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Preface

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United States: Private Antitrust Litigation

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IN SUMMARY

After noting the burden and high costs of litigating antitrust class certification issues, this chapter identifies trends in litigation procedure and substance that can save parties time and expense by supporting defendants seeking dismissal of class actions early in cases, as well as related considerations for plaintiffs planning to avoid these dismissal challenges.

DISCUSSION POINTS

- Background on federal antitrust claims and class actions in US courts
- Trends for dismissing alleged classes by motions made early in litigation
- Developments in party 'standing' that can support early dismissal of alleged classes

REFERENCED IN THIS ARTICLE

- US antitrust law
- US class action requirements
- 'Plausibility' standard for dismissal of claims
- Article III 'standing' for class plaintiffs and members
- Motions to dismiss
- Motions to strike
- Motions to amend

Introduction

Determining early in litigation whether alleged antitrust classes may be certified can benefit parties enormously by providing certainty and avoiding the burden and high costs of extended litigation of certification issues. However, US courts are intensifying their scrutiny of proposed classes, and parties are responding by increasing their time and expense in developing certification issues prior to seeking judicial determination of them. It does not always have to be this way.

Courts appear to be gradually more receptive to early resolution of classes alleged in antitrust complaints. Clarified, if not heightened, 'plausibility' standards for complaint allegations may support defendants' challenges of alleged classes with motions to dismiss, strike, and amend prior to full-blown litigation of class issues. And the 'standing' of parties to pursue class claims is emerging as a substantive issue particularly amenable to early resolution by motion. Following a summary of US antitrust class actions, this chapter reviews trends in possible procedures for challenging alleged classes early in litigation as well as related considerations for parties either pursuing or defending class allegations.

Antitrust class actions

Private parties may sue for antitrust violations in the United States. While many US states have enacted local laws that create private antitrust claims, most private cases are brought under federal antitrust laws. They create causes of action for private parties to seek injunctive relief, and also allow parties injured in their business or property by reason of anything forbidden in the antitrust laws to pursue cases seeking triple the damages sustained, the cost of suit and attorney's fees.[1]

Private antitrust cases can be expensive to litigate in US courts. To illustrate the magnitude of expense, a plaintiff and defendant spent US$4.7 and US$9 million-plus, respectively, in a single-plaintiff antitrust case recently litigated through trial in California,[2] and a plaintiff spent nearly US$5 million litigating an antitrust case through trial in Wisconsin that resulted in a nominal award of damages.[3] The potential damages for a single plaintiff in many antitrust cases – especially consumer cases – often are less than the cost of litigating. For this reason, private party antitrust cases

1 See 15 U.S.C. § 26 (injunctive relief); 15 U.S.C. § 15(a) (damages).

2 See *Optronic Techs, Inc v Ningbo Sunny Elec Co, Ltd*, --- F. Supp. 3d --- , No. 5:16-cv-06370-EJD, 2020 WL 1667435, at *13-14 (N.D. Cal. April 3, 2020).

3 See *ABS Global, Inc v Inguran, LLC*, No. 14-cv-503-wmc, 2018 WL 4689600 (W.D. Wis. Sept. 28, 2018).

often are brought and pursued on behalf of numerous claimants. In these lawsuits, one or more plaintiffs, known as the 'representatives,' sue on behalf of themselves and all other persons with the same or similar claims and injuries, known as the 'class.' Aggregating the damages of the plaintiff representatives and class members can make pursuing their antitrust claims on a collective basis attractive or economically feasible.

An antitrust claim in federal court may be certified as a class action only when the requirements of Federal Rule of Civil Procedure 23 are satisfied. Rule 23(a) provides four requirements applicable to all class actions: (1) the class is so numerous that joinder of all members would be impracticable; (2) there is a question of law or fact common to the class members; (3) the claims of the plaintiff representatives are typical of the claims of the rest of the class members; and (4) the plaintiff representatives will protect the interests of the class.[4] In addition, the class proponent must satisfy at least one of the requirements of Rule 23(b) by establishing: (1) the prosecution of separate actions could potentially result in inconsistent standards of conduct or substantially impair the ability of class members to protect their interests; (2) final injunctive or declarative relief is appropriate because the party opposing the class acted on grounds generally applicable to the class; or (3) common issues predominate over individual issues and a class action is a superior mechanism for resolving the claims.[5] Antitrust class actions usually are brought pursuant to the third requirement, often referred to as the 'predominance' requirement.

