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Hydrogen Peroxide Turns One

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At the close of 2008, the U.S. Court of Appeals for the Third Circuit decided *In re Hydrogen Peroxide Antitrust Litigation*,¹ a landmark decision that raised the bar for plaintiffs to obtain certification of antitrust class actions.

This article analyzes *Hydrogen Peroxide's* impact on class action law and procedure in the year since it was decided, with an emphasis on how different courts have interpreted *Hydrogen Peroxide's* holding that district courts must resolve conflicting expert testimony at the class certification stage.

Although *Hydrogen Peroxide* set forth a heightened standard for plaintiffs seeking class certification, a review of cases citing *Hydrogen Peroxide* in the first year following the decision shows that class certification is

not impossible after *Hydrogen Peroxide* and that the rigor with which a court analyzes the opinions of the plaintiffs' expert often has an important, if not dispositive, influence on the class certification outcome.

I. Overview of *Hydrogen Peroxide*

On January 19, 2007, Judge Stewart R. Dalzell of the U.S. District Court for the Eastern District of Pennsylvania certified a class of direct purchasers of hydrogen peroxide, an inorganic liquid used primarily as a bleach in the pulp and paper industry.² On December 30, 2008, the Third Circuit vacated the district court's order because it applied too lenient a standard in certifying the class. In so doing, the Third Circuit clarified the standards that plaintiffs must meet to obtain class certification.

First, plaintiffs must make more than a "threshold showing" to obtain class certification, and a decision to certify a class requires "findings" by the district court. District courts must make factual determinations supporting these findings by a preponderance of the evidence and must make such findings even if they overlap with the merits of the case. District courts must conduct a "rigorous analysis" of all relevant evidence, and they err as a matter of law if they fail to resolve a legal or factual dispute relevant to a Federal Rule 23 requirement.

Second, district courts must weigh and resolve conflicting expert opinion at the class certification stage. Like any matter relevant to a Rule 23 requirement, district courts must rigorously analyze expert opinion. District courts may not decline to resolve a genuine legal

¹ 552 F.3d 305 (3d Cir. 2008).

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² *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163 (E.D. Pa. 2007).

or factual dispute, including disputes between experts, out of “concern for avoiding credibility issues” or “concern for an overlap with the merits.”³

Third, in antitrust class actions, district courts should not resolve doubts about certifying a class in favor of certification and should not presume antitrust impact under *Bogosian v. Gulf Oil Co.*⁴ in every horizontal price-fixing case.

II. Split in Authority Outside the Third Circuit

One of *Hydrogen Peroxide*'s most important holdings concerned how district courts should treat conflicting expert testimony at the class certification stage. Under *Hydrogen Peroxide*, weighing conflicting expert testimony at the class certification stage is “integral to the rigorous analysis Rule 23 demands”⁵ and “is always a task for the court,” even if the dispute “might appear to implicate the ‘credibility’ of one or more experts” or “overlap with the merits.”⁶ Outside the Third Circuit, two lines of authority have emerged interpreting this holding. First, two district courts in the Second Circuit and one in the Seventh Circuit have taken a less rigorous approach to conflicting expert testimony, holding that plaintiffs’ experts only need to show that their models are “workable,” not that they actually “work.” On the other hand, one district court in the Seventh Circuit recently applied a more rigorous approach to conflicting expert opinion and rejected the “works versus workable” distinction.

A. “Works” vs. “Workable” Distinction

On February 13, 2009, less than two months after the Third Circuit decided *Hydrogen Peroxide*, Judge Stefan R. Underhill of the U.S. District Court for the District of Connecticut distinguished *Hydrogen Peroxide* in a decision certifying a class of purchasers of a popular type of synthetic rubber, *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*.⁷ As in many antitrust class actions, one of the main issues in *EPDM* was whether the plaintiffs could prove damages with common proof. The plaintiffs’ expert — who was the same expert the *Hydrogen Peroxide* plaintiffs used — opined that he could prove damages on a classwide basis using a “before-and-after” regression because the defendants engaged in a price war after the proposed class period, thereby allowing him to identify a benchmark period untainted by the alleged conspiracy. The defendants argued that the expert’s regression omitted key variables. In a footnote, Judge Underhill distinguished *Hydrogen Peroxide* on the ground that the expert in *Hydrogen Peroxide* merely asserted that he could create an economic model using proof common to the class but never actually completed one, whereas the expert in *EPDM* actually presented such a model.⁸

