



The American Antitrust Institute

Class Action Issues Update March 2017

The American Antitrust Institute (AAI) seeks to preserve the effectiveness of antitrust class actions as a central component of ensuring the vitality of private antitrust enforcement. As part of its efforts, AAI issues periodic updates on developments in the courts and elsewhere that may affect this important device for protecting competition and consumers. This update covers developments since [November 2016](#).

I. Proposed Legislation

On March 9, 2017, the [Fairness in Class Action Litigation Act of 2017](#), H.R. 985, passed the House in a floor vote, [220-201](#). Fourteen Republicans and all House Democrats voted against the bill. One amendment from the bill's sponsor, House Judiciary Committee Chairman Bob Goodlatte, R-Va., also passed in a voice vote.

The bill would drastically overhaul the class action device by creating new legal standards for class certification under Rule 23, imposing new reporting and disclosure requirements on class counsel and reducing and delaying their recovery of attorneys' fees, and stripping the federal judiciary of discretion in a variety of case management and appellate decision-making functions.

H.R. 985 is a sweeping expansion of H.R. 1927, which passed the House 211-188 in January 2016 before stalling upon being referred to the Senate Judiciary Committee. The new bill retains the core feature of the old bill, which requires the party seeking class certification to demonstrate, based on a "rigorous analysis of the evidence presented," that "each" person in a class has suffered "the same type and scope of injury."

AAI believes this provision alone likely would eviscerate consumer, antitrust, employment, and civil rights class actions. First, it would apparently prohibit certification of classes containing members who are uninjured for idiosyncratic reasons, which Judge Richard Posner has called an "inevitability" that cannot practically be determined based on evidence available at the certification stage. *Koben v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009).

Second, if the term "scope" is given its dictionary meaning, it would apparently require that all class members suffer identical damages, which effectively never occurs in price-fixing or monopolization cases because of changing market conditions and different purchasing contexts.¹ Even if such a class were conceivable, class plaintiffs in antitrust class actions often must rely on aggregate statistical evidence to prove damages, which effectively precludes them from making an evidentiary showing that "each" class member suffered identical damages.

H.R. 985 also:

- (1) adopts a heightened ascertainability requirement beyond the most restrictive standard applied by any appellate court (discussed below in Part V);
- (2) introduces new conflict and third-party-funding disclosure requirements that supersede attorneys' ethical obligations under the Rules of Professional Responsibility, as well as procedural obligations built into Rule 23(a)'s adequacy requirement and Rule 23(e)'s fairness requirement;
- (3) requires class counsel to meet new accounting and reporting obligations to facilitate data analysis by the Federal Judicial Center and Administrative Office of the U.S. Courts;
- (4) prevents class counsel who recover damages for victims from receiving fee awards until after a claims administrator has finished distributing class funds;
- (5) prevents class counsel from being compensated for securing indirect monetary relief such as *cy pres* awards on behalf of victims;
- (6) caps fee awards for securing monetary relief at a percentage of the amount "directly distributed to and received by" class members, and for most equitable relief at a percentage of the (often difficult-to-measure) "value" of the (often intangible) equitable relief;
- (7) prevents federal judges from bifurcating damages and liability phases of class action proceedings to make individualized damages inquiries sufficiently manageable under Rule 23(b)(3) (eliminating so-called "issues classes");
- (8) removes discretion from federal trial judges as to whether to stay discovery during motions to dispose of class allegations;
- (9) removes discretion from federal appellate courts as to whether to accept appeals of class certification orders under Rule 23(f), making such appeals automatic and staying cases during their pendency; and
- (10) imposes new burdens on class plaintiffs, federal trial and appellate courts, and the Judicial Panel on Multidistrict Litigation (JPML) that restrict or delay their ability to initiate or foster settlement of multi-district litigation, conduct bellwether trials, remand to state court, and accept or deny appeals.

