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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world..

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to include this publication, *US Courts Annual Review*, which takes a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the US, allowing our valued contributors to analyse both important local decisions and draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus surfaced, allowing readers to comprehensively understand how judges from around the country are interpreting antitrust law, and its evolution. New for our second edition of the publication are some high-level analysis chapters, looking at key trends across the country such as class certification, no poach and reverse payment cases.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the US, whose knowledge and experience has been essential in drawing together these developments. That team has been led and indeed compiled by Eric P Enson and Julia E McEvoy of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here. We thank all the contributors, and the editors in particular, for their time and effort in compiling this report. Thanks also go to Paula W Render, formerly of Jones Day, as co-editor of the inaugural edition.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Part 1

Topics and Trends

Trends in Class Certification

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The past decade has witnessed significant development in class action certification standards in the antitrust context, and the past year has been no exception. Questions of predominance continue to be at the forefront, although the numerosity requirement has also been put to the test. This chapter places these issues of class certification in context by tracing the standards of certification and discussing the evolution of the 'rigorous analysis' requirement now required by federal courts. It then spotlights notable decisions from the past year that have grappled with challenges to the sufficiency of plaintiffs' statistical models used to demonstrate the preponderance of class-wide questions, principally on the issue of showing class-wide harm, and with the number of putative class members required to be sufficiently numerous for certification.

Standards for class certification

Claims of anticompetitive conduct often involve allegations of harm to a large number of market participants. It is no surprise, then, that such claims are often brought by way of Federal Rule of Civil Procedure 23, which allows for the collective representation of a large group of plaintiffs allegedly injured by the same conduct. Indeed, antitrust disputes accounted for just under 10 percent of all active class actions in 2019 and were the fifth most common type of case litigated on a class-wide basis.[1]

Although class actions are commonplace in antitrust litigation, the Supreme Court has long considered them the exception to the general rule that parties may litigate only on their own behalf.[2] Only if a proposed representative demonstrates that

1 *Carlton Fields Class Action Survey* 15 (2020), https://ClassActionSurvey.com.

2 See *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

he or she is part of a class whose members possess the same interest and suffered the same injury may a court allow a class action to proceed.[3] To that end, Rule 23 requires a putative class to satisfy four requirements of Rule 23(a):

- the class must be sufficiently numerous that the joinder of all members would be impracticable (the numerosity requirement);
- the lawsuit must raise questions of law or fact common to the putative class (the commonality requirement);
- the representative plaintiffs' claims[4] must be typical of the claims of the class (the typicality requirement); and
- the representative parties must show that they will fairly and adequately protect the interests of the class (the adequacy of representation requirement).[5]

A proposed class must also satisfy Rule 23(b), which contemplates three types of classes of plaintiffs. A class satisfies Rule 23(b)(1) if it demonstrates either that separate actions 'would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class,'[6] or would be 'dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.'[7] (The latter class action is known as a limited funds action.[8]) Under Rule 23(b)(2), a class action may also be maintained if plaintiffs seek only injunctive relief.[9] Most commonly in the antitrust context, however, plaintiffs seek certification under Rule 23(b)(3), which allows a class of plaintiffs seeking monetary damages who demonstrate that common questions of law or fact predominate over any questions affecting only individual class members (the predominance requirement), and that litigation by class action is superior to litigating individual claims (the superiority requirement).

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3 See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011).

4 Rule 23 allows for defendant class actions as well, but certification of defendant classes is rare. See *Barnes Grp., Inc. v. Int'l Union United Auto. Aerospace & Agric. Implement Workers of Am.*, No. 3:16-cv-00559 (MPS), 2017 WL 1407638, at *2 (D. Conn. Apr. 19, 2017).

5 Fed. R. Civ. P. 23(a).

6 Fed. R. Civ. P. 23(b)(1)(A).

7 Fed. R. Civ. P. 23(b)(1)(B).

8 See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

9 Fed R. Civ. P. 23(b)(2).

Courts' evolving approach to application of class certification standards

For decades, plaintiff classes faced a relatively low hurdle to certification under Rule 23(b)(3). Guided by the Supreme Court's holding in *Eisen v Carlisle & Jacquelin*[10] that 'nothing in either the language or history of Rule 23 . . . 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,'[11] district courts routinely eschewed defendants' efforts to defeat class certification by reference to purported deficiencies in plaintiffs' theories of liability. This was so even after 1982, when the Supreme Court held in *General Telephone Company of the Southwest v Falcon*[12] that district courts must conduct a 'rigorous analysis' of the Rule 23 factors before certifying a class, and that 'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'[13]

