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Hydrogen Peroxide: The Third Circuit's "Acid Test" For Class Certification

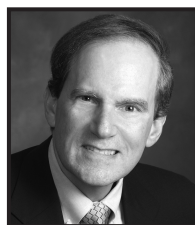
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A class action lawsuit can pose a significant legal risk to any corporation. Undoubtedly, whether to certify a proposed class action is the pivotal decision in the life of a proposed class action lawsuit. In recognition of the critical nature of that decision, the Third Circuit, in an important antitrust class action decision applicable to all class actions, has enunciated strict standards for meeting the requirements of Rule 23. In so doing, the class action determination will now, more than ever, at least in the Third Circuit, require more intensive discovery, consideration of greater involvement of experts and present heightened consequences for all sides.

It is well recognized that denial of class certification may sound the "death knell" of the litigation because pursuit of individual claims may not be financially feasible. On the other hand, grant of certification may place great pressure on the defendant to settle rather than incur potentially enormous legal exposure even if the claims lack merit. Consequently, the rigor

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employed by courts in applying the standards for class certification is critical. There has been a recent trend among federal appellate courts, including the First, Second, Fifth, Seventh and Eight Circuit Courts of Appeals, to impose stricter standards of proof to support requests for class certification.¹

Recently, the United States Court of Appeals for the Third Circuit followed that trend in its important decision in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008). In articulating strict class certification standards, the court clarified three key aspects of class certification procedure: First, the party seeking certification must show that it can meet all the class certification requirements set forth in Rule 23 by a preponderance of the evidence. A mere "threshold showing" will no longer be adequate. Second, the district court must resolve all factual or legal disputes relevant to class certification even if they overlap with the merits of the case. Third, the court's obligation to consider all relevant evidence and arguments extends to evaluating the expert testimony offered both by parties seeking and opposing class certification. *Id.* at 307.

Background Of The Litigation

This lawsuit was brought by purchasers

of hydrogen peroxide and related chemical products against chemical manufacturers alleging that the manufacturers had engaged in an antitrust conspiracy. In brief, the plaintiffs alleged that during an 11-year period through January 2005, the defendants communicated about prices and sales volume, allocated markets and customers, agreed to reduce production capacity and ultimately sold hydrogen peroxide at agreed upon inflated prices. Following extensive discovery, plaintiffs moved to certify a class of direct purchasers of hydrogen peroxide and related chemicals over the 11-year class period. Plaintiffs sought class certification under Rule 23(b)(3) which, among other things, requires that questions of law or fact common to class members predominate over any questions affecting only individual members. The appeal before the Third Circuit focused on whether plaintiffs satisfied this predominance test as to one key element of any antitrust claim – antitrust impact. This element requires proof that each member of the class suffered at least some individual antitrust injury resulting from the alleged antitrust violations.

The district court found that this predominance requirement had been met because plaintiffs' expert claimed he would use common, as opposed to individualized, proof to demonstrate antitrust impact at trial. In so ruling, the district court accepted the "threshold showing" by plaintiffs' expert on this issue, rather than weighing plaintiffs' expert's opinion against that of defendants' experts and making its own determination, and placed great weight on plaintiffs' express intention to prove antitrust impact on a class-wide basis at trial. Furthermore, after holding a Daubert hearing concerning the reliability of plaintiffs' expert testimony

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on antitrust impact, the district court declined to exclude the expert testimony. Significantly, the court refused to evaluate the defendants' competing expert opinions on whether the predominance standard could be met.

The Third Circuit Decision

The Third Circuit reversed the district court's class certification order finding it had abused its discretion in certifying the class. The court gave life to the Supreme Court's 1982 requirement that the prerequisites of Rule 23 must be found after a "rigorous analysis."² A party's mere assurance that it intends or plans to meet the Rule's requirements is insufficient. *In re Hydrogen Peroxide*, 552 F.3d at 318.

As the Third Circuit observed, the Rule 23 requirements are not mere pleading rules. *Id.* at 316. The district court must go beyond the pleadings and determine whether the factual record underlying the plaintiffs' allegations satisfy the certification requirements. The mere fact that there is "an overlap" between the class certification requirements and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. *Id.* In other words, a challenged certification requirement is not "forfeited in favor of the party seeking certification" simply because it is similar or identical to an issue normally decided by the trier of fact. *Id.* at 318. The district court must determine whether each requirement of Rule 23 is met. Consequently, the district court commits legal error if it fails to resolve a genuine legal or factual dispute relevant to a Rule 23 requirement.

