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Fishy Class Certification: A Packaged Tuna Antitrust Case and a Shift in Class Certification Standards

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NOTE

Fishy Class Certification: A Packaged Tuna Antitrust Case and a Shift in Class Certification Standards

Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022), *cert. denied sub nom., Starkist Co. v. Olean Wholesale Grocery Coop., Inc.*, 143 S. Ct. 424 (2022).

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I. INTRODUCTION

Class certification confers a fearsome power on plaintiffs. Organizing a group of otherwise disparate potential claimants through a class action produces a mighty concentration of power that plaintiffs can wield against defendants. This power is exerted on defendants in the form of "hydraulic pressure" to settle,[1] shifting focus from litigation to settlement.[2] The risk involved with one jury standing between a defendant and "potentially ruinous liability" often proves to be intolerable for corporate defendants.[3] The *in terrorem* nature of class actions means that just by obtaining class certification, plaintiffs achieve a major victory.[4] This notion is borne out by empirical results, with one study that spanned nine years finding that, once certified, classes "almost always settled."[5]

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[1] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 165 (3d Cir. 2001).

[2] STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, CIVIL PROCEDURE 829 (10th ed. 2019).

[3] FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012).

[4] Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 678 (7th Cir. 2009).

[5] BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 6 (2005).

In light of the awesome power that is class certification, a number of criteria, chiefly in Rule 23 of the Federal Rules of Civil Procedure, aim to certify only classes that are both fair and efficient.[6] To obtain certification, plaintiffs must satisfy all four prerequisites in Rule 23(a)—numerosity, commonality, typicality, and adequate protection of interests—and conform to one of three types of actions listed in Rule 23(b).[7] The most controversial of these three types is 23(b)(3), under which plaintiffs seek monetary damages.[8] Rule 23(b)(3) requires that issues "common" to the class "predominate" over those that affect individual class members.[9]

The rule states, in a single sentence, the bar that plaintiffs must clear in order to certify a class.[10] When the rubber of the rule meets the road of the real world, however, the rule provides but minimal guidance. Classes are often drawn in broad strokes. By nature, they consist of individuals with some common experience, such as every student subject to a challenged admissions rule, every employee working under the same compensation policy, or every consumer purchasing the same product.[11] The nature of this line drawing gives rise to a problem: what if some individuals who share the common experience were nonetheless completely uninjured by the defendant's conduct? Can those uninjured plaintiffs still be part of a certified class? If so, how many uninjured plaintiffs does Rule 23 tolerate? That is the central issue this Note addresses. Possible solutions run the gamut: a strict requirement that there be no uninjured class members, tolerance of a negligible or "de minimis" number of uninjured plaintiffs, or an acceptance of a significant number of uninjured plaintiffs at the certification stage.

Regardless of the approach that a court uses, satisfying the predominance requirement mandates that plaintiffs come forward with common proof on behalf of the class. In the quest to provide such proof, plaintiffs routinely turn to expert witnesses to establish a model that demonstrates injury.[12]

Prospective class members advanced such a model in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, an antitrust

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[6] FED. R. CIV. P. 23(b)(3).

[7] FED. R. CIV. P. 23(b).

[8] YEAZELL *supra* note 2, at 829.

[9] FED. R. CIV. P. 23(b)(3).

[10] *Id.*

[11] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 224, 252–53 (2003) (class action suit regarding University of Michigan admissions policies); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 343 (2011) (class action suit for alleged pay and promotion discrimination against women); Wallace v. SharkNinja Operating, LLC, 2020 WL 1139649 at *3 (U.S.D.C. N.D. Cal. Mar. 9, 2020) (class action suit for owners of the Ninja Stacked Blade Blenders from California).

[12] *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 460 (2016).

action against several of the world's largest manufacturers of tuna.[13] The plaintiff model purported to demonstrate injury in the form of higher prices the class paid.[14] The model was fiercely contested by the defendants, who, through their own expert, claimed that antitrust injury could not be established for nearly a third of the class and accused the plaintiff model of relying on faulty methodology.[15] The district court did not decide between the dueling experts and credited some claims made by both, ultimately certifying the class.[16] Following class certification, the Court of Appeals for the Ninth Circuit affirmed the decision not to pick between the battling experts' conclusions.[17] Its opinion broadened the path to class certification and created a circuit split when it rejected the rule that all or substantially all class members must have been injured to obtain certification.[18]

Part II of this Note sets forth the factual background and procedural posture of this dispute. Part III lays out both the doctrine of predominance and a court's obligations at the class certification stage. Part IV details the majority's rationale for affirming the refusal to find in favor of either expert's model and catalogues the dissent's qualms with that decision. Part V examines the holding of the case against the backdrop of Rule 23's text, precedent, and the requirement of standing. It also highlights key areas in which the holding is in tension with those doctrines and discusses the need for the Supreme Court's input on this issue. Part VI concludes by discussing the implications of the decision on future class certification disputes.

II. FACTS AND HOLDING

The defendants, Bumble Bee, StarKist, Chicken of the Sea, and their parent companies, are the largest tuna producers in the United States, accounting for about eighty percent of the domestic packaged tuna market.[19] In 2015, an investigation by the Department of Justice sparked a string of indictments against several of the defendants for a criminal price-fixing conspiracy ranging from late 2011 to late 2013.[20] Bumble Bee, StarKist, and three individual executives pleaded guilty.[21] A jury

[13] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022), *cert. denied sub nom.* Starkist Co. v. Olean Wholesale Grocery Coop., Inc., 143 S. Ct. 424 (2022).

[14] *Olean Wholesale*, 31 F.4th at 671.

[15] *Id*. at 673.

[16] *Id*. at 676.

[17] *Id*. at 685.

[18] *Id.*

[19] *Id*. at 661.

[20] *Id*. at 661–62.