But exactly how far district courts could pull back the curtain on the merits of a suit at the certification stage remained unsettled. In 2004, for example, one court held that it would be an 'injustice' to require plaintiffs to establish the elements of Rule 23 by a preponderance of the evidence when those elements are 'enmeshed' in the merits.[14] Another court observed in 2007 that the circuits had split over the district court's role in resolving a 'battle of the experts' at class certification.[15]

In 2008, the Third Circuit[16] articulated a more muscular understanding of the district courts' gatekeeping role in conducting a rigorous analysis in the antitrust context, holding that (1) a class may be certified only upon a showing by a preponderance of the evidence (and not merely a 'threshold' showing that some courts had required) that the Rule 23 requirements are met, (2) the district court's role at certification is to resolve all relevant factual or legal disputes, even if they overlap with the merits, and (3) in making its decision, the court must consider expert testimony, no matter which party offers it.[17]

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10 417 U.S. 156 (1974).

11 *Id.* at 177 (1974). The Supreme Court later characterized this language as 'the purest dictum,' and criticized courts' reliance on it to avoid merits examination at the certification stage. *Wal-Mart Stores, Inc.*, 564 U.S. at 351 n.6.

12 457 U.S. 147 (1982).

13 *Id.* at 160–61.

14 *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 91–2 (S.D.N.Y. 2004), vacated and remanded, 471 F.3d 24 (2d Cir. 2006).

15 *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 105 (C.D. Cal. 2007).

16 *In re: Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. Pa. 2008).

17 *Id.* at 307.

The Supreme Court was not far behind. In 2011, the Court held in *Wal-Mart Stores, Inc v Dukes*, an employment discrimination action, that a plaintiff 'must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.'[18] That such proof may overlap with the merits, as the Court held in *Falcon*, 'cannot be helped.'[19]

Two years later, the Court appeared to soften its stance in *Amgen Inc v Connecticut Retirement Plans & Trust Fund*,[20] holding that Rule 23(b) 'requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.'[21] It further explained that 'Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.'[22] Nevertheless, it held the following month in *Comcast Corp v Behrend* that courts must 'take a close look at whether common questions predominate over individual ones,' and reiterated the district court's burden to conduct a rigorous analysis.[23] Notably, that analysis requires consideration of whether 'any model supporting a plaintiff's damages case [is] consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.'[24]

The Supreme Court once again addressed class certification in *Tyson Foods, Inc v Bouaphakeo*,[25] holding that plaintiffs may sometimes rely on statistical sampling to establish that common questions of liability predominate. The plaintiffs – Iowa meat processing employees – sought to prove that, including time spent donning and doffing protective gear, they worked more than 40 hours per week and were entitled to overtime wages. In the absence of individualized data, the Court found that the plaintiffs satisfied the predominance requirement by applying an average donning and doffing time from a sample of employees to the class as a whole. The Court, while careful to avoid prescribing general rules as to the use of such representative sampling

18 *Wal-Mart Stores, Inc.*, 564 U.S. at 350.
19 *Id.* at 351.
20 568 U.S. 455 (2013).
21 *Id.* at 459.
22 *Id.* at 466.
23 *Comcast Corp. v. Behrend*, 569 U.S. 27, 34–5 (2013).
24 *Id.* at 35.
25 577 U.S. 442 (2016).

to establish class-wide liability, held that the soundness of the plaintiffs' sampling was a question common to the class, and one more properly addressed at summary judgment.[26] Although it sided with the plaintiffs, the Court reaffirmed the district courts' need 'to give careful scrutiny to the relation between common and individual questions in a case.'[27]

The circuits have followed suit. Although the Supreme Court has not explicitly ruled on burdens of proof at the class certification stage, circuits now widely agree that a plaintiff must prove compliance with Rule 23 by a preponderance of the evidence, even if the proof overlaps with plaintiffs' ultimate theory of liability.[28] Nevertheless, decisions issued in the past couple of years demonstrate that the full contours of the 'rigorous analysis' standard, and how it applies to antitrust claims, are far from settled.

