AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Fall 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 Spring 2019 update.

I. Ascertainability

As we noted in our Fall 2018 update, 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 addressed the issue but characterizes its position as "unresolved."

In July, in an expansive opinion authored by Chief Justice Tani Cantil-Sakauye, the California Supreme Court aligned itself with the Seventh Circuit, rejecting a heightened ascertainability requirement. In *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955 (2019), the court embraced the Seventh Circuit's opinion in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), first discussed in our Fall 2016 update, which it described as "thorough" and " illuminating."

The court held that due process "does not invariably require that personal notice be directed to all members of a class," or that an individual member of a certified class "must receive notice to be bound by a judgment." It believed that a construction of the ascertainability requirement that presumes such notice is necessary to satisfy due process, and demands that the plaintiff show how it can be accomplished, "threatens to demand too much, too soon." The court added that it is "likewise mistaken to take a categorical view that the relevant due process interests can be satisfied

[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.

only when 'official records' supply the means of identifying class members, and for a similar reason: due process is not that inflexible."

The Supreme Court has repeatedly declined to take up the ascertainability question despite numerous petitions for certiorari.

II. Classes Containing Uninjured Class Members

As discussed in our Spring 2017, Fall 2017 and Fall 2018 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. In our Fall 2018 update, we examined the First Circuit's decision in *United Food & Commer. Workers Unions & Emplrs. Midwest Health Bens. Fund v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.)*, 907 F.3d 42 (1st Cir. 2018) ("*Asacol*"), which held that, without a class-wide method to sort among injured and uninjured class members, individual questions may predominate over common questions absent unrebutted 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. Plaintiffs intended to prove class-wide impact using statistical representative evidence, citing the Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), and it proposed to cull out uninjured class members using affidavits during 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 during claims administration. 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."

We opined that 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.

In October, Chief Judge William E. Smith of the District of Rhode Island applied *Asacol* in reaffirming an order partially granting and partially denying class certification in *In re Loestrin 24 FE Antitrust Litigation*, No. 1:13-md-02472-WES-PAS (Oct. 27, 2019), a similar generic exclusion case that was in the midst of being briefed when *Asacol* was handed down. Although a conservative

estimate suggested that only 6.7% of the hundreds of thousands of *Loestrin* class members were brand loyalists, Chief Judge Smith held that the court was prevented from certifying a consumer class under *Asacol* because the problem of how to identify the brand loyalists would remain. He stated, "The Court is troubled that over ninety percent of consumers in the proposed [end-purchaser] class may have been injured by Defendants' alleged unlawful conduct, but now have no practical recourse under antitrust law." He added that "Perhaps the Court of Appeals will have occasion in this case or another to reconsider [*Asacol*]; or, if not, perhaps Congress will take up the issue."

In August, the District of Massachusetts, in *In re Intuniv Antitrust Litig.*, No. 1:16-CV-12396-ADB (D. Mass. Aug. 21, 2019), had issued a similar criticism, noting that while *Asacol* "eliminates the possibility that some consumers might obtain a recovery for damages they did not suffer, it also ensures that a much larger number of . . . consumers will receive no remedy for harm actually suffered."

Chief Judge Smith did certify a class comprised of third-party payors, relying on expert analysis suggesting that, in a but-for world, each third-party payor would have reimbursed at least a single purchase of generic Loestrin during the class period notwithstanding that they may also have reimbursed brand loyalists.

As of this writing, a petition for interlocutory appeal of the certification order remains pending in the First Circuit.

III. Class Action Waivers in Mandatory Arbitration Clauses

Since our November 2016 update, we have been tracking the use of mandatory arbitration clauses in employment agreements, which the Supreme Court upheld in a 5-4 decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

In our Spring 2019 update, we noted that the Court, in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), unanimously held that the FAA does not compel courts to enforce mandatory arbitration agreements included in employment contracts involving transportation workers because the FAA by its terms excludes such contracts from coverage. We noted, however, that it remains to be seen how courts might rule on the validity of such waivers as a matter of state contract law where the FAA does not apply.

As of this writing, district courts in Washington, Colorado, and Tennessee have addressed the question, with mixed results. In April, in *Rittmann v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196 (W.D. Wash. 2019), the Western District of Washington refused to enforce an arbitration agreement covering transportation workers that purported to be governed by the FAA. The court held that the contract was ambiguous because neither federal nor state law clearly governed its terms. The FAA could not govern given *New Prime*, and state law could not govern because an express contract term prevented application of state law.

