AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Spring/Summer 2021

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 2020 update.

I. CLASSES CONTAINING UNINJURED CLASS MEMBERS

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*, 577 U.S. 442 (2016), strongly implied that the presence of uninjured class members does not necessarily defeat class certification.

In our Spring 2020 update, we noted that the Eleventh Circuit in *Cordoba v. DirecTV, LLC*, 942 F.3d 1259 (11th Cir. 2019), held that individualized questions of standing can be relevant to the predominance inquiry, and that the standing of allegedly uninjured class members presented an individualized question in the Telephone Consumer Protection Act (TCPA) case before the court. We also noted that the Ninth Circuit, in *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), in a class action brought under the Fair Credit Reporting Act (FCRA), held that each class member must have Article III standing at the final judgment stage of a class action, subsequent to trial.

In December 2020, the Supreme Court granted certiorari in *Ramirez*, and in June, in a 5-4 opinion authored by Justice Kavanaugh, a sharply divided Court reversed. But the Court's controversial holding turned on what it takes for any individual victim of a federal statutory violation to establish standing, not on the timing of the standing inquiry when plaintiffs seek to aggregate claims in a class action.

The majority opinion by Justice Kavanaugh, joined by Justices Roberts, Alito, Gorsuch, and Barrett, held that the vast majority of class members suffered no concrete injury—and lacked Article III standing to bring FCRA claims accordingly—because the parties stipulated that false information contained in their TransUnion credit reports was never distributed to businesses. As a result, it was not possible that they suffered the requisite harm, which the Court defined by analogizing to the tort of defamation. Impassioned dissents authored by Justice Thomas, joined by the Court's three liberal members, and by Justice Kagan, joined by Justices Breyer and Sotomayor, chastised the majority for "transform[ing] standing law from a doctrine of judicial modesty into a tool of judicial

[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.

aggrandizement," and for holding, for the first time, "that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III."

As relevant to antitrust class actions, however, the Court expressly disclaimed any judgment as to the propriety or impropriety of certifying classes containing some class members who may be shown to lack standing at subsequent stages of litigation proceedings. In a footnote, citing the Eleventh Circuit's decision in *Cordoba*, the Court said, "We do not here address the distinct question whether every class member must demonstrate standing before a court certifies a class." But the Court did state, "On remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing."

In early April, while the Supreme Court's decision in *Ramirez* was still pending (and with potentially important implications for its future disposition on remand), the Ninth Circuit issued its highly anticipated decision in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021), discussed in our Fall 2020 update. In *Bumble Bee*, a divided Ninth Circuit panel held that, in applying Rule 23(b)(3)'s predominance requirement, a district court must find that no more than a "de minimis" number of class members are uninjured. Because the district court did not make such a finding, the panel vacated the class certification order and remanded for further proceedings. Judge Hurwitz, partially dissenting, maintained that neither the text of Rule 23 nor Ninth Circuit precedent permit the court to create such a requirement.

Although neither the plaintiffs nor the defendants sought *en banc* rehearing in *Bumble Bee*, the Ninth Circuit, acting *sua sponte*, ordered briefing on whether *en banc* rehearing is warranted and specifically directed the parties to focus on the "de minimis" issue that divided the panel. In May, AAI, which had submitted an amicus brief on the merits, submitted an amicus brief in support of *en banc* rehearing, identifying several legal and practical problems with the standard the panel majority articulated. As of this writing, the *en banc* rehearing vote remains pending, and a mandate has yet to issue.

The class plaintiffs have since settled with one of the defendants and moved the Court to begin settlement approval hearings. Although none of the remaining defendants objected to proceeding with settlement hearings, the district court has refused in light of the Ninth Circuit's order vacating class certification, noting that, because the panel's de minimis holding is grounded in predominance and not manageability, it will apply to both settlement and litigation classes if *en banc* rehearing ultimately is rejected and a mandate subsequently issues.

