

Class Certification in the Ninth Circuit After Olean

By Mark G. Weiss | Baker McKenzie



Edited by Justin Stewart-Teitelbaum & Angela Landry

Class Certification in the Ninth Circuit After *Olean*

By Mark G. Weiss*

The Ninth Circuit recently rejected the premise that Rule 23 of the Federal Rules of Civil Procedure precludes a class that “potentially includes more than a de minimis number of uninjured class members.” But, the Court does little to reconcile its holding with the inherent complications raised by uninjured class members, including issues of procedural justice and standing.¹

Class certification represents a watershed moment in most complex civil litigation—particularly in high-stakes antitrust and securities cases. Plaintiffs are tasked with the high burden of proving their putative classes meet the requirements of Rule 23 including the four prerequisites of Rule 23(a)—numerosity, commonality, typicality, and adequacy. Additionally, classes must meet at least one of the three requirements of Rule 23(b). The most common, particularly for classes seeking monetary damages is Rule 23(b)(3)—the predominance standard—which asks if “questions of law or fact common to class members predominate over any questions affecting only individual members.”

The Ninth Circuit grounds its conclusions in a textual analysis of Rule 23(b)(3), finding that the predominance standard requires district courts only to determine whether common questions predominate over individual questions. But the Court never denies that uninjured class members can raise individualized issues and provides little guidance on how trial courts should unravel the predominance analysis when uninjured class members are present.

The decision raises a number of questions. How should courts handle a situation where uninjured class members are present? Can plaintiffs freely define broader classes without fear of denial? And, how can defendants oppose

certification when a putative class contains uninjured class members?

This article suggests that the *Olean* decision actually imposes a heavier burden on district courts to analyze uninjured class members. A district court may not merely deny certification on the basis of the mere presence of uninjured class members but instead must conduct a rigorous predominance analysis that considers issues of procedural justice, standing, or class definition that may still inhibit certification. Plaintiffs seeking certification should carry the burden to show how uninjured class members will be identified and removed from the class without violating predominance requirements. And defendants should do more than merely identify uninjured class members—they should present a well-developed argument that the presence of those uninjured class members prohibits certification under a predominance analysis.

I. Background

A. *Procedural Posture.*

The *Olean* case commenced as a price-fixing investigation by the Department of Justice. A direct purchaser class and two indirect purchaser classes—commercial food preparers and individual consumers—filed civil follow-on actions. In 2019, a district court judge certified all three classes. On appeal, a three-judge Ninth Circuit panel decertified the classes on the basis that the district court improperly failed to resolve the issue whether the class had too many uninjured class members—holding that the number of uninjured class members “must be de minimis.” An en banc Ninth Circuit panel then voted 9-2 to vacate and affirm the district court opinion. Defendants then filed a writ of

¹ Mark G. Weiss is a Partner on the Baker McKenzie Antitrust and Competition team in Washington, D.C. Mark thanks associates Darley Maw and Halli Spraggins and summer associate Aeryka Fausett for invaluable assistance and comments on this article. This article contains only personal views of the author and does not reflect the views or opinions of Baker McKenzie, or any other member firm of Baker McKenzie. The comments made and views expressed in this article are intended for information purposes only, and nothing in this article is to be considered as creating an attorney-client relationship or indeed any contractual relationship or as rendering legal or professional advice for any specific matter, whether under U.S. law, English law, the laws of any other country, or otherwise. Readers are responsible for obtaining such advice from their own legal counsel. This article is otherwise published subject to these disclaimers.

certiorari to the Supreme Court, which was denied.

B. Olean's Key Holding.

Olean holds that a class can be certified with more than a de minimis number of uninjured class members. The en banc panel derived this holding from Defendants' expert Dr. John Johnson, who ran the plaintiffs' overcharge model on a customer-by-customer basis to conclude that "the model did not estimate a positive and statistically significant overcharge (attributable to the conspiracy) for 169 direct purchasers (or 28 percent)." According to the Ninth Circuit, this critique supported a conclusion not that 30% of class members were uninjured, but instead that not every putative class member could rely on the proffered liability model of their expert because some "class members [had] no or limited transactions during the benchmark period[.]"

