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REPORT

The Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litigation* changes the formerly minimal showing plaintiffs need to make for class certification, write attorneys Christine C. Levin, Michael I. Frankel, and Joseph A. Tate: District courts must now weigh both plaintiffs' and defendants' evidence—including expert evidence—and make findings on all Rule 23 requirements by a preponderance of the evidence even if such findings overlap with issues on the merits of the alleged claims.''

The ruling, the authors say, has major implications for class certification in antitrust cases.

Certification

In re Hydrogen Peroxide Antitrust Litigation: The Third Circuit Recognizes That Defendants—And Not Just Plaintiffs—Should Be Heard on Rule 23 Class Certification

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Prior to its December 30, 2008 decision in *In re Hydrogen Peroxide Antitrust Litigation*,[1] decisions by the Third Circuit and district courts within it imposed an increasingly minimal burden on plaintiffs seeking certification of a class in an antitrust conspiracy action. Despite the Supreme Court admonition to conduct a ''rigorous analysis'' of the issues on class certification,[2] courts within the Third Circuit often required only a ''threshold showing'' by plaintiffs and declined to ''indulge in 'dueling' between experts'' or to ''balance the credibility'' of conflicting expert reports. Courts even went so far as to hold that all doubts should be resolved in favor of certification.

Hence, plaintiffs could obtain certification on the basis of a generic expert report that reviewed the general structure of the industry coupled with a promise that at trial damage to all class members would be proven with

[1] No. 07-1689 (3d Cir. Dec. 30, 2008), on appeal from No. 05-cv-0666, E.D. Pa., MDL 1682.

[2] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982).

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common evidence. Rarely would such experts pay any heed to what actually happened in the marketplace, and if they did they focused on list price increases (without regard to actual transaction prices) or average pricing (which masks the individual differences so often crucial to a proper examination of the certification question). Defendants could do nothing to combat this. Once their class was certified, plaintiffs enjoyed substantial leverage to exact significant settlement payments from corporate defendants that faced joint and several liability coupled with statutory trebling of damages.

Hydrogen Peroxide changes all that. District courts must now weigh both plaintiffs' and defendants' evidence—including expert evidence—and make findings on all Rule 23 requirements by a preponderance of the evidence even if such findings overlap with issues on the merits of the alleged claims. In so ruling, the court set aside the bulk of its lenient class certification jurisprudence which for so long had effectively deprived antitrust defendants of any realistic opportunity to be heard. *Hydrogen Peroxide* will have major implications for class certification in antitrust cases under Federal Rule of Civil Procedure 23.

This article examines the law leading up to *Hydrogen Peroxide*. We also describe the conflicting expert opinions in *Hydrogen Peroxide* and the Third Circuit's ruling. Finally, some perspectives are offered on the possible effect of *Hydrogen Peroxide* on class certification proceedings in the Third Circuit.

Rule 23(b)(3) Class Certification in the Third Circuit Pre-Hydrogen Peroxide

The critical fight in class certification proceedings in antitrust conspiracy cases is typically whether the class can demonstrate antitrust impact (*i.e.*, fact of injury as opposed to amount of injury) to all its members through common proof.[3] This fight, in turn, usually emerges as a ''battle of experts.'' However, before *Hydrogen Peroxide*, district courts generally called a knock-out for plaintiffs before the defense's first punch was thrown. Most courts read the prevailing law in the Third Circuit to require merely that plaintiffs meet a basic minimum set of requirements for class certification of horizontal conspiracy cases. Defendants could do little, if anything to rebut the plaintiffs' showing.

