

The Antitrust Review of the Americas 2018

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The Antitrust Review of the Americas 2018

A Global Competition Review Special Report

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Global Competition Review is delighted to publish this twentieth edition of *The Antitrust Review of the Americas*, one of a series of three special reports that deliver specialist intelligence and research designed to help subscribers – general counsel, government agencies and private practice lawyers – successfully navigate the world’s increasingly complex competition regimes. Read in conjunction with *The European, Middle Eastern and African Antitrust Review* and *The Asia-Pacific Antitrust Review*, subscribers have unparalleled annual updates on the development of the world’s competition regimes.

In preparing this report, *Global Competition Review* has worked exclusively with leading competition practitioners. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put them into context – which makes the report of particular value to all those doing business in the Americas today.

Although every effort has been made to ensure that all matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

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United States: Private Antitrust Litigation

Robert G Abrams, Gregory J Commins and Danyll W Foix
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Introduction

The ‘plausibility’ pleading standard announced by the US Supreme Court in recent years changed how all claims are pleaded, and especially affected how antitrust class actions are alleged and defended in the United States. This standard increased the pleading requirements for plaintiffs and augmented the ability of defendants to challenge the sufficiency of claims at the onset of litigation, boosting the importance of motions to dismiss, strike and amend class action claims. In these motions, three substantive issues have emerged as decisive in antitrust class actions – whether standing is plausibly alleged, whether the alleged class includes uninjured members, and whether the alleged class members are ascertainable. Following a summary of US antitrust class action requirements and the plausibility pleading standard, this article reviews the motions that can challenge claims at the onset of litigation and the emerging substantive issues that should be considered by parties pursuing or defending antitrust class action litigation.

Antitrust and class action claims in the United States

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 the lawsuit, and reasonable attorneys’ fees.¹

Private antitrust cases are expensive to pursue in US courts and the potential individual damages for many antitrust claims – especially consumer claims – often are much less than the cost of litigation. For this reason, many private party antitrust cases are brought as class actions. They are lawsuits in which 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 all the class members can make pursuing their antitrust claims 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:

- the class is so numerous that joinder of all members would be impracticable;
- there is a question of law or fact common to the class members;
- the claims of the plaintiff representatives are typical of the claims of the rest of the class members; and
- the proposed plaintiff representatives will fairly and adequately protect the interests of the class.²

In addition to rule 23(a)’s requirements, the class proponent must satisfy at least one of the requirements of 23(b) by establishing that:

- the prosecution of separate actions could potentially result in inconsistent standards of conduct or substantially impair other class members’ ability to protect their interests;
- final injunctive or declarative relief is appropriate because the party opposing the class acted on grounds generally applicable to the class; or
- common issues predominate over individual issues and a class action is a superior mechanism for resolving the claims.³

Antitrust class actions usually are brought pursuant to the third requirement, often referred to as the ‘predominance’ requirement.

The plausibility pleading standard and its impact on antitrust class actions

A series of judicial decisions in recent years increased the standard for pleading an antitrust class action. Private parties commence antitrust class actions in federal courts with the filing of a complaint. Historically, complaints needed only provide a ‘short and plain statement of the claim that the pleader is entitled to relief,’⁴ and until recently a complaint was sufficiently pleaded ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.’⁵ In 2007, the Supreme Court began to increase the level of factual plausibility necessary to allow a complaint to survive at the very onset of the case.

