AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Fall 2020

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 2020 update.

I. CLASS ACTIONS IN A 6-3 CONSERVATIVE COURT

On October 26, 2020, shortly before the election of Democratic candidate Joe Biden, the Senate voted 52-48 to confirm President Trump's third U.S. Supreme Court nominee, Judge Amy Coney Barrett of the Seventh Circuit Court of Appeals, as the 115th justice. Justice Barrett heard her first oral argument the day before the election, filling the vacancy created by the passing of Justice Ruth Bader Ginsburg.

As AAI noted in an analysis of Justice Barrett's case law and scholarship during her three years as an appellate judge and 15 years as a law professor, Justice Barrett's record is too sparse to support meaningful predictions of how she will rule in antitrust or collective action cases. In her three years as a judge, she participated in seven antitrust cases and authored only one opinion, and none of the cases were decided on the merits. She authored one Rule 23 opinion and one collective arbitration opinion, both for unanimous panels that followed relatively clear and uncontroversial precedent. However, in an apparent split with other circuits, she has narrowly interpreted a provision of the Federal Arbitration Act (FAA) that excludes transportation workers, thereby allowing arbitration clauses to further thwart class actions in the one sector where they otherwise would not.

Justice Barrett is a self-described textualist and originalist, and she was chosen by advisors to President Trump because her decisions are believed to skew reliably conservative. According to one empirical study of a subset of Justice Barrett's cases, 88.9% of the opinions she authored, 88.33% of the opinions she joined, and 91.67% of her unsigned orders, were "pro-business." In its analysis, AAI observes that the Court's prevailing 5-4 conservative majority was already exceedingly hostile to private antitrust class actions in recent years, and the Court's opinions have largely served as a one-way ratchet in raising the burdens on class certification and strictly enforcing arbitration clauses. Thus, with rare exceptions where a given conservative justice might be recused, a further shift rightward in the Court's makeup may be largely academic. However, even if the tenor of the Court's class-action opinions is unlikely to change, the conservative justices now have unprecedented control of the Court's docket, because the liberal justices no longer have the four votes necessary to obtain a cert grant. It remains

[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.

to be seen whether any four conservatives will exercise this new power to set a more activist tort-reform agenda than the previous Court.

Under the Court's new makeup, majorities that controlled several recent decisions that were favorable to antitrust class plaintiffs, or only moderately unfavorable, also no longer hold. For example, the Court was ideologically split 5-4 in the *Amex* case (2018), which raised the bar for establishing a prima facie case under the rule of reason in two-sided transaction markets, and in the *Leegin* case (2007), which eased the legal treatment of resale price maintenance. The Court also was divided 5-4—along non-ideological lines—in *Apple v. Pepper* (2019), which rejected expansive interpretations of *Illinois Brick* that would have barred more claims, and 5-3 (with Justice Alito recused) in the *Actavis* case (2013), which held that pay-for-delay agreements are not immune from antitrust scrutiny, as the dissent would have held.

Justice Kavanaugh and now-retired Justice Kennedy joined the liberal justices in *Pepper* and *Actavis*, respectively. Thus, under the Court's new makeup, there are now only four "liberal" votes on *Illinois Brick* and only three remaining justices who voted with the majority in *Actavis*. Moreover, Justice Kennedy and Justice Roberts were each in the conservative majority in *Amex* and *Leegin*. Justice Kennedy's opinion in *Leegin* was relatively tempered, and Justice Thomas's opinion in *Amex* was limited to specific kinds of markets. If Justice Barrett lives up to her billing, subsequent cases can be expected to build out these decisions, with or without the support of Justice Roberts.

President-elect Biden has pledged that he will convene a bipartisan commission to propose changes to the Court and to the federal judiciary more generally. In the meantime, AAI expects antitrust plaintiffs likely will try to avoid the reconstituted Court unless their case presents uniquely strong textualist arguments or otherwise stands a chance of winning two reliably conservative votes for idiosyncratic reasons. Antitrust defendants, on the other hand, likely will compete vigorously for the new Court's attention. And pro-consumer developments in antitrust and class-action law, in the near term, likely will have to come from executive branch agencies or Congress.

II. SPECIFIC PERSONAL JURISDICTION

We have chronicled in several previous updates the Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), which prevents defendants who are engaged in nationwide conduct from being subject to a mass action by plaintiffs injured both within and outside the forum State if general jurisdiction is lacking. That decision has engendered questions in the lower courts as to whether such defendants can be subject to a class action brought by such plaintiffs. If not, nationwide or multi-state classes of plaintiffs likely would be unable to bring class actions except in a defendant's home state.

