



Americas Antitrust Review

2025

**Navigating class certification
challenges in the antitrust context**

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Navigating class certification challenges in the antitrust context

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IN SUMMARY

This article discusses recent patterns and legal developments in the context of class certification in the United States, particularly with respect to antitrust cases. It traces the standards of certification and discusses the evolution of the 'rigorous analysis' performed by federal courts. It then spotlights notable decisions in recent years that have grappled with challenges to the sufficiency of plaintiffs' statistical models used to demonstrate the preponderance of class-wide questions and with the number of putative class members required to be sufficiently numerous for certification.

DISCUSSION POINTS

- Standards for class certification and the courts' evolving approach to their application
 - Issues arising at the class certification stage in antitrust cases
 - Class-wide antitrust injury and the use of statistical and econometric modelling
 - Settlement classes
 - The numerosity requirement
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REFERENCED IN THIS ARTICLE

- Rule 23 of the Federal Rules of Civil Procedure
 - *Tyson Foods, Inc v Bouaphakeo*, 577 U.S. 442 (2016)
 - *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018)
 - *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), on reh'g *en banc*, 31 F.4th 651 (9th Cir. 2022), cert. denied *sub nom. Starkist Co .v. Olean Wholesale Grocery Coop., Inc*, 143 S. Ct. 424 (2022)
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Class action lawsuits continue to rise, both in terms of litigation spending and number of cases.^[1] Companies reportedly spent US\$3.9 billion on class action defences in 2023, surpassing the previous record high, set in US \$3.5 billion.^[2] Meanwhile, courts have continued their gatekeeping function at the class certification stage. Questions of whether common issues are truly predominant have remained at the forefront, with a continued focus on the presence of 'uninjured' class members. This article discusses these challenging class certification issues in the antitrust context by tracing the standards of certification and discussing the evolution of the 'rigorous analysis' performed by federal courts. It then spotlights notable decisions in recent years that have grappled with challenges to the sufficiency of plaintiffs' statistical models used to demonstrate the preponderance of class-wide questions 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, whether they are companies that resell goods or the ultimate

consumers. It is no surprise, then, that 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 injured by the same conduct. But while the total number of antitrust cases filed is back on the rise from 2023 (see Figure 1 below),^[3] antitrust disputes now constitute one of the smallest shares of all active class actions. Labour, employment and consumer fraud cases continue to dominate.^[4]

Figure 1: Antitrust Cases Filed Per Year, 2019–2023

US antitrust cases in 2023



420

Antitrust cases filed



1916

Active antitrust cases



453

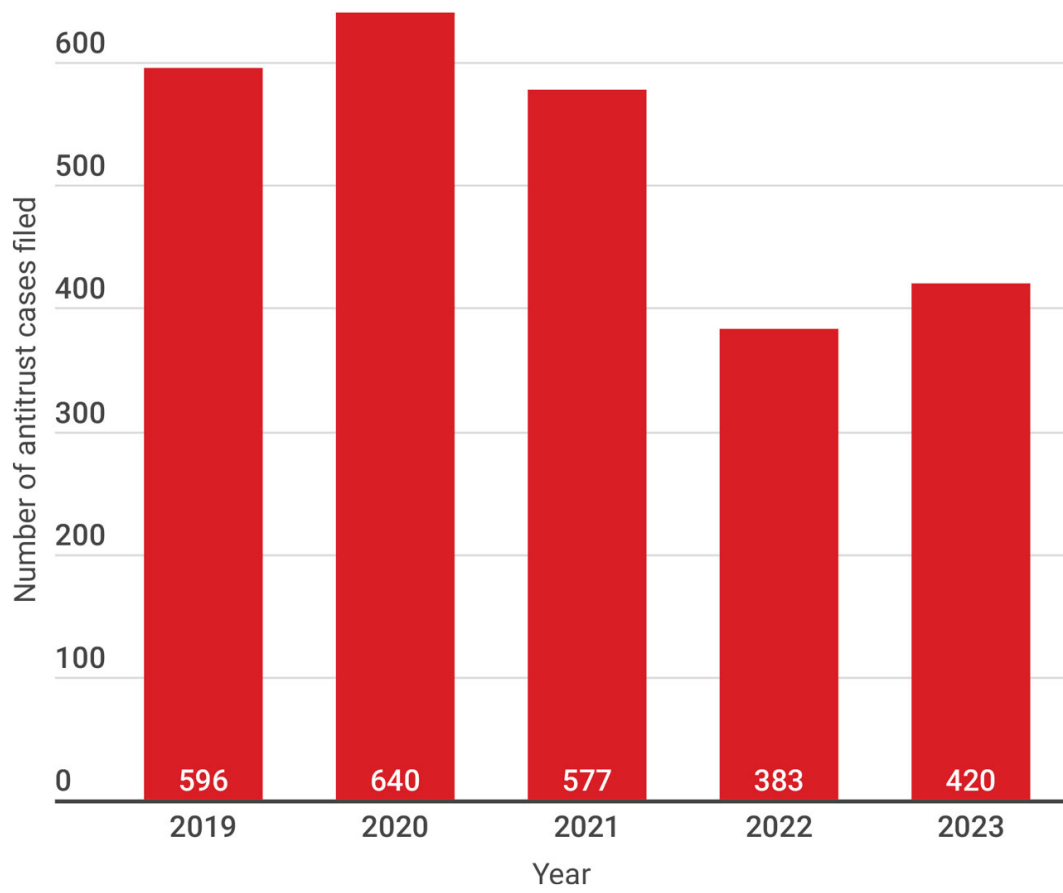
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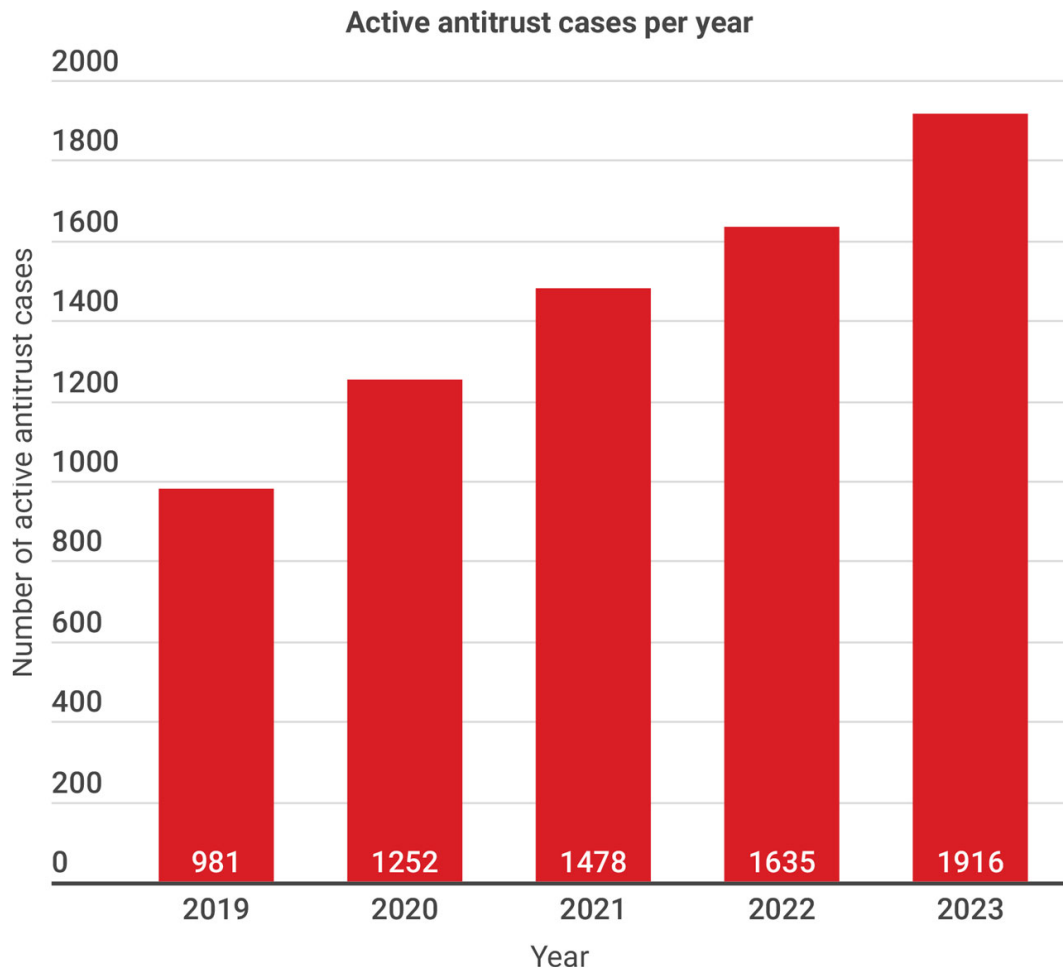


