From the Plaintiff's Side of the V Opposing Rule 23(f) Petition

Steve W. Berman
Hagens Berman Sobol Shapiro LLP

280994

There Is a Synergy Between New Rule 23 Standards of Rigorous Review and Opposing a Rule 23(f) Petition

Just A Few Years Back In The Good Old Days

- Plaintiffs' Complaint was **the** controlling document on a class motion.
- Inferences were always in plaintiffs' favor.
- Rule 23 was usually liberally construed in plaintiffs' favor.

In most areas of the country, the good old days are **gone** . . .

The Trend – The Second Circuit *IPO* [1] Decision, and The Third Circuit *HP* [2] Decision Require a More Rigorous Showing on Rule 23

- Must make a Rule 23 finding as to each element.
- Must resolve factual disputes necessary to the Rule 23 determination.

[1] *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006).
[2] *In re Hydrogen Peroxide Antitrust Litigation*, 2008 U.S. App. LEXIS 26871 (3d Cir. 2008).

What Does This Mean For Rule 23(f)

The record should be a more thorough one at times of a Rule 23(f) Petition.

With a Developed Record, You Can Focus the Rule 23 Opposition on the Fact End of the Continuum

The extent of this Court's review of a district court's class certification decision lies **on a continuum**, with pure issues of law reviewed under an abuse of discretion standard on one end and **"deferential clear-error review"** reserved for **"fact-dominated"** determinations on the other end. *Motor Vehicles*, 2008 U.S. App. LEXIS 6483, at *29.

An Example of Blending Rule 23 Rigorous Review With 23(F)

New England Carpenters v. McKesson (D. Mass.)

- Nationwide certification of all payors for 450 brand name drugs (two opinions on class certification).
- In her certification opinion, Judge Saris noted she reviewed an "avalanche of submissions".
- Three expert declarations from plaintiffs and two tutorials.
- Three expert reports from McKesson.
- Stage of decision after the close of discovery.
- Expert work was largely completed.

McKesson

- Court makes factual findings in order to define class period.
- "Rigorous Review" of damage model.

McKesson Appeals and Plaintiffs Emphasize The Facts Baby Just The Facts

As made clear by Judge Saris' order, the class certification decision in this case is a fact-dominated one. At the outset of the order, Judge Saris observed that she had received "an avalanche" of submissions, referring to Plaintiffs' submission of four briefs, three expert reports and a tutorial from the damage experts, three expert declarations and a tutorial from an industry expert, and a declaration of an industry expert as well as "countless documents." APP. 30. Judge Saris then noted that McKesson, "not to be outdone," filed the same types and volume of responsive materials, which were "extensive." Judge Saris' Order actually understates the extent of the submissions that she reviewed in dealing with class certification issues. As illustrated in Appendix D (APP. 58-67), **a total of 120 submissions** totaling thousands of pages as well as DVD materials were made relating to class certification.

Try to Portray the Decision as Fact Intensive

The conclusion that this case falls in the category of the deferential, clear-error review reserved for "fact dominated" determinations is supported by Judge Saris' comments about the order at a status conference the day she issued her class certification opinion:

> **It's very, very fact specific**, and it was difficult walking through this record on what actually happened in the marketplace but I did it to the best of my ability. **It turns out to be not so much law-based as much as understanding this very complex record, which was essentially was dramatically different from the first time around….**

Play Up the Extent of Work Done by the Expert

McKesson's claim that Judge Saris applied a low threshold or "fundamentally flawed" standard to the motion is disingenuous if not misleading given the wording of the Order and Judge Saris' statements at the status conference.

> THE COURT: In a way, this case is highly unusual because – well, for me, and maybe it's happening to you all in the rest of the country – **I essentially had to do a Daubert hearing to even get me to class cert. This is the most expansive record I've ever seen coming through, and it took me forever to go through. I'm not sure I need a separate Daubert hearing. So I'm ready to go.**

McKesson

First Circuit rejects 23(f) despite McKesson's claim review warranted because it was exposed to $21 billion in damages. **"Won't review detailed Findings of Fact."**

A Lesson Learned

- Thus compare McKesson 23(f) denied with *New Motor Vehicle* where it was granted.

- In *Motor Vehicles* the record was not developed and expert work was not close to completed.

The same Rule 23 and Rule 23(f) synergy was used to oppose the 23(f) petition in the Zyprexa MDL.[3]

Zyprexa Interpretation of *IPO*

- A district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met.
- Such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and **is persuaded to rule**, based on the relevant facts and the applicable legal standard, that the requirement is met (doesn't say what the burden of persuasion is).

Zyprexa Result – An Exhaustive Certification Order Based on:

- 6 Plaintiffs Experts at the Class Certification Hearing
- 2 By Affidavit
- 2 Defense Experts at the Class Certification Hearing
- 4 By Affidavit
- Decision at the close of discovery
- A substantial factual record with exhaustive review by the trial judge

Rule 23(f) Petition not ruled on but you can imagine the thrust of our *Zyprexa* argument on the fact end of the continuum.

