AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Spring/Summer 2022

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 Fall 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 Fall 2021 update, we noted that the Ninth Circuit vacated a controversial panel decision limiting certification of such classes in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021), and ordered *en banc* rehearing. The divided panel had 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 to establish common impact. 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 permitted the court to create such a requirement.

On April 8, 2022, the *en banc* court in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022), rejected the vacated panel majority's reasoning and affirmed the district court's order granting class certification. The court held that, to determine whether the element of impact is susceptible to classwide proof for purposes of satisfying Rule 23, the proper inquiry is whether the plaintiffs' evidence "is capable of answering the question whether there was antitrust impact due to the collusion on a class-wide basis." It is improper, by contrast, to conflate "the question whether evidence is capable of proving an issue on a class-wide basis with the question whether the evidence is persuasive." Here, the district court did not abuse its discretion or otherwise err, factually or legally, in finding that each class member could attempt to prove impact using common evidence.

With respect to the presence of uninjured class members generally, the court held, "courts must apply Rule 23(b)(3) on a case-by-case basis, rather than rely on a per se rule that a class cannot be certified if it includes more than a *de minimis* number of uninjured class members."

[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.

Judge Lee dissented from the *en banc* court's opinion, joined by Judge Kleinfeld. The two dissenting judges believed the district court's Rule 23 gatekeeper role required it to resolve the uninjured class member question and deny certification if the number of uninjured class members is more than *de minimis*. The dissent also argued that the majority created a circuit split with the First and D.C. Circuits, because those courts rejected classes containing more than a *de minimis* number of uninjured class members in *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), and *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869 (Rail Freight II)*, 934 F.3d 619, 443 U.S. App. D.C. (D.C. Cir. 2019), respectively. The majority countered, in a footnote, that neither court created a *per se* rule and both continue to look to facts and circumstances to assess predominance and manageability on a case-by-case basis. The exchange is arguably over *dicta*, because the plaintiffs offered statistical evidence capable of showing harm to all class members. The question whether a class may contain more than a *de minimis* number of uninjured class members arguably was not properly before the court.

AAI filed numerous amicus briefs at different stages of the case and has published a summary of the *en banc* opinion. In June, Defendant StarKist sought and received an extension of time to file a petition for certiorari in the Supreme Court. The petition is due August 8, 2022.

II. 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 *Olean* case, 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 any 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 majority had rejected this argument and 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 panel had ruled 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, as required by *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 its April 2022 *en banc* opinion, the court again sided with plaintiffs. It held that regression models are widely accepted as a generally reliable econometric technique to isolate the impact of antitrust violations on class members, notwithstanding that they may rely on average overcharges. Importantly, the court also resolved a recurring contest over the meaning of language from the Supreme Court's *Tyson Foods* holding, which provides that a statistical model is permissible evidence if "each class member could have relied on [the model] to establish liability if he or she had brought

an individual action." The *en banc* court explained that "it is irrelevant whether actual sales data shows a specific class member was overcharged by more or less than" the amount of the average overcharge reflected in the regression model. "Rather, the question is whether each member of the class can rely on [the] model to show antitrust impact of any amount." Here, the court held, "[w]hile individualized differences among the overcharges imposed on each purchaser may require a court to determine *damages* on an individualized basis, such a task would not undermine the regression model's ability to provide evidence of common *impact*." Thus, the model was sufficient to "sustain liability in individual proceedings" under *Tyson Foods*.

III. THE MERITS OF AFFIRMATIVE DEFENSES AT CLASS CERTIFICACTION

With respect to not only impact but any other element of antitrust class claims, defendants frequently encourage district courts to decide merits issues that, if resolved unfavorably to plaintiffs, would create individualized questions that may defeat predominance. Plaintiffs typically counter that deciding the merits is improper in such instances because Rule 23 requires only that some elements of the claim be "capable of" proof using common evidence, not that the plaintiffs must win. However, when defendants rely on affirmative defenses to establish individualized issues that may defeat predominance, these roles can be reversed. Plaintiffs sometimes urge the court to reach the merits of the affirmative defense, to show it fails to create individualized issues, and defendants may urge the court to put the merits aside and consider only whether its efforts to mount the defense will undermine the cohesiveness of the class.

