

THE SCOPE AND TIMING OF DISCOVERY IN ANTITRUST CLASS ACTION LITIGATION

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INTRODUCTION

Discovery in antitrust class actions is, in many respects, no different from that in any other type of class action litigation. In certain respects, however, discovery in antitrust class action litigation is fueled by unique considerations that dictate tactical decision-making on pivotal procedural matters. Class certification, which often decides the fate of a case, lies at the crux of these tactical decisions that shape the scope, timing and contours of discovery. Because no fixed certification “stage” exists in antitrust litigation, parties often jostle over the structure and sequencing of class and merits discovery. The scope of permissible discovery is theoretically as broad as the parties’ construction of relevant issues, and discovery can proceed in wholesale fashion unless the court suspends it for particular aspects of the case. In practice, however, parties to antitrust class actions are confronted early in the proceedings with whether and how to stagger discovery phases.

Negotiation over the terms of both class and merits discovery is usually framed by the defendants’ perceptions of the viability of the plaintiff’s claims and proposed class. Plaintiffs in complex antitrust class actions often assert initial claims premised on relatively thin allegations, sometimes arising from the announcement of preliminary government investigations into possible antitrust viola-

tions, perhaps even with no attendant enforcement action. Such claims may be brought against numerous companies spanning the globe, alleging extended misconduct, on behalf of a diverse putative class of loosely related purchasers and products.

This article examines the legal and practical considerations that may influence the parties’ positions and the courts’ resolution of issues raised by these motions.

Despite the absence of a robust independent factual predicate, a plaintiff may seek sweeping and onerous merits discovery on liability issues before the complaint has passed legal muster and before the viability and dimensions of the putative class have been determined.¹ A plaintiff may even seek full-blown discovery before threshold jurisdictional issues are clarified. In such circumstances, the defendants will predictably object that the plaintiff’s discovery approach will generate undue burden and (perhaps counterintuitively) unnecessary delay. Defendants often propose an alternative discovery program that they contend will be more efficient and orderly than prematurely unleashing full-blown discovery. If the parties fail to agree on a discovery schedule, motions to stay or phase discovery will often ensue. This article examines the legal and practical considerations that may influence the parties’

positions and the courts’ resolution of issues raised by these motions.

Staying Discovery Pending Resolution of Motions to Dismiss

Defendants often argue that discovery should be stayed during the pendency of motions to dismiss, such as for failure to state a claim (including motions raising the statute of limitations) or for lack of personal jurisdiction. Although (unlike in securities litigation) a stay of discovery is not automatic in the wake of a motion to dismiss antitrust claims, it may be granted in appropriate circumstances where legal issues presented by a motion to dismiss are indeed amenable to resolution without discovery. Should discovery commence before dismissal motions are decided, defendants – particularly foreign defendants increasingly embroiled in U.S. class actions – may face a burden that could dwarf any discovery delay caused by waiting until such motions are decided.² The international character of antitrust litigation often mandates that defendant-specific jurisdictional discovery be conducted (if at all) on a separate track before even class certification can be addressed.

Motions to dismiss, even if granted only in part, may materially narrow the scale of a case. Before an antitrust class may be certified, motions to dismiss for failure to state a claim may strike certain allegations (or, at a minimum, highlight their deficiencies), motions based on the statute

of limitations may excise portions of the class period that predate the limitations period, and jurisdictional motions may prune foreign defendants from the case. Defendants will therefore often urge that substantial grounds for dismissal of the plaintiff's claims provide good cause for postponing the oppressive costs of large-scale discovery (the burdens of which may be heightened for defendants headquartered overseas or that have significant foreign operations), particularly where the plaintiff will suffer little or no undue prejudice.³ A court may be persuaded to stay discovery altogether during the pendency of such motions because they may appear capable of eliminating or materially reshaping a plaintiff's claims.⁴