Chairman Goodlatte introduced H.R. 985 on February 9, 2017. Over objections from the [Judicial Conference of the United States](#) (which objected to Congress circumventing the Federal Rules Committee), the [American Bar Association](#), many leading class action scholars (including [Myriam Gilles](#), [Elizabeth Birch](#), [Howard Erichson](#), and [John Coffee](#)), 121 [civil rights organizations](#), 73 [consumer organizations](#) (including AAI), and even the conservative [House Liberty Caucus](#), the bill was favorably reported without a hearing by the House Judiciary Committee on February 15, 2017. A March 1 Rules Committee Print (115-1) combined the bill with H.R. 906, the Furthering Asbestos Claim Transparency Act of 2017, and made conforming changes.

On March 6, 2017, the Congressional Budget Office (CBO) issued a [cost estimate](#) finding that the direct costs to plaintiffs' lawyers of the bill's fee provisions alone, measured as the annual loss of net income that attorneys would experience in both pending and future cases, would "exceed the threshold established for private-sector mandates in the Unfunded Mandates Reform Act (UMRA) (\$156 million in 2017, adjusted annually for inflation) in each of the first five years" they are in effect. UMRA is a 1995 statute [designed](#) to curb the enactment of unfunded federal mandates that impose excessive costs and inefficiencies on private enterprises, including law firms.

On March 7, 2017, the House Judiciary Committee issued a [report](#) on the bill.

H.R. 985 will now move to the Senate, where Democrats have enough votes to filibuster any controversial legislation, assuming the filibuster is not repealed. Absent a filibuster, it is unclear whether Senate Republicans will prioritize this bill and whether it will attract enough moderates to muster a simple majority.

In the remainder of this update, we discuss the implications of H.R. 985 in the context of other recent legal, legislative, and policy developments involving the class action device.

II. Classes That Include Some Members Who Are Not Injured

In our [November 2016](#) update, we noted that the Supreme Court in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1040 (2016), approved the use of statistical and representative evidence to prove common impact without explicitly deciding whether classes containing uninjured members may be certified. As of this writing, no court has since interpreted *Tyson Foods* to prevent class plaintiffs from relying on statistical or other representative evidence for purposes of certifying an antitrust class action.

We also noted that the Court in *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016), did not resolve an apparent circuit split over whether only named plaintiffs must establish Article III standing at the class certification stage or absent class members must do so as well. Some courts had reasoned that individual questions can predominate over common questions because each class member must individually prove concrete and particularized injury to establish Article III standing. Others had held that requiring named plaintiffs to establish that absent class members were injured improperly conflates standing with a plaintiff's entitlement to relief and ability to satisfy Rule 23. Consistent with our findings in our [November 2016](#) update, courts post-*Spokeo* have refused to conflate absent class members' Article III standing with a named plaintiff's ability to satisfy Rule 23.

H.R. 985 would overrule these aspects of *Tyson Foods* and *Spokeo*, and their progeny. By requiring class plaintiffs to demonstrate that "each" class member suffered "the same type and scope of injury," the bill would foreclose certification of any class that may contain uninjured members without regard to what Article III or Rule 23 requires.

III. Speculative Individualized Inquiries Proffered to Defeat Predominance

In December, in *Bridging Communities Inc. v. Top Flite Financial Inc.*, 843 F.3d 1119 (6th Cir. 2016), the Sixth Circuit held that the "mere mention" of a defense that would require individualized inquiry is insufficient to defeat class certification on predominance grounds. In a "junk fax" class action under the Telephone Consumer Protection Act (TCPA), where the defendants "raised the

possibility” of consent as a defense to liability, the district court denied plaintiffs’ motion for class certification because it was not persuaded that the issue of consent was subject to generalized proof.

