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SCOTUS Leaves Standing 9th Circuit Ruling in Tuna Case That, at Certification, Plaintiffs Need Not Show Putative Class Has Few Unharmed Members

Litigation of the class certification question nearly always involves expert and significant factual discovery, and often requires an extensive hearing. And, although courts are not permitted to rule on the ultimate merits of a putative class's claims or a defendant's defenses at the certification stage, they must engage in a "rigorous analysis" when considering whether to certify the class, and the Supreme Court made clear in *Wal-Mart Stores, Inc. v. Dukes* that this analysis may overlap with the merits.[1]

The lower courts have struggled with and splintered over how far a court may go into the merits when resolving the certification question, particularly since the Supreme Court's decision in *TransUnion LLC v. Ramirez*,[2] which held that only those plaintiffs with a concrete injury may recover from a private defendant for statutory violations. They have asked, for example: May the court weigh each side's expert testimony and make findings about which side is more likely to ultimately prevail when the experts disagree on a question relevant to certification? May it inquire whether a proposed class contains uninjured parties? And if the presence of uninjured class members is relevant to class certification, how many is too many?

These questions were at the fore of the defendants' petition for certiorari in *Starkist Co. v. Olean Wholesale Grocery Cooperative, Inc.*, which the Supreme Court denied on November 14, 2022.[3] The Court thus set aside those issues for another day. In the meantime, it left standing an *en banc* Ninth Circuit holding that plaintiffs do not need to show at the certification stage there were no more than a de minimis number of unharmed members in the class.

The *Starkist* defendants' arguments that such a showing is required for certification remains viable outside the Ninth Circuit, however, and present possible paths to defeating class certification in other circuits.

[1] 564 U.S. 338, 351 (2011) ("Frequently th[e] 'rigorous analysis' [applicable to the class certification inquiry] will entail some overlap with the plaintiff's underlying claim. That cannot be helped." (citation omitted)).

[2] 141 S.Ct. 2190 (2020).

[3] No. 22-131, 2022 WL 16909174 (U.S. Nov. 14, 2022).

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The Underlying Case

Following a DOJ investigation that uncovered a price-fixing scheme among tuna suppliers, a number of tuna purchasers filed suit, alleging that they had been forced to pay supra-competitive prices for tuna products. The purchasers sought certification of three subclasses: (1) the direct purchasers of tuna suppliers' products, such as nationwide retailers and grocery stores; (2) indirect purchasers of the tuna suppliers' products who bought bulk-sized tuna products for prepared food or resale; and (3) individual end purchasers of tuna products. The district court certified all three subclasses based on testimony from different economists showing that the members of each subclass paid an overcharge due to the conspiracy.[4]

On appeal, the tuna suppliers contended that the district court erred by failing to resolve a dispute between the parties as to whether 28% of the direct purchaser class did not suffer an antitrust injury. According to the suppliers, who cited decisions from the First and D.C. Circuits, holding that a court may not certify a class with more than a "de minimis" number of uninjured class members,[5] that 28% far exceeded the de minimis limit. Additionally, they contended that the presence of so many uninjured class members also raised Article III standing issues.

A panel of the Ninth Circuit initially agreed with the suppliers. Concluding that the district court had abused its discretion in failing to resolve the dispute regarding the number of uninjured parties, the court vacated the district court's certification of the class and remanded the case with instructions to resolve the dispute, and only then assess whether common issues sufficiently predominated to justify certifying the class. The panel's decision was vacated, however, after the Ninth Circuit elected to take the case *en banc*.

