Class Action Monitor

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Class Action Honors

When Rule 23 and Article III Standing Collide

By Eric Hochstadt and Gabrielle Kanter

In 2015, purchasers of tuna products brought federal and California state antitrust claims, alleging that three of the largest domestic tuna suppliers conspired to fix the prices of tuna products, limit promotional activity for packaged tuna, and exchange confidential business information in furtherance of the alleged conspiracy. This class action litigation in *Olean Wholesale Grocery Cooperative Inc. v. Bumble Bee Foods LLC* followed from a similar investigation led by the Department of Justice, which resulted in guilty pleas and criminal convictions. In 2018, three putative classes moved for certification, which the district court granted. The Ninth Circuit granted defendants' petition for interlocutory review and the panel vacated the certification order, holding that the district court abused its discretion by declining to resolve the competing expert claims regarding the number of class members who were not injured prior to applying the class certification requirements under Federal Rule of Civil Procedure 23. Rule 23 sets the requirements for class certification, and frequently, the battleground for class certification is whether the plaintiff proves that "questions of law or fact common to class members predominate over any questions affecting only individual members," referred to as the "predominance requirement." The Ninth Circuit panel remanded with instructions to resolve the factual disputes concerning the number of uninjured class members in each proposed class before evaluating whether common questions predominate. The Ninth Circuit then *sua sponte* initiated rehearing en banc, affirming the district court's order certifying the class. In August 2022, the defendants filed a petition for certiorari seeking the Supreme Court's review of two questions, one of which probes "[w]hether, and in what circumstances, the presence of uninjured class members precludes the certification of a class."

The Predominance Inquiry Under Rule 23

As the Supreme Court has explained in another significant class action case, *Tyson Foods, Inc. v. Bouaphakeo*, the "predominance inquiry 'asks whether the common, aggregation-enabling issues in the case are more prevalent or important than non-common, aggregation-defeating, individual issues.'" Applied to the facts in this case, the key question was whether the plaintiffs could prove through a common body of evidence that the tuna suppliers engaged in a conspiracy that resulted in higher prices paid by each member of the class. To support that this could be shown, the plaintiffs' expert presented a model that showed that plaintiffs experienced a 10.28% overcharge in prices due to defendants' conduct and that 94.5% of the class experienced this overcharge. However, for the missing 5.5%, the actual price paid was lower for every transaction that the purchaser would have paid absent the conspiracy—meaning, these individuals were not affected or injured by the alleged conspiracy. Meanwhile, the defendants' expert determined that 28%—nearly one-third of class members—were not injured.

The Intersection Between Article III Standing and Predominance in the 9th Circuit

Much of the focus on the implications of the en banc majority's holding has been about the amount of class members that could be uninjured but still meet the requirements for class certification under Rule 23 (and how this determination has created a circuit split). But this bleeds into a related and important issue: Article III standing. Because Article III limits the jurisdiction of federal courts, they may only entertain actual cases with a real controversy between the parties. One of the mechanisms that ensures courts follow this constitutional rule is "Article III standing," which requires that plaintiffs demonstrate a concrete injury likely caused by the defendant in order to bring their suit in federal court.

The assertion that the outcome of the predominance inquiry can impact standing has subtly pervaded this class action litigation. First, the original Ninth Circuit panel explained in a footnote that the presence of uninjured class members "raises serious standing implications under Article III." However, the panel deferred on this issue because the Rule 23 issues were dispositive and, in doing so, cited to a recent Fifth Circuit case, *Flecha v. Medicredit, Inc.*, which also expressed skepticism that Article III would permit class certification for uninjured class members. Like in *Flecha*, the panel noted that it should first analyze Rule 23 pursuant to Supreme Court precedent, and the Rule 23 analysis was dispositive.

