4/24 Draft
(New York University Law Review, Forthcoming October 2017)

CLASS ACTIONS PART II: A RESPITE FROM THE DECLINE

Robert H. Klonoff[*]

ABSTRACT

In a 2013 article, I explained that the Supreme Court and federal circuits had cut back significantly on plaintiffs' ability to bring class actions. As I explain in this article, that trend has subsided. First, the Supreme Court has denied certiorari in several high-profile cases. Second, the Court's most recent class action rulings have been narrow and fact-specific. Third, the federal circuits have rejected defendants' broad interpretations of Supreme Court precedents and arguments for further restrictions on class certification. One explanation for this new trend is that defendants have been overly aggressive in their arguments, losing credibility and causing courts to push back. Another is that courts are retreating from the view that pressure on defendants to settle is itself a reason to curtail class actions. It remains to be seen, however, whether this trend is the new normal, or merely a respite from the decline of class actions.

In my 2013 article, *The Decline of Class Actions*,[1] I explained that the Supreme Court and the federal circuits have made it increasingly difficult for plaintiffs to litigate class actions. I did not declare the class action device dead, but I did express concern that it had been severely weakened.

---

[*] Jordan D. Schnitzer Professor of Law, Lewis & Clark Law School; Dean of Lewis & Clark Law School, 2007–2014. The author serves as a member of the U. S. Judicial Conference Advisory Committee on Civil Rules. He previously served as an Associate Reporter for the American Law Institute's project, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (West 2010). The author writes only in his personal capacity and not as a member of the Advisory Committee on Civil Rules. The author wishes to thank Professors Simona Grossi, Mary Kay Kane, and Rick Marcus, attorneys Jocelyn Larkin, Joe Sellers, and Elizabeth Cabraser, and various attendees at the NYU Conference, Rule 23@50, for their insightful comments. He also thanks his research assistants (Evan Christopher, Max Goins, Christina Helregel, Ben Pepper, Elisabeth Rennick, and Daniel Walker) for their able assistance.

[1] Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (hereinafter "*Decline*").

As I noted in *Decline*, the Supreme Court had in the past several years issued a number of seminal decisions, including *Wal-Mart Stores, Inc. v. Dukes*,[2] *AT&T Mobility LLC v. Concepcion*,[3] and *American Express Co. v. Italian Colors Restaurant*.[4] Federal circuit courts had also introduced new limits on class actions, including cases imposing rigid standards for numerosity, frontloading of merits evidence, class definition, and many other topics.[5] A recurring theme of both the Supreme Court and circuit cases was that class certification creates irresistible (and improper) pressure on defendants to settle even baseless claims.[6]

Reviewing the landscape four years later, I believe it is unlikely that the Supreme Court or the circuits will overrule the seminal decisions discussed in *Decline* any time soon. The plaintiffs' bar, however, has been hoping that, even if those key precedents are not overruled, at least the case law will not get more onerous. And indeed, four years after my pessimistic article, the plaintiffs' bar has reason for optimism. For lawyers, as for physicians, "the first goal . . . is to stop the bleeding."[7] In the class action field, that is now happening.

One obvious development is the February 13, 2016 death of Justice Scalia, the author of several of the Supreme Court's restrictive class action opinions, including *Dukes*, *Concepcion*,

---

[2] 564 U.S. 338 (2011) (setting a high hurdle for establishing commonality under Rule 23(a)(2)).

[3] 563 U.S. 333 (2011) (upholding arbitration and class action waiver clauses).

[4] 133 S. Ct. 2304 (2013) (upholding class action waiver clause).

[5] *See Decline*, *supra* note ___, at 745–823.

[6] *See, e.g.*, *Decline*, *supra* note 1, at 741 & n.68, 753, 818; *Concepcion*, 563 U.S. at 350 (class actions entail "the risk of 'in terrorem' settlements"); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) (class actions "may . . . create unwarranted pressure to settle nonmeritorious claims on the part of defendants") (citation omitted); In re Rhone–Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (class actions may lead to "blackmail settlements" induced by "intense pressure to settle" (citations and internal quotation marks omitted)).

[7] *Hemorrhage*, HUM. DISEASE & CONDITIONS (last visited Nov. 19, 2016), http://www.humanillnesses.com/original/Gas-Hep/Hemorrhage.html.

and *Italian Colors*. Certainly, the impact of Justice Scalia's death will be significant, at least until his successor is seated.[8] In addition, there can be little doubt that eight years of judicial appointments by President Obama have shifted the political balance in the circuits.[9]

Nonetheless, personnel changes at the Supreme Court and the circuits are only part of the explanation. Many of the key Supreme Court developments discussed herein pre-date Justice Scalia's death, and some of the recent circuit decisions refusing to cut back on class actions were written by Republican-appointed judges.

In this article, I focus on three important developments:

- First, in the past few years, the Supreme Court has denied certiorari in a host of high profile class actions, notwithstanding urgent pleas by the business community that review by the Court was essential.

- Second, in the past few years, the Supreme Court has taken a measured (and, in some instances, decidedly pro-plaintiff) approach to class actions. In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,[10] the Court reined in the growing circuit trend to require substantial merits determinations at the class certification stage. And in three closely watched

---

[8] For instance, only days after Justice Scalia's death, Dow Chemical withdrew a petition for certiorari in a case challenging a verdict of more than a billion dollars, choosing instead to settle the case for $835 million. Dow stated that it was doing so because Justice Scalia's death had significantly reduced the odds that certiorari would be granted. *See, e.g.*, Jef Feeley & Greg Stohr, *Scalia's Death Prompts Dow to Settle Suits for $835 Million*, BLOOMBERG BUS. (Feb. 26, 2016), http://www.bloomberg.com/news/articles/2016-02-26/dow-cites-scalia-s-death-in-settling-urethanes-case-for-835m.

[9] *See, e.g.*, Jeremy W. Peters, *Building Legacy, Obama Reshapes Appellate Bench*, N.Y. TIMES (Sept. 13, 2014), http://www.nytimes.com/2014/09/14/us/politics/building-legacy-obama-reshapes-appellate-bench.html?_r=0.

[10] 133 S. Ct. 1184, 1191 (2013).

class action cases in the 2015 Term, *Tyson Foods, Inc. v. Bouaphakeo*,[11] *Campbell-Ewald Co. v. Gomez*,[12] and *Spokeo, Inc. v. Robins*,[13] the Supreme Court issued rulings that rejected broad theories urged by the defendants.

- Third, in the past few years, the circuits have frequently rejected defendants' interpretations of Supreme Court cases and other arguments that would have imposed strict, new limits on class certification.

As I explain below, one explanation for these developments is that courts have reacted negatively to overly aggressive advocacy by defendants. Another is that courts are simply taking a break from the strident approach that has already resulted in significant cutbacks in class actions. Furthermore, I believe that courts have backed away from the oft-cited view that the pressure to settle is itself a reason to curtail class actions. While that theme still appears as a consideration in whether to grant review under Rule 23(f), it has all but disappeared as a rationale for restricting class actions. Instead, courts have adopted a more measured—and, in my view, more justified—approach: looking at each case based on its particular facts and circumstances.

It remains to be seen whether these developments represent the new normal, or instead are only a pause before the decline of class actions continues. Given the election of Donald Trump

---

[11] 136 S. Ct. 1036 (2016) (rejecting defendant's argument for categorical exclusion of aggregate statistical proof).

[12] 136 S. Ct. 663 (2016) (rejecting defendant's use of Rule 68 "pick-off" strategy to moot claims of class representatives).

