Class Action Litigation: The Court and Congress

name redacted
Legislative Attorney

April 11, 2016

Congressional Research Service
7-....
www.crs.gov
R44453

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The class action suit is a procedural device for joining numerous parties in a civil lawsuit when the issues involved are common to the class as a whole and when the issues turn on questions of law applicable in the same manner to each member of the class. Class actions are intended to save the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated together in an economical fashion. The class action is also intended to allow parties to pursue a legal remedy when it is not economically feasible to obtain relief, such as where each claim involves only a small dollar amount.

The modern class action appears to be derived from the Bill of Peace, an equitable proceeding developed by the English Court of Chancery, which enabled an equity court to hear an action by or against representatives of a group, if the plaintiff could establish that the number of people involved was so large as to make joinder impossible or impracticable. Class suits have long been a part of American jurisprudence, starting with their authorization by federal courts under equity rules. These rules gradually became codified at the state and federal level, but were generally restricted to cases where the class shared a common or general interest and where the parties were too numerous for the cases to be combined under traditional rules of joinder. With the increasing complexity and interconnectedness of modern society, the class action has taken on a more prominent role.

Over the last several years, both the Supreme Court and Congress have actively considered the scope of class action lawsuits. In *Wal-Mart Stores, Inc. v. Dukes*, decided in 2011, the Court has limited the ability of plaintiffs who are not similarly situated from bringing class action suits, which may result in smaller class sizes. During the 2015 term, the Court in *Campbell-Ewald Co. v. Gomez* declined to find that a defendant's offer to provide complete relief to settle a plaintiff's individual claims would moot a class action lawsuit before certification, which might have made it more difficult for a particular individual to bring a class action. The Court, however, left open the possibility that such an action might be rendered moot by the defendant putting funds in an account payable to the plaintiff.

In *Tyson Foods, Inc. v. Bouaphakeo*, also decided during the 2015 term, the Court held that each person joined in a class action suit need not prove, individually, that she was harmed by the claimed misconduct, if statistical models can show such harm. Although the Court declined to articulate all the situations in which statistical evidence could be introduced, it left open the possibility that such evidence could be used in a number of future class action cases. In *Spokeo, Inc. v. Robins*, the Court has been asked to consider whether a class action meets the standing requirements of Article III if the plaintiff suffered a statutory injury but no actual damages. If the Court finds that a statutory injury is sufficient to satisfy Article III, class actions brought under those claims might be more easily certified than class actions where proof of injury may vary from plaintiff to plaintiff.

In January 2016, the House passed H.R. 1927, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016. This legislation, if enacted into law, would arguably limit the size of some class action suits by limiting class action suits to class members who have suffered injuries of the same type and scope.

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Introduction

Over the last several years, both the Supreme Court and Congress have actively considered the scope of class action lawsuits. For the 2015 term, the Court accepted three cases with implications for these suits.[1] In *Campbell-Ewald Co. v. Gomez*,[2] the Court held that a defendant's offer to provide complete relief to settle a plaintiff's individual claims did not moot a class action filed by that individual. In *Tyson Foods, Inc. v. Bouaphakeo*,[3] the Court decided that each person joined in a class action suit need not prove, individually, that she was harmed by the claimed misconduct, if statistical models can be used to show such harm. In *Spokeo, Inc. v. Robins*,[4] the Court will consider whether a class action meets the standing requirements of Article III if the plaintiff suffered a statutory injury from a violation of the Fair Credit Reporting Act but no actual damages. Finally, in January 2016, the House passed H.R. 1927,[5] the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, which would provide that class action suits could be certified only if proposed class members had suffered injuries of the same type and scope.

Background

The class action suit is a procedural device for joining numerous parties in a civil lawsuit when the "issues involved are common to the class as a whole" and when the issues "turn on questions of law applicable in the same manner to each member of the class."[6] The suit is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[7] Class actions "save[] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.... "[8] The class action also affords aggrieved parties a remedy when it is not economically feasible to obtain relief, such as where each claim involves only a small dollar amount.[9]

[1] A fourth class action case that was pending before the Court during the 2015 term—Dow Chemical Co. v. Industrial Polymers, Inc. (No. 14-1091, filed March 9, 2015)—was settled before a decision was made on the writ of certiorari. *See Dow Announces Settlement in Urethanes Class Action Litigation*, Press Release, The Dow Chemical Company, available at http://www.dow.com/news/press-releases/dow%20announces%20settlement%20in%20urethanes%20class%20action%20litigation; *see also* CNN Money, *The death of Supreme Court Justice Antonin Scalia has prompted Dow Chemical to settle a class action lawsuit and pay out $835 million*, February 26, 2016, available at http://money.cnn.com/2016/02/26/news/companies/justice-scalia-death-dow-chemical/. The Court also denied a writ of certiorari for a fifth case where the U.S. Court of Appeals for the Eleventh Circuit found that, under Federal Rule of Civil Procedure 23(e)(2), a class counsel's receipt of 94% of the total cash settlement was "fair, reasonable, and adequate." Poertner v. Gillette Co., 2015 U.S. App. LEXIS 12318 (11th Cir. July 16, 2015), *cert. denied*, Frank v. Poertner, 2016 U.S. LEXIS 1904 (U.S. March 21, 2016) (No. 15-765).

