

A L E R T

JANUARY
2009

Financial Services Litigation & Antitrust and Trade Regulation

THIRD CIRCUIT CLARIFIES REQUIREMENTS FOR CLASS CERTIFICATION

By Theresa E. Loscalzo

In an opinion issued on December 30, 2008, the Third Circuit clarified the standards a district court must apply when deciding to certify a class, vacated the District Court order certifying the class, and remanded for further proceedings. *In re: Hydrogen Peroxide Antitrust Litigation*, No. 07-1689, 2008 U.S. App. Lexis 16871 (3d Cir. Dec. 30, 2008).

In deciding whether to certify a class under Federal Rule of Civil Procedure 23, the Third Circuit clarified three key aspects of class certification procedure: “First, the decision to certify a class calls for findings by the Court, not merely a ‘threshold showing’ by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the Court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. Third, the Court’s obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.”

* * * * *

After the United States Department of Justice and the European Commission began investigating possible price-fixing violations of the antitrust laws in the hydrogen peroxide industry, several purchasers filed class action complaints against the producers of hydrogen peroxide, sodium perborate and sodium percarbonate alleging a conspiracy in restraint of trade under the Clayton and Sherman Acts. After

extensive discovery, plaintiffs moved to certify a class of direct purchasers under Rule 23(b)(3), which is permissible when the court finds that 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. The key issue in this case was whether the plaintiffs could establish that the alleged conspiracy caused each of them to incur economic injury (“antitrust impact”), a necessary element of their antitrust claim, through common proof.

In support of class certification, plaintiffs offered the opinion of an expert economist. In their opposition, defendants offered the opinion of an expert economist and separately moved to exclude the opinion of plaintiffs’ economist as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The experts disagreed on the key disputed predominance issue – whether antitrust impact could be established through evidence common to the class. Concluding that the opinion of plaintiffs’ economist was admissible and supported plaintiffs’ motion for class certification, and further concluding that it was prohibited from resolving disputes between experts at the class certification stage, the District Court found that the predominance requirement was met and certified a class of direct purchasers under Rule 23. The Third Circuit granted defendants’ petition for an interlocutory appeal under Rule 23(f), reviewed the District Court’s decision on an abuse of discretion standard, and reversed.

(continued on page 2)

Reviewing the elements of plaintiffs’ claim “through the prism” of Rule 23 to determine whether the District Court properly certified the class, the Third Circuit first addressed the standard of proof to be applied to the Rule 23 requirements. The Court explicitly held that it was incorrect to state that a plaintiff need only make a “threshold showing” that common issues predominate, or demonstrate an “intention” to try the case in a manner that satisfies the predominance requirement. “A ‘threshold showing’ could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor.” Rather, the plaintiff must prove that antitrust injury is capable of proof at trial through evidence that is common to the class. “Deciding this issue calls for . . . rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove economic impact at trial.” Moreover, all factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence – that is, to certify a class the District Court must find that the evidence more likely than not establishes each and every fact necessary to meet the requirements of Rule 23.

Second, the Court of Appeals made clear that even where an overlap exists between a class certification requirement and the merits of a claim, such an overlap did not provide a valid basis for the district court to decline to resolve relevant

disputes when necessary to determine whether a class certification requirement is met. Because of the nature of the evidence that will suffice to resolve the question of whether common or individual issues predominate, the appeals court acknowledged that the district court must to some extent predict how specific issues will play out, but cautioned that “because 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.” Although the District Court’s findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits.

Finally, even if a plaintiff presents expert evidence admissible under Rule 702 of the Federal Rules of Evidence, Rule 23 requires the District Court to undertake a “rigorous analysis” of the proposed expert’s opinion. The Court of Appeals explained that “resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court,” even if a dispute might implicate the credibility of the experts or overlap with the underlying merits of the case.

In sum, the Third Circuit made clear that the District Court is required to take a “hard look” at each and every element of plaintiff’s proof under Rule 23, and that the proof supporting each element of the Rule 23 analysis must actually be in the record at the time the application for certification is made. ♦

For more information about Schnader’s Financial Services Litigation and Antitrust and Trade Regulation Practice Groups, please contact a group chair:

Financial Services Litigation
Theresa E. Loscalzo
tloscalzo@schnader.com, 215-751-2254

Antitrust and Trade Regulation
Carl J. Schaerf
cschaerf@schnader.com, 212-973-8005

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.