Frequent issues in antitrust class certification

The question of predominance in Rule 23(b)(3) putative class actions has been the focus of many antitrust cases, and this trend has continued in the past year. The use of representative data and econometric modeling to demonstrate class-wide effects of alleged antitrust violations has become widely accepted. However, the prevalence of statistical and econometric methods has led to significant developments in courts' evaluation of them, including increased scrutiny of whether the proposed models capture too many uninjured plaintiffs, or if the use of averages conceals too great a variation among the plaintiffs, including uninjured ones, undermining a finding of predominance. Separately, although less frequently litigated, the numerosity standard has continued to develop.

Statistical and econometric modeling to show class-wide antitrust injury

One area of recent focus has been the degree to which district courts scrutinize plaintiffs' methodologies for determining class-wide harm. This raises special considerations in antitrust cases, where plaintiffs must demonstrate not only class-wide injury, but also that the harm at issue resulted from the antitrust violation (i.e., antitrust impact), requiring them to show that injury consistent with their theory of liability is capable of proof on a class-wide basis.[29]

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26 *Id.* at 456–57.

27 *Id.* at 453.

28 See *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 784–86 (9th Cir. 2021) (collecting cases).

29 See *Comcast*, 569 U.S. at 35.

In this regard, and in the wake of *Tyson Foods*, courts have typically accepted the use of representative sampling and econometric modeling as a method of proof of antitrust impact.[30] As the Ninth Circuit has observed, 'statistical evidence has long been used to prove antitrust impact in individual suits,' and plaintiffs in both individual suits and class actions must often show antitrust impact by 'comparing the actual world with a "hypothetical" world that would have existed "but for" the defendant's unlawful activities.'[31] The court cited with approval the plaintiffs' expert's econometric regression model studying market prices before and after the alleged price-fixing conspiracy at issue, thereby estimating the average overcharge that resulted from the defendants' alleged antitrust conspiracy. The court similarly observed that the expert's model, which estimated the number of direct purchasers injured by the alleged price-fixing, was consistent with models typically employed to prove antitrust injury on an individual basis, and could thus be used on a class-wide basis.[32]

The Ninth Circuit is not alone. In December, a court in the Eastern District of Virginia approved of an econometric model purporting to isolate the effects of an alleged price-fixing conspiracy by comparing prices during the alleged conspiracy with those that prevailed during a benchmark period unaffected by anticompetitive behavior.[33] Although the court recognized that the plaintiffs may hone their model and adjust their variables through discovery, it was satisfied at the class certification stage that the methodology they presented could reasonably be used to determine class-wide antitrust impact.[34]

Such statistical modeling has also reached near ubiquity in class actions in the pharmaceutical sector, particularly with respect to allegations that manufacturers of brand-name drugs took measures to delay the entry of generic versions. In *In re Restasis*,[35] a putative class of end-payors (including consumers)[36] sought class-wide

30 Some courts have observed the significant overlap between predominance and standards of admissibility under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), as both require scrutiny of the reliability of a damages model. See *Rail Freight Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 42 (D.D.C. 2017); *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 416 (E.D. Pa. 2015).

31 *Olean Wholesale Grocery Coop., Inc.*, 993 F.3d at 788.

32 *Id.* at *8.

33 *D&M Farms v. Birdsong Corp.*, No. 2:19-cv-463, 2020 WL 7074140 (E.D. Va. Dec. 2, 2020).

34 *Id.* at *8.

35 *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 335 F.R.D. 1 (E.D.N.Y. 2020).

36 The Supreme Court barred federal antitrust claims by indirect purchasers in 1977 because of the evidentiary challenges of tracing damages through supply chains. *Ill. Brick Co. v. Illinois*, 431

relief against Allergan for allegedly delaying entry of a generic form of Restasis, a treatment for a dry-eye disease. To support certification, the end-payor plaintiffs advanced a 'yardstick' model that used the actual prices and quantities of a similar generics market to predict a but-for world in which Restasis faced generic competition.[37] Allergan did not contest the propriety of the yardstick approach to measure the hypothetical but-for world, which the court observed was 'unsurprising[,] as this approach is a generally accepted way to measure antitrust damages.'[38]

Presence of uninjured plaintiffs in putative classes

Although, as discussed above, it is uncontroversial that statistical evidence can supply the necessary showing of antitrust impact in recent years, courts have taken a harder look at that evidence, particularly when defendants have offered competing models or theories to undermine the reliability of plaintiffs' statistical evidence or to drive a wedge between such evidence and plaintiffs' theory of liability. Although some courts still reserve battles of the experts for the jury,[39] most now consider it necessary to resolve such disputes as part of their 'rigorous analysis' at the certification stage.

