AAI AMERICAN ANTITRUST INSTITUTE

# Class Action Issues Update
# Spring 2019

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, consumers and workers. This update covers developments since our Fall 2018 update.

## I. Consumer Antitrust Classes Dodge More Expansive Limitations on Standing

In May, the Supreme Court issued a 5-4 decision in favor of the plaintiffs in *Apple v. Pepper*, No. 17-204 (May 13, 2019). The decision preserves consumer antitrust class actions against retail platforms that sell directly to consumers without an intermediary. In his first antitrust opinion authored for the Court, Justice Kavanaugh joined Justices Breyer, Ginsburg, Kagan and Sotomayor in holding that consumers who purchased apps from Apple's iOS App Store qualify as direct purchasers and thus have standing to sue Apple for monopolization under the Court's *Illinois Brick* indirect purchaser rule. Under the rule, direct purchasers have standing under the Sherman Act to recover 100% of alleged overcharge damages caused by an antitrust violator, but indirect purchasers do not have standing to seek damages.

Apple had argued that *Illinois Brick* bars the consumer-plaintiffs' claims because app developers set the price at which Apple offers apps for sale in the App Store. Accordingly, Apple argued, any overcharges created by Apple's alleged monopolization would be "pass-on" damages insofar as they are passed on from developers to consumers through the App Store. The majority disagreed, siding with the plaintiffs and affirming the Ninth Circuit. The Court held that *Illinois Brick* establishes a bright-line rule that permits immediate buyers from an alleged antitrust violator to sue the violator for the full amount of overcharge damages.

The four dissenting justices, in an opinion authored by Justice Gorsuch, argued that the *Illinois Brick* rule was never intended to turn on contractual privity between the purchaser and the violator. Rather, the dissent believed *Illinois Brick* rests on the premise that pass-on theories of damages violate proximate cause principles, because they require complex apportionment calculations and lengthy proceedings while permitting recovery for derivative and remote injuries. Notwithstanding

[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 http://www.antitrustinstitute.org. Comments on this update or suggestions for AAI amicus participation should be directed to Randy Stutz, rstutz@antitrustinstitute.org, (202) 905-5420.

that consumers bought apps directly from the App Store, the dissent would have expanded *Illinois Brick* to shield Apple.

The opinion embraces several arguments that AAI set forth in an amicus brief in support of the respondents, and AAI has since published a commentary examining the implications of the decision. Among other things, AAI believes *Pepper* protects against the risk that dominant internet platforms would enjoy de facto immunity from antitrust damages claims by both upstream suppliers and downstream purchasers. It is also significant because it clarifies that damages claims for overcharges and lost-profits are legally non-duplicative under *Illinois Brick*—in the sense that they are not "conflicting claims to a common fund"—and that upstream and downstream firms may each independently bring antitrust claims against intermediaries without interference from *Illinois Brick*. Moreover, the Court resolved the non-duplicative nature of consumer and supplier claims against intermediaries by interpreting the Clayton Act's statutory text in a manner that helps reinvigorate the law's broad mandate encouraging victim recovery.

In our Fall 2018 update, we noted that *Pepper* was set against the backdrop of a significant policy debate over the prospect of reforming the indirect purchaser rule. The *Pepper* majority explained that, in light of its ruling in favor of the plaintiffs, it had no occasion to consider the argument for overturning *Illinois Brick*. The dissent, for its part, believed the Court lacked "any invitation or reason to revisit [its] precedent." It noted that the plaintiffs had disavowed any request to overrule *Illinois Brick*, and consequently the Court lacked the benefit of the adversarial process in considering a complex rule rooted in 40-year-old precedent.

