Legal Backgrounder

Vol. 30 No. 20 September 25, 2015

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Supreme Court Should Use Trio of Cases to Reaffirm that Uninjured Plaintiffs Have No Place in Class Actions

by Theodore B. Olson and Lucas C. Townsend

The Supreme Court's 2015 Term presents an excellent opportunity for the Court to provide much-needed guidance on a persistent problem in federal class actions: the uninjured class-action plaintiff. With increasing frequency, many putative and certified classes contain class representatives and members who have suffered no concrete injury, even though "injury in fact" is required under Article III of the United States Constitution for standing to sue in federal court. In some instances, such uninjured plaintiffs seek class-wide statutory damages for a no-harm infraction. Even where a class representative allegedly suffered concrete harm, many plaintiffs obtain class certification or prove liability and damages using statistics and extrapolation to create a fictitious "average" plaintiff that does not resemble any actual member of the class. Sometimes, the class representative may receive an offer of complete relief for his individual claim, thus extinguishing any arguable injury, yet is allowed to continue litigating on behalf of the class.

In all of these scenarios, maintenance of a federal class action violates Article III's standing requirements, contravenes the Rules Enabling Act, and offends due-process principles embodied in Rule 23. A trio of class actions set for argument on the Supreme Court's 2015 calendar squarely presents each of these respective problems: *Spokeo, Inc. v. Robins*;[1] *Tyson Foods, Inc. v. Bouaphakeo*;[2] and *Campbell-Ewald Co. v. Gomez*.[3] This Legal Backgrounder provides an overview of *Spokeo*, *Tyson Foods*, and *Campbell-Ewald*, and explains how each case allows the Court to reaffirm the proper limits on the class-action device for uninjured class plaintiffs.

Spokeo, Inc. v. Robins: The Plaintiff with No "Injury in Fact"

One of the most closely watched business cases of the 2015 Term is *Spokeo, Inc. v. Robins*. Spokeo aggregates individuals' personal information from Internet sources and sells that information to subscribers. A plaintiff filed a putative class action against Spokeo under the federal Fair Credit Reporting Act ("FCRA"), which restricts the reporting of information by "consumer reporting agencies" and authorizes actual or statutory damages for violations. The complaint alleged that Spokeo incorrectly reported the plaintiff's education level, marital status, and income, and sought statutory damages on behalf of a putative class potentially containing millions of members.

The district court dismissed the claims for lack of standing because the plaintiff had not alleged concrete harm, but the Ninth Circuit reversed, holding that the alleged violation of the plaintiff's "statutory rights" under the FCRA was sufficient injury to confer standing. The Supreme Court granted certiorari to decide "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could

---

Theodore B. Olson, a Partner in Gibson, Dunn & Crutcher LLP's Washington, D.C. office, is a member of the firm's Executive Committee and founder of the Appellate and Constitutional Law and Crisis Management Practice Groups. He is also a member of WLF's Legal Policy Advisory Board. **Lucas C. Townsend** is an Associate in the firm's Appellate and Constitutional Law Practice Group in the Washington, D.C. office.

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."[4]

Whether so-called "injury in law" can support Article III standing is a question with broad implications for companies subject to statutes, like the FCRA, that impose technical requirements for certain commercial activities and authorize private plaintiffs to seek statutory damages for infractions. Indeed, the U.S. Code contains dozens of provisions authorizing fixed damages upon proof of a bare statutory violation.[5] Such statutes are susceptible of abuse because they are frequently the subject of class actions seeking no-harm damages on behalf of potentially millions of other uninjured individuals. Despite the need for a plaintiff to show concrete harm to support Article III standing, some courts of appeals have elided the distinct injury-in-fact requirement, allowing no-harm class actions to proceed "without proof of injury."[6]

***Tyson Foods, Inc. v. Bouaphakeo*: The "Average" Plaintiff**[7]

The uninjured plaintiff will come under scrutiny again in *Tyson Foods, Inc. v. Bouaphakeo*, where the Supreme Court will consider the use of statistical techniques to create an "average" plaintiff for purposes of proving class-wide liability and damages. In *Tyson Foods*, a district court certified a class purportedly consisting of all hourly employees of a pork processing plant who allegedly are entitled to overtime pay for "doffing" and "donning" protective clothing and walking to and from their workstations, as well as a Fair Labor Standards Act ("FLSA") collective action.

