



US COURTS ANNUAL REVIEW



FOURTH EDITION

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Preface

Global Competition Review (GCR) 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 in-depth analysis of longer-term trends provided by leading practitioners in key jurisdictions. Within that broad stable, we are delighted to include the fourth iteration of the *US Courts Annual Review*, which takes a 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 circuit around the United States, allowing our valued contributors both to analyse important local decisions and to draw together national trends that point to a direction of travel in antitrust litigation. Both much-discussed developments and infrequently noted decisions are thus brought to the surface, allowing readers to gain a comprehensive understanding of how US judges are interpreting antitrust law and its evolution.

For this digital-only fourth edition, the Review also includes exclusive data from Docket Navigator. In-depth charts drill down into the raw data – from the number of fresh cases filed every year to the average case duration – to give readers primary insights from the front line. The chapters focusing on particular circuits are also complemented by charts that provide a snapshot of everything from active numbers of antitrust cases to the number of cases that are closed off every year.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the United States, whose knowledge and experience have been essential in drawing together these developments. We thank all the contributors for their time and effort in compiling this Review.

Although every effort has been made to ensure that all 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 GCR 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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Docket Navigator Data

GCR's *US Courts Annual Review*'s digital-only fourth edition is supplementing the in-depth commentary with some raw numbers on antitrust case filing data. The charts on the following pages have been provided by Docket Navigator (owned by GCR's parent company, Law Business Research) – a market-leading business intelligence platform that has reviewed and flagged 6.7 million docket entries to date, allowing it to provide exclusive data on US filing patterns.

From the average length of cases to the numbers of fresh antitrust cases being filed each year, this data adds a fresh dimension to the expert commentary provided by our authors to allow even greater understanding of this fast-moving space.

US antitrust cases in 2022



366

Antitrust cases filed



1,478

Active antitrust cases



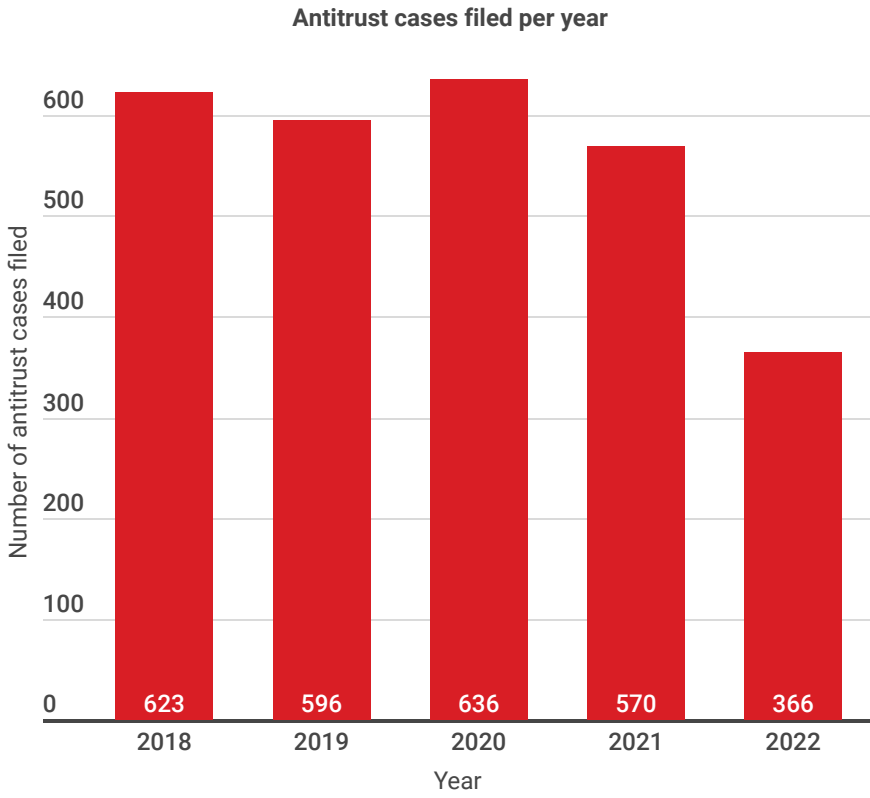
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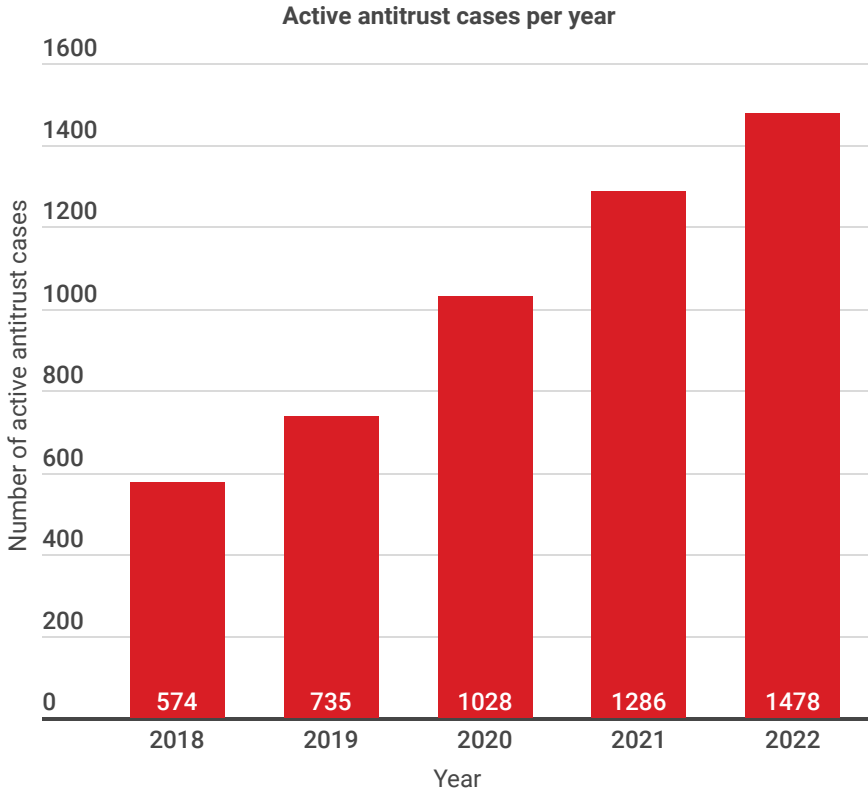
Antitrust cases concluded