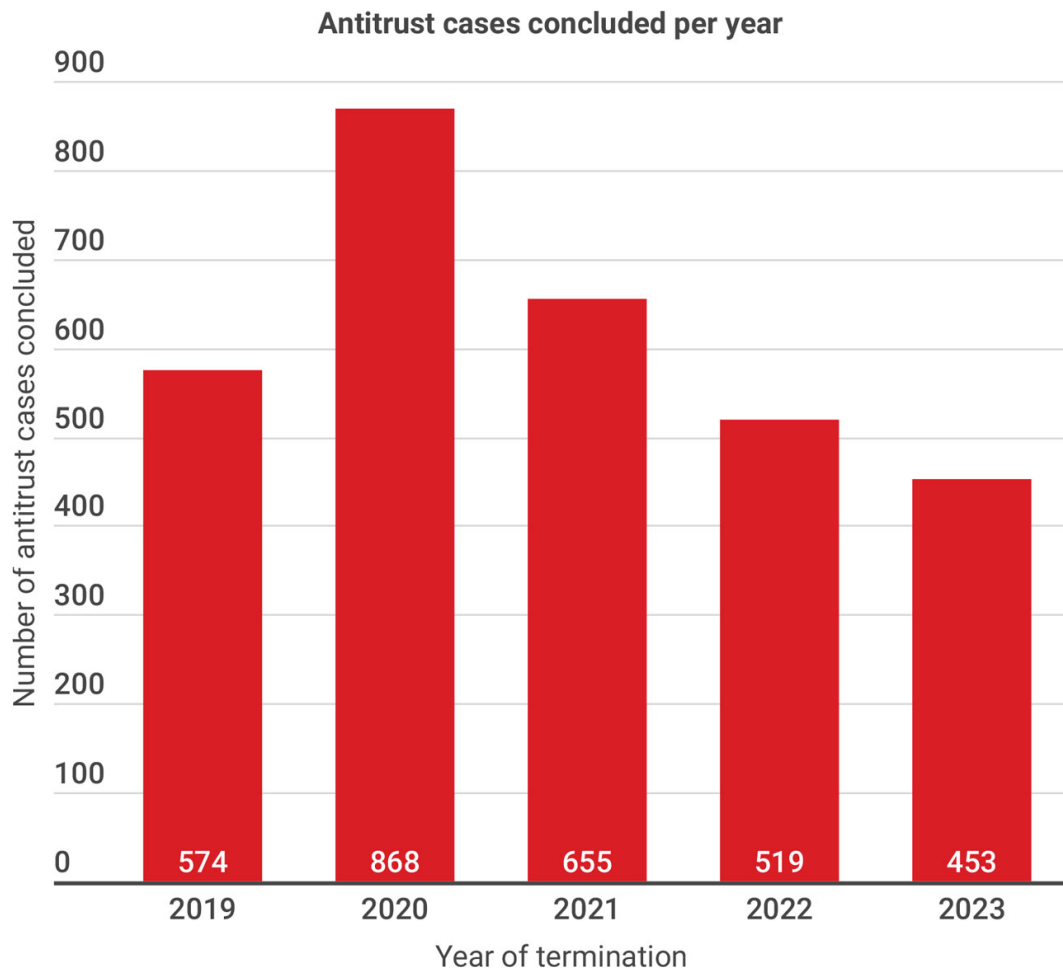
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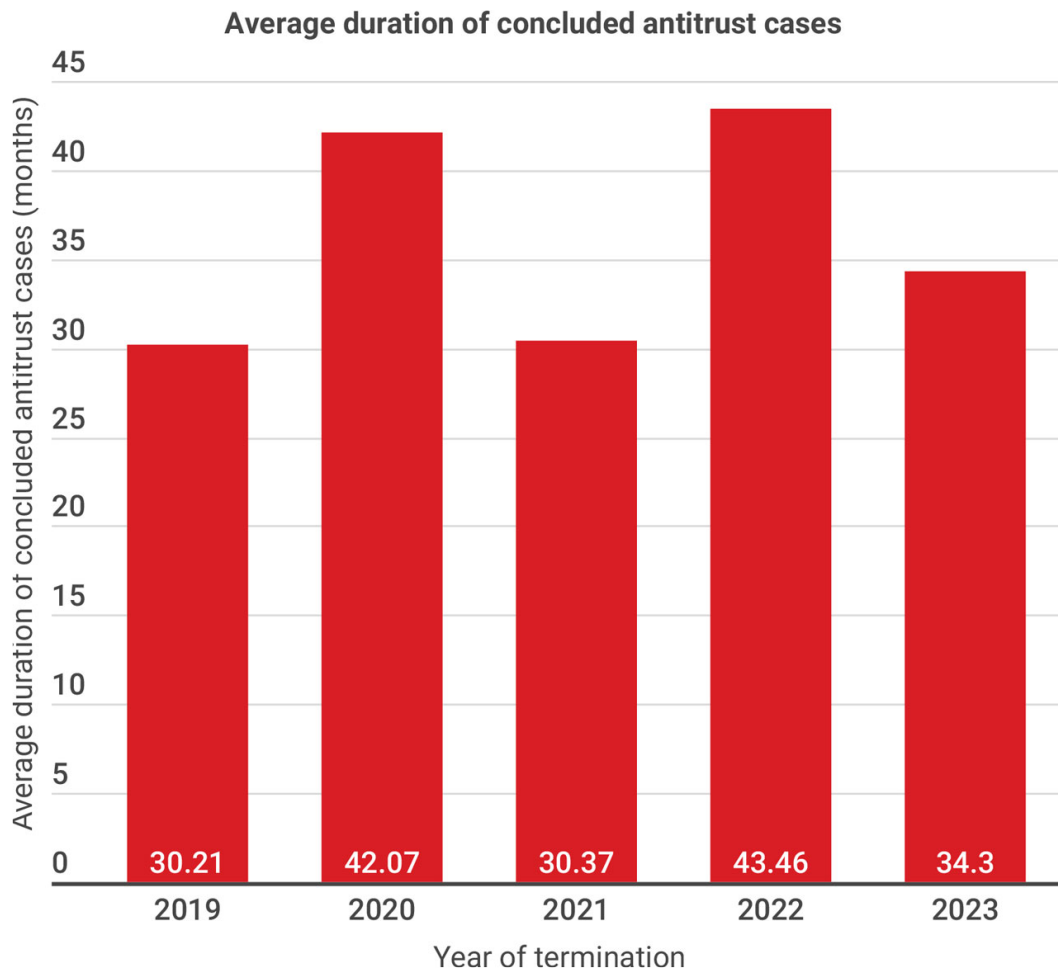
Average length (in months) of concluded cases

