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High Court Class Action Law: Between A Bang And A Whimper

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This was expected to be a blockbuster year for the development of class action law. The U.S. Supreme Court had accepted certiorari in several cases involving highly controversial issues, and decisions in those cases were expected to have a broad impact on class actions in the federal courts. For various reasons, the anticipated groundbreaking decisions did not fully materialize. In one case, the petitioner took the biggest issue off the table. In another, the court chose to set out only general principles, leaving it to the lower courts to figure out how to apply them. Two other cases confirmed that principles that appeared to be largely settled were, indeed, settled. And the parties in a fifth case reached a settlement before oral argument.

While none of these cases generated extraordinary headlines, it would be a mistake to underestimate the significance of the recent term in the development of class action law, particularly in the area of standing. Some "big" issues may have been left for another day, in whole or in part — and in one instance the court posed (but did not answer) a tantalizing new question that few had anticipated. But although the class action portion of the court's docket may not have been resolved with quite the expected bang, it offered much more than a whimper.

The Early Rounds: DirecTV and Campbell-Ewald

The first two class action decisions of the term confirmed that principles that had seemed to be settled were, indeed, settled — but in one instance with a surprising twist. First, in DirecTV Inc. v. Imburgia (decided Dec. 14, 2015), the court rejected yet another effort to circumvent the court's groundbreaking decision in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). Concepcion held that the Federal Arbitration Act preempted state laws barring the enforcement of arbitration agreements with class action waivers. In DirecTV, a California court refused to apply Concepcion because the contract's choice-of law clause selected California law, which — but for Concepcion — would bar enforcement of the agreement. Pointing out that the federal law embodied in Concepcion is part of California law as well, the court rejected this ingenious attempt to avoid the preemptive force of the FAA.

The second case, Campbell-Ewald Co. v. Gomez (decided Jan. 20, 2016), could have been a blockbuster had the decision been contrary to what most observers expected. It wasn't. The question presented was whether a defendant could defeat a class action through a Rule 68 offer of judgment to the named plaintiff that offered full payment of the plaintiff's individual claim. The defendant argued that, even though the Rule 68 offer was rejected, the offer of full relief eliminated any case or controversy between the parties and hence eliminated the plaintiff's standing to pursue claims on behalf of a class.

Almost every circuit to consider this argument had rejected it.

The Supreme Court agreed, holding that an unaccepted offer of judgment does not moot a plaintiff's claim. But in a tantalizing side note (echoed in a dissent filed by Chief Justice John Roberts and joined by Justices Samuel Alito and Antonin Scalia), the court stressed that it was not deciding whether a defendant might be able to achieve the same result by depositing funds sufficient to cover the named plaintiff's claim into an account payable to the plaintiff and then seeking entry of judgment in that amount.

Whether this alternative strategy would in fact be sufficient to moot a putative class action is a question the court left for another day. One circuit has already answered that question in the negative. See Chen v. Allstate Insurance Co., 2016 (9th Cir. April 12, 2016). But in a case in which the court was widely expected to slam the door on a defendant's ability to terminate a putative class action simply by paying off the named plaintiff's individual claim, this statement suggests that door might ultimately be opened in a different way.

The Main Events: Spokeo and Tyson Foods

For those who follow developments in class action law, the main events for the term were expected to be the court's decisions in Spokeo Inc. v. Robins (decided May 16, 2016) and Tyson Foods Inc. v. Bouaphakeo (decided March 22, 2016). The question presented in Spokeo, as stated by the petitioner was: "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." Many federal statutes confer standing on private litigants to challenge statutory violations and to recover statutory damages; when aggregated in a class action, such statutory damages can sum to ruinous amounts even for a mere technical violation that causes little or no concrete harm to anyone. Many on the defense side hoped that Spokeo would eliminate the risk of such outcomes.

Tyson Foods presented a related question: "Whether a class action may be certified or maintained under Rule 23(b)(3) ... when the class contains hundreds of members who were not injured and have no legal right to any damages." A second question presented was "[w]hether differences among individual class members may be ignored and a class action certified ... where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample." Tyson Foods thus promised to be a true blockbuster, resolving once and for all whether a certified class could include persons who had suffered no injury, while also offering further guidance on the extent to which the claims of a class may be proven through class-wide statistical evidence that glosses over differences among class members.

Although argued after Spokeo, Tyson Foods was decided first and seemed to fall short of its promised scope. The court did not address the blockbuster "no injury" issue presented in Tyson Foods' petition, as Tyson Foods had abandoned that argument in light of difficult, case-specific challenges it faced on that issue. The court therefore focused on the second issue, presenting a simple, yet critically important answer: Statistical evidence may be used to prove the claims of a class to exactly the same extent that it may be used to prove an individual claim of a class member — no more and no less.

