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PRIVATE LITIGATION GUIDE

SECOND EDITION

Editors
Nicholas Heaton and Benjamin Holt

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This article was first published in December 2020
For further information please contact Natalie.Clarke@lbresearch.com

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Published in the United Kingdom by Global Competition Review

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

www.globalcompetitionreview.com

Second edition

To subscribe contact subscriptions@globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-83862-262-6

Printed in Great Britain by Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following contributors for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN VINGE

ALLEN & OVERY LLP

CAMINATI BUENO ADVOGADOS

CDC CARTEL DAMAGE CLAIMS CONSULTING SCRL

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Collective or Class Actions and Claims Aggregation in the United States

Eva W Cole and Jeffrey J Amato[1]

Introduction

United States antitrust laws are widely enforced through private lawsuits and often through class actions. These highly complex cases can last for many years and may potentially involve billions of dollars in treble damages. Given the high stakes and the tremendous significance of the class certification decision, federal district courts in the United States are empowered to act as gatekeepers to consider seriously whether plaintiffs satisfy both the explicit and implicit requirements for an antitrust claim to proceed as a class action.

In fact, class certification in the United States is not a foregone conclusion. To certify a class, plaintiffs must establish standing; meet the explicit requirements of Federal Rule of Civil Procedure 23; and satisfy the implicit requirement of ascertainability. Recent Supreme Court decisions have tightened the scrutiny of class actions, including putative antitrust class actions. Following the decision in *Dukes*, the Supreme Court affirmed in *Comcast* that a district court must conduct a 'rigorous analysis' to satisfy itself that the prerequisites for certification have been met.[2] Moreover, recent decisions have highlighted several key issues courts consider in the antitrust class action context, from what constitutes a 'direct' purchaser for federal antitrust standing to the degree to which the presence of uninjured members renders a class unable to satisfy the predominance requirement to certify a class under Rule 23(b).

1 Eva W Cole and Jeffrey J Amato are partners at Winston & Strawn LLP. Sean D Meenan co-authored the original version of this chapter in 2019. The authors would like to thank Winston & Strawn associate Zachary E Sproull for his assistance in updating this chapter.

2 See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013).

'Direct purchaser' standing under Illinois Brick

All antitrust plaintiffs must establish two court-made prerequisites that have come to be known as the 'antitrust standing' requirements.[3] First, an antitrust plaintiff must have suffered an antitrust injury, meaning the type of injury that the antitrust laws were intended to prevent. This injury must not be speculative and it must also flow from the defendant's unlawful acts. Additionally, the allegedly unlawful acts must produce an anticompetitive effect on the market itself – not just on an individual competitor or consumer with a personal grievance. Second, an antitrust plaintiff must demonstrate that it is well situated to serve as an efficient enforcer of the antitrust laws.

Under long-standing precedent, only 'direct purchasers' have statutory standing to bring claims for damages under federal antitrust laws. A 'direct purchaser' is the first purchaser in a supply chain of a defendant's goods or services, while an 'indirect purchaser' purchases from an intermediary and is thus two or more steps removed from the defendant in a distribution chain. Although both direct and indirect purchasers may seek injunctive relief for antitrust violations, in *Illinois Brick Co. v. Illinois*, the Supreme Court held that conferring statutory standing on indirect purchasers to seek damages under federal antitrust law would open the door to 'multiple recovery' and unnecessarily complicate antitrust litigation.[4] Accordingly, the options for indirect purchasers to seek money damages are more limited. While a direct purchaser can bring an action for damages on behalf of a nationwide class under federal law, indirect purchasers are limited to pursuing damages claims under the antitrust or consumer protection laws of certain states, and thus typically must allege separate state classes with representative plaintiffs from each relevant state. They will also need to prove that they satisfy each element of the various statutes at issue, many of which have stricter requirements than the Sherman Act, and overcome any conflicts among those state laws.

The Supreme Court recently considered the application of *Illinois Brick* to iPhone users' suit against Apple for alleged monopolisation of the company's App Store in *Apple v. Pepper*.[5] A divided Supreme Court held that the plaintiffs were direct purchasers under *Illinois Brick* because they bought apps directly from Apple, the retailer and alleged antitrust violator. In making this determination, the Court rejected Apple's argument that the company itself was not directly selling apps because the plaintiffs used the App Store to buy apps directly from independent app developers, who in turn paid a 30 per cent commission to Apple for the right to sell the app in the App Store. The Court observed that '[i]n the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer.'[6] Notably, in finding that the plaintiffs directly purchased from Apple, the Court avoided confronting the issue of whether to overturn *Illinois Brick*, which some amici had advocated.

