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Class Certification Now an 'Olympic High Hurdle Event' in the Third Circuit

The Hydrogen Peroxide *Antitrust Case*

By Jeffrey H. Newman

In a recent opinion issued by Chief Judge Scirica (not Chief Judge Sirica; the "Watergate" judge died in 1992), the Third U.S. Circuit Court of Appeals has clarified the hurdle height to "jump over" in order to obtain class action certification. In so doing, the Third Circuit has both "ratified" and, at the same time, "put greater bite into" the trend of imposing a stricter standard for certification. In short, the court re-affirmed that the rules for certification are not based on mere pleadings, but require an actual, careful determination. *In Re Hydrogen Peroxide Antitrust Litigation*, 552 F. 3d 305 (3d Cir. 2008).

The Ruling

The court made absolutely clear that:

> (i) each requirement of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") must be met by a preponderance of the evidence; 552 F.3d at 307. (The pre-requisites for certification as a class are that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

In addition, the proponent of class certification must also satisfy one of the requirements of Rule 23(b). In this litigation, the district court had certified the class pursuant to Fed. R. Civ. P. 23(b)(3), which requires a finding that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." It was the finding as to the first (predominance) prong of this test that was challenged in this appeal:

> (ii) a court must resolve each and every factual or legal dispute relevant to a grant of certification, even if the issues overlap with the merits of the case due to their potentially touching upon the actual elements of the underlying cause of action; 552 F.3d at 307, and (iii) the obligation of a court to review all the evidence and arguments also embraces evidence introduced by experts, whether on behalf of the defendant, plaintiff or both. *Id.*

'Rigorous Analysis'

In defining the "rigorous analysis" obligation of a court with the most precision to date, the court acknowledged its recognition of the broad discretionary powers of a court, yet underscored that such discretionary powers cannot emasculate the requirement to conduct a rigorous analysis resolving each genuine issue of law or fact relevant to Rule 23 by a preponderance of the evidence. 552 F. 3d at 316-320; *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (class certification is appropriate only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites" of Rule 23 are met.). To emphasize the court's position, the appellate court specifically addressed elements of the expert testimony introduced by each side at the certification hearing. 552 F. 3d at 312-27. In so doing, the court affirmed that expert testimony is subject to the rigorous analysis standard, even though the subject matter of the testimony may require a finding regarding credibility and even though that type of determination will again be required by the ultimate trier of the facts. *Id.* at 324. ("Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court — no matter whether a dispute might appear to implicate the "credibility" of one or more experts, a matter resembling those usually reserved for a trier of fact.")

The court yet further demonstrated that expert testimony is subject to a

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rigorous analysis requiring the court's determination to be made based upon a preponderance of the evidence (including resolution of credibility issues). The court did so by seemingly admonishing the district court for failing to resolve conflicting testimony between "adverse" experts adequately when the appellate court addressed the lower court's apparent acceptance of the plaintiff's claim that it merely needed to make a threshold showing because the plaintiff later intended to meet the requirement of preponderance. *Id*. at 323-24.

Perhaps most telling, while setting forth the "high hurdle standard" for the grant of class certification, the Third Circuit recognized, in a clear and direct manner, the potential economic impact to each side of a grant or denial of class certification. In fact, the court was highly sensitive to the impact of denial by recognizing that denial may well be the practical "death knell" for a class action plaintiff (of course, a plaintiff could always institute an individualized case). *Id*. at 310, quoting N*ewton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3rd Cir. 2001). However, conversely, the court was equally sensitive to the potential impact of a grant of class certification upon a defendant. *Id*. at 310. ("Certain antitrust class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims.") The court clearly understood the economic and other costs a defendant would endure by mere grant of a class action certification, as well as the incalculability of a potential damage award, all of which could cause a defendant to settle a claim, post class certification, regardless of its belief in its case and its analysis of the merits.

The Meaning of the *Hydrogen Peroxide* Case

Grant of certification usually sets the table for the commencement of settlement negotiations, with settlement demands by the plaintiff usually carrying a substantial premium, regardless of the merits. For many plaintiff class action lawyers, the mere grant of class certification is the plaintiff's Holy Grail, regardless of the merits of the case.

Accordingly, the good news is that federal courts seem to be undergoing a "sea change." The Third Circuit seeks to cause neither a tidal inflow nor tidal outflow in favor of either party; rather, a waveless sea where decisions are not based on ideology, concepts of "plaintiff's getting their day in court," or concepts of "corporations can afford to pay." To the contrary, the Third Circuit has reinserted into class action litigation the infusion solely of rigorous analysis and impassionate justice, removing any semblance of lesser motivations and standards.

Class action litigation is endemic. Perhaps most of us think of mass torts dealing with asbestos, or medical devices or drugs. However, class actions are also numerous in consumer-oriented industries such as retailing and real estate. The high incidence of class action litigation in the retail-real estate industries is not surprising, given the innumerable personal interactions between and among employees and customers, at least in comparison to many other industries, whether due to the use of credit cards or simply the everyday interactions occurring as a function of normal commerce. Therefore, it is particularly heartening that several jurisdictions within the Third Circuit's vicinage, which are plaintiff-friendly, will now be subject, at the federal level, to what may be the "strictest" of all circuits moving in the higher hurdle direction. (The Second Circuit, while holding similarly, seemed to "hold back" on definitively applying the "preponderance" standard and perhaps discouraged trial courts from elongated hearings at the certification stage. *See In Re Initial Public Offering Securities Litigation*, 471 F. 3d 24 (2nd Cir., 2006)). Notably, New Jersey has long been a jurisdiction sought by plaintiffs in consumer fraud, employment and product liability related litigation.

Until such time as other circuits fully adopt the position of the Third Circuit, one can expect class action plaintiffs to seek circuits other than the Third (and, when venued in the Third Circuit, to seek to institute class action litigation at the state court level), save only the strongest cases. On the other hand, defendants will seek to venue claims in the federal courts of jurisdictions within the Third Circuit — a circuit that clearly understands the enormous economic impact of simply certifying a class to give the plaintiff its "day in Court." Justice will yet be served for deserving plaintiffs when certification is denied (due to a determination that either class action issues do not predominate and/or a class action is simply not superior to individualized cases), because meritorious claims can still be filed as individualized cases.

Conclusion

The plaintiffs' class action bar must now become high hurdlers because "a plea to get a class action plaintiff a day in Court" will not carry the day in the Third Circuit. For "Third Circuit contestants," the low hurdle event has been removed from the class action Olympics. As a result, even more so now, federal class action defendants will be well served always to consider: 1) early retention of expert witnesses; 2) evidentiary hearings; and 3) interlocutory appeals. Class action defendants should make certain the bar remains elevated "on the playing field."

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