

# Third Circuit Demands Rigorous Analysis of the Predominance Requirement for Class Certification in Pharmaceutical Antitrust Case

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On April 22, 2020, the Third Circuit Court of Appeals vacated and remanded an order certifying a class of direct purchaser plaintiffs in *In re: Lamictal Direct Purchaser Antitrust Litigation*, holding that the district court failed to conduct the “rigorous analysis” of the facts, evidence and arguments that is necessary to determine whether the putative class satisfied the requirements for class certification under FRCP 23. This decision, considered with other recent Third Circuit precedent, signals a trend in the Third Circuit towards a more demanding examination of the requirements for class certification, particularly in pharmaceutical antitrust cases.

## The Third Circuit’s *In re: Lamictal* Decision

In *In re: Lamictal*, the Third Circuit vacated the district court’s 2018 decision certifying a class of wholesalers accusing pharmaceutical manufacturers of unlawfully delaying the entry of generic Lamictal through a purported reverse-payment settlement agreement that ended a patent dispute. The Third Circuit found that the district court made impermissible assumptions without the required “rigorous analysis” of the evidence and arguments related to the applicable FRCP 23 requirements for class certification, and remanded for resolution of certain factual disputes by a preponderance of the evidence.

In their appeal, the defendants had challenged the district court’s predominance finding — *i.e.*, that the putative class of wholesalers satisfied FRCP 23(b)(3)’s requirement that questions of law or fact common to all class members “predominate” over any questions affecting only individual members. To determine whether the predominance requirement is satisfied, the district court must assess whether the issues in the case are subject to classwide proof, and whether those issues predominate over any others requiring individualized proof. The Third Circuit concluded that the district court abused its discretion by merely “assum[ing], absent a rigorous analysis,” that claimed average price increases sufficed to support the conclusion that the putative class could establish antitrust injury by common proof at trial. Whether averages are “acceptab[le]” in assessing the predominance requirement, the panel explained, depends on a number of factual predicates, including (i) whether the market is characterized by “individual negotiations” between the manufacturer and wholesaler (as the defendants had argued), (ii) whether the generic manufacturer had “preemptively” dropped its prices to compete with the brand manufacturer’s “contracting strategy” of offering discounts and rebates to pharmacies that agreed to continue selling branded Lamictal instead of the generic version and (iii) what the brand manufacturer’s marketing strategy would have been, absent the purported reverse-payment settlement agreement. The Third Circuit found that the district court had failed to resolve these factual disputes through weighing and making credibility determinations about the parties’ competing evidence, including dueling expert reports.

The Third Circuit also was critical of the district court’s treatment of the wholesalers’ claims of antitrust injury, proof of which is required to recover under the antitrust laws. According to the Third Circuit, it was improper for the district court to assume that the wholesalers suffered antitrust injury the moment generic prices were allegedly artificially inflated by the purported reverse-payment settlement agreement. Where the parties had vigorously contested whether the generic manufacturer had preemptively lowered its prices, the panel held that the district court was required to resolve that factual dispute by a preponderance of the evidence as well.

Ultimately, in the absence of a “rigorous analysis” of the competing expert reports — which relied on conflicting evidence and factual assumptions — the Third Circuit concluded that it could not determine whether the putative direct purchaser plaintiff

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class satisfied FRCP 23's predominance requirement by a preponderance of the evidence, and remanded the matter back to the district court.

## An Earlier Indication of a Trend

The *In re: Lamictal* decision follows the Third Circuit's 2016 decision in *In re: Modafinil Antitrust Litigation*, another pharmaceutical antitrust case upending certification of a direct purchaser plaintiff class where the district court had not conducted a sufficiently rigorous analysis. In *Modafinil*, the putative class of wholesalers alleged that they purchased Provigil at artificially inflated prices due to a purported reverse-payment settlement agreement that allegedly delayed generic entry. The district court had rejected the defendants' argument that the putative class of 22 pharmaceutical wholesalers was not sufficiently "numerous" under FRCP 23(a)(1), basing its decision on principles of judicial economy (focusing on the late stage of the litigation) and its perception that the class members would not be motivated to litigate individually. On appeal, however, the Third Circuit held that the district court's analysis of these factors was flawed. With respect to the judicial economy factor, the Third Circuit held that the district court abused its discretion by considering the stage of the litigation. With respect to the class members' motivation to litigate individually, the district court improperly failed to consider the availability of joinder. The Third Circuit therefore remanded the *Modafinil* case for further analysis of six numerosity factors: (i) judicial economy; (ii) class members' motivation

to litigate as joined plaintiffs; (iii) the financial resources of class members; (iv) the geographic dispersion of class members; (v) the ability to identify future claimants and (vi) whether the claims are for injunctive relief or damages. On remand, the district court denied certification of the direct purchaser plaintiff class for failure to satisfy the numerosity requirement.

## Key Takeaways

The decision in *In re: Lamictal* confirms that the Third Circuit will hold district courts to their responsibility to conduct a rigorous analysis of factual and expert evidence to determine whether a putative class has satisfied the requirements for class certification under FRCP 23. The Third Circuit currently has before it another pharmaceutical antitrust class certification appeal — *In re: Suboxone Antitrust Litigation* — where the defendant is challenging certification on the basis that the class lacks common evidence of injury that can be aligned with any viable antitrust violation alleged. Suboxone will be a case to watch.

We expect that, going forward, district courts in the Third Circuit are likely to more closely examine the arguments and evidence offered by putative class representatives in support of class certification. This trend serves as a reminder that defendants in antitrust class actions should evaluate potential class certification arguments early on in the case, including by developing evidence on contracting processes and pricing practices that could aid in defeating predominance.