

## Plaintiffs Face High Class Cert. Bar In Antitrust Cases

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In *Amchem Products Inc. v. Windsor*, the U.S. Supreme Court clearly stated that to certify a class seeking damages under Federal Rule 23(b)(3), a court’s “inquiry trains on the legal or factual questions that qualify each class member’s case as a genuine controversy.”[1] In other words, courts must consider whether, through common evidence, plaintiffs can demonstrate whether each and every class member was in fact injured by the challenged conduct. This simple conclusion flows directly from a fundamental precept of U.S. law — standing.



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Claimants in federal court must have suffered an actual injury in fact caused by the defendants that will likely be redressed by a favorable court decision.[2] If claimants lack standing, not only would courts exceed their constitutional authority to decide only “cases” and “controversies,”[3] but also proceedings would raise serious due process concerns should defendants be forced to pay “damages” compensating for nonexistent injury. Under the Rules Enabling Act, which authorized the creation of the Federal Rules of Civil Procedure, nothing about Rule 23 changes — or could change — this constitutional requirement.[4]

The simplicity of *Amchem*’s unassailable conclusion has proven much more complicated in practice. In antitrust class actions in particular, plaintiffs routinely seek to demonstrate injury through statistical modeling based on highly averaged price data that infers classwide injury without direct proof. But in recent years, courts across the country have been pushing back and refusing to certify classes if plaintiffs can prove no more than that a hypothetical average class member was injured.

On Jan. 25, 2016, the Eastern District of Tennessee became the latest court to deny class certification for exactly this reason. In *Food Lion LLC v. Dean Foods Co.*, U.S. District Judge J. Ronnie Greer refused to certify a direct purchaser class challenging defendant milk producers and processors’ allegedly anti-competitive conduct.[5] The plaintiffs alleged the three defendants colluded in a wide variety of ways, including by allocating territories, submitting sham bids, and restricting production capacity. In their motion for class certification, plaintiffs sought to demonstrate that the putative class members were accordingly overcharged for all milk purchased from 2002 to 2009.

Plaintiffs’ expert, Professor Ronald W. Cotterill, conducted a regression analysis using nearly 7 million pieces of defendants’ sales data by which he concluded that the price of processed milk during the relevant time period was 7.2 percent higher than could be explained by other factors that might affect the price of milk. However, as with many industries, defendants’ customers did not simply pay an easily identified, uniform market price. Instead, many large customers, including the named plaintiff Food

Lion, paid prices set through individually negotiated contracts. In fact, Food Lion was such a large customer of defendant Dean Foods that it was the only customer of two of Dean Foods' processing plants in the Southeast. As such, Food Lion was able to use its purchasing power to negotiate a cost-plus supply contract and a "paid to stay" concession from Dean Foods by which Dean Foods agreed to pay Food Lion 1 percent of net milk sales for the right to continue to supply milk to Food Lion.

Defendants argued that Cotterill's model could not accurately determine whether Food Lion and many other putative class members were actually injured at all. Defendants charged that his model did no more than find an average overcharge and then assume that average applied to each and every class member.

Judge Greer agreed. Invoking *Amchem*,<sup>[6]</sup> the Third Circuit's opinion in *Hydrogen Peroxide*,<sup>[7]</sup> and the D.C. Circuit's opinion in *Rail Freight*,<sup>[8]</sup> Greer found that to certify a class, plaintiffs must be able to demonstrate through common evidence that "every class member [suffered] at least some antitrust impact resulting from the alleged violation."<sup>[9]</sup> Greer noted that Food Lion in particular illustrated the faults in the plaintiffs' approach, stating that "[n]either Cotterill nor the plaintiffs' counsel have provided the court with a plausible explanation for how Food Lion, or any other purported class member with a negotiated formula, has suffered injury from the alleged conspiracy."<sup>[20]</sup>

Cotterill argued that the observed price effects would likely "ripple" through the entire market and affect the baseline of negotiations, but Greer rejected this assumption on the basis of the defendants' evidence that only about half of all actual purchases in the data set demonstrated any statistically significant average overcharge, even according to Cotterill's own model.<sup>[11]</sup> Thus, Greer found that the plaintiffs' use of averaging could not "prove impact for all, or even substantially all of the putative class members."<sup>[12]</sup> Accordingly, the plaintiffs had failed to demonstrate common questions would predominate over the individualized inquiries needed to determine harm. Greer also held that for similar reasons, the plaintiffs could not demonstrate typicality as needed to satisfy Rule 23(a).<sup>[13]</sup>

By now, this back and forth is very familiar to practitioners of class action litigation.<sup>[14]</sup> These recent battles over antitrust class certification consistently raise two related fundamental questions. First, is it sufficient for plaintiffs to demonstrate that the average class member suffered harm according to a formula that analyzes a subset of transaction data, calculates an average overcharge from that subset, and then assumes that the average overcharge tainted all other transactions in the market? Second, given that the Rules Enabling Act states that Rule 23 cannot alter fundamental burdens of proof and standing requirements, can a court certify a class where most but not all class members suffered harm?

