Buzzing About Rule 23: *Bumble Bee* & the Predominance Inquiry in Antitrust Cases

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For decades, litigants embroiled in antitrust class action suits have buzzed about Rule 23's predominance requirement. At the class certification stage, the issue of predominance has proven both pivotal and vexing—can a proposed class including any uninjured class members satisfy Rule 23(b)(3)? And, if so, how many uninjured class members are too many and what type of evidence is required to demonstrate the extent to which class members are uninjured? For years, circuits and courts have sharply divided on this issue.[1]

The Ninth Circuit recently tackled these issues in a long-running packaged tuna price-fixing case, *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*,[2] ultimately rendering an en banc ruling rejecting arguments that Rule 23 would "not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members," and ruling instead that the district court acted within its discretion by concluding after "rigorous analysis" that "the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages."[3]

The defendants in *Bumble Bee* have now filed a petition for certiorari, opening the door for the Supreme Court to resolve the Circuit split and answer whether, and under what circumstances, the presence of uninjured class members should preclude class certification.[4] Unless the Supreme Court gives additional guidance, the Ninth Circuit's en banc opinion (and contrasting views of other circuits) raise as many questions as they answer, leaving parties guessing as to how the predominance requirement will be applied in antitrust suits moving forward.

Rule 23: Setting the Stage for the Predominance Inquiry

Federal Rule of Civil Procedure 23 is simple in form and nuanced in application. In all types of cases, to proceed as a class action, plaintiffs must establish the elements of numerosity, commonality,

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1 *Compare In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 194 (3d Cir. 2020) (vacating class certification because the district court failed to resolve conflicting expert opinions about whether "up to one-third of the entire class" was uninjured, "even though [that issue] touches on the merits"); *In re* Asacol Antitrust Litigation, 907 F.3d 42 (1st Cir. 2018) (a proposed class in which 10% of the class had not suffered any injury did not satisfy Rule 23(b)(3)); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013) (proposed class with 12% uninjured class members failed to satisfy Rule 23(b)(3) *with* Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136 (9th Cir. 2016) (presence of non-injured class members does not defeat predominance).

2 Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC, 993 F.3d 774 (9th Cir. 2021) ("*Bumble Bee I*"), *reh'g en banc granted*, 5 F.4th 950 (9th Cir. 2021), *rev'd*, 31 F.4th 651 (9th Cir. 2022) (en banc) ("*Bumble Bee II*").

3 *Bumble Bee II*, 31 F.4th at 669.

4 Petition for a Writ of Certiorari, StarKist Co., et al. v. Olean Wholesale Grocery Coop., Inc., No. 22-131 (S. Ct. Aug. 8, 2022), https://www.supremecourt.gov/DocketPDF/22/22-131/232991/20220808152205100_2022-08-08%20Starkist%20Cert%20Petition%20with%20App.pdf.

typicality and adequacy of representation.[5] In addition, "[to] obtain certification of a class action for money damages," a putative class must also establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members. . . ."[6]

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Deriving from early-twentieth century jurisprudence, Rule 23 serves to balance competing interests: permitting efficient and potentially effective group litigation while protecting defendants' Seventh Amendment due process rights to challenge evidence brought against them.[7] Beginning in 2011, the Supreme Court signaled that the predominance inquiry would be the touchstone of class action cases where money damages are at issue. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court held for the first time that lower courts must engage in a "rigorous analysis" of the prerequisites for class certification and noted that such analysis would inevitably "entail some overlap with the merits of the plaintiff's underlying claim."[8] Two years later, in *Comcast Corp. v. Behrend*, the Supreme Court reversed class certification in an antitrust case and shed some light on what that "rigorous analysis" should entail, holding that Rule 23 requires an inquiry into damages models at the class certification stage, even if such an inquiry requires the court to consider the merits of a claim.[9] Prior to *Dukes* and *Comcast*, courts routinely bifurcated discovery between class certification issues and the merits.[10] *Dukes* and *Comcast* made clear that, moving forward, cases could not be so cleanly divided and that courts would be required to "probe behind the pleadings" on the certification question to determine not only common injury, but the quantum of damages as to all (or at least a large majority of the class) in one stroke.[11]

At the same time, however, the Supreme Court cautioned that Rule 23 does not grant a "license to engage in free-ranging merits inquiries at the certification stage."[12] This framework requires courts to engage in a delicate balance—going past the pleadings, but not too far into the merits. For example, *Comcast* required that to satisfy predominance, a damages model would need to be capable of measuring damages on a class-wide basis; otherwise, individual damage calculations would "inevitably overwhelm questions common to the class."[13]

Unfortunately, neither *Comcast* nor *Dukes* provided specific guidance on whether inclusion of potentially uninjured class members would undermine or defeat predominance at the class certification stage. The question of uninjured class members is particularly important given the real-world implications of class action litigation. In theory, because injury is an element of the claim, a trial court could exclude uninjured persons or entities from the class in a damages phase that followed adjudication on the merits. In reality, however, most class actions resolve before a final adjudication on the merits, making the class certification stage critically important for litigants on both sides of the *v.* [14]

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[5] Fed. R. Civ. P. 23(a).

