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Class & Collective Action Group Newsletter

Federal Appellate Courts

Decision in *Jock v. Sterling Jewelers Inc.* (Second Circuit)

Key Issue

Whether an arbitrator may certify an arbitration class binding non-parties who signed an arbitration agreement authorizing an arbitrator to determine whether the agreement permits class procedures.

Background

Plaintiffs are a group of female current and former retail sales employees of Defendant Sterling Jewelers Inc. ("Sterling"), who allege that they were paid less than their male counterparts on account of their gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d).

Each plaintiff agreed to a mandatory arbitration agreement called the "RESOLVE Program" agreement.[1] The RESOLVE agreement provides that any claim arising under the agreement will be arbitrated "in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association,"[2] and that "[q]uestions of arbitrability" and other "procedural questions" "shall be decided by the arbitrator."[3]

The parties asked the arbitrator to decide whether the RESOLVE agreement allowed class arbitration. The arbitrator ruled that the agreement did permit class arbitration, and certified a class of approximately 44,000 women with respect to the Title VII disparate impact claim seeking declaratory and injunctive relief. The class includes 254 named plaintiffs, as well as absent class members who had neither submitted claims nor opted in to the arbitration proceeding.

The district court vacated the arbitrator's class determination ruling, holding that the arbitrator incorrectly interpreted the RESOLVE agreement, and that even if the 254 plaintiffs who made claims or opted in to the proceeding could be bound by that interpretation, the arbitrator's erroneous interpretation could not bind absent class members.

Decision

The Second Circuit reversed the district court's decision and held that the absent class members—all of whom had agreed to the RESOLVE agreement—had authorized the arbitrator to determine whether the agreement permits class procedures, and therefore had consented to be bound by class procedures.

[1] Judgment at 4, *Jock v. Sterling Jewelers Inc.*, No. 18-153 (2d Cir. Nov. 18, 2019), ECF No. 132-1.

[2] *Id.* at 4-5 (citation omitted).

[3] *Id.* at 13 (citation omitted).

As relevant to this case, a court is empowered to vacate an arbitration award only "where the arbitrator[] exceeded [his or her] powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."[4] This deferential standard of review framed the court's inquiry: "whether the arbitrator[] had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, *not whether the arbitrator[] correctly decided that issue*."[5]

As an initial matter, the Court noted that the district court's holding that the arbitrator incorrectly interpreted the RESOLVE agreement was irrelevant; as long as the arbitrator was interpreting the agreement, the correctness of that interpretation was not properly within the scope of the court's review.

The Court then determined that the absent class members gave the power to decide class arbitrability to the arbitrator for two reasons. *First*, the RESOLVE agreement explicitly incorporated the American Arbitration Association's rules, which give the arbitrator the authority "to determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class."[6] Under Second Circuit precedent, an agreement which explicitly incorporates rules empowering an arbitrator to decide an issue "serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."[7]

Second, the RESOLVE agreement provided that "[q]uestions of arbitrability" and other "procedural questions" "shall be decided by the arbitrator."[8] The Second Circuit noted that the Supreme Court has suggested that the availability of classwide arbitration is a "question of arbitrability" that is presumptively for the court to decide,[9] though the parties assumed that it was a "procedural question,"[10] such that it would ordinarily be the province of the arbitrator. In either case, the Second Circuit concluded that the RESOLVE agreement clearly committed the question to the arbitrator.

Ultimately, the Court held that the absent class members, "no less than the parties . . . 'bargained for the arbitrator's construction of their agreement' with respect to class arbitrability,"[11] and could thus be bound by the arbitrator's decision to subject them to class procedures.

Thoughts & Takeaways

A series of recent Supreme Court opinions have taken relatively narrow views of the circumstances under which arbitrators may resolve classwide claims.[12] Nevertheless, classwide arbitration remains a real possibility, particularly where, as here, the parties agreed (including by incorporating the AAA rules) to submit the question of classwide arbitrability to the arbitrator.

The standard of review also played a key role in this case; because the parties submitted all "question[s] of arbitrability" to the arbitrator, the correctness of the arbitrator's decision was not reviewable by the Court. By contrast, in the Supreme Court's recent *Lamps Plus* decision, the parties explicitly agreed that the question of class arbitration was one for the court, not for the arbitrator, and the Supreme Court ultimately overruled the state court's contrary holding.

Read the opinion here.

[4] 9 U.S.C. § 10(a)(4).

[5] Judgment, *supra* note 1, at 9-10.

