WHAT'S COMING FOR CLASS ACTIONS

Zoe Niesel[*]

A trio of cases before the Supreme Court in its current term has the potential to dramatically impact the ability of plaintiffs to bring class actions. By taking up *Tyson Foods v. Bouaphakeo*, *Spokeo v. Robins*, and *Campbell-Ewald v. Gomez*, the Court could be signaling that a shift against class actions is underway which could have significant consequences for plaintiffs seeking class certification. Recently, in *Wal-Mart v. Dukes*,[1] *Comcast v. Behrend*,[2] and *AT&T Mobility v. Concepcion*,[3] the Court handed down decisions that increased the burden on plaintiffs' attorneys to show issues and damages common to all plaintiffs in the proposed class, thereby making class certification increasingly challenging for plaintiffs. If the Court continues its trend, the current trio of cases may further increase the challenges associated with bringing a successful class action.

I. THE MARCH AGAINST CLASS ACTIONS

It is no secret that the Roberts Court has been somewhat hostile to class actions, with the Court deciding a number of cases[4] that substantially limited a plaintiff's ability to use the class certification mechanism to achieve class litigation.[5] Recent decisions have

---

* Associate at Kilpatrick Townsend & Stockton LLP; Adjunct Professor at Wake Forest University School of Law.

1. 564 U.S. 338, 131 S. Ct. 2541, 2560 (2011).
2. 569 U.S. __, 133 S. Ct. 1426, 1434 (2013).
3. 563 U.S. 333, 131 S. Ct. 1740, 1748 (2011).
4. Indeed, the sheer number of cases heard on class actions by the Roberts Court has drawn significant scholarly and national attention. *See* Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court"*, 48 AKRON L. REV. 757, 800 (2015) (noting that recent Supreme Court jurisprudence on class actions has resulted in "more frequent and searching scrutiny than has occurred during any decade since the modern class action was created by the 1966 amendments to Rule 23"); *see also* Bernadette Bollas Genetin, *Back to Class: Lessons from the Roberts Court Class Action Jurisprudence*, 48 AKRON L. REV. 697, 698 (2015) (noting a dozen class-action decisions from the Roberts Court).
5. Some scholars have suggested that this is the result of a "business-friendly" Court, as evidenced by the impressively high win ratio currently enjoyed by the U.S. Chamber of Commerce. *See* David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1019–20 (2009) (noting that in forty-three cases in front of the Roberts Court, "the party supported by the Chamber ended up prevailing in thirty, for a winning percentage of almost seventy percent.

typically involved a split among the justices in the vein of 5-4, with differing ideologies rearing their heads particularly high in this procedural context.[6] Perhaps the most substantial, and most well-known, example of this phenomenon came in *Wal-Mart v. Dukes*, which involved a 5-4 split in a case that substantially increased procedural hurdles for the plaintiff class.[7] Specifically, the majority in *Dukes* found that variability in the plaintiff class, composed of female workers at Wal-Mart alleging sex discrimination, cut against the requirement for class certification that the class has "common questions of law or fact."[8] The class would need to show a "common contention" among them that was capable of class-wide resolution—essentially, the resolution of that common contention would need to determine something central to the claims of all class members in one blow. The result of this decision has increased the burden on the plaintiffs to sort through the merits before seeking certification of the class and determine the common factual threads of the class.

Dukes is perhaps best seen as an example of using class certification as a sword against the class-action mechanism—by substantially increasing the burden of class certification, it is more difficult to find the claims or resources to maintain this type of suit.[9] Additional cases in the past ten years have further shaped the class-action mechanism. *AT&T Mobility v. Concepcion* involved a 5-4 split in which the Court held that the Federal Arbitration Act preempted California state law regarding the unconscionability of class-action waivers in consumer arbitration agreements.[10] *Comcast v. Behrend* implicated the question of whether a court could certify a class without sufficient admissible evidence that damages may be measured on a class-wide basis.[11] The class had been certified by the district court, but the Supreme Court determined that the lower court failed to hear argument against certification and failed to determine whether the plaintiffs' proposed method to quantify damages was

---

This is a very impressive win/loss ratio for any amicus other than the United States"); *id.* at 1029–31 (noting that in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, a Roberts Court case holding that the Securities Litigation Uniform Standards Act of 1998 preempted state law securities class actions, the Chamber argued that securities class actions were essentially an "economic horror show").

