AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
April 2018

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.[1] 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 our Fall 2017 update.

I. Proposed Legislation

In our Spring 2017 update, we provided a detailed review of the Fairness in Class Action Litigation Act of 2017, H.R. 985, which passed the House in a floor vote, 220-201. AAI believes the bill would likely eviscerate consumer, antitrust, employment, and civil rights class actions. There has been no further action since the bill was received in the Senate and referred to the Senate Judiciary Committee on March 13, 2017. If it is not signed into law before the expiration of the current congressional term on January 3, 2019, it would have to be reintroduced in the 116th Congress and pass both houses to become law. Govtrack currently predicts that the bill has a 36% chance of being enacted.

II. Offers of Judgment and Mootness

In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Supreme Court 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. In several previous updates, we have tracked the lower courts' treatment of this hypothetical. Our Fall 2016 update noted that the Third, Sixth, and Ninth Circuits had held that named class plaintiffs may continue to seek class certification even if they no longer have a justiciable claim for individual relief. Our Fall 2017 update noted that the Seventh Circuit in *Fulton Dental LLC v. Bisco Inc.*, 860 F.3d 541 (7th Cir. 2017), in an opinion by Chief Judge Wood, went so far as to hold that a deposit of funds into the court registry does not moot a plaintiff's *individual* claim, let alone its class claim, based on principles of contract law.

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[1] The American Antitrust Institute is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information see www.antitrustinstitute.org. Comments on this update or suggestions for AAI amicus participation should be directed to Richard Brunell, rbrunell@antitrustinstitute.org, (202) 600-9640, or Randy Stutz, rstutz@antitrustinstitute.org, (202) 905-5420.

The Second Circuit, in *Leyse v. Lifetime Entertainment Services, LLC*, 679 Fed. Appx. 44 (2d. Cir. 2017), had held that a district court could enter judgment in favor of a class representative notwithstanding the plaintiff's refusal to accept a settlement offer tendered in the amount of its claim, although the court recognized that such a dismissal would not moot the entire case. With respect to the validity of the dismissal, the court cited Second Circuit precedent, including *Tanasi v. New All. Bank*, 786 F.3d 195 (2d Cir. 2015), and reasoned that the *Campbell-Ewald* hypothetical expressly left open this scenario. But in our Fall 2017 update, we noted that the Second Circuit subsequently reversed course, apparently creating an intra-circuit split on the validity of such dismissals. In *Radha Geismann v. ZocDoc*, 850 F.3d 507 (2nd Cir. 2017), on facts similar to *Leyse*, the court relied on *Campbell-Ewald*'s treatment of an unaccepted settlement offer as a legal nullity, which led it to hold that the district court's entry of judgment was a "precluded dismissal" that "should not have been entered in the first place." The court, without citing or referencing *Leyse*, interpreted *Tanasi* as "declining to address" the proposition for which *Leyse* believed *Tanasi* stood.

Radha Geismann has since been remanded, and the district court judge, the Hon. Louis L. Stanton, proceeded to work with the defendants in a pre-motion conference to "perfect the *Campbell-Ewald* hypothetical." After the pre-motion conference, the defendant sought permission to deposit the full amount owed (and to voluntarily consent to injunctive relief) and file a motion for summary judgment requesting that the court enter judgment, which the defendant believed the court would be permitted to grant under *Leyse* and then dismiss the claims with prejudice. Judge Stanton granted the defendant's request. Since our Fall 2017 update, this remand decision has been appealed and briefed in the Second Circuit. Oral argument is scheduled for May 14, 2018 (No. 17-2692).

As of this writing, no circuit court has held that the *Campbell-Ewald* hypothetical moots a plaintiff's class claim.

III. Ascertainability

There remains an 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. The tide of decisions has moved against such a requirement, with each of the last five circuit courts to consider a heightened ascertainability requirement having ruled against it. The Second, Sixth, Seventh, Eighth, and Ninth Circuits now reject an administrative feasibility prerequisite, while the First and Third Circuits (and to a lesser extent, the Eleventh Circuit[2]) have embraced some form of a heightened ascertainability requirement. The Fifth, Tenth, and D.C. Circuits have not yet explicitly addressed the issue.

In our Fall 2017 update, we noted that the Supreme Court refused to enter the fray, declining ConAgra's petition for certiorari in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) (No. 16-1221). The Court had previously declined cert. petitions in *Mullins v. Direct Digital,* 795 F.3d 654 (7th Cir. 2015) (No. 15-549), and *Rikos v. The Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015) (No.

