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Class Certification Standards Tighten

RECENT DECISIONS in the federal courts of appeals have changed the landscape for plaintiffs and defendants in antitrust class actions. The majority of circuit courts now requires a more stringent standard of review for class certification decisions in antitrust and non-antitrust cases alike.

BY MOSES SILVERMAN, AIDAN SYNNOTT AND WILLIAM MICHAEL

This includes the U.S. Court of Appeals for the Third Circuit, where until recently antitrust classes were certified under a relaxed standard of proof. Similarly, the First Circuit requires a "searching inquiry" at the class certification stage in antitrust cases, not only where basic facts are disputed between the parties, but also where plaintiffs' case relies on a novel theory of legally cognizable injury.

The effects of these changes are just beginning to be felt by litigants and businesses across the country.

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Tightening the Standards

The Third Circuit recently joined a growing list of appellate courts, including the First, Second, Fifth, Seventh and Eighth circuits, that insist on stricter standards of proof to support class certification decisions.

In *In re Hydrogen Peroxide Antitrust Litigation*,[1] the Third Circuit rejected earlier decisions suggesting that a future "intention" by plaintiffs to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure would suffice at the class certification stage. To warrant class certification, plaintiffs must actually meet such requirements and must demonstrate their ability to do so by a preponderance of the evidence.

The court also held that district courts must resolve all factual and legal disputes relevant to a class certification motion, even if such disputes overlap with the merits of the case. Finally, the court of appeals clarified that the district court's obligation to consider all the relevant evidence and to resolve factual and legal disputes includes weighing expert testimony on both sides of the action.

The effect of the *Hydrogen Peroxide* decision was not only to raise the standard of proof applicable to class certification motions, by holding that such motions must be supported by a preponderance of the evidence, rather than merely a "threshold showing." The court also limited the extent to which antitrust plaintiffs could rely on a presumption of class-wide impact or injury as a result of the alleged anticompetitive conduct by defendants.

Distinguishing its own 1977 decision in *Bogosian v. Gulf Oil Corp.*,[2] the court held that a presumption of impact may only be applied where plaintiffs have demonstrated the existence of an industry price structure in which the affected prices are "higher in all regions than the range which would have existed in all regions under competitive conditions." Moreover, in determining whether an application of the *Bogosian* presumption is appropriate, the district court must consider all the evidence in the record, including any analysis by the defendants' expert.

The *Hydrogen Peroxide* decision brings Third Circuit law more in line with the class certification standards applied by other courts of appeals, in antitrust as well as non-antitrust cases.

For example, in *Blades v. Monsanto Co.*, a putative antitrust class action, the Eighth Circuit held in 2005 that district courts must "look[] behind the pleadings" in conducting a class certification inquiry, recognizing that such inquiry "may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case."[3]

Likewise, in *In re IPO Securities Litigation*, a 2006 non-antitrust decision, the Second Circuit held that a district court "may certify a class only after making determinations that each of the Rule 23 requirements has been met," and that such determinations necessarily involve resolving factual disputes relevant to class certification even where such disputes may overlap with the merits.[4]

Within the Third Circuit, district courts have already begun to apply holdings of *Hydrogen Peroxide*, including that "[f]actual determinations supporting Rule 23 findings must be made by a preponderance of the evidence" in class certification decisions in contexts ranging from ERISA to Title VII.[5]

Using Expert Testimony

In addition to heightening the burden for plaintiffs on class certification motions, *Hydrogen Peroxide* and similar decisions place significantly greater emphasis on the role played by expert testimony in antitrust class actions before the merits of such cases are reached. As the Third Circuit made clear, district courts are now required to resolve "expert disputes in order to determine whether a class certification has been met," regardless of "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."[6]

At the same time, these decisions stop short of requiring plaintiffs to prove the merits of their case-in-chief at the class certification stage. A district court in the Second Circuit, for example, recently pointed out that plaintiffs seeking class certification in an antitrust action "need not demonstrate that their multiple regression analysis captures all the proper variables and thus reaches the 'right' answer."[7]

On a class certification motion, where the ability to prove class-wide impact is in dispute, the district court concluded that it was not required "to determine which expert's report is more persuasive on the merits, but rather which expert is correct about whether or not the plaintiffs' method of proof is a form of common evidence."[8]

The depth and breadth of expert testimony required at the class certification stage, following *Hydrogen Peroxide* and similar decisions in other circuits, is likely to remain a subject of dispute between plaintiffs and defendants. The outcome of such disputes may vary based on the circumstances of the individual case as well as the jurisdiction in which the case is pending.

How Much Discovery?

Also likely to be disputed in the district courts is the extent of discovery warranted on a class certification motion.

Plaintiffs may argue, for example, that the more stringent standard of proof that courts are now applying to such motions necessitates more discovery from defendants than what was previously permitted in support of class certification. And plaintiffs may seek to delay class certification decisions until more extensive discovery can be undertaken, and may begin to oppose the bifurcation of class and merits discovery that has become common in antitrust class actions.

