

Civil RICO Class Actions: A New *Bridge* to the Courthouse?

By Sara E. Kropf



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Civil Racketeer Influenced and Corrupt Organizations Act (RICO) class actions are one of the most significant litigation liabilities a modern corporation can face. When the statute's treble damages are multiplied by thousands or even millions of claims and attorney fees are added, a corporation's survival can be at stake. Unless the defendant can win on a motion to dismiss or defeat a motion for class certification, there will be tremendous pressure to settle.

Before the Supreme Court's 2008 decision in *Bridge v. Phoenix Bond & Indemnity Co.* on civil RICO class actions in consumer fraud cases, some circuits required class plaintiffs to prove their individual reliance on the supposed misrepresentations. This individualized proof was one of the most significant barriers to class certification in such cases. However, in *Bridge*, the Supreme Court held that civil RICO plaintiffs need not show that they actually relied on the misrepresentations. Although the Court's ruling was relatively narrow and made clear that reliance still plays an important role in showing causation, some lower courts have misinterpreted *Bridge* to mean that plaintiffs are *never* required to show reliance, and at least one has allowed statistical proof of causation through a theory of "aggregate reliance." Although *Bridge* should not ultimately increase the number of RICO class actions filed, it does nothing to discourage them,

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and it weakens one of the key defenses available to corporate defendants.

Background of RICO

Congress drafted RICO to target organized crime's infiltration into legitimate businesses through extortion and other criminal means. Unfortunately, RICO has given rise to a different type of extortion: using the threat of the statute's treble damages and fee shifting to compel settlement. In a classic example of unintended consequences, the statute designed to give prosecutors and innocent businesses a weapon against the Mafia has instead been wielded as a bludgeon in routine business disputes.

RICO was enacted in 1970 as Title IX of the Organized Crime Control Act. See *United States v. Turkette*, 452 U.S. 576, 591 n.13 (1981). Congress, however, made two fateful decisions for the business community when drafting the statute. First, with little discussion or debate, Congress inserted a provision creating a civil cause of action. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of" a pattern of racketeering "may sue therefor" and "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C.A. § 1964(c). One court searched the legislative history behind the provision and, finding only "clanging silence," explained that "[t]he most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c)." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492 (2d Cir. 1984).

The commission of two or more "predicate acts" in a "pattern of racketeering activity" is a violation of the act. Congress's second fateful decision was to include violations of the federal mail and wire fraud statutes as "predicate acts" not only for criminal charges, but also civil causes of action. Fraud is a notoriously ambiguous and malleable charge, requiring only a "scheme to defraud" using the mail or wires. Given that almost every

act of modern business involves the use of mail, faxes, or the Internet, businesses may be exposed to RICO liability for even minor misdeeds. Justice Thurgood Marshall noted that "[t]he effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because [of the] 'extraordinary expansion of mail and wire fraud statutes.'" *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., dissenting). Because of RICO's coercive power, the Department of Justice has implemented guidelines to constrain its abuse, discouraging "'imaginative' prosecutions under RICO which are far afield from the congressional purpose of the RICO statute." U.S. Department of Justice, U.S. Attorneys' Manual § 9-110.200. Unfortunately, no such guidelines constrain plaintiffs in the civil class-action context.

Civil RICO Class Actions Before *Bridge*

Civil RICO cases vastly outnumber criminal ones. One recent study found that 78 percent of all RICO cases were civil cases. Pamela H. Bucy, *Private Justice*, 76 S. Cal. L. Rev. 1, 22 (2002). Fully 16 percent of RICO cases in the study were class actions. *Id.* Defendants have two procedural opportunities to end RICO class actions before the stakes dramatically increase: winning on a motion to dismiss and defeating a motion for class certification. If a corporate defendant loses at both stages, it will almost certainly be compelled to settle the case. For example, one recent RICO class action involving insurance underpayments resulted in a \$255 million settlement, which included nearly \$70 million in attorney fees. *McCoy v. Health Net, Inc.*, No. 03-cv-1801 (FSH) (PS), 2008 WL 3473130 (D.N.J. July 24, 2008). Public companies face extraordinary pressure to avoid trial in these cases, given that the worst-case outcome could financially cripple the company.