[21] *Id*. at 662.

convicted Bumble Bee's former CEO, whereas Chicken of the Sea cooperated and admitted its guilt in exchange for lenience.[22] Following the criminal proceedings, several purchasers of the defendants' products filed putative class actions against the defendants, alleging that they had engaged in a conspiracy from 2010 through at least the end of 2016.[23] These actions were initially consolidated in a multidistrict litigation proceeding in the Southern District of California.[24]

The purchasers consisted of three putative subclasses: (1) direct purchasers of the defendants' products (e.g., major retailers and small mom-and-pop shops that then sold the tuna to consumers), (2) indirect purchasers that bought tuna in bulk for prepared food or resale (e.g., restaurants), and (3) individual end purchasers for personal consumption.[25] The plaintiffs moved to certify the three subclasses in 2018.[26]

In an attempt to demonstrate class-wide impact in the form of an overcharge, the plaintiffs proffered economic analyses by three different expert witnesses who deployed substantially identical methodology.[27] The defendants countered with expert evidence of their own, advancing numerous criticisms of the plaintiff model.[28] Both sides deployed regression models that attempted to isolate changes in price attributable to the conspiracy by controlling for other factors.[29] Although the parties clashed over the expert analyses for all three subclasses, it was the direct purchaser class that proved to be the most violent battleground.

Applying his regression model, the plaintiff expert found that the direct purchasers incurred an average overcharge of 10.28% as a result of the conspiracy.[30] Using the outcome of the regression analysis, the plaintiff expert created a but-for price—the expected price if there was no conspiracy.[31] The plaintiff expert then compared the predicted but-for price to the actual prices the direct purchasers paid and found that 94.5% of the class had at least one purchase above the but-for price.[32] The defense expert challenged the plaintiff expert's conclusions on multiple grounds.[33] The primary critique was that the plaintiff model's reliance on

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[22] *Id*.

[23] *Id*.

[24] *In re* Packaged Seafood Prods. Antitrust Litig., 148 F. Supp. 3d 1375, 1376 (J.P.M.L. 2015).

[25] *Olean Wholesale*, 31 F.4th at 662.

[26] *Id*. at 662.

[27] *Id*.

[28] *Id*.

[29] *Id*. at 671–73.

[30] *Id*. at 672. The expert on whom the Supplier subclass relied was Dr. Russel Mangum. *Id.* at 670.

[31] *Id*. at 672.

[32] *Id*.

[33] *Id.* at 673.

an average overcharge of 10.28% was faulty and masked individualized differences among the subclass members, such as bargaining power.[34] The defense expert performed his own test of the plaintiff model, abandoning the average overcharge figure and instead evaluating the overcharge based on each customer.[35] The results indicated that no positive, statistically significant overcharge occurred for 28% of the direct purchaser class.[36] Thus, the crux of the parties' dispute centered around the propriety of the single uniform overcharge of 10.28%.[37]

Although the parties differed on the number of uninjured prospective class members by more than 20%—roughly 6% of the class per the plaintiff model and approximately 28% according to the defense—the district court chose not to credit one model over the other.[38] Instead, the court noted that even class members for whom the model failed to produce statistically significant results could use it as proof "as it pertains to similarly situated class members."[39] The district court deemed the criticism of the plaintiff model nonfatal because the plaintiff expert could explain criticized results "using sound econometric principles that are not obviously contrary to the theory of the case."[40] Responding to another claim by the defense expert—that the plaintiff expert improperly used a cost index rather than the defendants' actual accounting data—the district court recounted the arguments and concluded that the plaintiff expert's "use of costs in this case [was] reasonable."[41]

The district court conceded that the plaintiff methodology contained "potential flaws"[42] and that the defendants' criticism was "serious and could be persuasive to a finder of fact."[43] Nonetheless, the district court certified the class, concluding that the defendants had not sufficiently demonstrated that the plaintiff model was "unreliable or incapable of proving impact on a class-wide basis."[44] In making its decision, the district

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[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *In re* Packaged Seafood Prod. Antitrust Litig., 332 F.R.D. 308, 324 (S.D. Cal. 2019), *vacated and remanded sub nom*. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774 (9th Cir. 2021), *on reh'g en banc*, 31 F.4th 651 (9th Cir. 2022), *and aff'd sub nom*. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022).

[38] *Id*. at 328.

[39] *Id*. at 324.

[40] *Id*. at 326.

[41] *Id*. at 327–28.

[42] *Id*. at 344.

[43] *Id*. at 328.

[44] *Id*.

court noted that econometric evidence should be allowed as common proof "where [it is] plausibly reliable."[45]

The defendants appealed the order certifying the class to the Ninth Circuit.[46] A panel heard the case and vacated the district court's certification order, remanding the case for further proceedings.[47] The panel concluded that, while representative evidence may be used to establish predominance, a district court abuses its discretion when it fails to resolve factual disputes necessary to adequately answer the predominance question.[48] On remand, the district court was instructed to "determine the number of uninjured parties in the proposed class based on the dueling statistical evidence."[49]

The Ninth Circuit subsequently granted rehearing *en banc* to consider whether the district court had correctly determined that the plaintiff satisfied the predominance requirement.[50] The court began by formalizing the standard for satisfying Rule 23, joining its sister circuits in concluding that plaintiffs must prove each requirement by a preponderance of the evidence.[51] The court stated that predominance begins with the elements of the underlying action.[52] It explained that plaintiffs satisfy predominance when they demonstrate that the elements of the action "are capable of being established through a common body of evidence, applicable to the whole class."[53] After perusing Rule 23 and precedent regarding the predominance inquiry, the court ultimately affirmed the order granting class certification.[54] It held that when representative evidence is used to establish predominance at the class certification stage, the district court need only conclude that the evidence is "capable" of

[45] *Id*. at 321 (quoting *In re* Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 491 (N.D. Cal. 2008)).

[46] *Olean Wholesale*, 31 F.4th at 662.

[47] *See* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774, 784 (9th Cir.), *reh'g en banc granted*, 5 F.4th 950 (9th Cir. 2021), *and on reh'g en banc*, 31 F.4th 651 (9th Cir. 2022), *cert. denied sub nom.* Starkist Co. v. Olean Wholesale Grocery Coop., Inc., 143 S. Ct. 424 (2022).

[48] *Id*. at 791–92. The phrase "representative evidence" originated in the 2016 case *Tyson Foods, Inc. v. Bouaphakeo*, and refers to evidence that is meant to apply to similarly situated class members, such as averaging. 577 U.S. 442, 450 (2016).