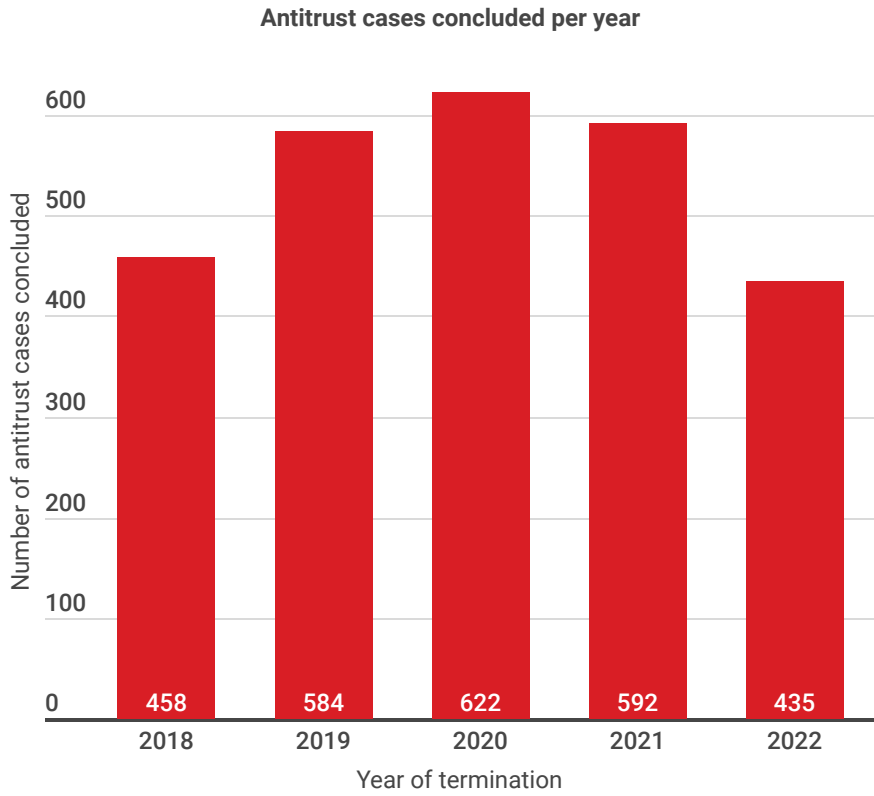


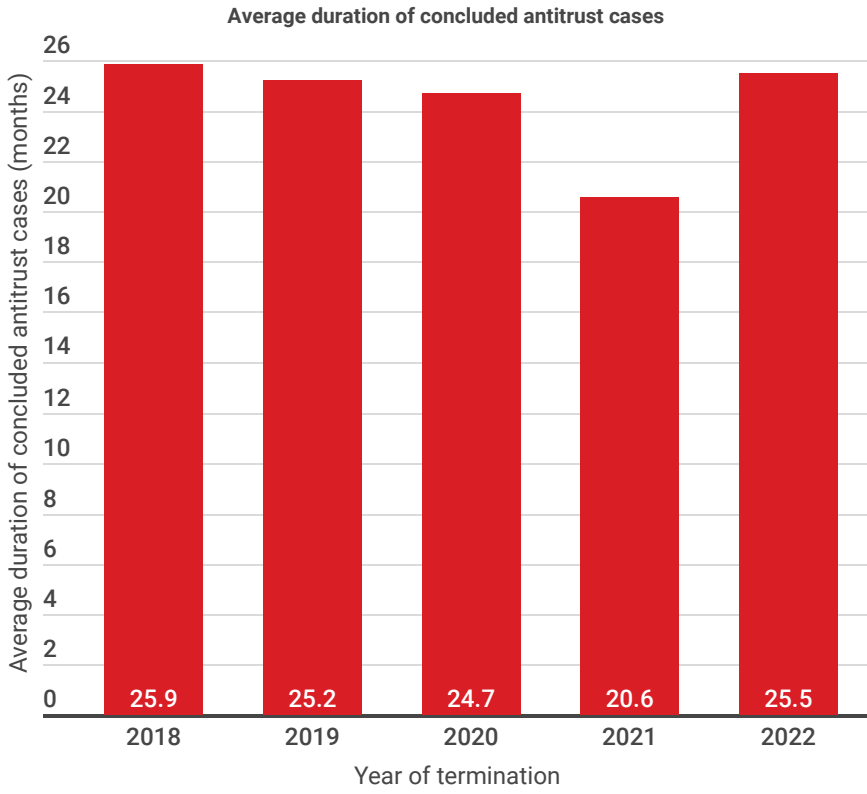
25.5

Average length (in months) of concluded cases









CHAPTER 3

Trends in Class Certification

William F Cavanaugh, David Kleban, and Voratida Sangchant¹

Class action lawsuits are on the rise, both in terms of litigation spending and the number of cases.² Companies reportedly spent \$3.5 billion on class action defense in 2022 – a record amount likely driven by larger claims and more companies facing class actions.³ Meanwhile, courts have continued to perform their gate-keeping function at the certification stage. Questions of whether common issues are truly predominant have remained at the forefront, with a continued focus on the issue of standing. This chapter discusses these issues of class certification in the antitrust context by tracing the standards of certification and discussing the evolution of the ‘rigorous analysis’ required by federal courts. It then spotlights notable decisions from the past few years that have grappled with challenges to the sufficiency of plaintiffs’ statistical models used to demonstrate the preponderance of classwide questions, principally on the issue of showing classwide harm, and with the number of putative class members required to be sufficiently numerous for certification.