It is said a court's decision whether to certify a class sounds the 'death knell' for the case.[6] A denial of certification often ends antitrust cases on the part of plaintiffs, because it would not be economically feasible for them to continue to litigate antitrust claims without the potential of class-wide recovery of damages. Likewise, a grant of certification 'may "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"'.[7] Given the decisiveness of certification, parties to class actions – and especially defendants – stand to benefit from obtaining decisions as early as possible to minimise the uncertainly, burden and expense resulting from antitrust class action litigation.

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4 Fed. R. Civ. P. 23(a)(1)-(4).

5 Fed. R. Civ. P. 23(b)(1)-(3).

6 *Newton v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 259 F.3d 154, 163 (3d Cir. 2001).

7 *Chamberlan v Ford Motor Co*, 402 F.3d 952, 957 (9th Cir. 2005) (quoting Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amend., Subd. (f)).

Obtaining early class decisions, however, has become increasingly challenging. In *Comcast Corp v Behrend*, the Supreme Court reinforced that courts must undertake a 'rigorous analysis' of Rule 23 requirements when deciding class certification – including antitrust class actions pursuant Rule 23(b)(3) – and that this analysis frequently will require 'the court to probe behind the pleadings.'[8] More recently, circuit courts have held that this rigorous analysis requires courts to determine whether Rule 23 requirements are met by 'a preponderance of the evidence,' illustrated by the Ninth Circuit's explanation in 2021 that courts must 'resolve all factual and legal disputes relevant to class certification' and 'judg[e] the persuasiveness of the evidence presented'.[9]

The rigorous analysis of class certification tends to compel parties to devote more time and resources leading to class motion practice and eventually judicial decisions. Plaintiffs alleging antitrust class claims routinely spend thousands of hours on class-related discovery and millions of dollars on experts who analyse data and offer opinions regarding Rule 23 requirements. Defendants, of course, incur similar burdens and expenses responding and contesting alleged classes. This increasingly time-consuming and expensive litigation of alleged classes makes the potential for early resolution of them all the more attractive for parties.

Developments and considerations for early resolution of alleged antitrust classes

There appears to be a gradually emerging receptiveness in US courts to considering the possible resolution of classes based on complaint allegations. This flows from a series of judicial decisions in recent years that increased the requirements for pleading antitrust claims – complaints now must 'contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face."[10] As more courts recognise that this 'plausibility' standard applies to Rule 23 class allegations in complaints, more defendants may move early in cases to challenge, and potentially resolve, alleged classes with motions to dismiss, strike or amend.

8 569 US 27 (2013).

9 *Olean Wholesale Grocery Corp v Bumble Bee Foods*, 993 F.3d 774, 786 (9th Cir. 2021) (quoting *Ellis v Costco Wholesale Corp*, 657 F.3d 970, 982 (9th Cir. 2011)).

10 id. at 678 (quoting *Bell Atl Corp v Twombly*, 500 U.S. 544, 570 (2007)).