Similarly, in the briefing for en banc review, the defendants raised the relevance of the injury-in-fact requirement for standing and that all class members must have standing, citing to the Supreme Court's recent decision from June 2021, *TransUnion LLC v. Ramirez*—decided after the briefing to the panel. In *TransUnion*, 8,185 class members sued TransUnion, a credit reporting agency, for not using reasonable procedures to ensure the accuracy of their credit information as required by the Fair Credit Reporting Act. Under one theory of harm, the court held that only 1,185 individuals were in fact injured and therefore had standing because it was only this subgroup whose information was actually reported to third parties. Chief Justice Roberts previewed this position in *Tyson Foods*, writing in concurrence that because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not . . .[so] if there is no way to ensure that the jury's [lump-sum] damages award goes only to injured class members, that award cannot stand." Here, according to the defendants, the tuna product market breeds different consumer experiences and many (28% according to their expert) experienced no impact from an alleged conspiracy due to widely different bargaining power of tuna purchasers (*i.e.*, Walmart who has meaningful bargaining power and may easily resist any price increases or impact from the alleged conspiracy due to its volume of commerce differs significantly from a mom-and-pop store, which may feel the full effect of any overcharges). Like in *TransUnion* where the "mere presence of an

inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm," the existence of an overcharge for some tuna purchasers, may not cause any impact on purchasers with the market power to resist price increases.

In the support of the tuna suppliers, the Chamber of Commerce, Software & Information Industry Association, and Internet Association filed a brief during the en banc review further exploring these standing issues. These amici argued that Rule 23 should not allow a sweeping number of uninjured parties to make an end-run of the constitutional limitations on jurisdiction through class actions. In addition, requiring that class members possess the same interest and suffer the same injury means that standing and predominance mutually reinforce the goal that the class will be sufficiently cohesive to justify "adjudication by representation." Setting aside the constitutional implications of allowing courts to hear claims of uninjured parties, having a large segment of the class that does not suffer an injury creates an additional layer of complexity to the predominance inquiry. Namely, if individualized inquiries are required to show which class members are injured, then standing itself is not capable of proof through common evidence. However, the en banc majority said that it "need not consider" the Article III standing argument because the plaintiffs "have demonstrated that all class members have standing here" given that conspiracy had a "common, supra-competitive impact on a class-wide basis," which is sufficient to show an injury-in-fact traceable to the defendants. To be sure, this conclusion makes sense in context of the majority's determination that viewing the 28% figure from the defendant's expert as a factual finding that these class members were uninjured mischaracterizes the expert's conclusion because the expert's critique merely demonstrates the unreliability of the plaintiffs' model.

Possible Future Guidance from the Supreme Court

Notably, as the Ninth Circuit en banc majority later highlighted, the Supreme Court in *TransUnion* declined to address whether every class member must demonstrate standing *before* a court certifies the class. (Different from this case, the class in *TransUnion* had already been certified and the case proceeded to trial through to a $60 million verdict before the Supreme Court's review.) In their arguments regarding the predominance inquiry under Rule 23, the defendants discussed these Article III standing issues in their petition for certiorari. The petition has the support of three sets of amici (Washington Legal Foundation, Computer & Communications Industry Association ("CCIA"), the Chamber of Commerce, Pharmaceutical Research and Manufacturers Association, and Software & Information Industry Association) and all three raise these standing issues. CCIA's brief emphasized that the Court's review is necessary so litigants can understand the "correct mode of analysis and the interplay between [Article III standing and predominance] requirements." A recent Southern District of California case illustrates this issue. The court analyzed the standing and predominance arguments in one swoop, noting that the named plaintiff had standing, so Article III was met and whether the proposed class had standing was to be addressed under Rule 23. *Bennett v. N. Am. Bancard, LLC*, 2022 WL 1667045, at *9 (S.D. Cal. May 25, 2022). The court did not mention *TransUnion*. The court ultimately denied class certification of the plaintiff's California Unfair Competition law claims on predominance grounds because the class would have encompassed unharmed members who did not see the misrepresentation upon which the plaintiff relied.