## II. New Developments on Class Action Waivers in Mandatory Arbitration Clauses

In our Fall 2018 update, we also discussed the Supreme Court's 5-4 decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which held that class action bans included in mandatory arbitration clauses inserted into employment agreements are enforceable under the Federal Arbitration Act (FAA) and do not conflict with the National Labor Relations Act (NLRA). The National Labor Relations Board (NLRB) and some circuits had held that such waivers are illegal under the NLRA and captured by a saving clause included in the FAA, which makes arbitration provisions valid "save upon such grounds as exist at law or in equity for the revocation of any contract."

The FAA, by its terms, excludes "contracts of employment" with transportation workers from its coverage, without regard to the saving clause at issue in *Epic Systems*. In January, the Supreme Court in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), unanimously held that the FAA does not compel courts to enforce private arbitration agreements involving workers covered by the exclusion. The Court also broadly interpreted the FAA's use of "contracts of employment" to include both employees and independent contractors. The Court explained that "[w]ords generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." In this case, at the time of the FAA's adoption, "a 'contract of employment' usually meant nothing more than an agreement to perform work."

In a concurring opinion, Justice Ginsburg agreed that a statute's words should be interpreted at the time of enactment but noted that Congress also "may design legislation to govern changing times

and circumstances." As an example, she noted that Congress intended for the Sherman Act term "restraint of trade" to have "changing content," authorizing courts to oversee the term's "dynamic potential."

In the wake of *New Prime*, *Epic Systems* apparently will not bar transportation employees or independent contractors in interstate commerce from successfully challenging class-action waivers embedded in arbitration agreements. However, 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.

In April, the Court also handed down a 5-4 decision in *Lamps Plus, Inc. v. Varela*, 138 S. Ct. 1697 (2019), which addressed whether class arbitration is available when an arbitration clause is ambiguous as to the availability of class proceedings. In 2010, the Court in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010), 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. In the present case, the Ninth Circuit had held that, where an arbitration agreement is ambiguous as to whether the parties authorized class arbitration, the ambiguity should be resolved against the defendant drafter of the agreement. Classwide arbitration was therefore available.

In an opinion by Chief Justice Roberts, the divided Court reversed. The Court held that, under the FAA, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration. The Court reasoned that classwide arbitration "is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration." The Court also condemned the Ninth Circuit's use of the state law *contra proferentem* doctrine, which counsels that ambiguities in contracts should be construed against the drafter. The majority believed reliance on the doctrine was inappropriate because the doctrine is based on public policy and seeks ends other than the intent of the parties. This, the Court explained, is inconsistent with the foundational principle of the FAA that arbitration is a matter of consent.

The majority opinion drew one concurrence and four dissents. Justice Thomas, concurring, would have reversed the Ninth Circuit simply because the agreement provides no "contractual basis" for concluding that the parties agreed to class arbitration.

Justice Ginsburg, in a dissenting opinion joined by Justices Breyer and Sotomayor, would have held that the FAA was not designed to govern contracts with such an imbalance of bargaining power, noting the irony in resting a decision that will force employees and consumers to forego important legal rights on the "essentiality of consent."

Justice Kagan, in a dissenting opinion joined by Justices Ginsburg and Breyer, emphasized that the FAA does not federalize basic contract law. "Under the FAA," she explained, "state law governs the interpretation of arbitration agreements, so long as that law treats other types of contracts in the same way." In her view, the agreement's language providing "any and all disputes, claims or controversies" clearly includes both individual and class variants. But even if the agreement was truly ambiguous, "a plain-vanilla rule of contract interpretation, applied in California as in every other State, requires reading it against the drafter—and so likewise permits a class proceeding here."

Justice Sotomayor also wrote separately to criticize the majority for pre-empting a neutral principle of State contract law. Justice Breyer wrote separately because he believed the Court lacked jurisdiction insofar as Lamps Plus's motion to compel arbitration was an unappealable district court order under Section 16(b) of the FAA.