The Sixth Circuit reversed. Although the plaintiffs’ evidence had “not foreclosed” the possibility that some fax recipients gave consent, the court of appeals was “unwilling to allow such speculation and surmise to tip the decisional scales in a class certification ruling.” “Holding otherwise and allowing such speculation to dictate the outcome of a class-certification decision would afford litigants in future cases wide latitude to inject frivolous issues to bolster or undermine a finding of predominance.” Accordingly, the Sixth Circuit found that the district court abused its discretion in permitting defendants to defeat a showing of predominance based on “speculation alone.”

Under H.R. 985, because the “party seeking to maintain . . . a class action [must] affirmatively demonstrate[]” that each class member suffered the same injury, the burden apparently would be entirely on plaintiffs to foreclose the possibility of individualized defenses and not on the defendant to raise non-speculative challenges to predominance.

IV. Offers of Judgment and Mootness

In our [November 2016](#) update, we noted that the Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), had left open the question of whether a defendant could moot a class action by depositing the full amount of the named plaintiff’s individual claim in an account payable to the plaintiff, where the court then enters judgment for the plaintiff in that amount. We noted that results have been mixed at the district court level, but that the federal courts of appeal – including the Third, Sixth, and Ninth Circuits – have largely held that named class plaintiffs may continue to seek class certification despite no longer having a justiciable claim for individual relief. These courts of appeal have done so under the “picking off” exception or the “inherently transitory” exception to mootness, which they have found *Campbell-Ewald* did not disturb. Some have noted that otherwise “complete” relief is also insufficient in these circumstances insofar as a named plaintiff maintains a personal stake in certifying a class action.

In February, the Second and Seventh Circuits declined to follow this line of cases in *Leyse v. Lifetime Entertainment Services, LLC*, 2017 WL 659894 (2d. Cir. 2017), and *Wright v. Calumet City, Illinois*, 2017 WL 656277 (7th Cir. 2017), respectively. The Second Circuit, in a summary order, held that where the district court had entered judgment in favor of a plaintiff notwithstanding the plaintiff’s refusal to accept a settlement offer tendered in the amount of its claim, intra-circuit precedent permitting dismissal in these circumstances is controlling, notwithstanding that the claim is not moot, because *Campbell-Ewald* expressly left open this precise scenario.²

The Seventh Circuit, on different facts, held that a plaintiff who *accepted* a Rule 68 settlement offer but had not recovered attorneys’ fees for the class claim no longer had a personal stake in the class action and could not satisfy the Article III case or controversy requirement where the settlement agreement did not expressly preserve his right to appeal the denial of class certification. The question of whether and under what circumstances a plaintiff maintains a personal stake in a class action after settling an individual claim is currently before the Supreme Court in *Microsoft v. Baker*, 136 S. Ct. 890 (Jan. 15, 2016), in the different context of the appealability of certification denials.

V. Ascertainability

The ongoing circuit split over whether Rule 23 contains a heightened ascertainability requirement that demands class plaintiffs plead and prove an administratively feasible mechanism for identifying class members continues to deepen. As we noted in our [November 2016](#) update, the Sixth, Seventh, and Eighth Circuits have rejected any separate administrative feasibility prerequisite, while the First, Second, and Third Circuits (and to a lesser extent, the Eleventh Circuit³) have embraced some form of heightened ascertainability requirement.

In January, the Ninth Circuit in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), joined with the Sixth, Seventh, and Eighth Circuits in repudiating a heightened ascertainability requirement, holding that Rule 23's enumerated criteria already address the cognizable interests purportedly served by the ascertainability inquiry. The panel noted that Rule 23's drafters specifically enumerated "prerequisites" to class certification in Rule 23(a), and read in light of traditional canons of statutory construction, this list must be construed as exhaustive. Moreover, imposing a separate administrative feasibility requirement would render the manageability criterion in Rule 23(b)(3) largely superfluous.

