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Third Circuit: “Rigorous Analysis” Required for Class Certification in Antitrust Cases

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The US Court of Appeals for the Third Circuit recently concluded in *In re Lamictal Direct Purchaser Antitrust Litigation* that a district court’s reliance on average prices to determine class-wide impact was insufficient. Instead, courts must conduct a rigorous analysis of the facts, evidence and expert testimony at the class certification stage of litigation.

IN DEPTH

On April 22, 2020, the US Court of Appeals for the Third Circuit overturned a district court decision certifying a class of direct purchaser plaintiffs without undertaking a rigorous analysis to resolve factual disputes, assess competing evidence or weigh conflicting expert testimony. *See In re Lamictal Direct Purchaser Antitrust Litig.*, No. 19-1655 (3d Cir. April 22, 2020). The Third Circuit concluded that the district court impermissibly found that average prices were generally acceptable to demonstrate common proof of antitrust injury necessary for satisfying the predominance requirement of class certification. The Third Circuit vacated and remanded the district court’s decision. This case is a reminder that courts must conduct a rigorous analysis of the facts, evidence and expert testimony at the class certification stage of litigation, even where factual disputes at issue may overlap with the merits of a case.

The *Lamictal* case stems from a so-called reverse-payment settlement agreement between GlaxoSmithKline (GSK) and Teva Pharmaceuticals concerning generic lamotrigine tablets. GSK sold branded Lamictal tablets. After Teva filed an application for approval to sell lamotrigine tablets (a generic version of Lamictal), GSK initiated litigation against Teva alleging that its generic lamotrigine tablets infringed on GSK’s patents for Lamictal. GSK and Teva eventually settled the litigation under an agreement that permitted Teva to begin selling generic lamotrigine six months before GSK’s patents expired, but later than if Teva had succeeded in defeating GSK’s patent infringement claims. In exchange, GSK promised not to launch its own generic version of Lamictal (known as an authorized generic).

Thereafter, a group of wholesalers that directly purchased Lamictal or lamotrigine tablets filed a class action claiming that GSK and Teva suppressed competition and artificially inflated prices for generic lamotrigine tablets by agreeing that GSK would not launch an authorized generic. A district court certified the class of direct purchaser plaintiffs, which GSK and Teva appealed to the Third Circuit.

The Third Circuit reviewed the district court's class certification order for abuse of discretion. An abuse of discretion occurs "if a district court's decision rests on a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." A district court "errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining" whether the requirements of Federal Rule of Civil Procedure 23 class certification are met. Because the Third Circuit reviewed the legal standards applied by the district court, the Third Circuit reviewed the district court's decision *de novo*.

To certify a class under Rule 23, a proposed class must meet the requirements of Rule 23(a) and (b). Rule 23(a) requires the class to satisfy numerosity, commonality, typicality and adequacy criteria. The relevant portion of 23(b) in *Lamictal* requires that common questions of law and fact predominate over individualized issues, and that the class action is the superior method for adjudication. GSK and Teva appealed the district court's predominance finding, arguing that the proposed class was not able to demonstrate that its legal claim is capable of proof common to the class at trial.

The Third Circuit reasoned that the court must undertake a "rigorous analysis" in considering the predominance requirement. The Third Circuit explained that such "rigorous analysis" involves:

- Determining whether facts underlying the Rule 23 requirements are met by a preponderance of the evidence,
- Resolving disputed factual or legal issues relevant to class certification and
- Weighing relevant evidence and arguments, including competing expert testimony.

