The American Antitrust Institute

Class Action Issues Update
November 2016

The American Antitrust Institute (AAI) promotes the vitality of private antitrust enforcement and the preservation of antitrust class actions, in particular. As part of these 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 the March 2016 update, which is available at http://www.antitrustinstitute.org/content/class-action-issues-update-february-2016. Many of these issues will be considered at AAI's 10th Annual Private Enforcement Conference on November 9, 2016, at the National Press Club in Washington, D.C. More information on the conference and a link to register are available at http://www.antitrustinstitute.org/10th-private-enforcement-conference.

I. Class Actions and the 2016 Presidential Election

The most important development of the year for class action practitioners likely will take place in a matter of days, when the country votes on who will nominate judges to the federal judiciary over the next four years, most especially the ninth Supreme Court justice.

If a Donald Trump administration nominates a fifth conservative justice, the Court's consistent conservative consensus on class actions likely would persist.

On the other hand, a fifth liberal or even moderate justice would likely cast doubt on a wide range of the Court's controversial class action decisions, which have been shaped largely through 5-4 majorities under the intellectual leadership of the late Justice Scalia. With prominent conservatives like Arizona Senator John McCain vowing to block the confirmation of any Hillary Clinton nominee, we might also see the current eight-member court remain intact for one or more terms. This could lead to fewer cert grants on controversial class action issues and more 4-4 per curium opinions on those that get through. Still another possibility, speculated about in the political press, is that a Republican-controlled Senate could approve President Obama's nominee, Merrick Garland, during the lame duck session before the next president takes office. All of that may depend on which party controls the Senate.

While we look ahead to these events, there is also much to look back upon since AAI's last Class Action Issues Update in March.

II. Classes That Include Some Members Who Are Not Injured

In March and May, respectively, the Supreme Court issued its much-anticipated opinions in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1040 (2016), and *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016). Neither was an antitrust case, but both had the potential to affect the use of class actions as a means of antitrust enforcement.

In *Tyson Foods*, the defendant had challenged a grant of class certification on grounds that (1) liability and damages were determined on the basis of statistical evidence that purportedly masked substantial differences among class members, and (2) the class improperly contained hundreds of allegedly uninjured members. Leading up to the Court's decision, there was speculation that its ruling on the first issue might significantly impact antitrust class actions because of antitrust class plaintiffs' frequent reliance on statistical and representative evidence to prove common impact. A 6-2 opinion by Justice Kennedy quelled any concerns about a new evidentiary standard, however. Citing its recent decision in *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 808 (2011), the Court reiterated that "whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action." In other words, "[i]ts permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." 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.

The Court stated that the second question – whether uninjured class members may recover – "is one of great importance," but it found the question was not yet fairly presented by the case because the damages award had not yet been disbursed, and the record did not indicate how it would be disbursed. The Court noted, however, that "when 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" This strongly suggests the presence of uninjured class members does not necessarily defeat class certification.

Spokeo, which involved a plaintiff's reliance on a statutory violation of the Fair Credit Reporting Act (FCRA) to establish injury-in-fact for purposes of Article III standing, had prompted speculation whether the Court might address an apparent circuit split regarding 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.

Justice Alito's opinion for a 6-2 majority focused narrowly on the lower court's application of the "concreteness" element of injury-in-fact, holding that a "bare" procedural violation "divorced from any concrete harm" was insufficient to establish concreteness in this case, but that a statutory violation on other facts, not to mention "intangible" injury, is capable of being "concrete." This aspect of the holding is likely insignificant for named plaintiffs in antitrust class actions, who ordinarily have little difficulty meeting the concrete-and-particularized test because of the pleading requirements established by Sections 4 and 16 of the Clayton Act and the Supreme Court's antitrust injury doctrine. The Court did recognize, however, that "named plaintiffs who represent a class

'must allege and show that they personally have been injured, *not* that injury has been suffered by other, unidentified members of the class to which they belong.'" (emphasis added). Several courts post-*Spokeo* have refused to consider the injury-in-fact element of Article III standing in conjunction with Rule 23's requirements.