Dismissing implausible alleged classes

Rule 12(b)(6) authorises parties to move for dismissal of claims that do not meet the plausibility standard. Most courts that considered the issue have applied this standard to alleged Rule 23 requirements the same as other allegations in complaints,[11] while some courts have ruled that the plausibility standard does not apply to class allegations because they are procedural in nature.[12] By right, parties may move for dismissal of implausible claims at the commencement of litigation, typically within 30 days of service of complaints.[13]

As the plausibility standard for complaints increases the requirements for alleging antitrust class actions, some courts give serious consideration to motions to dismiss alleged classes pursuant to Rule 12(b)(6). Two circuit courts have expressly affirmed that courts may dismiss alleged classes when they are implausible or deficient – the Eighth Circuit held that 'class claims that fail to meet the requirements of Rule 23 may be properly dismissed'[14] and the Fifth Circuit held that 'a district court may dismiss the class allegation on the pleadings' when it was 'facially apparent' that the alleged price-fixing class did not satisfy Rule 23.[15] Although other circuit courts have declined to follow – notably the DC Circuit in 2020[16] – many district courts have dismissed alleged classes when complaints lack sufficient factual matter to show the alleged classes plausibly satisfy the Rule 23 requirements.[17]

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11 See, eg, *Bourbonnais v Ameriprise Fin Servs, Inc*, No. 14-C-966, 2015 WL 12991000, at *7 (E.D. Wis. 2015); *Green v Liberty Ins Corp*, No. 15-10434, 2016 WL 1259110, at *2 (E.D. Mich. 2016) ('[w]hen the defendant challenges class certification based solely on the allegations in the complaint, the standard is the same as applied in deciding a motion to dismiss under Rule 12(b)(6)').

12 See, eg, *Garcia v Execu Search Group, LLC*, No. 17cv9401, 2019 WL 689084, at *5 (S.D.N.Y. 19 February 2019) (explaining plausibility of substantive claims is analytically distinct from Rule 23's procedural requirements); R*oyal Mile Co v UPMC*, 40 F. Supp. 3d 552, 579 (W.D. Pa. 2014) ('It would be error for a court to apply the Rule 12(b)(6) plausibility standard . . . to "dismiss" class action allegations in a complaint.');

13 See *Ashcroft v Iqbal*, 556 U.S. 662, 678 (2009).

14 *McCrary v Stifel, Nicolaus & Co, Inc*, 687 F.3d 1052, 1054 (8th Cir. 2012).

15 *John v Nat'l Sec Fire and Cas Co*, 501 F.3d 443 (5th Cir. 2007).

16 See *Molock v Whole Foods Market Group, Inc*, 952 F.3d 293 (D.C. Cir. 2020).

17 See, eg, *Freedline v O Organics*, No. 19-cv-01945-JD, 2020 WL 6290352 (N.D. Cal. 27 October 2020) (dismissing alleged nationwide class because asserted state law did not apply to alleged class); *Yates v Liberty Gen Ins Co*, No. SA-18-CV-01120-FB, 2018 WL 6303761 (W.D. Tex. 3 December 2018) (dismissing claimed class when complaint did not allege Rule 23 requirements); *Shabotinsky v Deutsche Lufthansa AG*, No. 16 C 4865, 2017 WL 1134475 (E.D. Ill. 27 March 2017) (dismissing claim when allegations could not support maintaining class action); *In re Packaged Seafood Prods Antitrust Litig*, No. 15-MD-2670 JLS (MDD), 2017 WL 1010329 (S.D. Cal.

There is some hesitancy in the lower courts to dismiss alleged classes under Rule 12(b)(6). As one district court explained in 2021 while declining to dismiss an alleged class, 'motions to dismiss class allegations should be met "with a great deal of skepticism," and the dismissal of class allegations should be "rare" and "generally disfavored".'[18] Courts may deny or defer motions to dismiss alleged classes on the rationale that plaintiffs should be allowed factual discovery that could support the class allegations,[19] and this rationale frequently is employed by plaintiffs responding to Rule 12(b)(6) motions. In any event, plaintiffs should include sufficient factual material in complaints to appear plausible to satisfy all Rule 23 requirements. Conversely, defendants facing class action complaints should consider Rule 12(b)(6) motions when allegations do not provide plausible support for all Rule 23 requirements. Keep in mind, however, that initial complaints can usually be amended as a matter of right so the initial Rule 12(b)(6) motion, if overly specific, could serve as a road map for an amended complaint.

