

News from our Commercial Class Action Litigation Group

Third Circuit Clarifies the “Rigorous Analysis” Inquiry District Courts Are to Conduct in Deciding Motions for Class Certification

The United States Court of Appeal for the Third Circuit recently issued a broad opinion regarding the proper standard of proof on a motion for class certification under Rule 23 that provides defendants with greater opportunity to avoid certification. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3rd Cir. 2008). This opinion may be one of the most important decisions in class action litigation in several years.

The Supreme Court has previously stated that a district court must conduct a “rigorous analysis” of the Rule 23 factors, *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982), and take a “close look” at those factors, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997), but it did not explain these terms. Noting this lack of guidance, the Third Circuit’s opinion in *Hydrogen Peroxide* clarified three key aspects of class certification procedure. The Third Circuit held that district courts: (1) may not certify a class action merely upon a “threshold showing,” but instead, must make factual findings by a preponderance of the evidence that the party seeking class certification has met each of the Rule 23 requirements; (2) must resolve all factual and legal disputes relevant to class certification, even if those disputes overlap with the merits of the underlying claims or touch on the elements of a claim; and (3) must consider all relevant evidence and arguments, including expert testimony, regardless of whether the party offering the expert testimony is the moving or opposing party, and must weigh conflicting expert testimony at the certification stage.

In *In re Hydrogen Peroxide Antitrust Litig.*, direct purchasers of hydrogen peroxide and certain other chemicals brought an antitrust class action against chemical manufacturers alleging a price-fixing conspiracy among different grades of hydrogen peroxide. After substantial discovery, plaintiffs moved to certify a class of direct purchasers of hydrogen peroxide and certain other chemicals, and defendants opposed class certification. In support of and in opposition to the motion, the parties offered conflicting testimony from expert economists. The district court certified the class. Defendants filed an interlocutory appeal under Rule 23(f), arguing that the district court erred by applying an overly lenient standard of proof, failing to meaningfully consider the defendants’ expert’s views while crediting the plaintiffs’ expert, and by erroneously applying a presumption of antitrust impact or individual injury. The Third Circuit agreed, vacated the district court’s certification order, and remanded the case for proceedings consistent with its opinion.

Regarding its holding that a district court must find that the party seeking class certification met each of the Rule 23 requirements by a preponderance of the evidence, the Third Circuit stated that it was incorrect to state that a moving party need only show an “intention” to try the case in a manner that satisfies the predominance requirement or that the moving party’s burden was only a “threshold showing.” The Court reasoned that such statements could incorrectly signify that the burden on the party seeking class certification is a prima facie showing

or burden of production, instead of preponderance of the evidence, or that the party seeking certification is entitled to some amount of deference or a presumption in its favor. Also, the Court rejected the notion that a district court should relax its certification analysis or presume a requirement is met even though courts have observed that the predominance requirement is readily met in certain types of cases or that certain categories of cases are generally amenable to class treatment. A party seeking class certification must meet the requirements of Rule 23 by a preponderance of the evidence on the unique facts of each case, regardless of the subject matter of the lawsuit.

In finding that a district court must resolve all factual and legal disputes relevant to class certification, including merits disputes

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that are relevant to certification requirements, the Third Circuit noted that other courts of appeal agree that a district court's rigorous analysis may include a preliminary inquiry into the merits when necessary to do so to determine a Rule 23 requirement. The Third Circuit also noted that preliminarily resolving a disputed merits issue at the class certification stage is appropriate because it is not a conclusive determination of the merits issue because findings for the purposes of class certification do not bind the fact finder, whether jury or judge, on the merits. Although the district court is to decide only those merits issues necessary to deciding class certification, in practice, rulings against defendants on disputed merits issues at the class certification stage may nonetheless negatively slant the court on such issues going forward in a case. Accordingly, litigating merits issues at this stage carries with it risks and strategic implications for defendants.

Last, the Third Circuit endorsed defendants opposing class certification through a "battle of the experts" if expert opinion is needed to decide a class certification issue. Regarding its holding that expert testimony must be considered if relevant and weighed if conflicting, the Third Circuit cautioned that the moving party's opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the testimony should not be excluded under a *Daubert*

challenge. The Court found that expert opinion, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis, and therefore, a district court must resolve conflicting expert testimony at the certification stage if the district court finds that expert testimony is relevant.

The opinion is only binding on federal district courts in the Third Circuit, but it is likely to have significant persuasive impact across the country because the opinion was written by one of the foremost legal authorities on civil procedure and as the opinion notes, other federal courts of appeal agree with the central thesis that a district court's rigorous analysis may include a preliminary inquiry into merits issues that are necessary to determine a Rule 23 requirement. Defendants around the country will undoubtedly ask federal courts not bound by the decision to adopt the Third Circuit's holding and reasoning, but some federal courts, particularly those that require class certification motions to be decided promptly after a lawsuit is filed and before extensive factual discovery is permitted, may struggle to do so.

Cooley's Commercial Class Action Litigation practice has significant experience litigating class certification. If you would like to discuss class certification procedures further or have questions about this *Alert*, please contact one of the attorneys listed above. ■