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Class Actions

Antitrust Class Actions After the Supreme Court's 2015 Term

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For the first time in many years, the Supreme Court does not (as of yet) have any significant antitrust cases on its docket. But don't be fooled—the Supreme Court's 2015 term has the potential to change the face of antitrust class actions. Already, the Court has granted *certiorari* in three cases bearing on the availability and nature of class-based litigation. Depending on how the Court rules, antitrust practitioners and their clients may find themselves litigating in a very different environment one year from now.

This article provides an overview of the following cases and their potential effects on antitrust class litigation: *Tyson Foods, Inc. v. Bouaphakeo*, which involves standards of proof under Rule 23(b)(3)'s predominance inquiry; *Campbell-Ewald Co. v. Gomez*, which asks whether a Rule 68 offer of complete judgment moots a class representative's claims; and *DirecTV, Inc. v. Imburgia*, which centers on the interpretation of an arbitration agreement that expressly incorporates federally preempted state law.

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Tyson Foods, Inc. v. Bouaphakeo

In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court will address the extent to which differences between putative class members—in particular, the presence of potentially uninjured class members—may defeat class certification under Federal Rule of Civil Procedure 23(b)(3).

The plaintiffs in *Tyson* represent a class of employees at an Iowa meat processing facility. They allege that their employer, Tyson Foods, failed to pay overtime for time employees spend putting on (donning) and taking off (doffing) personal protective equipment, in violation of the federal Fair Labor Standards Act (FLSA) and the Iowa Wage Payment Collection Law (IWPCL). While Tyson adds a certain number of minutes' worth of "K-code" time to each employee's paycheck, it does not record or compensate employees for the *actual* time they spend donning and doffing the required protective equipment.

The district court certified the action as a FLSA "collective action" under and an IWPCL class action.[1] Following trial, a jury returned a verdict for the class. On appeal to the Eighth Circuit, Tyson argued that class certification was inappropriate because some class members did not work overtime and therefore would receive no damages, even if Tyson undercompensated other employees.[2] In particular, Tyson criticized the plaintiffs' reliance on statistical averages, which would

[1] FLSA collective actions are somewhat different from Rule 23 class actions. For example, Rule 23 employs an "opt out" rule, while FLSA collective actions are "opt in."

[2] *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (2015).

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result in a ''windfall'' recovery for class members who were not actually undercompensated.[3]

In a split decision, the Eighth Circuit affirmed certification of the plaintiffs' class. While acknowledging that plaintiffs' reliance on averages to establish class-wide injury ''require[d] inference,'' the court held that such inference was allowable under a nearly 70-year-old Supreme Court decision: *Anderson v. Mt. Clemens Pottery*.[4] In *Mt. Clemens*, the Supreme Court held that where an ''employer's records are inaccurate or inadequate,'' the employer's liability under FLSA can be established by ''just and reasonable inference.''[5] Under *Mt. Clemens*, it is ***the employer's*** responsibility to ''come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference.''[6] According to the Eighth Circuit, Tyson failed to rebut the *Mt. Clemens* inference because it did not provide ''evidence of the specific time each class member spent donning, doffing, and walking.''[7] The court also pointed to Tyson's stipulation that workers at the facility in question ''tend to work a significant amount of overtime on a weekly basis'' as further evidence that classwide injury could rightly be inferred.[8]

While *Tyson* is not an antitrust case, it tees up an issue that is often critical in antitrust class actions: the effect of potentially uninjured class members on class certification under Rule 23(b)(3). Following the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*[9] and *Comcast Corp. v. Behrend*,[10] the lower courts have reached inconsistent outcomes concerning plaintiffs' burden to affirmatively demonstrate classwide injury—and to exclude uninjured class members—at the class certification stage.

In *Wal-Mart*, the Supreme Court held that ''commonality'' under Rule 23(a) referred not to the raising of common questions, but rather to ''the capacity of a classwide proceeding to generate common ***answers*** apt to drive the resolution of the litigation.''[11] ''Dissimilarities within the proposed class,'' the Court said, may ''impede the generation of common answers.''[12]

Two years later, the Court in *Comcast* held that the principles enunciated in *Wal-Mart* fully apply to Rule 23(b)(3)'s predominance inquiry.[13] The Court overturned certification in an antitrust class action due to a mismatch between the plaintiffs' theory of liability and their expert's damages model—specifically, the model imputed damages that were ''not the result of the wrong'' alleged by plaintiffs.[14] Writing for the majority, Justice Scalia scolded the Third Circuit for failing to adequately scrutinize the statistical model.[15]

In the wake of *Wal-Mart* and *Comcast*, courts have struggled to agree upon whether, or at what point, antitrust plaintiffs' failure to demonstrate injury-in-fact (sometimes called ''antitrust impact'') to all or virtually all members of a putative class precludes certification.