The Class Action Fairness Act of 2005 (CAFA) allows for easier removal of cases

from state to federal court, meaning that more class actions are likely to rely on federal statutes and will be governed by federal rules. Federal Rule of Civil Procedure 23(b)(3) requires a predominance of common questions of both law and fact. Beginning in the 1990s, a number of circuits decertified nationwide mass tort claims on the basis of unmanageable variations in state fraud laws, concluding that there was no legal predominance in such cases. For example, in *Castano v. American Tobacco Co.*, the Fifth Circuit decertified a multi-state mass fraud claim because of the differing standards for reliance and for mandatory disclosure of facts in the various state fraud laws applicable to the class. 84 F.3d 734 (5th Cir. 1996). RICO allows plaintiffs to overcome Rule 23's legal predominance requirement because in theory it will apply uniformly nationwide. The question that remains is whether pleading a RICO claim helps a plaintiff show predominance of factual issues in the class as well.

The Supreme Court has held that plaintiffs must prove both proximate and but-for causation in a RICO case. *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992). Causation in a fraud case is most commonly shown by proof of reliance. Unless a plaintiff shows that he or she relied on a misrepresentation, he or she cannot rule out that factors other than the misrepresentation may have caused the injury. If there are different reasons for each class member's injury, there cannot be predominance of common factual issues as required by Rule 23(b)(3). Before the *Bridge* decision, this served as a strong bulwark against certification of civil RICO class actions. Courts frequently held that the individual findings of reliance required to establish causation precluded certification because each class member had different circumstances, beliefs, knowledge, and motivations. See Joseph McLaughlin, 1 McLaughlin on Class Actions § 5:50 (6th ed.). The Fifth Circuit highlighted the issue, stating that "pervasive issues of individual reliance that generally exist in RICO fraud actions create a working presumption against class certification." *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003).

For example, in *Freedman v. Arista Records, Inc.*, a court rejected the certification of a putative class consisting of the seven million purchasers of Milli Vanilli's album "Girl You Know Its [sic] True." 137 F.R.D. 225 (E.D. Pa. 1991). The plaintiffs

contended that Arista fraudulently marketed the record by insinuating that Morvan and Pilatus, the front men of the group, actually sang on the record when they did not. Rejecting class certification, the court noted that fraud requires the defendant to induce the plaintiff to act in reliance on the defendant's conduct. The issue of reliance effectively destroyed the Rule 23(b)(3) factual predominance requirement because the plaintiffs could only establish through individualized proof whether each plaintiff bought the album because of Morvan and Pilatus's singing and such individualized proof is impossible in a class action of this size. As the court explained, "[w]hat causes a person to respond positively to a performance is a complex matter." *Id.* at 229. If an individual plaintiff bought the album because he or she heard a song on the radio or liked the music video, then the alleged misrepresentation was irrelevant.

Bridge and First-Person Reliance

The Supreme Court in *Bridge* weakened the factual predominance barrier by holding that first-person reliance is not an element of RICO. 553 U.S. 639 (2008). *Bridge* arose from a dispute between competing bidders in the Cook County, Illinois, tax lien auction process. In a tax lien auction, the "winner" was the party that bid the lowest tax penalty to be imposed on the property owner. However, it was not uncommon for several parties to bid down the potential tax penalty to zero. In these circumstances, the county could not pick the auction's winner based on bid price alone and would choose the winner by rotating among the zero-penalty bidders. If a party used an agent or two to bid on the same property, however, that party would have an unfair advantage because it would have more than one place in the rotation. Cook County therefore implemented a "Single, Simultaneous Bidder Rule," requiring each bidder to sign an affidavit agreeing that the bidder would not use any agents or additional parties to bid at auction.

The plaintiffs in *Bridge* accused a competitor of arranging for related firms to bid in the auctions, increasing the competitor's chances to win them. The plaintiffs' RICO claim was based on the multiple false affidavits the competitor filed with the county.

The district court dismissed the RICO claim because the plaintiffs had

not directly relied on (or even received) the misrepresentation—the county had. The lower court held that although the plaintiffs were injured by the misrepresentations to the county, the plaintiffs were not within the scope of the RICO statute because they had not personally relied on the misrepresentations. "[A]t best," according to the court, the plaintiffs "were indirect victims of the alleged fraud." *Id.* at 645. On appeal, however, the Seventh Circuit reversed, concluding that the alleged injury was sufficiently direct and proximately caused by the fraud to establish a RICO violation.