[2] 136 S. Ct. 663, 667 (2016).

[3] 2016 U.S. LEXIS 2134 (U.S. March 22, 2016) (No. 14-1146).

[4] 135 S. Ct. 1892 (2015) (granting writ of certiorari).

[5] H.R. 1927, 114th Cong., 2nd Sess. (House-passed version).

[6] Califano v. Yamasaki, 442 U.S. 682, 701 (1979).

[7] *Id*. at 700-701.

[8] *Id.* at 701; *see* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL §23.02 (LexisNexis ed. 2015).

[9] Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985).

The modern class action appears to be derived from the Bill of Peace, an equitable proceeding developed by the English Court of Chancery,[10] which enabled an equity court to hear an action by or against representatives of a group if the plaintiff could establish that the number of people involved was so large as to make traditional joinder impossible or impracticable.[11] If the court allowed the suit to proceed on a representative basis, the resulting judgment would bind all members of the group, whether they were present during the action or not.[12] The advantage of the representative suit was that it was cheaper and more convenient to bring a single proceeding in equity rather than to adjudicate multiple actions at law.[13]

Class suits have long been a part of American jurisprudence, starting with their authorization by federal courts under equity rules.[14] These rules gradually became codified at the state and federal level, but were generally restricted to cases where the class shared a common or general interest and where the parties were too numerous for the cases to be combined traditionally under joinder.[15] With the increasing complexity and interconnectedness of modern society, the class action has taken on a more prominent role.[16]

Federal class action suits are currently brought under Rule 23 of the Federal Rules of Civil Procedure (Rule 23). Rule 23(a) provides that a member of a class may sue or be sued on behalf of all members only if all of the following four elements are present:

> (1) the class is so numerous that joinder of all members is impracticable [("numerosity")[17]];
>
> (2) there are questions of law or fact common to the class [("commonality")];
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [("typicality")[18]]; and
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> (4) the representative parties will fairly and adequately protect the interests of the class [("adequacy")[19]].

Rule 23(b) further requires that one of the following elements be proven[20] by the party seeking to bring the action:

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[10] The English Court of Chancery was not bound by English common law, but rather served as an adjunct to the common law, providing for justice in individual cases without creating judgments binding on others. Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245, 252-53 (1996).

[11] CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE—FEDERAL RULES OF CIVIL PROCEDURE §1751 (3d ed. 2006); s*ee* Fed. R. Civ. P. 19 (required joinder of parties); Fed. R. Civ. P. 20 (permissive joinder of parties).

[12] WRIGHT, *supra* note 11, at §1751.

[13] *Id.*

[14] *See, e.g*., Smith v. Swormstedt, 57 U.S. 288, 302 (1854) (suit by Methodist Episcopal preachers to obtain church property after separation of church into two entities).

[15] WRIGHT, *supra* note 11, at §1751.

[16] *Id.*

[17] Some courts find that numerosity is typically established when there are at least 40 class members. Marcus v. BMW of N. Am., 687 F.3d 583, 595 (3rd Cir. 2012). Other courts have held that no fixed number of class members is sufficient, and that the court must consider "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *In re* TWL Corp., 712 F.3d 886, 894 (5th Cir. 2013) (citation omitted).

[18] The typicality requirement determines whether the legal or factual position of the named plaintiff "is markedly different" from the position of other class members. *Marcus*, 687 F.3d at 598.

[19] The adequacy requirement seeks to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods*., 521 U.S. at 625.

> (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
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> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.[21]

For purposes of this report, Rule 23(b)(1) will be referred to as the "inconsistency test," Rule 23(b)(2) will be referred to as the "general applicability test," and Rule 23(b)(3) will be referred to as the "predominance test."[22]

Recent Case Law

For many years, federal courts stated that Rule 23 should be given a liberal rather than a restrictive interpretation, meaning that the rule should be interpreted and applied to favor certification of class actions.[23] The Supreme Court had also indicated that a court should not inquire into the merits of the plaintiffs' claims while performing a Rule 23 analysis.[24] The Court, however, had more recently determined that a court should grant class certification only after it has performed a "rigorous analysis" to determine whether the prerequisites of Rule 23 have been satisfied.[25]

This seeming conflict was clarified by the Court's decision in *Wal-Mart Stores, Inc. v. Dukes* which held that, in some cases, an inquiry into the merits of a case is required.[26] In *Wal-Mart,* the

(...continued)

[20] The plaintiff bears the burden of proving that the prerequisites to class certification have been met by a preponderance of the evidence. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012).

[21] Fed. R. Civ. P. 23(b).

[22] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 364 (2011) ("Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief.")