En banc, the Ninth Circuit affirmed the district court's certification of the class, finding that the tuna suppliers had not proven that 28% of the class was uninjured. Instead, it concluded that the suppliers' expert had only critiqued the class's expert on that issue, and held that wading further into that dispute was unnecessary to determine if the class had shown that common issues predominated in the case. As to the standing question, the e*n banc* panel held that it "need not consider" whether the possible presence of uninjured class members raised Article III issues because the plaintiffs had proven they had standing "with the manner and degree of evidence" required at class certification.[6]

Two judges dissented from the en banc decision.[7] Pointing to the Supreme Court's requirement that courts " 'rigorous[ly]' scrutinize whether plaintiffs have met class certification requirements," (alteration in original) the dissenters argued that the majority had abdicated this duty by affirming the district court's refusal to assess whether more than a quarter of the direct purchaser subclass had not suffered an injury, as claimed by the defendants' expert. Making such a determination was critical, the dissenters explained, because if the defendants' expert was correct, the class should not have been certified, as the inclusion of so many non-injured parties foreclosed a finding that common issues predominated.

Takeaways

By denying certiorari, the Supreme Court has left standing the Ninth Circuit's holding that "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 plaintiff's burden of proof on that issue." Thus, for the time being, district courts in the Ninth Circuit are forbidden from weighing the relative merits of the parties' experts' testimony that bears on the propriety of certifying a class, if that evidence also relates to the underlying merits of the class's claims.

The Ninth Circuit's decision also appears to have created a circuit split between it and the D.C. and First Circuits on the significance of uninjured class members. Specifically, both the D.C. Circuit's decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation*,[8] and the First Circuit's decision in *In re Asacol Antitrust Litigation*,[9] appear to have held that the inclusion of anything more than a "de minimis" amount of non-injured parties (*i.e.*, 5 10% of the total class) within a proposed class must preclude the certification of a class. This approach stands in contrast to the Ninth Circuit's rejection of the notion that "Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members."

The Ninth Circuit's ruling on the resolution of expert disputes also is in tension with the conclusions of other circuits. For example, the Third Circuit has instructed that "[r]esolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court — no matter whether a dispute might appear to implicate the 'credibility' of one or more experts."[10]

[4] *See generally In re Packaged Seafood Prod. Antitrust Litig.*, 332 F.R.D. 308 (S.D. Cal. 2019).

[5] *See generally In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018).

[6] *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F. 4th 651, 680-682 (9th Cir. 2022).

[7] *See generally id.* at 685 92 (Lee, J. dissenting).

[8] 934 F.3d 619 (D.C. Cir. 2019).

[9] 907 F.3d 42 (1st Cir. 2018).

[10] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 324 (3d Cir. 2008), as amended (Jan. 16, 2009).

Conclusion

In summary, the Supreme Court's decision to deny certiorari in *Starkist Co. v. Olean Wholesale Grocery Cooperative, Inc*. means that defendants in the Ninth Circuit might face an uphill battle in defeating class certification based on the presence of uninjured parties in the putative class. Likewise, the Ninth Circuit has put in doubt the duty of district courts to assess the relative merits of competing experts' opinions, even on issues germane to class certification, if they also relate to the merits of the underlying dispute. As noted, however, other jurisdictions have reached contrary conclusions, and counsel should be mindful of the divergent approaches to these questions.

The next court to weigh in on these questions might be the D.C. Circuit, where similar issues are currently pending in the fully briefed and argued case *National ATM Council, Inc. v. Visa Inc*.[11] Indeed, as framed by the defendant-appellants, the question at issue in *National ATM* is whether "a district court [must] scrutinize the record and deny class certification where … plaintiffs cannot prove, through common evidence, that all or virtually all of the putative class members were injured by the challenged conduct."

Recent Class Action Decisions of Note

Ninth Circuit Addresses Multiple Class Settlement Issues

***In re Apple Inc. Device Performance Litig.*, 50 F.4th 769 (9th Cir. 2022)**

Judge Jacqueline H. Nguyen, writing for a panel of the Ninth Circuit, ruled on a number of issues regarding class action settlements in a single case. The plaintiffs alleged that "Apple secretly throttled the system performance of certain model iPhones to mask battery defects." The class action proceeded through motion practice, discovery, and mediation to reach a $310 million class settlement, which the district court approved. The Ninth Circuit ultimately vacated the settlement and remanded because the district court cited the wrong legal standard by explicitly applying a presumption that the settlement was fair and reasonable. The appellate court explained that presumption is inappropriate where, as here, the settlement was negotiated prior to class certification. The court also addressed two additional issues in its opinion: (1) attestation of injury and (2) incentive awards to class representatives.

