Business Litigation

Antitrust and Competition Law

In Divided *En Banc* Ruling, Ninth Circuit Holds That the Potential Presence of Uninjured Class Members Does Not Defeat Class Certification

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In April 2021, the Ninth Circuit issued its panel opinion in *Wholesale Grocery Cooperative v. Bumble Bee Foods LLC*, which held that the district court erred in certifying several classes of tuna purchasers in an antitrust class action because it failed to resolve the parties' dispute over whether the plaintiffs' class-wide damages model "mask[ed] individualized differences" between putative class members. In reaching this conclusion, the Ninth Circuit held that a district court cannot certify a class unless it includes only a "de minimis" number of uninjured class members. It also emphasized that the district court could not determine whether individualized issues predominated without first resolving the "factual disputes as to how many uninjured class members are included in Plaintiffs' proposed class," even if those disputes also bear on the merits. In April 2022, however, the Ninth Circuit issued a split *en banc* opinion in which it rejected the panel majority's "de minimis" requirement and held that the district court did not err in certifying a class. The *en banc* opinion—which not only rejects a "de minimis" standard, but also discourages district courts from resolving merits issues at the class certification stage—deprives defendants in the Ninth Circuit of a critical weapon to oppose the certification of overbroad classes.

The Ninth Circuit's Panel Opinion

Olean Wholesale arises from a long-running multidistrict litigation alleging that major tuna suppliers, who collectively sell over 80% of the tuna consumed in the United States, engaged in a price-fixing conspiracy that resulted in purchasers—including retail chains and other direct purchasers, indirect purchasers who bought tuna for food preparation or resale, and end consumers—paying inflated prices for tuna. When the purchasers moved for class certification, they sought to show class-wide antitrust injury through a regression model that attempted to demonstrate the average overcharge associated with the price-fixing conspiracy. The plaintiffs' expert concluded not only that the average purchaser was overcharged by 10.28% as a result of the alleged price fixing, but also that approximately 94.5% of purchasers were overcharged at least some amount. In contrast, the defendants' expert opined that this regression model was flawed because it relied on an average estimated overcharge for all purchasers, which falsely assumed that every purchaser was injured in the same way. When the defendants' expert conducted a regression analysis based on a "unique overcharge coefficient" for over 600 individual class members, he concluded that only 72% of class member paid an inflated price—and that 28% of class members suffered no injury at all. Despite these objections, the district court granted the class certification motion. Although it agreed that the defendants' criticisms of the plaintiffs' damages model were "serious" and "could be persuasive to a finder of fact," the district court nonetheless concluded that "determining which expert is correct is beyond the scope" of a class certification motion and agreed that the plaintiffs' damages model was "capable of showing" a class-wide antitrust injury.

A divided three-judge panel vacated the class certification order. Writing for the panel majority, Judge Bumatay—joined by Judge Kleinfeld—agreed that plaintiffs can use "representative evidence" to satisfy Rule 23(b)(3)'s predominance requirement and establish class-wide injury, that the plaintiffs' statistical evidence was sufficiently tied to their theory of antitrust injury, and that their expert's use of "averaging assumptions" did not defeat a finding of predominance. Nonetheless, Judge Bumatay noted that

"[s]tatistical evidence is not a talisman" and that courts "cannot embrace [the plaintiffs' conclusions and averaging assumptions uncritically." Instead, "[c]ourts must still rigorously analyze the use of such evidence to test its reliability and to see if the statistical modeling does *in fact* mask individualized differences."

Consistent with that principle, Judge Bumatay stressed that a "key factual determination courts must make is whether the plaintiffs' statistical evidence sweeps in uninjured class members," and he held that the district court erred by "declining to resolve the competing expert claims on the reliability of Plaintiffs' statistical model." Although the district court characterized this dispute as a "merits issue," Judge Bumatay concluded that "resolving this dispute is of paramount importance to certification of the class," as it was necessary to determine whether the class definition encompassed an impermissibly high number of uninjured class members. In so holding, Judge Bumatay acknowledged that the Ninth Circuit had "not established a threshold for how great a percentage of uninjured class members would enough to defeat predominance," but he nonetheless concluded that it "must be *de minimis*." While Judge Bumatay declined to "set the upper bound of what is *de minimis*," he stressed that "it's easy enough to tell that 28% would be out-of-bounds." And while he credited the district court for "admirably and thoroughly marshaling the evidence in this difficult case," he ultimately concluded that "the district court needed to go further by revolving the parties' dispute over whether the representative evidence swept in only 5.5% or as much as 28% uninjured [class] members."