II. THE USE OF STATISTICAL EVIDENCE TO PROVE COMMON IMPACT

The aforementioned Ninth Circuit opinion in *Bumble Bee* also has important implications for another recurring question we have tracked for several years: the appropriate class certification standards when liability and damages are determined on the basis of statistical evidence. In *Bumble Bee*, the defendants argued that the class plaintiffs' use of statistical evidence masked substantial differences among class members, partly because the plaintiffs' reliance on average overcharges obscured the presence of class members who did not pay an overcharge at all and therefore were not impacted by the admitted price fixing.

The Ninth Circuit affirmed the district court's holding that plaintiffs' reliance on common statistical evidence was capable of proving classwide impact. Citing the Supreme Court's holding in *Tyson*

Foods, the Ninth Circuit held that "representative evidence can be relied on to establish a class" so long as it is "closely and carefully scrutinized" for conformance with Rule 23's requirements. Here, the plaintiffs' statistical evidence passed muster because (1) an individual plaintiff could have relied on the statistical models to show impact in a hypothetical individual case; (2) there was a sufficient nexus between the plaintiffs' statistical evidence and their theory of liability in accordance with *Comcast*; and (3) the plaintiffs' statistical methodology was capable of showing that virtually all class members suffered injury so long as the methodology is sufficiently reliable.

The *Bumble Bee* panel-majority's treatment of plaintiffs' statistical evidence offered to prove common impact has not been briefed in *en banc* proceedings.

III. *DAUBERT* AT THE CLASS CERTIFICATION STAGE

When plaintiffs rely on expert testimony at the class certification stage, it is currently unsettled as to whether a court should perform a full *Daubert* analysis of the expert testimony or instead apply a tailored approach specific to the "rigorous analysis" required to satisfy Rule 23. In antitrust class actions, the *Daubert* and predominance standards can overlap when expert testimony is used to prove common impact and damages.

In January, in *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021), the Fifth Circuit held in an environmental case that *Daubert* analysis is required at the class certification stage when scientific evidence is relevant to the Rule 23 standard. Class plaintiffs filed suit under two environmental statutes alleging adverse health effects and property damage caused by emissions emanating from the defendant's Texas-based volatile chemical facility in the aftermath of Hurricane Harvey. The class plaintiffs relied upon four experts in seeking class certification, and on the defendant's motion to exclude, the district court granted the motion as to plaintiffs' damages expert but nonetheless certified the class. On appeal, the defendant argued that the district court erred in failing to ensure that the three remaining, relied-upon experts passed the *Daubert* test.

In an opinion by Judge Higginbotham, the Fifth Circuit agreed. Joining the Third, Seventh and Eleventh Circuits, the Fifth Circuit held that "the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify." Adopting Third Circuit reasoning, the Fifth Circuit found the application of *Daubert* analysis at the certification stage to be a "natural extension" of the need to conduct a "rigorous analysis" to determine whether the proposed class qualified under Rule 23. The court stated that expert testimony that "would not be admissible at trial … should not pave the way for certifying a proposed class."

According to one analysis, the 8th Circuit holds that a *Daubert* review is unnecessary at the class certification stage, and the Ninth Circuit holds that *Daubert* standards do not apply when weighing certification. Another analysis describes the 8th and 9th Circuits as applying a "limited *Daubert* analysis" in which some inquiry is made into reliability but a finding establishing ultimate admissibility is not required. The Ninth Circuit panel majority in *Bumble Bee* did not explicitly address the role of the *Daubert* standard at class certification.

IV. SPECIFIC PERSONAL JURISDICTION

Since 2017, we have been tracking the lower federal courts' application of the Supreme Court's 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 and if the defendant otherwise has insufficient contacts with the forum states to establish specific jurisdiction over the claims of some of the plaintiffs in the forum state. That decision has engendered questions 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 often might be unable to bring class actions except in a defendant's home state. Among other things, this would result in significant litigation advantages for corporate antitrust defendants, as well as inefficiency.