3 In addition, all plaintiffs, whether they sue individually or as a class, must satisfy the standing requirements of Article III of the US Constitution – injury in fact, causation, and redressability.

4 431 U.S. 720, 745–46 (1977).

5 139 S. Ct. 1514 (2019). The Court did not rule on the ultimate merits of the monopolisation claims, but simply allowed the case to proceed.

6 id., at 1522.

Although indirect purchasers are generally prohibited from bringing claims for damages under federal antitrust laws, several court-made exceptions to *Illinois Brick* have emerged over the years, providing indirect purchasers the ability to seek damages for violations of federal laws in limited circumstances. For example, a recent Ninth Circuit decision reversed a district court's dismissal of a putative antitrust class action on behalf of subscribers to DirecTV who alleged that DirecTV colluded with the National Football League (NFL) and individual NFL teams to reduce competition in the market for televised NFL games.[7] In finding that the plaintiffs had standing to bring their federal damages claims, the majority relied upon the rationale behind the co-conspirator exception to *Illinois Brick* under which a plaintiff who is the immediate purchaser from any conspirator is considered 'directly injured' by an antitrust violation committed jointly by co-conspirators.[8]

The co-conspirator exception has also been applied to other forms of anticompetitive conduct. For example, the Seventh Circuit recently reversed a district court's dismissal of a monopolisation case where healthcare providers allegedly paid supracompetitive prices to purchase medical equipment.[9] There, the healthcare providers used so called group purchasing organisations to negotiate purchase prices with manufactures, and then contracted with distributors to purchase the equipment at the negotiated prices.[10] The healthcare providers alleged that the manufacturers, distributors, and purchasing organisations all conspired to protect the manufacturers' monopoly power.[11] The district court dismissed the claims, ruling that the providers were indirect purchasers under *Illinois Brick*, and that the conspiracy exception did not apply because vertical price fixing was not alleged.[12] The Seventh Circuit disagreed, holding that the provider plaintiffs alleged a conspiracy, and because they are the first purchaser outside of the conspiracy, they can maintain antitrust claims based on any plausible anticompetitive conduct, not just vertical price fixing.[13]

In addition, a number of states have passed *Illinois Brick* 'repealer' statutes that allow indirect purchasers to sue for damages under state antitrust laws.[14] Tension between the laws of the repealer and non-repealer states often arises where indirect purchaser plaintiffs attempt to cer-

7 *In re National Football League's 'Sunday Ticket' Antitrust Litig.*, 933 F.3d 1136 (9th Cir. 2019).

8 id., at 1155.

9 *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832 (7th Cir. 2020).

10 id., at 836–37.

11 id.

12 id.

13 id., at 840–41.

14 As of 2020, *Illinois Brick* has been repealed to some extent by statute or judicial decision in at least 37 states. See Ala. Code § 6-5-60(a), Alaska Stat. Ann. § 45.50.577, *Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99, 102 (Ariz. 2003), Ark. Code Ann. § 4-75-315(B), Cal. Bus. & Prof. Code § 16750, Colo. Rev. Stat. Ann. § 6-4-111(2), CT ST § 35-46a, D.C. Code § 28-4509, *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 108 (Fla. Dist. Ct. App. 1996), Haw. Rev. Stat § 480-13(a)(1), Idaho Code Ann. § 48-108(2), 740 Ill. Comp. Stat. Ann. 10/7, Iowa Code § 553.12, Kan. Stat. Ann. § 50-161(B), Me. Rev. Stat. Ann. tit. 10, § 1104(1), Md. Code Ann., Com. Law § 11-209(b)(ii), *Ciardi v. F. Hoffman-La Roche, Ltd.*, 436 Mass. 53, 63 (2002), Mich. Comp. Laws Ann. § 445.778, Minn. Stat. Ann. § 325D.57, Miss. Code. Ann. § 75-21-9, Neb. Rev. Stat. § 59-821, Nev. Rev. Stat. Ann. § 598A.210, *LaChance v. U.S. Smokeless Tobacco Co.*, 931 A.2d 571, 576-77 (N.H. 2007), N.M. Stat. Ann. § 57-1-3, N.Y. Gen. Bus. Law § 340(6), *Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 683 (N.C. Ct. App. 1996), NDCC § 51-08.1-08, Or. Rev. Stat. § 646.780(1)(a), R.I. Gen. Laws Ann. § 6-36-12(g), S.D. Codified Laws § 37-1-33, *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 517 (Tenn. 2005), Utah Code § 76-10-3109, Vt. Stat. Ann. tit. 9, § 2465(b), Wash. Rev. Code. Ann. § 19.86.080(3), Wis. Stat. Ann. § 133.18(1)(a).

tify nationwide classes based on the application of the laws of a single state (often California). While some courts have permitted such nationwide classes to go forward, other courts have only permitted classes limited to members of repealer states to proceed.