In February, Sen. Richard Blumenthal (D-CT) and Rep. Hank Johnson (D-GA) introduced the Forced Arbitration Injustice Repeal Act (FAIR Act), which would eliminate forced arbitration clauses in employment, consumer, and civil rights cases. The Senate bill was introduced with 34 co-sponsors and the House bill was introduced with 147 co-sponsors.

## III. Challenges to Nationwide 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 on grounds that variations in state law might defeat predominance. The majority held 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. It also held that the predominance requirement under Rule 23 gives plaintiffs 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 panel majority drew heavy criticism from dissenting Judge Nguyen, who argued that it would be unwise to task district courts with raising and resolving choice-of-law issues on their own, and to give plaintiffs the burden of *disproving* material variances in affected states' laws. Judge Nguyen believed this would significantly burden overloaded district courts, create a circuit split, and run afoul of the *Erie* doctrine.

In July 2018, the plaintiffs successfully petitioned the Ninth Circuit for en banc rehearing. And on June 6, 2019, the en banc court sided with Judge Nguyen. In an opinion authored by Judge Nguyen, the en banc court held that "Subject to constitutional limitations and the forum state's choice-of-law rules, a court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class." The court also confirmed that the party seeking to apply foreign law bears the burden of showing that foreign law, rather than California law, should apply to class claims.

The court explained that, to meet their burden here, the settlement objectors had to satisfy the "three-step governmental interest test." Under the test, the party seeking to apply foreign law must prove (1) the law of the foreign state materially differs, (2) a true conflict exists, such that each state has an interest in the application of its own law to the case, and (3) the foreign state's interest would be more impaired than California's interest if California law were applied. In *Hyundai*, no objector argued that California law gave rise to constitutional problems or presented adequate choice-of-law analysis, or otherwise showed that differences in state law precluded certification of a settlement class.

In a dissenting opinion joined by two judges, and joined in part by a third, Judge Ikuta, who had authored the since-vacated panel opinion, argued that a district court has an independent obligation to determine what law applies before certifying a class as part of the requisite "rigorous analysis"

required under Rule 23. And even if the court was not obligated to consider the issue *sua sponte*, the dissent believed a subset of objectors from Virginia had adequately raised the issue. The dissent also believed the objectors had satisfied the governmental interest test.

The implications of variations in state law in antitrust class actions are currently before the Ninth Circuit on an interlocutory appeal in *Stromburg v. Qualcomm, Inc.*, No. 19-15159 (filed Oct. 11, 2018). The case involves class allegations that Qualcomm monopolized the market for semiconductor chips used in smartphones. After the district court certified an injunctive relief and a damages class, Qualcomm successfully petitioned for interlocutory review of the certification order. The Federal Trade Commission has since won its case against Qualcomm before the same judge in the same district court based on substantially similar allegations.

On interlocutory appeal, Qualcomm argues that state law variations with respect to *Illinois Brick*-repealer rules defeat predominance. The en banc Third Circuit addressed this issue in the context of nationwide settlement classes in 2011 in *Sullivan v. DB Investments*, 667 F.3d 273 (3d Cir. 2011) (en banc). There the court held 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 that case.

## IV. 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 and Fall 2018 updates, we chronicled a split among district courts over whether to apply *Bristol-Myers* to class actions where general jurisdiction is lacking, with the majority of districts declining to do so. We observed that 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 v. Nissan North America, Inc.,* 2018 WL 4922360, *14 (D. Minn. Oct. 10, 2018) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985)).

Courts declining to apply *Bristol-Myers* to class actions also have noted 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)). These courts thus reason that *Bristol-Myers* has no application in a class action so long as the "claim[s] being litigated"—i.e., the claims of any named plaintiffs—have the requisite connections to the forum.