[49] *Id*. at 782.

[50] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 5 F.4th 950, 951 (9th Cir. 2021).

[51] *Olean Wholesale*, 31 F.4th at 665.

[52] *Id.* (citing Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011) (quoting FED R. CIV. P. 23(B)(3)).

[53] *Id*. at 666.

[54] *Id*. at 685.

showing "impact on a classwide basis," which does not require a finding that a de minimis number of plaintiffs are uninjured.[55]

III. LEGAL BACKGROUND

To obtain class certification, plaintiffs must satisfy the four prerequisites listed in part (a) of Federal Rule of Civil Procedure 23 and conform to one of the three types of class actions listed in part (b).[56] The most common variety is a (b)(3) action,[57] which applies to most classes seeking monetary relief.[58] Classes of this type may be certified only when the district court finds that the class action is superior to other methods and that questions of law or fact common to the class predominate over those affecting individuals.[59]

A. Rule 23 and the Predominance Requirement

These requirements for class certification are notably stringent, excluding most classes from certification.[60] A party seeking class certification under these rigid requirements must "affirmatively demonstrate" that he is in compliance with Rule 23—that is, he must prove that the prerequisites are *in fact* satisfied.[61] A trial court grants certification only if it finds, after a "rigorous analysis," that the party actually satisfied the prerequisites.[62] During this rigorous analysis, the court must resolve legal or factual controversies that bear on certification as necessary to find that compliance with Rule 23 is "actually prove[n]" and not simply alleged.[63] This exercise may and often will "overlap with the merits" of the underlying claim.[64] This overlap, however, is unavoidable and should not deter the trial court from its analysis.[65]

The predominance requirement in Rule 23(b)(3) is designed to ensure that the proposed class is "sufficiently cohesive" to warrant a class

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[55] *Id*. at 678.

[56] FED. R. CIV. P. 23.

[57] Baker v. Masco Builder Cabinet Grp., Inc., No. CIV. 09-5085-JLV, 2011 WL 1256907, at *2 (D.S.D. Mar. 30, 2011).

[58] Donovan v. St. Joseph Cnty. Sheriff, Cause No. 3:11-CV-133-TLS, 2012 WL 1601314, at *7 (N.D. Ind. May 3, 2012).

[59] FED. R. CIV. P. 23(b)(3).

[60] Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 229 (2013).

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

[62] *Id*. at 305–51 (quoting Gen. Tel. Co. of Sw. v. Falcon, 102 S. Ct. 2364, 2372 (1982)).

[63] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 275 (2014).

[64] *Wal-Mart*, 564 U.S. at 351.

[65] *Id*.

action.[66] The predominance inquiry requires courts to devote "careful scrutiny" to the relation between common and individual questions presented in a case.[67] An issue is common where the same evidence will enable each member to make a showing or the issue is susceptible to "generalized, class-wide proof."[68] This can be accomplished through evidence common to the class that can both establish injury and prove that damages are measurable on a class-wide basis using common methodology.[69]

This common proof may take the form of representative or statistical evidence and may sustain class certification in some cases, depending on the type of evidence and claim at issue.[70] A trial court errs where it declines to decide whether the methodology used to establish representative evidence was a "just and reasonable inference or speculative."[71] Representative evidence demonstrates class-wide liability when it is sufficient to sustain a reasonable jury finding as to harm in an individual class member's case.[72] Representative statistical evidence cannot be used where class members are not similarly situated.[73] In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court approved representative evidence where class members "worked in the same facility, did similar work, and [were] paid under the same policy. . . ."[74]

B. The Predominance Requirement in Antitrust Cases

The circuit courts took this Supreme Court foundation on representative evidence and predominance and charted a more elaborate course. Building on the "similarly situated" wording in *Tyson Foods*, circuit courts have contemplated when representative evidence can be used in antitrust cases. Both the Third and Fifth Circuits have expressed that market diversity, where buyers differ substantially in traits such as size and bargaining power, can frustrate the use of representative evidence to establish predominance.[75] In such cases, the Third Circuit held that averages can be problematic in expert methodology and that the trial court's rigorous analysis must include a determination as to whether

[66] Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 623 (1997).

[67] Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016).

[68] *Id*.

[69] Comcast Corp. v. Behrend, 569 U.S. 27, 27 (2013).

[70] *Tyson Foods*, 577 U.S. at 455.

[71] *Comcast*, 569 U.S. at 35.

[72] *Tyson Foods*, 577 U.S. at 455.

[73] *Id*. at 458.

[74] *Id*. at 459.

[75] *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 194 (3d Cir. 2020); Alabama v. Blue Bird Body Co., 573 F.2d 309, 328 (5th Cir. 1978).

averages are appropriate.[76] This determination, the court claimed, is based on the characteristics of the market at issue.[77] These factors include, "most importantly," whether the market is characterized by individual negotiations.[78] Similarly, the Fifth Circuit noted that "the diverse nature" of a market may necessarily involve an individualized inquiry to ensure that an individual class member was affected, which would destroy predominance.[79] The application of the "similarly situated" phrasing in *Tyson Foods* to these circuit cases is plain: where participants in a market are very diverse from one another, they are probably not similarly situated.

Courts of appeals commonly note that individualized calculations of damages do not preclude a finding of predominance.[80] While that notion appears to enjoy general acceptance, some courts have made it a point to distinguish individual *damages* questions about the extent of harm suffered (which do not destroy predominance) from individual *injury* questions about whether any harm was suffered at all (which may prevent predominance).[81] Additionally, courts appear to disfavor the general rule that individual damages do not violate predominance when damages calculations are complex, fact specific, or include significant questions of liability.[82] The general rule holds true, however, where individual damages can be "readily determined."[83]

C. The Presence of Uninjured Persons in a Class

One cannot engage with the concept of representative evidence and predominance without asking a fundamental question: how many uninjured plaintiffs should a class be allowed to have? This question is directly intertwined with the standard for using representative evidence at the certification stage. The reason is straightforward. The thing that courts care about when evaluating representative evidence is the applicability of the evidence to the class.[84] Good, applicable representative evidence would prove injury for all or almost all of a class. Worse, less applicable representative evidence would prove injury for a fraction of a class. Thus, if classes are required to have very few uninjured class members, the

[76] *In re Lamictal*, 957 F.3d at 194.