[13] 136 S. Ct. 1540 (2016) (rejecting defendant's argument that risk of future harm cannot satisfy concreteness requirement for Article III standing in class action context).

as President, and the likelihood that he will appoint jurists who may embrace further limits on class actions, there is reason for concern about the future.

Supreme Court Justice Neil Gorsuch, who was confirmed on April 7, 2017, is likely to take a conservative position on class actions similar to that of Justice Scalia, although perhaps without the same degree of zeal. Justice Gorsuch himself has stated that he is neither pro- nor anti-class action,[14] but there is no shortage of articles attempting to predict his stance on class action issues.[15] At bottom, he is unlikely to favor expanding class actions in a particular case absent a compelling basis in Rule 23. And he has shown that he is willing to import restrictive Rule 23(b)(3) concepts into Rule 23(b)(2).[16] At the same time, it is not clear that Justice Gorsuch will have the same anti-class action agenda exhibited by Justice Scalia.[17]

In addition to the impact of Justice Gorsuch's appointment and the likelihood of further vacancies on the Supreme Court over the next four years, there are currently 127 vacancies on

---

[14] *See* Jessica Karmasek, *Trump's Pick for U.S. S.C. Denies He's Against Class Actions*, LEGALNEWSLINE (Mar. 24, 2017), http://legalnewsline.com/stories/511097344-trump-s-pick-for-u-s-sc-denies-he-s-against-class-actions.

[15] *See, e.g.*, Amy Howe, *A Closer Look at Judge Neil Gorsuch and Class Actions*, SCOTUSBLOG (Mar. 8, 2017), http://www.scotusblog.com/2017/03/closer-look-judge-neil-gorsuch-class-actions/; Ron Chapman, Jr. & Christopher Murray, *Gorsuch and the Future of Class Action Waivers*, LAW360 (Feb. 1, 2017), https://www.law360.com/articles/887293/gorsuch-and-the-future-of-class-action-waivers; Joseph H. Lang & D. Matthew Allen, *Judge Gorsuch on Class Actions*, CLASSIFIED (Feb. 6, 2017), http://classifiedclassaction.com/judge-gorsuch-class-actions/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original; *Client Alert: Judge Niel Gorsuch's Potential Impact on the Development of Class Action Law*, GIBSON DUNN (Mar. 13, 2017), http://www.gibsondunn.com/publications/Pages/Judge-Neil-Gorsuch-Potential-Impact-on-Development-of-Class-Action-Law.aspx.

[16] *See Schook v. Bd. of Cnty. Comm'rs of Cnty. of El Paso*, 543 F.3d 597, 604–05 (10th Cir. 2008) (applying manageability and cohesiveness in (b)(2) case). Other class action opinions authored by Justice Gorsuch prior to his appointment to the Supreme Court are not especially illuminating. They include *Hammond v. Stamps.com*, 844 F.3d 909 (10th Cir. 2016) (holding that amount in controversy was sufficient to meet CAFA minimum for removal); *McClendon v. City of Albuquerque*, 630 F.3d 1288 (10th Cir. 2011) (holding that order withdrawing approval for class action settlement was not a final decision for purposes of appeal); and *BP America v. Oklahoma ex rel. Edmondson*, 613 F.3d 1209 (10th Cir. 2010) (granting discretionary review of remand order).

[17] *See* Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1635–39 & n.407 (2016) (discussing Justice Scalia's focus on class actions and citing his restrictive class action opinions).

the lower federal courts,[18] with many more vacancies likely over the next four years. With a string of conservative appointments at all levels of the federal bench, it is impossible to say how long the current reprieve will last. But even if it is only temporary, it is a welcome change from years of court decisions curtailing class actions.

Finally, although this Article focuses on case law developments, it should be noted that even if the current reprieve in the case law proves to be more than just ephemeral, Congress may step in and pass major legislation curtailing class actions. At the time this Article went to press, the Fairness In Class Actions Litigation Act of 2017[19] had passed the House of Representatives and was pending in the Senate. The bill, which has drawn widespread criticism from the plaintiffs' bar and many scholars and commentators,[20] would significantly restrict the class action device. Among other things, in its current form it would codify (or even expand) the heightened ascertainability requirement that has been adopted by some courts,[21] would arguably preclude certification in cases involving individualized damages,[22] and would create a higher threshold for

---

[18] *Current Judicial Vacancies*, U.S. COURTS (last updated Apr. 23, 2017), http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies. *See* Josh Katz, *Older Judges and Vacant Seats Give Trump Huge Power to Shape American Courts*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/interactive/2017/02/14/upshot/trump-poised-to-transform-american-courts.html?_r=0 (noting that President Trump "could soon find himself responsible for appointing a greater share of federal court judges than any first-term president in 40 years" and emphasizing his "huge power" to reshape the federal judiciary).

[19] H.R. 985, 115th Cong. (2017).

[20] *See, e.g.*, Simona Grossi, *The Fairness in Class Actions Litigation Act of 2017: A Few Thoughts*, SUMMARY JUDGMENTS (Feb. 22, 2017), http://summaryjudgments.lls.edu/2017/02/the-fairness-in-class-actions.html; Letter from The Leadership Conference on Civil & Human Rights to the U.S. House of Representatives (March 8, 2017), *available at* http://www.civilrights.org/advocacy/letters/2017/oppose-hr-985-the-fairness.html; Howard M. Erichson, *New Republican Class Actions Bill Would Gut Class Actions, Not Improve Them*, THE HILL (Feb. 20, 2017), http://thehill.com/blogs/pundits-blog/lawmaker-news/320360-new-republican-bill-would-gut-class-actions-not-improve-them.

[21] H.R. 985 § 1718(a). *See* notes ___–___ and accompanying text (discussing heightened ascertainability requirement).

[22] *Id.* § 1716.

class certification—requiring courts to conduct a frontloaded merits analysis contrary to the Supreme Court's holding in *Amgen*.[23] It is almost certain that President Trump would sign the bill in its current form. Thus, there is reason for concern that, even if the case law trends remain favorable for class actions, Congress and the President will reverse this progress.

I. SUPREME COURT DENIALS OF CERTIORARI

In the past few years, the Supreme Court has denied certiorari in a number of high-profile cases that could have been effective vehicles to impose new limits on class actions. This trend is in marked contrast to the Court's prior approach as I recounted in *Decline*. As I explained there, looking at the case law as of 2013, it appeared that a majority of the Supreme Court was on a mission to rein in class actions. The Court not only granted certiorari in a significant number of class action cases, but took an unusually aggressive role in shaping the issues to be decided.

For instance, when the Supreme Court granted review in *Wal-Mart Stores, Inc. v. Dukes*, a massive sex discrimination class action, it added its own issue for review (in addition to those raised by Wal-Mart): "Whether the class certification ordered . . . was consistent with Rule 23(a) [requiring a common issue of law or fact]."[24] This commonality issue had barely been mentioned in Wal-Mart's petition for certiorari,[25] but the Court ended up devoting a major portion of its opinion establishing a new, strict test for commonality.[26] Likewise, in *Comcast Corp. v.*

---

[23] *Id.*

[24] Wal-Mart Stores, Inc. v. Dukes, 562 U.S. 1091 (2010).

[25] *See Decline*, *supra* note 1, at 774.

[26] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–360 (2011).