Zyprexa Opposition Focused on the Extensive Record

The parties undertook additional discovery. Citing its responsibility under *IPO*, 471 F.3d at 41, the district court conducted a multi-day "extensive evidentiary hearing … to comply with the certification standards set by the Court of Appeals for the Second Circuit." [A-58.] Based on the evidentiary record before it – bulging to more than 1,151 exhibits, 317 depositions, 82 expert reports, and the in-court testimony of 8 expert witnesses – the district court granted the Rule 23 motion in part, narrowing the proposed class to only health benefit providers, for only purchases from June 2001 to June 2005, and for only RICO claims predicated on alleged overpricing. [A-293.] The district court declined certification of a class of consumers, of non-RICO claims, for any other time period, and for RICO claims predicated on theories other than alleged overpricing. [A-263, 274-76, 293.]

In re Live Concert Antitrust Litigation: Even a Judge in the Ninth Circuit Has a Hearing

- Finds defense experts testimony "fundamentally flawed."
- Fact finding is key to Rule 23(f) opposition.

Back to the Standards – They Are Strict

Two factors guide consideration of a Rule 23(f) petition. The first is whether a **doubtful** class-certification decision "would virtually compel a party to abandon a potentially meritorious claim or defense before trial." *Id.* at 293. This factor encompasses both where the decision would effectively end the case (as in a denial where plaintiffs' individual claims would be too small to warrant the costs of stand-alone litigation) or where a grant of certification raises the stakes of the litigation so substantially that defendant feels irresistible pressure to settle. *Id.* **Petitioners who seek to fit within the contours of this category also must demonstrate "significant weakness" in the certification decision.** *Id.* at 295.

Lesson Learned – Develop the Facts

If you have a complete and thorough record its harder for defendants to identify a "significant weakness."

The size of the potential damages award was not the sole ground for review in *Motor Vehicles*; the Court also perceived a significant weakness in the certification order.

Investigate Petitioner's Claim of "Pressure" to Settle Due to the Size of the Case

McKesson ranks 18th in the Fortune 500 with annual revenues of $88 billion. Although McKesson opens its petition by asserting it is exposed to a $21 billion award that creates undue pressure to settle, it tells a far different story to its shareholders. McKesson's most recent 10-Q (filed on February 1, 2008) discusses this litigation and confidently concludes that "**such litigation and proceedings will not have a material adverse effect on our financial position, results of operations or cash flows.**"

Push Back on Claims of Pressure To Settle

- Lilly grossed $25 billion from Zyprexa sales and paid out $1.2 billion for P.I. claims without impairment.
- Lilly's most recent 10-K SEC filing stated

  > cash generated from operations, along with available cash and cash equivalents, will be sufficient to fund our normal operating needs, including debt service, capital expenditures, costs associated with product liability litigation, dividends, and taxes in 2008.

- The district court, reviewing the evidence and its many years of Zyprexa MDL experience, found "no risk that the size of any recovery or its distribution will put defendant's economic viability at issue or will create serious management problems."

In Most Cases, You Should Be Able to Oppose the "Novel Question Factor"

- The second factor is whether the case raises a novel or unsettled question that is "important to the particular litigation as well as important in itself." *Id.* at 294. The unsettled question additionally must be "likely to escape effective review" if not immediately addressed.
- It's a rare security, antitrust or consumer case that will pose such a question on class certification.

Strategies for the Future

Plan for the Rule 23(f) appeal using – *i.e.*, "new" or slightly modified Rule 23 standards in every circuit.

CMO Issues and Rule 23

- You will need a case management order that allows time to develop the record.
- You should consider using the circuit's Rule 23 standard and change in Rule 23's timing to argue for a later motion date and full discovery.
- For example, if a more rigorous standard is in play, you may need more time and a fuller record. This will help on appeal.

Implications for Bifurcation

- Defendants often want to bifurcate the class/merits issues.
- If there is now a look at the merits due to overlap of issues, or a more rigorous standard, then it is fair to argue there is no basis to limit discovery to "class issues."
- A positive – you may get to look at the dirty laundry implications and thus paint the class certification picture for the Court with bad evidence. This may help on appeal.

Seek Proof of Common Issues in Defendants' Documents

- McKesson's and Lilly's (Zyprexa) documents were chock full of admissions of the challenged conduct as having common impact on the class, while McKesson challenged the same through its experts.
- Give those documents to your expert as supporting his/her opinion.
- Can be used to undercut a defense expert – defendant says impact of a price fix was mitigated by sophisticated class members – but internal company documents say otherwise. **This will help on the 23(f).**

Experts

- Even if *Daubert* is not required it is advisable to prepare a report that meets 702 and *Daubert*.
- Do not assume "some showing" applies anywhere – even in the Ninth Circuit.
- An appellate court maybe less likely to grant a 23(f) if your expert has conducted a thorough report.

Consider Completion of the Expert Report and Then Move for Class Certification

As class decision comes later in the case you have an opportunity to turn the model from "can do it in the future" to a report where the expert did the work and it does prove liability, impact and damages on a classwide basis. (*McKesson I* (not done), *McKesson II* (done and certified).

Shuts down the defendants' litany of obstacles that are often hypothetical – **and this aids on 23(f).**

Example of the Benefits of Completion

Expert claims he can calculate aggregate damages.

↓

Defendants claim cannot do so because some class members mitigated the impact of the scheme.

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Expert completes his work and the model accounts for mitigation efforts thus defeating defendants' obstacle.

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Completing something is more powerful than saying you can do it in the future and avoid the *New Motor Vehicles* result.