Despite significant factual differences among the class members—with hundreds of employees working no overtime at all—the district court allowed the plaintiffs to present a statistical analysis at trial estimating the time an "average" employee engaged in doffing/donning-related activities. A jury imposed liability and damages based on this "average" employee, and a divided panel of the Eighth Circuit affirmed. The Supreme Court granted certiorari to decide whether a Rule 23 class action or an FLSA collective action may be 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," and whether such an action may be certified or maintained "when the class contains hundreds of members who were not injured and have no legal right to any damages."[8]

Similar examples of "trial by formula" are a recurring problem, despite the Supreme Court's disapproval of the practice in *Wal-Mart Stores, Inc. v. Dukes*[9] and *Comcast Corp. v. Behrend*.[10] Misuse of statistical techniques can allow individuals who have suffered no injury at all—like the hundreds of employees who worked no overtime in *Tyson Foods*—to proceed with their claim based on the assumption that *others* in the class have been injured. And it can allow a class to be certified, despite the existence of individualized issues, based on "a fictional composite" created to prove "a uniform, collective injury" to the class as a whole[11]—even though many individual class members may lack the qualities of the average plaintiff. Defendants have a strong interest in rebutting such statistical constructs at the class-certification stage by showing that individualized issues overwhelm common questions and thus defeat predominance.[12]

***Campbell-Ewald Co. v. Gomez*: The "Moot" Plaintiff**[13]

Rounding out the trio of cases, *Campbell-Ewald Co. v. Gomez* will allow the Supreme Court to decide whether a defendant's unaccepted offer of complete relief moots a lead class-action plaintiff's federal claim. A plaintiff who received an unsolicited text message from the Navy brought a putative class action under the Telephone Consumer Protection Act against the marketing firm that developed the Navy's recruitment campaign. Before any class was certified, defendant Campbell-Ewald offered complete relief on the plaintiff's individual claim. The plaintiff refused the offer and the district court declined to dismiss the claim as moot, but later granted summary judgment for Campbell-Ewald under the doctrine of derivative sovereign immunity.

The Ninth Circuit reversed, holding that the unaccepted offer of complete relief did not moot the plaintiff's claim and derivative sovereign immunity did not apply. The Supreme Court granted certiorari to decide whether a case becomes moot under Article III "when the plaintiff receives an offer of complete relief on his claim," and whether the answer is the same when a putative class representative "receives an offer of complete relief before any class is certified."[14]

Campbell-Ewald allows the Court to revisit a question it narrowly avoided two years ago in *Genesis Healthcare Corp. v. Symczyk*.[15] There, a five-justice majority "assume[d], without deciding," that a defendant's offer of judgment pursuant to Federal Rule of Civil Procedure 68 that would have provided complete relief for an FLSA plaintiff's individual claim was sufficient to moot that claim, even though the plaintiff had refused the offer.[16] The majority's assumption was well-founded: Allowing a lead plaintiff to litigate on behalf of a class, even after receiving an offer of complete relief for his individual claim, can create an impermissible "headless" class action. Although a lead plaintiff who has been offered all he can possibly recover in litigation is no longer injured in the constitutional sense—and thus no longer typical of the class—class counsel's pursuit of fees becomes the driver of litigation, both preventing settlement and placing the plaintiff at risk for costs if he fails to obtain a more favorable judgment.[17] Despite these dangers, however, the courts of appeals and the Supreme Court have struggled to recognize the effects of mootness in the class-action context.[18]

Why the Uninjured Plaintiff Has No Place in a Federal Class Action

At the core of each of these three cases is the question whether a plaintiff with no cognizable injury—either because it is not concrete, or because it is merely a statistical extrapolation, or because it has been extinguished in the course of litigation—can nevertheless maintain a federal class action for damages under Rule 23. If the Supreme Court faithfully applies its precedents, the clear answer is no: the uninjured plaintiff cannot maintain a federal claim for damages, either on behalf of himself or a putative class, for at least three distinct reasons.

First, allowing an uninjured plaintiff to maintain a federal class action offends Article III jurisdiction. The federal judicial power extends only to "Cases or Controversies" under Article III, which requires a plaintiff to demonstrate a "distinct" factual injury apart from any legal injury created by the statute at issue.[19] The injury-in-fact requirement "cannot be removed by statute,"[20] and "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."[21] The Supreme Court's longstanding prohibition on citizen suits to vindicate a generalized interest in law enforcement preserves the proper separation of powers, an essential bulwark against the coercive power of class actions.[22] Applying these principles, the Court should hold that a plaintiff may not maintain a federal claim, either individually or as a class action, absent concrete injury in fact.

Second, allowing an uninjured plaintiff to maintain a class claim violates the Rules Enabling Act, which provides that the federal rules "shall not abridge, enlarge or modify any substantive right."[23] The Rule 23 class-action device merely aggregates the individual claims of class members while retaining individual defenses. It does not allow a class plaintiff to aggregate individualized factual inquiries and defenses, a practice that would enlarge and modify plaintiffs' substantive rights.[24] Nor does it allow plaintiffs to extrapolate from an unrepresentative sample to manufacture a cognizable injury or a statistically "perfect plaintiff."[25] The Supreme Court should make clear that use of statistical techniques to presume identity of issues among all class members violates the Rules Enabling Act and can be defeated at the class-certification stage.

