Class Actions Alert

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9th Circuit Provides Key Guidance for Defendants Opposing Rule 23(b)(3) Class Actions

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Key Points

- The en banc 9th Circuit clarified numerous rules applicable to class actions brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The court's watershed decision in *Olean Wholesale Grocery v. Bumble Bee Foods* will guide how courts in the 9th Circuit decide whether to certify a class, and the case may have nationwide impact.
- First, the court emphasized that, when assessing whether a common question exists, the test is whether evidence shows that a question is ***capable*** of class-wide resolution, not whether evidence ***establishes*** that plaintiffs would prevail on that question at trial.
- Next, the court held that while Rule 23 does not necessarily foreclose certification when a class potentially includes more than a *de minimis* number of uninjured persons, whether individualized questions about injury or damages will overwhelm common issues is a key part of the predominance analysis.
- In addition, the court clarified multiple rules of the road for certification proceedings under Rule 23(b)(3):
  - Plaintiffs have the burden to prove by a ***preponderance of the evidence*** that Rule 23's prerequisites are satisfied.
  - *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies full force at the class certification stage.
  - When many members of a class suffered no injury, the class may be fatally "overbroad."
  - But a putative class that, by virtue of the class definition, contains ***only*** members who are necessarily entitled to relief is an impermissible "fail safe" class.

Until recently, the 9th Circuit has not provided clear guidance on how plaintiffs can establish the existence of common questions under Rule 23(a)(2), or whether district courts can certify a Rule 23(b)(3) class that may contain uninjured members. On April 8, the en banc 9th Circuit held in *Olean Wholesale Grocery v. Bumble Bee Foods* that a common question must be susceptible to class-wide proof, even if the evidence does

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not show that plaintiffs will prevail on that question. The court also rejected a per se rule precluding certification of a Rule 23(b)(3) putative class containing more than a *de minimis* number of uninjured members. But the court reiterated that certification is not appropriate when the need to weed out uninjured class members will defeat predominance. Although the court upheld the district court's order certifying three subclasses, the decision nevertheless provides strong support for defendants opposing motions for class certification under Rule 23(b)(3).

Background

The underlying litigation arises from an established price-fixing conspiracy among the largest suppliers of packaged tuna in the United States. A related Department of Justice prosecution yielded multiple guilty pleas by industry-leading companies. Tuna purchasers sued on behalf of three putative subclasses: (1) direct purchasers, like nationwide retailers; (2) indirect bulk purchasers; and (3) individual end purchasers. Although the parties provided conflicting expert evidence regarding class-wide antitrust impact, the district court certified all three subclasses.

In April 2021, a 9th Circuit panel vacated the district court's order, holding that when a class contains more than a *de minimis* number of uninjured persons, a Rule 23(b)(3) class cannot be certified.

The En Banc Opinion

The en banc 9th Circuit disagreed and affirmed the district court's class certification order in an opinion written by Judge Ikuta. The court's opinion centered on how to determine whether plaintiffs have satisfied two Rule 23 prerequisites: whether a common question exists under Rule 23(a)(2), and whether any such questions predominate over individualized issues under Rule 23(b)(3).

First, the court emphasized that in determining whether plaintiffs have shown that a common question exists, a district court "is limited to resolving whether the evidence establishes that a common question is ***capable*** of class-wide resolution," *i.e.*, resolution in "one stroke." Making that determination might require the district court to resolve disputes between the parties' experts. But the test is whether, "if the class members had pursued individual lawsuits, each could have relied on the expert evidence" on the merits—***not*** whether the expert evidence "in fact establishes that plaintiffs would win at trial."

The court then considered whether Rule 23(b)(3) can be satisfied when a putative class may contain more than a *de minimis* number of uninjured class members. Because Rule 23(b)(3) requires only "that the court determine whether individualized inquiries about such matters would predominate over common questions," the court rejected a per se rule prohibiting certification of such a class.

At the same time, the court held that if "a great number of" class members could not have been "harmed by the defendant's allegedly unlawful conduct," the class may be "fatally overbroad." In such circumstances, the district court should consider redefining the class rather than denying certification outright. But the court cautioned that a district court may not certify a class that, by definition, includes "only those individuals who were injured by the allegedly unlawful conduct." Such a "fail safe" class is improper because a putative class member either wins on the merits or is "defined out of the class and is therefore not bound by the judgment."

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In setting forth these rules, the court also answered other class certification questions that were previously unresolved in the 9th Circuit. The court (joining other circuits) held that plaintiffs' burden of proof at the Rule 23 stage is the preponderance of the evidence standard. And the court made clear that to carry their burden, plaintiffs may use only admissible evidence. The court also held that Daubert applies at the Rule 23 stage, such that defendants may challenge the reliability of expert evidence proffered in support of class certification. Finally, the court reiterated that even if expert evidence satisfies *Daubert* and is admissible, the district court must independently assess whether the evidence is capable of answering a common question in one stroke on a class-wide basis.

The court applied this legal framework and upheld the district court's order certifying the tuna subclasses. Because plaintiffs' expert evidence was at least ***capable*** of showing class-wide antitrust impact, plaintiffs had identified a common question that a jury could later decide. The court noted that defendants had forfeited any *Daubert* challenge to the expert evidence, along with any argument that individualized damages issues predominated.

The court also touched on the question of Article III standing, declining to expressly address whether "the presence of a large number of uninjured class members raises an Article III issue." Instead, the court—relying on the general principle that a plaintiff must prove standing "with the manner and degree of evidence required" at each stage of the litigation—held that evidence capable of showing class-wide antitrust impact satisfies Article III standing at the class certification stage, "whether or not that was required." The court did, however, overrule its prior broad statement that "no class may be certified that contains members lacking Article III standing," because at least in cases involving only injunctive or declaratory relief, "only one plaintiff need demonstrate standing to satisfy Article III."

Dissenting, Judge Lee argued that classes with more than a *de minimis* number of uninjured members "cannot present a predominance of common issues" even if a class-wide method can separate the uninjured from the injured at trial. Judge Lee would have held that such classes thus fail to satisfy Rule 23(b)(3).

Takeaways

The en banc 9th Circuit's opinion in *Bumble Bee Foods* clarifies the class certification test in the 9th Circuit and provides a roadmap for defendants opposing motions to certify Rule 23(b)(3) classes. Defendants can rely on the decision to argue that plaintiffs have not satisfied the preponderance of the evidence standard as to any Rule 23 requirement, including whether a common question exists. The decision also establishes that *Daubert* and other challenges to the admissibility of evidence are viable and important at the class certification stage. Further, the decision presents many grounds for challenging a putative class with uninjured class members. Under *Bumble Bee Foods*, a putative class containing many uninjured class members is likely overbroad. But—at the other end of the spectrum—a class defined to include only injured members who are necessarily entitled to relief on the merits is an impermissible "fail safe" class. And finally, although the decision does not prohibit the certification of classes with more than a *de minimis* number of uninjured members, the opinion makes clear that Article III standing is part of the Rule 23(b)(3) predominance inquiry—if individualized inquiries will be necessary at trial to distinguish injured from uninjured class members, those inquiries can defeat predominance. The opinion is

also a reminder that defendants should raise these arguments (if applicable) at the class certification stage and on appeal to avoid forfeiting them. Given the court's thorough analysis of many issues that frequently arise in Rule 23(b)(3) class actions, the opinion is likely to have a significant impact in cases across the nation.

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