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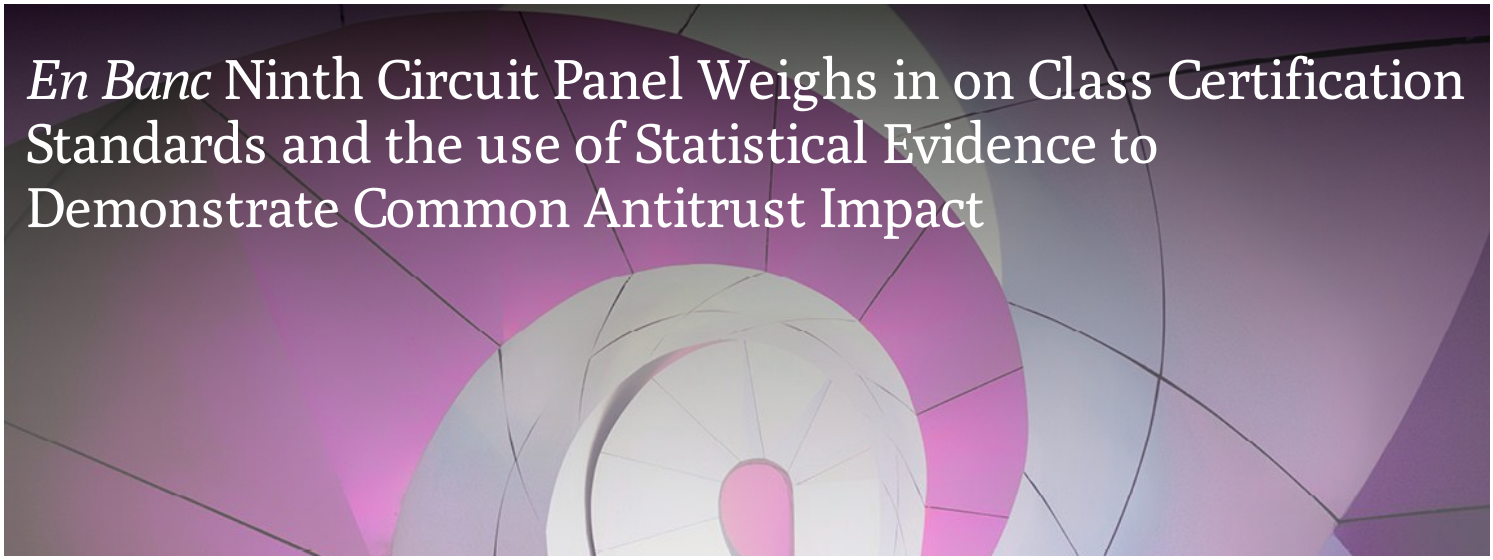

En Banc Ninth Circuit Panel Weighs in on Class Certification Standards and the use of Statistical Evidence to Demonstrate Common Antitrust Impact

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In a highly anticipated ruling, an *en banc* Ninth Circuit panel affirmed a district court's certification of three classes of purchasers in a price fixing case against the three largest American producers of packaged tuna. In doing so, the Court analyzed several open issues in class certification litigation, potentially widening a divide among the circuits on key issues, providing fuel for future class litigants and new challenges for defendants facing class claims. The highlights of the Court's ruling include:

- Concluding that plaintiff has the burden of establishing that the prerequisites of Rule 23 by a preponderance of the evidence (joining other circuits holding the same);
- Holding that a district court is limited to resolving whether evidence offered in support of certification is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiff will win at trial;
- Finding that even where plaintiff's evidence relating to the common question is unpersuasive or unlikely to carry plaintiff's burden of proof on the ultimate issue of liability, a district court does not abuse its discretion in finding that the common question requirement had been satisfied;
- Rejecting a *per se* rule that Rule 23 does not permit the certification of a class that potentially includes more than a *de minimis* number of uninjured class members, in favor of applying Rule 23(b)(3) on a case-by-case basis.

Summary of the Ruling

An 8-2 majority of the *en banc* panel disagreed with a previous panel of the Ninth Circuit that had reversed the district court's grant of class certification on the ground that factual disputes over conflicting statistical expert evidence must be resolved to determine whether predominance has in fact been met. *Olean Wholesale Grocery Co-op Inc v. Bumble Foods LLC*, No. 19-56514 Dkt. No. 186-1 (9th Cir. Apr. 8, 2022). *See* prior Competition Corner post, in April 2021. Writing for the majority, Circuit Judge Sandra Judge Ikuta held that "a district court is limited to resolving whether the evidence establishes that a common question is capable of class-wide resolution, not whether the evidence in fact establishes that Plaintiffs would win at trial." *Opinion* at 26. The panel held that this was proper even in the face of conflicting testimony provided by the defendants, and that a true resolution between the competing expert testimony and statistical analyses should be left for trial.