Standards for class certification

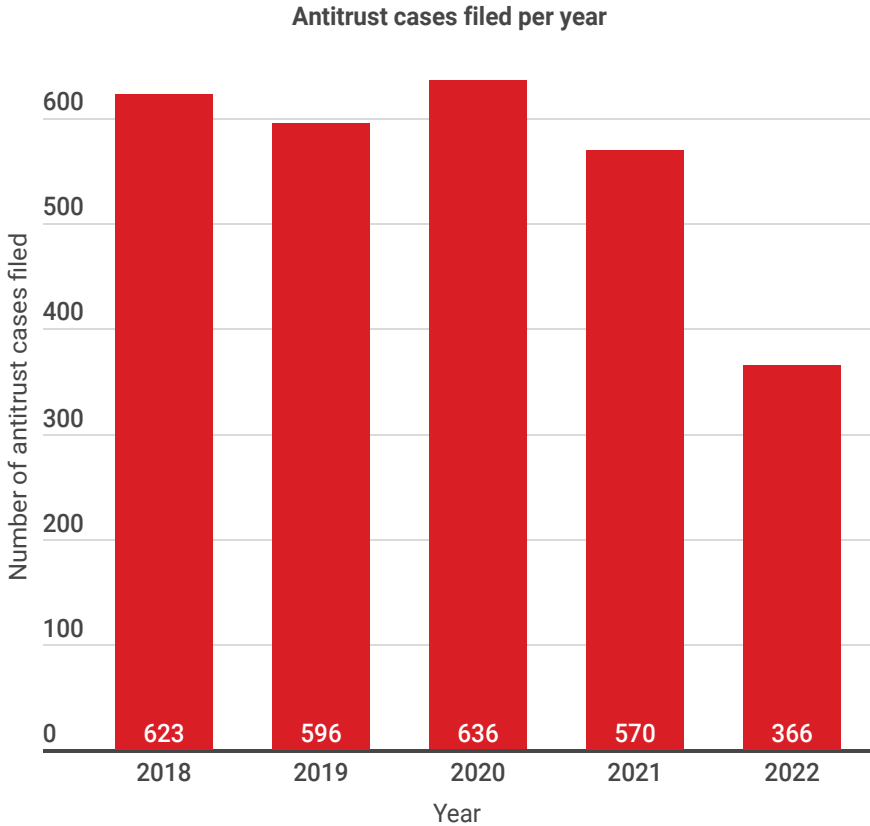
Claims of anticompetitive conduct often involve allegations of harm to a large number of market participants. It is no surprise, then, that such antitrust claims are often brought under Rule 23 of the Federal Rules of Civil Procedure (FRCP), which allows for the collective representation of a large group of plaintiffs allegedly

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² Carlton Fields, ‘Class Action Survey’, 8 [2023], <https://ClassActionSurvey.com> (Mar. 6, 2023).

³ *Id.* at 2.

injured by the same conduct. But while antitrust disputes continue to account for a significant share of all active class actions, that share has fallen over the past few years, along with the total number of antitrust cases filed (see chart below).⁴



Labor and employment cases and consumer fraud cases were the most common types of disputes litigated on a classwide basis in 2022, with antitrust cases coming in sixth.⁵

Although class actions are commonplace in antitrust litigation, the Supreme Court has long considered class actions to be the exception to the general rule that parties may litigate only on their own behalf.⁶ Only if a proposed representative

⁴ Data compiled by Docket Navigator.

⁵ Carlton Fields, *supra* at 8.

⁶ *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979).

demonstrates that 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.⁷

To that end, Rule 23(a) requires a putative class to satisfy four requirements:

- 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’ claims⁸ 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 interest of the class (the ‘adequacy of representation’ requirement).⁹

A proposed class must also satisfy Rule 23(b), which contemplates three types of classes of plaintiff actions. 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’¹⁰ 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.’¹¹ (The latter class action is known as a ‘limited funds’ action.¹²) Under Rule 23(b)(2), a class action may also be maintained if plaintiffs seek only injunctive relief.¹³ 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).

⁷ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 [2011].

⁸ 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).

⁹ Fed. R. Civ. P. 23(a).

¹⁰ Fed. R. Civ. P. 23(b)(1)(A).

¹¹ Fed. R. Civ. P. 23(b)(1)(B).

¹² See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 [1999].

¹³ Fed. R. Civ. P. 23(b)(2).

Courts' evolving approach to applying 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*¹⁴ 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,'¹⁵ 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*¹⁶ (*Falcon*) 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.'¹⁷

But it remained unsettled exactly how far district courts could pull back the curtain and consider the merits of a suit at the certification stage (and their bearing on the question of class certification). 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.¹⁸ Another court observed in 2007 that the circuits were split regarding the district court's role in resolving a 'battle of the experts' at class certification.¹⁹

In 2008, the Third Circuit²⁰ articulated a more muscular understanding of the district courts' gatekeeping role in conducting a 'rigorous analysis' in the anti-trust 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.²¹

¹⁴ 417 U.S. 156 (1974).

¹⁵ *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.

¹⁶ 457 U.S. 147 (1982).

¹⁷ *Id.* at 160–61.

¹⁸ *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 91–92 (S.D.N.Y. 2004), vacated and remanded, 471 F.3d 24 (2d Cir. 2006).