The Seventh Circuit recently ruled for the defendants in such a case, but in the process it may have created precedent that will more commonly tend to favor plaintiffs. In *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839 (7th Cir. 2022), the putative class brought an action under the Telephone Consumer Protection Act ("TCPA") seeking statutory penalties as recipients of allegedly unsolicited fax advertisements sent by the defendants. The district court denied class certification on predominance grounds because it believed the defendants' affirmative defense of solicitation would require numerous individualized mini-trials to sort out which fax recipients had engaged in conduct meeting the definition of "soliciting." Some class members had arguably provided permission to receive the challenged faxes in person at trade shows; others had arguably done so through a variety of different franchise agreements; and still others through their membership and participation in a national purchasing network. Some arguably provided consent through multiple means.

The plaintiffs argued that, because solicitation is an affirmative defense, the district court erred by failing to impose a burden on defendants at the class certification stage to identify those members of the proposed class who provided express prior permission and to show with specific evidence that a significant percentage of the class is subject to this defense. Moreover, plaintiffs argued, the district court's analysis failed because it relied on a substantively flawed "implied consent" standard to establish the solicitation defense available under the TCPA.

The Seventh Circuit ruled for the defendants, holding that "it is not the final merits of the permission inquiry that matter for Rule 23(b)(3) purposes; it is the method of determining the answer and not the answer itself that drives the predominance consideration." The court explained, "The Rule 23(b)(3) predominance requirement inherently requires the court to engage with the merits of the case, yet without deciding the merits." Thus, the court continued, "[a]t class certification, the issue is not whether plaintiffs [or defendants] will be able to prove these elements on the merits, but only whether their proof will be common for all plaintiffs [or defendants], win or

lose." The court held that the same analysis applies regardless of whether the predominance inquiry is focused on the elements of the claim, which plaintiffs must prove, or an affirmative defense, which the defendant must prove. In either instance, "[t]he judge must examine the evidence for its cohesiveness while studiously ignoring its bearing on merits questions."

In an unpublished decision denying a defendant's Rule 23(f) petition, the Sixth Circuit recently ruled for the plaintiffs in such a case, holding that district courts may appropriately probe behind the pleadings to reach merits issues when affirmative defenses are offered to defeat predominance, but that it should not decide them. In *In re Louisville-Jefferson Cnty.*, No. 21-0503, 2022 U.S. App. LEXIS 12150 (6th Cir. May 4, 2022), the class plaintiffs brought civil rights claims against several local government entities in Louisville, Kentucky, alleging Eighth Amendment violations stemming from the unauthorized towing of vehicles and charging of excessive fines for holding them. The defendants argued that their statute-of-limitations defense created individualized questions concerning the legality of the increased fines.

In rejecting the defendants' argument, the district court relied on plaintiffs' allegations of a missing memorandum that was required to give plaintiffs notice of the challenged increase in fine amounts, which created material fact questions as to when plaintiffs knew or should have known of the allegedly unlawful increase. If the plaintiffs were to prove their allegations regarding the missing memorandum, then the statute-of-limitations period would not be a bar to the plaintiffs' claims. The Sixth Circuit affirmed, holding that the district court's approach properly accorded with the Supreme Court's holding in *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*. The lower court correctly considered the timing question only to the extent it was relevant to determining whether the Rule 23 prerequisites were satisfied, and "[n]ever did the district court's certification analysis implicate or rely on the substantive merits of Plaintiff's claims."

IV. 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 held that affidavits from class members coupled with other reliable evidence could satisfy the standard.

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). There, the court explained that "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.

In our Fall 2021 update, we noted that 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 successfully petitioned for interlocutory appeal under Rule 23(f).

The *Niaspan* case has now been briefed, and oral argument is scheduled for September 6, 2022. AAI submitted an amicus brief explaining the ascertainability inquiry's derivation from Rule 23 and its appropriate application in the pharmaceutical sector.

V. 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) [hereinafter "*BMS*"], 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 *BMS* 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 *BMS* does not apply to class actions.

In our Fall 2021 update, we noted that the Supreme Court denied certiorari in *Mussat*, and 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."

Since our last update, the 1st Circuit has followed suit in *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022). The court rejected a novel argument for applying *BMS* to "collective actions" under the federal Fair Labor Standards Act (FLSA), which are distinct from Rule 23 class actions. Once an action is filed under the FLSA, the statute permits additional plaintiffs to form a collective action by "opting-in." The defendant argued that out-of-state opt-ins were barred by *BMS* insofar as FRCP 4(k), which establishes that "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant," incorporates the Fourteenth Amendment's limitation on the jurisdiction of federal courts that proved controlling in *BMS*.