III. Offers of Judgment and Mootness

As we noted in our March 2016 update, the Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), held that a defendant could not moot a class action merely by offering to satisfy the class representative's individual claim, because an unaccepted offer (whether in the form of a Rule 68 offer or otherwise) was a legal nullity. However, the Court explicitly left open the question "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." Justices Roberts, Alito, and Thomas made clear they would hold this form of pick-off maneuver moots the individual plaintiff's claim, without requiring that judgment be entered or that the defendant admit liability.

Unsurprisingly, defendants have been vigorously testing the Court's hypothetical. Although results have been mixed at the district court level, 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. Many 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. The latter point is currently before the Supreme Court in the different context of the appealability of certification denials, discussed below.

IV. Ascertainability

For all its activity in other areas, the Court recently turned down a second opportunity to resolve the question whether Rule 23 contains a heightened ascertainability requirement that demands class plaintiffs plead and prove an administratively feasible mechanism for identifying class members. After denying a petition for certiorari in February in *Mullins v. Direct Digital,* 795 F.3d 654 (7th Cir. 2015) (No. 15-549), the Court did so again in late March in *Rikos v. The Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015) (No. 15-835).

Circuit case law, however, continues to evolve. In May, the Eighth Circuit in *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 996 (8th Cir. 2016), joined the Sixth and Seventh Circuits in rejecting a heightened ascertainability requirement, holding that "'[t]he policy concerns motivating the [Third Circuit's] heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3).'" On the other hand, the First, Second, Third, and Eleventh Circuits have embraced a heightened standard to some degree. The Fifth, Ninth, Tenth and D.C. Circuits have not yet explicitly addressed the issue.[1] The Ninth and Tenth Circuits, however, have been called upon to opine on ascertainability in *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726 (N.D. Cal. 2014), and *In re Syngenta Ag Mir 162 Corn Litig.*,

2016 WL 5371856 (D. Kan. 2016), respectively. *Jones* is currently stayed pending the Supreme Court's decision in *Microsoft v. Baker*, discussed below. As of this writing, *Syngenta* is on petition to the Tenth Circuit under Rule 23(f).

V. Appealability of Certification Denials

In our March 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." The issue arises from a case in which the Ninth Circuit denied interlocutory review of a district court order denying class certification, and the named plaintiffs then voluntarily dismissed their individual claims and appealed the class certification decision as a final order, agreeing to forego their individual claims if unsuccessful on appeal. The Ninth Circuit subsequently heard the appeal and reversed the denial of certification.

The case has now been briefed on the merits and is awaiting oral argument. In its merits brief challenging the named plaintiffs' "ploy" to obtain appellate review of their initial certification denial, Microsoft argues: (1) the voluntary dismissal tactic contravenes *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), which held that class certification denials were not subject to mandatory appellate review even if the denial is the "death knell" of the case; (2) the tactic thwarts the discretionary review process prescribed by Rule 23(f) of the Federal Rules of Civil Procedure; and (3) the named plaintiffs' claims must necessarily be moot if they are sufficiently "final."

Respondents counter that (1) *Livesay* and Rule 23(f)'s prescriptions are readily distinguishable insofar as they exclusively concern interlocutory orders rather than appeals of final judgments; and (2) Microsoft's mootness arguments improperly rely on cases involving dismissals without prejudice, which implicate different Article III interests than final judgments. In the alternative, they argue the plaintiffs' *lawsuit* is not moot even if their individual claims are moot because the Supreme Court's holdings in *Deposit Guaranty National Bank v. Roper*, 445, U.S. 326 (1980), and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), recognize that named plaintiffs maintain a personal stake in certifying a class even after they no longer have a justiciable individual claim.

VI. *Cy Pres*

The Sixth Circuit in *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 286 (6th Cir. 2016), recently held that district courts, in determining the appropriate relationship between attorneys' fees and benefits to the class, should adopt a case-by-case approach in deciding whether to discount *cy pres* and other funds unclaimed by class members, such as funds that revert back to the defendant. The court's opinion delineates a circuit split as to whether courts may, must, or must not factor unclaimed funds into the calculation of attorneys' fees. The Ninth and Second Circuits strictly hold that district courts are required to rely on 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. The majority of courts consider the question on a case-by-case basis.

