April 13, 2015

Third Circuit Court of Appeals Joins Other Circuits in Applying *Daubert* to Expert Testimony at Class Certification

On April 8, the United States Court of Appeals for the Third Circuit issued an opinion vacating class certification in an antitrust case and holding that when a plaintiff relies on expert testimony to satisfy the requirements of Federal Rule of Civil Procedure 23, that testimony is subject to scrutiny under the standards set forth in *Daubert* v. *Merrell Dow Pharmaceuticals*.

In *In re: Blood Reagents Antitrust Litigation*, No. 12-4067, the Third Circuit considered the standards that apply to an expert methodology put forward to support class certification. The Third Circuit previously had permitted use of expert evidence at the class certification stage if that evidence could later "evolve" into an admissible form, but the Court held that this relatively lenient standard had been overturned by the Supreme Court in *Comcast Corp*. v. *Behrend*, 133 S. Ct. 1426 (2013)). Slip Op. at 7-8. The Court next held that the expert testimony may not be used to satisfy the class certification requirement of Rule 23 unless the district court finds "that the expert testimony satisfies the standard set out in *Daubert*." *Id*. at 8. In so holding, the Third Circuit joined three other circuit courts which have recently held that the *Daubert* standards must be taken into account in analyzing certain expert testimony at the class certification stage. This holding affirms the viability of *Daubert* challenges as a tactic in attacking class certification.

Background

In re Blood Reagents concerned a putative class action by direct purchasers of "traditional blood reagents": products used to test blood compatibility between donors and recipients. Plaintiffs claimed that defendant Immucor, Inc.[1] and defendant-appellant Ortho-Clinical Diagnostics, Inc. ("Ortho"), which together controlled the products' entire domestic supply, conspired to fix prices over a period of more than eight years. Slip Op. at 4. Plaintiffs sought to certify a class of all individuals and entities who purchased traditional blood reagents in the United States directly from the defendants. *Id*. at 4-5.

Ortho opposed class certification, arguing that plaintiffs had failed to establish predominance under Rule 23(b). For their class certification motion, plaintiffs relied on an expert opinion for "their antitrust impact analyses and damages models." *Id*. at 5. Ortho argued, among other things, that plaintiffs' expert (1) was

[1] Immucor, Inc. settled at an earlier stage in the action.

not capable of producing "just and reasonable damage estimates at trial" and that (2) the expert, by failing to distinguish lawful from unlawful price increases, had failed to show the necessary class-wide antitrust impact of the conduct. *Id.* at 6 & n.4. The district court rejected these challenges, and certified the class. Applying then-controlling Third Circuit authority, the district court held that it was premature to consider objections on the merits to the reliability of the expert's damages model as the model could "evolve" over time to become admissible evidence. *See id.* at 5; *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222, 240-244 (E.D. Pa. 2012).[2]

The Court of Appeals Opinion

The Third Circuit vacated the order granting class certification. The Court first held that, under the Supreme Court's decision in *Comcast* v. *Behrend*, the "could evolve" test was no longer good law. Slip Op. at 7. Based in part on the reasoning of *Comcast*, the Court then held that, in order to rely on expert testimony to achieve class certification, a plaintiff must "demonstrate[], and the trial court find[], that the expert testimony satisfies the standard set out in *Daubert*." *Id.* at 8. The *Daubert* standard is the standard used by federal courts to determine whether an expert's proposed testimony is admissible at trial. The Court held that this rule was necessary because a party seeking class certification must "prove" that the relevant requirements of Rule 23 are met and that "[e]xpert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot" provide the necessary proof. *Id.* at 9 (quotation omitted).

The Court did clarify, however, that the *Daubert* inquiry was required only for expert testimony "offered to prove satisfaction of Rule 23's requirements." *Id.* at 10 n.8. It thus remanded to the district court to determine which of Ortho's objections "challenge those aspects of plaintiffs' expert testimony offered to satisfy Rule 23" as well as to conduct a *Daubert* analysis if necessary. *Id.* at 11. The Court also reiterated that, even if the evidence in question satisfies a *Daubert* analysis, the district court is still required to assess the persuasive force of the evidence to determine if the requirements of Rule 23 have in fact been met. *See id.* at 11 & n.10 (discussing and quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008)).

[2] As the district court opinion makes clear, the damages model was one of the factors it considered in determining whether class-wide antitrust impact had been sufficiently established for class certification. 283 F.R.D. at 239-240.

Significance of the Decision

The Third Circuit has now joined the Seventh, Eighth and Ninth Circuits in requiring that district courts take *Daubert* into account when assessing expert testimony at the class certification stage.[3]

The Third Circuit's decision is not limited to antitrust class actions. However, because expert testimony often plays a significant role in such actions – including at class certification – the decision may have an especially significant impact on class certification proceedings in antitrust cases.

The Third Circuit's previous rule permitted certification of antitrust (and other) classes based on expert testimony of potentially dubious reliability as long as the plaintiffs could demonstrate that the testimony "could evolve" into reliable evidence. The Third Circuit's newly-announced rule now explicitly allows defendants to mount an early, full-scale attack on the reliability of expert testimony proffered in support of class certification. This rule is likely to make class certification more challenging for plaintiffs in antitrust cases and other actions in which plaintiffs rely on expert testimony to satisfy the requirements of Rule 23.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins
212-373-3183
ratkins@paulweiss.com

Andrew C. Finch
212-373-3460
afinch@paulweiss.com

Kenneth A. Gallo
202-223-7356
kgallo@paulweiss.com

William B. Michael
212-373-3648
wmichael@paulweiss.com

Joseph J. Simons
202-223-7370
jsimons@paulweiss.com

Aidan Synnott
212-373-3213
asynnott@paulweiss.com

Associate Noam Lerer contributed to this client alert.

[3] *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F. 3d 604, 613-14 (8th Cir. 2011); *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 972, 982 (9th Cir. 2011); *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010); *see also Local 703 IB of T Grocery & Food Emps. Welfare Fund* v. *Regions Fin. Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014) (dicta).