[2] The Eleventh Circuit adopted an administrative feasibility requirement in an unpublished opinion, *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed.Appx. 945, 947 (11th Cir. 2015).

15-835), but *Briseno* marked the first time it had done so since Justice Gorsuch ascended to the bench.

In November 2017, the losing defendants in *In re Petrobras Securities*, 862 F.3d 250, 265 (2d. Cir. 2017), where the Second Circuit first aligned itself with the Sixth, Seventh, Eighth, and Ninth Circuits, petitioned the Court for certiorari on the ascertainability question. However, on January 3, 2018, the parties reached a $2.95 billion settlement in the case and proceeded to file a joint motion asking the Court to defer consideration of the petition pending the district court's decision whether to approve the settlement. On January 16, 2018, the joint motion was granted.

In December 2017, after a district court had denied class certification on a combination of ascertainability, commonality, and predominance grounds, the Third Circuit in *Luppino v. Mercedes Benz USA*, 2017 WL 6015698 (3d Cir. 2017), affirmed on the basis of commonality and predominance, without discussing the district court's ascertainability analysis.

IV. Predominance in Nationwide Settlement Classes Involving Varying State Laws

In a class action filed in California by vehicle purchasers alleging that car manufacturers falsely advertised the fuel efficiency of their vehicles' engines, the Ninth Circuit in *In re Hyundai and Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018), recently vacated a district court's certification of a nationwide settlement class on grounds that variations in state law might defeat predominance.

After settlement objectors appealed the district court's certification order, a divided panel held that the district court erred by failing to apply California's choice-of-law rules, failing to address evidence that the laws in various states were materially different, and failing to rule on whether material differences in various state laws defeated predominance. Notably, the majority determined that it is incumbent upon a district court to examine for itself the forum state's choice-of-law rules to determine whether the forum state's laws or the laws of multiple states apply to the claims. Moreover, because the choice-of-law question implicates satisfaction of the predominance requirement under Rule 23, the majority believed the plaintiff bore the burden "of demonstrating through evidentiary proof that the laws of the affected states do not vary in material ways" so as to preclude a finding of commonality.

The dissent sharply criticized the majority for applying a "newly invented standard" that significantly burdens overloaded district courts, creates a circuit split, and runs afoul of the *Erie* doctrine. Among other things, the dissent argued that the majority erred by placing the burden "on the district court or class counsel to extensively canvass every state's laws and determine that none other than California apply," particularly where, under California's choice-of-law rules, California law applies unless a foreign law *proponent* carries the burden of showing otherwise. The dissent saw no basis in Rule 23 to shift the choice-of-law burden from objectors, who were the proponents of applying foreign state law, to class counsel, or to require class counsel to prove a negative. It also believed the burden shift violated the *Erie* doctrine, because *Erie* requires that federal courts sitting in diversity jurisdiction must apply the substantive law of the state in which it sits, and California's choice-of-law rules are substantive law. Finally, the dissent noted that the majority's ruling was at odds with sister

circuits, which place the burden on the objector to prove which law applies. Plaintiffs have filed a petition for rehearing en banc, which has attracted numerous amicus briefs.

In the context of antitrust class actions, the Third Circuit held in 2011 in *Sullivan v. DB Investments*, 667 F.3d 273 (3d Cir. 2011) (en banc), that variations in state *Illinois Brick*-repealer rules do not defeat or create any special burden on plaintiffs to establish commonality and predominance. AAI filed an amicus brief in support of the position adopted by the en banc court.

V. Tolling

In our Fall 2017 update, we noted that the Ninth Circuit in *Resh v. China Agritech*, 857 F.3d 994 (9th Cir. 2017), held that the pendency of an uncertified class action tolls the statute of limitations for subsequent class actions. This extension of the Supreme Court's rule in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), which tolls the statute of limitations for individual claims, enables unnamed class plaintiffs to later bring a separate individual *or class* claim when class certification is denied.

The court recognized that allowing unnamed plaintiffs to later bring class actions as named plaintiffs could lead to successive attempts at certifying a class, but the court was satisfied that its holding would not lead to abusive, repetitive filings, because class counsel on contingency fee arrangements have little incentive to bring such cases, and ordinary principles of preclusion and comity will further reduce those incentives. At the same time, the court reasoned that permitting the tolling of class claims where putative class plaintiffs can satisfy Rule 23 and overcome any comity or preclusion obstacles would advance the policy objectives that led the Supreme Court to permit tolling in the first place.