Antitrust cases filed per year









Class actions are an exception to the general rule that parties may litigate solely on their own behalf.^[5] Only if a proposed representative demonstrates that it is part of a class whose members possess the same interest and have suffered the same injury may a court allow a class action to proceed.^[6] 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 must be typical of the claims of the class (the ‘typicality’ requirement).^[7]
- The representative parties must show that they will fairly and adequately protect the interests of the class (the ‘adequacy of representation’ requirement).^[8]

Meeting the requirements of Rule 23(a) is just one step. A proposed class must also satisfy one of the provisions of Rule 23(b), which contemplates three types of classes. 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’,^[9] 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’.^[10] (The latter class action is sometimes referred to as a ‘limited funds’ action.^[11]) Under Rule 23(b)(2), a class action may also be maintained if the plaintiffs seek only injunctive relief.^[12] Most commonly in the antitrust context, however, plaintiffs seek certification under Rule 23(b)(3), which allows plaintiffs seeking monetary damages to proceed as a class if they 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).

COURTS’ EVOLVING APPROACH TO THE APPLICATION OF CLASS CERTIFICATION STANDARDS

For decades, plaintiff classes faced a relatively low hurdle to secure class certification under the predominance requirement imposed by Rule 23(b)(3). Guided by the Supreme Court’s holding in *Eisen v Carlisle & Jacquelin*^[13] 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’,^[14] district courts routinely eschewed defendants’ efforts to defeat class certification by reference to purported deficiencies in the plaintiffs’ theories of liability. This was so even after 1982, when the Supreme Court held in *General Telephone Co of the Southwest v Falcon*^[15] 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’.^[16]

But it remained unsettled exactly how far district courts could pull back the curtain and consider the underlying factual and legal merits of a suit at the certification stage (and their bearing on the question of class certification), particularly given that certification should occur ‘[a]t an early practicable time[.]’^[17] 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 had split over the district court’s role in resolving a ‘battle of the experts’ at class certification.^[19]

