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Class Action Litigation Alert October 2018

In re Asacol: First Circuit Sharply Limits Certification of Classes Containing Uninjured Members

A recent decision by the U.S. Court of Appeals for the First Circuit, *In re Asacol Antitrust Litig.*, No. 18-1065, 2018 U.S. App. LEXIS 28920, 2018 WL 4958856 (Oct. 15, 2018), is the latest word in the debate about certifying class actions where some class members are clearly uninjured. In *Asacol*, the First Circuit changed its position, holding that Rule 23's "predominance" requirement generally bars certification of a class that includes uninjured members. Especially if other circuits follow suit, many types of class actions—including consumer class-actions—will be harder to certify.

Background

In cases filed as putative class actions, it is common for less than all members of the class to have been affected by the alleged violation of law. Courts have taken two dramatically different approaches to this common scenario. The Second, Third, Fifth, Eighth, and D.C. Circuits have held or suggested that the presence of clearly uninjured class members precludes certification. Other courts, such as the Seventh and Ninth Circuits, have held that the presence of uninjured class members is generally not a bar to class certification.

Until now, the First Circuit was thought to be on the latter side of the divide. Three years ago, in *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015), it held that a class containing uninjured members could still be certified, as a claims administrator could use affidavits from putative class members at the post-trial stage to identify who was and was not injured, and thus, who should and should not receive a payout.

The Asacol Decision

In *Asacol,* the First Circuit essentially limited *Nexium* to its facts, holding that classes containing uninjured members generally cannot be certified—at least, as long as the defendant reserves its right to dispute any purchaser affidavits, and as long as there are more than a handful of genuinely disputed claims in the class.

Like *Nexium*, *Asacol* was an antitrust case brought against pharmaceutical manufacturers. The plaintiffs alleged that the manufacturers had engaged in anti-competitive activity that prevented the introduction of a generic version of their drug, Asacol. The plaintiffs sought to certify a class of all indirect purchasers of Asacol, on the theory that they would have paid less if they had had the opportunity to buy a generic. It was undisputed, however, that this theory of harm did not apply to some purchasers, who were "brand loyal" and would have continued buying name-brand Asacol even if a cheaper generic had been available.

The district court found that fully 10% of the putative class (which equates to thousands of purchasers) was unharmed for this reason. As such, it was undisputed that "injury-in-fact w[ould] be an individual issue, the resolution of which w[ould] vary among class members." Nevertheless, the district court certified the class. Relying on *Nexium*, it reasoned that the purchasers who would not have switched to a generic could be removed in a post-trial proceeding conducted by a claims administrator, based on affidavits from each claiming purchaser stating what it would have done.

The First Circuit reversed, holding unanimously that the plaintiffs had not satisfied Rule 23's requirement that common issues predominate over individualized ones. *Nexium,* the First Circuit explained, came out the way it did only because the court had assumed that the defendant did not intend to challenge any purchaser affidavits. The *Asacol* defendants, by contrast, had "expressly stated their intention to challenge any affidavits that might be gathered." This made all the difference: as the court observed, defendants have a due-process right to challenge the proof of each class member on an adversarial basis, if they wish. Permitting a claims processor to answer, on a non-adversarial basis, the individualized

question of what each class member would have done violates due process; it also "give[s] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action," in violation of the federal Rules Enabling Act.

The First Circuit recognized that the plaintiffs' proposal to have a claims processor review affidavits *might* be appropriate if there were some "basis … [to] conclude that the number of affidavits to which the defendants [would] be able to mount a genuine challenge [was] so small that it [would] be administratively feasible to require those challenged affiants to testify at trial." In such a case, the defendants would still have an ability to present their individualized defenses to all "genuine[ly]" disputed claims. But the plaintiffs had failed to show that *Asacol* was "a case in which a very small absolute number of [uninjured] class members might be picked off in a manageable, individualized process at or before trial." To the contrary, there were "thousands" of such uninjured class members.

The First Circuit also rejected the plaintiffs' "fallback" argument that they could prove "class-wide impact" through the model of their damages expert. The expert himself conceded that roughly 10% of class members would not have switched to the generic form, even if it had been available. His opinion, therefore, could not be "used to prove that *each* individual would have likely purchased the generic drug and was thus injured by defendants' conduct" (emphasis added). "Accepting plaintiffs' propos[al]," the court warned, would "put us on a slippery slope, at risk of an escalating disregard of the difference between representative civil litigation and statistical observations of tendencies and distributions."

The First Circuit recognized that, as a consequence of its holding, the class-action device will sometimes be unavailable to address "conduct that inflicts small amounts of damage on large numbers of people." But it did not find this problematic. As the court explained, class certification under Rule 23 is "fundamentally a *procedural* device," not a substantive tool for effectuating policy. That wrongdoing may sometimes go unaddressed, therefore, "grants [courts] no license to [certify a] class … by either altering or reallocating substantive claims or departing from the rules of evidence." In any event, the First Circuit observed, "other tools [are] available" to punish and deter wrongdoing where injury is non-uniform, such as suits by government regulators or use of collateral estoppel in individualized private suits.

Conclusion

Asacol obviously makes it more difficult to certify antitrust class actions in the First Circuit. But its reasoning applies equally to false-advertising class actions involving the purchase of food, drug, or other consumer products. Consumers are diverse in their purchasing practices and their preferences. It is almost always true that some consumers who bought a product did not see the disputed product claim; that some who saw it did not rely on it; and that some purchasers may actually prefer the product the way it is to the way the plaintiff alleges that it "should have" been. *Asacol* would make certification very difficult on facts like those—as long as the defendant does not waive its right to challenge individual consumers' proof. Defendants faced with putative class actions would be wise to preserve that right, loudly and clearly. And while *Asacol* is binding only within the First Circuit, it may prove persuasive elsewhere, given its unanimous holding, the composition of the panel (all three judges were appointed by Democratic presidents), and its clear and thorough reasoning.

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