Striking alleged classes

Class action allegations also may be eliminated pursuant to Rule 12(f). It authorises courts to strike redundant, immaterial and other allegations from pleadings. In recent years, courts have interpreted Rule 12(f), in light of the plausibility standard, as authorising the striking of alleged classes when the complaint itself demonstrates that the requirements of Rule 23 cannot be met.[20] Motions to strike pursuant to Rule 12(f)

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14 March 2017) (dismissing antitrust class action claim when allegations could not satisfy Rule 23's requirements); *Fejzulai v Sam's W, Inc*, 205 F. Supp. 3d 723 (D.S.C. 2016) (dismissing unfair competition claim when statute did not authorise class actions).

18 *Miles v Medicredit, Inc*, F. Supp. 3d, No. 4:20-CV-01186 JAR2021, WL 1060105 (W.D. Mo. 18 March 2021) (quoting *Giesmann v Am Homepatient, Inc*, No. 4:14CV1538 RLW, 2015 WL 3548803, at *6 (E.D. Mo. 8 June 2015) ('The Court is not entertaining a motion to certify the class and finds these issues better left for a fully briefed and supported motion for class certification.')).

19 See, eg, *Miles v Medicredit, Inc*, --- F. Supp. 3d --- , No. 4:20-CV-01186 JAR2021, WL 1060105, at *6 (W.D. Mo. 18 March 2021) (Rule 12(b)(6) motion because plaintiff 'should be given the opportunity to conduct discovery on class certification issues'); *In re McCormick & Co, Inc, Pepper Prods Mktg and Sales Practices Litig*, 217 F. Supp. 3d 124 (D.D.C. 2016) (denying Rule 12(b)(6) challenge to class allegations because court was not certain prior to discovery whether Rule 23's requirements could be satisfied); *Kaatz v HYLANDS, INC*, No. 16 CV 237 (VB), 2017 WL 3676697 (S.D.N.Y. 5 July 2016) (denying Rule 12(b)(6) challenge to class allegations as premature prior to discovery).

20 See, eg, *Amerine v Ocwen Loan Serv LLC*, No. 2:14cv15, 2015 WL 10906068 (S.D. Ohio 31 March 2015).

must be brought early in litigation, usually within 21 days of service of complaints. Whether plaintiffs as the proponents for alleged classes or defendants as the challenging parties bear the burden in motions to strike class allegations is not uniform across US courts.[21]

Motions to strike class allegations still appear to be infrequent. Some courts have explained that these motions are disfavoured because they are a 'poor fit' with class issues,[22] or they could 'preemptively terminate the class' before plaintiffs take discovery on class certification.[23] Other courts have explained that these motions should be denied unless the allegations demonstrate 'it would be impossible to certify the alleged class' even after discovery.[24] Based on these considerations, courts likely may 'strike class allegations if the complaint plainly reflects that a class action cannot be maintained'.[25]

There remains potential, however, for parties to utilise Rule 12(f) motions early in litigation to strike all or portions of alleged classes that are inconsistent with an array of class action law or court rulings. In this context, for instance, courts have struck alleged classes when complaints propose 'fail-safe' classes that are not permitted by law,[26] alleged class claims are subject to arbitration agreements or class action waivers,[27]

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21 Compare *In re Railway Indus. Employee No-Poach Antitrust*, 395 F. Supp. 3d 464, 495 (W.D. Pa. 2019) ('moving party bears the burden to show allegations should be stricken from a pleading') with *Dieter v Aldi, Inc*, No. 2:18-00846, 2018 WL 6191586, at *3 (W.D. Pa. 28 November 2018) ('plaintiff has the burden to prove that the requirements set forth in Rule 23 are met' in response to motion to strike but 'it would be error for a court to apply the Rule 12(b)(6) plausibility standard').

22 *Freedline v O Organics*, No. 19-cv-01945-JD, 2020 WL 6290352, at *1 (N.D. Cal. 27 October 2020) ('Although some courts have accepted Rule 12(f) as a basis for deciding the appropriateness of class action issues, this Court considers it a poor fit for that.')

