July 11, 2022

Class & Collective Action Group Newsletter

U.S. Supreme Court

Decision in *Southwest Airlines Co. v. Saxon*

Key Issue

Whether airline cargo loaders belong to a "class of workers engaged in foreign or interstate commerce" and their employment contracts are therefore exempt from arbitration under Section 1 of the Federal Arbitration Act ("FAA").

Background

Plaintiff, a ramp supervisor who works for Southwest Airlines, brought a putative class action in the Northern District of Illinois under the Fair Labor Standards Act against the airline for allegedly failing to pay proper overtime wages. Pursuant to its arbitration agreement with the plaintiff, Southwest moved to dismiss under the FAA. Plaintiff maintained that she is exempt from arbitration as a transportation worker under Section 1 of the FAA because she supervises airline cargo loaders and frequently loads and unloads cargo herself.

Section 1 of the FAA exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[1] Plaintiff argued that airline employees generally, and people in her role specifically, fall within that exception because they are a "class of workers engaged in foreign or interstate commerce." The district court disagreed, holding that Section 1 only exempts workers who are involved in "actual transportation," not merely the handling of goods, and that her work did not involve actual transportation.[2]

On appeal, the Seventh Circuit reversed, holding that "[t]he act of loading cargo onto a vehicle to be transported interstate is itself commerce" and accordingly that the plaintiff, as a ramp supervisor, was exempt from arbitration of her employment contract under the FAA.[3] Because this decision conflicted with a recent Fifth Circuit decision,[4] the Supreme Court granted certiorari to resolve the split.

Decision

In an 8-0 decision[5] written by Justice Thomas, the Court agreed with the plaintiff that she falls within

[1] 9 U.S.C. § 1.

[2] *Saxon v. Southwest Airlines*, No. 19-cv-0403, 2019 WL 4958247 at *7 (N.D. Ill. Oct. 8, 2019).

[3] *Saxon v. Southwest Airlines*, 993 F.3d 492, 494 (7th Cir. 2022).

[4] *See Eastus v. ISS Facility Services, Inc.*, 960 F.3d 207 (5th Cir. 2020).

[5] Justice Barrett recused.

the exemption in Section 1 of the FAA because she belongs to a class of workers engaged in foreign or interstate commerce, but disagreed that all personnel who work in the airline industry are similarly exempted.

Section 1 of the FAA exempts from arbitration "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." Plaintiff argued that she fell under this exemption because she supervises a team of workers who load and unload airplane cargo and frequently does so herself, making her directly involved in transporting goods across state or international borders. She additionally argued that all airline employees fall under the exemption. Southwest argued that neither plaintiff nor most airline employees falls under the exemption because they do not accompany goods across state or international borders.

The Court adopted a middle ground, holding that cargo loaders are a class of workers directly involved in transporting goods across state or international borders because loading cargo is "intimately involved" with moving goods across state or national lines. The Court dismissed plaintiff's proposed industry-wide standard as overbroad, reasoning that "seamen" encompasses only those workers who work on board a vessel, and therefore does not include the entire maritime industry. Likewise, the Court rejected Southwest's reading as too narrow because "railroad employees" is not limited to workers who travel across state lines. The Court further determined that the central feature of a transportation worker is one who is "actively 'engaged in transportation' of goods across borders via the channels of foreign or interstate commerce."[6] Because plaintiff, as a ramp supervisor for Southwest, frequently loads and unloads cargo on and off airplanes traveling in interstate commerce, the Court held that she is exempted from arbitration of her employment contract under Section 1 of the FAA.

Thoughts & Takeaways

This decision allows more workplace disputes to be settled in court rather than in arbitration—but only after a gating inquiry of whether the individual worker is actually engaged in foreign or interstate commerce. It is not entirely clear from the Court's decision which classes of workers are exempt from arbitration under Section 1, leaving a significant amount of room to argue over these classifications, particularly beyond the airline industry. The Court's fact-specific inquiry provides little guidance—and ample room for interpretation—for lower courts. At the same time, the fact-intensive nature of the inquiry likely will impose new hurdles for class certification, to the extent that a putative class is comprised of employees with varying roles that may or may not be closely tied to interstate commerce.