At the time of this writing, the applicability of *Bristol-Myers* to class actions is currently on appeal in four circuit courts: The Seventh Circuit in *Mussat v. IQVIA, Inc.*, No. 19-1204 (7th Cir. filed Feb. 1, 2019); the D.C. Circuit in *Mollock v. Whole Foods Market Inc.*, No. 18-7162 (D.C. Cir. filed Oct. 11, 2018); the Fifth Circuit in *Tredinnick v. Jackson National Life Ins. Co.*, No. 18-40605 (5th Cir. filed June 27, 2018); and the Ninth Circuit in *Feller v. TransAmerica Life Ins. Co.*, No. 18-55408 (9th Cir. filed Mar. 28, 2018). *Whole Foods* and *IQVIA* have been briefed. *Jackson National* has been briefed and argued. The briefing schedule in *TransAmerica* was vacated pending mediation.

## V. 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, when 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.

Our last several updates have chronicled an apparent intra-circuit split on the implications of the hypothetical in the Second Circuit. In *Leyse v. Lifetime Entertainment Services, LLC*, 679 Fed. Appx. 44 (2d. Cir. 2017) (unpublished), the court 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, and that binding precedent in *Tanasi v. New All. Bank*, 786 F.3d 195 (2d Cir. 2015), required it to respect the validity of the dismissal, including because the *Campbell-Ewald*

hypothetical expressly left open this scenario. But 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 and held that the district court's entry of judgment was a "precluded dismissal" that "should not have been entered in the first place." Without citing or referencing *Leyse*, the court 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 as per *Leyse* and then dismiss the claims with prejudice. Judge Stanton granted the defendant's request, and the remand decision was appealed to the Second Circuit.

On November 27, 2018, the day after AAI issued its Fall 2018 update, the Second Circuit vacated Judge Stanton's order and definitively resolved the intra-circuit split. The court held that a "Rule 67 deposit, by itself, could not have rendered Geismann's action moot" for the reasons explained by Chief Judge Wood in *Fulton Dental*. In addition, the court clarified that *Tanasi* stands for the proposition that a defendant may surrender to "'complete relief' in satisfaction of a plaintiff's claims," that the district court may then enter default judgment against the defendants, and that after judgment is entered the plaintiff's individual claims may become moot. However, a Rule 67 deposit would not afford "complete relief" to a named plaintiff in a class action, because a named plaintiff retains a personal stake in obtaining class certification and nothing forces it to accept a defendant's valuation of the additional reward that it hopes to earn by serving as the lead plaintiff for the class. Consequently, the court concluded that "the district court must resolve the pending motion for class certification *before* entering judgment and declaring an action moot based solely on relief provided to a plaintiff on an individual basis." It explained that a conclusion otherwise "would risk placing the defendant in control of a putative class action, effectively allowing the use of tactical procedural maneuvers to thwart class litigation at will."

In our Fall 2018 update, we also noted that a district court in *Franco v. Allied Interstate*, No. 15-4003 (2nd Cir. filed Apr. 9, 2018), had ruled that an individual plaintiff's refusal to accept full relief rendered him unable to satisfy the adequacy requirement of Rule 23(a)(4). In a remarkably hostile opinion, the district judge, the Hon. Katherine Forrest, reasoned that "if plaintiff is willing to forego 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.'" Judge Forrest 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. Shortly thereafter Judge Forrest abruptly resigned from the bench and went to work for the litigation department of a large defense firm. In January, the plaintiffs' petition for interlocutory review was denied by the Second Circuit. In May, the case settled.

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

## VI. *Cy Pres*

In March, the Court issued a per curium opinion in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), a case we began following in our Fall 2015 update because of potentially important implications for *cy pres* awards. The Court did not reach the merits of the question presented, which was: "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)." Instead, following the recommendation of the Trump Administration in an amicus brief, the Court vacated and remanded for a determination whether the plaintiffs lacked standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). After oral argument, the Court had ordered supplemental briefing from the parties and the Solicitor General on whether any named plaintiff had alleged claims that were sufficiently concrete and particularized under *Spokeo*.