[3] For class certification pursuant to the predominance requirement under Rule 23(b)(3), there is rarely a dispute between the parties as to whether the other two key elements of a conspiracy case are provable with common evidence. The existence of a conspiracy (*i.e.*, an agreement) to restrain competition—*e.g.*, fix prices or reduce supply—is generally held to ''entail common proof because the inquiry necessarily focuses on the defendants' conduct.'' *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 03-1556, 2007 WL 4150666, at *12 (M.D. Pa. Nov. 19, 2007). Also, although the relative amount of damages between class members may differ, the need to conduct an individualized inquiry per member to assess such amounts is not generally considered to negate the predominance of the common issues of conspiracy and fact of damage. *See In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 220 (E.D. Pa. 2001) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 817 (3d Cir. 1995)). Therefore, whether common issues predominate under Rule 23(b)(3) has evolved to typically hinge on whether fact of damage can be proved through evidence common to all class members. *See In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008).

Before *Hydrogen Peroxide*, district courts generally called a knock-out for plaintiffs before the defense's first punch was thrown.

Such requirements for certification had evolved to be, from the defense perspective, disturbingly loose. For example, the Third Circuit's 1977 decision in *Bogosian v. Gulf Oil Corporation* had often been read by district courts to permit a *presumption* of antitrust impact in many horizontal price-fixing cases.[4] *Bogosian* involved an alleged conspiracy among gasoline producers to tie the purchase of their gasoline to the lease of their service stations.[5] The district court had denied certification on the basis that individual issues about whether ''tying'' market power existed in each plaintiff lessee's geographical market would predominate over common issues. The Third Circuit reversed.[6] Without citing to any expert testimony in support, the Third Circuit stated that if a nationwide conspiracy were shown, and that conspiracy ''affected prices at the wholesale level [such that prices were] higher in all regions than [ ] would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage,'' though not necessarily the same amount.[7] This so-called ''price structure'' theory became the talisman for plaintiffs' experts.

In 2002, the Third Circuit reaffirmed its *Bogosian* presumption doctrine in *In re Linerboard Antitrust Litigation*.[8] Plaintiffs had alleged a nationwide conspiracy to reduce the supply of linerboard (used to make corrugated boxes) by coordinating production mill downtimes.[9] Over a two-year period coincident with the alleged conspiracy linerboard prices had risen by 90 percent.[10] In affirming class certification, the Third Circuit ruled that the district court had ''properly applied''

[4] 561 F.2d 434, 455 (3d Cir. 1977).
[5] Id. at 439.
[6] Id. at 455.
[7] Id. at 454-55.
[8] 305 F.3d 145 (3d Cir. 2002).
[9] Id. at 152.
[10] Id.

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Bogosian to presume impact to all class members.[11] Since *Bogosian* and *Linerboard*, plaintiffs' experts have endeavored to force-fit the subject products and markets in each newly filed case into a ''price structure'' that would permit a presumption of impact and an easy road to class certification.

Even where such a presumption would not be allowed under *Bogosian,* the *Linerboard* decision was interpreted as a significant restriction on defendants' ability to contest class certification. The Third Circuit approved the district court's ''belt and suspenders'' approach of also relying on expert testimony in certifying the class. This expert testimony, supported by ''charts, studies and articles,''[12] ''*suggested* that advanced econometric models *could be* effectively prepared to establish class-wide impact.''[13] The Third Circuit opinion did not even mention the existence of any defense expert report, much less analyze or weigh it. *Linerboard* was viewed as effectively endorsing a principle that to achieve class certification plaintiffs need only make a ''threshold showing'' that impact to all class members is an issue amenable to classwide proof.[14] That is, merely by proffering an expert opinion that common proof of impact might be possible, plaintiffs could obtain class certification.