[6] *Id.* at 12-13 (citation omitted).

[7] *Id.* at 13 (quoting *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 (2d Cir. 2018)).

[8] *Id.* at 13 (citation omitted).

[9] *Id.* at 14 (citing *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013)).

[10] *Id.*

[11] *Id.* at 15 (citing *Oxford Health*, 569 U.S. at 569).

[12] *See Stolt-Nielsen S.A. v. AnimalFeeds*, 559 U.S. 662, 687 (2010) (holding that class arbitration was inappropriate when parties stipulated that they had reached "no agreement" on the issue); *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring) (agreeing with the majority that classwide arbitration would bind the parties who asked the arbitrator to decide the issue, but doubting whether absent class members who did not make the request could be so bound); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis").

Decision in *Ward v. Apple Inc.* (Ninth Circuit)

Key Issue

Whether the district court abused its discretion in denying class certification without conducting the "rigorous analysis" required by *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), based on the plaintiff's failure to provide sufficient evidence of a common class-wide injury.

Background

On January 7, 2007, Apple announced that it had entered into an exclusivity agreement with AT&T. Under the terms of the agreement, AT&T would be the only authorized provider of wireless voice and data services for Apple iPhones in the United States for five years. In exchange, the two companies agreed to share revenue for voice and data services received from iPhone customers. Apple further agreed to install SIM card "Program Locks" on all phones, to prevent customers from using other cellular networks.[13]

On March 21, 2012, a group representing individuals who had purchased iPhones between 2008 and 2012 filed suit against Apple, alleging violations of antitrust laws and requesting class certification. The putative class alleged that Apple's agreement with AT&T and subsequent actions amounted to anticompetitive behavior and conspiracy to engage in anticompetitive behavior.[14]

In February 2018, a district judge denied plaintiffs' motion for class certification for failure to meet the predominance requirement of Rule 23(b)(3). The court focused primarily on the testimony of the plaintiffs' expert witness, who had presented testimony intended to show that "all (or nearly all) members of the class suffered damage as a result of Defendants' alleged anti-competitive conduct."[15] However, the court found that the expert had failed to provide "any data-driven analysis," and referred "generically to . . . 'common methodology and data'" offered by an expert in another case involving Apple.[16] The court found that the expert had offered "only theories of impact and damages," and stated that "theory alone 'is not sufficient to satisfy Rule 23(b)(3)'s requirements.'"[17] Given plaintiffs' failure to provide sufficient evidence of injury and damages, the court found that it was unable to conduct a "rigorous analysis" to determine whether the predominance requirement was met, as is required under the Supreme Court's holding in *Comcast*.[18]

In October 2019, the plaintiffs appealed the denial of class certification to the Ninth Circuit.

Decision

In an unpublished opinion, a divided Ninth Circuit panel affirmed the district court's decision to deny class certification. The majority found that the lower court had not abused its discretion in determining that plaintiffs' evidence was insufficient, concluding that "[p]laintiffs' expert did not provide a workable method for classwide determination of the impact of the alleged antitrust violation."[19] The expert's "mere" assertion that he would develop a model some point in the future was not enough for class certification under the Supreme Court's holding in *Comcast*, which requires that the plaintiff offer a model that "measure[s] damages resulting from the particular antitrust injury on which [defendants'] liability" was premised.[20] The court concluded that "plaintiffs here have done even less than the *Comcast*

[13] Order Denying Without Prejudice Defendant's Motion To Compel Arbitration; Granting In Part Defendant's Motion To Dismiss at 2, *In re Apple iPhone Antitrust Litig.*, No. C 11-06714 JW (N.D. Cal. July 11, 2012), ECF No. 75.

[14] *Id.* at 4.

[15] Order Denying Motion for Class Certification at 4, *Ward v. Apple Inc.*, No. 12-cv-05404-YGR (N.D. Ca. Feb. 16, 2018), ECF No. 193.

[16] *Id.* at 5 (citation omitted).

[17] *Id.* (citation omitted).

[18] *Id.* at 4-5.

[19] Memorandum at 3, *Ward v. Apple Inc.*, No. 18-16016 (9th Cir. Nov. 13, 2019), ECF No. 57-1.