In the same month, in *Merrill v. Pathway Leasing Ltd. Liab. Co.*, No. 16-cv-02242-KLM, (D. Colo. Apr. 29, 2019), the District of Colorado upheld such an agreement on grounds that its adhesive nature

did not necessarily render it unconscionable. In October, the Middle District of Tennessee, in *Byars v. Dart Transit Co.*, No. 3:19-cv-00541 (M.D. Tenn. Oct. 21, 2019), also upheld such an agreement on grounds that it neither created biased procedures nor was unconscionable.

In our Spring 2019 update, we noted that Sen. Richard Blumenthal (D-CT) and Rep. Hank Johnson (D-GA) had 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. On September 6, AAI and ten other organization submitted a letter in support of the Act, arguing that it would restore the ability of antitrust victims to effectively vindicate their Sherman and Clayton Act rights. On September 20, the House bill passed by a vote of 225-186. It will now move to the Senate. Govtrack predicts that the bill has a 47% chance of being enacted.

On October 10, Governor Gavin Newsom signed California Assembly Bill No. 51, enacting a ban on mandatory arbitration provisions in employment contracts that is enforceable through private rights of action. However, the law states that it is not "intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act [FAA]." It therefore does not interfere with arbitration provisions that are already included in existing employment contracts.

In addition, it is unclear whether the law can effectively prevent mandatory arbitration provisions from being inserted into future employment contracts that have not yet been formed. The Supreme Court held in *AT&T Mobility v. Concepcion* that state laws are preempted if they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the FAA, and the Court has since interpreted this holding expansively. As we discussed in our Fall 2017 update, for example, the Court in *Kindred Nursing Centers, et al. v. Clark*, 137 S.Ct. 1421 (2017), invalidated Kentucky's "clear-statement rule," which required a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement. The Court reasoned that the FAA "cares not only about the 'enforcement' of arbitration agreements, but also about their initial 'validity'—that is, about what it takes to enter into them."

Nonetheless, in the near term, AB-51 may discourage California employers from imposing mandatory arbitration provisions in employment contracts. And the law should serve to bar use of the provisions in employment contracts governing transportation workers who fall within the FAA's exclusion. It will take effect on January 1, 2020.

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, Fall 2018 and Spring 2019 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. At the time of this writing, the applicability of *Bristol-Myers* to class actions is currently on appeal in three 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); and the Fifth Circuit in *Tredinnick v. Jackson National Life Ins. Co.*, No. 18-40605 (5th Cir. filed June 27, 2018). A fourth case in the Ninth Circuit, *Feller v. TransAmerica Life Ins. Co.*, No. 18-55408 (9th Cir. filed Mar. 28, 2018), was voluntarily dismissed after mediation.

Whole Foods has been briefed and was argued before Chief Judge Garland, Judge Tatel, and Judge Silberman on September 25, 2019. *IQVIA* likewise has been briefed and was argued before Chief Judge Wood, Judge Kanne, and Judge Barrett two days later, on September 27, 2019. *Jackson National* has been briefed and was argued before Judges Clement, Duncan, and Oldham on April 30, 2019. Decisions in all three cases remain pending.

V. Challenges to Nationwide Classes Involving Varying State Laws

In our Spring 2019 update, we noted that the *en banc* Ninth Circuit in *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 926 F.3d 539 (9th Cir. 2019), overturned a panel opinion vacating 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 *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.

We also noted that the Ninth Circuit in *Stromburg v. Qualcomm, Inc.*, No. 19-15159 (filed Oct. 11, 2018), is currently considering whether state law variations with respect to *Illinois Brick*-repealer rules defeat predominance. In August, AAI filed an amicus brief arguing that California's choice-of-law rules do not prevent the court from applying California's rule permitting indirect-purchaser suits, which would render antitrust standing a common question under Rule 23. First, the brief argues that state-law variations in indirect purchaser standing do not create a "true conflict" under California's governmental interest test, because all states, regardless of whether they have followed or repealed the *Illinois Brick* rule, seek to deter anticompetitive injury and compensate victims. Second, follower-

states do not have a cognizable interest in preventing indirect-purchaser suits in repealer states, and even if they did it would not trump California's interest in deterring anticompetitive conduct in California. Oral argument in the case is scheduled for December 2, 2019.