In the cause of making a full discovery stay (or staggered discovery schedule) more palatable to a court otherwise reluctant to slow or suppress discovery, defendants may offer to produce limited transactional and related data during the pendency of a motion to dismiss. Such data – which would not necessarily require review of discrete customer files and may be confined to the limitations period – would reflect the terms of transactions with class members during the class period and could additionally include, for example, price lists, market shares and corporate organization. In this way, through a spirit of compromise, production of useful, accessible, but limited information potentially relevant to both class and merits issues can mitigate any perceived delay caused by a discovery stay (or by a deferral of merits discovery).⁵

Bifurcating Discovery Into Class Certification and Merits Phases

A full stay of discovery during the pendency of a dismissal motion is, of course, not the only procedural vehicle that can influence the timing of class and merits discovery. If a complaint survives the pleading stage, the defendants will often oppose certification if the putative

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class consists of varied purchasers of disparate products. In these circumstances, the defendants may propose bifurcating discovery of class-related and merits-related issues. The Manual for Complex Litigation recognizes that a carefully phased discovery schedule is consistent with the objectives of Rule 23. To rebut a plaintiff's likely contention that phased discovery would lead only to delay, defendants often contend that a bifurcated discovery schedule will shorten the litigation because any eventual merits discovery would likely be substantially streamlined. A sensible bifurcated discovery schedule, it is argued, can serve the twin goals of effective and efficient case management.⁶

Efficiency Advantages of Bifurcation

Bifurcated discovery permits decisive (and potentially dispositive) pleading and certification issues to be resolved before exhaustive – and highly contentious – discovery on the substantive merits of plaintiff's allegations is begun. The apparent heterogeneity of a putative class

may justify an initial discovery phase devoted exclusively to clarifying whether, for example, issues common to the class predominate over individual issues. If a court denies certification (or certifies a significantly narrowed class), the case may be quickly resolved through voluntary dismissal or settlement. Such efficient dispute resolution serves the interests of both parties and courts.

Even if a class is eventually certified, confining initial discovery to class issues will allow the court to tailor any subsequent merits-related discovery to issues that are actually relevant to the class, perhaps newly configured. By establishing through an initial class discovery phase the proper class membership and product markets, the parties can then address merits discovery that is demonstrably relevant. Defendants usually contend that circumscribed merits discovery vis-à-vis the certified class would be more efficient than unfettered and overbroad discovery related to products and purchasers that may ultimately be irrelevant.

A court's evaluation of a motion for phased discovery is typically guided by pragmatic considerations of economy and efficacy, such as potential unnecessary discovery burdens and (as discussed in the next section) the feasibility of distinguishing between class and merits issues.⁷ Courts are usually sensitive to the fact that in modern antitrust class actions, which often entail the production of electronically stored information in far-flung places, conducting merits discovery simultaneously with elaborate certification proceedings may significantly delay resolution of potentially dispositive class issues. Such substantial discovery burdens should

certainly be justifiable before a court sees fit to impose them.

Therefore, in seeking to achieve a flexible balance between permissible and necessary discovery in class actions, courts generally consider whether a bifurcated discovery schedule will facilitate efficient proceedings under Rule 23.⁸ Phased discovery may indeed concretely serve the interests underlying the 2003 amendments to Rule 23, which were designed in part to encourage expeditious but sufficiently deliberative resolution of class certification.⁹ In service of this mandate, courts order phased discovery specifically to expedite the certification decision as well as to satisfy the Federal Rules' overall prescription for a "just, speedy, and inexpensive determination of every action."¹⁰

The burdens associated with extensive precertification merits discovery may be particularly acute for foreign defendants (and for plaintiffs alleging claims against them where recourse to foreign regimes such as the Hague Convention may be required). Certain defendants' elaborate corporate histories, which may render document retention spotty and therefore discovery responses particularly cumbersome and fragmentary, may likewise counsel in favor of shelving thorny merits discovery issues until certification is resolved. Phased discovery may also yield the collateral benefit of putting off prickly problems associated with grand jury witnesses called to testify in civil litigation.¹¹