6. In some sense, because the class action is utilized in situations where plaintiffs would not normally be attempting to sue individually, changes in the class-action procedure "[are] not only a change in procedure, but also a change in liability." Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 166 (2015).

7. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2541 (2011).

8. *See id.* at 2550–52.

9. Genetin, *supra* note 4, at 702 (noting a "front-loading" of class-action litigation).

10. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1740 (2011).

11. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432–1433 (2013).

mere speculation.[12] Again, the issue of the merits at the time of class certification remained an important theme.

In some ways, the Roberts Court's fascination with class actions recognizes the importance of procedural questions in shaping the litigation system. The number of procedural questions addressed by the current Court has done much to shape an understanding of areas such as jurisdiction, relation back, removal, the *Erie* doctrine, and other important procedural topics.[13] Further, the debate about class actions implicates certain societal concerns about access to justice, the cost of litigation and the role of attorneys in the court system.[14] While some predict the death of the class action in coming years,[15] other commentators have insisted that the class action will remain alive and well[16]—even through the latest round of Supreme Court picks.

II. CURRENT CASES

Against the background of a "flurry"[17] of class-action cases, the Supreme Court heard three additional cases this term that will continue to shape the future of Rule 23 and class-action litigation. Each case provides ample opportunity for the Court to continue its recent history of limiting the ability to bring class actions.

In *Tyson Foods v. Bouaphakeo*, past and present employees of a meat-packing facility brought suit alleging that Tyson Foods unlawfully failed to pay overtime for pre- and post-shift activities that were required aspects of their jobs, including such activities as putting on protective gear and storing cutting knives.[18] The employees worked on the slaughter floor and processing floor of the plant, with each floor requiring different types of protective measures. Plaintiffs' expert testified that failure to compensate employees for equipping protective gear and other necessary work activities amounted to a failure to pay for eighteen to twenty-one minutes per day of compensable work. All totaled, the amount alleged

---

12. *Id.*

13. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 315–316 (2012) (collecting cases).

14. Fitzpatrick, *supra* note 6, at 193–195 (noting differing views from commentators on the role, importance, and future of the class action).

15. John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO. L. REV. 463, 463 (2013).

16. Cabraser, *supra* note 4, at 800–01 (although noting that class certification might now be more expensive).

17. Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 721 (2015).

18. Brief for the United States as Amicus Curiae Supporting Respondents at 9, Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Sept. 29, 2015), http://www.scotusblog.com/wp-content/uploads/2015/10/14-1146_amicus_resp_UnitedStates.authcheckdam.pdf.

to be owed to employees was $6.7 million in unpaid overtime.[19] On appeal before the Court are the issues of (1) whether plaintiffs' suit seeking unpaid overtime on behalf of employees at the meat-processing plant was properly maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) and (2) whether a Rule 23(b)(3) class action may be certified when the class members include individuals who may not have been harmed by the defendant.

Tyson Foods has drawn significant attention—despite its relatively low price tag—because the defendant seeks a particularly broad ruling that has the potential to affect the ability of plaintiffs to bring class actions. If the Court decides for Tyson Foods, class-action plaintiffs could be required to show actual injury for every individual plaintiff in the class action, a requirement that could be prohibitively expensive for plaintiffs' attorneys.[20] It would also have substantial impacts for statistical modeling, a common strategy for class-action plaintiffs when seeking class certification.

Additional cases to be decided by the Court also may change the ability to seek class certification. In *Spokeo v. Robins*, an individual brought a putative class-action suit against an online search company that disseminated erroneous information about him, including respondent's age and wealth, and that respondent was employed and was married with children.[21] The issue for the underlying class is whether the online search company's alleged violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq*., granted plaintiff Article III standing to pursue his claim. At the core of this case is whether a statutory violation of the FCRA is sufficient to confer standing without a showing of further harm to plaintiff. A decision in *Spokeo* might be a watershed moment for class actions as it will answer the question of whether injured class members have standing to recover statutory damages. This has the potential to implicate a number of other common class actions based on federal laws that provide a private right of action, including the Americans with Disabilities Act.

The final case the Court heard is *Campbell-Ewald v. Gomez*, which was decided last week on January 20, 2016.[22] A federal contractor working to promote U.S. Navy recruiting sent thousands of text messages to potential recruits, many of whom did not

---

19. *Id.* at 10.