Regarding the first issue, the court held that requiring settlement class members to attest that they suffered an injury was not unfair. The proposed settlement required settlement class members to certify under penalty of perjury that "they experienced diminished performance on [an] eligible device when running [the applicable iOS] before December 21, 2017" (alterations in original) in order to receive a cash payment. The district court found this provision was reasonable. The Ninth Circuit affirmed, noting that the parties agreed to the attestation requirement as a compromise and that compromise was reasonable, in part because all remaining claims at the time of settlement required a showing of damages for a plaintiff to recover.

Regarding the second issue, the court held incentive awards are not foreclosed by Supreme Court precedent, siding with the Second Circuit and disagreeing with the Eleventh Circuit. The district court found service awards of either $3,500 or $1,500 for each of the named plaintiffs were reasonable. Relying on Supreme Court precedent from the 19th century,[12] certain objectors argued that such awards are prohibited. The Ninth Circuit noted an apparent circuit split between the Second and Eleventh Circuits on the issue.[13] The court then explained that the cases cited by the objectors do not categorically reject incentive awards, but instead require only that any such award must be reasonable.

Fifth Circuit Holds Boeing 737 Max 8 Plaintiffs Who Were Not Physically Injured by Flying on the Planes Lack Standing

***Earl v. Boeing Co.*, No. 21-40720, 2022 WL 17088680 (5th Cir. Nov. 21, 2022)**

The Fifth Circuit, in an opinion by Judge Andrew S. Oldham, held that the plaintiffs in a class action alleging fraudulent conduct in connection with Boeing 737 MAX 8 flights lacked standing because they failed to plausibly allege that they suffered either physical or economic injury. The plaintiffs alleged that the defendants (Boeing and Southwest Airlines) defrauded them by, *inter alia*, concealing a serious safety defect in the Boeing 737 MAX 8 aircraft. They claimed that this alleged fraud caused them to overpay for airline tickets because the defendants' actions allegedly allowed airlines to overcharge passengers for their tickets. The district court held that this constituted an economic injury and certified four classes of consumers who purchased or reimbursed roughly 200 million airlines tickets for flights that were flown or could have been flown on MAX 8 planes.

[11] No. 21-7109 (D.C. Cir.) (consolidated with Case Nos. 21-7111 & 21-7110).

[12] *Trustees v. Greenough*, 105 U.S. 527 (1881), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

[13] As the *Apple* court noted in a footnote, "[t]he Second Circuit rejected a similar argument [that incentive awards were barred by *Greenough* and *Pettus*]. *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019). The Eleventh Circuit also rejected it, *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1196 (11th Cir. 2019), but later vacated the opinion and, on rehearing en banc, dismissed the case for lack of standing, 979 F.3d 917 (11th Cir. 2020). Meanwhile, the majority of another Eleventh Circuit panel reached the opposite conclusion — that *Greenough* and *Pettus* prohibit any incentive award to class representatives. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1255 (11th Cir. 2020)."

The defendants filed an interlocutory appeal. Upon review, the Fifth Circuit held that the plaintiffs lacked standing to bring the class action. The court explained that the plaintiffs failed to plausibly allege they were worse off financially because of the alleged fraud. To the contrary, the court reasoned that, if anything, the plaintiffs were likely *better off* financially because if the safety defect had been widely exposed earlier, the flights the plaintiffs chose "would have been unavailable and [the plaintiffs would] have had to take different, more expensive (or otherwise less desirable) flights instead." The court, therefore, held that the plaintiffs lacked standing and remanded to the district court with instructions to dismiss the action.