[77] *Id*.

[78] *Id*.

[79] *Blue Bird Body Co.*, 573 F.2d at 328.

[80] Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240, 258 (5th Cir. 2020).

[81] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 189 (3d Cir. 2001) ("Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)."); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1493–94 (8th Cir. 1992).

[82] Brown v. Electrolux Home Prod., Inc., 817 F.3d 1225, 1240 (11th Cir. 2016).

[83] Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013).

[84] *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 459 (2016).

standard for representative evidence must be quite high, because worse representative evidence would impermissibly loop in too many uninjured plaintiffs. This means that the number of uninjured plaintiffs that a court will tolerate before denying class certification directly determines its standard for representative evidence.

The Supreme Court has not given clear guidance on the issue of uninjured plaintiffs at the certification stage. It did, however, note that the potential for a defendant to attempt to pick off "the occasional class member here or there through individualized rebuttal" does not destroy predominance.[85] At least one circuit has directly interpreted this phrasing as imposing a de minimis standard for uninjured class members.[86] In fact, most circuits that have considered the issue have gravitated toward a de minimis standard, relying on hints from the Supreme Court and their own construction of Rule 23(b)(3).[87] The First Circuit, for example, set the de minimis line at around ten percent uninjured,[88] while the D.C. Circuit said that the outer limit of a de minimis number was five to six percent.[89] On the other hand, the Fifth Circuit held that injury must be established for "every class member" at the certification stage or predominance would be defeated and the class would not be certified.[90]

Some circuits have addressed this uninjured class member issue in the context of Article III's standing requirement rather than Rule 23.[91] Both the Second and Eighth Circuits have suggested that a putative class must prove standing (and by extension, injury-in-fact) for every class member to obtain certification.[92] This is, of course, even more stringent than a de minimis approach, which permits a small number of uninjured class members without frustrating certification. To be sure, there are circuits that have adopted a much more relaxed standing requirement than that which the Eighth and Second Circuits have adopted.[93]

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[85] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 276 (2014).

[86] *In re* Nexium Antitrust Litig., 777 F.3d 9, 24 (1st Cir. 2015) ("Thus, the Halliburton Court contemplated that a class with uninjured members could be certified if the presence of a de minimis number of uninjured members did not overwhelm the common issues for the class.").

[87] *See In re* Asacol Antitrust Litig., 907 F.3d 42, 54 (1st Cir. 2018); *In re* Rail Freight Fuel Surcharge Antitrust Litig. – MDL No. 1869, 934 F.3d 619, 625 (D.C. Cir. 2019).

[88] *In re Asacol*, 907 F.3d at 54.

[89] *In re Rail Freight*, 934 F.3d at 625.

[90] Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003).

[91] Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013).

[92] *Denney*, 443 F.3d at 264; *Halvorson*, 718 F.3d at 778.

[93] *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 634 (3d Cir. 2017) (adopting the "representative plaintiff" rule in which only one named plaintiff must establish injury-in-fact); *In re* Deepwater Horizon, 739 F.3d 790, 806

Nonetheless, standing does have a place in the Rule 23 scheme. In a recent Supreme Court case, *TransUnion LLC v. Ramirez*, the Court held that every class member must have Article III standing to recover individual damages.[94] The Court deliberately declined to decide whether the requirement of standing as to all class members extended to the certification stage.[95] Although not fully crafted by the Supreme Court, doctrinal development at the circuit level has seemed to gravitate toward a de minimis rule for uninjured class members and an analysis that permits representative evidence to serve as common proof only if such evidence would not encompass significant numbers of uninjured plaintiffs.[96]

IV. INSTANT DECISION

The en banc Ninth Circuit issued its opinion in *Olean Wholesale* in April 2022.[97] Of the eleven judges who heard the case, nine affirmed the trial court's holding in a lengthy opinion authored by Judge Ikuta.[98] Two judges dissented, with Judge Lee writing the shorter, incisive dissenting opinion.[99]

A. Majority Opinion

The majority began its Rule 23 predominance analysis by stating that the plaintiffs must show a common question related to a central issue in their claim.[100] A predominance analysis, the court noted, begins with the underlying elements of the action.[101] The principal claims at issue were federal and state antitrust violations.[102] The essential elements were: (1) the existence of an antitrust violation, (2) an antitrust injury flowing from the violation, and (3) measurable damages.[103] Thus, in order to satisfy predominance, the plaintiffs had to establish that those elements were capable of being established by a common body of evidence,

(5th Cir. 2014) (holding that it is inappropriate to review evidence of absent class members' standing at the certification stage).

[94] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

[95] *Id*. at 2208 n.4.

[96] *See supra* Part III. C.

[97] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022), *cert. denied sub nom.* Starkist Co. v. Olean Wholesale Grocery Coop., Inc., 143 S. Ct. 424 (2022).

[98] *Id*.

[99] *Id*. at 685.

[100] *Id*. at 665.

[101] *Id*.

[102] Specifically, the claims arose under the Sherman Antitrust Act and the Cartwright Act. *Id*.

[103] *Id*. at 666.

applicable to the whole class.[104] The court acknowledged that part of the rigorous analysis at the certification stage can involve weighing conflicting expert testimony and resolving disputes where necessary to ensure that predominance is established.[105] The court elaborated that, at the certification stage, trial courts are limited to resolving whether the evidence establishes that a common issue is *capable* of class-wide resolution.[106]

The court asserted that Rule 23 does not allow trial courts to engage in free-ranging merits analyses at the certification stage.[107] As an example, the court alluded to a class certification case, *Ellis v. Costco Wholesale Group*, that it decided in 2011 in which the plaintiffs alleged that their employers had engaged in discriminatory practices.[108] *Ellis* held that the trial court needed to make fact determinations, such as whether local or national management made promotion decisions, but was not to decide questions on the merits, such as whether the defendant in fact had a "culture of gender stereotyping."[109] Therefore, the *Olean Wholesale* court inferred, a district court cannot decline certification merely because it believes a plaintiff's common evidence to be "unpersuasive" and unlikely to succeed at trial.[110]