The Supreme Court granted certiorari on the narrow question of whether first-party reliance was an element of a civil RICO claim predicated on mail fraud. The Court held that it was not. While common-law fraud requires proof of reliance, the mail fraud statute has no such requirement. The only requirement under RICO was to prove injury to the plaintiff's business or property "by reason of" mail fraud.

However, the Court explained that while first-person reliance was not required in every case, the reliance element was not necessarily eliminated. To show that the injury was caused "by reason of" the fraud, the plaintiff would likely have to show that *someone* relied on the misrepresentation. "In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation." *Id.* at 658. For example, if Cook County had not accepted the fraudulent affidavits, there would be no reliance and the injury would never have occurred. The *Bridge* Court emphasized a plaintiff's obligation to prove causation, which, in most cases, would necessarily be established through reliance.

The Effect of Bridge

Bridge poses several threats for corporate defendants. One, of course, is the holding itself, which eliminates from RICO what some courts had considered a key pleading requirement—first-person reliance. This holding makes it somewhat easier for plaintiffs to file RICO-based class actions by allowing for lengthier causative chains. Another threat for defendants is that courts may misread *Bridge* to eliminate causation altogether. This concern is not entirely unfounded, as a few courts have done so to the detriment of corporate defendants.

One such example is the recent ruling in *Martrano v. Quizno's Franchise Co.* No. 08-0932, 2009 WL 1704469 (W.D. Pa. June 15, 2009). The case was one of multiple civil RICO cases brought against Quizno's by unhappy franchisees. The Quizno's form franchise contract contained explicit disclaimers and non-reliance clauses in which the franchisees were informed that sales representatives were not authorized to make separate oral representations. It also made clear that Quizno's was providing no information as to "actual or potential sales, earnings, or profits," and the plaintiffs were furnished with a list of past and present Quizno's franchisees to contact about any questions.

The *Martrano* plaintiffs alleged that Quizno's and its representatives made material misrepresentations or omissions regarding the financial prospects of owning Quizno's franchises to induce the plaintiffs to purchase them. Based on its contractual disclaimers, Quizno's moved to dismiss the complaint on the grounds that the plaintiffs did not properly allege proximate cause. The company contended that the plaintiffs did not allege how any use of the wires or mail damaged them or how the plaintiffs relied on any misrepresentations to their detriment.

The district court denied the motion to dismiss, rejecting the company's reliance argument out of hand. It addressed reliance in a footnote, simply stating that in *Bridge*, "the Supreme Court held that a reliance element is not incorporated into RICO." *Id.* at *11 n.34. The court held that the plaintiffs' conclusory allegation that they suffered losses that they would not have incurred had they not been induced to become franchisees was sufficient to state a claim.

Unlike in *Bridge* where the plaintiffs' theory was not based on first-party reliance, the misrepresentations were made directly to the *Martrano* plaintiffs. But by citing *Bridge* for the proposition that reliance is not necessary, the *Martrano* court failed to recognize the key role that individualized questions about reliance should play in establishing proximate cause given the facts of that case. For example, perhaps the plaintiff decided to become a Quizno's franchisee because he or she had a friend who had opened a successful franchise. The *Martrano* court ignored these other possible reasons for the decision to buy a franchise.

In another case, *Spencer v. Hartford Financial Services Group*, the district court likewise applied *Bridge* to effectively eliminate causation entirely from the RICO statute. 256 F.R.D. 284 (D. Conn. 2009). In *Spencer*, the plaintiffs sought to certify a class of individuals who had entered into structured settlements with the defendants. The plaintiffs claimed they were defrauded because the defendants did not disclose that the price of the annuity that was the basis of the structured settlement included the defendants' internal costs of providing the financial product. At the class certification stage, the defendants asserted that Rule 23's factual predominance requirement was not satisfied because the class plaintiffs received many different oral representations and because plaintiffs had not shown that they relied on the statements in entering the structural settlements. The theory of the case depended on showing first-party reliance by the plaintiffs on the defendants' supposed misrepresentations.

