

## *In re Hydrogen Peroxide*: Reinforcing Rigorous Analysis for Class Action Certification

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“[D]enying or granting class certification is often the defining moment in class actions (for it may sound the ‘death knell’ of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants).”<sup>1</sup>

### I. INTRODUCTION

Despite district courts defining their own, and often conflicting, standards for evaluating class certification motions, the Supreme Court has remained silent on the question of what facts plaintiffs must show in support of a motion for class action certification.<sup>2</sup> Initially, the Supreme Court noted that “nothing in . . . [Federal Rule of Civil Procedure (FRCP) 23] gives a court any authority to conduct a preliminary inquiry into the merits of a suit . . . to determine whether it may be maintained as a class action.”<sup>3</sup> Later, the Supreme Court somewhat clarified its position, stating that a “[c]lass action[] may only be certified if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied.”<sup>4</sup> To complete such a rigorous analysis, the Court

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1. *In re Hydrogen Peroxide Antitrust Litig. (Hydrogen Peroxide II)*, 552 F.3d 305, 310 (3d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)).

2. *See In re Initial Pub. Offering Sec. Litig. (In re IPO)*, 471 F.3d 24, 33–34 (2d Cir. 2006).

3. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974). *But see* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (“[C]lass determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’” (quoting *Mercantile Nat’l Bank v. Langdeau*, 371 U.S. 555, 558 (1963))); *Livesay*, 437 U.S. at 469 n.12 (“The more complex determinations . . . entail even greater entanglement with the merits.” (quoting 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911, 485 n.45 (1976))).

4. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (emphasis added).

continued, it “may be necessary for the court to probe behind the pleadings.”<sup>5</sup> But the Supreme Court has failed to provide any further guidance of what constitutes such a rigorous analysis and the role a court must take in responding to conflicting expert testimony.<sup>6</sup>

Recently, the Third Circuit announced a clearly defined rigorous analysis standard for class certification in *In re Hydrogen Peroxide Antitrust Litigation (In re Hydrogen)*.<sup>7</sup> This standard, outlining a court’s role and involvement, should be adopted by the Supreme Court. In reversing certification of a massive class action based on the absence of sufficient proof, the *In re Hydrogen* court held that a lower court has not conducted a rigorous analysis without inquiring into and resolving whether the requirements for class certification were met.<sup>8</sup> “Only upon a consideration of the elements underpinning [a plaintiff’s] . . . claims” can a court determine whether the FRCP 23 requirements for a class action have been satisfied.<sup>9</sup> The *In re Hydrogen* court’s application is just one example that illustrates the continuing struggle among courts addressing the requirements of class certification.<sup>10</sup>

While previous decisions have supported the need for a court to conduct a thorough examination of each FRCP 23 requirement, only *In re Hydrogen* held that a court should address *and resolve* any conflicting evidence as to whether the requirements have been satisfied.<sup>11</sup> Moreover, in clearly defining this rigorous analysis standard, the Third Circuit in *In re Hydrogen* concluded that a court should also evaluate the admissibility of expert testimony when determining whether the plaintiff can meet FRCP 23 requirements for class certification, even if it leads to threshold determinations about the credibility of competing expert opinions.<sup>12</sup>

In *In re Hydrogen*, direct purchasers of hydrogen peroxide and other chemicals brought an antitrust class action suit against various chemical manufacturers claiming a conspiracy of price-fixing spanning several

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5. *Id.* at 160.

6. See *In re IPO*, 471 F.3d at 33–34.

7. See *Hydrogen Peroxide II*, 552 F.3d 305, 307 (3d Cir. 2008).

8. *Id.*

9. Principal Brief for Radioshack Corp. Following Order Granting Permission to Appeal (F.R.C.P. 23(f)) at 40, *Kamar v. Radioshack Corp.*, No. 09-55674 (9th Cir. Apr. 14, 2010) (discussing *Hydrogen Peroxide II*, 552 F.3d at 311).

10. *Hydrogen Peroxide II*, 552 F.3d at 307; see, e.g., *In re IPO*, 471 F.3d 24, 39–40 (2d Cir. 2006); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1224–25 (9th Cir. 2007).

11. Jeffrey S. Klein et al., *Courts Must Resolve “Battle of the Experts” Before Class Certification*, N.Y. L.J., (Aug. 3, 2009), <http://www.weil.com/news/pubdetail.aspx?pub=9558>.

12. *Hydrogen Peroxide II*, 552 F.3d at 323.

years.<sup>13</sup> After extensive discovery, the plaintiffs moved to certify the suit as a class action.<sup>14</sup> Despite conflicting expert testimony presented by both sides regarding the class certification requirements, mainly concerning the predominance requirement—whether the issues common to the class predominated over individual issues—the district court certified the class.<sup>15</sup> The defendants then appealed the class certification order, arguing that the district court erred by failing to meaningfully consider the defendants’ expert, applying too lenient of a standard of proof to the plaintiffs’ expert, and inferring a presumption of impact.<sup>16</sup> The Third Circuit agreed that the district court failed to adequately consider expert testimony and applied too lenient a proof standard in evaluating the predominance requirement; the court then vacated and remanded the class certification order.<sup>17</sup>

In vacating the class certification order, the Third Circuit clarified three key aspects that courts within its circuit must apply when considering class certification motions.<sup>18</sup> First, a court must consider all relevant evidence and arguments, including expert testimony offered by either party.<sup>19</sup> While this may result in a “battle of the experts” to decide class certification, the Third Circuit emphasized that conflicting expert testimony, like the other requirements under FRCP 23, must be subject to a rigorous analysis.<sup>20</sup> Therefore, a court must resolve any relevant and possibly conflicting expert testimony at the certification stage.<sup>21</sup>

Second, decisions to certify a class action require more than a mere “threshold showing” that each FRCP 23 requirement is met.<sup>22</sup> Rather, factual determinations supporting each requirement must be based on a preponderance of the evidence.<sup>23</sup> The Third Circuit requires more than an “intention” to satisfy the procedural requirements: each FRCP 23 requirement must be met, “not just supported by some evidence.”<sup>24</sup>

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13. *Id.* at 307–08.

14. *Id.* at 308.

15. *In re Hydrogen Peroxide Antitrust Litig. (In re Hydrogen)*, 240 F.R.D. 163, 167 (E.D. Pa. 2007).

16. *Hydrogen Peroxide II*, 552 F.3d at 312.

17. *Id.* at 325–27. The court of appeals held that the district court applied an improperly lenient proof standard and that the district court failed to adequately consider the opinion of the manufacturer’s expert economist. *Id.* at 323–24.

18. *Id.* at 307.

19. *Id.*

20. *Id.* at 323.

21. *Id.*

22. *Id.* at 307.

23. *Id.* While the Third Circuit’s “preponderance of evidence” requirement involves a higher showing by the plaintiff, this Comment will not focus exclusively on the burden of proof requirement at the precertification stage.

24. *Id.* at 321 (quoting *In re IPO*, 471 F.3d 24, 33 (2d Cir. 2006)).

Finally, a court must resolve all factual and legal disputes relevant to class certification, even if these disputes overlap with the merits of the claim.<sup>25</sup> As noted by the Third Circuit, prior to *In re Hydrogen* a number of district courts applied a rigorous analysis including preliminary inquiry into the resolution of conflicting expert testimony as necessary to evaluate a FRCP 23 requirement.<sup>26</sup> But some courts declined to apply this analysis because of concern for the potential overlap with the merits of the plaintiffs' claim. Yet a court must first determine the legal elements of the plaintiffs' claim before it can determine whether the requirements of FRCP 23 have been met.<sup>27</sup> Therefore, in conducting a rigorous analysis, a court must make at least a preliminary decision on the merits of a case by applying the alleged facts to the legal elements, which requires more than a court's determination of whether a legal element of the plaintiffs' claim is satisfied.<sup>28</sup>

Although binding only in the Third Circuit, *In re Hydrogen* has the potential to substantially assist other circuit courts and the class certification process in general. The majority opinion was written by Chief Judge Anthony J. Scirica, a leading civil procedure scholar, who sets forth a persuasive argument for courts to take a heightened role in promoting efficient use of the legal system and curbing potential abuse of class actions.<sup>29</sup> The Third Circuit provides a clear and concise rigorous analysis standard for class certification that can easily serve as guidance for the circuits, in contrast to the Supreme Court's vague assertions and repeated avoidance of core FRCP 23 requirements for class certification.<sup>30</sup> In light of the current circuit split regarding class certification requirements and the Supreme Court's failure to articulate a clear standard for rigorous analysis, Supreme Court involvement is clearly needed to address the issue of a court's involvement and to adopt a reinforced rigorous analysis standard prior to class certification.

This Comment explores the reasons why the Third Circuit's high rigorous analysis standard, which increases a district court's role in the class certification process, should be reviewed and adopted by the Su-

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25. *Id.* at 307.

26. *See, e.g., In re IPO*, 471 F.3d 24, 42 (2d Cir. 2006); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

27. *Hydrogen Peroxide II*, 552 F.3d at 311; *see also Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984).

28. Appellant's Reply Brief at 22, *Kamar v. Radioshack Corp.*, No. 09-55674 (9th Cir. Apr. 14, 2010).

29. Klein et al., *supra* note 11.

30. *Year-End Update on Class Actions: Explosive Growth in Class Actions Continues Despite Mounting Obstacles to Certification*, GIBSON, DUNN & CRUTCHER L.L.P. PUBL'NS, Feb. 10, 2009, <http://www.gibsondunn.com/publications/pages/Year-EndUpdateOnClassActions.aspx>.

preme Court. Part II contains an overview of the history of class actions, the class certification process, and the procedural requirements under FRCP 23. Part III analyzes the Third Circuit's rigorous analysis standard for certification of a class action and discusses the three standards that district courts must apply when considering class certification motions. Part IV explores other relevant federal court class certification decisions, examines the principal case at odds with the Third Circuit (the Ninth Circuit case *Dukes v. Wal-Mart*), and explains the need for further Supreme Court clarification. Part IV also explains why Supreme Court involvement is needed to resolve this class certification issue and why the Court should adopt the *In re Hydrogen* rigorous analysis standard. Part V summarizes this Comment and argues in support of a high rigorous analysis standard for class certification. Part VI concludes.