Hence, courts became reluctant to involve themselves in resolving the parties' conflicting class certification evidence. Just prior to *Linerboard* in 2001, the Third Circuit held in *Newton v. Merill Lynch, Pierce, Fenner & Smith* that preliminary inquiries into issues overlapping with the merits were only ''sometimes necessary'' at the class certification stage, depending on the complexity of the case.[15]

Newton, when combined with the low burden of proof expected from plaintiffs in *Bogosian* and *Linerboard*, caused most Third Circuit district courts—especially in so called ''garden variety'' horizontal price fixing cases—to refuse to consider, either at all or more than superficially, defendants' factual and expert evidence opposing class certification. For example, in *In re K-Dur Antitrust Litigation*, the court granted certification, explaining that ''at [this] stage, the Court should not delve into the merits of an expert's opinion or indulge in 'dueling' between opposing experts.''[16] In *In re Plastic Additives Antitrust Litigation*, another case where a plaintiff class was certified, the court similarly stated that ''it is not appropriate at this stage to balance the credibility of the parties' experts.''[17] Indeed, subsequent district court decisions cited *Linerboard* to require no more than such a ''threshold showing'' under Rule 23(b)(3) in certifying plaintiffs' classes.[18]

The District Court's Certification of a Class in Hydrogen Peroxide

The *Hydrogen Peroxide* defendants included the U.S. and/or foreign affiliate entities of FMC, Arkema, Solvay, Degussa, Akzo, and Kemira Chemicals. These defendants vigorously opposed plaintiffs' motion for class certification. Hydrogen peroxide transaction prices had trended downward markedly over the alleged eleven-year class period while production costs and market demand had increased (in contrast to *Linerboard*, where the court found that prices almost doubled following reductions in capacity). These market dynamics cried out for an in-depth analysis of the parties' conflicting positions on whether any ''pricing structure'' existed to support a *Bogosian* presumption that all class members had paid an artificially inflated price, and on whether individualized inquiries on this question would be necessary at trial.

Plaintiffs relied upon the testimony of John C. Beyer, (who also happened to be the expert for plaintiffs in *Linerboard*) who followed a testimonial formula that had become all too familiar to defense counsel practicing in the Third Circuit. Dr. Beyer testified that all hydrogen peroxide products were essentially one fungible commodity, even though various grades of hydrogen peroxide—distinguished by levels of purity and selected additives—were clearly not fungible across all markets. For example, pulp and paper mills that used impure grades of hydrogen peroxide to bleach paper would never pay the increased supply cost for high purity hydrogen peroxide used by microprocessor chip manufacturers, nor could the latter use impure hydrogen peroxide for their needs. Dr. Beyer also testified that the hydrogen peroxide industry exhibited a ''pricing structure.'' However, that ''structure'' consisted simply of (1) alleged parallel list price increase announcements, without regard to what actually happened to transaction prices afterwards (they often went down) and (2) ''graphs'' (per *Linerboard*) that purported to show that average transaction prices moved in parallel, without regard to individual transaction prices that often moved in opposite directions for given purchasers at given points in time. Dr. Beyer further testified that as a result of this ''pricing structure'' he would be able to determine with common proof whether all class members had been impacted by the alleged conspiracy. However, Dr. Beyer did not assert any particular formula or process by which he would accomplish this. Rather, he offered only conclusory promises that he could do it using the generally recognized methods of benchmark and regression analyses.[19]

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[11] Id.

[12] Id at 153, 155.

[13] Id. at 153 (emphasis added).

[14] *See Lumco Indus., Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 174 (E.D. Pa. 1997) (citing *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524 (M.D. Fla. 1996)); *see also In re Plastic Cutlery Antitrust Litig.*, No. 96-728, 1998 WL 135703, at *5 (E.D. Pa. Mar. 20, 1998) (quoting *Lumco*).

[15] 259 F.3d 154, 168 (3d Cir. 2001).

[16] No. 01-1652, 2008 WL 2699390, at *18 (D.N.J. Apr. 14, 2008) (internal citations omitted).

[17] 2006 WL 6172035, at *10 (E.D. Pa. Aug. 31, 2006) (vacated and remanded by Third Circuit on January, 29, 2009, Nos. 07-2159 and 07-2418, for further proceedings consistent with *Hydrogen Peroxide*); *see also In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030, 2006 WL 891362, at *14 (D.N.J. Apr. 4, 2006) (declining ''to weigh the arguments of the plaintiffs' expert and the defendants' expert'' when analyzing whether common evidence of injury predominates).