Notably, numerous *amici* sought to be heard in this case, and Uber, Lyft, and Amazon all filed *amicus* briefs in support of Southwest. These companies argued that the Section 1 exemption requires more purposeful cross-boundary transportation—in other words, workers who incidentally cross borders in the course of their duties (like ride-share and Amazon delivery drivers) should not be exempt from arbitration. How the Court's decision will be applied in the future to these arguments remains to be seen.

Read the opinion here.

Denial of Certiorari in *Russell v. Educational Commission for Foreign Medical Graduates* (Third Circuit)

Key Issue

Whether Rule 23(c)(4) may be used to certify an issue-only class without satisfaction of the predominance requirement under Rule 23(b)(3).

[6] Quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001).

Background

A group of plaintiffs, representing former patients of a particular physician practicing in Maryland, brought tort claims against the Educational Commission for Foreign Medical Graduates arising out of the commission's certification of the physician to practice in the United States.[7] The plaintiffs claimed in particular that the Commission failed to properly investigate, and then subsequently certified, the physician for practice, despite knowing that the physician's certification was based on fraudulent documentation.[8]

Plaintiffs sought certification of a class of all patients who had been treated by the physician and proposed two alternative grounds for certification under Rule 23(c)(4) to the district court: either (1) an issue class covering all of the liability elements of plaintiffs' negligence causes of action or (2) multiple issue classes each addressing the various prongs of those negligence actions (including the existence of duty, whether there was breach, foreseeability, etc.).[9] Plaintiffs argued that each of the proposed issues were common to the class, and that "[r]esolution of any one of these common issues will resolve a key issue central to the individuals' claims in one stroke." Plaintiffs acknowledged that certification of the issue classes would not fully address liability on a class-wide basis, and that individualized damages issues would remain, but argued that these limitations should not prevent certification under Rule 23(c)(4).[10] Plaintiffs argued that the Fifth Circuit was an anomaly in finding that the predominance requirement needed to be satisfied as to "the action as a whole," as opposed to only requiring that common questions predominate over individualized inquiries "*within* the issues proposed for certification."[11]

The district court agreed, finding that the Third Circuit had, in a prior decision, affirmed the use of Rule 23(c)(4) to certify certain issues for class determination, while leaving other issues for individual adjudication. The court declined to certify the class under the first proposed option, finding that there were too many individualized questions on the issues of causation and damages, but approved class certification as to a subset of the issue classes proposed by plaintiff (in particular, those related to the existence of legal duty and breach of that duty).

The Commission appealed to the Third Circuit on a number of issues, including whether the district court had erred by certifying the class without finding satisfaction of the predominance requirement. On that issue, the Commission argued that Rule 23 on its face requires satisfaction of one of the subsections of Rule 23(b) before certification, which in this case would be Rule 23(b)(3) because the action ultimately was one for damages. The Commission further contended that the Third Circuit had not previously commented on whether the predominance requirement applied to issue classes under Rule 23(c)(4), and how to apply it, noting a circuit split and citing in particular a Fifth Circuit decision (*Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)) finding that the requirement applied to the cause of action "as a whole," and Second Circuit precedent (*In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006)) finding that Rule 23(c)(4) could be used to certify liability classes regardless of whether the "claim as a whole" satisfied the predominance requirement.

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[7] *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 263 (3rd Cir. 2021).

[8] *Id.* at 264.

[9] Memorandum of Law in Support of Motion for Class Certification at 10–11, *Russell v. Educ. Comm'n for Foreign Med. Graduates*, No. 2:18-cv-05629-JDW (E.D. Pa. Oct. 7, 2019), ECF No. 32-1.

[10] *Id.* at 15.

[11] *Id.* at 19–20.

