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# Antitrust class actions: Ninth Circuit rules that predominance "cannot be outsourced to a jury"

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**Takeaway:** We have posted a number of articles about whether Rule 23's predominance requirement can be satisfied when a proposed class includes uninjured class members. *See, e.g., 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). The Ninth Circuit added to this line of cases in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC,* 993 F.3d 774, 2021 WL 1257845 (9th Cir. 2021), where it held that the district court abused its discretion by granting class certification without determining the percentage of class members injured by the allegedly anticompetitive conduct. The *Olean* decision presents another case study in the hurdles presented to class certification by the predominance requirement, especially in cases where plaintiffs employ statistical or representative evidence to show class-wide injury at the class certification stage.

In *Olean*, producers of packaged tuna appealed a ruling 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." 2021 WL 1257845, at *2.

In evaluating the expert reports and testimony submitted by both the putative class representatives and the defendants on the issue of class-wide impact, and despite finding "potential flaws" in the methodology employed by the plaintiffs' econometrician expert, the district court ruled that "determining which expert is correct is beyond the scope" of a Rule 23 analysis. *Id*. at *3 (citation omitted). Accordingly, the district court certified three classes, including a direct purchaser class. *Id*. (citation omitted).

The majority ruled on a number of issues relevant to proof of the predominance requirement. As to burden of proof, and following the rulings of sister circuits, the majority ruled that Rule 23 predominance must be satisfied by a preponderance of the evidence. Regarding the use of "representative evidence" such as the statistical evidence submitted by the plaintiffs, and following the Supreme Court's opinion in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), the majority ruled that representative evidence could be used to demonstrate predominance, although it cautioned that representative evidence should be "closely and carefully scrutinized" at the Rule 23 stage, and that a district court must determine whether the predominance requirement is *actually* satisfied to certify a class. In other words, "the threshold predominance determination cannot be outsourced to a jury." *Id*. a *10.

Against this standard, the district court's Rule 23 analysis fell short: "When considering if predominance has been met, a key factual determination courts must make is whether the plaintiffs' statistical

evidence sweeps in uninjured class members." *Id*. at *10. The majority further ruled that "[a]lthough we have not established a threshold for how great a percentage of uninjured class members would be enough to defeat predominance, it must be *de minimis*." *Id*. at *11. On what constitutes *de minimus*, and citing the D.C. and First Circuit opinions featured in our prior articles, the majority observed that where a proposed class contains a significant percentage of class members who suffered *no* injury at all, then individual issues necessarily predominate over common issues. *Id*. at *11 (citing *In re Rail Freight Fuel Surcharge Antitrust Litig*., 934 F.3d 619 (D.C. Cir. 2019) (predominance not satisfied where over 12% of class members not injured), and *In re Asacol Antitrust Litig*., 907 F.3d 42 (1st Cir. 2018) (predominance not satisfied where roughly 10% of class members not injured)).

The plaintiffs' expert in *Olean* opined that over 94% of the class members suffered a class-wide impact (injury) from the defendants' price-fixing conspiracy. The defendants' expert, on the other hand, identified flaws in plaintiffs' methodology, concluding that plaintiffs' expert had shown injury for roughly 28% of the class members. The majority concluded: "While we do not set the upper bound of what is *de minimis*, it's easy enough to tell that 28% would be out-of-bounds." *Id*. But the district court did not resolve this factual dispute, effectively outsourcing the predominance determination to the jury.

Holding "[t]he district court's gloss over the number of uninjured class members was an abuse of discretion," the majority vacated the class certification order and "remand[ed] with instructions to resolve the factual disputes concerning the number of uninjured parties in each proposed class before determining predominance." *Id*. a *12.

Judge Hurwitz dissented, taking issue with the majority's focus the *de minimus* framework adopted by other circuit courts. According to Judge Hurwitz, Rule 23 contains no firm requirement with respect to uninjured class members. In his view, a district court should retain the discretion to certify a class containing even larger percentages of uninjured class members, because district courts ultimately have the tools available to make sure that uninjured class members are not compensated.