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Federal Appeals Court Tightens Standards For Class Certification in Antitrust Actions

Last week the United States Court of Appeals for the Third Circuit vacated and remanded another order from a district court certifying a class of antitrust plaintiffs on the grounds that the lower court applied too lenient a standard of proof. The decision, *In re Plastics Additives Antitrust Litigation*,[1] underscores the impact of the Court of Appeals's recent clarification of class certification standards in *In re Hydrogen Peroxide Antitrust Litigation*,[2] and definitively places the Third Circuit (which includes New Jersey, Pennsylvania, Delaware, and the Virgin Islands) on the growing list of appellate courts – including the First, Second, Fifth, Seventh, and Eighth Circuit Courts of Appeals[3] – that are insisting on stricter standards of proof to support class certification decisions.

Plaintiffs in the Third Circuit can expect increased scrutiny of their ability to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure. *First*, plaintiffs have to show that they meet these requirements by a preponderance of the evidence; a "threshold showing" will no longer suffice. *In re Hydrogen Peroxide*, 2008 WL 5411562, at *1. *Second*, at the class certification stage, the district courts will need to resolve all factual or legal disputes relevant to the certification motion, "even if they overlap with the merits." *Id*. *Third*, the obligation to consider all relevant evidence and disputes includes weighing the expert testimony from both sides. *Id*.

In *In re Plastics*, plaintiffs alleged that makers and sellers of "plastics additives" – defined as "'heat stabilizers, impact modifiers, and processing aids used to manufacture or process plastics'" – engaged in price fixing in violation of Section One of the Sherman Act. *In re Plastics Additives Antitrust Litig.*, No. 03-2038, Mem. Op. at 2 (E.D. Pa. Aug. 31, 2006). Plaintiffs sought to represent a nationwide class of purchasers of such products. In granting plaintiffs' motion for class certification, the U.S. District Court for the Eastern District of Pennsylvania focused its analysis on the question of "predominance" – *i.e.*, whether issues common to the class predominate over individual issues. Relying heavily on the affidavit of plaintiffs' expert witness,

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1 *In re Plastics Additives Antitrust Litig.*, Nos. 07-2159, 07-2418 (3d Cir. Jan. 27, 2009).

2 *In re Hydrogen Peroxide Antitrust Litig.*, No. 07-1689, 2008 WL 5411562 (3d Cir. Dec. 30, 2008).

3 *See, e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008); *In re IPO Securities Litig.*, 471 F.3d 24 (2d Cir. 2006); *Blades* v. *Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005); *Bell Atlantic Corp.* v. *AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003); *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001).

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John Beyer, and requiring that plaintiffs make only a "threshold showing that each element of their claim may be proven through common, class-wide evidence," the court found plaintiffs had met their burden under Rule 23. *Id*. at 9-10. Although the defendants' economics expert disputed Beyer's methodology and conclusions, the court found that class certification was not the appropriate time to weigh and resolve differences between the parties' experts. *Id*. at 22.

On January 27, 2009, the U.S. Court of Appeals for the Third Circuit vacated the district court's order and remanded the case for further proceedings consistent with the Court's December 30, 2008 opinion in *In re Hydrogen Peroxide*.

In *In re Hydrogen Peroxide,* the Court made it clear that plaintiffs seeking class certification must actually meet the requirements of Rule 23 by a preponderance of the evidence; a future "intention" to do so will no longer suffice in the Third Circuit. Nor can the element of "impact" or injury in antitrust class actions be presumed for purposes of class certification. Instead, "actual, not presumed, conformance with the Rule 23 requirements is essential." 2008 WL 5411562, at *15 (quotation marks omitted). As for whether the district court should weigh expert testimony at the class certification stage, the Court's answer was explicit: "Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the [district] court." *Id*. at *13. The district court was instructed on remand to weigh the expert opinions and to resolve any genuine issues of fact or law after considering all the evidence.

The Court also distinguished its own 1977 decision in *Bogosian* v. *Gulf Oil Corp*., 561 F.2d 434 (3d Cir. 1977), on which the notion of presumed impact had been based, by limiting it to circumstances in which an industry price structure was such that the affected prices could be demonstrated to be "higher in all regions than the range which would have existed in all regions under competitive conditions." *Id*. at *14 (quotation marks omitted). It was error, the Court concluded, for the district court to apply the *Bogosian* presumption without having considered all the evidence in the record, including the analysis of defendants' expert. *Id*. at *15.

* * * *

The Third Circuit's decisions are likely to have a significant impact on antitrust class actions going forward. They bring the Third Circuit more closely in line with the other appellate courts that are already increasing their scrutiny of class certification motions. They also bring greater clarity to the standards that district courts in the Third Circuit must apply in considering whether to certify a class of antitrust plaintiffs, especially with respect to expert disputes over common impact of the alleged violative conduct, an area often fiercely contested in antitrust actions.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum may be addressed to any of the following:

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