Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

1st Circ. Weighs In On Uninjured Class Members Issue

By **Alden Atkins and Ryan Will** (October 24, 2018, 3:02 PM EDT)

Alden Atkins

Ryan Will

In nearly every class certification motion in antitrust cases, the parties dispute whether the putative class contains uninjured persons and whether their presence defeats class certification. Rule 23(b)(3) requires plaintiffs to show that common issues predominate, and this requires plaintiffs to show (among other things) that the element of antitrust injury can be proven with evidence common to the class. Defendants often respond that the proposed class includes members that have not been injured by the allegedly anti-competitive conduct, and therefore individual inquires of injury will overwhelm the common evidence. The parties typically present fact and expert evidence on antitrust injury, and they debate whether the presence of uninjured persons should be fatal to class certification and, if so, how many uninjured class members would defeat class certification.

The First Circuit recently addressed this recurring issue in In re Asacol Antitrust Litigation.[1] The court held that certifying a class with uninjured persons would deny the defendant's right to challenge whether a plaintiff has suffered antitrust injury, which is an element of every antitrust claim. In doing so, the court rejected arguments often made by plaintiffs in response — that uninjured class members can be removed in the post-judgment claims administrative process, and that defendants have no interest in how the damages are allocated to the class. And, the court emphasized that the federal circuits have split on this question, thus inviting the U.S. Supreme Court to review this important issue at the forefront of class certification.

Background of the Case

The underlying antitrust case challenged a so-called "product hopping" strategy involving Asacol, a drug that treats ulcerative colitis. Just a few months before its patent was set to expire, Warner Chilcott Ltd., the drug's manufacturer, withdrew Asacol from the market and replaced it with two similar drugs still under patent protection. This allegedly frustrated generic manufacturers from offering generic versions of Asacol. A group of union-sponsored benefit plans that paid for the replacement drugs filed a putative indirect purchaser class action against Warner, alleging that the drug switch was designed to preclude entry of lower-cost generic alternatives to Asacol, thereby maintaining Warner's monopoly power.

A federal district court in Massachusetts granted a motion to certify a class of people who purchased Asacol

prior to the date on which its patent expired and also purchased one of the patent-protected replacement drugs after that date. Consumer research offered by experts on both sides agreed that about 10 percent of Asacol customers would not have switched to generics if they had been available, which meant that approximately 10 percent of class members would not have been injured by the allegedly anti-competitive conduct. Nevertheless, the district court certified the class, accepting the plaintiffs' contentions that (1) uninjured class members could be removed post-judgment by a claims administrator, and (2) that the total damages could be reduced by the same 10 percent to account for the uninjured class members.

The First Circuit's Opinion

The First Circuit granted interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure and rejected this approach. At the heart of the court's opinion is the concern that it would be unfair and violate Warner's Seventh Amendment and due process rights to prevent Warner from challenging at trial whether individual class members suffered injury in the name of efficiency. Antitrust injury is an element of every antitrust claim, and a defendant with a legitimate defense should be permitted to present its defense before it is held liable to a class that includes members who cannot prove an antitrust claim. Allowing a claims administrator to weed out uninjured persons post-judgment would unfairly deny Warner the right to present this defense. The First Circuit also rejected the plaintiffs' proposed workaround that would reduce the damages by 10 percent to account for the estimated 10 percent uninjured class members. Doing so, according to the court, "flies in the face of the core principal that class actions are the aggregation of individual claims, and do not create a new entity or reapportion substantive claims."[2] The court rejected the plaintiffs' argument — often made in these circumstances — that the defendant has no interest in how the damages are allocated among class members.

The First Circuit concluded that denying class certification would not undermine the policies for class actions. The court recognized that "there remains the problem of how to deal with conduct that inflicts small amounts of damage on large numbers of people."[3] It acknowledged that class certification is intended to address that problem. Other courts had said that such "negative value" suits provide the "most compelling rationale for finding superiority in a class action."[4] But the First Circuit was unpersuaded. It said that concern gives courts no license in class actions to alter or reallocate substantive rights or to depart from the rules of evidence. It said there are other tools to address that concern, such as lawsuits by regulators, parens patriae suits by governments, and private litigants could use the specter of res judicata and issue preclusion from judgments in individual lawsuits to induce aggregate settlements.[5]

The strength of the evidence showing there were uninjured class members was important to the court's decision. In a prior case, In re Nexium Antitrust Litigation,[6] the First Circuit had affirmed class certification, stating that a mechanism to prove injury could be established by requiring class members to submit affidavits affirming their injury. The Nexium court said that such "unrebutted" testimony would suffice.[7] In Asacol, the court said that in Nexium neither the district court nor the First Circuit "ever learned whether the defendants would in fact rebut any affidavits" from class members.[8] The distinguishing factor in Asacol was that the defendant had a well-supported defense that some class members were not injured. Thus, where injury-in-fact is an element of a claim, "a class cannot be certified based on an expectation that the defendant will have no opportunity to press at trial genuine challenges to allegations of injury-in-fact."[9]

Where to Draw the Line?

