March 21, 2022

Ninth Circuit: proof of injury is a merits issue that can doom class treatment

by James F. Bogan III

Takeaway: When a district court certifies a damages class action, it often cites the long line of cases holding that, because damages for each class member can be determined after a class action trial on liability, individualized damages determinations do not render class treatment inappropriate. In a recent decision, however, a Ninth Circuit panel recognized that proof of injury – the fact of damage – constitutes a merits issue that can predominate over common issues and render class treatment inappropriate under Federal Rule 23. That case, *Lara v. First National Ins. Co. of America*, 25 F.4th 1134 (9th Cir. 2022), gives class action defendants a potent weapon to defeat class certification.

In *Lara*, insurance policy holders Leeana Lara and Cameron Lundquist sued their auto insurer, Liberty Mutual, and a third-party valuation company, CCC Intelligent Solutions, alleging that (a) Liberty breached its insurance contracts with its insureds and that (b) both companies violated Washington's unfair trade practices act and engaged in a civil conspiracy, based on an allegedly unlawful process to undervalue totaled vehicles. A vehicle will be deemed "totaled" when the cost of repair exceeds the fair market value, requiring the insurer to determine the vehicle's value before the accident occurred. Under the valuation process, the insurer prepares a valuation report that can be adjusted; the insurer then makes an offer to the insured, possibly triggering negotiations with the insured; and, if negotiations fail, the parties engage in an appraisal process that could result in a binding value being determined by a neutral appraiser. *Lara*, 25 F.4th at 1137.

The plaintiffs sought compensatory damages and the certification of a damages class. The district court denied certification because individualized issues predominated, rendered the class device unmanageable, and individualized lawsuits superior. *Id*. The Ninth Circuit affirmed, finding no abuse of discretion.

The Ninth Circuit held the plaintiffs had to show the essential element of injury to prevail on their claims for breach of contract, unfair trade practices, and civil conspiracy. *Id*. at 1139. In other words, for any class member to establish liability on the merits, an individualized class member-by-class member valuation examination must occur, because the class members' cars could have been undervalued, overvalued, or properly valued in the valuation process. *Id*. Even if the valuation process allegedly did not comply with particular requirements of Washington state's insurance regulations, the insurance regulations did not provide a private cause of action, requiring the plaintiffs to proceed under causes of action requiring proof of injury. *Id*. at

1139. Allowing plaintiffs to recover based on a mere statutory violation without proof of injury would amount to a "strict liability remedy" not available under their common law and unfair trade practices claims. *Id*. at 1140.

Thus, the plaintiffs could not salvage class certification by claiming that the damages issue could be resolved after a class-wide determination of liability, because injury constituted an essential liability element of their substantive claims: "if there's no injury, then the breach of contract and unfair trade practices claims must fail. That's not a damages issue; that's a merits issue." *Id*. at 1139.