In our Spring 2020 update, we noted that a large majority of district courts to consider the question have refused to extend *Bristol-Myers* to unnamed, out-of-state class members. We also noted that the 5th, 7th, and D.C. Circuits all ruled on the issue in the span of a two-week period in March, and all three held that *Bristol-Myers* does not bar nationwide class actions before class certification notwithstanding that specific jurisdiction may be lacking for unnamed class members. We also noted

that the issue was before the Ninth Circuit on interlocutory appeal in *Moser v. Health Ins. Innovations, Inc.* No. 19-56224 (9th Cir. docketed Oct. 23, 2019).

As of this writing, *Moser* remains pending. The defendant-appellant has filed its opening brief, which was supported by an amicus brief from the U.S. Chamber of Commerce. The plaintiffs-appellants answering brief is due December 14, 2020. Since our Spring 2020 update, no other circuit court has addressed the question and, to date, no circuit court has held that *Bristol-Myers* bars nationwide class actions in forum states where general jurisdiction is lacking. The 5th, 7th, and D.C. Circuits all hold that the issue of personal jurisdiction over unnamed class members is not properly before a court before class certification, and the Seventh Circuit holds further that plaintiffs must establish personal jurisdiction only over named class members, not absent class members.

We also noted in our Spring 2020 update that the Supreme Court granted certiorari in two consolidated cases, *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, No. 19-368, and *Ford Motor Co. v. Bandemer*, No. 19-369, addressing the "arise out of or relate to" requirement for specific personal jurisdiction. We observed that the petitioners seek a strict standard requiring a causal connection between the plaintiff's claimed injury and the defendant's contacts with the forum state, which would raise the stakes as other circuit courts consider whether to apply *Bristol-Myers* to class actions. If, for example, personal jurisdiction requires that the defendant's contacts with the forum state must be the but-for or proximate cause of each plaintiff's claimed injury, then nearly all nationwide classes would be left without a venue other than the defendant's home state. That would result in significant litigation advantages for corporate antitrust defendants.

The cases have now been briefed and were argued on October 7, 2020. At oral argument, all eight of the justices expressed skepticism of Ford's proposed test, but also about the existing test originating in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which does not account for the internet age. Justice Alito in particular expressed frustration that *International Shoe* is not based on an originalist reading of the due process clause. He said, "we're in a strange situation where we are not purporting to apply what due process was understood to mean when the Fourteenth Amendment was adopted. We are applying a 1945 standard adopted by the Court when it put on its fair play hat and said this is fair play as we understand the world in 1945."

The Justices also closely questioned the plaintiffs' proposed theory under which specific jurisdiction should be found where the defendant systematically marketed, sold, and serviced similar products in the state where the plaintiff's injury occurred. Several Court watchers agreed that the Justices did not appear to coalesce around any of the available pathways for resolving the case, and it is unclear how the Court will rule.

III. ASCERTAINABILITY

As we have chronicled in several previous updates, including our Spring 2020 update, a circuit split remains over whether Rule 23 requires a heightened ascertainability requirement that demands class plaintiffs plead and prove an administratively feasible mechanism for identifying class members. The tide of recent decisions has moved against such a requirement, with each of the last five 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 adopted a position. The Eleventh Circuit has addressed the issue but has characterized its position as "unresolved."

In our Fall 2017 update, we noted that the Third Circuit, where the heightened ascertainability theory first gained credence, gave a slightly more forgiving interpretation in *City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, 867 F.3d 434 (3d Cir. 2017). The court vacated and remanded a district court's denial of class certification, holding that affidavits from class members coupled with other reliable evidence could satisfy the standard. Concurring Judge Fuentes wrote separately to criticize the "the unnecessary burden on low-value consumer class actions" created by the heightened ascertainability requirement. He suggested that the Third Circuit should join the Second, Sixth, Seventh, and Ninth Circuits in rejecting it.

In September, in a 2-1 panel opinion authored by Judge Ambro in *Hargrove v. Sleepy's LLC*, 974 F.3d 467 (3d Cir. 2020), the Third Circuit continued its retreat. After a district court denied certification because a putative class of FLSA plaintiffs, confronted with gaps in defendants' employment records, would have had to "piece together" the identities of class members using affidavits and other evidence, the court held that the district court "misapplied" the ascertainability requirement and overstated the requirement's evidentiary demands. The court explained, "all that is required is that [the plaintiffs] show there is a reliable and administratively feasible mechanism," and gaps in the record "do not undermine the conclusion that all the evidence taken together *could* at the merits stage be used to determine [the identities of class members]." The district court's test was "too exacting and essentially demand[ed] that Appellants identify the class members at the certification stage." Citing *City Select Auto Sales*, the court reiterated that "[a]ffidavits, in combination with other reliable and administratively feasible means, can meet the ascertainability standard."