VI. *Cy Pres*

In our Spring 2019 update, we noted that 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 of whether the plaintiffs lacked standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

In August, the Third Circuit in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, Civ. No. 17-1480 (3d Cir. filed Mar. 7, 2017), ruled on a similar settlement challenged by the same objector, which had been stayed pending the Court's decision in *Gaos*. Google settled allegations that it unlawfully bypassed privacy settings to track its users' internet activity by agreeing to stop using certain cookies in Safari browsers, to pay class counsel's fees and costs, to pay incentive awards to named class representatives, and to make *cy pres* distributions to organizations that protect internet privacy.

The objector argued that *cy pres* was improper, and that the court should have either required direct compensation to class members or decertified the class. The objector further argued that the named *cy pres* recipients raised a conflict-of-interest concern because Google was a regular donor to four of the recipients and lead class counsel was on one recipient's board of directors. The objector implied that any relationship between a recipient and a party or party's counsel should automatically disqualify the recipient.

After determining that the plaintiffs satisfied *Spokeo*, consistent with *Gaos*, the court rejected the objector's proposed *cy pres* standards but remanded the case for further fact-finding and analysis. The court upheld the *cy-pres* only form of settlement, noting that such settlements may be proper in some cases and that settlement approval generally should be a practical inquiry rooted in the particular case's facts and procedural posture. The court also distinguished *cy pres*-only settlements involving (b)(2) classes, where a single, indivisible equitable remedy is intended to provide relief to all class members equally, without individualized damages determinations, ascertainability considerations, or the need for the same procedural protections available to (b)(3) classes.

The court adopted the American Law Institute's standard for *cy pres* conflicts, holding that a recipient should not be approved if it has "a significant prior affiliation with any party, counsel, or the court" and "such a prior affiliation would raise substantial questions whether the selection of the recipient was made on the merits." The court added that parties seeking settlement approval bear the burden

of "explaining to a court why the *cy pres* selection was fair," and this "may include describing the nature of any prior affiliations; what role, if any, each affiliation played in the *cy pres* selection process; whether other recipients were sincerely considered; and why these recipients are the proper choice." It encouraged increased scrutiny of the settlement if a court fears counsel is conflicted.

The court remanded with instructions for the district court to consider whether the named *cy pres* recipients have significant prior affiliations with Google, class counsel, or the court, and, if so, whether the selection process failed to satisfy Rule 23(e)(2) by raising substantial questions whether the recipients were chosen on the merits. It also observed that, in future *cy pres*-only settlements, parties may wish to avoid conflicts by involving class members or neutral participants in the selection of recipients.

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

In our Spring 2019 update, we noted that Logitech had 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 argued 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, and his order ensures "the claims of absent class members are compromised only on their merits without further discount due to the 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 noted 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.

In September, in an unpublished order, the Ninth Circuit denied Logitech's mandamus position. No. 19-70248, 2019 U.S. App. LEXIS 27535 (9th Cir. Sep. 12, 2019). The court observed that district courts are free to reject class settlements *after* they have been negotiated, and it observed that it was "unclear why that approach was not taken here." But because "district courts have both the duty and the broad authority to exercise control" over class actions, the court believed the order did not amount to clear error, notwithstanding that it was neither narrowly drawn nor based on the specifics of the case.

The court also held that the order is not clearly erroneous under the First Amendment, because it is unclear whether discussing and agreeing to class settlement—or petitioning for such a settlement—is protected speech insofar as Logitech does not have a right to negotiate with absent, unrepresented, potential class members before there is a class or interim class counsel.

It is unclear whether or how Judge Alsup's order may receive any further appellate scrutiny.

VIII. Government Intervention in Private Class Action Settlement Proceedings

In our Spring 2018 update, we noted that the Consumer Protection Branch of the Department of Justice (DOJ) interposed an uninvited "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 had made such an appearance in more than a decade and only the third time since CAFA was enacted in 2005. We also noted that the DOJ had since made similar appearances, including an amicus filing opposing settlement in *Chapman v. Tristar Prods., Inc.*, No. 18-3847 (6th Cir. filed Feb. 4, 2019), a product liability class action.

