SOMETHING IS BUZZING IN THE 9TH CIRCUIT: HOW CANNED TUNA, BUMBLE BEES, AND UNINJURED CLASS MEMBERS COMBINE FOR AN IMPORTANT CLASS CERTIFICATION RULING

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Over the past several years, the U.S. Court of Appeals for the 9th Circuit appeared poised to sanction a generous approach to certifying proposed classes under Rule 23 of the Federal Rules of Civil Procedure.[1] Recently, however, the 9th Circuit has taken steps to tighten up the rigor of the required analysis that district courts must conduct when evaluating motions for class certification.[2] The 9th Circuit appears to have taken another step in that direction in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*.[3]

In *Bumble Bee Foods*, the 9th Circuit sharpened the standards governing Fed. R. Civ. P. 23(b)(3)'s predominance requirement, which mandates that common issues predominate over individual issues. Specifically, the Court provided much-needed teeth to the district courts' obligations to resolve factual and legal disputes bearing on predominance—including conflicting expert testimony—before certifying a class and, for the first time, held that a proposed class containing more than a *de minimis* number of uninjured members cannot satisfy predominance and should not be certified.

THE DISTRICT COURT PROCEEDINGS

The *Bumble Bee Foods* decision arose from a multidistrict litigation alleging a price-fixing conspiracy by producers of packaged tuna in violation of U.S. antitrust laws. Specifically, plaintiffs (various purchasers of tuna products) accused the defendants (entities that "account for over 80% of all branded packaged tuna sales in the [United States]") of conspiring "to artificially inflate the prices of their tuna products" through various anticompetitive means.[4] The plaintiffs moved to certify three classes of similarly situated tuna purchasers under Rule 23(b)(3).

In support of their motion, the plaintiffs relied "primarily" on statistical analysis performed by expert witnesses, who opined that approximately 94.5 percent of the putative class members suffered an injury from defendants' price-fixing conspiracy.[5] The defendants presented their own expert witness who challenged the reliability of plaintiffs' analysis and opined that approximately 28 percent of the putative class members "suffered no injury at all."[6] The district court certified the classes, reasoning that resolution of the dueling expert analyses was for the jury, not the court, and that, despite the serious and potentially persuasive criticisms, the plaintiffs' expert's model was "capable of showing impact on all or nearly all class members."[7] The defendants appealed.

THE 9TH CIRCUIT REVERSES CERTIFICATION OF THE CLASSES

On appeal, the 9th Circuit addressed several important class certification issues regarding predominance, including the appropriate standard of review, the applicable burden of proof, the role of statistical, or "representative" evidence, and the impact of uninjured members of a putative class on the certification analysis.

First, the 9th Circuit strengthened the "rigorous analysis" that district courts must bring to bear on a motion for class certification. It held that "[c]ourts must resolve all factual and legal disputes relevant to class certification, even if doing so overlaps with the merits[,]" including "judging the persuasiveness of the evidence presented for and against certification."[8] A district court, in fact, abuses its discretion if it merely glosses over or seeks to avoid such disputed issues. Similarly, the 9th Circuit adopted the preponderance of the evidence standard to govern the district court's predominance analysis. Accordingly, a plaintiff must establish that common issues predominate over individual issues by a preponderance of the evidence before the court may certify a class.[9] In doing so, the 9th Circuit fell in line with the majority of circuit courts of appeal that have considered the issue and further emphasized the importance of the district court's "role as the gatekeeper of Rule 23's requirements."[10]

Second, the Court considered the role of statistical evidence in establishing predominance. Hewing closely to the U.S. Supreme Court's guidance, the 9th Circuit found that such evidence may suffice, in some cases, to show class-wide injury, and thus to support predominance, but that its use "'will depend on the purpose for which the sample is being introduced and on the underlying causes of action.'"[11] When considered, however, the 9th Circuit made clear that district courts must scrutinize statistical evidence "with care and vigor" to ensure "actual, not presumed, conformance" with the Rule 23 requirements.[12] According to the Court, "[s]tatistical evidence is not a talisman," and, as such, the 9th Circuit instructed courts to "rigorously analyze the use of such evidence to test its reliability and to see if the statistical modeling does in fact mask individualized differences."[13]

Finally, the 9th Circuit considered the thorny question of whether a district court may certify a class that contains absent class members that have not suffered any injury. Because the district court refused to resolve the conflicting expert testimony, it had certified a class of individuals, more than one-quarter of which may not have suffered any injury from the alleged price-fixing conspiracy. Or, if the plaintiffs' expert was correct, the class might consist of 94.5 percent injured and only 5.5 percent uninjured members. The 9th Circuit held that the district court abused its discretion by finding predominance satisfied and certifying a class before resolving this open issue, which it described as an "essential component of predominance."[14]

Following on the wings of its instructions for district courts to carefully scrutinize statistical evidence, the 9th Circuit explained that "a *key factual determination* courts must make is whether the plaintiffs' statistical evidence sweeps in uninjured class members."[15] That is because "[i]f a substantial number of class members 'in fact suffered no injury,' the 'need to identify those individuals will predominate.'"[16] Thus, the 9th Circuit described this inquiry as "of paramount importance to certification of the class."[17]