[20] *Id.*

plaintiffs: Instead of providing an imperfect model, they have provided only a promise of a model to come."[21] The court thus disagreed with plaintiffs' argument that the district court had abused its discretion by failing to conduct the requisite "rigorous analysis" of whether the Rule 23 criteria were satisfied, finding that such analysis was impossible "because plaintiffs gave the court little to analyze."[22]

In her dissent, Judge Jacqueline Nguyen argued that the district court should have still conducted the "rigorous analysis" required under *Comcast*. The judge found that even if plaintiffs' evidence was "wholly insufficient," the district court was still required to analyze it. In particular, the court should have considered "whether the antitrust impact identified by the [expert's] but-for worlds is consistent with plaintiffs' aftermarket theory."[23] The court also should have analyzed Apple's criticisms of the expert and the expert's rebuttal in its order. Judge Nguyen thus stated that she would reverse and remand for the district court to conduct the required analysis.[24]

Thoughts & Takeaways

This case sheds light on how the Ninth Circuit reads the "rigorous analysis" requirement under *Comcast*, and on what degree of expert evidence may be needed to prove a class-wide injury in antitrust class action cases. If plaintiffs' submissions are seriously deficient, the opportunity to deny class certification without undertaking a "rigorous analysis" may be welcomed by district court judges. Nevertheless, this is a non-precedential decision from a divided panel, suggesting that the Ninth Circuit is not unified on the question of when a "rigorous analysis" is required under *Comcast*.

Read the order here.

Decision in *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw. Inc.* (Ninth Circuit)

Key Issue

Whether a class must be decertified when the class representative is found to lack standing as to its individual claims.

Background

The plaintiff, NEI, purported to represent a group of customers who placed orders by phone with the defendant, concrete supplier Hanson Aggregates, and who were recorded without their consent in violation of California's Invasion of Privacy Act ("CIPA").[25] To place their orders with Hanson, customers called Hanson's telephone order line, where Hanson recorded all customer calls.

In July 2012, NEI sued Hanson under CIPA, alleging that Hanson recorded NEI's calls without its consent. NEI's complaint sought statutory damages for each recorded call, injunctive relief, and class certification. NEI's proposed class included "[all] persons who called Defendant with a cellular telephone and selected the Aggregate or Ready Mix Dispatch lines through Defendant's telephone system, whose calls were recorded by Defendant, during the time period beginning July 15, 2009, and continuing through December 23, 2013."[26] The district court certified the class, but before trial Hanson successfully moved for decertification on the basis of new evidence showing that the class failed to meet Rule 23(b)(3)'s predominance requirement.

[21] *Id.*

[22] *Id.* at 3-4.

[23] *Id.* at 6 (Nguyen, J., dissenting).

[24] *Id.* at 5-6.

[25] Cal. Penal Code § 630, et seq.

[26] Opinion at 5, *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, No. 16-56498 (9th Cir. June 5, 2019), ECF No. 47-1.

NEI then proceeded to a bench trial on its individual claim. In September 2016, the district court ruled that NEI lacked Article III standing to seek damages or claim injunctive relief. The court found that NEI had not suffered a "concrete or particularized injury" as a result of Hanson's actions, even if Hanson had violated CIPA.[27]

NEI then appealed the class decertification order, but not the judgment in Hanson's favor on NEI's individual claim.

Decision

The Ninth Circuit affirmed the district court's order to decertify the class.[28] The court did not reach NEI's challenge to the district court's predominance analysis, but instead focused its decision on whether NEI could serve as a class representative despite the district court's unchallenged ruling that NEI lacked standing to bring a claim against the defendant. Citing the Ninth Circuit's prior decision in *Lierboe v. State Farm Mutual Auto Insurance Co.*,[29] the court stated, "[S]tanding is the threshold issue in any suit. If the individual plaintiff lacks standing, the court need never reach the class action issue."[30] Based on this statement of the law, the court held that "when a class is certified and the class representatives are subsequently found to lack standing, the class should be decertified and the case dismissed."[31]

NEI argued that it could serve as class representative despite lacking standing to bring individual claims against Hanson, based on two exceptions to the mootness doctrine. *First*, NEI argued that class representatives that maintained a "personal stake" in class certification could appeal a certification decision.[32] *Second*, NEI argued that a named plaintiff could continue to litigate class certification "[w]hen the claim on the merits is 'capable of repetition, yet evading review.'"[33]

The Ninth Circuit rejected NEI's two arguments, finding that neither mootness principle could remedy or excuse NEI's lack of standing for its individual claims. The court distinguished between cases where mootness was an issue—*i.e.*, where a once-viable claim later became moot—and standing cases, where no viable claim existed from the outset.[34] In support of this distinction, the Ninth Circuit quoted the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, stating, "if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum."[35] NEI could not solve a standing problem with mootness arguments.