In a subsequent proceeding in *Chapman*, the State of Arizona sought to formally intervene to offer its own objections to the settlement, citing the same CAFA notice provision as a basis for Article III standing. The DOJ, in its *Chapman* brief as well as other statements of interest filed pursuant to 28 U.S.C. § 1715, has argued, "While the CAFA notice provision does not expressly grant specific authority or impose explicit obligations upon federal or state officials, the Act's legislative history shows that Congress intended the notice provision to enable public officials to 'voice concerns if they believe that the class action settlement is not in the best interest of their citizens.'"

In October, in *Chapman v. Tristar Prods., Inc.*, 940 F.3d 299 (6th Cir. 2019), the Sixth Circuit denied Arizona's request, holding that CAFA's plain text forecloses the argument that CAFA's notice provision creates standing to intervene in private settlement proceedings. The court held that § 1715(f), which provides that "[n]othing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials," controls the question, and the court therefore would not entertain arguments invoking CAFA's legislative history. The court also rejected Arizona's argument that it had standing pursuant to its *parens patriae* authority, because any objections it can make are indistinguishable from objections which individual Arizonans may raise. It further denied standing on the basis of claimed "participatory interests" under *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997).

The court's interpretation of § 1715(f) casts doubt on the DOJ's assertion that CAFA creates "a role in the settlement-approval process for the Attorney General." However, the DOJ has independently relied on 28 U.S.C. § 517 as a basis for asserting the right to file amicus briefs or statements of interest in district court proceedings. That statute allows the Attorney General to "send any officer of the Department of Justice" to any State or district in the United States to "attend to the interests of the United States" in a pending federal or state lawsuit. In appellate proceedings, Rule 29 of the Federal Rules of Appellate Procedure permits the United States to file an amicus brief without the consent of parties or leave of court.

IX. Preliminary Results of FTC Class Action Studies

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 were 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.

In September, the FTC published an 83-page preliminary report presenting the results of its "Administrators Study" and "Notice Study." The former is based on a sample of 149 consumer class action cases from large class action administrators, and the latter draws from "internet-based consumer research" exploring consumer perceptions of emailed class action notices.

The Administrators Study found the following: (1) the overall claims rate of the cases in the sample was less than 10% and varied depending on whether class members received notice by packets, postcards, or email; (2) claims rates did not differ when publication notices were used as a supplement to direct notices; (3) changes in median compensation were not found to be related to claims rates, although check cashing rates were higher as median compensation increased; and (4) a supplementary examination of qualitative notice and claim form characteristics suggested that the claims rate was higher in cases where the notices used visually prominent, "plain English" language to describe payment.

The Notice Study found the following: (1) referencing the class action in the subject line increased respondent comprehension but resulted in fewer respondents stating that they would open the email relative to emails without such references; (2) respondents had the highest stated opening rates for emails with subject lines that omitted any reference to a class action; (3) omitting the amount of compensation from the subject line improved both comprehension and stated opening rates; (4) using a long-format email with formal, legal writing improved the understanding of the nature of the email while a condensed form of the email improved the understanding of next steps; (5) respondents were more suspicious of the condensed form email than the long form emails; (6) less than half of respondents understood that the email pertains to a class action settlement or a refund rather than representing a promotional email; and (7) less than half correctly understood the steps required to receive a refund. The preliminary report suggests respondents may view class action settlement notices with skepticism, but that the area would benefit from further study.

On October 29, the FTC hosted a workshop discussing the studies. Video of the three panels and related presentations is available on the FTC website.

X. The Conservative Case for Class Actions

In November, Vanderbilt Law School Professor Brian T. Fitzpatrick published a new book, *The Conservative Case for Class Actions*. As the title implies, the book defends class actions by drawing on conservative and libertarian academic scholarship and economic reasoning. A self-described

Federalist Society acolyte who worked for the "most conservative judges" and one of the "most conservative members of the U.S. Senate" after law school, and who "never voted for a Democrat for president in [his] entire life," Professor Fitzpatrick argues that class actions are both the most effective and the most *conservative* means of holding big businesses accountable, including because they are preferable to market feedback and government regulation as inevitable alternatives. The 272-page book is available from the University of Chicago Press.

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