¹⁹ *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 105 (C.D. Cal. 2007).

²⁰ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

²¹ *Id.* at 307.

The Supreme Court was not far behind. In 2011, the Court held in *Wal-Mart Stores, Inc v Dukes*, 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.’²² That such proof may overlap with the merits, as the Court held in *Falcon*, ‘cannot be helped.’²³

Two years later, the Supreme Court appeared to soften its stance in *Amgen Inc v Connecticut Retirement Plans & Trust Fund*,²⁴ 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.’²⁵ 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.’²⁶ 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.’²⁷ 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.’²⁸

The Supreme Court once again addressed class certification in *Tyson Foods, Inc v Bouaphakeo (Tyson Foods)*,²⁹ 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 pay. 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 regarding the use of such representative sampling to establish class-wide liability, held that the soundness of the plaintiffs’ sampling was a question common to the

²² *Wal-Mart Stores*, 564 U.S., at 350 [emphasis in original].

²³ *Id.* at 351.

²⁴ 568 U.S. 455 (2013).

²⁵ *Id.* at 459.

²⁶ *Id.* at 466.

²⁷ *Comcast Corp. v. Behrend*, 569 U.S. 27, 34–35 (2013) [*Comcast*].

²⁸ *Id.* at 35.

²⁹ 577 U.S. 442 (2016).

class, and one more properly addressed at summary judgment.³⁰ Although it sided with the plaintiffs, it reaffirmed the district courts' need 'to give careful scrutiny to the relation between common and individual questions in a case.'³¹

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 that plaintiff's ultimate theory of liability.³² 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, especially in recent years.³³ Although 2022 saw fewer landmark decisions than in past years, the Ninth Circuit's April 2022 en banc decision affirming certification in *Olean Wholesale Grocery Cooperative, Inc v Bumble Bee Foods LLC* was significant. In *Olean* and other cases, statistical and econometric modeling has continued to be central at the certification stage as parties offered dueling methods of attempting to prove or undercut predominance. In addition, courts continue to navigate their role as gatekeepers to certification when defendants identify uninjured plaintiffs allegedly swept up by plaintiffs' models, or when defendants otherwise criticize those models for papering over individualized differences among class members.

Some attention on this battleground has shifted from litigation involving pharmaceutical companies to cases about 'Big Tech', such as *In re Google Play Store Antitrust Litig.*³⁴ and *In re Apple iPhone Antitrust Litigation.*³⁵ In these cases,

³⁰ *Id.* at 456–57.

³¹ *Id.* at 453.

³² See, e.g., *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022), cert. denied sub nom. *StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, 143 S. Ct. 424 (2022); *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191 (3d Cir. 2020); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) (*Messner*); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009); *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

³³ See *William F. Cavanaugh et al.*, Trends in Class Certification, US Courts Annual Review 54–73 (3d ed. 2022).

³⁴ *In re Google Play Store Antitrust Litig.*, No. 20-cv-05761-JD (N.D. Cal.).

³⁵ *In re Apple iPhone Antitrust Litig.*, No. 11-cv-6714-YGR (N.D. Cal., Mar. 29, 2022) Dkt. No. 630.

plaintiffs are suing consumer technology companies for unlawful monopolization of application markets through the use of their app stores. Both Google and Apple challenged methodologies proffered by plaintiffs at the certification stage, raising issues about the presence of uninjured class members. Apple defeated the plaintiffs' first motion for class certification on grounds of predominance, asserting that 14.6 percent of the app store 'accounts' in the proposed class suffered no injury, corresponding to approximately 30 million accounts.³⁶ In *Google Play Store*, defendants similarly challenged the methodology used by plaintiffs' expert as failing to identify uninjured class members.³⁷ That challenge was unsuccessful, but the class certification order is on appeal as at the time of writing.

Separately, although less frequently litigated, the numerosity standard once again saw some attention in the past year when certification was denied in another pharmaceutical case in which the putative class was found to be too small.³⁸

Statistical and econometric modeling to show classwide antitrust injury
One area of continuing focus has been the degree to which district courts scrutinize plaintiffs' methodologies for determining classwide harm. In antitrust cases, plaintiffs must demonstrate not only 'antitrust injury'³⁹ but also 'antitrust impact,' namely that the individual injury resulting from the alleged violation is capable of proof on a classwide basis.⁴⁰

In this regard, and in the wake of *Tyson Foods*, courts have typically accepted the use of statistical modeling as a method of proof of antitrust impact.⁴¹ Although some courts have cautioned that 'certification [should not be] automatic every

³⁶ *Id.* at 23.

³⁷ *In re Google Play Store*, No. 3:20-cv-05761-JD (N.D. Cal. Nov 28, 2022).

³⁸ *In re: Lamictal Direct Purchaser Antitrust Litig.*, No. 2:12-cv-00995 (D.N.J. Feb. 1, 2023).

³⁹ *In re: Lamictal Direct Purchaser Antitrust Litig.*, No. CV 12-995, 2021 WL 2349828, at *4 (D.N.J. June 7, 2021) (describing 'antitrust injury' (or 'antitrust standing') as a 'prudential limitation,' and defining it as an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful' (first quoting *Ethypharm S.A. France v. Abbott Labs*, 707 F.3d 223, 232 (3rd Cir. 2013), then quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977))).

⁴⁰ See *Comcast*, 569 U.S. at 30.