In adopting the case-by-case approach for the Sixth Circuit, the *Gascho* court recognized, on the one hand, that class members' "right to share the harvest of the suit upon proof of their identity, *whether or not they exercise it,* is a benefit in the fund created by the efforts of class representatives and their counsel." But, on the other hand, "awarding attorneys' fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel." The court noted the "varying danger of tacit collusion" depending on the settlement facts, and it acknowledged that settlements involving unclaimed funds returned to a defendant are more problematic than settlements that create "constructive common funds" by employing *cy pres* awards.

In July, Judge Easterbrook in *Holtzman v. Turz*a, 828 F.3d 606, 608 (7th Cir. 2016), distinguished "common-fund" cases from class actions that "aggregate individual claims," holding that attorneys' fees must ordinarily be calculated from the amount actually distributed to class members in the latter instance. The opinion foreclosed any *cy pres* distribution because the court believed the plaintiffs' claims under the Telephone Consumer Protection Act (TCPA) sought recovery "for discrete wrongs." The court clarified, however, that "[w]e do not mean to foreclose the possibility of a *cy pres* distribution . . . in all cases with individual harms." It left open the prospect of *cy pres* where settlements require that none of the money be returned to the defendant. In that instance, "[i]f the government does not demand escheat, a charitable distribution to an organization that will do some good for the class becomes attractive." And even absent a settlement, a district judge maintains discretion to allow *cy pres* if it determines that the inability to identify a victim should not automatically benefit the wrongdoer. Antitrust class actions have historically been recognized as common-fund cases.

The appeal of the settlement in *Gaos v. Google, Inc.*, No. 15-15858 (9th Cir.) (appeal docketed Apr. 28, 2015), discussed in our November 2015 update and referenced in our March 2016 update, remains fully briefed and awaiting oral argument.

VII. Class Action Waivers

Perhaps no area of class action law has been the subject of greater action and attention than class action waivers inserted into mandatory arbitration clauses. In May, the Consumer Financial Protection Bureau issued a Notice of Proposed Rulemaking (NOPR) 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. Consumer contracts involving covered entities would be required to include boilerplate language expressly permitting the consumer to file or be a member of a class action. During the NOPR's three-month public comment period ending August 22, the CFPB received nearly 13,000 comments.

A recent decision of the D.C. Circuit, *PHH Corporation v. CFPB*, 2016 WL 5898801 (D.C. Cir. 2016), found the CFPB's structure as an independent agency to be unconstitutional and required that the Bureau instead "operate as an executive agency." There is an open question, given the timing of the

decision (if it stands), and the timing of the NOPR, 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.[2]

In final regulations issued in September, the Centers for Medicare & Medicaid Services (CMS), an agency within the Health and Human Services Department, banned the future use of binding pre-dispute arbitration agreements by long term care facilities participating in Medicare and Medicaid. The new regulations take effect on November 28, 2016. Several provider groups have already filed lawsuits challenging the pre-dispute arbitration ban as being in conflict with the Federal Arbitration Act (FAA). In response to public comments challenging the regulation on this basis, CMS has stated that "[t]he proposed and final regulation would have no legal effect on the enforceability of existing pre-dispute arbitration agreements between [long-term care] facilities and patients, and therefore we believe that the terms of the FAA are not implicated."

On October 28, 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 bears importantly on whether the post-Scalia Court remains committed to its maximalist interpretation of the FAA.

The next important Supreme Court case in this area could very well involve the legality of inserting mandatory arbitration provisions containing class action waivers into employment agreements. A deepening circuit split was created in May when Chief Judge Dianne Wood, writing for the Seventh Circuit in *Lewis v. Epic Systems Corporation*, 823 F.3d 1147, 1156-58 (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 FAA's savings clause, 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*, have separately petitioned for certiorari, and all three cases are currently listed on SCOTUSblog's "Petitions We're Watching." The enforceability of mandatory arbitration agreements inserted into employment agreements could be particularly important for antitrust practitioners involved in wage suppression cases, which the Obama Administration's Council of Economic Advisors recently highlighted in discussing priorities for combatting anticompetitive behavior in labor markets. The FTC and DOJ also recently released *Antitrust Guidance for Human Resource Professionals* and have indicated that the DOJ will prosecute naked wage fixing and anti-poaching agreements criminally.

