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May 18, 2020

Big pharma antitrust class actions: Third Circuit gives primer on predominance in vacating class certification

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Takeaway: Class action litigation tends to be complicated, especially for trial courts resolving motions for class certification. These motions usually require courts to pour through dense briefing and evidentiary submissions, including dueling expert witness reports. It has long been the case that a district court must conduct a "rigorous analysis" of the arguments and evidence submitted. *Gen. Tel. Co. of the SW v. Falcon*, 457 U.S. 147, 161 (1982). The Third Circuit Court of Appeals recently had an opportunity to grade a district court's Rule 23 effort in a pharmaceutical antitrust class action. *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 2020 WL 1933260 (3d Cir. 2020) ("*Lamictal*"). At least from the Third Circuit's perspective, counsel for both the putative class representatives and the pharmaceutical defendants submitted sufficient evidence and argument so that the district court could "rigorously analyze" the Rule 23 issues. But, according to the panel, the district court failed to do its job. In the course of resolving the appeal, the Third Circuit provided a primer on Rule 23's predominance requirement, illustrating how complicated the analysis of that Rule 23 element can be.

In *Lamictal*, direct purchasers of an anti-epilepsy drug filed a putative class action against both the brand manufacturer and the generic manufacturer, alleging that their agreement to settle patent litigation violated the antitrust laws. In particular, they alleged that the settlement amounted to an illegal "reverse payment agreement," because the brand manufacturer agreed *not* to market an "authorized generic" for a period of time, giving the generic manufacturer time to enjoy a "generic monopoly." 2020 WL 1933260, at *2. Had the generic manufacturer prevailed in the patent litigation and launched a generic product, then the brand manufacturer could have immediately competed by launching its own "authorized generic," meaning two types of generic drugs would have been available at the same time, thereby lowering prices. *Id*.

The district court granted the direct purchasers' motion to certify a class of purchasers that bought the generic from the generic manufacturer. The manufacturers appealed and the Third Circuit reversed.

The panel faulted the district court for not doing the "rigorous analysis" required under Rule 23. According to the panel, three levels of analysis are required. First, the district court must find by a preponderance of the evidence that each Rule 23 requirement for a damages class action is satisfied (numerosity, commonality, typicality, adequacy, predominance, and superiority). *Id*. at *3. Second, "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits." *Id*. at *4 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2009)). Third, the district court must consider all

of the relevant evidence, including expert testimony. *Id*. The predominance requirement is satisfied only if, after conducting this analysis, the district court is satisfied that the class claims are capable of common proof at trial.

To satisfy the predominance requirement, the direct purchasers' theory of antitrust injury required *common* proof that (1) but for the settlement, the brand manufacturer would have launched an authorized generic and (2) as a result, all class members would have paid less for the generic.

The direct purchasers' proof was based on average drug prices and the district court "assumed, absent rigorous analysis, that averages are acceptable." *Id*. at *6. But whether averages were acceptable depended on a number of factors, including "1) whether the market is characterized by individual negotiations; 2) whether [the generic manufacturer] preemptively lowered its pricing in response to the [brand manufacturer's discounted-brand competition strategy] and 3) whether and to what extent [the brand manufacturer], absent the settlement agreement, would or could have pursued both the [discounted-brand competition strategy] and an [authorized generic]." *Id*. The district court did not resolve these fact issues, "which would have required it to weigh the competing evidence and make a prediction as to how they would play out at trial." *Id*. The panel further observed that "[w]hile averages may be acceptable where they do not mask individualized injury, we cannot determine whether that occurred here because of the lack of analysis." *Id*. (citation omitted).

The district court, moreover, conflated proof of antitrust injury (the fact of harm) with proof of damages (the amount of harm), despite these distinct issues being judged by different standards.*Id*. at *7.Antitrust injury must always be established by common proof.Proof of damages, on the other hand, can vary as between each class member.

Accordingly, the panel vacated the class certification order and "remand[ed] for a redo." *Id*. at *1. On remand, the district court should "conduct a rigorous analysis of the competing expert reports that rely on competing evidence and assume competing facts" to determine if the movants had met the predominance requirement, while avoiding conflating "injury with damages in its analysis." *Id*. at *7.

If you are interested in other articles about class actions against pharmaceutical companies, see *Ninth Circuit deepens circuit split in pharmaceutical industry-specific RICO proximate cause ruling* (Jan. 31, 2020); *Notes from RICO Class Action Wars Against Pharmaceutical Companies* (Mar. 6, 2019); *and First Circuit addresses an issue that continues to vex (and split) the circuits: should a class be certified that includes uninjured class members?* (Oct. 24, 2018).