Judge Hurwitz dissented in part and "part[ed] company . . . with the majority's conclusion that, before certifying a class, the district court must find that only a '*de minimis*' number of class members are uninjured." In reaching this conclusion, Judge Hurwitz emphasized that "[t]he text of Rule 23 contains no such requirement" and that "our caselaw squarely forecloses the majority's approach." Relying on the Ninth Circuit's decision in *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125 (9th Cir. 2016), Judge Hurwitz reasoned that "[t]he critical question is not what percentage of class members is injured, but rather whether the district court can economically 'winnow out' uninjured plaintiffs to ensure they cannot recover for injuries they did not suffer." "If the district court can ensure that uninjured plaintiffs will not suffer," Judge Hurwitz continued, "their mere presence in the putative class does not mean that common issues will not predominate."

Furthermore, Judge Hurwitz observed not only that "no Ninth Circuit case imposes a cap on the number of uninjured plaintiffs as a prerequisite to class certification," but also that "[a] numerical cap on uninjured class members is not very helpful to district courts analyzing predominance." While "a large percentage of uninjured plaintiffs may raise predominance concerns," Judge Hurwitz noted, Rule 23 is still "not categorical with respect to the number of uninjured plaintiffs." For that reason, Judge Hurwitz concluded that imposing a "de minimis" requirement would "effectively rewrite[] Rule 23" and suggested that the majority had "legislate[d] from the appellate bench based on [its] personal concerns with the class action device." Instead of imposing a *per se* rule on the number of uninjured class members a class can contain, Judge Hurwitz stated that the court "should instead leave fact-based determinations on predominance to the sound discretion of the district courts." "Put simply," Judge Hurwitz concluded, "the *de minimis* rule is a solution in search of a problem."

The Ninth Circuit's *En Banc* Opinion

Several months after the panel majority issued its decision, the Ninth Circuit agreed to rehear the case *en banc*. In April 2022, just over a year after the panel majority issued its initial opinion, the *en banc* court reversed course, rejected the panel majority's "de minimis" requirement, and affirmed the district court's class certification order.

Writing for the *en banc* majority, Judge Ikuta began from the premise that, in assessing whether a plaintiff's statistical evidence is sufficient to satisfy Rule 23's commonality and predominance requirements, "a district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." Relying primarily on *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), Judge Ikuta noted that "[m]erits questions may be considered [only] to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are

satisfied" and that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." Consistent with that reasoning, Judge Ikuta emphasized that "a district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue." And Judge Ikuta similarly stressed that a district court cannot "decline to certify a class that will require determination of some individualized questions at trial, so long as such questions do not predominate over the common questions."

Based on those broad principles, Judge Ikuta rejected the proposition that "Rule 23 does not permit the certification of a class that includes more than a de minimis number of uninjured class members." Judge Ikuta explained that this rule is "inconsistent with Rule 23(b)(3), which requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages." Although Judge Ikuta acknowledged that the dissent raised "policy questions" about whether "district courts should refrain from certifying classes that may include more than a de minimis number of uninjured class members," she emphasized that "we are bound to apply Rule 23(b)(3) as written, regardless of policy preferences." Moreover, Judge Ikuta asserted that the court's "conclusion that courts must apply Rule 23(b)(3) on a case-by-case basis, rather than rely on a per se rule that a class cannot be certified if it includes more than a de minimis number of uninjured class members, is consistent with the approach taken by our sister circuits." And while Judge Ikuta agreed that "a court must consider whether the possible presence of uninjured class members means that the class definition is fatally overbroad," she found that this did not require courts to adopt a *per se* rule that the presence of a certain percentage of uninjured class members defeated certification.

After holding that Rule 23 did not preclude certification of a class that included more than a *de minimis* number of class members, Judge Ikuta then concluded that the district court "did not make any legal or factual errors" in granting the plaintiffs' class certification motion. Although Judge Ikuta noted the district court's conclusion that "the defendants' critique of [the plaintiffs'] model could be persuasive to a jury at trial," she emphasized that "at this stage of the proceedings, its task was to determine whether [plaintiffs'] evidence was capable of showing class-wide impact, not to reach a conclusion on the merits of [their] claims." In so holding, Judge Ikuta specifically rejected the defendants' argument that "pooled regression models involve improper 'averaging assumptions' and therefore are inherently unreliable when used to analyze complex markets." And while the defendants argued that the plaintiffs' calculation of "uniform 10.28 percent overcharge" was inherently implausible because the "individual plaintiffs . . . showed overcharges both above and below the overcharge indicated by [the plaintiffs'] model," Judge Ikuta rejected this argument and found that it "improperly conflates the question of whether evidence is capable of proving an issue on a class-wide basis with the question of whether the evidence is persuasive."