The court referenced the Supreme Court's holding in *Tyson Foods* that representative evidence meets the predominance requirement if it could sustain a reasonable jury finding in an individual plaintiff's case.[111] The court reiterated that individualized damages issues do not, typically, predominate and prevent class certification.[112] From this widely recognized rule, the court deduced that "therefore" Rule 23 permits the certification of a class with "more than a de minimis number of uninjured class members."[113] After mentioning that it reviews a trial court's decision to certify a class for abuse of discretion, the court turned to the litigants' arguments and the trial court's analysis.[114]

The court began with the issue of the pooled regression and uniform average overcharge.[115] The majority specifically noted that the trial court "considered" the experts' arguments and "credited" the plaintiff expert's

[104] *Id*.
[105] *Id*.
[106] *Id*. at 666–67.
[107] *Id*. at 667.
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*. at 668.
[113] *Id*. at 669.
[114] *Id*. at 670.
[115] *Id*. at 673.

rebuttal of the defense's criticism.[116] And it pointed out that the trial court accepted the plaintiff model because there was "a rational basis for [the plaintiffs'] use of the pooled regression to demonstrate class-wide impact . . . ."[117] The court concluded its review observing that the trial court found that the defendants' critiques of the model "could be persuasive to a jury at trial."[118] This, the court noted, was not an abuse of discretion, as the trial court concluded that the model was capable of determining whether there was antitrust impact on a class-wide basis.[119]

Moving into its own assessment of the class certification, the court first addressed the use of the 10.28% average overcharge.[120] It explained that "it is not implausible" to find that representative evidence establishes a class-wide impact even when the market is diverse.[121] The court also claimed that it was "both logical and plausible" that the conspiracy could have raised baseline prices by around ten percent.[122] The court next engaged with the defense's argument that the notion of a uniform overcharge was nonsensical given the differing bargaining power among class members.[123] A trial court, the court observed, is not free to substitute its own views about the market tendencies for that of the model.[124] The court also drew a distinction between evidence that is "persuasive," which it claims is not necessary for predominance, and that which is "capable of proving an issue on a class-wide basis."[125] The court next broached the subject of the differing expert findings as to uninjured class members.[126] The court explained that the defense's model did not actually find that twenty-eight percent of the class was uninjured, just that there was insufficient data to establish a positive overcharge for that number.[127]

The majority concluded that the district court did not abuse its discretion because it "credited" the plaintiff expert's contention that, even for that twenty-eight percent, the increase in the average overcharge can be used to establish "impact on similarly situated class members."[128] The upshot of the court's findings was that the district court "fulfilled its obligation to resolve" disputes in order to "satisfy itself" that

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[116] *Id*. at 676.
[117] *Id*. at 675–76.
[118] *Id*. at 676.
[119] *Id*.
[120] *Id*. at 677.
[121] *Id*. at 677–78.
[122] *Id*. at 678.
[123] *Id*.
[124] *Id*.
[125] *Id*. at 679.
[126] *Id*. at 680.
[127] *Id*. at 681.
[128] *Id*. at 680–81.

predominance was present—i.e., found that the evidence was capable of showing antitrust impact on a class-wide basis.[129] The court briefly addressed the topic of Article III standing.[130] It held that demonstrating antitrust impact is sufficient to establish injury-in-fact at the certification stage.[131] Antitrust impact, the court found, was established on a class-wide basis, and therefore injury-in-fact was "adequately demonstrated" for all class members.[132]

B. The Dissent

The dissent primed its substantive disagreement with the majority by taking stock of the practicalities of class action litigation.[133] The dissent observed that the vast majority of class actions never go to trial.[134] "If trials these days are rare," mused the dissent, "class action trials are almost extinct."[135] This reality, the dissent claimed, is the reason for the requirement that trial courts "rigorously scrutinize" certification requirements.[136] The dissent flatly stated that "if defendants' econometrician is correct that almost a third of the class members may not have suffered injury, plaintiffs have not shown . . . predominance."[137] The dissent asserted that the trial court's failure to decide this question and to instead leave it for another day was impractical, as "that day will likely never come to pass . . . ."[138] Kicking this question to trial, the dissent claimed, was tantamount to "handing victory to plaintiffs" because, in all likelihood, the case would settle before trial.[139]

The dissent keyed in on the apparently diverse cluster of class members in the direct purchaser class, ranging from "multibillion dollar chain retailers" to "small mom-and-pop stores."[140] It further elaborated that the major retailers wield substantial bargaining power enabling them to demand reductions in price, whereas the smaller bodegas have no influence to exert.[141] The dissent lamented that the trial court did not conduct a rigorous analysis prior to certification.[142] It adopted the position

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[129] *Id*. at 681.
[130] *Id*. at 682.
[131] *Id*.
[132] *Id*.
[133] *Id*. at 685.
[134] *Id*.
[135] *Id.*
[136] *Id*. (*quoting* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011)).
[137] *Id*.
[138] *Id*. at 686.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*. at 687.

that, when a dispute between experts implicates the satisfaction of a certification requirement, the trial court must pick a side, and the dissent argued this was one such occasion.[143] The factual dispute demanding resolution, according to the dissent, was the number of uninjured class members, which it claimed "overlaps with Rule 23(b)(3)'s predominance requirement . . . ."[144] The dissent's premise was of course that "a plaintiff cannot prove that common issues predominate if one out of three putative class members suffered no harm."[145] The dissent's fear was that declining to evaluate the "persuasiveness" of expert evidence would allow a plaintiff to certify a class by merely offering a "well-written and plausible expert opinion."[146] And persuasiveness, in the opinion of the dissent, was squarely absent from the plaintiff model in this case.[147]

