AUGUST 31, 2022

Seven Key Takeaways: Class Certification in the Ninth Circuit – Predominance

by James F. Bogan III

Kilpatrick Townsend partner Jay Bogan, along with three other panel members, recently presented "Class Certification after *Olean v. Bumble Bee:* Expert Testimony, Uninjured Class Members, and Article III Standing." This webinar was presented by (and is available for purchase from) Strafford.

The focus of the presentation was understanding and applying the Ninth Circuit's significant *en banc* class certification decision in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods, LLC*, 31 F.4th 651 (9th Cir. 2022), *pet. for cert. docketed sub nom. Starkist Co. v. Olean Wholesale Grocery Coop., Inc.*, No. 22-131 (U.S. Aug. 10, 2022).

Olean is an antitrust class action where the focus of the Ninth Circuit's opinion was on whether the plaintiffs' expert testimony was capable of proving class-wide injury, as required for satisfying Rule 23(b)(3)'s predominance requirement.

The panel presented on numerous issues raised by this *en banc* decision. Below are key takeaways:

1. Standard of proof: *Olean* held that class action plaintiffs must establish the requirements for class certification under the preponderance of the evidence standard.
2. Admissibility: Class certification evidence must be admissible under the Federal Rules of Evidence.
3. Expert testimony: District courts must analyze expert testimony to determine if that testimony supports class certification (i.e., shows class-wide impact), beyond just determining the admissibility of that testimony.
4. Circuit split on *de minimis* rule: The *de minimis* rule – a rule applied by the D.C. and Third Circuits – mandates that Rule 23(b)(3) predominance is defeated whenever a district court finds that a given percentage of the class (e.g., 5% or 10%) suffered no injury. The *Olean* court rejected that rule, creating a circuit split.
5. Injury/Article III standing: Issues of injury and Article III standing are relevant to the predominance analysis and can defeat predominance.
6. Plaintiffs' strategies for applying *Olean*:
    (a) Develop strong expert testimony showing that class-wide injury is capable of being proved at trial.
    (b) Emphasize *Olean*'s holding that district courts must avoid resolving ultimate merits issues in the class certification analysis.
    (c) Emphasize that attacks on expert testimony that go to the merits should be resolved by a jury and not the district court.
    (d) Do you very best to tailor class definitions to limit the number of uninjured class members.
7. Defendants' strategies for applying *Olean*:
    (a) If possible, challenge the admissibility of plaintiffs' expert evidence as unreliable, in addition to

attacking the persuasiveness of that testimony in terms of showing class-wide impact.

(b) Draw analogies to cases *Olean* cited with approval where the plaintiffs' expert testimony did not suffice

- Where the expert evidence did not prove an element of the claim for the entire class
- Where the damages evidence did not fit with the plaintiffs' theory of liability
- Where the evidence was based on unsupported assumptions
- Where the evidence led to nonsensical results, such as positing injury to class members who could not logically have been injured

(c) Develop evidence of individualized issues relating to injury / Article III standing to defeat predominance.

(d) Attack class definitions as overbroad or as otherwise creating improper "fail safe" classes (classes defined as every person injured by the alleged misconduct)

For more information, please contact Jay Bogan at jbogan@kilpatricktownsend.com.