## II. OVERVIEW OF CLASS ACTIONS AND PROCEDURAL REQUIREMENTS

### *A. History of Class Actions*

A "class action" is a lawsuit in which a group of people with the same or similar injuries caused by a product, action, or omission sue as a group.<sup>31</sup> The action can be brought by one or more individuals on behalf of the larger group or the "class."<sup>32</sup> Because many of the individuals' same or similar injuries may be minor, providing little incentive to pursue legal redress on their own, the value of consolidated claims can be more attractive than individual lawsuits.<sup>33</sup> Moreover, the "promotion of efficiency and economy of litigation" are well-established as the most important benefits and goals of a class action suit.<sup>34</sup>

Class action suits have been popular judicial remedies because they are viable options for plaintiffs to seek redress. Although class actions became widely available with the promulgation of the Federal Rules of Civil Procedure in 1938 and the enactment of FRCP 23, the use of class actions in various legal arenas has expanded over the years.<sup>35</sup> More recently, plaintiffs' attorneys have found an incentive to file class actions because of the potential for multimillion-dollar judgments or settlements

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31. *Class Action Cases*, FINDLAW.COM, <http://public.findlaw.com/library/legal-system/class-action-cases.html> (last visited Oct. 7, 2010).

32. ROBERT H. KLONOFF, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL* 15 (2d ed. 2004).

33. *Id.* at 11–12; *Class Action Cases*, *supra* note 31.

34. See *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 349 (1983) (discussing *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974)).

35. FED. R. CIV. P. 23; see also *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

resulting in large attorney-fee awards that accompany such judgments.<sup>36</sup> In connection with the popular class action trend, courts have viewed their role in managing and monitoring class action suits as an affirmative function, not only in evaluating class certification but also in administering the litigation once a class has been certified.<sup>37</sup> A court's increased involvement causes it to evaluate and resolve any conflicts at the pre-certification stage, which directly corresponds to how much a plaintiff must demonstrate to meet the FRCP 23 requirements for class certification.<sup>38</sup>

The federal government also recognized the courts' heightened role in class action cases when President George W. Bush signed the Class Action Fairness Act (the Act) on February 18, 2005.<sup>39</sup> In support of an active court, the Act directs courts to give greater scrutiny to class action settlements and to limit fees for plaintiffs' attorneys.<sup>40</sup> In addition, the Act offers greater protection to individual class members, such as consumer protection provisions, which incorporates the idea that justice may not be served in all class action suits if individuals are not appropriately compensated for their injuries.<sup>41</sup> While protecting individual class members, the Act seeks to prevent plaintiffs of class actions from having unfair bargaining power to force a settlement.<sup>42</sup> While class action lawsuits can help numerous plaintiffs obtain relief for harms that affected a large group of people who would not otherwise recover, they also run the risk of abuse by attorneys seeking multimillion-dollar settlements or attorney fees. Therefore, the tension among these conflicting interests supports the need for an active court to evaluate the appropriate litigation structure and then to manage such suits, if certified.

### B. FRCP 23 Requirements and Criteria

Recognizing the effectiveness of class action lawsuits, courts have permitted the use of class actions in various substantive legal areas, such as defective products, fraud, corporate misconduct, and employment

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36. LITTLER MENDELSON, P.C., *THE NATIONAL EMPLOYER—2009/2010 EDITION* 671 (2009) (on file with author).

37. *Id.* at 673.

38. *Id.*

39. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

40. 28 U.S.C. §§ 1712–14 (2006). The Act also provides for federal jurisdiction over certain state law class actions. 28 U.S.C. § 1332(d) (2006).

41. 28 U.S.C. §§ 1712–14.

42. Class Action Fairness Act, § 2. The Act also recognizes the efficient and valuable purpose served by a class action structure—one of the goals is to provide both plaintiffs and defendants broader access to federal courts. *Id.*

practices.<sup>43</sup> But FRCP 23 requires courts to take multiple steps under subsections (a) and (b) for a case to be certified as a class action.<sup>44</sup>

In order for a class action to be certified under FRCP 23, four criteria must initially be met under subsection (a).<sup>45</sup> First, FRCP 23 requires numerosity: the proposed class size must be so “numerous that joinder of all members is impracticable.”<sup>46</sup> Second, commonality of questions of law and fact must exist.<sup>47</sup> Under the commonality requirement, there must be “questions of law or fact common to the class,”<sup>48</sup> and these issues are such that the “resolution of [them] will advance the litigation.”<sup>49</sup> Third, FRCP 23 requires typicality: the “claims or defenses of the representative parties” must be “typical of the claims or defenses of the class.”<sup>50</sup> Fourth, FRCP 23 requires adequacy of representation: a determination that “the representative parties will fairly and adequately protect the interests of the class.”<sup>51</sup>

Once these criteria are satisfied, the plaintiff must also satisfy one of the three categories of FRCP 23(b) in order for the suit to be certified as a class action.<sup>52</sup> The three categories include: (1) the risk of inconsistent or impaired adjudication; (2) action by the defendant on grounds generally applicable to the class; and (3) common questions of law or fact predominate and class resolution is superior to other available methods.<sup>53</sup>

The requirements of FRCP 23 are fact heavy, which results in courts having to examine evidence in order to determine whether a class should be certified.<sup>54</sup> But FRCP 23 is silent on which evidence the plaintiffs must show in order to meet the FRCP 23 requirements,<sup>55</sup> and the

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43. KLONOFF, *supra* note 32, at 9–10; *see also* *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (noting that class actions did not originate with the adoption of the Federal Rules, but were an “invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable”).

44. FED. R. CIV. P. 23.

45. *Id.* at 23(a).

46. *Id.* at 23(a)(1); *see* *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 559–60 (8th Cir. 1982).

47. FED. R. CIV. P. 23(a)(2); *see* *Harris v. Gen. Dev. Corp.*, 127 F.R.D. 655, 661 (N.D. Ill. 1989).

48. FED. R. CIV. P. 23(a)(2).

49. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998).

50. FED. R. CIV. P. 23(a)(3); *see* *Sprague*, 133 F.3d at 399.

51. FED. R. CIV. P. 23(a)(4); *see* *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

52. FED. R. CIV. P. 23(b); *see also* FED. R. CIV. P. 23 advisory committee’s notes on 1966 amendments.

53. FED. R. CIV. P. 23(b)(3); FED. R. CIV. P. 23(b)(1)(A)–(B), (b)(2). Discussion of the various elements for each of these categories is beyond the scope of this Comment.

54. *In re IPO*, 471 F.3d 24, 40 (2d Cir. 2006).

55. FED. R. CIV. P. 23.

Supreme Court has yet to clarify the matter.<sup>56</sup> Through rigorous analysis, the court must ensure a continuing balance between protecting plaintiffs' access to the courts and protecting defendants from forced settlements upon class action certification.

*C. The Use of Expert Testimony During the Certification Stage*

Both the party seeking class certification and the party opposing certification often present expert testimony regarding whether the various FRCP 23 requirements have been met.<sup>57</sup> Lower courts have struggled with the limited and sometimes conflicting Supreme Court guidance on how to address the FRCP 23 requirements—especially regarding conflicting expert testimony.<sup>58</sup> Part of this confusion stems from the FRCP 23 requirements; for instance, “whether common or individualized issues predominate can only be made in reference to the legal elements of the claims.”<sup>59</sup> FRCP 23 requires the court to look for commonalities between the plaintiffs' claims to determine whether the suit can be certified as a class action.<sup>60</sup> Therefore, when a court is looking at the commonalities of the plaintiffs' claims, it must look at the legal elements of those claims. These legal elements are often supported by expert testimony. As a result, the court must determine the credibility of the expert testimony before certifying the class action.

Although it appears that the court's review of the elements of a claim would unavoidably involve the merits of the case, the court is not asked to decide the merits at this stage but, more narrowly, to determine whether the plaintiffs' claims support the FRCP 23 requirements. In the past, many courts refused to make credibility determinations about competing experts' opinions at the class certification stage.<sup>61</sup> Yet it appears appellate courts have started to resist such a laissez-faire approach and have more recently required lower courts to evaluate and weigh expert testimony during the class certification stage, even if weighing the testimony leads the court to make “threshold determination[s]” about the credibility of conflicting expert testimony.<sup>62</sup>

As noted previously, the Supreme Court has failed to provide any guidance on what constitutes a rigorous analysis or the role the court

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56. See *In re IPO*, 471 F.3d at 33 n.4.

57. Margaret Lyle & Andrew Wirmani, *Courts Deciding Class Certification Must Resolve “Dueling” Expert Testimony*, AM. BAR ASS'N, <http://www.abanet.org/litigation/committees/classactions/class-certification-expert-testimony.html> (last visited Oct. 10, 2010).

58. *Id.*

59. Appellant's Reply Brief, *supra* note 28, at 22.

60. See *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998).

61. Lyle & Wirmani, *supra* note 57.

62. Lyle & Wirmani, *supra* note 57.

must take in deciding conflicting expert testimony.<sup>63</sup> In light of this lack of direction from the Supreme Court, district courts have struggled with the extent of their role during the precertification process.<sup>64</sup> Since expert testimony may focus on almost every element of the plaintiffs' claim, from commonality and predominance to proof and damages, clear guidance on how a court should evaluate expert testimony for certification purposes is necessary. The Third Circuit's articulation of a clear rigorous analysis standard in *In re Hydrogen* is an appropriate response to the struggles of the district courts and further supports the need for Supreme Court involvement and guidance in the class certification process.<sup>65</sup>

#### D. Approaches to Evaluating Expert Testimony

In evaluating expert testimony at the class certification stage, district courts often take one of two approaches. The first approach is to allow the expert testimony as long as it is not "fatally flawed."<sup>66</sup> In following this approach, many district courts decline to consider whether the plaintiffs have stated a cause of action or whether the plaintiffs would prevail on the merits of the action.<sup>67</sup> Rather, district courts determine "whether [plaintiffs have] shown, based on a methodology that [is] not fatally flawed, that the requirements of [FRCP] 23 were met."<sup>68</sup> Courts often refer to this approach as the "some showing" standard, stating that the "showing may take the form of, for example, expert opinions, evidence (by document, affidavit, live testimony, or otherwise), or the uncontested allegations of the complaint."<sup>69</sup> Imposing such a low threshold requirement on plaintiffs' presentation of expert testimony gives plaintiffs greater bargaining power in settlement negotiations because the suit is more likely to be certified as a class action under such a lenient approach.

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63. *In re IPO*, 471 F.3d at 30–33 n.4.

64. Kenneth Ewing, *Hydrogen Peroxide: The Crest of the Wave*, 5 CPI ANTITRUST CHRONICLE (May 14, 2009), <https://www.competitionpolicyinternational.com/emhydrogen-peroxide-em-the-crest-of-the-wave>.

65. This Comment does not focus on whether the circuit split may be resolved through further rulemaking or legislative action, especially in light of the recent *Dukes v. Wal-Mart* petition for certiorari. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), cert. granted, 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277).

66. *In re Visa Check/MasterMoney Antitrust Litig. (Visa Check)*, 280 F.3d 124, 134–35 (2d Cir. 2001); see *In re IPO*, 471 F.3d at 42.

67. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974) ("The question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather, whether the requirements of Rule 23 are met.").

68. *Visa Check*, 280 F.3d at 135; see *In re IPO*, 471 F.3d at 36–38.