In *Bell Atlantic Corp. v Twombly*, an antitrust class action, the Supreme Court announced a plausibility standard for complaints.⁶ *Twombly* explained that antitrust plaintiffs had to allege ‘enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of the alleged conduct.’⁷ Two years later, the Supreme Court expanded on this standard in *Ashcroft v Iqbal*, which held that allegations must be sufficient to ‘allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’⁸ Together, these decisions require that complaints ‘must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.”’⁹

This plausibility pleading standard changed how claims are pleaded and affects whether claims are filed at all. Since complaints must now include factual recitation rather than conclusions, antitrust class action complaints have swollen in size since *Twombly* – with complaints 50 pages and longer becoming routine. And, with a heightened pleading standard, plaintiffs appear more selective in the claims that are pursued, reflected in the sharp decrease in antitrust class actions filed in federal court.¹⁰ In the year before *Twombly* (2006), 600 antitrust class actions were filed in federal court.¹¹ In the year after *Iqbal* (2010), only 200 such cases were filed. The number of antitrust cases annually filed in federal courts has remained in this lower range since *Twombly* and *Iqbal*.¹³

The increased pleading standard also has influenced how antitrust class action complaints are challenged and whether they survive. Studies following the Supreme Court’s pleading decisions indicate that defendants more frequently respond to complaints

with motions to dismiss or to strike allegations for failure to meet the pleading standard.¹⁴ Courts also appear increasingly receptive to motions challenging pleadings. In the years following *Twombly* and *Iqbal*, about half of all antitrust claims were terminated at the pleading stage, including over half of the antitrust cases typically filed as class actions.¹⁵ The growing ability to challenge and possibly dispose of class claims at the onset of litigation is a significant development for defendants since these cases are notoriously expensive to defend and the prospect of class-wide damages can impact settlement considerations. This punctuates the importance of defendants and plaintiffs alike considering procedural and substantive developments in potential challenges to antitrust class actions at the onset of litigation.

Procedural developments and considerations for challenging class action allegations

As courts have become more receptive to early challenges to the plausibility of antitrust class action allegations, courts also have considered expanding forms of challenges, including motions to dismiss, motions to strike, and motions to amend. A decision on any of these motions could terminate a class action. Plaintiffs considering antitrust class actions should be cognisant of these potential challenges, and defendants facing such allegations should consider whether to file these motions.

Courts may give serious consideration to motions to dismiss alleged classes pursuant to rule 12(b)(6), which allows for the dismissal of claims that lack sufficient factual material to state a claim for relief.¹⁶ This is illustrated by *McCrary v Stifel, Nicolaus & Co.*, where the Eighth Circuit held in 2012 that ‘class claims that fail to meet the requirements of Rule 23 may be properly dismissed by granting a Rule 12(b)(6) motion.’¹⁷ Since then, several lower courts have dismissed alleged classes without leave to amend when the complaints failed to plead sufficient factual matter to show the classes plausibly satisfy the rule 23 requirements.¹⁸ Many lower courts, however, appear hesitant to dismiss alleged classes under rule 12(b)(6) on the rationale that plaintiffs be allowed discovery that could support the class allegations.¹⁹ This rationale often 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 rule 23’s requirements. Conversely, defendants facing class action complaints should compare the allegations against rule 23 and consider rule 12(b)(6) motions to dismiss when it appears implausible to satisfy rule 23’s requirements.

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 The consideration courts may give these motions is exemplified in *Cole’s Wexford Hotel, Inc. v UPMC*, where the court analysed whether the antitrust class allegations plausibly satisfied rule 23’s commonality and typicality requirements and ultimately found the allegations to be sufficient.²¹ While several courts recently struck class allegations without leave to amend pursuant to rule 12(f),²² other courts appear reluctant to strike class allegations at the onset of litigation because certification issues typically are decided on a factual record developed through discovery.²³ With this in mind, defendants seeking to strike alleged classes should focus on showing the classes as alleged are incapable of satisfying rule 23’s requirements regardless of discovery, and plaintiffs may survive such challenges by showing their allegations could satisfy rule 23’s requirements with refinement of the allegations or

benefit of necessary discovery.

