September 27, 2019

Class Certification Developments

In this installment of our client alerts focused on class certification decisions, we discuss recent cases evaluating the impact on class certification of economic models that sweep in uninjured class members. In two recent cases, certification was denied on these grounds. Other courts, also discussed below, have granted certification notwithstanding uninjured class members.

Recent cases where uninjured class members defeated certification

Dakota Granite Co. v. *BNSF Ry. Co. (In re Rail Freight Fuel Surcharge Antitrust Litig.), No. 18-7010 (D.C. Cir. Aug. 16, 2019) ("Slip. Op.")*

As we noted in an earlier client alert on August 23, 2019, the D.C. Circuit recently affirmed a district court's decision to deny class certification because the proposed class contained too many uninjured class members.[1] In the case regarding an alleged fuel charge price-fixing conspiracy among the nation's largest railroads, the district court found, among other things, that plaintiffs' economic model "measured negative damages—and hence *no* injury—for over 2,000 members of the proposed class."[2] It therefore held that the model failed to show that injury to the class could be shown by common proof. This meant plaintiffs could not meet the requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

On appeal, the D.C. Circuit affirmed the decision, concluding that the district court did not abuse its discretion in denying class certification. The appeals court agreed, because plaintiffs' damages model "indicates that 2,037 members of the proposed class—or 12.7 percent—suffered 'only negative overcharges' and thus *no* injury from any conspiracy."[3] The court dismissed plaintiffs' argument that this number could be explained by prediction error. This left "the plaintiffs with no common proof of [] essential elements of liability for the remaining 12.7 percent" since plaintiffs "ha[d] proposed no 'further way'—short of full-blown, individual trials" to segregate the uninjured from the injured.[4] This is the second time the Court of

---

1 *See D.C. Circuit Upholds Denial of Class Certification When Economic Model Showed Uninjured Members*, Aug, 23, 2019, https://www.paulweiss.com/practices/litigation/antitrust/publications/dc-circuit-upholds-denial-of-class-certification-where-plaintiffs-economic-model-showed-uninjured-members?id=29267.

2 *In re Rail Freight Fuel Surcharge Antitrust Litig.*—MDL No. 1869, 934 F.3d 619, 621–22 (D.C. Cir. 2019).

3 *Id.* at 623.

4 *Id.* at 624–25.

Appeals for the D.C. Circuit has held that class certification is inappropriate in a case where the expert's damages model failed to show injury to a portion of class members. Days after the *Rail Freight* decision, another court also denied class certification in a case where the plaintiffs' proposed method for class certification contained too many uninjured class members.

*In re Intuniv Antitrust Litigation (Indirect Purchasers), No. 1:16-CV-12396-ADB, 2019 WL 3947262, at *1 (D. Mass. Aug. 21, 2019).*

Intuniv is a so-called "pay-for-delay case." *Id.* at *1. A class of indirect purchasers ("IPPs") of a drug called Intuniv (used to treat ADHD) alleged that branded drug manufacturer, Shire, settled patent litigation with generic drug manufacturer, Actavis, by unlawfully incentivizing Actavis delay its launch of its generic version of Intuniv. They alleged that the settlement thereby artificially propped up the prices of the branded drug.

The IPPs sought to certify classes of indirect purchasers who paid for branded or generic Intuniv themselves, and also those who paid for part of the purchase price through an insurance co-payment or co-insurance provision.[5] The parties conceded that there were three groups of purchasers, who could not have been injured by the delay in generic competition: (1) "brand loyalists" who would have continued to purchase branded Intuniv even if a generic entered the market; (2) purchasers using co-payment coupons for the branded drug, who would not have paid any less for the generic drug; and (3) those who purchased the drug through insurance after reaching out-of-pocket maximums. The parties disagreed about the total number of uninjured purchasers: defendants' expert estimated 44,000 class members were uninjured (about 12.4% of the class); plaintiffs' expert estimated around 25,000 members (about 8% of the class). The court concluded, based on the evidence, that "more than 25,000 nationwide putative class members never paid an overcharge."[6]

The court identified the key class certification issue to be "whether the IPPs have shown either that the number of uninjured class members is de minimis or [] designed a reasonable and workable mechanism to allow Defendants to challenge class members' individual purported injury[.]"[7]

It relied on the First Circuit opinion from last year in *In re Asacol*, 907 F.3d 42 (1st Cir. 2018). In *Asacol*, the First Circuit upheld a denial of certification where uninjured class members made up 10% of the class, and where "determining whether any given individual was injured . . . turn[ed] on an assessment of the individual facts" that the defendants had to be "offered the opportunity to challenge."[8] The *Intuniv* court

5 *Id.* at *2.

6 *Id* . at *4.

7 *Id.* at *8.

8 *Asacol*, at 55.

concluded that the IPPs had "not put forth a reasonable and workable plan" to weed out uninjured class members.[9] It also observed that, because the defendants "inten[ded] to challenge individual class members' claims of injury," IPP's argument that the issue could be "addressed at the claims administration stage" was unpersuasive.[10]

Recent cases where uninjured class members did not defeat certification

Other courts have concluded that the presence of uninjured class members will not defeat class certification, where the process for identifying those class members would otherwise be manageable.

In re Loestrin 24 Fe Antitrust Litig., in the District of Rhode Island and *Herbert* v. *Vantage Travel Serv., Inc.*, in the District of Massachusetts, held that the presence of uninjured class members in those cases would not defeat class certification.

In *Loestrin*, a class of 48 corporate entities that purchased branded and generic Loestrin 24 directly brought suit against Defendants for allegedly settling sham patent lawsuits in an effort to artificially raise prices of the Loestrin product.[11] When evaluating the evidence for class certification, the court held that there would be "a very small absolute number [of the class] . . . picked off in a manageable, individualized process at or before trial" and that "[t]he prospect that a handful of class members may be uninjured is not a barrier to class certification."[12] The court thus found it was enough for the Direct Purchaser Class to provide evidence common to the class that the Generic-Only purchasers sustained injury-in-fact.

Similarly, in *Herbert* v. *Travel Serv., Inc.*, a court determined that deposition testimony or sworn affidavits were a "manageable, individualized process" to determine whether each of the 68 class members who received compensation after a mechanical failure ruined a cruise, were already adequately compensated and should be removed from the class.[13] The court decided this was a feasible option, given that there was a spreadsheet listing all customers from all tours, which also indicated whether customers accepted compensation.

These cases reflect the continued evolution of often fact-specific case law on under what circumstances the number or proportion of uninjured class members will defeat certification. Practitioners on both sides of

---

9 *In re Intuniv Antitrust Litig.*, at *8.

10 *Id.*

11 *In re Loestrin 24 Fe Antitrust Litig.*, 2019 WL 3214257, at *1 (D.R.I. July 2, 2019).

12 *Id.* at *15.

13 2019 WL 1440400, at *6 (Apr. 1, 2019).

class action practice are well-advised to review the legal landscape in developing their evidence in support of, or against, class certification.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Craig A. Benson
+1 202-223-7343
cbenson@paulweiss.com

Yahonnes Cleary
+1 212-373-3462
ycleary@paulweiss.com

Jane B. O'Brien
+1 202-223-7327
jobrien@paulweiss.com

Jacqueline P. Rubin
+1 212-373-3056
jrubin@paulweiss.com

Liza M. Velazquez
+1 212-373-3096
lvelazquez@paulweiss.com

Associates Jessica Finberg and Bethlehem Mebratu contributed to this client memorandum.