Third, no-harm class actions violate Rule 23 and the due-process principles that it embodies. A lead plaintiff must be "representative" and "typical" of the class, and must present common issues that "predominate" over individualized inquiries.[26] These requirements are rooted in longstanding notions of procedural fairness.[27] When a class representative lacks the qualities of those he purports to represent—for example, because his claim

ISBN 1056 3059

has become moot—allowing that plaintiff to maintain a class action violates Rule 23 and the due-process rights of both the defendant and absent class members.

Conclusion: The Supreme Court Should Affirm Traditional Standing Principles

To be sure, the Supreme Court has opportunities to decide these cases narrowly on their particular facts, rather than addressing head-on the overarching question of the uninjured plaintiff. It is also possible that the Court may fail to provide useful guidance by issuing a fractured ruling in one or more of these cases, as it has in some prior cases involving class actions.[28] The Supreme Court should avoid these pitfalls and seize this opportunity to provide litigants with a clear affirmation that traditional standing principles apply with no less force when a plaintiff invokes the Rule 23 class-action device. The fundamental promise of Article III, the Rules Enabling Act, the Due Process Clause, and Rule 23 demands no less.

Endnotes

[1] *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. cert. granted Apr. 27, 2015). [Ed. Note: Brief of Washington Legal Foundation (WLF) as *amicus curiae* available at http://www.wlf.org/upload/litigation/briefs/13-1339tsacWashingtonLegalFoundation.pdf.]
[2] *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (U.S. cert. granted June 8, 2015). [Ed. Note: Brief of WLF as *amicus curiae* available at http://www.wlf.org/upload/litigation/briefs/Tyson%20v.%20Bouaphakeo-%20WLF%20Merits%20Brief.pdf.]
[3] *Campbell-Ewald Co. v. Gomez*, No. 14-857 (U.S. cert. granted May 18, 2015). [Ed. Note: Brief of WLF as *amicus curiae* available at http://www.wlf.org/upload/litigation/briefs/Campbell-Ewald%20v%20Gomez-%20WLF%20Amicus.pdf.]
[4] Brief for Petitioner at i, No. 13-1339 (U.S. July 2, 2015).
[5] *See* Brief of the Chamber of Commerce of the United States of America et al. as *amici curiae* in Support of Petitioner at 13 n.3, No. 13-1339 (U.S. July 7, 2015) (citing, among other examples, the Electronic Communications Privacy Act, 18 U.S.C. § 2707(c), and the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3)(B)).
[6] *See, e.g.*, *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) (holding that class-wide statutory damages are available under the FCRA "without proof of injury").
[7] Gibson Dunn represents Wal-Mart Stores, Inc. as *amicus curiae* in support of petitioner Tyson Foods.
[8] Petition for a Writ of Certiorari at i, No. 14-1146 (U.S. Mar. 19, 2015).
[9] 131 S. Ct. 2541, 2561 (2011).
[10] *See* 133 S. Ct. 1426, 1433 (2013) (damages theory must tie to class members' liability).
[11] *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 345 (4th Cir. 1998).
[12] Fed. R. Civ. P. 23(b)(3).
[13] Gibson Dunn represents the Chamber of Commerce of the United States of America and the Business Roundtable as *amici curiae* in support of petitioner Campbell-Ewald Co.
[14] Brief for Petitioner at i, No. 14-857 (U.S. July 16, 2015). The Court also granted review to consider whether the doctrine of derivative sovereign immunity for government contractors "is restricted to claims arising out of property damage caused by public works projects," *ibid*, an issue outside the scope of this Legal Backgrounder.
[15] 133 S. Ct. 1523, 1529 (2013).
[16] *Ibid.* The majority declined to decide the question because the plaintiff had not filed a cross-petition for certiorari review of the court of appeals' judgment that her individual claim was moot.
[17] Fed. R. Civ. P. 68(d).
[18] *See Genesis Healthcare*, 133 S. Ct. at 1528 & n.3 (noting disagreement among courts of appeals); *see also id.* at 1533 (Kagan, J., dissenting) (describing an unaccepted offer as a "legal nullity").
[19] *See, e.g.*, *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449 (1989) (requiring a "distinct injury" to assert a violation of the Federal Advisory Committee Act).
[20] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).
[21] *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).
[22] *See Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) ("In an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so.").
[23] 28 U.S.C. § 2072(b).
[24] *Wal-Mart*, 131 S. Ct. at 2561.
[25] *Broussard*, 155 F.3d at 344.
[26] Fed. R. Civ. P. 23(a)(3), (b)(3).
[27] *See Hansberry v. Lee*, 311 U.S. 32, 45 (1940); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854).
[28] For an infamous example, see *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010).

  ISBN 1056 3059