New York District Court Certifies Four Classes in Action Alleging Water Contamination

***Baker v. Saint-Gobain Performance Plastics Corp.*, No. 116CV0917LEKDJS, 2022 WL 9515003 (N.D.N.Y. Sept. 30, 2022)**

Judge Lawrence E. Kahn of the United States District Court for the Northern District of New York recently certified four classes of plaintiffs bringing claims based on alleged water contamination. The plaintiffs were residents of Hoosick Falls, New York, who sued a number of manufacturers for a variety of claims alleging that the defendants contributed to the contamination of groundwater with perfluorooctanoic acid (PFOA). Most of the defendants settled with the plaintiffs or were otherwise dismissed. At issue was the plaintiffs' remaining action against DuPont, which was based on claims of negligence and strict product liability for failure to warn. The plaintiffs moved to certify four classes: the Municipal Water Property Damage Class,[14] the Private Well Water Property Damage Class,[15] the Nuisance Damage Class,[16] and the PFOA Invasion Injury Class.[17] The court held that the requirements of numerosity, commonality, typicality, adequacy and ascertainability were satisfied for all four classes.

The PFOA Invasion Injury Class was certified pursuant to Rule 23(b)(2) because the plaintiffs alleged a common act or refusal to act (DuPont's alleged failure to warn of the toxicities linked with PFOA and products containing PFOA) and the plaintiffs sought a single form of injunctive relief (a court-ordered medical monitoring program). The remaining classes were certified pursuant to Rule 23(b)(3) and Rule 23(c)(4). The court found that common issues of fact predominated for the remaining classes, in part because the plaintiffs alleged one source of contamination for a single contaminant not found in nature and because liability centered on the common issues of DuPont's knowledge and duty. The court also found that the superiority requirement of Rule 23(b)(3) was satisfied for the remaining classes. The court further found the method of damages calculations used for the Municipal Water Property Damage Class and the Private Well Water Property Damage Class was appropriate and that individualized damages would not predominate.

When considering the Nuisance Damage Class, however, the court found that the plaintiffs failed to establish a methodology capable measuring damages on a classwide basis. The court therefore declined to certify the Nuisance Damage Class with respect to damages, but chose to certify the class for liability purposes under Rule 23(c)(4) because "resolution of common liability issues regarding the Nuisance Damage Class would materially advance the disposition of the litigation as a whole" and "would ensure greater consistency and uniformity in legal decisions governing persons similarly situated." Although liability would be litigated for the Nuisance Damages Class, damages would be determined through individual proceedings. Accordingly, the court certified all four classes.

[14] Consisting of "[a]ll individuals who are or were owners of real property that was supplied with drinking water from the Village of Hoosick Falls municipal water supply, and who purchased that property on or before December 16, 2015."

[15] Consisting of "[a]ll individuals who are or were owners of real property located in the Contamination Zone that was supplied with drinking water from a private well contaminated with PFOA and who owned that property at the time the contamination of the property's private well was discovered through a water test on or after December 16, 2015."

[16] Consisting of "[a]ll individuals who are or were owners or lessors of real property located in the Contamination Zone that was supplied with drinking water from a privately owned well contaminated with PFOA, had a point-of-entry treatment (POET) system installed to filter water from that well, and who occupied that property at the time the contamination of the property's private well was discovered through a water test on or after December 16, 2015."

[17] Consisting of "[a]ll individuals who, for a period of at least six months between 1996 and 2016, have (a) ingested PFOA-contaminated water from the Village of Hoosick Falls municipal water supply or from a PFOA-contaminated private well in the Contamination Zone and (b) suffered invasion and accumulation of PFOA in their bodies as demonstrated by blood serum tests disclosing a PFOA level in their blood above the average background level of 1.86 ug/L; or in any natural child born to a female who meets and/or met this criteria at the time of the child's birth and whose blood serum was tested after birth disclosing a PFOA level above the average background level of 1.86 ug/L."

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