In rare circumstances, defendants may decide that, for tactical reasons, bifurcation should work in the inverse order such that merits discovery pre-

cedes class certification proceedings. If class certification seems inevitable, summary judgment may be the defendants' optimal means of disposing of the case. This strategy may be premised on apparent factual or legal weaknesses of the named plaintiff's claims, because only evidence relevant to a plaintiff's individual claims (as opposed to those of the putative class) is probative on a precertification summary judgment motion.¹² Of course, this aggressive strategy entails the risk of a relatively early adverse summary judgment ruling that may moot class certification and, indeed, effectively terminate the action.¹³

Distinguishing Class and Merits Issues for Discovery

Because courts are generally discouraged from fully assessing the merits of a plaintiff's claims at the certification stage – though some "probing behind the pleadings" may be inevitable¹⁴ – some degree of partition between class and merits issues is inescapable. If class certification does not hinge on the substantive merits of a plaintiff's claims, permitting merits discovery at the precertification stage may impede the decision on certification. A discovery schedule that promotes early determination as to the viability of the putative class (as well as the adequacy of the named plaintiffs) – particularly in jurisdictions that have adopted a somewhat more restrictive view of the extent to which courts may broadly inquire into the merits when deciding class certification¹⁵ – may be especially attractive.¹⁶

The successful proposal and implementation of phased discovery, however, dictates that "class" and "merits" phases be distinguishable.

The segregation of distinct class and merits discovery phases is feasible only if questions central to the certification decision (such as whether plaintiffs can adequately represent the purported class and whether their claims are susceptible to classwide proof) can be resolved independently of information likely to be derived only through discovery directed to the merits. That is, class certification issues can be resolved first only if the "merits" inquiry into the defendants' alleged misconduct – whether, for example, they actually illegally monopolized markets or conspired to fix prices, requiring discovery into their business plans or alleged conspiratorial communications – can legitimately be segregated and deferred as a factual matter. A court that concludes that class and merits issues are substantially intertwined will likely reject any artificial class/merits discovery distinction that "thwarts the informed judicial assessment" of class certification issues.¹⁷

Demarcating between class and merits issues, and insulating class-from merits-related discovery, is not always practicable, even when parties confer in good faith to clarify whether such (ideally bright) lines can be drawn.¹⁸ Even when delineation is relatively straightforward, counsel are nevertheless likely to quibble over precisely where to draw the lines, adding an additional layer of intricacy to parties' routine negotiation over discovery requests. For example, parties may grapple over whether information relating to the defendants' capacity utilization falls into the "class" or "merits" discovery bucket. Haggling over a phased discovery proposal or, more specifically, over the boundaries of a murky class/merits

distinction, may prompt a plaintiff to seek to extract the defendants' stipulation to certain facts relating to class certification so that class issues can be narrowed expeditiously. Further cluttering the landscape, discovery proceedings in federal antitrust class actions must often be coordinated with separate counsel in parallel individual and state court actions to avoid duplication of effort. To foster as much consensus as possible, parties may be required to submit precertification discovery plans in accordance with Section 21.14 of the Manual for Complex Litigation.

A court generally receptive to phased discovery may limit initial discovery to clearly discernible class issues and, where particular line-drawing issues arise, permit concurrent "merits" discovery only to the extent that it is also obviously pertinent to class certification. Through this pragmatic approach, where class- and merits-based issues are not mutually exclusive, class discovery will not necessarily be enjoined merely because it touches upon merits-based issues.¹⁹ Depending on a plaintiff's eagerness (motivated by settlement leverage or other strategic concerns) for prompt and unlimited merits discovery, such a blended approach to phased discovery may comport with the parties' usual focus on class certification as an early "stage" of antitrust litigation and, therefore, be agreeable to both sides.

When class and merits issues can be sufficiently disentangled, sequential discovery is particularly appropriate where the class certification decision (such as when a narrowed class is ultimately certified) may dramatically reshape the scope of subsequent merits discovery in any residual action.

A deferral or stay of merits discovery may be manifestly warranted where defendants petition for appellate review of a class certification decision.²⁰ Thus, at any procedural stage at which the viability and breadth of the putative class have not yet been definitively settled, merits discovery may be subject to postponement, particularly where sizeable portions of such discovery may later be rendered moot or irrelevant.

