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## In Win for WLF, Court Bars Certification of Class Actions When the Class Includes Uninjured Plaintiffs

*(In re Asacol Antitrust Litig.)*

**“A class action becomes totally unmanageable when, as here, it is undisputed that many members of the proposed class were not injured. The class does not satisfy Rule 23 standards when a trial would require an individual-by-individual determination of liability.”**

**—Richard Samp, WLF Chief Counsel**

WASHINGTON, DC—The U.S. Court of Appeals for the First Circuit in Boston late yesterday overturned a district court’s certification of a near-nationwide class action involving antitrust claims against a pharmaceutical manufacturer. The decision in *In re Asacol Antitrust Litigation* was a major victory for WLF, which filed a brief arguing that class certification was particularly objectionable because many members of the class were not injured by the defendant’s alleged wrongdoing—yet the plaintiffs did not demonstrate any method by which the injured could be separated from the uninjured by means of common proof.

Rule 23(b)(3) of the Federal Rules of Civil Procedure states that a class may be certified only if the plaintiff demonstrates that common issues of fact or law predominate over individual issues. The First Circuit held that the predominance requirement barred class certification because a determination of which class members suffered any injury would have to be determined on an individualized basis.

The lawsuit focuses on the marketing of Asacol, a drug approved by FDA for treating ulcerative colitis. The plaintiffs—four union-sponsored health-benefits plans—assert that the manufacturer violated state antitrust laws by taking allegedly anticompetitive measures designed to thwart generic competition. But expert witnesses on both sides agreed that even if generic competition had begun more quickly, at least 10% of those using the defendant’s drugs would have continued doing so instead of switching to lower-cost generic competition. The appeals court explained that consumers who would not have switched were not injured and thus could not maintain a cause of action.

The appeals court rejected the plaintiffs’ proposed solution: conducting a class-wide trial on the issue of liability and then reducing any damages award to account for the existence of uninjured plaintiffs. The court held that when the evidence indicates that more than a negligible number of class members were not injured by the alleged misconduct, an antitrust defendant is entitled to challenge *every* individual plaintiff on the issue of liability. This last portion of the First Circuit’s ruling is very significant. Some other courts have been willing to certify classes despite the existence of uninjured plaintiffs, reasoning that a jury should be permitted to calculate aggregate damages based on findings regarding how many class members suffered no injury.

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