The court also quoted the Supreme Court in *Amgen* for the proposition that "Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted." Although the Third Circuit has justified an administrative feasibility requirement as necessary to avoid compromising the efficiencies that Rule 23(b)(3) was designed to achieve, "Rule 23(b)(3) already contains a specific, enumerated mechanism to achieve that goal," namely manageability. And considering administrative feasibility "in a vacuum" conflicts with "the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns," which the court said "makes ample sense given the variety of procedural tools courts can use to manage the administrative burdens of class litigation," such as dividing classes into subclasses or certifying issues classes. Finally, the court also rejected arguments that an administrative feasibility prerequisite is necessary to protect absent class members, shield bona fide claimants from fraudulent claims, or protect defendants' due process rights.

The Tenth Circuit, meanwhile, recently declined to join the fray, rejecting a Rule 23(f) petition in *In re Syngenta Ag Mir 162 Corn Litig.*, 2016 WL 5371856 (D. Kan. 2016), after the district court likewise refused to apply a heightened ascertainability requirement. The Fifth, Tenth, and D.C. Circuits have not yet explicitly addressed the issue.

Notwithstanding that each of the last four circuit courts to consider the question, and the district court in *Syngenta*, have now rejected a heightened ascertainability requirement, H.R. 985 would mandate it. At the same time, by prohibiting courts from certifying issues classes, the bill would upend existing law in every circuit and remove one of the key procedural tools courts have used to resolve manageability problems.

H.R. 985 also would expand the heightened ascertainability requirement to include not only an administratively feasible mechanism for identifying class members, but also an administratively feasible mechanism for distributing monetary relief "directly to a substantial majority of class

members.” This would likely sound the death knell for consumer antitrust class actions, because class members often forego claims to the individually small sums of money available in high-volume, low-dollar price fixing cases. The Advisory Committee on Civil Rules and Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in their [letter](#) opposing H.R. 985, cited the bill’s ascertainability and Rule 23(f) alterations among a list of “significant changes to Rule 23 procedures.”

VI. Appealability of Certification Denials

In our [November 2016](#) update, we noted that the Supreme Court granted certiorari in *Microsoft v. Baker*, 136 S. Ct. 890 (Jan. 15, 2016), to consider “[w]hether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.” We also described the parties’ arguments in merits briefing. Oral argument in this case is now scheduled for March 21, 2017.

If H.R. 985 is enacted, the issue to be decided by the Court may be unlikely to arise in the future as a practical matter. Because appellate courts would no longer have discretion to deny petitions for interlocutory review of class certification denials, plaintiffs seeking to appeal an order denying class certification would no longer need to voluntarily dismiss their individual claims to convert the class certification decision into a final order. Indeed, appeals of every certification order, whether granting or denying certification, will become routine. In *Vallario v. Vandebey*, 554 F.3d 1259 (10th Cir. 2009), which the Tenth Circuit cited in rejecting the Rule 23(f) petition in *Syngenta*, the court stated that such appeals ought to be discouraged. The court said they are “necessarily disruptive, time-consuming, and expensive for the parties and the courts,” and “may also serve, quite wrongfully, to discourage district courts from reconsidering their class certification orders under Federal Rule of Civil Procedure 23(c)(1)(C).”

VII. Cy Pres

There is currently a circuit split as to whether courts may, must, or must not discount *cy pres* and other funds unclaimed by class members from the percentage calculation of attorneys’ fees in class actions. The Ninth and Second Circuits strictly hold that district courts are required to consider the full value of the authorized fund, including *cy pres*, rather than the value of funds actually distributed to class members. The Seventh Circuit holds the opposite – that courts must consider only the value of the funds actually distributed to class members and not the value of funds made available that go unclaimed. In our [November 2016](#) update, we noted that the Sixth Circuit in *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269 (6th Cir. 2016), recently joined the majority of circuits, including at least the Third, Fifth, and Eleventh Circuits, in considering the question on a case-by-case basis.

H.R. 985 would reverse the Second, Third, Fifth, Sixth, Ninth, and Eleventh Circuits and require them to conform to the Seventh Circuit’s minority position. The bill requires that any attorneys’ fee award based on monetary relief must be limited to the percentage of any payments directly distributed to and received by class members. The bill also goes further and requires that the

attorneys' fee award in these circumstances may never exceed the total amount of money directly distributed to and received by all class members.

