AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Fall/Winter 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 Spring 2022 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 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.

In our Spring 2022 update, we noted that the *en banc* court in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022), rejected the panel majority's reasoning and affirmed the district court's order granting class certification. The *en banc* 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."

Since our last update, Defendant StarKist petitioned the U.S. Supreme Court for certiorari, arguing that the *en banc* majority created a circuit split over "whether, or in what circumstances, the presence of uninjured class members precludes the certification of a class," and also over whether "a class

[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.

may be certified based on the assumption that each class member suffered the same injury as the average person in the class, so long as a juror might find that assumption 'plausible.'" In opposition, the class plaintiffs argued that all circuits "take the potential presence of uninjured class members into account in determining whether common issues predominate over individual ones," and "the Ninth Circuit's application of that approach to the facts of this case does not warrant review." As to the Defendant's argument regarding the improper use of assumptions in statistical modeling techniques, the class plaintiffs maintained that all circuits "permit the use of statistical evidence by a class where a class member suing individually could use similar evidence to prove an element of a claim or defense," and "the Ninth Circuit's finding that the standard was met here does not warrant review." On November 14, 2022, the Supreme Court denied certiorari.

AAI filed numerous amicus briefs at different stages of the case and has published a summary of the *en banc* opinion.

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 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 electronic claims data that could show the identity of every potential class member. The plaintiffs successfully petitioned for interlocutory appeal under Rule 23(f).

Since our last update, the *Niaspan* case has been briefed, and oral argument was held on 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.

In August, the Third Circuit reversed a district court's denial of class certification on ascertainability grounds in a FCRA case, again emphasizing that plaintiffs "must establish only that the proposed class members *can* be identified; they need not definitively identify all class members at the certification stage." In *Kelly v. Realpage Inc.*, 47 F.4th 202 (3d Cir. 2022), the court addressed whether the administrative feasibility requirement is satisfied where class members could be ascertained using the defendant's files, and class membership would be "clear from the face of each file but would require a file-by-file review." The court held that the requirement was satisfied. Reviewing all of the Third Circuit's previous ascertainability cases, it explained, "Together, *Byrd*, *Hargrove*, and *City Select* instruct that a straightforward 'yes-or-no' review of existing records to identify class members is administratively feasible even if it requires review of individual records with cross-referencing of voluminous data from multiple sources."

Here, it was sufficient that "[a]ppellants have already identified the records they require, demonstrated they are in [the defendant's] possession, and explained how those records can be used to verify putative subclass members." "So long as the review is for information apparent on the face of the document, the number of files does not preclude ascertainability." Indeed, the court explained, "To hold otherwise would be to categorically preclude class actions where defendants purportedly harmed too many people," because an "objection to … the number of records that must be individually reviewed … is essentially an objection to the size of the class, which we stated explicitly in *Byrd* is not a reason to deny class certification."

III. 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 state 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, plaintiffs may be unable to bring suits on behalf of nationwide or multi-state classes 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 noted 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."

In our Spring 2022 update, we noted that the 1st Circuit followed suit in *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022). *Waters* addressed the application of *BMS* to collective actions under the federal Fair Labor Standards Act (FLSA) rather than to Rule 23 class actions. Collective actions require plaintiffs to "opt in," whereas the latter are representative "opt-out" actions. The court held that out-of-state FLSA opt-ins were not barred by *BMS*. In doing so, the court cited favorably to the Sixth Circuit's opinion in *Lyngaas* and emphasized that only the named plaintiff has "party" status, which strongly suggests it will follow the logic of *Mussat* and *Lyngaas* in refusing to extend *BMS* to class actions.

In July, shortly after our last update, the 3rd Circuit split from the 1st Circuit on the application of *BMS* to FLSA collective actions, but it also joined with the 1st, 6th and 7th Circuits on the application of *BMS* to class actions. In *Fischer v. Fed. Express Corp.*, 42 F.4th 366 (3d Cir. 2022), the plaintiff argued that an FLSA collective action should be analogized to a class action, and accordingly personal-jurisdiction analysis should occur at the level of the suit rather than the level of each individual claim. In an opinion by Judge Scirica, the court disagreed because FLSA collective actions are different from class actions.