The 1st Circuit rejected the argument, and in doing so, it left little doubt where it stands on the application of *BMS* to Rule 23 class actions. Citing favorably to the Sixth Circuit's opinion in *Lyngaas*, the court held that "FLSA collective actions and Rule 23 class actions are dissimilar in myriad ways," but that "[t]he paramount similarity, and the only one that matters for purposes of assessing the district court's jurisdiction here, is that the named plaintiff in both actions is the only party responsible for serving the summons, and thus the only party subject to Rule 4." While the holding may be *dicta* as applied to Rule 23 class actions, the court's emphasis on only the named plaintiff having "party" status strongly suggests it will follow the logic of *Mussat* and *Lyngaas* in refusing to extend *BMS* to class actions.

In our Fall 2021 update, we noted that a divided Ninth Circuit panel in *Moser v. Benefytt, Inc.*, 8 F.4th 872 (9th Cir. 2021), introduced a new wrinkle. The panel majority in *Moser*, comprised of Judge Bress and Judge Bybee, held that, because a defendant may not interpose a personal jurisdiction objection to absent class members' claims prior to class certification, such objections cannot be waived prior to class certification. The panel majority also allowed that, while a personal jurisdiction defense against such class members would be unavailable under Rule 12, it may conceivably be available at the class certification stage under Rule 23. The court said, "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, dissenting, noted that the majority could cite no cases "suggesting personal jurisdiction is relevant to a Rule 23 factor." Moreover, the Ninth Circuit in *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 672 (9th Cir. 2004), held that "personal jurisdiction and class certification 'involve the application of different standards.'" Judge Cardone also believed the defendant's Rule 23 argument had been waived.

Moser was remanded with instructions for the district court to consider the merits of the defendant's *BMS* objection to class certification in the first instance. Since our last update, the plaintiff has moved to certify the class, and the defendant has opposed. A decision on remand remains pending.

In June 2022, the Ninth Circuit applied *Moser* over class plaintiffs' objection in *Owino v. CoreCivic, Inc.*, 36 F.4th 839 (9th Cir. 2022). After a district court certified three classes of immigrant detainees who alleged federal statutory and state labor code violations against the overseer of a private detention facility, which allegedly forced them to perform labor against their will and without adequate compensation, the defendant overseer appealed, asserting that the district court erred in holding that its personal jurisdiction defense had been waived. The *Moser* opinion was handed down after the district court's decision in *Owino* but prior to the appeal.

The plaintiffs-appellants in *Owino* argued that *Moser* was wrongly decided, and that the *Moser* panel majority improperly relied on out-of-circuit precedent instead of intra-circuit precedent holding that "[p]ersonal jurisdiction is a bread and butter defense to a claim for relief asserted in a pleading, including relief a plaintiff seeks on behalf of a putative class." The Ninth Circuit panel in *Owino* did not suggest it disagreed, but the court held that the issue was squarely addressed in *Moser* and "we have no authority to ignore circuit precedent." The panel declined to vacate the district court's class

certification order, however, holding that while the defendant retains its personal jurisdiction defense on remand, the district court may consider the personal jurisdiction defense at the appropriate time.

To date, no circuit court has held that *BMS* bars nationwide class actions in forum states that lack personal jurisdiction over absent class members.

VI. DISCRETIONARY APPEALABILITY UNDER RULE 23(f)

Empirical studies show that 75% of Rule 23(f) petitions to appeal class certification decisions are denied by the appellate court, and most of the denials are accomplished via summary orders. A published or unpublished opinion made available in an electronic database, explaining the reasons for the denial, is reportedly issued in only 10% of cases. Since our last update, however, the Sixth Circuit, in the span of a little over a month, has issued four opinions explaining denials of Rule 23(f) petitions on the merits.

In May, in the aforementioned *In re Louisville-Jefferson Cnty.* case, the Sixth Circuit explained that Rule 23(f) gives it "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." The court explained that it "eschew[s] any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal." Some of those relevant factors include whether "the case 'raises a novel or unsettled question,' the risk to the parties in the absence of interlocutory review, and 'the posture of the case as it is pending before the district court.'" The court considered, and rejected as unavailing, each of the defendants' merits arguments that the district court had abused its discretion. Accordingly, it denied the defendants' petition for interlocutory appeal.