The Court justified its holding with a statutory interpretation of Federal Rule of Civil Procedure 23(b)(3), which requires that common questions predominate over individual questions. The Ninth Circuit determined that the mere existence of uninjured class members does not trigger a predominance problem sufficient to justify denial of certification—as this requirement is not found in the rule. However, the court acknowledged that the presence of these class members (and related standing issues) can create individualized issues that predominate. Accordingly, a predominance analysis into uninjured class members must be conducted on a case-by-case basis rather than by adopting a per se rule that the existence of more than a de minimis number of uninjured class members automatically results in a denial of certification.

II. Olean's Consistency with Other Circuits

The dissent argues that the Olean holding creates a circuit split with the D.C. Circuit and the First Circuit over whether a class can be certified that contains more than a de minimis number of uninjured class members. But the en banc opinion disagrees.

In the D.C. Circuit, in *In re Rail Freight Fuel Surcharge Antitrust Litigation* the district court denied certification where the plaintiffs' own

model found that 12.7% of plaintiffs suffered "only negative overcharges" and no injury. In raw numbers, the D.C. Circuit found that this constituted "2,037 uninjured classmembers . . . all of whom would need individualized adjudications of causation and injury" which could not be adequately resolved without individualized trials.

Similarly in *In re: Asacol Antitrust Litigation*, the First Circuit found that the putative class was one where "any class member may be uninjured, and there are apparently thousands who in fact suffered no injury." The First Circuit accepted arguments that "some class members stopped taking (and will therefore have no record of purchasing) Asacol anywhere between 2009 and 2012, and some class members when asked will admit a preference for [alternative medications] . . . Additionally, some class members would not have switched to a generic because they had no co-pay, and therefore were not price sensitive."

The en banc Olean opinion argues that these cases do not represent a circuit split and rejects application of a "per se rule"—rejecting certification any time more than a de minimis number of class members are included in a putative class. The Ninth Circuit suggests that the three circuits are aligned, analyzing whether the presence of uninjured class members "will predominate and render an adjudication unmanageable."

Importantly, the Olean decision rejects that the class included a "substantial" number of uninjured class members, as Defendants argued based on their economist's finding that 28 percent of the DPPs cannot rely on the model proffered to establish injury or harm. The Ninth Circuit did not agree that this criticism goes to the issue of injury and standing.

This underscores the distinction with the other Circuit Courts. In *Rail Freight* the plaintiffs' own model conceded a lack of injury and in *Asacol* the class definition included numerous uninjured class members where plaintiffs had provided no mechanism by which to identify and weed them out of the class.

III. Olean's Holding and Factual Support

The key holding of Olean goes beyond the facts present in the case. This conclusion is supported by the underlying economic testimony and factual findings.

The Direct Purchaser Plaintiffs' expert in the case—Dr. Mangum—sought to demonstrate a class-wide method of proving injury by way of a before-and-after model regression that estimates the average overcharge during the alleged conspiracy period. The model compares transactions prior and subsequent to an alleged conspiracy period to transactions during the alleged conspiracy period. The model also seeks to control for factors representing the supply and demand in the industry. The overcharge is estimated using a dependent “dummy” variable that is equal to one during the conspiracy period and equal to zero during the benchmark periods. All things equal, if the dependent variable results in a positive coefficient, the expert will attribute that difference, not already controlled for by other factors, to the effects of the illegal conspiracy. In reality, that variable estimates effects created by anything that the model does not control for that may have been different between the conspiracy period and the benchmark periods. As is the trend in these cases, Plaintiffs' expert ran an overcharge regression only capable of estimating a single average overcharge for every transaction and sale during the class period.

Defendants' expert—Dr. Johnson—critiqued the plaintiffs' overcharge conclusions by running the model independently over each individual customer's data. He found that if plaintiffs' overcharge model was run over the data of individual customers, roughly 28% of the individual plaintiffs lacked sufficient data to rely on the overcharge model. The court found that this is best explained by data limitations; that is, some of the customers purchased only during the conspiracy period or during the benchmark period, so this comparative model has nothing to compare. When a customer lacks at least one transaction in the conspiracy period and at least one transaction in a benchmark period, the results for that customer are insignificant.