The court explained that, in the class action context, "we analyze the jurisdictional questions with respect to the class as a whole, as exemplified by the named plaintiff." Citing favorably to *Mussat* and *Lyngaas*, as well as several district court opinions, the court said, "Thus, we agree with many of our colleagues across the appellate and trial benches who have held that *Bristol-Myers* did not change the personal jurisdiction question with respect to class actions." Among other things, the court found it relevant that the Supreme Court itself, in *Walmart v. Dukes* and *Phillips Petroleum Co. v. Shutts*, "has regularly entertained nationwide classes where the [named] plaintiff relied on specific personal jurisdiction, without taking note of any procedural defects." In doing so, the Supreme Court "did not find any jurisdictional deficiencies due to the presence of claims by absent out-of-state class members."

However, the court believed that the statutory text of the FLSA, the FLSA's legislative history, and the weight of the caselaw, all favored treating FLSA collective actions "as ordinary in personam suits for purposes of personal jurisdiction." Accordingly, the court held, "opt-in plaintiffs are required to demonstrate the court has personal jurisdiction with respect to each of their claims." The losing plaintiffs petitioned for certiorari on October 24, 2022, and a response is due December 29. SCOTUSblog covered the petition in its Petitions of the Week column on November 11, 2022.

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 Judges Bress and 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. The plaintiff moved to certify the class, and the defendant opposed. However, in September 2022, before the district court ruled on the class certification motion, the plaintiff filed a notice of settlement. The district court has since denied the class certification motion without prejudice in light of the pending settlement.

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 the detainees 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 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.

The defendants-appellants petitioned for panel and *en banc* rehearing, pressing its arguments that the panel should have reversed the district court's class certification order. Since our last update, the petition has been fully briefed, and neither party has addressed the panel's application of *Moser*, although plaintiffs-appellants raise the issue in a footnote.

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

IV. 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. The Eleventh Circuit entered an order withholding the issuance of the mandate following the plaintiff's petition for rehearing *en banc*. In our Spring 2021, Fall 2021, and Spring 2022 updates, we noted that numerous district courts both within and outside the Eleventh Circuit, and numerous appellate panels both within and outside the Eleventh Circuit, have rejected, distinguished, or narrowly construed the decision, choosing to allow payment of incentive awards. Several other district courts in the Eleventh Circuit have denied service awards without prejudice,

pending disposition of the *Johnson* plaintiffs' *en banc* rehearing petition. At least one district court in the Eleventh Circuit has applied *Johnson* to bar a service award.

In August, the Eleventh Circuit denied *en banc* rehearing in *Johnson*. Judge Pryor, joined by Judges Wilson, Jordan and Rosenbaum, authored a lengthy dissent, concluding that "[t]he panel majority opinion fundamentally undermined class action law based on a misinterpretation of two Supreme Court cases," and "by denying rehearing *en banc*, our court has struck a lasting blow to class actions as a device for righting wrongs in this circuit." The dissent also urged that, "[g]iven our failure to act, it will be up to the Supreme Court to overrule or clarify [the 1880s Supreme Court cases] to undo this problem of our making. If the Supreme Court does not act, then I urge either the Advisory Committee on Civil Rules to amend Rule 23 or Congress to enact a statute that explicitly authorizes incentive awards."

Judge Newsom, who authored the panel opinion, chose not to respond to the dissent. He issued a one-paragraph concurrence explaining that, although it is customary for the author of a panel opinion to respond to a dissent when the full court declines to rehear a case *en banc*, he did not wish to take additional time to do so because the case "has been pending too long already" and "[t]he parties and the bar are entitled to closure."

In September, the Ninth Circuit squarely rejected *Johnson* in *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 n.13 (9th Cir. 2022). Addressing the same argument and the same nineteen-century cases, the court held that those cases do not bar incentive awards. The court held that "incentive awards cannot categorically be rejected or approved," and "[s]o long as they are reasonable, they can be awarded."

