AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Fall 2021

The American Antitrust Institute (AAI) seeks to preserve the effectiveness of antitrust class actions as a central and vital component 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 2021 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 Spring 2021 update, we noted that a divided Ninth Circuit panel in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021), 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 party petitioned for *en banc* rehearing, the Ninth Circuit ordered briefing *sua sponte* on whether rehearing was warranted, specifically directing the parties to focus on the "*de minimis*" issue that divided the panel. On August 3, the court vacated the panel opinion, ordered *en banc* rehearing, and scheduled oral argument for September 20, after which the defendant sought and obtained another round of merits briefing without disrupting the court's timeline. The case has now been briefed and argued before the *en banc* court, and a decision remains pending. AAI, which had submitted an amicus brief before the merits panel and an amicus brief in support of *en banc* rehearing, submitted an amicus brief on the merits before the *en banc* court as well.

On August 30, the same First Circuit panel that decided the controversial *Asacol* case, first discussed in our Fall 2018 update and cited frequently by the defendant in *Bumble Bee*, reaffirmed *Asacol* despite mounting criticism from First Circuit trial courts. In *Asacol*, Judge Kayatta, writing for himself and Judge Lynch, held that plaintiffs who lacked a common method for distinguishing injured from uninjured class members, and who sought to identify injured members using individual affidavits, did not satisfy Rule 23's predominance requirement where the total amount of damages varied based upon the number of members in the class and defendants had "stated their intention to challenge any affidavits that might be gathered." Judge Barron, concurring, emphasized that plaintiffs could still satisfy the predominance requirement by proving injury using individual affidavits where

[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.

defendants make only a speculative case that they would be able to effectively contest an affiant's representation, or where the subset of class plaintiffs that would actually need to rely on individualized testimony is small.

In *Bais Yaakov of Spring Valley v. ACT, Inc.*, 12 F.4th 81 (1st Cir. 2021), Judge Kayatta, again writing for himself and Judge Lynch, applied *Asacol* in summary fashion. The court affirmed the district court's refusal to certify a class of Telephone Consumer Protection Act (TCPA) plaintiffs where the defendant argued that it intended to individually challenge class members' claims on the basis that individual class members gave permission to receive allegedly unsolicited faxes that formed the basis for the alleged violations. Judges Kayatta and Lynch held that the district court did not abuse its discretion in refusing to certify the class where an unknown number of class members "could be found by the factfinder to have given the requisite permission" and plaintiffs did not offer an administratively feasible way to "identify and cull out those who did give express permission."

Judge Barron, again concurring in the judgment, as in *Asacol,* acknowledged "thoughtfully expressed" criticism from highly respected trial judges tasked with applying *Asacol*, including Chief Judge Smith in *In re Loestrin 24 FE Antitrust Litig.*, 410 F. Supp. 3d 352, 403-04 (D.R.I. 2019), and Judge Burroughs in *In re Intuniv Antitrust Litig.*, No. 1:16-cv-12396, 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262, at *7 n.8 (D. Mass. Aug. 21, 2019). However, Judge Barron maintained that the concern that the First Circuit is "unduly cutting back on Rule 23 through our construction of the predominance requirement" is "misplaced, or, at least, premature." He emphasized (1) "the limits on the scope of our holding in *Asacol*," (2) that the current opinion "break[s] no ground that *Asacol* did not already break," and (3) that plaintiffs relying on individualized affidavits can still prevail in the First Circuit by "identify[ing] a persuasive ground for doubting the defendant's showing that a stream of mini-trials likely awaits on the other side of certification." Judge Barron encouraged district courts to undertake an inquiry into whether it is "highly unlikely" that the defendant's showing of likely mini-trials would "survive typical pretrial screening (such as a [plaintiff's] motion to strike or a motion for summary judgment)."