The Ninth Circuit concluded that this critique does not require holding that these individual customers are uninjured. Instead, for roughly 28% of the putative class members, the result is statistically insignificant because there is not enough customer-specific data to reach a conclusion about injury. This distinction is important. Lacking enough data to estimate injury is very different than concluding that 28% of customers were uninjured.

The relevant Rule 23 consideration is whether all customers can rely on the Plaintiffs' overcharge model as proof of injury even where certain class members lacked sufficient data for these individualized regressions. The Olean court holds that they can—finding that the district court “considered and resolved this methodological dispute” crediting a conclusion of Plaintiffs' expert reply report and the lack of any factual dispute over the existence of an industry-wide price-fixing scheme. Thus, in the en banc opinion of the Ninth Circuit, this class did not necessarily have any uninjured class members.

The vacated Olean Panel decision held that “[a]lthough we [the Ninth Circuit] have not established a threshold for how great a percentage of uninjured class members would be enough to defeat predominance, it must be de minimis.” The en banc decision overruled the holding that “Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members.” Instead, Rule 23(b)(3) requires a “rigorous analysis” of the predominance issues.

This holding, thus, begs an important question. Why did the court hold that classes can be certified with more than a de minimis number of uninjured class members when the case in front of them did not necessarily have any? The Court could have cabined its holding to the case, finding that the Olean panel erred in concluding that there were uninjured class members, but instead the en banc opinion went beyond the apparent facts (or legal conclusions) of the case to create a new rule of predominance.

IV. Issues with Uninjured Class Members: Due Process, Article III Standing, and Class Definition

A. Procedural Justice Issues Presented by Uninjured Class Members

Given that a denial of class certification is likely to deprive a substantial number of class members of valid injury claims, it is important to understand the serious issues raised by uninjured class members related to due process and procedural justice.

A class action, by its nature, sets aside the general right of a defendant to oppose individualized claims. This sacrifice is made in the name of efficiency to aggregate and allow recompense for small-dollar claims where the injury is dispersed among a large number of parties. As found by the First Circuit, “a class may be certified notwithstanding the need to adjudicate individual issues so long as the proposed adjudication will be both administratively feasible and protective of defendants’ Seventh Amendment and due process rights.”

In *Asacol*, this issue arose in a plan submitted by the plaintiffs to bypass the typical injury-in-fact requirement of putative class members. The First Circuit vacated a certification decision where plaintiffs planned to have class members submit a claim form with supporting documentation that would be evaluated by a claims administrator and then fed into a formula which would spit out individual damages, subject to approval by the court. The court, questioning this approach, stated that “[o]ne can only guess what data and documentation may be deemed necessary, what the formula will be, and how the claims administrator will decide who suffered no injury.” The court acknowledged the defendants’ right to object to individual claims and found that the use of a claim’s administrator would fail to be “protective of defendants’ Seventh Amendment and due process rights.”

Certifying a class that includes uninjured members can also violate the Rules Enabling Act by enlarging class members’ substantive rights. Uninjured class members should not succeed in individual claims because they

cannot prove injury-in-fact. Allowing them to hide in a larger class would substantively expand their rights. As the Supreme Court held in *Tyson Foods*, examining *Wal-Mart*, “Trial By Formula” was contrary to the Rules Enabling Act because it “enlarge[d]” the class members’ “substantive right[s]” and deprived defendants of their right to litigate statutory defenses to individual claims.

Certified classes with uninjured class members can deprive the rights of defendants who may be forced to pay damages to parties without claims. The Olean dissent raises strong objections on these grounds: “By expressly rejecting a *de minimis* rule, the majority’s opinion will invite plaintiffs to concoct oversized classes stuffed with uninjured class members—with little fear of having their class certification bids being denied for lack of ‘predominance’ or ‘commonality.’” The Olean majority, however, brushes aside these concerns as “policy reasons” unrelated to the court’s obligation to “apply Rule 23(b)(3) as written.”

B. Uninjured Class Members and Article III Standing Deficiencies

The Olean decision also raises questions about balancing the prerequisite Article III standing requirement with the predominance analysis required by Rule 23(b)(3). The Ninth Circuit seems to be on a narrow tightrope walk between certifying classes with uninjured class members while acknowledging that those class members may lack Article III standing. Courts have long wrestled with this distinction.

