How Tuna Antitrust Ruling Affects Job Bias Class Actions

By **Marc Shapiro, Katie Mantoan and Kelly Williams**

Courts have increasingly scrutinized the use of statistical evidence to secure class certification.

Olean Wholesale Grocery Cooperative Inc. v. Bumble Bee Foods LLC[1] is the most recent pronouncement in this growing trend.

And although Olean is an antitrust case, the approach it adopts is nevertheless of key importance in employment discrimination class actions.

The U.S. Court of Appeals for the Ninth Circuit explained that district courts must find predominance by a preponderance of the evidence and, in making that determination, they may not rely on statistical models that obscure the extent of uninjured class members.

Rather, they must conclude that the percentage of injured class members is insignificant enough to warrant uniform treatment, emphasizing, "[t]here is reason to be wary of overreliance on statistical evidence to establish classwide liability" and "[i]f highly consequential evidence emerges from what looks like an indecipherable statistical model to most non-statisticians, it is imperative that qualified individuals explain how the [model] works, and courts must ensure that it produces reliable information."[2]

Meanwhile In Title VII and Equal Pay Act cases — as well as their state analogs — plaintiffs frequently rely upon classwide statistical modeling in an effort to demonstrate commonality and predominance under the relevant certification standard.

But because those models rely on averaging across the entire class, they tend to obscure differences in outcomes in different parts of the company and mask individualized issues about whether specific class members have in fact been harmed.

Imagine, for example, a company that has 10 employees, nine of which make $100,000 per year, and one — Employee A — who makes $25,000. And further assume that all these individuals perform equal work and that no legitimate business reasons explain the pay differences.

If Employee A is a member of a protected class, as are three other employees — but not the other six — a model that reports out only average, groupwide pay differences would make it appear as if all four members of the protected class are being discriminated against — on average, they make $81,250 — when, in reality, three members are being treated the same as the other employees and thus are uninjured.

The aggregated model in this example wouldn't just obscure differences in damages; it would obscure the fact that there is no injury, and thus no liability, as to three putative class members at all.

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Courts have been mindful of efforts to manipulate statistics in this way in an effort to secure class certification. Indeed, the U.S. Supreme Court itself expressed such skepticism in 2011's Wal-Mart Stores Inc. v. Dukes. Addressing the plaintiffs' nationwide statistical evidence concerning promotion disparities among men and women at Walmart, the Supreme Court explained, "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores."[3]

That's because

[a] regional pay disparity … may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.[4]

Lower courts have echoed these concerns. In Bolden v. Walsh Construction Co., for instance, the U.S. Court of Appeals for the Seventh Circuit rejected the plaintiffs' attempt to rely on statistics to show managers discriminated by giving white and Hispanic workers more overtime. As the court explained,

If [the defendant] had 25 superintendents, 5 of whom discriminated in awarding overtime, aggregate data would show that black workers did worse than white workers — but that result would not imply that all 25 superintendents behaved similarly, so it would not demonstrate commonality.[5]

Likewise, in Kassman v. KPMG LLP, the court refused to certify a gender discrimination class action notwithstanding the aggregated statistical disparities the plaintiffs presented.

Even crediting the plaintiffs' statistical analysis, the court found no good reason to rely on their nationwide statistics because the relevant decision making took place at the practice-area level.

Thus, the court determined that a finding of disparity in that instance "may be attributable to only a small set of [KPMG decision makers at the practice-area level], and cannot by itself establish the uniform … disparity upon which the plaintiffs' theory of commonality depends." Consequently, the court held that the plaintiffs' statistical evidence was insufficient to show any common issue that would permit a nationwide class.[6]

Nevertheless, the plaintiffs frequently cite to the Supreme Court's more generous approach to the use of statistical sampling in Tyson Foods Inc. v. Bouaphakeo[7] in attempting to elide in-class variation.

Olean imposes important limitations on that reliance. In Olean the defendants, producers of packaged tuna, appealed the district court's order certifying three classes of intermediate or end purchasers of their products.

Defendants argued that the district court improperly ruled that the plaintiffs' statistical evidence of classwide impact satisfied Rule 23(b)(3)'s "predominance" requirement.

