

## Class Action Issues Update Fall 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.<sup>1</sup> 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, consumers and workers. This update covers developments since our [Spring 2018](#) update.

### I. Class Actions and the Newest Supreme Court Justice

On October 6, 2018, after a rancorous confirmation process, President Trump’s second U.S. Supreme Court nominee, Brett M. Kavanaugh of the D.C. Circuit Court of Appeals, was sworn in as the 114th justice. Justice Kavanaugh heard his first oral arguments a few days later on October 9, taking the place of retired Justice Anthony Kennedy.

Citing his sparse but conspicuous antitrust record, AAI [opposed](#) Justice Kavanaugh’s nomination on grounds that his opinions and decisions on the D.C. Circuit demonstrate unusual hostility to antitrust plaintiffs, including the expert federal antitrust agencies.

Justice Kavanaugh’s [record](#) in class action cases is similarly sparse but conspicuous. He does not appear to have ever written or joined an opinion addressing class certification. However, in dicta in his dissenting opinion in *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011), he characterized putative class plaintiffs’ efforts to recover excessive taxes levied by the IRS on long distance telephone calls as a cynical gimmick aimed at achieving a “classwide jackpot.” Similarly, in a short opinion affirming dismissal in *Mills v. Giant of Md., LLC*, 508 F.3d 11 (D.C. Cir. 2007), he mocked class-based failure-to-warn tort claims against milk producers brought by lactose-intolerant plaintiffs, stating that “[a] bout of gas or indigestion does not justify a race to the courthouse.” While serving in the Bush White House, Justice Kavanaugh also [oversaw](#) the administration’s tort-reform initiatives, including the initiative that led to the Class Action Fairness Act of 2005 (CAFA).

While no conclusions can be drawn from his dicta, holdings, or previous White House experience, Justice Kavanaugh’s apparent skepticism of class claims, and penchant for [defendant-friendly business](#)

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<sup>1</sup> 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](http://www.antitrustinstitute.org). Comments on this update or suggestions for AAI amicus participation should be directed to Richard Brunell, [rbrunell@antitrustinstitute.org](mailto:rbrunell@antitrustinstitute.org), (202) 600-9640, or Randy Stutz, [rstutz@antitrustinstitute.org](mailto:rstutz@antitrustinstitute.org), (202) 905-5420.

[rulings](#), suggest he probably will vote reliably with conservatives to hamper class actions, much like Justice Kennedy.

## II. The *Illinois Brick* Bar to Consumer Antitrust Class Actions

In June, the Supreme Court granted certiorari in *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017) (No. 17-204), which implicates consumer-plaintiffs' ability to challenge powerful distributors that use an agency business model rather than a wholesale model. The key issue in the case involves the scope of the *Illinois Brick* indirect purchaser rule, which concentrates the full amount of antitrust overcharge damages in the claim by the first purchasers in a supply chain, thus eliminating the need for damages apportionment between the first purchasers and subsequent purchasers while also helping to ensure that at least one category of injured parties has sufficient incentives to bring a treble-damages action and thereby deter future wrongdoing.

A proposed class of consumers who purchased apps from the Apple App Store alleged that Apple monopolized the aftermarket for iPhone apps and charged supracompetitive prices by extracting a 30% "Apple tax" (i.e. commission) on app sales. Apple countered that the consumer-plaintiffs were barred from recovery by *Illinois Brick* because developers individually set app prices and therefore "passed on" any commission-based overcharges *through* Apple to Apple's customers, rendering them "indirect." The district court granted Apple's motion to dismiss, but the Ninth Circuit reversed.

The case, which is now captioned *Apple v. Pepper*, has been briefed by the parties, and AAI submitted an [amicus brief](#) in support of the respondents on October 1, 2018. AAI's brief explains why it is essential that injured customers of a retailer have standing to recover for overcharge damages caused by the retailer's monopolization of the distribution tier of a supply chain. The brief argues that the mere fact that an antitrust violation produces multiple classes of victims—in this case app developers who lose profits because of inflated distribution costs, and consumers who pay overcharges on app purchases—does not trigger *Illinois Brick*'s concern with "pass on." Among other things, the injuries are not duplicative.