Judge Hardiman, dissenting, would have held that the district court did not abuse its discretion in ruling that the plaintiffs failed to satisfy the test. He also faulted the majority for extending the logic of the Supreme Court's holding in *Tyson Foods* to the ascertainability context.

IV. CLASSES CONTAINING UNINJURED MEMBERS

As discussed in several previous 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 2016 update, we noted that the Supreme Court's opinion in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1040 (2016), strongly implied that the presence of uninjured class members does not necessarily defeat class certification.

Since the Eleventh, Seventh, and Ninth Circuit decisions in *Cordoba*, *Physicians Healthsource*, and *Ramirez*, which we discussed in our Spring 2020 update, the Ninth Circuit has taken up the question in the context of an antitrust case, *In re Packaged Seafood Antitrust Litigation*, No. 19-56514. After a district court granted the plaintiffs' motion for class certification based in part on common statistical evidence of impact, the court accepted the defendants' petition for interlocutory appeal, which argues that plaintiffs' common statistical evidence was impermissible because it relied on average overcharges,

which, according to defendants, masked the presence of uninjured class members who did not pay an overcharge. AAI filed an amicus brief in support of the class plaintiffs, explaining why the Rule 23 standards announced in *Tyson Foods*, properly understood and applied, should govern the case. Oral argument was held on October 9, 2020, before Judges Hurwitz, Kleinfeld, and Bumatay.

V. CLASS ACTION WAIVERS IN MANDATORY ARBITRATION CLAUSES

Since our Fall 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 System Corp. v. Lewis*, 138 S. Ct. 1612 (2018). In our Spring 2019 update, we noted that the FAA, by its terms, excludes "contracts of employment" with transportation workers from its coverage, provided they are "engaged in foreign or interstate commerce." 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, and the Court also broadly interpreted the FAA's use of "contracts of employment" to include both employees and independent contractors.

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

Since our Spring 2019 update, a circuit split arguably has arisen over how the "foreign or interstate commerce" requirement affects the scope of the transportation-worker exclusion. In July, the First Circuit in *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020), held that delivery drivers who "haul goods on the final legs of interstate journeys" fit within the exemption "regardless of whether the workers themselves physically cross state lines." In August, however, the Seventh Circuit in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020)—in the opinion authored by now-Justice Barrett discussed in Part I above—held that the exclusion applies only to "workers actively engaged in the movement of goods across interstate lines," and to "determine whether a class of workers meets that definition, we consider whether the interstate movement of goods is a central part of the class members' job description." The court held that a class of local food-delivery drivers did not meet the requirement.

Two weeks after *Wallace*, the Ninth Circuit, in *Rittman v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), sided with the First Circuit, holding that the exclusion exempts transportation workers who are engaged in the movement of goods in interstate commerce "even if they do not cross state lines." As the Congressional Research Service observed in reviewing Justice Barrett's ruling for the Seventh Circuit, *Rittman* raises questions as to the nature of the holding of *Wallace*. The majority in *Rittman* purported to distinguish *Wallace* as resting on the fact that the affected goods in that case were both prepared and delivered locally. However, a dissenting judge in *Rittman*, who would have held that workers must actually cross state lines to be considered "engaged in interstate commerce," said "My interpretation of the FAA aligns with the recent decision in *Wallace*" because "the Seventh Circuit held that to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods *across state or national borders*."

In September, in the course of denying a mandamus petition in *In re Grice*, 974 F.3d 950 (9th Cir. 2020), the Ninth Circuit undertook a survey of recent cases and, citing *Wallace*, *Rittman*, *Waithaka*, and others, concluded that, "In each case, the critical factor was not the nature of the item transported in interstate commerce (person or good) or whether the plaintiffs themselves crossed state lines, but rather '[t]he nature of the business for which a class of workers perform[ed] their activities.'"

