The American Antitrust Institute

Class Action Issues Update
November 2015

As part of our efforts to promote the vitality of private enforcement and preserve antitrust class actions in particular, the American Antitrust Institute (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 July 2015 update. Many of these timely 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 D.C., and will feature a panel on *Developments on Class Certification in the Antitrust Context*.

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. *Tyson Foods Inc. v. Bouaphakeo*, 765 F.3d 791 (8th Cir. 2014), *cert. granted*, 135 S.Ct. 2806 (U.S. June 8, 2015) (No. 14-1146). AAI has been actively involved in this issue.[1] Although *Tyson Foods* is a Fair Labor Standards Act case, the issue is important to antitrust class actions because, for instance, statistical models used to show common injury for class certification in cartel cases often predict that some class members may avoid paying overcharges. Oral argument is scheduled for November 10, 2015. The Solicitor General filed a brief in support of plaintiffs and will participate in oral argument.

The Supreme Court may not actually reach the question because, from the briefs, it is not clear that it is squarely raised. Tyson objects to what it describes as a "single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." However, plaintiffs reject this characterization, noting that "the judgment does not award damages to, or on account of, uninjured people. The jury was instructed not to award damages to uninjured class members and had the evidence needed to avoid doing so."

The Solicitor General suggests that the Court dismiss certiorari on this issue as improvidently granted because Tyson concedes that a class *can* be certified with uninjured members as long as there is some mechanism, prior to judgment, to ensure that uninjured class members do not contribute to the size of the damage award and cannot recover damages (in effect, Tyson argues for a rigorous ascertainability requirement, *see* below).

[1] *See* AAI's successful amicus brief in *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

Tyson Foods also raises the question of whether class-wide liability and damages can be determined by statistical techniques based on averages. And as with uninjured class members, the Court may not address this issue in any general way because plaintiffs have adopted a narrow argument. Plaintiffs maintain that representative proof is permitted because the employer failed to keep the time records required by the Fair Labor Standards Act that would have allowed individualized assessment.

II. Offers of Judgment and Mootness

The Supreme Court is considering whether defendants can defeat class actions by "picking off" the proposed class representatives with an offer of "complete relief" for the representatives' individual claims, even when the offer to settle is rejected. *Campbell-Ewald Co. v. Gomez*, 768 F.3d 861 (2014), *cert. granted*, 135 S. Ct. 2311 (U.S. May 18, 2015) (No. 14-857). This tactic, if permitted, could pose particular risks to small-dollar indirect purchaser class actions. The Court heard oral argument on October 14, 2015. The Solicitor General filed a brief in support of plaintiffs and participated in oral argument.

Campbell-Ewald addresses an issue left open in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), in which a sharply divided Court effectively held that the mootness of a class representative's claim prior to certification precluded a class action. The majority in *Genesis Healthcare* did not reach the question of whether an unaccepted Rule 68 offer mooted the class representative's claim itself, while the four liberal dissenting Justices took the position that such an unaccepted offer was a legal nullity. Given the division in *Genesis Healthcare*, it came as no surprise that the Court appeared sharply divided at oral argument as to whether and how an unaccepted offer of complete relief might moot the individual class representative's claim.

It would not be surprising if the Court concluded that an unaccepted Rule 68 offer alone did *not* moot the class representative's claim.[2] However, there seemed to be some support for the proposition that "complete relief" embodied in a tender and entry of judgment for the plaintiff (over the plaintiff's objection and without preclusive effect) was permissible and would moot or terminate the plaintiff's claim. Whether "complete relief" would have to take into account the class representative's continued interest in a success fee, or in sharing fees and expenses with other class members, remains to be seen.

III. Ascertainability

Some courts have adopted a rigorous "ascertainability" requirement as a precondition for class certification, demanding not only that the class definition be based on objective criteria, but also that an "administratively feasible" method must exist for identifying individual class members and ascertaining their class membership. Recent cases applying a heightened ascertainability requirement include *In re Processed Egg Products Antitrust Litig.*, 2015 WL 5544524 (E.D. Pa. Sep. 18, 2015) (rejecting use of affidavits from consumers), and *Brecher v. Republic of Argentina*, 2015 WL 5438797 (2d Cir. Sep. 16, 2015) (clarifying that "touchstone of ascertainability is whether the class is sufficiently

[2] Every Court of Appeals to consider the question has now adopted this position.

definite so that it is administratively feasible for the court to determine whether a particular individual is a member") (internal quotation marks omitted).

