



IN *IN RE ASACOL*, FIRST CIRCUIT SHOWS WHAT A RIGOROUS ANALYSIS OF PREDOMINANCE LOOKS LIKE

by Andrew J. Trask

Class actions are famous for turning low-value individual claims into high-stakes aggregated litigation. But one under-discussed side effect of that aggregation is its tendency to obscure the fact that in many cases, much of the class simply has not been injured. Not “injured by only a few pennies,” but not injured at all. Back in 2014, Covington & Burling LLP associate Alexandre Biard published a working paper through the Rotterdam Institute for Law & Economics: Alexandre Biard, *Iudex non calculat?: Judges & the Magnitude of Mass Litigation from a Behavioural Perspective*, ROTTERDAM INSTITUTE OF L. & ECON. Working Paper No. 2014/07, <http://ssrn.com/abstract=2517882> (last viewed Dec. 21, 2018).

Biard’s paper provided rigorous economic support for an intuition long held by defense practitioners: one danger of class actions is that the sheer number of claims can convince a judge that problems exist where they really do not. Once the numbers get large enough, as Biard observes, judges get “short-sighted on the concrete consequences and implications of their decisions.” In other words, if you allege enough people have suffered a harm, a judge will be strongly tempted, even unconsciously, to take short cuts in resolving the alleged harm.

In the past year, a trend has emerged that indicates that appellate judges may be paying more attention to curbing the short cuts that frequently suggest themselves in class actions. The most recent case indicating this trend is *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018). The plaintiffs in *Asacol* alleged that the defendant had committed anticompetitive conduct by withdrawing drugs at the end of their patent life (right before they would have to compete with cheaper generics), replacing them with similar drugs with longer patents. 907 F.3d at 45. In its certification decision, the lower court found that roughly ten percent of the class would not have switched to a cheaper generic if it were available, meaning that ten percent suffered no economic harm because of the alleged conduct. *Id.* The trial court certified the class anyway, relying on plaintiffs’ promise that a damages hearing could sort injured from uninjured class members through the use of affidavits, a method seemingly blessed in another First Circuit precedent, *In re Nexium*, which had affirmed a certification of a similar class with potentially uninjured buyers. *Id.* at 47 (citing *In re Nexium*, 777 F.3d 9 (1st Cir. 2015)).

The *Nexium* opinion had addressed a similar class where it appeared a non-negligible number of class members might never have been injured by the alleged price increases on a drug. The First Circuit had ultimately affirmed certification in that case (over the dissent of Judge Kayatta, who authored the *Asacol* opinion), reasoning that claimants could certify their injury by affidavit; if un rebutted, the affidavit would suffice as proof. 777 F.3d at 20. Given the arguably small number of uninjured class members, the *Nexium* court held that challenges to individual affidavits would not overwhelm the common issues it had identified. *Id.*

The *Asacol* defendants filed a Rule 23(f) petition to challenge the trial court’s certification. The First Circuit took the appeal because there was a split among appellate circuits about whether certifying a class with uninjured members was appropriate, and also because the issue would likely recur before a final judgment and appeal in this case. 907 F.3d at 47. (It is worth pausing to note that this focus on whether an issue will recur

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provides a newly announced justification for Rule 23(f) interlocutory review in the First Circuit, one that may well prove persuasive in other circuits as well.)

The First Circuit panel—consisting of two President Obama appointees (Judges Kayatta and Barron) and a President Clinton appointee (Judge Lynch)—reviewed the certification opinion for two issues raised by the presence of uninjured class members: first, did the absent class members have standing to assert claims under the named plaintiffs’ antitrust theories, and second, was the class properly certified?

The First Circuit definitively found the class would have standing. As it explained: “assuming a proper class is certified, success on the claim under one state’s law will more or less dictate success under another state’s law.” *Id.* at 49. Since a properly certified class would have accounted for any differences in state law as part of its predominance inquiry, there would be no bar to allowing the named plaintiffs to represent class members from other states in the class. That, of course, begged the second question: was the class properly certified? Here, the First Circuit answered “no.” The class that had been certified was not one in which, as Rule 23(b)(3) required, common issues predominated over individualized issues.

The panel reviewed the aim of the predominance inquiry, which is “to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not ‘inefficient or unfair.’” *Id.* at 51. As it conceived these two conditions, an inefficient result would create “a line of thousands of class members” waiting to offer evidence in order to resolve their claims. *Id.* An unfair result, by contrast, would move quickly at the expense of depriving the defendant of “plausible individual challenges.” *Id.* at 51-52.

In this case, the plaintiffs’ offer of affidavit testimony about whether they were in the ten percent of uninjured buyers would prove inefficient once challenged by the defendants. Not requiring that testimony, however, would be unfair to the defendants. The *Asacol* panel distinguished *Nexium*—which had endorsed a similar approach—by pointing out that neither the lower court nor the First Circuit panel had known whether the *Nexium* defendants would challenge the proposed affidavits, while the *Asacol* defendants were standing on their rights to challenge each affidavit. *Id.* at 52. The *Asacol* panel refused to presume that “these plaintiffs can rely on un rebutted testimony in affidavits to prove injury-in-fact.” *Id.* at 53. Indeed, it noted, a challenged affidavit would not prevail at a summary judgment hearing, let alone a Seventh Amendment trial. *Id.*

The *Asacol* panel offered several other reasons plaintiffs would not be able to rely on affidavits, including the fact that injury in fact was an element of the underlying claim (as opposed to an affirmative defense or component of damages), that there was no manageable way to isolate uninjured class members and confirm their status, and that no substantive law allowed statistical or representative proof to stand in for individualized evidence (as had been the case when the Supreme Court affirmed the use of statistical proof of injury in an unpaid-wage class action in *Tyson Food, Inc. v. Bouaphakeo*). *Id.* at 53-54.

Finally, and perhaps most importantly, the panel stressed that it could find no principled reason to certify a class where the court knew ten percent of the members were uninjured, but not then certify a class where fifty-one percent of the class (or, to be more extreme, ninety percent) were uninjured. *Id.* at 55-56.

The *Asacol* opinion is important for its stressing rigorous analysis over judicial intuition when evaluating the predominance inquiry. But it also serves as an important reminder to those litigating large, complex class actions to assert their substantive rights to a full defense, even in the face of a hostile court or adverse precedent. As Judge Barron wrote in his concurrence, it is understandable that the trial court had relied on the *Nexium* opinion; at first glance it appeared to govern the situation before it. *Id.* at 59. Had either the defendant or the *Asacol* panel refused to delve deeper into how the proof would actually play out at a classwide trial, the lower court’s certification would likely have stood, and probably have resulted in a problematic no-injury class settlement. But class actions require closer looks, and *Asacol* teaches the importance of rigorous analysis of the predominance requirement, by both litigators and by courts.