Judge Lee's Dissent

Judge Lee, joined by Judge Kleinfeld, dissented. Because defendants in class actions face potentially "catastrophic" liability at trial, Judge Lee explained, "class action cases almost always settle once a court certifies a class." For that reason, Judge Lee reasoned, it is improper to defer resolution of issues that bear on the propriety of class certification—such as the parties' dispute over whether the class includes an excessive number of uninjured class members—simply because they overlap with "merits issue[s]." In effect, Judge Lee explains, this approach "hand[s] victory to plaintiffs" because a certified class action "will likely settle without the court ever deciding that issue," which "is neither fair nor true to [Rule 23]." And with this overarching concern in mind, Judge Lee concluded that "the majority opinion conflicts with Rule 23's text, common sense, and precedent from other circuits."

Beginning with Rule 23's text, Judge Lee noted that the dictionary definitions of "common" and "predominance" collectively establish that "questions of law or fact [must] be shared by all or substantially all members of the class." Although the district court and the *en banc* majority both characterized the parties' dispute about the number of uninjured class members as a merits issue, Judge Lee disagreed and held that this dispute "center[s] on Rule 23(b)(3)'s predominance requirement"—and, in particular, "whether it has been met if the defendants' expert concludes that

potentially a significant number of putative class members were uninjured." "Simply put," Judge Lee explained, "a plaintiff cannot prove that common issues predominate if one out of three putative class members suffered no harm." And "[i]f we had to refrain from deciding the persuasiveness of an expert opinion used to show commonality," Judge Lee continued, "a plaintiff could prevail on class certification by merely offering a well-written and plausible expert opinion." By effectively relaxing the standard necessary to obtain class certification, Judge Lee explained, the *en banc* opinion would "allow plaintiffs to weaponize Rule 23 to impose an in terrorem effect on defendants." "[I]f a class certifies a class with many uninjured class members," Judge Lee explained, "it dramatically expands the potential exposure and artificially jacks up the stakes." "It matters little," he reasoned, "that the uninjured class members can be separated at trial." Even if that were theoretically true, Judge Lee reasoned, "[t]he opportunity at trial to jettison unharmed class members from the certified class is a phantom solution because defendants will have little choice but to settle before then."

Judge Lee also concluded that the *en banc* majority "err[ed] in rejecting a *de minimis* rule." Although Judge Lee agreed that "a plaintiff need not show that every single putative class member has suffered an injury," he nonetheless concluded that a *de minimis* requirement was consistent with "Rule 23's language, common sense, and precedent from other circuits." Leaving aside Rule 23's use of the phrases "common" and "predominate," which provide textual support for a *de minimis* requirement, Judge Lee expressed concern that "allowing more than a *de minimis* number of uninjured class members tilts the playing field in favor of plaintiffs" and that "the majority's opinion will invite plaintiffs to concoct oversized classes stuffed with uninjured class members—with little fear of having their class certification bids denied for lack of 'predominance' or 'commonality.'" By "creating these grossly oversized classes," Judge Lee explained, "plaintiffs will inflate the potential liability . . . to extract a settlement, even if the merits of their claims are questionable." And Judge Lee also noted that "the majority opinion needlessly creates a split with other circuits"—including the DC Circuit in *In re Rail Freight Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019) and the First Circuit in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018)—"that have endorsed a *de minimis* rule."

Implications of the *En Banc* Opinion

Given that the Ninth Circuit's rejection of a "de minimis" rule at least arguably diverges from the holdings of two other circuits, it is possible that the Supreme Court may grant certiorari to resolve this split. Nonetheless, if *Olean Wholesale* remains the law in the Ninth Circuit, it poses significant risk to defendants faced with putative class actions. Although the *en banc* majority nominally acknowledged the possibility that a class might be "fatally overbroad" if it includes an excessive number of uninjured class members, its rejection of a concrete "de minimis" standard will undeniably make it more difficult for defendants to persuade courts that a putative class is, in fact, "fatally overbroad." Just as importantly, the *en banc* majority's admonition against resolving "merits issues" at the class certification stage may discourage district courts from taking a close look at the testimony offered by plaintiffs' experts—even though the Supreme Court has made clear that Rule 23 is not a "mere pleading standard" and requires a "rigorous analysis" into whether a case is suitable for class certification. *Wal-Mart Stores, Inc. vs. Dukes*, 564 U.S. 338, 350–51 (2011). And while it is not yet clear how district courts will apply *Olean Wholesale* in practice, it undeniably represents a significant setback for class action defendants who—as Judge Lee predicted—may choose to settle instead of attempting to navigate around the Ninth Circuit's decision.

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