[23] *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968), *rev'd on other grounds*, 417 U.S. 156, (1974) ("Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation.... "); *In re* A.H. Robins Co, Inc., 880 F.2d 709, 729 (4th Cir. 1989) (trend was to give Rule 23 liberal rather than restrictive construction); Gunnells v. Healthplan Servs., 348 F.3d 417, 424 (4th Cir. 2003) (federal courts should give Rule 23 a liberal rather than restrictive construction).

[24] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[25] General Telephone Co. of Sw. v. Falcon, 457 U.S. 147, 160-161 (1982).

[26] *Wal-Mart*, 564 U.S. at 351 n.6 (limiting *Eisen* to where a court is considering whether to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants).

Court reversed a decision certifying a class of Wal-Mart employees who alleged sex discrimination under Title VII of the Civil Rights Act of 1964[27] and sought equitable relief, a declaratory judgment, and backpay. The Court in *Wal-Mart* found that the "commonality" required by Rule 23(a)(2) not only requires that class members "have suffered the same injury," but also that their claims involve a "common contention" as to how the law was violated.[28]

The Court initially determined that there was no proof that the company "operated under a general policy of discrimination."[29] The only company-wide policy that the plaintiffs' submitted as evidence of discrimination was Wal-Mart's policy of allowing discretion by local supervisors over employment matters.[30] While the Court has recognized that giving discretion to lower-level supervisors can be the basis for liability under Title VII, the Court found that the disparate nature of the claims that would arise in such a situation would be unlikely to give rise to a common question of liability or damages.[31]

The Court held that "Rule 23 does not set forth a mere pleading standard,"[32] but it requires a plaintiff to "affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."[33] "What matters ... [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[34] The class members' claims "must depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[35] Although such a rigorous analysis will frequently overlap with an inquiry into the merits, the Court stated "[t]hat cannot be helped."[36]

The plaintiffs offered statistical evidence to establish gender discrimination by comparing the number of women promoted to management positions nationwide with the number of women in the available pool of hourly workers.[37] The Court rejected the sufficiency of such evidence to establish the required proof of commonality, finding that the plaintiffs were additionally required to establish that there was a challenged employment practice common to each claim.[38] The Court also rejected anecdotal evidence of discrimination, noting that the 120 affidavits filed addressing discrimination claims represented a small percentage of the thousands of class members participating in the case.[39] The Court concluded that the commonality requirement needed for class certification was not met where Wal-Mart did not have a uniform classwide discriminatory

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[27] 42 U.S.C.S. §§2000e-1 *et seq*.

[28] *Wal-Mart*, 564 U.S. at 349-50.

[29] *Id.* at 353.

[30] *Id.* at 355.

[31] *Id.* at 355-56.

[32] *Id.* at 350.

[33] *Id*.

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

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 356.

[39] *Id.* at 358.

employment practice, but instead allowed employment decisions to be made by low-level employees.[40]

The Court in *Wal-Mart* also addressed the issue of how damages for backpay might be calculated for the class, if gender discrimination were established. The Court overruled the Ninth Circuit's holding that such damages could be determined in a "Trial by Formula."[41] Under this statistical approach, a sample set of class members who had been the subject of gender discrimination would be selected, and a special master, using depositions, would evaluate the backpay owed. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery.[42] The Court rejected such a statistical method of establishing injury for the class and held that Wal-Mart was entitled to individualized determinations of each employee's eligibility for backpay.[43]

In the subsequent case of *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,[44] however, the Court indicated that the holdings of *Wal-Mart* should not be interpreted too broadly. In *Amgen*, the Court considered whether, in a private securities-fraud action[45] alleging reliance on a material misrepresentation or omission,[46] "questions of law or fact common to class members predominate[d]," thus satisfying the predominance requirement for class certification.[47] The plaintiffs' case relied on the "fraud-on-the-market" theory, which permits certain securities-fraud plaintiffs to invoke a rebuttable presumption of reliance on material misrepresentations aired to the general public.[48] The Court in *Amgen* held that the while the plaintiffs must prove the materiality of misrepresentations to prevail on the merits, that such proof was not a prerequisite to class certification. The Court stated that "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. Because materiality is judged according to an objective standard [under the 'fraud-on-the-market' theory], the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class Connecticut Retirement would represent."[49] "... Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[50]

Yet, in the more recent *Comcast Corp. v. Behrend*,[51] the Court indicated a willingness to evaluate as part of class certification whether classwide damages would be ascertainable in the merits case.

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[40] *Id.* at 356.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 366.

[44] Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013).

[45] The suit was brought under Section 10(b) of the Securities Exchange Act, 15 U.S.C. §78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5.

[46] *Amgen*, 133 S. Ct. at 1191-92.

[47] Fed. R. Civ. P. 23(b)(3).

[48] *Amgen*, 133 S. Ct. at 1192; s*ee* Basic Inc. v. Levinson, 485 U.S. 224, 241-49 (1988) (discussing the "fraud-on-the-market" theory).

[49] *Amgen*, 133 S. Ct. at 1191.

[50] *Id.* at 1194-95 (citations omitted).

[51] Comcast v. Behrend, 133 S. Ct. 1426 (2013).