In 2008, the Third Circuit^[20] articulated a more muscular understanding of the district courts’ gatekeeping role in conducting a rigorous analysis, holding that (1) a class may be certified only upon a showing of meeting Rule 23’s requirements by a preponderance of the evidence (and not merely a ‘threshold’ showing that some courts had required it); (2) the district court’s role at certification is to resolve all relevant factual or legal disputes relating to the requirements of Rule 23, 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]

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 favour 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*,^[29] holding that plaintiffs may sometimes rely on statistical sampling to establish that common questions of liability predominate. The Court, while careful to avoid prescribing general rules as to the use of representative sampling 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.^[30] 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.’^[31]

While the Supreme Court has not explicitly ruled on burdens of proof at the class certification stage, circuit courts now widely agree that a plaintiff must prove compliance with Rule 23 by a preponderance of the evidence, even if such proof overlaps with the plaintiffs’ ultimate theory of liability.^[32] Nevertheless, decisions issued over 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. And yet, in 2023, the Supreme Court declined an invitation to address the issue when it denied a petition for a writ of certiorari in *National ATM Council, Inc v Visa Inc*.^[33] The petitioners argued that different circuit courts have been applying the predominance requirement in different ways, with the Eighth, Ninth and DC Circuits holding that the Rule 23(b)(3) requirements are ‘satisfied as long as plaintiffs’ proposed method appears to be valid, even if there are unresolved material disputes’ while the Second, Third, Fifth and Eleventh Circuits apply a stricter standard requiring ‘careful consideration of a defendant’s arguments that predominance is lacking, even if those arguments overlap with the merits; a finding that plaintiffs have met their burden of proving predominance; and the resolution of any factual or legal dispute relevant to the predominance inquiry’.^[34] At least for the time being, the Supreme Court will not step into the debate.

CLASS CERTIFICATION IN ANTITRUST CASES

In antitrust cases, the focus in recent years has been on the question of predominance in putative class actions.^[35] In particular, statistical modelling has continued to play a central role at the certification stage as parties offered duelling 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 criticise those models for papering over individualised differences among class members.

Separately, although less frequently litigated, numerosity challenges based on the putative class being too small have been successful in recent years in a handful of cases in the pharmaceutical industry.^[36]

Statistical And Econometric Modelling To Demonstrate Class-wide Antitrust Injury

One area of continuing focus has been the degree to which district courts scrutinise plaintiffs' methodologies for determining class-wide harm. In antitrust cases, plaintiffs must demonstrate not only 'antitrust injury'^[37] but also 'antitrust impact', namely that the individual injury resulting from the alleged violation is capable of proof on a class-wide basis.^[38]

In this regard, and in the wake of *Tyson Foods*, courts have typically accepted the use of statistical modelling as a method of proof of antitrust impact.^[39] While some courts have cautioned that 'certification [should not be] automatic every time counsel dazzle the courtroom with graphs and tables',^[40] 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.^[41] 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 favourably, with the Ninth Circuit endorsing them as 'a generally reliable econometric technique' to prove class-wide antitrust impact.^[42]

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 behaviour.^[43] Although the court recognised 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.^[44] More recently, a court in the District of Minnesota approved of an econometric model that sought to control for the variable of potential legitimate grounds for price increases as a means of estimating an overcharge to a putative class of indirect consumer purchasers.^[45]

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, courts have taken a harder look at that evidence in recent years, 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.

While some courts still reserve battles of the experts for the jury,^[46] most now consider it necessary to resolve such 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 proceeding[s]', also known as 'expert hot tub' hearings, in the *Google Play Store* litigation.^[47] In such a hearing – in this case, both at the class certification stage and at the merits stage – 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.^[48]

One common theme in attacks on plaintiffs' modelling efforts has been the presence of members who have not suffered any cognisable injury in a proposed class. Questions

about such ‘uninjured’ class members have become a proving ground for the predominance requirement and have sparked a debate among courts about the degree to which statistical models should be scrutinised at the certification stage because of their presence. 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.^[49] The presence of uninjured plaintiffs has also implicated questions of article III standing (under the US Constitution),^[50] 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 forces them to pay for more harm than the alleged anticompetitive conduct may have caused.^[51] Courts have grappled with how to balance these certification issues against the economic and judicial efficiency of class actions.

In 2018, plaintiffs were dealt a blow when the First Circuit held that the proposed class of the plaintiffs’ economic model swept up too many purchasers uninjured by the defendants’ conduct. In *In re Asacol*, 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.^[52] In *Asacol*, however, the court found that as many as 10 per cent of the defined class’s members were uninjured,^[53] exceeding the de minimis threshold.^[54] 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.^[55]

The DC Circuit in *In re Rail Freight Fuel Surcharge* 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 rail companies 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 class-wide injury because the plaintiffs’ modelling identified 12.7 per cent as uninjured, exceeding a de minimis amount.^[56] And, because the plaintiffs’ model did not have a winnowing mechanism, the *Rail Freight* court upheld the district court’s denial of certification.^[57]

A panel of the Ninth Circuit appeared to follow in the footsteps of *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*.^[58] Reversing the district court, the Ninth Circuit panel found that although the plaintiffs’ economic model classified only 5.5 per cent of the direct-purchaser plaintiffs as uninjured, the defendants’ model suggested that the proportion was as high as 28 per cent.^[59] Citing *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 predicted, even if that question overlapped with the merits.^[60]

The defendants’ victory was short-lived. In August 2021, the Ninth Circuit vacated the panel decision in *Olean*,^[61] and in April 2022, it revived the certified classes in an *en banc* opinion.^[62] The divided court held that common questions may predominate over individualised ones even if a proposed class contains more than a de minimis number of uninjured plaintiffs.^[63] The majority declined to read either *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.^[64] Instead, it understood those decisions as urging a case-by-case examination, and 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.”^[65] In this regard, the *Olean* majority appears to view its decision as being in harmony both with *Asacol* and *Rail Freight* on the one hand, and with *Messner v Northshore University HealthSystem* on the other.^[66] In its 2012 *Messner* decision, the Seventh Circuit counselled against certification of a class if it contains a ‘great many’ uninjured plaintiffs – a flexible standard that turns on the facts of each case.^[67] 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. Nevertheless, *Olean* may foreshadow a more unified case-by-case approach to predominance.^[68]

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 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.^[69] With the undisputed conspiracy as a backdrop, the court found that the plaintiffs’ models 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 for all buyers.^[70]

In recent years, the issue of uninjured class members has played out in cases concerning ‘big tech’, including *In re Google Play Store Antitrust Litigation*^[71] and *In re Apple iPhone Antitrust Litigation*.^[72] In these two cases, the plaintiffs are suing consumer technology companies for unlawful monopolisation of application markets through the use of their app stores. Both Google and Apple challenged methodologies proffered by the plaintiffs at the certification stage, raising issues about the presence of uninjured class members.