Decision

In its decision, the Third Circuit confirmed that its prior decisions permitted certification, if the class met certain requirements, of issues under Rule 23(c)(4) that would not fully resolve liability. On top of this, the Third Circuit found that the predominance requirement only needed to be satisfied as to the particular issues sought for certification, and not to the "cause of action as a whole."[12] The Court determined that it would adopt the "broad view" of Rule 23(c)(4), which aligned with decisions from the Second, Fourth, Sixth, Seventh, and Ninth Circuits, and rejected the "narrow view" endorsed at one time by the Fifth Circuit.[13] Finding that the district court had failed to conduct the predominance analysis at all, however, the Court remanded.

The Commission filed a petition for certiorari, primarily on the predominance issue, noting the circuit split and observing that the Eighth Circuit also appeared to favor the "narrow view."[14] However, the Supreme Court declined to take up the case for review.

Thoughts & Takeaways

The Supreme Court's decision to deny certiorari leaves in place a circuit split on how to apply Rules 23(b)(3) and 23(c)(4) together, particularly on the issue of predominance. As the Commission observed in its petition, a number of other questions are also in dispute generally around the application of Rule 23(c)(4), including as to what issues are appropriate for class treatment under the rule. However, the majority trend seems to favor the "broad" application of Rule 23(c)(4), which reduces the likelihood that predominance will stand as a hurdle to certification of issue-only classes even in cases where the issue to be certified is not the predominant issue in the litigation.

Read the Third Circuit decision here.

Federal Appellate Courts

Decision in *Wit v. United Behavioral Health* (Ninth Circuit)

Key Issue

Whether plaintiffs had sufficiently alleged Article III standing in an ERISA claim based on alleged deficiencies in the process used to deny benefits claims.

Background

Plaintiffs brought a putative class action against United Behavioral Health ("UBH"), an administrator for mental health and substance use disorder benefits for a number of plans under the Employee Retirement Income Security Act of 1974 ("ERISA").[15] Plaintiffs alleged that UBH had breached its duties as an ERISA fiduciary to adjudicate claims for benefits in accordance with generally accepted best practices for mental healthcare and the standards promulgated by

[12] *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 274 (3rd Cir. 2021).

[13] *Id.* at 273–74.

[14] Petition for a Writ of Certiorari at 11, *Educ. Comm'n for Foreign Med. Graduates v. Russell*, No. 21-948, 2021 WL 6140304 (U.S. Dec., 2021).

[15] Class Action Complaint ¶¶ 3, 5–7, *Alexander v. United Behavioral Health*, No. 3:14-cv-5337 (N.D. Cal. Dec. 4, 2014), ECF No. 1.

plaintiffs' ERISA plans, and so brought suit seeking declaratory and injunctive relief to compel UBH to change its policies and re-process a number of benefit requests.[16]

The plaintiffs sought class certification for a number of classes, each defined in part by a denial of a claim by UBH on the basis of UBH's internal guidelines, which plaintiffs claimed did not align with generally accepted best practices and other relevant guidelines.[17] On September 19, 2016, the district court granted class certification to plaintiffs. In making the determination, the court agreed with the plaintiffs' core assumptions that (1) the crux of their claim was as to the validity of UBH's internal claims-processing guidelines, and that (2) plaintiffs' challenge to the guidelines could be proven with common evidence—in essence, by showing that they are more restrictive than generally accepted standards of care or other applicable standards.[18]

In so doing, the district court rejected UBH's objections that Rule 23's commonality requirement could not be met. UBH had challenged plaintiffs' characterization that their claims could be made just by showing that UBH's guidelines were not aligned with best practices, arguing that the plaintiffs would further need to show "whether a denial based on those guidelines was improper or gives rise to any relief."[19] UBH argued that the second part of that inquiry essentially meant reviewing numerous individualized benefit claims involving unique clinical issues, raised under thousands of different insurance plans and 169 different coverage guidelines.[20] The district court disagreed, accepting plaintiffs' assertion that their breach of fiduciary duty claim was only based on the use of a flawed set of internal guidelines, and that plaintiffs' requested relief was limited to a re-processing of claims in accordance with an acceptable set of guidelines—not a re-determination by the court as to whether each class member was owed benefits.[21]

