The American Antitrust Institute

CLASS ACTION ISSUES UPDATE
July 2015

Class actions play a critical role in the enforcement of the antitrust laws, ensuring that the private damages remedy serves its intended function of deterring antitrust violations and compensating victims.[1] Indeed, a large swath of the harm inflicted by cartels would go unremedied (and hence undeterred) without class actions. It is no secret that, for many years, the class-action device has been under assault from certain business groups, and that this assault has resulted in judicial decisions making class actions—antitrust and otherwise—more costly and difficult to bring.

The American Antitrust Institute (AAI) has stood as a counterweight to these efforts, having made it an important priority to defend the ability of private attorneys general to bring antitrust class actions. This update highlights some recent developments in the courts and elsewhere that may threaten the viability of class actions. Many of the issues will be considered at the AAI's 9th Annual Private Enforcement Conference, which will be held November 18, 2015 at the National Press Club in Washington, DC.

I. Classes That Include Some Members Who Are Not Injured

The Supreme Court has taken up the question of whether a class may be certified under Rule 23(b)(3) if it includes "members who were not injured and have no legal right to any damages." Petition for Writ of Certiorari at i, *Bouaphakeo v. Tyson Foods*, 765 F.3d 791 (8th Cir. 2014), *cert. granted*, 2015 WL 1278593 (U.S. June 8, 2015) (No. 14-1146). The AAI successfully briefed this issue in *In re Nexium Antitrust Litig.,* 777 F.3d 9, 22 (1st Cir. 2015), in which the First Circuit recognized that "objections to certifying a class including uninjured members run counter to fundamental class action policies" because "excluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a 'fail-safe class'—a class defined in terms of the legal injury." Further, including uninjured members in a class need not increase a defendant's damages and does not raise due process issues, particularly not ones a defendant should have standing to raise.[2]

Tyson Foods is a Fair Labor Standards Act case (with a cognate state law claim) that resulted in a plaintiffs' verdict. It also raises the question of whether class-wide liability and damages can be determined by statistical techniques based on averages. Also pending before the Court (and presumably being held pending *Tyson*), is a certiorari petition challenging class certification in a price-fixing case, which raises the related question of whether class-wide harm can be demonstrated when

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[1] *See generally* Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013); ANTITRUST MODERNIZATION COMMISSION, REPORT & RECOMMENDATIONS 241 (2007).

[2] *See* Joshua P. Davis, Eric L. Cramer & Caitlin May, *The Puzzle of Class Actions With Uninjured Members*, 82 GEO. WASH. L. REV. 858, 868-81 (2014).

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prices are negotiated. *In re Urethane Antitrust Litig.,* 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, 2015 WL 1043612 (U.S. Mar. 9, 2015) (No. 14-1091).

II. Offers Of Judgment And Mootness

In the upcoming term, the Supreme Court will also consider whether defendants can defeat class actions by "picking off" the proposed class representatives with an offer of complete relief for the representative's individual claim, even when the offer to settle is rejected. *Campbell-Ewald Co. v. Gomez*, 135 S. Ct. 2311 (May 18, 2015) (No. 14-857) (granting certiorari petition). Specifically, the Court will consider whether a class representative's claim is mooted by an offer of complete individual relief before the class is certified, an issue left open in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). For the reasons stated in Justice Kagan's dissent for four justices in *Genesis Healthcare*, an unaccepted offer is a legal nullity that should not moot a class representative's claim, let alone the claims of the class. *Campbell-Ewald* involves statutory damages under the Telephone Consumer Protection Act for unwanted text messages.

III. Ascertainability

Some courts have adopted a demanding "ascertainability" requirement as a precondition for class certification, requiring not only that the class definition be based on objective criteria, but also that an "administratively feasible" method exists for identifying individual class members and ascertaining their class membership. The heightened ascertainability requirement has no basis in Rule 23 and poses a particular threat to consumer class actions.

For example, a divided Third Circuit endorsed the heightened requirement in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), in which it vacated certification of a consumer class that would have relied on affidavits of class members in the absence of receipts. In *In re Wellbutrin XL Antitrust Litigation*, No. 08-2433, 2015 WL 3970858 (E.D. Pa. June 30, 2015), a pay-for-delay case, the court decertified the indirect-purchaser class because it was not convinced that sufficient records existed or were obtainable to ascertain whether individual consumers were members of the class. *In Jones v. ConAgra Foods, Inc.*, No. C 12-01633, 2014 WL 2702726 (N.D. Cal. June 13, 2014), the court also found ascertainability was not met in a consumer class that relied on affidavits. But in *Byrd v. Aaron's Inc.*, 784 F.3d 154, 171 (3d Cir. 2015), the court reversed the denial of class certification, concluding that "*Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken."