23 See *Richardson v Verde Energy USA, Inc*, 354 F. Supp. 3d 639, 654 (E.D. Pa. 2018) ('a motion to strike is "for all practical purposes, identical to an opposition to a motion for class certification"').

24 *Garcia v Execu Search Group, LLC*, No. 17cv9401, 2019 WL 689084, at *2 (S.D.N.Y. 19 February 2019).

25 *Carpenter v PetSmart, Inc,* 441 F. Supp. 3d 1028, 1032 (S.D. Cal. 2020); see also *Ortiz v Sig Sauer, Inc,* 448 F. Supp. 3d 89, 99 (D.N.H. 2020) ('If it is obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis, district courts [may] use their authority under Federal Rule of Civil Procedure 12(f) to delete the complaint's class allegations.') (citations and quotations omitted).

26 See, eg, *Bigelow v Syneos Health, LLC*, No. 5:20-CV-28-D, 2020 WL 5078770 (E.D.N.C. 27 August 2020).

27 See, eg, *Donelson v Ameriprise Fin Servs, Inc*, 999 F.3d 1080 (8th Cir. 2021) (reversing and remanding to the district for entry of an order striking the class action allegations and compelling arbitration).

courts determine asserted state laws do not apply to the entirety of alleged classes,[28] plaintiff representatives lack article III standing,[29] or the 'face of the complaint leaves little doubt' that class allegations are not viable.[30]

With this in mind, defendants seeking to strike alleged classes should focus on showing the classes as alleged are legally unsound or incapable of satisfying Rule 23 requirements regardless of discovery, and plaintiffs may survive such challenges by showing their class claims are legally permissible and they could satisfy Rule 23 with refinement of the allegations or benefit of necessary discovery.

Amending alleged classes

Class claims may be resolved early in litigation by court-ordered amendment pursuant to Rule 23. Effective since 2004, Rule 23(d)(1)(D) provides courts with the discretion to order amendments to pleadings 'to eliminate allegations about representation of absent persons.' Courts in recent years have interpreted this provision, coupled with Rule 23(c)(1)(A)'s instruction that certification be determined at 'an early practicable time,' as generally authorising the removal of class allegations that are insufficient to support certification. Notably, motions to amend could be brought any time during litigation, even after deadlines for motions to dismiss and strike.

While not frequently utilised, Rule 23(d), in appropriate cases, can be a powerful tool for early resolution of class claims. These challenges can place the burden on plaintiffs to show their complaints satisfy Rule 23 requirements (or likely to be satisfied after discovery),[31] an advantage for defendants. This is demonstrated in *In re Railway Industry Employee No-Poach Antitrust*, a large case alleging railroad equipment suppliers agreed not to 'poach' employees.[32] Relatively early in the case, the district court granted defendants' motion to remove class claims pursuant to Rule 23(d), finding the complaint did not discharge plaintiffs' burden to satisfy Rule 23's predominance requirement due to insufficient complaint allegations about compensation paid

28 See, eg, *Carpenter v PetSmart, Inc*, 441 F. Supp. 3d 1028, 1032 (S.D. Cal. 2020).

29 See, eg, *Knapp v Zoetis Inc*, No. 3:20cv191, 2021 WL 1225970 (E.D. Va. 31 March 2021).

30 See, eg, *Zarichny v Complete Payment Recovery Servs, Inc*, 80 F. Supp. 3d 610, 624 (E.D. Pa. 2015).

31 See, eg, *Trunzo v Citi Mortgage*, No. 11-1124, 2018 WL 741422, at *4 (W.D. Pa. 7 February 2018) ('Courts have recognized that with respect to whether class allegations should be stricken "the plaintiff bears the burden of advancing a prima facie showing that the class action requirements of Fed. R. Civ. P. 23 are satisfied or that discovery is likely to produce substantiation of the class allegations".') (quoting *Mantolete v Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985)).