Comcast considered the certification of a class by the U.S. Court of Appeals for the Third Circuit (Third Circuit) of more than 2 million current and former Comcast subscribers who alleged violation of the federal antitrust laws by "clustering," i.e., the purchase of competing cable systems in selected regions and the swapping to competitors of systems outside those regions.[52] As in *Amgen,* the plaintiffs sought certification under the "predominance test."[53] In order to meet this test, plaintiffs needed to show that the injury to each individual was "capable of proof at trial through evidence that [was] common to the class rather than individual to its members"; and (2) that the damages resulting from that injury were measurable "on a class-wide basis" through use of a "common methodology."[54]

The plaintiffs had sought certification under four theories of antitrust impact.[55] The U.S. District Court for the Eastern District of Pennsylvania (District Court), however, certified a class on only one of these theories: that "clustering" limited competition by reducing the number of "overbuilders," that is, cable companies competing in the market where Comcast operates.[56] The District Court held that an antitrust impact could be shown on a classwide basis based on a proffered economic model, even though this model did not isolate damages resulting from the "overbuilders" theory from the three other theories.[57] The District Court held that the exact calculation of such injury should be addressed during the merits of the case,[58] and the Third Circuit affirmed.[59]

The Supreme Court reversed, determining that a "plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation,"[60] and that the economic model proposed by the plaintiffs could not analyze the individual impact on class members of the economic damages that were the subject of the class certification.[61] While the District Court and the Third Circuit had not considered a damage analysis to be relevant for purposes of class certification, the Supreme Court stated that the District Court's holding "flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim."[62]

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[52] *Comcast*, 133 S. Ct. at 1430.

[53] Fed. R. Civ. P. 23(b)(3). As noted previously, part of the requirement for certification of a class includes meeting either the "inconsistency test," the "general applicability test," or the "predominance test." *See* text accompanying and following note 20, *supra*.

[54] *Comcast*, 133 S. Ct. at 1430 (citations omitted).

[55] *Id.* at 1430-31. "First, Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from 'overbuilders,' companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of 'benchmark' competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers." *Id.*

[56] *Id.* (citing Behrend v. Comcast Corp., 264 F.R.D. 150, 165, 174, 178, 181 (E.D. Pa. 2010)). The other theories were held by the District Court not to be capable of classwide proof. *Id.*

[57] *Id.*

[58] *Id.* at 1434.

[59] Comcast Corp. v. Behrend, 655 F.3d 182, 207 (3rd Cir. 2011).

[60] *Comcast*, 133 S. Ct. at 1433 (citation omitted).

[61] *Id.* at 1434-35.

[62] *Id.* at 1434.

The 2015 Supreme Court Term

In the 2015 Supreme Court term, the Court agreed to consider three cases which involved class action lawsuits: *Campbell-Ewald Co. v. Gomez*,[63] *Tyson Foods, Inc. v. Bouaphakeo*,[64] and *Spokeo, Inc. v. Robins*.[65] These cases address important issues that have the potential to reshape jurisprudence concerning certification of class actions.

Campbell-Ewald Co. v. Gomez: Whether a Settlement Offer to Named Plaintiffs Moots a Class Action Case

In *Campbell-Ewald Co v. Gomez*, the Court held that an unaccepted offer of complete relief to a named plaintiff's claim did not render that case moot. *Campbell-Ewald* arose from alleged violations of the Telephone Consumer Protection Act (TCPA), which prohibits any person, absent the prior express consent of a telephone recipient, from "mak[ing] any call ... using any automatic telephone dialing system ... to any telephone number assigned to a paging service [or] cellular telephone service."[66] The TCPA authorizes a private right of action for a violation of this prohibition, and a plaintiff may recover "actual monetary loss" or $500 for each violation, whichever is greater.[67]

In 2006, the Campbell-Ewald Company (Campbell), a nationwide advertising and marketing company, transmitted text messages[68] regarding U.S. Navy recruitment to over 100,000 recipients.[69] One of these recipients was the petitioner in this case, Jose Gomez, who alleged that he had not provided prior express consent to receive the solicitation. Gomez filed a class action suit on behalf of himself and a nationwide class of individuals who had received, but had not consented to the receipt of, the text message. Gomez sought statutory damages, costs, attorney's fees, and an injunction against unsolicited messages.[70]

Prior to Gomez's having filed a motion in the case for class certification, Campbell offered to settle Gomez's individual claim and filed an offer of judgment pursuant to Federal Rule of Civil Procedure 68 (Rule 68).[71] Campbell then moved to dismiss the case, arguing that its offer mooted Gomez's individual claim by providing him with complete relief. Because Gomez had not yet moved for class certification, Campbell argued that the class action claims were also moot.[72] The

[63] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016).

[64] Tyson Foods, Inc. v. Bouaphakeo, 2016 U.S. LEXIS 2134 (U.S. March 22, 2016) (No. 14-1146).

[65] Spokeo, Inc. v. Robins, 135 S. Ct. 1892 (April 27, 2015) (granting writ of certiorari).