One common theme in attacking the use of statistical modeling to arrive at an average overcharge has been the presence of uninjured plaintiffs in a proposed class. The issue has become a proving ground for the predominance requirement and has sparked a debate among courts about the degree to which statistical models should be scrutinized at certification. In some recent cases, courts have refused to certify a class

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U.S. 720 (1977). The Court's holding did not pre-empt indirect purchasers from bringing antitrust claims under state law, however, and many states have since passed *Illinois Brick* repealer statutes. See *In re Relafen Antitrust Litig.*, 225 F.R.D. 14, 20 (D. Mass. 2004). These indirect purchasers have historically based jurisdiction in federal court by asserting a claim for injunctive relief under the Sherman Antitrust Act, 15 U.S.C. § 1, alongside state-law damages claims. See, e.g., *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 265 (D. Mass. 2004). Relatedly, courts have been receptive to allowing indirect wholesalers to bring 'direct' antitrust claims under federal law assigned to them by direct purchasers. See, e.g., *Walgreen Co. v. Johnson & Johnson*, 950 F.3d 195, 196 (3d Cir. 2020); *United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, Inc.*, No. 14-md-02521 (WHO), 2015 WL 4397396, at *4 (N.D. Cal. Jul, 17, 2015).

37 *In re Restasis*, 335 F.R.D. at *15.

38 *Id.* at *18.

39 See, e.g., *In re Glumetza Antitrust Litig.*, 336 F.R.D. 468, 480 (N.D. Cal. 2020) (certifying a class of direct purchasers alleging injury from a reverse settlement agreement, and noting that the parties could 'quibble' about the appropriate variables in plaintiffs' damages model after certification).

containing more than a *de minimis* number of uninjured plaintiffs, reasoning that the need to identify those uninjured plaintiffs will overshadow questions common to the class.[40] The presence of uninjured plaintiffs has also implicated Seventh Amendment and due process concerns, as defendants have argued that the inclusion of unidentified, uninjured plaintiffs in a certified class deprives them of a meaningful opportunity to contest each plaintiff's injury and forces them to pay for more harm than the alleged anticompetitive conduct may have caused.[41]

In 2018, plaintiffs were dealt a blow when the First Circuit held that the proposed class of plaintiffs' economic model swept up too many purchasers uninjured by the defendants' conduct. That case (*In re Asacol*) concerned allegations that drug manufacturers conspired to delay market entry of generic versions of an ulcerative colitis treatment. At the certification stage, the defendants argued that certain 'brand loyalists' would not have switched to the generic drug even if it had been introduced earlier, and therefore did not suffer cognizable injury from the allegedly delayed entry of the generic.[42] The district court certified a class of two subsets of direct purchasers, but the First Circuit reversed, holding that the district court failed to conduct a sufficiently rigorous analysis of plaintiffs' methodology for determining antitrust impact. Under First Circuit precedent, the presence of a *de minimis* number of uninjured plaintiffs does not categorically defeat a finding of predominance.[43] In *Asacol*, however, the court found that as many as 10 percent of the defined class's members were uninjured,[44] which exceeded the *de minimis* threshold.[45] In the absence of an administratively feasible mechanism to weed them out of the class, the court held that the plaintiffs had failed to carry their burden that common questions predominated.[46]

The DC Circuit in *In re Rail Freight Fuel Surcharge* sided with the First Circuit in 2019, when it upheld a district court's denial of certification to a class of direct purchasers who accused the four largest freight railroads in the United States of conspiring to fix fuel prices. As in *Acasol*, the DC Circuit held that the plaintiff's expert's damages

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40 See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018).

41 See, e.g., *In re Restasis*, 335 F.R.D. at 17.

42 See *In re Asacol*, 907 F.3d at 59–60.

43 *Id.* at 53–4.

44 Although the parties disputed the number of uninjured plaintiffs (the plaintiffs argued the number was lower, whereas the defendants argued it was higher), the court found that the parties had not preserved their objections for appellate review. *Id.* at 51.

45 *Id.* at 54.