69. *In re Initial Pub. Offering Secs. Litig.*, 227 F.R.D. 65, 93 (S.D.N.Y. 2004); see *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999); see also *Visa Check*, 280 F.3d at 134–35.

The second approach courts use to evaluate expert testimony is derived from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>70</sup> The standard announced by the *Daubert* Court was applied pursuant to Federal Rule of Evidence 702, which permits an expert to testify “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>71</sup> A trial judge then acts as a “gatekeeper” and must “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”<sup>72</sup> Therefore, the expert testimony must rest “on a reliable foundation” and be “relevant to the task at hand” in order to be admitted.<sup>73</sup> While *Daubert* requires more of a plaintiff in presenting expert testimony, it does not provide courts specific guidance on how to evaluate reliable, yet conflicting, expert testimony at the class certification stage.

Although both approaches are valuable tools for courts to use in evaluating and resolving conflicting expert testimony, these approaches are seldom used in this manner. Lower courts have permitted conflicting expert testimony to help satisfy class certification requirements as long as the testimony has met one of the two standards. As set forth by the Third Circuit in *In re Hydrogen*, rigorous analysis requires courts to take their evaluation of expert testimony one step further by tying the information provided by the expert back to the legal elements of the plaintiffs’ claims for class certification.<sup>74</sup> In so holding, the Third Circuit asserts that when a court fails to examine the elements of the claim going to each FRCP 23 requirement, the court circumvents the rigorous analysis required and fails to meet its duty at the class certification stage.<sup>75</sup>

### III. HISTORY OF *IN RE HYDROGEN PEROXIDE*

The Supreme Court previously explained that a district court must conduct a rigorous analysis of the moving party’s claims to determine whether the requirements of FRCP 23 can be established.<sup>76</sup> The Third Circuit’s decision in *In re Hydrogen* helps define the “rigorous analysis” standard.

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70. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

71. *Id.* at 588 (quoting FED. R. EVID. 702).

72. *Id.* at 589.

73. *Id.* at 597; *see also* FED. R. EVID. 702. Hence, if the expert testimony is irrelevant or unreliable, it must be excluded.

74. *Hydrogen Peroxide II*, 552 F.3d 305, 324 (3d Cir. 2008).

75. *Id.*

76. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 147 (1982) (holding the district court erred in permitting plaintiff to maintain a failure-to-hire employment class action without any specific presentation identifying the questions of law or fact that were common to claims of employee and of class members the plaintiff sought to represent).

*A. The District Court's Holding: Intent to Prove*

The reasoning of the Third Circuit's announcement of a clear rigorous analysis standard cannot be fully appreciated without an understanding of the underlying nature of *In re Hydrogen*. On January 31, 2005, direct purchasers of hydrogen peroxide and related chemicals brought an antitrust action against eighteen hydrogen peroxide manufacturers, alleging a price-fixing conspiracy over eleven years.<sup>77</sup> After an investigation of possible violations of antitrust law in the hydrogen peroxide industry, multiple class action filings followed.<sup>78</sup> The district court consolidated the cases, resulting in the direct purchaser action where plaintiffs requested to be certified as a class action.<sup>79</sup>

Pursuant to FRCP 23(b)(3), plaintiffs claimed that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for . . . adjudicating the controversy."<sup>80</sup> As part of the plaintiffs' antitrust violation claims, every class member was required to prove at least some antitrust impact resulting from the alleged violation.<sup>81</sup> The court reasoned that "[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable."<sup>82</sup>

The district court found that the plaintiffs satisfied the FRCP 23 requirements for class certification.<sup>83</sup> The district court noted that at the class certification stage, the plaintiffs' burden is not to prove the elements of antitrust impact, but rather to demonstrate that the elements are

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77. *In re Hydrogen*, 240 F.R.D. 163, 166–67 (E.D. Pa. 2007). Hydrogen peroxide, an inorganic liquid, is available in solutions of different concentrations and grades depending on its use. While all the defendants sold the standard-grade concentration, not all defendants sold all the other available concentration grades in the same amounts. *Hydrogen Peroxide II*, 552 F.3d at 307.

78. *Hydrogen Peroxide II*, 552 F.3d at 308.

79. *In re Hydrogen*, 240 F.R.D. at 167. Upon transfer to the United States District Court for the Eastern District of Pennsylvania, the court consolidated and divided the cases. *Id.*

80. FED. R. CIV. P. 23(b)(3). Predominance and superiority are the dual requirements of FRCP 23(b)(3). Therefore, a class action may be maintained when the questions common to the class predominate over the questions affecting individual members. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hydrogen Peroxide II*, 552 F.3d at 310–11 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

81. *Hydrogen Peroxide II*, 552 F.3d at 311; see also *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977). The impact element in antitrust cases is often critically important for "evaluating Rule 23(b)(3)'s predominance requirement because it . . . may call for individual, as opposed to common, proof." *Hydrogen Peroxide II*, 552 F.3d at 311; see also *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008).

82. *Hydrogen Peroxide II*, 552 F.3d at 311 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001)). If damages cannot be established through proof common to the class, but only to individual class members, then the predominance requirement is not met. *Id.*

83. *In re Hydrogen*, 240 F.R.D. at 177.

capable of proof at trial through evidence that is common to the class rather than individual members.<sup>84</sup> Therefore, the key issues at this pre-certification stage include the district court's "assessment of the available evidence and the [method(s)] by which [the] plaintiffs propose to use the evidence to prove [their claims] at trial."<sup>85</sup>

### 1. Conflicting Expert Testimony

The conflicting expert testimony presented in *In re Hydrogen* focused on two contentious points: (1) evidence of common proof and (2) proof of damages.<sup>86</sup> The plaintiffs offered the expert opinion and testimony of economist John C. Beyer, Ph.D.<sup>87</sup> The defendants offered the expert opinion of their own economist, Janusz A. Ordover, Ph.D., who disputed many of Dr. Beyer's opinions regarding the alleged conspiracy claim.<sup>88</sup>

For the first issue of common proof, the plaintiffs' expert, Dr. Beyer, claimed that "there is common proof that can be used to demonstrate that the alleged conspiracy to raise prices, restrict output, and allocate customers would have impacted all purchasers of hydrogen peroxide . . . ."<sup>89</sup> A "market analysis," according to Dr. Beyer, "suggested that conditions in the hydrogen peroxide industry favored a conspiracy that would have impacted the entire class."<sup>90</sup> In response, the defendants argued that the plaintiffs failed to provide proof of damages or impact using evidence common to potential class members.<sup>91</sup> Dr. Ordover directly questioned whether a "formulaic approach exist[ed] by which impact could be demonstrated and damages to the class could be reasonably calculated."<sup>92</sup>

In support of the plaintiffs' contention that the conspiracy would have impacted the entire class, Dr. Beyer set out four main arguments.<sup>93</sup> First, he asserted that hydrogen peroxide and related chemicals are

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84. *Id.* at 174.

85. *Hydrogen Peroxide II*, 552 F.3d at 312.

86. *Id.* at 312–13.

87. *Id.* at 312.

88. *Id.* at 313.

89. *Id.* at 312.

90. *Id.*

91. *Id.* at 314. The defendants' argument focused on FRCP 23(b)(3)'s requirement that questions of law or fact common to the class members predominate and that the proposed class action be superior to other available methods. *Id.* at 310–11.

92. *Id.* at 313.

93. *Id.* at 312–13. As discussed above, impact is often important for the purposes of the predominance requirement because it may call for individual, as opposed to common, proof. *Id.* at 311; see also *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008).

“fungible, undifferentiated commodity products.”<sup>94</sup> Second, Dr. Beyer stated that hydrogen peroxide “production is heavily concentrated in a small group of manufacturers.”<sup>95</sup> Third, he argued that the “high barriers [of] entry in[to] the industry and no close economic substitutes[] prevent[ed] . . . competitors from entering the market[] and undercutting prices.”<sup>96</sup> Finally, according to Dr. Beyer, the manufacturers’ markets “overlapped, so that purchasers would have benefitted from price competition if not for the alleged conspiracy.”<sup>97</sup> Dr. Beyer also contended that a “pricing structure” in the hydrogen peroxide industry existed, which further suggested a “conspiracy [that] would have impacted all class members.”<sup>98</sup>

But Dr. Ordover disputed Dr. Beyer’s finding that hydrogen peroxide is fungible and argued that an individualized assessment of the impact on an alleged conspiracy was required.<sup>99</sup> Moreover, Dr. Ordover presented evidence that common proof was not available to all class members and claimed that Dr. Beyer only “promised” to overcome the obstacle of explaining common proof without showing or even suggesting how such method might be proved.<sup>100</sup>

For the second contested issue regarding proof of damages, Dr. Beyer identified two “potential approaches” for estimating damages on a class-wide basis: benchmark and regression analyses.<sup>101</sup> Dr. Beyer did not take into account individual transaction prices in either approach but relied instead on list-price-increase announcements and average prices.<sup>102</sup> He contended that either method “could be used to estimate the prices plaintiffs would have faced but for the conspiracy” and that “sufficient reliable data” existed to allow the completion of one or both of the potential approaches.<sup>103</sup> Finally, Dr. Beyer generally stated that the benchmark analysis and the regression analysis were two approaches that could be used to provide an estimate of damages if the suit was certified

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94. *Hydrogen Peroxide II*, 552 F.3d at 312. This means “producers compete[d] on price, not quality or other features.” *Id.*

95. *Id.*

96. *Id.* at 312–13.

97. *Id.* at 313.

98. *Id.* Dr. Beyer claimed that this pricing structure existed because prices across producers, grades, concentrations, and end uses “moved similarly over time.” *Id.*

99. *Id.* at 313–14. Dr. Ordover claimed that the various grades had different supply characteristics and, thus, different demand requirements. *Id.* at 313.

100. *Id.* at 314.

101. *Id.* at 313.

102. *Id.*

103. *Id.*

as a class action, but he did not provide any particular formula or process to prove common impact in the instant case.<sup>104</sup>

In response, Dr. Ordover asserted that the statistical methods Dr. Beyer proposed to demonstrate common impact and damages were not feasible; rather, a case-by-case inquiry was needed to determine price fluctuations for any class member.<sup>105</sup> In addition to presenting Dr. Ordover's testimony, the defendants moved to exclude the affidavit and testimony of Dr. Beyer as unreliable under *Daubert*.<sup>106</sup> Because the plaintiffs' analysis of FRCP 23(b) factors depended largely on Dr. Beyer's affidavit, the district court had to first resolve the motion to exclude the testimony, as well as the "irreconcilable" expert analyses presented by the parties.<sup>107</sup> After consideration, the district court ultimately denied the defendants' motion.<sup>108</sup>

## 2. Summary of the District Court's Reasoning

The district court based its reasoning on two underlying considerations: the preponderance of the evidence and the credibility of experts. First, the district court found the predominance requirement was satisfied because the plaintiffs' "market analysis" and "pricing structure" analysis were sufficiently independent, and the plaintiffs were not required to produce any further evidence in support of a motion for class certification.<sup>109</sup> In finding that the predominance requirement was met, the district court permitted the plaintiffs to use common, as opposed to individualized, evidence to prove antitrust impact at trial.<sup>110</sup>

Next, in consideration of the defendants' *Daubert* motion to exclude Dr. Beyer's testimony, the district court noted that the evidence was being offered for the limited purpose of class certification; therefore, the court's "inquiry is perhaps less exacting than it might be for evidence . . . presented at trial."<sup>111</sup> The district court found, rather narrowly,

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104. *Id.* at 314.

