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Courts Face Controversy Over Uninjured Antitrust Class Members

Antitrust defendants have long argued that a class may not be certified if it includes members who have suffered no demonstrable injury. But is this argument gaining traction?

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For years, defendants in antitrust suits have argued that a class may not be certified if it includes members who have suffered no demonstrable injury. Recent developments suggest that argument may be gaining traction.

In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, the U.S. Court of Appeals for the D.C. Circuit in 2019 addressed allegations that four railroad companies, who collectively control almost 90% of the rail freight traffic in the U.S., conspired to fix fuel prices in violation of antitrust laws. As in any complex antitrust class action, the plaintiffs proposed to show damages via statistical modeling. Their model reflected that approximately 2,000 customers, or about 12% of the class, were actually undercharged by the pricing scheme. In other words, they were not injured.

The issue before the court in *Rail Freight* was whether the inclusion of those uninjured class members precluded certification under Federal Rule of Civil Procedure 23. Under Rule 23(b)(3), the "predominance" factor, common questions of fact or law must predominate over individual questions. Without predominance, a class action would be either inefficient or unfair: The court would have to hold countless "mini-trials" on

the individualized questions, or it would have to deprive a party of the opportunity to prove its case with respect to those questions.

The case presented a significant predominance problem. The plaintiffs' model reflected that thousands of customers were not injured by the scheme. But the model did not identify which customers were uninjured. Thus, even if the existence of the scheme was proved, the court would still have to sort through every customer to decide whether it was or was not injured. Or so the defendants argued.

Judge Paul L. Friedman of the U.S. District Court for the District of Columbia disagreed that the inclusion of uninjured members in a

class necessarily created a predominance problem. Under the "de minimis exception," if the class includes a small number of uninjured members, and there is an easy way of identifying those members, the class could be certified. But the court concluded that 12% was more than de minimis and denied certification. The D.C. Circuit affirmed, assuming, without deciding that a de minimis exception exists.

The D.C. Circuit is not the first court to address uninjured class members. Four years ago, in *Tyson Foods v. Bouaphakeo*, the Supreme Court upheld certification of a class containing uninjured class members. Unlike the courts in *Rail Freight*, the Supreme Court suggested the issue may be one of claims administration, not certification. Recognizing that "the question whether uninjured class members may recover is one of great importance," the court declined to answer it, holding that the defendant could raise the issue once a claims-administration procedure was proposed.

Since *Tyson Foods*, other courts have weighed in on the issue. In 2018, the First Circuit in *In re Asacol Antitrust Litigation* addressed a suit by pension funds against a pharmaceutical manufacturer. As in *Rail Freight*, statistical models showed that approximately 10% of the proposed class was uninjured, but there was no easy way of identifying who fell into that category. As a result, the court ruled, the class could not satisfy the predominance requirement. Therefore, the class could not be certified. The court did not outright reject the idea of a de minimis exception, but it did express disapproval of other decisions embracing it.

The courts are now split over whether Rule 23 allows a de minimis exception, permitting certification despite a small number of uninjured class members. The Seventh Circuit, in *Messner v. Northshore University HealthSystem*, addressed the issue in the context of a merger challenge. In 2012, it held that a class containing "a great many" uninjured members could not be certified. The court went on to find that 2.4%—the amount of uninjured class members, by the defendant's estimation—did not amount to "a great many." The Ninth Circuit has also suggested, in the 2016 case *Torres v. Mercer Canyons*, that it would permit a de minimis exception.

The Fifth Circuit, on the other hand, has rejected such an exception. In the 2003 decision, *Bell Atlantic v. AT&T*, the court held that "where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." The Third Circuit reached a similar conclusion in *In re Hydrogen Peroxide Antitrust Litigation*, noting that the issue of antitrust impact is "an element of the claim that may call for individual, as opposed to common, proof," requiring "the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial."

The controversy over uninjured class members and whether Rule 23 permits a de minimis exception will persist until resolved by the Supreme Court. Until then, counsel will have to consider carefully how to structure proposed classes to minimize the risk that their efforts will be thwarted by the inclusion of uninjured members.

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