Behrend,[27] the Court granted review but rewrote the question presented.[28] Ultimately, the Court did not reach even its own rewritten question because it found that Comcast had failed to preserve the issue.[29] Usually, in such a circumstance, the Court would dismiss certiorari as improvidently granted,[30] but in *Comcast*, the Court proceeded to decide the case—in Comcast's favor on the ground that plaintiffs' expert model was flawed and thus could not establish classwide damages.[31]

The Court also took a very aggressive role in the context of class action waivers and arbitration agreements, deciding *three* important cases on the topic—*Concepcion*, *Italian Colors*, and *DIRECTV, Inc. v. Imburgia*[32]—since 2011.

In many of these seminal Supreme Court cases, the business community had mobilized substantial amicus support at the certiorari stage (as well as at the merits stage).[33] For instance, nine amicus briefs in support of certiorari were filed in *Wal-Mart*, four were filed in *Concepcion*, and four were filed in *Italian Colors*. Multiple amicus briefs in support of certiorari were also filed in two of the three 2015 Term class action cases: seven in *Tyson Foods* and seven in

---

[27] 133 S. Ct. 1426 (2013).

[28] *See Decline*, *supra* note 1, at 753–54.

[29] *Id.*

[30] *See, e.g.*, Michael E. Solimine & Rafael Gely, *The Supreme Court and the Dig: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1450–54; *cf.* Nos. 15-961 & 15-962, VISA, Inc. v. Osborn and VISA Inc. v. Stoumbos, dismissed as improvidently granted, Nov. 17, 2016 (dismissing certiorari as improvidently granted, noting that petitioners "'persuaded us to grant certiorari' on [one] issue . . . [but then] 'chose to rely on a different argument' in their merits briefing") (citation omitted).

[31] 133 S. Ct. at 1435.

[32] 133 S. Ct. 463 (2015).

[33] Repeat amicus players on behalf of the business community include the U.S. Chamber of Commerce (Chamber), the Defense Research Institute (DRI), the Washington Legal Foundation (WLF), and the Product Liability Advisory Council (PLAC).

Spokeo. While it is difficult to know the precise impact of these amicus briefs, it is reasonable to assume that they played a part in the Court's decision to hear so many class action cases given its limited docket.

But the surprising trend in the past few years is the number of class action cases that the Court has *refused* to hear, notwithstanding strong pleas from the business community.[34] For instance, in *Sears, Roebuck & Co. v. Butler*,[35] Sears sought review of a Seventh Circuit decision upholding class certification in a case alleging defective (mold producing) front-loading washing machines. Sears sought review on issues of predominance under Rule 23(b)(3) and on whether a class may be certified when most class members did not experience the alleged product defect.[36] The Supreme Court granted review, vacated the judgment, and remanded in light of *Comcast Corp. v. Behrend*.[37] On remand, the Seventh Circuit adhered to its earlier opinion upholding class certification.[38] Sears again petitioned for certiorari, and eight amicus briefs were filed in support of certiorari. Yet, the Court denied certiorari, with no Justice dissenting.[39]

Another moldy washing machine case had a parallel history. In *Whirlpool Corp. v. Glazer*,[40] the Supreme Court initially granted review of, vacated, and remanded a Sixth Circuit decision

---

[34] Thus far in the 2016 Term, the Supreme Court is scheduled to hear only one class action, *Microsoft Corp. v. Baker*, 797 F.3d (9th Cir. 2015), *cert. granted*, 136 S. Ct. 890 (mem) (U.S. Jan. 15, 2016) (No. 15-457), which raises the issue of whether an appellate court has jurisdiction to review an order denying class certification when a plaintiff voluntarily dismisses his claim with prejudice.

[35] 702 F.3d 359 (7th Cir. 2012).

[36] Petitioner for Writ of Certiorari at 1–5, *Sears*, 133 S. Ct. 2768 (2013) (12-1067).

[37] 133 S. Ct. 1426 (2013).

[38] 727 F.3d 796 (7th Cir. 2013).

[39] 134 S. Ct. 1277 (2014).

[40] 678 F.3d 409 (6th Cir. 2012).

upholding class certification, also in light of *Comcast*.[41] When the Sixth refused to reverse its ruling,[42] Whirlpool again sought certiorari, supported by the same eight amici who filed briefs in *Sears*. The Supreme Court denied certiorari in that case as well, again with no dissent.[43]

Given the Supreme Court's heavy focus on class actions in recent years, the denial of review in these cases surprised many on both the plaintiff and the defense side. These denials pre-dated Justice Scalia's death; thus, there were clearly four potential votes for certiorari (the number required to grant review) among the conservative Justices (Roberts, Scalia, Thomas, and Alito).

Moreover, given all of the firepower supporting the petitioners in *Sears* and *Whirlpool*, it was logical to think that the Court would be persuaded that the issues were important. This was especially so given that the amici predicted dire and profound consequences from the failure to grant review. Illustrative is the combined brief filed by the Chamber in *Sears* and *Whirlpool*. The Chamber, which touts itself as "the world's largest business organization representing the interests of more than 3 million businesses,"[44] argued that, if the rulings were allowed to stand, they would "dramatically increase the class-action exposure" faced by the business community.[45] The Chamber also invoked the unfair pressure to settle:

> In light of the costs of discovery and trial, certification unleashes "hydraulic" pressure to settle. That pressure is generally less rooted in the merits of the plaintiffs' claims than in the economic rationality of defendants, meaning that class certification—particularly certification based on a loose application of Rule

[41] 133 S. Ct. 1722 (2013).

[42] 722 F.3d 838 (6th Cir. 2013).

[43] 134 S. Ct. 1277 (2014).

[44] *About the U.S. Chamber*, CHAMBER (Nov. 22, 2016 6:14 PM), https://www.uschamber.com/about-us/about-the-us-chamber.

[45] Brief for Chamber of Commerce of the U.S., et al. at 2, *Whirlpool*, 134 S. Ct. 1277 (2014) (13-430, 13-431).

> 23's essential prerequisites—dramatically increases the chances that plaintiffs with even meritless claims will obtain an unwarranted payout.[46]

Yet, despite these and similar arguments by petitioners and the other amici, the Court denied review without dissent.

Similarly, in *Mullins v. Direct Digital, LLC*,[47] petitioner Direct Digital sought review on whether a class can be certified when a significant number of class members cannot be ascertained. The so-called heightened ascertainability requirement–requiring plaintiffs to demonstrate an administratively feasible means of identifying class members[48]—had divided the courts, with the Seventh Circuit in *Mullins* expressly rejecting Third Circuit decisions, including *Marcus v. BMW of North America, LLC*,[49] that had imposed such a requirement.[50] Direct Digital thus had a strong argument for certiorari, based on the acknowledged circuit conflict. Nor could there be any serious doubt that the issue was important. A strict ascertainability requirement provided a powerful vehicle to curtail small claims class actions. The Chamber once again filed an amicus brief in support of certiorari, citing the "clear split" among the circuits, and advising the Court that the issue "call[ed] out for immediate review."[51] Several other amici also urged the Court to grant review. Again, the Supreme Court, without dissent, denied review.[52]

---

[46] *Id.* at 20 (citations omitted).

[47] 795 F.3d 654 (7th Cir. 2015).

[48] *See infra* notes ___ and accompanying text.

[49] 687 F.3d 583, 592–94 (3d Cir. 2012).

[50] *See also infra* notes ___–___ and accompanying text (noting that the Third Circuit itself has retreated on heightened ascertainability).

[51] Brief for the Chamber of Commerce of the U.S. as Amicus Curiae Supporting Petitioner at 4, Direct Digital, LLC v. Mullins, 136 S. Ct. 1161 (2016) (No. 15-549).