46 *Id.* at 52–5, 61.

model, even if reliable in attempting to show an average overcharge to the class, failed to show class-wide injury because the plaintiff's modeling identified 2,037 members of the proposed class (or 12.7 percent) as uninjured, exceeding a *de minimis* amount.[47] Furthermore, because the plaintiff's model did not have a winnowing mechanism, the *Rail Freight* court upheld the district court's denial of certification.[48]

In April 2021, the Ninth Circuit also followed in the footsteps of *Asacol* and embraced the *de minimis* limit on uninjured class members.[49] The defendants in *Olean Wholesale Grocery Cooperative, Inc v Bumble Bee Foods LLC* had admitted that they conspired to fix the price of canned tuna.[50] Having established antitrust liability, the plaintiffs sought certification of three different classes of purchasers. Although the plaintiffs' economic model classified only 5.5 percent of the direct-purchaser plaintiffs as uninjured, the defendants' model suggested that the proportion was as high as 28 percent.[51] The district court certified the class nonetheless, holding that the determination of whose expert was correct spoke to the merits of the plaintiffs' case and was for a finder of fact to resolve.[52] The Ninth Circuit reversed. Citing *Asacol*, the court held that the 'rigorous analysis' standard required the district court to resolve whether the plaintiffs' class in fact included as many uninjured plaintiffs as the defendants had predicted, even if that question overlapped with the merits.[53] In dissent, Judge Hurwitz criticized the majority for focusing on a *de minimis* threshold for uninjured class members, which he said Rule 23(b)(3) does not impose.[54] Instead, he construed *Asacol* more narrowly as requiring a district court to consider whether it will be feasible and economical to winnow out uninjured class members at some stage in the litigation.[55] He reasoned that the proportion of uninjured plaintiffs may affect the answer to that question, but should not be dispositive.[56]

The treatment of uninjured plaintiffs captured in the plaintiffs' antitrust impact models is not monolithic, and other courts have imposed apparently less rigid predominance requirements. The Seventh Circuit, for example, has held that a class

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47 *In re Rail Freight Fuel Surcharge*, 934 F.3d at 623–24.
48 *Id.* at 625.
49 *Olean Wholesale Grocery Coop., Inc.*, 993 F.3d at 792.
50 *Id.* at 782.
51 *Id.* at 791.
52 *Id.* at 791–92.
53 *Id.* at 792.
54 *Id.* at 794 (Hurwitz J, dissenting).
55 *Id.* at 796–97.
56 *Id.*

should not be certified only if it contains a 'great many' uninjured plaintiffs – a flexible standard that turns on the facts of each case.[57] That more generous articulation has had influence outside the Seventh Circuit, as district courts have cited the 'great many' standard to break from *Asacol* and *Rail Freight*. In 2020, both the District of Kansas and the Eastern District of New York granted class certification motions over defendants' objections that the classes contained uninjured plaintiffs. Although it was not clear in either case that the proportion of uninjured plaintiffs would have defeated a predominance finding under the *de minimis* standard, both courts explicitly declined to follow the First and DC Circuits.

In *In re EpiPen*,[58] the District of Kansas predicted that the Tenth Circuit, which had not examined *Asacol*, would follow the Seventh Circuit's 'great many' test over *Asacol*'s *de minimis* standard.[59] In support of its prediction, it cited an opinion affirming class certification in which the Tenth Circuit held that '"[c]lass-wide proof is not required for all issues" as long as plaintiffs made "a showing that the questions common to the class predominate over individualized questions."'[60] After weighing the economic assumptions by both sides' experts and concluding that the plaintiffs had supplied a more accurate measure of uninjured plaintiffs[61] (5 percent), the court found that the number of uninjured plaintiffs was small enough not to stand in the way of finding that antitrust impact was capable of class-wide proof, even if some individualized questions remained.[62]

The Eastern District of New York similarly disavowed *Asacol* in the *Restasis* decision, discussed above, in which it considered defendant Allergan's attacks on the proposed class's expert, who had attempted to calculate the hypothetical penetration rate of a generic market entrant and, relatedly, the rate of Restasis brand loyalists who would be uninjured by the alleged pay-for-delay scheme.[63] After finding persuasive the expert's estimate that 5.7 percent of end-payor plaintiffs were uninjured, the court rejected the holding in *Asacol* that certifying a class that included uninjured plaintiffs risked 'an escalating disregard of the difference between representative civil litigation

57 *Messner v Northshore Univ. Health System*, 669 F.3d 802, 825 (7th Cir. 2012).

58 *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, No. 17-md-2785 (DDC) (TJJ), 2020 WL 1180550 (D. Kan. Feb. 27, 2020).

59 *Id.* at *31–2.