[6] Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 460 (2013) (citing Fed. R. Civ. P. 23(b)(3)).

[7] *See* Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment.

[8] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011).

[9] Comcast Corp. v. Behrend, 569 U.S. 27, 33-34 (2013).

[10] *See, e.g., In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 612-13 (8th Cir. 2011).

[11] *Dukes*, 564 U.S. at 350-51 (internal citations omitted).

[12] *Amgen*, 568 U.S. at 465-66.

[13] *Comcast*, 569 U.S. at 34.

[14] The question that *Bumble Bee* presented was whether a class with a substantial number of uninjured class members could be certified in the first instance.

The Supreme Court in 2016 again took up the contours of the predominance inquiry in *Tyson Foods, Inc. v. Bouaphakeo*, but declined to comment on uninjured class members.[15] There, workers at a meatpacking facility alleged that their employer committed wage and hour violations by failing to pay workers for the time that they donned and doffed protective gear. The district court certified the class, acknowledging that the workers did not all wear the same protective gear (and therefore that the relevant changing time would vary), but permitting the case to proceed to a jury trial.[16] The plaintiffs' experts presented their estimates of average donning and doffing time at trial, and the defendant declined to challenge the statistical validity of the experts' studies.[17] After the jury found in favor of the class, the defendant sought to set aside the jury verdict, arguing that the variation in donning and doffing time meant that the class should not have been certified in the first place.[18] The district court denied the defendant's motion to set aside the jury verdict and the Eighth Circuit affirmed.[19] The Supreme Court affirmed and held that representative, statistical evidence may be used to establish class-wide liability; however, the Court declined to answer whether a class could be certified if it contained uninjured class members.[20] While the defendant contended that the plaintiffs were required to demonstrate that uninjured class members would not recover damages, the Court noted that the defendant could raise the issue of uninjured class members at the damages disbursement stage.[21]

The Circuits Grapple with Unanswered Questions as to Predominance

The First Circuit in 2018 sought to answer the question left open in *Tyson Foods*. In *In re Asacol Antitrust Litigation,* the plaintiffs accused defendant pharmaceutical manufacturers of anticompetitive conduct after the defendants discontinued a drug before its patent-protection expired and, shortly thereafter, introduced a similar drug with patent protection lasting years longer.[22] The plaintiffs argued that, as a result, the defendants prevented other drug manufacturers from making cheaper, generic versions of the discontinued drug.[23] The district court had certified a class of union-sponsored benefit plans that paid for purchases of medication, while acknowledging that 10% of drug purchasers (numbering in the thousands) suffered no injury as a result of the defendants' alleged conduct because they would have remained brand-loyal even if there were a generic drug option on the market.[24] The lower court reasoned that 10% of the class was not more than a *de minimis* number of class members and, therefore, was not a sufficient basis for denying class certification.[25] On appeal, the First Circuit reversed, holding that Rule 23 does not allow the certification of a class unless, when moving for class certification, the plaintiffs offered a way for

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15 Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442 (2016).

16 *Id.* at 448.

17 *Id.* at 450-51.

18 *Id.* at 451-52.

19 Bouaphakeo v. Tyson Foods Inc., No. 5:07-cv-04009, 2012 WL 4471119, at *3 (N.D. Iowa Sept. 26, 2012), *aff'd*, 765 F.3d 791, 799 (8th Cir. 2014).

20 *Tyson Foods, supra* n. 15, 577 U.S. at 445 ("This case presents no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions.").

21 *Id.* at 461.

22 *In re* Asacol Antitrust Litig., 907 F.3d 42, 45 (1st Cir. 2018).

23 *Id.* at 45-46.

24 *In re* Asacol Antitrust Litig., 323 F.R.D. 451, 482 (D. Mass. 2017).