If the Supreme Court grants certiorari, *Olean* may be an interesting vehicle to provide more guidance on the impact of Article III standing on the predominance requirement and, especially, *when* in class action litigation courts should scrutinize this. Certified classes with large amounts of uninjured class members—even for a portion of the litigation—have the potential to require defendants to defend claims against many individuals who would not otherwise have the ability to bring their claims in federal court. And as the dissent from the en banc decision warned, the majority's decision would lead to "monstrously oversized classes" that would force many

more defendants to settle cases because, once the class is certified, it hands the plaintiffs a “victory . . . unless and until the game reaches overtime.” Certainly, the number of class members impacts whether to settle and for how much money.

Three Strategies for Combating Parallel Litigation

By Chantale Fiebig, Pravin R. Patel, and Mark Pinkert

Americans are accustomed to the constitutional protection of double jeopardy, in which individuals cannot be prosecuted more than once for the same crime.

Many American companies face their own version of double—and sometimes triple—jeopardy in the form of so-called parallel actions brought by various state enforcement agencies for the same alleged offense. These parallel actions impose an enormous legal and financial burden on corporations across the economic spectrum.

Increasingly, corporate defendants engaged in federal criminal and regulatory investigations faced parallel civil proceedings brought by private individuals in which the plaintiffs alleged actions similar to, if not identical to, those brought by the government.

That's the bad news. The good news is that corporate defendants have a host of tools to combat these dual adversaries.

Issue 1: Parallel Class Actions and Public Civil Litigation

Federal and state statutes often confer dual enforcement authority, creating causes of action for both government actors and private plaintiffs. But most of these statutes do not make public and private enforcement mutually exclusive—that is, they do not require a stay of the later-filed action, do not require consolidation, and do not create preclusion rules beyond those available under common law. Similarly, even if there is no express cause of action for a public agency, state attorneys general have the ability to bring *parens patriae* lawsuits to enforce civil law as representatives of the states' citizens, often under state consumer statutes and for mass torts. Some federal statutes, like the Hart-Scott-Rodino Antitrust Improvements Act of 1976, even explicitly confer state attorneys general with standing to bring *parens patriae* civil lawsuits. Accordingly, these *parens patriae* cases often proceed in parallel with private class action litigation, or actions brought by the federal government.

Defendants who are facing class actions lawsuits also increasingly face parallel "multistate actions," in which state attorneys general sue not only on behalf of their own constituents, but also join together with other states. These multistate actions often materialize in the wake of high-profile events involving national corporations; they have arisen recently after data and privacy breaches, and following allegations of nationwide antitrust violations by large companies. *See* Elysa M. Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 B.Y.U. L. Rev. 421 (2019). For example, in the last several years, after a breach into its customers' credit card data, a large retailer settled with private class litigants for a substantial monetary award, agreed to take numerous steps to improve data security, and provided additional monetary relief to financial institutions affected by the breach. Despite this relief, the company also had to settle with several states, which had sued on behalf of their constituents, many (if not all) of whom were presumably the same consumers represented in the class action settlement.

There are many examples of state and federal law that create overlapping enforcement authority. But corporate defendants facing a lawsuit, class action, or agency investigation must be aware of all relevant laws

that confer overlapping enforcement authority and should proceed with a global legal strategy to manage and prevent parallel litigation.

Issue 2: Duplicative Class Action and Parallel Litigation Recoveries

Private plaintiffs and plaintiffs' attorneys have powerful financial incentive to seek the largest awards and settlements possible. But scholars have recognized that the enforcement zeal of private litigants does not reduce incentives for public enforcers. Studies have shown that public enforcers have their own financial, political, institutional, and reputational incentives that lead them to also pursue corporate defendants, even while private plaintiffs pursue similar claims. *See, e.g.,* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853 (2014) (some "federal and state agencies have self-interested reasons to maximize financial recoveries").