The district court ultimately found against UBH on the merits, issuing a final judgment that UBH appealed to the Ninth Circuit. In addition to other issues, UBH argued that the district court had erred by excusing plaintiffs from needing to show causation between denials of class members' claims, and the alleged flaws in its internal claims-processing guidelines—in other words, by excusing plaintiffs from the part of the inquiry that UBH argued could not be subject to common proof.[22] UBH framed this argument under a number of requirements, including (1) as a matter of the Article III standing requirement to show an injury "fairly traceable" to the alleged misconduct under the Supreme Court's decision in *Spokeo, Inc. v. Robins*;[23] and (2) as a requirement in the ERISA statute to show proof that an alleged ERISA violation caused harm.[24] Particularly as to the standing requirement, UBH noted that plaintiffs alleged no more than a procedural injury to their right to a fair adjudication, which was insufficient for standing under *Spokeo* and the more recent *Thole v. U.S. Bank N.A.*[25] decision from the Supreme Court, which had applied Article III standing requirements to the ERISA context.[26]

[16] *Id.* ¶¶ 8, 10, 17, 19.

[17] Order Granting Motion for Class Certification at 12–13, *Wit v. United Behavioral Health*, No. 14-cv-02346-JCS (N.D. Cal. Sept. 19, 2016), ECF No. 174.

[18] *Id.* at 13–14, 30.

[19] *Id.* at 21.

[20] *Id.*

[21] *Id.* at 27, 30–31.

[22] Defendant-Appellant's Opening Brief at 24, *Wit v. United Behavioral Health*, No. 20-17363 (9th Cir. Mar. 15, 2021), ECF No. 25.

[23] 578 U.S. 330 (2016).

[24] Defendant-Appellant's Opening Brief at 25–42, *Wit v. United Behavioral Health*, No. 20-17363 (9th Cir Mar. 15, 2021), ECF No. 25.

[25] 140 S. Ct. 1615 (2020).

[26] *Id.* at 1619.

Decision

In a short decision, the Ninth Circuit rejected UBH's contentions about standing, but reversed on the merits.

The Ninth Circuit found that ERISA's "core function" was to protect contractually defined benefits.[27] The breaches of UBH's fiduciary duties alleged by plaintiff presented several injuries related to plaintiffs' contractual rights, including (1) the "risk that [plaintiffs'] claims will be administered under a set of Guidelines that narrows the scope of their benefits" and (2) a "present harm" of not knowing the scope of coverage under their ERISA plans, which would affect plaintiffs' abilities to make informed decisions about the need to purchase further coverage. These injuries, the Ninth Circuit concluded, were sufficiently concrete. The Ninth Circuit further concluded that these injuries were sufficiently "particularized" because UBH's internal guidelines were applied to the contractual benefits owed to each class member, and so "materially affected" each class member.[28] Plaintiffs did not need to show that they were actually denied benefits in order to allege a concrete injury.[29]

In a short paragraph, the Ninth Circuit further affirmed that the district court had not abused its discretion in deciding that it was "within Rule 23's ambit" to allow the class to proceed without requiring that plaintiffs show a causal link between their benefits denials and the alleged breach of fiduciary duty, since plaintiffs' alleged injuries were as to their contractual rights under the plans. Notably, however, the Ninth Circuit declined to reach the question of whether the court's injunctive order requiring that UBH "re-process" plaintiffs' benefits claims overextended Rule 23, by simply rejecting the claim on the merits.[30] The Ninth Circuit found that the district court had applied the wrong standard of review in evaluating UBH's internal guidelines, and that UBH's guidelines did not need to comply with generally accepted standards of care in order to be consistent with the requirements of plaintiffs' ERISA plans.[31] On that basis, the appellate court reversed.[32]

Thoughts and Takeaways

Despite offering only a short unpublished opinion, the Ninth Circuit's decision provides further color around the nebulous boundaries of "concrete injury" as required to show Article III standing. There have been a number of cases from the Supreme Court and various appellate courts over the past year adding to jurisprudence on this hot issue, which can have meaningful impacts on the viability of a number of claims that often serve as the basis for class actions.