Judge Underhill held that the issue before a court at the class certification stage “is whether the plaintiffs have established a *workable* multiple regression equation, not whether plaintiffs’ model actually *works*.”⁹ He declined to follow *Hydrogen Peroxide*'s holding that

district courts should resolve expert disputes even if the dispute “might appear to implicate the ‘credibility’ of one or more expert,”¹⁰ holding instead that “the issue at class certification is not which expert is the most credible.”¹¹ He also declined to follow *Hydrogen Peroxide*'s dictate that courts should not decline to resolve a dispute between experts “because of concern for an overlap with the merits,”¹² holding instead that whether the plaintiffs’ expert’s regression incorporated the right variables was “an issue to be reserved for the merits.”¹³

On August 4, 2009, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York applied similar reasoning in certifying a securities fraud class action in *Fogarazzo v. Lehman Brothers, Inc.*¹⁴ One of the issues in *Fogarazzo* was whether the plaintiffs could prove loss causation on a classwide basis. The defendants argued that the plaintiffs’ expert proposed an event study that *could* be used to prove loss causation by classwide proof but that the expert did not actually perform such a study. Judge Scheindlin disagreed with the defendants and ruled that the plaintiffs could satisfy their burden under Rule 23 simply “by proposing a suitable methodology.”¹⁵ This would appear to conflict with *Hydrogen Peroxide*'s holding that “[a] party’s assurance to the court that it intends or plans to meet the requirements [of Rule 23] is insufficient.”¹⁶ In a footnote, Judge Scheindlin interpreted this language from *Hydrogen Peroxide* to mean that plaintiffs must show that their expert’s methods “actually work.”¹⁷ Judge Scheindlin held, however, that “the Second Circuit has — to date — not adopted such a requirement” and that “[c]ourts in this district have similarly not required actual employment of a methodology.”¹⁸ It bears noting that while *Hydrogen Peroxide* is a Third Circuit decision, the court in *Hydrogen Peroxide* noted that the Second Circuit’s decision in *In re Initial Public Offerings Securities Litigation*¹⁹ is “consistent with a proper application of [Third Circuit] standards”²⁰ and cited *IPO* repeatedly throughout the opinion.²¹

On September 9, 2009, Judge Sarah Evans Barker of the U.S. District Court for the Southern District of Indiana followed *EPDM* in a decision certifying a class of ready-mixed concrete purchasers.²² *Ready-Mixed Concrete* involved the same expert as *Hydrogen Peroxide* and *EPDM*. Interestingly, Judge Barker did not cite *Hy-*

¹⁰ *Hydrogen Peroxide*, 552 F.3d at 324.

¹¹ *EPDM*, 256 F.R.D. at 100.

¹² *Hydrogen Peroxide*, 552 F.3d at 324.

¹³ *EPDM*, 256 F.R.D. at 102. In this regard, Judge Underhill relied on a pre-*Hydrogen Peroxide* case from the Southern District of New York, *Hnot v. Willis Group Holdings, Ltd.*, which held that courts should not “decide which expert report is more credible” because disagreements between experts is relevant only to the merits of the plaintiffs’ claims. 241 F.R.D. 204, 210 (S.D.N.Y. 2007).

¹⁴ 2009 U.S. Dist. LEXIS 67555 (S.D.N.Y. Aug. 4, 2009).

¹⁵ *Id.* at *39.

¹⁶ *Hydrogen Peroxide*, 552 F.3d at 318.

¹⁷ *Fogarazzo*, 2009 U.S. Dist. LEXIS 67555, at *45 n.158.

¹⁸ *Id.* at *46 n. 158.

¹⁹ 471 F.3d 24 (2d Cir. 2006).

²⁰ *Hydrogen Peroxide*, 552 F.3d at 323 n. 24.

²¹ *See id.* at 312, 317 n. 17, 318 n. 19, 320, 321, 323, 324.

²² *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154 (S.D. Ind. 2009).

³ *Hydrogen Peroxide*, 552 F.3d at 324.

⁴ 561 F.2d 434 (3d Cir. 1977).

⁵ *Hydrogen Peroxide*, 552 F.3d at 323 (emphasis added).

⁶ *Id.* at 324 (emphasis added).

⁷ 256 F.R.D. 82 (D. Conn. 2009).

⁸ *Id.* at 102 n. 11.

⁹ *Id.* at 100.

drogen Peroxide in her opinion. She did, however, rely on *EPDM*'s holding that plaintiffs only have to establish "a workable multiple regression equation," not one that "actually works."²³ She therefore declined to "resolve a 'battle of experts' at the class certification stage in determining if common proof has been established."²⁴

B. *Reed v. Advocate Health Care*

On September 28, 2009, Judge John F. Grady of the U.S. District Court for the Northern District of Illinois denied certification of a putative class of registered nurses in a lawsuit alleging that several Chicago area hospitals conspired to depress their pay in violation of federal antitrust law in *Reed v. Advocate Health Care*.²⁵ *Reed* was the first reported district court opinion in the Seventh Circuit to deny class certification following the principles articulated in *Hydrogen Peroxide*.