As an illustration, state attorneys general—almost always elected officials—may leverage well-publicized scandals to gain political capital. *See* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization,* 97 Tex. L. Rev. 43, 86-95 (2018); Colin Provost, *An Integrated Model of US. State Attorney General Behavior in Multi-State Litigation*, 10 St. Pol. & Pol'y Q. 1, 10, 14-15 (2010) (state AGs are responsive to consumer interests and participate in cases in part based on electoral goals). Thus, even if private lawsuits would suffice to make victims whole and deter wrongful conduct, state attorneys general may still initiate parallel proceedings. And attorneys general often publicize their efforts, which may in turn galvanize other litigants.

Issue 3: Financial Incentives for Public Enforcers

Although public enforcers are not primarily motivated by profit, they may have some financial incentives, specifically where statutes authorize the suing agency to retain a portion of the litigation recovery. Similarly, individuals in government agencies, even those unelected and politically insulated, still may seek reputational capital from large and well-publicized lawsuits. According to recent scholarship, government agencies have brought in record amounts of civil damages and settlements, sometimes surpassing private awards.

Strategic Responses to Parallel Civil Litigation

Defendants should confer with counsel early in any class action to manage and mitigate the effects of parallel litigation. Defendants should evaluate the areas of greatest exposure—often the class action—to guide the legal strategy.

Class action defendants should also consider how the lawsuit may lead to parallel enforcement, and how parallel litigation can alter the chances of success. Understanding this early on will help the company evaluate the overall risks of litigation. In particular, studies show that public investigations, regardless of what the investigation turns up, will catalyze private lawsuits. In the securities context, for example, the SEC Enforcement Division's decisions increase the flow of private litigation, even before there is a resolution of the government's claims on the merits.

There are several procedural and substantive legal rules that can mitigate the effects of parallel litigation. First, preclusion rules (judicial or statutory) can foreclose subsequent claims altogether. But there are limitations to these doctrines relating to lack of privity. For example, in *Sam Fox Pub. Co. v. United States*, 366 U.S. 683,

690 (1961), the Supreme Court explained that the government is not bound by private antitrust litigation "to which it is a stranger," and vice versa.

Some statutes expressly preclude private actions after state enforcements or limit damages. *See, e.g.,* 15 U.S.C. § 15c(a)(1) & (b) (excluding "duplicate[]" monetary relief for Clayton Act *parens patriae* lawsuits and providing that a "final judgment . . . shall be res judicata as to any claim" under the same title by plaintiff who fails to opt out); 29 U.S.C. § 626(c)(1)(terminating private right of action for ADEA violation upon EEOC complaint); 29 U.S.C. § 216(b) (terminating right of action under FLSA upon complaint by Secretary of Labor). But statutory preclusion is relatively rare, particularly in state consumer statutes. And so typically preclusion will depend on the application of common-law principles, which in turn raise some difficult questions as to whether the rights being litigated can be considered so-called public or private rights.

Second, damages rules can mitigate the effects of redundant litigation, even if the claims are not barred by preclusion. Such rules include off-sets and damages caps. But defendants should be aware that the way the government characterizes the remedies it pursues—as civil penalties, disgorgement, restitution, or damages—may affect the ability to set off damages against private plaintiffs.

Third, claim-processing rules such as stays, intervention, venue, consolidation, and transfer may determine where, when, and how the company must defend itself. These and related issues will be explored in future articles, but corporate defendants should confer with counsel to develop a global strategy that leverages these rules to strengthen the company's defense.

Next Steps:

Many large companies have already faced parallel-track lawsuits. But scholars are increasingly focused on parallel litigation as a conceptual issue in itself, and are probing the institutional motivations that can lead to over-enforcement and quantifying and comparing the outcomes between public and private litigants. Corporate defendants should study these trends and work with counsel to develop strategies that will avoid excessive recoveries by class action or public plaintiffs (or both). Corporate defendants facing parallel actions should proceed with a coordinated defense that accounts for the interplay and overlap in parallel civil proceedings.

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Whether our clients face a nationwide class action in one court or statewide class actions in courts across the country, we develop tailored litigation strategies based on our clients' near- and long-term business objectives, and guided by our ability to exert leverage at all phases of the case – especially at trial. Our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters—their businesses.

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