The American Antitrust Institute

# Class Action Issues Update
# March 2016

As part of its efforts to promote the vitality of private enforcement in general and to 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 November 2015 update, which is available at http://www.antitrustinstitute.org/content/class-action-issues-update-november-2015. Many of these issues were considered at AAI's 9th Annual Private Enforcement Conference, the audio and materials from which are available at http://www.antitrustinstitute.org/2015PEconference. Be sure to mark your calendars for AAI's 10th Annual Private Enforcement Conference, which will be held on November 10, 2016 at the National Press Club in Washington, DC.

## I. Classes That Include Some Members Who Are Not Injured

The Supreme Court heard oral argument in *Tyson Foods Inc. v. Bouaphakeo*, No. 14-1146 (Nov. 10, 2015), an appeal of the jury verdict in favor of a group of plaintiffs in a Fair Labor Standards Act case. The petitioner (Tyson Foods) challenged a grant of class certification on the ground that liability and damages were determined on the basis of statistical evidence that purportedly masked substantial differences among class members and that the class improperly contained hundreds of members who were, it was argued, not injured. At oral argument, several Justices seemed disinclined to address the question of uninjured class members because, *inter alia*, the record did not necessarily establish that there were, in fact, uninjured class members, and in any event, the allocation of damages to individual class members after trial could be taken up on remand and there was nothing unusual about certifying a class that may turn out to include uninjured members. As for statistical evidence and the use of averages, it seems likely that the Court will rest its decision not on any general principles under Rule 23, but on the requirements of the Fair Labor Standards Act and the rule of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which allows for reasonable representative proof of damages when the employer fails, as it did in this case, to keep requisite time records (perhaps extending *Mt. Clemens* to proof of injury as well as damages). The questioning was much more sharply directed at petitioner's counsel and was deeply mired in the facts of the case and the reasonableness of the averaging technique followed by plaintiffs' expert.

There has been much speculation about the potential impact of *Tyson Foods* on antitrust class actions, particularly given that the Court was holding a certiorari petition raising arguably similar issues in a price-fixing case, *Dow Chemical Co. v. Industrial Polymers, Inc.*, 2015 WL 1043612 (No. 14-1091) (filed

Mar. 9, 2015).[1] As the business press has noted, following Justice Scalia's death Dow Chemical announced that it reached a settlement, mooting its petition for certiorari. In a press release, the company explained, "Growing political uncertainties due to recent events within the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class action suits have changed Dow's risk assessment of the situation."[2] Dow Chemical was represented in the Supreme Court by Carter Phillips, who also argued for the petitioner in *Tyson Foods*.

## II. Offers of Judgment and Mootness

In an opinion written by Justice Ginsburg for the four liberal Justices and Justice Kennedy, the Supreme Court held in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), that a defendant could not moot a class action merely be offering to satisfy the class representative's individual claim. Adopting the reasoning of Justice Kagan's dissent in *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Court held that an unaccepted offer (whether in the form of a Rule 68 offer or otherwise) was a legal nullity. Justice Thomas concurred in the judgment under the theory that a common law "tender" required more than a mere offer. However, the Court expressly did not decide "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." Justice Thomas and the three dissenters (Roberts, Alito, and Scalia) clearly would hold that this form of pick-off maneuver would moot the individual plaintiff's claim, and the dissenters would not require that judgment be entered or that the defendant admit liability. Besides leaving open whether and how a payment would moot the class representative's claim, it remains to be seen whether "complete relief" would have to take into account the class representative's continued interest in a success fee, attorney's fees and costs (or sharing fees and expenses with other class members), and injunctive relief as to the class representative and the class.[3]

Following *Gomez*, a federal district court judge denied a request by the defendants in a proposed class action to deposit funds with the clerk of court under Rule 67 in an amount sufficient to satisfy the named plaintiffs' individual claims.[4] Judge Feuerstein denied the request as inappropriate under

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[1] *Dow Chemical* involved a $1.2 billion jury verdict (after trebling) obtained by a class of direct polyurethane purchasers represented by, *inter alios*, AAI Board Member Roberta Liebenberg and Advisory Board Member Joe Goldberg. Dow Chemical sought review principally on a theory that class-wide harm cannot be established by an increase in baseline prices when "prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges." The Tenth Circuit had held that the district court did not abuse its discretion in finding that common issues predominated even if there were some individual issues as to negotiated prices.

[2] *Dow Announces Settlement in Urethanes Class Action Litigation*, http://www.dow.com/en-us/news/(Feb. 26, 2016).

[3] In *Gomez*, the defendant proposed a stipulated injunction in which it agreed not to send text messages that violated the law, but denied liability and disclaimed the existence of grounds for the imposition of the injunction.

[4] *Brady v. Basic Research L.L.C.*, No. 2:13-cv-7169, 2016 WL 462916 (E.D.N.Y. Feb. 3, 2016). Plaintiffs argued that defendants' gambit did not provide complete relief because, *inter alia*, it did not admit liability and failed to address plaintiffs' claims for injunctive relief.

the Rule and inconsistent with *Gomez*'s admonition that "a would-be class representative with a live claim must be accorded a fair opportunity to show that certification is warranted."