The Sixth Circuit in *Gascho* noted that this rigid approach can lead to perverse results, because it would “have the lasting effect of discouraging the filing of class actions in cases where few claims are likely to be made but the deterrent effect of such a suit would be socially desirable.” The court recognized that the amount *allocated* to class members in such cases is the appropriate denominator, not the amount *received by* class members, because large numbers of consumers may simply forego claims for very small sums. As we noted previously, this is particularly true of consumer antitrust class actions. The bill's fee limitations likely would convert many consumer antitrust class actions into a financially irrational pursuit for class counsel, as the aforementioned CBO cost estimate seems to implicitly recognize.

The appeal of the settlement in *Gaos v. Google, Inc.*, now captioned *Holyoak v. Google*, No. 15-15858 (9th Cir.) (appeal docketed Apr. 28, 2015), discussed in our [November 2015](#) update and referenced in our [March](#) and [November 2016](#) updates, is scheduled for oral argument on March 13, 2017.

VIII. Class Action Waivers

In our [November 2016](#) update, we noted that the Supreme Court could very well take up the legality of inserting mandatory arbitration provisions containing class action waivers into employment agreements. A circuit split was created in May 2016 when Chief Judge Dianne Wood, writing for the Seventh Circuit in *Lewis v. Epic Systems Corporation*, 823 F.3d 1147 (7th Cir. 2016), broke with the Second, Fifth, and Eighth Circuits in holding that such provisions are unenforceable insofar as they are illegal under the National Labor Relations Act (NLRA) and captured by the saving clause in the Federal Arbitration Act (FAA), which makes arbitration provisions valid “save upon such grounds as exist at law or in equity for the revocation of any contract.”

A second such opinion, adopting and expanding Judge Wood's reasoning, followed in August by Chief Judge Sidney Thomas, writing for the Ninth Circuit in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). Then, in September, a Second Circuit panel in *Patterson v. Raymours Furniture Company, Inc.*, 2016 WL 4598542, at *2 (2d Cir. 2016), held that a similar arbitration clause was enforceable, but only because the court believed it was bound by contrary intra-circuit precedent. The court stated, “If we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the [arbitration provision's] waiver of collective action is unenforceable.”

The losing defendants in *Lewis* and *Morris*, and the losing plaintiffs in *Patterson*, separately petitioned for certiorari. On January 13, the Supreme Court granted certiorari in *Lewis*, *Morris*, and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), a Fifth Circuit case decided in 2015 in which Judge Southwick, writing for a three-judge panel, rejected the National Labor Relations Board's determination that such provisions unlawfully interfere with employees' NLRA rights to engage in concerted activity. The three cases have been consolidated before the Court, with merits briefing to

begin in late April. Oral argument has been postponed until the October 2017 term, perhaps after Judge Gorsuch becomes the ninth justice.⁴

The Consumer Financial Protection Bureau, which in May 2016 issued a Notice of Proposed Rulemaking (NPR) that would prevent various consumer financial products and services providers from invoking a pre-dispute arbitration agreement to prevent a consumer from participating in a class action, has yet to issue a final arbitration rule. In our [November 2016](#) update, we noted that the D.C. Circuit's decision in *PHH Corporation v. CFPB*, 2016 WL 5898801 (D.C. Cir. 2016), which found the CFPB's structure as an independent agency to be unconstitutional and required that the Bureau instead "operate as an executive agency," created a question whether the CFPB's proposed arbitration rule could now be subject to review by the Office of Information and Regulatory Affairs within the Office of Management and Budget, which could require a cost-benefit analysis, among other things. On February 17, however, the D.C. Circuit granted the government's petition for en banc rehearing and vacated the panel opinion. The constitutionality of the CFPB's structure, therefore, is once again an open question. Briefing is set to begin in early March, and argument before the en banc court is scheduled for late May.

