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D.C. Circuit Upholds Denial of Class Certification Where Plaintiffs' Economic Model Showed Uninjured Members

On August 16, 2019, the United States Court of Appeals for the District of Columbia Circuit affirmed the denial of class certification in *In re Rail Freight Fuel Surcharge Antitrust Litigation*. With the plaintiffs' economic model showing no damages for over 2,000 members of the proposed 16,000-member class, the court concluded that common issues did not predominate over the individualized inquiries necessary to determine injury and causation for the class. Therefore, the court held it was within the district court's discretion to reject class certification for failing to satisfy the requirement of predominance under the applicable federal rule.[1]

Background

The *Rail Freight* plaintiffs were a group of rail shippers, suing "the four largest freight railroads in the United States." Plaintiffs filed their suit in 2007. They alleged that the railroads had conspired with each other "to fix rate-based fuel surcharges," which "are calculated as a percentage of the base shipping price" and charged "when the price of fuel rises above a certain trigger price."[2] Plaintiffs sought to certify a Rule 23(b)(3) damages class comprising "all shippers who paid rate-based fuel surcharges for unregulated services purchased from the defendants between June 1, 2003 and December 31, 2008."[3]

To certify a class under Rule 23(b)(3), a court must find, among other things, "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[4]

In this case, the district court initially certified a class, but the court of appeals (in 2013) vacated the certification order and remanded the case for reconsideration. Upon reconsideration, the district court denied class certification. The district court found, among other things, that the plaintiffs' economic model

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1 Dakota Granite Co. v. BNSF Ry. Co. (In re Rail Freight Fuel Surcharge Antitrust Litig.), No. 18-7010 (D.C. Cir. Aug. 16, 2019) ("Slip. Op.") at 8-9.

2 *Id.* at 2-3.

3 *Id.* at 3.

4 Fed. R. Civ. P. 23.

"measured negative damages – and hence *no* injury – for over 2,000 members of the proposed class."[5] As a result, the court found that plaintiffs' economic model failed to show that injury to the class could be shown by common proof and plaintiffs failed to meet the predominance requirement of Rule 23.[6]

The Decision of the Court of Appeals

The Court of Appeals held that "the district court did not abuse its discretion in denying class certification on the ground that common issues do not predominate."[7] Central to the court's decision was that the plaintiffs' economic model, which was intended to show common impact from the alleged conspiracy "indicates that 2,037 members of the proposed class – or 12.7 percent – suffered 'only negative overcharges' and thus *no* injury from any conspiracy."[8] This, the court found, "leaves the plaintiffs with no common proof of . . . essential elements of liability for the . . . 12.7 percent."[9] And, "plaintiffs have proposed no 'further way' – short of full-blown, individual trials – 'to reduce this number and segregate the uninjured from the truly injured.'"[10] The court added that to determine whether any of the 2,037 class members for which the plaintiffs' expert's model showed negative overcharges actually suffered injury would involve exploring "impacts on shippers of different sizes, shipping different products in different geographic markets, with different transportation options and different degrees of leverage" – all of which would require complex, individualized inquiries and defeat the purposes of the class action mechanism.[11]

The court did not decide whether Rule 23 permitted a class to include a *de minimis* number of uninjured members. (Certain courts have permitted this.) Rather, the court determined it was unnecessary to reach that issue given that the district court "reasonably concluded that such a *de minimis* exception would not encompass this case" where 12.7 percent of the class was shown by the plaintiffs' model to have suffered no injury from the alleged conspiracy.[12] Notably, the court rejected plaintiffs' argument that the 2,037 class members for whom their damages model showed no injury constituted a *de minimis* portion of the class "because their shipments make up less than one percent of the railroads' overall revenue from the alleged conspiracy."[13] The court held that "revenue is irrelevant to predominance, which looks to whether elements

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5 Slip Op. at 5.

6 *Id.*

7 *Id.* at 15.

8 *Id.* at 8.

9 *Id.*

10 *Id.* at 11.

11 *Id.* at 12.

12 *Id.* at 10.

13 *Id.* at 13.

such as causation and injury may be proved through common evidence, not how much the defendants benefited from any wrongdoing."[14]

Significance

Rail Freight makes clear that the presence of uninjured class members may be dispositive for class certification decisions, and that this is not an issue that courts can avoid addressing when confronted with it. Specifically, the court emphasized that district courts considering class certification are not permitted "to defer questions about the number and nature of any individualized inquiries that might be necessary to establish liability. To the contrary, confronting such questions is part-and-parcel of the 'hard look' required" by prior Supreme Court decisions such as *Wal-Mart* and *Comcast*.[15] In reaching this conclusion, the D.C. Circuit aligned itself with other courts of appeals, including the First Circuit, which have recently held that the presence of uninjured class members doomed class certification.[16] Further, the court's holding clarifies that it does not matter for determining predominance of common issues whether uninjured class members account for a small percentage of defendants' revenues. What matters is that individualized inquiries are needed to determine whether a portion of the class suffered injury.

The upshot is that several courts have recently denied certification where there have been problems properly identifying uninjured members. As such, defendants facing the *in terrorem* prospect of a certified class would do well to closely evaluate whether plaintiffs' proposed classes improperly include potentially uninjured members, for this may provide an independent basis for courts to deny certification.

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14 *Id.*

15 *Id.* at 12.

16 Teamsters Union 25 Health Servs, & Ins. Plan v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.), 907 F.3d 42 (1st Cir. 2018).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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