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D.C. Circuit denies class certification where putative antitrust class includes uninjured class members

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In a prior post [*First Circuit addresses an issue that continues to vex (and split) the circuits: should a class be certified that includes uninjured class members?* (October 24, 2018)], we reported on a First Circuit antitrust decision (*In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018)) that surveyed the state of the law and ruled 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. We now add another federal circuit court of appeals to that list: *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL No. 1869, --- F.3d ---, 2019 WL 3850581 (D.C. Cir., Aug. 16, 2019). That case involved an alleged class of more than 16,000 shippers allegedly injured by a price-fixing conspiracy among the largest freight railroads in the United States. The district court denied class certification because the "regression analysis" performed by the class plaintiffs' expert witness – which constituted the class members' class-wide evidence for proving causation, injury, and damages – measured negative or no damages for over 2,000 members of the putative class. 2019 WL 3850581, at *1. Because (among other reasons), over 2,000 class members was not *de minimus*, the D.C. Circuit affirmed. *Id*. at *4-6. As with *Asacol*, the D.C. Circuit's decision outlines a defense strategy for opposing putative classes that include uninjured members.