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SCOPE OF US PLAINTIFFS TO PURSUE CLASS ACTIONS REMAINS UNCLEAR ON MANY FRONTS

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Legal Briefings – By **Benjamin Rubinstein** and **David Wallace**

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SCALE BACK HOPES HAVEN'T EVENTUATED

While corporate defendants had hoped the Supreme Court's decisions last term would continue a recent trend in the Court's jurisprudence of making class actions more and more difficult for the US plaintiffs' bar to pursue and win, those expectations failed to materialise. Instead, the Court's more narrow recent rulings have left much to the lower courts to clarify and for the parties in class action cases to litigate.

From a client's perspective, the following questions should be considered:

- Whether and under what circumstances of a defendants' offer of full payment to a named class member can moot individual and class claims?
- Whether and under what circumstances an alleged harm will be regarded as sufficient to confer standing to bring class claims in data use and data breach suits?
- Whether and under what circumstances statistical evidence may be used to prove liability and entitlement to remedial relief for class action claims?

Since the Supreme Court's 2011 decision to decertify a class of 1.6 million female Wal-Mart employees alleging discrimination over pay and promotion due to a lack of common issues, there has been much speculation (and hope) among corporate defendants that the Court would continue to scale back the ability of plaintiffs to pursue class action claims.

Roughly five years later, the high Court's class action jurisprudence has taken a more nuanced and measured approach toward defining and constraining the ability of plaintiffs to pursue class action litigation. On the defense side of the ledger, two prominent decisions (one issued two months before Wal-Mart and the other a few years later) held that arguments based on public policy and unconscionability cannot be used to invalidate class action waivers in arbitration agreements. The reason was the Federal Arbitration Act preempts such state law principles.

In three cases decided this past term however, the high court largely demurred from issuing rulings that would have imposed clear initial barriers to plaintiffs' pursuit of class action. Here we examine these recent Supreme Court decisions, along with some of the issues lower courts and litigants are already, and are set to, grapple with in their wake.

CAMPBELL-EWALD

In the case of *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (Jan. 20, 2016) , the Court held that a defendant's unaccepted offer of settlement does not moot the plaintiff's claim, but reserved decision on whether a prospective class representative can continue to litigate in federal court if she receives unconditional payment in full.

Following the Supreme Court's ruling, a number of courts have been hesitant to dismiss individual or class claims based solely on offers that were not clearly accepted, were provided on partial payment, were made only after a class had been certified, or otherwise left open the possibility that the plaintiff retained a live claim.

Not all courts have taken such a limited view of the impact of tendering payment to the plaintiff. In a case briefed and argued by Herbert Smith Freehills, *Demmler v. ACH Food Cos.*, 2016 WL 4703875 (D. Mass. June 9, 2016), the court found that, in light of the defendant's tender of full relief, the court could offer nothing more on the plaintiff's underlying claim than what had already been provided. This dynamic, the court concluded, served to moot the case.

Because the named plaintiff received such relief before there was any certified class, the court directed judgment for the defense. The nature of the claims, timing and method of payment, and relationship of the individual and class plaintiffs' respective interests all factored into the court's decision. As *Demmler* illustrates, a tender or payment of relief may still prove an effective strategy for early dismissal of class action claims, especially in consumer fraud cases with multiple low-dollar-amount claims and classes that are not easy to ascertain.

SPOKEO

In the *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (May 16, 2016) class action case, the Supreme Court held that a "bare procedural violation" is not an "injury-in-fact" permitting a plaintiff to sue in federal court. The claim in *Spokeo* was that the defendant had published inaccurate information about plaintiff in alleged violation of the Fair Credit Reporting Act. Although recognising that a plaintiff's injury could be either tangible or intangible, such as risk of future harm or harm to reputation, the Court's ruling does little to clarify the circumstances under which a plaintiff may bring suit to address intangible injuries.

This issue of tangible versus intangible harms is at the center of controversies over data use and data breach suits, which invite class action claims. In *Khan v. Children's Nat'l Health System*, 2016 WL 2946165 (D.Md. May 19, 2016), for example, the court ruled that a prospective class action could not proceed in federal court because an increased risk of identity theft does not mean that the plaintiffs suffered an injury-in-fact.

In contrast, the court in *Boelter v. Hearst Communications, Inc*., 2016 WL 3369541 (S.D.N.Y. June 17, 2016) found that the plaintiffs had asserted a sufficient "intangible" harm in the form of their exposure to unwanted solicitations and possible fraudsters, allegedly stemming from the defendant's sale of plaintiffs' personal information to third parties and by providing it to "data mining" companies.

Citing *Spokeo*, the court reasoned that a *de facto* harm that the legislature has identified and elevated such that an individual may seek relief when she suffers the harm, is sufficient. The court concluded that the plaintiffs had suffered a particularised and concrete injury-in-fact, including the violation of their statutory rights and economic harm, that could be remedied by court action.

TYSON FOODS

Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036 (March 22, 2016), was a wage and hour class action by employees of a meat-processing plant. The plaintiffs claimed that the defendant violated the Fair Labor Standards Act (FLSA) by not properly compensating workers for time spent changing into and out of protective gear at the beginning and end of their work shifts.

The question on appeal was whether statistical evidence regarding average time spent on these activities could be used to prove liability for overtime pay to the class as a whole, avoiding the individualised issues that might otherwise preclude certification of the class as a cohesive group. The Supreme Court's decision avoided a broad rule, and neither prohibits nor permits the use of statistical evidence as a matter of course in class action cases.

Rather, the decision recognised that if the evidence put forward by a plaintiff could be used by an individual class member in pursuit of his or her own claims in an individual lawsuit, it was appropriate for use by the class. In this respect, the high Court's ruling did not further advance *Wal-Mart*'s criticism of "trial by formula" in class actions.

Nevertheless, issues surrounding the use of representative evidence has presented a hurdle to class certification in some post-*Tyson Foods* cases. In *Harnish v. Widener University School of Law*, 2016 WL 4363133 (3d Cir. Aug. 16, 2016), for example, the court affirmed the denial of class certification for failure to meet the predominance requirement.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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