Plaintiffs and defendants often debate whether a class can be certified when it contains uninjured persons and, if so, how many is too many uninjured class members to certify a class. The court in Asacol made a

point to say "[w]e have not previously required every class member to demonstrate standing when a class is certified, nor do we do so today."[10] No other court has gone so far as to say the presence of a de minimus number of uninjured class members would preclude class certification. The First Circuit would have been less troubled if only a "few unusual class members" could have been "picked off" by the defendant.[11]

The court also would have been less troubled if plaintiffs had offered a method, using proof that is common to the class, to identify and eliminate those uninjured class members prior to a liability determination. Where a defendant has a genuine defense to injury, the court said that a district court must have a "workable plan" to protect defendants' constitutional rights to present that defense that "does not cause individual inquiries to overwhelm common issues."[12] The court concluded "[t]hese plaintiffs have plainly not enabled the district court to articulate such a plan."[13]

The First Circuit's opinion highlights the uncertainty across the circuits about where to draw the line. Although several circuits, including the Third, Fifth and Eighth analyze uninjured class members through the lens of Rule 23(b)(3)'s predominance requirement, none have set forth a clear standard on when individual questions regarding injury erode common questions to the point of failure.[14] Even in circuits, including the Seventh and Ninth, that will certify a class with some uninjured members, just how many is too many is up for debate.[15]

The cases provide some clues about where the threshold may lie. The First Circuit (in Asacol) obviously concluded that 10 percent was not de minimus. In the Rail Freight litigation, the D.C. Circuit reversed an order certifying a class, saying that plaintiffs must show that "all class members were in fact injured."[16] On remand, the district court in the Rail Freight found that 12.7 percent was too high, and cited cases suggesting that 5 percent to 6 percent of uninjured class members is the outer limit of de minimus. That is is one of the issues presently being appealed in Rail Freight.[17] Asacol and Rail Freight also note that the absolute number estimate of uninjured class members is relevant to a practical determination of predominance; a court can obviously weed out 10 clearly uninjured class members more easily than it can 2,000.

Takeaways

For many years, antitrust injury has been one of the central issues in antitrust cases for class certification. The Asacol opinion reinforces the importance for plaintiffs and defendants to present evidence on this issue. Neither plaintiffs nor defendants should rely on arguments and policy. To demonstrate a genuine defense to injury, the defendant must present persuasive factual and/or expert evidence that a significant number of class members have not been injured. If other courts follow Asacol, plaintiffs cannot brush those concerns aside with arguments that uninjured persons can be removed through the claims administration process, or that the defendant has no interest in how the damages are allocated. Instead, the plaintiffs must address the defendants' noninjury evidence head on. If the evidence of noninjury is strong enough, Asacol instructs that plaintiffs must present a method to identify the uninjured class members and a plan to allow defendants to present their injury defenses. That plan must not raise so many individual inquiries that it would defeat the predominance of common issues.

In addition, the First Circuit all but encourages the Supreme Court to review this issue. It refers to the "divergence" of views among the different federal circuits.[18] Recent Supreme Court cases like Comcast and Tyson Foods potentially raised issues about whether a class could be certified if it includes a significant number of uninjured persons, but the court decided those cases without resolving those issues.[19] This may be the case raising this important issue in class certification jurisprudence.

Alden L. Atkins is a partner and Ryan Will is an associate at Vinson & Elkins LLP.

[1] In re: Asacol Antitrust Litigation, No. 18-1065, 2018 WL 4958856 (1st Cir. Oct. 15, 2018).

[2] Asacol at *10.

[3] Id.

[4] Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996).

[5] Asacol at *10..

[6] In re Nexium Antitrust Litigation, 777 F.3d 9 (1st Cir. 2015).

[7] Id. at 20-21.

[8] Asacol at *7.

[9] Id. at *11.

[10] Id..

[11] Id..

[12] Id..

[13] Id.

[14] See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294 (5th Cir. 2003); Halvorson v. Auto-Owners Insurance Co., 718 F.3d 773 (8th Cir. 2013).

[15] See Messner v. Northshore Univ. Healthsystem, 669 F.3d 802 (7th Cir. 2012); Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672 (7th Cir. 2009); Torres v. Mercer Canyons Inc., 835 F.3d 1125 (9th Cir. 2016).

[16] In re Rail Freight Fuel Surcharge Antitrust Litigation, 725 F.3d 244, 252 (D.C. Cir. 2013).

[17] In re Rail Freight Fuel Surcharge Antitrust Litigation, 292 F.Supp. 3d 14 at 137 (D.D.C. 2017).

[18] Asacol at *10.

[19] Comcast Corp. v. Behrend, 569, U.S. 27, 33 (2013); Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045-47 (2016).