⁴¹ 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) (*Daubert*), 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). In a recent decision, one court in the Northern District of California rejected the plaintiffs' model under *Daubert*, thereby avoiding a holding as to whether the putative class – all purchasers of iOS applications, application licenses,

time counsel dazzle the courtroom with graphs and tables,⁴² there is widespread agreement that ‘plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages’ to establish antitrust impact at the certification stage.⁴³ Regression models, which ‘control for the effects of the differences among class members and isolate the impact of the alleged antitrust violations on the prices paid by class members,’ have been viewed particularly favorably, with the Ninth Circuit endorsing them as ‘a generally reliable econometric technique’ to prove classwide antitrust impact.⁴⁴

The Ninth Circuit is not alone. In December 2020, 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.⁴⁵ 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 classwide antitrust impact.⁴⁶

More recently, a court in the District of Minnesota approved of an econometric model that controlled for lawful causes of price increases to arrive at an overcharge range for a putative class of indirect consumer purchasers.⁴⁷

The presence of uninjured plaintiffs in putative classes

Although 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 that evidence and the plaintiffs’ theory of liability.

or in-app purchases since 2007 – included too many uninjured plaintiffs. *In re Apple iPhone*, No. 11-cv-6714-YGR, (N.D. Cal. Mar. 29, 2022) ECF No. 630.

⁴² *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 491 (N.D. Cal. 2008).

⁴³ *Kleen Prod. LLC v. Int’l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016).

⁴⁴ *Olean Wholesale Grocery Coop.*, 31 F.4th, at *15677 & n.24.

⁴⁵ *D&M Farms v. Birdsong Corp.*, No. 2:19-cv-463, 2020 WL 7074140 (E.D. Va. Dec. 2, 2020).

⁴⁶ *Id.* at *8. The case has since settled.

⁴⁷ *In re Pork Antitrust Litig.*, No. CV 18-1776 (JRT/JFD), 2023 WL 2696497, at *21 (D. Minn. Mar. 29, 2023)

Some courts still reserve battles of the experts for the jury,⁴⁸ but most now consider it necessary to resolve those disputes as part of their ‘rigorous analysis’ at the certification stage. Indeed, Judge Donato of the Northern District of California attracted attention for conducting ‘concurrent expert proceedings,’ also known as ‘expert hot tub’ hearings, in the *Google Play Store* litigation.⁴⁹ In an expert hot tub hearing, experts from both sides jointly present evidence and answer questions. This technique, originating from Australian courts, is designed to encourage a dialogue between the experts in open court, as opposed to calling one expert to give a monologue, followed by the rebuttal expert.⁵⁰

One common theme in attacks on plaintiffs’ modeling efforts has been the presence of uninjured plaintiffs in a proposed class. Uninjured plaintiffs are those included within a class but who have not suffered any demonstrable injury. The presence of uninjured class members 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 the past decade, some courts have refused to certify a class 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.⁵¹ The presence of uninjured plaintiffs has also implicated questions of Article III standing,⁵² as well as Seventh Amendment and due process concerns, with some defendants arguing that the inclusion of unidentified, uninjured plaintiffs in a certified class deprives them of a meaningful opportunity to contest each plaintiff’s injury and

⁴⁸ 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).

⁴⁹ *In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587, at *3 (N.D. Cal. Nov. 28, 2022) (noting its prior use of the hot tub procedure, and finding it ‘an invaluable tool for vetting Daubert issues and determining questions of class certification’).

⁵⁰ Anjelica Cappellino, ‘“Hot-Tubbing” Expert Witnesses: An Experimental Technique From Australia Makes a Splash in U.S. Courts’ (Aug. 23, 2021), www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts (accessed Jun. 14, 2023).

⁵¹ 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).

⁵² See Defs.’-Appellants’ Br. at 12, *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, No. 19-56514 (9th Cir. Aug. 31, 2021), ECF No. 149 (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021)).

forces them to pay for more harm than the alleged anticompetitive conduct may have caused.⁵³ Courts have grappled with how to balance these certification issues against the economic and judicial efficiency of class actions.

In 2018, the plaintiffs in *In re Asacol*⁵⁴ were dealt a blow when the First Circuit held that the proposed class from the plaintiffs' economic model swept up too many purchasers who were not injured by the defendants' conduct. 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 the 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.⁵⁵ In *In re Asacol*, however, the court found that as many as 10 percent of the defined class's members were uninjured,⁵⁶ which exceeded the *de minimis* threshold.⁵⁷ 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.⁵⁸

The DC Circuit in *In re Rail Freight Fuel Surcharge*⁵⁹ sided with the First Circuit the following year 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 *Asacol*, the DC Circuit held that the plaintiff's expert's damages model, even if reliable in attempting to show an average overcharge to the class, failed to show classwide injury because plaintiffs' modeling identified 12.7 percent as uninjured, exceeding a *de minimis* amount.⁶⁰ And, because the plaintiffs' model did not have a winnowing mechanism, the Rail Freight court upheld the district court's denial of certification.⁶¹

⁵³ See, e.g., *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 335 F.R.D. 1, 17 (E.D.N.Y. 2020).

⁵⁴ *In re Asacol*, 907 F.3d.

⁵⁵ *Id.*

⁵⁶ Although the parties disputed the number of uninjured plaintiffs – the plaintiffs argued that the number was lower, while the defendants argued that it was higher – the court found that the parties had not preserved their objections for appellate review. *Id.* at 51.

⁵⁷ *Id.* at 54.

⁵⁸ *Id.* at 52–55, 61.

⁵⁹ See note 51, *supra*.

⁶⁰ *In re Rail Freight*, 934 F.3d at 623–24.