[52] 136 S. Ct. 1161 (2016).

Still another example is *Rikos v. Procter & Gamble*.[53] In *Rikos*, a consumer fraud case, the primary issue was whether a district court, in certifying a class, must evaluate whether there is a "common injury" that cohesively binds the plaintiffs. The Chamber, in an amicus in support of certiorari, noted that while the decision was an "outlier," review was necessary because "all it takes is one overly permissive circuit for abusive litigation to take hold."[54] The International Association of Defense Counsel (IADC) also filed an amicus brief in support of certiorari. Yet, the Court denied review.[55]

What explains the Court's denial of certiorari in these cases? My own sense is that, at least for now, the Court has lost interest in announcing major new limits on class actions. It is not uncommon for the Supreme Court to target an area, focus on it rigorously in several cases, and then decline to hear other cases. A similar scenario took place in the area of punitive damages; the Court granted review and decided a number of punitive damages cases, and then became much less interested in the topic.[56] Having given so much attention to class actions in recent

---

[53] 799 F.3d 497 (6th Cir. 2015).

[54] Brief for the Chamber of Commerce of the U.S. as Amicus Curiae Supporting Petitioner at 18, *Rikos*, 136 S. Ct. 1493 (2016) (No. 15-835).

[55] 136 S. Ct. 1493 (2016). Also relevant (although involving a motion to dismiss rather than an issue of class action procedure) is *In re Avandia*, 804 F.3d 633 (3d Cir. 2015). In that putative class action, GlaskoSmithKline challenged a decision by the Third Circuit refusing to dismiss a complaint alleging RICO injury. PLAC and WLF filed briefs in support of certiorari, criticizing the Third Circuit's "expansive and unworkable interpretation of RICO's injury requirement for standing" (PLAC) and plaintiffs' use of RICO to "inappropriately . . . force the settlement of doubtful claims" (WLF). Brief for PLAC as Amicus Curiae Supporting Petitioner at 2, *In Re* Avandia, 136 S. Ct. 2409 (2016) (15-1078); Brief for WLF as Amicus Curiae Supporting Petitioner at 1–2, *In Re* Avandia, 136 S. Ct. 2409. The Supreme Court denied certiorari in that case as well, also without dissent. 136 S. Ct. 2409.

[56] *See Punitive Damages: U.S. High Court Takes Its Biggest Step Yet*, SEDGWICK LAW (2003), http://www.sedgwicklaw.com/Publications/detail.aspx?pub=3814 (describing, in 2003, punitive damages as "one of the hottest topics on the legal radar screen," and noting that "[m]ost of the activity has come from the U.S. Supreme Court, which, with every new opinion, is giving out progressively stronger signals about reducing punitive damage awards"). The Court has decided only two punitive damages cases since its 2003 opinion in *State Farm v. Campbell*, 538 U.S. 408 (2003). *See* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Philip Morris USA v. Williams, 549 U.S. 346 (2007).

years, the Justices may simply be ready for a break from the topic, and thus not especially eager to add class action cases to the docket. Of course, the Justices could also be stepping back to see how the lower courts apply cases such as *Dukes*, *Concepcion*, and *Amgen*.

Relatedly, while the threat of "blackmail pressure to settle" may at one time have been persuasive, that mantra has lost its punch. Various amici have invoked it so many times in recent years that, I believe, the Court has become numb to it. Indeed, that argument has become increasingly tenuous because, as I have noted elsewhere,[57] defendants are more willing than ever to go to trial in large, bet-the-company class action cases. For example, after the Court denied review in *Whirlpool*, the company went to trial and *won*.[58] Although the Supreme Court has not explicitly disparaged the "blackmail settlement" rationale, it has come close.[59] Moreover, other courts have explicitly disparaged the rationale recently.[60]

Moreover, it is my opinion that, wholly apart from the unpersuasive reliance on the "pressure to settle," the business community has suffered a lack of credibility in its amicus strategy. When numerous amicus briefs are filed in one class action after another, trumpeting the same parade of

---

[57] Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 Emory L.J. 1569, 1641–50 (2016).

[58] Laura Northrup, *Ohio Jury Finds Whirlpool Not Liable for Moldy Front-Loading Washers*, CONSUMERIST (Oct. 30, 2014), https://consumerist.com/2014/10/30/ohio-jury-finds-whirlpool-not-liable-for-moldy-front-loading-washers/.

[59] *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1199–1201 (2013) (stating, in response to defendant's "seeking [the Court's] aid in warding off 'in terrorem' settlements" by requiring proof of materiality at the class certification stage, that "'[w]e do not think it appropriate for the judiciary to . . . reinterpret[] Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits'" (quoting Schleicher v. Wendt, 618 F.3d 679, 686 (7th Cir. 2010) (alteration in *Amgen*)).

[60] *See, e.g.*, In re Oppenheimer Rochester Funds Grp Sec. Litig., No. 09-MD-02063-JLK-KMT, 2015 WL 6126800 at *2 (D. Colo. Oct. 16, 2015) (characterizing the argument about "unfair[] pressure[] . . . to settle for reasons wholly unrelated to the merits" as "transparent hyperbole"); Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 572 (S.D.N.Y. 2014) (noting that the alleged "'pressure'" to settle "is common to virtually all class actions, so that if it were a sufficient argument to defeat certification, virtually no class actions would ever be certified").

horribles for businesses, the message inevitably gets diluted.[61] After all, the Court grants review and oral argument in only about 60–70 cases per year out of more than 7,000 petitions filed.[62] The Chamber's brief in *Rikos* illustrates the problem of overstated arguments. Even though the Chamber admitted that the case was an "outlier," it claimed that this one flawed case would lead to an avalanche of bad decisions.[63]

Interestingly, the Chamber's aggressive amicus strategy on behalf of the business community appears to be deliberate and recent. Its litigation arm, the U.S. Chamber Litigation Center, was created in 1977, but it was completely revamped in 2010 because "inside the [Chamber] some clamored for a more aggressive approach."[64] The Center hired a number of former Bush Administration officials to write amicus briefs, and as a result "the Chamber became more active before the Supreme Court and throughout the U.S. court system."[65] It is possible that this deliberate strategy has backfired and that the Chamber would have been better off filing fewer, more carefully targeted amicus briefs.

To be sure, the Court will continue to grant review in class action cases when they meet the high standards for certiorari. Thus, in January 2017, it granted review to decide whether arbitration agreements that bar class actions are unlawful under the National Labor Relations Act

---

[61] *Cf. The Boy Who Cried Wolf*, AESOP'S FABLES (1941).

[62] Kedar S. Bhatia, *Likelihood of a Petition Being Granted*, DAILYWRIT (Jan. 10, 2013), http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/.

[63] *See supra* note ___ and accompanying text.

[64] John Shiffman, *Chamber of Commerce Forms Its Own Elite Law Team*, REUTERS (Dec. 8, 2014), http://www.reuters.com/investigates/special-report/scotus/#sidebar-chamber.

[65] *Id.*

and thus unenforceable under the Federal Arbitration Act.[66] The circuits are indisputably in conflict on the question.[67] Also in January 2017, it granted review to decide whether tolling under *American Pipe & Construction Co. v. Utah*[68] applies to a three-year time limit contained in section 3 of the 1933 Securities Act.[69] The Court had granted review on that issue in 2014, but the parties settled before the Court could resolve the case.[70] And in January 2016, the Court granted review in *Microsoft Corp. v. Baker*[71] to determine whether a federal court of appeals has jurisdiction to review an order denying class certification where plaintiffs have sought to obtain immediate review by voluntarily dismissing their individual claims with prejudice. At the time this text went to press, the case had been argued but not yet decided.