If the Court sides with Apple and gives an expansive interpretation to the *Illinois Brick* doctrine, the opinion threatens to eliminate claims by consumers who purchase products from dominant distributors employing an agency business model rather than a wholesale model, notwithstanding that suppliers like the app developers are unlikely to sue.

## III. Class Certification in a World Without *Illinois Brick*

Apart from the merits issues directly before the Court in *Pepper*, the case has also played host to a significant policy debate over the prospect of reforming the indirect purchaser rule. The Department of Justice (DOJ), which has participated as amicus curiae at both the [cert.](#) and [merits](#) stages, first raised eyebrows when its cert. stage brief levelled criticism at the overall litigation scheme that has emerged under *Illinois Brick*, before conceding that the question whether to revisit the 1977 decision was not before the Court. Its merits brief in support of the petitioner repeated the criticism as well as the concession.

However, on October 1, 2018, the attorneys general of Texas and Iowa submitted an [amicus brief](#) in support of respondents on behalf of 29 States arguing that the Court should affirmatively overrule *Illinois Brick*. Among other things, the States’ brief argues that *Illinois Brick* is “grounded in predictions and policy concerns that have been undermined by subsequent experience and events.”

Citing their decades of experience with indirect-purchaser claims, the States make four primary arguments. First, they contend that economic experts in indirect-purchaser cases have shown that they have reliable tools and methodologies to calculate indirect purchaser damages with reasonable precision. Second, courts now reliably apply gatekeeping rules of evidence to determine whether expert proof of indirect-purchaser damages is satisfactory. Third, the threatened risk that, without an indirect-purchaser rule, defendants would face multiple liability for the same overcharge, has never materialized since *Arc America* was decided in 1989. And fourth, to the extent concentrating all overcharge damages in a single claim is intended to promote deterrence by making claims worthwhile, direct purchasers sometimes *lack* incentives to sue, and even small consumer claims can be made worthwhile when aggregated.

AAI’s brief urged the Court to leave to Congress any further changes to the regime that has evolved around *Illinois Brick*. AAI is concerned that, if undertaken without due care, reform to the existing regime threatens to undermine the deterrent value of antitrust treble damages class actions. Judicially overturning *Illinois Brick* likely means overturning *Hanover Shoe* (often described as *Illinois Brick*’s “corollary”) as well, notwithstanding that the States do not propose to do so. Allowing a pass-on defense would make direct-purchaser class actions very difficult to certify under Rule 23 by introducing a host of new challenges involving predominance of common issues (including the ability to prove impact (or injury) on a classwide basis), ascertainability, and damages calculation.

As even the Antitrust Modernization Commission (AMC) recognized in its [2007 Report](#), “the extent of pass-on affects both direct purchasers’ claims and the indirect purchasers’ claims” and “has the potential to prevent *any* class from being certified.” Antitrust Modernization Commission, Report & Recommendations 278 (2007) (emphasis in original). The AMC recommended legislation to “specify that courts should certify direct purchaser classes without regard to whether the injury alleged was passed on by direct purchasers.” *Id.*

Although judicially overturning *Illinois Brick* and *Hanover Shoe* would nominally create a new category of federal indirect purchaser class actions not previously available, we know from experience with indirect purchaser class actions in *Illinois Brick*-repealer States that these would be exceedingly difficult to certify, as the *Asacol* case, discussed below, aptly illustrates. Without a corresponding change to prevent defendants from using pass-on arguments to derail direct-purchaser claims *and* a relaxation of the standards governing class certification in indirect cases, *both* direct and indirect purchaser class actions likely would become very difficult to certify, leading to a significant net reduction in overall deterrence levels.

The *Pepper* case is scheduled for oral argument on November 26, 2018.

#### IV. Classes Containing Members Who Are Not Injured

As discussed in our [Spring 2017](#) and [Fall 2017](#) updates, there is recurring debate in the federal courts over the rules and standards that govern the certification of classes that may contain some class members who were not injured by the defendant's conduct. On October 15, 2018, the First Circuit in *In re Asacol Antitrust Litig.*, No. 18-1065, 2018 WL 4958856 (1st Cir. Oct. 15, 2018), held that where there is no classwide method to sort among injured and uninjured class members, and thus "any class member may be uninjured," individual questions may predominate absent un rebutted evidence of individual injury that renders the class sufficiently manageable.