During a one-week span in June, the court issued three more opinions explaining its basis for denying separate Rule 23(f) petitions. In *Arends v. Family Sols. of Ohio, Inc.* (*In re Family Sols. of Ohio, Inc.*), No. 21-0303/3375, 2022 U.S. App. LEXIS 16990 (6th Cir. June 17, 2022), the court reemphasized that it eschews any hard-and-fast test in exercising discretion, and it added further that "'the Rule 23(f) appeal is never to be routine' and 'should not become a vehicle for early review of a legal theory that underlies the merits of a class action.'" It also specified that "[f]our factors typically guide our consideration of a Rule 23(f) petition. First, '[t]he case that raises a novel or unsettled question may . . . be a candidate for interlocutory review.' '[T]his factor weigh[s] more heavily in favor of review when the question is of relevance not only in the litigation before the court, but also to class litigation in general.' Second, 'the likelihood of the petitioner's success on the merits is a factor in any request for a Rule 23(f) appeal.' Third, '[t]he "death-knell" factor . . . recogni[zes] that the costs of continuing litigation for either a plaintiff or defendant may present such a barrier that later review is hampered.' Fourth, 'the posture of the case as it is pending before the district court is of relevance.'" Here, the court considered and rejected the defendant's arguments that the interlocutory appeal presented novel issues, that the defendant was likely to succeed on the merits, and that review was appropriate to prevent the incursion of unnecessary costs. The court then denied the petition.

In *In re Macy's W. Stores, Inc.*, No. 22-0303, 2022 U.S. App. LEXIS 17222, at *3 (6th Cir. June 22, 2022), the court again described, in similar terms, its standard of review and the four factors that typically guide its consideration. It added further that "any pertinent factor may be weighed in the exercise of that discretion," and "[n]ot all factors can be foreseen or stated with particularity." The

defendant, Macy's, which argued that some of the class members did not actually purchase a bed-linen product at issue that was allegedly the subject of consumer protection violations, maintained that its interlocutory appeal presented novel or unsettled questions because "[n]o federal appellate court has set forth a clear standard for determining whether, and when, named plaintiffs in consumer class-action lawsuits have Article III standing to pursue class claims for unpurchased products."

The Sixth Circuit rejected the argument and denied interlocutory appeal because "the law in this Circuit is clear" on the role of Article III standing in these circumstances. "'Once [a plaintiff's individual] standing has been established, whether a plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23.'" Here, "Macy's does not dispute that [the named plaintiff] has individual standing to bring *her* claims against Macy's based on *her* purchase[.]" Accordingly, Macy's standing argument "implicates the requirements of Rule 23(a) and (b), not Article III standing," and the issue was not sufficiently novel to warrant a Rule 23(f) appeal.

In *In re Ascent Res.-Utica, LLC*, No. 21-0307, 2022 U.S. App. LEXIS 17437 (6th Cir. June 23, 2022), the court described the standard and the four factors similarly to the *Macy*'s and *Arends* courts without further elaboration. The defendant argued that its Rule 23(f) petition should be granted based on the death-knell factor, because the risk of $90 million in damages threatened its "entire business model" and created undue settlement pressure. The court rejected the argument because the defendant's statements were devoid of any context. "'[T]he discussion of this factor must go beyond a general assertion,'" the court explained. Because "'[t]he magnitude of damages is relative to the size of the defendant,'" the defendant "'should provide the court insight into potential expenses and liabilities.'"

The defendant's remaining arguments focused on the novelty of issues raised and alleged abuses of discretion by the district court. The Sixth Circuit considered and rejected each argument. It then denied the Rule 23(f) petition.

In March, the Eleventh Circuit also issued an opinion explaining its denial of a Rule 23(f) petition. In *Mastercard Int'l Inc. v. Scoma Chiropractic, P.A.*, No. 22-90004-F, 2022 U.S. App. LEXIS 6844 (11th Cir. Mar. 16, 2022), the court held that it looks to five factors when deciding whether to grant interlocutory appellate review of a district court's class-certification decision: "(1) whether the district court's ruling is likely dispositive of the litigation by creating a 'death knell' for either the plaintiff or defendant; (2) whether the petitioner has shown a substantial weakness in the district court's class-certification decision, such that the decision likely constitutes an abuse of discretion; (3) whether the appeal will permit resolution of an unsettled legal issue that is important both to this particular litigation and in and of itself; (4) the nature and status of litigation before the district court; and (5) the likelihood that future events may make immediate appellate review more or less appropriate." The defendant failed to satisfy any factor.

