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## AVERAGING IN ANTITRUST CLASS CERTIFICATION

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When is “averaging” injury claims for putative class members appropriate—or instead insufficient for class certification by masking critical differences among class members? Averaging has been accepted for years in antitrust cases and is often essential in analyzing class member injuries. But when the use of averages hides the lack of injury for some, several courts in recent years have pushed back and denied certification. This paper takes a rough stab at summarizing the issues, noting the direct connection to the question the Supreme Court ducked in *LabCorp*: can a class be certified with some uninjured class members and, if so, what quantity or percentage is the upper limit before certification must be denied.

Here’s a simple illustration: Let’s say A and B are each injured \$10, but C *gains* \$5. The *average* injury is \$5.00. Should a class of ABC be certified? Doing so would undercompensate A and B for their injuries while giving C an unwarranted windfall. But denying certification in a typical case could leave the A’s and B’s with nothing.

Some cases endorse averaging with varying levels of enthusiasm: “[A]verages are widely accepted methods of proving antitrust injury and damages on a classwide basis.” *In re Ranbaxy Generic Drug Application Antitrust Litig.*, 338 F.R.D. 294, 305 (D. Mass. 2021). “Any potential variation among class members in the actual prices paid for each drug is more relevant to assessing the extent of the injury suffered than to determining the existence of an injury at all.” *Id.* at 304; *see also In re Loestrin 24 Fe Antitrust Litig.*, 410 F. Supp. 3d 352, 389-90 (D.R.I. 2019); *In re Nexium Antitrust Litig.*, 297 F.R.D. 168, 183 (D. Mass. 2013). *See In re Nexium Antitrust Litig.* 777 F.3d 9, 25 (1st Cir. 2015) (“Numerous courts have certified plaintiff classes even though the plaintiffs have not been able to use common evidence to show harm to all class members.”)

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(quoting Davis et al., *The Puzzle of Class Actions with Uninjured Members*, 82 G.W.L. Rev. 858, 859 (May 2014)).

Other cases are more reluctant to accept averaging, at least where there is reason to believe that some appreciable number of putative class members were in fact never injured. *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 192 (3d Cir. 2020), is an example. The case involved allegations of anticompetitive agreements between two pharmaceutical companies. The Third Circuit vacated the district court's class certification order because plaintiffs' expert model improperly relied on averages without adequate analysis. *Id.* (citing *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266 (3d Cir. 2011)). To the same effect, see *In re Keurig Green Mt. Singleserve Coffee Antitrust Litig.*, 2025 WL 3240044 (S.D.N.Y. Nov. 20, 2025), where the court denied plaintiffs' motion for class certification because of their expert's misuse of averages.

In the discussion below, I will address both lines of cases to see if there is a reasonable way of harmonizing the facially disparate approaches.

### 1. **Averaging upheld**

Some courts uphold significant averaging. It is useful to note that courts tend towards certifying classes, especially in price-fixing antitrust cases where the effect of denying certification may be to leave legitimately injured purchasers with nothing. Here are a few examples.

In *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651 (9th Cir. 2022) (en banc), defendants argued that the plaintiffs' expert's pooled regression model "is not a permissible method of proving class-wide liability because the regression model uses 'averaging assumptions,' meaning that the model assumes that all [direct purchasers] were overcharged by the same uniform percentage (10.28 percent). These averaging assumptions, according to the Tuna Suppliers, 'paper over' individualized differences among class members." *Id.* at 677. The en banc court disagreed: "It is not implausible to conclude that a conspiracy could have a class-wide impact, 'even when the market involves diversity in products, marketing, and prices,' especially 'where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations.'" *Id.* at 677-78 (citing *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254-55 (10th Cir.