While the court reached an unfavorable decision for UBH on standing, the Ninth Circuit's refusal to address head-on UBH's objection to the "re-processing" remedy suggests at least some level of recognition of UBH's argument as to the need for plaintiffs to show causality on the merits. Re-processing is ultimately a request for financial compensation, which under the relevant ERISA provisions should require a showing of a causal link between the alleged breach and the alleged harms. As UBH argued at length, evaluating that causal link is an individualized inquiry for each class member, based on the underlying facts of the denials of their benefits claims.

Read the opinion here.

[27] *Wit v. United Behavioral Health*, No. 20-17363, 2022 WL 850647, at *1 (9th Cir. 2022).

[28] *Id.*

[29] *Id.*

[30] *Id.* at *2.

[31] *Id.*

[32] *Id.* at *2–3.

Federal District Courts

Decision in *In re Oracle Corporation Securities Litigation* (N.D. Cal.)

Key Issue

Whether a securities-fraud class action can meet the Rule 23(b)(3) predominance requirement for class certification by providing expert testimony that a class-wide damages model is feasible, but without proffering an actual damages model.

Background

Shareholders of Oracle brought a securities fraud class action against the company and its management alleging that they made material misrepresentations about Oracle's cloud business.[33] Later disclosures allegedly caused the stock prices to decline, damaging the shareholders who had bought shares at the higher prices pre-disclosure. Plaintiffs moved to certify the class under Rules 23(a) and 23(b)(3). Oracle contested the certification on the basis that the plaintiffs had not met the predominance requirement of Rule 23(b)(3). They argued that, under *Comcast*,[34] plaintiffs are required to provide a class-wide damages model that measures only those damages attributable to the theory of liability on which the court had permitted them to proceed. Plaintiffs did not proffer any actual damages model and instead solely relied on expert testimony that constructing the requisite damages model would be feasible.

Decision

The district court granted class certification, holding that expert testimony that identifies a damages model and details how such a model could be constructed satisfies *Comcast*. In so holding, the court relied on precedents from other decisions made in securities fraud cases in the Northern District of California that granted class certification based on similar—but even less detailed—expert testimony.[35] For example, plaintiffs cited to an expert decision entered in *In re: SanDisk LLC Securities Litigation*, which included only two high-level paragraphs discussing the out-of-pocket methodology.[36] Additionally, the district court reasoned that requiring plaintiffs in a securities fraud action to provide an actual damages model at the class certification stage would require the court to prematurely assess loss causation.

Thoughts & Takeaways

Since the *Comcast* holding, courts across the country have diverged on the question of how much a plaintiff must do to satisfy the damages model requirement for predominance.[37] Some courts, like the court in this case, have found expert testimony that a damages model is feasible to be sufficient, while others have required an actual damages model.[38]

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[33] *City of Sunrise Firefighters' Pension Fund v. Oracle Corp.*, No. 18-cv-04844-BLF, 2022 WL 1459567, at *1 (N.D. Cal. May 9, 2022).

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

[35] *Oracle Corp.*, 2022 WL 1459567, at *9 (citing to *In re SanDisk LLC Secs. Litig.*, No. 15-cv-01455-VC, 2018 WL 4293336, at *3 (N.D. Cal. Sep. 4, 2018); *City of Miami*, 2018 WL 4931543, at *3–4; *Luna v. Marvell Tech. Grp., Ltd.*, No. C 15-05447 WHA, 2017 WL 4865559, at *6 (N.D. Cal. Oct. 27, 2017); *Hatamian v. Adv. Micro Devices, Inc.*, No. 14-cv-00226 YGR, 2016 WL 1042502, at *8 (N.D. Cal. Mar. 16, 2016)).

