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Ninth Circuit Issues Important En Banc Opinion Regarding Class Certification Issues

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On April 8, 2022, the Ninth Circuit released a significant en banc opinion in *Olean Wholesale Grocery v. Bumble Bee Foods*, — F.4th —, 2022 WL 1053459 (9th Cir. Apr. 8, 2022) (en banc), that addresses numerous key class certification issues, including the evidentiary burden for a plaintiff seeking class certification, the assessment of expert testimony at the class certification stage, and the interplay between Rule 23 and injury and Article III standing.

While the Ninth Circuit ultimately affirmed the granting of class certification in *Olean*, and rejected a *per se* ruling against certifying a class that contains more than a de minimis number of uninjured class members (a ruling which conflicts with decisions from the First and D.C. Circuits), the court's opinion outlines a framework for class certification that creates significant hurdles for plaintiffs seeking to certify expansive classes, especially where proving injury at trial would require individualized adjudications. And while *Olean* is an antitrust case involving claims of price fixing, its holdings are likely to impact all types of class actions, including consumer and employment cases.

Below, we outline the key holdings of Judge Ikuta's lengthy opinion for the en banc Ninth Circuit:

- **Evidentiary Burden—Preponderance.** The Ninth Circuit joined other circuits in holding that the preponderance-of-the-evidence standard should be used to evaluate whether the proponent of class certification satisfied the prerequisites of Rule 23. 2022 WL 1053459 at *5.
- **Admissible Evidence.** The Ninth Circuit held that a plaintiff seeking class certification must satisfy its burden at class certification with *admissible* evidence. *Id.* at *6. This effectively overrules a prior Ninth Circuit panel decision, *Sali v. Corona Regional Medical Center*, 909 F.3d 996 (9th Cir. 2018), which had suggested that class certification could not be denied on the ground that the plaintiff's evidence was inadmissible.
- **Inquiry Into the Merits**. The Ninth Circuit cautioned 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." *Id*. at *7. But the court recognized that a "district court must also resolve disputes about historical facts if necessary to determine whether the plaintiffs evidence is capable of resolving a common issue central to the plaintiffs' claims." *Id.* at *8.
- **Scrutiny of Expert Testimony.** The Ninth Circuit held that *Daubert* and Rule 702 of the Federal Rules of Evidence applies to expert testimony submitted at the class certification stage. at *6, n.7. But at the same time, the court emphasized that a district court cannot stop at simply evaluating whether expert testimony is admissible, as "[c]ourts have frequently found that expert evidence, while

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otherwise admissible under *Daubert*, was inadequate to satisfy the prerequisites of Rule 23." *Id.* at *7, n.9. The Ninth Circuit then cataloged several examples of such inadequate expert testimony, including where "the evidence demonstrated nonsensical results such as false positives," "where the evidence contained unsupported assumptions," and "where the expert evidence was inadequate to prove an element of the claim for the entire class." *Ibid.*

- **Uninjured Class Members.** Breaking with the *Olean* panel decision—as well as the First Circuit's decision in *In re Asacol Antitrust Litig*., 907 F.3d 42 (1st Cir. 2018), and the D.C. Circuit's decision in *In re Rail Freight Fuel Surcharge Antitrust Litig*., 934 F.3d 619 (D.C. Cir. 2019)—the Ninth Circuit rejected a categorical rule precluding certification of a class that includes more than a de minimis number of uninjured class members. *Id*. at *9.

  But the Ninth Circuit did not hold that injury is irrelevant to the class certification calculus. To the contrary, the court repeatedly emphasized that injury, both as an element of the underlying claim and as a requirement of Article III, is an essential issue in determining whether Rule 23(b)(3)'s predominance requirement is satisfied.

  First, the court held that "[w]hen individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." at *9. And "[b]ecause the Supreme Court has clarified that '[e]very class member must have Article III standing in order to recover individual damages,' Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions." *Id.* at *9, n.12 (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021)).

  Second, the court directed district courts to perform a "rigorous analysis" on a case-by-case basis, including analyzing "whether the possible presence of uninjured class members means that the class definition is fatally overbroad." *Id*. at *10, n.14.

  Third, while the court encouraged district courts to "redefine" overbroad classes rather than denying certification altogether, it expressly cautioned that courts cannot create "fail safe" classes designed to "include only those individuals who were injured by the allegedly unlawful conduct." *Ibid*.

  Finally, the court declined to address whether the "possible presence of a large number of uninjured class members raises an Article III issue," as it concluded that the plaintiffs had demonstrated that all class members had standing. *Id*. at *19. The court did, however, expressly overrule its prior statement in *Mazza v. American Honda Motor Co*., 666 F.3d 581 (9th Cir. 2012), that "no class may be certified that contains members lacking Article III standing," reasoning that this statement was wrong as applied to class actions seeking only injunctive or equitable relief, as opposed to damages. 2022 WL 1053459 at *19, n.32.

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Gibson Dunn attorneys are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Class Actions, Labor and Employment, Antitrust and Constitutional, or Appellate and Constitutional Law practice groups, or any of the following lawyers:

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