IV. Cy Pres

Some "tort reform" groups are on a campaign to eliminate or sharply restrict *cy pres*.[3] While *cy pres* can be subject to abuse, critics apparently see the elimination or restriction of *cy pres* as a way to eliminate small-dollar consumer class actions or make them less attractive (for example, by not including a *cy pres* award in the amount of the recovery for purposes of calculating attorneys' fees). Perhaps responding to the criticism, some courts have unnecessarily restricted the use of *cy pres* as part of class settlements.

For example, *In re BankAmerica Corp. Securities Litig.*, 775 F.3d 1060 (8th Cir. 2015), the court held that the district court erred by not requiring that funds unclaimed after two distributions be

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[3] *See* U.S. Chamber Institute for Legal Reform, *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, Oct. 2010; *Lawyers for Civil Justice, Comment to the Advisory Committee on Civil Rules and its Rule 23 Subcommittee*, April 7, 2015 ("LCJ Comment") (urging Rules Committee not to enshrine *cy pres* in the civil rules).

redistributed to original claimants, because it was feasible to do so even though the original claims process was riddled with problems and delays. The Chief Justice has expressed skepticism of *cy pres* as part of class settlements, noting "fundamental concerns surrounding the use of such remedies in class action litigation," and that in a "suitable case, this Court may need to clarify the limits on the use of such remedies." *Marek v. Lane*, 134 S. Ct. 8 (2013) (Roberts, C.J., concurring in the denial of certiorari). The AAI has been active in urging a responsible approach to *cy pres* and will continue to do so in the courts and other forums.[4]

V. Class-Action Waivers

The AAI has been active in trying to halt the Supreme Court's march toward making class-action waivers in arbitration agreements per se enforceable. Our efforts to date have not met with success. After *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), some critics have predicted the eventual demise of direct purchaser antitrust class actions. Professor Elhauge makes the point that, "Given the *Italian Colors* decision, it is hard to see why all businesses would not at least insert arbitration clauses into their contracts that preclude class arbitration."[5] Others suggest that "producers of almost any product can now bind purchasers to contractual language," even if the purchasers are indirect, although "empirical evidence does not yet bear out a flight to class action waivers in the consumer and employment context".[6]

The Supreme Court will take up yet another class-action waiver case, *DirecTV v. Imburgia*, 135 S. Ct. 1547 (March 23, 2015) (No. 14-462) (granting certiorari petition), which involves the question of whether a class-action waiver is enforceable in an arbitration agreement that incorporates state law where the law would bar enforcement but is preempted.

VI. Proposed Legislation

The U.S. House of Representatives is considering H.R. 1927, the "Fairness in Class Action Litigation Act," which would effectively eviscerate consumer, antitrust, employment, and civil rights class actions. The bill bars class certification unless proponents demonstrate, based on a "rigorous analysis," that each person in a class has suffered "the same type and scope of injury." The AAI has signed on to letters with numerous public-interest groups opposing the bill.

VII. Advisory Committee On Civil Rules

The Rule 23 subcommittee of the Advisory Committee on Civil Rules is considering whether to recommend that work begin on possible class action amendments. Toward that end, in April 2015 the subcommittee presented "conceptual sketches" of some possible amendments, with the intention of presenting drafts for possible amendments to the full committee at its Fall 2015 meeting. The sketches cover settlement approval criteria, settlement class certification, *cy pres*, objectors, Rule 68 offers and mootness, issue classes, and notice.

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[4] See, e.g., *Letter from Diana Moss and Albert Foer to the Members of the Advisory Committee on Civil Rules and the Rule 23 Subcommittee*, March 16, 2015 (endorsing ALI principles on *cy pres*, with some caveats and additions).

[5] Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing it With Ineffective Forms of Arbitration*, 38 FORDHAM INT'L L. J. 771, 775 (2015).

[6] Brian F. Fitzpatrick, *The End of Class Actions?,* 57 ARIZ. L. REV. 161, 177, 191 (2015).

As referenced above, the AAI submitted a letter on *cy pres* to the subcommittee, and is participating with a coalition of like-minded groups to monitor and provide input into the process. So far, the subcommittee's approach seems even-handed, but critics of class actions have sharply criticized the conceptual sketches.[7]

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Comments or suggestions for amicus participation should be directed to AAI Vice President and General Counsel Richard Brunell, rbrunell@antitrustinstitute.org, 202-600-9640. For more information about AAI's Private Enforcement Conference, go to http://www.antitrustinstitute.org.

[7] *See* LCJ Comment at 1, *supra* note 3 (sketches "seem aimed at enshrining into the Federal Rules of Civil Procedure (FRCP) several inventions that have enabled the metamorphosis of class actions into the form they have taken today.").