In December 2017, the Supreme Court granted the defendant's petition for certiorari in *Resh* on the question of "[w]hether the American Pipe rule tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period." Among other things, petitioner argues that permitting the tolling of class claims creates strong incentives for abuse by plaintiffs because the prospect of repetitive claims exacerbates the threat of high discovery costs and extreme liability exposure that already pressure defendants to settle even meritless claims. Petitioner also contends that preclusion will not prevent abusive, repetitive filings because preclusion does not apply to absent class members unless and until a class is certified. Finally, petitioner contends that the comity doctrine would be ineffective because it is too loose and weak.

Respondents counter that petitioner's policy preference for fewer class actions is better addressed to Congress or the process for amending the Federal Rules of Civil Procedure. In any event the Court already considered and unanimously dismissed petitioner's policy concerns in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), as a basis for expanding ordinary res judicata principles in the context of class certification decisions. Moreover, comity is in fact a workable doctrine to adjudicate the kinds of concerns raised by the tolling of class claims, and denying such tolling would lead to inequities.

The Court heard oral argument on March 26, 2018. According to a SCOTUSblog analysis, "most of the justices expressed grave doubts about limiting earlier [tolling] precedents," which suggests that

allowing the tolling of class claims will be deemed permissible. However, several justices did express concern about the prospect of "stacked" class actions when the original such action is dismissed on grounds that it is not suitable for class adjudication.[3]

VI. Specific Personal Jurisdiction

In state court suits where general personal jurisdiction is lacking, plaintiffs must establish specific personal jurisdiction, which requires that the suit arise out of or relate to the defendant's contacts with the forum. In our Fall 2017 update, we noted that the Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), strictly interpreted this requirement under a due process and federalism rationale, thereby preventing a group of non-resident plaintiffs from joining with resident plaintiffs in a California mass action where the defendant had extensive forum contacts but the contacts were not related to the non-resident plaintiffs' claims.

We noted that the upshot of the holding is that defendants who are engaged in nationwide conduct likely cannot be sued by groups of people injured both within and outside the forum State if general jurisdiction is lacking. We also raised the issue, identified in a footnote in Justice Sotomayor's dissent, whether the Court's opinion would be extended to class actions in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, some of whom were injured outside the forum state.

Since our last update, district courts have split on whether to apply *Bristol-Myers* to class actions where general jurisdiction is lacking.[4] Courts that have found it inapplicable to class actions have tended to distinguish class actions based on the unique due process considerations reflected in Rule 23, mindful that these due process considerations reflect Congress's judgment pursuant to an exercise of its constitutional authority. Courts that have found it applicable tend to read *Bristol-Myers* as articulating a general due process principle, without regard to Rule 23. In the lone antitrust class action where a court took up the question, *In re Dental Supplies Antitrust Litig.*, the district court determined that *Bristol-Myers* was "instructive" and found personal jurisdiction lacking for one of the

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[3] Ronald Mann, *Argument analysis: Justices dubious about limiting precedent that tolls statutes of limitations to permit "stacked" class actions*, SCOTUSblog (Mar. 27, 2018).

[4] *Compare Casso's Wellness Store & Gym, L.L.C. v. Spectrum Laboratory Products, Inc.*, 2018 WL 1377608 (E.D. La., Mar. 19, 2018) (distinguishing class actions from mass actions and refusing to extend *Bristol-Myers* to unnamed class plaintiffs); *Jackie Fitzhenry-Russel v. Dr. Pepper Snapple Grp, Inc.*, No. 17-00564, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017) (same); *In Re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-02047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017) (same, noting Congress's Constitutional authority to shape federal court jurisdiction using Rule 23); *Swamy v. Title Source, Inc.*, No. 17-01175, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017) (same) *with Practice Management Support Services, Inc. v. Cirque du Soleil, Inc.*, 2018 WL 1255021 (N.D. Ill., Mar. 12, 2018) ("Bristol-Myers applies with equal force in the class action context"); *Greene v. Mizuho Bank, Ltd.*, 2017 WL 7410565 (N.D. Ill. Dec. 11, 2017) (Court announced a general due process principle); *In re Dental Supplies Antitrust Litig.*, No. 16-696, 2017 WL 4217115 (E.D. N.Y. Sept. 20, 2017) (*Bristol-Myers* is instructive in determining the requisite connection between forum and specific claims); *McDonnell v. Nature's Way Prods. LLC*, No. 16-5011, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017) (same). *See also Sloan v. General Motors LLC*, 2018 WL 784049 (N.D. Cal., Feb. 7, 2018) (exercising pendent personal jurisdiction).

