

In re Hydrogen Peroxide Antitrust Litigation Bleaches Clean the Class Certification Standard

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With its December 30, 2008, decision in *In re Hydrogen Peroxide Antitrust Litigation*,¹ the Third Circuit joins a growing list of U.S. Courts of Appeals that have clarified the responsibilities that district courts face in determining the suitability of a claim for class treatment. The features that distinguish the *Hydrogen Peroxide* opinion from the decisions by the Seventh Circuit in *Szabo*,² the Second Circuit in *Initial Public Offerings*³ and the First Circuit in *Canadian Export*⁴ are: (1) the unambiguous instructions it gives district courts as to the degree of fact finding necessary under Rule 23 of the Federal Rules of Civil Procedure; (2) its rejection of the “battle of experts” argument which class plaintiffs have invoked with metronomic regularity; and (3) its acknowledgment that the “*Bogosian* short-cut”—which emerged from a thirty-year old Third Circuit antitrust decision⁵—is no longer a standalone basis for satisfying Rule 23(b) on the issue of classwide antitrust impact.

The Third Circuit’s decision will undoubtedly influence the timing, tactics, and evidentiary record of future class certification disputes in that circuit, as *Szabo*, *IPO*, and *Canadian Export* did in their respective circuits. The *Hydrogen Peroxide* opinion, however, likely will enhance and focus the role of expert testimony in Rule 23 analysis, an area of particular importance in antitrust claims.

Hydrogen Peroxide

At the District Court. *In re Hydrogen Peroxide Antitrust Litigation* encompasses price-fixing claims brought by direct and indirect purchasers of hydrogen peroxide, filed as a follow-up to criminal investigations by U.S. and E.U. regulators of eighteen hydrogen peroxide manufacturers.⁶ The direct purchasers moved for certification of a national class. In response, the defendants did not “specifically contest” the plaintiffs’ Rule 23(a) arguments but instead focused their attack on whether maintenance of the suit as a class action would satisfy Rule 23(b)(3)—that is, whether “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.”⁷

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¹ 552 F.3d 305 (3d Cir. 2008) (*Hydrogen Peroxide II*). (The authors represented one of the defendants in an unrelated matter.)

² *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

³ *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

⁴ *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

⁵ *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977).

⁶ See *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 166 (E.D. Pa. 2007) (*Hydrogen Peroxide I*) (citing FED. R. CIV. P. 23(b)(3)).

⁷ *Id.* at 169–72.

At the outset of its Rule 23(b) analysis, the district court carefully articulated what it believed were the limits of any inquiry it could conduct into the merits of the plaintiffs' claim in resolving the class certification motion. On this threshold issue, the district court observed that the instructions in the Supreme Court's *Eisen*⁸ and *Coopers & Lybrand*⁹ decisions "are seemingly difficult to reconcile."¹⁰ Acknowledging that "some inquiry" into the merits was necessary, the district court nevertheless ruled that, under Third Circuit law, the inquiry should be limited "to the minimum necessary."¹¹ Consequently, the district court held "[i]t will not do here to make judgments about whether the plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants."¹²

The court extended this reasoning to its consideration of the defendants' motion to strike the opinion of the plaintiffs' class expert under *Daubert*.¹³ Defendants, based on the findings of their expert, argued that the plaintiff expert's conclusions were unreliable in four areas: that (1) the chemicals at issue were fungible, undifferentiated commodity products; so (2) price was the most significant means of competition; (3) the pricing structure for the chemicals was industry-wide; and (4) as a result, an agreement to control prices would hinder competition across the board.¹⁴ Characterizing the defendants' class expert's conflicting conclusions as "of no moment" to its *Daubert* analysis, the court held that, at the class certification stage, the plaintiff expert's opinion passes muster unless shown to be "junk science."¹⁵ "We are not permitted," the court observed, "in addressing defendants' *Daubert* motion, to weigh the relative credibility of the parties' experts."¹⁶ Under this standard, the court held that plaintiff's expert "identified a generally accepted methodology which is applicable to the class" and had probative value; therefore the court would consider his findings in addressing the Rule 23(b)(3) factors at issue.¹⁷

With respect to the issue of antitrust impact, the court determined that a presumption of class-wide impact was appropriate under the Third Circuit's 1977 decision in *Bogosian v. Gulf Oil Corp.*,¹⁸ which held that if plaintiffs alleged a nationwide conspiracy successfully increased prices, then it was likely that each member of the class would have made purchases at the artificially raised price.¹⁹ Further, the court held that the plaintiffs' expert demonstrated sufficient common impact, as summarized above. The court rejected the defendants' argument that, even at the

⁸ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

⁹ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) ("Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. . . . The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits," (quoting 15 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3911, at 485 n.45 (1976))).

¹⁰ *Hydrogen Peroxide I*, 240 F.R.D. at 169–70.