[18] *See, e.g., In re K-Dur Antitrust Litig.*, No. 01-1652, 2008 WL 2699390, at *13-14 (D.N.J. Apr. 14, 2008); *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 03-1556, 2007 WL 4150666, at *13-19 (M.D. Pa. Nov. 19, 2007); *In re Plastic Additives Antitrust Litig.*, No. 03-2038, 2006 WL 6172035, at *5-*9 (E.D. Pa. Aug. 31, 2006); *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030, 2006 WL 891362, at *10-*11 (D.N.J. Apr. 4, 2006).

[19] Interestingly, Dr. Beyer could not deliver on these promises in his merits expert report which was submitted prior to the Third Circuit decision on class certification. There Dr. Beyer was forced to abandon three years of the court-certified

In contrast, defendants' expert, Janusz A. Ordover, studied actual transaction prices, production cost data, and market production and demand data, over the entire alleged class period. He testified to a number of significant evidentiary opinions based on his analysis:[20]

1. That despite an intervening list price increase announcement, direct purchasers of the same grade and concentration of hydrogen peroxide from the same defendant/supplier in the same timeframe during the class period, were just as likely to have been charged a lower price (compared to their most recent prior purchase) or experienced no price change whatsoever, as they were to have been charged a higher price; and
2. That the average prices of the most common grades and concentrations of hydrogen peroxide were decreasing overall throughout the class period, despite overall increasing demand and input costs.
3. That the several grades of hydrogen peroxide were subject to different supply and demand conditions
4. That plaintiffs' use of average transaction prices to argue that all customers' prices moved together masked the reality that many customers' prices did not move at all or moved down while others moved up.

Taken individually or in combination, Dr. Ordover's conclusions were compelling evidence that to determine whether any particular class member paid an artificially inflated price (*i.e.*, suffered antitrust impact), the court would need to consider proof unique to that class member, such as the particular terms of its purchase contracts with defendants. Without an individualized inquiry, defendants argued, there would be no way for the court to determine whether class members whose prices fell during the class period suffered any injury, *i.e.*, that their prices would have been even lower but for the alleged conspiracy.

Not surprisingly, however, given the prevailing law in the Third Circuit, the district court certified plaintiffs' proposed class with little modification,[21] and without any evaluation of the compelling factual and expert evidence proffered by defendants in opposition. In its opinion,[22] the court acknowledged the existence of Dr. Ordover's testimony, but did not evaluate the credibility or substance of his conclusions. Nor did the court attempt to reconcile Dr. Ordover's testimony with the conflicting testimony of Dr. Beyer. Instead, the District Court accepted Dr. Beyer's testimony at face value, stating that it ''will not do here to make judgments about whether plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants.''[23] The court further stated that plaintiffs need only make a ''threshold showing'' at class certification that the Rule 23(b)(3) predominance requirement is met.[24]

The district court also made statements in its decision that would have likely helped to lower plaintiffs' bar even further in future cases. The court stated that ''[s]o long as plaintiffs demonstrate their *intention* to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice.''[25] The court also stated that because civil antitrust actions in horizontal price-fixing cases are a supplement to government enforcement, when a court is in ''doubt as to whether or not to certify a class action, the court should err in favor of allowing the class.''[26] As summed up by the Third Circuit, it did not matter to the district court that Dr. Beyer ''had not completed any benchmark or regression analyses, and the court would not require plaintiffs to show at the certification stage that either method would work.''[27]

The Third Circuit Departs From its Prior Case Law to Raise the Bar at Class Certification

The Third Circuit did not hear argument on the case until April 2008,[28] and its opinion did not issue until almost a full two years following the district court's order certifying a class.[29] The Third Circuit's opinion vacating the *Hydrogen Peroxide* class was a striking (though to the defense bar, welcome) departure from the Third Circuit's decades-long leniency towards plaintiffs at class certification—especially in horizontal price-fixing cases.