25 *Id.*

the defendant to contest, at or before trial, whether the defendant's conduct injured all or nearly all class members.[26] The First Circuit acknowledged but distinguished its own 2015 decision in *In re Nexium*, which had ruled that "class certification is permissible even if the class includes a de minimis number of uninjured parties."[27] The First Circuit noted that Rule 23 aims to ensure that class action claims are dealt with efficiently and fairly, but that Seventh Amendment due process rights entitle the defendant to challenge each class member's proof of liability at the class certification stage, such as challenging the use of inadmissible hearsay offered to prove a claim that each class member suffered injury.[28] In effect, the First Circuit held that unless the defendant can raise challenges as to each class member's proof of injury in a manner that is "manageable and superior" to non-class action litigation, Rule 23 does not permit certification of the class.[29] The First Circuit thus signaled that a case in which 10% of class members were uninjured was not a case "in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial."[30]

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After the First Circuit's decision, Plaintiffs asked the district court to reconsider certification in April 2019. But before the court could consider whether to certify a class again, Allergan sent offers of judgment to Plaintiffs under Federal Rule of Civil Procedure 68. Judgment was entered shortly thereafter.

Two years later, the Third Circuit held, in another antitrust suit involving pharmaceutical drugs, that the "rigorous analysis" that the Supreme Court has required since *Dukes* must be applied to the statistical evidence plaintiffs put forth to establish predominance.[31] In *In re Lamictal Direct Purchaser Antitrust Litigation*, a group of wholesalers who purchased Lamictal pills, used to treat certain types of seizures and bipolar disorder, alleged that defendant pharmaceutical companies suppressed competition and artificially inflated prices by colluding to not launch a generic Lamictal product.[32] To establish predominance, the plaintiffs' experts used sales data, internal pricing forecasts, and economic literature on the price of generic drugs to demonstrate that defendants' conduct had increased the costs to wholesalers.[33] The plaintiffs' expert presented a model which demonstrated that, on average, prices of generic drugs decrease as more generics enter the market, and relied on an average hypothetical price to determine whether class members were injured.[34] The defendants' expert criticized that model, arguing that the use of averages failed to account for individual negotiations between wholesalers and pharmaceutical manufacturers, and failed to acknowledge that the differing prices that purchasers paid were the result of individualized discounts and rebates.[35] According to defendants' expert, plaintiffs' expert's model

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[26] *Asacol*, *supra* n. 22, 907 F.3d at 58.

[27] *In re* Nexium Antitrust Litig., 777 F.3d 9, 14 (1st Cir 2015).

[28] *Asacol, supra* n. 22, 907 F.3d at 52.

[29] *Id.* at 55.

[30] *Id.* at 53.

[31] *Lamictal*, supra n. 1, 957 F.3d at 192-93.

[32] *Id.* at 188-89.

[33] *Id.* at 193.

[34] *Id.*

[35] *Id.* at 193-94.

impermissibly relied on averages, masking the fact that up to one third of the entire class likely suffered no economic injury.[36]

Given the nuances in drug pricing, the defendants' expert argued that the amount each drug purchaser would have paid absent the alleged anticompetitive conduct required an individual analysis.[37] In a unanimous panel decision, the Third Circuit vacated class certification and sided with the defendants, holding that the district court "abused its discretion when it assumed, absent a rigorous analysis, that averages are acceptable."[38] In the words of the Third Circuit, "addressing the micro-level analysis here, even though it touches on the merits, was necessary in order to determine whether the [plaintiffs], in light of the competing expert reports and evidence, could show that common issues predominated by a preponderance of the evidence."[39] Although the Third Circuit addressed the issue of uninjured class members less directly than the First Circuit in *In re Asacol Antitrust Litigation*, the Third Circuit nevertheless signaled that the district court could not proceed until it resolved the issue of conflicting expert opinions regarding whether one-third of the entire class was uninjured.

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In re Lamictal answered some questions about the court's role in determining predominance but left observers wondering what the case meant for the Supreme Court's holding in *Tyson Foods*, where the Court expressly permitted the use of representative statistical averages to demonstrate predominance.

The Supreme Court Signals Concern Over Inclusion of Uninjured Class Members

Most recently, the Supreme Court addressed the issue of uninjured class members in the context of class certification in *TransUnion LLC v. Ramirez*.[40] There, the plaintiff brought a class action against TransUnion alleging violations of the Fair Credit Reporting Act.[41] The named plaintiff, Mr. Ramirez, filed suit after he visited a California car dealership and was informed that he could not buy a car there because his TransUnion credit report indicated that his name matched one listed on a database maintained by the Treasury Department's Office of Foreign Assets Control ("OFAC"), which identifies terrorists, individuals who pose threats to national security, and international drug or weapons traffickers.[42] The district court certified a proposed class of all individuals who, in a six-month period, requested and received a copy of their credit report, sent in two contemporaneous but separate mailings, and showed that the individual's name was a potential match to a name on the OFAC list.[43] TransUnion moved to decertify the class, arguing that each class member must have suffered a concrete injury, but the lower court denied TransUnion's motion.[44] At trial, Mr. Ramirez stipulated that more than 75% of class members never had a credit report showing a potential name match

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[36] *Id.* at 192.