105. *Id.* Dr. Ordover disputed Dr. Beyer's price-structuring analysis and presented further evidence that list prices were not reliable and that the use of average prices by Dr. Beyer did not reflect average customer prices. Additionally, Dr. Ordover asserted that there was a tendency for prices charged to individuals to move together, which indicated that the alleged conspiracy could not be shown to have a class-wide impact. *Id.*

106. *Id.* at 314–15.

107. *Id.* at 315; *In re Hydrogen*, 240 F.R.D. 163, 170 (E.D. Pa. 2007).

108. *Hydrogen Peroxide II*, 552 F.3d at 315.

109. *Id.*

110. *Id.* Additionally, the district court concluded that hydrogen peroxide is fungible and rejected the defendants' objections to this finding of fungibility. *Id.*

111. *In re Hydrogen*, 240 F.R.D. at 170. The district court continued: "To preclude such evidence at the class certification stage, it must be shown that the opinion is the kind of 'junk science'

that Dr. Beyer's qualifications met the two evidence requirements: the witness possessed "specialized knowledge" and demonstrated "reliability and fit."<sup>112</sup>

The court also found that the plaintiffs' proposed methods were sufficient for proving impact and damages.<sup>113</sup> Although Dr. Beyer did not complete any specific analysis, the district court allowed his use of general analyses at the precertification stage.<sup>114</sup> The district court rejected the defendants' attack on the reliability of Dr. Beyer's methods, while acknowledging that the defendants' own expert reached a different conclusion.<sup>115</sup> Moreover, the district court refused to require the plaintiffs to demonstrate that either of their proposed methods would work at the class certification stage; rather, the court concluded that the plaintiffs' intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members was sufficient.<sup>116</sup>

Finally, the district court refused to "weigh the relative credibility of the parties' experts" because requiring the court to choose between opinions of battling experts would take a vital piece of fact-finding away from the jury.<sup>117</sup> But the court then stated that at the precertification stage of the suit, it was not concerned with whether it found the plaintiffs' evidence convincing because the persuasiveness of the evidence was a question for the jury.<sup>118</sup> The court reasoned that the plaintiffs "need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the class."<sup>119</sup> By relying on plaintiffs' intentions to prove their claims with generalized expert testi-

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that a *Daubert* inquiry at this preliminary stage ought to screen." *Id.* (quoting *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n.13 (E.D. Pa. 2001)).

112. *Id.* at 170-71. "Reliability is a question of whether the 'opinion is based on valid reasoning and reliable methodology.'" *Id.* at 171 (quoting *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997)). "The question of fit requires us to assess the Rule 702 requirement that 'the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact.'" *Id.* (quoting *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003)).

113. *Id.* at 175.

114. *Id.*

115. *Id.* at 171. The defendants specifically attacked Dr. Beyer's methods to reveal an industry-wide pricing structure. *Id.*

116. *Id.* at 170.

117. *Id.* at 171. The court believed that "plaintiffs would be able to show antitrust impact on all purchasers merely by showing that defendants kept list prices that were artificially high because of their conspiracy." *Id.* at 174.

118. *Id.* at 174 n.16.

119. *Id.* at 174 (quoting *Lumco Indus., Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 174 (E.D. Pa. 1997)). Moreover, the court did not address the defendants' expert's reports in determining whether the FRCP 23 requirements were met. *Hydrogen Peroxide II*, 552 F.3d 305, 322 (3d Cir. 2008).

mony, the court fell short of undergoing the rigorous analysis required to determine whether the plaintiffs' claims could be collectively adjudicated. The district court then went on to grant the plaintiffs' motion to certify the suit as a class action.<sup>120</sup>

*B. The Third Circuit's Rigorous Analysis for Class Certification*

On appeal of the district court's determination to certify the class, the *In re Hydrogen* defendants claimed that the district court applied too lenient of a standard of proof, failed to consider the defendants' expert with any significant weight, and applied an erroneous presumption of antitrust impact.<sup>121</sup> Specifically, the defendants contended that the district court erred "by (1) accepting only a 'threshold showing' by plaintiffs, . . . (2) requiring only that plaintiffs demonstrate their 'intention' to prove impact on a class-wide basis, and (3) singling out antitrust actions as appropriate for class treatment even when compliance with [FRCP] 23 is 'in doubt.'"<sup>122</sup>

The United States Court of Appeals for the Third Circuit granted review to consider "the standards a district court applies when deciding whether to certify a class" under FRCP 23.<sup>123</sup> Ultimately, the Third Circuit found the district court erred in two ways: (1) it failed to meaningfully consider the views of the defendants' expert while crediting the plaintiffs' expert, and (2) it applied too lenient of a standard of proof for class certification.<sup>124</sup> The Third Circuit then explained that a lower court "must make whatever factual and legal inquiries are necessary [to] consider all relevant evidence and arguments presented by the parties."<sup>125</sup> The court noted that the party seeking certification must convince a district court that the FRCP 23 requirements are met, but it also acknowledged that little guidance is available on the "proper standard of 'proof' for class certification."<sup>126</sup>

The Third Circuit clarified "three key aspects" for district courts to apply when considering class certification motions.<sup>127</sup> First, a district court is obligated to consider all relevant evidence and arguments, which includes expert testimony offered by either the party seeking or opposing

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120. *Hydrogen Peroxide II*, 552 F.3d at 322.

121. *Id.* at 312.

122. *Id.* at 315.

123. *Id.* at 307.

124. *Id.* at 321–22.

125. *Id.* at 307.

126. *Id.* at 315–16. The Third Circuit reiterated the well-established rule that a class may not be certified without a finding that each FRCP 23 requirement is met. *Id.* at 310.

127. *Id.* at 307.

class certification.<sup>128</sup> Therefore, a district court's assumption that it is not permitted to weigh expert opinions presented by the parties is erroneous.<sup>129</sup> Rather, for class certification, when confronted with expert opinions, district courts must undergo the "rigorous analysis" required under FRCP 23.<sup>130</sup> The Third Circuit then rejected the *Daubert* standard as the sole standard for an expert opinion when determining if class certification is appropriate.<sup>131</sup> In addition to applying the *Daubert* standard, the district court must be persuaded by the expert opinion, regardless of whether that inquiry implicates the expert's credibility.<sup>132</sup> The Third Circuit noted that "[w]eighing conflicting expert testimony at the [class] certification stage is not only permissible [but] it may be integral to the rigorous analysis [FRCP] 23 demands."<sup>133</sup>

Second, the Third Circuit concluded that "the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of [FRCP] 23."<sup>134</sup> The Third Circuit emphasized that the FRCP 23 requirements are not "mere pleading rules."<sup>135</sup> A district court must "delve beyond the pleadings to determine whether the requirements for class certification are satisfied."<sup>136</sup> A "threshold showing" by the party seeking class certification is "inadequate"; such factual determinations must be supported by a preponderance of the evidence.<sup>137</sup> Under this second requirement, the Third Circuit rejected the district court's holding that the plaintiffs' intention to prove impact through common evidence was sufficient and stated that a party's "assurance to the court that it intends or plans to meet the [FRCP 23] requirements" is insufficient.<sup>138</sup>

Third, the Third Circuit held that a district court "must resolve . . . legal disputes relevant to class certification, even if [the disputes] overlap with the merits—including [those] touching on elements of the cause of action."<sup>139</sup> The Third Circuit's conclusion stemmed from

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128. *Id.*

129. *Id.* at 322.

130. *Id.* at 323.

131. *Id.*

132. *Id.* at 324.

133. *Id.* at 323. Interestingly, on appeal, the Third Circuit noted that "Beyer's and Ordovery's analyses are irreconcilable." *Id.* at 314.

134. *Id.* at 320. In addition, the Third Circuit discouraged the district court's use of the term "threshold showing" because it could imply a more lenient standard for the party seeking certification, which the Third Circuit rejected. *Id.* at 321.

135. *Id.* at 316 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001)).

136. *Id.*

137. *Id.* at 320–21.

138. *Id.* at 318.

139. *Id.* at 307.

the Supreme Court's directive in *Eisen v. Carlisle & Jacquelin*, which provided that there is "nothing in either the language or history of [FRCP] 23 that 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."<sup>140</sup> Yet, the Third Circuit explained that "*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a [FRCP] 23 requirement."<sup>141</sup> It further explained that "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."<sup>142</sup>

Because the plaintiffs had the burden to demonstrate that the element of impact was capable of proof at trial through evidence common to the class, the Third Circuit stated that expert testimony "calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial."<sup>143</sup> Therefore, a district court "errs as a matter of law" when it does not resolve a factual dispute relevant to the FRCP 23 requirements.<sup>144</sup>

Hence, by failing to resolve such a factual dispute, district courts risk erroneously certifying a class action when class certification may not be the best form of adjudication to ensure justice for both parties. By prematurely certifying a class, the court gives the plaintiffs significant power over the suit—especially the settlement—which may not result in fairness for all parties involved given related concerns about remedies. A court, by resolving conflicting information regarding the legal elements of the plaintiffs' claim at the precertification stage through a rigorous analysis, ensures protection for the defendants while allowing plaintiffs, who could not bring their claims otherwise, access to the courts.

#### IV. CIRCUIT SPLITS AND POSSIBLE IMPLICATIONS OF A HIGH RIGOROUS ANALYSIS STANDARD

The Third Circuit's decision in *In re Hydrogen* not only articulates the highest rigorous analysis standard for class certification to date but also highlights the inconsistency of class certification standards among

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140. *Id.* at 316–17 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). *Eisen* involved a class action by odd-lot traders against brokerage firms and the New York Stock Exchange for alleged violations of antitrust and securities laws. *Eisen*, 417 U.S. at 156.

141. *Hydrogen Peroxide II*, 552 F.3d at 317.

142. *Id.* at 316.

143. *Id.* at 312.

