The Evolving Challenges of Class Certification

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For 40 Years Class Certification Has Filled A Gaping Void

- Absent the Rule 23 procedure, courts:
  - would be buried under thousands of similar cases.
- And litigants:
  - would be forced to prosecute and defend thousands of identical cases, greatly increasing transaction costs without any benefit, and/or
  - many small but valid claims would effectively be denied without regard to their merits.

In 1974, The Supreme Court Emphasized The Importance Of Class Certification

- The Court expressed concern about any rules that "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

Antitrust Claims Are Especially Appropriate For Class Treatment

- Antitrust cases are complex, requiring extensive (and expensive) economic and industry expert analyses.
- Antitrust cases often result from secretive, collusive agreements, necessitating voluminous discovery.
- Antitrust violations harm broad and diffuse sets of plaintiffs, some of whom purchased sufficient amounts to make an individual action feasible, and most of whom have not.

Case Law Recognizes Appropriateness Of Class Certification In Antitrust Cases

- "'[A]ntitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy.'" *In re Indus. Diamonds Antitrust Litig*., 167 F.R.D. 374, 379 (S.D.N.Y. 1996).
- "[B]ecause of the important role that class actions play in the private enforcement of the antitrust statutes, courts resolve doubts about whether a class should be created in favor of certification." *Id*. at 378.

The Traditional Approach

- Plaintiffs allege satisfaction of all four Rule 23(a) requirements – numerosity, commonality, typicality, and adequacy – and one provision of Rule 23(b), usually 23(b)(3)'s requirement of predominance and superiority.

- Frequently there is little dispute as to the Rule 23(a) requirements, and the class decision hinges on whether common issues predominate over individual ones, often concerning impact/fact of damages.

- Experts opine on existence of class-wide evidence concerning impact; *e.g*., economists opine on whether common evidence can be used to demonstrate that all or nearly all class members were impacted.

- Courts take a quick look to ensure a basis for class certification and avoid a more searching inquiry into the facts supporting the allegations.

- Courts <u>do not</u> engage in a weighing of the evidence or a battle of the experts (if, *e.g*., Ps' expert opines that common evidence is available and Ds' expert opines to the contrary, courts defer resolving that dispute).

Sound Basis For Traditional Approach

- Courts "must" determine whether to certify proposed classes at "an early practicable time[.]" FED. R. CIV. P. 23(c) (emphasis added).
- "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).
- *Eisen* is based on the specific language of Rule 23 and the early stage of the litigation at which the Rule contemplates class certification will occur.
- *Eisen* has not been overruled.

Common Practice Under The Traditional Approach

- Traditional paradigm encourages early class certification motions.
- Many local rules require this (E.D. Pa.; W.D. Pa.; and N.D. Ga. all set 3 month presumptive deadline for the filing of a class motion).
- Early certification can benefit both sides by narrowing issues and focusing resources.
- Early certification also impacts the timing of opt outs and gives greater clarity to early litigants. Should a case develope in a way not contemplated by the certification motion, motions to decertify or to amend certification can be pursued.
- *Nonetheless, recent circuit court decisions arguably have altered this framework.*

In 2001 Courts Start To Take A Fresh Look At Class Certification: *Szabo*

- *Szabo* was a defective products/breach of warranty and fraudulent marketing case brought by purchasers of machine tools.
- Judge Easterbrook (writing for a Seventh Circuit panel including Judge Posner) required district courts to perform more searching class certification analyses, beginning a trend that has gained momentum.
- Rejected "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class" *Szabo v. Bridgeport Machs., Inc*., 249 F.3d 672, 675-76 (7th Cir. 2001).
- Held that "the judge must make a preliminary inquiry into the merits" when issues pertaining to class certification are contested.

In 2006 The Second Circuit Weighs In With *IPO*

- *IPO* was an idiosyncratic securities fraud case involving over hundreds of class actions concerning IPOs of hundreds of different companies and millions of plaintiffs.
- Issue: "whether a definitive ruling must be made that each Rule 23 requirement has been met or whether only some showing of a requirement suffices."
- The Second Circuit in *IPO* carefully considered the Supreme Court's admonition in *Eisen*, and emphasized that in making determinations concerning whether the requirements of Rule 23 are satisfied, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement.
- Held: definitive ruling necessary when contested class issues are present; "some showing" is not sufficient.

Third Circuit Follows With *Hydrogen Peroxide* (“*HP*”)

- Antitrust class action brought by purchasers of hydrogen peroxide and related chemicals. *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 307 (3d Cir. 2008).
- Defendants opposed class certification and attacked plaintiffs’ expert’s methodology.
- District court deferred deciding disputed issues and certified the class; Third Circuit vacates and remands.

Parts Of *HP* Decision Embrace Traditional Standard

- "[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact *is capable of proof* through common evidence."

Other Sections Of *HP* Encourage Weighing The Evidence

- "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.
  - First, the decision to certify a class calls for findings by the court [by a preponderance of the evidence], not merely a "threshold showing" by a party, that each requirement of Rule 23 is met.
  - Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action.
  - Third, the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it."

Under The Most Severe Reading Of *HP*, Plaintiffs Bear New Burdens

- Plaintiffs must demonstrate each Rule 23 element by a preponderance of the evidence.
  - Mere allegations no long suffice.
- Court will serve as fact-finder and resolve disputed issues concerning the Rule 23 requirements.
- Plaintiffs' experts must be more persuasive than Defendants' experts.
  - Merely proffering experts will not suffice.
  - As fact-finder, court will decide who wins the battle of the experts.