¹¹ *Id.* at 170 (citing *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 152 (3d Cir. 2002)).

¹² *Id.*

¹³ *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

¹⁴ *Hydrogen Peroxide I*, 240 F.R.D. at 170–72.

¹⁵ *Id.* at 170.

¹⁶ *Id.* at 171.

¹⁷ *Id.*

¹⁸ 561 F.2d 434, 455 (3d Cir. 1977).

¹⁹ See 240 F.R.D. at 173 (citing *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 (E.D. Pa. 2001) (applying *Bogosian* presumption of impact); *Lumco Indus. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 173 (E.D. Pa. 1997) (same)).

class certification stage, plaintiffs must establish that each class member has, in fact, been injured.²⁰

On the issue of damages, the defendants observed that the plaintiffs' expert's analysis was incomplete but the district court held the incomplete status of the damage analysis was not fatal to the plaintiffs' motion.²¹ The plaintiffs' burden was limited to whether they had identified an accepted method of determining damages on a classwide base, a burden the court found the plaintiffs had met.²²

The Third Circuit. The Third Circuit granted the defendants' Rule 23(f) motion for interlocutory appeal in order to consider "the standards a district court applies when deciding whether to certify a class."²³ The court broke this question into three procedural issues: (1) the quantum of evidence necessary to meet Rule 23 requirements; (2) the scope of a merits inquiry the court must conduct to resolve factual and legal disputes regarding those requirements; and (3) the role of expert testimony in the court's analysis.²⁴

The court observed that the requirements set out in Rule 23 are "not mere pleading rules"; rather, these requirements frame how the courts are to test the factual sufficiency of a class certification request. The movant bears the burden of meeting those requirements by a preponderance of the evidence, and that burden will not be met by an assurance of how the movant intends or plans to meet these requirements.²⁵ Thus, the court rejected the notion that a plaintiff can satisfy Rule 23 by making a "threshold showing."²⁶

Next, the court instructed that "[a]n 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."²⁷ The language in *Eisen* that gave the district court pause—"nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."²⁸—is "best understood," the Third Circuit explained, "to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement."²⁹ The Third Circuit stated: "A contested requirement is not forfeited in favor of the party seeking class certification merely because it is similar or even identical to one normally decided by a trier of fact."³⁰ Consequently, a district court "errs as a matter of law" when it does not resolve, on an evidentiary basis, a factual dispute relevant to the Rule 23 requirements.³¹

²⁰ *Id.* at 174 n.14.

²¹ *Id.* at 175.

²² *Id.*

²³ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

²⁴ *Id.* at 307.

²⁵ *Id.* at 316, 318.

²⁶ *Id.* at 321–22.

²⁷ *Id.* at 316.

²⁸ 417 U.S. at 177.

²⁹ 552 F.3d at 317.

³⁰ *Id.* at 318.

³¹ *Id.* at 320. The court also rejected the concept that, in antitrust claims, doubt as to whether to certify a class should be resolved in favor of allowing class treatment of the claims asserted. *Id.* at 321.

Those disputes include conflicting expert testimony.³² The court held that “opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason.”³³ Instead, resolving conflicts presented by the experts’ testimony “may be integral to the rigorous analysis Rule 23 demands.”³⁴ The court acknowledged that weighing expert opinions may not be necessary in every case, but held that a district court must do so where the conflicting evidence is relevant to a Rule 23 requirement. Here, the defense expert’s dispute on characterizations of the relevant market and the alleged pricing structure demanded resolution by the district court, and its refusal to do so because of a perceived bar to resolving a “battle of the experts” at the class certification stage constituted reversible error.³⁵

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Finally, the Third Circuit considered the district court’s application of the presumption of class-wide impact under *Bogosian*. Without abrogating the presumption, the Third Circuit concluded that presuming impact based solely on an “unadorned” price-fixing allegation “would appear to conflict with the 2003 amendments to Rule 23, which emphasize the need for a careful, fact-based approach, informed, if necessary, by discovery.”³⁶ The plaintiffs had proffered its expert’s opinions to demonstrate independently the assertion of common impact that the presumption establishes, but the court of appeals observed that, in evaluating that evidence, the district court failed to consider the defense expert’s evidence submitted to undermine this presumption. Thus, it instructed the district court to review all the evidence pursuant to the clarified standards, and then “consider whether the reasoning in *Bogosian* is compatible with the record in this case.”³⁷

The Post-Hydrogen Peroxide World

Timing of the Class Certification Motion. *Hydrogen Peroxide II*’s unequivocal command that district courts resolve all genuine factual disputes regarding Rule 23 elements by weighing all probative evidence and make the necessary credibility assessments—without regard to that evidence’s role in the merits of the case—should cause discerning antitrust class plaintiffs to re-think the timing of the class certification motion. In the past, class plaintiffs opted for sooner rather than later, a decision that had both tactical and legal support. Plaintiffs found legal support in the pre-2003 version of Rule 23, which instructed courts to determine the suitability of class treatment “as soon as practicable after the commencement of an action”³⁸ and in case law that tilted in plaintiffs’ favor early class certification requests.³⁹ The tactical advantage of an early request is to bring

³² *Id.* at 322–24.