In *Google Play Store*, defendants’ initial challenge to plaintiffs’ expert’s methodology failed because it did not identify uninjured class members.^[73] Apple, in contrast, defeated an initial motion for class certification on grounds of predominance, asserting that 14.6 per cent of the app store ‘accounts’ in the proposed class suffered no injury, corresponding to approximately 30 million accounts.^[74] In February 2024, however, the court granted a renewed motion for class certification in *Apple* after the plaintiffs narrowed the proposed class such that the estimated number of uninjured accounts had been reduced to just over 10 million, or 7.9 per cent of the class.^[75] The court rejected Apple’s argument that *Olean* involved robust evidence of injury to all class members and that the proposed class in *Apple* was ‘fatally overbroad’.^[76] The court held that even if the proposed class includes uninjured members, *Olean* suggests that this fact alone is not fatal to class certification.^[77]

Use Of Averages To Demonstrate Class-wide Injury With Varying Degrees Of Harm

The use of average-pricing models has also been a recent focal point in predominance inquiries. This relates in large part to the issues discussed above and defendants often argue that the presence of uninjured plaintiffs undermines the reliability of such averaging. But while 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 individualised 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 class-wide antitrust impact, the defendants in *Olean* argued that the plaintiffs' use of 'pooled' regression models, which aggregated the sale transaction data during the conspiracy and benchmark periods, impermissibly utilised averaging assumptions that acted to 'paper over individualised differences among class members.'^[78] 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 class-wide basis, and more granularly, whether the models controlled for variables that may otherwise undermine the explanatory power of those regressions.^[79] Affirming the district court's 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 were sufficiently controlled for individualised variation among plaintiffs.^[80]

In contrast, in *In re Pre-Filled Propane Tank Antitrust Litigation*,^[81] 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.^[82] As in *Olean*, the plaintiffs' expert introduced a regression analysis purporting to show that the defendants' conspiracy caused all indirect purchasers to pay supra-competitive prices for propane exchange tanks, arriving at an average overcharge for the class. The court denied the certification motion, crediting the defendants' model, which criticised 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 such injury. It also cited the plaintiffs' expert's admission that his regression model could not account for individualised differences between retailers (the direct purchasers), such as negotiating leverage in dealing with the 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 . . . assesse[d], the "common impact[.]"^[83]

In June 2021, a court in the District of New Jersey in *In re Lamictal Direct Purchaser Antitrust Litigation*^[84] also denied certification based on the plaintiffs' use of averages. The previous year, 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 authorised generic.^[85] In reversing, the Third Circuit criticised the plaintiffs' model, which compared average generic discounts in a but-for world with the average price paid by the plaintiffs.^[86] On remand, the district court characterised its central task as determining the 'acceptability of averages' and found that the use of averages was not appropriate because the plaintiffs failed to account for evidence that the brand manufacturer offered varying discounts to different types of customers in response to the generic's market entry, and therefore class-wide injury could not be shown by a preponderance of the evidence.

As with the issue of uninjured plaintiffs, courts have continued to scrutinise 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 Class Members

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 manageability problems (as required by FRCP, Rule 23(b)(3)(D)), since settlement would obviate a trial. Nevertheless, a settlement class must satisfy Rule 23's remaining requirements, 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'.^[87]

In 2018, Rule 23 was amended to provide a uniform list of considerations guiding class settlement approval. Under subdivision 23(e)(2), courts must now determine that 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.^[88] Since then, courts have sometimes taken a more active role in considering class settlements, such as in the Ninth Circuit 2023 decision in *Kim v Allison*. The court vacated the approval of a class settlement, holding that because the lead plaintiff was subject to a binding agreement to arbitrate and therefore had a strong interest in settling, she could not adequately represent the class.^[89]

Until recently, article III 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. But since the purpose of certification in *Drazen* was a damages settlement, the panel reasoned based on *TransUnion* that all class members must have article III standing. After a rehearing *en banc*, the circuit court vacated the decision and remanded it to the panel, finding that the panel had erred in its assessment of what facts are necessary to establish standing under the federal statute at issue.^[92] If, in subsequent proceedings, the panel holds again that every member of a damages settlement class must have article III standing, it 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 the plaintiffs' geographical dispersion favoured proceeding as a class action.^[93] 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.^[94]

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.^[95]

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 judicial economy concerns and the plaintiffs' ability and motivation to litigate as joint plaintiffs disfavoured certification.^[96] Similarly, in February 2023, a court in the District of New Jersey declined on numerosity grounds to certify a class of 32 plaintiffs.^[97]

Fourth Circuit numerosity case law is in accord. In 2020, a court in 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).^[98] The district 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, holding in part that the focus of Rule 23(a)(1) is whether judicial economy favours class adjudication over multiple individual trials.^[99] Citing the Third Circuit's *Modafinil* decision, 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 favour 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 geographical 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 to issues of predominance, the requirement has nevertheless received its share of the limelight in recent years.