144. *Id.* at 320.

the various circuit courts. In the last thirty-five years, the Supreme Court has decided fewer than a dozen cases involving core class certification issues that address the procedural aspects of FRCP 23, expert testimony related to the FRCP 23 requirements, and the level of the court's role in determining class certification. Despite deciding other class action issues in various areas of law,<sup>145</sup> the Supreme Court has neither expanded upon nor provided further clarification regarding its ambiguous statement that “[c]lass certification is proper only ‘if the trial court is satisfied, after a rigorous analysis, that the prerequisites’ of [FRCP] 23 are met.”<sup>146</sup>

The *In re Hydrogen* decision supports the “growing consensus”<sup>147</sup> that the scope of class certification inquiry is broad and FRCP 23 requires district courts to conduct a rigorous analysis that must include a preliminary inquiry of merit issues.<sup>148</sup> Yet, while courts may be moving away from a lenient standard of review, a clear split regarding the level of court involvement exists. The Supreme Court should resolve the circuit split in order to curb misuse of class action suits by plaintiffs and to protect the interests of defendants. This section provides an overview of relevant circuit court decisions, contrasts the principal case at odds with *In re Hydrogen*, *Dukes v. Wal-Mart*, and discusses possible implications of the Third Circuit's high rigorous analysis standard.

#### A. Relevant Circuit Court Decisions

While other circuit courts have attempted to define and strengthen the parameters of the rigorous analysis standard, the Third Circuit adopted the highest rigorous analysis standard yet for class certification, which built upon a prior Second Circuit decision, *In re Initial Public Offering Securities Litigation (In re IPO)*.<sup>149</sup> Following the lead of the Third, Fifth, Seventh, Eighth, and Eleventh Circuits, the Second Circuit

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145. Marcia Coyle, *Class Action Fairness Act Achieves Goal, but With a Catch*, NAT'L L.J., Feb. 13, 2009, <http://www.law.com/jsp/article.jsp?id=1202428246880>; see also *Year-End Update on Class Actions*, *supra* note 30 (such areas of law include tax law, ERISA, Title VII, and the Age Discrimination in Employment Act). For a review of prior Supreme Court decisions, see, for example, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (notice to class members); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (limits on communication with unnamed members of class); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982) (typicality); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984) (res judicata); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (choice of law); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (settlement class actions); and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (“limited fund” class actions).

146. *Hydrogen Peroxide II*, 552 F.3d at 309 (quoting *Gen. Tel. Co. of the Sw.*, 457 U.S. at 161).

147. Klein et al., *supra* note 11.

148. See, e.g., *In re IPO*, 471 F.3d 24, 27 (2d Cir. 2006); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

149. *In re IPO*, 471 F.3d at 41.

in *In re IPO* held “that a district court may and, depending on the case, must, consider and determine questions relating to the merits of a case”<sup>150</sup> and rejected the more lenient standard of proof.<sup>151</sup>

Prior to *In re Hydrogen*, *In re IPO* exemplified the general consensus among circuit courts, which adopted a moderate view of the rigorous analysis standard. The Second Circuit’s view, as consistent with the other moderate circuits, generally discouraged district courts from turning class certification into a “mini-trial” and did not apply the exact preponderance of the evidence standard.<sup>152</sup> Yet, the Second Circuit held that before certifying a class action, a district court must make a “definitive assessment” of the class requirements, and the court’s obligation to “make such determinations is not lessened by overlap between a [FRCP] 23 requirement and a merits issue.”<sup>153</sup> Finally, the Second Circuit noted that any determination of the FRCP 23 requirements was only for purposes of class certification and is not binding on the trier of fact.<sup>154</sup> Although the Second Circuit in *In re IPO* expanded the district court’s role in class certification, it failed to take the final step set forth in *In re Hydrogen*—that a court should not just weigh *but also resolve* any conflicting evidence or expert testimony at the precertification stage.

### 1. Principal Case at Odds: *Dukes v. Wal-Mart*

Imagine yourself as the in-house counsel of a growing corporation who was just notified that a court certified a class action lawsuit involving alleged discriminatory practices based on excessive subjectivity by various store managers. While the sheer size of the class and potential financial impact on the company are intimidating and quite frightening, the suit is ominous for several other reasons.<sup>155</sup>

First, the court certified the class based on the plaintiffs’ mere intention to prove the class requirements, despite acknowledgments that

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150. Joel Haims, Matthew D’Amore & Mark David McPherson, *United States: Second Circuit Decision Clarifies the Standards for Class Certification*, MONDAQ BUS. BRIEFING, Dec. 15, 2006, <http://www.mondaq.com/unitedstates/article.asp?articleid=45000>; see e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001); *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009).

151. *In re IPO*, 471 F.3d at 41. In *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 484 (2d Cir. 2008), a securities class action, the Second Circuit continued down the path of requiring plaintiffs to establish, through evidentiary showings at the class certification stage, that the FRCP 23 factors are satisfied.

152. *In re IPO*, 471 F.3d at 41.

153. *Id.*

154. *Id.*

155. See *Dukes v. Wal-Mart, Inc. (Dukes)*, 474 F.3d 1214, 1222 (9th Cir. 2007). Note that this hypothetical fact pattern is based on Wal-Mart’s current case. *Id.*

much of the sociology expert's opinion was conjecture. Additionally, the court's avoidance in resolving the conflicting expert testimony at the precertification stage reduces available litigation strategies. Once the plaintiffs' class has been certified as a class action, it appears that the defendants only have two options: attempt to contest the class certification through costly, time-consuming litigation or initiate settlement discussions. Defending the class action with the potential for massive financial liability, not to mention reputational harm, does not appear to be a possibility at this point.

In reality, the nation's largest employer currently faces a similar situation in *Dukes v. Wal-Mart (Dukes)*, where the Ninth Circuit recently affirmed the district court's decision to certify the class.<sup>156</sup> Although a district court has broad discretion in certifying a class action, the *Dukes* decision highlights the need for a court's heightened role in performing a rigorous analysis, especially when conflicting expert testimony is presented.<sup>157</sup> Without this rigorous analysis by courts, plaintiffs, such as those in *Dukes*, are given tremendous bargaining power at the certification stage whether or not the legal elements of their claims have been or may be satisfied if the suit continues.

Not all courts have followed the trend toward applying a high rigorous analysis standard for class certification.<sup>158</sup> *Dukes* is an example of a court confusing the merits of the case as applied to the facts versus determining the procedural FRCP 23 elements needed for the plaintiffs' claim as part of the court's rigorous analysis. The *Dukes* court allowed the largest class action case in history to proceed without any resolution of the highly conflicting expert testimony on whether the FRCP 23 requirements had been satisfied.

In *Dukes*, six female employees who were allegedly subjected to Wal-Mart's systematic discriminatory pay and promotion policies brought suit under Title VII on behalf of all other similarly situated women at Wal-Mart.<sup>159</sup> The district court in *Dukes*, as affirmed by the United States Court of Appeals for the Ninth Circuit, permitted class certification based on the plaintiffs' *intention* to prove their claims, without

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156. Wal-Mart recently filed a petition for certiorari on August 25, 2010. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277). According to the Supreme Court's online docket for *Wal-Mart Stores, Inc. v. Dukes*, Case No. 10-277, the plaintiffs' response to Wal-Mart's petition was due on September 24, 2010.

157. *See Dukes*, 474 F.3d at 1214.

158. *Id.* at 1222-23; *Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571, 628 (9th Cir. 2010).

159. *Dukes*, 474 F.3d at 1222. The potential class is composed of as many as 1.5 million women currently or formerly employed by Wal-Mart in its 3,400 stores in 41 regions of the United States. *Id.*

requiring the plaintiffs to *actually* prove their claims. Additionally, the court failed to examine or resolve the conflicting expert testimony.<sup>160</sup>

The class in *Dukes* was certified pursuant to FRCP 23 because the court found that questions of law or fact common to the class members predominated over any questions involving only individual members.<sup>161</sup> Both parties appealed but for different reasons.<sup>162</sup> Specifically, Wal-Mart, the largest private employer in the United States, argued that the plaintiffs' evidence—expert opinions, statistical evidence, and anecdotal evidence—was not sufficient to raise an inference of discrimination.<sup>163</sup> Further, Wal-Mart contended that because of the subjective decision making of managers regarding pay and promotions, the district court's finding of commonality could not be supported.<sup>164</sup>

In a two-to-one decision, the Ninth Circuit affirmed the class certification, resulting in the largest gender-discrimination case in United States history.<sup>165</sup> The appellate court found that the district court acted within its broad discretion by properly considering expert opinions from the plaintiffs' sociologist and statistician that were offered to show commonality.<sup>166</sup> While other circuits have not typically approved social science testimony, the Ninth Circuit permitted the sociological expert's testimony by stating that the expert had a "reliable basis" to satisfy *Daubert*.<sup>167</sup> The court then accepted the opinions of the plaintiffs' sociology expert despite acknowledging the opinions lacked certainty. The Ninth Circuit further reasoned that "social science statistics may add probative value to plaintiffs' class action claims."<sup>168</sup>

The Ninth Circuit rejected Wal-Mart's assertion that the plaintiffs' sociological expert did not meet the necessary standards for experts under *Daubert*. Instead, the Ninth Circuit adopted the district court's reasoning that the "necessary standards" argument went to the weight of the expert opinion, not its admissibility.<sup>169</sup> The Ninth Circuit also rejected

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160. *Id.* at 1222–23.

161. *Id.* at 1231. The district court granted in part and denied in part the plaintiffs' motion for class certification. In response to Wal-Mart's challenges to the evidence, the court responded that the "objections are predominantly of the type that go to the weight of the evidence, and thus should properly be addressed by a jury considering the merits." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 166 (N.D. Cal. 2004).

162. *Dukes*, 474 F.3d at 1223. The content of the plaintiffs' appeal is outside the scope of this Comment.

163. *Id.* at 1222–33. While Wal-Mart did not contest the numerosity requirement, it did challenge the remaining requirements of commonality, typicality, and adequacy of representation. *Id.*

164. *Id.* at 1231.

165. *Id.* at 1244.

166. *Id.* at 1231.

167. *Id.* at 1227.

168. *Id.*

169. *Id.*

Wal-Mart's claims that the district court should have taken into account Wal-Mart's statistical expert testimony and found that the employees exceeded the permissive and minimal burden of establishing commonality through significant evidence.<sup>170</sup> The *Dukes* decision emphasized a court's lenient and limited role by stating that the weight of evidence, like the merits of the claims, were not to be considered at the class certification stage.<sup>171</sup> Plainly, the *Dukes* decision is in direct conflict with the *In re Hydrogen* decision and fails to follow the general trend of circuit courts that support at least some form of examination into the weight of evidence offered at the precertification stage.