The *Spencer* court relied on *Bridge* to sidestep two Second Circuit decisions that required the plaintiffs to show that there was a uniform misrepresentation and that the reliance element could not be shown by generalized (rather than individualized) proof. *Id.* at 296–97 (discussing *Moore v. PaineWebber*, 306 F.3d 1247, 1253 (2d Cir. 2002); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008)). Ultimately, the court in *Spencer* determined that "after *Bridge*, the *Moore* and *McLaughlin* decisions are no longer good law on the question of whether a plaintiff must show that he or she was personally a recipient of a material misrepresentation." *Spencer*, 256 F.R.D. at 297. The court went on to hold that after *Bridge*, plaintiffs no longer needed to prove that each class member received and relied on the misrepresentation, they need only demonstrate that the defendant made uniform misrepresentations. The *Spencer* court did not require the plaintiffs to show that the misrepresentations (or anything else) actually caused any injury. Like the *Martrano* court, the *Spencer* court used *Bridge* to avoid the issues of individualized reliance necessary to prove causation that could have denied class certification. In the end, the reasoning of the *Martrano* and *Spencer* decisions effectively deprives defendants of the ability to challenge whether each class member has proven causation.

Bridge and Aggregate Reliance

A third potential threat from *Bridge* is that courts will allow proof of causation through a theory of "aggregate reliance." Under this theory, if enough people rely on a misrepresentation—whether or not they are in the class—the demand for a consumer good will rise and so will its price. The increased price paid by class members is the alleged injury; there is no need to show that each individual class plaintiff relied on the misrepresentation, only that they all paid the artificially inflated price. Following *Bridge*, a New York district court allowed proof of causation through a theory of "aggregate reliance" rather than requiring individualized proof in a consumer fraud case. The Second Circuit, however, recently rejected that theory, providing some comfort to corporate defendants.

The specter of aggregate reliance emerged in a 2006 decision, *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006). *Schwab* involved a putative RICO class action against cigarette manufacturers for fraudulently marketing "light" cigarettes as a healthier alternative to the regular variety. (The plaintiffs claimed to have paid a higher price for the light cigarettes.) To prove causation, plaintiffs offered expert testimony based on a survey showing that 90.1 percent of light smokers chose light cigarettes based on the desire to reduce health risks. *Id.* at 1048. Based on this testimony, Judge Jack Weinstein certified the class action, holding that the misrepresentations proximately caused the damages and that factual predominance was met through the statistical evidence.

The *Schwab* class certification, however, was reversed by the Second Circuit in *McLaughlin*. *McLaughlin* held that the district court had abused its discretion because reliance "cannot be the subject of general proof." 522 F.3d at 223. The court also pointed to a troubling problem with the *Schwab*'s expert's survey attempting to establish reliance and causation: The price of light cigarettes did not drop after it was revealed that they were not, in fact, healthier.

Following the *Bridge* decision, Judge Weinstein once again applied the theory of aggregate reliance in a class action based on marketing practices by pharmaceutical companies. In *In re Zyprexa Products Liability Litigation*,

Judge Weinstein certified a RICO class action against the manufacturer of the drug Zyprexa, Eli Lilly. 253 F.R.D. 69 (E.D.N.Y. 2008). The plaintiffs claimed that the company systematically drove up demand for the drug by pushing doctors through fraudulent marketing practices to prescribe it for off-label use. The class consisted of insurance providers or other third-party payors who claimed to have suffered injury by paying an inflated reimbursement price for Zyprexa because they did not know about some problems with the drug's efficiency and potential side effects. The key contention was that the doctors had relied on the company's marketing materials when they decided to prescribe the drug, as opposed to independent factors, such as their own experience in prescribing Zyprexa. This reliance led to increased demand and, therefore, an increased price paid by the plaintiffs.

The district court explained that *Bridge* had "placed in doubt" *McLaughlin's* holding that reliance was not subject to general proof. *Id.* at 193. It certified the class on the basis of an "excess price" theory, finding that the plaintiffs had paid more for the prescriptions than they would have had the doctors known about the undisclosed side effects and the drug's true efficacy. Unlike in *Schwab*, though, in *Zyprexa*, there was evidence that the market negatively responded when the company disclosed new information about the drug's dangers.