The case involved a product hopping claim by indirect purchasers of the drug Asacol, which is used to treat ulcerative colitis. Shortly before its patent on Asacol was set to expire, drug manufacturer Warner Chilcott pulled Asacol from the market and replaced it with two similar drugs that still enjoyed patent protection, thereby delaying generic entry. Plaintiffs intended to prove classwide impact using statistical representative evidence, citing the Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016), and it proposed to weed out uninjured class members through the claims administration process, in accordance with *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015). The experts on both sides agreed that approximately 10 percent of customers ("brand loyalists") would not have switched to a generic and therefore were not injured by the product hop.

In reversing the district court's class certification order, the First Circuit distinguished *Tyson Foods* and narrowly cabined *Nexium*. The court emphasized that, in *Tyson Foods*, controlling substantive law rendered the proffered representative evidence admissible and sufficient. Here, however, there was no controlling substantive law, and the court did not believe plaintiffs' representative evidence showing that 90 percent of class members were injured was "admissible and sufficient to prove that any given individual class member was injured."

The court interpreted *Nexium* as holding that the use of *unrebutted* affidavits would suffice for purposes of segregating injured and uninjured class members. Here, however, *Nexium* did not apply because the defendants "stated their intention to challenge any affidavits that might be gathered," and thus the proffered evidence was not "unrebutted."

Although the court conceded that plaintiffs' total aggregate damages award apparently would net out all purchases by brand loyalists as a group, that fact did not save plaintiffs because this was not a case where "the total damage caused by the defendant is independent of the number and identity of people harmed." Here, rather, "the aggregate damage amount is the sum of damages suffered by a number of individuals, such that proving that the defendant is not liable to a particular individual because that individual suffered no injury reduces the amount of the possible total damage."

In a concurring opinion, Judge Barron further explicated the factors distinguishing the claims-culling process in *Nexium* from the process suggested here, noting that the *Nexium* plaintiffs provided a mechanism to establish individual injury at the liability stage, whereas here culling would have occurred post-judgment. He also noted that plaintiffs could still satisfy the predominance requirement by proving injury using affidavits where defendants make only a speculative case that they would be able

to effectively contest an affiant's representation, or where the subset of class plaintiffs that would actually need to rely on individualized testimony is small.

The upshot of the decision is that class plaintiffs in the First Circuit likely cannot certify a class if (1) they cannot separate injured from uninjured class members using a common method (or show that the number of uninjured members is small), and (2) the total amount of damages varies based upon the number of class members involved.

The movement by courts to make it difficult to certify classes containing uninjured members, to which *Nexium* had served as a counterweight, elucidates the problem posed in the previous section. If a defendant could assert that "pass-on" in a direct-purchaser case, or the lack thereof in an indirect-purchaser case, results in either individualized issues pertaining to the demonstration of impact or the inclusion of uninjured members in the class, it may be very difficult to certify a large swath of *both* kinds of classes.

## V. Class Action Waivers in Mandatory Arbitration Clauses

In May, the Supreme Court handed down its much-anticipated decisions in three consolidated cases involving the use of mandatory arbitration provisions containing class action waivers in employment agreements, *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). The National Labor Relations Board (NLRB) and some circuits had held that such waivers are illegal under the National Labor Relations Act (NLRA) and captured by a saving clause included in the Federal Arbitration Act (FAA), which makes arbitration provisions valid "save upon such grounds as exist at law or in equity for the revocation of any contract."

The Court split 5-4 along ideological lines, with the conservative majority further expanding its maximalist interpretation of the FAA's reach. In an opinion by Justice Gorsuch, the Court held that an arbitration clause's bar on collective action to bring suit does not conflict with the NLRA. The Court characterized the employees' argument that the NLRA was a ground that exists at law for the revocation of their arbitration agreements as a defense that "interferes with the fundamental attributes of arbitration," citing *Kindred Nursing Centers v. Clark* (discussed in our [Fall 2017](#) update), rather than a "generally applicable contract defense[], such as fraud, duress, or unconscionability." Although the Court acknowledged that illegality under federal statutory law may be a generally applicable contract defense, it characterized the plaintiffs' argument as an attack solely on the bilateral nature of arbitration, which was prohibited by the Court's holding in *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 (2011).