The dissent additionally detailed the substantial diversity in bargaining power between the various class members in the direct purchaser class and noted that economic theory clearly indicated that the larger retailers would have used their substantial negotiating power to pay lower prices.[148] These price reductions, cautioned the dissent, would likely not come in a reduction in the listed price but would instead take the form of rebates or promotional concessions, which the plaintiff model did not account for.[149] Extensive inquiry into the presence of these negotiated concessions would predominate.[150] The dissent concluded by asserting that the majority's decision to eschew a de minimis standard was erroneous.[151] The dissent contended that Rule 23's language, common sense, and the precedent of other circuits commanded an acceptance of the de minimis rule.[152] The dissent stated in closing that the abandonment of a de minimis standard created a circuit split and invites plaintiffs to stuff classes with uninjured members "to extract a settlement, even if the merits of their claims are questionable."[153]

V. COMMENT

The holding in *Olean Wholesale* charters a course in class certification that deviates from the text and purpose of Rule 23, the thrust

[143] *Id*. at 688.
[144] *Id*.
[145] *Id*.
[146] *Id*. at 688–90.
[147] *Id*. at 689.
[148] *Id*.
[149] *Id*. at 689–90.
[150] *Id*. at 690.
[151] *Id*. at 691.
[152] *Id*.
[153] *Id*. at 692.

of Supreme Court precedent, and the conclusions of other circuits. The holding directs that a class may be certified even if it contains a significant number of uninjured class members.[154] Thus, representative evidence need not show harm to the whole class, or even almost all of the class, to suffice at the certification stage.[155]

This is inconsistent with the text of Rule 23(b)(3). The Rule reads in relevant part that certification is denied unless "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members . . . ."[156] To "find" is to determine a fact by verdict or decision.[157] To "predominate" is to hold advantage in numbers or to exert controlling influence.[158] Most importantly, a feature is "common" when it relates to a community at large and is shared "by all members of a group."[159] Thus, the plain text of Rule 23(b)(3) requires a court to decide whether questions of law or fact that are shared by all or substantially all of the class are more numerous or exert more influence than individual questions.[160] This plain text is blatantly incompatible with a reading that allows significant amounts of uninjured class members. Indeed, there is nothing "common" between those uninjured class members and those who were actually injured that is relevant to the underlying action because they will have suffered no injury and sustained no damages.

The effect that this holding will have on expert evidence is troubling, especially insofar as it condones an overreliance on averaging assumptions to establish predominance. This inadequacy is best illustrated by a hypothetical that nudges the circumstances further toward absurdity. The *Olean Wholesale* court held that it is "irrelevant" whether class members were actually overcharged by more or less than the assumed 10.28%.[161] The question, per the court, is whether the model can establish "*impact*."[162] But of course, averages do not always reflect impact across the entire group for which data is averaged. For a simple example, suppose ten

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[154] *Id.* at 669.

[155] *Id.*

[156] FED. R. CIV. P. 23(b)(3).

[157] *Find*, Black's Law Dictionary (11th ed. 2019).

[158] *Predominate*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/predominate [https://perma.cc/R42Z-X3NB] (last visited Mar. 26, 2023).

[159] *Common*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/common [https://perma.cc/7T2G-SLKR] (last visited Mar. 26, 2023).

[160] FED. R. CIV. P. 23(b)(3).

[161] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022), *cert. denied sub nom.* Starkist Co. v. Olean Wholesale Grocery Coop., Inc., 143 S. Ct. 424 (2022).

[162] *Id*. (emphasis added).

customers buy widgets from BigCo at a but-for price of $1.00. Suppose further that nine of the ten customers pay $0.99 for their widget and one customer, affected by conspiracy, pays $2.09. The but-for price charged to the class as a whole would be $10, but $11 was the actual class-wide charge. Thus, averaged across ten class members, each class member was overcharged by $0.10, or an average overcharge of ten percent. Despite the averaged overcharge, nine of the ten class members actually paid *less* than the but-for price of the widget. One could not reasonably argue that this averaged data proves a class-wide impact.

The obvious shortcoming of using averages to satisfy the nebulous "class-wide impact" standard is that when class members are not similarly situated, averaging can produce extreme and inaccurate results. One can easily retort that the above hypothetical would never come to fruition and that "class-wide impact" might be inferred only when courts are confident that a great many more than just one class member was actually injured. This begs the obvious question, however, how many is enough? How many class members need to be injured in fact to suggest that the evidence depicts a class-wide impact? Fifty percent? Fifty-one? Without a de minimis standard, the line drawing to establish a "class-wide" threshold becomes ill-defined and intractable.

The majority's holding is also contrary to the thrust of Supreme Court precedent on predominance and class certification. The Court has extensively emphasized the need for a "rigorous analysis" at the certification stage.[163] It has also made clear that a trial court must actually decide issues bearing on the propriety of certification, even if that analysis "overlap[s] with the merits" of the underlying claim.[164] Thus, if the number of uninjured plaintiffs in a class bears on the propriety of certification, the trial court must concretely resolve dueling expert findings. Though the Supreme Court has never used the phrase "de minimis," it has noted that "pick[ing] off" the odd class member does not destroy predominance[165]—a claim that the First Circuit took to be a direct endorsement of a de minimis rule.[166]

Even if the Supreme Court's guidance does not mandate the adoption of a de minimis rule, its proclamations on representative evidence were

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[163] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (establishing the need for a "rigorous analysis"); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 275 (2014) (noting that Rule 23 compliance must be actually proven, not merely alleged); Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 229 (2013). (explaining that Rule 23 requirements are stringent and exclude most actions).

[164] *Wal-Mart Stores*, 564 U.S. at 351.

[165] *Halliburton*, 573 U.S. at 276.