⁶¹ *Id.* at 625. To be sure, *Asacol* and *Rail Freight* have not been barriers to certification when there is little question that the number of uninjured plaintiffs is *de minimis*. For example, in May 2021, the court in *In re Ranbaxy* certified three classes of direct purchasers of branded and generic pharmaceuticals over defendants' challenge to predominance, holding that

A panel of the Ninth Circuit appeared to follow in the footsteps of *In re Asacol* in April 2021 when it embraced the *de minimis* limit on uninjured class members in *Olean Wholesale Grocery Coop, Inc v Bumble Bee Foods LLC*.⁶² Reversing the district court, the Ninth Circuit panel found that 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.⁶³ Citing *In re Asacol*, the panel 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.⁶⁴

The defendants' victory was short-lived. In August 2021, the Ninth Circuit vacated the panel decision in *Olean*⁶⁵ and, in April 2022, it revived the certified classes in an en banc opinion.⁶⁶ The divided court held that common questions may predominate over individualized ones even if a proposed class contains more than a *de minimis* number of uninjured plaintiffs.⁶⁷ The majority declined to read either *In re Asacol* or *Rail Freight* as adopting a per se rule precluding certification where the class contains more than a *de minimis* number of uninjured class members.⁶⁸ Instead, it understood those decisions as urging a case-by-case examination, and as requiring a finding that the predominance requirement is unsatisfied only if 'the need to identify uninjured class members "will predominate and render an adjudication unmanageable."⁶⁹

In this regard, the *Olean* majority appears to view its decision as being in harmony both with *In re Asacol* and *Rail Freight* on the one hand and with *Messner* on the other hand.⁷⁰ In its 2012 *Messner* decision, the Seventh Circuit counseled

the putative class had shown that the number of potentially uninjured members was in the 'single digits,' and that they could be easily identified and excluded at a later stage. *In re Ranbaxy Generic Drug Application Antitrust Litig.*, 338 F.R.D. 294, 304 [D. Mass. 2021] (citing *In re Asacol*, 907 F.3d at 53).

⁶² *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 792 (9th Cir. 2021), reh'g en banc granted, 5 F.4th 950 (9th Cir. 2021).

⁶³ *Id.* at 791–92.

⁶⁴ *Id.*

⁶⁵ *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 5 F.4th 950 (9th Cir. 2021).

⁶⁶ *Olean Wholesale Grocery Coop.*, 31 F.4th at 683–84.

⁶⁷ *Id.* at 668–69.

⁶⁸ *Id.* at 669 n.13.

⁶⁹ *Id.*

⁷⁰ *Messner*, 669 F.3d at 825. But see *Olean Wholesale Grocery Coop.*, 31 F.4th, at 691–92 (Lee, J., dissenting) (characterizing the majority opinion as splitting with *Asacol* and *Rail Freight* in rejecting a *de minimis* rule).

against certification of a class if it contains a ‘great many’ uninjured plaintiffs – a flexible standard that turns on the facts of each case.⁷¹ It remains to be seen how district courts will navigate their respective circuit’s stance on uninjured plaintiffs, particularly since the Supreme Court declined in November 2022 to hear an appeal from the *Olean* decision.⁷² Nevertheless, *Olean* may foreshadow a more unified case-by-case approach to predominance.⁷³

In the end, however, the *Olean* majority did not wade far into the debate about when the presence of uninjured plaintiffs in a proposed class may or may not defeat a finding of predominance or standing. Departing from the 2020 panel’s decision, the en banc majority held that the defendants’ model did not actually identify any uninjured plaintiffs, and that there was no dispute that the defendants’ conspiracy affected the entire packaged tuna industry nationwide.⁷⁴ With the undisputed conspiracy as a backdrop, the court found that the plaintiffs’ model isolated the effect of that conspiracy, and that it was therefore capable of proving the plaintiffs’ ‘simple one-step theory’ that the conspiracy raised the baseline price of tuna for all buyers.⁷⁵

Future rulings may indicate how courts will approach the issue of uninjured class members in light of the appellate authorities discussed above. For example, the issue has been raised in a renewed motion for class certification in *In re Apple*

⁷¹ *Messner*, 669 F.3d, at 825.

⁷² *Starkist*, 143 S. Ct.

⁷³ Depending on how successful one views the *Olean* court’s effort to harmonize *Asacol* and *Messner*, courts that have expressly rejected the *de minimis* rule in favor of the ‘great many’ standard may not have had to choose at all. See, e.g., *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, No. 17-md-2785 (DDC) (TJJ), 2020 WL 1180550, at *31–32 (D. Kan. Feb. 27, 2020); *In re Restasis*, 335 F.R.D. at 24–26. Further signaling a trend towards uniformity across circuits, the defendants themselves in *Olean* argued in their supplemental en banc brief and at oral argument that *Asacol*’s *de minimis* standard is best understood as requiring a case-by-case assessment the theory of classwide injury, and not as a uniform or bright-line rule as to uninjured plaintiffs. See Defs.’-Appellants’ Br., at 18, *Olean Wholesale Grocery Coop.*, No. 19-56514, ECF No. 149; *id.*, Filed Audio recording of oral argument (Oct. 22, 2021), ECF No. 173.

⁷⁴ *Olean Wholesale Grocery Coop.*, 31 F.4th at 673 n.21, 680–81. The court disagreed with defendants and the dissent that up to 28 percent of the direct purchaser class could have been uninjured, finding instead that there was limited transaction data for approximately 28 percent of the class during the pre-collusion benchmark period to generate statistically significant results. *Id.* at 673 n.21, 680–81. It therefore characterized defendants’ critique of plaintiffs’ model as a challenge to its persuasiveness, and it held that the district court met its obligation in its scrutiny and ultimate rejection of defendants’ argument. *Id.* at 680–82.

⁷⁵ *Id.* at 676–82.

iPhone Antitrust Litigation.⁷⁶ In that case, the plaintiffs argue that even if the proposed class definition includes uninjured members, *Olean* suggests that this fact alone is not fatal to class certification. Defendants resist this more forgiving understanding of *Olean*, arguing *Olean* involved robust evidence of injury to all class members, whereas the proposed class in *Apple* is ‘fatally overbroad’ because it is undisputed that the proposed class includes ‘over ten million uninjured accounts (at least).’⁷⁷ At the time of writing, a decision on the plaintiffs’ renewed certification motion has not been rendered.