The Third Circuit stated that to rely upon a mere "threshold showing" as the district court did here "risks misapplying Rule 23" and "is an inadequate and improper standard."

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class certification period to make his formula show an overcharge. When that same formula was applied to the entire class period, no overcharge was shown.

[20] Among the many expert conclusions to which Dr. Ordover testified during the district court proceedings, the Third Circuit identified those listed here as informing its decision to vacate the class certification. *See Hydrogen Peroxide*, No. 07-1689, at 21-24.

[21] The court shaved a few months off the beginning of the alleged class period, which it certified as beginning on the date of the first defendant price increase announcement within the proposed period.

[22] *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163 (E.D. Pa. Jan 19, 2007).

[23] Id. at 10.

[24] Id. at 20.

[25] Id. at 10.

[26] Id. at 4.

[27] *Hydrogen Peroxide*, No. 07-1689, at 26.

[28] By the time the appeal was heard by the three-judge panel of the Third Circuit in April 2008, all defendants except FMC and Arkema had settled with the direct purchaser class.

[29] In the interim, and shortly before the Third Circuit heard oral argument in *Hydrogen Peroxide*, it ruled in *Am. Seed Co. v. Monsanto Co.* that post-*Linerboard* presuming impact under *Bogosian* was no longer sufficient on its own to meet the requirements of Rule 23(b)(3), and that such a presumption must also ''be supported by some additional amount of empirical evidence.'' 271 Fed. Appx. 138 (3d Cir. Jan. 14, 2008). Nevertheless, after this decision district courts still certified classes relying solely on the *Bogosian* doctrine. *See Teva Pharmaceuticals USA, Inc. v. Abbott Laboratories*, 252 F.R.D. 213, 230-31 (D. Del. Aug. 18, 2008); *Sullivan v. DB Investments, Inc.*, No. 04-2819, 2008 U.S. Dist. LEXIS 81146, at * 29 (D.N.J. May 22, 2008).

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''risks misapplying Rule 23'' and ''is an inadequate and improper standard.''[30] The appeals court also stated that the district court's statements suggesting that doubt should be resolved in favor of class certification ''invite error,'' and that ''the court should not suppress 'doubt' as to whether a Rule 23 requirement is met—no matter the area of substantive law.''[31] The court set forth a new standard to govern the evaluation and sufficiency of evidence at class certification—one that broadly applies to class treatment of any case under Rule 23.[32] Specifically, the court ruled that district courts must:

1. Make findings that each Rule 23 requirement is met by a preponderance of the evidence;
2. Resolve all factual and legal disputes relevant to class certification even if they overlap with the merits of the cause of action; and
3. Consider all relevant evidence – including expert testimony in opposition to class certification.[33]

Applying this new standard, the Third Circuit emphasized that the district court ''did not confront Ordover's analysis or his substantive rebuttal of Beyer's points.''[34] In particular, the district court erroneously thought it was barred from addressing ''Ordover's finding of substantial price disparities among similarly situated purchasers of hydrogen peroxide.''[35] The Third Circuit further cited Dr. Ordover's expert testimony to observe that in the hydrogen peroxide industry ''price was lower, not higher, at the end of the lengthy class period than at the beginning . . . [and] production of hydrogen peroxide was increasing rather than decreasing,'' thereby distinguishing this case from the facts that gave rise to a presumption of classwide impact in *Bogosian*.[36]

The Third Circuit also found only ''surface similarities between this case and *Linerboard*,'' *i.e.*, that Dr. Beyer was the plaintiffs' expert in both cases and ''proposed'' in both cases to demonstrate classwide impact.[37] However, the court emphasized that *Linerboard* never addressed the standard for considering defendants' opposition evidence—which the court in *In re Hydrogen Peroxide* was now setting down.[38] In contrast, the Third Circuit stated, ''Ordover disputed Beyer's characterizations of the market and the alleged pricing structure.''[39]