In considering such challenges, courts will be confronted with the fact that "proceeding to antitrust discovery can be expensive,"[9] and that "the potential for unwarranted settlement pressure is a factor" that must be weighed as part of the class certification "calculus."[10]

Novel or Complex Theories

Unwarranted settlement pressure arising from the granting of class certification was a significant factor in the First Circuit's decision in *In re New Motor Vehicles Canadian Export Antitrust Litigation*.[11] There, the court held that "when a Rule 23 requirement relies on a novel or complex theory as to injury, …the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed."[12]

Plaintiffs in *New Motor Vehicles* alleged that defendants, automobile manufacturers, unlawfully conspired to block the import of lower-priced cars from Canada to the United States and thereby inflated the price of new cars sold in the United States. The plaintiffs advanced a two-step theory of liability.

First, plaintiffs argued that but for the defendants' suppression of competition from Canadian imports, U.S. car manufacturers would have had to set their suggested retail prices and dealer invoice prices lower to meet such competition. Second, plaintiffs argued that the higher suggested retail and dealer invoice prices injured U.S. consumers by resulting in higher actual retail prices for new cars. This theory, the court determined, was "both novel and complex."[13]

Likely to be disputed in the district courts is the extent of discovery warranted on a certification motion in light of the more stringent standards; in considering such challenges, courts will be confronted with the fact that 'proceeding to antitrust discovery can be expensive,' and that 'the potential for unwarranted settlement pressure is a factor' that must be weighed as part of the calculation.

Moreover, the testimony of plaintiffs' expert had left several important questions unanswered. In particular, the court observed that plaintiffs' expert had failed to explain "how the size of the but-for influx of [Canadian] cars would be established" under step one of plaintiffs' theory or how plaintiffs could "sort out the effects of any permissible vertical restraints from the effects of the alleged, impermissible horizontal conspiracy."[14] Under step two of plaintiffs' theory, plaintiffs' expert had not yet offered a means of determining that each member of the class was actually injured and that defendants' liability would be subject to common proof.

Plaintiffs' ability to prove that their alleged injuries had been caused by defendants' anticompetitive conduct, the court concluded, depended on the viability of their novel two-step theory. And to demonstrate that theory's viability in turn required plaintiffs "to establish—whether through mathematical models or further data or other means—the key logical steps behind their theory."[15]

Mindful that the granting of class status could "'raise[] the stakes of litigation so substantially that the defendant likely will feel irresistible pressure to settle,'" the court held that "a more searching inquiry" by the district court into whether plaintiffs could actually prove the key elements of their claims through common proof at trial was necessary.[16]

The court in *New Motor Vehicles* declined to specify a precise standard of proof that plaintiffs would be required to satisfy at the class certification stage. However, the court made clear that the district court's analysis of class certification motions should be sufficiently thorough to identify, at a preliminary stage in the litigation, cases where "there is no realistic means of proof" where "many resources will be wasted setting up a trial that plaintiffs cannot win."[17]

Recent district court decisions in the First Circuit have applied *New Motor Vehicles* to securities as well as antitrust class actions.[18] The court of appeals decision has also had an impact on district courts outside the First Circuit. For example, in *Kelly v. Microsoft Corp.*, the U.S. District Court for the Western District of Washington relied in part on *New Motor Vehicles* in rejecting plaintiffs' motion for class certification.[19]

The *Kelly* plaintiffs alleged that Microsoft had violated state consumer protection laws in connection with the marketing of its Windows Vista operating system. The court determined that plaintiffs' theory of "price inflation," advanced as a means of proving class-wide causation, was novel in the context of consumer protection claims and thus required a searching analysis at the class certification stage. As in *New Motor Vehicles*, plaintiffs' expert had failed to demonstrate a viable method for determining class-wide causation by common proof.

Kelly and other recent cases suggest that the influence of *New Motor Vehicles* in the district courts may reach beyond the First Circuit and beyond antitrust class actions to other areas of law.

1. *In re Hydrogen Peroxide Antitrust Litig.*, No. 07-1689, __ F.3d__, 2008 WL 5411562 (3d Cir. Dec. 30, 2008).
2. 561 F.2d 434 (3d Cir. 1977).
3. 400 F.3d 562, 566-67 (8th Cir. 2005).
4. 471 F.3d 24, 41 (2d Cir. 2006).
5. See, e.g., *NAACP v. N. Hudson Reg. Fire & Rescue*, Civ. No. 07-1683 (DRD), __F.R.D.__, 2009 WL 396130 (D.N.J. Feb. 18, 2009); *In re Merck & Co. Inc. Sec., Deriv. & "ERISA" Litig.*, MDL No. 1658 (SRC), 2009 WL 331426 (D.N.J. Feb. 10, 2009).
6. 2008 WL 5411562, at *13.
7. *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, Civ. No. 3:03md1452 (SRU), __F. Supp. 2d__, 2009 WL 395131, at *21 (D. Conn. Feb. 13, 2009).
8. Id. at *22.
9. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007).
10. *Hydrogen Peroxide*, 2008 WL 5411562, at *3.
11. 522 F.3d 6, 26 (1st Cir. 2008).
12. Id.
13. Id. at 27.
14. Id.
15. Id. at 26.
16. Id. (citation omitted).
17. Id. at 29.
18. See, e.g., *In re Boston Scientific Corp. Sec. Litig.*, 2009 WL 723490 (D. Mass. March 10, 2009); *In re Pharma. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83 (D. Mass. 2008); *In re Credit Suisse–AOL Sec. Litig.*, 253 F.R.D. 17 (D. Mass. 2008).
19. 2009 WL 413509 (W.D. Wash. Feb. 18, 2009).