CONCLUSION

As class action antitrust litigation in the consumer technology industry continues to progress, it could lead to further interesting developments in this area. The question of predominance, as always, should continue to occupy centre stage. Courts will scrutinise the plaintiffs' ability to demonstrate, through statistical modelling that often utilises averaging assumptions, that common questions predominate, even where the putative class contains some percentage of uninjured plaintiffs. Time will also tell how courts approach certification in the wake of the Supreme Court's decision in *TransUnion*, which – while not explicitly focused on the certification stage – has already had significant implications for that question.

Endnotes

- 1 '2024 Class Action Survey', Carlton Fields, P.A., <https://www.carltonfields.com/insights/class-action-survey> (last visited 12 June 2024). ^ [Back to section](#)
- 2 id.; '2023 Class Action Survey', Carlton Fields, P.A., <https://www.carltonfields.com/getmedia/d71bff8d-56f9-4448-89e1-2d7ee3f8fe6a/2023-carlton-fields-class-action-survey.pdf> (last visited 12 June 2024). ^ [Back to section](#)

- 3 Data compiled by Docket Navigator. [^ Back to section](#)
- 4 '2024 Class Action Survey', Carlton Fields, P.A., <https://www.carltonfields.com/insights/class-action-survey> (last visited 12 June 2024). [^ Back to section](#)
- 5 See *Califano v Yamasaki*, 442 U.S. 682, 700–01 (1979). [^ Back to section](#)
- 6 See *Wal-Mart Stores, Inc v Dukes*, 564 U.S. 338, 348 (2011). [^ Back to section](#)
- 7 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). [^ Back to section](#)
- 8 Fed. R. Civ. P. 23(a). [^ Back to section](#)
- 9 *id.* at (b)(1)(A). [^ Back to section](#)
- 10 *id.* at (b)(1)(B). [^ Back to section](#)
- 11 See, eg, *Ortiz v Fibreboard Corp.*, 527 U.S. 815 (1999). [^ Back to section](#)
- 12 Fed R. Civ. P. 23(b)(2). [^ Back to section](#)
- 13 417 U.S. 156 (1974). [^ Back to section](#)
- 14 *id.* at 177. The Supreme Court later characterised this language as 'the purest dictum' and criticised courts' reliance on it to avoid merits examination at the certification stage. *Wal-Mart Stores*, 564 U.S. at 351 n.6. [^ Back to section](#)
- 15 457 U.S. 147 (1982). [^ Back to section](#)
- 16 *id.* at 160–61. [^ Back to section](#)
- 17 Fed. R. Civ. P. 23(c)(1)(A). [^ Back to section](#)
- 18 *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 91–92 (S.D.N.Y. 2004), vacated and remanded *sub nom. Miles v Merrill Lynch & Co., Inc (In re Initial Pub. Offerings Sec. Litig.)*, 471 F.3d 24 (2d Cir. 2006), clarified, 483 F.3d 70 (2d Cir. 2007). [^ Back to section](#)
- 19 *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 105 (C.D. Cal. 2007). [^ Back to section](#)
- 20 *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008). [^ Back to section](#)
- 21 *id.* at 307. [^ Back to section](#)

- 22** *Wal-Mart Stores*, 564 U.S. at 350 (emphasis in original). [^ Back to section](#)
- 23** *id.* at 351. [^ Back to section](#)
- 24** 568 U.S. 455 (2013). [^ Back to section](#)
- 25** *id.* at 459 (original emphasis omitted). [^ Back to section](#)
- 26** *id.* at 466. [^ Back to section](#)
- 27** *Comcast Corp. v Behrend*, 569 U.S. 27, 34–35 (2013) (quoting *Amchem Prods., Inc v Windsor*, 521 U.S. 591, 615 (1997)). [^ Back to section](#)
- 28** *id.* at 35. [^ Back to section](#)
- 29** 577 U.S. 442 (2016). [^ Back to section](#)
- 30** *id.* at 456–57. [^ Back to section](#)
- 31** *id.* at 453. [^ Back to section](#)
- 32** See, eg, *Weidman v Ford Motor Co. (In re Ford Motor Co.)*, 86 F.4th 723 (6th Cir. 2023); *Brayman v KeyPoint Gov’t Sols., Inc*, 83 F.4th 823 (10th Cir. 2023); *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); *AstraZeneca AB v United Food & Com. Workers Unions (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); *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). [^ Back to section](#)
- 33** *Nat’l ATM Council, Inc v Visa Inc*, No. 21-7109, 2023 WL 4743013 (D.C. Cir. July 25, 2023), cert. denied, 144 S. Ct. 1381 (2024). [^ Back to section](#)
- 34** Pet. for a Writ of Cert. at 13–14, 18, *Visa Inc v Nat’l ATM Council, Inc*, 144 S. Ct. 1381 (2024) (No. 23-814). [^ Back to section](#)
- 35** See William F Cavanaugh, David Kleban and Voratida Sangchant, ‘Trends in Class Certification’ in *US Cts. Ann. Rev.* 44–62 (4th ed., 2023). [^ Back to section](#)
- 36** *In re Lamictal Direct Purchaser Antitrust Litig.*, No. 2:12-cv-00995, 2021 WL 2349828 (D.N.J. June 7, 2021). [^ Back to section](#)

