

Client Alert

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Third Circuit Requires District Courts to Make Findings that Each Element of Rule 23 is Met Before Granting Class Certification**Areas of Interest****Consumer Litigation & Class Actions****Antitrust & Competition****United States**

The US Court of Appeals for the Third Circuit recently clarified the standard of proof necessary to permit class certification. In *In re: Hydrogen Peroxide Antitrust Litigation*, No. 07-1689 (3d Cir. Dec. 31, 2008), the Third Circuit vacated a district court's decision to certify a class in a significant antitrust lawsuit, and held that the lower court had failed to resolve disputed issues concerning whether each requirement of Federal Rule of Civil Procedure 23 had been satisfied. The *Hydrogen Peroxide* decision joins the recent trend of

federal courts of appeal calling for careful scrutiny of requests for class certification. The decision is important because it underscores the principle that Rule 23's requirements "are not mere pleading rules," but rather, require district courts to engage in rigorous analysis of evidence concerning whether the requirements have been met.

Plaintiffs moved to certify a class of direct purchasers of hydrogen peroxide and other chemicals, alleging that the defendant manufacturers had fixed prices in violation of the Sherman Act. The district court granted plaintiffs' motion for class certification. On appeal, the manufacturers argued that plaintiffs had failed to satisfy Rule 23(b)(3)'s requirement that common questions of law or fact predominate over any questions affecting individualized issues. Specifically, the manufacturers argued that plaintiffs could not use common evidence to prove injury to each putative class member; instead, they would be required to use individualized evidence, therefore defeating predominance.

The Third Circuit vacated the lower court's class certification order, articulated the standard of proof required for class certification under Rule 23, and remanded the case so that the lower court could reconsider the decision in light of the principles identified in its opinion. The court held that, under Rule 23, (i) the plaintiffs must prove each certification requirement by a "preponderance of the evidence," (ii) the district court must resolve all factual and legal issues relevant to certification, even where those issues "overlap with the merits," and (iii) the district court must critically evaluate conflicting expert testimony rather deferring to the plaintiffs' expert at the certification stage.

In holding that each class certification requirement must be proven by a preponderance of the evidence, the Third Circuit relied extensively on the 2003 amendments to Rule 23, which provided district courts with more time to make certification decisions and eliminated language suggesting that certification could be granted on a tentative basis. These changes, the court stated, supported its conclusion that district courts may certify class actions only after carefully considering all evidence relevant to certification and making a definitive determination that each Rule 23 requirement is satisfied.

Accordingly, the Third Circuit explained, a district court must resolve all factual and legal issues raised by a class certification motion even when those issues are "similar or even identical to [those] normally decided by a trier of fact" at the merits stage. Although recognizing that the Supreme Court has held that a court cannot "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action" (*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)), the Third Circuit

rejected the view that overlapping certification and merits questions should be automatically resolved in favor of the plaintiff at the certification stage. Instead, the court held that *Eisen* "preclude[s] only a merits inquiry that is not necessary to determine a Rule 23 requirement."

Finally, the Third Circuit considered the question of conflicting expert testimony. Both parties had submitted to the district court expert testimony on the question of whether an injury to each member of the proposed class could be proved using evidence common to the class or instead whether proof of the injury required individualized treatment. The district court seemed to believe that it was enough for plaintiffs to make a "threshold showing," and that the defendant's expert testimony was irrelevant to its analysis. The Third Circuit disagreed, holding that "weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."

In short, the Third Circuit's holding in *Hydrogen Peroxide* provides clear guidance to district courts that they must not certify a class unless they have concluded—after resolving disputed legal and factual questions—that all of Rule 23's requirements have been met.

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