The order staying the mandate in *Johnson* was lifted on October 17, 2022, and the plaintiff petitioned the Supreme Court for certiorari on October 21. The respondent requested an extension of time to file the response to the petition on December 21.

V. CLASS ACTION WAIVERS IN MANDATORY ARBITRATION CLAUSES

Since our Fall 2016 update, we have been tracking the use of mandatory arbitration clauses in employment agreements, which the Supreme Court upheld in a 5-4 decision in *Epic System Corp. v. Lewis*, 138 S. Ct. 1612 (2018). 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 Supreme Court, in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), unanimously held that the Federal Arbitration Act (FAA) does not compel courts to enforce private arbitration agreements involving "contracts of employment" with transportation workers, which are expressly excluded from the FAA's coverage provided the workers are "engaged in foreign or interstate commerce."

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 our Spring 2021, Fall 2021, and Spring 2022 updates, we noted that some courts inquire whether the workers in question haul goods on the final legs of interstate journeys, whereas others inquire not simply whether the workers were connected to the goods, but whether they were connected to the act of moving the goods across state or national borders.

In our Spring 2022 update, we noted that the Supreme Court had granted certiorari and issued an opinion in *Saxon v. Southwest Airlines*. In *Saxon*, the Seventh Circuit had 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. Such statutes 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.

The Supreme Court unanimously affirmed. In an opinion by Justice Thomas, the Court held 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 the plaintiff, 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. 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." In our Spring 2022 update, we opined that, 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 early results suggest uncertainty will indeed persist. In September 2022, the Second Circuit, in light of *Saxon*, vacated a May 2022 panel opinion issued in *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655 (2d Cir. 2022), and it granted panel rehearing. The plaintiffs were drivers who deliver baked goods by truck to stores and restaurants in designated territories within Connecticut. After having initially ruled that the drivers did not qualify for the FAA exclusion, a divided panel reaffirmed. The court reasoned that, "[a]lthough the plaintiffs spend appreciable parts of their working days moving goods from place to place by truck, the decisive fact is that the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. Customers pay for the baked goods themselves; the movement of those goods is at most a component of total price. The commerce is in breads, buns, rolls, and snack cakes—not transportation services."

In dissent, Judge Pooler, who dissented from the original holding as well, believed it was "anomalous and unfounded" for the majority to find "that because the plaintiffs do their trucking for a bakery company, they 'are in the bakery industry, not a transportation industry,' hence not transportation workers." Judge Pooler accused the majority of altogether ignoring *Saxon* insofar as "[t]he plaintiffs drive trucks; they are not bakers." "Only by looking to what their employer does

generally—making and selling bread—can the majority conclude that the plaintiffs are not transportation workers."

In our Spring 2022 update, we noted that the losing defendant in *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627 (9th Cir. 2021), in which the Ninth Circuit held 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," had petitioned for certiorari. In October 2022, the Supreme Court granted the petition but immediately vacated and remanded back to the circuit court for further consideration in light of *Saxon*.

In August 2022, the Fifth Circuit, applying *Saxon*, held that last-mile delivery drivers are not "engaged in" interstate commerce. In *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022), the court held that, once the goods at issue arrived at a Houston warehouse and were unloaded, "anyone interacting with those goods was no longer engaged in interstate commerce." It also noted that, unlike either seamen or railroad employees, "the local delivery drivers here have a more customer-facing role."

In November 2022, the First Circuit in *Immediato v. Postmates, Inc.*, No. 22-1015, 2022 U.S. App. LEXIS 32848 (1st Cir. Nov. 29, 2022), held that couriers who deliver goods from local restaurants and retailers in trips that typically span a few miles are not exempt. While the court believed the FAA exclusion "plainly applies to workers who in fact carry cargo across state borders" and "also applies to those who load and unload cargo in the course of interstate shipments," it recognized, quoting *Saxon*, that "[t]he extent of the exemption is not so clear … 'when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders.'" Applying First Circuit precedent, and considering Supreme Court precedent contemporary with Congressional enactment of the FAA, the court held that "once an interstate shipment arrives at a local retailer and is 'there held solely for local disposition and use,' the goods are no longer considered to be 'in interstate commerce.'" The court also explained that actors "engaged in the intrastate sale of locally manufactured goods are not engaged in interstate commerce."