Notably, the First Circuit in *Waithaka*, upon finding that the plaintiffs fell within the FAA's exclusion of transportation workers, held further that the statutory right to proceed as a class articulated in the employment statutes under scrutiny "represent[s] the fundamental public policy of Massachusetts" and that the challenged class action waiver inserted in an employment contract therefore was invalid under state law. The *Rittman* court did not reach the question because it held the arbitration provision invalid on other grounds, namely that the contract as interpreted was governed by neither federal nor state law.

VI. INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

In September, the Eleventh Circuit in *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), unexpectedly held that incentive awards paid to lead class plaintiffs—a mainstay of antitrust and other class actions for decades—are unlawful under 19th century Supreme Court precedent. After a district court preliminarily approved a settlement and set deadlines for class member to opt-out and object, one class member appealed, arguing, among other things, that a $6,000 incentive award to the lead plaintiff contravened the Supreme Court's decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), creating a conflict of interest between the lead plaintiff and other class members. The Eleventh Circuit, in an opinion by recently appointed Judge Kevin Newsom, sided with the objector.

The court held that *Greenough* and *Pettus* establish limits on the types of awards that attorneys and litigants may recover from a common fund, including that "[a] plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses." The court found that the modern-day incentive award "is roughly analogous to a salary—in *Greenough*'s terms, payment for personal services," and such awards are designed not only to compensate, but also to promote litigation by providing a "bounty."

On October 22, the plaintiff filed a petition for en banc rehearing, arguing that (1) the panel's categorical prohibition on incentive awards is an issue of exceptional importance, resulting in far fewer victims willing to step forward to serve as class representatives; (2) the decision is in tension with other decisions from the Eleventh Circuit; (3) the decision creates an open conflict with every other circuit; and (4) the panel's reliance on *Greenough* is erroneous for a variety of reasons. The petition has attracted six supporting amicus briefs on behalf of 45 amici curiae, including a brief by Prof. William Rubenstein, the author of the leading class action law treatise, which argues that the panel opinion is erroneous for additional reasons. On November 9, the court entered an order withholding the issuance of the mandate, which prevents the court's jurisdiction over the appeal from terminating and the decision from taking immediate effect.

VII. NATIONWIDE CLASSES INVOLVING VARYING STATE LAWS

In our Spring 2019 and Fall 2019 updates, we discussed the en banc Ninth Circuit opinion in *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 926 F.3d 539 (9th Cir. 2019), which overturned a panel opinion vacating a district court's certification of a nationwide settlement class in a false advertising class action. The panel had vacated class certification because variations in state law might defeat predominance. The en banc court reversed, holding that, "[s]ubject 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, notwithstanding that plaintiffs have the burden to show that Rule 23 is satisfied.

We also noted that the Ninth Circuit in *Stromburg v. Qualcomm, Inc.*, No. 19-15159 (filed Oct. 11, 2018), has been considering whether state law variations with respect to *Illinois Brick*-repealer rules defeat predominance. In August 2019, 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 for purposes of the predominance inquiry. Oral argument was held in December before Judges Siler, Bybee and Nelson, but in March the court ordered simultaneous supplemental briefing by the parties on whether the appeal should be held in abeyance pending a merits decision in Qualcomm's appeal of the FTC's successful district court challenge of the same conduct, which was also pending before the Ninth Circuit. The parties submitted supplemental briefs in March.

In August, before the *Stromberg* panel ruled on whether to hold the appeal in abeyance, the panel reviewing the FTC's trial court victory reversed. Shortly thereafter, the *Stromberg* panel ordered the parties to submit letter briefs addressing the effect of the court's holding in the FTC's case on the *Stromberg* case. In September and early October, letter briefs were submitted by both parties, as well as the United States appearing as amicus curiae to further encourage the court to decide pending questions in favor of Qualcomm. As of this writing, the future of the *Stromberg* case is uncertain; *en banc* rehearing in the FTC case was subsequently denied.

In July, in *Jabbari v. Farmer*, 965 F.3d 1001 (9th Cir. 2020), the Ninth Circuit distinguished *Espinosa* from the court's 2012 decision in *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), which Qualcomm relies on heavily in arguing that differences in *Illinois Brick*-repealer rules should defeat predominance. In *Mazza*, which involved a litigation class, the court held that the district court abused its discretion when it erroneously applied California law to the entire nationwide class despite conflicting law in other states. In *Espinosa*, which involved a settlement class, the court held that "a district court does not commit legal error by not conducting a choice-of-law analysis, despite variations in state law, before determining that common issues predominate for a settlement class." The *Jabari* court reconciled the cases by explaining that both "align with the general rule that predominance is easier to satisfy in the settlement context." Although Qualcomm involves a litigation class and therefore may not benefit from *Espinosa*, the question remains whether variations in *Illinois Brick*-repealer rules create a "true conflict" under California's choice-of-law test. AAI's amicus brief argues they do not.