In *Reed*, the plaintiffs alleged that hospitals in the Chicago metropolitan area conspired to depress registered nurse pay through their joint participation in wage and salary surveys and through informal, direct communications between hospital human resources employees. Judge Grady held four days of hearings on class certification in June and July of 2009. Judge Grady's opinion cited *Hydrogen Peroxide* for the propositions (i) that courts must resolve factual and legal disputes relevant to class certification, even if they overlap with the merits; (ii) that factual findings must be made by a preponderance of the evidence; (iii) that antitrust impact is critically important in evaluating predominance under Rule 23(b)(3), and plaintiffs have the burden of demonstrating that impact is capable of proof at trial that is common to the class; and (iv) that weighing expert opinion at the class certification stage is not only permissible, it is integral to a rigorous analysis of Rule 23.

Hydrogen Peroxide's holding that district court should weigh and resolve conflicting expert opinion at the class certification stage proved crucial to Judge Grady's ruling in *Reed*. During four days of hearings, Judge Grady heard extensive argument from both sides relating to the econometric model the plaintiffs' expert used to prove antitrust impact and damages on a classwide basis. The plaintiffs' expert proffered an econometric model that purported to measure the hypothetical "competitive" wage for nurses in Chicago during the proposed class period and compare that "but-for" wage to the actual wages the defendants paid their nurses. The defendants offered their own expert, who opined that the plaintiffs' expert's analysis was conceptually flawed, lacked a basis in the economics literature, and was poorly executed. Judge Grady dove deeply into the competing opinions of the parties' experts and found that the methodologies of the plaintiffs' expert were so unreliable that they were "essentially inadmissible."²⁶

In delving into the parties' competing expert opinions, Judge Grady rejected two arguments that had started to gain some currency among plaintiffs seeking certification of antitrust class actions. First, the plaintiffs in *Reed* relied heavily at the class certification hearing and in their briefs on *EPDM* for the notion that at

the class certification stage, they only needed to offer a model that was workable, not one that actually works. While Judge Grady did not cite *EPDM* in his decision, he found that the "works versus workable" distinction was unhelpful and rejected the plaintiffs' argument because it seemed to suggest that the court should not subject their expert's models to rigorous analysis. According to Judge Grady's opinion, a rigorous analysis of expert opinion is not only appropriate, it is "necessary."²⁷

The second argument Judge Grady rejected was plaintiffs' contention that the conflict in the experts' opinions amounted to a "battle of the experts" that was better resolved by a jury. Judge Grady rejected that argument, holding that the reliability of an expert's methods is "integral" to a proper analysis of Rule 23.²⁸

III. *Hydrogen Peroxide* Takes Hold in the Third Circuit

A. Third Circuit Decisions

On the basis of numbers alone, the Third Circuit has not been friendly to plaintiffs in the year since it decided *Hydrogen Peroxide*. The Third Circuit cited *Hydrogen Peroxide* in seven cases in 2009. Five of those seven cases vacated district court orders granting class certification, including cases involving allegations of unjust enrichment and breach of warranty,²⁹ consumer fraud,³⁰ age discrimination,³¹ and violations of ERISA³² and federal antitrust law.³³ Only one of these five decisions was an antitrust case, and only one contained any detailed discussion of *Hydrogen Peroxide*.

The only antitrust case decided by the Third Circuit in 2009 that involved a contested class certification motion and cited *Hydrogen Peroxide* was *In re Plastic Additives Antitrust Litigation*.³⁴ In 2006, Judge Legrome D. Davis of the U.S. District Court for the Eastern District of Pennsylvania certified six subclasses of plastics additives purchasers, with each subclass corresponding to a different product segment.³⁵ Judge Davis rejected the defendants' arguments that the diversity and non-substitutability of products within the plastics additives industry, the fragmentation of supply and demand structures, and putative class members' individualized purchasing practices precluded proof of impact using common evidence. Judge Davis also ruled that the defendants' expert testimony failed to defeat class certification because "it is not appropriate at this stage to bal-

²⁷ *Id.* at *62.

²⁸ *Id.* at *63 (quoting *Hydrogen Peroxide*, 552 F.3d at 323).

²⁹ *Powers v. Lycoming Engines*, 2009 U.S. App. LEXIS 6785 (3d Cir. Mar. 31, 2009).