Similarly, class action allegations may be removed by amendment pursuant to rule 23. Effective since 2004, rule 23(d)(1)(D) provides that courts may 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 authorising the removal of class allegations that are insufficient to support certification. For example, in *Davis v Bank of America NA*, the district court ordered the removal of 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.’²⁴ 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.²⁵ And, even though many courts reserve ordering amendments under rule 23(d)(1)(D) for ‘rare’ cases,²⁶ defendants should consider these motions because they can eliminate class allegations and, significantly, they can be brought at any stage of litigation unlike rule 12 motions.²⁷

Substantive trends and considerations for dismissing class action allegations

Along with courts considering more forms of motions in response to class allegations, the plausibility pleading standard also has fostered the emergence of a few substantive issues that increasingly determine whether class allegations are dismissed at the onset of litigation. While these issues are continuing to develop, they include whether standing is plausibly alleged, the alleged class includes uninjured members, and the alleged class members are ascertainable.

Standing to maintain antitrust class action claims

A party’s ‘standing’ for a federal court to entertain a claim is a threshold requirement for all cases, including antitrust class actions.²⁸ Mere complaint assertions of standing will no longer suffice. The plausibility pleading standard now requires factual content that establishes standing, and complaints not meeting this standard may be dismissed pursuant to rule 12. Whether complaints meet this standard has become a hotly contested issue for both types of standing that must be established in antitrust class action litigation.

Article III of the US Constitution limits the power of federal courts to hear only cases or controversies, meaning a representative plaintiff must allege an injury that is fairly traceable to the conduct of the defendant and is likely to be redressed by a favourable judicial decision.²⁹ This standard may appear easy to meet, but defendants frequently challenge standing and courts dismiss class action complaints for lack of plausibly alleged standing. For example, in *Finkelman v National Football League*, the court dismissed a claim alleging NFL tickets were sold at inflated prices when the plaintiff failed to allege facts plausibly demonstrating he paid an inflated price for any tickets at issue.³⁰ In contrast, in *Supreme Auto Transport LLC v Arcelor Mittal*, the court denied a motion to dismiss an antitrust claim for lack of article III standing when the alleged facts plausibly demonstrated that the plaintiff was injured by paying inflated prices for steel products.³¹ As these cases illustrate, article III standing for antitrust class actions often turns on whether plaintiffs bought or sold products on terms affected by the alleged anticompetitive conduct. Accordingly, plaintiffs should prepare complaints with facts that demonstrate article III standing, and defendants should consider

moving to dismiss pursuant to rule 12(b)(1)³² when complaints do not plausibly allege this standing.

In addition to article III standing, an antitrust plaintiff must demonstrate ‘antitrust standing’ in the complaint. This is a more rigorous type of standing inasmuch as it requires an antitrust plaintiff to show it was injured by the effects of the anticompetitive acts and the plaintiff is an efficient enforcer of the antitrust laws considering the directness of the asserted injury, the extent to which claimed damages claim are speculative, and the risk of duplicate recoveries or complex apportionment of damages.³³ Since the plausibility standard, parties increasingly have clashed on whether antitrust class action complaints satisfy these standing requirements. Courts have dismissed significant class action cases when the allegations lacked factual content that plausibly established antitrust standing, reflected in the recent dismissal of claims against several international banks that allegedly suppressed platinum and palladium prices by an alleged US\$140 billion when the complaint lacked facts that plausibly established plaintiffs are efficient enforcers of the antitrust laws in light of their indirect relationship with the banks and speculative nature of damages.³⁴ As with article III standing, plaintiffs should prepare complaints with facts that demonstrate antitrust standing and defendants should consider moving to dismiss pursuant to rule 12(b)(6)³⁵ when complaints do not plausibly allege standing.