[37] *Id.*

[38] *Id.* at 194. The Court also noted that "it was up to the District Court to scrutinize the evidence to determine what [evidence] was credible and could be used in the expert analysis." *Id.*

[39] *Id.*

[40] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021).

[41] *Id.* at 2200.

[42] *Id.* at 2201.

[43] *See* Ramirez v. TransUnion LLC, 951 F.3d 1008, 1033 (9th Cir. 2020).

[44] Ramirez v. TransUnion LLC, No. 12-cv-00632-JSC, 2016 WL 6070490, at *5 (N.D. Cal. Oct. 17, 2016).

disseminated to a third party during the relevant time period. Nevertheless, the jury found for the class on all claims and awarded statutory and punitive damages totaling over $60 million.[45]

On appeal, TransUnion argued that the class should not have been certified because Mr. Ramirez was an atypical class representative whose experiences may not have been similar to others in the class.[46] The Ninth Circuit held that Mr. Ramirez was not so atypical as to defeat the typicality requirement of Rule 23 and held that "each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover damages in federal court."[47] Furthermore, the Ninth Circuit held that the entire class had standing, because the "material risk of harm" conferred standing even upon those class members whose credit reports were not disseminated to third parties.[48]

The Supreme Court granted certiorari on the question of "[w]hether either Article III or Federal Rule of Civil Procedure 23 permits a damages class action when the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered," which implicates how to handle uninjured class members, predominance and typicality.[49]

In a 5-4 ruling, the Court held that every member of a class certified under Rule 23 must establish Article III standing in order to be awarded individual damages, and that a mere risk of future harm that never materializes, standing alone, does not constitute concrete injury that could establish standing.[50] As a result, the Court determined that the class members whose credit reports had been disseminated to third parties had standing to pursue their claims, whereas class members whose reports were never disseminated lacked standing.[51] However, while the Court found that class members are required to have Article III standing, it did not clarify at what point—at the class certification stage or later—the class must demonstrate adequate standing.

The Ninth Circuit Wades into Muddy Waters

It is against this backdrop that the Ninth Circuit's April 2021 panel decision in *Bumble Bee I* provided an opportunity for the Court to clarify the predominance requirement in Rule 23(b)(3) antitrust cases. Can a class action be certified if it contains *any* uninjured class members?[52] Is a *de minimis* number of uninjured class members permissible under Rule 23, and if so, where should courts draw the line?[53] And how "rigorous" must the court's analysis be of evidence that purportedly establishes predominance and the extent of uninjured class members or lack thereof at the class certification stage?[54]

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[45] *See Ramirez*, *supra* n. 43, 951 F.3d at 1022, 1039.

[46] *Id.* at 1033.

[47] *Id.* at 1023.

[48] *Id.* at 1029-30.

[49] Petition for Writ of Certiorari, TransUnion LLC v. Ramirez, No. 20-297, 2020 WL 5411253, at *i (S. Ct. Sept. 2, 2020), cert. granted in part, 141 S. Ct. 972 (2020).

[50] *TransUnion*, *supra* n. 40, 141 S. Ct. at 2214.

[51] *Id.*

[52] *See id.* at 2208; *Tyson Foods*, 577 U.S. at 1040-41.

[53] *See Asacol*, 907 F.3d at 53-54 (citing *Nexium*, 777 F.3d at 30 ("We thus define 'de minimis' in functional terms."[sic])).

[54] *See Lamictal*, 957 F.3d at 193.

Bumble Bee I: Plaintiffs Cannot Certify a Class with More Than a De Minimis Number of Uninjured Members

Although court observers were hopeful that *Bumble Bee I* would allow the Ninth Circuit to clarify some of these longstanding questions regarding the predominance standard, the opinion left many of these pressing questions unresolved.