For example, in *In re Qualcomm Antitrust Litigation*, the plaintiffs sought certification of a nationwide class based on violations of California law against the defendant Qualcomm for its sales of wireless chips to makers of wireless handsets. The district court certified the nationwide class, including residents of non-repealer states, finding that the law of each purchaser's home state is not relevant where the only defendant, Qualcomm, is a California resident, and Qualcomm's primarily California-based conduct caused harm to purchasers in other states.[15] On the other hand, in *In re Packaged Seafood Products Antitrust Litigation*, the district court dismissed the indirect purchasers' complaint seeking certification of a similar nationwide class of purchasers based on California state law as improper in part because the plaintiffs attempted to apply California's repealer law to citizens of non-repealer states.[16] The court ultimately granted certification when the plaintiffs narrowed their class allegations to cover only purchasers in repealer states.[17]

Predominance under Rule 23(b)

A class may be certified only if it satisfies all four of the prerequisites from Rule 23(a) and also falls into one of the categories of class actions described in Rule 23(b).[18] Antitrust class actions typically seek certification of a damages class under Rule 23(b)(3), which requires the court to find that 'the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'[19] Fights over certification in antitrust class actions often focus on the predominance requirement of Rule 23(b)(3).

In *Comcast*, the Supreme Court held that the damages model used to support a plaintiff's predominance argument must be consistent with the plaintiff's theory of liability.[20] Although the district court ultimately rejected three of the plaintiffs' four proposed theories of antitrust impact, the plaintiffs' expert's calculated damages theory assumed the validity of all four theories of antitrust impact initially advanced by the plaintiffs. The Supreme Court thus found that the plaintiffs did not meet the predominance requirement where their expert did not establish

15 *In re Qualcomm Antitrust Litig.*, 328 F.R.D. 280 (N.D. Cal. 2018). As of October 2020, the *Qualcomm* class certification decision, including the choice of law issue, was pending on appeal before the Ninth Circuit Court of Appeals. See *Stromberg, et al. v. Qualcomm Inc.*, No. 19-15159 (9th Cir. 2019).

16 *In re Packaged Seafood Products Antitrust Litig.*, 242 F. Supp. 3d 1033 (S.D. Cal. 2017).

17 *In re Packaged Seafood Products Antitrust Litig.*, No. 3:15-MD-02670 JLS (MDD), 2019 WL 3429174 (S.D. Cal. 30 July 2019); see also *In re Korean Ramen Antitrust Litig.*, No. 13-cv-04115-WHO, 2017 WL 235052, at *22 (N.D. Cal. 19 January 2017) (denying an attempt by indirect purchasers of noodles to certify a nationwide class under California's Cartwright Act and ultimately certifying a class of indirect purchasers from '24 Illinois Brick repealer jurisdictions.').

18 Rule 23(a) requires numerosity (the class must be so numerous that joinder of all members is impracticable); commonality (there must be questions of law or fact common to the class); typicality (the claims or defences of the class representatives must be typical of the claims or defences of the class); and adequacy (the class representatives must fairly and adequately protect the interests of the class).

19 Fed. R. Civ. Pro. 23(b)(3).

20 *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

that damages were capable of measurement on a class-wide basis. In so holding, the Court re-emphasised that the rigorous analysis required at class certification will frequently entail 'overlap with the merits of the plaintiff's underlying claim'.[21]

In more recent years, the courts have continued to find that material inconsistency between the named plaintiffs' theories of damages and liability precludes certification under Comcast. For example, in *In re Auto. Parts Antitrust Litigation*, the court denied a motion for class certification filed by a group of direct purchasers of automotive bearings, holding that the named plaintiffs' claims were not typical of the class, the named plaintiffs were not adequate representatives of the class, and individual questions predominated.[22] The plaintiffs had alleged that the defendants engaged in price-fixing using three distinct mechanisms, yet they proposed a single methodology for establishing antitrust impact and damages, creating the risk that the evidence would 'identif[y] damages that are not the result of the wrong'.[23] Thus, the court found a 'lack of fit' between the liability and damages theories, which was fatal to the direct purchaser plaintiffs' class certification efforts.[24]