Uninjured members in alleged classes

Whether alleged classes may be maintained when they include uninjured members is emerging as a frequently contested issue raised at the onset of antitrust litigation. Recent decisions reflect that alleged classes with uninjured members may be challenged with motions to dismiss pursuant to rules 12(d)(1) and (6) for failure to allege plausible article III and antitrust standing, as well as motions to strike pursuant to rules 12(f) and 23(d)(1)(D) for failure to allege plausible satisfaction of rule 23’s requirements such as the plaintiff’s typicality with the class and commonality among class members.³⁶

Uncertainty remains, however, in how many members of an alleged class must be uninjured to preclude certification. Some circuit courts have explained that classes cannot include any uninjured members.³⁷ Other circuit courts have held that a class may be certified even though some members are not injured.³⁸ While these divergent circuit court opinions may be explained by underlying factual differences, the DC Circuit ruling that plaintiffs must show ‘all members’ are injured,³⁹ for instance, appears at odds with the Seventh Circuit explaining that the presence of uninjured members does not preclude certification.⁴⁰ The Supreme Court has declined to address whether classes may include uninjured members.⁴¹ Thus, the precise number of alleged class members, if any, who may be uninjured remains unresolved.

Notwithstanding this uncertainty, parties should be cognisant that overbroad class definitions can end antitrust class actions at the onset of litigation. Antitrust plaintiffs are well advised to formulate class definitions that cannot include members who would be uninjured by the alleged anticompetitive conduct. This may be accomplished by limiting classes to the purchasers or sellers of the products at issue in the complaint. Defendants may be well served by scrutinising the alleged class and pointing out any discrepancy between the composition of the alleged class and the alleged antitrust injury.

Ascertainability of alleged class members

A related emerging issue is whether members of alleged classes are ascertainable. This term does not appear in rule 23, but courts

have begun to recognise ‘ascertainability’ as an implied rule 23 requirement because class members need to be identified following certification of classes.⁴² While courts utilise varying definitions of what constitutes an ascertainable class, they generally require that an alleged class be definite enough to determine whether particular individuals would be members.⁴³

Spurred by the plausibility requirements of *Twombly* and *Iqbal*, perhaps, defendants increasingly have challenged alleged classes as non-ascertainable, often with motions to strike class claims pursuant to rule 12(f). Nearly all the courts of appeals have considered these challenges in recent years, with most agreeing that alleged classes cannot be maintained unless the complaints allege classes that are ascertainable.⁴⁴ Lower courts have stricken more than a few claims that failed to allege ascertainable class definitions. In *Zarichny v Complete Payment Recovery Services*, for example, the district court struck an alleged class as unascertainable because it was alleged to consist of individuals wronged by defendants without reference to any objective criteria that would enable the court to identify the members upon future certification of the classes.⁴⁵

While courts continue to define the meaning of ascertainability, parties should be mindful that courts generally require that putative class members be identifiable by reference to objective criteria.⁴⁶ It follows that antitrust plaintiffs should consider alleging classes based on demonstrable measures, such as classes consisting of persons who purchased or sold a particular product affected by the alleged anticompetitive conduct. Equally, defendants should scrutinise alleged classes for any potential ambiguities or obstacles that hinder identifying putative members, such as the inability to confirm whether persons actually purchased or sold a particular product, the lack of records that would identify members, or other administrative barriers to identifying members.

Conclusion

The plausibility pleading standard changed more than how complaints are stated. It has invigorated an array of challenges – motions to dismiss, strike and amend – that can test the plausibility of antitrust allegations at the onset of class action cases. As courts increasingly entertain these challenges, the standing of plaintiffs, presence of uninjured class members, and ascertainability of class members have emerged as decisive substantive issues. Antitrust plaintiffs may avoid early rejection of their class claims by appreciating these issues while formulating their complaints, and defendants may obtain dismissal of class claims by motion practice showing that plaintiffs have not plausibly alleged standing, injury or a properly defined class.

