



---

Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | [www.law360.com](http://www.law360.com)  
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | [customerservice@portfoliomedia.com](mailto:customerservice@portfoliomedia.com)

---

## Pimco: Another Guidepost For Class Certification

*Law360, New York (September 23, 2009)* -- The class certification opinions in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008) (“Hydrogen Peroxide”), *In re Initial Public Offerings Securities Litig.*, 471 F.3d 24 (2d Cir. 2006) (“IPOs”), and *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008) (“Canadian Autos”) have undoubtedly caused class action lawyers to reconsider their approach to class certification — at least for cases pending in the First, Second and Third Circuits.

In each of these opinions, the appellate courts reversed the trial court’s grant of class certification and each was based, at least in part, on a concern that the plaintiffs were not able to plausibly establish widespread injury to the class through common evidence.

In situations like this, courts have generally found that common issues do not predominate over individual ones and have denied certification under FRCP 23(b)(3).

In *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, \_\_\_F.3d\_\_\_, 2009 WL 1919013 (7th Cir. July 7, 2009) (“Pimco”), Judge Posner made clear, however, that cases like *Hydrogen Peroxide*, *IPOs* and *Canadian Autos* do not abrogate the well-established rule that for purposes of class certification, plaintiffs need not show that every individual in the class was harmed by the defendants’ alleged conduct — only that it is plausible that most were.

In *Pimco*, the defendants appealed from the district court’s certification order. The plaintiffs accused the defendants of monopolizing the futures market for certain treasury notes during a two month period in 2005, and the class consisted of persons who bought a futures contract during that time period. *Pimco*, 2009 WL 1919013, at \*1.

The defendants challenged the class definition on the ground that it included speculators that may not have been injured.

“For example, some of the class members might have taken both short and long positions (in order to hedge—that is, to limit their potential losses) and made more money in the long positions by virtue of PIMCO’s alleged cornering of the market than they lost in their short positions.” *Id.* at \*3.

The Seventh Circuit assumed that the defendants’ assertion might prove true, but rejected its argument that the class should not be certified because some of its members may not have suffered an injury in fact.

While the court agreed that a “class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant” (*Id.*, citing cases, including *Canadian Autos*, sub nom. *Brown v. American Honda*, 522 F.3d 6, 28-29 (1st Cir. 2008)), Judge Posner continued by rejecting “statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant’s conduct.” *Pimco*, 2009 WL 1919013, at \*5.

Indeed, there is a substantial body of case law holding that the mere fact that some class members may not have been injured does not preclude certification.[1]

The Seventh Circuit concluded that it was implausible to believe that there would be a substantial number of class members who were net beneficiaries of the defendants’ conduct given that defendants would have no economic incentive to corner the treasury notes market unless they also knew that there would be substantial numbers of class members who would have to buy those notes at monopoly prices. *Id.* at \*6.

Under these circumstances, the Seventh Circuit shifted the burden to the defendants to establish that the class definition was overbroad. The court explained:

At argument PIMCO's lawyer told us that he could obtain names of class members. If so, he can, as in *Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 9 Cal.Rptr.3d 544, 550-51, 568, 571 (2004), and *Long v. Trans World Airlines Inc.*, 1988 WL 87051, at \*1 (N.D.Ill. Aug.18, 1988), depose a random sample of class members to determine how many were net gainers from the alleged manipulation and therefore were not injured, and if it turns out to be a high percentage he could urge the district court to revisit its decision to certify the class. *Id.* at \*6.

Judge Posner’s opinion in *Pimco* serves as a reminder that the evolution of class certification standards that some commentators assert is reflected in decisions like *Hydrogen Peroxide*, *IPOs* and *Canadian Autos* is not without limits.

Where injury to a substantial majority — but not necessarily all — of the class is facially plausible, the burden appropriately shifts to the defendants to establish that certification would nonetheless be inappropriate.

This aspect of Pimco is appears consistent with the longstanding principle that “injury may be presumed when it is clear the violation results in harm to the entire class.” Hydrogen Peroxide, 522 F.3d at 326.

--By Christopher L. Lebsack, Hausfeld LLP

*Christopher Lebsack is a partner with Hausfeld in the firm's San Francisco office.*

*The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*

[1] In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, 256 F.R.D. 82, 89 (D. Conn. 2009) (“The plaintiffs need not demonstrate to an absolute certainty that all EPDM purchasers ultimately suffered damages as a result of inflated list prices”); In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 307 (E.D. Mich. 2001) (a plaintiff is not required to show that ‘the fact of injury actually exists for each class member’); Meijer Inc. v. Warner Chilcott Holdings Co. III Ltd., 246 F.R.D. 293, 310 (D.D.C. 2007) (“the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class”); Elliott v. ITT Corp., 150 F.R.D. 569, 575 (N.D. Ill. 1992) (A certified class may include “members who have not been injured or do not wish to pursue claims against the defendant.”); In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig., 209 F.R.D. 323, 337 n.20 (S.D.N.Y. 2002) (“Certainly, each potential plaintiff need not prevail on the merits in order to qualify as a class member, a theory which ‘would preclude certification of just about any class of persons alleging injury from a particular action.’”) (quoting Forbush v. J.C. Penney Co., 994 F.2d 1101, 1104-06 (5th Cir. 1993)); Nat’l Org. for Women Inc. v. Scheidler, 172 F.R.D. 351, 357 (N.D. Ill. 1997) (rejecting a proposed “requirement that every potential class member must have suffered a cognizable injury”), aff’d, 267 F.3d 687 (7th Cir. 2001), rev’d on other grounds, 537 U.S. 393 (2003); Thomas v. City of Evanston, 1983 WL 4552, \*3 (N.D. Ill. Feb. 28, 1983) (allowing employment class action to proceed where some class members were subject to, but not necessarily injured by, unlawful action); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657 (D. Minn. 1991) (same); Smith v. Univ. of Wash. Law School, 2 F. Supp. 2d 1324, 1341 (W.D. Wash. 1998) (“[T]here is no requirement that every potential class member must have suffered a cognizable injury.”); Singer v. AT&T Corp., 185 F.R.D. 681, 688 (S.D. Fla. 1998) (“Additionally, the fact that AT&T may be able to offer one of three defenses to individual claims is insufficient to destroy commonality.”); In re Static Random Access Memory (SRAM) Antitrust Litigation, 2008 WL 4447592, at \*5 (N.D. Cal. Sept. 29, 2008) (plaintiffs need only demonstrate that injury to “all (or nearly all) members of the class” can be shown with common evidence).