³⁰ *Nafar v. Hollywood Tanning Sys., Inc.*, 2009 U.S. App. LEXIS 17561 (3d Cir. Aug. 5, 2009).

³¹ *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009).

³² *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585 (3d Cir. 2009).

³³ *In re Plastic Additives Antitrust Litig.*, 2009 U.S. App. LEXIS 2177 (3d Cir. Jan. 27, 2009).

³⁴ 2009 U.S. App. LEXIS 2177 (3d Cir. Jan. 27, 2009). As discussed below, another antitrust case, *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241 (3d Cir. 2009), involved a settlement class.

³⁵ 2006 U.S. Dist. LEXIS 69105 (E.D. Pa. Aug. 31, 2006); 2006 U.S. Dist. LEXIS 98278 (E.D. Pa. Dec. 20, 2006).

²³ *Id.* at 171 (citing *EPDM*, 256 F.R.D. at 101).

²⁴ *Id.* at 170-71.

²⁵ 2009 U.S. Dist. LEXIS 89576 (N.D. Ill. Sept. 28, 2009).

²⁶ *Id.* at *65.

ance the credibility of the parties' experts."³⁶ In a once sentence order issued the month after it decided *Hydrogen Peroxide*, the Third Circuit vacated the lower court's order and remanded the case for further proceedings consistent with *Hydrogen Peroxide*.³⁷

In *In re Schering Plough Corporation ERISA Litigation*, the district court certified a class under Rule 23(b)(1)(B) of all participants in the defendants' employee savings plan since 1998. The Third Circuit cited *Hydrogen Peroxide*'s holdings on the standard of review applicable to a class certification motion, but it also addressed another issue not explicitly addressed in *Hydrogen Peroxide* — whether a district court should take the substantive allegations of the complaint as true when considering a motion for class certification. Citing *Hydrogen Peroxide*, the Third Circuit held that it was an abuse of discretion for the district court to do so and remanded the case back to the district court.³⁸

Of the two Third Circuit opinions that cited *Hydrogen Peroxide* and affirmed district court decisions granting class certification, one involved a settlement class.³⁹ In the other, a securities fraud case, the defendant objected to the district court's ruling, which was issued before *Hydrogen Peroxide*, that courts should apply a "liberal construction" of Rule 23 in shareholder suits and that doubts about certification in such suits should be resolved in favor of certification.⁴⁰ This would appear to violate the principles articulated in *Hydrogen Peroxide* that a court should not suppress "doubt" as to whether a Rule 23 requirement is met or relax its certification analysis or presume that a requirement for certification is met merely because the plaintiff's claims fall within a certain substantive category.⁴¹ Nevertheless, the *Constar* court affirmed certification because the district court cited the need for a rigorous analysis of Rule 23, spent 25 pages undertaking such an analysis, and went through each of the elements of Rule 23, addressing the defendants' arguments as to each element.⁴²

B. Third Circuit District Court Opinions

While *Hydrogen Peroxide* made it harder for plaintiffs to obtain class certification, district courts in the Third Circuit have continued to certify classes after *Hydrogen Peroxide*. District courts in the Third Circuit cited *Hydrogen Peroxide* in 43 decisions in 2009. Eight of those decisions were not class certification decisions. Of the 35 cases where the district court decided a motion for class certification, 18 decisions granted certification, 14 denied certification, and three granted certification in part and denied certification in part.

Only one of these cases, *McDonough v. Toys "R" Us, Inc.*⁴³, was an antitrust case. The plaintiffs in *McDonough* alleged that Babies "R" Us, which faced stiff competition from internet retailers, threatened not to carry

manufacturers' products unless the manufacturers agreed to prevent internet retailers from offering discounts. In her decision granting class certification, Judge Anita B. Brody of the U.S. District Court for the Eastern District of Pennsylvania recognized *Hydrogen Peroxide* as a "watershed" decision that "clarified the legal standard for class certification."⁴⁴ According to Judge Brody, *Hydrogen Peroxide* teaches that plaintiffs "must explain how the case will be tried and demonstrate that proof can be made using common evidence," and defendants "may then poke holes in the plaintiffs' case under Rule 23 using expert testimony, empirical evidence, or other methods."⁴⁵ Recognizing that district courts must "resolve significant disputes between expert witnesses,"⁴⁶ Judge Brody analyzed each expert's arguments on the issues of antitrust impact and damages. The plaintiffs' expert opined that the vertical price restraints in question caused classwide impact because they allowed Babies "R" Us to charge supra-competitive prices for its products and because every class member made a purchase at a supra-competitive price. In response, the defendants' expert argued that Babies "R" Us would not have lowered prices on some products even with unrestrained internet discounting, that some class members did not pay supra-competitive prices because they made their purchases during sales, using coupons, or under price-matching guarantees, and that Babies "R" Us offered non-price services that subclass members value differently.⁴⁷ Judge Brody found the plaintiffs' expert's position "most persuasive" and certified the class.⁴⁸

IV. "May the Best Expert Win"

In the year since the Third Circuit decided *Hydrogen Peroxide*, there have been several important jurisprudential and practical implications of the decision.