[66] 47 U.S.C. §227(b)(1)(A)(iii).

[67] 47 U.S.C. §227(b)(3). Damages may be trebled if "the defendant willfully or knowingly violated" the act. *Id.*

[68] Text messages qualify as calls under the TCPA. Gomez v. Campbell-Ewald Co., 768 F.3d 871, 876 (9th Cir. 2014).

[69] *Campbell-Ewald*, 136 S. Ct. at 667.

[70] *Id.*

[71] *Id.* at 667. Rule 68 provides, in relevant part, the following:

> (a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
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> (b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

[72] *Campbell-Ewald*, 136 S. Ct. at 668.

question before the Supreme Court was whether an unaccepted offer can moot a plaintiff's claim,[73] thereby depriving federal courts of Article III jurisdiction.[74]

The Court held that the plaintiff's claim was not rendered moot by an unaccepted offer.[75] The Court has previously held that a case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[76] In *Campbell-Ewald,* the Court noted that, under principles of contract law, a settlement offer, absent acceptance, is not binding on either party.[77] Further, under Rule 68, an unaccepted offer is "considered withdrawn" if not accepted within specified time limits.[78] "In short, with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset."[79] The Court did, however, reserve the question 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."[80]

While this decision does not appear to disturb existing case law, it addresses an important issue—whether plaintiffs in class action cases can be compelled to accept a settlement offer before class certification. If a plaintiff were to accept a settlement offer before class certification, the case would be dismissed, and the defendant would avoid the necessity of defending itself against a class action with a potentially large numbers of plaintiffs. While another plaintiff could bring a similar action, the defendant would have a similar opportunity to compel settlement. While the Court rejected the argument that a settlement offer by itself was sufficient to render a case moot, it did not "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."[81] If this latter mechanism were found to render a case moot, it might become a tool for defendants to avoid class action cases.

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[73] The Court had previously reserved this question in the case of *Genesis HealthCare v. Symczyk*, 133 S. Ct. 1523 (2013). In that case, a collective action was brought by a former employee of the Genesis HealthCare Corporation under the Fair Labor Standards Act (29 U. S. C. §§201 *et seq.)*. As in *Campbell-Ewald*, a settlement offer was made, and the defendant allowed the offer to lapse. *Symczyk*, 133 S. Ct. at 1527. Because the plaintiff did not dispute that her individual claims were moot, the Court reserved the question. *Id.* at 1528-1530.

[74] *Campbell-Ewald*, 136 S. Ct. at 668. U.S. CONST., art. III, Section 2 limits federal court jurisdiction to "cases" and "controversies." This requirement has been interpreted to require that "an actual controversy ... be extant at all stages of review, not merely at the time the complaint is filed." Arizonans for Official English v. Arizona, 520 U. S. 43, 67 (1997) (*quoting* Preiser v. Newkirk, 422 U. S. 395, 401 (1975)).

[75] *Campbell-Ewald*, 136 S. Ct. at 666.

[76] Knox v. Service Employees Int'l Union, 132 S. Ct. 2277, 2287 (2012) (quotes and citations omitted).

[77] *Campbell-Ewald*, 136 S. Ct. at 670.

[78] *See supra* note 71.

[79] *Campbell-Ewald*, 136 S. Ct. at 670-71.

[80] *Id.* at 670.

[81] *Id.* at 672; *see id.* at 685 (Roberts, J., dissenting) ("Today's decision thus does not prevent a defendant who actually pays complete relief—either directly to the plaintiff or to a trusted intermediary—from seeking dismissal on mootness grounds.").

Tyson Foods, Inc. v. Bouaphakeo: Certification of Class Action When Liability and Damages Are Determined by Statistical Techniques

In *Tyson Foods, Inc. v. Bouaphakeo*,[82] the Supreme Court upheld a $2.9 million award against Tyson Foods, Inc. (Tyson) for violations of the Fair Labor Standards Act (FSLA). The named plaintiffs were current and former employees of Tyson at a meat-processing facility in Storm Lake, Iowa, who sought class certification under the "predominance test."[83] The employees claimed that Tyson failed to pay overtime under the FSLA[84] for donning (putting on) and doffing (taking off) personal protective equipment before work, during lunch, and after production, and for transporting the items from lockers to the production floor.[85] Tyson calculated compensated work time based on "gang time," which is the time that employees are at their working stations and the production line is moving.[86] Although Tyson did not record the amount of time that it took for employees to perform donning and doffing of personal protective equipment as worktime, it did add a uniform number of minutes of compensated time per day ("K-Code time") for the donning and doffing of items "unique" to the meat-processing industry for employees who worked in a department where knives are used, and for walking time required of the employees.[87]

Although the FLSA does not require compensation for time in transit to work[88] or to preliminary or postliminary activities,[89] it does require compensation for activities that are an "integral and indispensable part of the principle activities."[90] The employees sued, claiming that the K-Code time was insufficient to cover compensable pre- and post-production line activities.[91] The employees were granted "class certification" under the FLSA, which allows named plaintiffs to sue "for and in behalf of ... themselves and other employees similarly situated."[92] In order to prove liability and damages, the plaintiffs relied on individual timesheets, along with average donning, doffing, and walking times calculated from 744 observations of employees at work.[93] A jury returned a verdict for the plaintiffs, and a final judgment totaling $5,785,757.40 was awarded.[94]

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[82] *Tyson Foods*, 2016 U.S. LEXIS at *6, 30.

