

# Bogosian's Legacy Uncertain in Wake of Recent Third Circuit Decision in Hydrogen Peroxide

By Paula Render and Andrea Renaldi

Historically, the Third Circuit has applied less strenuous standards than other federal appellate courts when deciding whether to grant class certification in antitrust cases, particularly through its well-known decision in *Bogosian v. Gulf Oil* and its progeny. A recent opinion, however, suggests that the court may be revising those standards.

## I. The Third Circuit's Decision in *In re Hydrogen Peroxide Antitrust Litigation*

On December 30, 2008, the United States Court of Appeals for the Third Circuit issued its decision in *In re Hydrogen Peroxide Antitrust Litigation*, addressing several questions about the standards a district court must apply when deciding whether to certify a class. See No. 07-1689 (3d Cir. Dec. 30, 2008). This case arose when various plaintiffs filed class action suits under § 4 of the Clayton Act against chemical manufacturers of different hydrogen peroxide and persalts products, alleging antitrust violations. The actions were consolidated in the United States District Court for the Eastern District of Pennsylvania, and plaintiffs moved to certify a class consisting of direct purchasers of hydrogen peroxide and persalts over an eleven — year class period. No. 07-1689 at 7-8. The district court subsequently granted class certification under Fed. R. Civ. P. 23(b)(3), and the Third Circuit granted defendants' petition for an interlocutory appeal of that decision. *Id.* at 9-10. On appeal, defendants argued that the district court erred in finding that plaintiffs met the class certification requirement of "predominance," under Rule 23(b)(3). Specifically, defendants disagreed with the district court that sufficient evidence was presented to support a finding that antitrust impact, or injury, could be shown at trial through common, as opposed to individualized, evidence. *Id.* at 17. The appellate court vacated the district court's class certification order and remanded for proceedings consistent with its decision. *Id.*

The court, in an opinion by Chief Judge Scirica, addressed three issues raised by defendants concerning the

district court's finding of predominance: (1) whether it applied too lenient a standard of proof for class certification, (2) whether it failed to consider appropriately the views of defendants' expert while crediting plaintiffs' expert, and (3) whether it erroneously applied presumption of antitrust impact under the Third Circuit's previous decision in *Bogosian*. *Id.* at 17.

First, the court clarified the appropriate standard of proof for class certification determinations and remanded to the extent that the district court's analysis applied too lenient a standard. Emphasizing that the Supreme Court has described class certification inquiries as necessitating "rigorous analysis," the Third Circuit held that trial courts must make findings that each Rule 23 requirement is met, and necessary factual determinations for these findings must be made by a preponderance of the evidence. No. 07-1689 at 39 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Also, the court stated that it is proper for a district court to inquire into the merits of a suit to the extent necessary to determine if a requirement under Rule 23 is met. *Id.* at 29. Thus, it held that, as a matter of law, a district court errs if it "fails to resolve a genuine legal or factual dispute relevant to determining [Rule 23] requirements." *Id.* at 38.

Second, the Third Circuit held that it was error for the district court to assume it was unable to weigh the opinions of defendants' expert against those of plaintiffs' expert. *Id.* at 44. Both plaintiffs and defendants presented the opinions of expert economists; these experts offered conflicting opinions about whether antitrust impact could be established at trial through common evidence. *Id.* at 18. The court explained that expert opinions, just like any other relevant evidence, should be a part of the rigorous analysis applied by the trial court, if pertinent to determining whether a Rule 23 requirement is met. *Id.* at 45. Indeed, it is up to the district court, when necessary, to resolve expert disputes concerning class certifi-

(Continued on page 6)

# Bogosian's Legacy Uncertain in Third Circuit

(Continued from page 5)

cation requirements, even if they appear to implicate the “credibility” of an expert. *Id.* at 47.

Finally, the court instructed the district court, upon remand, to reconsider whether it was proper to analyze this case under the Third Circuit’s decision in *Bogosian v. Gulf Oil Corporation*, 561 F.2d 434 (3d Cir. 1977). *Bogosian* announced the concept of “presumed impact,” allowing individual plaintiffs to prove injury simply by showing that the antitrust violation resulted in higher prices than would be paid in a competitive market, and that the plaintiff made purchases at the higher price. *In re Hydrogen Peroxide*, No. 07-1689 at 52 (citing *Bogosian*, 561 F.2d at 455). However, the *Hydrogen Peroxide* court was unconvinced that the district court gave proper consideration to the opinion of defendants’ expert regarding impact, and therefore remanded for review of its analysis in light of the appellate court’s holdings. *Id.* at 53-54.

