The Increasing Relevance of Expert Testimony in the Wake of *Hydrogen Peroxide*

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The Third Circuit's order in December of 2008 remanding the class certification decision in *In Re Hydrogen Peroxide Antitrust Litigation*[2] is the latest in a string of similar rulings mandating that courts undertake a rigorous examination when certifying a class.[3] Specifically, the Third Circuit held that Rule 23 of the Federal Rules of Civil Procedure called for the lower court to consider all relevant evidence and arguments, including the testimony of both defendants' and plaintiffs' experts.[4] It further held that it was appropriate for the fact finder to weigh competing expert testimony,[5] and clarified that the standards set forth by Rule 23 must be met by a "preponderance" of evidence, rather than a mere "threshold showing."[6] Finally, the court ruled that all findings required under Rule 23 had to be made, even if such findings overlapped with the merits of the underlying action.[7]

As a direct result of the Third Circuit's ruling in *Hydrogen Peroxide*, federal, as well as state courts, are applying increasingly-strict standards in the certification of class actions. This increasing stringency extends not only to antitrust matters, but also to class actions involving labor and employment, product liability, securities, and other litigation areas. In this article, we discuss several recent class actions in a variety of fields that have directly applied the *Hydrogen Peroxide* standard to Rule 23. Throughout, we explain how the application of *Hydrogen Peroxide* has led to a greater emphasis on expert testimony, especially the weighing of competing expert testimony.

Hydrogen Peroxide

In *Hydrogen Peroxide*, several chemical manufacturers were accused of conspiring to fix the prices of hydrogen peroxide and associated substances from 1994 through early 2005.[8] Plaintiffs moved to certify a class of direct purchasers in part on the basis of plaintiffs' expert report, citing an increase in producers' list prices as evidence of a price-fixing conspiracy. Plaintiffs' expert did not, however, consider how the price increase may have varied across grades of the chemical, presuming that the grades were substitutes. As a result, plaintiffs' expert assumed that each purchaser of hydrogen peroxide experienced a similar impact from the alleged conspiracy, irrespective of the grade of hydrogen peroxide that they purchased or the degree to which their purchase price may have differed from the list price.[9]

While the District Court certified the proposed class of direct purchasers, finding that the evidence presented by plaintiffs had met a 'threshold,' certification was ultimately overturned by the Third Circuit Court of Appeals.[10] The Appeals Court found that Rule 23 requires courts to consider all relevant evidence presented, necessitating that courts consider the expert economic testimony on the defendant's as well as plaintiffs' side. In considering plaintiffs' expert testimony in isolation, and not in tandem with the defense's response, the District Court was deemed to have erred.[11] The Court of Appeals found that by giving incomplete consideration to the defense expert's testimony, the District Court missed a major flaw in the plaintiffs' expert's impact theory – the exclusion of a major market participant.[12]

The Appeals Court also ruled that in certifying a class, a court must engage in 'rigorous analysis,' rather than in a cursory overview to ensure that each tenet of Rule 23 is met.[13] The court generally found that "a party's assurance to the court that it intends or plans to meet the [Rule 23] requirements is insufficient."[14] Rather, the plaintiff must show that these requirements will be met at the class certification stage itself.[15] The court devoted particular focus to the fulfillment of part (b)(3) of Rule 23, in emphasizing that for a class to be certified, common issues must predominate over individual ones,[16] and concluded that the District Court had not performed the 'rigorous analysis'[17] required under Rule 23.[18]

1 Dr. Johnson served as a consultant to Arkema Inc. on the 3rd Circuit Appeal in *Hydrogen Peroxide*.

2 552 F.3d 305 (3rd Cir. 2008).

3 *See In Re IPO Sec. Litig.*, 471 F.3d 24 (2nd Cir. 2006); *Blades v. Monsanto,. Co.*, 400 F.3d 562 (8th Cir. 2005), among others

4 552 F.3d at 307.

5 *Id.* at 323.

6 *Id.* at 307.

7 *Id.*

8 *Id.* at 307-09.

9 *Id.* at 313-15.

10 *Id.* at 307.

11 *Id.* at 322-23.

12 *Id.* at 313.

13 *Id.* at 323.

14 *Id.* at 318.

15 *Id.*

16 *Id.* at 310-311.

17 *Id.* at 321.

18 In July 2009, the Third Circuit Court of Appeals also decertified a class in *Hohider v. United Parcel Service*, a labor case involving the largest American With Disabilities Act ("ADA") class that has ever been certified. The *Hohider* decision focused extensively on Rule 23 (b)(2) and damages considerations. Yet, as part of its ruling, the Appeals Court cited the *Hydrogen Peroxide* decision numerous times, even though Hydrogen Peroxide was an antitrust ruling that focused on issues of preponderance under Rule 23 (b)(3). *Hydrogen Peroxide*'s effect on class certification is thereby not restricted solely to antitrust matters and class actions brought under Rule 23 (b)(3).