60 *Id.* at *30 (quoting *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014), cert. denied 137 S. Ct. 291 (2016)).

61 *Id.* at *32–4.

62 *Id.* at *35–6.

63 *In re Restasis*, 335 F.R.D. at 19.

and statistical observations of tendencies and distributions.'[64] Instead, it found that the plaintiffs' econometric model was sufficient to show antitrust impact on a class-wide basis, and, in a further departure from *Asacol*, held that uninjured plaintiffs may be identified and removed during the claims administration process.[65]

Moreover, neither the *EpiPen* court nor the *Restasis* court was persuaded by the defense argument, based on *Asacol*, that the presence of uninjured plaintiffs runs afoul of defendants' Seventh Amendment or due process rights. Both explained that where an econometric model identifies antitrust liability to a class as a whole, the presence of uninjured plaintiffs alone would not affect the class-wide antitrust impact. In other words, because the plaintiffs in both cases had offered a method to calculate the aggregate injury caused by the defendants' allegedly anticompetitive acts, those courts held that the defendants' constitutional rights would not be impinged.[66]

At this stage in the case law, it is unclear whether there is a quantitative disagreement among courts about how many uninjured plaintiffs is too many, or whether some denials of certification have been due in part to other perceived deficiencies in the plaintiffs' models and their relationship to the proposed classes' liability theories. In *Olean Wholesale Grocery Cooperative*, for example, the defendants' expert criticized the plaintiffs' econometric model for assuming that the prices the defendants charged the plaintiffs would rise or fall evenly across the class.[67] In contrast, the defendant Restasis limited its challenge to the number of uninjured brand loyalists that may have been captured by the plaintiffs' model, and not that its alleged conduct impacted the class of end-payor plaintiffs in a heterogenous manner, such as through idiosyncratic price effects.[68] Accordingly, the lack of uniformity among the courts thus far may have as much to do with the unique characteristics of the proposed classes that have come before them as it does with a disagreement about the threshold number of uninjured plaintiffs that will defeat certification.

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64 *Id.* at 25 (quoting *In re Asacol*, 907 F.3d at 55–6). Notably, the court framed its task as 'decid[ing] if the class contains only a *de minimis* number of uninjured plaintiffs.' *Id.* at 18. Although such language echoed that used in *Asacol*, the *Restasis* court clarified that its overall objective was to determine whether the plaintiffs 'advance[d] a workable methodology to demonstrate that antitrust injury can be proven on a class-wide basis.' *Id.* (quoting *Dial Corp. v. News Corp.*, 314 F.R.D. 108, 115 (S.D.N.Y. 2015), amended, No. 13-cv-6802, 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016)).

65 *Id.* at 26.

66 *In re Restasis*, 335 F.R.D. at 23–6; *In re EpiPen*, 2020 WL 1180550, at *37.

67 *Olean Wholesale Grocery Coop., Inc.*, 993 F.3d at 782–83.

68 *In re Restasis*, 335 F.R.D. at 15–26.

Use of averages to demonstrate class-wide injury with degrees of harm

The use of average-pricing models has also been a recent focal point in predominance inquiries. This is related in large part to the issues discussed above, and defendants often argue that the presence of uninjured plaintiffs undermines the reliability of such averaging. However, although the presence of too many uninjured class members appears to be treated as a binary issue, the use of average-pricing models is often cited by defendants as implicating more granular and individualized questions, such as plaintiffs' price elasticity and negotiating power, that may operate to defeat a finding of predominance.

The Third Circuit in *In re Lamictal Direct Purchaser Antitrust Litigation*[69] confronted the use of averages after a District of New Jersey court certified a class of direct purchasers of the brand-name anti-epilepsy drug Lamictal and a generic version who alleged that the defendants entered into a reverse settlement agreement that delayed the generic lamotrigine's market entry. In reversing, the Third Circuit declined to interpret the Supreme Court's decision in *Tyson Foods* as sanctioning the use of averages to establish predominance, writing that *Tyson Foods* was cabined to cases brought under the Fair Labor Standards Act where direct proof of injury was unavailable.[70] The court then criticized the plaintiffs' model, which compared average generic discounts in a but-for world with the average price paid by the plaintiffs.[71] Such a model, it held, was not capable of proving common injury in the Lamictal/lamotrigine market, which was characterized by individual price negotiations between the defendants and the direct purchasers.[72] According to the defendants' injury model, such negotiations may have allowed certain plaintiffs to actually pay less than they would have if the alleged reverse payment settlement had not happened.[73] Although the district court declined to 'address the multi-leveled microeconomic analysis of what each Defendant would or would not have possibly done in the but-for world,' the Third Circuit held that a more rigorous analysis was needed to determine whether the defendants' model raised sufficiently individualized issues to defeat the predominance requirement.[74]

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69 957 F.3d 184 (3d Cir. 2020).