A number of courts have latched onto the Seventh Circuit's holding in *Messner v. Northshore University HealthSystem* that it is ''almost inevitable'' that a proposed class will ''include persons who have not been injured by the defendant's conduct,'' and that this alone does not defeat certification.[16] On this view, the class should be certified (assuming it otherwise satisfies Rule 23) unless it is ''defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct.''[17] But even this latter caveat did not prevent the First Circuit from affirming class certification in *In re Nexium Antitrust Litigation*,[18] a case in which the district judge acknowledged that ''a number of the proposed class members suffered no actual injury whatsoever.''[19] (That said, the First Circuit did question the district judge's finding that the population of uninjured class members was more than *de minimis*.[20])

In contrast, a number of courts have held that a failure to establish injury to all or virtually all class members may defeat certification in antitrust cases. In *In re Rail Freight Fuel Surcharge Antitrust Litigation*,[21] for instance, the D.C. Circuit vacated a certification order where the plaintiffs' statistical model resulted in false positives—imputing injury to customers who did actually not suffer any. The court held that the presence of false positives ''would shred the plaintiffs' case for certification'' since ''we have no way of knowing [whether] the overcharges the damages model calculates for class members is any more accurate than the obviously false

[3] *Id.*

[4] *See id.* (relying on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)).

[5] *Mt. Clemens*, 328 U.S. at 687–88.

[6] *Id.*

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

[8] *Id.*

[9] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

[10] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

[11] *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original) (quotation omitted).

[12] *Id.* (quotation omitted).

[13] *See Comcast*, 133 S. Ct. at 1432 (''The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a).'')

[14] *Id.* at 1433–35.

[15] *See id.* at 1432–33 (''By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis.'').

[16] *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009)).

[17] *Id.* at 824. The Seventh Circuit conceded that ''[t]here is no precise measure for 'a great many,'' explaining that ''[s]uch determinations are a matter of degree, and will turn on the facts as they appear from case to case.'' *Id.* at 825.

[18] *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

[19] *In re Nexium Antitrust Litig.*, 297 F.R.D. 168, 180 (D. Mass. 2013), *aff'd*, 777 F.3d 9 (1st Cir. 2015). The district judge expressly ''conclude[d] . . . that certain class members were not actually injured, including more than a *de minimis* number of TPPs and consumers who—through rebates, contracts, and brand-loyal purchasing—suffered no damages from the foreclosure of a generic version of Nexium to the market.'' *Id.* at 177–78.

[20] *See Nexium*, 777 F.3d at 31 (''Plaintiffs' evidence has shown that the vast majority of class members were probably injured. 'Rigorous analysis' of the evidence does not show that the number of uninjured class members is more than *de minimis*.'')

[21] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013).

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estimates it produces for [uninjured customers].''[22] In this court's view, *Comcast* makes clear that ''Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it.''[23]

In *Tyson*, it seems undisputed that (1) not all class members spent the same amount of time donning and doffing protective equipment; and (2) a certain number of class members did not work any overtime, and therefore suffered no damages.[24] It is also undisputed that the plaintiffs relied on statistical modeling to compute ***average*** donning and doffing times, which would impute uniform damages to all class members, regardless of their actual injury (if any).[25] In both *Wal-Mart* and *Comcast*, the Supreme Court evaluated the class plaintiffs' statistical models and found them wanting. Given this trend, it would not be altogether surprising if the Court similarly condemned the *Tyson* plaintiffs' use of averaging, which may obscure differences between putative class members.

If the Court does side with Tyson, the ruling could require antitrust plaintiffs to meet an even heavier evidentiary burden in order to proceed with class-based litigation. This, in turn, may push certification motions back even further past the pleading stage, so that the parties can conduct the substantial (and often expensive) fact and expert discovery that is necessary to support—and effectively oppose—such motions.

At the same time, for class counsel who operate on a contingency basis, heightened standards under Rule 23(b)(3) could mean that difficult decisions regarding a case's viability as a class action must be made earlier on. Under the Supreme Court's new class action jurisprudence, plaintiffs' lawyers are shouldering increasingly large upfront costs before class certification is even put to the court. In antitrust disputes, the necessity of expert economic analysis can easily push pre-certification expenses into the millions of dollars.

Of course, there is a chance the Supreme Court issues a more modest ruling. At oral argument on November 11, 2015, the usual swing vote Justice Anthony Kennedy, along with the four liberal Justices, seemed more concerned with whether the plaintiffs' evidence satisfied *Mt. Clemens* than with the larger Rule 23 question. Reading the tea leaves, it seems likely that the Court will issue a narrow FLSA ruling that does not dramatically impact Rule 23.