In our Spring 2020 update, we explained that the 5th, 7th, and D.C. Circuits all ruled on the issue in the span of a two-week period, and all three held that *Bristol-Myers* does not bar nationwide class actions prior to class certification, notwithstanding that specific jurisdiction may be lacking for unnamed class members. The 7th Circuit, in an opinion by Chief Judge Wood in *Mussat v. IQVIA*, went further than the others in holding affirmatively that *Bristol-Myers* does not apply to class actions.

In January, the Supreme Court denied certiorari in *Mussat*. Two months later, in *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021), the 6th Circuit joined the 7th Circuit in holding explicitly that "*Bristol-Myers Squibb* does not extend to federal class actions." Citing and quoting extensively from Chief Judge Wood's opinion in *Mussat*, the court noted that a class action is formally one suit in which a defendant litigates against only the class representative, and, accordingly, precedent does not deem the absent class members to be "parties." Therefore, the court held, "The different procedures underlying a mass-tort action and a class action demand diverging specific personal jurisdiction analyses."

In our Fall 2020 update, we noted that the 9th Circuit is currently considering this question on interlocutory appeal in *Moser v. Health Ins. Innovations, Inc.* No. 19-56224 (9th Cir. docketed Oct. 23, 2019). The appeal has now been fully briefed, and oral argument was held on May 13, 2021. A decision remains pending. To date, no circuit court has held that *Bristol-Myers* bars nationwide class actions in forum states that lack personal jurisdiction over absent class members.

We also noted in our Fall 2020 update that the Supreme Court granted certiorari and heard oral argument in *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, which addressed the "arise out of or relate to" requirement for specific personal jurisdiction. The petitioners sought a strict standard requiring a causal connection between the plaintiff's claimed injury and the defendant's contacts with the forum state, which would have raised the stakes as other circuit courts consider whether to apply *Bristol-Myers* to class actions. If, for example, personal jurisdiction were understood to require that the defendant's contacts with the forum state must be the but-for or proximate cause of each plaintiff's claimed injury, as the *Ford* defendants argued, then nearly all nationwide classes would be left without a venue other than the defendant's home state.

In March, the Supreme Court unanimously rejected the petitioners' strict causal connection standard. Justice Kagan's opinion for the Court, joined by Justices Roberts, Breyer, Sotomayor, and Kavanaugh, held that the "relates to" language in the "arise out of or relate to" requirement "contemplates that some relationships will support jurisdiction without a causal showing."

Justice Alito, concurring, would have held that "arise out of" and "relate to" are "are not really two discrete grounds for jurisdiction." He would have reaffirmed the basic minimum contacts standard

adopted in *International Shoe* and thereby "leave the law exactly where it stood before we took these cases." Justice Gorsuch, in a concurring opinion joined by Justice Thomas, implied that he would have overturned *International Shoe* and begun creating "a new jurisprudence about corporate jurisdiction" rooted in the Fourteenth Amendment's original meaning as it pertains to personal jurisdiction.

Although the Court's holding leaves room for further development of its personal jurisdiction jurisprudence, the majority and concurring opinions arguably should quell concerns that the Court will look to adopt overly stringent causation requirements that could threaten the viability of nationwide antitrust class actions on personal jurisdiction grounds.

V. ASCERTAINABILITY

A circuit split persists over whether Rule 23 contains a heightened ascertainability requirement that demands class plaintiffs plead and prove an administratively feasible mechanism for identifying absent class members. In our Fall 2020 update, we noted that 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 had addressed the issue in unpublished opinions but characterized its position as "unresolved."

In February, in a 3-0 panel opinion authored by Chief Judge Pryor in *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021), the Eleventh Circuit joined the majority of circuits in holding that "administrative feasibility cannot be a precondition for certification" under Rule 23. The court reasoned that an ascertainability requirement is implicit in Rule 23's requirement of a clearly defined class, but administrative feasibility is not. Class membership can be "capable of determination without being capable of *convenient* determination." (emphasis in original). Administrative feasibility therefore has "no connection to Rule 23(a)."