We also noted previously that the Centers for Medicare & Medicaid Services (CMS), an agency within the Health and Human Services Department, had banned the future use of binding pre-dispute arbitration agreements by long term care facilities participating in Medicare and Medicaid. Several provider groups had promptly filed lawsuits challenging the pre-dispute arbitration ban as being in conflict with the FAA. On November 7, 2016, the U.S. District Court for the Northern District of Mississippi issued an order preliminarily enjoining enforcement of the ban. On December 9, CMS issued a [memorandum](#) suspending enforcement of the rule until or unless the injunction is lifted.

Finally, we noted previously that the Supreme Court granted certiorari in *Kindred Nursing Centers, et al. v. Clark*, 2016 WL 3617216 (Oct. 28, 2016) (No 16-32), on the question of "[w]hether the FAA preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement." In each of three consolidated wrongful death cases at issue, an agent with power of attorney for the decedent signed admission documents to nursing homes that included an arbitration clause. The Kentucky Supreme Court, in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 330 (Ky. 2015), had refused to enforce the arbitration clause because it was unwilling to draw the inference that the agent had "authority to waive his principal's constitutional right to access the courts and to trial by jury." Rather, "the power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power-of-attorney document."

The case has now been briefed and argued. The petitioners' [opening brief](#) on the merits contends that the Kentucky Supreme Court defied the U.S. Supreme Court's repeated rulings that the FAA preempts state law rules that disfavor arbitration agreements and the FAA's mandate that courts must place arbitration agreements on equal footing with all other contracts. The respondents [counter](#) that that the FAA does not preempt State law regarding issues of contract *formation*, and the

power of attorney at issue here implicates the scope of the agent’s authority and requires an interpretation as to the intentions and expectations of the principal.

At oral argument, Justice Alito offered that “the context here seems different from the arbitration cases that we’ve had in recent years” insofar as the arbitration provision may “implicate the care of someone who is vulnerable,” and hence “this seems like something that is close to or that it falls [sic] squarely within the police power of a State.” Justice Breyer, however, said “What I really think has happened is that Kentucky just doesn’t like the Federal law. That’s what I suspect. So they’re not going to follow it.”

The Court questioned counsel for both parties on how to distinguish neutral state applications of contract interpretation that affect arbitration clauses from discriminatory state applications of contract interpretation that do not put arbitration on equal footing. Counsel for the petitioners argued that the standard should require that state contract interpretations do not distinguish a category of contracts based on a characteristic of arbitration. Counsel for the respondents argued that the standard should not allow federal courts to second guess state court interpretations of authority to form and enter arbitration agreements as distinct from already-formed arbitration agreements themselves. The case bears importantly on the limits of the Court’s recent, expansive interpretations of the FAA.

IX. Advisory Committee on Civil Rules

As we reported in our [November 2016](#) update, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, based on recommendations from the Advisory Committee on Civil Rules, published proposed amendments to Rule 23 for public comment in August 2016. The comment period closed on February 15, 2017. The draft rules, public comments, and information on three public hearings held in Washington, D.C., Phoenix, AZ, and Dallas/Fort Worth, TX, are [published](#) at Regulations.gov. The Advisory Committee on Civil Rules and the Rule 23 Subcommittee to the Advisory Committee will now consider final changes to the proposed rules and then forward them to the Standing Committee in the spring. If approved by the Standing Committee, they will be forwarded to the Judicial Conference in September. If approved by the Judicial Conference, they will be forwarded to the Supreme Court, and if approved by the Court, then to Congress. If approved by Congress, the proposed amendments would become effective on December 1, 2018.

Notably, H.R. 985 departs markedly from the conclusions and recommendations of the Rule 23 Subcommittee, the Advisory Committee, and the Standing Committee. First, the bill’s “same type and scope of injury” requirement, which the Standing Committee and Advisory Committee have said would [overlap and modify](#) the typicality and adequacy requirements of Rule 23(a)(3) and (4), did not even merit placement on the Rule 23 Subcommittee’s [preliminary agenda](#).