Courts Have Taken Notice Of *HP*, But Some Are Ambivalent

- "The relevant question is not whether each element can be proved but whether such proof will require evidence individual to class members." *McDonough v. Toys "R" Us, Inc.*, 638 F. Supp. 2d 461, 479 (E.D. Pa. 2009).
- Fact-finder role a double-edged sword:
  - Finding: plaintiffs' methodology was "most persuasive . . . [and] will give a reasonable estimate of damages."
  - Query: does this factual finding estop defendants from attacking plaintiffs' methodology at summary judgment? At trial?

And Some Defendants Have Overreached

- In *Jackson v. SEPTA*, a Title VII case, defendants sought to contest the merits of plaintiffs' allegations at class certification.

- Only issue germane to class is "whether the relevant evidence is common to the class." *Jackson v. SEPTA*, No. 08-4572, 2009 U.S. Dist. LEXIS 78561, at *33 (E.D. Pa. Aug. 31, 2009).

- "[A] preliminary inquiry [] does not require the plaintiff to come forth with evidence – generally only obtained once merits discovery is completed – proving or establishing by a preponderance of the evidence the merits of his claims."

- Court denied class certification, but noted: "This denial is not preclusive of any further action by Plaintiff. Nor does this denial reflect on the merits of Plaintiff's individual claim."

Plaintiffs Have Taken Notice Of *HP* And Litigate Accordingly

- Early class certification motions have been withdrawn, to be re-filed later. *See, e.g*., *In re Flonase Antitrust Litig.*, No. 08-3149 (E.D. Pa.).

- Case schedules now reflect need for class certification briefing near the end of discovery. *See, e.g*., *Flonase*; *In re Wellbutrin XL Antitrust Litig*., No. 08-2431 (E.D. Pa.).

- Plaintiffs (and defendants) submit more fulsome expert reports concerning not just existence of class-wide evidence of impact, but also: weight of the evidence and, potentially, market power, relevant market, industry analyses, and damages

Defendants Continue To Push The Envelop

- In several recent antitrust class actions non-settling defendants have opposed on class certification grounds early partial settlements. *See, e.g*., *In re Packaged Ice Antitrust Litig.*, No 08-1952 (E.D. Mich.), *In re Puerto Rican Cabotage Antitrust Litig*., No. 08-1960 (D.P.R.); *In re Processed Egg Products Antitrust Litig.*, MDL No. 2002 (E.D. Pa.).

- This despite the fact that:
  - non-settling defendants arguably have no standing to make such a challenge, and
  - courts historically regularly approved settlement classes without a full-blown class certification evidentiary hearing.

- Non-settling defendants argue that they will be prejudiced and that Plaintiffs need to make a more complete proof of class certification requirements
  - some defendants make this argument even while opposing discovery.

Jeopardizing Early Partial Settlements Has Substantial Costs For All Parties

- A common element of early settlements is substantial cooperation from the settling defendant. *E.g.*, *PR Cabotage*; *Packaged Ice*.
- Early settlors often settle at a discount, and, in the case of companies on the edge, this can keep companies from bankruptcy.
- The non-settling defendants are wielding class certification to solve *their* collective action problem at the expense of plaintiffs and settling defendants.
- New class certification standards should not be a tool for defendants to avoid prisoners' dilemmas.

Class Certification Now Delayed To Near End Of Discovery

- Defendants fought for this.
- But to whose benefit is this?
- The heightened scrutiny for class cert leads to:
  - Increased litigation costs on both sides.
  - More and more substantial expert reports, all before the issues are narrowed by a class certification decision. Potentially wasteful for all parties.
- Most defendants want global resolution binding on all potential plaintiffs and class actions are uniquely able to satisfy this goal.
  - Defendants' attacks may be short-sighted.
- Fact-finder role for the court can harm either side. *See, e.g.*, *McDonough*, 638 F. Supp. 2d at 491.

Class Certification Case Law Remains In Flux

- Numerous courts reject the most aggressive interpretations of the recent circuit court decisions:
  - "[T]his disagreement [about whose experts' statistical findings were more persuasive] is relevant only to the merits of plaintiffs' claim . . . and not to whether plaintiffs have asserted common questions of law or fact. By asking the Court to decide which expert report is more credible, defendants are requesting that the Court look beyond the Rule 23 requirements and decide the issue on the merits, a practice *In re IPO* specifically cautions against." *Hnot v. Willis Group Holdings, Ltd.*, 241 F.R.D. 204, 210 (S.D.N.Y. 2007).
  - "Although the defense experts claim to dispute the feasibility of constructing an econometric model using proof common to the class, their reports are better characterized as disputing the results of the plaintiffs' modeling. To resolve this dispute would be to place myself in the role of the ultimate factfinder by choosing which expert's econometric model or theory is 'correct.' Therefore, having presented a working econometric model that demonstrates class-wide impact and injury using proof common to the class, the plaintiffs here have gone further than the plaintiffs in *Hydrogen Peroxide* in establishing that the requirements of Rule 23 have been met." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 102 n.11 (D. Conn. 2009).

Is The Pendulum Swinging Back?

- Even in the Third Circuit courts acknowledge the uncertainty:
  - *HP* "merely shows that an analysis under Rule 23 must consider all evidence." *Elias v. Ungar's Food Prods.*, No. 06-2448, 2009 U.S. Dist. LEXIS 74140, at *16-17 (D.N.J. Aug. 20, 2009).
- The *HP* opinion itself is ambivalent, perhaps mindful that it lacked the power to overturn the traditional approach employed in *Linerboard* and *Bogosian*.
- Nonetheless, prudent practitioners will prepare and schedule their cases as if the most severe interpretation of *HP* is the law, with costs to all sides.