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February 2, 2015

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First Circuit Upholds Class Certification in Nexium Indirect Purchaser Case

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In a split decision, the U.S. Court of Appeals for the First Circuit affirmed the certification of a class of indirect purchasers who allege that they paid inflated prices for the heartburn drug Nexium. *In re Nexium Antitrust Litig.* (available at http://media.ca1.uscourts.gov/pdf.opinions/14-1521P-01A.pdf), No. 14-5121, 2015 U.S. App. LEXIS 968 (1st Cir. Jan. 21, 2015). In a departure from several other courts of appeal, the First Circuit upheld certification, even though as many as 24,000 class members may have suffered no injury and the plaintiffs failed to identify a method to cull such class members before judgment.

In *Nexium*, union health and welfare funds representing a putative class of individual consumers and third-party payors allege that several pharmaceutical manufacturers violated antitrust laws by agreeing to patent litigation settlements that impermissibly delayed generic competition for Nexium. District Court Judge William Young certified a class of individuals and entities who indirectly purchased branded Nexium or its generic equivalents beginning on April 14, 2008.

In their appeal, the defendants argued that Judge Young's grant of class certification conflicted with *New Motor Vehicles Canadian Export Litigation*, in which the First Circuit held that, to satisfy Rule 23(b)(3)'s predominance requirement, plaintiffs must prove through common evidence that "each member of the class was in fact injured." 522 F.3d 6, 28 (1st Cir. 2008). The defendants explained that the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, as well as decisions from the District of Columbia, Third and Fifth Circuits,[1] were all in accord with the *New Motor Vehicles* rule. The defendants therefore argued that certification was improper because the class included members who were not injured by generic foreclosure, including brand-loyal individuals who would have continued to pay for branded Nexium, regardless of generic competition.

> The decision to uphold certification, even though a number of plaintiffs may not have been injured, represents a split from other circuit court decisions.

The First Circuit acknowledged that the plaintiffs had not proposed a mechanism for excluding uninjured brand loyalists. The court rejected the defendants' challenge, however, explaining that only a *de minimis* number of class members — approximately 2.4% of the class — were uninjured.[2] Relying on the Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), the court held that, even where a *de minimis* number of uninjured class members exists (and issues of injury-in-fact therefore present individual questions), it does not necessarily follow that individual issues predominate over common ones. The court explained that individual class members could establish injury later in the case by submitting affidavits stating that they would have switched to generic Nexium had it been available.

Judge Kayatta's dissenting opinion agreed that a class including uninjured consumers may be certified if there is an administratively feasible and fair method of identifying and removing those consumers prior to judgment. He disagreed, however, that the Court of Appeals should "don[] the hats of both plaintiffs' counsel and the district court by first proposing, sua sponte, a culling method that no party has proposed—limiting recovery to consumers who file affidavits—and then announcing itself quite satisfied with that method."[3] Judge Kayatta noted that the Third Circuit announced limitations on the use of affidavits in class action cases in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) and *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012), and that the majority's method raised practical questions concerning, for example, notice to class members. He also observed that 2.4% of the class may constitute as many as 24,000 consumers, and he explained that culling such a big number would almost certainly present challenges, even though culling a similarly small percentage of a class of 30 would be relatively easy.

While the defendants' interlocutory appeal of Judge Young's class certification decision was pending, the defendants won a jury verdict in their favor on the merits. However, even though the decision's impact on the *Nexium* litigation is uncertain, it has already caused a stir. *Nexium* puts the First Circuit in conflict with the Third Circuit, which has limited the use of affidavits in class actions, and several circuit courts, which have held that plaintiffs must be able to prove injury to all class members. With this split, *Nexium* may be a contender for Supreme Court review.

Endnotes

1. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (holding that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (requiring "[t]he plaintiffs [to] show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (requiring injury to "every class member"); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (requiring proof of injury "for every class member through proof common to the class").
2. Although the defendants argued that the number of uninjured class members was more than *de minimis*, the court found problems with the defendants' theories that consumers who used coupons to purchase Nexium and some groups of third-party payors were uninjured.
3. Relatedly, Judge Kayatta objected to the majority's suggestion that defendants bear the burden of demonstrating that culling cannot feasibly be accomplished. Plaintiffs bear the burden of showing that Rule 23 has been met, including by showing that a method exists for excluding uninjured members prior to judgment. If the plaintiffs had done their job, Judge Kayatta explained, there would be no need for the court to propose a culling method *sua sponte*.