Class-wide injury

A key issue in a predominance inquiry in an antitrust class action is whether individual issues related to antitrust injury predominate. In weighing class certification and evaluating antitrust class actions on the merits, numerous courts have focused on the requirement that plaintiffs establish antitrust injury on a class-wide basis with evidence that is common to all class members. This can be a particularly challenging hurdle for indirect purchaser plaintiffs because they must present a methodology for proving on a class-wide basis that the anticompetitive injury – an overcharge, for example – uniformly passed through the distribution chain to all members of the putative class.

The difficulty for indirect purchaser plaintiffs to present a plausible methodology for proving antitrust injury on a class-wide basis was recently demonstrated in *In re Lithium Ion Batteries Antitrust Litigation*, where a Northern District of California court twice denied certification for a purported class of indirect purchaser plaintiffs. In opposing the plaintiffs' motion for class certification, the defendants submitted expert and third-party discovery disputing the plaintiffs' theory that alleged overcharges were passed along the distribution chain. The evidence showed that component-cost increases were absorbed along the distribution chain either by finished product manufacturers themselves or by retailers and others in the distribution chain through consistent use of focal point prices (e.g., US$9.99), negotiated rebates, set discounts and bundled sales. The court ultimately found that the plaintiffs' expert testimony could not establish that the alleged overcharge passed through the distribution chain to purported class members – an

21 id., at 33–34.

22 No. 12-cv-00501, 2019 WL 626143 (E.D. Mich. 7 January 2019). With respect to typicality, the court agreed with the defendants' arguments that the claims of the named plaintiffs, who were small distributors of bearings for industrial and after-market applications, were not typical of the claims of the class that included large automakers like GM, Ford, Chrysler, and Toyota, as well as industrial original equipment manufacturers like Caterpillar, all of which purchased bearings at negotiated prices as opposed to off price lists like the distributors. id. at *8-12. The court declined to redefine the plaintiffs' classes into a smaller class or subclasses.

23 id. at *15 (quoting *Comcast*, 569 U.S. at 37).

24 id.

essential element of indirect purchaser plaintiff injury – because the plaintiffs' econometric analysis relied on aggregate data that did not account for the variety of different types of class members and product categories.[25]

The court in *In re LIBOR-Based Financial Instruments Antitrust Litigation* recently found that class certification was appropriate as to only a certain sub-section of plaintiffs and only as to a portion of their claims.[26] Various plaintiff groups sought class certification based on their purchase of LIBOR-backed financial instruments: exchange-based investors, US lenders, and over-the-counter (OTC) investors.[27] The court denied class certification for the proposed classes of exchange-based investors and US lenders, finding that while they had established the four Rule 23(a) requirements, both 'stumble[d] at Rule 23(b)'s predominance and superiority hurdles' in part because 'the limited number of common questions are substantially outweighed by individualised questions of specific intent to manipulate' prices.[28] The court found that the OTC investors, on the other hand, met the requirements of Rule 23, 'including the requirement that common questions predominate over individual ones' as to their antitrust claims against two defendants and certified their class.[29]

Predominance can also be challenged in cases where class-wide injury rests on a highly complex theory of causation. For example, in *In re Aluminum Warehousing Antitrust Litigation*, the district court denied certification to a putative class of plaintiffs alleging that defendants conspired to inflate the benchmark price for aluminium by delaying the time it took to deliver the metal from their warehouses.[30] At class certification, the court found that the economic models presented by plaintiffs' expert to show causation diverged from plaintiffs' theory of the case.[31] The court also found that the expert's pass-through analysis, which included indirect modelling based on averages, masked differences in pricing terms among the class and also yielded false positives. As a result, plaintiffs could not establish predominance with respect to class-wide impact.[32]

Class-wide injury can also be difficult to establish in markets where individual negotiations, discounts, rebates and other factors regularly affect the prices paid by consumers. For example, in *In re Lamictal Direct Purchaser Antitrust Litigation*, the Third Circuit overturned a district court decision granting certification to a class of direct purchasers of a branded drug and its generic equivalent.[33] To demonstrate class-wide injury, the purported class offered an

25 See Ord. Denying IPPs' Renewed Mot. for Class Cert.; Granting Mot. to Strike Expert Report, *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-2420-YGR, ECF No. 2197 at 5 (N.D. Cal. 5 March 2018); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-2420-YGR, 2017 WL 1391491, at *12 (N.D. Cal. 12 April 2017).

