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# 4 Takeaways From 3rd Circ. Classwide Antitrust Injury Ruling

By **Alden Atkins, Lindsey Vaala and Morgan Kelley** (May 6, 2020, 5:52 PM EDT)

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With increasing frequency, district and circuit courts across the country are grappling with whether class certification is appropriate when the proposed class contains — or may contain — uninjured persons or entities.

In just the past year and a half, the U.S. Court of Appeals for the First Circuit and the U.S. Court of Appeals for the D.C. Circuit have both weighed in, with each court finding class certification impermissible given the presence of a more than a de minimis number of uninjured class members.[1]

With its April 22 decision vacating class certification in the In re: Lamictal Direct Purchaser Antitrust Litigation, the U.S. Court of Appeals for the Third Circuit has now added its voice to this important discussion.[2] Like these other circuits, the Third Circuit has now stated unequivocally that "every plaintiff must be able to show antitrust injury," and that such injury must be shown through evidence that is common to the class.[3]

As we discuss below, Lamictal has several important implications for parties litigating the predominance requirement under Federal Rule of Civil Procedure 23(b)(3) in district court.

**Background of the Case**

In Lamictal, the putative class plaintiffs brought pay-for-delay allegations against defendants GlaxoSmithKline PLC and Teva Pharmaceutical Industries Ltd., which manufacture, respectively, the brand and generic versions of the antiepilepsy drug Lamictal.

Direct purchasers of Lamictal and of the generic version, called lamotrigine, alleged that GSK and Teva violated the antitrust laws when they settled patent litigation with an agreement that delayed entry of the GSK's authorized generic and agreed to a date on which Teva would begin selling lamotrigine.[4]

The plaintiffs claimed that the settlement constituted an unlawful reverse payment agreement, in which GSK's promise to delay entry of its authorized generic constituted payment to Teva stay out of the

market until the agreed-upon date.[5]

According to the plaintiffs, but for the settlement, Teva would have launched its generic much earlier than July 2008, thus driving down the price of brand Lamictal, and GSK, in turn, would have launched its own AG to compete with Teva's generic, lamotrigine. As a result, purchasers of Lamictal and of lamotrigine alleged that they paid more than they would have absent the settlement.

The plaintiffs moved to certify a class of two subsets of direct purchasers: companies that purchased Lamictal directly from GSK, and companies that purchased the generic directly from Teva. The district court subsequently granted class certification. Notably, it ruled on the papers without oral argument. GSK and Teva then petitioned for an interlocutory appeal under Federal Rule of Civil Procedure 23(f), challenging class certification.

The Third Circuit agreed to consider the interlocutory appeal. On appeal, the key class certification issue was whether the plaintiffs met the Rule 23(b)(3) predominance requirement — that common questions of law or fact predominate over individual ones in proving the element of antitrust injury, which is essential to every antitrust claim.[6] If an individualized analysis is required to establish injury (or any other element of the antitrust claim), class certification is not appropriate.

**The Third Circuit Decision**

In a unanimous decision, the Third Circuit vacated the district court's class certification order and sent the case back down for a redo.[7] It found that the district court failed to conduct a sufficiently rigorous analysis to resolve key factual disputes and weigh conflicting evidence and expert testimony bearing on the predominance element required for class certification under Rule 23(b)(3).

Without this analysis, the Third Circuit could not discern whether the plaintiffs had met their burden of showing that they could prove classwide antitrust injury through common evidence.

The Third Circuit's decision reads like a road map to district courts on how to conduct this necessary analysis. Specifically, the district court must:

- Determine that the requirements of Rule 23 are met, with any factual determinations made by a preponderance of the evidence;
- Resolve all factual or legal disputes relevant to class certification, even if they overlap with merits; and
- Consider all relevant evidence and arguments, including expert testimony, offered by the moving and opposing parties.[8]

In a similar vein, the Third Circuit rejected the district court's unquestioning acceptance of the averages put forward by the plaintiffs' expert to show that antitrust injury could be shown through common proof. While "averages may be acceptable where they do not mask individualized inquiry," the district court failed to conduct the necessary inquiry to determine whether the averages put forward by the plaintiffs could prove injury to all or substantially all class members.[9]

Instead, the district court was required to resolve by a preponderance of the evidence the material factual and expert disputes to reasonably conclude that antitrust injury could be proven by common evidence.[10]

**Key Takeaways**

***In the wake of Lamictal, the Supreme Court's predominance discussion in Tyson Foods is likely limited to the FLSA context.***

With its holding, the Third Circuit explicitly rejected the direct purchasers' argument that the U.S. Supreme Court's 2016 decision in Tyson Foods Inc. v. Bouaphakeo,[11] permits a lesser standard for establishing predominance. Specifically, relying on Tyson Foods, the plaintiffs argued that predominance is satisfied "unless no reasonable juror could believe the common proof at trial."[12]

Swiftly dispensing with this argument, the Third Circuit distinguished Tyson Foods as unique to the Fair Labor Standards Act setting. In FLSA cases, a lack of record-keeping may mean that the only feasible way to establish liability is through a data sample from representative employees, rather than data from a wide swath of class members. In such instances, individual class members must rely on the representative evidence to provide FLSA liability. The U.S. Courts of Appeals for the Ninth and Sixth Circuits similarly have limited Tyson Foods to the FLSA context.[13]

***Common proof of injury through average price increases may be insufficient.***

Although less explicit than the First and D.C. Circuits, the Third Circuit's decision indicates a trend toward refusing to certify a class when defendants provide persuasive evidence that a nonincidental number of putative class members have not suffered any antitrust injury. When this happens, the plaintiffs will likely be required to develop evidence and an economic model that excludes uninjured class members. Accordingly, it may be increasingly difficult for plaintiffs to rely on a model that uses averages to show common proof of antitrust injury in order to satisfy the predominance requirement.