Campbell-Ewald Co. v. Gomez

Federal Rule of Civil Procedure 68(a) allows defendants to ''serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued,'' at least 14 days before trial. In *Campbell-Ewald Co. v. Gomez*, the Supreme Court will decide whether a class action defendant can ''pick off'' class representatives prior to a motion for class certification by making an offer of complete judgment pursuant to Rule 68.

Jose Gomez, the named plaintiff in *Campbell-Ewald*, brought a class action under the Telephone Consumer Protection Act (TCPA) after receiving unsolicited text messages inviting him to ''Get a career'' in the Navy. The Navy had hired the defendant, Campbell-Ewald, as a marketing consultant. After the district court denied Campbell-Ewald's motion to dismiss, the company offered Gomez $1503 per TCPA violation, plus reasonable costs. When Gomez rejected the offer, Campbell-Ewald moved to dismiss for lack of jurisdiction, arguing that Gomez's TCPA claim was now moot. The district court denied the motion, but granted a follow-up summary judgment motion by which Campbell-Ewald asserted derivative sovereign immunity.

On appeal, the Ninth Circuit addressed both the mootness and sovereign immunity issues. On the basis of circuit precedent, the court held that ''an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action.''[26] In so doing, the Ninth Circuit distinguished the Supreme Court's 2013 decision in *Genesis Healthcare Corp. v. Symczyk*,[27] which held that a Rule 68 offer of judgment moots a FLSA collective action in which a class has not yet been certified. In the Ninth Circuit's view, ''fundamental'' differences between FLSA collective actions and Rule 23 class actions render *Genesis Healthcare* inapplicable in the traditional class action context.[28]

The Ninth Circuit's holding that a Rule 68 offer of complete judgment does not moot a class representative's claims represents a minority position among the courts of appeals. The Third, Fourth, Fifth, Sixth, and Seventh Circuits have all held that a Rule 68 offer of complete judgment made prior to a motion for class certification ***does*** moot the plaintiff's claim.[29] In contrast, the Second, Ninth, and Eleventh Circuits hold that a Rule 68 offer ***does not*** moot the plaintiff's claim.[30] Notably, however, the Second Circuit has stated that the ''better resolution'' is for the court to enter default judgment against the defendant[31]—which, while not rendering the plaintiff's claim moot, has the practical effect of ending the litigation.

While the Supreme Court did state in *Genesis Healthcare* that ''Rule 23 actions are fundamentally different from collective actions under the FLSA,''[32] it is unclear whether the Court will agree with the Ninth Circuit that this distinction should produce a different result in *Campbell-Ewald*. In *Genesis Healthcare*, the Court

[22] *Id.* at 252, 254.
[23] *Id.* at 255.
[24] *See Bouaphakeo*, 765 F.3d at 797–800.
[25] *See id.* at 797–98.

[26] *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015) (quoting *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091–92 (9th Cir. 2011)).
[27] *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).
[28] *See Gomez*, 768 F.3d at 875–76 (''Nevertheless, courts have universally concluded that the *Genesis* discussion does not apply to class actions. In fact, *Genesis* itself emphasizes that 'Rule 23 [class] actions are fundamentally different from collective actions under the FLSA' and, therefore, the precedents established for one set of cases are 'inapplicable' to the other.' (quoting *Genesis Healthcare*, 133 S. Ct. at 1529)).
[29] *See Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365 (4th Cir. 2012); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567 (6th Cir. 2009); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489 (5th Cir. 2005); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004); *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012 (7th Cir. 1999).
[30] *See Gomez*, *supra*; *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698 (11th Cir. 2014); *McCauley v. Trans Union, LLC*, 402 F.3d 340 (2d Cir. 2005)
[31] *McCauley*, 402 F.3d at 342.
[32] *Genesis Healthcare*, 133 S. Ct. at 1529.

pointed out that in the Rule 23 context, ''Courts of Appeals on both sides of [the mootness] issue have recognized that a plaintiff's claim may be satisfied even without the plaintiff's consent''—whether by dismissing claims where an offer of complete judgment has been extended, or entering judgment in favor of the plaintiff in accordance with the Rule 68 offer.[33] Under either of these positions, a Rule 68 offer has the potential to stop a class action in its tracks.

A ruling in favor of the defendant in *Campbell-Ewald* could put pressure on class representatives to move for certification earlier in the proceedings, since certification bestows upon the absent class members ''a legal status separate from the interest asserted by [the named plaintiff],'' such that a Rule 68 offer of judgment to the class representative cannot render the class's claims moot.[34] However, such pressure would be at tension with the growing tendency—some would say the ***necessity***, particularly in complex antitrust cases—to move for class certification only after significant discovery has taken place. As discussed above, many see delayed certification motions as an inevitable consequence of the heightened standards of proof the Supreme Court has enunciated in *Wal-Mart* and *Comcast*. Permitting class action defendants to ''pick off'' class representatives early in litigation through offers of complete judgment could make plaintiffs' lawyers even less likely to shoulder the risk of an antitrust class action.