In *In re Packaged Seafood Products Antitrust Litigation*, a putative class of direct purchasers—predominantly resellers such as grocers and grocery distributors—alleged that the defendants, producers of packaged tuna, conspired to artificially inflate prices over a six-year period.[55] At the class certification stage, the plaintiffs' expert relied on a price correlation analysis to demonstrate a likelihood of common impact to all class members, and then used a reduced-form regression to estimate overcharges of canned tuna.[56] The plaintiffs' expert's regression utilized both transactional data obtained from defendants and publicly available data, and allegedly controlled for variables such as product characteristics, input costs, customer type, demand, and customer preference.[57] According to the plaintiffs' expert's model, prices during the period at issue were, on average, approximately 10% higher than the estimated competitive price absent price-fixing, and 94% of customers suffered overcharges as a result of the alleged conspiracy.[58]

The defendants' expert contended that the plaintiffs' expert's methodology was incapable of establishing that all or nearly all direct purchasers suffered injury as a result of the alleged conspiracy.[59] The defendants' expert argued that plaintiffs' expert's model improperly used a single average overcharge that masked individual differences in impact across class members, relied on too small of a sample size, and failed to distinguish price effects resulting from alleged anticompetitive conduct from those resulting from legal conduct.[60] Furthermore, the defendants' expert argued that the plaintiffs' expert failed to adequately account for competition from non-defendant producers of packaged tuna in the market, which may have allowed individual class members to negotiate lower prices.[61] When the defendants' expert used the same variables and all of the same data observations as the plaintiffs' expert, but allowed the overcharge coefficient to vary for each class member, his model showed that only 72% of the class suffered a statistically significant financial impact, leaving over one quarter of the class uninjured.[62]

The district court granted class certification, reasoning that it did not need to resolve the dispute between the experts because a jury could do so.[63] The court did not take issue with the plaintiffs' expert's use of averages in his regression model and instead found that the jury, not the court, should decide the fact question of whether such an analysis was persuasive.[64] After a three-day

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55 *In re* Packaged Seafood Prods. Antitrust Litig., 332 F.R.D. 308, 317 (S.D. Cal. 2019).

56 *Id.* at 322.

57 *Id.* at 323.

58 *Id.* at 323-24.

59 *Id.* at 323.

60 *Id.* at 323-26.

61 *Id.* at 334.

62 *Id.* at 323.

63 *Id.* at 344 ("Defendants once again raise potential flaws in the methodology that could convince a finder of fact that the [End Payer Plaintiffs] have not proven impact, however, the potential flaws raised are not so dramatic that the methodology must be thrown out and certification denied.").

64 *Id.* at 324.

[T]he Ninth Circuit held for the first time that a proposed class with more than a de minimis number of uninjured class members could not satisfy the predominance requirement of Rule 23.

evidentiary hearing on the class certification motion, the district court certified all three subclasses at issue in the litigation.

On appeal, in *Bumble Bee I*, a three-judge panel of the Ninth Circuit reversed in a three-part holding. First, the Ninth Circuit held that "[c]ourts must resolve all factual and legal disputes relevant to class certification, even if doing so overlaps with the merits," including "judging the persuasiveness of the evidence presented for and against certification."[65] The Ninth Circuit found that a lower court abuses its discretion if it merely glosses over or fails to resolve disputed issues relating to predominance.[66]

Second, the Ninth Circuit held that statistical evidence may be sufficient to demonstrate predominance and class-wide injury, but district courts must analyze the evidence "rigorously" to ensure its reliability.[67] Individualized issues as to damages will not necessarily defeat class certification, but statistical evidence must be sufficiently robust to demonstrate legitimate class-wide injury.

Third, the Ninth Circuit held for the first time that a proposed class with more than a *de minimis* number of uninjured class members could not satisfy the predominance requirement of Rule 23.[68] Although the Ninth Circuit did not define what a *de minimis* number is, it cited other circuit decisions suggesting that five to six percent was the outer limit of *de minimis*, and that a class with 10% or more of uninjured class members would violate Rule 23's predominance requirement.[69] Notably, the Ninth Circuit did not comment further on whether the putative class, which according to the plaintiffs' own expert included 5.5% of uninjured members, failed predominance and should not have been certified.

Judge Hurwitz partially dissented, agreeing with the majority that the district court, and not the jury, should have resolved factual disputes bearing on predominance, but disagreeing with the idea that the district court should impose a "numerical cap" on uninjured class members.[70] Instead, Judge Hurwitz noted that a district court could adjudicate the issue of uninjured class members at the damages stage, without reading into Rule 23 a *de minimis* uninjured class member limit at the class certification stage.[71]

Following the panel decision in *Bumble Bee I*, practitioners grew more uncertain about how to apply the predominance requirement for class certification. What does it mean for a class to contain only a *de minimis* number of uninjured class members? Why would a class where seven percent of class members are uninjured run afoul of Rule 23, whereas a class with five to six percent of uninjured class members would not? And which statistical methodologies for demonstrating class-wide impact would courts deem permissible or most persuasive in the future?

