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No “shortcut” to certification in recent antitrust class action

David L Hanselman Jr of McDermott Will & Emery LLP in Chicago examines the impact that *In re Hydrogen Peroxide Antitrust Litigation* is likely to have on class certification

The United States Court of Appeals for the Third Circuit rang in the new year with an important new opinion on class certification that is bound to have major implications in antitrust class actions across the United States. The case, *In re Hydrogen Peroxide Antitrust Litigation*, makes it harder for plaintiffs to obtain certification of antitrust class actions.

In 2005, competition authorities in Europe charged 18 hydrogen peroxide manufacturers with price fixing. In 2006, two manufacturers pleaded guilty in the United States to the same charge. A series of class action lawsuits ensued and were consolidated in the Eastern District of Pennsylvania before Judge Stewart Dalzell.

In January 2007, Judge Dalzell certified a class of direct purchasers. On 30 December, 2008, the Third Circuit vacated the district court’s order because it applied too lenient a standard in deciding whether to certify the class.

The issue before the Third Circuit was whether the plaintiffs satisfied the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). According to the Third Circuit, fact of injury, also called antitrust impact, is “critically important” for purposes of predominance in antitrust class actions, as it is an element of the claim that may require proof on an individual basis.

In analysing this issue, the Third Circuit issued four key holdings in a 55-page opinion.

First, the court held that plaintiffs must make more than a “threshold showing” to obtain class certification and that 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 “carefully consider” and 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 one of rule 23’s requirements.

Second, the Third Circuit held that in antitrust cases, district courts should not resolve doubts about certifying a class in favour of certification. The district court, citing a 1988 antitrust case, held that when a court is in doubt as to whether or not to certify a class in a horizontal price-fixing case, it should err in favour of certifying the class. This concept has been cited in a number

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of antitrust cases granting class certification on the theory that class actions play an important role in the private enforcement of the antitrust laws. The Third Circuit flatly disagreed, holding that courts should not suppress doubt as to whether a requirement of rule 23 is met, no matter what area of substantive law is involved.

Third, the Third Circuit held that district courts must weigh and resolve conflicting expert opinion at the class certification stage. At the district court level, both parties offered testimony from expert economists on the question of whether antitrust impact was capable of proof at trial through evidence

common to the class. The two experts’ opinions were irreconcilable. The defendants argued on appeal that the district court applied too lenient a standard in evaluating the expert testimony. The Third Circuit agreed, holding that weighing conflicting expert testimony may be “integral” to analysing the requirements of rule 23 and that it is “especially important” to do so when the party opposing class certification offers expert testimony.

Fourth, the Third Circuit held that district courts should not presume antitrust impact in every horizontal price-fixing case. In a well-known 1977 decision, *Bogosian v Gulf Oil Co*, the Third Circuit held that antitrust injury could be presumed when it is clear that the violation results in harm to the entire class. This is often referred to as the “Bogosian shortcut”. In *Hydrogen Peroxide*, the Third Circuit held that courts should not presume impact based on an “unadorned allegation of price fixing” and that the facts of *Hydrogen Peroxide* were different to *Bogosian* in three ways. First, the price of hydrogen peroxide was lower at the end of the proposed class period than it was at the beginning. Second, hydrogen peroxide production increased through much of the class period. Third, the empirical analysis of the defendants’ expert showed substantial price disparities among similarly situated customers.

Hydrogen Peroxide will become an important decision for antitrust defendants trying to defeat class certification in the United States, in the Third Circuit and beyond. The decision raises the bar to obtaining certification. It also continues a recent trend among federal appellate courts holding that district courts should rigorously weigh conflicting expert testimony at the class certification stage. Finally, and most important for antitrust litigators, the Third Circuit squarely rejected the notion that “doubts” as to certification in antitrust cases should be resolved in favour of certifying a class and limited the *Bogosian* concept of presumed impact. ■