# Third Circuit Clarifies Rigorous Class Certification Standards

On December 30, 2008, the United States Court of Appeals for the Third Circuit issued its decision in *In re: Hydrogen Peroxide Antitrust Litigation*[1], following the more stringent standard adopted by several other circuits when deciding whether to certify an action to proceed as a class. The Court of Appeals clarified three main points under Rule 23 of the Federal Rules of Civil Procedure:

> (i) a decision to certify a class requires factual determinations, not merely a threshold showing, which must be made using a preponderance of the evidence standard;
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> (ii) the court must resolve factual or legal disputes relevant to class certification even if those disputes overlap with the merits of the case; and
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> (iii) the court is obligated to consider all expert testimony by either party and review all relevant evidence in making a class determination.[2]

## I. Background and Procedural History

Plaintiffs filed complaints alleging that thirteen chemical manufacturers fixed the prices of hydrogen peroxide and persalts (sodium percarbonate and sodium perborate) and sought certification of a class of direct purchasers of hydrogen peroxide and persalts over an eleven-year class period.[3]

In evaluating whether to certify the class, the District Court was presented with two contradictory expert economists' opinions on the issue of impact, a key element in any treble-damages antitrust case. Plaintiffs' expert opined that there was a common impact on the class and offered two alternative approaches to determining damages on a class-wide basis. Defendants' expert concentrated on whether plaintiffs would be able to show, through common proof, that almost all of the class members suffered economic injury from the alleged antitrust violations, and opined that a class-wide impact could not be inferred from common evidence as required under Rule 23(b). Defendants moved to exclude the opinion of plaintiffs' expert as unreliable, but the motion was denied. The District Court found that plaintiffs' proposed methods for proving impact and damages were reliable[4] and certified the class.

On appeal, defendants argued that the District Court erred in its finding that plaintiffs met the predominance requirement: "(1) by applying too lenient a standard of proof for class certification, (2) by failing meaningfully to consider the views of defendants' expert while crediting plaintiffs' expert, and (3) by erroneously applying presumption of antitrust impact."[5]

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1 *In re: Hydrogen Peroxide Antitrust Litigation*, No. 07-1689, 2008 WL 5411562 (3d Cir. Dec. 30, 2008), *available at* http://www.ca3.uscourts.gov/opinarch/071689p.pdf (with the following citations to the "*Slip Opinion*").

2 *Id.* at 5.

3 *Id.* at 8. The consolidated complaint alleged that from the period of January 1, 1994, to January 5, 2005, defendants: "(1) communicated about prices they would charge, (2) agreed to charge prices at certain levels, (3) exchanged information on prices and sales volume, (4) allocated markets and customers, (5) agreed to reduce production capacity, (6) monitored each other, and (7) sold hydrogen peroxide at agreed prices." *Id.*

4 *Id.* at 26.

5 *Id.* at 16-17.

## II. Third Circuit's Decision

The Third Circuit panel ruled that the District Court failed to resolve the dispute among the expert opinions and failed to make a factual finding based on a preponderance of the evidence standard, instead allowing a mere threshold showing by the plaintiffs to satisfy the requirements of Rule 23(b). The Court held that in determining whether to certify a class, the district court is required to make all factual and legal inquiries that are necessary and must consider all evidence presented by the parties.[6]

The Court of Appeals observed that common issues to the class must predominate over individual issues,[7] and emphasized that "if proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable."[8] In the context of an antitrust case, common issues predominate only if an antitrust violation and antitrust impact or injury can be established through common proof.[9] Plaintiffs must show at the class certification stage that the element of antitrust impact can be proved at trial through "evidence that is common to the class rather than individual to its members."[10]

Focusing on antitrust impact, the Court of Appeals stated that the District Court erred in certifying the class based on plaintiffs' expert opinion that plaintiffs might be able to show a common impact, while disregarding defendants' expert opinion that such a showing would be "impossible."[11] The Court of Appeals stated that the District Court erred by accepting the opinion of plaintiffs' expert without resolving the dispute between the experts over the predominance issue.[12] The Third Circuit added that the District Court erroneously applied a presumption of antitrust impact under *Bogosian*[13] by relying only on evidence offered by the plaintiffs' expert, while ignoring the discrepancy between the two expert economists as to the pricing structure in the industry.