VII. § 1291 APPEALS AFTER CLASS CERTIFICATION DENIALS

In our Fall 2017 update, we discussed the Supreme Court's holding in *Microsoft v. Baker*, 137 S. Ct. 1702 (2017), which prohibited plaintiffs who lose on class certification from converting a district court's interlocutory order into a final judgment within the meaning of § 1291 by voluntarily dismissing their individual claims with prejudice subject to a right to revive the claims if the class

certification decision is reversed on appeal. The issue arose after the Ninth Circuit denied interlocutory review of a district court order denying class certification, and the plaintiffs implemented what the Court referred to as this "dismissal device." The Ninth Circuit subsequently heard the appeal and reversed the denial of certification.

Reversing the Ninth Circuit, the Court held that the final-judgment rule codified in § 1291 requires that finality "be given a practical rather than a technical construction." Here, permitting the plaintiffs' dismissal device would subvert the final-judgment rule and Congress's balanced solution for determining when non-final orders may be immediately appealed. The Court believed the dismissal device invites protracted litigation and piecemeal appeals, undercuts Rule 23(f)'s discretionary regime, and is one-sided in that it allows plaintiffs, but never defendants, to force immediate appeal of an adverse ruling.

In January, the Sixth Circuit held that plaintiffs who requested that the district court *sua sponte* enter summary judgment in favor of defendants to create an appealable final order did not run afoul of the Supreme Court's holding in *Baker*. In *Ohio Pub. Emples. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, No. 20-4082, 2022 U.S. App. LEXIS 488 (6th Cir. Jan. 6, 2022), the plaintiffs were denied class certification and the Sixth Circuit denied their Rule 23(f) petition for interlocutory appeal. After the Rule 23(f) denial, the putative class plaintiffs asked the district court to *sua sponte* enter summary judgment for the defendants, reserving the right to appeal the adverse class certification decision. After the defendants indicated their intent to delay summary judgment proceedings for 18 months and failed to proffer a discovery request for over a year, the district court complied with the plaintiffs' request. On appeal, the defendants argued that the court's *sua sponte* summary judgment grant amounted to "manufactured finality" prohibited by *Baker*.

Citing and quoting from a 1980 *per curium* opinion, the Sixth Circuit held that a dismissal solicited by appellants is nonetheless final even if "'solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint.'" The court could find no cases in any federal circuit "that have held that [*Baker*] prohibits a district court from *sua sponte* entering summary judgment in similar factual circumstances."

VIII. 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). Such agreements often include forced class-action waivers that may serve to prevent both class litigation and class arbitration. In our Spring 2019 update, we noted that the Federal Arbitration Act (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. Since our Fall 2020 update, we have been

tracking a circuit split over how the "foreign or interstate commerce" requirement affects the scope of the transportation-worker exclusion, particularly as applied to gig economy workers. In *Rittman v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), which we discussed in our Fall 2020 update, the Ninth Circuit held that local Amazon 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 Seventh Circuit 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.

In our Fall 2021 update, we noted that the Eleventh, Ninth and Third Circuits issued opinions following an approach similar to that of *Wallace*, *Grice*, and *Saxon*. We also noted that the losing defendant in *Saxon*, Southwest Airlines, had petitioned for certiorari. In December 2021, the Supreme Court granted certiorari. It heard oral argument in March, and in June, it issued an 8-0 affirmance, with Justice Barrett recused.

The opinion of the Court, authored by Justice Thomas, holds that a "class of workers" under the FAA is defined by the work the workers perform, not the business their employer is in. And the class is "engaged in foreign or interstate commerce" for purposes of the FAA exclusion if the work renders the workers "directly involved in transporting goods across state or international borders." The analysis, the Court held, requires a contextual inquiry into whether the employees "are actually engaged in interstate commerce in their day-to-day work." To be "engaged in foreign or interstate commerce" under § 1, the class of workers must "play a direct and 'necessary role in the free flow of goods' across borders," which is to say the workers must "be actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce."

