9th Circ. Ruling Legitimizes Classwide Injury In Predominance

By **John Beisner, Geoffrey Wyatt and Jordan Schwartz** (April 6, 2023)

John Beisner

Geoffrey Wyatt

Jordan Schwartz

In the wake of the U.S. Supreme Court's decision in TransUnion LLC v. Ramirez in 2021, courts have grappled with how the question of Article III standing bears on predominance and other essential requirements from Rule 23 of the Federal Rules of Civil Procedure.

In a rare en banc decision on class certification, the U.S. Court of Appeals for the Ninth Circuit hinted at an answer on that question last year in Olean Wholesale Grocery Coop. Inc. v. Bumble Bee Foods Inc., suggesting that there may be limits on a court's ability to consider whether and how the extent of a purported classwide injury affects the predominance analysis.

However, in a panel decision that was joined by Olean's author, the Ninth Circuit once again delved into this arena in March — this time making clear that the question of injury is highly relevant to predominance and that a district court's failure to consider a defendant's evidence on that score constitutes an abuse of discretion.

In Van v. LLR Inc., an Alaska plaintiff filed a putative class action alleging that LuLaRoe, an online clothing company, violated Alaska's unfair trade practices statute by improperly charging sales tax based on the location of the retailer rather than the purchaser.

The U.S. District Court for the District of Alaska certified the class in 2021 under Rule 23(b)(3), finding predominance where the plaintiff had shown that "all of the proposed class members were the subject of the same [point of sale] system" that erroneously charged sales tax.

Though LuLaRoe claimed that a large number of [class] members ... received a discount in an amount at least equal to the tax item," the district court found that

> the number of proposed class members for whom it can presently be determined received a discount to offset the sales tax being billed is de minimus. Moreover, the fact that individualized determinations may need to be made as to the nature of the discounts does not defeat class certification.

LuLaRoe appealed on three separate grounds:

1. The alleged financial injury at issue was de minimus — 5 cents or less — for a large number of plaintiffs, negating standing;

2. Some plaintiffs knew of the improper tax charge but completed their transactions anyway and, thus, could not have been deceived, barring their claims under the voluntary payment defense; and

3. Some customers received a "discount ... equal to or greater than" the tax, negating any alleged injury to those class members and resulting in individualized issues that would

overwhelm common ones and defeat predominance.

In a majority opinion joined by two judges, the Ninth Circuit **rejected** the defendant's first two theories in March.

First, the panel held that "[a]ny monetary loss, even one as small as a fraction of a cent, [was] sufficient to support standing" for all class members. As to the second issue, the panel initially concluded that it had jurisdiction to rule on it, which the plaintiff had challenged on the ground that the voluntary payment defense was rejected as a matter of law on an earlier motion to strike.

Because LuLaRoe had reargued the point in its class certification opposition, however, the court concluded that the validity of the defense as a matter of state law was "a necessary part of [the] class certification" and therefore properly before it.

But the court rejected the defense as raising individualized issues sufficient to defeat predominance. It found that the invoices LuLaRoe pointed to as evidence of voluntary payment did not clearly show that "any member of this Alaska class was informed of the nature of the improper sales tax, was not provided a discount, and paid the sales tax nonetheless."

The Ninth Circuit agreed, however, with LuLaRoe's third argument, vacating class certification and remanding with instructions to reevaluate predominance. LuLaRoe's evidence "that at least eighteen of the 13,680 discounts provided to class members were provided for the purpose of offsetting the improperly assessed sales tax" obviated any alleged injury to those plaintiffs.

According to the Ninth Circuit, showing that even a small number of class members were not injured was enough to suggest that individualized assessments of "the circumstances and motivations behind each of the 13,680 discounts might be necessary."

Though LuLaRoe's invoices did not definitively undermine predominance or show "who will win or lose at trial," they indicated that "at least some class members lack meritorious claims" and raised questions as to "whether a class-member-by-class-member assessment of the individualized issue will be unnecessary or workable."