Also pending at the time of writing is an appeal from an order granting class certification in the *Google Play Store* litigation. The order relied on *Olean* when rejecting Google’s argument (as characterized by the court) ‘that each class member individually prove an injury before certification may be granted.’⁷⁸

Use of averages to show classwide injury with varying degrees of harm
The use of average-pricing models has also been a focal point in recent 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 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.

In challenging the direct purchaser plaintiffs’ proof of classwide antitrust impact, the defendants in *Olean* argued that plaintiffs’ use of ‘pooled’ regression models, which aggregated the sale transaction data during the conspiracy and benchmark periods, impermissibly utilized averaging assumptions that acted to ‘paper over individualized differences among the class members.’⁷⁹ The en banc Ninth Circuit was not persuaded. In assessing whether the district court conducted a sufficiently rigorous analysis, the Ninth Circuit looked to whether the models could reliably explain the plaintiffs’ theory of injury on a classwide basis and, more granularly, whether the models controlled for variables that may otherwise undermine the explanatory power of those regressions.⁸⁰ Affirming the district court’s

⁷⁶ *In re Apple iPhone*, No. 11-cv-6714 (N.D. Cal., Mar. 29, 2022).

⁷⁷ *In re Apple iPhone*, No. 11-cv-6714 (N.D. Cal., Mar. 10, 2023), Dkt. No. 689, at 4.

⁷⁸ *In re Google Play Store Antitrust Litig.*, No. 20-cv-05761-JD, 2022 WL 17252587, at *12 (N.D. Cal. Nov. 28, 2022).

⁷⁹ *Olean Wholesale Grocery Coop.*, 31 F.4th, at 677.

⁸⁰ *Id.* at 676–80.

order, it held that it was ‘both logical and plausible’ that the conspiracy raised the baseline price for all class members, and that the district court did not abuse its discretion in finding that the models sufficiently controlled for individualized variation among plaintiffs.⁸¹

In contrast, in *In re Pre-Filled Propane Tank Antitrust Litigation*,⁸² a court in the Western District of Missouri declined to certify a class of end purchasers of propane gas tanks who alleged that the nation’s leading sellers of portable propane exchange tanks conspired to underfill the tanks without concomitantly reducing their price.⁸³ As in *Olean*, the plaintiffs’ expert introduced a regression analysis purporting to show that the defendants’ conspiracy caused all indirect purchasers to pay supracompetitive prices for propane exchange tanks, arriving at an average overcharge for the class. The court denied the certification motion, crediting the defendants’ model, which criticized the plaintiffs’ use of a single average overcharge estimate as wrongly attributing injury to a significant portion of the class that otherwise lacked evidence of any injury. It also cited the plaintiffs’ expert’s admission that his regression model could not account for individualized differences between retailers (the direct purchasers), such as negotiating leverage in dealing with defendants. The court also found there was no evidence that the alleged conspiracy persisted through the class period, such that the model ‘assume[d], rather than . . . asse[ss]e[d], the “common impact.”’⁸⁴

In February 2023, a district court in *In re Lamictal Direct Purchaser Antitrust Litigation*⁸⁵ has also denied certification based on the plaintiffs’ use of averages. In 2020, the Third Circuit had reversed the district court’s certification of 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 delaying the market entry of the brand manufacturer’s authorized generic.⁸⁶

⁸¹ *Id.* at 678.

⁸² *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 14-02567-MD-W-GAF, 2021 WL 5632089 (W.D. Mo. Nov. 9, 2021).

⁸³ *Id.* at *2.

⁸⁴ *Id.* at *8.

⁸⁵ *In re Lamictal*, 2021 WL 2349828.

⁸⁶ *In re Lamictal*, 957 F.3d 184. Under the Hatch-Waxman Act, a potential manufacturer of a generic drug may utilize a streamlined Food and Drug Administration (FDA) approval process if it can establish that its generic is the bioequivalent of an FDA-approved brand-name drug, and that either the brand manufacturer’s patent is invalid, or that the generic will not infringe on the brand manufacturer’s patent. See 21 U.S.C. § 355(j)(2)(A)(vii). The first generic drug manufacturer to do so (i.e., the first-filer) enjoys a 180-day period of exclusive marketing rights. 21 U.S.C. § 355(j)(5)(B)(iv); see *King Drug Co. of Florence v.*

In reversing, the Third Circuit criticized the plaintiffs' model, which compared average generic discounts in a but-for world with the average price paid by the plaintiffs.⁸⁷ On remand, the district court characterized its central task as determining the 'acceptability of averages' and found that, although the plaintiffs' theory of liability was sound, they failed to account for evidence that the brand manufacturer offered varying discounts in response to the generic's market entry.

As with the issue of uninjured plaintiffs, courts have continued to scrutinize average-pricing models, the propriety of which depends not only on a proposed class's theory of liability but on the degree to which they account for variation of injury between class members.

Settlement classes and uninjured plaintiffs

When parties reach a settlement before a class is certified, they typically must propose a definition of the class, along with the settlement itself, for judicial approval. The Supreme Court held in *Amchem Products, Inc v Windsor* that a trial court need not inquire whether the case, if tried, would present management problems (as required by Rule 23(b)(3)(D) of the FRCP), since settlement would obviate a trial. Nevertheless, a settlement class must satisfy the remaining requirements of Rule 23 of the FRCP, which 'focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.'⁸⁸

In 2018, Rule 23 was amended to provide a uniform list of considerations guiding class settlement approval. Under Rule 23(e)(2), courts must now determine whether the proposed settlement is 'fair, reasonable and adequate,' after considering the adequacy of the representation; whether the proposed settlement was negotiated at arm's length; the adequacy of the offered relief in light of the costs, risks, and delay of continued litigation and the effectiveness of the proposed distribution scheme; and whether the settlement treats class members equitably relative to one another.