[83] *Id.* at *17-18.

[84] 29 U.S.C. §§201 *et. seq.* The suit also included claims under the Iowa Wage Payment Collection Law (IOWA CODE §§91A.1 *et. seq.*).

[85] Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 794 (8th Cir. 2014).

[86] *Tyson Foods*, 2016 U.S. LEXIS at *8.

[87] *Id.*

[88] The FSLA provides an exception for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform.... " 29 U.S.C. §254(a)(1).

[89] The FSLA provides an exception for "activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. §254(a)(2).

[90] Steiner v. Mitchell, 350 U. S. 247, 249, 255 (1956).

[91] *Bouaphakeo*, 765 F.3d at 796.

[92] 29 U.S.C. §216(b). Although class certification in this case was sought under the FLSA, not Rule 23, the parties did not dispute that the standards of certification for the former were no more stringent than the latter. *Tyson Foods*, 2016 U.S. LEXIS at *10.

[93] *Bouaphakeo*, 765 F.3d at 799.

[94] *Id.* at 796.

The defendants in *Tyson Foods*, relying on *Wal-Mart*,[95] argued to the Supreme Court that the use of the 744 observations as "representative evidence" made class certification improper.[96] As discussed previously, the *Wal-Mart* Court rejected the use of a sample set of class members who had been the subject of gender discrimination to extrapolate the backpay owed to the class, holding that Wal-Mart had the right to litigate statutory defenses to individual claims.[97] In *Tyson Foods*, however, the Supreme Court rejected this comparison with the "Trial by Formula" that had been at issue in *Wal-Mart*. The Court in *Tyson Foods* held that *Wal-Mart* could be distinguished because the employees seeking backpay in *Wal-Mart* were not similarly situated, so that depositions which detailed the ways in which other employees were discriminated against by their particular store managers could not have been used in individual gender discrimination suits.[98]

In contrast, the statistical evidence introduced in *Tyson Foods* did not prove liability only for a sample set of class members, but rather was intended to prove liability for all members of the class. While the plaintiffs did rely on inference to extrapolate the average time for donning, doffing, and walking, these inferences applied to each class member individually.[99] The Court found that, in many cases, the use of representative samples is "the only practicable means to collect and present relevant data"[100] to establish liability, and that the use of the 744 samples here was permissible under the circumstances of the case.[101] The Court declined, however, to establish categorical rules for when inferences from representative data would be admissible as "just and reasonable,"[102] noting that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action."[103]

The Court's decision in *Tyson Foods* addressed an important issue in class certification—what methods plaintiffs can use to establish, as required by the predominance test, that there are questions of law and fact common to a class. While the use of statistical evidence to establish a class was found insufficient in the *Wal-Mart* case because the plaintiffs' claims were too diverse, the use of statistical evidence in *Tyson Foods* was upheld because it applied to the liability of defendants to claims from similarly situated plaintiffs. Although the Court declined to articulate all the situations in which statistical evidence could be introduced to establish class certification, it left open the possibility that statistical evidence could be used in a number of future cases.

Spokeo, Inc. v. Robins: Whether Article III Standing Can Be Based on Statutory Violations Without Proof of Injury

In *Spokeo, Inc. v. Robins*, the Court has been asked to determine whether an individual plaintiff has Article III standing to sue a website under the Fair Credit Reporting Act (FCRA) for

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[95] 564 U.S. 338 (2011).

[96] *Tyson Foods*, 2016 U.S. LEXIS at *19.

[97] *Wal-Mart*, 564 U.S. at 366.

[98] *Tyson Foods*, 2016 U.S. LEXIS at *25.

[99] *Id.* at *26-27.

[100] *Id.* at *20 (citation omitted).

[101] *Id.* at *25.

[102] *See* Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 687 (1946). Hearing and testimony established evidence sufficient to show average compensable time worked under the FLSA. *Id.* at 685.

[103] *Tyson Foods*, 2016 U.S. LEXIS at *27.

publishing inaccurate personal information about him to potential employers. In *Spokeo*, the issue to be considered by the Court is whether a plaintiff who suffers no concrete harm may nonetheless have standing based on a bare violation of a federal statute.[104] Although the plaintiff's request for class certification has not yet been reached in this case, the establishment of Article III standing by the plaintiff would raise the possibility that class action lawsuits could be brought based on statutory damage claims alone, arguably reducing the importance of establishing individualized injuries as part of the class certification process.