four named defendants that had no purposeful availment or direct activity in the forum state. However, the case was permitted to proceed against the remaining defendants.[5]

VII. Settlements that Include States as Class Members

The Third Circuit recently held in *In re Flonase Antitrust Litig.*, 879 F.3d 61 (3d Cir. 2017), that under the Eleventh Amendment, class action settlements precluding further lawsuits could not be enforced against States that have not waived sovereign immunity. After indirect purchasers of Flonase nasal spray sued SmithKline Beecham (d/b/a GlaxoSmithKline) (GSK) alleging state and federal antitrust violations arising from alleged sham citizen petitioning of the Food and Drug Administration, the parties reached a global settlement, to which the State of Louisiana did not object or opt out. However, a year later, the Louisiana Attorney General sued GSK in state court making allegations similar to the class. GSK moved to enforce the class settlement against the State, and the district court denied GSK's motion. The Third Circuit affirmed.

First, the court held that a motion to enforce a class settlement qualifies as an action "against" a state for Eleventh Amendment purposes because the motion "sought an equitable remedy against a State" insofar as granting relief would enjoin the State from bringing claims released in the class settlement. Second, the State did not waive its immunity simply be receiving a notice of the class settlement provided under the Class Action Fairness Act (CAFA), because "a state cannot waive its immunity merely by receiving notice and failing to act." Consequently, Louisiana's state court suit could proceed. GSK petitioned for en banc review but was denied.

The upshot of the decision is that, when unnamed States are included as members of a settlement class, the States' claims likely cannot be extinguished by enforcing the settlement in federal court. Unless the settlement can be enforced in state court in these circumstances, the decision may make it more difficult for certain class actions to settle, particularly where State claims may be substantial and defendants seek global peace. The parties may have to explore whether affected States are willing to effectively opt into the settlement by explicitly releasing any claims.

VIII. Removal Under CAFA

The Sixth Circuit in *Roberts v. Mars Petcare US, Inc.*, 874 F.3d 953 (6th Cir. 2017), recently held that defendants cannot selectively interpret their dual citizenship to trigger removal under the diversity language in CAFA. Under CAFA, 28 U.S.C. § 1332(d)(2)(a), removal from state to federal court is possible only so long as "any member of a class of plaintiffs is a citizen of a State different from any defendant." Plaintiffs filed a class action on behalf of Tennessee citizens in Tennessee state court and sought to maintain the action there. The defendant was a citizen of both Tennessee and Delaware and invoked its Delaware citizenship in support of removal to federal court under CAFA, arguing that its Tennessee citizenship was not a bar. The Sixth Circuit held that a defendant cannot ignore its principal place of business (in this case Tennessee) to create diversity under CAFA.

[5] *See Chinese-Manufactured Drywall*, 2017 WL 5971622 at *13 (discussing *Dental Supplies*).

The Court believed the plain language of the statute was equally susceptible to both parties' interpretations. However, the statutory and historical context were both instructive. First, two of 1332(d)(2)(a)'s "statutory neighbors" consider corporations to be simultaneous citizens of the state in which they are incorporated and the state that serves as their principal place of business, which informs 1332(d)(2)(a). Second, diversity jurisdiction's historical concern with protecting out-of-state parties from the risk that local fact-finders would favor in-state parties is not implicated where a corporation is subject to suit in the state that serves as its principal place of business.

For the court to rule otherwise, the panel reasoned, CAFA would have to have effectively "granted federal jurisdiction over class actions against two-thirds of all publicly traded companies in the United States as long as the lawsuit is filed outside of Delaware [where public companies are often domiciled for tax and other reasons]." The panel believed such a jurisdictional grant would significantly alter the balance between federal and state courts, and "Congress does not ordinarily hide animals that big in dens so small."