Thoughts & Takeaways

This case reiterates that a class should be decertified and the case dismissed if the class's representatives are found to lack individual standing to bring claims against the defendant. It also serves as a reminder that mootness and standing are distinct concepts, and arguments that might be effective to cure mootness may have no effect on a standing problem.

Finally, the case is a reminder of the importance of preserving issues for appeal; the apparent strategic decision not to appeal the adverse judgment on NEI's individual claims ended up precluding NEI from serving as class representative.

Read the order here.

[27] *Id.* at 6-7.

[28] *Id.* at 11.

[29] 350 F.3d 1018, 1022 (9th Cir. 2003).

[30] Opinion, *supra* note 26, at 8.

[31] *Id.* at 8-9.

[32] *Id.* at 10 (citing *Deposit Guar. Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 336, 340 (1980)).

[33] *Id.* (citing *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980)).

[34] *Id.*

[35] *Id.* at 11 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Sers., Inc.*, 528 U.S. 167, 170).

Federal District Courts

Decision in *Yashtinsky v. Walmart, Inc.* (W.D. Ark.)

Key Issue

Whether plaintiff had alleged a sufficiently "concrete" injury for standing under Article III.

Background

Plaintiff Kevin Yashtinsky received a two-part text message on his cell phone from Walmart, inviting him to enroll in Walmart Pharmacy's prescription messaging program. Yashtinsky responded by filing a putative class action lawsuit against Walmart, alleging violations of the Telephone Consumer Protection Act ("TCPA") and claiming damages, injunctive relief, and any other available legal or equitable remedies. In his complaint, Yashtinsky claimed that he was not a Walmart customer, that he was not enrolled in Walmart's prescription messaging program, and that the text messages were sent *en masse*.[36] Yashtinsky argued that the unsolicited text messages were an aggravation, a nuisance, and an invasion of his privacy. He further argued that the receipt of the messages wasted data on his cellphone, that it temporarily reduced computing power on his phone, and that it required use of a quantifiable amount of electricity.[37]

Walmart moved to dismiss, arguing that Yashtinsky had failed to plausibly allege Walmart's use of an automatic telephone dialing system ("ATDS"), a required element for a claim under the TCPA, and asking the court to issue a stay until the Federal Communications Commission issued a ruling on the scope of the statutory definition of an ATDS. Walmart further alleged that Yashtinsky had failed to provide evidence of a sufficient injury for standing under Article III. Walmart pointed toward the Eleventh Circuit's holding in *Salcedo v. Hanna*, where the court found that receipt of one text message was not a sufficient injury for standing.[38] Yashtinsky argued that the Eighth Circuit's precedent in *Golan v. FreeEats.com, Inc.* barred Walmart's standing argument.[39]

Decision

The district court denied Walmart's motion to dismiss, finding that the plaintiff had sufficiently alleged both a concrete injury and the use of an ATDS. While the court did not find plaintiff's allegations regarding the waste of data and electricity to be sufficient injury by themselves, the court stated that the plaintiff's allegations as a whole were sufficient to establish a particularized and concrete injury.

The court relied on the Eighth Circuit's holding in *Golan*, where the circuit court had found that the receipt of two unsolicited answering machine messages constituted a "concrete injury" sufficient for Article III standing.[40] The district court reasoned that "[u]nwanted text messages are, if anything, more intrusive than unanswered messages left on an answering machine, especially since individuals are more likely to have their cell phones in close proximity at all times."[41] The court also cited the Eighth Circuit's reasoning in the case, finding that in passing the TCPA, Congress had elevated

[36] Memorandum Opinion and Order at 1-2, *Yashtinsky v. Walmart, Inc.*, No. 5:19-CV-5015 (W.D. Ark. Nov. 12, 2019), ECF No. 42.

[37] *Id.* at 5.

[38] Reply in Support of Defendant Walmart Inc.'s Motion to Dismiss or, in the Alternative, to Stay the Action at 2-3, *Yashtinsky*, No. 5:19-CV-5015 (W.D. Ark. Oct. 10, 2019), ECF No. 33 (citing *Salcedo v. Hanna*, 936 F.3d 1162, 1165, 1172 (11th Cir. 2019)).

[39] Notice of Filing Supplemental Authority at 1, *Yashtinsky*, No. 5:19-CV-5015 (W.D. Ark. Oct. 15, 2019), ECF No. 36 (citing *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019)).

