DUELING EXPERTS: WHAT *OLEAN* MIGHT MEAN FOR THE FUTURE OF CLASS CERTIFICATION IN THE NINTH CIRCUIT

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Class plaintiffs often attempt to establish class-wide injury by relying on expert evidence, like surveys, correlation studies, or other statistical analyses that seek to measure the class-wide impact of the alleged misconduct. In response, defendants have traditionally attacked such evidence by seeking to undermine the methodology used by the plaintiffs' expert. But an en banc ruling from the Ninth Circuit Court of Appeals earlier this year in *Olean Wholesale Grocery Coop. v. Bumble Bee Foods* (9th Cir. 2022) 31 F.4th 651, suggests that this typical defense response may not be enough to defeat class certification. Rather, in light of *Olean*, a defendant facing the threat of class certification would be better served by using expert evidence to show that (1) the alleged misconduct *could not* have affected the entire class and/or (2) as to a significant portion of the class, assessing whether class members were injured would necessitate individualized inquiries. On August 8, 2022, certain of the defendants in *Olean* filed a cert petition with the Supreme Court, asking the Court to address the question of whether and to what extent a putative class with uninjured class members can be certified. The Supreme Court denied the petition on November 14, 2022.

THE *OLEAN* DECISION

The underlying dispute concerned an antitrust conspiracy involving the three largest domestic producers of packaged tuna products. (*In re Packaged Seafood Prods. Antitrust Litig.* (S.D.Cal. 2019) 332 F.R.D. 308, 316-317.) To show antitrust impact in a class action, the district court held, "'plaintiffs must establish, predominantly with generalized evidence, that all (or nearly all) members of the class suffered damage as a result of Defendants' alleged anti-competitive conduct.'" (*Id.* at p. 320.) The plaintiffs' expert opined that a "pooled regression model" showed class-wide injury. In turn, defendants' expert countered that the model failed some important statistical tests, and thus could not establish injury for about 28% of the class. The district court held that the "issue of whether pooling is appropriate" presented a "'genuine conflict between the experts as to the proper approach,'" and was "not a reason to reject [Plaintiffs' expert's]

model at the class certification stage." (*Id.* at p. 325.) The district court held that the defendants' expert's opinions were "ripe for use at trial, but, at this stage, are not fatal to a finding of class-wide impact." (*Ibid.*)

On appeal, the Ninth Circuit majority panel reversed, holding that "[w]hen considering if predominance has been met, a key factual determination courts must make is whether the plaintiffs' statistical evidence sweeps in uninjured class members." (*Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC* (9th Cir. 2021) 993 F.3d 774, 791.) The court observed that dueling experts' claims regarding the number of uninjured members was not an issue that could be delegated to a jury. Reasoning that "[i]f a substantial number of class members 'in fact suffered no injury,' the 'need to identify those individuals will predominate,'" the Ninth Circuit held that "the district court abused its discretion in declining to resolve the competing expert claims on the reliability of Plaintiffs' statistical model." (*Ibid.*, quoting *In re Asacol Antitrust Litig.* (1st Cir. 2018) 907 F.3d 42, 53.)

An en banc panel then affirmed the district court's order certifying a class, holding that at the certification stage, "all that was necessary" was a showing that the plaintiffs' expert evidence "was *capable* of showing" class-wide injury, "*notwithstanding*" the rebuttal expert's critique. (*Olean*, *supra*, 31 F.4th at p. 681.) The en banc panel agreed with the district court's reasoning that, despite the district court's "acknowledge[ment] that failure of a statistical test used to determine whether a regression is appropriate should be taken seriously, and could lead a court to reject the model at the class certification stage as not capable of providing class-wide proof," here, "there was a rational basis" for the manner in which plaintiffs' expert conducted his study. (*Id.* at p. 675.) The en banc panel rejected the defendants' argument that the plaintiffs' expert's theory was implausible, as such an argument "improperly conflates the question whether evidence is capable of proving an issue on a class-wide basis with the question whether the evidence is persuasive. A lack of persuasiveness is not fatal at certification." (*Id.* at p. 679; see also *Tyson Foods, Inc. v. Bouaphakeo* (2016) 577 U.S. 442, 459 ["Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury."].) This approach caused the dissent to remark that "a plaintiff could [now] prevail on class certification by merely offering a well-written and plausible expert opinion." (*Olean*, *supra*, at p. 689 (dis. opn. of Lee, J.).)

IN LIGHT OF *OLEAN*, HOW CAN DEFENDANTS USE EXPERT EVIDENCE TO DEFEAT CLASS CERTIFICATION?

