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First Circuit addresses an issue that continues to vex (and split) the circuits: should a class be certified that includes uninjured class members?

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Takeaway: The issue of how to treat uninjured class members continues to vex the federal courts. This issue presents both substantive and procedural complexities. Substantively, a class must be defined in objective terms, so that class members can be ascertained in an administratively feasible way. But the class definition cannot be a so-called "failsafe class," *i.e.*, a class that requires a potential class member to prevail on an ultimate merits issue (such as injury) just to be a part of the class. These competing considerations make it difficult to define a class properly and exclude uninjured class members. Procedurally, some courts view the question of uninjured class members through the lens of Article III standing, while most courts treat it as a Rule 23 issue. In a recent decision, *In re Asacol Antitrust Litigation*, -- F.3d --, No. 18-1065, 2018 WL 4958856 (1st Cir. Oct. 15, 2018) ("*Asacol*"), the First Circuit comprehensively addressed this issue, surveying the current state of the law and ruling that if a class definition includes uninjured class members (or at least class members whose injury cannot be presumed), a class cannot be certified because individual issues will predominate.

In *Asacol*, a pharmaceutical company discontinued selling a drug just before its patent protection expired. The company then introduced a similar drug with patent protection lasting years longer. That switch precluded other drug manufacturers from marketing generic versions of the discontinued drug (due to state substitution laws governing the prescription of generics by pharmacists). Alleging anticompetitive conduct, the class representatives filed suit against the pharmaceutical company, asserting violations of the state consumer protection and antitrust laws of 26 jurisdictions (25 states and the District of Columbia).

The class plaintiffs asserted that the pharmaceutical company made the switch to avoid lower-priced competition from generics. According to the plaintiffs, the members of the putative class could have saved money buying lower-priced generic drugs, instead of being locked into a market where they had no choice but to buy the more expensive (and patent protected) substitute drug. In other words, the pharmaceutical company "forced consumers into a 'hard switch' and maintained its monopoly power unencumbered by competition from generic entry." *Asacol*, 2018 WL 4958856, at *1. This liability theory is supported by a relatively recent Second Circuit decision condemning similar conduct. *See New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015).

Each of the consumer protection and antitrust claims asserted by the plaintiffs requires proof of injury (or

"injury in fact"). The evidence developed by both parties, however, demonstrated that a segment of the putative class suffered no injury. Specifically, the parties' experts agreed that certain class members would not have purchased an available generic drug (because, for example, the class members had no co-pay and thus would not have been price sensitive), but instead would have continued purchasing the more expensive drug. The district court estimated that 10% of the putative class fell into this "no injury" category.

Nevertheless, the district court certified a class of all persons in the 26 jurisdictions who originally purchased the discontinued drug and then purchased the substitute drug. Applying the First Circuit's 2015 decision in *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015) ("*Nexium*"), the district court ruled that the non-injured class members could later be culled from the class by a claims administrator, through the submission of declarations by individual class members.

The First Circuit reversed the district court's class certification order and, in so doing, limited its prior ruling in *Nexium* to the unique facts of that case. It also surveyed how the First Circuit's "sister circuits have addressed the treatment of uninjured putative class members." *See* 2018 WL 4958856, at *10 (Barron, J., concurring).

The pharmaceutical company raised two primary issues on appeal: (1) because the class representatives made purchases in only four jurisdictions, they lacked Article III standing to assert claims on behalf of class members who made purchases in the other 22 jurisdictions; and (2) the district court erred by certifying a class containing uninjured class members.

On the standing issue, the *Asacol* panel concluded that the class representatives had Article III standing to prosecute claims on behalf of class members in 25 or the 26 jurisdictions (excluding New York), concluding that the class representatives were incentivized "to adequately litigate issues of importance" to all of those class members. *Id*. at *4. In other words, the differences between the claims of the named plaintiffs and those class members were not so great to show that the class representatives had "an insufficient personal stake in the adjudication of the class members' claims." *Id*.

As for New York, the Court of Appeals explained that "New York's consumer protection statute requires proof of deception." *Id.* at *5. Because Plaintiff had not alleged deception to be a common issue in plaintiffs' operative complaint, and because the plaintiffs failed to address this issue on appeal, the class could not be certified as to New York residents. *Id*.

The *Asacol* panel then analyzed whether the named representatives could satisfy the requirements of Rule 23. The panel described this issue as follows: "Can a class be certified in this case even though injury-in-fact will be an individual issue, the resolution of which will vary among class members?" *Id*. at *6. To answer this question, the panel focused its attention on the First Circuit's prior decision in *Nexium*.