Just as in *Schwab*, the Second Circuit reversed. *UFCW Local 1776 v. Eli Lilly and Co.*, 620 F.3d 121 (2d Cir. 2010). The court rejected the plaintiffs' argument that there is no need to show reliance under RICO. It explained that after *Bridge*, "while reliance may not be an element of the cause of action, there is no question that in this case the plaintiffs allege, and must prove, third-party reliance as part of their chain of causation. . . . Because reliance is a necessary part of the causation theory advanced by the plaintiffs, we must ask whether reliance can be shown by generalized proof." *Id.* at 133. The court concluded that it could not do so "in this context." The court explained that any reliance by the doctors on the disclosed efficacy and side effects of the drug was not the but-for cause of the plaintiffs' injury because the evidence showed that doctors do not rely on price when they prescribe a drug.

So, even if the misrepresentations of the drug's efficacy and side effects affected the price, those misstatements did not cause the doctors to prescribe it more often and therefore harm the plaintiffs. Moreover, the alleged chain of causation was much too attenuated to satisfy proximate cause because any of several intermediate steps may have affected the price.

Although the *Zyprexa* decision shed considerable doubt on the theory of aggregate reliance advocated by plaintiffs' lawyers in consumer class actions and on lengthy causative chains, it did not close the door completely. Rather, it concluded that the facts of this particular case did not lend themselves to generalized proof.

The *Bridge* decision eliminated the first-party reliance requirement for RICO class-action claims, but it did not eliminate the causation requirement altogether.

A Positive Outcome from *Bridge*?

Corporate defendants may be able to use part of the *Bridge* decision to their advantage, based on a 2010 Supreme Court decision. In *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), the Supreme Court addressed proximate cause in a civil RICO case and provided some guidance as to *Bridge's* application. In *Hemi Group*, the City of New York sued an out-of-state cigarette retailer for its failure to provide reports detailing which residents had bought cigarettes. These reports, required by the federal Jenkins Act, were intended in part to allow local jurisdictions to collect cigarette taxes from residents. The City claimed that the retailer's failure to provide these reports had caused the city injury through lost tax revenue. The retailer itself had no legal obligation to collect or pay these taxes.

In a plurality opinion written by

Justice Roberts and joined by Justices Scalia, Thomas, and Alito, the Court concluded that the city did not have a viable RICO claim because it could not satisfy "RICO's direct relationship requirement." *Id.* at 989. According to the plurality, RICO requires a "direct relationship" between the defendant's conduct and the injury, and a link that is too remote or attenuated cannot satisfy this requirement. Here, the causal link between the retailer's conduct (failure to provide reports) and the injury (the city's loss in tax revenue) was insufficiently direct because it was the customers who had "directly caused" the injury by not paying city cigarette taxes, not the retailer. *Id.* at 990. The plurality specifically rejected the city's reliance on *Bridge*, noting that the theory of causation there was "straightforward" and that there were no intervening causes of the injury to the plaintiff.

The *Hemi Group* decision did not question *Bridge's* holding with respect to reliance. Nonetheless, this decision does suggest that corporate defendants may be able to use the *Bridge* decision to their advantage. In cases where the plaintiffs' theory of causation is not direct, the *Bridge* decision lends support to *Hemi Group's* plurality holding that RICO requires a "direct relationship." Corporate defendants may be able to defeat RICO claims on this basis. The fact that *Hemi Group* is a plurality opinion, however, does undercut its strength as a defense. Three justices filed a vigorous dissent, and courts of appeal are not bound to follow a plurality decision. The *Hemi Group* decision may result only in confusion among the courts of appeal as they struggle with how to define the limits of causation under RICO.

Conclusion

The *Bridge* decision eliminated the first-party reliance requirement for RICO class-action claims, but it did not (and could not) eliminate the causation requirement altogether. This holding certainly will not decrease the number of consumer class actions filed against corporations under RICO and may, in fact, increase them as plaintiffs experiment with lengthier causative chains.

Bridge is still a fairly new decision, and lower courts continue to refine its reach. Despite the fact that some lower courts

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The Third Circuit found support for this principle in the 2003 amendments to Rule 23, while acknowledging that the amendments did not alter the substantive standards for class certification. The amendment to Rule 23(c)(1)(A) changed the timing of the class-certification motion from “as soon as practicable after commencement of an action” to “an early practicable time.” According to *Hydrogen Peroxide*, this “subtle” change reflected the need for a “thorough evaluation of the Rule 23 factors.” The court found a similar import in the introduction of a trial plan concept in the Advisory Committee’s 2003 notes. Similarly, the revision of Rule 23(c)(1) eliminating the language stating that class certification “may be conditional” clarified that certification may be granted only after a searching inquiry demonstrates satisfaction of all of the requirements of Rule 23. *Hydrogen Peroxide*, 552 F.3d at 318–19.

