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Defense Bar Gives 1st Circuit an 'A+' for Its Order on Uninjured Class Members

A significant opinion by the U.S. Court of Appeals for the First Circuit is expected to bolster the defense argument that judges shouldn't grant certification of class actions with uninjured class members. Judge William Kayatta wrote on Oct. 15 that a judge should not have granted certification of an antitrust class in which 10 percent of the class members had no injuries.

By Amanda Bronstad | October 23, 2018

Ulcerative colitis treatment Asacol. Photo: JB Reed/Bloomberg

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William Kayatta Jr., a judge on the First Circuit, wrote on Oct. 15 (https://images.law.com/contrib/content/uploads/documents/398/25375/Asacol-Decision-10-19.pdf) that a federal district judge should not have granted certification of a class action alleging antitrust violations over the anti-inflammatory prescription drug Asacol.

"In making those determinations, the district court grappled with a problem that has been the source of much debate among the circuits: the presence of uninjured class members," Kayatta wrote. A federal district judge had granted certification in a Nov. 9 order even though an estimated 10 percent of the class might not be injured.

"We find this approach to certifying a class at odds with both Supreme Court precedent and the law of our own circuit," Kayatta added.

Many in the defense bar praised the decision, which they plan to use in future cases to defeat class certification. Among them is Scott O'Connell, a Boston partner at Nixon Peabody who is following the case. "This is definitely a helpful decision for defense of class action claims," he said. "It's a welcome development for those of us on the defense side of cases."

The defendant, Allergan, and its lawyer, White & Case Washington, D.C., partner J. Mark Gidley, did not respond to requests for comment. Lead plaintiffs lawyer Justin Boley, a partner at Chicago's Wexler Wallace, declined to comment, including about whether he planned to file a petition for rehearing.

This is not the first time Kayatta, who is an appointee of President Barack Obama, has taken a tough stance on class certification. In a case involving heartburn medication Nexium, he wrote the dissent in a 2015 opinion in which the majority provided one of the most exceptionally plaintiff-friendly opinions on the issue. That decision, cited frequently by plaintiffs, allowed uninjured class members in the class so long as they provided affidavits about their purchasing decisions.

The Asacol ruling, if it stands, could be "extremely significant" for defendants in class actions, said Richard Samp, chief counsel at the Washington Legal Foundation, which filed an amicus brief in the case. "The First Circuit seems to be saying that unless you can show that everybody in the class can establish liability, you may not have class certification," Samp said. "And, to me, that's a very big deal."

Scott Nelson, an attorney at Washington, D.C.-based Public Citizen Litigation Group, which filed an amicus brief for the plaintiffs in the *In re Nexium Antitrust Litigation* case, called it "premature to declare antitrust class actions based on manipulative practices aimed at excluding generic competition dead in the First Circuit."

The issue in both cases focuses on unnamed class members—not the named plaintiffs that bring class actions. Defendants have argued that class actions should not be certified at all if they include unnamed class members who don't have the same injuries as those outlined in the case. Plaintiffs, however, have insisted those differences can be worked out in the case down the line, possibly through the use of affidavits.

In *Nexium*, the First Circuit upheld certification of a class of consumers, insurance firms and employee benefit plans in 24 states after concluding that the number of uninjured plaintiffs was "not so large as to render the class impractical or improper." Such a "de mimimis number of uninjured members" could be identified later in the case, possibly through individual affidavits, wrote Judge Timothy Dyk of the Federal Circuit, sitting by designation and joined in the majority opinion by First Circuit Judge Juan Torruella, a Ronald Reagan appointee.

But Kayatta, in his *Nexium* dissent, said the plaintiffs hadn't established a method to ensure that was true. As many as 24,000 potential members of an estimated 1 million might be uninjured, he wrote. Then, last year, Kayatta weighed in on a related issue of whether lawyers could identify unnamed class members—an issue the class action bar calls ascertainability. He penned (https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/08/01/1st-circuit-dissenter-courts-must-eye-ascertainability-of-consumer-classes/) a dissent that

accompanied the First Circuit's rejection of an interlocutory appeal in a case over the labeling of Dial Corp.'s antibacterial soap, warning his colleagues of "further mischief" that could challenge the constitutional rights of defendants—such as "say-so" affidavits.

Asacol is a medication used to treat ulcerative colitis, a bowel inflammation disorder. Four union-sponsored benefit plans filed a lawsuit accusing Warner Chilcott, now owned by Allergan, of pulling Asacol off the market just prior to its patent expiring and then introducing an identical patented medication. Such acts prevented generic competition, according to the lawsuit, brought under the consumer and antitrust laws of 25 states and Washington, D.C.

The First Circuit took up an interlocutory appeal of the class certification order given that it "raises issues on which circuits are split and that are likely to arise in other cases in this circuit."

Kayatta, in the majority opinion, quickly brushed aside Allergan's chief argument that the lead plaintiffs lacked standing to bring the class action because they came from only four of the states. He moved onto the second issue involving uninjured class members, writing that the First Circuit's decision was in line with other circuits and its own precedent in *Nexium*. Unlike *Nexium*, the defendant in *Asacol* intended to challenge affidavits, he wrote. But there wasn't a procedure to do so, particularly since uninjured class members could have numbered in the thousands.

"Our inability to fairly presume that these plaintiffs can rely on unrebutted testimony in affidavits to prove injury-in-fact is fatal to plaintiffs' motion to certify this case," Kayatta wrote. "We also reject any invitation to rewrite *Nexium* as sanctioning the use of inadmissible hearsay to prove injury to each class member at or after trial."

In a concurring opinion, First Circuit Judge David Barron, another Obama appointee, agreed that the class should be decertified but wrote that he could envision cases in which lawyers could use affidavits to prove individual injuries, particularly if there was only a "small identifiable subset" of them.

"In the event that plaintiffs made those showings, I could see how, in light of *Nexium*, a court might be able to conclude that the plaintiffs, at the certification stage, could succeed in showing that resolution of the injury issue would not require an impermissibly large number of individualized determinations," he wrote.

That gave plaintiffs lawyers some hope.

"I expect lawyers will be closely studying Judge Barron's concurring opinion to determine how best to assure that the overwhelming majority of purchasers who are injured by such violations are able to pursue effective class remedies," wrote Nelson, of Public Citizen.