Underscoring how critical it is for district courts not to avoid, but to resolve, such disputes, the Third Circuit explained that the salient question is not whether plaintiffs' theory of classwide impact from the alleged conspiracy is plausible notwithstanding decreasing prices over the class period and the divergence in price movements experienced by similarly situated customers.[40] Rather, the salient question at class certification is ''whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class.''[41] The Third Circuit remanded the class certification question back to the district court to consider ''all relevant evidence and arguments'' and make findings as to whether each Rule 23 requirement is met—though such findings may not be binding at trial.[42]

The Third Circuit said that the salient question at class certification is "whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class."

In reaching its opinion, the Third Circuit drew guidance from a number of key sources. The court particularly emphasized the import of the 2003 amendments to Rule 23—which (a) changed the timing of the court's evaluation from ''as soon as practicable'' to ''an early practicable time,'' thereby permitting discovery necessary to address the question, a purpose the Third Circuit acknowledged in its 2004 decision, *Weiss v. Regal Collections*,[43] and (b) removed the provision that class certification decisions ''may be conditional.''[44] In combination, the court explained, these amendments dictate that ''a district court ''errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining'' that each Rule 23 requirement is met.[45]

The Third Circuit further relied[46] on like decisions of sister circuits, such as the Second Circuit in *In re Initial Public Offerings Securities Litigation*,[47] and the U.S. Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,[48] which ''cautioned that certain antitrust class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims.''

Class Certification Going Forward

The Third Circuit has now set a clear standard for district courts to use to evaluate evidence for and against class certification under Rule 23, giving new teeth to the U.S. Supreme Court's long-standing requirement that a district court conduct a ''rigorous analysis'' of class certification prerequisites.[49] This decision is likely to have a number of practical effects at the class certification stage.

First and foremost, plaintiffs would be well advised to be more judicious in their motions for class certification, constraining their proposed classes to time periods, products and circumstances for which the evidence

[30] *Hydrogen Peroxide*, No. 07-1689, at 41.
[31] Id. at 42.
[32] Id. at 5.
[33] Id. at 38-40.
[34] Id. at 44.
[35] Id.
[36] Id. at 53.
[37] Id. at 49.
[38] Id. at 50.
[39] Id.
[40] Id.
[41] Id.
[42] Id. at 48, 50-51.
[43] 385 F.3d 337 (3d Cir. 2004).
[44] *Hydrogen Peroxide*, No. 07-1689, at 34-38.
[45] Id. at 38.
[46] Id. at 13, 45, 46 & n.24, 48.
[47] 471 F.3d 24 (2d Cir. 2006).
[48] 127 S.Ct. 1955, 1967 (2007).
[49] *Falcon*, 457 U.S. 147 (1982).

can reasonably support a Rule 23(b)(3) certification. Second, both plaintiffs and defendants may seek more fact discovery prior to briefing on class certification. Plaintiffs will need to more carefully study individual transaction pricing, and possibly cost-related data. Similarly, defendants will be motivated to further extend the scope of their discovery of class representative plaintiffs, and third parties if applicable, to oppose certification. Finally, the selection and presentation of expert evidence—especially by the defense—will be of paramount importance. Because of the complex economics typically inherent in horizontal price-fixing cases, the court's decision is likely to turn on the most credible, thorough, and digestible expert opinion. And whereas class certification had become predominantly a decision district courts made on the parties' papers alone, hearings on class certification may now be more commonplace as courts seek to evaluate the credibility of the parties' experts first hand in an effort to conform with the Third Circuit's new standard.

District courts are now required to weigh all relevant factual and expert evidence, even if such evidence conflicts, and make findings about whether plaintiffs have met all Rule 23 requirements by a preponderance of the evidence. Plaintiffs will certainly need to make a better case for class certification than they have typically been required to make pre-*Hydrogen Peroxide*. But by all indications, defendants opposing class certification in the Third Circuit will finally have an opportunity to deliver the match-winning punch.

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