26 *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430 (S.D.N.Y. 2018).

27 id.

28 id., at 555–56. The proposed class representative of the lender class was also found to be inadequate based on an undisclosed fee arrangement between the son of the CEO of the proposed class representative and interim class counsel.

29 id., at 607; however, the court did not certify the OTC class for the purposes of state law claims, finding that the plaintiffs failed to establish commonality concerning alleged breaches of the implied covenant of good faith and fair dealing and unjust enrichment, because '[v]ariations in state substantive law defeat predominance and superiority for the class as initially proposed'. id., at 607–08.

30 13-md-2481, 2020 WL 4218329, at *42-54 (S.D.N.Y. July 23, 2020).

31 id.

32 id.

33 957 F.3d 184 (3d Cir. 2020).

economic model that relied on the average hypothetical prices consumers would have paid but for the allegedly anticompetitive conduct.[34] Defendants argued that this model was flawed because it ignored individual pricing negotiations, discounts, and other factors that could reduce the prices actually paid by consumers.[35] The Third Circuit agreed, ruling that the district court abused its discretion by certifying the class without conducting a rigorous analysis to determine whether plaintiffs' use of averages was appropriate.[36] Without weighing the competing economic evidence, the court could not find that proof of class-wide impact could be established with common evidence.[37]

Uninjured class members

Courts have also grappled with the issue of the degree to which the presence of uninjured members in a putative class should defeat certification. Defendants often argue that issues requiring individual proof will overwhelm the common evidence of injury when a proposed class includes members that have not been injured by the alleged anticompetitive conduct. Courts have made varying determinations on this issue.

Recently, the First Circuit held in *In re Asacol Antitrust Litigation* that certifying a class with uninjured persons would deny the defendants' right to challenge whether a plaintiff has suffered antitrust injury.[38] The district court had certified a purported class of consumers who allegedly paid supracompetitive prices for Allergan medicines even though it acknowledged that as many as 10 per cent of the absent class members would not have switched to a generic option and therefore suffered no injury, because any uninjured class members could be identified by a claims administrator.[39] The First Circuit rejected this rationale and instead found that the plaintiffs could not satisfy Federal Rule 23(b)(3) because the question of whether each absent class member suffered injury predominated over the common questions. The court further rejected the proposition that a claims administrator could remove uninjured class members, as the claims administrator would be forced to answer individualised questions of fact that defendants would be precluded from challenging at trial, thereby violating the defendants' due process rights and protections under the Seventh Amendment to the US Constitution.[40] The First Circuit thus reversed certification of the purported class, holding that plaintiffs had failed to establish damages on a class-wide basis because they could not differentiate purchasers who were injured from those who were not.[41]

The sheer number or percentage of uninjured class members may play a significant role in persuading courts to deny certification. For example, in the earlier *In re Nexium Antitrust Litigation* action, the First Circuit affirmed a grant of class certification of end payers of

34 id., at 192–94.
35 id.
36 id.
37 id.
38 907 F.3d 42 (1st Cir. 2018).
39 id., at 47.
40 id., at 53.
41 id., at 58.

heartburn medication, despite evidence that some class members did not suffer any harm.[42] There, the court concluded that the number of such uninjured class members was de minimis and that such class members could later be excluded through procedures, such as the submission of class-member affidavits.[43] Notably, while the court in *Nexium* assumed that such affidavits would be uncontested, the courts in *Asacol* and *Intuniv* rejected the plaintiffs' proposal that member declarations could be used in a *Nexium*-like process to cull uninjured individuals because such a process would not work unless such affidavits were 'unrebutted' by defendants.[44]

The District of Columbia Circuit recently considered the issue of uninjured class members in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, where it affirmed denial of class certification of a group of rail shippers.[45] The direct purchasers were suing for treble damages under Section 4 of the Clayton Act, which requires a plaintiff to prove that he or she was 'injured in his business or property by reason of anything forbidden in the antitrust laws'.[46] Yet the damages model submitted by plaintiffs' economic expert had measured '"only negative overcharges" and thus no injury from any conspiracy' for 12.7 per cent (2,037 members) of the proposed class.[47] The court rejected the plaintiffs' argument that this represented only a de minimis number, noting that the district court's analysis of analogous case law involving uninjured class members suggested that the upper bound of a de minimis number was 5 to 6 per cent of the class.[48] The court further found that no winnowing mechanism like that used in *Nexium* would be possible where the defendants intended to contest whether the 2,037 shippers had suffered any injury, which would lead to thousands of mini trials to individually determine injury and causation.[49]