Thus, if statistical evidence, such as the averages presented by the plaintiffs in Tyson Foods, could be used by an individual to prove a required element of his claim, that same evidence could be used to prove the same claim for a class. Observing that Tyson Foods had not mounted a Daubert challenge to

the specific evidence presented by the plaintiffs below, and that reliable expert evidence of that kind would have been admissible in an individual action, the court held that such evidence was therefore admissible on behalf of the class as well.

The court determined that it would be premature to address Tyson Foods' further argument that the manner in which statistical sampling evidence had been used at trial caused damages to be awarded to class members who had suffered no actual harm. Although the judgment below was for a lump sum for the class as a whole, it was not clear how the jury had calculated that sum, and the district court had not yet determined how to allocate the judgment. Significantly, although the court declined to condemn the judgment as necessarily compensating class members who were not injured, it appeared to take it for granted that the lower court on remand would seek to avoid that outcome. Chief Justice Roberts (joined by Justice Alito) wrote separately that, while he concurred in the decision, he was skeptical that the lower court would be able to allocate the judgment in a way that avoided awarding damages to uninjured persons, and that it therefore "remains to be seen whether the jury verdict can stand."

The decision in Spokeo also had a less sweeping reach than many had expected, although it would be a mistake to argue (as some headlines suggested) that the Supreme Court "punted" the case. The court had little difficulty in agreeing with the petitioner that Congress cannot grant Article III standing to a plaintiff who has suffered no concrete harm, confirming that a "bare procedural violation" of a statute, "divorced from any concrete harm," is insufficient to convey Article III standing. Rather, to possess standing, a plaintiff must be able to show a "concrete" injury — i.e., one that "actually exist[s]."

But the court also rejected the premise of the petitioner's question: that it was clear that the Spokeo plaintiff had in fact suffered no concrete harm merely because he could claim no tangible injury. To be sure, the Ninth Circuit had erred in finding it unnecessary to decide that question. But, the court explained, a "concrete harm" can encompass intangible as well as tangible injuries, with the former including, in some circumstances, "the risk of real harm." The court ended its analysis there, however. It did not explain how much "risk" of future harm would be sufficient to establish standing; nor did it decide whether the plaintiff in Spokeo himself satisfied the standing requirement. Instead, the court remanded the case to the Ninth Circuit to evaluate those issues in the first instance.

Notwithstanding the questions left open on remand, Spokeo goes a long way toward resolving standing questions that are central to many high-risk class actions. A private right of action created by statute is not alone enough to convey Article III standing, and a plaintiff who has suffered no concrete injury cannot invoke such a statute to recover statutory damages. On the other hand, a plaintiff does not necessarily need to have suffered a tangible injury in order to have standing to sue for a violation if he can show a sufficiently concrete risk that the violation will cause him actual harm. What showing is required in the latter circumstance is, of course, a looming unanswered question that will doubtless be back before the Supreme Court in the future.

What, then, of the "big" issue from Tyson Foods that the petitioner abandoned — i.e., whether a class may be certified when it includes persons who suffered no injury? The court made clear in Tyson Foods that it was not purporting to decide that question. Nonetheless, if one reads Tyson Foods and Spokeo together, it can be argued that the court effectively answered the question indirectly.

Tyson Foods strongly reinforces the core principle of Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338 (2011), that the rules of proof for a class action are exactly the same as for an individual case, with no short-cuts allowed simply because the claims of class members are presented through a class action. It necessarily follows that the most fundamental requirement for an individual claim — proof that the plaintiff

suffered an injury sufficient to establish Article III standing —applies to all members of a proposed class. If a class representative cannot establish that all members of a proposed class suffered such injury, that class may not be certified.

Moreover, to the extent plaintiffs propose to establish standing under a "risk of harm" theory, there may be serious questions about whether they can satisfy Rule 23's typicality and predominance requirements. When the violation at issue is largely procedural and actual impacts on class members are variable and uncertain, even a plaintiff who can establish his own standing under Spokeo may not be able to show that he is typical of the class as a whole and that the standing of other class members can be established without resort to individualized proof. Moreover, if an individual plaintiff cannot establish standing without individualized evidence, Tyson Foods confirms that it cannot be established for a class either.

Overall, while leaving a number of interesting and potentially critical questions unanswered, the Supreme Court's most recent class action decisions made substantial forward progress in developing the law, answering many important questions — either directly or indirectly — while pointing the way to the next set of issues that remain to be resolved.

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