VIII. RESOLVED OR CONCEDED ISSUES AND COMMONALITY

In *Hicks v. State Farms Ins. Co.*, 965 F.3d 452 (6th Cir. 2020), the Sixth Circuit addressed whether a question that has been resolved at the motion-to-dismiss stage counts as a common question under Rule 23(a). After putative class plaintiffs alleged that State Farm underpaid claimants on homeowners insurance contracts by systematically miscalculating "actual cash value" payments, the district court certified a class of policyholders. On appeal, State Farm argued that Rule 23(a)'s commonality requirement was not satisfied because the common liability question had already been resolved in the plaintiffs' favor. The Sixth Circuit rejected the argument and held that "[c]ommonality—whether a common question is capable of classwide resolution—is not undermined when a party concedes an issue, or the issue is resolved in the plaintiffs' favor." Here, the common (resolved) liability question was central to the validity of each of the putative class members' claims and no individualized proof was necessary to resolve the question on a classwide basis.

IX. CALCULATING ATTORNEY'S FEES

In August, in *Linneman v. Vita-Mix Corp.*, 970 F.3d 621 (6th Cir. 2020), the Sixth Circuit considered several questions of first impression regarding the calculation of attorney's fees in class-action settlements. After commercial customers and consumers brought state law claims against Vita-Mix alleging that the latter sold defective high-end blenders, the parties entered a coupon settlement without agreeing to attorney's fees. The district court preliminarily approved the settlement but the parties proceeded to litigate over attorneys' fees for two years, with the district court ultimately awarding $3.9 million ($2.2 million plus a 75% upward multiplier) using a lodestar calculation.

On appeal, the defendant argued that the district court erred in using the lodestar method to calculate fees under a coupon settlement, because § 1712 of the Class Action Fairness Act ("CAFA") requires that, "[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." The court disagreed, explaining that the CAFA inquiry "centers on the meaning of the phrase 'attributable to the award of the coupons' because only that 'portion' of the fees award must be 'based on the value to class members of the coupons that are redeemed.'" The court identified a circuit split, noting that the majority of circuits construe the "attributable to" language narrowly and allow use of the lodestar method in coupon settlements, but that the Ninth Circuit does not. It sided with the majority and held that the lodestar method is permissible.

The defendant also argued that the district court abused its discretion in calculating billing rates, and this time the court agreed. The Sixth Circuit follows the "community market rule," under which the billing rate "should not exceed what is necessary to encourage competent lawyers within the relevant community to undertake legal representation." The court held that the district court ran afoul of the community market rule by relying on counsels' affidavits describing their backgrounds, billing rates, and involvement in the case, and opting to split the difference between pre-calculated local billing rates and requested rates claimed to "reflect[ ] the national practice and experience" of class counsel.

The court also held that the district court abused its discretion in three other respect. First, the district court erred by awarding a multiplier without first making a finding that the case involves "rare and exceptional circumstances" as required by *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010). Applying *Perdue*, the court held that a multiplier was not justified. Second, the district court erred by failing to consider whether to exclude any hours that class counsel worked after they rejected an arguably reasonable settlement offer on the fee award at the time of the merits settlement. Third, the district court erred by failing to make any specific findings about the value of the settlement. The court noted that in a coupon settlement in particular, "redemption rates should … play a crucial role in assessing the reasonableness of a fees award," although "[t]hat is not to rule out the possibility that a court might be able to determine the reasonableness of an award—and specifically the 'success obtained'—without reference to the redemption rates."

Finally, the court held that the district court did not err in awarding counsel post-judgment interest pursuant to 28 U.S.C. § 1961, under which "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." The court found that the district court correctly held that § 1961 applies in this case because the phrase "any money judgment" includes a judgment awarding attorney's fees, and such a judgment is "recovered" regardless of whether it arises from a voluntary settlement or a decision on the merits.

X. ACPERA

In our Spring 2020 update, we noted that the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), enacted by Congress in 2004 and reauthorized in 2010, was scheduled to sunset on June 22, 2020. Although Congress did not meet the original deadline, both the House and Senate approved a bill renewing and permanently extending ACPERA a few days later, on June 25, 2020. And on October 1, 2020, President Trump signed the permanent reauthorization bill into law in a continuing resolution.