Notes

- 1 See 15 U.S.C. § 26 (injunctive relief); 15 U.S.C. § 15(a) (damages).
- 2 FED. R. CIV. P. 23(a)(1)-(4).
- 3 FED. R. CIV. P. 23(b)(1)-(3).
- 4 FED. R. CIV. P. 8(a)(2).
- 5 *Conley v Gibson*, 355 U.S. 41, 45-46 (1957).
- 6 550 U.S. 544 (2007).
- 7 *Id.* at 562-63.
- 8 556 U.S. 662, 678-79 (2009).
- 9 *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).
- 10 See Donald W Hawthorne, ‘Recent Trends in Federal Antitrust Class Action Cases’, 24 *ANTITRUST*, at 58 (Summer 2010) (reviewing *Twombly*’s impact on antitrust class action filings).
- 11 See Brian Ellman & Almudena Arcelus, ‘The Evolving Standards for Class Certification in Antitrust Cases’, *Analysis Group*, at 5 (2012), available

- at www.analysisgroup.com/uploadedfiles/content/insights/publishing/the_evolving_standards_class_certification.pdf.
- 12 See *id.*
 - 13 See Jacqueline Bell, 'Dip in Antitrust Suits Shows Limits of Plaintiffs Bar', *Law360*, April 25, 2015, available at www.law360.com/articles/647824/dip-in-antitrust-suits-shows-limits-of-plaintiffs-bar.
 - 14 See Edmund W Searby, 'United States: Private Antitrust Litigation – Class Actions', *The Antitrust Review Of The Americas 2015*, at 45 (2015).
 - 15 See *id.*
 - 16 See *Iqbal*, 556 U.S. at 678.
 - 17 687 F.3d 1052, 1059 (8th Cir. 2012).
 - 18 See, eg, *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-MD-2670 JLS (MDD), 2017 WL 1010329 (S.D. Cal. 14 March 2017) (dismissing antitrust class action claim when allegations could not satisfy rule 23's 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); *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).
 - 19 See, eg, *In re McCormick & Co., Inc., Pepper Prods. Marketing 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).
 - 21 127 F. Supp. 387, 424-25 (W.D. Pa. 2015).
 - 22 See, eg, *Zarichny v Complete Payment Recovery Servs., Inc.*, 80 F. Supp. 3d 610, 624 (E.D. Pa. 2015) (striking alleged class when 'face of the complaint leaves little doubt' that class allegations are not viable); *In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 82 (D. Conn. 2014) (striking alleged class that was barred by unfair trade practices statute).
 - 23 See, eg, *First Impressions Salon, Inc. v Nat'l Milk Producers Fed'n*, 214 F. Supp. 3d 723 (S.D. Ill. 2016) (denying rule 12(f) motion to strike antitrust class action allegations prior to discovery that could resolve disputed factual issues relevant to certification); *Whitaker v Herr Foods, Inc.*, 198 F. Supp. 3d 476, 498 (E.D. Pa. 2016) (denying motion to strike because certification issues are more appropriately addressed with a developed factual record).
 - 24 No. 13-4396, 2016 WL 427050 (E.D. Pa. 3 February 2016).
 - 25 See, eg, *First Impressions Salon*, 214 F. Supp. 3d at 726 (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).
 - 26 See *Goode v LexisNexis Risk & Info. Analytics Group, Inc.*, 284 F.R.D. 238, 246 (E.D. Pa. 2012).
 - 27 Rule 12(b)(6) motions generally must be brought before responding to a pleading and rule 12(f) motions generally must be brought before responding to a pleading or, if a response is not allowed, within 21 days after being served with the pleading.
 - 28 See *Lewis v Casey*, 518 U.S. 343, 357 (1996).
 - 29 See *Spokeo, Inc. v Robins*, 136 S. Ct. 1540, 1547 (2016).
 - 30 No. 3-14-cv-00096 (D.N.J. 15 January 2015), *aff'd*, 810 F.3d 187 (3rd Cir. 2016).
 - 31 No. 08 CV 5468, 2017 WL 839484 (N.D. Ill. 3 March 2017).
 - 32 Rule 12(b)(1) provides for motions that challenge a court's jurisdiction to entertain a claim.
 - 33 See *Gelboim v Bank of Am. Corp.*, 823 F.3d 759, 776-78 (2nd Cir. 2016) (citing *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, (1977) and *Associated Gen. Contractors of Calif., Inc. v Calif. State Council of Carpenters*, 459 U.S. 519, 545 (1983)).
 - 34 See *In re Platinum and Palladium Antitrust Litig.*, No. 1-14-cv-9391-GHW, 2017 WL 1169626 (S.D.N.Y. 28 March 2017).
 - 35 Unlike article III standing that is jurisdictional and challenged pursuant to rule 12(b)(1), antitrust standing is an element of an antitrust claim and typically is challenged pursuant to rule 12(b)(6). See, eg, *Knevelbaard Dairies v Kraft Foods, Inc.*, 232 F.3d 97 (9th Cir. 2000).