Justice Thomas, concurring, would have also rejected the employees' defense on grounds that illegality is a public policy defense, whereas the FAA saving clause applies only to grounds for revocation that concern the formation of the contract.

The dissent, authored by Justice Ginsburg, believed the majority was "egregiously wrong" and chastised it for "subordinat[ing] employee-protective labor legislation to the Arbitration Act." It argued that Congress clearly intended for the NLRA "to protect the right of workers to act together to better their working conditions," and "[t]here can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot." The dissenting justices likened

the Court's treatment of the essentially unbargained-for class action waivers to sanctioning *Lochner*-era "yellow dog" contracts, whereby employers would condition employment on agreements to forego an array of federal labor protections. They warned that Congressional correction of the majority's ruling "is urgently in order."

The decision marks the first Supreme Court class-action opinion rendered by Justice Gorsuch, who while in private practice [represented](#) an antitrust plaintiff in seminal moist snuff tobacco litigation that laid the groundwork for several successful consumer class actions. The opinion's elevation of the FAA's values over and above other values embodied in federal statutory law, and its expansive reading of *Concepcion*, arguably eliminate any [doubt](#) that he will be a reliable conservative vote to preserve and expand existing roadblocks to class actions.

Apart from the saving clause at issue in *Epic Systems*, the FAA, by its terms, does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court is independently considering the scope of this exclusion in *New Prime, Inc. v. Oliveira*, No. 17-340 (cert. granted Feb. 26, 2018). The petitioner argues that independent contractor agreements are not within the exclusion, because it applies only to formal employer-employee relationships. The respondent argues that, when the FAA was passed, "contracts of employment" were understood to refer to any agreement to perform work.

At oral argument on October 3, 2018, Chief Justice Roberts and Justice Gorsuch both signaled that they lean toward siding with the independent contractor in this case, as did Justices Ginsburg and Sotomayor. A SCOTUSblog [analysis](#) suggests that the worker-plaintiff is very likely to win, and that the case could be one of the earliest decisions in the new term. If the worker-plaintiff prevails, *Epic Systems* apparently would not bar transportation workers in interstate commerce from challenging class-action waivers embedded in arbitration agreements, but it remains to be seen how the Court might rule on the validity of such waivers as a matter of contract law where the FAA does not apply.

The Court is also considering, in *Lamps Plus, Inc. v. Varela*, No. 17-988 (cert. granted Apr. 30, 2018), the question of whether class arbitration is available when an arbitration clause is ambiguous as to the availability of class proceedings. In *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010), the Supreme Court held that it is inconsistent with the FAA to impose class arbitration on parties to an arbitration agreement who have not agreed to authorize class proceedings. Here, however, the Ninth Circuit held that the arbitration agreement was ambiguous as to whether the parties authorized class arbitration, and it reasoned that the ambiguity should be resolved against the defendant drafter of the agreement, and that classwide arbitration was therefore available.

The case has been briefed, and oral argument was held on October 29, 2018. According to a SCOTUSblog [analysis](#) of the argument, the Court appears divided. The liberal justices focused on the role of State law in resolving contract ambiguities, with no apparent exceptions for class actions, and the difference between state law interpretations of ambiguous contracts versus state law that discriminates against arbitration agreements. The conservative justices focused on their recent precedent, such as *Stolt Nielsen*, *Concepcion*, and *Epic Systems*, which has emphasized that class and individual arbitration are fundamentally different. They appeared to question whether state

interpretations of contract law can ever be neutral when such interpretations conclude that ambiguous language in arbitration clauses permits class arbitration.

## VI. *Cy Pres*

In April, the Supreme Court granted cert. in *Gaos v. Google, Inc.*, a case we began following in our [Fall 2015](#) update. The Ninth Circuit 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. Objectors had argued that a claims process was feasible because only a negligible number of class members would likely submit claims. They also challenged the choice of *cy pres* recipients because of the affiliation of plaintiffs' lawyers and Google with the recipients' institutions. The Ninth Circuit flatly rejected the objectors' argument on the appropriateness of an all-*cy pres* award, although a dissenting judge would have required greater scrutiny of the alleged conflict of interest.