## II. Consistent with Other Circuits

In *Hydrogen Peroxide*, the Third Circuit moved closer to the body of law that has developed in other Circuits, which have advocated a more rigorous class certification analysis than is contemplated by *Bogosian*. For example, not long after *Bogosian* was decided, the Fifth Circuit, in *Alabama v. Blue Bird Body Co.*, discussed the importance of antitrust impact in class certification decisions and the various approaches applied by other courts. 573 F.2d 309 (5th Cir. 1978). In *Blue Bird Body*, the court stated that impact is “a question unique to each particular plaintiff and one that must be proved with certainty.” *Id.* at 327. Ultimately the court held that this fact does not mean that no cases exist where impact can be established through classwide proof, but it made clear that there are certainly cases where classwide proof would be improper. *Id.*

The *Hydrogen Peroxide* court was unconvinced that the district court gave proper consideration to the opinion of defendants’ expert regarding impact, and therefore remanded for review of its analysis in light of the appellate court’s holdings.

The view that district courts must more closely analyze evidence regarding predominance, as well as all class certification requirements, is one that a majority of other Circuits, especially recently, have upheld. Recent decisions in other circuits have clarified that a more comprehensive review of potential merits issues and inquiry into expert opinions is necessary. See *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91 (2d Cir. 2007); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008). One case cited to by the *Hydrogen Peroxide* court was the recent Eighth Circuit opinion in *Blades v. Monsanto*, 400 F.3d 562 (8th Cir. 2005). Addressing the predominance requirement, the appellate court held that, on the facts in that case, impact could not be proven on a class-wide basis. *Id.* at 569. The court agreed with the district court’s analysis that the plaintiffs’ evidence on this point was not adequate because they simply “presumed” and their expert “assumed[d]” class-wide impact without support, and the court could not rely on mere “conclusion.” *Id.* at 570. Thus the court affirmed the district court’s denial of class certification. *Id.*

## III. Bogosian’s Legacy

While, in *Hydrogen Peroxide*, the Third Circuit did not overturn *Bogosian*, what remains of the *Bogosian* “presumption” or “shortcut” is unclear. First, the court rejected the notion that a more lenient certification analysis is applied or that any certification requirements are presumed to be met just because plaintiffs’ suit falls within a certain area of substantive law, such as antitrust. No. 07-1689 at 42. And citing to its own more recent decision in *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002), as well as the 2003 Amendments made to Rule 23, the court made clear that a presumption of antitrust impact based on a price-fixing alle-

## Bogosian's Legacy Uncertain in Third Circuit

gation alone is insufficient to support class certification in the absence of other supporting evidence. *Id.* at 54. But it is also the court's emphasis on the need for a thorough and careful approach to class certification decisions that is likely to limit the applicability of *Bogosian*. The court stated that when determining whether plaintiffs have adequately demonstrated that antitrust impact can be proven through common evidence as opposed to individual evidence, the district court must rigorously assess the available evidence and how plaintiffs propose to prove impact using that evidence at trial. *Id.* at 17. This approach is reflected in the court's holdings that a district court must specifically find that each Rule 23 requirement is met and properly weigh the opinion of defendants' expert against that of plaintiffs' expert.

In its opinion, the court cited liberally to the 2003 Amendments to Fed. R. Civ. P. 23. According to the *Hydrogen Peroxide* opinion, that rule requires the courts to undertake a more intensive inquiry when making class certification decisions. For instance, while Rule 23 previously called for class certification decisions to be made "as soon as practicable after commencement of an action," it now simply requires that such decisions be made "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23 advisory committee's notes, 2003 Amendments; *see also In re Hydrogen Peroxide*, No. 07-1689 at 34. The Third Circuit explained that implicit in that change is the need for a more "thorough evaluation of the Rule 23 factors." No. 07-1689 at 34. Thus, the court indicated that it was improper for the district court, in this case, to state that plaintiff need only demonstrate an "intention" or make a "threshold showing" in relation to proving predominance under Rule 23. *Id.* at 40-41.

The court suggested that the facts of some cases may still be compatible with an application of the *Bogosian*

shortcut. As a practical matter, however, the court appears to have significantly limited the reach of that decision. *Hydrogen Peroxide* makes clear that district courts must engage in a rigorous, fact-based analysis when it comes to determining whether the Rule 23 requirements have been met, which includes consideration of expert opinions presented by defendants. Such an analysis forces plaintiffs to present more than mere "conclusions" or ask the court to make "assumptions" in the face of deficient evidence. Thus, the *Hydrogen Peroxide* analysis seems inconsistent with the notion that antitrust impact, or any other Rule 23 requirement, can be "presumed."



Paula Render is a Partner in the Antitrust and Competition Law Practice Group of Jones Day, in the Chicago office. She specializes in antitrust litigation.



Andrea E. Renaldi is an Associate in the Chicago office of Jones Day and focuses on trial practice and litigation.

"This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association."