2014)). The court concluded that “a district court could reasonably conclude ‘that price-fixing would have affected the entire market, raising the baseline prices for all buyers.’ [Urethane, 768 F.3d] at 1255. In other words, it is both logical and plausible that the conspiracy could have raised the baseline prices for all members of the class by roughly ten percent. The district court did not abuse its discretion in so concluding.” 31 F.4th at 678. As for uninjured class members, the court said that “23(b)(3) . . . requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about *injury* or entitlement to damages.” *Id.* at 669 (emphasis added). The plaintiffs’ averaging survived by arguing that prices were increased so much that individual negotiations would still cause the price paid to be higher than the pre-conspiracy price—an argument that defendants’ data could not disprove conclusively and thus could only be used to persuade a jury at trial.

In *Ranbaxy*, the court explained that, generally, the using averages is] “widely accepted” for proving antitrust injury and damages classwide. *In re Ranbaxy Generic Drug Application Antitrust Litig.*, 338 F.R.D. 294, 305 (D. Mass. 2021) (collecting cases). The court allowed use of averaging where “offsets such as consumer contributions and manufacturer rebates” made after the common overcharge occurred potentially offset all of the overcharge. The court reasoned that “antitrust injury occurs at the moment of the overcharge regardless of later rebates or other offsets.” *Id.* at 306; *accord In re Nexium*, 777 F.3d 9, 27 (1st Cir. 2015) (“antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset.”). The defendants proposed two other reasons that the plaintiffs’ economist was masking uninjured class members: (1) brand loyal customers wouldn’t switch to generics and (2) third-party payors that manage Medicare plans see no difference in their costs between the drugs because of what the government and consumers cover. The court rejected both of these arguments—there was evidence brand loyalty would not stretch that far, and the second point is just another offset that occurs after the antitrust injury.

In *In re Actos Antitrust Litig.*, 2024 WL 4345568 (S.D.N.Y. Sept. 30, 2024), the court certified both direct and indirect purchaser classes of buyers of the Actos diabetes medication. Although individual inquiry of some 300,000 putative class members was necessary to determine

class eligibility, data were available to accomplish that inquiry, and the common questions of liability and aggregate injury predominated over these individual issues. The court concluded that the plaintiffs' "aggregate damages" approach permissibly produced a figure that "roughly reflects" the amounts owed class members. *Id.* at \*8-\*11.

In *In re Mushroom Direct Purchaser Antitrust Litig.*, 319 F.R.D. 158 (E.D. Pa. 2016), class certification was granted to a class of direct purchasers of "agaricus mushrooms." The plaintiffs' expert performed a regression analysis that averaged the effects of defendants' alleged price-fixing. The court explained that, although "without more, [the plaintiffs'] average effects regression would not be sufficient to show that common impact predominates," this was just one piece of evidence which, when combined with regressions of individual class members, demonstrated classwide impact. Those regressions showed that, for each class member with *statistically significant* results, there was cognizable injury. The fact that many class member results were *not* statistically significant did not alter that result. *Id.* at 202–05. The court specifically noted that "a finding of predominance is not foreclosed by the possibility that there may be uninjured class members." *Id.* at 203 (citing *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016) (explaining that precedents had "not insisted on" a showing of impact by every class member "at the class certification stage")). *See also In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374 (S.D.N.Y. 1996) (certifying a class of list-price purchasers, but denying certification for those who did not buy off price lists).

Finally, an older example with some extreme facts. In *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98 (C.D. Cal. 2007), the district court certified a class of all rock concertgoers in each geographic market. The case preceded the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *Dukes* had reinforced the commonality requirement of Rule 23(a), requiring "significant proof" of a policy common to all putative class members. *Comcast v. Behrend* held that certification must be based on a rigorous analysis tied to the operative claims in issue. In *Live Concert*, the court relied on the plaintiffs' expert's evidence that average ticket prices had risen over time, which he attributed to anticompetitive conduct by the defendant. This meant averaging the likes of Modest Mouse versus the Rolling Stones or averaging the price of a Stones nosebleed seat ticket versus one in the front row. Further, many

concerts of course sell out, sometimes immediately, suggesting that the ticket price was actually below the competitive level. And several artists, like Bruce Springsteen, impose *price ceilings* on their tickets. But based on the Ninth Circuit’s then liberal certification standard, the court certified the classes, and the Ninth Circuit denied 23(f) review. Five years later, however, after more discovery and the *Dukes* decision, the court de-certified the classes, *Dauberted* the plaintiff expert, and granted summary judgment for the defense. 863 F. Supp. 2d 966 (C.D. Cal. 2012).