ACPERA has important implications for private enforcement because it defines the rights and obligations of leniency applicants who report criminal wronging to the Department of Justice. One of the key provisions of ACPERA is its "detrebling relief," which relieves a leniency applicant accepted into the program of treble damages otherwise available to plaintiffs in civil actions arising from the anticompetitive activity of the applicant that is within the scope of the leniency agreement. Detrebling relief is available, however, only if the applicant cooperates satisfactorily with the private civil damages plaintiff seeking recovery from the applicant's co-conspirators. Among other things, the leniency applicant must provide the civil plaintiff a full account of all facts, furnish documents and other items, and submit to interviews, depositions and testimony.

XI. EMPIRICAL DATA ON ANTITRUST CLASS ACTIONS

In August, Huntington Bank (Huntington) and the University of San Francisco School of Law (USF) published the 2019 Antitrust Annual Report: Class Action Filings in Federal Court, their second annual antitrust report examining empirical information involving the filing and resolution of private antitrust class action lawsuits. Whereas the 2018 report covered the years 2013-2018, the new 2019 report extends the coverage period to ten years—from 2009-2019.

The Report shows the number of antitrust class action complaints filed each year, the amount of time they took on average to reach a settlement, the mean and median recoveries, the attorneys' fees and costs awarded, and the total settlement amounts in each year and overall. It also analyzes the law firms that represented plaintiffs and defendants in antitrust class action settlements, describes cumulative results, and tabulates cumulative totals for claims administrators involved in the settlement process. The report also distinguishes private antitrust enforcement by particular industries, by type of claim, and by type of plaintiff.

Contemporaneous with the report's publication, AAI and USF released a commentary examining the report's key findings, which include the following:

- From 2009-2019, a mean number of 117 consolidated complaints were filed per year, with outlier years as low as 72 and as high as 211.
- From 2009-2019, there were Defendant Wins in 95 cases as a result of judgments on the pleadings, summary judgment, judgment as a matter of law, or trial.
- From 2009-2019, most antitrust class actions that reached final approval did so within 5-7 years.
- The mean settlement amount varied by year from $6 million to $41 million, and the median amount varied by year from $2 million to $11 million.
- The total annual settlements ranged from $225 million to $5.3 billion per year.
- The cumulative total of settlements was $24.1 billion from 2009-2019.

XII. HOUSE JUDICIARY REPORT AND PRIVATE ANTITRUST CLASS ACTIONS

On October 6, 2020, the Majority Staff of the House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law released a 450-page Report on its Investigation of Competition in Digital Markets. The Report includes recommendations designed to strengthen substantive antitrust doctrine and private antitrust enforcement that, if codified and enacted, would remove barriers to both individual and class actions. AAI provided comments to the Subcommittee in response to a submission request.

Among other things, the Report recommends overturning or amending Supreme Court precedents governing proof of monopoly leveraging (*Spectrum Sports, Inc. v. McQuillan*), predatory pricing (*Matsushita v. Zenith Ratio Corp.* and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*), predatory bidding (*Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*), refusals to deal (*Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP* and *Pacific Bell Telephone Co. v. LinkLine Commc'ns, Inc.*), market definition (*Ohio v. American Express*), antitrust injury (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*), and antitrust standing (*Assoc. Gen. Contractors v. California State Council of Carpenters*). It also recommends overturning or amending Supreme Court precedent favoring forced arbitration clauses containing class action waivers (*American Express v. Italian Colors* and *AT&T Mobility v. Concepcion*), favoring undue limits on class actions (*Comcast v. Behrend*), and raising pleading requirements (*Bell Atlantic Corp. v. Twombly*).

Rep. Ken Buck (R-CO) released a separate report that finds some "common ground" with the Majority Staff and calls for "further study" of the Majority Staff's recommendations regarding "predatory pricing, monopoly leveraging, the Essential Facilities Doctrine, and policies related to the Supreme Court's recent decision related to two-sided markets in *Ohio v. American Express*." However, Rep. Buck's report suggests that "eliminating arbitration clauses and further opening companies up to class action lawsuits" are "non-starters for conservatives." It also does not support changes to pleading standards and says it "would rather see the subcommittee focus on legislation that removes barriers to agency antitrust enforcement rather than private enforcement."

Minority Staff issued a third report that focuses on conservative social issues in the digital technology sector without addressing antitrust law.

As of this writing, many expect Democrats to control the House and Republicans to control the Senate during the 117th Congress, though election results in several Congressional races have yet to be determined.

American Antitrust Institute
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