In what is now captioned *Frank v. Gaos* (No. 17-961), the question presented on cert. is "Whether a class-action settlement that provides no direct relief to unnamed class members, but instead distributes settlement funds to non-parties on a *cy pres* theory, is 'fair, reasonable, and adequate' under Federal Rule of Civil Procedure 23(e)(2)."

In its opening merits brief, the petitioner-objectors argue that *cy pres* tempts class counsel to breach their fiduciary duty to class members by diverting property interests generated by class members' claims to undeserving third-party charities. They also contend that *cy pres* "incentivizes meritless class actions" and can infringe upon the First Amendment rights of absent class members by requiring them to subsidize organizations they may disagree with. Moreover, petitioners contend, classes should not be certified in the first place if it is not feasible to distribute proceeds to class members.

The Trump Administration submitted an [amicus brief](#) arguing that the case should be remanded for consideration of whether plaintiffs lack standing. If the Court reaches the merits, however, the government argues that the decision below should be vacated. It contends that "*cy pres* has little basis in history, creates incentives for collusion [among class counsel and defense counsel], and raises serious questions under Article III." The brief concludes that *cy pres* should be allowed only in rare circumstances.

The respondents argue that courts have broad discretion under Rule 23 to approve fair, reasonable, and adequate settlements and that nothing prevents *cy pres* settlements from meeting this standard, particularly when the alternative is that class members receive no relief at all. Moreover, *cy pres* is an appropriate use of courts' equitable powers, and settlements providing noncash, indirect benefits to class members are consistent with class representatives' fiduciary duty. They also note that Congress and the Federal Rules Advisory Committee have studied *cy pres* settlements and refused to bar them, and they urge the Court to decline petitioners' invitation to circumvent the rigorous process for amending the Federal Rules. They argue further that petitioners' First Amendment argument is defeated by opt-out rights, and that its other policy arguments are unavailing.

The case has attracted 26 amicus briefs, and a quadfurcated oral argument—featuring the objectors’ counsel, the Principal Deputy Solicitor General, and both plaintiff and defense counsel—was held on October 31, 2018. The Court’s questioning was scattershot, with the focus of conversation shifting among whether the Court (rather than Congress) should appropriately decide *cy pres* standards (and if so what those standards should be), whether the plaintiffs lack standing (and whether the Court should consider ruling on the standing issue itself or should remand), and whether cert. should be dismissed as improvidently granted.

Chief Justice Roberts, who had previously expressed skepticism of *cy pres* in a statement he attached to a cert. denial in *Marek v. Lane*, 134 S. Ct. 8 (2013), led the discussion of *cy pres* standards. He, Justice Alito, and Justice Kavanaugh all expressed fundamental concerns with the concept of indirect relief for class members, with Justice Kavanaugh suggesting that a lottery system awarding unclaimed funds to a single class member would be superior to *cy pres*. They also expressed concerns regarding the selection of *cy pres* recipients by parties and class counsel (let alone by judges tasked with approving the settlement under Rule 23), appropriately calculating fee awards based on *cy pres* relief, and ensuring an appropriate nexus with the interests of the class. Justices Ginsburg, Sotomayor, and Breyer addressed the issue of appropriate *cy pres* standards but did not share the conservative justices’ concerns.

Justice Sotomayor indicated that appropriate *cy pres* standards may be an issue properly reserved for Congress and the Rules Committee, and that the superior course of action may be to leave district court judges with discretion until Congress acts. Justice Kavanaugh expressed shared concern that the issue was for Congress, but both he and Chief Justice Roberts also speculated that Congress may be leaving the issue for the Court decide.

Both Justices Kagan and Gorsuch focused their questioning exclusively on the issue of whether plaintiffs lacked standing in the underlying action, which involves privacy claims under the Stored Communications Act. The lower court found standing based solely on the existence of statutory injury, without inquiry into whether the class plaintiffs themselves suffered concrete and particularized injury as required by the Court’s decision in *Spokeo* (discussed in our [Fall 2016 Update](#)). Both of the justices, as well as Justices Breyer and Alito, seemed to indicate that the lower Court failed to adequately consider standing, but there was disagreement as to whether remand would be necessary or the Court could decide the issue for itself on the record.