[166] *In re* Nexium Antitrust Litig., 777 F.3d 9, 24 (1st Cir. 2015) ("Thus, the Halliburton Court contemplated that a class with uninjured members could be certified if the presence of a de minimis number of uninjured members did not overwhelm the common issues for the class.").

offended by the court's holding in *Olean Wholesale*. The *Olean Wholesale* court took note of the *Tyson Foods* rule that representative evidence can be used to establish predominance if it could sustain a reasonable jury finding as to harm in an individual trial.[167] It claimed that the direct purchasers' representative evidence could be used in such a fashion by individual class members.[168] Setting aside the fact that some circuits have explicitly barred this use of representative data in an individual action,[169] the analysis in *Olean Wholesale* is far removed from that of *Tyson Foods*.[170]

In *Tyson Foods*, the Court's conclusion was buttressed by the substantial similarity it established among the class members—namely that they "worked in the same facility, did similar work, and were paid under the same policy."[171] Such a finding of similarity among the direct purchaser class is totally absent from the *Olean Wholesale* opinion, likely because that finding cannot be made. By contrast, in *Wal-Mart Stores, Inc. v. Duke*, where a class of more than 1.5 million female employees, spread across thousands of Wal-Mart stores, sued the company for discriminatory promotion and pay practices, the Supreme Court rejected representative evidence of alleged employment discrimination because the class members were not similarly situated and the employment decisions were decentralized.[172] The Court found the evidence insufficient to satisfy the lesser requirement of commonality in Rule 23(a)(2).[173]

Admittedly, the plaintiffs here are more related than the disparate class members in *Wal-Mart*. But between the two poles of precedent related to representative evidence, this case seems closer to *Wal-Mart* than *Tyson Foods*. That conclusion is furthered by the numerous circuit cases

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[167] *Olean Wholesale*, 31 F.4th at 667.

[168] *Id*. at 679–80.

[169] *In re* Asacol Antitrust Litig., 907 F.3d 42, 54 (1st Cir. 2018) (refusing to find that an injury to ninety percent of class members could sustain liability in an individual action); Guenther v. Armstrong Rubber Co., 406 F.2d 1315, 1318 (3d Cir. 1969) (refusing to allow a case based on "probability hypothesis" to go to a jury because the verdict would "at best be a guess" as to whether the individual plaintiff was among those injured).

[170] This note assumes that the Court's analysis in *Tyson Foods* is controlling in non-FLSA cases. In *Tyson Foods*, the Court relied heavily on the Mt. Clemens rule, which provides a more lenient evidentiary standard for plaintiffs in FLSA actions. Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 456 (2016). Some courts have held that the Supreme Court's guidance on representative evidence in *Tyson Foods* does not control outside of the FLSA context. *See In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 191 (3d Cir. 2020). If *Tyson Foods*' more permissive rule does not control in non FLSA actions, the standard for relying on representative evidence would be even higher here, further undermining the *Olean Wholesale* court's holding.

[171] *Tyson Foods*, 577 U.S. at 459.

[172] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011).

[173] *Id.*

in which diverse markets were found to be especially ill-suited for averaging assumptions and representative evidence.[174] Definitionally, similarly situated persons are much harder to come by in a diverse market, thus representative evidence is weaker.

Under Supreme Court precedent, a trial court must ensure that expert methodology is a just and reasonable inference,[175] and that evidence is not statistically inadequate or based on implausible assumptions.[176] These requirements could have served as grounds to require a more concrete finding by the trial court in *Olean Wholesale*. Several components of the plaintiff expert's methodology, particularly the use of a 10.28% averaging assumption for a diverse market, could be credibly criticized as an unreasonable inference or an implausible assumption. Indeed, that seemed to be the defendants' very argument.

Another troubling aspect of the court's holding is its subtle alteration of the standard required to establish predominance. In *Comcast Corp. v. Behrend*, the Supreme Court stated that a plaintiff using representative evidence must prove "that damages are capable of measurement on a class-wide basis."[177] In *Olean Wholesale*, by contrast, the court held not that damages must be capable of *measurement* on a class-wide basis, but that the evidence must demonstrate class-wide *impact*.[178] Although the Ninth Circuit did not explain the details of what "class-wide impact" consists of, it is notably different in phrasing from the class-wide *measurement* standard in *Comcast*. The court also affirmed the district court's decision not to reject the plaintiff model because "there was a *rational basis* for [the plaintiffs'] use of the pooled regression model to demonstrate class-wide impact."[179]

"Impact" as a concept is certainly a more forgiving standard than "measurement."[180] A person who receives an envelope containing an unknown sum of money that is later stolen from him certainly knows that

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[174] *See, e.g.*, *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 194 (3d Cir. 2020); Alabama v. Blue Bird Body Co., 573 F.2d 309, 328 (5th Cir. 1978).

[175] Comcast Corp. v. Behrend, 569 U.S. 27, 35 (2013).

[176] *Tyson Foods*, 577 U.S. at 459.

[177] 569 U.S. at 34.

[178] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022), *cert. denied sub nom.* Starkist Co. v. Olean Wholesale Grocery Coop., Inc., 143 S. Ct. 424 (2022).

[179] *Id*. at 675–76 (emphasis added).

[180] "Impact" is defined as "the force of impression of one thing on another." *Impact*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/impact [https://perma.cc/3S56-5YLU] (last visited Mar. 26, 2023); "Measurement" is defined as "a figure, extent, or amount obtained by measuring." *Measurement*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/measurement [https://perma.cc/H57S-XE7P] (last visited Mar. 26, 2023).

he was *impacted*, but he has no idea about the *measurement* of the damages. In other words, measurement relates to the ability to quantify something, whereas impact does not. Although the Supreme Court held that the measurement of damages at class certification "need not be exact," *Comcast* seems to require some kind of numerical estimate as to damages, not merely a general impact.[181]

More alarming still is the *Olean Wholesale* court's reference to a "rational basis" test.[182] The Supreme Court has never endorsed a rational basis test to determine whether class-wide evidence satisfies predominance. To the contrary, the Supreme Court has explicitly stated that a plaintiff must "actually *prove*" satisfaction of "each requirement of Rule 23, including . . . the predominance requirement of Rule 23(b)(3)."[183] Similarly, the Supreme Court appears to have never used the phrase "class-wide impact" in any of its class action jurisprudence. By replacing a class-wide *measurement* standard with a class-wide *impact* analysis, requiring a mere rational basis to make that determination, the Ninth Circuit needlessly loosened certification standards and departed from Supreme Court precedent.