Factors Disfavoring Bifurcation

Despite the logic generally favoring phased discovery, some courts have declined to embrace proposed bifurcation viewed as self-serving, overreaching or unworkable. For example, phased discovery (as well as a broader discovery stay) was rejected in *In re Plastics Additives Antitrust Litigation*, distinguished by circumstances that made it particularly unappealing to the court. The *Plastics Additives* defendants did not move to bifurcate discovery until more than a year after the plaintiffs' consolidated complaint had been filed and nearly four months after the defendants' motions to dismiss had been decided; their proposal was seen as injecting additional delay in already protracted proceedings.²¹ Moving for phased discovery soon after the filing of a complaint and before resolution (or even filing) of any motions to dismiss likely enhances the factors favoring bifurcation.²² The defendants in *Plastics Additives* also did not delineate between "class" and "merits" issues to the court's satisfaction.²³ As discussed in the last section, defendants proposing bifurcation are well served to distinguish class and merits issues as transparently as possible.

In *Plastics Additives*, the likelihood that individual claims would persist even in the face of a denial of class certification similarly disfavored bifurcation. The court determined that individual claims were likely to proceed even if certification were denied because one defendant had already been granted leniency and agreed to cooperate with plaintiffs' counsel in the prosecution of claims against non-settling defendants, and all defendants had already been subpoenaed by the government.²⁴ Where there has been no indictment (or even immunity grant) and limited contact between defendants and regulatory authorities, individual plaintiffs are less likely to have sufficient incentive to pursue claims despite a denial of certification in the class action and, therefore, the logic in favor of bifurcating discovery is correspondingly more potent.

CONCLUSION

Antitrust class actions frequently involve multiple defendants and expansive discovery. In an effort to spare parties from at least some of the burden and expense attendant to voluminous discovery, courts have in some instances stayed discovery pending motions to dismiss. More frequently, they have adopted phased discovery protocols that defer wide-ranging and potentially avoidable merits discovery until after the viability of the proposed class has been tested and confirmed. Bifurcated discovery schedules, when feasible, may help promote more efficient and systematic resolution of complex antitrust class actions that subject defendants to potentially crippling liability and courts' dockets to unwelcome congestion.

ENDNOTES

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¹ Plaintiffs often seek to highlight liability for the court as an issue common to class members that is relevant to class certification issues under Federal Rule of Civil Procedure 23, and therefore worthy of class-related discovery. However, beyond a plaintiff's boilerplate assertion that the defendants' alleged antitrust violations affected all putative class members similarly, the precise factual circumstances of the defendants' alleged misconduct (e.g., concerning conspiratorial meetings at which prices were allegedly fixed) are usually beyond the purview of the class certification analysis. Discovery relating to these facts consequently can readily be deferred until after the certification ruling.

² *But see In re Vitamin C Antitrust Litig.*, No. MDL 06-1738 DGT/JO, 2006 WL 2252143, at *2 (E.D.N.Y. June 7, 2006) (rejecting Chinese defendants' appeal to both international comity and practicality in support of their application for stay of all discovery pending resolution of their motions to dismiss).

³ Courts certainly have the discretion to stay discovery pending resolution of motions to dismiss. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936); *see also Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("A court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.").

⁴ Courts indeed occasionally stay all discovery in circumstances where a well-founded motion to dismiss seems poised to dispose of a substantial portion of a case. *See, e.g., In re Initial Public Offering Antitrust Litig.*, No. 01 Civ. 2014 (WHP

(S.D.N.Y. May 22, 2002) (order staying discovery pending motion to dismiss antitrust price-fixing claims).

⁵ Another possible, and consequential, carve-out to a discovery stay may emerge where antitrust claims are precipitated by government investigations or enforcement actions. Parties may tussle over discovery of documents created in the normal course of a defendant's business that were provided to (or seized by) investigative authorities. Such documents, which if already produced to government authorities may be turned over to a civil plaintiff with relatively little burden (excepting privilege and responsiveness review), will likely go to the core of a plaintiff's case. The production early in litigation of such key information may largely render moot any debate over the proper scope and timing of additional discovery.

⁶ The Manual for Complex Litigation advises that "[d]iscovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. . . . Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed." Manual for Complex Litigation (Fourth) § 21.14 (2004).