The Ninth Circuit held that the plaintiffs' statistical evidence could be used to establish predominance under Rule 23(b)(3) in the case before it because the evidence could have been used to establish liability in each class member's individual suit by demonstrating the antitrust impact of the alleged price fixing.

Note that this initial requirement — that aggregated statistic evidence be appropriate for establishing individual claims—is key in the employment context as well, where it can be far harder for the plaintiffs to establish then in the antitrust context. Indeed, in cases where the plaintiffs rely on overly aggregated models and simply report out average differences in employment outcomes, even their experts may concede that those models do not actually demonstrate injury to each putative class member.

If so, allowing the class (including uninjured members) to proceed on such a model would violate the foundational principle that the class action procedural device cannot be used to "abridge, enlarge or modify [a plaintiff's] substantive right[s]."[8]

The Ninth Circuit also held, however, that the trial court erred by certifying the classes in Olean because it failed to resolve the factual disputes concerning the competing experts' methodologies and — crucially — the extent to which the plaintiffs' statistical evidence swept in uninjured individuals.[9] The Ninth Circuit stressed that even though the statistical evidence the plaintiff presented was of a type that could be used to satisfy predominance, courts must still rigorously analyze such statistical evidence at the class certification stage to test its reliability and determine if its modeling does in fact mask individualized differences.[10]

In justifying this requirement, the court pointed to the typically seismic implications of class certification:

Courts cannot relocate the predominance inquiry to the merits stage of the trial. Rule 23 requires this determination be made at the pre-trial stage. And for good reason. Suppose the jury ultimately decides Defendants' expert is right and the plaintiffs' model sweeps in 28% uninjured class members. Too late: the damage has been done. By then, Defendants would have possibly weathered years of litigation at untold costs, only to discover that the case never should have reached the merits at all. Rule 23's objective — that only cases suitable for class adjudication be certified — would have been effectively undermined.[11]

The Olean court further emphasized that deferring determination of classwide injury effectively "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert."[12] As the court underscored, if "'savvy crafting of the evidence' were enough to guarantee predominance, there would be little limit to class certification in our modern world of increasingly sophisticated aggregate proof."[13]

While acknowledging the inevitability that classes will sometimes include uninjured class members, the court explained that when that number becomes great enough, certification is improper. If, for example, the statistics showed that more than one-fourth of the class may not have suffered an injury, it would be improper to find by a preponderance of the evidence that "questions of law or fact common to class members predominate over any questions affecting only individual members."

The impact of Olean would appear significant. Not only did the Ninth Circuit clarify that plaintiffs must satisfy the predominance inquiry by a preponderance of the evidence, it also explained that plaintiffs may no longer cobble together statistical evidence and argue any meaningful scrutiny should be deferred until the merits.

Rather, it cements the requirement that district courts in the Ninth Circuit engage in a meaningful assessment of competing statistical models and determine at the certification stage whether use of a model would result in inclusion of a significant number of uninjured putative class members.

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[1] No. 19-56514, 2021 WL 1257845 (9th Cir. Apr. 6, 2021).

[2] Id. at *6, citing United States v. Gissantaner, 990 F.3d 457, 463 (6th Cir. 2021) (simplified).

[3] 564 U.S. 338, 356 (2011).

[4] Id.

[5] 688 F.3d 893, 896 (7th Cir. 2012). See also Brand v. Comcast Corp., Inc., 302 F.R.D. 201, 227 (N.D. Ill. 2014) (concluding "statistical data indicating adverse outcomes for [ ] pay, promotion and discipline overall does not answer the commonality question" because it relies on averages but "[t]he commonality inquiry concerns whether the individual experiences of those whose salaries make up the average share enough common ground").

[6] 416 F. Supp. 3d 252, 282-83 (S.D.N.Y. 2018), quoting Dukes, 564 U.S. at 357.

[7] 577 U.S. 442 (2016).

[8] 28 U.S.C. § 2072(b).

[9] Olean, 2021 WL 1257845, at *10.

[10] Id.

[11] Id. at *10 n.8.

[12] Id. at *12, citing West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002).

[13] Id., citing Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 103 (2009).