Spokeo, Inc. operates a website that provides users with personal information about individuals, including contact data, marital status, age, occupation, and wealth level. The plaintiff sued Spokeo for a willful violation of the FCRA by providing false information about him, specifically that he had a graduate degree, was employed, was in the top 10% nationwide for wealth, was in his 50s, was married, and had children. [105] The report also included a photograph purporting to be the plaintiff, which it was not.[106] The plaintiff, who was unemployed, claimed that the information caused harm to his employment prospects, and that this had caused "anxiety, stress, concern, and/or worry about his diminished employment prospects."[107] The plaintiff also alleged a failure by the company to comply with various notice requirements associated with providing consumer information.[108]

Article III, Section 2 of the Constitution requires that, for a court to exercise federal judicial authority, there must be a "case or controversy," and one of the components of a "case or controversy" is standing.[109] The three components of standing are: (1) the plaintiff has suffered an "injury in fact" that is: (a) concrete and particularized (b) and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[110] In *Spokeo*, however, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) held that the violation of a statutory right is sufficient to confer standing, even absent a showing of actual harm.[111] The Ninth Circuit found that the interests protected by the FCRA are sufficiently concrete and particularized to satisfy the injury-in-fact requirement of Article III.[112]

The defendant in the case has argued in its merits brief to the Supreme Court that, historically, a violation of a statutory right could not, absent further injury, serve as the basis for Article III

[104] Brief of Petitioner at i, Spokeo, Inc. v. Robins, No. 13-1339 (U.S. July 2, 2015) (Brief of Petitioner).

[105] Brief of Respondent at 8-9, Spokeo, Inc. v. Robins, No. 13-1339 (U.S. August 31, 2015) (Brief of Respondent).

[106] *Id.* at 9.

[107] *Id.*

[108] The plaintiff alleged that the defendants (1) failed to issue notices to providers and users of information pursuant to 15 U.S.C. §1681e(d); (2) failed to ensure that employers who sought consumer reports for purposes of making employment decisions complied with the FCRA's disclosure requirements under 15 U.S.C. §1681b(b)(1); and (3) violated 15 U.S.C. §1681j(a)(1)(c) and 12 C.F.R. §1022.136 by failing to provide consumers with a toll-free number to request annual reports. Brief of Petitioner at 3.

[109] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180 (2000).

[110] *Id.* at 180-81.

[111] Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014) ("When, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages.").

[112] *Id.* at 413-14. Because the court found that such injuries were sufficient, the court declined to evaluate whether the plaintiff's alleged diminished employment prospects constituted sufficient injury for standing purposes. *Id.* at 414 n3. The court went on to find that the second and third requirements of standing, causation and redressability, had been adequately plead. *Id.* at 414.

standing.[113] The defendant has also argued that the collection of statutory damages by parties who only suffered violation of a statutory right more closely resembles a fine than recovery for damages.[114] The defendant has added that allowing self-interested private parties, as opposed to public prosecutors, to enforce laws in the absence of concrete harm threatens violation of separation-of-powers principles, as it intrudes on the executive branch's duty under the Take Care Clause[115] to decide which cases warrant prosecution.[116]

The defendant also has contended that the practical impact of allowing suits based on injuries to a statutory right would be amplified in the context of a Rule 23 class action. Specifically, "[o]nce concrete harm is no longer an element of the plaintiff's case, the named plaintiff will argue that issues of injury and causation have been transformed from individualized matters to issues susceptible to common proof because, under an 'injury-in-law' regime, the actual impact of the alleged legal violation is no longer relevant."[117]

The plaintiff, on the other hand, has argued that English common law and early American law allow for a right of action for the invasion of a private legal right without any further showing of harm.[118] The plaintiff further has asserted that, when no evidence is given of the amount of loss, courts have long awarded either nominal damages or statutory damages.[119] While admitting that he must have more than an injury common to all members of the public,[120] the plaintiff has argued that an invasion of a legally protected interest is sufficient to establish standing as long as the invasion is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.[121] The plaintiff also has cited examples of prior Supreme Court cases where a statutory right conferred standing even absent cognizable injury,[122] arguing that his right to statutory damages presents a real dispute regarding injury,[123] and asserting that the right not to have false information regarding oneself provided to others is an extension of the common law doctrine of defamation.[124]

In oral argument, a number of Justices asked questions about whether the alleged injury that is the basis for the suit is "concrete" enough to sustain the lawsuit. Chief Justice Roberts[125] and Justice

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[113] Brief of Petitioner at 20-26 (surveying English legal tradition regarding the concrete harm necessary to initiate a suit).

[114] *Id.* at 29.

[115] The Take Care Clause of Article II confers upon the President the responsibility to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §3.

[116] Brief of Petitioner at 30.

[117] *Id.* at 33.

[118] Brief of Respondent at 15-21.

[119] *Id.* at 21-23.

[120] Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

[121] Brief of Respondent at 25; *Summers*, 504 U.S. at 560.

[122] Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982) (violation of African-American real estate tester's right to truthful housing information conferred standing under the Fair Housing Act even though she they had no intention of buying or renting a home); Public Citizen v. Dep't of Justice, 491 U.S. 440, 449-50 (1989) (persons seeking access to public records under the Federal Advisory Committee Act had standing based on denial of statutory right of access).