The Court held that workers who load cargo on and off airplanes, like Saxon, constitute a class of workers engaged in foreign and interstate commerce and therefore qualify for the FAA exclusion. However, the Court provided scant guidance on what it means to be "engaged in foreign or interstate commerce" more generally. In a footnote, for example, the Court cited both to the 9th Circuit's opinion in *Rittman* and to then-Judge Barrett's opinion for the 7th Circuit in *Wallace*, which reached divergent conclusions as to similarly situated delivery drivers, but the Court demurred as to

which case was decided correctly. The Court said only that "[w]e recognize that the answer will not always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders." After *Saxon*, the FAA exclusion's applicability may become a case-by-case inquiry for many undefined classes of workers, creating significant litigation uncertainty for both plaintiffs and defendants.

The Court will have the opportunity to provide further guidance, and harmonize the FAA exclusion's applicability to delivery drivers, if it wishes, after the Ninth's Circuit holding in *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627 (9th Cir. 2021). Shortly after our last update, the Ninth Circuit in *Carmona* re-affirmed *Rittman*, holding that Domino's delivery drivers qualify for the FAA exclusion because they are "engaged in a 'single, unbroken stream of interstate commerce' that renders interstate commerce a 'central part' of their job description." The court emphasized that Domino's is directly involved in the procurement and delivery of interstate goods, and that drivers transport those goods for the "last leg" to their final destinations. That some of the goods were delivered to an intermediate Supply Center and then shipped from intrastate distributors, and that some (but not all) were "altered" at the Supply Center, does not change the result. Domino's petitioned for certiorari on June 15, 2022. The petition is featured among ScotusBlog's "petitions of the week" for the week of July 8, 2022.

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. In our Fall 2021 update, we noted that, over a two-day span in November, the FAIR Act passed the House Judiciary Committee, and a new 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. We noted that the Gillibrand and Graham bill does not affect antitrust plaintiffs, but it is nonetheless significant because it would mark the first legislative action to directly limit *Epic Systems*.

Since our last update, the Gillibrand and Graham bill passed both chambers and was signed into law by President Biden on March 3, 2022. The FAIR Act was reported out of the House Judiciary Committee on March 11, 2022, and a week later, on March 17, it passed the House 220-209, with one Republican, Rep. Matt Gaetz (FL), joining House Democrats in the majority. GovTrack currently predicts that the Fair Act has a 53% chance of being enacted.

IX. 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 2021, 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.

In our Fall 2021 update, we noted that 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 that "it is important to note that the mandate has been withheld in *Johnson* and a ruling for rehearing *en banc* is pending." Accordingly, it followed the lead of its sister courts in the Circuit and denied plaintiffs' request for service awards without prejudice, but it retained jurisdiction for the limited purpose of revisiting the denial of service awards should *Johnson* ultimately be overruled.

Since our last update, an Eleventh Circuit panel has declined to apply *Johnson*. In *Dasher v. RBC Bank (USA) (In re 1:09-md-02036-JLK, Checking Account Overdraft Litig.)*, No. 20-13367, 2022 U.S. App. LEXIS 4277 (11th Cir. Feb. 16, 2022), the court refused to vacate a $10,000 incentive award where the defendant neither objected to the award before the district court nor articulated an argument as to why the award should be invalidated.

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.

X. EMPIRICAL DATA ON ANTITRUST CLASS ACTIONS

In April, Huntington Bank (Huntington) and the UC Hastings Center for Litigation and Courts (UCHCLC) published the 2021 Antitrust Annual Report: Class Action Filings in Federal Court, their fourth annual antitrust report examining empirical information involving the filing and resolution of private antitrust class action lawsuits. The new report covers the years 2009-2021.

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 UC Hastings released a commentary examining the report's key findings, which include the following:

- From 2009-2021, a mean number of 127 consolidated complaints were filed per year, with outlier years as low as 72 and as high as 220.
- From 2009-2021, there were Defendant Wins in 125 cases as a result of judgments on the pleadings, summary judgment, judgment as a matter of law, or trial.
- From 2009-2021, 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 $16 million.
- The total annual settlements ranged from $225 million to $5.3 billion per year.
- The cumulative total of settlements was $29.3 billion from 2009-2021.

American Antitrust Institute
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