³³ *Id.* at 323.

³⁴ *Id.*

³⁵ *Id.* at 325.

³⁶ *Id.* at 326 (citing FED. R. CIV. P. 23 advisory committee’s note, 2003 Amendments (“[D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial.”)).

³⁷ *Id.* The Third Circuit distinguished its *Linerboard* decision, *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002), which affirmed class certification where the district court invoked *Bogosian*, because there the plaintiffs submitted evidence of common impact, but the court did not address whether opposing expert opinions would have been properly considered.

³⁸ The 2003 amendments replaced that language with “at an early practicable time.”

³⁹ *E.g.*, *Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir. 1975) (“If the court does choose to rule on class certification at an early stage of the litigation before the supporting facts are fully developed, then it should err ‘in favor and not against the maintenance of the class action, for [the decision] is always subject to modification . . .’”(citation omitted)).

about what the Third Circuit observed was often the “defining moment” of class actions that could sound the “death knell of the litigation, irrespective of the merits of the claims.”⁴⁰ This strategy now must be tempered by an assessment of when the record evidence is sufficiently robust to support the necessary fact finding that *Hydrogen Peroxide II* demands; failure to do so creates a significant risk that plaintiffs will not meet their Rule 23 burden, particularly in antitrust claims, which are likely to rely heavily on empirical data not in the plaintiffs’ possession, custody, or control. From the defendants’ perspective, a strategy of bright-line sequencing of class and merits discovery (which, in the past, courts seldom implemented) arguably lacks even a toehold of support following the Third Circuit’s decision. In addition, arguing against discovery of any merits issue might effectively concede that the issue is irrelevant to the Rule 23 analysis.⁴¹

Simply put, Hydrogen Peroxide II will greatly expand the scope of evidentiary presentations. *Tactical Considerations.* *Hydrogen Peroxide II* also should lay to rest either side’s attempts to oppose an evidentiary hearing on a class certification motion. The district court’s now explicit duty to assess credibility and persuasiveness should make the request for an evidentiary hearing a no-brainer. The Third Circuit’s reversal of class certification came in part due to the evidentiary record that the defendants compiled at the district court. Prudent parties will take the steps necessary to ensure that the record contains all their evidence on disputed Rule 23 elements and should consider proffers of evidence that the district court refuses to admit into evidence in order to preserve the record for appeal.

A related tactical consideration is the form of the evidentiary presentation. Given the persuasiveness/credibility discussion in the Third Circuit’s decision, a party arguably takes an unnecessary risk when its presentation does not provide the district court with an opportunity to make such observations—e.g., presentations limited to documents and written statements (affidavits or printed deposition transcripts). The district court is a fact finder—albeit in a limited context—and one cannot discount the impact of live testimony, particularly from lay witnesses. Further, the factual findings that resolve disputes relevant to Rule 23 assessment are reviewed under the abuse of discretion standard, which includes “a clearly erroneous finding of fact.”⁴² Prevailing parties at the district court level will be a better position to defend those findings where they are embedded with in-person credibility assessments, which courts of appeals are more reluctant to supplant.⁴³ *Hydrogen Peroxide II* reinforces the belief held by some defense counsel that the class certification evidentiary hearing should be approached forensically no differently than a trial on the merits.

Substance and the Role of Experts. Simply put, *Hydrogen Peroxide II* will greatly expand the scope of evidentiary presentations. One could ask, with regard to antitrust claims, what factual dispute would *not be* relevant to resolve the class certification issue. For example, class certification defense in such claims has been focused primarily on impact or injury in fact, with quan-

⁴⁰ 552 F.3d at 310 (quoting *Newton v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)).

⁴¹ *See id.* at 320 (“[B]ecause each requirement of Rule 23 must be met, 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”).

⁴² *See id.* at 320 (quoting *In re Gen. Motors Corp., Pick-Up Truck Prod. Liab. Litig.* 55 F.3d 768, 783 (3d Cir. 1995)).

