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Ninth Circuit vacates class certification in LuLaRoe sales tax class action

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Takeaway: In *Van v. LLR, Inc.*, 61 F.4th 1053 (9th Cir. 2023), the Ninth Circuit vacated the district court's grant of class certification and remanded for re-assessment of whether the plaintiff had satisfied the predominance requirement. Although the court rejected challenges to class certification based on standing and the voluntary payment doctrine, it found that individual issues related to defendants' provision of discounts for the purpose of offsetting the allegedly improper sales tax assessment potentially defeated predominance.

Plaintiff Katie Van filed a putative class action against Defendants LLR, Inc., and LuLaRoe (collectively, "LuLaRoe") alleging that LuLaRoe over-charged sales tax to Alaskan customers. LuLaRoe, a multi-level marketing company that sold leggings and other women's clothing through independent fashion retailers, used a point-of-sale system that calculated sales tax based on the retailer's location, not the customer's location. This practice caused LuLaRoe to overcharge customers in states – like Alaska – that did not charge any sales tax. The District Court of Alaska granted class certification in September 2021 and LuLaRoe appealed.

Finding that LuLaRoe's provision of retailer discounts created individualized issues, the Ninth Circuit reversed and remanded. Before addressing the discounts, the court addressed – and rejected – LuLaRoe's other challenges to of class certification.

First, the Court of Appeals found that Ms. Van had standing. 61 F.4th at 1063. After the filing of litigation, LuLaRoe had attempted to refund the money improperly collected as sales tax. LuLaRoe did not, however, pay interest for the time between the improper charge and the return. The only injury suffered by many of the putative class members was a small amount – often less than $0.05 of the time value of money. LuLaRoe argued that such *de minimis* injury was insufficient to establish standing. The court disagreed, concluding that "[a]ny monetary loss, even one as small as a fraction of a cent, is sufficient to support standing." *Id*. at 1064.

Second, the court found that the voluntary payment doctrine did not defeat predominance. LuLaRoe argued that some retailers informed purchasers of the sales tax issues before consummating the purchase. But LuLaRoe's "minimal proffers of evidence" did not suffice to show "that any class member knew of the sales tax *and then paid it*." *Id*. at 1068. While the voluntary payment doctrine could create individual issues, the Ninth Circuit found that LuLaRoe failed to submit evidence sufficient to substantiate its defense.

Finally, the court addressed LuLaRoe's argument that class certification should be vacated because some retailers provided discounts for the purpose of offsetting the improperly assessed sales tax. *Id*. Because LuLaRoe only provided evidence that 18 of the 13,860 discounts were provided for the purpose of offsetting improperly assessed sales tax, the district court found that any individual issue was *de minimis* and insufficient to defeat class certification.

The Ninth Circuit disagreed. *Id*. at 1069. It found that the evidence that at least 18 of the discounts were targeted at excess taxes meant that discovery would be necessary to understand the purpose of each of these discounts. Such discovery "could potentially involve up to 13,680 depositions and months of trial, [and] certainly cannot be described as de minimis." *Id*. After finding an individual issue, the court remanded to the district court to "re-assess whether Van has met her burden of proving by a preponderance of the evidence that common issues predominate over questions affecting only individual members." *Id*.

Conclusion: The *Van* decision emphasizes the importance of fully developing evidence of individualized issues during discovery. The district court rejected LuLaRoe's voluntary payment defense because of a lack of evidence. But it found the LuLaRoe's discounts created individual issues, and potentially defeated predominance, because LuLaRoe had demonstrated that at least a portion of the discounts targeted tax offsets. This contrast highlights the critical importance of class action defendants promptly identifying factual strategies for defeating predominance and systematically developing evidence to support those strategies.