The court did hold that administrative feasibility is relevant to the manageability criterion of Rule 23(b)(3). However, "because Rule 23(b)(3) requires a balancing test, it does not permit district courts to make administrative feasibility a requirement."

VI. 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.

In our Fall 2020 update, we noted that a circuit split arguably had arisen over how the "foreign or interstate commerce" requirement affects the scope of the transportation-worker exclusion, particularly as applied to gig economy workers. In cases involving Amazon workers, the First and Ninth Circuits held that local delivery drivers fell within the exclusion insofar as they hauled goods on the final legs of interstate journeys, notwithstanding that they did not personally cross state lines. The Seventh Circuit, in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020)—in an opinion authored by now-Justice Amy Coney Barrett—held that workers seeking to qualify for the exclusion must be connected not simply to the goods, but to the act of moving those goods across state or national borders.

The Ninth Circuit, in the course of denying a mandamus petition in *In re Grice*, 974 F.3d 950 (9th Cir. 2020), surveyed the recent cases and concluded that the critical factor in each case "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.'"

In March, the 7th Circuit issued an opinion implying that the 9th Circuit's statement is correct, and that there may be less to the perceived circuit split than meets the eye. In *Saxon v. Southwest Airlines*, in a unanimous panel opinion authored by Judge St. Eve, the court reversed a district court order holding that a ramp supervisor who manages and assists workers loading and unloading airplane cargo for Southwest Airlines fell outside the transportation-worker exclusion of the FAA. The court explained that the FAA's residual phrase—"any other class of workers engaged in foreign or interstate commerce"—"cuts both ways." A transportation worker need not work for a transportation company, but a person does not become a transportation worker simply because she does work for a transportation company.

Here, the 7th Circuit, citing approvingly to then-Judge Barrett's opinion *Wallace*, maintained that transportation workers must be "actively occupied in 'the enterprise of moving goods across interstate lines'" to be sufficiently engaged in "commerce" in satisfaction of the FAA exclusion. But it interpreted the scope of work meeting that requirement expansively, to avoid "put[ting] ourselves in conflict with the Third Circuit's approach and in tension with the First and Ninth Circuits' interpretation of § 1."

The court held, "Actual transportation is not limited to the precise moment either goods or the people accompanying them cross state lines." Rather, consistent with contemporary statutes from the 1920s when the FAA was passed, which recognized as much, the "loading and unloading [of] cargo onto a vehicle so that it may be moved interstate, too, is actual transportation." In the aftermath of Judge St. Eve's opinion, district courts in the Seventh Circuit may likewise resort to textualist analyses in determining whether any given class of workers is engaged in "the actual transportation of goods" under the FAA's transportation-worker exclusion.

According to one analysis, federal courts in the last two years have issued more rulings on whether plaintiffs are transportation workers engaged in interstate commerce—and thus are exempt from the FAA—than they did over the preceding 17 years. Over the past two decades, courts have reportedly decided 92 cases involving worker claims that they are covered by the FAA's transportation-worker exclusion, with workers prevailing in 30 percent of the cases.

VII. INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

In our Fall 2020 update , we discussed the Eleventh Circuit's decision in *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), which held that incentive awards paid to lead class plaintiffs—a longstanding feature of antitrust and other class actions—are unlawful under 19th Century Supreme Court precedent. The court entered an order withholding the issuance of the mandate following the plaintiff's petition for rehearing *en banc*. In May, the plaintiffs submitted a notice of supplemental authority regarding plaintiffs' contention that the prohibition on incentive awards conflicts with decisions from every other circuit.

According to the submission, nine district court cases from outside the Eleventh Circuit and seven appellate panels have addressed the legality of incentive awards paid to lead class plaintiffs since the petition for rehearing *en banc* was submitted. The nine district court decisions have cited to and rejected the *Johnson* holding, permitting service awards to class representatives. The seven appellate panels, most of which are unpublished, have affirmed service awards. In a response, the defendant counters that the cited cases are non-binding and did not directly consider the 19th Century precedent on which *Johnson* relied. As of this writing, the plaintiffs' *en banc* rehearing petition remains pending.

