

# 9th Circ. Decision Sets New Framework For Class Certification

By **Seamus Duffy, Aileen McGrath and Mike Weisbuch** (May 6, 2022)

The en banc U.S. Court of Appeals for the Ninth Circuit's recent watershed decision in *Olean Wholesale Grocery Cooperative Inc. v. Bumble Bee Foods LLC* established several significant benchmarks for determining class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Previously, the Ninth Circuit had not provided clear guidance as to the evidence required to show that common questions predominate over individual inquiries. Nor had the Ninth Circuit addressed whether district courts can certify a class that may contain uninjured members.

On April 8, the en banc court held that plaintiffs must show, by a preponderance of admissible evidence, that common questions are susceptible to class wide proof. The court also rejected a per se rule precluding certification of a Rule 23(b)(3) class containing more than a de minimis number of uninjured members.

However, the court also confirmed that Rule 23(b)(3) certification is not appropriate where the need to weed out uninjured class members defeats predominance.

Because the decision provides a thorough framework for assessing Rule 23(b)(3) motions for class certification, the case will likely have a significant impact in the Ninth Circuit and beyond. 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 case arises from an established price-fixing conspiracy among the largest suppliers of packaged tuna in the United States.

Tuna purchasers sued on behalf of three putative subclasses: direct purchasers like nationwide retailers, indirect bulk purchasers and individual end purchasers. After the parties submitted conflicting expert evidence regarding class wide antitrust impact, the district court certified all three subclasses.

The defendants persuaded the Ninth Circuit to review the district court's decision under Rule 23(f), which permits courts of appeals to review class certification orders on an interlocutory basis. In April 2021, a Ninth 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 Ninth Circuit disagreed and affirmed the district court's class certification order in an extensive opinion written by U.S. Circuit Judge Sandra Segal Ikuta. The court's opinion



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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 that determination does not consider whether the expert evidence "in fact establishes that plaintiffs would win at trial." Instead, the appropriate test is "if the class members had pursued individual lawsuits, each could have relied on the expert evidence" on the merits.

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 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 recognized that if a great number of class members could not have been harmed, 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 against a class definition that 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."

In setting forth these rules, the court also answered other class certification questions that were previously unresolved in the Ninth 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, and allows defendants to 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.

Applying this legal framework, the Ninth Circuit upheld the district court's order certifying the tuna subclasses. Because the plaintiffs' expert evidence was at least capable of showing class wide antitrust impact, the plaintiffs had identified a common question that a jury could later decide.

The court did not reach several potential arguments against certification, concluding that the defendants had forfeited any Daubert challenge to the plaintiffs' expert evidence, and any argument that individualized damages issues predominated.

The court also addressed the role of Article III standing of putative class members, holding that Rule 23(b)(B) requires that the district court determine at class certification "whether individualized inquiries about such matters would predominate over common questions."

However, the court declined 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 satisfied Article III standing at the class certification stage, "whether or not that was required."

The court also overruled 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, U.S. Circuit Judge Kenneth K. 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 opinion in Bumble Bee Foods clarifies the class certification test in the Ninth Circuit and provides a road map 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 class certification.

Further, the decision presents many grounds for challenging a putative class with uninjured class members. The U.S. Supreme Court's 2021 opinion in *TransUnion LLC v. Ramirez* left open whether and to what extent plaintiffs must prove unnamed class member standing at the certification stage.

And while the Ninth Circuit did not resolve that question — instead assuming such evidence was required — its decision creates a structure for addressing putative classes with many possibly uninjured members. 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 outright prohibit the certification of classes with more than a de minimis number of uninjured members, the opinion reinforces that Article III standing is a key 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 may well defeat predominance.

Given the court's thorough analysis of many issues that frequently arise in Rule 23(b)(3) class actions, the en banc opinion is likely to have a significant impact in cases across the nation. The Ninth Circuit's approach resembles the path the U.S. Court of Appeals for the Eleventh Circuit took in *Cordoba v. DirecTV LLC* in 2019, where the court declined to adopt a per se rule regarding uninjured class members, but held that, "when it appears that a large portion of the class does not have standing," courts must determine "whether the

individualized issue of standing will predominate over the common issues in the case."

Other courts have similarly hedged on whether a per se rule should be recognized, but have nonetheless refused to approve classes with uninjured members on predominance grounds. For example, in *In re: Asacol Antitrust Litigation* in 2018, the U.S. Court of Appeals for the First Circuit rejected a proposed class where the plaintiffs had presented no "mechanism that [could] manageably remove uninjured persons from the class."

And in *In re: Rail Freight Fuel Surcharge Antitrust Litigation* in 2019, the U.S. Court of Appeals for the District of Columbia Circuit rejected a proposed class based on a similar lack of an administrable "winnowing mechanism." Although we expect courts to continue resolving questions regarding uninjured class members under a predominance framework, it remains to be seen whether courts will follow the Ninth Circuit and expressly reject a broader per se rule.

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