Thus, I am not suggesting that the Court is now *denying* review simply because a case raises a class action issue. What I am suggesting, however, is that the Court will not reach out and decide a case merely because the business community says the case is important and invokes the mantra of blackmail pressure to settle. For now at least, the Court does not appear to be on a conscious mission to scale back class actions.

---

[66] Epic Sys. Corp. v. Lewis, 2017 WL 125664 (U.S. Jan. 13, 2017) (No. 16-285); Ernst & Young, LLP v. Morris, 2017 WL 125665 (U.S. Jan. 13, 2017) (No. 16-300); N.L.R.B. v. Murphy Oil USA, Inc., 2017 WL 125666 (U.S. Jan. 13, 2017) (No. 16-307).

[67] *See, e.g.*, Ron Chapman, Jr. & Christopher Murray, *Supreme Court Jumps Into Class Action Waiver Fight*, NAT'L L. REV. (Apr. 22, 2017), http://www.natlawreview.com/article/supreme-court-jumps-class-action-waiver-fight (noting "split between the Second, Fifth, and Eighth Circuits on one side and the Seventh and Ninth Circuits on the other").

[68] 414 U.S. 538, 550–51 (1974) (holding that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined").

[69] Cal. Pub. Employees Ret. Sys. v. ANZ Sec., Inc., 2017 WL 125670 (U.S. Jan. 13, 2017) (No. 16-373).

[70] Pub. Employees' Ret. Sys. of Miss. v. IndyMac MBS, Inc., 134 S. Ct. 1515 (2014), *cert. dismissed*, 135 S. Ct. 42 (2014).

[71] 136 S. Ct. 890 (U.S. Jan. 15, 2016) (No. 15-457).

II. RECENT SUPREME COURT CLASS ACTION RULINGS

A. The Court's 2013 *Amgen* Opinion

In *Decline*, I discussed the trend among various circuits in favor of frontloading evidence (and resolving merits issues) at the class certification stage.[72] These cases have led some courts to essentially require mini-trials at the class certification stage, even when no merits discovery has occurred. In its 6–3 decision in *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, the Supreme Court reined in that approach drawing a sharp distinction between the district court's role at class certification and its role at summary judgment. The Court cautioned against "putting the cart before the horse,"[73] and emphasized that Rule 23 is not a "license to engage in free-ranging merits inquiries at the certification stage."[74] It explained 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.*"[75] Even two of the conservative Justices (Roberts and Alito) joined Justice Ginsburg's opinion for the Court. Importantly, the Court gave short shrift to defendant's argument that a plaintiff needed to prove materiality at the class certification stage because certification places unfair pressure on defendants to settle. The Court was sending a clear message that class certification decisions should focus on the requirements of Rule 23, not on the strength of the underlying claims.

B. 2015 Term

---

[72] *Decline, supra* note 1, at 747–51.

[73] 133 S. Ct. at 1191.

[74] *Id.* at 1194–95.

[75] *Id.* at 1191 (second emphasis added).

In the 2015 Term, the Supreme Court decided three closely watched class action cases: *Tyson Foods v. Bouaphakeo*, *Campbell-Ewald Co. v. Gomez*, and *Spokeo v. Robins*. Each of these cases had the potential to weaken the class action device, and many observers viewed the granting of certiorari in those cases—*three* in one term—as a signal that the Court was poised to do further significant damage.[76] But in each case, the decision rejected broad arguments urged by defendants.

Tyson Foods, which addressed the propriety of plaintiffs' use of statistical evidence, was brought as a class action for state law claims and as a collective action for claims under the Fair Labor Standards Act.[77] The members of those aggregate actions were workers at a pork-processing facility who alleged entitlement to overtime based upon the time involved in "donning" and "doffing" protective gear and walking to and from their work areas.[78] To prove their case, given Tyson Foods' failure to preserve relevant records, plaintiffs relied on an expert study that purported to calculate the average donning and doffing time based on a non-random sample of employees.[79] At trial, the expert admitted that there was significant variation among class members because they performed different jobs, used different equipment, and put on different quantities of protective gear depending on the specific work performed.[80] Another plaintiff expert used the average to calculate classwide damages but conceded that many of the

---

[76] *See, e.g.*, Zoe Niesel, *What's Coming for Class Actions*, WAKE FOREST L. REV. BLOG (Jan. 31, 2016), http://wakeforestlawreview.com/2016/01/whats-coming-for-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.").

[77] 29 U.S.C. §§ 207(a), 216(b) (2012).

[78] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1041–43 (2016).

[79] *Id.* at 1043–44.

[80] Petition for Writ of Certiorari at 8–9, *Tyson*, 2015 WL 4720265 U.S. (No. 14-1146) (U.S. 2015).

employees did not suffer injury because they did not work more than forty hours per week.[81] The jury found for the plaintiffs, and a divided Eighth Circuit panel affirmed.[82]

The Supreme Court, in a 6–2 decision, rejected the aggressive argument by Tyson Foods and several of its amici for "[a] categorical exclusion" of statistical proof in class actions, noting that such a ruling "would make little sense."[83] The Court explained that statistical proof "is used in various substantive realms of the law,"[84] and is sometimes "'the only practical means to collect and present relevant data' establishing a defendant's liability."[85] According to the Court, "in a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class."[86] Applying those principles, the Court found that, because Tyson Foods had failed to keep proper records, statistical proof would have been admissible in an individual case. Thus, such evidence was properly admitted in the aggregate trial.

This ruling has been characterized as a narrow one that, ultimately, is not harmful to plaintiffs.[87] If anything, a few commentators view it as an important *pro-plaintiff* ruling that has the potential to greatly expand plaintiffs' ability to use statistical evidence in class actions.[88]

---

[81] *Id.* at 10–11.

[82] *Tyson*, 136 S. Ct. at 1044–45.

[83] *Id.* at 1046.

[84] *Id.* (citing Brief of Amicus Curiae Complex Litigation Law Professors in Support of Respondents at 5–9, *Tyson*, 136 S. Ct. 1036 (No. 14-1146); Brief of Economists and Other Social Scientists as Amici Curiae in Support of Respondents at 8–10, *Tyson*, 136 S. Ct. 1036 (No. 14-1146)).

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

[86] *Id.*

[87] *See, e.g.*, Philip Oliss, Troy Yoshino, Amy Brown, & Kristin Bryan, *What the Narrow* Tyson *Ruling Means for Class Actions*, LAW360 (Mar. 23, 2016), http://www.law360.com/articles/774960/what-the-narrow-tyson-ruling-

Also in *Tyson Foods*, the petitioner raised the issue of whether an aggregate action may be maintained "when the class contains hundreds of members who were not injured and have no legal right to any damages."[89] The Court did not address the Article III question, concluding that it was not "fairly presented [in *Tyson Foods*], because the damages award ha[d] not yet been disbursed, nor [did] the record indicate how it [would] be disbursed."[90] This language suggests that perhaps the Article III problem would arise only if a court intended to distribute funds to uninjured people.

Finally, *Tyson Foods* is notable because the Court offered a plaintiff-friendly definition of predominance from Newberg's treatise on class actions, one that indicated that individualized damages do not automatically defeat class certification.[91] This language supports the argument that *Comcast Corp. v. Behrend*[92] should not be read to bar class actions merely because damages are individualized.[93]

---

means-for-class-actions (characterizing the holding in *Tyson Foods* as "narrow," "tailored," and of "limited applicability"); D. Matthew Allen, *Sample This!* Tyson *Employee Class Wins Significant But Narrow Supreme Court Victory*, CLASSIFIED (March 22, 2016), http://classifiedclassaction.com/tyson-employee-class-wins-significant-narrow-supreme-court-victory/ (similar).

