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LITIGATION

3rd Circuit's Standard for Class Certification Alters Legal Landscape

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Special to the Legal

Class action practice is a high-stakes game, with the court's class certification order often a "lethal force" that, regardless of the merits of the lawsuit, "bestows extraordinary leverage" upon plaintiffs and places substantial pressure on defendants to settle. (See *Oscar Private Equity Investments v. Allegiance Telecom Inc.*) Notwithstanding the power of the class certification decision, however, the federal courts, including those in the 3rd Circuit, have historically construed Rule 23 of the Federal Rules of Civil Procedure liberally in plaintiffs' favor. Further, as a result of the U.S. Supreme Court's admonition against merits-based inquiries in its 1974 decision in *Eisen v. Carlisle & Jacquelin*, district courts have, until recently, resisted an in-depth review of the plaintiffs' claims and the likely evidence to be introduced at trial at the class certification stage, concluding that plaintiffs need only make "some showing" that the requirements for class certification are satisfied.

This trend began to shift several years ago following Congress' enactment of the Class Action Fairness Act of 2005, or CAFA, which significantly expanded federal jurisdiction over class actions, in large part to limit perceived abuses of the class action mechanism at the state level. In the post-CAFA world, the federal appellate courts have begun to chart a change in direction from the *Eisen* years, requiring something more than a mere threshold showing that each of the Rule 23 elements



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is satisfied for class certification to be granted. Indeed, in the past several years, the 2nd U.S. Circuit Court of Appeals and 5th Circuit have announced new standards for district courts to follow in making class certification decisions, requiring a critical evaluation of all of the relevant evidence at the class certification stage, and the resolution of any relevant factual disputes to determine whether each of the Rule 23 requirements is met. (See, e.g., *Oscar Private Equity Investments v. Allegiance Telecom Inc.* and *In re Public Offering Securities Litig.*)

And so follows the state of the law now in the 3rd Circuit as well, following an opinion authored by Chief Judge Anthony

Scirica at the close of 2008 in *In re Hydrogen Peroxide Antitrust Litigation*. The *Hydrogen Peroxide* litigation was a putative class action against several chemical manufacturers alleged to have participated in a price-fixing conspiracy in violation of the Sherman Act. Following extensive discovery and a hearing that included the testimony of the parties' competing economics experts, the district court certified a class consisting of all purchasers of hydrogen peroxide and several other chemicals from any of the defendants over an 11-year period. The court identified seven common issues to be tried on a classwide basis, including whether the defendants engaged in the alleged conspiracy and, if so, the duration of the conspiracy, its effect on prices and whether the conspiracy violated the Sherman Act.

On appeal, Scirica held that the district court erred in finding that the plaintiffs satisfied Rule 23's predominance requirement by applying too lenient a standard of proof for certification and concluding that it was barred from resolving disputes between the parties' experts. In so doing, the court "clarif[ied] three key aspects of class certification procedure" and mandated that all requirements of Rule 23 be met before a class can be certified. In sum, the court opined that: more than a "threshold showing" is required to meet the requirements of Rule 23; the district court must resolve all factual and legal issues pertinent to the question of certification to a preponderance; and the district court's consideration of all relevant evidence and arguments must include consideration of expert opinions offered by the parties.

Referring to the “little guidance ... available on the subject of the proper standard of ‘proof’ for class certification,” the court added flesh to the bones of Rule 23 to assist the district courts to bring the appropriate level of rigor to class certification analysis. In this regard, the 3rd Circuit confirmed that Rule 23 requirements are more than “mere pleading rules,” meaning that courts must look behind the pleadings to determine whether the facts undergirding the complaint’s allegations are sufficient to warrant certification, even if the certification inquiry intersects with the merits of a claim that will later be decided by the trier of fact. Accordingly, before certifying a class, the district court must find, based on facts, that each of Rule 23’s requirements has been satisfied, rather than assume that facts exist in favor of certification, or that some (if not all) of the requirements are met sufficient to warrant certification.

Therefore, “the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23,” and must find “that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties.” Conversely, if the district court certifies a class based on a proposed class plaintiff’s satisfying a “threshold showing” by demonstrating “an intention to try the case in a manner that satisfies the predominance requirement,” the district court has abused its discretion.

As the 3rd Circuit further articulated, in establishing whether certification is appropriate, the district court is also obligated to evaluate expert opinion relevant to the requirements of Rule 23. While the “district court may be persuaded by the testimony of either (or neither) party’s expert with respect to whether a certification requirement is met,” its “[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.” Moreover, although the district court has the discretion to decide that expert opinion is unnecessary to establish

particular certification requirements, it “may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits.” As the 3rd Circuit explained, the district court’s evidentiary findings and considerations concerning witness credibility that are made during the certification phase will not bind the finder of fact on the merits later on.

In vacating the district court’s order certifying a class and remanding for proceedings in accordance with the 3rd Circuit’s opinion and the standards set forth therein, the court reiterated that

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“[a]ctual, not presumed, conformance’ with the Rule 23 requirements is essential” when the district court decides whether to certify a class.

Like the decisions in the 2nd and 5th Circuits that preceded it, the *Hydrogen Peroxide* decision ushers in a new era of class action practice in the 3rd Circuit that likely will not be limited to antitrust matters of the type that was before the court, requiring a more rigorous standard for all class plaintiffs to meet to obtain the “extraordinary leverage” that a class

certification order offers. The decision is likely to have a number of practical effects on federal class action practice, including more extensive discovery on class issues, delayed rulings on class certification to allow for a more fully developed record, and an increased likelihood of an evidentiary hearing highlighted by competing experts and *Daubert* challenges.

Perhaps more significantly, *Hydrogen Peroxide* is likely to bring greater significance to questions of federal jurisdiction and removal law under CAFA — questions that remain the subject of ambiguity and vigorous debate some four years after CAFA’s effective date — as plaintiffs and defendants battle over the forum in which to litigate class claims, the result of which can have a profound impact on the outcome of a putative class action. In Pennsylvania, the standard for class certification has been, and continues to be, relatively lenient: a plaintiff who can successfully avoid removal to federal court under CAFA need only present evidence sufficient to make out a prima facie case from which the state court can conclude that the class certification requirements are met, and the trial court is prohibited from considering the merits of the action, the plaintiff’s ultimate right to recover, the credibility of witnesses, or the substantive merits of defenses raised. (See, e.g., *Debbs v. Chrysler Corp.* and *Janicik v. Prudential Ins. Co.*) Given the marked difference in this state court standard and the higher standard that now applies in federal class action proceedings in the 3rd Circuit, it is expected that plaintiffs and defendants alike will be focusing an even greater amount of attention on removal and remand strategies under CAFA than they did pre-*Hydrogen Peroxide*. •