## 2. Averaging rejected

Other courts require the plaintiffs to prove that any averaging does not mask uninjured class members. Here are some examples.

*In re Lamictal Direct Purchaser Antitrust Litig.* dealt with an appeal of class certification related to allegations about anticompetitive agreements between two pharmaceutical companies. The Third Circuit vacated the district court’s class certification order because plaintiffs’ expert model “impermissibly relies on averages, which in a market characterized by individual negotiations . . . masks the fact that many—up to one-third of the entire class—likely paid no more, or even less, for [the drug] than they would have [otherwise].” 957 F.3d 184, 192 (3d Cir. 2020). The panel explained that “the acceptability of averages [to show antitrust injury] depends largely on the answer to several factual predicates, most importantly . . . whether the market is characterized by individual negotiations.” *Id.* at 194. Further, “[w]hile averages may be acceptable where they do not mask individualized injury, we cannot determine whether that occurred here because of the lack of analysis.” *Id.* (citing *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266 (3d Cir. 2011)).

Most recently, *In re Keurig Green Mt. Singleserve Coffee Antitrust Litig.* denied plaintiffs’ motion for class certification because of their expert’s use of averages. 2025 WL 3240044 (S.D.N.Y. Nov. 20, 2025). The case was brought by direct purchasers of single-serve coffee “portion packs” who accused Keurig of anticompetitive conduct including sham patent litigation, disparagement, exclusive supplier agreements, and an updated brewer machine that was purposefully not compatible with competitor packs. The court explained that “averaging mechanisms” sometimes cannot “provide common answers to the question of whether class members were in fact harmed, without a more tailored analysis of

antitrust impact.” *Id.* at \*9 (quotations omitted). This “lack of analysis” can be fatal to the predominance inquiry under Rule 23(b)(3). *Id.* This was one such case because certain customers paid nonnegotiable prices while others negotiated. And those who negotiated had differentiated successes in doing so. The court concluded that the expert’s model “d[id] not take into account whether some customers were able to negotiate away the purported overcharges, and if so, by how much.” *Id.* The court also found it convincing that expert admitted they could not “rule out” that “some customers suffered no injury.” *Id.* at \*10.

The *Keurig* Plaintiffs argued that the “range of prices charged was higher as a result of Keurig’s unlawful conduct than it would have been in the but for world” (hearkening back to the plaintiffs’ arguments in *Olean Wholesale Grocery*). But the court rejected this because expert’s econometric model did not establish individual pricing and thus “cannot prove that the bottom end of the range of prices charged by Keurig reflected supra-competitive pricing because that would necessitate looking beyond the average data to analyze the lowest individual prices.” *Id.* Though price lists can provide “common evidence of antitrust injury in some instances,” the court found that it was not enough in this case, especially after the Supreme Court’s 2013 decision in *Comcast v. Behrend*, 569 U.S. 27, 33 (2013), which established that courts must conduct a “rigorous analysis” to determine whether a model supporting a bid for class certification indeed “satisf[ies] through evidentiary proof” the dictates of Rule 23(b). *Id.* at 35–36.

Similar to *Keurig*, the D.C. Circuit vacated and remanded a class certification decision where the expert’s methodology for quantifying the effects of a price-fixing conspiracy purported to calculate damages for class members who had negotiated the relevant rates. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). The court explained that the model thus “detect[ed] injury where none could exist.” *Id.* The court also noted that “plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.” *Id.* (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 623–24 (1997)). See also *In re Aluminum Warehousing Antitrust Litig.*, which involved an alleged conspiracy to inflate prices in the primary aluminum market. The court denied the plaintiffs’ class certification motion in part because their expert’s model used “improper averaging” that destroyed any “common proof that

conspiratorial conduct caused pricing injury to all purchasers.” 336 F.R.D. 5, 56–57 (S.D.N.Y. 2020).