Finally, *Hydrogen Peroxide* concluded that a district court must make “findings” that the proposed class meets each of the requirements of Rule 23. The factual determinations necessary to make Rule 23 findings must be established by a preponderance of the evidence. This means that to certify a class, “the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.” In the proper exercise of its discretion, the court must “resolve factual disputes” and make findings on the Rule 23 requirements “having considered all relevant evidence and arguments presented by the parties.” *Hydrogen Peroxide*, 552 F.3d at 319–20.

After articulating these general principles, the Third Circuit applied them to the defendants’ specific challenges to the class-certification ruling. It found the district court’s acceptance of the plaintiffs’ assurance that they intended to prove their case through common proof and prior decisions, holding that a plaintiff was only required to make a “threshold showing” of antitrust impact, inconsistent with the standards adopted in the opinion. In perhaps the most significant portion of its decision, the *Hydrogen Peroxide* court then turned to the defendants’ contention that the district court had failed to consider the testimony of the defendants’ expert in deciding if common issues predominated. The district court found the plaintiffs’ showing of commonality adequate and declined to weigh the conflicting opinions

of the experts in deciding whether the requirements of Rule 23 had been met. *Hydrogen Peroxide* found this approach to be erroneous. Instead, the court reasoned that all evidence relevant to class certification, including expert opinion, is subject to the rigorous analysis standard. “Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.” The district court cannot uncritically accept plaintiffs’ expert testimony to establish that common issues predominate. It must resolve any dispute between the experts even if the dispute implicates the credibility of one or more experts. Ultimately, the district court must be persuaded by the plaintiffs’ expert.

Conclusion

IPO and *Hydrogen Peroxide* rest on the premise that the “rigorous analysis” language of *Falcon* justifies imposing an exacting standard on plaintiffs to achieve class certification. At least in part to protect class-action defendants from the pressure to settle “non-meritorious claims,” plaintiffs should be forced to prove each of the requirements for class certification by a preponderance of the evidence. The district courts should not hesitate to weigh conflicting expert testimony and resolve conflicts. They should also make findings on issues that overlap with the merits notwithstanding *Eisen*’s admonition to the contrary.

Although not every circuit has adopted the new standard, an increasing number of district courts have embraced the “rigorous analysis” mandate to raise the class-certification hurdle. This trend has a number of implications for the class-certification process, including:

- Timing. The motion for class certification should await the development of an adequate record in the litigation.
- Discovery. The need to establish each requirement for class certification by a preponderance of the evidence militates in favor of expanding the scope and extent of discovery.
- Limitations on merits discovery. The rationale for bifurcating discovery and limiting plaintiffs to class discovery prior to certification falls away, at least wherever there is any overlap between class and merits issues.

- The requisite showing. The enhanced certification hurdle and burden of proof will lead to more detailed and extensive evidentiary presentations at class certification.
- Battles of the experts. In many cases, class-certification decisions will turn on battles of the experts over issues previously left for resolution at summary judgment or trial.
- Evidentiary hearings. Where a district court must weigh conflicting expert testimony, assess the credibility of experts, and resolve the conflicts, an evidentiary hearing may be necessary to allow an informed decision.

It may be, however, that the most important long-term implication of *IPO* and *Hydrogen Peroxide* is that merits matter at the class-certification stage more than many previously realized. These two decisions empower district courts to invoke the “rigorous analysis” language of *Falcon* to eliminate cases through class-certification rulings that they believe lack merit. In courts applying *IPO* and *Hydrogen Peroxide*, the notion that the certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious” (*Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-40 (2000)) may be relegated, along with *Eisen*, to obscurity. Indeed, *IPO* and *Hydrogen Peroxide* may open the door to mini-trials in which plaintiffs will be forced to prove the merits of their claims just to achieve class certification. ■

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have arguably misread *Bridge* or improperly concluded that it permits proof of causation by aggregate reliance, corporate defendants in these class actions are far from defenseless. They will need to shift their efforts from attacks on the lack of first-party reliance to proof that the alleged misrepresentations were not uniform across the class or that any reliance by the plaintiffs (or third parties) on them was not reasonable. These remain potent defenses even in a post-*Bridge* world. ■