The 9th Circuit's analysis leads directly to the obvious next question: How many uninjured class members is too many?[18] According to the 9th Circuit, a class containing uninjured class members may be certified only where the number of such members is *de minimis*.19 What, then, constitutes a *de minimis* number of uninjured class members? Although the 9th Circuit did not provide a specific numerical threshold to answer that question, it did suggest certain boundaries to guide courts in the future. Specifically, the Court cited, with approval, to decisions from other circuit courts suggesting that 5 percent to 6 percent of a class "'constitutes the outer limits of a *de minimis* number'"[20] and that "'around 10%'" of uninjured members warranted reversal of certification.[21] The Court

also definitively held that a class in which 28 percent of the members suffered no injury, like the class in *Bumble Bee Foods*, is easily "out-of-bounds."[22]

For that reason, the 9th Circuit reversed the certification of the plaintiffs' proposed classes and remanded the case to the district court "with instructions to resolve the factual disputes concerning the number of uninjured parties in each proposed class before determining predominance."[23]

JUDGE HURWITZ AND HIS PARTIAL DISSENT

It is worth noting that one of the three judges on the *Bumble Bee Foods* panel, Judge Hurwitz, dissented in part from the 9th Circuit's decision. Judge Hurwitz agreed with the majority that: (1) "the district court, not a jury, must resolve factual disputes bearing on predominance"; (2) "a district court's 'rigorous analysis' of whether a putative class has satisfied Rule 23's requirements should proceed by a preponderance of the evidence standard"; and (3) "the question for the district court is not whether common issues *could* predominate at trial; the court must determine they *do* predominate before certifying the class."[24] Judge Hurwitz, however, disagreed that a "district court must find that only a '*de minimis*' number of class members are uninjured" before it certifies a class.[25] On that point, Judge Hurwitz reasoned that neither Rule 23 nor the 9th Circuit's precedent supported a *de minimis* rule and that such a rule sacrifices the broad discretion otherwise vested in a district court to evaluate all evidence presented at the class certification stage.[26]

CONCLUSION

The final destination of the 9th Circuit's class certification jurisprudence remains uncertain. The Court appears to sit at a fork in the road—will it follow the flight of *Bumble Bee Foods* and demand truly rigorous enforcement of the Rule 23 requirements, or will it turn back down the path leading to a looser, certify-first, worry-later, standard? Only time will tell. The positive news, however, is that the 9th Circuit's latest precedential decision points to a reinvigorated certification standard—one that is more in line with Supreme Court guidance and the caselaw in other circuit courts. The 9th Circuit, in fact, may have actually jumped ahead of several of its sister circuits in directly addressing the implications of uninjured class members and adopting a *de minimis* standard. In any event, the *Bumble Bee Foods* decision makes clear that the 9th Circuit will not sanction the certification of classes unless the district court truly and rigorously evaluates all of the evidence presented and is satisfied that the plaintiff has actually satisfied its burden to establish each requirement of Rule 23.

FOOTNOTES

[1] For example, in 2018, the 9th Circuit held that a district court may consider inadmissible evidence when evaluating a motion for class certification. See Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1005-06 (9th Cir. 2018). For a further discussion of this issue, see Robert W. Sparkes, III, *Curious Case Of The Class Cert. Evidentiary Standard* (part 1 & part 2) LAW 360 (June 13, 2018), LAW 360 (June 14, 2018).

[2] *See* Robert W. Sparkes, III, 9th Circuit Gets Tougher On Experts At Class Certification, LAW 360 (Jan. 11, 2021). https://www.law360.com/articles/1342758

[3] Olean Wholesale Coop., Inc. v. Bumble Bee Foods LLC, — F.3d —, No. 19-56514, 2021 WL 1257845 (9th Cir. Apr. 6, 2021).

[4] *Id.* at *2.

[5] *See id.* at *2-3.

[6] *Id.* at *2.

[7] *Id.* at *3.

[8] *Id.* at *4 (internal quotation marks and citations omitted).

[9] *Id.*

[10] *Id.* at *4-5.

[11] *Id.* at *5 (quoting Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 422, 460 (2016)).

[12] *Id.* at *5-6 (internal quotation marks and formatting omitted).

[13] *Id.* at *10 (emphasis in original).

[14] *See id.* at *11-12. The 9th Circuit also criticized the district court's decision to defer the resolution of the dueling expert opinions until trial, reasoning that this effectively created a rule whereby plaintiffs “can obtain class certification just by hiring a competent expert.” *Id.* at *11.

[15] *Id.* at *11 (emphasis added).

[16] *Id.* (quoting In re Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018)).

[17] *Id.*

[18] The panel majority also noted, without deciding, the “serious” implications to Article III standing posed by “[t]he presence of uninjured parties in a certified class.” *Id.* at *10 n.7. Citing to a recent 5th Circuit decision, the majority expressed skepticism “that Article III permits certification of a class where '[c]ountless unnamed class members lack standing.'” *Id.* (quoting Flecha v. Medicredit, Inc., 946 F.3d 762, 768 (5th Cir. 2020)).

[19] *Id.* at *11.

[20] *Id.* (quoting *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 624-25 (D.C. Cir. 2019)).

[21] *Id.* (quoting *In re Asacol*, 907 F.3d at 47, 51-58).

[22] *Id.*

[23] *Id.*

[24] *Id.* at *12 (Hurwitz, J., concurring in part and dissenting in part) (emphasis in original).

[25] *Id.* at *13.

[26] *See id.* at *13-15.

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