Another denial was ordered in *In re Photochromatic Lens Antitrust Litig.*, 2013 WL 8183461 (M.D. Fla. Mag. Judge March 12, 2013). There the plaintiff expert found that the direct purchasers’ average injury was 2.7%, but he admitted that some 10-14% of putative class members were not injured. The ruling was adopted on the basis of the Magistrate Judge's reasoning. 2014 WL 1338605 (M.D. Fla. Apr. 3, 2014). The denial of certification to direct purchasers also doomed the indirect purchaser case. 2013 WL 12155832 (M.D. Fla. Mag. Judge May 24, 2013).

In a pre-*Dukes* case, *In re Graphics Processing Units Antitrust Litig.* dealt with a plaintiffs’ regression model that “masked important differences between products and purchasers” thus making class certification inappropriate. 253 F.R.D. 478, 494 (N.D. Cal. 2008). In his class impact analysis, the expert “chose to average certain products and purchases with one another and then correlate instead of correlating disaggregated data for individual products and particular customers.” *Id.* at 493. This “masked” potential differences in the prices changed for very different products and customers. *Id.* at 494. The court determined that this resulted in a model “filled with broad categories that each includes highly varying products and purchasers,” and the expert could not explain “why the breadth of the categories he analyzed . . . would yield accurate correlation results over an even more particular category or, further, than categories of individual products and particular purchasers.” *Id.*

### **3. So where to go from here?**

A good statement of the general rule for averaging comes from the *Keurig* case. The district court explained that “it is common practice to use averages to determine whether class members suffered a common antitrust injury in direct purchaser actions,” but issues arise when there is a “meaningful concern that the use of averages masks uninjured class members and individual inquiry is [] required to establish injury in fact across the class.” *Keurig*, 2025 WL 324004, at \*9 (citing *In re Actos Antitrust Litig.*, 2024 WL 4251891, at \*36 (S.D.N.Y. Mag. Judge 2024), *report adopted*, 2024 WL 4345568)).

Averaging is thus acceptable generally. It suffers from problems only when the averaging obscures individual variations that may show a lack of any injury. If everyone pays in excess of the competitive price but there are variations in how much, the class will be certified. But if there is an appreciable number who paid the competitive price or less, the class cannot be certified.

The results of the averaging cases, as a whole, relate directly to the *LabCorp* issue. If a trivial number of putative class members suffered no injury, the class will nevertheless be certified based on an averaging analysis. But if the number of uninjured is significant, and if the expert's model cannot provide a simple mechanism to exclude them, there will be no certification. Whether the number of uninjured to defeat certification is just one, 5%, or some other value is up in the air after the DIG in *LabCorp*. But although there is no established dividing line, the advocate's job can be stated simply: plaintiffs will argue that the law requires a higher number to defeat certification, defendants for as the smallest number possible.

The cases strongly suggest that the burden of going forward (not proof) is on the defendant(s) to provide evidence that averaging will mask the absence of injury by, e.g., individual negotiations. The burden then shifts to the plaintiff to show that all or almost all members of the putative class incurred some measurable injury notwithstanding individualized negotiations or other factors. The plaintiff expert model should show how this will work; the model should be executed to avoid challenge on that basis. The defense expert will say why it doesn't.

The effect of offsets is unclear. *Ranbaxy* says that if the original price paid shows antitrust injury, then an offset through rebates and the like does not bar class certification. If the rebate is spread over the cost of several units or items, or comes much later than the original purchase, this makes some sense. But if the rebate is specifically directed at the injury-causing price and is made within a reasonable time after the price has been paid, this seems wrong.

We are a long way from clarity and consistency on these issues.