[88] *See* Robert G. Bone, Tyson Foods *and the Future of Statistical Adjudication*, 95 N.C. L. REV. (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860332## ("*Tyson Foods*, when properly understood, authorizes statistical adjudication well beyond the Fair Labor Standards Act claim at issue in the case.").

[89] Petition for Writ of Certiorari, *supra* note 80, at i.

[90] *Tyson Foods*, 136 S. Ct. at 1050.

[91] *Id.* at 1045 (quoting 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:50 (5th ed. 2012)).

[92] 133 S. Ct. 1426 (2013).

[93] *See infra* notes 118–121 and accompanying text.

The second case, *Campbell-Ewald*, involved a tactic whereby a defendant attempts to "pick off" a class representative under Federal Rule of Civil Procedure 68[94] by offering the full judgment sought by the representative. The goal is to moot not only the representative's own claim but also the putative class action complaint, with the hope that new class representatives will not emerge. Gomez was the class representative in a putative class action alleging that Campbell-Ewald violated the Telephone Consumer Protection Act (TCPA), which bars "using any automatic dialing system" to send a text message to a cell phone without the recipient's consent.[95] Prior to the deadline for the motion for class certification, Campbell-Ewald proposed to settle Gomez's individual claims for their full value.[96] Gomez did not accept the offer, and it thus lapsed. Campbell-Ewald thereafter argued that the unaccepted offer mooted Gomez's individual claims (as well as mooting the putative class).[97] The district court and the Ninth Circuit rejected that argument. In a 6–3 decision, the Supreme Court held that the unaccepted offer of judgment did not moot the case and that defendant's contrary argument was unsupported by Rule 68. Limiting the case to its facts, the Court noted: "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."[98]

---

[94] Rule 68(a) provides that "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." FED. R. CIV. P. 68(a). The offer lapses if it is not accepted "within 14 days . . . ." *Id.* Rule 68(b) states that "[a]n unaccepted offer is considered withdrawn." FED. R. CIV. P. 68(b).

[95] 136 S.Ct. at 666–67 (citing 47 U.S.C. § 227(b)(1)(A)(iii) (2012)).

[96] *Id.* at 667–68 (citing FED. R. CIV. P. 68).

[97] *Id*. at 668.

[98] *Id.* at 672.

The third case, *Spokeo*, involved a putative class action filed by respondent Robins under the Fair Credit Reporting Act (FCRA),[99] claiming that the web site known as "Spokeo" posted inaccurate information about him, thereby harming his prospects for finding work.[100] The defendant argued that Robins had not suffered actual injury. The district court dismissed the case for lack of standing, but the Ninth Circuit reversed, holding that Robins had adequately alleged that his statutory rights had been violated. Although the Court reversed in a 6–2 ruling, the opinion did not break new ground. The majority reasoned that the Ninth Circuit erred in its Article III analysis by focusing solely on particularity and not on concreteness. According to the Court, the fact that Congress has "identif[ied] and elevat[ed]" intangible interests "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement . . . ."[101] Yet, the Court stated that even a "risk of harm" can satisfy the concreteness requirement.[102] The dissenters agreed with most of the majority's legal analysis but merely disagreed about the need for a remand under the specific facts. Had the Court issued a sweeping opinion, the case could have eliminated many statutory damages class actions (which, according to the business community, were classic "settlement pressure" cases[103]). But the Court left open the possibility that many such cases can still go forward.

---

[99] 15 U.S.C. § 1681 (2012).

[100] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544–46 (2016).

[101] *Id.* at 1549.

[102] *Id.* at 1550.

[103] *See, e.g.*, John Nadolenco, Archis A. Parasharami, & Joseph Minta, *Too High a Price? The Perilous Combination of Statutory Damages and Class Certification*, CLASS ACTION, Feb. 2011, at 1, *available at* https://m.mayerbrown.com/Files/Publication/f1fed2fc-e4e1-48ea-8da0-9dbdd0e2887a/Presentation/PublicationAttachment/0a7523a3-6f13-4566-a573-5dc9645a9ed1/10563.pdf ("[S]tatutory damages provisions sometimes create a risk of staggeringly high awards . . . . The threat of such awards can place intense settlement pressure on defendants in class actions.").

These decisions cannot be explained by Justice Scalia's death. He participated in the 6–3 *Campbell-Ewald* decision, joining Chief Justice Roberts's dissent. And while both *Tyson Foods* and *Spokeo* post-dated his death, his vote would not have changed the outcome in either case because both were 6–2 decisions.

All three decisions avoid establishing sweeping, bright line tests. None of the them even alludes to the pressure to settle as a guiding principle or in any way suggests that class actions are typically abusive and unfair. Although *Spokeo* was resolved against the plaintiff, the decision left open a path for the plaintiff's case to go forward after review on remand. Both *Tyson Foods* and *Campbell-Ewald* were plaintiff victories, and in both cases the Court was critical of defendants' overly aggressive arguments. In short, what began as a potential watershed Supreme Court term for class actions ended with a whimper.

C. 2016 Term

With respect to the trio of cases before the Supreme Court addressing whether arbitration agreements barring class actions are permissible in employment contracts under the National Labor Relations Act,[104] the Court has delayed arguments until October 2017, presumably due to the potential for a 4–4 split before Justice Gorsuch took the bench. And as noted above, the Court heard oral arguments in *Microsoft v. Baker* in March 2017,[105] but had not yet issued a decision at the time this Article went to press.

[Discuss tolling case when decision is rendered.]

---

[104] *See supra* note ___ and accompanying text.

[105] *See supra* note ___ and accompanying text.

III. RECENT CIRCUIT COURT DECISIONS REJECTING PROPOSED NEW LIMITS

Finally, on multiple occasions in recent years, the circuits have rebuffed efforts by defendants to push Supreme Court and prior circuit precedents to their limits. Like the Supreme Court's recent decisions, most recent circuit decisions have been fact specific and have avoided the adoption of broad, bright line rules that would broadly restrict class actions. Given space constraints, I offer several examples without purporting to be exhaustive.[106]

A. Interpretation of *Amgen*, *Tyson Foods*, *Campbell-Ewald*, and *Spokeo*

The circuits have not been reticent about applying the teachings in *Amgen* and, as a result, supporting class certification in various cases. For instance, in *Rikos v. Procter & Gamble Co.*, the Sixth Circuit cited *Amgen* and criticized Procter & Gamble for "misconstru[ing] Plaintiffs' burden at the class certification stage."[107] In *Suchanek v. Sturm Foods, Inc.*,[108] the Seventh Circuit cited *Amgen* and later noted, in reversing a decision denying class certification, that "'Rule 23 allows certification of cases that are fated to lose as well as cases that are sure to win.'"[109] In *Alcantar v. Hobart Service*,[110] the Ninth Circuit likewise cited *Amgen* in reversing a denial of class certification on the ground that the district court "ask[ed] too much" of the plaintiffs in weighing the merits of their common contentions at the class certification stage.[111]

---

[106] Of course, there are exceptions to this trend. For instance, in *In re Modafinil Antitrust Litigation*, 837 F.3d 238 (3d Cir. 2016), the Third Circuit imposed new requirements for numerosity, citing pressure on defendants to settle after certification.