Justice Thomas issued a short but controversial dissent, explaining that he would have reached the merits and reversed. Justice Thomas believes "cy pres payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees)." Among other things, Justice Thomas cited a concurring opinion issued by Chief Judge Edith Jones in *Klier v. Elf Atochem North Am., Inc.*, 658 F. 3d 468 (5th Cir. 2011), which argues that use of *cy pres* should be barred because it violates constitutional separation of powers principles, and it may violate the Rules Enabling Act and create tension with Article III. This position represents a radical departure from the consensus positions adopted in the American Law Institute's Principles of Aggregate Litigation. However, Justice Thomas also cited Judge Higginbotham's majority opinion in *Klier*, which hews closer to the consensus view.

The merits involved an $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. Settlement objectors 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 upheld the settlement and 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.

Had the Court reached the merits, the Trump Administration would have sided with the objectors. Absent remand to determine standing, it argued in the alternative that the decision below should be vacated. It contended 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." It suggested that *cy pres* should be allowed only in rare circumstances.

Because Justice Thomas's opinion was premised on his willingness to reach the merits, it is unclear where the other justices may stand on the issue of *cy-pres*-only settlements or *cy pres* more generally. Chief Justice Roberts has previously expressed skepticism of *cy pres* as part of class settlements,

noting "fundamental concerns surrounding the use of such remedies in class action litigation," and that in a "suitable case, this Court may need to clarify the limits on the use of such remedies." *Marek v. Lane*, 134 S. Ct. 8 (2013) (Roberts, C.J., concurring in the denial of certiorari).

A similar settlement challenged by the same objectors is currently on appeal to the Third Circuit in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, Civ. No. 17-1480 (3d Cir. filed Mar. 7, 2017). The case was stayed when cert. was granted in *Gaos*, but the Court has since lifted the stay. In April, the Third Circuit, citing *Gaos*, ordered supplemental briefing on whether plaintiffs have asserted a sufficiently concrete injury to meet the standing requirements articulated in *Spokeo*.

## VII. Tolling

In our Spring 2018 update, we noted that the Supreme Court voted 9-0 to reverse in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018), holding that the *American Pipe* rule, which tolls the statute of limitations during class actions to allow individuals to intervene or pursue individual claims if the class fails, does not permit the maintenance of another *class action* after the statute of limitations expires.

The question presented in *Resh* was limited to whether the *American Pipe* rule applies to successive class actions filed "[u]pon denial of class certification." In January, in *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Forest Pharm., Inc.*, 915 F.3d 1, 17 (1st Cir. 2019), the First Circuit gave *Resh* an expansive reading, holding that *American Pipe* tolling does not apply to otherwise time-barred class claims even if class certification has not been denied. The court reasoned that *Resh* "effectively ruled that the tolling effect of a motion to certify a class applies only to individual claims, no matter how the motion is ultimately resolved."

In February, the Supreme Court ruled that a Rule 23(f) petition to appeal an order granting or denying class certification, which ordinarily must be filed within 14 days of the district court order, also is not subject to equitable tolling. In *Nutraceutical Corp. v. Lambert*, No. 17-1094 (U.S. Feb. 26, 2019), the Court held that the 14-day deadline is mandatory and unalterable if the opposing party objects. The Court believed the Federal Rules of Appellate Procedure "express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." The Court left open the question of whether a party can move for reconsideration of a class certification order and then safely file a Rule 23(f) petition within 14 days of the order granting or denying reconsideration.

## VIII. Removal Under CAFA

On May 28, the Supreme Court issued a 5-4 decision in favor of the plaintiffs in *Home Depot U.S.A., Inc. v. Jackson*, No. 17-1471, 2019 U.S. LEXIS 3558 (U.S. 2019). The case involves the right of a defendant named in a counterclaim to remove a class action from state to federal court under the Class Action Fairness Act (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.

In an opinion by Justice Thomas, joined by Justices Breyer, Kagan, Ginsburg, and Sotomayor, the Court held that neither the language of the general removal statute, nor CAFA, permits removal by a third-party counterclaim defendant.