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Gates v. Rohm and Haas

In *Gates v. Rohm and Haas*,[19] plaintiffs alleged that vinyl chloride leaks from Rohm and Haas's facility in Ringwood, Illinois contaminated the groundwater and air in and around McCullom Lake Village over a period of decades. Plaintiffs moved for a 'medical monitoring' class to be certified under Rule 23 (b)(2) and 23 (b)(3), which would provide village residents with periodic medical monitoring, given plaintiffs' allegation that vinyl chloride exposure can lead to higher incidence of brain cancer. Plaintiffs also moved for a 'property damages' class to be certified under Rule 23 (b)(3), as compensation to villagers for declines in the values of their property.[20]

In its ruling, the Eastern District of Pennsylvania looked to the standards laid out in *Hydrogen Peroxide* in deciding whether to certify the classes. In subjecting each of the classes to 'rigorous analysis' under Rule 23, including over three days of hearings and examination of extensive expert testimony, the District Court found that the medical monitoring class could not be certified under 23 (b)(3) due to a lack of commonality. The District Court ruled that individual members of the proposed class could merit different degrees of monitoring, based on their risk profile and their exposure.[21] In addition, the District Court found that the same lack of commonality precluding certification under 23 (b)(3) translates into a lack of cohesion precluding certification under 23 (b)(2).[22] Class certification for the proposed property damages class was also rejected by the District Court. There, the court ruled that individual issues would predominate over common ones, given that different properties could have different vinyl chloride exposure levels, with correspondingly different effects on property value. This variation runs counter to the predominance requirements set forth in Rule 23 (b)(3),[23] and thus the class was not certified.

Reed v. Advocate Health Care

In *Reed v. Advocate Health Care*,[24] a group of nurses alleged that several Chicago area hospitals and medical providers conspired to depress salaries below the prevailing market wage. The plaintiffs moved for class certification,[25] with the plaintiffs' expert offering an analysis on the supposed common impact experienced by the nurses. Citing the standard laid out in *Hydrogen Peroxide*, the District Court for the Northern District of Illinois closely examined the testimony of both the plaintiffs and the defendants, weighing one expert's claims against the other's. The court found there to be a critical mistake in the plaintiffs' expert's methodology, deeming the expert's model of nurse wages to be "too imprecise," given that it left over half of wage variation unexplained. The court also took issue with the plaintiffs' expert's use of averages for all nurse salaries, as this approach did not account for differences in nurse salaries across positions. Meanwhile, for over 20% of nurses in the subclass, the plaintiffs' expert did not even attempt to demonstrate common impact.[26] Further, the court found that plaintiffs invalidly assumed that any possible damages model would suffice, per the ruling in the *EPDM Antitrust* Litigation, rather than a model that was actually suitable. The court ruled that subjecting an expert's model to 'rigorous analysis,' as called for in *Hydrogen Peroxide*, required full validation of the expert's model.[27]

In short, the District Court found that any kind of damages determination in this case would require individualized inquiry, especially given that the salaries of certain categories of nurses, such as those who were experienced, deviated from the benchmarks upon which the plaintiffs were relying. As such, common impact was not demonstrated within the proposed class, precluding certification.[28]

Whitaker v. 3M

In *Whitaker v. 3M*[29], a case in Minnesota state court, 3M was accused of age discrimination in its compensation, promotion, and other employment practices.[30] At the class certification stage, plaintiffs' expert cited a correlation between promotion/compensation measures and age as evidence of discrimination. Defendant's expert argued that correlation did not necessarily equate to causation. To this end, defendant's expert argued that a relationship between age and promotion/compensation measures

19 265 F.R.D. 208, (E.D. Pa. 2010).
20 *Id.* at 210-13.
21 *Id.* at 220-29.
22 *Id.* at 230-32.
23 *Id.* at 232-34.
24 No. 06 C 3337, 2009 WL 3146999 (N.D. Ill Sept. 28, 2009).
25 *Id.* at 1.
26 *Id.* at 19.
27 *Id.* at 20. The court also found that a Daubert motion can be considered at the class certification stage, even though this motion was not ultimately granted. *Id.* at 21.
28 *Id.* at 13, 21-22.
29 764 N.W.2d 631 (Minn. Ct. App. 2009).
30 *Id.* at 633.

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could be an artifact of different rates of progression at different stages of a career, or other such factors, and not a product of discrimination.[31] The state court granted class certification. The Minnesota State Court of Appeals, however, overturned the state court's certification of class. In deciding on class certification, the State Court of Appeals looked to the *Hydrogen Peroxide* decision, using the federal case as a guide to how Minnesota should apply its own version of Rule 23.[32]

The Minnesota Court of Appeals found that Rule 23 required the court to reconcile the differing testimony offered by plaintiffs' and defendant's expert. The Court of Appeals found that the state court erred in certifying a class prior to having resolved such differences. The Court also found that the District Court focused insufficiently on statistics, which the Appeals Court deemed as the necessary bridge for combining individual claims into a common claim.[33]

Conclusion

The Third Circuit's ruling in *Hydrogen Peroxide* has led federal as well as state courts to review more rigorously whether to certify a class action in any area of law. In the wake of the Third Circuit's ruling, class certification is being transformed from a foregone victory for plaintiffs into a potential opportunity for the defense to preempt damaging litigation. Class certification thereby merits increased attention from counsel, especially in the realm of expert testimony. Accordingly, plaintiffs will be required to offer increasingly robust expert testimony that is sufficient to rebut the testimony of defendants' experts rather than merely being competent in its own right. Defense experts, meanwhile, are coming to assume increasingly prominent and influential roles at the class certification stage.

In addition, trends in the wake of *Hydrogen Peroxide* could result in greater discovery costs and in more thorough presentation of evidence prior to class certification. These trends could also lead to more tailored and exacting class proposals from plaintiffs, with more subclasses potentially materializing. Finally, these developments could result in a greater number of settlements, given the high cost of litigating individual cases.■

31 *Id.* at 633-34.

32 *Id.* at 637-40.

33 *Id.* at 637-40.