## 2. Dissent in *Dukes v. Wal-Mart*: Class Certification Improper

Judge Andrew J. Kleinfeld's dissenting opinion in *Dukes*, from the two-judge majority opinion, is more consistent with the Second and Third Circuit views adopting a court's increased role in the precertification process. Judge Kleinfeld believed that the plaintiffs failed to meet the FRCP 23 requirements; thus, class certification was improper.<sup>172</sup> In arguing that class certification in this case would harm both parties in the lawsuit, Judge Kleinfeld commented that he would require the district court to conduct a more in-depth analysis of the evidence to ensure that the FRCP 23 requirements are met.<sup>173</sup> In doing so, a district court judge "must make a 'definitive assessment of [the FRCP] 23 requirements, notwithstanding their overlap with merit issues' and 'must receive enough evidence . . . to be satisfied that each [FRCP] 23 requirement has been met.'"<sup>174</sup>

In addition to disputing the majority's finding of commonality, Judge Kleinfeld disagreed with the majority's finding on damages.<sup>175</sup> The district court had rejected Wal-Mart's objections to permitting an *inference* that it engaged in discriminatory practices based on the plain-

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170. *Id.* at 1229–30. The court found the plaintiffs' statistical expert report (examined data at a regional level) to be more probative than Wal-Mart's statistical expert (examined data on a store-department level). *Id.* at 1229, 1231. The evidence provided by both parties focused on company-wide corporate practices and policies, statistical evidence of gender disparities caused by discrimination, and anecdotal evidence of gender bias. *Id.* at 1225–31.

171. *Id.* at 1227.

172. *Id.* at 1244 (Kleinfeld, J., dissenting).

173. *Id.* at 1245. Judge Kleinfeld commented that both parties would be harmed by violating the rights of the women injured and by violating Wal-Mart's constitutional due process rights. *Id.* at 1244.

174. *Id.* at 1245 (quoting *In re IPO*, 471 F.3d 24, 51–52 (2d Cir. 2006)).

175. *Id.* at 1248. Judge Kleinfeld concluded that there were no "questions of law or fact common to the class" and that the "class lacked 'typicality' because the claims or defenses of the representative parties [were] not typical of the claims or defenses of the class." *Id.* at 1245–46 (quoting FED. R. CIV. P. 23(a)(2)–(3)).

tiffs' evidence.<sup>176</sup> In permitting such an inference, the district court believed the information went to the weight of the evidence, rather than the validity; thus, the evidence should be addressed by a jury at the merit phase of the case.<sup>177</sup>

While the *Dukes* decision is deeply concerning to both defendants' counsel and various circuit courts, it appears the Ninth Circuit also recognized the significant impact of the case when later granting Wal-Mart's petition for rehearing. After the Ninth Circuit three-judge panel affirmed the district court's determination to certify the class on February 6, 2007,<sup>178</sup> Wal-Mart promptly filed for a rehearing en banc, contending that the majority committed legal error with regard to whether the grounds for class action certification had been met.<sup>179</sup> On December 11, 2007, the same Ninth Circuit panel withdrew its initial opinion and issued a subsequent, superseding opinion that still permitted the class certification.<sup>180</sup> Wal-Mart again filed for a rehearing en banc.<sup>181</sup> Subsequently, on February 13, 2009, the Ninth Circuit again granted Wal-Mart's petition for a rehearing en banc on the issue of class action certification.<sup>182</sup>

#### *B. Ninth Circuit Upholds Certification of the Largest Nationwide Class in Dukes v. Wal-Mart*

On April 26, 2010, the Ninth Circuit held that the district court did not abuse its discretion by certifying a class of approximately 1.5 million female Wal-Mart employees.<sup>183</sup> In the 6–5 en banc ruling, the court of appeals affirmed in part, and reversed and remanded in part, the class certification order.<sup>184</sup> “[T]he Ninth Circuit also affirmed the district court’s ruling that, although enormous, the class was nonetheless manageable for trial, and that certification did not violate Wal-Mart’s statutory

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176. *Id.* at 1225 (majority opinion) (emphasis added).

177. *Id.*

178. *Id.* at 1222, *withdrawn and superseded by* 509 F.3d 1168 (9th Cir. 2007).

179. *Dukes v. Wal-Mart, Inc. (Dukes II)*, 509 F.3d 1168, 1174 (9th Cir. 2007).

180. *Id.* The panel dismissed the original petition for rehearing in light of its superseding opinion on the grounds that the revised opinion addresses the legal errors claimed in the petition. Among other changes, the Ninth Circuit altered its original opinion regarding admissibility of expert testimony and the use of *Daubert* challenges during a motion for class certification. *Id.* at 1178–80.

181. *See Dukes v. Wal-Mart, Inc.*, 556 F.3d 919, 919 (9th Cir. 2009).

182. *Id.* As a result, the Ninth Circuit’s December 2007 opinion was no longer effective.

183. *Dukes v. Wal-Mart Stores Inc. (Dukes III)*, 603 F.3d 571, 615 (9th Cir. 2010). The class potentially includes all female employees who were employed by Wal-Mart when the lawsuit was filed in 2001 with respect to their claims for injunctive relief, declaratory relief, and back pay resulting from allegations of gender discrimination. *Id.* at 577.

184. *Id.* While the discussion of the appellate court’s finding related to damages is outside the scope of this Comment, the court reversed and remanded the district court’s certification of the employees’ claims for punitive damages. *Id.*

and due process right to defend against each individual claim of discrimination.<sup>185</sup>

Circuit Judge Sandra Ikuta, joined by four other judges including Chief Judge Alex Kozinski, authored the dissent, which emphasized the divided court.<sup>186</sup> The dissenting opinion begins with the following statement:

No court has ever certified a class like this, until now. And with good reason. In this case, six women who have worked in thirteen of Wal-Mart's 3,400 stores seek to represent every woman who has worked in those stores over the course of the last decade—a class estimated in 2001 to include more than 1.5 million women.<sup>187</sup>

The dissent asserted that the district court abused its discretion in two ways: (1) “it failed to follow the Supreme Court’s direction to ‘evaluate carefully the legitimacy of the named plaintiff’s plea that he is a proper class representative under 23(a),’ and to ensure ‘after a rigorous analysis’ that the prerequisites of [FRCP] 23(a) have been met”<sup>188</sup> and (2) “it erred in ignoring Wal-Mart’s statutory right to raise defenses to liability for back pay and punitive damages under Title VII . . . and therefore abused its discretion in holding that the proposed class could be certified under [FRCP] 23(b)(2).”<sup>189</sup>

The dissent stated that the plaintiffs failed to present “significant proof” of a discriminatory practice or policy that Wal-Mart engaged in, which would make it possible for such a large class of female employees to have suffered similar discrimination.<sup>190</sup> The dissent expressed concern about the majority’s conclusion that courts are not bound by *Falcon*’s “significant proof” requirement. The dissent stated that, although the plaintiffs are not required to prove the merits of their claim, *Falcon* does require the plaintiffs to put forth some significant proof more than mere allegations that a general policy of discrimination exists.<sup>191</sup> Thus, the dissent would require more from plaintiffs before a class of that size is certified.<sup>192</sup>

Additionally, the dissent favorably cited *In re Hydrogen* to support its argument that the *Daubert* standard for testimony is to be similarly

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185. *Dukes v. Wal-Mart Stores: En Banc Ninth Circuit Drastically Lowers the Bar for Class Certification*, MAYER BROWN LEGAL UPDATE, May 3, 2010, at 2, available at <http://www.mayerbrown.com/publications/article.asp?id=8939>.

186. *Dukes III*, 603 F.3d at 628 (Ikuta, J., dissenting).

187. *Id.*

188. *Id.* at 631 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982)).

189. *Id.* (internal citations omitted).

190. *Id.* at 628; see *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

191. *Dukes III*, 603 F.3d at 632; see also *Gen. Tel. Co. of the Sw.*, 457 U.S. at 159 n.15.

192. *Dukes III*, 603 F.3d at 634.

applied to both class certification as well as expert testimony relevant at trial: “Expert opinion with respect to class certification, like any matter relevant to a [FRCP] 23 requirement, calls for rigorous analysis.”<sup>193</sup>

Wal-Mart’s lead appellate counsel, Theodore Boutros, Jr., indicated that Wal-Mart would appeal to the U.S. Supreme Court and stated that the decision violates “both due process and federal class action rules, contradicting numerous decisions of other federal appellate courts and the Supreme Court itself.”<sup>194</sup> Subsequently, Wal-Mart filed a petition for certiorari to the Supreme Court. On December 6, 2010, the Supreme Court granted the writ of certiorari and directed the parties to argue whether the class certification ordered under FRCP 23(b)(2) was consistent with FRCP 23(a).<sup>195</sup> As in other stages of this litigation, it is likely that amicus briefs will be filed on behalf of both parties to represent the wide variety of interests and areas that are affected by this decision, such as other employers with stores across the country.

### C. Possible Implications of a Clearly Defined Rigorous Standard

The clearly-articulated rigorous analysis standard for class certification by the Third Circuit in *In re Hydrogen* has the potential for many wide-ranging effects in the world of class action litigation. The Third Circuit opinion makes clear that its holding applies across all substantive areas of the law and is not limited solely to antitrust actions.<sup>196</sup> Therefore, the Third Circuit’s decision will affect class action trial strategy for both plaintiffs and defendants. Although the Third Circuit’s rigorous analysis standard appears beneficial to defendants, the effects of this holding are offset by certain advantages to plaintiffs.

In “many cases, once a class has been certified[,] the defendant must settle, while[,] if no class is certified, the plaintiff [may have] neither the incentive nor the practical ability to maintain the lawsuit.”<sup>197</sup>

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193. *Id.* at 639 (quoting *Hydrogen Peroxide II*, 552 F.3d 305, 323 (3d Cir. 2008)).

194. Tresa Baldas, *Wal-Mart Yells ‘Supreme Court’ after 9th Circuit Certifies Largest Civil Class Action Ever*, NAT’L L.J., Apr. 26, 2010, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202453222347&WalMart\\_yells\\_Supreme\\_Court\\_after\\_th\\_Circuit\\_certifies\\_largest\\_civil\\_class\\_action\\_ever&hbxlogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202453222347&WalMart_yells_Supreme_Court_after_th_Circuit_certifies_largest_civil_class_action_ever&hbxlogin=1). Wal-Mart filed a petition for certiorari on August 25, 2010, No. 10-277, with the following questions for the Court: (1) whether claims for monetary relief can be certified under FRCP 23(b)(2) and, if so, under what circumstances and (2) whether the lower court’s order certifying a class conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and FRCP 23? *Wal-Mart v. Dukes: Pending Petition*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/wal-mart-v-dukes> (last visited Nov. 7, 2010).

195. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277).

196. *Hydrogen Peroxide II*, 552 F.3d 305, 321 (3d Cir. 2008).

197. Donald M. Falk & Fatima Goss Graves, *Federal Court Ruling Undermines Defendants’ Ability to Appeal Class Action Certifications*, 20 LEGAL BACKGROUNDER (2005).