⁷ As with respect to stays of discovery, decisions concerning the allowable scope of discovery at the class certification stage (and the phasing of discovery in particular) rest within the considerable discretion of the court and depend upon the specific circumstances of the individual case. Some class discovery may be merely permissible while other class discovery may be deemed indispensable. A district court's decision to limit class certification discovery in order to conserve the parties' resources, and to prevent a certification motion from becoming a platform for a trial on the merits, will be reviewed under an abuse-of-discretion standard. *See, e.g., In re Initial Public Offering Sec. Litig.*, No. 05-3349-cv, 2006 WL 3499937 (2d Cir. Dec. 5, 2006), at *15; *Heerwagen v. Clear Channel Commc'ns.*, 435 F.3d 219, 233-34 (2d Cir. 2006).

⁸ *See* Fed. R. Civ. P. 23(c)(1)(A); 5 James WM. Moore, *Moore's Federal Practice* § 23.81 (3d ed. 2006).

⁹ The new Rule 23(c)(1)(A) directs courts to make class certification determinations "at an early practicable time" instead of, as formerly, "as soon as practicable," thereby investing courts with additional discretion to control the timing of certification decisions. The Advisory Committee chose this language as an alternative to "when practicable," which could have "encourage[d] courts to delay deciding certification motions, leading to an unwarranted increase in precertification discovery into the merits of a class suit." Agenda F-18 Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 9-10 (Sept. 2002) (cited in Joshua B. Gray and Michelle H. Seagull, *Class Action Reaction: Amended Rule 23 Enhances Judicial Supervision in Class Litigation*, 18-SPG Antitrust 91, 92 (2004)). The Advisory Committee notes to the 2003 amendments to Rule 23 do caution against "an artificial and ultimately wasteful division between 'certification discovery' and 'merits discovery,'" which likely has led some courts to disfavor phased discovery and undervalue its potential benefits.

¹⁰ Fed. R. Civ. P. 1; *see also Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570-71 (11th Cir. 1992) ("To make early class determination practicable and to best serve the ends of fairness and efficiency, courts may allow classwide discovery on the certification issue and postpone classwide discovery on the merits.") (citing *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982)); *Larson v. Burlington N. & Santa Fe Ry. Co.*, 210 F.R.D. 663, 666 (D. Minn. 2002) ("[Discovery] bifurcation is not only prompted by the showings required by [Rule 23], but also by the uniqueness of the putative class claim that the Plaintiffs have asserted. While, at this preliminary stage, we cast no projections as to the potential success of a certification Motion, the claim alleged by the Plaintiffs is potentially fraught with factual distinctions which could render certification problematic."); *Thomas v. Moore USA, Inc.*, 194 F.R.D. 595, 604 (S.D. Ohio 1999) (noting that the court would defer resolution of discovery dispute in

antitrust action until after ruling on class certification motion since “the scope of the parties’ present discovery dispute will be narrowed significantly once the issue of class certification is resolved”).

- ¹¹ An obvious potential downside to postponing merits discovery until after (sometimes lengthy) class certification proceedings is the increased staleness of information with regard to document preservation and witnesses’ memories. Documents subject to preservation orders may still be inadvertently destroyed, and key witnesses may grow forgetful, change jobs or otherwise depart the scene.
- ¹² See, e.g., *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1013 n.1 (9th Cir. 2000); *Novella v. Westchester County*, No. 02 Civ. 2192 (MBM), 2004 WL 1752820, at *1 n.1 (S.D.N.Y. Aug. 4, 2004).
- ¹³ Although precertification summary judgment is obtained only as to the individual plaintiff and does not bind the class that might have been certified, it may, as a practical matter, be the death knell of any further litigation. In evaluating the prudence of an expedited summary judgment – as opposed to class certification – decision that may turn out unfavorably, antitrust defendants must also consider, on the flip side, the increased pressure to settle (particularly in light of trebled damages) that a ruling certifying a class carries in its wake.
- ¹⁴ *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982); see also *Am. Seed Co. v. Monsanto Co.*, No. Civ. 05-535-SLR, 2006 WL 3276831, at *2 (D. Del. Nov. 13, 2006) (“the court must conduct a limited preliminary inquiry, looking beyond the pleadings, to determine whether common evidence could suffice to make out a prima facie case for the class”). Even when particular facts that underlie both class and merits issues are examined at the class certification stage, they should generally be assessed in light of whether they are susceptible to classwide common proof and not to determine the probability of the plaintiff’s success on the merits. See, e.g., *Heerwagen*, 435 F.3d at 232 (citing Charles A. Wright, Arthur R. Miller & Mary K. Kane, 7B *Federal Practice and Procedure* § 1798, at 223 (3d ed. 2005)).
- ¹⁵ See, e.g., *In re Initial Public Offering Sec. Litig.*, 2006 WL 3499937, at *15;

