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Class Action Standards in Crisis: Whether Common Merits Questions Predominate Does Not Depend on the Questions' Answers

J. Douglas Richards[1]

In recent class action case law, the United States Courts of Appeals for the First, Second, and Third Circuits have modified governing legal standards that had been established law for decades, explicitly overruling some precedents and arguably adopting a new paradigm for class action certification. Unfortunately, however, recent opinions have engendered widespread confusion and disagreement concerning how the new approach properly functions in the context of the most commonly disputed element of class certification analysis, which is the predominance of "common questions of law or fact" over "questions affecting only individual members" of the class, under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

To determine whether such "common questions" predominate over "individual questions," all that Rule 23 asks a court to do is to identify the merits "questions" that are to be tried in a case, and to weigh those that are common to multiple class members against those that affect "only individual members" of the class. It does not ask the court to answer those merits questions, nor does it ask the court to determine which side of the disputed issues is correct. Language in the recent appellate case law clearly recognizes that to do so is inappropriate.

First, in *Canadian Cars*,[2] the First Circuit recognizes that "the validity of plaintiffs' theory is a common disputed issue" and that "[i]t will be for the fact finder to decide whether this theory is persuasive."[3] The First Circuit explains that a court deciding class certification should not be making such "persuasiveness" determinations with regard to "hard factual proof," but instead should only scrutinize the plaintiffs' arguments for a satisfactory "explanation of how the pivotal evidence behind plaintiffs' theory can be established."[4]

Second, in *IPO*,[5] the Second Circuit carefully addresses the statement of the Supreme Court in *Eisen*[6] that "[w]e find nothing in either the language or history of Rule

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[2] *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

[3] *Id*. at 29.

[4] *Id*.

[5] *In re Initial Public Offering Securities Litig.*, 471 F.3d 24 (2d Cir. 2006).

[6] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974),

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23 that gives the court any authority to conduct a preliminary inquiry into the merits of the suit in order to determine whether it may be maintained as a class action." The Second Circuit observes that this observation was made "in a case in which the district judge's merits inquiry had nothing to do with determining the requirements for class certification."[7] Consistently with *Eisen*, the Second Circuit in *IPO* emphasizes that in making determinations concerning whether the requirements of Rule 23 are satisfied, "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."[8]

Third, in *Hydrogen Peroxide*,[9] the Third Circuit states that "Plaintiffs' burden at the class certification stage is not to "prove" its case, but that, instead, "the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof through evidence that is common to the class rather than individual to its members."[10]

Emphasizing such language in these recent opinions of the Courts of Appeals, those supporting a more traditional interpretation of the legal standards continue to argue that in inquiring into the predominance of common questions to support a class action, a court should not attempt to determine the persuasiveness of a plaintiff's common proof. Because the predominance inquiry does not ask the court to answer the common questions, to attempt to answer those questions in the context of class certification would violate the Second Circuit's admonition —which comes directly from the Supreme Court's authority in *Eisen*—that "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."

Unfortunately, however, other language in these decisions has confused some courts and attorneys into believing that a court deciding class certification is now permitted to determine whether it is persuaded by the plaintiffs' methods of common proof, thereby transforming the court's role from that of merely identifying common and individual questions in a case, into the much more problematic role of determining which are the correct answers to key merits questions.

Those who advocate this transformational view of the case law emphasize language from *Hydrogen Peroxide*, for example, in which the Third Circuit states that "the court must resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits." Those taking the more transformational view contend that such language requires a court, in effect, to determine, at the time of class certification, whether the plaintiffs' proposed common proof of their case is correct or incorrect, by a standard of the preponderance of the evidence.

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[7] 471 F.2d at 33.
[8] *Id*. at 41.
[9] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).
[10] *Id*. at 311-12.

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The effect of such an interpretation of the recent case law would be highly revolutionary, because it would effectively call for the court to stop class action cases from going to a jury even when there are "genuine issues of material fact" that would preclude summary judgment, in effect substituting a court's own evaluation of key merits questions for that of the jury.

However, close and careful reading of the recent Court of Appeals case law shows that this revolutionary view is incorrect where the "predominance" element of class certification analysis is concerned. To be sure, all of the recent Court of Appeals case law has stated unequivocally that in order to certify a class a court must make either "findings" or "determinations" that the prerequisites to class certification are satisfied. However, one must consider the substance of the specific class action requirements in question.

In the *IPO* case, for example, the Second Circuit illustrated its statements with regard to the need for "determinations" by reference to the requirement of numerosity, stating that "in considering whether the numerosity requirement is met, a judge might need to resolve a factual dispute as to how many members are in a proposed class. Any dispute about the proposed class must be resolved. . ."[11] This is true of the numerosity requirement which, on its face, calls for the court to determine how numerous the class members are. Some other class action requirements, similarly, call for a court to make outright determinations of fact. For example, the requirement of adequacy of representation requires that court find the representation to be, in fact, adequate.

However, the key point, which has been sometimes lost sight of by those who wish to interpret recent Court of Appeals authority in a way that hinders class actions, is that unlike Rule 23 requirements like numerosity or adequacy, the requirement of predominance does not ask a court to determine whether proposed common methods of proof are correct or incorrect, persuasive or unpersuasive. Instead, all it asks the court to do is to determine that common questions are presented and that the plaintiff in fact has common methods of proof.

Once that key point is grasped, it becomes clear that recent Court of Appeals case law is less transformational than some have contended, in light of the fact that the class action prerequisites that call for the court to make actual fact determinations—such as numerosity and adequacy—are not commonly the primary controversies on class certification in the first instance. Instead, the primary controversy at the time of class certification nearly always centers on the predominance of common questions. Those questions need not be answered in order for a court to determine that they are common questions.

[11] 471 F.3d at 40.

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Accordingly, for a court in the context of the predominance inquiry to determine whether the plaintiffs' proposed common proof is correct or incorrect would violate the Second Circuit's admonition in *IPO*—which comes directly from the Supreme Court's authority in *Eisen*—that "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."

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