However, the presence of uninjured class members and the need to assess damages on an individual basis do not necessarily render certification inappropriate in all courts. For example, in the *In re Capacitors Antitrust Litigation*, the court opined that 'Rule 23 does not require proof of impact on each purchaser before a class can be certified.'[50] Rather, '[w]hat really matters "is whether the class can point to common proof that will establish antitrust injury (in the form of cartel pricing here) on a class-wide basis."'[51] With this guidance in mind, the court certified a class of direct purchasers, finding that the expert reports combined with other evidence established that class-wide impact could be established with common evidence. The court rejected the defendants' arguments that the prevalence of individualised inquiries meant that damages could not be established with common evidence on a class-wide basis. The court determined that 'these kinds of individualised damage variations do not defeat predominance,' and 'to the

42 *In re Nexium*, 777 F.3d 9, 32 (1st Cir. 2015). See also *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-MD-02503, 2017 WL 4621777, at *11 (D. Mass. 16 October 2017); *In re Nexium (Esomeprazole)*, 297 F.R.D. 168, 183 (D. Mass. 2013); *In re Terazosin Hydrochloride*, 220 F.R.D. 672, 699 (S.D. Fla. 2004).

43 777 F.3d 9, 32 (1st Cir. 2015).

44 See *In re Asacol*, 907 F.3d at 53–54; *In re Intuniv*, 2019 WL 3947262, at *8 ('[d]efendants' assertion of their intention to challenge individual class members' claims of injury distinguishes this case from *In re Nexium* . . . for the same reason that the First Circuit distinguished that case in *Asacol*.').

45 934 F.3d 619 (D.C. Cir. 2019).

46 id., at 623 (quoting 15 U.S.C. § 15(a)).

47 id., at 623 (emphasis in original).

48 id., at 625.

49 id., at 625, 627.

50 *In re Capacitors Antitrust Litig.* (No. III), No. 14-CV-03264-JD, 2018 WL 5980139, at *7 (N.D. Cal. 14 November 2018) (citing *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016)).

51 id., at *8 (quoting *Kleen*, 831 F.3d at 927).

extent any class members may not have paid any overcharges at all . . . the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition.'[52]

Several other courts have rejected the First Circuit's decision in *Asacol* in recent years. For example, in *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, a court in the Eastern District of New York agreed to certify a class of end-payer plaintiffs in spite of defendants' arguments based on *Asacol*.[53] There, plaintiffs offered a damages methodology that would present the number of uninjured class members as a question of fact for the jury and allow the jury to reduce the damage award based on their findings.[54] Because the jury's damage award would not compensate uninjured class members, and they could otherwise be removed during the claims process, the court held that defendants did not have a constitutional right to eliminate uninjured class members during the liability phase of the case.[55]

Ascertainability requirement

In addition to showing that they have standing and that they meet the explicit requirements of Rule 23, many federal courts require that class plaintiffs satisfy an implied requirement of ascertainability. Although the exact standard varies from circuit to circuit, most courts require that a class be readily identifiable by objective criteria. A class definition that includes subjective criteria – such as class members' state of mind – is not sufficiently definite to make a class ascertainable. That said, courts need not know the identity of each class member to certify a class. As long as the court can identify class members at some stage of the litigation, that is generally sufficient. For example, when detailed sales records or similar documents enable a court to easily ascertain who is part of the class, courts have found the class to be sufficiently ascertainable.

Defendants can challenge certification on ascertainability grounds where the class definition is so vague that it is impossible to identify its members. For example, defendant credit card companies recently challenged certification of a purported class of merchants alleging Sherman Act violations in part because their indefinite class period rendered the class members unidentifiable.[56] The plaintiffs' proposed class definition was 'Merchants who have been unlawfully subjected to the so-called Liability Shift for the assessment of MasterCard, Visa, Discover and/or American Express payment card chargebacks, from October 2015 until the

52 id., at *9 (quotations omitted).

53 335 F.R.D. 1 (E.D.N.Y. 2020).

54 id.

