

## NEW DECISION SUPPORTS TOUGHER STANDARD FOR CLASS CERTIFICATION IN ANTITRUST ACTIONS

January 6, 2009

To Our Clients and Friends:

The Third Circuit Court of Appeals vacated and remanded an order certifying a nationwide antitrust class after finding that the district judge had not given sufficiently rigorous scrutiny to the plaintiffs' certification motion. With its decision, *In re Hydrogen Peroxide Antitrust Litigation*, \_\_\_ F.3d \_\_\_, 2008 WL 5411562 (3d Cir. Dec. 30, 2008), the Third Circuit joins several other courts of appeals in requiring antitrust plaintiffs to demonstrate at the class certification stage, by a preponderance of the evidence, that they manageably can prove at trial the impact of an alleged antitrust conspiracy on all putative class members through evidence common to the class.

The case involves an alleged conspiracy among manufacturers of a chemical used primarily in the pulp and paper industry. In January 2007, the district court certified a class consisting of direct purchasers of the affected products over an 11-year period. The Third Circuit accepted the defendants' petition for interlocutory appeal pursuant to Fed. R. Civ. P. 23(f). Only the "predominance" requirement of Rule 23(b)(3) (that issues common to the class predominate over issues affecting individual class members) was disputed.

The Third Circuit found that the district court committed three errors. First, the court required the plaintiffs to make only a "threshold showing" that the Rule 23 factors were satisfied, instead of requiring them to demonstrate by a preponderance of the evidence their ability to show how and why "the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." 2008 WL 5411562, at \*5, \*10. Second, the district court "fail[ed] meaningfully to consider the views of defendants' expert while crediting plaintiffs' expert." *Id.* at \*5, \*14. Third, the court incorrectly applied the presumption of class-wide antitrust impact articulated in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977) without considering whether the evidence in the record supported application of that presumption. *Id.* at \*15-\*16.

The Third Circuit discussed the consensus that has formed among the courts of appeals that courts must "delve beyond the pleadings to determine whether the requirements for class certification are satisfied," and that "an overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met." 2008 WL 5411562, at \*8; *see also id.* at \*9-\*10 (citing numerous cases). The district court here required only a "threshold

showing that the element of impact will predominantly involve generalized issues of proof.” *Id.* at \*11 (citing district court opinion). The Third Circuit rejected that standard, holding that “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.” *Id.* The appellate court similarly rejected the notion that a “court should err in favor of allowing the class” in horizontal price fixing cases, holding that “the court should not suppress ‘doubt’ as to whether a Rule 23 requirement is met — no matter the area of substantive law.” *Id.* Instead, a court must resolve all genuine legal and factual disputes relevant to assessing a plaintiff’s ability to satisfy Rule 23 and make corresponding findings. *Id.* at \*10.

Expert opinions are not insulated from this scrutiny. The defendants had submitted a detailed expert report attacking the analysis of plaintiffs’ expert, but the district court “apparently believed it was barred from resolving disputes between the plaintiffs’ and defendants’ experts.” *Id.* at \*13. The Third Circuit held that this was error.

The Third Circuit joins a growing roster of appellate courts that have issued strong and clear statements demanding greater scrutiny by district judges of evidence offered on class certification motions. See, e.g., *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6 (1<sup>st</sup> Cir. 2008); *In re IPO Securities Litigation*, 471 F.3d 24 (2d Cir. 2006); *Blades v. Monsanto Co.*, 400 F.3d 562 (8<sup>th</sup> Cir. 2005); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5<sup>th</sup> Cir. 2003). This represents a dramatic change from older decisions like *Blackie v. Barrack*, 524 F.2d 891 (9<sup>th</sup> Cir. 1975), in which the court held that lower courts considering class certification motions are “bound to take the substantive allegations of the complaint as true.” *Id.* at 901 n.17.

Notwithstanding this enhanced analysis, the *Hydrogen Peroxide* court left open the possibility that in some cases lower courts could presume class-wide antitrust impact. Specifically, a presumption of class-wide impact may be appropriate “[i]f the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions....” *Bogosian v. Gulf Oil Corp.*, 561 F.2d at 455. Lower courts cannot apply this presumption, however, without considering all of the available evidence, including expert evidence. *In re Hydrogen Peroxide*, 2008 WL 5411562, at \*15-\*16.

The decision in *Hydrogen Peroxide* and similar decisions in other circuits demonstrate the importance of engaging an expert to analyze the market and price structure of the relevant industry early enough to ensure that the expert’s analysis is fully developed by the class certification stage. Although such analyses vary by industry, in price-fixing cases they

typically consider changes in price and output over the alleged class period; differences between actual and list prices; and variations in prices across products, customers and regions. Developing such evidence at the class certification stage can be crucial since, as the *Hydrogen Peroxide* court noted, a denial of class certification “may sound the ‘death knell’ of the litigation on the part of the plaintiffs.” *Id.* at 3.

\*\*\*\*\*

Please do not hesitate to contact us with any questions.

Daniel M. Abuhoff  
+1 212 909 6381  
dmabuhoff@debevoise.com

Molly S. Boast  
+1 212 909 1069  
msboast@debevoise.com

Jeffrey S. Jacobson  
+1 212 909 6479  
jsjacobson@debevoise.com

Gary W. Kubek  
+1 212 909 6267  
gwkubek@debevoise.com

Michael Schaper  
+1 212 909 6737  
mschaper@debevoise.com