Bumble Bee I promptly led to a spate of decertification motions in courts across the country, as defendants took notice of the Ninth Circuit's guidance and sought to press other jurisdictions to

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65 *Bumble Bee I*, 993 F.3d at 784-85 (internal quotation marks omitted).

66 *Id.* at 793.

67 *Id.* at 791.

68 *Id.* at 792.

69 *Id.* at 792-93 (citing *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 624-25 (D.C. Cir. 2019) and *Asacol*, 907 F.3d at 47).

70 *Id.* at 796-97 (Hurwitz, J., dissenting).

71 *Id.*

follow suit.[72] Meanwhile the plaintiffs' bar was outspoken in its criticism of the decision, arguing that it would make it more challenging for injured parties to obtain relief.[73]

Numerous interest groups supported the Ninth Circuit's rehearing the case en banc, even if they did not agree on how the case should ultimately be decided. On one hand, the American Antitrust Institute argued in an amicus brief that the *Bumble Bee I* standard would impermissibly require plaintiffs to prevail twice on the merits (once at the class certification stage and again before the trier of fact), and that the defendants' proposed *de minimis* standard was inappropriate because, in many cases, common issues would predominate regardless of whether more than a *de minimis* percentage of class members were uninjured.[74] On the other hand, the U.S. Chamber of Commerce, the Software & Information Industry Association, and the Internet Association submitted an amicus brief arguing that a class definition that is known to sweep in identified uninjured class members is improper, and that a *de minimis* rule is appropriate *if* the parties have not identified specific uninjured class members and there is a logical possibility that some small portion of the class may be uninjured.[75] Likewise, an amicus brief from the Consumer Healthcare Products Association, which represents manufacturers of over-the-counter medicines and dietary supplements, argued that rejecting the panel majority's *de minimis* rule would authorize overbroad classes and open defendants up to claims from putative class members who have no standing and therefore no valid claim to recover.[76] Each of these amicus briefs advocated for more clarity from the courts.

Bumble Bee II: *Rejecting a* De Minimis *Rule*

Perhaps recognizing the growing calls for clarity, the Ninth Circuit issued a *sua sponte* order, requesting briefing by the parties on whether it should consider the issue of uninjured class members en banc. The order noted that a Ninth Circuit judge had called for a vote on rehearing the appeal in *Bumble Bee* as it pertains to the issue of whether Rule 23 requires a district court to find no more than a *de minimis* number of uninjured class members before certifying a class.[77] On August 3, 2021, the court vacated the panel opinion and ordered en banc rehearing.[78]

The Ninth Circuit issued its en banc decision on April 8, 2022.[79] Writing for the majority, Judge Ikuta addressed three major issues pertaining to class certification and affirmed the district court's grant of class certification.

First, the Ninth Circuit joined other circuits, including the First, Second, Third, Fifth and Seventh Circuits, in holding that the preponderance of the evidence standard should be used to evaluate

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[72] *See, e.g.,* Alison Frankel, *Did the 9th Circ. just create a split on a key class certification issue?*, Reuters (Apr. 11, 2022, 5:28 PM), https://www.reuters.com/legal/litigation/did-9th-circ-just-create-split-key-class-certification-issue-2022-04-11/.

[73] *See* Alison Frankel, *9th Circuit decertifies tuna price-fixing classes, clamps down on uninjured class members*, Reuters (Apr. 7, 2021, 4:15 PM), https://www.reuters.com/article/us-otc-tuna-idUSKBN2BU37T.

[74] Brief for the American Antitrust Institute as Amicus Curiae in Support of Rehearing En Banc at 9, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, No. 19-56514 (9th Cir. May 19, 2021), ECF No. 105-2.

[75] Brief of Amici Curiae Chamber of Commerce of the United States, et al. in Support of Appellants at 14-19, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, No. 19-56514 (9th Cir. Sept. 7, 2021), ECF No. 155.

[76] Brief Amicus Curiae of Consumer Healthcare Products Association in Support of Defendants-Appellants at 10-11, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, No. 19-56514 (9th Cir. Sept. 7, 2021), ECF No. 154.

[77] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, No. 19-56514, 2021 U.S. App. LEXIS 12707 (9th Cir. Apr. 28, 2021) (order requesting briefing).

[78] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 5 F.4th 950 (9th Cir. 2021) (ordering case be reheard en banc).

