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Class Action Certification In the Oil Patch: Red Herrings Often Abound

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Increasingly, class actions are—for all intents and purposes—won or lost at the certification stage. After all, if a class is certified, especially under the heightened standards for class treatment that have been articulated by the United States Supreme Court in recent years, the exposure for defendants in the vast majority of cases is simply too great to risk a jury trial on the merits. This is, of course, why lucrative settlements often follow so closely on the heels of successful motions for class certification.

By and large, class certification motions will rise or fall based on whether the representative plaintiffs can demonstrate "commonality" to the trial court's satisfaction. At the risk of oversimplifying what can sometimes be a highly nuanced concept, commonality exists when there is a critical mass of factual and legal issues that are generally constant across the entire class. Commonality is closely related to, and often confused with, the further requirement of "predominance," which turns on this slightly different question: even assuming there is a nucleus of common questions of law and fact shared by most class members, do they sufficiently outweigh the factual and legal wrinkles that are unique to individual members of the class? Both commonality and predominance are codified in Rule 23 of the Federal Rules of Civil Procedure and, without exception, in all of its state-law equivalents.

All of these dynamics were recently on display when, according to an appeal filed by Devon Energy in the Fifth Circuit (*Seeligson v. Devon Energy Production LP*, No. 17-10320), a Texas federal judge ran afoul of the commonality and predominance requirements by certifying a class of natural gas royalty owners who alleged that the company had for many years shortchanged them on royalty payments by failing to obtain the best available market prices for their gas. According to Devon's appeal brief, "if it is allowed to stand, the certification order will compel [Devon] to face the fundamental unfairness of attempting to defend thousands of disparate individual claims in a single trial."

On the surface, at least to a casual observer, it looked as though the trial court had done what it was obligated to do under the Supreme Court's seminal decision in *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011). Namely, District Judge Edward Kinkeade determined that the putative class representatives had isolated no fewer than two questions of classwide applicability. The problem, however, as was aptly observed by the Texas Oil and Gas Association in an *amicus curiae* brief, was that the court stopped its analysis too soon. In particular, it did "not take the additional step of comparing those classwide questions to the method by which, under Texas law, plaintiffs must prove breach of an implied covenant to market."

Put another way, even crediting that the questions identified by the plaintiffs have classwide applicability, the answers to the questions would not nearly dispose of the class claims. The questions—however "common" they might be—are ultimately red herrings that do nothing to meaningfully advance the plaintiffs' burden of proof. Identifying a similar flaw in logic in another royalty underpayment case, the Fourth Circuit Court of Appeals, in *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014), reprimanded "the district court [for] plac[ing] an inordinate emphasis on the sheer number of uniform

practices without considering whether those practices are relevant to assessing the defendants' ultimate liability." *Id.* at 366.

The TXOGA's amicus brief perhaps put it best when it explained that:

> In short, it is abundantly clear Rule 23 requires putative class representatives to do more than propose a classwide common question. They must also show that, under the applicable substantive law, the answer to that question will further their burden of proof. Because their common questions are irrelevant to their burden of proof under Texas law, the [class representatives] failed to meet this burden.

The lesson learned here should be obvious: before engaging in a debate over whether a fact or a legal principle is "common" to the class, or whether it "predominates" over individual issues, be sure to first ask these fundamental threshold questions: "So what? Why do we care? Does this even matter?" If the answer is no, the class representatives need to move on to greener pastures, if there are any. As obvious as this may seem, it is surprising just how often capable defense counsel allow themselves to get drawn into commonality and predominance arguments about matters that are, in the final analysis, either irrelevant or ancillary to the core matters with respect to which the plaintiffs bear the burden of proof.

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