[36] Ex. F to Rizio-Hamilton Reply Decl., *Oracle Corp.*, No. 5:18-cv-04844-BLF (N.D. Cal. Feb. 9, 2022), ECF No. 113-7.

[37] Joshua Kipnees & Jonah Knobler, *Class Damages Models After Comcast: Rigorous Proof or Expert's Promise?*, Patterson Belknap (Mar. 4, 2019), https://www.pbwt.com/misbranded/class-damages-models-after-comcast-rigorous-proof-or-experts-promise.

[38] *See In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 413, 414 n.11 (S.D.N.Y. 2015) (finding that "nothing in *Comcast* requires an expert to *perform* his analysis at the class certification stage" or, as interpreted in the Second Circuit, to "describe his proposed methodologies in … detail."); *Werdebaugh v. Blue Diamond Growers*, No. 12-cv-02724-LHK, 2014 WL 7148923, at *14 (N.D. Cal. Dec. 15, 2014) ("[T]he Court is obligated to do more than rubberstamp a proposed damages class merely because a plaintiff's expert purports to have used a peer-reviewed methodology such as a regression analysis.").

The defendant has appealed to the Ninth Circuit and the case is currently awaiting review. On appeal, the Chamber of Commerce has filed an *amicus* brief in support of Oracle that argues that the district court's decision, if permitted to stand, would essentially nullify *Comcast* and that, under *Goldman Sachs Group v. Arkansas Teacher Retirement System*,[39] the court must determine that Rule 23 is satisfied even if that inquiry requires the court to reach the merits.[40]

While the district court's holding in *Oracle* is focused on securities fraud actions, the decision, if affirmed, could affect damages model requirements and lower plaintiffs' burden of proof in all cases in the Ninth Circuit. Because the district court relied on other district court decisions requiring even less detailed expert testimony, it is also possible the Ninth Circuit could enact a less onerous standard than that which was applied here.

Read the opinion here.

Decision in *In re Apple iPhone Antitrust Litigation* (N.D. Cal.)

Key Issues

1. Whether plaintiff's expert's impact and damages model was scientifically valid under the *Daubert* standard, and

2. Whether plaintiffs adequately demonstrated that the questions of law or fact common to class members predominate over any questions affecting only individual members under Rule 23(b)(3).

Background

Plaintiffs brought claims against Apple under Section 2 of the Sherman Antitrust Act for (1) unlawful monopolization of the applications aftermarket and (2) attempted monopolization of the applications aftermarket. Their theory of the case was that Apple charged developers on the App Store supra-competitive commissions, which the developers then passed to consumers in the form of increased prices for app downloads or subscriptions. Plaintiffs argued this conduct allowed Apple to unlawfully monopolize the retail market for the sale of apps, including in-app purchases.

Plaintiffs moved to certify a class under Rule 23 that would include millions of consumers: "All persons in the United States, exclusive of Apple and its employees, agents and affiliates, and the Court and its employees, who purchased an iOS application or application license from Apple, or who made an in-app purchase, including, but not limited to, a subscription purchase, through such an application, for use on an iOS Device at any time from December 29, 2007 through the present."[41] Their motion relied primarily on the econometric opinions and methods of Professor Daniel McFadden, a Nobel Prize-winning econometrist, whom they had retained to develop a model quantifying impact and damages, including identifying injured class members.

The Court heard the motion alongside two *Daubert* motions filed by Defendant challenging McFadden's expert opinions and model. First, Defendant claimed that, breaking from sound scientific methods, McFadden "designed his model not to test whether Apple's conduct had common impact on putative class members, but to prove it."[42] Second, Defendant took issue with McFadden's opinion that there is

[39] 141 S. Ct. 1951 (2021).

[40] Brief of the Chamber of Commerce as Amicus Curiae at 3, *In re: Oracle Corp. Securities Litigation*, No. 22-80048 (9th Cir. May 31, 2022), ECF No. 2-2.