IX. DOJ Advocacy in Private Class Action Settlement Proceedings

In February 2018, in *Cannon v. Ashburn Corp.*, No. 1:16-cv-01452-RMB-AMD (D.N.J. filed Feb. 16, 2018), the Consumer Protection Branch of the Department of Justice (DOJ) appeared in a private class action to file a statement of interest urging the district court to reject the parties' settlement agreement. The statement of interest criticized the settlement for failing to meet Rule 23's fair, reasonable, and adequate standard on grounds that it provided rebate codes of limited value to class members and provided class counsel a fee of $1.7 million, which it claimed was excessive under the circumstances.

Under CAFA, 28 U.S.C. § 1715, class-action defendants are required to notify the Attorney General and state officials of proposed class action settlements. In making its appearance, the DOJ argued that, "While the CAFA notice provision does not grant any specific authority to, or impose any obligation on, federal or state officials, its legislative history shows that Congress intended the notice provision to enable public officials to 'voice concerns if they believe that the class action settlement is not in the best interest of their citizens.'"

The filing marked the first time the DOJ has made such an appearance in more than a decade and only the third time since CAFA was enacted in 2005. The dearth of such filings was recently explained by DOJ Associate Attorney General Rachel Brand during a Federalist Society Luncheon speech. Brand said that, although DOJ receives over 700 CAFA notices every year, it has rarely acted on them because of "an almost comical story of government bureaucracy." Mail addressed to the Attorney General, she explained, "goes through multiple mail rooms, each in a different government building and each requiring weeks of processing and sorting." The mail, she continued, is "then scanned by X-ray machines, which makes any CDs in the package unreadable. And that's just the mailroom process. On average, it would take 70 days from receipt until a [DOJ] lawyer reviewed the [CAFA] notice. Often, they weren't reviewed by a lawyer until after the fairness hearing or even after the settlement had been finalized."

Brand indicated that the DOJ has since begun to fix this process and is now better positioned to review CAFA notices. One week prior to her speech, however, Walmart announced that, after an eight-month tenure as Associate Attorney General, Brand would be leaving DOJ to join the company as an Executive Vice President. It is therefore unclear whether high-ranking DOJ officials will continue to champion close scrutiny of CAFA notices and whether additional interventions may be forthcoming.

X. Class Action Waivers

As we noted in or Spring 2017 and Fall 2017 updates, the Supreme Court granted cert. in *Lewis v. Epic Systems Corporation*, 823 F.3d 1147 (7th Cir. 2016) (No. 16-285), *Morris v. Ernst & Young*, LLP, 834 F.3d 975 (9th Cir. 2016) (No. 16-300), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (No. 16-307), which involve the use of mandatory arbitration provisions containing class action waivers in employment agreements. The NLRB (and some circuits) held that such waivers 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 decision remains pending, and there have been no further developments since the cases were argued in October 2017.

XI. *Cy Pres*

In our Fall 2017 update, we noted that the Ninth Circuit in *Gaos v. Google, Inc.* upheld the parties' $8.5 million settlement of a privacy claim related to Google 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. An objector had argued that a claims process was feasible because only a negligible number of class members would likely submit claims. It also challenged the choice of *cy pres* recipients because of the affiliation of plaintiffs' lawyers and Google with the recipients' institutions. The court flatly rejected the objector's arguments.

In what is now captioned *Frank v. Gaos* (No. 17-961), the losing objector has petitioned for certiorari. On March 28, 2017, the petition was distributed for conference on April 13, 2018.

A similar settlement challenged by the same objector is currently on appeal to the Third Circuit in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, Civ. No. 12-MD-2358 (SLR) (3d Cir. filed Mar. 7, 2017). The case was argued in November 2017, and a decision remains pending.

XII. Advisory Committee on Civil Rules

As we first reported in our Fall 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, proposed amendments to Rule 23 that (1) require that more information be provided to the district court at the time of class notice; (2) clarify that the decision to send notice is not appealable under Rule 23(f); (3) clarify that Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) update Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establish procedures for dealing with class action objectors; (6) refine standards for approval of class settlements; and (7) address a Department of Justice proposal to

include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.

In October 2017, after a review process involving the Advisory Committee on Civil Rules, the Rule 23 Subcommittee to the Advisory Committee, the Standing Committee, and the full Judicial Conference, a package of materials including the rules and relevant excepts from the various committee reports was forwarded to the Supreme Court. If the proposed amendments are approved by the Supreme Court, they will be forwarded to Congress. If approved by Congress, they may become effective as early as December 1, 2018.