VIII. Numerosity

In an antitrust case, the Third Circuit recently became the first appellate court to implement an analytical framework for evaluating Rule 23(a)'s requirement that "the class is so numerous that joinder of all members is impracticable." In an appeal of a district court order certifying a 22-member class challenging a reverse payment agreement between branded and generic manufacturers of the sleep disorder drug Modafinil, the panel vacated and remanded, instructing the lower court to conduct a "particularly rigorous" evaluation of whether joinder is impracticable where the putative class consists of fewer than forty members. *In re Modafinil Antitrust Litigation*, 2016 WL 4757793 (3d Cir. 2016). The court articulated a "non-exhaustive list" of factors for district courts in the Third Circuit to consider in evaluating impracticability, including "judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages." The court added that "judicial economy and the ability to litigate as joined parties are of primary importance." The plaintiffs' petition for *en banc* rehearing was recently denied.

IX. Proposed Legislation

No further actions have been taken on the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016," known colloquially as the "Frankenbill," which passed the House 211-188 in January and was referred to the Senate Judiciary Committee. As previously noted, the bill would likely eviscerate consumer, antitrust, employment, and civil rights class actions by barring class certification unless proponents 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." The White House Office of Management and Budget has stated that "[i]f the President were presented with H.R. 1927, his senior advisors would recommend that he veto the bill."

X. Advisory Committee on Civil Rules

As we reported in our March update, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules identified the following topics for possible amendments: (1) "frontloading" in Rule 23(e)(1), requiring information relating to the decision whether to send notice to the class of a proposed settlement; (2) making clear that a decision to send notice to the class under Rule 23(e)(1)

is not appealable under Rule 23(f); (3) making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice does trigger the opt-out period in Rule 23(b)(3) class actions; (4) updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) addressing issues raised by "bad-faith" class action objectors; and (6) refining standards for approval of proposed class-action settlements under Rule 23(e)(2).

In April the Advisory Committee voted unanimously to forward the proposed amendments to the civil rules to the Standing Committee on Rules of Practice and Procedure with a recommendation that they be published for public comment. In August, the Standing Committee made its own modifications and then published them for public comment on the Judiciary's website, where they are currently available for download. Public comments on the proposed amendments may be submitted electronically no later than Wednesday, February 15, 2017, at http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment. Public hearings on the proposed amendments to the civil rules, including but not limited to Rule 23, have been scheduled in Washington, D.C., on November 3, 2016, in Phoenix, Arizona, on January 4, 2017, and in Dallas/Fort Worth, Texas, on February 16, 2017. Members of the public are invited to testify at the hearings. If approved, the proposed amendments would become effective on December 1, 2018.

XI. Foreign Developments

The first opt-out antitrust class action in the United Kingdom was filed before the specialist Competition Appeal Tribunal on May 25. As we noted in our November 2015 update, the Consumer Rights Act 2015 created a new private enforcement regime whereby plaintiffs for the first time may bring opt-out class actions on behalf of class members domiciled in the UK. Class members domiciled outside the UK may opt in. UK law continues to prohibit contingency fee agreements related to opt-out collective proceedings and loser-pays principles still apply. On the other hand, third-party litigation funding is permitted, insurance is available against an award of costs, and success-fee arrangements are permitted. The first ever such case, *Gibson v. Pride Mobility Products Ltd.* (No. 1257/7/7/16), involves allegations of resale price maintenance.

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.

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[1] *See* Chad R. Fuller et al., *A Serious Circuit Split on Class Ascertainability*, LAW360 (Jun. 30, 2016), *available at* http://www.law360.com/articles/813021/a-serious-circuit-split-on-class-ascertainability (chart listing cases by circuit); *but see* Rule 23(f) Petition for Permission to Appeal Class Certification Order 14, In re Syngenta AG MIR162 Corn Litigation, MDL No. 2591, Case No. 2:14-md-2591 (10th Cir., filed Oct. 11, 2016), *available at* http://www.agweb.com/assets/1/6/syngenta%20appeal1.pdf [hereinafter "Petition for Permission to Appeal"] (suggesting Ninth Circuit adopted heightened standard in *Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x 803, 804 (9th Cir. 2014)).

[2] *See* Allan S. Kaplinsky, *What the D.C. Circuit's PHH Decision Means for CFPB Rulemaking*, JDSUPRA (Oct. 18, 2016), *available at* http://www.jdsupra.com/legalnews/what-the-d-c-circuit-s-phh-decision-56562/.