In Lamictal, to satisfy Rule 23(b)(3), the plaintiffs were required to show, through classwide evidence, that GSK would have launched an authorized generic and that the presence of GSK's authorized generic in the market would have caused purchasers of Teva's lamotrigine to pay less for that generic absent the settlement. In support of certification, the plaintiffs offered expert testimony that only summarily concluded — relying on an average hypothetical price — that common evidence demonstrated that direct purchaser paid inflated prices.[14]

In opposing the motion for class certification, GSK and Teva argued (among other things), that the plaintiffs' evidence impermissibly relied on average prices because the drug market is heavily impacted by individual negotiations, and relying on averages is therefore neither accurate nor appropriate.

Also, as a result of competitive pricing maneuvering by both manufacturers, at least some direct purchasers of lamotrigine paid the same or less for the generic than they would have absent the settlement (and were therefore uninjured).

As discussed above, the Third Circuit held that the district court "abused its discretion when it assumed, absent a rigorous analysis, that average are acceptable," and where it did not resolve the factual predicates in dispute or determine the credibility of the parties' expert analysis.[15] When there is credible evidence of uninjured class members, litigants should expect that the district court will probe representative or average data to make sure it does not mask individual differences.

In other words, to borrow from U.S. Circuit Judge Kent Jordan, using averages may be "about as meaningful as saying that 'with one foot on fire and the other on ice, I am, on average, comfortable.'"[16]

***Parties should prepare to litigate evidentiary and factual issues at the class certification stage.***

The Third Circuit's Lamictal decision highlights the importance for parties on both sides of the motion to present not only evidence about whether the proposed class contains uninjured class members but also well-developed facts that bear on whether the element of injury is capable of being proven through common evidence.

Plaintiffs and defendants should therefore expect district courts to conduct a thorough and rigorous probing of both sides' arguments, facts and evidence, including an assessment of the merits where necessary to resolve factual disputes by a preponderance of the evidence.

A district court's failure to meaningful engage with and resolve material disputes will also likely be grounds for a successful 23(f) petition to challenge the class certification decision. After Lamictal, district courts will likely need to hold a hearing before deciding class certification, particularly if there are key issues and facts in dispute. Parties should prepare their experts to testify live, in addition to preparing a written report, and would be wise to factor live testimony experience into expert selection considerations.

***Predominance remains a key class certification issue.***

Whether the Rule 23 predominance requirement has been met remains a key issue at the class certification stage of class action litigation. Our research reflects that, since 2008, predominance has been the main issue in about 20% of cases in which the Third Circuit has granted a Rule 23(f) petition to consider an interlocutory appeal on class certification.

More generally, during that same time frame, approximately 30% of Rule 23(f) petitions filed in the Third Circuit have been granted, and nearly 40% of those granted petitions have resulted in the Third Circuit vacating the district court's class certification decision below.

This reflects a broader trend among courts of appeals in recent years — including the D.C. Circuit and First Circuit — to closely examine whether the Rule 23 requirements for class actions, and specifically the predominance requirement, have actually been met.

Certification is a critical point in any class action. Antitrust injury — and specifically whether such injury is classwide and can be shown through common proof — remains a key issue in the class certification determination. Counsel for parties on both sides therefore must carefully consider and address these complex issues.

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[1] In In re Asacol Antitrust Litigation, the First Circuit held that certifying a class containing uninjured persons would deny the defendants their right to challenge whether a plaintiff has in fact suffered antitrust injury. In re Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018). And in August 2019, the D.C.

Circuit upheld a trial court's decision not to certify a proposed class of railroad shippers in which 12.7% of the proposed class members were uninjured. In re Rail Freight Fuel Surcharge Litig., 934 F.3d 619, 623-24 (D.C. Cir. 2019).

[2] In re Lamictal Direct Purchaser Antitrust Litig., No. 19-1655, 2020 WL 1933260 (3d Cir. Apr. 22, 2020).

[3] Id. at *7 (citing In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2009)). See also id. at *5 (requiring direct purchaser plaintiffs to prove that all class members would have paid less for the generic drug at issue absent the defendants' alleged conduct).

[4] The patent litigation was triggered by Teva's filing of an Abbreviated New Drug Application ("ANDA") under procedures established by the Hatch-Waxman Act of 1984, the official title of which is the Drug Price Competition and Patent Term Restoration Act of 1984, Pub, L. No. 98-417, 98 Stat. 1585. Teva's ANDA application included what is known as a "Paragraph IV" certification asserting that GSK's patent for Lamictal was either invalid or not infringed by Teva's proposed generic. See In re Lamictal, 2020 WL 1933260, at *1; see also 21 U.S.C.§355(j)(2)(A)(vii)(IV).

[5] In re Lamictal, 2020 WL 1933260, at *1.

[6] Id. at *3-4.

[7] Id. at *1.

[8] Id. at *4 (internal quotation marks omitted) (quoting In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2009)).

[9] Id. at *6 (internal citation omitted).

[11] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016).

[12] In re Lamictal, 2020 WL 1933260, at *4.

[13] See Senne v. Kan. City Royals Baseball Corp., 934 F.3d 918, 940–41 (9th Cir. 2019); Monroe v. FTS USA, LLC, 860 F.3d 389, 400 (6th Cir. 2017).

[14] In re Lamictal, 2020 WL 1933260, at *5.

[15] Id. at *6.

[16] Behrend v. Comcast Corp., 655 F.3d 182, 223 (3d Cir. 2011) (Jordan, J., concurring in part and dissenting in part), rev'd, 569 U.S. 27 (2013).