Bais Yaakov likely leaves First Circuit law after *Asacol* unchanged. Named plaintiffs in the First Circuit likely cannot obtain class certification 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. Two First Circuit judges—Judges Kayatta and Lynch—have signaled that they continue to embrace *Asacol*'s reasoning. Judge Barron's latest concurrence does not show how the identified tensions between the opinion and the language of Rule 23 can be overcome in practice. It remains to be seen whether other First Circuit judges assigned to First Circuit panels will seek to cabin the opinion in line with criticisms from other courts and the class action bar, or whether a different set of facts might persuade Judge Barron that the identified tensions have "matured."

II. 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 Spring 2021 update, we noted that the tide of recent decisions has continuously moved against such a requirement, with each of the last six circuits to consider a heightened ascertainability requirement having ruled against it. The Second, Sixth, Seventh, Eighth, Ninth and Eleventh 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.

In our Fall 2017 update, we noted that the Third Circuit, where the heightened ascertainability theory first gained credence, gave a 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 repudiating it.

In our Fall 2020 update, we noted that the Third Circuit continued its retreat in *Hargrove v. Sleepy's LLC*, 974 F.3d 467 (3d Cir. 2020). 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, "[A]ll 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, "Affidavits, in combination with other reliable and administratively feasible means, can meet the ascertainability standard."

In October, the Third Circuit agreed to take up its heightened ascertainability standard yet again, this time in an antitrust case. In *In re Niaspan Antitrust Litig*. No. 21-8042 (3d Cir. docketed Oct. 7, 2021), a pharmaceutical reverse payment case, the district court denied class certification on grounds that plaintiffs had failed to establish an administratively feasible mechanism for identifying class members notwithstanding plaintiffs' evidence of comprehensive and detailed electronic claims data that could show the identity of every potential class member. The plaintiffs petitioned for interlocutory appeal under Rule 23(f) and defendants opposed, and the court granted the petition before plaintiffs filed a reply brief. The plaintiffs' opening appellate brief is due December 13, 2021.

In August, the Sixth Circuit, which does not impose a heightened administrative feasibility requirement, addressed the question of whether a class is sufficiently ascertainable where establishing membership in the class would "require individualized assessment and self-identification by each plaintiff." In *In re Sonic Corp.*, No. 20-0305, 2021 U.S. App. LEXIS 25403 (6th Cir. Aug. 24, 2021), the defendants petitioned for interlocutory appeal of a district court's order granting class certification in a data breach case, arguing that the need for individual assessment and self-identification should have led to denial on administrative feasibility grounds. The court rejected the argument and denied the petition. It stated, "We have declined to endorse self-identification when there is no documentary evidence and potential class members would have to submit individual affidavits testifying to receipt of a single-page facsimile seven years in the past. But we have never rejected self-identification as a means of determining membership when there are records verifying that determination." Here, the class plaintiffs could be ascertained using information from financial institutions affected by the data breach that could be cross referenced with third parties.

III. THE USE OF STATISTICAL EVIDENCE TO PROVE COMMON IMPACT

Since 2016, we have tracked recurring questions over the appropriate class certification standards to be applied when liability and damages are determined on the basis of statistical evidence. In the aforementioned *Bumble Bee* case, which is currently undergoing *en banc* review in the Ninth Circuit, 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. They argued that these differences defeated a showing of predominance.

The vacated Ninth Circuit panel opinion had *affirmed* the district court's holding that plaintiffs' reliance on common statistical evidence was capable of proving classwide impact (even though, as noted above, it had reversed on other grounds). Citing the Supreme Court's holding in *Tyson Foods*, the vacated panel opinion 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. Judge Hurwitz, who partially dissented on other grounds, joined this aspect of the vacated panel opinion, and the panel's treatment of plaintiffs' statistical evidence offered to prove common impact was not briefed or argued in *en banc* proceedings.