32 395 F. Supp. 3d 464 (W.D. Pa. 2019).

to alleged class members and how they were injured by the alleged no-poach agreements.[33] The parties subsequently settled, reflecting the loss of class claims.[34] Other courts have similarly removed class allegations on occasion.[35]

Rule 23(d) challenges should be reserved for only those complaints with plainly deficient class allegations. Despite the discretion accorded district courts, cases indicate they may remove alleged classes only when 'the complaint itself demonstrates that the requirements for maintaining a class action cannot be met.'[36] When complaints are not so plainly deficient, courts have stated that Rule 23(d) motions may be premature before plaintiffs have moved for class certification or have conducted discovery that would permit a rigorous analysis of the class issues.[37]

The potential for court-ordered amendments pursuant to Rule 23(d)(1)(D) motions drives home the importance of plaintiffs ensuring antitrust class action complaints include allegations that satisfy all requirements of Rule 23, and being prepared to respond to such motions by showing that discovery on class allegations is necessary.[38] And, even though many courts reserve ordering amendments under Rule 23(d)(1)(D) for 'rare' cases, defendants should consider these motions because they can be brought at any stage of litigation and can place the burden on plaintiffs to establish that class allegations should not be removed by amendment.

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33 id. at 504–14.

34 See Plaintiffs' Memorandum of Law in Support of Proposed Class Action Settlements at 17, *In re Railway Indus Employee No-Poach Antitrust Litig,* No. 2:18-mc-00798-JFC, Doc. No. 306 ('motion to strike the class action allegations set forth some of the challenges that Plaintiffs would have faced here on a litigated class certification motion and potential Rule 23(f) appeal').

35 See, eg, *Davis v Navient Corp,* No. 17-CV-00992-LJV-JJM, 2018 WL 1603871 (W.D.N.Y. 12 March 2018) (removing class allegations when complaint failed to show predominance or uniformity among putative class members); *Davis v Bank of Am. NA*, No. 13-4396, 2016 WL 427050 (E.D. Pa. 3 February 2016) (removing class allegations from an unfair competition complaint when they failed to satisfy the requirements of Rule 23 and '[n]o amount of discovery could surmount this legal obstacle').

36 *Miller v Glen Mills Schs*, No. 19-1292, 2019 WL 6877176, at *2 (E.D. Pa. 17 December 2019) (citing *Landsman & Funk PC v Skinder-Strauss Assocs*., 640 F.3d 72, 93 n.30 (3d Cir. 2011).

37 See, eg, *McIntyre v Trans Union LLC,* NO. 18-3865, 2020 WL 1158560 (E.D. Pa. 5 March 2020).

38 See, eg, *First Impressions v Nat'l Milk Producers*, 214 F. Supp. 3d 723, 726 (S.D. Ill. 2016) (explaining Rule 23(d)(1)(D) motion was 'jumping the gun' when there were disputed facts relevant to class certification issues and no discovery had been conducted).

Early resolution of alleged classes for lack of standing

For motions challenging class allegations, standing is emerging as a substantive issue particularly amenable to early resolution. A party's 'standing' for a federal court to entertain a claim is a threshold requirement for all cases, including antitrust class actions.[39] Article III of the US constitution limits the power of federal courts to hear only cases or controversies, meaning a plaintiff must allege an injury that is fairly traceable to the conduct of a defendant and is likely to be redressed by a favourable judicial decision.[40]

If the representative plaintiffs lack article III standing, alleged classes may be dismissed. In antitrust cases, article III standing often turns on whether the plaintiffs were injured by buying or selling products on terms affected by the alleged anticompetitive conduct. This is illustrated in two recent cases: *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, which dismissed class allegations because the representative plaintiffs did not plausibly allege they actually purchased the pharmaceuticals at issue;[41] and *Finkelman v National Football League*, which dismissed class allegations because the plaintiff failed to allege facts plausibly demonstrating he paid an inflated price for the football tickets at issue.[42]

Developing law also supports dismissal of alleged classes that would include mere alleged members – as opposed to the representative plaintiffs – without article III standing. The Supreme Court's recent decision in *TransUnion LLC v Ramirez*[43] confirmed that *'[e]very class member must have Article III standing in order to recover individual damages'*, and further confirmed that this standing requirement also applies to members of alleged classes. This ruling shows federal courts lack constitutional jurisdiction to hear cases claiming violations of federal statutes on behalf of alleged classes with members with no injuries.