Regarding the preponderance inquiry, on appeal the direct purchaser plaintiffs argued that predominance is satisfied where plaintiffs can demonstrate that antitrust injury is capable of common proof at trial, but that class-wide injury need not be conclusively proven. The plaintiffs further submitted that class-wide impact is capable of common proof unless "no reasonable juror could have believed" the common proof at trial. *See Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016). The Third Circuit rejected the direct purchaser plaintiffs' argument. It found that the plaintiffs erroneously relied on a standard concerning the accuracy and representativeness of sample data that was confined to Fair Labor Standards Act (FLSA) cases. The Third Circuit held that the correct standard to apply for class determinations outside the FLSA context is the Third Circuit's longstanding rule that "a putative class must demonstrate that its claims are capable of common proof at trial by a preponderance of the evidence." *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009).

Next, the Third Circuit turned to whether the direct purchaser plaintiffs' claims of antitrust injury are capable of common proof at trial. The plaintiffs' expert opined that antitrust injury was capable of common proof because evidence common to the proposed class showed that the prices paid for lamotrigine tablets by all or almost all of the class members were affected by the agreement between GSK and Teva. The plaintiffs' expert created a model relying on an average hypothetical price that purported to show the price each direct purchaser plaintiff would have paid absent the GSK-Teva settlement. The plaintiffs' expert relied on economic literature concerning the average price of generic drugs, Teva's internal general pricing forecasts and transactional sales data.

The defendants' expert criticized the direct purchaser plaintiffs' model for relying on an average hypothetical price and assuming that an "aggregate actual price" applied to the entire class. This model failed to account for individual negotiations, Teva's preemptive pricing strategy or GSK's contracting strategy. The defendants' expert further argued that the plaintiffs' model failed to acknowledge the differing prices that each purchaser paid, including accounting for varying rebates or discounts. The model also should have relied on drug-specific prices rather than general forecasting documents discussing average prices. Thus, the defendants' expert argued that the direct purchaser plaintiffs' model masked meaningful variation in the prices that class members paid. According to the defendants' expert, evidence showed that up to one-third of the class members paid prices for generic lamotrigine tablets that were the same or lower than the generic prices that some class members would have paid had GSK launched an authorized generic. The defendants' expert argued that such considerations require an individualized inquiry rather than proof common to the class.

The Third Circuit held that the district court abused its discretion when it assumed that average prices were acceptable to satisfy the Rule 23(b) predominance requirement without first undertaking a rigorous analysis. The Third Circuit acknowledged that whether averages are acceptable turns on several factual predicates disputed by the parties, as well as competing legal theories. A district court "must formulate a prediction as to how some specific issues will play out in order to determine whether common or individual issues predominate in a given case."

In the instant case, the district court failed to address "the multi-leveled microeconomic analysis of what each [d]efendant would or would not have possibly done in the but-for world." Instead, the district court focused on whether GSK's contracting strategy created individualized issues sufficient to defeat predominance. The Third Circuit further reasoned that the district court's lack of analysis may have been due to a mistaken assumption that antitrust injury occurred the moment that GSK and Teva reached their reserve settlement agreement. This assumption, however, fails to account for the defendants' argument that Teva preemptively lowered its prices for generic lamotrigine tablets after learning about GSK's contracting strategy for Lamictal. The district court should have resolved this contested fact and other factual disputes by a preponderance of the evidence, assessed competing evidence and weighed the expert analysis before finding that average prices were acceptable and that the predominance requirement was satisfied.

Finally, the Third Circuit further justified remanding the district court's order because its class certification analysis conflated antitrust injury with damages. During class certification, the direct purchaser plaintiffs presented average pricing analyses to show injury—*i.e.*, that each wholesaler paid inflated prices for lamotrigine tablets—in addition to damages. This error was significant given that the Third Circuit applies a more lenient standard for calculating damages than it does for injury.

The *Lamictal* case serves as a reminder to antitrust litigants and others that reliance on average prices to show common antitrust injury creates significant risk to class certification. While in rare instances average prices might be sufficient to meet the predominance requirement in an antitrust case, courts should also review the evidence, resolve factual disputes and consider conflicting expert testimony. Litigants should ensure that the appropriate standards are applied for each portion of the class certification analysis, particularly as they relate to antitrust injury and antitrust damages.

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