The Deputy Solicitor General, counsel for the plaintiffs, and counsel for the defendant each independently raised the prospect that cert. may be dismissed as improvidently granted. None of the justices addressed the prospect directly, however.



## VII. 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.

The Second Circuit, in *Leyse v. Lifetime Entertainment Services, LLC*, 679 Fed. Appx. 44 (2d Cir. 2017) (unpublished), 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. ZoeDoc*, 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* was subsequently 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 [Spring 2018](#) update, the remand decision has been appealed, briefed, and argued in the Second Circuit. A decision remains pending.

In the meantime, however, the Second Circuit issued a summary order in April 2018 that may have signaled its fidelity to *Radha Geismann* over *Leyse*. In *Franco v. Allied Interstate*, No. 15-4003 (2nd Cir. Apr. 9, 2018), the court vacated and remanded an order by district judge Katherine Forrest after she entered judgement for the defendant following an unaccepted Rule 68 settlement offer. The Court reiterated that an unaccepted Rule 68 offer "is a legal nullity and therefore provides no basis for the entry of judgment." It characterized *Radha Geismann* as "clear precedent" for the proposition that "an unaccepted Rule 68 offer does not moot a claim even where, as here, the district court subsequently enters judgment in favor of the plaintiff, and the defendant attempts to tender judgment."

In a novel [twist](#), the defendants on remand argued, and Judge Forrest held, that the plaintiff's refusal to accept full relief, without further record explanation, rendered him unable to satisfy the adequacy requirement of Rule 23(a)(4). In a remarkably hostile opinion, Judge Forrest reasoned that, "if plaintiff is willing to forgo recovery on his own behalf [to seek class certification], there is no telling how many potential class members he is willing to prejudice for the 'greater good.'" The Court concluded that the plaintiff's rejection of a "considerable offer" without explanation raised "substantial concerns" regarding his adequacy to represent the class, or alternatively, that the litigation is "lawyer driven," in which case the court questioned the plaintiff's interest in vigorously pursuing the claims of the class. The plaintiff has since petitioned for interlocutory review in the Second Circuit. In July, Judge Forrest abruptly announced that she was leaving the bench after only 7 years to rejoin the litigation department at Cravath. The district court case has been transferred to Judge Vernon Broderick.

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

### **VIII. Ascertainability**

A circuit split remains 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 have embraced some form of a heightened ascertainability requirement. The Fifth, Tenth, and D.C. Circuits have not yet explicitly addressed the issue.

The Eleventh Circuit has sometimes been characterized as joining with the First and Third Circuits because it embraced a heightened ascertainability requirement in an unpublished opinion in *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed.Appx. 945, 947 (11th Cir. 2015). However, in June, in yet another unpublished opinion, the court declined to follow *Karhu* and instead characterized the Eleventh Circuit's ascertainability standard as "unresolved." *Ocwen Loan Servicing, LLC v. Belcher*, 2018 WL 3198552, \*3 (11th Cir. 2018). The court declined to consider whether to adopt a heightened ascertainability standard for the Eleventh Circuit because the determination would not have altered the outcome of the instant case, and the issue did not qualify as a "recurring and important question" that is "likely to evade review." In the aftermath of *Ocwen*, the Eleventh Circuit is arguably more closely aligned with the Fifth, Tenth, and D.C. Circuits, which take no position, than with the First and Third Circuits.

In our [Fall 2017](#) update, we noted that the Supreme Court had denied certiorari on the ascertainability question in *Mullins v. Direct Digital*, 795 F.3d 654 (7th Cir. 2015) (No. 15-549), *Rikos v. The Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015) (No. 15-835), and *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) (No. 16-1221), with *Briseno* marking the first time it had done so since Justice Gorsuch ascended to the bench. And in our [Spring 2018](#) update, we noted that the parties settled before a cert. petition could be decided in *In re Petrobras Securities*, 862 F.3d 250, 265 (2d. Cir. 2017). In March, the

Court declined to take up ascertainability yet again, this time denying cert. in *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017).

## IX. 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 in the non-resident plaintiffs' States 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.

