APRIL 21, 2022

En banc Ninth Circuit reinstates class certification ruling in Bumble Bee price-fixing case, arguably solidifying a circuit split on whether a class may include uninjured class members

by James F. Bogan III

Takeaway: A year ago we wrote about the Ninth Circuit's decision in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021), where a panel held that a district court abused its discretion by granting class certification without determining the percentage of class members injured by the anticompetitive conduct. *See Antitrust class actions: Ninth Circuit rules that predominance "cannot be outsourced to a jury"* (April 30, 2021). The Ninth Circuit granted en banc review in that case and recently reinstated the district court's class certification ruling, ruling that the lower court did not abuse its discretion in finding predominance under Rule 23. *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, --- F.4th ----, No. 19-56514, 2022 WL 1053459 (9th Cir. Apr. 8, 2022) ("Olean"). This en banc decision is notable for a number of reasons, including (1) it establishes the burden of proof in the Ninth Circuit for satisfying Rule 23's class action requirements, (2) it forbids a district court from assessing the persuasiveness of evidence in a Rule 23 predominance context, when the evidence goes to a merits issue for a jury to decide, and (3) it arguably solidifies a circuit split on the issue of whether a certified class may include uninjured class members.

In *Olean*, producers of packaged tuna appealed a ruling by the Southern District of California certifying three classes in a multidistrict antitrust case alleging a price-fixing conspiracy. The appellants challenged the district court's finding that Rule 23's predominance requirement had been satisfied by disputed expert statistical evidence showing class-wide impact on the classes, based on averaging assumptions and pooled transaction data. Initially, a Ninth Circuit panel vacated this ruling, only to have the en banc court reinstate the decision.

The *Olean* en banc decision addressed three major issues:

First, noting that "[w]e have not yet prescribed the plaintiffs' burden for proving that the prerequisites of Rule 23 are satisfied," the en banc court conducted a balance of interests test, examined decisions from other circuits, and concluded: "We therefore join our sister circuits in concluding that plaintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." *Olean*, 2022 WL 1053459, at *5.

Second, the court examined the disputed expert statistical evidence. The plaintiffs' expert concluded that 5.5% of the class may not have suffered an injury. The defendants' expert concluded that about 28% of class did not suffer an injury, further advancing well-justified criticisms of the plaintiffs' expert's methodology. But because the plaintiffs' expert offered an admissible method *capable* of measuring class-wide impact, the en banc court held that the district court correctly did not resolve this merits

issue: "a district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue." *Id*. at *8.

Third, the court "reject[ed] the dissent's argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." *Id*. at *9. On this point, rulings by the D.C. and First Circuits – cases featured in two of our prior articles – address the "de minimis" issue. *See D.C. Circuit denies class certification where putative antitrust class includes uninjured class members (Aug. 30, 2019), and First Circuit addresses an issue that continues to vex (and split) the circuits: should a class be certified that includes uninjured class members?* (Oct. 24, 2018).

Judge Lee authored a dissenting opinion joined by Judge Kleinfeld. *Id*. at 22 (Lee, J., dissenting). On the uninjured class member issue, the dissent cited the D.C. Circuit's holding that "5% to 6% constitutes the outer limits of a de minimis number." *Id*. at *28 (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig*., 934 F.3d 619, 624–25 (D.C. Cir. 2019)). It also cited the First Circuit's "de minimis border" for uninjured class members of "around 10%." Id. (quoting In re Asacol Antitrust Litig., 907 F.3d 42, 51–58 (1st Cir. 2018)). Thus, according to the dissent, the Ninth Circuit's decision creates a circuit split on this issue. In response, the majority concluded that the D.C. and First Circuit rulings did not create a *per se* rule and were instead limited to the facts of those particular cases. *Olean*, 2022 WL 1053459, at *8 n.13.

In the dissent's view, the district court's Rule 23 gatekeeper role required it to resolve the question of how many class members were uninjured by the anticompetitive conduct, concluding: "if defendants' econometrician expert is correct that almost a third of the class members may not have suffered injury, plaintiffs have not shown the predominance of common issues under Rule 23(b)." *Id*. at *22. While the majority concluded that the number of uninjured class members could be determined either at trial or in post-trial damages determinations, the case would never go to trial, the minority said, because class actions always settle after a district court certifies a class: "If trials these days are rare, class action trials are almost extinct." *Id*. at *22.