Therefore, if a trial court fails to resolve conflicting testimony as established by the Third Circuit, plaintiffs who present expert testimony with only the “intent” to prove the FRCP 23 requirements will have an unfair, highly influential advantage over defendants. Before the Third Circuit’s decision, plaintiffs may have sought to bring their motion for class certification—the defining moment of the case—early on in the litigation, thereby prematurely sounding the “death knell of the litigation[,] . . . irrespective of the merits of the claims.”<sup>198</sup> Plaintiffs who prevail on the issue of class certification can often force defendants into a strategic settlement rather than risk the potential exposure of facing a jury.

Once a class action is certified, a defendant may not be able to present individual defenses and, instead, may wage a statistical war with the other side—the outcome of which will be decided by jurors who lack the statistical acumen to understand the statistical nuances.<sup>199</sup> Without a clearly-defined rigorous analysis standard, courts may permit hundreds or even millions of plaintiffs (such as in *Dukes*) to join class action suits without giving defendants the opportunity to address individual claims on the merits, which is akin to denying the defendants due process.<sup>200</sup> Such class actions are really no more than “corporate shakedowns” with the companies’ employees and stockholders, and everyone as consumers paying the price.<sup>201</sup> As a result, the Third Circuit provides an appropriate balance between preserving the plaintiffs’ rights to bring class action suits to seek redress and protecting defendants from frivolous class actions.

Although the issue of damages is beyond the scope of this Comment, some courts have questioned whether the plaintiffs would adequately represent the interests of the class by foregoing class certification on damages.<sup>202</sup> Additionally, violations of the defendants’ due process rights may occur if money is taken from the defendants and given to undeserving individuals, such as uninjured class action members. Certain damages calculations, such as punitive damages, are determined without consideration of individual entitlement. Such a calculation should be

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198. *Hydrogen Peroxide II*, 552 F.3d at 310 (citations omitted) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162, 167 (3d Cir. 2001)).

199. Jim Copland, *These Actions Have No Class*, MANHATTAN INST. FOR POL’Y RES., Sept. 15, 2004, [http://www.manhattan-institute.org/html/\\_sfe-these\\_actions.htm](http://www.manhattan-institute.org/html/_sfe-these_actions.htm).

200. *Id.*

201. *Id.*

202. JOEL WM. FRIEDMAN, *THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS* 582–83 (7th ed. 2009) (“[E]ven assuming that the district court could conduct an initial bench trial on the merits of the equitable claims, and that the court actually found in favor of the plaintiffs, it would still be necessary for a single jury to hear and rule on more than 2000 individual claims for compensatory damages.” (quoting *Cooper v. S. Co.*, 390 F.3d 695, 722 (11th Cir. 2004))).

proportionate to actual personal damages; however, when a case has been certified as a class action, the court is unaware of personal damages in the absence of individual determination.<sup>203</sup> Conversely, formulas for damages can also hurt the plaintiffs if uninjured individuals not entitled to compensation are awarded damages. Often these undeserving plaintiffs are lumped into the class action without individual determinations and, as a result, the parties truly injured by the defendant are awarded less in damages.

Accordingly, litigating merit issues at the precertification stage carries with it risks and strategic implications for both defendants and plaintiffs.<sup>204</sup> Although a district court must decide only those “merit issues necessary to deciding class certification, in practice, rulings against defendants on disputed merits issues at the class certification stage may nonetheless negatively slant the court on such issues going forward in a case.”<sup>205</sup> Further, under this clearly-defined rigorous analysis standard, plaintiffs may be reluctant to file a motion for class certification earlier in the process because they must produce expert evidence that satisfies the burden of proof under the FRCP 23 requirements. Requiring plaintiffs to prove more of their case at the precertification stage limits their access to the judicial system; however, plaintiffs must prove these necessary elements later in the suit in order to succeed. Therefore, the rigorous analysis standard requires the plaintiff to prove the FRCP 23 requirements at an earlier stage of the case, and it does not place any undue burden on the plaintiff that is not currently required.

While the Third Circuit’s rigorous analysis standard appears to be beneficial to defendants, the increased discovery prior to class certification may outweigh the benefits of a more involved court. The Third Circuit’s standard is advantageous for defendants because plaintiffs must persuade the court that their expert’s opinion satisfies FRCP 23, rather than put forward a competent expert that merely passes the *Daubert* or “not fatally flawed” standard.<sup>206</sup> This practice of requiring more evidence at an early stage is appropriate given the considerable effect that a class certification has on a case; thus, a court should be able to require more from the plaintiff at the precertification stage to prove that all the FRCP 23 requirements have been met. *In re Hydrogen* strongly favors an early and aggressive defense strategy designed to marshal compelling

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203. *Id.* (discussing *Allen v. Int’l Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004)).

204. *See id.* at 574–75, 580–82.

205. Cooley Godward Kronish, L.L.P., *Third Circuit Clarifies the “Rigorous Analysis” Inquiry District Courts Are to Conduct in Deciding Motions for Class Certification*, COOLEY ALERT!, Feb. 2009, [http://www.cooley.com/files/ALERT\\_ClassCertRigAnalysis.pdf](http://www.cooley.com/files/ALERT_ClassCertRigAnalysis.pdf).

206. Klein et al., *supra* note 11.

fact and expert testimony that demonstrates the FRCP 23 factors cannot be met.<sup>207</sup>

Also, the Third Circuit's rigorous analysis standard gives district courts greater discretion to resolve factual issues at the precertification stage of the case. This greater discretion may result in more extensive pre-discovery and pre-trial evidentiary hearings in order for the court to have all the information necessary to make a decision on the FRCP 23 requirements. Thus, district courts are reluctant to make a determination based solely on motion papers. But if the district court is given greater latitude to resolve conflicting expert testimony by utilizing other tools, such as discovery, to resolve any conflicting reports, then the potential for premature class certification can be reduced.<sup>208</sup> Given the broad inquiry required by courts under such an approach, it may be difficult for defendants to limit class discovery at an early stage in the case. Yet, even with these increased discovery costs, ultimately, it is cost effective for a defendant to contest class certification early rather than fight for a class action to be decertified and be unsuccessful.

Finally, *In re Hydrogen* is likely to influence the Supreme Court because the majority opinion was authored by Chief Judge Anthony J. Scirica,<sup>209</sup> who is a leading figure in civil procedure and oversaw extensive revisions to FRCP 23 during his role as chair of the Standing Committee on Rules of Practice and Procedure. In his decision, Chief Judge Scirica relied on the 2003 Amendments to FRCP 23.<sup>210</sup> The 2003 amendments eliminated the previous language that class certification "may be conditional" and granted on a tentative basis.<sup>211</sup> The revised language now provides for a more thorough evaluation of the FRCP 23 requirements at this earlier stage and the revisions clarified that FRCP 23 neither requires nor encourages premature certification decisions.<sup>212</sup> These revisions are also consistent with the Advisory Committee Notes to the 2003 amendments, which state that "[a]ctive judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ul-

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207. *Year-End Update on Class Actions*, *supra* note 30.

208. Jeffrey J. Greenbaum & Stuart M. Feinblatt, *Hydrogen Peroxide: The Third Circuit's 'Acid Test' for Class Certification*, METROPOLITAN CORP. COUNS. 52 (Apr. 2009).

209. *Hydrogen Peroxide II*, 552 F.3d 305, 306 (3d Cir. 2008); *see also* Klein et al., *supra* note 11.

210. *Hydrogen Peroxide II*, 552 F.3d at 318–20; *see* FED. R. CIV. P. 23 advisory committee's notes on 2003 amendments.

211. *Hydrogen Peroxide II*, 552 F.3d at 319.

212. FED. R. CIV. P. 23 advisory committee's notes on 2003 amendments.

timately wasteful division between ‘certification discovery’ and ‘merits discovery.’”<sup>213</sup>

Although the Third Circuit’s approach in *In re Hydrogen* requires district courts to apply the highest rigorous analysis standard for class certification, the potential effects from its decision have not been fully realized. It is possible that courts may opt for a somewhat less rigorous standard, like that established in *In re IPO*, which appears to strike a middle ground between *In re Hydrogen* and *Dukes*. Yet it seems unlikely that future district courts will follow the reasoning in *Dukes* by allowing certification on mere intent to prove a case based on questionable expert testimony, which is “replete with conjecture.”<sup>214</sup> Which standard will be the leading view remains to be seen given the recent Ninth Circuit decision affirming class certification.

#### V. THE NEED FOR SUPREME COURT INVOLVEMENT AND CLARIFICATION

The Supreme Court should adopt the Third Circuit’s high rigorous analysis standard in order to curb misuse of class actions and ensure fairness for all injured plaintiffs. Rigorous analysis must include a preliminary inquiry into and the resolution of the issues to determine that the FRCP 23 requirements have been met before certifying a class.<sup>215</sup> The need for a clearly defined rigorous analysis standard by the Supreme Court is long overdue. Although different courts have articulated various versions of what such a “rigorous review” might look like, the Supreme Court has not spoken authoritatively on the issue.<sup>216</sup>

Regardless of liability, the threat of a class action is enough to force many defendants to settle a lawsuit rather than risk a trial. “As a result, the key event and driver of risk and exposure in class actions continues to be the court’s decision on whether to certify a class.”<sup>217</sup> Class action trials are less common given the financial and reputational effects at

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213. *Id.*

214. James J. Oh, *Dukes v. Wal-Mart: A Foreboding Class Certification Decision for Employers*, ASAP, July 2004, <http://www.littler.com/PressPublications/Documents/11259.pdf>.

215. At a minimum, the Supreme Court needs to establish clear standards for a rigorous analysis and the level of a court’s involvement in resolving conflicting expert testimony. While not ideal, the Supreme Court may follow the general trend as set forth in *In re IPO*, which held “that a district court may—and, depending on the case, must—consider and determine questions relating to the merits of a case” but without actually resolving such questions. See Haims, D’Amore & McPherson, *supra* note 150.

216. Rebecca Justice Lazarus, *Discovery Prior to Class Certification: New Considerations and Challenges*, 9 MEALEY’S LITIG. REPORT CLASS ACTIONS 1, 3 (2010).

