Third Circuit Raises Bar for Class Certification

By Kristine L. Roberts, Litigation News Associate Editor

A recent ruling by the U.S. Court of Appeals for the Third Circuit adds to the line of cases requiring a more extensive inquiry into the class certification requirements of Federal Rule of Civil Procedure 23. In *In re Hydrogen Peroxide Antitrust Litigation*, a unanimous panel vacated the district court's order certifying an antitrust class action and announced stringent standards for class certification procedures.

Several plaintiffs brought class actions claiming that manufacturers of hydrogen peroxide and related products had conspired to fix prices from 1994 through 2005. The cases were consolidated. After extensive discovery, the plaintiffs moved to certify a class, which the district court granted. The Third Circuit allowed interlocutory review of the certification order under Rule 23(f).

In a 55-page opinion, the court clarified three aspects of class certification:

- the decision to certify a class requires the court to find that each requirement of Rule 23 has been met, and any factual determination must be made by a preponderance of the evidence;
- the courts must resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits; and
- the obligation to conduct a rigorous analysis extends to expert testimony.

Noting the lack of guidance on the "rigorous analysis" standard adopted by the U.S. Supreme Court in *General Telephone Co. v. Falcone*, the Third Circuit stated that the Rule 23 requirements "are not mere pleading rules." The court rejected a "threshold showing" standard, holding that a party's assurance that it intends to satisfy Rule 23 is not enough.

The court also held that the existence of an overlap between class certification and the merits of a claim "is no reason to decline to resolve relevant dispute when necessary to determine whether a class certification requirement is met."

Finally, the court held that weighing conflicting expert testimony at the class certification stage "is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." Matthew Heffner, Chicago, cochair of the Rule 23 Subcommittee of the Section of Litigation's Class Actions and Derivative Suits Committee, says that this holding may mean that litigants in the Third Circuit will invest more time and money on experts earlier in the litigation.

"If experts must prepare comprehensive reports, give deposition testimony, and spend time rebutting opposing experts' opinions, the costs at the class certification stage will be much greater," Heffner says.

The panel relied on the 2003 Amendments to Rule 23, which, among other things, eliminated language that class certification could be granted on a tentative basis and altered the timing of the certification decision to allow for more thorough consideration, notes Andrew J. McGuinness, Ann Arbor, MI, cochair of the Antitrust Subcommittee of the Section's Class Actions and Derivative Suits Committee.

The court used these amendments to address perceived contradictions in Third Circuit jurisprudence and bolster the "rigorous analysis" standard, explains McGuinness.

The impact of the decision outside of the Third Circuit and antitrust law remains to be seen. McGuinness notes that the court did not limit its analysis of Rule 23 to the antitrust context. Yet Heffner maintains that "the decision is going to be a lot more influential in the area of antitrust law than in other areas. The analysis can differ significantly depending on the type of case."

Court Defines Survivability of Arbitration Clause

By Henry R. Chalmers, Litigation News Associate Editor

The U.S. Supreme Court has held that structural provisions relating to remedies and dispute resolution can survive a labor contract's termination to enforce duties "arising under the contract." *Litton Business Systems, Inc. v. National Labor Relations Board*

Post-expiration claims may "arise under a contract" if they involve facts and occurrences that took place prior to the contract's expiration. The agreement to arbitrate survives the contract's expiration, but only for that particular claim.

"An example of where this might occur is when a franchise agreement with an arbitration clause is terminated, but the franchisee continues using the franchisor's trademarks," says Edward M. Mullins, Miami, FL, cochair of the Section of Litigation's Alternative Dispute Resolution Committee. "Even though the contract itself is no longer enforceable, the agreement in the contract to arbitrate may be," Mullins explains.

"If you want to make sure the arbitration provision governs" in this situation, drafters should include language "explicitly stating that the arbitration clause survives the contract's termination," advises Lori A. Sochin, Miami, the Section's Alternative Dispute Resolution Committee cochair. For those obligations that both arise and are breached after the contract's termination, however, the contract's arbitration provision generally is not available unless the contract is a collective bargaining agreement.

In that narrow field, employers and unions who continue their relationships with one another after expiration of their collective bargaining agreements may be able to force arbitration, even where the obligations that were violated arose after the written contract had expired.

"The employer's uninterrupted fidelity to the arbitration provision stood as the implied consideration for the employees' continued diligent and loyal service," the Third Circuit notes. *Luden's Inc. v. Local Union No. 6 of Bakery, Confectionary & Tobacco Workers' International.*

By accepting the benefits of the employees' continued labor after the collective bargaining agreement had expired, the employer implicitly assented to an implied-in-fact agreement to arbitrate. This then begs the question: Should this reasoning apply equally in nonlabor contexts where parties continue