[40] Memorandum Opinion and Order, *supra* note 36, at 4.

[41] *Id.*

unsolicited messages "to the status of legally cognizable injuries."[42] The court thus rejected Walmart's argument that the Eleventh Circuit's holding in *Salcedo* should control instead.

Thoughts & Takeaways

While the court expressed some reservations about the strength of the plaintiff's claims in this case, the case nonetheless establishes that two unsolicited text messages may be enough to allege an injury under the TCPA. The court's decision seems to toe the line between the concrete injury required for standing under *Spokeo, Inc. v. Robins*, and a non-injury based solely on a statutory violation. Depending on how this case moves forward, the scope of a "concrete injury" may expand and open the door for similar class action suits based on smaller scale injuries.

Read the order denying Walmart's motion to dismiss here.

Order in *In re Intuniv Antitrust Litig. (Indirect Purchasers)* (D. Mass.)

Key Issue

Whether a putative class of indirect purchasers can be certified in a pharmaceutical antitrust litigation under the predominance requirement of Rule 23(b)(3) and the First Circuit's 2018 holding in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), which held that at putative class containing many members who suffered no injury could not be certified.

Background

The defendants in this case are two pharmaceutical companies, Shire and Actavis, that manufacture a medication to treat ADHD. Shire manufactures and holds patents for a brand name version of the medication, called "Intuniv." Plaintiffs alleged that in 2009, Actavis filed for approval to manufacture a generic version of Intuniv, and in the process Actavis constructively infringed on Shire's patents. Shire then sued, and the two companies reached a settlement agreement in which Actavis agreed to delay its launch of the generic drug.[43]

In 2016, the plaintiffs filed a complaint and motion for certification of two classes of indirect purchasers of Intuniv, alleging that Shire and Activis settled "sham litigation" as part of an anticompetitive "pay-for-delay" scheme to create a period during which Activis could charge artificially high prices for Intuniv.[44] The two proposed classes aimed to cover those who had either personally paid the entire purchase price for Intuniv, or who had paid some of the purchase price pursuant a co-payment or co-insurance plan.[45]

In an order on August 21, 2019, the court denied the motion for class certification for failure to meet the predominance requirement of Rule 23(b)(3), finding that the plaintiffs had failed to put forth a reasonable and workable plan to weed out over 10,000 uninjured class members from each of the putative classes.[46] The court found that the putative classes incorporated at least three groups of uninjured class members. These included: (1) "brand loyalists," who would have continued to purchase the brand name drug over the generic; (2) consumers who received co-payment coupons from Shire and thus for whom purchasing the generic drug would have been more costly; and (3) consumers who purchased the drug after reaching out-of-pocket maximums under their insurance plans.[47] Weeding these groups out would require individualized assessment of several facts, including each consumer's insurance plan, views on Intuniv and the generic, consumption habits, and use of coupons, among others. Based on expert

[42] *Id.* (citation omitted).

[43] Memorandum and Order at 2-4, *In re Intuniv Antitrust Litig.*, 1:16-cv-12396-ADB (D. Mass. Aug. 21, 2019), ECF No. 230.

[44] *Id.* at 4-5.

[45] *See id.*

[46] *See id.* at 18.

[47] *See id.* at 6-7.

testimony, the court concluded that uninjured class members totaled over 25,000 individuals, and likely comprised at least 8% of each putative class.[48] Given the high number of potential uninjured class members, the lack of a plan to exclude them, and the Defendant's stated intent to challenge any attestations that individual class members were injured, the court found that the plaintiffs could not show that "questions of law or fact common to class members [would] predominate over any questions affecting only individual members."[49]

In reaching this conclusion, the court relied on First Circuit precedent in *In re Asacol Antitrust Litigation*, a case where the First Circuit found that a district court had abused its discretion in certifying a class in which thousands of class members had likely suffered no injury.[50] In a footnote, the district court noted that *In re Asacol* was "likely a death knell for pharmaceutical, antitrust class actions brought by indirect purchasers," given the many ways in which consumers could theoretically be uninjured.[51] The court determined that it would become "nearly impossible" for indirect purchasers to show that common issues would predominate once a defendant asserted an intent to challenge each individual claim of injury.[52]

Plaintiffs filed a motion with the district court to reconsider its denial of class certification.[53]

Decision

On November 6, 2019, the court denied the motion to reconsider class certification. Noting that reconsideration is "an extraordinary remedy" that should only be granted if "the court has patently misunderstood the party or there is a significant change in the law or facts," the court provided three reasons for rejecting the plaintiff's motion.[54]