 - 36 See, eg, *Buonomo v Optimum Outcomes, Inc.*, 301 F.R.D. 292, 296-97 (N.D. Ill. 2014) (striking class allegations for failing to meet rule 23's typicality requirement when plaintiff's alleged injury did not match alleged injury sustained by proposed class); *Trunzo v Citi Mortgage*, No. 2:11-cv-01124, 2014 WL 1317577 (W.D. Pa. 31 March 2014) (dismissing class allegations pursuant to 23(d)(1)(D) when complaint confirmed plaintiff's alleged injury was not typical of alleged class members).
 - 37 See, eg, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ('plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy'); *Denney v Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) ('no class may be certified that contains members lacking article III standing'); *New Motor Vehicles Canadian Export Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (holding certification required proof that 'each member of the class was in fact injured').
 - 38 See, eg, *Torres v Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) ('a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct'); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 14 (1st Cir. 2015) ('We conclude that class certification is permissible even if the class includes a de minimis number of uninjured parties'); *Suchanek v Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014) ('If the court thought that no class can be certified until proof exists that every member has been harmed, it was wrong').
 - 39 *Rail Freight*, 725 F.3d at 252.
 - 40 *Suchanek*, 764 F.3d at 757.
 - 41 In 2015, the Supreme Court accepted a petition in that asked 'whether a class may be certified if it contains "members who were not injured and have no legal right to any damages."' *Tyson Foods, Inc. v Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016) (citation omitted). But the petitioners later dropped that question and the Supreme Court did not address it.
 - 42 See, eg, *Shelton v Bledsoe*, 775 F.3d 554, 559 (3rd Cir. 2015) ('[a]lthough not specifically mentioned in the rule, an essential prerequisite of an action under rule 23 is that there must be a class.') (internal quotation marks and citation omitted).
 - 43 See, eg, 5-23 MOORE'S FEDERAL PRACTICE, § 23.21 (Matthew Bender 3d ed.).
 - 44 *Sandusky Wellness Ctr., LLC v Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (class must be 'adequately defined and clearly ascertainable'); *Carriuolo v GM Co.*, 823 F.3d 977, 984 (11th Cir. 2016) (plaintiff seeking to represent proposed class must establish that proposed class is adequately defined and clearly ascertainable); *Nexium*, 777 F.3d at 19 (explaining definition of class must be 'definite,' such that class members are ascertainable by objective criteria); *Marcus v BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012) ('the class must be currently and readily ascertainable based on objective criteria.');
 - 45 *Mullins v Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015) ('Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria.').
 - 46 80 F. Supp. 3d 610, 625 (E.D. Pa. 2015).
 - 47 *Shelton*, 775 F.3d at 559; see also 5-23 MOORE'S FEDERAL PRACTICE, § 23.21 (Matthew Bender 3d ed.) (reviewing objective criteria).



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Bob Abrams leads BakerHostetler's antitrust and competition practice team and guides a team of attorneys with great depth and strength in the litigation and trial of antitrust cases, including class actions. The antitrust group also has significant experience in mergers and acquisitions, and its partners have been point persons in dealing with the Department of Justice (DOJ) and the Federal Trade Commission (FTC) on the antitrust aspects of clearing transactions. Bob has more than 30 years of experience litigating and trying antitrust and complex commercial and government enforcement matters. He is a fellow of the American College of Trial Lawyers and is ranked in *Chambers USA: America's Leading Lawyers for Business* in the area of antitrust.

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