- 37** *id.* at *4 (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. Fr. v Abbott Lab’ys*, 707 F.3d 223, 232 (3rd Cir. 2013), then quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). [^ Back to section](#)
- 38** *See Comcast*, 569 U.S. at 30–31. [^ Back to section](#)
- 39** Some courts have observed the significant overlap between predominance and standards of admissibility under *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as both require scrutiny of the reliability of a damages model. *See In re Rail Freight Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 42 (D.D.C. 2017), *aff’d sub nom. Dakota Granite Co. v BNSF Railway Co. (In re Rail Freight Fuel Surcharge Antitrust Litig.)*, 934 F.3d 619 (D.C. Cir. 2019); *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 licences or in-app purchases since 2007 – included too many uninjured plaintiffs. *In re Apple iPhone Antitrust Litig.*, No. 11-cv-6714-YGR, 2022 WL 1284104 (N.D. Cal. Mar. 29, 2022). [^ Back to section](#)
- 40** *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 491 (N.D. Cal. 2008). [^ Back to section](#)
- 41** *Kleen Prods. LLC v Int’l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016). [^ Back to section](#)
- 42** *Olean Wholesale Grocery Coop., Inc.*, 31 F.4th at 677 and n.24. [^ Back to section](#)
- 43** *D&M Farms v Birdsong Corp.*, No. 2:19-cv-463, 2020 WL 7074140 (E.D. Va. Dec. 2, 2020). [^ Back to section](#)
- 44** *id.* at *8. The case has since settled. [^ Back to section](#)
- 45** *In re Pork Antitrust Litig.*, No. CV 18-1776 (JRT/JFD), 2023 WL 2696497, at *21 (D. Minn. Mar. 29, 2023). [^ Back to section](#)
- 46** *See, eg, 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). [^ Back to section](#)
- 47** *In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587, at *3 (N.D. Cal. Nov. 28, 2022) (noting prior use of the hot tub procedure and finding it ‘an invaluable tool for vetting *Daubert* issues and determining questions of class certification’). [^ Back to section](#)

- 48** Anjelica Cappellino, “Hot-Tubbing” Expert Witnesses: An Experimental Technique From Australia Makes a Splash in U.S. Courts’, Expert Inst. (updated 21 May 2024), <https://www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts/>. ^ [Back to section](#)
- 49** See, eg, *Dakota Granite Co. v BNSF Railway Co. (In re Rail Freight Fuel Surcharge Antitrust Litig.)*, 934 F.3d 619 (D.C. Cir. 2019); *United Food & Com. Workers Unions & Emps. Midwest Health Benefits Fund v Warner Chilcott Ltd. (In re Asacol Antitrust Litig.)*, 907 F.3d 42 (1st Cir. 2018). ^ [Back to section](#)
- 50** See Defs.’-Appellants’ Suppl. En Banc Br. at 12, *Olean Wholesale Grocery Coop., Inc v Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (No. 19-56514), ECF No. 149 (citing *TransUnion LLC v Ramirez*, 594 U.S. 413, 431 (2021)). ^ [Back to section](#)
- 51** See, eg, *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 335 F.R.D. 1, 17 (E.D.N.Y. 2020). ^ [Back to section](#)
- 52** *In re Asacol*, 907 F.3d at 53–54. ^ [Back to section](#)
- 53** Although the parties disputed the number of uninjured plaintiffs – the plaintiffs argued the number was lower, while the defendants argued it was higher – the court found that the parties had not preserved their objections for appellate review. *id.* at 51. ^ [Back to section](#)
- 54** *id.* at 54. ^ [Back to section](#)
- 55** *id.* at 52–55, 61. ^ [Back to section](#)
- 56** *In re Rail Freight Fuel Surcharge*, 934 F.3d at 623–24. ^ [Back to section](#)
- 57** *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 the defendants’ challenge to predominance, holding that 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). ^ [Back to section](#)
- 58** *Olean Wholesale Grocery Coop., Inc v Bumble Bee Foods LLC*, 993 F.3d 774, 792 (9th Cir. 2021), reh’gen *banc* granted, 5 F.4th 950 (9th Cir. 2021), on reh’g *en banc*, 31 F.4th 651 (9th Cir. 2022), cert. denied *sub nom. Starkist Co. v Olean Wholesale Grocery Coop., Inc*, 143 S. Ct. 424 (2022). ^ [Back to section](#)
- 59** *id.* at 791–92. ^ [Back to section](#)

- 60 id. [^ Back to section](#)
- 61 *Olean Wholesale Grocery Coop., Inc v Bumble Bee Foods LLC*, 5 F.4th 950 (9th Cir. 2021). [^ Back to section](#)
- 62 *Olean Wholesale Grocery Coop.*, 31 F.4th at 683–84. [^ Back to section](#)
- 63 id. at 668–69. [^ Back to section](#)
- 64 id. at 669 n.13. [^ Back to section](#)
- 65 id. (quoting *In re Asacol*, 907 F.3d at 53–54). [^ Back to section](#)
- 66 *Messner*, 669 F.3d at 825. But see *Olean Wholesale Grocery Coop., Inc*, 31 F.4th at 691–92 (Lee, J., dissenting) (characterising the majority opinion as splitting with *Asacol* and *Rail Freight* in rejecting a de minimis rule). [^ Back to section](#)
- 67 *Messner*, 669 F.3d at 825. [^ Back to section](#)
- 68 Depending on how successful one views the *Olean* court’s effort to harmonise *Asacol* and *Messner*, courts that have expressly rejected the de minimis rule in favour of the ‘great many’ standard may not have had to choose at all. See, eg, *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & 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 signalling a trend towards uniformity across circuits, the defendants themselves in *Olean* argued in their supplementary *en banc* brief and at oral argument that *Asacol*’s de minimis standard is best understood as requiring a case-by-case assessment of the theory of class-wide injury, and not as a uniform or bright-line rule as to uninjured plaintiffs. See Defs.’-Appellants’ Suppl. En Banc Br. at 18, *Olean Wholesale Grocery Coop., Inc v Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (No. 19-56514), ECF No. 149; Filed Audio Recording of Oral Arg., id., ECF No. 173. [^ Back to section](#)
- 69 *Olean Wholesale Grocery Coop., Inc*, 31 F.4th at 673 n.21, 680–81. The court disagreed with the defendants and the dissent that up to 28 per cent of the direct-purchaser class could have been uninjured, finding instead that there was limited transaction data for approximately 28 per cent of the class during the pre-collusion benchmark period to generate statistically significant results. id. It therefore characterised the defendants’ critique of the 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 the defendants’ argument. id. at 680–82. [^ Back to section](#)
- 70 id. at 676–82. [^ Back to section](#)
- 71 2022 WL 17252587. [^ Back to section](#)
- 72 2022 WL 1284104. [^ Back to section](#)