A unanimous panel of the Seventh Circuit recently rejected any heightened requirement of ascertainability in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015). The court expressly rejected the Third Circuit's restrictive approach in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), finding the Third Circuit's policy reasons for requiring more than affidavits from putative class members to be unpersuasive. Importantly, the Seventh Circuit stated "By focusing on making absolutely certain that compensation is distributed only to those individuals who were actually harmed, the heightened ascertainability requirement has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing." *Mullins*, 795 F.3d at 668 (internal quotation marks omitted).

The defendant has filed a petition for certiorari based on a conflict in the circuits. *Direct Digital, LLC v. Mullins*, 15-549 (docketed Oct. 29, 2015), 2015 WL 6549672.

IV. Cy Pres

The Ninth Circuit is hearing two appeals involving cy pres awards. Objectors argue that the cy pres awards are inappropriate under the ALI Principles because they claim it would have been feasible to return some (or more) funds to members of very large consumer classes. *See Gaos v. Google, Inc.*, No. 15-15858 (9th Cir.) (docketed Apr. 28, 2015); *Fraley v. Facebook, Inc.*, No. 13-16819 (9th Cir.) (argued Sep. 17, 2015).

The *Google* case involves an $8.5 million settlement of a privacy claim related to search queries where all of the funds were approved to go to cy pres recipients for Internet privacy protection projects, rather than to any of the more than 100 million class members. The objectors argue that a claims process was feasible because only a negligible number of class members would likely submit claims. They also challenge the choice of cy pres recipients because of the affiliation of plaintiffs' lawyers and Google with the recipients' institutions.

The *Facebook* case involves a $20 million settlement of a privacy claim related to "sponsored stories" where the class exceeded 150 million members. A claims process was used, at the urging of the district court, which will result in a distribution of $15 to each claimant, with the remainder going to cy pres. Nonetheless, the objectors argue that the balance should be returned to claimants.

V. Class-Action Waivers

The Supreme Court heard oral argument on October 6, 2015, in *DirecTV v. Imburgia*, 135 S. Ct. 1547 (No. 14-462). The case 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. During oral argument some Justices expressed frustration with the California courts' engaging in what the Justices described as a "run around" of Court decisions, but other Justices questioned the power of the Court to rule on a point of state contract interpretation.

On October 7, 2015, the Consumer Financial Protection Bureau announced that it would initiate a formal rulemaking process to regulate arbitration agreements in consumer finance products. Companies could still have an arbitration clause, but they would have to say explicitly that it does not apply to cases brought on behalf of a class unless and until class certification is denied by the court, or the class claims are dismissed in court.

VI. Proposed Legislation

H.R. 1927, the "Fairness in Class Action Litigation Act," was passed out of committee on June 24, 2015, and is awaiting a floor vote. 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," that each person in a class has suffered "the same type and scope of injury." A comparable Senate bill has yet to be introduced.

VII. Advisory Committee on Civil Rules

The Rule 23 subcommittee of the Advisory Committee on Civil Rules has revised and refined its work on possible class action amendments, which it anticipates publishing in draft form in August 2016. The subcommittee's agenda book for the meeting of the Advisory Committee, scheduled for November 5-6, 2015, indicates that the subcommittee has narrowed potential amendments to six issues: (1) "frontloading,"[3] (2) excluding preliminary approvals of class certification from immediate appeal, (3) clarifying the trigger for the opt-out period, (4) notice to unnamed class members, (5) handling objections to proposed settlements, and (6) criteria for settlement class certification.

The subcommittee put two issues on hold (ascertainability and Rule 68 "pick off" offers), and recommended removing two other issues (cy pres and issue classes). With regard to Chief Justice Roberts' concern about the manner in which cy pres issues have been handled in some cases, the subcommittee noted that the ALI addressed these issues in § 3.07 of its Principles of Aggregate Litigation, and that the courts are increasingly referring to the ALI formulation in addressing these issues. The subcommittee "concluded that a rule amendment would not be likely to improve the handling of these issues, and that it could raise the risk of undesirable side effects."

VIII. Foreign Developments

The U.K. Consumer Rights Act 2015, which amended the Competition Act 1998 to establish "opt out" collective proceedings in competition cases, went into force on October 1, 2015. The opt-out provision applies only to UK domiciled claimants; however, non-UK domiciled claimants may opt in to such actions. Whether the law will attract antitrust class action activity in the UK remains to be seen. 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

[3] This refers to requiring that certain key information is provided to the judge asked to approve class action settlements.

permitted. Activity under the new law initially may be limited because of transitional rules involving the statute of limitations.

To register for AAI's Private Enforcement Conference, visit the AAI website here. Comments or suggestions for amicus participation should be directed to AAI Vice President and General Counsel Richard Brunell at rbrunell@antitrustinstitute.org or 202-600-9640.