## III. Ascertainability

Whether Rule 23 contains a heightened ascertainability requirement that bars reliance on customer affidavits to establish class membership continues to attract attention and litigation. The Supreme Court (post-Scalia) denied certiorari in *Mullins v. Direct Digital,* 795 F.3d 654 (7th Cir. 2015) (No. 15-549), which rejected the Third Circuit's restrictive approach to ascertainability in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). A similar certiorari petition remains pending in *Rikos v. The Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015) (No. 15-835), in which the Sixth Circuit also rejected *Carrera*'s heightened ascertainability requirement, albeit in a case in which the Sixth Circuit believed that most sales were made online and so class membership could be determined without relying solely on customer affidavits. NYU law professor Sam Issacharoff, on behalf of the plaintiffs in both *Direct Digital* and *Proctor & Gamble*, wrote in opposition to Direct Digital's petition, "[w]hat Petitioner presents as a circuit split on an issue of law in reality boils down to a nascent difference in case management approaches." Brief in Opposition, *Direct Digital LLC v. Mullins*, No. 15-549, 2015 WL 9488470, *3 (Dec. 29, 2015).

## IV. Cy Pres

A divided Ninth Circuit panel recently affirmed the district court's approval of the class action settlement in *Fraley v. Facebook*, which involves a $20 million settlement of a privacy claim related to "sponsored stories" where the class exceeded 150 million members. The settlement provided for an award of $15 for each of the 600,000 class members that submitted claims, with the balance after fees and expenses going to cy pres. In an unpublished opinion, the Ninth Circuit said that the cy pres award was reasonable "as long as an appropriate nexus existed between the issues underlying the case and the cy pres recipients," which was evident because the "recipient organizations focus on consumer protection, research, education regarding online privacy, the safe use of social media, and protection of minors—the very issues raised in plaintiffs' complaint." 2006 WL 145984, *1 (9th Cir. Jan. 6, 2016). A further distribution to claimants was not required "in light of the minimal (if any) harm suffered by the plaintiffs." In dissent, Judge Bea would allow cy pres only if the district court finds that it is "infeasible to distribute the money directly, such as when identifying the members of the class is exceedingly difficult or costly," or that "funds are left over after a distribution has been made, and the per-class-member amount remaining is so small as to make a pro rata distribution of funds uneconomical." According to Bea, neither condition holds true in this case, and the amount awarded to claimants should have been increased so that it would be expected to exhaust the net settlement fund.

The appeal of the settlement in *Gaos v. Google, Inc.,* No. 15-15858 (9th Cir.) (appeal docketed Apr. 28, 2015), also discussed in the November update, is fully briefed and waiting for oral argument.

## V. Appealablity of Certification Denials

The Supreme Court has granted certiorari 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." *Microsoft Corp. v. Baker*, 2016 WL 205947 (Jan. 15, 2016) (No. 15-457). The issue arises from a case in which the district court struck class certification allegations on comity grounds (in deference to the denial of certification in another case involving the same allegations), and the Ninth Circuit denied interlocutory review of the order under Rule 23(f). Thereafter, the named plaintiffs voluntarily dismissed their individual claims and appealed the class certification decision as a final order; the Ninth Circuit allowed that appeal and held that, due to an intervening change in the law, the district court should not have dismissed the class action demand on comity grounds. *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015). Contending that the circuit courts are split 5 to 2 against allowing the "dismissal tactic" to obtain appellate review of certification denials, Microsoft argues in its petition for certiorari that the tactic is inconsistent with *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, and with Fed. R. Civ. P. 23(f), which provides for discretionary review of class certification orders. Respondents argue that the "dismissal tactic" is a common and perfectly lawful practice whereby plaintiffs voluntarily dismiss remaining claims in order to obtain an appealable final judgment.

## VI. Class Action Waivers

In December, the Supreme Court decided *DirecTV v. Imburgia*, 136 S. Ct. 463 (2015). The Court held that the California Court of Appeal erred in not enforcing a consumer arbitration agreement where the agreement expressly incorporated state law that would have barred enforcement at the time of the contract but which was subsequently held preempted in *AT & T Mobility LLC v. Concepcion*. The Court reasoned that interpreting "state law" to include subsequently invalidated laws discriminated against arbitration agreements. Justice Thomas dissented, restating his long-held position that the Federal Arbitration Act does not apply to state courts. Justice Ginsburg, joined by Justice Sotomayor, also dissented, lamenting that the "Court has again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts." Based on *DirecTV*, the Court (post-Scalia) granted certiorari, vacated, and remanded in a case in which the Supreme Court of Appeals of West Virginia refused to enforce an arbitration clause challenged as unconscionable where the agreement delegated issues of "arbitrability" to the arbitrator. *Schumacher Homes of Circleville, Inc. v. Spencer Eyeglasses*, 774 S.E.2d 1 (W. Va. 2015).

## VII. Proposed Legislation

The "Fairness in Class Action Litigation Act," H.R. 1927, merged with H.R. 526, the "Furthering Asbestos Claim Transparency Act." The new bill passed the House on January 8 by a vote of 211-188. It is now titled "Fairness in Class Action Litigation and Furthering Asbestos Claim

Transparency Act of 2016," though some are referring to it as the "Frankenbill." The bill now goes to the Senate for consideration. 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." GovTrack estimates a 21% chance the bill will be enacted. *See* https://www.govtrack.us/congress/bills/114/hr1927.

## VIII. Advisory Committee on Civil Rules

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules has further refined the topics for possible amendments to include: (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).

The Subcommittee is expected to make a final proposed amendment available to the Advisory Committee in April. If the Advisory Committee approves the draft amendment, it would be sent to the Standing Committee for its review and approval, followed by an official notice and public comment period on the draft rule.

**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. Thanks to AAI Research Fellow Art Durst for help in preparing this update.**