

## Seventh Circuit Upholds Class Certification in Price Setting Antitrust Case Despite Nonuniformity of Prices

February 8, 2012 by [Louis M. Solomon](#)

Our analysis of class actions, typically called collective actions in the international litigation context, continues with a brief review of [Messner v. Northshore Univ. HealthSystem](#), No. 10-2514 (7th Cir. 2012). In Messner, the Seventh Circuit reviewed pursuant to the rare (in federal court) interlocutory review procedure of Fed. R. Civ. P. 23(f).

The antitrust allegations in the case included a challenge to a merger between two health systems. The Federal Trade Commission successfully challenged the merger. In the private suits, the district court denied class certification after the plaintiffs' expert was found not to have determined antitrust impact on a class-wide basis.

Reversing, the Court of Appeals analyzed and reversed the district court's conclusion that that lack of uniform price increases required denial of class certification. Said the Seventh Circuit, plaintiffs' expert was entitled to be credit at this stage of the proceedings in concluding that despite the absence of strict uniformity of prices there could still be a common methodology to determine the fact and extent of impact. The Court of Appeals said that "the degree of uniformity the district court demanded simply is not required for class certification under Rule 23(b)(3)". The Court of Appeals continued:

"In essence, it is important not to let a quest for perfect evidence become the enemy of good evidence"

The Court also differentiated between class members who did not suffer injury vs. those as to whom the proof was that they could not suffer injury. With respect to those members who "did not" suffer injury, the Court of Appeals ruled that, at best, this was "an argument that some class members' claims will fail on the merits if and when damages are decided, a fact generally irrelevant to the district court's decision on class certification". For those who "could not" have suffered injury, the Court of Appeals explained that class definition should be used to exclude such persons. The Court observed the problem of the "fail-safe" class: "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim". Defining a class to avoid this problem is, in the words of the Court, "more of an art than a science".

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