Olean signifies that genuine disputes between dueling experts regarding methodology are unlikely to move the needle in terms of class certification. Rather, *Olean* suggests two approaches a defendant may take in using expert evidence to defeat class certification. First, a defendant can attack Federal Rules of Civil Procedure, rule 23(a)'s commonality requirement by arguing that expert evidence shows that the entire class was not exposed to the alleged misconduct. Second, a defendant can argue that rule 23(b)(3)'s predominance requirement is not met, as expert evidence shows that individualized issues would predominate in determining the extent to which there are uninjured class members. (See, e.g., *Prescott v. Reckitt Benckiser LLC* (N.D.Cal. July 29, 2022) No. 20-CV-02101-BLF, 2022 WL 3018145, *6; *id.* at pp. 6, 9, quoting *Olean*, *supra*, 31 F.4th at pp. 666–667 [relying on *Olean*'s holding 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'" in granting class certification on the ground that "Plaintiffs have shown that all putative class members were exposed to the [alleged] representation, and have presented common evidence [an expert opinion] that the representation was false."].)

First, the *Olean* court pointed to *Ellis v. Costco Wholesale* (9th Cir. 2011) 657 F.3d 970, as providing the rubric for the use of expert evidence in defeating rule 23(a)'s commonality requirement. In *Ellis*, the Ninth Circuit vacated a class certification order in a case involving alleged gender discrimination. There, plaintiffs adduced expert evidence showing that, among other things, Costco had a "pervasive culture" of gender stereotyping and paternalism. (*Id.* at pp. 982-983.) Costco's expert responded that such gender disparities, if any existed, were confined to two of Costco's eight nation-wide regions. The *Ellis* court held that the district court erred by not resolving "the critical factual disputes centering around the national versus regional nature of the alleged discrimination." (*Id.* at p. 984.) As the Ninth Circuit explained in *Olean*, the key difference between the expert disputes in *Ellis* and *Olean* was that, in the former case, the court had to resolve a dispute of historical fact to determine whether the challenged discriminatory conduct "*could affect* a class as a whole,"

a dispute that concerned the issue of commonality. (*Id.* at p. 983, italics added.) Whereas in *Olean*, the court reasoned that "*[t]here is no factual dispute* that the Tuna Suppliers engaged in a price-fixing scheme affecting the entire packaged tuna industry *nation-wide*." (*Olean*, *supra*, 31 F.4th at p. 681, italics added.)

Second, as to rule 23(b)(3)'s predominance requirement, the court in *Olean* left open the possibility that a defendant could defeat class certification by offering expert evidence showing that individualized inquiries would predominate as to the need to identify individual uninjured class members. (*Olean*, *supra*, 31 F.4th at pp. 681-682 [observing that the defendants-appellants "have not argued that the complexity of damages calculations would defeat predominance here"].) There are cases from other jurisdictions in which courts appear to have held that, where there is more than a "de minimis" number of uninjured class members, class certification is inappropriate. (See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869* (D.C. Cir. 2019) 934 F.3d 619, 625 ["The 12.7 percent [uninjured] figure in this case is more than twice that approximate upper bound reflected in analogous caselaw."]; *Asacol Antitrust Litig.*, *supra*, 907 F.3d at p. 53 ["[T]his is a case in which any class member may be uninjured, and there are apparently thousands who in fact suffered no injury."].) Indeed, these are the cases that the *Olean* appellants argued in their petition for certiorari create a circuit split requiring the Supreme Court's intervention. The Ninth Circuit attempted to reconcile its holding in *Olean* with the holdings in *Rail Freight* and *Asacol* by reasoning that (1) neither *Rail Freight* nor *Asacol* created a *per se* rule that a class cannot be certified where there is more than a de minimis number of uninjured class members, and (2) those cases held that rule 23(b)(3)'s predominance requirement cannot be met where "the need to identify uninjured class members" will overwhelm common questions. (*Olean*, *supra*, 31 F.4th at p. 669, fn. 13.) Given that the Supreme Court denied the *Olean* appellants' cert petition, the Ninth Circuit's reasoning in this respect is likely to guide lower courts.

In short, *Olean* does not foreclose an argument that there are too many uninjured members in a putative class for certification to be appropriate. Rather, such an argument is more likely to gain traction in the Ninth Circuit if it is couched in terms of the minitrials that would result should the trier of fact be required to determine whether and to what extent numerous individual class members actually suffered an injury.

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