

STATE OF MINNESOTA  
IN COURT OF APPEALS

OFFICE OF  
APPELLATE COURTS

JUN 26 2008

FILED

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Clifford L. Whitaker, et al., on behalf  
of themselves and all others similarly  
situated,

**ORDER**

Respondents,

**A08-816**

vs.

3M Company,

Petitioner.

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Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Minge,  
Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE  
FOLLOWING REASONS:**

Petitioner 3M Company seeks review of the district court's order granting certification of the plaintiff-respondents' age-discrimination claims under Minn. R. Civ. P. 23. In determining whether to grant discretionary review of a class-certification order, this court considers factors including whether "a questionable grant of class certification places inordinate pressure on the defendant to settle" and whether "the appeal will permit resolution of an important legal issue that is also important to the particular litigation." *Gordon v. Microsoft Corp.*, 645 N.W.2d 393, 401-02 (Minn. 2002).

Petitioner asserts that the district court erred in determining that the proposed class met the commonality requirement of Rule 23.01(b) based on expert statistical analyses

submitted by the plaintiff-respondents. The statistical analyses, which purportedly show a pattern of differential treatment of older workers, are relevant to commonality because, in order to proceed as a class, respondents must bridge the gap between their individual claims of discrimination and the existence of a class of similarly situated employees. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157-58, 102 S. Ct. 2364, 2370-71 (1982). Petitioner and its expert assert that the respondents' statistical analyses are flawed because they fail to account for important nondiscriminatory variables and thus cannot be used to show commonality. Petitioner raised these objections before the district court. The district court acknowledged petitioner's challenges to the statistical analyses, but declined to resolve a "battle of the experts," instead concluding that "sufficient statistical evidence [had] been presented to suggest that the data presents common questions for a class-wide pattern or practice trial."

Neither the Minnesota Supreme Court nor this court has addressed the standard of proof to be applied under Rule 23, or the extent to which the district courts must resolve factual disputes, including expert disputes, in certification proceedings. There is, however, a growing consensus among the federal courts that the longstanding prohibition against merits inquiries at the class-certification stage does not apply when class-certification issues overlap with the merits. *See, e.g., In re Live Rock Concert Antitrust Litig.*, 247 F.R.D. 98, 113-15 (C.D. Cal. 2007) (summarizing caselaw). Rather, the federal courts are holding that Rule 23 requires a "definitive assessment" of class-certification requirements, even if they coincide with merits issues. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *see also Blades v. Monsanto Co.*,

400 F.3d 562, 575 (8th 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th 2004); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001). Issues requiring resolution may include those that are subject to competing expert analyses. See *Blades*, 400 F.3d at 575. Minn. R. Civ. P. 23 closely tracks Fed. R. Civ. P. 23 and is intended to produce consistent results. See Minn. R. Civ. P. 23 advisory committee comments 1968, 2006.


In light of the foregoing precedents, we conclude that the district court's certification order is questionable. We further conclude that this appeal raises important legal issues regarding the quantum and nature of evidence necessary to support findings of commonality and other rule 23 requirements, and, conversely, the appropriate level of "rigor" to be applied by the district courts in determining whether that burden is met. These are issues of broad application, and resolving them at this juncture will promote judicial economy in this matter as well as providing prospective guidance for the bench and bar.

**IT IS HEREBY ORDERED:**

1. The petition for discretionary review is granted.
2. The appeal shall proceed in accordance with Minn. R. Civ. App. P. 105.03.

Dated: June 25, 2008

**BY THE COURT**

  
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Chief Judge