Put another way, can a court allow uninjured class members to recover alongside injured class members? If the answer to these questions is no, plaintiffs face an extremely high bar to proving certification in many antitrust cases where the prices actually paid by customers vary widely. Some plaintiffs may contend that without the efficiency of the class action mechanism, injured purchasers in some cases may not be able to afford to secure redress, although such an argument would fail in the antitrust context where prevailing plaintiffs in nonclass cases also recover attorneys' fees and costs. And yet, if classes containing uninjured class members are in fact certified, claimants can recover despite the fact they have suffered no injury and have no standing to be before the court at all.

The two questions identified above are exactly the two questions presented to the Supreme Court in this term's *Tyson Foods Inc. v. Bouaphakeo*, but at oral argument, the justices focused their attention on the standard of proof under the Fair Labor Standards Act — a question that might allow them to avoid directly answering the broader questions before them.<sup>[15]</sup>

In any case, the Rules Enabling Act squarely answers the quandary presented by the balancing of achieving efficiency through class actions — the goal of Rule 23 — against the requirement of constitutional standing. Subsection (b) of the statute provides that the “general rules of practice and procedure” created by the Supreme Court “shall not abridge, enlarge or modify any substantive right.”<sup>[16]</sup> As a result, the court’s laudable desire to improve the efficiency of the court system cannot trump the antitrust law’s requirement that plaintiffs demonstrate antitrust injury, or the related constitutional requirement that claimants seeking redress from the court demonstrate injury in fact.

The Supreme Court reached this same conclusion when it previously prohibited “trial by formula” in its landmark opinion *Wal-Mart Stores Inc. v. Dukes*.<sup>[17]</sup> If the court chooses to take the opportunity in *Tyson* to further address these complicated questions of class action proof head on, the damages models used by many antitrust class action plaintiffs may be categorically insufficient to demonstrate compliance with Rule 23.

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[1] *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (emphasis added).

[2] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[3] U.S. Constitution Art. III.

[4] 28 U.S.C. § 2072(b).

[5] *Food Lion LLC v. Dean Foods Co.*, -- F.R.D. --, 2016 WL 310432 (E.D. Tenn. Jan. 25, 2016).

[6] *Id.* at \*12 (citing *Amchem*, 521 U.S. at 623-24).

[7] *Id.* (citing *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 311 (3d Cir. 2008) (“If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.”)); see also *id.* at \*19.

[8] See *id.* at \*13 (citing *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013) (“The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.”)).

[9] *Id.* at \*13 (quoting *In re Hydrogen Peroxide*, 552 F.3d at 311).

[10] *Id.* at \*19.

[11] *Id.* at \*15.

[12] *Id.* at \*15-16.

[13] For another recent example of a court refusing to certify an antitrust class action because the plaintiffs' expert extrapolated an average overcharge from a subset of data across the entire market, see *In re Class 8 Transmission Indirect Purchaser Antitrust Litigation*, Case No. 1:11-cv-00009, 2015 WL 6181748, at \*8-11 (D. Del. Oct. 20, 2015) (denying class certification of both direct- and indirect-purchaser classes because the plaintiffs' expert analyzed only a small slice of data and extrapolated average calculations across the entire market).

[14] Compare, e.g., *Rail Freight*, 725 F.3d at 253 (reversing class certification where the plaintiffs' model for showing classwide injury could not distinguish between injured and uninjured class members); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) (affirming decertification when the plaintiffs proposed proving liability through sampling class members at trial and extrapolating their alleged injury to the remainder of the class); *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 261, 266 (3d Cir. 2011) (denying class certification where the plaintiffs' "common" proof of tort injury was based on "an average exposure [to alleged carcinogen], not the exposure of any actual class member"); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (rejecting trial-by-sample because "the rights of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation"); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003) (affirming denial of certification when the plaintiff proposed calculating damages through averaging); *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 336 (4th Cir. 1998) (holding that proof of damages based on franchisees' "average profit margin" fell short of the "proof of individual damages necessary" to affirm class action trial verdict); with *Bouaphakeo v. Tyson Foods Inc.*, 765 F.3d 791, 799 (8th Cir. 2014) (evidence of average time spent donning and doffing protective equipment could support a "reasonable inference" of classwide liability), cert. granted, 135 S. Ct. 2806 (June 8, 2015); *In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1254 (10th Cir. 2014) (affirming certification despite proof of liability based on extrapolation and acknowledgement that "some of the plaintiffs may have successfully avoided damages").

[15] Case No. 12-3753 (argued Nov. 10, 2015). The questions presented are: "I. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample. II. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages."

[16] 28 U.S.C. § 2072(b).

[17] *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2561 (2011) (disapproving of the "novel project" of awarding an average back pay award, determined from a sample set of the class, to an entire class without further individualized proceedings). Similarly, the court recently emphasized that "at the class-certification stage ... any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anti-competitive effect of the violation.'" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Thus Comcast also dictates that class certification proof must "fit" the actual harm suffered by class members. *Id.* (requiring that model measure only damages resulting from antitrust injury alleged).