

Corporate & Financial Weekly Digest

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D.C. District Court Holds Plaintiff to a Demanding Standard and Denies Class Certification Based on Inability to Establish Common Damages

The plaintiff filed a class action suit in the District Court of the District of Columbia against the defendant, Whole Foods Market, Inc. (Whole Foods), alleging that Whole Foods had violated antitrust laws by purchasing one of its competitors, Wild Oats Markets. The class certification hearing focused on whether the plaintiff could demonstrate that the putative class of consumers of natural and organic foods had been adversely affected by the merger and their alleged damages could be proven with evidence common to the class. The plaintiff offered an expert witness, who proposed to create an econometric model to demonstrate that the merger caused prices of Whole Foods products to rise. Whole Foods disputed the proposed model, offering its own expert.

Relying on the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the court probed the merits of the plaintiff's antitrust theory and the probative value of the evidence offered to conclude that the standards for certification had not been satisfied. Explaining that current precedent requires courts to "apply more scrutiny to experts at the class certification stage," the Court examined the methodology the plaintiff proffered and concluded that it failed to demonstrate that common issues predominated the evidence required to establish the fact of damages. The Court found the plaintiff's proposed general analysis of the prices of Whole Foods products insufficient. The methodology failed to take into account the offset caused by the fact that prices on some products were lower post-merger. In addition, the methodology did not adequately account for the fact that consumers buy different types and amounts of products from Whole Foods. As a result, the harm caused by any price increase required evidence of each individual customer's losses and could not be demonstrated via evidence common to all class members. The Court also found the plaintiff's expert methodology too vague to meet the strict evidentiary standards applicable at the class certification stage. In this respect, the Court observed that its failure to conduct a "careful and searching analysis" including "neglecting to resolve disputes between experts[,] 'amounts to a delegation of judicial power to the plaintiffs who can obtain class certification just by hiring a competent expert.'"

Kottaras v. Whole Foods Market, Inc., Civil Action No. 08-1832(JEB), 2012 WL 259862
(D.D.C. January 30, 2012).

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