Heerwagen, 435 F.3d at 232; *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 134-35 (2d Cir. 2001); 5 *Moore’s Federal Practice* § 23.84[2][b] (3d ed. 2006). The growing propensity of courts to ask a party seeking class certification for a viable “trial plan” under new Rule 23 may create some impetus to reconnoiter more deeply into merits territory sooner than before.

- ¹⁶ See, e.g., Manual for Complex Litigation (Fourth) § 21.14 (“in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden”); *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, 2006 WL 3000763, at *1 (D. Kan. Oct. 18, 2006); *In re Publication Paper Antitrust Litig.*, No. 3:04 MD 1631 (SRU) (D. Conn. March 15, 2005); *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03 MDL 1556 (M.D. Pa. Apr. 15, 2004); *KK Motors, Inc. v. Brunswick Corp.*, No. 98 Civ. 2307, 1999 WL 246808, at *5 (D. Minn. Feb. 23, 1999); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 500 (S.D.N.Y. 1996).
- ¹⁷ See Manual for Complex Litigation (Fourth) § 21.14; *In re Plastics Additives Antitrust Litig.*, No. 03 Civ. 2038, 2004 WL 2743591, at *3 (E.D. Pa. Nov. 29, 2004) (“*Plastics Additives*”); cf. *In re Vitamin C Antitrust Litig.*, 2006 WL 2252143, at *2-3 (adopting discrete class and merits discovery phases but with no interruption due to pendency of certification motion; “I see no reason why the parties and their counsel should be unable to conduct two types of discovery at the same time or why, during the period that a class certification motion is under review, they should do nothing at all to prepare for trial on the merits.”).
- ¹⁸ See Manual for Complex Litigation (Fourth) § 21.14 (advocating use of a specific and detailed precertification discovery plan under Rule 26(f)); see also *In re Hamilton Bancorp, Inc. Sec. Litig.*, No. 01 Civ. 0156, 2002 WL 463314, at *1 (S.D. Fla. Jan. 14, 2002) (“[a] more reasoned approach is for the Court to approve a detailed discovery plan which prioritizes ‘class’ related discovery, while

not depriving a plaintiff or defendant from engaging in ‘merits’ discovery when facts and issues are inextricably intertwined”).

- ¹⁹ See, e.g., *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03 MDL 1556 (M.D. Pa. Apr. 15, 2004) (order granting defendants’ motion to bifurcate discovery in antitrust price-fixing action).
- ²⁰ See, e.g., *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 6 (D.D.C. 2002) (granting stay of proceedings pending resolution of defendants’ petition for interlocutory review of class certification; “proceeding headlong with discovery and other matters before this Court has the very real potential of unnecessarily wasting significant resources of all parties . . . and the Court, because two significant issues are currently pending before the Court of Appeals, one of which could dispose of this litigation while the other could substantially reshape it”).
- ²¹ See *Plastics Additives*, 2004 WL 2743591, at *2-3.
- ²² See, e.g., *In re Publication Paper Antitrust Litig.*, No. 3:04 MD 1631 (SRU) (D. Conn. March 15, 2005) (order granting defendants’ motion for phased discovery).
- ²³ See *Plastics Additives*, 2004 WL 2743591, at *3.
- ²⁴ See *id.* at *1, 4. ♦