[107] 799 F.3d 497, 505 (6th Cir. 2015).

[108] 764 F.3d 750 (7th Cir. 2014).

[109] *Id.* at 758 (citation omitted).

[110] 800 F.3d 1047 (9th Cir. 2015).

[111] *Id.* At 1053.

And in *Williams v. JaniKing of Phila., Inc.*,[112] the Third Circuit cited *Amgen* and emphasized that "the class certification stage is not the place for a decision on the merits."[113]

With respect to the 2015 Term cases, although plaintiffs have suffered some circuit court defeats as a result of *Tyson Foods*, *Campbell-Ewald*, and *Spokeo*,[114] the overall response to those cases has been nuanced and mildly favorable for plaintiffs. For instance, two circuits have cited *Tyson Foods* as support for the proposition that individualized damages do not automatically defeat class certification.[115] And two circuits have held, post-*Campbell-Ewald*, that even if a "pick off" successfully moots a class representative's individual case, the representative should be given an opportunity to seek class certification.[116] These latter decisions, of course, remove all incentive for defendants to make offers of judgment as a way to derail class actions. And post-*Spokeo*, a number of circuits have found no Article III concerns with allegations of purely intangible injuries or mere risk of harm.[117]

---

[112] 837 F.3d 314 (3d Cir. 2016).

[113] *Id.* At 322.

[114] *See, e.g.*, DiCuio v. Brother International Corporation, 653 Fed. Appx. 109 (3d Cir. 2016) (citing *Tyson Foods* and refusing to allow the use of company maintenance reports that were not representative of the class in a consumer class action); Bank v. Alliance Health Networks, 15-4037-cv, 2016 WL 6128043 (2d Cir. Oct. 20, 2016) (holding post *Campbell-Ewald* that by accepting an offer of judgment, plaintiff lacked standing to pursue class certification on behalf of the class, and declining to leave the case open for an opportunity to substitute a new class representative); Nicklaw v. Citimortgage, Inc., 839 F.3d 998 (11th Cir. 2016) (dismissing suit (post-*Spokeo*) alleging violation of New York statute because of failure to allege concrete injury); Hancock v. Urban Outfitters, Inc., 830 F.3d 511 (D.C. Cir. 2016) (same).

[115] Vaquero v. Ashley Furniture Industries, Inc., 824 F.3d 1150, 1155 (9th Cir. 2016); Ibe v. Jones, 836 F.3d 516, 529 (5th Cir. 2016) (recognizing this takeaway from *Tyson Foods* although finding that class certification was inappropriate on the facts of the case because of the difficulty in calculating damages).

[116] Richardson v. Bledsoe, 829 F.3d 273, 278 (3d Cir. 2016); Chen v. Allstate, 819 F.3d 1136, 1147 (9th Cir. 2016). *But see* Bank v. Alliance Health Networks, LLC, ___ F. App'x ___, No. 15-4037-cv, 2016 WL 6128043 (2d Cir. 2016) (holding that class representative "lack[ed] standing to pursue the class claims" after his individual claims were mooted by successful Rule 68 pick-off).

[117] *See, e.g.*, In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262 (3d Cir. 2016) (intangible injury); Church v. Accretive Health, Inc., No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2006) ("injury need not be tangible to be

B. Damages and Class Certification

In *Comcast*, the Supreme Court ruled that Rule 23(b)(3)'s predominance requirement was not satisfied because "respondents' [damages] model [fell] far short of establishing that damages are capable of measurement on a classwide basis."[118] After *Comcast*, defendants began to argue (contrary to pre-*Comcast* case law) that the existence of individualized damages, by itself, defeated class certification. Even prior to *Tyson Foods*' discussion of the issue,[119] defendants had virtually no success in selling that interpretation of *Comcast* to the circuits. Examples of decisions rejecting the argument include *Roach v. T.L. Cannon Corp.*,[120] and *Neale v. Volvo Cars of North America, LLC*.[121] Again, the fact that defendants have been almost universally unsuccessful in their sweeping reading of *Comcast* is notable.

C. Impact of *Dukes*

Dukes has no doubt had an impact on class action jurisprudence. In a number of cases, courts have relied on *Dukes* to reverse class certification in injunctive suits under Rule 23(b)(2) where a significant component of the case involves damages.[122] Similarly, several circuits have held that employment class actions involving decentralized decision making cannot go forward under

---

concrete"); Galaria v. Nationwide Mut. Ins. Co., Nos. 14-3386/3387, 2016 WL 4728027 (6th Cir. Sept. 12, 2006) (risk of harm); Nicklaw v. Citimortgage, Inc., 839 F.3d 998 (11th Cir. 2016) (dismissing suit (post-*Spokeo*) because of failure to allege concrete injury); Hancock v. Urban Outfitters, Inc., 830 F.3d 511 (D.C. Cir. 2016) (same).

[118] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

[119] *See supra* notes ___–___ and accompanying text.

[120] 778 F.3d 401, 407 (2d Cir. 2015).

[121] 794 F.3d 353, 374–75 (3d Cir. 2015).

[122] *See, e.g.*, Wang v. Chinese Daily News, Inc., 737 F.3d 538, 542 (9th Cir. 2013); Nationwide Life Ins. Co. v. Haddock, 460 F. App'x 26, 29 (2d Cir. 2012).

Dukes because of a lack of commonality.[123] But the impact of *Dukes* has been less profound than one might have predicted when it was decided in 2011.

In a recent article, I pointed out that numerous courts have approved Rule 23(b)(2) public interest class actions involving juveniles, prisoners, immigrants, and disabled people notwithstanding *Dukes*.[124] Moreover, *Dukes* has by no means meant the end of employment discrimination class actions. As one commentator has observed, "[c]ourts throughout the nation have continued to certify class actions in employment cases since *Dukes* . . . ."[125] A prominent example is *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[126] in which the Seventh Circuit, in a decision by Judge Posner, reversed the district court's denial of class certification in a race discrimination case involving 700 African–American brokers currently or formerly employed by Merrill Lynch. The court relied on two company-wide policies that allegedly resulted in a disparate impact. It described *Dukes* as a case where "there was no company-wide policy to challenge … —the only relevant corporate policies were a policy forbidding sex discrimination and a policy of delegating employment decisions to local managers—[and thus]

[123] *See, e.g.*, Bennett v. Nucor Corp., 656 F.3d 802 (8th Cir. 2011); Davis v. Cintas Corp., 717 F.3d 476 (6th Cir. 2013).

[124] Klonoff, *supra* note 57, at 1590–91.

[125] Paul Yetter et. al., *The Impact of* Wal-Mart v. Dukes *on Employment Law Class Actions and FLSA Collective Actions*, YETTER COLEMAN LLP 5 (Oct. 12, 2013), http://www.yettercoleman.com/wp-content/uploads/2013/10/The-Impact-of-Wal-Mart-v.-Dukes-on-Employment-Law-Class-Actions-and-FLSA-Collective-Actions.pdf.

[126] 672 F.3d 482 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338.

there was no common issue to justify class treatment."[127] Other employment cases have similarly distinguished *Dukes.*[128]

D. Ascertainability

Under the Third Circuit's "ascertainability" requirement (discussed *supra* at ___), "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."[129] As noted (*supra* at __), in *Mullins v. Direct Digital, LLC,*[130] the Seventh Circuit rejected the Third Circuit's ascertainability jurisprudence, and the Supreme Court declined to review that decision. What is particularly interesting, however, is that even the Third Circuit has retreated in the face of overly aggressive advocacy by defendants.