In our [Spring 2018](#) update, we cited cases showing that district courts have split on whether to apply *Bristol-Myers* to class actions where general jurisdiction is lacking. Since then the split has persisted, but there is disagreement as to its severity. Compare, e.g., *Chernus v. Logitech, Inc.*, 2018 WL 1981481, at \*7 (D.N.J. 2018) ("most of the courts that have encountered this issue have found that *Bristol-Myers* does not apply in the federal class action context") with *Molock v. Whole Foods Market Group, Inc.*, 317 F.Supp.3d 1, 5 (D.D.C. 2018) ("there is a near even split on the question").

In an October 10 opinion canvassing prior decisions, Judge Nelson from the District of Minnesota determined that most of the decisions extending *Bristol-Myers* to class actions came from the Northern District of Illinois, although three other courts—in the District of Arizona, the Eastern District of New York, and the Northern District of New York—also did so to some degree. But "[o]utside of Illinois," she found that "district courts have largely declined to extend [*Bristol-Myers*] to the class action context." *Knotts v. Nissan North America, Inc.*, 2018 WL 4922360, \*14 (D. Minn. Oct. 10, 2018) (collecting cases in California, Louisiana, Florida, Georgia, Virginia, Texas, the District of Columbia, and other districts in Illinois).

Courts that do apply *Bristol-Myers* to class actions tend to emphasize that, under the Rules Enabling Act, due process considerations do not differ as between class and non-class actions. And since nothing in *Bristol-Myers* precludes its application to class actions, and its rationale otherwise appears broadly applicable, *Bristol-Myers* is "instructive" in the class-action context.

Courts that do not apply *Bristol-Myers* to class actions find no authority requiring that specific jurisdiction must be found as to unnamed members of a putative class. Moreover, they note that the Supreme Court has a pre-*Bristol-Myers* rule, which has not been overruled, that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may

not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.” *Knotts*, 2018 WL 4922360, at \*14 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985)).

Sympathetic courts also find a crucial difference in the fact that, in a mass action, each plaintiff is a real party in interest, whereas in a representative class action only the named plaintiffs are actually named in the complaint. *Bristol-Myers* itself explicitly “framed its specific jurisdiction analysis at the level of the ‘suit’ and not at the level of the named or unnamed parties.” *Id.* (quoting *Bristol-Myers*, 137 S. Ct. at 1780 (“[T]he *suit* must ‘aris[e] out of or relat[e] to the defendant’s contacts with the forum.’” (emphasis in original, citations omitted))). Sympathetic courts thus reason that *Bristol-Myers* has no application in a class action so long as the “claim being litigated” (i.e. the named plaintiff’s claim) has a direct connection to the forum through the named plaintiff.

Another question to arise is whether *Bristol-Myers* overrules, *sub silentio*, the doctrine of pendent personal jurisdiction, whereby a court may exercise personal jurisdiction over a defendant when it is otherwise lacking so long as the plaintiff’s claim arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction. In a nationwide price-fixing case, the Southern District of California recently held that pendent jurisdiction is appropriate when a court is confronted with federal question claims arising under the Clayton and Sherman Acts, and that pendent jurisdiction is permissible whenever a federal statute provides for nationwide service of process. *In re Packaged Seafood Products Antitrust Litig.*, 2018 WL 4222506, at \*32 (S.D. Cal. Sept. 5, 2018).

As of this writing, no federal circuit court has ruled upon whether *Bristol-Myers* extends to nationwide classes containing members injured outside the forum state where general jurisdiction is lacking, or whether it overrules the doctrine of pendent jurisdiction *sub silentio*. The former issue is currently on appeal in the Ninth Circuit in *Feller v. TransAmerica Life Ins. Co.*, No. 18-55408 (filed Mar. 28, 2018).

## **X. Tolling**

In our [Spring 2018](#) update, we noted that the Supreme Court granted cert. in *Resh v. China Agritech*, 857 F.3d 994 (9th Cir. 2017), 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.” The Ninth Circuit had held that the pendency of an uncertified class action tolls the statute of limitations for subsequent class actions, extending the Court’s rule in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), which tolls the statute of limitations for individual claims, to apply to future class claims when class certification is denied.