[41] Order Denying Plaintiffs' Motion for Class Certification Without Prejudice at *1, *In re Apple iPhone Antitrust Litigation*, No. 11-cv-6714-YGR, 2022 WL 1284104 (N.D. Cal. Mar. 29, 2022), ECF No. 630.

[42] *Id.* at *5.

only a single relevant aftermarket for the sale of iOS apps and in-app content to consumers. Finally, Defendant challenged the reliability of each step of McFadden's three-step impact and damages model. Their strategy was clear: to exclude McFadden's model in order to frustrate Plaintiff's ability to meet the predominance requirement of Rule 23(b)(3).

Decision

The Court determined that McFadden's model should be excluded on the basis of unreliability, but expressed the expectation that Plaintiffs would be able to address the deficiencies. The Court thus denied Plaintiffs' motion for class certification without prejudice.

While the Court concluded that McFadden's expert opinions were sound, it identified several faults with his impact and damages model. Of particular concern were calculation data and model errors that produced uncertain results as to the number of uninjured accounts comprising the class. In McFadden's original report, this number was 5.8%. However, in his reply report, he changed the definition of "uninjured accounts,"[43] resulting in a 2% increase of this number. In addition, his original estimate included a computational error, which, once corrected, led to a 7% increase. Finally, he conceded that his team should have used a different methodology for calculating damages, which would have likely resulted in a further increase. In sum, the Court did not have reliable data on the number of uninjured class members in the proposed class; it only had an adjusted estimate of 14.6% based on the current model.

Turning to Plaintiffs' class certification motion, the Court found that the Plaintiffs met the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy, but did not meet the predominance requirement of Rule 23(b)(3). Under this rule, Plaintiffs must prove predominance for both class-wide injury and class-wide damages. Here, the Court held that Plaintiffs did not prove either.

For class-wide injury, a key inquiry is whether the plaintiffs' statistical evidence sweeps in uninjured class members; if a substantial number of class members "in fact suffered no injury,"[44] the need to identify those individuals will predominate. The Court held that without a reliable model demonstrating which class members were injured and which were not, individual issues would predominate in this case.

The Court also questioned whether it could properly certify a class containing 14.6% uninjured members—a percentage representing some 30 million accounts. As Defendant noted, this proportion would be regarded as too high in the First, Eighth, and D.C. Circuits. In the Ninth Circuit, the "fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition."[45] Although Plaintiffs urged a liberal construction of this proposition, the Court did not land on an interpretation, and instead relied on the outcome of its *Daubert* decision regarding the unreliability of the damages model to find Plaintiffs could not show predominance.

As to class-wide damages, plaintiffs bear the burden of proof to demonstrate that they are measurable; while they may rely on aggregate damage estimates, they must also establish that there is a method, common across the class, for arriving at individual damages. McFadden's model produced aggregate damages estimates ranging from $7 to $10 billion.

[43] *Id.* at *15.

[44] *Id.* (citation omitted).

[45] *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016).

The Court found that his methodology for this assessment was unsound and "too speculative,"[46] holding that without a common approach to measuring damages, individual damages would predominate.

Finally, the Court noted that given the complexities and nuances of the damages issue in this case, class certification as to the issue of liability under Rule 23(c)(4) may be warranted, and that if liability is established, it is possible that damages could be resolved expeditiously.

Thoughts and Takeaways

This case is yet another example of how the technical aspects of class modeling have come to dominate Rule 23 judgments. Here, the Court dove into the details and held Plaintiffs' model to a high standard—even though "many of Apple's arguments [were] not well-taken"[47] and Plaintiffs' expert was highly reputed. The case also highlights a question of law that remains unsettled in most circuits: how many uninjured Class members is too many? This case may soon provide the Ninth Circuit with an opportunity to rule on this issue.

Read the opinion here.

[46] 2022 WL 1284104, at *16.

[47] *Id*. at *1.

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