In August, in *FWK Holdings, LLC v. Merck & Co. (In re Zetia (Ezetimibe) Antitrust Litig.)*, 7 F.4th 227 (4th Cir. 2021), the Fourth Circuit rejected a similar predominance challenge to class certification based on the plaintiffs' reliance on statistical averages to help prove impact. The court held, "we find no issue with the practice of proving injury by class-wide averages, which the district court correctly characterized as 'common.' Moreover, even if some individualized-injury inquiry is ultimately required at trial for some defendants, common issues will still predominate." The plaintiff's burden was to show that "common proof could show antitrust injury to the class." In a reverse-payment case, this means showing that "a reasonable jury could find that all class members would have purchased some generic form of the drug—rather than the more expensive brand—had a generic been available earlier."

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. 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* did 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 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 August, in *Moser v. Benefytt, Inc.*, 8 F.4th 872 (9th Cir. 2021), a divided Ninth Circuit panel purported to follow the 5th and D.C. Circuits in holding that a defendant may not interpose a personal jurisdiction objection to absent class members' claims prior to class certification. After the district court held that the defendant had waived its personal jurisdiction defense by failing to raise it in its Rule 12(b) motion, the court held that a Rule 12 personal jurisdiction defense to the claims of unnamed putative class members was not waived because it was not available; unnamed class members are "not yet parties to the case" before class certification.

However, in a footnote, Judge Bress, who wrote the panel majority opinion for himself and Judge Bybee, allowed that while a personal jurisdiction defense is unavailable under Rule 12, it may conceivably be available under Rule 23. He maintained, "Nothing in the Federal Rules somehow requires a district court to assert its power over the claims of putative class members in the face of a class action defendant's personal jurisdiction objection *to class certification*. And nothing in the Federal Rules prevents that objection to a plaintiff's request *for class certification* from being interposed at the Rule 23 stage, as part of Rule 23 proceedings," as distinct from Rule 12 proceedings.

Judge Cardone dissented based on a disagreement with the majority about the scope of appealable issues under Rule 23(f), which we discuss in Section V. below. However, in her own footnote, in response to Judge Bress's footnote, she disagreed with Judge Bress's supposition that a personal jurisdiction objection to absent class members' claims can be raised prior to class certification as part of Rule 23 proceedings. She noted that the majority could cite no cases "suggesting personal jurisdiction is relevant to a Rule 23 factor," and indeed the Ninth Circuit in *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 672 (9th Cir. 2004), has held that "personal jurisdiction and class certification 'involve the application of different standards.'" She also believed the defendant's Rule 23 argument was waived because the defendant never raised it below, and the district court never considered it.

Moser was remanded with instructions for the district court to consider the merits of the defendant's *Bristol-Myers* objection to class certification in the first instance. It remains to be seen whether the case will return to Judges Bress and Bybee, and whether they will create a circuit split. 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.

V. THE SCOPE OF APPEALABILITY UNDER RULE 23(f)

In the aforementioned *Moser* case, Judges Bress and Bybee, to rule that a personal jurisdiction objection to putative class member claims could be attempted prior to class certification under Rule 23, had to first accept the appeal under Rule 23(f). Rule 23(f) provides, "A court of appeals may permit an appeal from an order granting or denying class-action certification *under this rule*." (emphasis added). The issue of whether personal jurisdiction is "relevant to a Rule 23 factor" thus also implicates whether a Rule 23(f) appeal can address personal jurisdiction.

Judges Bress and Bybee ruled that it can. They reasoned that the defendants made personal jurisdiction over putative class members relevant to class certification by arguing that the class should not be certified for want of personal jurisdiction over potential absent class members, and that the district was complicit because its class certification order rejected those arguments. They apparently would have denied appealability under Rule 23(f), consistent with the aforementioned *Poulos* decision, only if the defendant had chosen to challenge personal jurisdiction under a Rule 12 motion rather than under Rule 23.