[123] Brief of Respondent at 12-13.

[124] *Id.* at 13.

[125] Oral Argument Transcript at 34, Spokeo, Inc. v. Robins, No. 13-1339 (November 2, 2015) available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1339_j5fl.pdf.

Kennedy[126] suggested that an "injury in fact" (not an "injury in law") is needed to establish standing, with Justice Scalia stating that the requirement of "injury in fact" is contemplated within the term "concrete."[127] Justice Sotomayor, however, suggested that the application of the term "concrete" to legally created rights is not required under long-standing case law.[128] Justice Kagan, in turn, expressed the view that Congress might be better at identifying concrete harm than the Court, and observed that Congress had identified the dissemination of inaccurate information as harming persons individually. [129] The Court's decision in this case is pending as of the date of this report's publication.

The implications of this case for class actions are significant. If Congress can establish a statutory claim that meets the requirements of Article III standing without a showing of actual injury to a plaintiff, this would raise the possibility that class action lawsuits could be brought based on the violation of statutory claims alone. If this is the case, class actions brought under those claims might be more easily certified than class actions where proof of injury may vary from plaintiff to plaintiff.

Proposed Legislation

H.R. 1927, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, passed the House on January 8, 2016. The bill provides that "[n]o Federal court shall certify any proposed class seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives."[130] The bill also requires that this determination shall be made based on a "rigorous analysis of the evidence presented.... "[131]

The House Judiciary Committee report on H.R. 1927 (House Report) notes that class action rules require that the claims and defenses of representative parties are "typical" of a class, but suggest that in some cases, courts have allowed class certification without showing that all members of the class share a common injury of the same type and comparable scope.[132] For instance, the House Report states that in certain class action suits, class certification has been permitted for defective products, even though the majority of absent class members experience no damages due to this defect.[133] The House Report states that the bill would allow class members who experience *de minimis* or nonexistent damages to bring separate class actions from people who are injured more significantly.[134]

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[126] *Id.* at 35.

[127] *Id.*

[128] *Id.* at 17.

[129] *Id.* at 11.

[130] H.R. 1927, 114th Cong., 2d Sess. at §2(a).

[131] *Id*. at §2(b).

[132] H.Rept. 114-328, at 2 (2015).

[133] *Id.* For example, the Report stated that, in a case brought against Whirlpool, the United States Court of Appeals for the Sixth Circuit affirmed certification of a class of all owners of a certain washing machine that allegedly produced moldy smelling laundry, even though the overwhelming majority of the absent class members experienced no problem with their machines. *In re Whirlpool Corp. Front-Loading Washer Products Liability*, 722 F.3d 838, 849 (6th Cir. 2013), *cert denied*, 134 S. Ct. 1277 (2014).

[134] H.Rept. 114-328, at 3.

Dissenting Members on the Committee, however, assert in the House Report that the proposed bill would increase the difficulty of bringing class actions, as it would require class action plaintiffs to prove the merits of their case at the preliminary stage of class certification.[135] These Members also stated that in many cases—including civil rights, antitrust, and privacy cases—it would be "virtually impossible" to prove that class members suffered the same "type" or "scope" of injury at the certification stage.[136] These members also assert that proponents of the bill consider "benefit of the bargain" cases (where the injury of a defective product is that it is of less value than a non-defective product) to be examples of "no-injury" class actions, even though an economic injury has been suffered.[137]

Conclusion

While the Supreme Court has accepted a variety of cases over recent years regarding class action lawsuits, the impact of these cases on the availability of class actions have been mixed. In *Wal-Mart Stores, Inc. v. Dukes*, the Court has limited the ability of plaintiffs who are not similarly situated from bringing class action suits, which may result in smaller class sizes. The Court in *Campbell-Ewald Co. v. Gomez* declined to find that a defendant's offer to provide complete relief to settle a plaintiff's individual claims would moot a class action lawsuit before certification, which might have made it more difficult for a particular individual to bring a class action. The Court, however, left open the possibility that such an action might be rendered moot by the defendant putting funds in an account payable to the plaintiff.

In *Tyson Foods, Inc. v. Bouaphakeo*, the Court held that each person joined in a class action suit need not prove, individually, that she was harmed by the claimed misconduct, if statistical models can show such harm. Although the Court declined to articulate all the situations in which statistical evidence could be introduced, it left open the possibility that such evidence could be used in a number of future class action cases. In *Spokeo, Inc. v. Robins*, the Court is still considering whether a class action meets the standing requirements of Article III if the plaintiff suffered a statutory injury but no actual damages. If the Court finds that a statutory injury is sufficient to satisfy Article III, class actions brought under those claims might be more easily certified than class actions where proof of injury may vary from plaintiff to plaintiff.

In January 2016, the House passed H.R. 1927, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016. This legislation, if enacted into law, would arguably limit the size of some class action suits by limiting class action suits to class members who have suffered injuries of the same type and scope.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

[135] *Id*. at 13 (dissenting views).

[136] *Id*.

[137] *Id*. at 16-17.

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