To clear this up, the court cites *TransUnion LLC v. Ramirez*, in which the Supreme Court clarified that “[e]very class member must have Article III standing in order to recover individual damages,” and notes that Rule 23 requires district courts to determine if these standing issues create predominance problems that prohibit certification.

In *TransUnion*, a class of consumers alleged claims under the Fair Credit Reporting Act that *TransUnion*, a credit reporting agency, erroneously reported that certain individuals were “terrorists, drug traffickers, and other serious criminals.” These reports were sent to third parties, creating a concrete injury for 1,853

class-members; for the other 6,332 class members, no report was sent to any third parties. The Court held: “[n]o concrete harm, no standing. . . . The 6,332 class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus do not have standing[.]” TransUnion focuses on the substance of the injury-in-fact requirement but gives little guidance on the predominance analysis of uninjured class members.

Indeed, regarding TransUnion the Olean court notes that “[t]he Supreme Court expressly held open the question ‘whether every class member must demonstrate standing before a court certifies a class.’” Clearly, the Ninth Circuit has now answered that question in the negative—the presence of uninjured class members, even a substantial number, is not a per se bar to certification. But reconciling Olean with TransUnion suggests that there must be a way to determine at a later stage, after certification, that uninjured class members can be identified and removed. And, at class certification, district courts should consider whether the standing issues raised by uninjured class members predominate over any class-wide method of determining injury, liability, and damages.

What is lacking from the Olean opinion, however, is any explanation of how exactly that predominance analysis should proceed. The Ninth Circuit has chosen to punt that issue to the lower courts, presumably because the methods and relevant facts will vary substantially from case to case. But the Ninth Circuit’s sub silentio holding is that damages classes can be certified with uninjured class members but only if there is a method to identify and filter out those class members in a reliable manner without holding hundreds or thousands of individualized mini-trials.

This suggests that the Ninth Circuit has actually placed an increased burden on district courts to analyze predominance issues under Rule 23—far from rubber-stamping classes with uninjured class members. Both plaintiffs and defendants should heed those concerns when fashioning their arguments, but district courts should recognize that plaintiffs carry all the burdens at the class certification stage. Unless they can

identify a functional procedure to address the presence of uninjured class members, individualized issues are likely to predominate.

C. Uninjured Class Members and Class Definition

The en banc Olean opinion cautions that “[n]evertheless, a court must consider whether the possible presence of uninjured class members means that the class definition is fatally overbroad[.]” This occurs when the class definition includes “a great number of members who for some reason could not have been harmed by the defendant’s allegedly unlawful conduct.”

The Olean opinion offers the broad contours of a permissible class definition. It offers, for example, that classes in false advertising cases should only contain individuals who were exposed to the materially misleading advertising. On the other end of the spectrum, fail-safe classes—that is, classes defined as “only those individuals who were injured by the allegedly unlawful conduct”—are impermissible. Members of such classes would eventually either win or, after a loss, be “defined out of the class” and therefore be “not bound by the judgment.” The court then offers guidance—that “the problem of a potentially ‘over-inclusive’ class ‘can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis.’”

The guidance is certainly non-controversial—if a class definition is too broad and can be easily remedied then amending the class definition is appropriate. However, the issue has not been central to many of the recently decided cases, suggesting it will rarely serve as a solution to predominance issues arising from uninjured class members. As an example, the class definition issue is not one raised by the facts of Olean and while the Ninth Circuit remands in Mazza, the Court provided “no opinion whether a differently defined class may meet the” Rule 23(b)(3) requirements. Accordingly, the direction may offer little guidance to parties and may rarely apply.

V. Subsequent Ninth Circuit Certification Analysis After Olean

Subsequent Ninth Circuit precedent illustrates the effects of Olean on certification. Since Olean, certified classes have still been vacated or remanded by the Ninth Circuit where individual issues predominate, suggesting that the effect of the Olean opinion is not monolithic. A few examples are illustrative.