Judge Cardone noted that no Ninth Circuit panel has ever interpreted Rule 23(f) to confer appellate jurisdiction over an exercise of personal jurisdiction. Moreover, she noted that Ninth Circuit precedent holds, "In a Rule 23(f) appeal, an appellate court must limit its review to whether the district court correctly selected and applied Rule 23's criteria." She observed, "Personal jurisdiction over putative class members is not one of those criteria."

In response to Judge Bress's determination that the present case is distinguishable because the defendant argued on appeal that its personal jurisdiction objection was made pursuant to Rule 23 rather than Rule 12, she noted that Rule 12(h)(1)(B) provides that "a personal jurisdiction challenge like [the defendant's] can *only* be raised 'by motion under [Rule 12]." She also noted that the defendant's decision to make the arguments at class certification, and the district court's disposal of what it called a "threshold issue" in its class certification order, does not render the issue appealable under Rule 23(f) under either Ninth Circuit or any other precedent.

VI. NATIONWIDE CLASSES INVOLVING VARYING STATE LAWS

In our Fall 2020 update, we noted that the Ninth Circuit in *Stromburg v. Qualcomm, Inc.*, No. 19-15159 (filed Oct. 11, 2018), was considering whether state law variations with respect to *Illinois Brick*-repealer rules can 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. California's choice-of-law rules permit application of California law absent a "true conflict" with the laws of other states.

In September, a Ninth Circuit panel comprised of Judges Nelson and Bybee, and Sixth Circuit Judge Siler, sitting by designation, ruled squarely for Qualcomm, largely adopting Qualcomm's arguments and the supporting arguments offered by the Department of Justice in an amicus brief signed by then-Assistant Attorney General Makan Delrahim. Although the Department of Justice had long maintained that the laws of *Illinois Brick*-repealer states do not irreconcilably conflict with the *Illinois Brick* regime and had explicitly argued the point to the Supreme Court in the *Arc America* case, the

Delrahim-led Antitrust Division, in its amicus brief supporting Qualcomm, quietly reversed course without explanation, arguing that the regimes do irreconcilably conflict.

Without identifying or otherwise acknowledging numerous arguments to the contrary in the parties' briefing and elsewhere in the record, the panel concluded that States which have not passed *Illinois-Brick* repealer legislation can be understood to have signaled a conflicting policy preference and a desire to prevent their citizens from recovering for their antitrust injuries under other states' repealer laws. The conclusion seems impossible to square with the Supreme Court's *Arc America* opinion, which held that "nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws."

The upshot of the court's holding is that multi-state indirect purchaser class actions filed in California likely cannot include residents of states that lack *Illinois-Brick*-repealer legislation, unless other common issues collectively predominate over individual issues raised by variations in state indirect-purchaser laws.

VII. 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 unclear 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. 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.

In our Spring 2021 update, we noted that 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, consistent with *Wallace*, 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.'"

We also noted that the Seventh Circuit, in *Saxon v. Southwest Airlines*, cited approvingly to *Wallace* and held 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. The court interpreted the scope of work meeting that requirement expansively so as to mitigate the appearance of a circuit split and to maintain consistency with contemporary statutes from the 1920s when the FAA was passed, which recognized that the cargo loading workers at issue were engaged in interstate transportation if they were unloading or loading cargo onto a vehicle so that it may be moved interstate.

Over the last five months, three new circuit courts have issued opinions following an approach similar to that of *Wallace*, *Grice*, and *Saxon*. In June, the Eleventh Circuit, in *Hamrick v. Partsfleet, Ltd. Liab. Co.*, 1 F.4th 1337 (11th Cir. 2021), held that the transportation worker exemption applies "if the worker belongs to a class of workers in the transportation industry and the class of workers actually engages in foreign or interstate commerce," and that this determination requires "factfinding and the weighing of conflicting evidence." It vacated and remanded a district court order finding that "final-mile delivery drivers" fell within the exclusion because the district court wrongly "focused on the movement of the goods and not the class of workers."