The most critical doctrinal development the *Olean Wholesale* court made was the rejection of a de minimis standard—a decision that the dissent claimed created a circuit split.[184] The rejection of the standard led to the court's ultimate acceptance of the plaintiff model because, if more than a de minimis number of uninjured class members may be certified, there is no need to decide between the two models.[185] The basis for the court's rejection of the de minimis rule is highly dubious. The court began with the oft-repeated notion that individualized *damages* calculations typically do not defeat predominance—a widely held view across circuits, with the noted exception that complex damages calculations *can* destroy predominance.[186] From this one axiom, the court leapt to entirely new territory, suggesting that "therefore" Rule 23 permits the certification of a class that "includes more than a de minimis number of *uninjured* class members."[187]

The court took a widely held truth about damages calculation and transformed it into a completely new rule. In so doing, the court made the critical mistake of conflating *damages* and *injury*. The Supreme Court and

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[181] Comcast Corp. v. Behrend, 569 U.S. 27, 35 (2013).

[182] *Olean Wholesale*, 31 F.4th at 675–76.

[183] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 275 (2014) (emphasis added).

[184] *Olean Wholesale*, 31 F.4th at 691 (Lee, C.J. and Kleinfeld, C.J. dissenting).

[185] *Id*. at 669.

[186] Brown v. Electrolux Home Prod., Inc., 817 F.3d 1225, 1240 (11th Cir. 2016); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013).

[187] *Olean Wholesale*, 31 F.4th at 669 (emphasis added).

numerous circuits have clearly articulated that injury and damages calculations represent two distinct concepts of differing importance at the class certification stage.[188] This distinction is well-founded. There may well be compelling logic behind the notion that damages varying in severity should not destroy predominance and prevent certification. After all, in that situation, a common defendant still injured every plaintiff in some common way. Further judicial resources to determine just how bad that common injury is for each class member may be a necessary sacrifice. That scenario stands in stark contrast to individual questions of injury. Instead of determining the extent of a common injury committed by a common defendant, many of these plaintiffs might have absolutely nothing in common with one another except for purchasing the same product.

In these cases, there is no common injury, nor common method of inflicting the injury, because, at least for a chunk of putative class members, there is no harm suffered at all. It is much more difficult to justify the inclusion of those class members in a certified class. The injustice of including those uninjured class members is evident when considering the immense pressure to settle a class action. When only individual questions of damages exist, there is no injustice to certifying a class of affected plaintiffs because the defendant injured them in some way; therefore, the pressure their numbers exert on the defendant is merely the defendant reaping what it sows. If a large section of the class is completely uninjured, they exert the same pressure on the defendant to settle the case but are doing so through no fault of the defendant. The *Olean Wholesale* court's rejection of the de minimis rule does not follow from the authority that it cited and was based instead on the erroneous conflation of injury and damages.

Also notable is the court's conclusion regarding Article III standing. Under current Supreme Court precedent, each class member must demonstrate injury-in-fact to recover monetary damages, but the question of whether standing must be proven at the class certification stage has been deliberately left open.[189] The *Olean Wholesale* court performed a standing analysis "whether or not that was required" and found that standing was

[188] *See, e.g.*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 188 (3d Cir. 2001) ("Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)."); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1494 (8th Cir. 1992) (finding that the plaintiff must prove injury in fact prior to any lenience as to damage calculations); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931) (". . . there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount.").

[189] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 n.4 (2021).

adequately proven for the certification stage.[190] Standing is properly established at the class certification stage, according to the court, when the district court finds evidence capable of demonstrating antitrust impact on a class-wide basis.[191] It is noteworthy that the court hinged standing on its predominance analysis, i.e., evidence capable of establishing a class-wide impact would simultaneously satisfy both standing and the predominance standard.[192]

As previously noted, at least two circuits, the Second and the Eighth, have suggested that injury-in-fact is required for each class member to establish standing at the certification stage.[193] The Ninth Circuit's rejection of a de minimis rule creates greater disparity and tension among the circuit courts; now, some courts tolerate no uninjured class members and others will certify with a substantial amount. More alarming than the circuit split itself is the fact that courts of appeals cannot even seem to agree on where to look when confronted with uninjured class members, be it Article III or Rule 23.[194] This growing tension and uncertainty makes the interrelated doctrines of Article III standing and predominance at the certification stage ripe for Supreme Court resolution.[195]

VI. CONCLUSION

Ultimately, *Olean Wholesale* is of great significance in the ever-evolving jurisprudence of class certification. The holding makes attaining class certification much easier for motivated plaintiffs by allowing their eventual classes to contain significant numbers of uninjured class members. By extension, expert evidence with serious flaws that could not sustain a finding of predominance in other circuits will be accepted in the Ninth Circuit. This is a necessary consequence of permitting a greater number of uninjured class members at the certification stage, because accuracy in defining the injured class with common proof is less important. The decision could directly influence the risk calculus that plaintiffs' attorneys undergo when deciding how to define their class and even whether to file suit in the first place.

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[190] *Olean Wholesale*, 31 F.4th at 682.

[191] *Id*.

[192] *Id*.

[193] *Supra* note 93.

[194] *See In re* Asacol Antitrust Litig., 907 F.3d 42, 57–58 (1st Cir. 2018) (discussing the interrelation of the varying approaches for dealing with uninjured class members, with some circuits leaning on Rule 23, some on Article III, and some not specifying between the two).

[195] Note, however, that the Supreme Court recently denied certiorari in the *Olean Wholesale* case—an unfortunate missed opportunity to clarify increasingly unclear doctrine. StarKist Co. v. Olean Wholesale Grocery Coop., Inc., On Behalf of Itself & All Others Similarly Situated, 214 L. Ed. 2d 233, 143 S. Ct. 424 (2022).

The dissent vividly warned that the majority's holding will encourage plaintiffs to "concoct oversized classes stuffed with uninjured class members" with little possibility of having the certification rejected, provided a competent expert can be retained.[196] It is yet unclear how *Olean Wholesale* will ultimately affect the doctrine of class certification, but, with numerous circuits and the Supreme Court devoid of on-point precedent, *Olean Wholesale*'s impact is likely to be felt outside of the Ninth Circuit. Whether that impact will come in the form of an eventual rejection by the Supreme Court, or gradual approval and adoption of the case's novel holdings, remains to be seen. One thing is for certain: litigants will be watching closely.

[196] *Olean Wholesale*, 31 F.4th 651 at 692 (Lee, C.J. and Kleinfeld, C.J. dissenting).