Second, the Advisory Committee “[decided not to proceed](#)” with amendments involving ascertainability “[g]iven the evolving state of this doctrine in the lower courts, and the initial difficulties the Rule 23 Subcommittee encountered in drafting possible amendments.”

Third, the Standing Committee’s [proposed amendments](#) require a flexible approach to determining fee awards in class actions rather than relying exclusively on percentages tied to the monetary relief directly received by the class. The Committee note to paragraphs (C) and (D) of Subdivision (e)(2) states that relief directly delivered to class members “can be an important factor in determining the appropriate fee award,” but “[u]ltimately, any award of attorney’s fees must be evaluated under Rule 23(h), and no rigid limits exist.”

Finally, the proposed amendments also note that settlement funds “often go unclaimed” and cite approvingly to § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010), which sanctions the use of indirect monetary relief such as *cy pres*. H.R. 985 would preclude class counsel from relying on *cy pres* as a basis for compensation.

The Judicial Conference [letter](#) in opposition to H.R. 985 states that it has “long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act,” which “institutes thorough and inclusive procedures . . . to produce the best rules possible through broad public participation and review by the bench, the bar, the academy, and Congress.” The Rules Enabling Act process “undertake[s] extensive study, including empirical research, [to] propose rules that best serve the American justice system while avoiding unintended consequences.”

The American Bar Association’s opposition [letter](#) similarly objects to the bill’s circumvention of the Rules Enabling Act.

X. FTC to Study Class Action Settlement Notice

As part of the FTC’s Class Action Fairness Project, initiated under Chairman Tim Muris in 2002, the Commission [announced](#) in November 2016 that it will study the effectiveness of various class action settlement notice programs. It has sent information requests to eight claims administrators, which will form the basis of a special report.

The announcement also noted that the Commission has proposed two related studies: the [Notice Study](#), which examines consumer perception and understanding of class action notices and the options they provide to consumers, and the [Deciding Factors Study](#), which analyzes factors that influence consumers’ decisions to participate, opt out of, or object to a class action settlement. The initial comment periods for both studies have closed.

The Judicial Conference Standing Committee’s [proposed amendments](#) to Rule 23 include several changes designed to modernize and improve notice to class members.

XI. Class Actions and President Trump’s SCOTUS Nominee

On January 31, 2017, President Trump nominated Neil Gorsuch from the 10th Circuit Court of Appeals to fill the current vacancy on the U.S. Supreme Court. Judge Gorsuch has practiced and taught antitrust law, and he currently serves as Chair of the Advisory Committee on Appellate Rules to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference. On the 10th Circuit, he authored three published antitrust opinions and joined three more. He also joined one unpublished antitrust opinion. None were class actions.

We are aware of 14 non-antitrust class-action opinions authored by Judge Gorsuch since August 2006, when he was appointed to the Tenth Circuit. While many were decided according to underlying substantive law, several raised procedural or other similar issues of the kind addressed in this update.⁵

In *Shook v. Board of County Commissioners of County of El Paso*, 543 F.3d 597 (10th Cir. 2008), in which a putative class of prison inmates challenged the denial of mental healthcare as a violation of the Eighth Amendment's ban against cruel and unusual punishment, Judge Gorsuch, relying heavily on the abuse of discretion standard, affirmed a district court's refusal to certify a Rule 23(b)(2) class. The class lacked "a certain cohesiveness among class members with respect to their injuries," such that plaintiffs failed to show that defendants acted on grounds generally applicable to the class. He endorsed the use of subclasses in these circumstances but noted that the parties did not seek them and the court was not obligated to impose them *sua sponte*.