55 id. The defendant subsequently petitioned for permission to pursue an interlocutory appeal before the Second Circuit Court of Appeals under Federal Rule of Civil Procedure 23(f). See Allegran Rule 23(f) *Pet., Allegran, Inc., v. Am. Fed. of State, County and Municipal Empl's, et al.*, No. 20-1603 (2d. Cir. 19 May 2020), Dkt. No. 1. On 27 August 2020, the court of appeals denied the petition, finding that an immediate appeal was not warranted. See U.S.C.A. 2d Cir. Mandate, *In re Restasis Antitrust Litig.*, 18-md-2819 (NG) (LB) (E.D.N.Y. 27 August 2020), Dkt. No. 540.

56 See *B & R Supermarket, Inc. v. MasterCard Int'l Inc.*, No. 17-CV-02738 (MKB), 2018 WL 1335355, at *10 (E.D.N.Y. 14 March 2018).

anticompetitive conduct ceases.'[57] The court accepted the defendants' argument that the indefinite ending of the class period did not allow for a determination as to which merchants were members of the class.[58]

Defendants can also argue that a class is not ascertainable where the class definition is so complex that the court will be unable to reliably determine who is included. For example, plaintiffs in a recent generic pharmaceutical antitrust class action moved to certify a class that included four sub-classes and ten categories of purchasers that were excluded from the classes.[59] Among the exclusions were purchasers who paid for the branded drug but not the generic version, and those who purchased the drugs through various types of insurance plans.[60] Plaintiffs' expert testified that it would possible to acquire and compare purchase data from multiple sources, remove any excluded purchasers, and compose a list of qualifying class members.[61] In response, defendants argued – and the court agreed – that plaintiffs' methodology failed to account for ambiguities and inconsistencies in the data. Nor had plaintiffs accounted for the fact that insurance plan payment structures can change over time. Given that the class could include at least 600,000 qualifying members, the court found that although the necessary data was obtainable, plaintiffs had not presented a reliable methodology for ascertaining which purchasers were class members.[62]

Procedural considerations

The use of motions to strike

Defendants need not wait until the class certification stage to challenge the propriety of proceeding as a class action. In addition to the typical motions to dismiss that are routinely filed in large antitrust actions, defendants can also consider filing motions to strike class action allegations under Federal Rule of Civil Procedure 12(f). When a court grants a motion to strike class action allegations, it allows a plaintiff to continue the action in his or her individual capacity but not as a representative of a class.

The Western District of Pennsylvania recently granted a motion to strike class action allegations filed by defendant employers in the *In re Railway Industry Employee No-Poach Antitrust Litigation*, finding that the plaintiffs had failed to allege facts that could plausibly satisfy Rule 23's predominance requirement.[63] Specifically, while the plaintiffs alleged that the defendants'

57 id.

58 id., at *13–14 (finding that proposed class was not ascertainable and denying motion for certification without prejudice).

59 *In re Niaspan Antitrust Litig.*, MDL No. 2460, 2020 WL 2933824, at *12-19 (E.D. Pa. 2 June 2020).

60 id., at *14–19.

61 id.

62 id.

63 id.

agreements harmed all of the employees in the putative class, the court found that the complaint failed to present facts that all employees suffered a cognisable antitrust injury that could be proven on a class-wide basis.[64]

Notably, the burdens on plaintiffs at the pleading stage are lower than they are on class certification. As the court explained, when considering the motion to strike, it 'must determine only whether plaintiffs satisfied their burden to set forth factual allegations to advance a prima facie showing of predominance or that at least it is likely that discovery will reveal evidence that antitrust impact may be proven on a class-wide basis'.[65]

Class and merits overlap

The distinction between the class certification phase and the merits phase has softened in recent years. As the Supreme Court held in Comcast, certification is proper only if the evidentiary proof that the plaintiffs submit withstands a 'rigorous analysis' that 'frequently entail[s] overlap with the merits of the plaintiff's underlying claim'.[66] District courts are now willing, and even required, to take a look at the merits of the claim when assessing whether to certify a class. Accordingly, plaintiffs often use liability documents and testimony in connection with their class certification motions. Defendants should similarly counter with affirmative evidence to tell their own merits story in connection with their opposition to class certification.