[79] *Bumble Bee II*, 31 F.4th at 651.

[T]he Ninth Circuit rejected the de minimis rule used by the First and D.C. Circuits and suggested that the presence of potentially uninjured class members would not defeat class certification, as long as questions regarding uninjured class members did not predominate over common questions.

whether plaintiffs have established the prerequisites of Rule 23.[80] In doing so, the Ninth Circuit contrasted the preponderance standard with the clear and convincing evidence standard used where "particularly important individual interests or rights are at stake, such as termination of parental rights or involuntary commitment proceedings."[81] In fact, the Ninth Circuit reasoned that "[b]ecause the application of Rule 23 to certify a class does not alter the defendants' rights or interests in a substantive way, there is no basis for applying a heightened standard of proof beyond the traditional preponderance standard."[82]

Second, the Ninth Circuit delved into the statistical evidence presented by the plaintiffs, in order to determine whether the district court properly certified the class where it declined to resolve a dispute between the parties as to whether 28% of the class did not suffer antitrust impact.[83] The Ninth Circuit determined that the district court properly held that the plaintiffs' expert's pooled regression model was *capable* of showing antitrust injury on a class-wide basis, and that was all that was necessary at the class certification stage.[84] The Ninth Circuit also provided a framework for the district court's role, noting that a district court does not abuse its discretion in concluding that a pooled regression model may be capable of showing class-wide antitrust impact, provided it also considers "factors that may undercut the model's reliability (such as unsupported assumptions, erroneous inputs, or nonsensical outputs such as false positives)."[85] Notably, the Court reasoned that a defendant who failed to raise a *Daubert* challenge to expert evidence before a district court could still argue that the evidence is not capable of answering a common question on a class-wide basis, reinforcing a critical distinction between the district court's role in deciding class certification issues versus *Daubert* issues.[86]

Finally, the en banc Ninth Circuit considered the issue of uninjured class members and, in doing so, repudiated the panel decision in *Bumble Bee I*. The Ninth Circuit rejected the argument that Rule 23 does not permit class certification of a class potentially including more than a *de minimis* number of uninjured class members.[87] Instead, the Ninth Circuit held that Rule 23(b)(3) requires an inquiry *only* into whether common questions predominate over individual ones.[88] In other words, the Ninth Circuit rejected the *de minimis* rule used by the First and D.C. Circuits and suggested that the presence of potentially uninjured class members would not defeat class certification, as long as questions regarding uninjured class members did not predominate over common questions. In fact, the Ninth Circuit signaled that a class can be certified where plaintiffs offer a method *capable* of determining class-wide impact. At trial, the district court can then separate out those uninjured class members from the rest of the class.[89]

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[80] *Id.* at 665 n.6.

[81] *Id.* at 664 (internal quotation marks omitted).

[82] *Id.* at 665. Other circuits have either yet to specify a particular burden of proof when deciding class certification issues, or have articulated a standard lower than the preponderance standard. *See* WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, 6th ED. § 7:21 (2022) (collecting cases).

[83] *Id.* at 680.

[84] *Id.* at 681.

[85] *Id.* at 683.

[86] *Id.* at 665.

[87] *Id.* at 669.

[88] *Id.*

[89] *Id.* at 668-69.

Judge Lee and Judge Kleinfeld dissented, writing that "punting this key question [of uninjured class members] until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue."[90] Looking to the practical realities of litigation—including that almost all complex class actions resolve before they reach a jury—the dissent analogized the Ninth Circuit's refusal to encourage the district court to examine uninjured class members as "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 [Rule 23]."[91] The dissent instead urged district courts to judge the persuasiveness of the evidence presented by experts, because the alternative would allow plaintiffs to prevail on class certification "by merely offering a well-written and plausible expert opinion."[92] The dissent, reasoning that judges may be better equipped than juries to decide highly technical issues, outlined an approach whereby the courts would review evidence and make findings of fact necessary for determining whether Rule's 23's requirements have been met.[93] While the dissent acknowledged that injury is a merits issue that a jury should decide, it argued that "as a practical matter, that day will likely never come to pass because class action cases almost always settle once the court certifies a class."[94]

As a practical matter, in seeking to define "*de minimis*," the dissent cited the D.C. Circuit's holding that "5% to 6% constitutes the outer limits of a *de minimis* number" for uninjured class members and characterized the First Circuit's *Asacol* "*de minimis* border" as around 10%.[95]