Justice Alito, dissenting, joined by Chief Justice Roberts and Justices Gorsuch and Kavanaugh, would have permitted Home Depot to remove the action to federal court. The dissent lamented the "loophole" created by the Court's decision, which allows plaintiffs to leverage "a defendant's routine attempt to collect a debt from a single consumer . . . into an unremovable attack . . . brought on behalf of a whole class of plaintiffs . . . in the very state courts that CAFA was designed to help class-action defendants avoid."

## IX. Judge-Made Limits on the Timing of Class Settlement Negotiations

In January, Logitech petitioned the Ninth Circuit for mandamus to overturn a controversial standing order of Judge William Alsup of the Northern District of California. The order bars class counsel from entering settlement negotiations until after the class has been certified. Among other things, Logitech's petition argues that Judge Alsup's prohibition on settlement negotiations is an unconstitutional prior restraint on its First Amendment rights and conflicts with Rule 23 and established policies favoring class action settlements.

In a statement issued in response to the Ninth Circuit's invitation to address the petition, Judge Alsup countered that the commercial speech at issue is entitled to less protection. The "central point" of his order, he explained, is to address the difference between settlements prior and subsequent to class certification. "When a lawyer files a putative class action complaint and negotiates a proposed class-wide settlement before certification is decided," he explained, "plaintiff's counsel necessarily negotiates from a position weakened by the uncertainty over whether or not counsel will later win or lose a class certification motion." At the same time, a defendant can "take advantage of the uncertainty over the outcome of a Rule 23 motion to extract a cheaper settlement while wiping a class-wide liability off its books."

Judge Alsup believes his policy, by clearing away any doubts about certification, ensures "the claims of absent class members are compromised only on their merits without further discount due to uncertainty over whether plaintiffs' counsel will win class certification."

Asked for their views on Judge Alsup's order, two attorneys on AAI's Advisory Board disagreed with Judge Alsup's rationale. Both agreed that it is not unusual for class counsel to make critical decisions on behalf of the class prior to class certification, and that settlement "discounts" are unavoidable on both sides. In addition to "class certification uncertainty," for example, negotiations are influenced by "motion-to-dismiss uncertainty," "Daubert uncertainty," and "trial uncertainty," to name a few. Both attorneys also questioned the wisdom of expending resources to certify a litigation class for trial if the trial will never happen. At bottom, they believe Judge Alsup's policy, if widely adopted, would make cases more risky, time-consuming, and expensive. Although class certification

considerations can sometimes influence settlement negotiations in unique ways, courts can most appropriately address those considerations in deciding whether to certify a settlement class.

## X. DOJ Advocacy in Private Class Action Settlement Proceedings

In our Spring 2018 update, we noted that the Consumer Protection Branch of the Department of Justice (DOJ) intervened to file a statement of interest objecting to a private class action settlement, acting on an obscure provision of CAFA, 28 U.S.C. § 1715, which requires class-action defendants to notify the Attorney General and state officials of proposed class action settlements. 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 filing discussed in our Spring 2018 update appeared to have been spearheaded in part by then-Associate Attorney General Rachel Brand, who came to the DOJ from the Chamber of Commerce, served for eight months, and then left to become Executive Vice President at Walmart. Since Brand's departure, however, similar interventions have continued. In May, the DOJ's Consumer Protection Branch opposed a class action settlement in *In re Dial Complete Marketing and Sales Practices Litig.*, No. 11-md-2263-SM, (D.N.H. filed May 10, 2019). In February, it made a similar filing in *Cowen v. Lenny & Larry's Inc.*, No. 1:17-cv-01530 (N.D. Ill. filed Feb. 15, 2019). Also in February, it filed an amicus brief opposing settlement in *Chapman v. Tristar Prods., Inc.*, No. 18-3847 (6th Cir. filed Feb. 4, 2019). According to its website, the Consumer Protection Branch's mission is to lead the DOJ's efforts "to enforce laws that protect Americans' health, safety, economic security, and identity integrity." Civil Division Assistant Attorney General Jody Hunt has implied that CAFA could be construed as such a law, and that interventions in private class action settlements are justified by the aforementioned notice provision in CAFA.