In a 9-0 opinion authored by Justice Ginsburg, the Court reversed. It held that “*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.” *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018).

Justice Sotomayor issued a concurring opinion, arguing that the majority’s rule was appropriate for class actions brought under the Private Securities Litigation Reform Act of 1995 (PSLRA) but that the

majority's reasoning does not justify denying tolling to other later-filed class actions under Rule 23. She noted that, instead of adopting "a blanket no-tolling-of-class-claims-ever rule," the majority could have held as a matter of equity that tolling becomes unavailable for future class claims where class certification is denied for a reason that bears on the suitability of the claims for class treatment. Justice Sotomayor also encouraged district courts to help mitigate the potential unfairness of denying *American Pipe* tolling to class claims by "liberally permitting amendment of the pleadings or intervention of new plaintiffs and counsel."

## **XI. Predominance in Nationwide Settlement Classes Involving Varying State Laws**

In our [Spring 2018](#) update, we noted that a divided Ninth Circuit panel in *In re Hyundai and Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018), had vacated a district court's certification of a nationwide settlement class in a false advertising class action by California vehicle purchasers against car manufacturers on grounds that variations in state law might defeat predominance. The majority opinion drew a stinging rebuke from dissenting Judge Nguyen, who argued that the majority's holding effectively imposed a requirement upon district courts to examine whether a forum state's choice-of-law rules operate to apply the forum state's laws or the laws of multiple states, and also gave plaintiffs the burden of disproving material variances in affected states' laws as part of satisfying Rule 23. Judge Nguyen said this would significantly burden overloaded district courts, create a circuit split, and run afoul of the *Erie* doctrine.

The case is relevant for antitrust class actions because state laws can vary with respect to *Illinois Brick*-repealer rules. 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 under Rule 23. AAI filed an [amicus brief](#) in support of the position adopted by the en banc court.

In July, the plaintiffs' petition for rehearing en banc in *Hyundai and Kia* was granted. The en banc case has since been briefed and argued, and it was submitted to the full court on September 27, 2018. A decision remains pending.

## **XII. Removal Under CAFA**

On September 27, 2018, the Supreme Court granted cert. in *Jackson v. Home Depot*, 880 F.3d 165 (4th Cir. 2018), which involves the right of a defendant named in a counterclaim to remove a class action from state to federal court under CAFA. The case began when Citibank filed a debt-collection action against a North Carolina resident who refused to pay for a water-treatment system he purchased using a Citibank-issued credit card. The resident then brought a counterclaim against Citibank and third-party class action claims against Home Depot and Carolina Water Systems Inc. (CWS), alleging that all three were joint and severally liable for unfair and deceptive trade practices that mislead customers about the water-treatment systems at issue.

After Citibank voluntarily dismissed its debt-collection action with prejudice, Home Depot moved to realign the parties, with the resident as plaintiff and Home Depot, CWS, and Citibank as defendants, and sought removal under CAFA. The resident moved for remand.

The district court denied Home Depot’s motion to realign because it concluded that this was not a case “where there are antagonistic parties on the same side,” and it granted the resident’s remand motion because Home Depot was not a “defendant” under CAFA, but rather a “counter-defendant.” The Fourth Circuit affirmed.

The question presented is “Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of [CAFA] when the class action was originally asserted as a counterclaim against a co-defendant.”

In addition to the question presented, the Court’s order granting cert. directs the parties to brief and argue the following question: “Should this Court’s holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313, U.S. 100 (1941) – that an original plaintiff may not remove a counterclaim against it – extend to third-party counterclaim defendants?” The Fourth Circuit decision reasoned that it was bound by intra-circuit precedent applying *Shamrock Oil* on similar facts to hold that CAFA’s expanded removal authority does not allow removal of a class action counterclaim asserted against an additional counter-defendant.

### **XIII. 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 excerpts from the various committee reports was forwarded to the Supreme Court. On April 26, 2018, the Court issued an order approving the amendments, and Chief Justice Roberts [transmitted](#) the Court’s order and various accompanying materials to both houses of Congress. If timely approved by Congress, the amendments will become effective on December 1, 2018.

### **XIV. 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 3% chance of being enacted, down from 36% in March 2018.

American Antitrust Institute  
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