In fixing the evidentiary standard, the Third Circuit determined that any necessary factual determinations must be made by a preponderance of the evidence. In other words, before certifying a class, "the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *Id.* at 320.

Expert opinion may well come into play in resolving class certification issues. As with any other matter relevant to a class certification decision, the Third Circuit commented that expert opinion should be the subject of rigorous analysis. The district court should not uncritically accept expert testimony as establishing a Rule 23 requirement merely because the court finds that the testimony should not be excluded under Daubert or under other reliability standards. Even at the certifica-

tion stage, the district court should weigh conflicting expert testimony as this "may be integral to the rigorous analysis Rule 23 demands." *Id.* at 323. A district court should resolve such expert disputes even if it implicates the credibility of one or more of the experts. In resolving a class certification application, the court should resolve these key issues even if they are usually reserved for the trier of fact. *Id.* at 324.

Based on the district court's failure to follow these rigorous standards of class certification enunciated by the Third Circuit, the Third Circuit vacated the class certification order and remanded for proceeding consistent with its opinion.

Implications Of The Decision

We have come a long way since the abuses of "drive by" class certifications where courts in one southern state certified classes before process was served, and others, after motion practice, certified classes based solely upon allegations in pleadings. This decision undoubtedly establishes the Third Circuit among the strictest in the nation on class certification requirements. Of interest to practitioners in the Northeast, the Third Circuit appears slightly stricter than the Second Circuit. In *In re Initial Public Offering Securities Litigation*, 471 F.3d 24, 41 (2d Cir. 2006), which the Third Circuit cited with approval, the Second Circuit articulated generally the same standards as in *In re Hydrogen Peroxide*. However, *In re IPO* did not definitively apply the preponderance of the evidence standard, *id.* at 37, and generally discouraged district courts from conducting protracted mini-trials on class certification. *Id.* at 41.

In the wake of *In re Hydrogen Peroxide*, district courts in the Third Circuit have already imposed strict standards for class certification and rejected class certification applications. For example, a District of New Jersey court recently denied the plaintiffs' motion for class certification in a suit alleging improper billing practices by a major medical laboratory. *See Agostino v. Quest Diagnostics Inc.*, No. 04-4362, 2009 U.S. Dist. LEXIS 10451 (D.N.J. Feb. 11, 2009). The court adhered to the strict requirements imposed in *In re Hydrogen Peroxide* and to the court's instruction that a court should not relax the certification analysis merely because a plaintiff's claim falls within "an oft-certified category of cases," such as medical billing disputes. *Id.* at *33.

In re Hydrogen Peroxide undoubtedly

increases a defendant's chances of defeating a motion for class certification but also heightens the importance of that decision for the outcome of the case. Findings made by the trial judge on a full record may be harder to overturn on appeal. Consequently, defendants sued in a class action in a state court falling within the Third Circuit's jurisdiction must seriously weigh whether the action is removable, including whether it complies with the CAFA requirements, and make a removal decision with full knowledge of the *In re Hydrogen Peroxide* standards.

The decision will likely have a number of practical consequences on class certification practice. First, as a general matter, the increased rigor under which class certification applications will be evaluated will undoubtedly increase the cost and length of class certification proceedings. Indeed, the court cited 2003 Amendments to Rule 23 altering the timing of the class certification decision to allow discovery, probe behind the pleadings and to permit a rigorous evaluation of the likely shape of the trial on the issues and whether they are susceptible to class-wide proof. Second, it is likely that both sides will seek greater discovery prior to briefing and appearing at a class certification hearing. Third, in order to diminish the chances of losing at a class certification hearing, plaintiffs' counsel will probably be more careful in articulating the definition of the class, the issues covered and the time frame involved. Fourth, given the decision's emphasis on competing expert opinions, it is inevitable that all parties will devote more time and money on expert witnesses at the class certification stage.

Fifth, *In re Hydrogen Peroxide* reminds the district court of its obligation to weigh the relevant factual and expert evidence and even make credibility determinations, if necessary. This will likely result in many more evidentiary hearings on class certification rather than district courts ruling solely on the motion papers. Finally, the further enhanced importance of the certification decision will likewise heighten the importance of Rule 23(f), which allows courts of appeals to entertain interlocutory appeals from district court decisions granting or denying class certification.

¹ See, e.g., *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 29-31 (1st Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41-42 (2d Cir. 2006); *Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 301 (5th Cir. 2003); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001).

² *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).