In May, the Antitrust Division of the DOJ filed a motion to intervene in a private antitrust class action settlement not to object, but rather to help enforce its terms. As part of a proposed settlement agreement among private plaintiffs and Duke University and the University of North Carolina (UNC) resolving allegations that the schools entered no-poaching agreements in which they agreed not to compete in hiring each other's medical faculty, Duke and UNC are to become bound by an injunction designed to prevent the maintenance or recurrence of any such agreements. The DOJ sought permissive intervention for the limited purpose of joining the settlement and obtaining the right to enforce the injunctive provisions. Assistant Attorney General Makan Delrahim explained, "Permitting the United States to become part of this settlement agreement in this private antitrust case, and thereby to obtain all of the relief and protections it likely would have sought after a lengthy investigation, demonstrates the benefits that can be obtained efficiently for the American worker when public and private enforcement work in tandem."

## XI. Advisory Committee on Civil Rules

Since our Fall 2016 update, we have been regularly tracking 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.

After a lengthy review process culminating in congressional approval, the rules took effect on December 1, 2018.

## XII. Proposed Legislation Defeated

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 was concerned the bill would likely eviscerate consumer, antitrust, employment, and civil rights class actions. Because the bill was not signed into law before the conclusion of the 115th congressional term on January 3, 2019, it has expired. The bill's sponsor, Richard Goodlatte, did not seek reelection. The House is now controlled by Democrats, none of which voted in favor of the bill.

## XIII. Empirical Data on Antitrust Class Actions

In May, Huntington Bank (Huntington) and the University of San Francisco School of Law (USF) published an inaugural Antitrust Annual Report, which examines empirical information involving the filing and resolution of private antitrust class action lawsuits. The report covers the number of antitrust class action complaints that are filed each year, the amount of time they took on average to reach a settlement, the mean and median recoveries, the attorney's fees and costs awarded, and the total settlement amounts in each year and overall.

The report also analyzes the law firms that represented plaintiffs and defendants in antitrust class action settlements, describing particular cases as well as some cumulative results, and it tabulates cumulative totals for claims administrators involved in the settlement process. Among other things, the report finds that, cumulatively, plaintiffs recovered $19.3 billion through settlements during the period from 2013-2018. Huntington and USF plan to continue providing similar information on an annual basis.

Contemporaneous with the report's publication, AAI and USF published a joint commentary examining the implications of the report's findings. The commentary, The Vital Role of Private Antitrust Enforcement in the U.S., highlights a number of key takeaways from the 2018 Report's data on antitrust actions (particularly class actions) over the period 2013-2018. These include: (1) private enforcement resources are focused efficiently on violations that harm victims, such as consumers and businesses; (2) private antitrust enforcement continues to be effective, across the board; and (3) private enforcers obtain sizable recoveries associated with large, often global antitrust conspiracies that disrupt commerce and victimize thousands, or even millions, of U.S. consumers.

As we noted in our Spring 2017 update, the FTC announced in November 2016 that, as part of the FTC's Class Action Fairness Project, initiated under Chairman Tim Muris in 2002, the Commission would study the effectiveness of various class action settlement notice programs. It sent information requests to eight claims administrators, which was to form the basis of a special report. The

Commission also proposed two additional studies pursuant to the project: a Notice Study examining consumer perception and understanding of class action notices and the options they provide to consumers, and a Deciding Factors Study analyzing factors that influence consumers' decisions to participate, opt out of, or object to a class action settlement. No further updates have been provided.

American Antitrust Institute
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