Conversely, while issues regarding class-wide impact are generally litigated in the class certification context, they can also be dispositive in the merits context. For example, in December 2017, the Northern District of California granted summary judgment for defendants in an antitrust class action alleging a price-fixing conspiracy in the market for optical disk drives. Indirect purchaser plaintiffs had previously obtained class certification based on expert testimony supporting two key overcharge theories, namely that (1) the price-fixing at issue was not meant to increase prices, but rather to curb declining prices; and (2) the alleged overcharge was not passed down in the form of increased prices, but instead resulted in finished products of poorer quality.[67] However, at the summary judgment phase, the court agreed with the defendants' contention that the plaintiffs had not offered sufficient evidence to support their expert testimony that manufacturers reduced the quality of their finished products as a result of an alleged overcharge on the drives, and the court found that this lack of evidence was fatal to the indirect purchaser plaintiffs' ability to prove class-wide impact.[68] Notably, in a related order, the court refused to decertify the class, maintaining that although the evidence was insufficient to survive summary judgment, the methodology for establishing impact was still plausible.[69]

64 *In re Ry. Indus. Employee No-Poach Antitrust Litig.*, No. MC 18-798, 2019 WL 2542241, at *38 (W.D. Pa. 20 June 2019) (noting that 'for a plaintiff in a no-poach wage suppression case to satisfy the requirement of predominance with respect to antitrust impact, there must be evidence that the compensation structures of the defendants in the pertinent industry were so rigid that the compensations of all class members were tethered together').

65 id., at *37.

66 *Comcast Corp. v. Behrend*, 569 U.S. at 33–34.

67 See *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-02143-RS, 2017 WL 6503743, at *8 (N.D. Cal. 18 December 2017).

68 id. at *9–10.

69 *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-02143-RS, 2017 WL 6448192 (N.D. Cal. 18 December 2017).

Practical trends in US antitrust class actions

Putative classes have grown in size over the years. Antitrust class plaintiffs often define a class in a manner designed to incorporate as many defendants, and the longest class period, as possible in order to capture a critical mass of market share and potential damages. However, larger and more diverse classes are drawing increased scrutiny from courts as to whether a plaintiff's damages model presents a viable method for determining if class members have been injured, and whether courts should rely on self-identification to form a class. Defendants have successfully challenged class certification by arguing that it is not administratively feasible to identify whether a given person is a class member who purchased a relevant product. These concerns may be more acute in indirect purchaser class actions where, for example, it is often impossible to trace an allegedly price-fixed component through the stream of commerce into the hands of a consumer.

Over recent years, US antitrust class actions have also grown more complex, and motions for class certification now rely on economic modelling and the testimony of economic experts. Given the significance of transactional data to pursuing and defending antitrust actions, both plaintiffs and defendants tend to hire economists at the early stages of an action. Economists analyse the transactional data obtained through discovery, and investigate what other variables (besides collusion) may have led to price changes. Plaintiffs' counsel often consult with an economist before filing a complaint, and may hire multiple economists as experts to submit reports in support of their motion for class certification. Defendants also engage economists, often collectively in a joint defence group, to assist in obtaining and analysing affirmative evidence to try to show that there was no overcharge or no pass-on through the supply chain. Experts guide on what discovery to seek. Third-party discovery – including data, declarations, and depositions – generally requires the filing of subpoenas and time to negotiate over the proper scope of the discovery sought and the burdens of complying, so parties find it advisable to seek assistance from economic experts as soon as practicable.

As parties are preparing their certification or opposition papers, including expert submissions, they should keep in mind that the sheer volume of materials can be overwhelming for a court. With expert evidence crucial to proving a case, it is becoming increasingly common for parties to antitrust class actions to file Daubert motions challenging the admissibility of the opposing side's expert reports.[70] Judges often advise parties to carefully tailor their submissions related to class certification to focus on the key points necessary to either certify or deny certification so that they do not drown the judge in paperwork that she or he may not have a chance to thoroughly read. Parties can also request to present an economics tutorial to the court or ask to have the economists from both sides testify as part of the class certification hearing to help the judge understand the economic modelling employed.

70 Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, the trial judge plays a 'gatekeeping' role with respect to expert testimony, evaluating whether the witness is qualified as well as whether the testimony is based upon sufficient facts or data and is the product of reliable principles and methods, which the witness has reliably applied to the facts of the case. See also Fed. R. of Evid. 702. Daubert challenges seek to exclude expert testimony as inadmissible in whole or in part.

Appendix 1

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – explores in depth key themes such as territoriality, causation and proof of damages that are common to competition litigation around the world with jurisdictional overviews and Q&As. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as Brazil, Japan and Mexico.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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ISBN 978-1-83862-262-6