20. *See* Richard Wolf, *Justices Tilt Towards Workers in Dressing Time Fight*, USA TODAY (Nov. 10, 2015, 1:17 PM), http://www.usatoday.com/story/news/2015/11/10/class-action-lawsuits-supreme-court-tyson/75316684/ (quoting David Gans, civil rights director at the Constitutional Accountability Center, stating that a ruling for the defendant in *Tyson Foods* might "close the courthouse doors on ordinary Americans").

21. Brief for the United States as Amicus Curiae Supporting Respondent at 4, Spokeo, Inc. v. Robins, No 13-1339 (U.S. Sept. 8, 2015), http://www.scotusblog.com/wp-content/uploads/2015/09/US-Brief.pdf.

22. Campbell-Ewald Co. v. Gomez, No. 14-857 (U.S. Jan. 20, 2016).

authorize the contractor to send them messages.[23] Plaintiff's class-action complaint alleged that the contractor had violated the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. 227 *et seq*., by sending the unauthorized text messages.[24] On appeal, the petitioner argued that the named plaintiff's claim became moot after petitioner offered to pay respondent-plaintiff an amount greater than the maximum damages he could have obtained through litigation, although respondent did not accept the offer of judgment.[25] Justice Kennedy noted the particular problem with the case at oral argument, stating that the defendant essentially wanted the Court "to write an opinion saying that a settlement offer is equivalent to a judgment."[26] In addition to implicating concerns under Federal Rule of Civil Procedure 68 regarding the effect of offers of judgment, the result in this case had the potential to determine whether defendants may "buy out" the named plaintiff in order to deter class certification. Writing for the majority, Justice Ginsburg reasoned that an unaccepted offer has no binding effect on either party, and that petitioner's unaccepted offer could therefore not moot the plaintiff's claim.[27]

At first glance, this may seem like a change of course in the Roberts Court's anti-class-action decisions. Yet, the Court left open a unilateral option for the defendant to "buy out" a named plaintiff:[28]

> We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.[29]

---

23. Brief for the United States as Amicus Curiae Supporting Respondent at 3, Campbell-Ewald Co. v. Gomez, No. 14-857 (U.S. Aug. 31, 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-857_amicus_resp_UnitedStates.authcheckdam.pdf.

24. Class Action Complaint & Demand for Jury Trial at 6, Campbell-Ewald Co. v. Gomez, No. CV 10–02007 DMG (CWX) (S.D. Cal. Mar. 19, 2010), 2013 WL 655237.

25. Brief for Petitioner at 10, Campbell-Ewald Co. v. Gomez, No. 14-857 (U.S. July 16, 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-857_pet.authcheckdam.pdf.

26. Ronald Mann, *Argument Analysis: Justices Struggle over Procedures for Forcing Settlement of Class Actions*, SCOTUSBLOG (Oct. 15, 2015, 2:52 PM), http://www.scotusblog.com/2015/10/argument-analysis-justices-struggle-over-procedures-for-forcing-settlement-of-class-actions/.

27. *Gomez*, slip op. at 1.

28. *See* Ronald Mann, *Opinion Analysis: Justices Deal Twin Blows to Class-Action Defendants*, SCOTUSBLOG (Jan. 21, 2016), http://www.scotusblog.com/2016/01/opinion-analysis-justices-deal-twin-blows-to-class-action-defendants/.

29. *Gomez*, slip op. at 11–12.

It is only a matter of time before a class-action defendant not only makes an offer of judgment, but also tenders the full amount to an account established for the plaintiff. While it remains open how exactly the defendant will convince the court to actually enter judgment in this situation, the suggestion will most certainly lead to additional litigation, and clarification, in the future.

CONCLUSION

With decisions in the two remaining cases expected sometime before July 2016, many will be watching closely to determine what the future of class actions holds. While additional procedural clarification in an area is always desirable, the ideological differences that divide the Court, and the parties to these lawsuits, weigh particularly heavily in the class-action context. While limitations on the class-action mechanism remain a likely result of *Tyson Foods*, *Spokeo*, and the next iteration of *Gomez*, whether such limitations support the goal of securing the "just, speedy, and inexpensive determination of every action and proceeding"[30] under Federal Rule 1 remains to be seen.

30. Fed. R. Civ. P. 1