70 *Id.* at 191–92.

71 *Id.* at 192–94.

72 *Id.*

73 *Id.* at 192.

74 *Id.* at 192–3. On remand, the District of New Jersey declined to certify the class. See Order, *In re: Lamictal Direct Purchaser Antitrust Litig.*, No. 2:12-cv-00995 (JMV) (CLW) (D.N.J. Apr. 9, 2021) (Dkt. No. 503).

The holding in *Lamictal* may signal a growing skepticism of the use of averages as being sufficient to demonstrate class-wide harm, particularly in the face of factual disputes at the certification stage. But, as with the question of uninjured plaintiffs, *Lamictal* may simply underscore the need for district courts to rigorously examine the interplay between the market dynamics at issue and the plaintiffs' theories of liability. For example, an Eastern District of Pennsylvania court, citing *Lamictal*, declined to certify a class of end-payor purchasers of cholesterol treatment Niaspan in its 2020 *In re Niaspan*[75] decision, even after having certified a class of Niaspan direct purchasers the previous year.[76] As the court observed in its most recent Niaspan certification decision, the plaintiffs' yardstick model, which employed averages, masked the variation of injury among members of the putative class, which included not only uninjured brand loyalists, but also plaintiffs who may have suffered zero-to-negative damages, such as those who received rebates or paid flat co-pays.[77]

In contrast, in its decision that predated *Lamictal*, the court had found that the use of averages did not threaten to paper over variations of injury among a subset of direct purchasers, which the defendants contended were a function of increased generic competition over time.[78] Instead, although it acknowledged that '[t]he use of averages in a common impact analysis is controversial,' it held that the plaintiffs' econometric model, which employed multiple averages, adequately addressed the price fluctuation caused by increased competition of generics.[79] Whether the averages in fact provided a 'useful benchmark' to determine antitrust impact, the court held, was a question for the jury.[80] Accordingly, the difference in outcomes between the two *Niaspan* opinions appears to result not from *Lamictal*'s intervening effect, but may be more attributable to the differences between the theories of liability and econometric models advanced by the different proposed classes.

Two certification decisions out of the Southern District of New York further highlight how the ability of average-pricing models to predict class-wide antitrust impact turns on the facts of each case, rather than on bright-line rules about their use.

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75 464 F. Supp. 3d 678 (E.D. Pa. 2020).

76 *In re Niaspan Antitrust Litig.*, 397 F. Supp. 3d 668, 688–90 (E.D. Pa. 2019).

77 *In re Niaspan*, 464 F.3d at 715–21.

78 *In re Niaspan*, 397 F.3d at 687.

79 *Id.*

80 *Id.* at 687–88.

Citing *Lamictal*, the Southern District of New York in *In re Namenda*[81] certified a class of third-party payors (indirect purchasers) on the theory that the defendants engaged in reverse settlements with generic manufacturers, which the plaintiffs argued delayed market entry of generic competition and led the third-party payors to continue to pay supra-competitive prices.[82] The court was careful to undertake a rigorous analysis of the plaintiffs' average-pricing data and engage with the defendants' objections in a manner that the Third Circuit had found the *Lamictal* district court failed to do.[83] In particular, the *Namenda* court, in certifying the class, found that although the brand manufacturer's payment of rebates may have offset any price increases borne by the plaintiffs, it held that the plaintiffs' antitrust injury occurred at the moment of overcharge, and that, in any event, the plaintiffs' model accounted for rebates, such that the antitrust impact was capable of common proof.[84]

On the other hand, in *In re Aluminum Warehousing*,[85] in which primary aluminum purchasers accused aluminum warehouse owners of undertaking a series of anticompetitive actions that raised the price of aluminum, the court rejected the plaintiffs' expert's average pricing model as supporting predominance. The court noted that although allegations of price-fixing are generally susceptible to common proof, the plaintiffs' theory of liability was idiosyncratic, as they conceded that they were not alleging price-fixing, but rather 'complicated interactions between participants who are alleged to have gained benefits primarily from trading activity.'[86] Because there was significant variation in the purported conspiratorial activity under the plaintiffs' theory of liability, the court found that the plaintiffs' expert's model, which applied average metrics affecting the market price of aluminum across the period of the alleged conspiracy, lacked the ability to prove class-wide pricing injury.[87]

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81 *In re Namenda Indirect Purchaser Antitrust Litig.*, No. 1:15-cv-6549 (CM) (RWL), 2021 WL 509988 (S.D.N.Y. Feb. 11, 2021).