Bumble Bee's Sting

The questions left open by *Bumble Bee I*, *Bumble Bee II*, and *TransUnion* are weighty, implicating the delicate balance between a defendant's due process right to investigate each class members' claims, and a class's interest in litigating a potentially meritorious claim beyond the class certification stage. In antitrust cases, where statistical evidence is often the hallmark for determining whether class members are injured, *Bumble Bee II* leaves open questions regarding the type and quality of evidence necessary to win or defeat class certification. As noted by the dissent, in a litigation landscape in which class actions are likely to settle before trial, where a court "certifies a class with many uninjured class members, it dramatically expands the potential exposure and artificially jacks up the stakes. . . . The opportunity at trial to jettison uninjured members from the certified class is a phantom solution because defendants will have little choice but to settle before then."[96] Even in smaller cases that are not "bet-the-company" cases, the realities of class action litigation—absent a pre-trial check on uninjured class members— present defendants with a tough choice: either invest the time and resources to litigate a matter through trial, or resolve the matter notwithstanding evidence that some portion of the class suffered no injury.

And while defendants have due process rights to litigate their defenses, plaintiffs have due process interests in having their claims heard, without the procedural safeguards of Rule 23 serving

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[90] *Id.* at 686.

[91] *Id.*

[92] *Id.* at 688-89.

[93] *Id.*

[94] *Id.* at 686.

[95] *Id.* at 692 (citing *Asacol*, 907 F.3d at 47, 51-58 and *Rail Freight*, 934 F.3d at 624-25).

[96] *Id.* at 691.

Bumble Bee II provides some answers to antitrust litigants but leaves many more questions unresolved. While the Supreme Court has thus far declined to address the issue of pre-certification standing for uninjured class members, given the due process implications on both sides of the v., the Ninth Circuit's opinion in Bumble Bee II deepens a circuit split ripe for the Supreme Court to resolve.

as insurmountable obstacles to relief. As litigants weigh their settlement options during various stages of litigation, uncertainty over the issue of uninjured class members may influence their settlement considerations.

The Ninth Circuit's en banc opinion in *Bumble Bee II* signals its preference for examining issues of uninjured class members on a case-by-case basis, rather than based on a bright-line rule. Bright-line rules benefit parties to the extent that they are easy to follow and apply. At the same time, however, they threaten to be both under-inclusive and over-inclusive. In rejecting a *de minimis* rule, *Bumble Bee II* highlights that class certification will continue to be a highly fact-intensive process in which experts take center stage. Defendants will need to do more than point to a given number of uninjured class members, and plaintiffs will need to be prepared to demonstrate how their experts' models are capable of demonstrating class wide injury through common proof.

Bumble Bee II provides some answers to antitrust litigants but leaves many more questions unresolved. While the Supreme Court has thus far declined to address the issue of pre-certification standing for uninjured class members, given the due process implications on both sides of the *v.,* the Ninth Circuit's opinion in *Bumble Bee II* deepens a circuit split ripe for the Supreme Court to resolve. On one side of the circuit split is *Bumble Bee II*, which rejected the view that a class could not be certified where it contains more than a *de minimis* number of uninjured class members. On the other side is *Asacol* and *In re Rail Freight*, which not only (explicitly or implicitly) endorsed a *de minimis* rule, but sought to define its outer bounds in the First Circuit and D.C. Circuit. Other circuits have yet to decisively weigh in, despite the importance of this issue to both sides of the bar.

On August 8, 2022, the defendants in *Bumble Bee* petitioned the Supreme Court for a writ of certiorari to do just that. In their petition, the defendants argue that the Ninth Circuit's en banc decision flouts Supreme Court precedent from *Dukes* and *Tyson Foods*, while exacerbating the Circuit split on whether, or in what circumstances, the presence of uninjured class members precludes class certification.[97] Petitioners presented two questions: First, whether, or in what circumstances, the presence of uninjured class members precludes the certification of a class under Federal Rule of Civil Procedure 23(b)(3); and second, what types of representative evidence may be sufficient at the class certification stage to show that all members of the class suffered injury?[98] Petitioners argued that *Bumble Bee II*'s unique procedural history makes it an ideal vehicle through which the Supreme Court can provide clarity on long-standing, important questions of law.

Should the Supreme Court grant certiorari, we look forward to its much-needed guidance on either or both of these critical questions. ●

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[97] Petition for a Writ of Certiorari, StarKist Co., et al. v. Olean Wholesale Grocery Coop., Inc., No. 22-131 (S. Ct. Aug. 8, 2022), https://www.supremecourt.gov/DocketPDF/22/22-131/232991/20220808152205100_2022-08-08%20Starkist%20Cert%20Petition%20with%20App.pdf.

[98] *Id.*