First, the court found that it had not misunderstood plaintiff's proposed class in the first instance, as the plaintiffs argued, and stated that plaintiffs could not use the motion for reconsideration to re-characterize its proposed classes. The court also stated that the plaintiffs had failed to support their argument that "district courts must *sua sponte* create a workable class after plaintiffs have failed to carry their burden."[55] *Second*, the court found that the plaintiffs had failed to show that the named plaintiffs would be representative of the classes, as newly characterized, in the original motion for certification. *Finally*, the court found that the plaintiffs had failed to address the court's concerns regarding the number of uninjured plaintiffs in the putative classes.

The court also noted the practical concern that, should it not either deny the motion to reconsider or stay proceedings, the district court was at risk of analyzing the denial of certification at the same time as the First Circuit. Given that the district court found that the motion to reconsider lacked merit, the court decided to deny the motion and "provide a clean jurisdictional record to the court of appeals."[56]

Thoughts & Takeaways

This case both applies and provides further analysis on the First Circuit's decision in *In re Asacol*, and how that decision may affect future pharmaceutical antitrust class actions under Rule 23(b)(3). The court expresses a negative outlook on the future of indirect purchaser class actions, and in denying the motion to reconsider, seems to set up the First Circuit to clarify how *In re Asacol* should apply going forward.

Read the order denying class certification here, and the order denying reconsideration here.

[48] *See id.* at 16-17.

[49] *Id.* at 18 (citation omitted).

[50] *See id.* at 16 n.8, 16-17.

[51] *Id.* at 16 n.8.

[52] *See id.*

[53] *See* Petition for Permission to Appeal from Order Denying Class Certification Pursuant to Fed. R. Civ. P. 23(f), *Picone v. Shire U.S. Inc.*, No. 19-8023 (1st Cir. Sept. 6, 2019), ECF No. 1.

[54] Memorandum and Order on Plaintiffs' Motion for Reconsideration at 4-5, *In re Intuniv*, No. 1:16-cv-12396-ADB (D. Mass. Nov. 6, 2019), ECF No. 276 (citations omitted).

[55] *Id.* at 6.

[56] *Id.* at 3-4.

Other Noteworthy Developments

Class Actions Tested in UK in Foreign Exchange Rigging Suit

On November 5, 2019, the British Competition Appeals Tribunal held its first hearing for a consumer antitrust suit that will serve as a "test case" for American-style class action suits in the United Kingdom. Investors brought the collective action suit against banks including JPMorgan, Citibank, and Barclays, claiming that the banks unlawfully manipulated the foreign exchange market between 2007 and 2013 in violation of European competition laws. The plaintiffs include U.K.-based pension funds, asset managers, and corporations.[57]

In 2015, the United Kingdom passed the Consumer Rights Act, a law that introduced the possibility of initiating "opt-out" collective action suits for breaches of British or European Union competition law. The "opt-out" collective action would automatically bind U.K.-based members of a defined group to the result of a legal action, and thus allow them to claim from the pool of damages unless they opt-out, much like in an American-style class action. Before 2015, British law only allowed "opt-in" collective actions, which made it more difficult to assemble claims.

While the opt-out collective action has been in place for several years in the United Kingdom, attempts to utilize the system have so far faced delays and challenges. An earlier suit meant to test the new opt-out action against Mastercard was blocked by the Competition Appeals Tribunal in 2017, a decision that was overturned by the Court of Appeal and is currently set to be heard by the Supreme Court.[58]

[57] Joanne Faulkner, *Class Action Comes to UK with Major Forex Rigging Suit*, Law360 (Nov. 5, 2019), https://www.law360.com/classaction/articles/1216952.

[58] *See* Kirstin Ridley & Iain Withers, *Barclays, JP Morgan Among Banks Facing UK Class Action Over Forex-Rigging*, Reuters (July 29, 2019), https://www.reuters.com/article/us-banks-forex-lawsuit/barclays-jp-morgan-among-banks-facing-uk-class-action-over-forex-rigging-idUSKCN1UO0LG; Sean Farrell, *Barclays, RBS and Other Banks Face £1bn Forex Rigging Lawsuit*, Guardian (July 29, 2019), https://www.theguardian.com/business/2019/jul/29/barclays-rbs-banks-forex-rigging-lawsuit-jp-morgan-citigroup-ubs.

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