In August, in *Capriole v. Uber Techs., Inc.*, 7 F.4th 854 (9th Cir. 2021), the Ninth Circuit found *Grice* "instructive" and "persuasive" notwithstanding that *Grice* was decided in "the highly deferential context of a mandamus petition." It held that "Uber drivers, as a nationwide 'class of workers,' are not 'engaged in foreign or interstate commerce' and are therefore not exempt from arbitration under the FAA." The court reasoned that "Uber drivers, as a class, 'are not engaged in interstate commerce' because their work 'predominantly entails intrastate trips,' even though some Uber drivers undoubtedly cross state lines in the course of their work and rideshare companies do contract with airports 'to allow Uber drivers . . . to pick up arriving passengers.'"

In September, in *Harper v. Amazon.com Servs.*, 12 F.4th 287 (3d Cir. 2021), the Third Circuit held that district courts may appropriately order limited discovery designed to show whether the plaintiff belongs to a class of workers engaged in foreign or interstate commerce for purposes of claiming the FAA exclusion. However, the court held that, before ordering discovery, in the interests of efficiency, the district court must first determine whether state law grounds exist that would enforce arbitration even if the FAA does not apply. The court reasoned that this requirement "honors the principles of federalism and the expectations of the parties." Judge Schwartz, dissenting, believed this was error. Judge Schwartz maintained that, under the Supreme Court's holding in *New Prime* and prior Third Circuit precedent, "where the parties have selected the FAA as the law that governs arbitration, the court should first review whether the FAA covers the relevant class of workers."

The losing defendant in *Saxon*, Southwest Airlines, petitioned for certiorari in August. ScotusBlog lists the filing among its "featured petitions."

Since *Epic Systems* was decided in 2018, several legislative proposals that would fully or partially overturn the decision have circulated, including the Forced Arbitration Injustice Repeal Act (FAIR Act), which was first introduced by Sen. Richard Blumenthal (D-CT) and Rep. Hank Johnson (D-GA) in February 2019, and which we discussed in our Spring 2019 update. On November 3, the FAIR Act passed the House Judiciary Committee. In addition, on November 4, a narrower bill, the

Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act, introduced by Sen. Kirsten Gillibrand (D-NY) and Sen. Lindsey Graham (R-SC), passed the Senate Judiciary Committee.

The Gillibrand and Graham bill, which would not affect antitrust plaintiffs but rather would prevent forced arbitration from being imposed only in claims of sexual assault and harassment, is nonetheless significant because it marks the first time since *Epic Systems* that legislation limiting forced arbitration has advanced in the Senate. The bill has received bipartisan support from Republican Senators Chuck Grassley (R-IA), Lisa Murkowski (R-AK), John Kennedy (R-LA), Marsha Blackburn (R-TN) and Josh Hawley (R-MO), and Democratic Senators Dick Durbin (D-IL), Patrick Leahy (D-VT), Dianne Feinstein (D-CA), Sheldon Whitehouse (D-RI), Amy Klobuchar (D-MN), Chris Coons (D-DE), Richard Blumenthal (D-CT), Mazie Hirono (D-HI), Cory Booker (D-NJ), Alex Padilla (D-CA) and Jon Ossoff (D-GA).

VIII. 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 nineteen century Supreme Court precedent. In our Spring 2021 update, we noted that the Eleventh Circuit 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 had 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 had cited to and rejected the *Johnson* holding, permitting service awards to class representatives. The seven appellate decisions, most of which are unpublished, have affirmed service awards. In a response, the defendant countered that the cited cases are non-binding and did not directly consider the nineteen century precedent on which *Johnson* relied.