In *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975 (10th Cir. 2014), in a dispute over whether the parties had entered an agreement to arbitrate that would trigger the FAA, Judge Gorsuch held that the parties first must proceed summarily to trial to resolve factual disputes over whether an arbitration agreement was formed, as required by the text of the FAA.

In *Hammond v. Stamps.com, Inc.*, 844 F.3d 909 (10th Cir. 2016), Judge Gorsuch reversed a federal district court order refusing to accept transfer of a class action from state court under the Class Action Fairness Act (CAFA) after defendants had not shown sufficiently convincing evidence that CAFA's \$5 million amount-in-controversy requirement would be satisfied. Judge Gorsuch held that the party seeking removal to federal court under CAFA need not show that "damages 'are greater' or will *likely* prove greater 'than the requisite amount' specified by statute," but "only and much more modestly" that a fact-finder "might conceivably lawfully award" the requisite amount, or that this prospect does not fail a "legally impossible standard."

In *McClendon v. City of Albuquerque*, 630 F.3d 1288 (10th Cir. 2011), Judge Gorsuch held that an order withdrawing approval of a class action settlement agreement does not qualify as a "final decision" subject to appeal under 28 U.S.C. § 1291, notwithstanding that a prior decision may have amounted to a final judgment for purposes of Rule 58 of the Federal Rules of Civil Procedure.

In *BP America, Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029 (10th Cir. 2010), Judge Gorsuch considered as a matter of first impression under what circumstances the court should exercise its discretion to grant leave to appeal an order remanding a case to state court under CAFA. He adopted an approach followed by the First Circuit and granted the defendant's request for leave to appeal the district court's remand order.

AAI issued a [statement](#) on the antitrust implications of the nomination of Judge Gorsuch on February 2, 2017.

Comments on this update or suggestions for AAI amicus participation should be directed to AAI Vice President and General Counsel Richard Brunell, rbrunell@antitrustinstitute.org, (202) 600-9640, or AAI Associate General Counsel Randy Stutz, rstutz@antitrustinstitute.org, (202) 905-5420.

¹ See, e.g., Ellen Meriwether, *The Outlook for Private Enforcement in a Trump Administration*, ANTTITRUST SOURCE (Feb. 7, 2017) (“[I]f injury of the ‘same scope’ means injury of the ‘same amount,’ then Rule 23 would be rendered virtually useless as a mechanism for private enforcement of the antitrust laws.”); Daniel R. Karon, *Class Actions: The “Fairness” in Class Action Litigation Act*, 4 ABA LIT. J. — (Summer 2016), available at http://www.americanbar.org/publications/litigation_journal/201516/summer/class_actions_fairness_class_action_litigation_act.html) (bill’s requirement that victims “purchased the exact same product for the exact same price in a market that measured their overpayments identically” means “economic-loss class actions . . . would be eliminated altogether”).

² *But cf.* Conway v. Portfolio Recovery Associates, LLC, 840 F.3d 333, 335 (6th Cir. 2016) (holding that intra-circuit precedent *requiring* rather than permitting the court to enter judgment in these circumstances was abrogated by *Campbell-Ewald*).

³ The Eleventh Circuit adopted an administrative feasibility requirement in an unpublished opinion, *Karbu v. Vital Pharmaceuticals, Inc.*, 621 Fed.Appx. 945, 947 (11th Cir. 2015). The issue has been raised again in *Siegel v. Delta Airlines, Inc.*, No. 16-16401, now before the court.

⁴ See Edith Roberts, *Judge Gorsuch’s Arbitration Jurisprudence*, SCOTUSblog (Mar. 6, 2017, 10:33 a.m.), <http://www.scotusblog.com/2017/03/judge-gorsuchs-arbitration-jurisprudence/>; see also *infra* Part XI.

⁵ See Amy How, *A Closer Look at Judge Neil Gorsuch and Class Actions*, SCOTUSblog (Mar. 6, 2017, 10:33 a.m.), <http://www.scotusblog.com/2017/03/closer-look-judge-neil-gorsuch-class-actions/>.