The *Ramirez* decision, while not an antitrust case, is consistent with the trend in lower courts of denying certification of antitrust classes that include uninjured members. After the Second Circuit ruled that 'no class may be certified that contains

39 See *Lewis v Casey*, 518 U.S. 343, 357 (1996).

40 See *Spokeo, Inc v Robins*, 136 S. Ct. 1540, 1547 (2016).

41 386 F. Supp. 3d 477, 487 (E.D. Penn. 2019).

42 No. 3-14-cv-00096 (D.N.J. 15 January 2015), aff'd, 810 F.3d 187 (3rd Cir. 2016). But see *In Supreme Auto Transport LLC v Arcelor Mittal*, No. 08 CV 5468, 2017 WL 839484 (N.D. Ill. 3 March 2017) (declining to dismiss an antitrust claim for lack of article III standing when the complaint plausibly demonstrated the plaintiff paid inflated prices for steel products).

43 No. 20-297, 2021 WL 2599472, --- S. Ct. --- (2021).

members lacking Article III standing,'[44] the First Circuit ruled that certification of antitrust claims requires proof that 'each member of the class was in fact injured',[45] and then the DC Circuit likewise ruled that antitrust plaintiffs must show 'all class members were in fact injured by the alleged conspiracy.'[46] As the Eighth Circuit summarised, plaintiffs 'cannot represent a class of persons who lack the ability to bring a suit themselves. If members who lack the ability to bring a suit themselves are included in a class, the court lacks jurisdiction over their claims.'[47] Other lower courts may be guided into issuing similar rulings with the benefit of *Ramirez's* explanation, such as the Ninth Circuit, which, shortly before *Ramirez*, ruled that antitrust classes may include a de minimis number of uninjured class members and allowed that 'a well-defined class may inevitably contain some individuals who have suffered no harm'.[48]

Importantly, the *Ramirez* majority suggests that article III standing be determined early in class proceedings. While *Ramirez* does not identify specific timing, it affirms that federal courts lack 'the power to order relief to any uninjured plaintiff, class action or not,'[49] and it cites the Eleventh Circuit's *Cordoba v DIRECTV, LLC* decision that explains courts 'should sort out the uninjured class members', prior to class certification, 'when it appears that a large portion of the class does not have standing'.[50] Defendants could rely on this rationale for seeking early judicial resolution of whether the presence of uninjured members of alleged classes prevents certification.

Conclusion

The plausibility pleading standard can invigorate an array of challenges that test alleged classes at the onset of antitrust cases. As courts slowly but increasingly entertain these challenges, the standing of both plaintiffs and alleged class members has emerged as decisive substantive issues. Antitrust plaintiffs may avoid early challenges to alleged classes by appreciating these issues while formulating their complaints, and defendants may avoid class claims altogether by challenging alleged classes with motions to dismiss, strike or amend early in litigation.

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44 *Denney v Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006).

45 *New Motor Vehicles Canadian Export Litig*, 522 F.3d 6, 28 (1st Cir. 2008).

46 *In re Rail Freight Fuel Surcharge Antitrust Litig*, 725 F.3d 244, 252 (D.C. Cir. 2013).

47 *In re Zurn Pex Plumbing Prods Liab Litig*, 644 F.3d 604, 616 (8th Cir. 2011) (quotations and citations omitted).

48 *Olean Wholesale Grocery Corp v Bumble Bee Foods*, 993 F.3d 774, 792 (9th Cir. 2021).

49 See *Ramirez,* 2021 WL 2599472, at *10 n.4 (emphasis in original) (quoting *Tyson Foods, Inc v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C J, concurring)).

50 942 F.3d 1259 (11th Cir. 2019).

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