82 *Id.* at *1.

83 *Id.* at *23.

84 *Id.*; see also *id.* at *23–6. The *Namenda* court declined to certify the class under a separate theory of liability, but its reasoning was unrelated to the use of average-pricing models and the holding in *Lamictal*. See *id* at *28–33.

85 *In re Aluminum Warehousing Antitrust Litig.*, 336 F.R.D. 5 (S.D.N.Y. 2020).

86 *Id.* at 45.

87 *Id.* at 56–7.

As with the issue of uninjured plaintiffs, the propriety of an average-pricing model has appeared to be highly fact-intensive and has turned on a proposed class's theory of liability. The more uniform the alleged effect across the proposed class, the more likely a finding of predominance.

A return from exile for the numerosity requirement?

Numerosity is rarely a stumbling block for putative classes alleging antitrust violations, but the Third Circuit added teeth to that requirement in 2016 when it vacated the Eastern District of Pennsylvania's certification of a class of 22 plaintiffs.[88] Citing circuit precedent that numerosity is generally satisfied if the potential number of plaintiffs exceeds 40, the Third Circuit clarified that a court's numerosity analysis turns not on bright-line numerical thresholds, but on whether the joinder of all interested parties would be impracticable. On remand, the Eastern District of Pennsylvania denied certification on numerosity grounds, finding both that judicial economy concerns and the plaintiffs' ability and motivation to litigate as joint plaintiffs disfavored certification.[89]

The cases out of the Third Circuit do not appear to have portended a wider trend of certification denial on numerosity grounds, but there have been close calls. In the past year, the Eastern District of Virginia certified a class of 35 plaintiffs over the defendants' objection that the class failed to satisfy Rule 23(a)(1).[90] Although, like the Third Circuit, it was careful not to assign a strict numerical cutoff, the court held that putative classes of between 20 and 40 plaintiffs require close scrutiny to determine the practicability of joinder.[91] Even under such scrutiny, however, the court found that the plaintiffs – direct purchasers of cholesterol medication Zetia who accused drug manufacturers Merck and Glenmark Pharmaceuticals of conspiring to keep generic versions of Zetia off the market– were sufficiently numerous to justify a class action as more economical than the plaintiffs' joinder, taking into account the anticipated costs of further discovery.[92] It also rejected the defendants' reliance on the Third Circuit's *In re Modafinil* decision that the plaintiffs' sophistication and adequate resources to pursue

88 *In re Modafinil Antitrust Litig*, 837 F.3d 238 (3d Cir. 2016).

89 *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797, 2017 WL 3705715, at *6–11 (E.D. Pa. Aug. 28, 2017).

90 *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2020 WL 3446895 (E.D. Va. Jun. 18, 2020), report and recommendation adopted, 481 F. Supp. 3d 571 (E.D. Va. 2020).

91 *In re Zetia*, 481 F. Supp. 3d at 574–75.

92 *Id.* at 574–77.

their claims individually or jointly should preclude certification, instead holding that even well-heeled and sophisticated businesses are entitled to pursue their claims as a class if those claims have a negative expected value.[93]

Although the frequency with which numerosity has been litigated at the class certification stage pales in comparison to issues of predominance, the requirement has nevertheless received its share of the limelight in recent years.

Conclusion

The decisions during the past year reveal that questions of class certification in antitrust litigation show no signs of abating. Courts have continued to grapple with what the 'rigorous analysis' standard requires of them, particularly with respect to plaintiffs' ability to demonstrate, through statistical modeling, that common questions predominate at the certification stage. Although questions of uninjured plaintiffs and average-pricing models often turn on the facts of each case, the recent decisions have shown cracks forming between the circuits, as courts have navigated the often-elusive line between common questions and individualized inquiries. The numerosity standard has also undergone development, albeit less dramatically than its counterpart requirement. These issues will undoubtedly continue to develop in the years to come.

93 *Id.* at 575–76.

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