⁴³ *Cf.* *Rothermel v. Wronke*, No. 07-3799, 2008 U.S. App. LEXIS 8860 at **3 (7th Cir. Apr. 16, 2008) (due deference given to bankruptcy court’s credibility findings; “as the trier of fact, it is in the best position to observe witnesses to determine whether they are telling the truth”); *El Paso Elec. v. NLRB*, No. 07-60600, 2008 U.S. App. LEXIS 7126 at **5 (5th Cir. Apr. 3, 2008) (same—ALJ’s credibility findings in NLRB hearing); *Ray v. Campbell*, No. 07-14283, 2008 U.S. App. LEXIS 18968 at *3–*4 (11th Cir. Aug. 29, 2008) (same—trial court’s credibility findings at suppression hearing); *FED. R. Civ. P. 52(a)(6)* (in bench trials, “the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

tification of damages coming in a distant second. Yet a dispute over common impact could readily encompass one, some or all of the following issues as to which, in the past, courts had accepted plaintiffs' proffers without much analysis: (1) definition of the relevant market (product and geographic); (2) market structure and market power; (3) plausible exercise of market power in terms of price and non-price predation, (4) conditions conducive to coordination among competitors, among other threshold findings related to the likelihood of classwide impact. This means that the "battle of the experts" will actually be fought.

Hydrogen Peroxide II changes the character and substance of potential expert opinions and testimony from the prevailing focus—i.e., the extent to which cognizable methods exist that allow for the demonstration of class-wide impact by means of common proof to a new focus—i.e., evidence of [actual and expected] outcomes of such methods, within the context of the specific facts of the case. Experts should expect that courts will apply the well-accepted standards used in evaluating their merits opinions relating to liability, impact, and damages when judging whether conduct is suitable for class treatment. Thus, methods used in assessing class-wide impact would need to be shown to be reliable both in theory and practice as they pertain to the specific facts of the case.

The Third Circuit's decision assures that empirical evidence will get its day in court.

Going forward, parties may need to reassess whether expert opinions on class impact are deficient in the *Daubert* context, or whether they can expect that the type of stringent review of expert opinions and methods necessary to meet the preponderance standard will adequately identify and dispose of insupportable methodologies, rendering a separate *Daubert* challenge and hearing superfluous. Another likely change in the scope and rigor of expert testimony will be more thorough vetting of evidence relating to the functioning of the market in the absence of the challenged conduct (the "but-for" market). A case will be suitable for class treatment where common proof can be used to demonstrate that all members of the purported class would have been made better off in the absence of the challenged conduct. Previously, experts may have offered limited evidence and opinions as to potential market outcomes and which was most plausible given the characteristics of the market. Deference to avoiding a "battle of the experts" may have limited the court's ability to assess the most likely outcome in this regard. Because a common impact finding may turn on the decision among alternative versions of the "but-for" market, *Hydrogen Peroxide II* places heightened emphasis on developing the facts by which experts are able to opine about the most plausible outcome.

Finally, the Third Circuit's decision assures that empirical evidence will get its day in court. Positing that a method could be applied to a hypothetical set of information with a predictable outcome will no longer suffice.⁴⁴ A proposed method without adequate support, be it lacking recognized statistical significance or theoretically unsupportable based on the available evidence, seem likely to fail to satisfy the standards announced in *Hydrogen Peroxide II*. Similarly, reliability standards, in the form of tests for robustness of proposed methods for demonstrating and measuring impact, have until now skirted the standards that apply when the proposed methods are executed at the merits stage. Such a distinction in assessing the basis for expert opinions has

⁴⁴ Indeed, less than thirty days after its decision, the Third Circuit vacated a class certification order and remanded for further proceedings consistent with *Hydrogen Peroxide II*. *In re Plastic Additives Antitrust Litig.*, Nos. 07-2159, 07-2418 (Jan. 27, 2009). The plaintiff class expert in the case was the same as the plaintiff expert in *Hydrogen Peroxide*, and the contours of his conclusions in the two industries were remarkably similar. See *In re Plastic Additives Antitrust Litig.*, CA 03-2038, 2006 U.S. Dist. LEXIS 69105 (E.D. Pa. Sept. 1, 2006).

arguably lapsed with *Hydrogen Peroxide II*.⁴⁵ A challenge to the applicability of a proposed method can no longer be met with a promise that something will be workable at the trial stage.

Conclusion

The Third Circuit's decision in *Hydrogen Peroxide II* maintains the momentum generated by *Szabo* and *IPO*, and confirms what defense counsel litigating in courts in that Circuit have long advocated: class certification must be grounded in evidence that makes each element of Rule 23 more likely than not. The added value that *Hydrogen Peroxide II* brings to jurisprudence in this area is an expectation that economic theories advanced with respect to those elements will be supported by evidence, and that the trial court must resolve competing theories based on that evidence. ●

⁴⁵ *But see In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, No. 3:03md1542 (SRU), Ruling on Class Certification (D.I. 512), at 41 (D. Conn. Feb. 13, 2009), available at <http://ecf.ctd.uscourts.gov/doc1/04112026207> (granting class certification while declining to assess which conflicting expert opinion was "correct," distinguishing *Hydrogen Peroxide II* factually because the EPDM expert actually completed the proposed analytic models "demonstrat[ing] class-wide impact and injury using proof common to the class.>").