In *Van v. LLR, Inc.*, the Ninth Circuit vacated a district court's certification decision for lack of predominance. There, a fashion company improperly charged sales tax based on the location of its sales rather than the location of the purchasers. A class of Alaskans sued claiming they were improperly charged because the state has no sales tax. The Ninth Circuit considered evidence that frequent discounts often exceeded the purported sales tax, noting that "[s]ome of these unexplained discounts discounted the price by the exact amount, or nearly the exact amount, of the improperly assessed sales tax." The court found that evidence of 13,680 individual discounts was sufficient to substantiate an individualized inquiry that must be considered at class certification—"summoning the specter of class-member-by-class-member adjudication."

The court noted that the class members who received discounts may lack injury and, thus, Article III standing. Citing Olean, the opinion raised the Supreme Court's open question whether a lack of Article III standing defeats class certification. The court then vacated and remanded to the district court to consider whether the reimbursements raise predominance issues that defeat certification. The case is evidence that uninjured class members can raise predominance issues sufficient to deny certification.

In a similar vein, in *Harvey v. Morgan Stanley Smith Barney LLC*, the Ninth Circuit remanded a class settlement approval because the "district court did not make a factual finding that every class member suffered some injury."

So too for *Bowerman v. Field Asset Services, Inc.*, where the Ninth Circuit vacated certification of a class of employees. The plaintiffs claimed the class members were injured based on

misclassification as independent contractors, but the Court credited evidence that class members may not have worked overtime or may not have incurred necessary business expenses, resulting in individualized damages inquiries predominating over common ones.

VI. Conclusions and Recommendations for a Path Forward

The Olean opinion provides little guidance to explain the gap between the permissibility of certified classes with uninjured class members and the rule that damages classes cannot be certified if any plaintiff lacks standing. The en banc Olean opinion identifies the issue but also downplays it. That may be intentional—leaving some ambiguity to the district courts to work out in actual cases, but the lack of direction will create some confusion along the way.

In the absence of clear guidance, a key question is where the burdens of proof lie. At class certification, plaintiffs carry the burden to meet the Rule 23 requirements. To the extent plaintiffs define a class containing uninjured class members, they should carry the primary burden of proving that the class definition does not raise individualized inquiries that predominate. As district courts seek to apply the Olean opinion, they should require plaintiffs to prove that there is a valid means by which to identify and weed out uninjured class members without "numerous mini-trials." In other words, where uninjured class members are evidently part of a class, certification requires that plaintiffs prove that these class members can be identified either through evidence, economics, a reasonable and manageable claims process, or some other method.

Individualized issues may then require that courts deny certification, either with prejudice, or without prejudice after the court has "consider[ed] whether the possible presence of uninjured class members means that the class definition is fatally overbroad." This may sometimes be the case, but in many cases it may not be possible to redefine the class to remove uninjured members without converting it into an impermissible fail-safe class.

Plaintiffs will, of course, claim that damages issues can be sorted out at trial, but again the approach raises the specter of individualized inquiries. And those inquiries need to be considered in a rigorous predominance analysis that considers the actual process at the certification stage. District courts should consider how those individualized damages issues will be resolved. If the process is too arduous or complicated, then certification is likely not appropriate.

The lesson for Defendants is that if faced with a class with uninjured class members, that deficiency should be tied to an individualized predominance analysis. Defendants should raise these difficult-to-answer questions in their briefing (or a hearing), including:

- (1) Can we identify which class members are uninjured?
- (2) What process would be used to make that identification?
- (3) What evidence would need to be gathered to identify and remove uninjured class members

(and how burdensome would it be to gather that evidence)?

(4) Could a trial, or a set of mini-trials be used to identify uninjured class members?

(5) Would the process upend the very idea of jointly trying these claims together?

If a reasonable and manageable process cannot be established, then there is a fairly strong argument that these individualized issues will predominate. By tying the presence of uninjured class members to a predominance analysis, Defendants can increase the chance that certification will be denied.

District courts in the Ninth Circuit may now carry an even heavier burden at class certification. Should a district court find that a class contains uninjured class members, Olean holds that they cannot merely deny certification as a matter of course, but should instead conduct a rigorous predominance analysis that considers the individualized inquiries raised by uninjured class members in the context of procedural justice, standing, and class definition.