First and foremost, there are the holdings of *Hydrogen Peroxide* itself, which unquestionably heightened the burden for plaintiffs to obtain class certification. Even plaintiff-friendly decisions like *EPDM* and *McDonough* acknowledge that plaintiffs may no longer "slide by the class certification stage on unsupported legal conclusions or merely plausible expert methodologies,"⁴⁹ which was "common practice" before *Hydrogen Peroxide*.⁵⁰ Second, the Third Circuit has cited *Hydrogen Peroxide* for the proposition that district courts should not accept the allegations of the plaintiff's complaint as true for purposes of a motion for class certification. This holding may cause other courts to rethink this proposition.⁵¹ Third, at the district court level, a split of authority has emerged between cases such as *EPDM* that hold that it is not necessary for a plaintiff to prove that an expert's methodology "works," only that it is "workable," and those such as *Reed* that reject that

³⁶ 2006 U.S. Dist. LEXIS 69105, at *39.

³⁷ *In re Plastics Additives Antitrust Litig.*, 2009 U.S. App. LEXIS 2177, at *1.

³⁸ *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 600 n.14, 603.

³⁹ *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009).

⁴⁰ *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 781 (3d Cir. 2009).

⁴¹ *Hydrogen Peroxide*, 552 F.3d at 321-22.

⁴² 585 F.3d at 781.

⁴³ 638 F.Supp.2d 461 (E.D. Pa. 2009).

⁴⁴ *Id.* at 467.

⁴⁵ *Id.* at 491.

⁴⁶ *Id.* at 467.

⁴⁷ In her discussion of these arguments, Judge Brody distinguished *Hydrogen Peroxide* on the ground that some contracts for the sale of hydrogen peroxide were individually negotiated, whereas Babies "R" Us prices were uniform across customers within each store. *Id.* at 485-86.

⁴⁸ *Id.* at 491.

⁴⁹ *EPDM*, 256 F.R.D. at 101.

⁵⁰ *McDonough*, 638 F.Supp.2d at 467.

⁵¹ See, e.g., *Vallario v. Vandehey*, 554 F.3d 1259, 1265 (10th Cir. 2009).

distinction and adhere more faithfully to *Hydrogen Peroxide*'s holding that "[r]esolving expert disputes in order to determine whether a class certification requirement has been met is *always* a task for the court," even if the dispute "might appear to implicate the 'credibility' of one or more experts."⁵²

Hydrogen Peroxide is also having a profound practical impact on class action procedure. Because district courts must now resolve disputes between opposing expert witnesses, they are more likely to hold multi-day class certification hearings and issue lengthier class certification opinions that analyze the experts' opinions in detail.⁵³ This does not, of course, mean that district

⁵² *Hydrogen Peroxide*, 552 F.3d at 324 (emphasis added).

⁵³ The trend toward more rigorous analysis of expert opinion at the class certification stage continued in 2010. In one of the first antitrust class certification decisions this year, Judge John R. Padova of the U.S. District Court for the Eastern District of Pennsylvania reconsidered his earlier decision granting class certification following the Third Circuit's ruling in *Hydrogen Peroxide*, held a four-day evidentiary hearing, and granted

courts will automatically deny class certification. As discussed above, district courts have certified classes even after conducting a rigorous analysis of competing expert testimony. From the standpoint of defendants attempting to defeat class certification, however, this is preferable to the regime that existed prior to *Hydrogen Peroxide*, where plaintiffs' experts were often given the benefit of the doubt and courts applied a presumption in favor of certifying antitrust class actions. Based on our review of cases decided in the year since *Hydrogen Peroxide*, the results in any particular case generally turn on which expert the court finds more persuasive. As a result of the increased scrutiny of expert witness testimony courts are giving after *Hydrogen Peroxide*, finding the right expert and submitting a well-reasoned expert report often make the difference between winning and losing a class certification motion.

class certification in an 81-page memorandum opinion. See *Behrend v. Comcast Corp.*, 2010 U.S. Dist. LEXIS 1049 (E.D. Pa. Jan. 7, 2010).