In reviewing the lower court's class certification analysis, the Court of Appeals stated that although there is little guidance on the standard of proof for class certification,[14] the inquiry must be a "rigorous analysis."[15] In doing the required "rigorous analysis," the District Court should have made a preliminary factual inquiry to resolve the dispute between the experts as to the predominance issue, even though that factual dispute also goes to the merits of the case. This discrepancy goes to the merits because plaintiffs must show antitrust injury to prevail in their suit even if they do not proceed as a class. The Court of Appeals also emphasized that this preliminary

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6 *Slip Opinion* at 5.

7 *Id.* (citing *In re The Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 F.3d 283, 313-314 (3d Cir. 1998)).

8 *Id.* at 15 (citing *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 172 (3d Cir. 2001)).

9 *Id.* at 16.

10 *Id.* at 17.

11 *Id.* at 22.

12 *Id.* at 40-41.

13 *Id.* at 17 (citing *Bogosian* v. *Gulf Oil Corp*., 561 F.2d 434, 454-55 (3d Cir. 1977), and summarizing the presumption as follows: "when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual").

14 *Id.* at 26 (citing *Unger* v. *Amedisys*, 401 F.3d 316, 320 (5th Cir. 2005)).

15 *Id.* at 26 (quoting *Gen. Tel. Co. of Sw*. v. *Falcon*, 457 U.S. 141, 161 (1982)).

inquiry into the merits does not later bind the fact-finder on the merits of the case.[16] An "overlap between a class certification requirement 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."[17]

The Court of Appeals explained that factual determinations must be made by a preponderance of the evidence, and that "a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements."[18] The Court of Appeals held that the District Court applied an improper and inadequate standard in using a mere "threshold showing," where it should have been "satisfied"[19] or "persuaded"[20] as to each Rule 23 requirement before certifying the class.[21] The Court of Appeals also emphasized that "weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands," and doing so is "always" a task for the district court.[22]

The Court of Appeals remanded the class certification to the District Court for re-analysis of the class certification determination using the standards set forth in the Court of Appeals' opinion.

## III. Significance of the Decision

This decision clarifies the rigorousness of analysis district courts must put forth in deciding whether to certify a class. It makes clear that the district court must apply a preponderance of the evidence standard and that where there is conflicting evidence at the certification stage, the court is required to engage in fact-finding even when such fact-finding overlaps with findings as to the merits of the case, especially since any decisions made at the certification stage will not be binding on the finder of fact at trial. No longer will a mere threshold showing be sufficient for class action certification in the Third Circuit, nor will a presumption of class-wide impact be applied where there is a factual dispute on the issue.

Further, this decision follows the trend among other Circuits of imposing more rigorous standards on class certification determinations. The Seventh Circuit previously held that the district court did not have to accept allegations made in the complaint as true, but that it had to make any factual and legal inquiries necessary to ensure the requirements of class certification were met, even if those inquiries overlapped with the merits of the case.[23] Similarly, the First Circuit held that the rigorous analysis required under Rule 23, "may inevitably overlap with some critical assessment regarding the merits of the case."[24] The Second Circuit also clarified that in deciding whether to certify a class, "there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue."[25]

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16 *Slip Opinion* at 33.

17 *Id.* at 29.

18 *Id.* at 38.

19 *Id.* at 46 (citing *Falcon*, 457 U.S. at 161).

20 *Id.* at 46 (citing *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)).

21 *Id* at 46.

22 *Id.* at 46, 47.

23 *Szabo* v. *Bridgeport Machines, Inc.*, 249 F. 3d 672, 676 (7th Cir. 2001).

24 *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008).

25 *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d at 41.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.