Judge Ikuta and the majority held that all that was needed at the class certification stage was for the district court to decide that the plaintiffs' expert model *could* show that a price-fixing conspiracy caused class-wide impact, saying, "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 plaintiffs' burden of proof." *Opinion* at 28. Rather, if "'the evidence could have sustained a reasonable jury finding' on the merits of a common question, then a district court may conclude that the plaintiffs have carried their burden of satisfying the Rule 23(b)(3) requirements as to that common question of law or fact." *Id.* (*quoting Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 at 455 (2016)). Judge Ikuta found that the district court did not abuse its discretion in finding a common question of fact for the proposed class, as it was permitted to make such a finding.

Though the defendants' own expert model purported to show that 28 percent of the proposed direct purchaser class did not suffer antitrust impact, the en banc court held that the district court did not err in failing to resolve the discrepancy between the two sides' models. The Court also firmly rejected adoption of a *per se* rule, adopted by the prior panel and supported by the defendants and the dissent, "that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." *Opinion* at 30-31. Interestingly, the majority did not view this as a split from rulings out of the First and DC Circuits (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019) and *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018)) that had rejected classes including more than a de minimis number of uninjured class members, but instead characterized the rulings as confined to the particular facts of the case and not per se prohibitions.

Dissenting, Circuit Judge Kenneth Lee, who was joined by Circuit Judge Andrew Kleinfeld, cautioned that the majority's opinion permitted certification of a class in which nearly a third of class members potentially suffered no injury. He opined that the original Ninth Circuit panel was right and that if defendants' expert evidence was correct that 28 percent of the class did not suffer antitrust impact, then Plaintiffs did not adequately show that common issues predominated over the class. He opined that this issue necessarily should be resolved at the class certification stage, rather than "punting" it to a jury at trial as proposed by the majority opinion. He wrote, in part, that "the refusal to address this key dispute now is akin to the NFL declining to review a critical and close call fumble during the waning minutes of the game unless and until the game reaches overtime (which, of course, will likely never occur if it does not decide the disputed call). Such a practice is neither fair nor true to the rule." *Opinion* at 65.

Additionally, Circuit Judge Lee commented on the practical implications of the district court's decision, as affirmed by the en banc majority: "the district court acknowledged the dueling experts' differing opinions on this crucial question but held that it would leave the issue for another day at trial . . . but as a practical matter, that day will likely never come to pass because class action cases almost always settle once a court certifies a class." *Opinion* at 65. Lee argued that "a district court thus must serve as a gatekeeper to resolve key issues implicating Rule 23 requirements," given the overwhelming likelihood that a class action of this nature will settle long before it ever goes to trial. *Id.*

Key Takeaways

This may not be the end of the line for the Tuna class. Given the divide among jurists and commentators on the proper role of judge and jury in deciding critical issues of Rule 23 certification, and lingering questions about whether statistical models are capable of resolving the issue of antitrust impact with common proof, the matter will most likely be on course for a petition for certiorari with the Supreme Court.

In the absence of more clarity from the Supreme Court, which could be years off, defendants facing class certification have a new set of concerns to address when opposing class certification. The Ninth Circuit seems to have opened the door for class certification despite the presence of significant numbers of uninjured class members, so long as the evidence offered can be viewed as "capable" of proving class-wide liability. And the bar is now much lower for judges in the Ninth Circuit to allow disputes between the experts at the class certification stage to be deferred to the jury, a result that will likely pressure defendants to settle earlier, as noted by the dissent.

But this decision does not mean antitrust defendants in class actions should just cut the line and settle. Notably, the defendants in the Tuna price fixing case never raised a *Daubert* challenge to the expert evidence before the district court and thus forfeited a powerful potential defense to argue that the evidence was inadmissible, which would render it incapable of proving class-wide liability. For that reason, it is critical for defendants and their experts to rigorously analyze plaintiffs' statistical models for flaws and challenge the reliability of the experts' opinions and try to render them inadmissible.

The Ninth Circuit also left the door open for other challenges to plaintiffs' expert evidence, nothing that "[n]ot all expert evidence is capable of resolving a class-wide issue in one stroke." *Opinion* at 26, fn. 9. The Ninth Circuit noted several examples where the evidence was inadequate to prove an element of a claim, where the evidence is not consistent with plaintiffs' theory of liability, or where the evidence shows nonsensical results like false positives.

Although the Ninth Circuit rejected the bright line approach of denying certification of proposed classes that contain a de minimis number of uninjured class members, it kept open the potential for defendants to make similar or additional arguments. The Ninth Circuit's case-by-case approach permits defendants in future battles to argue why the presence of uninjured class members precludes a finding of predominance under the circumstances of the particular case, or renders plaintiffs' classwide proof incapable of class-wide resolution.

Finally, the Ninth Circuit recognized that the Supreme Court recently held that "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Accordingly, the Ninth Circuit acknowledged that Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions. This presents another avenue for defendants facing overbroad classes to challenge certification.

Winston & Strawn Law Clerk Zach Broner also contributed to this blog post.

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