217. *Fourth Annual Workplace Class Action Litigation Report from Seyfarth Shaw Notes Significant Growth in High Stakes Litigation at State Court Levels*, SEYFARTH SHAW, L.L.P., PRESS & NEWS, Jan. 14, 2008 [http://www.seyfarth.com/dir\\_docs/news\\_item/2a69ffe5-df15-475f-a78a-da0661200731\\_documentupload.pdf](http://www.seyfarth.com/dir_docs/news_item/2a69ffe5-df15-475f-a78a-da0661200731_documentupload.pdf).

stake for the defendants.<sup>218</sup> “Class actions are [also] the litigation industry’s weapons of choice because they aggregate so many claims—hundreds, thousands, or (as in the [*Dukes*] case) even millions—even the largest companies are forced to settle or face potential bankruptcy.”<sup>219</sup> Interestingly, the Ninth Circuit, in upholding *Dukes*’s class certification, skimmed past the impact of such settlement pressure: “[n]early every circuit to consider the issue, including our own, has recognized the practical importance of the certification decision as leverage for settlement, yet [FRCP] 23 gives neither party the right to turn the certification decision into a trial.”<sup>220</sup> Often, the numbers are so large that the merits of the case mean little because the expense of litigating the claim and the potentially high verdict in the event of loss can give the plaintiffs’ attorneys a very strong hand despite their weak legal position.<sup>221</sup> These class action settlements and jury awards cost hundreds of millions of dollars—costs that must be recovered through higher prices for goods and services, which ultimately affect the economy as a whole.<sup>222</sup>

The Supreme Court should clarify the standards in class actions to avoid certification issues as highlighted in cases like *Dukes v. Wal-Mart*, which potentially deprive victims of the protection of laws and deny defendants their due process rights.<sup>223</sup> The district court in *Dukes* described the outcome as “rough justice,” proclaiming that it was “better than the alternative of no remedy at all for any class member.”<sup>224</sup> But there is a better approach—the Third Circuit’s rigorous analysis standard. Even though this standard may result in a suit not being certified as a class action, a remedy is still available for actual victims of injury without sacrificing due process for defendants.

Class actions continue to be a primary exposure, which drives corporate legal expenditures and supports the need for Supreme Court involvement. In addition, the current struggles in the economy appear to fuel class action lawsuits that result in inconsistent rulings due to the lack of a clear standard. Class actions continue to be filed across many substantive areas of the law.<sup>225</sup> Without a clear standard set forth by the Su-

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218. Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, CATO INST., Summer 2007, at 52.

219. Copland, *supra* note 199.

220. *Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571, 591 (9th Cir. 2010).

221. Copland, *supra* note 199.

222. California Citizens Against Lawsuit Abuse (CALA), *Class Action Abuse*, CALA.COM, <http://www.cala.com/issues/class-action> (last visited Oct. 12, 2010).

223. Eric S. Dreiband, *Willie Sutton was a Piker*, WALL ST. J., Jan. 7, 2006, at A7.

224. *Id.* (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 177 (N.D. Cal. 2004)).

225. *Year-End Update on Class Actions*, *supra* note 30.

preme Court, the varying and sometimes conflicting circuit standards will continue.

Due to the lack of a clearly articulated rigorous analysis standard and splits among the circuit courts, attorneys have found other legal avenues to pursue class action issues. For example, in recent years, the Class Action Fairness Act (the Act) has continued to play a significant role in class action suits in evolving case law developments, including creative plaintiff strategies to prevent the effectiveness of the Act.<sup>226</sup> Moreover, President Barack Obama's administration adopted a more protective view of workers' rights than the Bush administration, including increased funding for several government and enforcement agencies, which could directly affect the future of class action suits because these agencies are able to bring suits on behalf of injured parties.<sup>227</sup>

The stakes of class action litigation can be significant and the financial risks enormous. When certified as class actions based on a lenient rigorous analysis standard, the result is an unfair advantage to the plaintiffs. The potential for massive settlements (in *Dukes* for example) increases the financial stakes as plaintiffs' lawyers are likely to push the envelope to craft damages theories to expand the size of classes and the scope of recoveries.<sup>228</sup> Additionally, class actions adversely affect the market share of a corporation and its reputation in the marketplace.<sup>229</sup> Even if cases are never actually certified, the possibility of the litigation expanding into a formal class action raises the stakes significantly, perhaps requiring a more aggressive defense or resulting in a settlement on an individual basis at a premium.<sup>230</sup> Not only for judicial efficiency reasons, but also for economic reasons, the Supreme Court's immediate involvement is needed, and a clear standard has been established by the Third Circuit that can and should be adopted. The Third Circuit's rigorous analysis standard is an appropriate balance between providing plaintiffs access to the judicial system to seek redress and providing appropriate protections to defendants against unsupported class action motions.

Additionally, Supreme Court involvement is necessary because class certification decisions can also be "susceptible to two sources of

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226. Coyle, *supra* note 145. "While many multi-state cases are being pushed into the federal system, the plaintiffs' bar has responded to CAFA by filing 'single state' class suits to avoid CAFA's removal provisions." *Year-End Update on Class Actions*, *supra* note 30.

227. *Year-End Update on Class Actions*, *supra* note 30.

228. *Seyfarth Shaw's Fifth Annual Workplace Class Action Litig. Report Shows Financial Stakes in Workplace Class Action Litig. Continue to Surge*, SEYFARTH SHAW, L.L.P., PRESS RELEASE, Jan. 13, 2009 [http://www.seyfarth.com/dir\\_docs/news\\_item/67a01808-3b3f-4c99-bd6f-bf48d5f0a9ce\\_documentupload.pdf](http://www.seyfarth.com/dir_docs/news_item/67a01808-3b3f-4c99-bd6f-bf48d5f0a9ce_documentupload.pdf).

229. Moller, *supra* note 218.

230. *Year-End Update on Class Actions*, *supra* note 30.

bias: political bias and bias that stems from [the] courts' own self-interest in docket clearance."<sup>231</sup> First, loose certification standards are "vulnerable to trial judges' political biases" because they require little of a judge in evaluating the merits of the FRCP 23 requirements.<sup>232</sup> Additionally, some courts, including the Ninth Circuit, discern from FRCP 23's vague text a basis for ignoring *Daubert* entirely when assessing whether certification of a class action is proper based on expert testimony.<sup>233</sup> Because FRCP 23's text points in different directions, it invites exploitation by judges who would prefer to ignore the *Daubert* standard entirely.<sup>234</sup>

Even if political ideology is not a source of bias, trial courts remain at risk of bias in class action suits because they have a material interest in promoting certification for one simple reason: certification promotes docket clearance.<sup>235</sup> Rule 23 "directs that certification decisions should be made 'at an early practicable time' and, in design, forces certification decisions to be made before a trial of the case."<sup>236</sup> "Based on this, a number of courts, including the Ninth Circuit panel that decided *Dukes*, have held that consideration of the 'merits' is entirely off-limits at the class certification stage."<sup>237</sup> "*Daubert* is a merits-based inquiry because it relates to the admissibility of evidence at trial; therefore, these courts argue that a full-blown *Daubert* analysis is premature at the class certification stage."<sup>238</sup> Yet the Third Circuit's articulation of a rigorous analysis requiring plaintiffs to present a preponderance of evidence that the FRCP 23 requirements are met would reduce the number of courts that apply their own inconsistent standards to expert testimony.

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231. Moller, *supra* note 218, at 53.

232. *Id.* For example, a trial judge with a "strong aversion to large corporations might . . . want to punish big corporate interests, 'sending a message' that they must respect the little guy. . . . Conversely, a pro-business trial judge might want to go out of the way to deny class certification of meritorious claims." *Id.*

233. *Id.* at 54.

234. *Id.*

235. *Id.* "Dockets are congested because of the explosion of statutes and because of the modern rules that govern when legal issues can be litigated more than once (called 'preclusion'). The explosion of vague, overlapping laws gives plaintiffs many potential vehicles for prosecuting complaints against a defendant. . . . At the same time, modern rules of 'preclusion' apply more strictly to defendants than plaintiffs. A defendant who loses a lawsuit against one plaintiff typically cannot re-litigate his [or her] failed defenses against a different plaintiff asserting similar claims." *Id.* at 54–55.

236. *Id.* at 54.

237. *Id.*

238. *Id.* Yet this reading is not the only one "because other portions of Rule 23 point in an opposite direction. . . . Judge Frank Easterbrook notes, 'if some of the [other] considerations under Rule 23(b)(3), such as "the difficulties likely to be encountered in the management of a class action," overlap the merits—as they do . . . where it is not possible to evaluate impending difficulties without [a merits-based inquiry]—then the judge must make a preliminary inquiry into the merits.'" *Id.*

More recently, there appears to be change on the horizon—the Ninth Circuit demonstrated a willingness to take a step back in the defense-oriented ruling *Vinole v. Countrywide Home Loans, Inc.*<sup>239</sup> In *Vinole*, class certification was denied in an action for failure to pay over-time brought by current and former Countrywide external home loan consultants.<sup>240</sup> The Ninth Circuit affirmed the district court’s holding, which denied class certification where no rule or decisional authority prohibited the defendants from filing their motion to deny certification before the plaintiffs filed their motion to certify the class.<sup>241</sup> A district court, the Ninth Circuit noted, “must take into consideration all factors in favor of, or against, class certification.”<sup>242</sup> Moreover, “the overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy.”<sup>243</sup> The Ninth Circuit concluded that the district court had conducted a proper inquiry into the FRCP 23 requirements and did not abuse its discretion in deciding not to certify the proposed class. The decision confirmed that a defendant is entitled to bring a motion under FRCP 23 advocating that a class action should not be certified.<sup>244</sup> The willingness of the Ninth Circuit to affirm in favor of defendants is important in the class action context because this decision is consistent with the idea of a court taking a more involved role in the class certification process.

In summary, the need for Supreme Court involvement and articulation of a rigorous analysis standard is needed. The Supreme Court should adopt the high rigorous analysis standard set forth in *In re Hydrogen*.

## VI. CONCLUSION

Class action certification has gained significant media attention and raised widespread debate in light of the recent *Dukes v. Wal-Mart* and *In re Hydrogen* cases. While the sheer magnitude of the *Dukes* certified class alone may draw Supreme Court attention, the Court cannot continue to ignore this issue due to the continued struggle among the lower

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239. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009); see also Caroline McDonald, *More Claims, Bigger Exposures Likely for Employers in 2010*, NATIONAL UNDERWRITER PROPERTY & CASUALTY, Jan. 25, 2010, <http://www.property-casualty.com/News/2010/1/Pages/More-Claims-Bigger-Exposures-Likely-For-Employers-in-2010.aspx>.

240. *Vinole*, 571 F.3d at 942.

241. *Id.* The court also found that denial was proper when the plaintiffs had ample time to prepare and present their certification argument. *Id.* at 942–43.

242. Georgene Vairo, *Motion to Deny Class Certification: Georgene Vairo on Vinole v. Countrywide Home Loans, Inc.*, 2009 EMERGING ISSUES 4479, 4 (Oct. 15, 2009).

243. *Id.*

244. See *Vinole*, 571 F.3d at 941.

courts regarding certification standards. Thus, Supreme Court involvement is necessary to finally and clearly articulate what constitutes a “rigorous analysis.”

The Third Circuit has defined a standard for a district court’s rigorous analysis that includes a preliminary inquiry and resolution of merit issues that are necessary to determine FRCP 23 requirements for class certification. The need for a clear standard is evident from the sheer volume of class action litigation. In order to preserve judicial efficiency and fairness across jurisdictions, a single, national standard is required. The Third Circuit standard strikes the appropriate balance between judicial access for plaintiffs and due process rights of the defendants and provides an ideal model standard for the Supreme Court.