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BLOG

Ninth Circuit Serves up a Decision in Big Tuna Case

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Key Takeaway(s):

1. District courts need only determine whether plaintiffs' evidence proves that a common question is *capable* of class-wide resolution.
2. There is no *per se* rule preventing certification of a class that includes more than a de minimis number of uninjured class members.

In *Olean Wholesale Grocery Co-op Inc v. Bumble Foods LLC*, No. 19-56514 Dkt. No. 186-1 (9th Cir. Apr. 8, 2022), an *en banc* Ninth Circuit panel overturned a previous Ninth Circuit decision in this litigation, finding that the district court did not abuse its discretion in certifying three classes of purchasers in their price fixing case against the three largest American producers of packaged tuna.

The **key takeaway** from the ruling pertains to the level of evidence needed for the district court to find that the Rule 23 common question requirement has been satisfied. Writing for the majority, Circuit Judge Sandra 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. Further, "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 [at trial]." *Opinion* at 28.

The 8-2 majority decision comes despite the district court failing to resolve conflicting expert testimony offered by defendants, including statistical analyses that purported to show that 28 percent of the class did not suffer injury, thereby rejecting a *per se* rule suggested by the prior Ninth Circuit panel 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.

In his dissent, Circuit Judge Kenneth Lee cautioned that the common question issue must be resolved at the class certification stage, rather than being "punted" to trial. He emphasized his concern with the practical implications of the majority's holding and its failure to consider the district court's role as gatekeeper, writing that the district court

“held it would leave the issue [of a common question] for another day at trial . . . that day will likely never come to pass because class action cases almost always settle once a court certifies a class.” *Opinion* at 65.

The story is not likely to end here – given the split between circuits and within the Ninth Circuit, the decision seems ripe for a petition for certiorari with the Supreme Court.

For more information on this decision, please also read our *Competition Corner* blog post.

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