The Ninth Circuit therefore vacated class certification and remanded to the district court with instructions to "re-assess whether [the plaintiff] has met her burden of proving ... that common issues predominate over questions affecting only individual members."

Van's predominance analysis underscores the contested importance of classwide injury in the predominance analysis.

That question has taken on renewed significance in the wake of the Supreme Court's ruling in TransUnion, which ruled that class members must have standing in order to recover at the end of a case, but expressly left open the question of whether "every class member must demonstrate standing before a court certifies a class."

Notably, Van also declined to answer that specific question, though it noted that "the district court may be required to address the issue on remand."

At a minimum, the Ninth Circuit's reasoning presupposes that the extent of injury within the class is at least relevant to the predominance analysis, and an issue that a district court

must consider and resolve when a defendant presents evidence that a significant number of class members are not injured.

That implication is an important one in the immediate aftermath of the Ninth Circuit's en banc ruling in Olean, which seemed to impose limits on the extent to which a district court may inquire into the extent of injury within the class where a plaintiff has furnished an expert who opines that injury extends classwide.

In Olean, the defendants argued that the statistical model used by the plaintiffs' expert could not show a common injury, i.e., predominance, because of "individualized negotiations and different bargaining power among the purchasers," who ranged from national grocery chains to restaurants and individual buyers.

The defendants supported their argument with testimony from their own expert, who opined that 28% of the class members could claim no injury.

Writing for the Ninth Circuit en banc, U.S. Circuit Judge Sandra Ikuta rejected the defendants' argument, holding that the plaintiffs' expert's model could "serve as common evidence for all class members" because "price-fixing would have affected the entire market, raising the baseline prices for all buyers."

The majority rejected the notion that the defendants' contrary evidence must be considered at the class certification stage because the extent of injury was a merits question that could be resolved by a jury at trial.

The ruling prompted a vociferous dissent by U.S. Circuit Judge Kenneth Lee, who argued that a district court must rigorously analyze evidentiary disputes bearing on predominance, including disputes between experts who disagree on the scope of injury.

In short, the reasoning of Van's majority seems to echo Olean's dissent. Yet the cases must be reconcilable in the mind of Ikuta, who wrote the majority opinion in Olean and joined the main opinion in Van, which also cited Olean favorably.

One conceivable way to try to reconcile the two cases might focus on the nature of the evidence presented by the different defendants.

In Olean, the majority seemed persuaded that, because the dispute over the extent of injury was between two experts, it would not entail time-consuming, individualized inquiries to determine the extent of injury.

Instead, the jury could simply pick a winner between the two experts, and if it picked the defense expert, there would be a failure of proof of injury.

In Van, by contrast, the proof of lack of injury consisted of individual receipts showing that purchasers had received discounts intended to offset the contested charges at issue, which by their nature "could potentially involve up to 13,680 depositions and months of trial."

Another reading of the cases, however, is that Olean simply failed to grapple with the practical problems posed by the presence of large numbers of uninjured class members.

As the Olean dissent pointed out, if the defendants' expert was correct that 28% of the class was uninjured, the district court would "need to conduct individualized mini-trials to determine whether each class member suffered an injury, and if so, what the damages are

for each member."

Perhaps because this potential reality hid behind a superficially simple battle of the experts that the Olean majority thought a jury could conceivably decide in the plaintiffs' favor, the majority thought it could ignore the problem for purposes of deciding class certification.

Whatever the explanation, Van underscores the importance of making plain the practical implications of arguments that injury is individualized within the class.

Practitioners wishing to press individualized injury as a basis for defeating predominance in opposition to class certification in the Ninth Circuit should be mindful of the different approaches and outcomes in Van and Olean and of the need to make a persuasive argument that the case is more like the former than the latter.

John Beisner and Geoffrey Wyatt are partners, and Jordan Schwartz is counsel, at Skadden Arps Slate Meagher & Flom LLP.

Skadden associate Ryan Feeney contributed to this article.