In *Byrd v. Aaron's Inc.*,[131] the Third Circuit reversed the denial of class certification on ascertainability grounds. The case alleged damages from spyware installed on leased computers. The putative class included purchasers or lessees of computers, along with their "household members." The court held that the inclusion of "household members" should not derail certification because "'household members' is a phrase that is easily defined and not, as Defendants argue, inherently vague."[132] Notably, the court criticized defendants for "seiz[ing] upon [the] lack of precision [in the case law] by invoking the ascertainability requirement with

[127] 672 F.3d at 488.

[128] *See, e.g.*, Scott v. Family Dollar Store, 733 F.3d 105 (4th Cir. 2013); Vaquero v. Ashley Furniture Industries, Inc., 824 F.3d 1150 (9th Cir. 2016).

[129] *Marcus*, 687 F.3d at 593.

[130] 795 F.3d 654, 657 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

[131] 784 F.3d 154 (3d Cir. 2015).

[132] *Id.* at 170–71.

increasing frequency in order to defeat class certification."[133] It noted that the doctrine was "narrow" and that "[i]f defendants intend to challenge ascertainability, they must be exacting in their analysis …."[134] Clearly, the court was stating, in judicious terms, that defendants had been too aggressive in relying on ascertainability as a basis for defeating class certification.

E. Standing of Unnamed Class Members

As noted above,[135] *Tyson Foods* did not decide whether a class action that includes uninjured class members can go forward. Defendants have been aggressive in the circuits in arguing that a class with some uninjured class members is barred by Article III of the Constitution. While defendants have had some success,[136] several circuits have rejected the argument.[137] As the Seventh Circuit put it, "How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified."[138] Or, as the Third Circuit put it: "unnamed, putative class members need not establish Article III standing."[139] This standing issue would have been low hanging fruit to any circuit that was determined to cut back on class actions in a dramatic fashion. The fact that a number of circuits have refused to embrace defendants' arguments is noteworthy.

---

[133] *Id.* at 162.

[134] *Id.* at 165.

[135] *See supra* notes __–___ and accompanying text.

[136] *See, e.g.*, Denney v. Deutsche Bank AG, 443 F.3d 253, 263–64 (2d Cir. 2006) (although unnamed class members were not required to "submit evidence of personal standing," it was essential that the class "be defined in such a way that anyone within it would have standing"). *Accord, e.g.*, Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010).

[137] *See* Theane Evangelis & Bradley Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383, 387–91 (2014) (discussing circuit split); Joshua Snyder, *Tyson Foods and "Uninjured Class Members" in Antitrust Class Actions*, 15-DEC ANTITRUST SOURCE 1, 5 (2015) (same).

[138] Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014).

[139] Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015).

F. Arbitration Clauses

The Supreme Court's most recent arbitration cases—*Concepcion*, *Italian Colors*, and *DIRECTV*—have made it very difficult for plaintiffs to circumvent arbitration agreements and class action waivers. Not surprisingly, a number of circuit cases have relied on those authorities in rejecting efforts by plaintiffs to avoid such agreements and waivers.[140] Nonetheless, there have been some surprising pro-plaintiff developments at the circuit level.

Most importantly, contrary to several other circuits,[141] the Seventh and Ninth Circuits have held that arbitration agreements and class action waivers in employment cases are unenforceable under the National Labor Relations Act (NLRA)[142] and that the Federal Arbitration Act (FAA)[143] does not require a contrary conclusion. For example, in *Lewis v. Epic Systems Corporation*,[144] the Seventh Circuit determined that the FAA "work[ed] hand in glove" with the NLRA.[145] The Ninth Circuit has reached a similar outcome,[146] and the Supreme Court has granted review as noted above.[147] Regardless of the outcome, the point for present purposes is that, even in the

---

[140] *See, e.g.*, Rueili v. Baystate Health, Inc., 835 F.3d 53 (1st Cir. 2016) (enforcing arbitration clause in wage and hour context); Kaspers v. Comcast Corp., 631 F. App'x 779 (11th Cir. 2015) (enforcing arbitration agreement between Comcast and customers alleging that services were not received).

[141] *E.g.*, D.R. Horton, Inc. v. NLRD, 737 F.3d 344 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013) (per curiam); Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016).

[142] 29 U.S.C. § 157.

[143] 9 U.S.C. § 2.

[144] 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 2017 WL 125664 (U.S. Jan. 13, 2017) (No. 16-285).

[145] *Id.* at 1157.

[146] Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 2017 WL 125665 (U.S. Jan. 13, 2017 (No. 16-300).

[147] *Lewis*, 2017 WL 125664 (U.S. Jan. 13, 2017) (No. 16-285); *Morris*, 2017 WL 125665 (U.S. Jan. 13, 2017 (No. 16-300); *see supra* notes ___–___ and accompanying text.

arbitration area, with several sweeping Supreme Court cases to grapple with, some circuits have been unwilling to enforce arbitration agreements and class action waivers in employment cases.

G. Consumer Class Actions

As discussed above, the Supreme Court declined to review the Sixth and Seventh Circuit "moldy washing machine" cases, thus leaving these important precedents intact. In *Sears*, the Seventh Circuit (in an opinion by Judge Posner) recognized that predominance is not "determined simply by counting noses: that is, by determining whether there are more common issues or more individual issues . . . ."[148] The court also recognized that it is "more efficient" to decide common liability issues once than to litigate them "separately in hundreds of trials."[149] In *Whirlpool*, the Sixth Circuit noted that "[u]se of the class method [was] warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery."[150]

In *Reyes v. Netdeposit, LLC*,[151] a 2015 case involving allegations of a fraudulent telemarketing scheme and unauthorized debits from bank accounts, the Third Circuit reversed the denial of class certification. In so holding, the court reasoned: "Class actions are often the only practical check against the kind of widespread mass-marketing scheme alleged here."[152] It

[148] 727 F.3d at 801.

[149] 702 F.3d at 363.

[150] 722 F.3d at 861.

[151] 802 F.3d 469 (3d Cir. 2015).

[152] *Id.* at 491.

noted that "[t]he individual claims arising from such conduct are usually too small to justify suit unless aggregated in a class action."[153]

In *Rikos v. Procter & Gamble Co.*,[154] another case that the Supreme Court declined to review,[155] the Sixth Circuit upheld class certification in a case alleging that Procter & Gamble's probiotic, Align, did not work as advertised. The court found that the common question—whether Align is snake oil that does not work for anyone—is one that "will yield a common answer for the entire class that goes to the heart of whether P & G will be found liable under the relevant false-advertising laws."[156]

All four cases recognized that small-claim consumer cases were especially suitable for classwide litigation. These cases are the antithesis of hostility to class actions.

* * *

Like the Supreme Court's *Amgen* opinion and its 2015 Term decisions, recent circuit cases, for the most part, are cautious, narrow, and generally unreceptive to defendants' requests to impose sweeping new limits on class actions. Exceptions can be found, but the general tenor of the recent case law is notable. Importantly, the "pressure to settle" rationale for limiting class actions has all but disappeared from circuit court decisions in the past few years.

CONCLUSION

[153] *Id.*

[154] 799 F.3d 497 (6th Cir. 2015).

[155] *See supra* note ___ and accompanying text.

[156] *Id.* at 508–09.

For those (such as myself) who believe that the class action device is a valuable tool in many kinds of cases, the reprieve I have described in the Supreme Court and the circuits is a welcome change from years of adverse case law. How long this reprieve will last, however, is anyone's guess.