Since our last update, district courts within the Eleventh Circuit have joined courts outside the circuit in permitting payments to lead class plaintiffs where circumstances allow. In *Broughton v. Payroll Made Easy, Inc.*, No. 2:20-cv-41-NPM, 2021 U.S. Dist. LEXIS 139514 (M.D. Fla. July 27, 2021), the Middle District of Florida narrowly interpreted *Johnson* as applying only to an incentive award "that compensates a class representative for his time and rewards him for bringing a lawsuit." The court held that, although the parties' settlement agreement contained "references to a 'service award,'" the facts here were distinguishable from *Johnson* because the parties had clarified in a second amended motion and notice that the lead plaintiff was "receiving additional compensation for executing a supplemental agreement, which contains a much broader release of claims."

Other district courts in the Eleventh Circuit have denied service awards without prejudice, pending disposition of the *Johnson* plaintiffs' *en banc* rehearing petition. In *Cotter v. Checkers Drive-In Rests., Inc.*, No. 8:19-cv-1386-VMC-CPT, 2021 U.S. Dist. LEXIS 160592 (M.D. Fla. Aug. 25, 2021), for example, the district stated, "it is important to note that the mandate has been withheld in *Johnson* and a ruling for rehearing *en banc* is pending. Accordingly, this Court will follow the lead of its sister courts in this Circuit and deny Plaintiffs' request for service awards without prejudice, but it will

retain jurisdiction for the limited purpose of revisiting the denial of service awards should *Johnson* ultimately be overruled."

At least one district court in the Eleventh Circuit has applied *Johnson* to bar a service award. In *Rosado v. Barry Univ.*, No. 20-21813-CIV, 2021 U.S. Dist. LEXIS 169196 (S.D. Fla. Sep. 7, 2021), the court held that *Johnson* barred a $5,000 service award, and it refused to reserve jurisdiction to allow class counsel to renew their request for a service award should *Johnson* be reversed *en banc*. Although the court acknowledged that several other district courts have taken this approach, it worried that allowing class counsel to renew their request for the service award in this case might delay the distribution of settlement payments or increase settlement administration costs.

As of this writing, the plaintiffs' *en banc* rehearing petition in *Johnson* remains pending, and a mandate has yet to issue.

IX. NUMEROSITY IN CLASSES WITH 20-40 MEMBERS

In August, the Fourth Circuit clarified the standard for assessing Rule 23(a)'s numerosity requirement when the proposed class contains 20-40 members, which the court called a "gray area" between those proposed classes that presumptively fail and those that presumptively satisfy the numerosity requirement, respectively. In *FWK Holdings, LLC v. Merck & Co. (In re Zetia (Ezetimibe) Antitrust Litig.)*, discussed above in Section V., the court vacated and remanded a class certification order in a direct-purchaser reverse-payment case after the district court wrongly based its numerosity determination on the prospect of "multiple individual trials" in lieu of a class action. The court emphasized that the proper inquiry is "whether 'the class is so numerous that *joinder* of all members is impracticable,' not whether the class is so numerous that failing to certify presents the risk of many separate lawsuits." It explained, "Plaintiffs must bring to bear some evidence" that it would be uneconomical for smaller claimants to be individually joined as parties in a traditional lawsuit.

Judge Niemeyer, concurring, wrote separately to identify additional factors beyond the number of class members that might be used to "give flesh to the numbers inquiry." Relevant factors include "(1) judicial economy resulting from avoidance of joined or independent actions, (2) geographic dispersion of putative class members, and (3) the ability and motivation of class members to bring suit absent class certification." The weight to be given any factor will depend on the facts of the case.

The judicial economy factor, Judge Niemeyer noted, will usually favor a class action regardless of whether joinder is practicable, because individual suits, even if joined, affect economy of docket management and courtroom space and correlated staffing, and they "naturally place a greater strain on a district court than having just two or three class members represent the whole." A district court may also consider "the differential in costs of discovery between a class action and an action with many joined parties." Moreover, "an aspect of broader practicality, and also, perhaps, judicial economy, might relate to the ability to identify class members." If a majority of proposed class members have already been identified and reside within an established jurisdictional boundary, then joinder may be more practicable. But if absent class members are not yet "specifically identifiable," then joinder might be more impracticable.