Smithkline Beecham Corp., 791 F.3d 388, 404–05 [3d Cir. 2015]. Nevertheless, the brand manufacturer may launch its own generic, called an 'authorized generic,' to compete with the first-filer's generic. *King Drug Co. of Florence*, 791 F.3d at 405.

⁸⁷ *In re Lamictal*, 957 F.3d, at 192–94.

⁸⁸ *Amchem Products, Inc. v Windsor*, 521 U.S. 591, 621 [1997].

Until recently, the issue of Article III⁸⁹ standing was not frequently raised as an issue when the district court is considering whether to approve the settlement. In *Drazen v Pinto*,⁹⁰ however, a panel of the Eleventh Circuit reversed the district court's certification of a settlement class, finding *sua sponte* that the class definition included members who lacked Article III standing. It relied in part on *TransUnion*, where the Supreme Court held that every member of a class must have Article III standing to recover individual damages.⁹¹ Notably, *TransUnion* was not itself a decision about class certification; however, since the sole purpose of certification in *Drazen* was a damages settlement, the panel reasoned based on *TransUnion* that all class members must have Article III standing. The panel decision was vacated in March 2023 for rehearing en banc. That decision, if upheld by the full Eleventh Circuit, could have significant ramifications for where plaintiffs choose to bring (and settle) their cases.

Occasional failure of numerosity

In recent years, numerosity has rarely been a stumbling block for putative classes alleging antitrust violations. For example, the District Court of Massachusetts certified a class of 39 plaintiffs, holding that judicial economy and plaintiffs' geographical dispersion favored proceeding as a class action.⁹² A court in the Northern District of Illinois certified a class of 37 plaintiffs on similar grounds, noting that there is no 'magic number' to establish numerosity.⁹³

Nevertheless, the Third Circuit added teeth to the numerosity requirement in 2016 when it vacated an Eastern District of Pennsylvania court's certification of a 22-member class.⁹⁴ 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 district court denied certification on numerosity grounds, finding both that

⁸⁹ U.S. Const. Art. III.

⁹⁰ *Drazen v Pinto*, 41 F.4th 1354, 1355 (11th Cir. 2022), reh'g en banc granted, op. vacated, 61 F.4th 1297 (11th Cir. 2023).

⁹¹ *TransUnion LLC v. Ramirez*, 210 L. Ed. 2d 568, 141 S. Ct. 2190, 2204-05 [2021] (holding that all class members must demonstrate standing to receive post-trial damages). See also *Spokeo, Inc. v. Robins*, 194 L. Ed. 2d 635, 136 S. Ct. 1540, 1549 [2016] (holding that a statutory right to sue does not create automatic standing).

⁹² *In re Ranbaxy*, 338 F.R.D., at 300-01.

⁹³ *In re Opana*, 2021 WL 3627733, at *4-5 (rev'd on other grounds) (quoting *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017)).

⁹⁴ *In re Modafinil Antitrust Litig.*, 837 F.3d 238 (3d Cir. 2016).

judicial economy concerns and the plaintiffs' ability and motivation to litigate as joint plaintiffs disfavored certification.⁹⁵ Similarly, in February 2023, a court in the District of New Jersey declined, on numerosity grounds, to certify a class of 32 plaintiffs.⁹⁶

Fourth Circuit numerosity case law is in accord. In 2020, a court in the Eastern District of Virginia had certified a class of 35 plaintiffs over the defendants' objection that the class failed to satisfy Rule 23(a)(1) of the FRCP.⁹⁷ The district court found that the plaintiffs – who were 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, holding in part that the focus of Rule 23(a)(1) is whether judicial economy favors class adjudication over multiple individual trials.⁹⁸ Citing the Third Circuit's *Modafinil* decision,⁹⁹ the Fourth Circuit reversed and held that the appropriate comparison is instead between class actions and joinder, observing that in the district court's formulation, 'the judicial-economy factor would always favor class certification, which is simpler to manage than individual lawsuits.'¹⁰⁰ In light of what he observed as the lack of a mechanical test for determining whether the numerosity element has been satisfied, Circuit Judge Niemeyer, writing in concurrence, identified non-exclusive factors for district courts to consider, including the geographic dispersion of the putative class members, their ability and motivation to file suit absent class certification, and any difficulty in identifying specific class members.¹⁰¹

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

⁹⁵ *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).

⁹⁶ *In re: Lamictal Direct Purchaser Antitrust Litig.*, No. 2:12-cv-00995 (D.N.J. Feb. 1, 2023).

⁹⁷ *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), vacated and remanded, 7 F.4th 227 (4th Cir. 2021).

⁹⁸ *In re Zetia*, 481 F. Supp. 3d, at 574–77.

⁹⁹ See note 93, *supra*.

¹⁰⁰ *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 235 (4th Cir. 2021).

¹⁰¹ *Id.* at 239–41 (Niemeyer, J., concurring).

Concluding remarks

This past year witnessed fewer remarkable opinions addressing class certification in antitrust disputes than in years past, but as litigation in the consumer tech industry continues to progress, it will likely lead to interesting developments in this area. The question of predominance, as always, has continued to occupy center stage as courts have scrutinized plaintiffs' ability to demonstrate, through statistical modeling that often utilizes averaging assumptions, that common questions predominate, even if a putative class contains uninjured plaintiffs. Time will also tell how courts approach the question of certification in the wake of the Supreme Court's decision in *TransUnion*, which – while not explicitly focused on the certification stage – has already been interpreted as having implications for that question.



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