- 73** *In re Google Play Store Antitrust Litig.*, 2022 WL 17252587. Later, however, after considering criticisms of the plaintiffs' expert's methodology at the merits stage in relation to injury and damages, the court concluded that the order granting certification should be vacated because the 'pass-through formula', an essential element of the plaintiffs' argument in support of certification, was not reliable. *In re Google Play Store Antitrust Litig.*, No. 3:20-cv-05761-JD (N.D. Cal. Sept. 13, 2023), Dkt. No 604 and Dkt. No 588. [^ Back to section](#)
- 74** *id.* at *16. [^ Back to section](#)
- 75** *In re Apple iPhone Antitrust Litig.*, No. 4:11-cv-06714-YGR (N.D. Cal. Feb. 2, 2024). Apple sought but was denied leave to appeal the decision to the Ninth Circuit. [^ Back to section](#)
- 76** Def. Apple Inc's Opp'n to Consumer Pls.' Renewed Mot. for Class Certification at 4, *In re Apple iPhone Antitrust Litig.*, No. 4:11-cv-06714-YGR (N.D. Cal. Mar. 10, 2023), ECF No. 689. [^ Back to section](#)
- 77** *In re Apple iPhone Antitrust Litig.*, No. 4:11-cv-06714-YGR, slip op. at 26–27 (N.D. Cal. Feb. 2, 2024). [^ Back to section](#)
- 78** *Olean Wholesale Grocery Coop., Inc.*, 31 F.4th at 677. [^ Back to section](#)
- 79** *id.* at 676–80. [^ Back to section](#)
- 80** *id.* at 678. [^ Back to section](#)
- 81** No. 14-02567-MD-W-GAF, 2021 WL 5632089 (W.D. Mo. Nov. 9, 2021). [^ Back to section](#)
- 82** *id.* at *2. [^ Back to section](#)
- 83** *id.* at *8. [^ Back to section](#)
- 84** *In re Lamictal*, 2021 WL 2349828. [^ Back to section](#)
- 85** *In re Lamictal*, 957 F.3d 184. Under the Hatch-Waxman Act, a potential manufacturer of a generic drug may utilise 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 upon the brand manufacturer's patent. See 21 U.S.C. § 355(j)(2)(A)(vii). The first generic drug manufacturer to do so (ie, 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, Inc v Smithkline Beecham Corp.*, 791 F.3d 388, 404–05 (3d Cir. 2015). Nevertheless, the brand manufacturer may launch its own generic, called an 'authorised generic', to compete with the first filer's generic. *King Drug Co. of Florence*, 791 F.3d at 405. [^ Back to section](#)

- 86** *In re Lamictal*, 957 F.3d at 192–94. [^ Back to section](#)
- 87** *Amchem Prods., Inc v Windsor*, 521 U.S. 591, 621 (1997). [^ Back to section](#)
- 88** Fed. R. Civ. P. 23(e)(2). [^ Back to section](#)
- 89** *Kim v Allison*, 87 F.4th 994 (9th Cir. 2023). The court also identified failures of the lead plaintiff to vigorously litigate on behalf of the class members. [^ Back to section](#)
- 90** *Drazen v Pinto*, 41 F.4th 1354, 1355 (11th Cir. 2022), reh'g *en banc* granted, opinion vacated, 61 F.4th 1297 (11th Cir. 2023), on reh'g *en banc*, 74 F.4th 1336 (11th Cir. 2023). [^ Back to section](#)
- 91** *TransUnion LLC*, 594 U.S. at 424–25 (holding that all class members must demonstrate standing to receive post-trial damages). See also *Spokeo, Inc v Robins*, 578 U.S. 330, 340–42 (2016) (holding that a statutory right to sue does not create automatic standing). [^ Back to section](#)
- 92** *Drazen v Pinto*, 74 F.4th 1336 (11th Cir. 2023). [^ Back to section](#)
- 93** *In re Ranbaxy*, 338 F.R.D. at 300–01. [^ Back to section](#)
- 94** *In re Opana ER Antitrust Litig.*, No. 14 C 10150, 2021 WL 3627733, at *4–5 (N.D. Ill. June 4, 2021) (quoting *Mulvania v Sheriff of Rock Island Cnty.*, 850 F.3d 849, 859 (7th Cir. 2017)), rev'd on other grounds, No. 21-8017, 2021 WL 4047034 (7th Cir. 2021). [^ Back to section](#)
- 95** *In re Modafinil Antitrust Litig.*, 837 F.3d 238 (3d Cir. 2016). [^ Back to section](#)
- 96** *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). [^ Back to section](#)
- 97** *In re Lamictal Direct Purchaser Antitrust Litig.*, 2021 WL 2349828. [^ Back to section](#)
- 98** *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2020 WL 3446895 (E.D. Va. June 18, 2020), report and recommendation adopted, 481 F. Supp. 3d 571 (E.D. Va. 2020), vacated and remanded *sub nom. FWK Holdings, LLC v Merck & Co., Inc (In re Zetia (Ezetimibe) Antitrust Litig.)*, 7 F.4th 227 (4th Cir. 2021). [^ Back to section](#)
- 99** *In re Zetia (Ezetimibe) Antitrust Litig.*, 481 F. Supp. 3d 571, 574–77 (E.D. Va. 2020), vacated and remanded *sub nom. FWK Holdings, LLC v Merck & Co., Inc (In re Zetia (Ezetimibe) Antitrust Litig.)*, 7 F.4th 227 (4th Cir. 2021). [^ Back to section](#)
- 100** *FWK Holdings, LLC v Merck & Co., Inc (In re Zetia (Ezetimibe) Antitrust Litig.)*, 7 F.4th 227, 235 (4th Cir. 2021). [^ Back to section](#)
- 101** *Id.* at 239–41 (Niemeyer, J., concurring). [^ Back to section](#)



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