

Class Certification in Nexium ‘Pay for Delay’ Litigation Survives Appeal

By Bo Griffith, J.D. Candidate 2016 | January 29, 2015

On January 21, the U.S. Court of Appeals for the First Circuit concluded that a [district court did not abuse its discretion](#) in certifying a class of Nexium purchasers in their “pay for delay” claim against the drug’s producer, AstraZeneca. The plaintiff class, made up of Nexium purchasers, asserted a Sherman Act claim against AstraZeneca, arguing the drug company injured consumers by foreclosing generic markets of the heartburn drug.

This foreclosure allegedly occurred under a settlement agreement arising out of a patent infringement dispute between AstraZeneca and three generic drug companies, in which AstraZeneca [paid the generic defendants large sums of money](#) in exchange for not challenging the validity of the Nexium patent, and delaying the release of cheaper generic forms of the drug until the patent’s expiration in 2014 (“payment for delay”). The plaintiffs claim the [settlement constituted an unlawful agreement](#) between AstraZeneca and the generic defendants because the patents were likely invalid. The case is the first pay-for-delay suit to go to trial [since the U.S. Supreme Court ruled](#) that Hatch-Waxman Act settlements could be scrutinized for antitrust violations in the 2013 case *FTC v. Actavis*.

AstraZeneca challenged the class certification under the Federal Rules of Civil Procedure based [on a brand-loyalty theory](#), arguing that the presence of uninjured parties [was not de minimis](#) and therefore defeats the predominance requirement because it precludes common proof at trial. The First Circuit disagreed and upheld a challenge to the class certification by the drug maker, justifying their decision on the grounds that the possibility of a de minimis amount of purchasers not harmed does not foreclose a conclusion that common issues of law and fact predominate among class members. The court reasoned that “[Defendants ha\[d\] merely speculated](#) that a mechanism for exclusion c[ould not] be developed later. This [was] not enough to overcome plaintiffs’ case for having met the requirements of Rule 23.”

The [court later distinguished *Walmart v. Dukes*](#), noting that Walmart did not require that every member of the class establish they were in fact injured for purposes of class certification. The court’s final conclusion that when a mechanism for identifying which parties were injured and which were not exists, the presence of a de minimis number of uninjured parties does not defeat a class action, allows the present case to move forward and may have sweeping implications towards future consumer class actions.