VIII. PRIVATE ENFORCEMENT FEATURES OF PROPOSED ANTITRUST LEGISLATION

As we noted in our Fall 2020 update, the majority and minority staffs of the House Antitrust Subcommittee issued dueling reports that found common ground after a year-long investigation into the market power of Big Tech firms, and how the antitrust laws can be strengthened to address it. However, the minority report emphasized that it "would rather see the subcommittee focus on legislation that removes barriers to agency antitrust enforcement rather than private enforcement."

On June 11, 2021, Subcommittee members introduced five new antitrust bills aimed at curbing the monopoly power of Big Tech firms. Two of the five bills feature private enforcement and *parens patriae* provisions, as discussed below.

The American Choice and Innovation Online Act, sponsored by Rep. David Cicilline (RI-01) and Rep. Lance Gooden (TX-05), prohibits discriminatory conduct by dominant online platforms. This bill allows for an injured person to recover three-times the damages he or she sustained with simple interest on actual damages during the pendency of the suit, as well as the cost of the suit, including a reasonably attorney's fee. It also has a *parens patriae* provision that empowers state attorneys general to bring civil actions to recover on behalf of their injured citizens.

The "Platform Competition and Opportunity Act," sponsored by Rep. Hakeen Jeffries (NY-08) and Rep. Ken Buck (CO-04), prohibits covered platform operators from acquiring any entity that competes with or can augment the covered platform operator's existing business. This bill contains

private enforcement and *parens patriae* provisions that are identical to those of the American Innovation and Choice Online Act.

The "Ending Platform Monopolies Act," sponsored by Rep. Pramila Jayapal (WA-07) and Rep. Gooden, prohibits covered platform operators from selling goods or services on their platforms, and also from vertically or horizontally integrating into any line of business if the platform would have the ability and incentive to favor its own products or exclude rivals. Unlike the aforementioned bills, this bill lacks private enforcement or *parens patriae* provisions. Enforcement is left to the Department of Justice and the Federal Trade Commission.

The "Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act," sponsored by Rep. Mary Scanlon (PA-05) and Rep. Burgess Owens (UT-04), enhances standards for data security and data transferability to third-parties. This bill likewise lacks private enforcement or *parens patriae* provisions and vests enforcement authority solely with the Department of Justice and the Federal Trade Commission.

The "Merger Filing Fee Modernization Act," sponsored by Rep. Joe Neguse (CO-02) and Rep. Victoria Spartz (IN-05), amends the Hart Scott Rodino Act to increase filing fees for certain large mergers and acquisitions and increases budget appropriations for the Department of Justice and the Federal Trade Commission. There are no enforcement provisions in this bill.

A sixth bill introduced in May, the State Antitrust Enforcement Venue Act, sponsored by Reps. Cicilline, Buck, Neguse, Owens and Sanford Bishop (GA-02), exempts states' suits brought under federal antitrust law from being consolidated and relocated with private cases by the Judicial Panel on Multidistrict Litigation. In this regard, the bill would put states on equal footing with the federal government when enforcing federal antitrust law. It does not feature any enforcement provisions.

After a 29-hour markup session that ended on June 24, 2021, the House Judiciary Committee advanced all six bills with at least some bipartisan support for each. The American Innovation and Choice Online Act passed 24-20; the Platform Competition and Opportunity Act passed 23-18-1; the Ending Platform Monopolies Act passed 21-20; the ACCESS Act passed 25-19; the Merger Filling Fee Modernization Act passed 29-12; and the State Antitrust Enforcement Venue Act passed 34-7. The legislation is expected to receive a close vote in the full House, and as of this writing it is unclear when it will get to the floor.

Two analogous bills introduced in the Senate in February and April, respectively, lack private enforcement and *parens patriae* provisions: the Competition and Antitrust Law Enforcement Act of 2021, sponsored by Senator Amy Klobuchar (D-MN), and the Trust-Busting for the Twenty-First Century Act, sponsored by Senator Josh Hawley (R-MO).

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