"Refining the matter to bare essence," the court elaborated, "we proceed upon the following principles. The term 'engaged in foreign or interstate commerce' in section 1 can apply to workers who are engaged in the interstate movement of goods, even if they are responsible for only an intrastate leg of that movement. Their work, though, must be a constituent part of that movement, as opposed to a part of an independent and contingent intrastate transaction. And the interstate movement necessarily terminates when those goods arrive at the local manufacturer or retailer." Here, "Although the appellants transport goods, qua couriers, they do so as part of separate intrastate transactions that are not themselves within interstate commerce…. The interstate journey terminates when the goods arrive at the local restaurants and retailers to which they are shipped."

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 Spring 2022 update, we noted that 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. Since our last update, no action has been undertaken in the Senate.

VI. CLASS MEMBER MOTIONS TO INTERVENE IN CLASS PROCEEDINGS

In October 2022, the Fifth Circuit addressed the standard for resolving motions to intervene by class members who disagree with the litigation strategy of counsel for class representatives. In *Guenther v. BP Ret. Accumulation Plan*, 50 F.4th 536 (5th Cir. 2022), class plaintiffs sued BP Corporation alleging ERISA violations stemming from BP's acquisition of Standard Oil of Ohio and subsequent conversion of Standard Oil's employee retirement benefits to BP retirement benefits. After five years of litigation, on the eve of class certification, a class member who had also been involved in separate litigation against BP moved to intervene as of right. The district court, applying the circuit's four-factor test for evaluating intervention as of right under FRCP 24(a)(2), denied the motion. The class member appealed, challenging only the district court's finding that the fourth factor—inadequate representation—was unsatisfied.

The Fifth Circuit affirmed. The court explained that the movant's burden in satisfying the fourth factor is "minimal." The movant "must only show that the existing representation '*may* be inadequate.'" Here, however, the movant did not make the requisite showing. To ensure that the fourth factor "has some teeth," the movant "must establish 'adversity of interest, collusion, or nonfeasance on the part of the existing party.'" To establish adversity of interest, the movant must establish that "its interests diverge from the putative representative's interests in a manner germane to the case.'" As relevant here, "Differences of opinion regarding an existing party's litigation strategy or tactics used in pursuit thereof, without more, do not rise to an adversity of interest." The court held that intervention as of right was inappropriate because the movant and the class plaintiffs "shared the same ultimate objective" and the movant "lack[ed] a distinct interest that is at risk of being adversely represented."

VII. EMPIRICAL DATA ON ANTITRUST CLASS ACTIONS

In our Spring 2022 update, we noted that, 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 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.

In the October 2022 issue of the Indiana Law Journal, Professor Christine Bartholomew of the University at Buffalo Law School published an empirical analysis of antitrust class actions based on a dataset of published and unpublished federal antitrust final settlement approval decisions from 2005–2020. The dataset, which she describes as "the most exhaustive gathering of such decisions to date," spans 393 final approval opinions and over 1,300 settlements.

Among other things, Prof. Bartholomew finds:

- Settlements afforded consumers over $32.05 billion in compensatory relief, in addition to nonmonetary, injunctive, and declaratory relief.
- Class counsel earned over $6.7 billion in fees, and the average fee rate was 27.6%, with percentages varying notably by circuit.
- Courts granted roughly 50.3% of motions to dismiss in antitrust class actions, which is on par with dismissal rates in federal contract cases and lower than civil rights, employment discrimination, and financial instrument cases.
- Antitrust filings have dropped 30% from 2005 to 2019.
- Sixty-nine percent of the settlements occurred after at least one motion to dismiss; 33% faced at least one motion for summary judgment.
- The median time from filing to settlement was 4.41 years or 52.93 months—44.16 months longer than the median across all federal civil actions.
- The time from filing to settling is growing at a rate of 8.6% annually.
- Rule of reason cases made up 10.94% of the studied settlements.
- Objectors contested roughly 40% of antitrust settlements and courts granted 2.6% of these objections.

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