The *Nexium* case similarly involved allegations that a drug manufacturer took steps to prevent competition by generics. Similar to *Asacol*, injury-in-fact arose from the absence of lower-priced generic competition (in other

words, if available, the class members would have purchased cheaper generics). The defendant in *Nexium*, however, presented a categorical challenge to class certification, challenging the plaintiffs' theory of injury as hypothetical in nature and arguing they had no ability to prove injury at all. The *Nexium* court rejected that categorical challenge, ruling that, had the claim been litigated on an individual basis, a plaintiff could prove injury by testifying that he or she would have purchased the lower-cost alternative. The *Nexium* court further ruled that a class could rely on individualized evidence of injury, especially where the number of class members required to submit such evidence would be *de minimus*.

Importantly, the *Nexium* court did not envision any challenge to this individualized proof, ruling that "unrebutted testimony" set out in affidavits would suffice to cull out the uninjured class members. And the defendant in *Nexium*, relying on its categorical challenge, did not articulate a challenge to this individualized proof.

Federal Rule 23 constitutes a purely procedural device, and the rules of civil procedure and evidence should work the same way in class litigation as in individual litigation. In individual litigation, an uncontroverted evidentiary showing of injury at the summary judgment stage should result in the grant of summary judgment, eliminating any factual dispute about injury. So the *Nexium* ruling makes sense in its unique factual context.

In *Asacol*, in contrast, the defendant intended to challenge the affidavits, but effectively would have been foreclosed from raising this defense to liability under the district court's certification order (because it established a *post-judgment* process for the submission of "injury affidavits" by individual class members). In this context, the duty to accord individual and class cases similar substantive treatment required the opposite result from *Nexium*: "The fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act, 28 U.S.C. § 2072(b)." *Id*. at *8 (citing and quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1048 (2016) (evidence may not be used in a class action to give "plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action")).

In reaching this conclusion, the First Circuit conducted a useful survey of the law in this area:

The Second Circuit frames the issue as one of Article III standing: "no class may be certified that contains members lacking Article III standing," and the class must "be defined in such a way that anyone within it would have standing." *Id*. at *10 (citing and quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)).

The Eighth Circuit follows a similar rule, but without clearly tying it to Article III standing or Rule 23(b)(3) predominance. *Id*. (citing and quoting *Halvorson v. Auto-Owners Insurance Co.*, 718 F.3d 773, 779 (8th Cir. 2013) (denying class certification because the "individual inquiries" necessary to determine which class members were uninjured would "overwhelm questions common to the class.")).

The D.C. Circuit views the issue "through the prism of Rule 23(b)(3) predominance." *Id*. at *11 (citing and quoting *In re Rail Freight Fuel Surcharge Antitrust Litig.- MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013) (vacating

certification because class plaintiffs had failed to "show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.")).

The Fifth Circuit, according to the *Asacol* panel, articulates the "majority view": "[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." *Id*. (citing and quoting *Bell Atl. Corp. v. AT&T Corp.,* 339 F.3d 294, 302 (5th Cir. 2003)). This majority view has been followed by the Third Circuit and finds support in a prior First Circuit ruling. *Id*. (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) and *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008)).

The Seventh Circuit, in contrast, "does appear to have signaled a willingness to allow a district court to certify a damages class containing not 'a great many' uninjured members without requiring that there be a mechanism for eventually culling out the uninjured." *Id*. (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) and *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677-78 (7th Cir. 2009)).

The Ninth Circuit appears to apply a similar rule as the Seventh Circuit, "although to some uncertain extent [the Ninth Circuit] seems to rely in great part on a notion that being 'exposed to' injurious conduct can serve a proxy for common injury." *Id*. (citing and quoting *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016)). But, as the *Asacol* panel pointed out, neither the Seventh nor the Ninth Circuits "has explained what not 'a great many' means." *Id*.

The First Circuit ultimately concluded that, whatever differences existed among the Circuits, no appellate decision endorsed what the district court had done in the case before it: "In any event, in no case cited above, nor in any case to which plaintiffs have directed our attention, has a federal court affirmed a damages judgment in a class action against a defendant who was precluded from raising genuine challenges at trial to the assertion of liability by individual members of a class that was known to have members who could not be presumed to be injured. Nor has either party drawn to our attention any federal court allowing, under Rule 23, a trial in which thousands of class members testify. We see no reason to think that this case should be the first such case." *Id*.

The *Asacol* decision offers an excellent survey of current federal appellate authority on the issue of uninjured class members. And it outlines a defense strategy for resisting classes that include uninjured members. Outside the Second Circuit, class defense counsel should focus their efforts on showing how individualized injury issues outweigh any common issues. And in the Seventh and Ninth Circuits, defense counsel should vigorously preserve and insist upon the defendant's right to defend itself fully on the merits of any claim with injury-in-fact as an essential element, while endeavoring to develop as much as evidence as possible showing that a "great many" members of the putative class have not suffered injury.