DirecTV, Inc. v. Imburgia

Coming on the heels of *AT&T Mobility LLC v. Concepcion*[35] and *American Express Co. v. Italian Colors Restaurant*,[36] *DirecTV, Inc. v. Imburgia* is the third case the Supreme Court has taken in recent years dealing with the interplay between the Federal Arbitration Act (FAA) and arbitration agreements that preclude class-based litigation. In both *Concepcion* and *Italian Colors*, the Court upheld class action waivers under the FAA. Whether the Court does so again in *Imburgia* will likely come down to the terms of the particular arbitration agreement at issue.

The two named plaintiffs in *Imburgia* are former DirecTV subscribers who allege that DirecTV improperly charged them early termination fees, in violation of California's Consumer Legal Remedies Act (CLRA), Unfair Competition Law (UCL), and common law. Both plaintiffs were bound by DirecTV's 2007 customer agreement, which generally required that disputes be arbitrated on an individual basis under JAMS rules. However, the arbitration clause provided that ''[i]f . . . the law of your state would find this agreement to dispense with class arbitration procedures, then this entire [arbitration clause] is unenforceable.'' In 2006, the California Court of Appeal had relied on the California Supreme Court's decision in *Discovery Bank v. Superior Court*[37] in ruling that the arbitration provision in DirecTV's customer contract was unenforceable.[38] With that decision on the books, DirecTV did not initially seek to compel arbitration in *Imburgia*.

The Superior Court certified a consumer class in *Imburgia* on April 20, 2011.[39] Exactly one week later, the U.S. Supreme Court handed down its decision in *Concepcion*, which held that the FAA preempts the California Supreme Court's ruling in *Discover Bank*.[40] Within a matter of weeks, DirecTV moved to stay or dismiss plaintiffs' action, decertify the class, and compel arbitration under *Concepcion*.[41] The superior court denied the motion.[42]

The Court of Appeal affirmed the trial court's refusal to compel arbitration. In its view, the arbitration clause's particular language—which provided that the agreement to arbitrate would be entirely unenforceable if ''the law of your state would find this agreement to dispense with class arbitration procedures unenforceable''—took the contract outside of *Concepcion*'s scope.[43] While the FAA may require enforcement of agreements to arbitrate on a non-class basis, the court held, enforcing an agreement to abide by ''state rules of arbitration'' is ''fully consistent with the goals of the FAA.''[44] Since ''the CLRA expressly precludes waiver of the right to bring a class action under the CLRA,'' the Court of Appeal held that DirecTV's arbitration agreement was unenforceable on its own terms.[45]

DirecTV took its case directly to the U.S. Supreme Court. As DirecTV pointed out in its petition for *certiorari*, the California Court of Appeal's decision conflicts with a 2013 decision by the Ninth Circuit that construed the ***same exact language***. In *Murphy v. DirecTV, Inc.*, the Ninth Circuit held that the ''contention that the parties intended for state law to govern the enforceability of DirecTV's arbitration clause, even if the state law in question contravened federal law, is nonsensical.''[46] Under the doctrine of preemption, ''the *Discover Bank* rule is not, and indeed never was, California law.''[47]

Thus, the central issue in *DirecTV* is whether an arbitration agreement's incorporation of state law ***that is preempted by the FAA*** must still be enforced in accordance with such state law. Given the breadth of the Supreme Court's holding in *Concepcion* concerning the FAA's preemption of California law, it may be natural to assume that the Court will reverse the appellate court's ruling in *Imburgia* and hold the class action waiver enforceable. But things may not be so simple. The Supreme Court has consistently held that ''arbitration is a matter of contract,'' and that ''courts must 'rigorously enforce' arbitration agreements according to their terms.''[48] If a contract provides for arbitration only to

[33] *Id.* at 1529 n.4 (citations omitted).
[34] *Sosna v. Iowa*, 419 U.S. 393, 399 (1974).
[35] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
[36] *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).
[37] *Discovery Bank v. Superior Court*, 133 P.3d 1100 (Cal. 2005).
[38] *See Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1455 (Ct. App. 2006).
[39] *See Imburgia v. DirecTV, Inc.*, 225 Cal. App. 4th 338, 341 (Ct. App. 2014), *cert. granted*, 135 S. Ct. 1547 (2015).
[40] *See id.*
[41] *Id.*
[42] *Id.*
[43] *See id.* at 342–47.
[44] *Id.* at 343 (quoting *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)).
[45] *Id.* at 342, 347–48.
[46] *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013)
[47] *Id.*
[48] *Italian Colors*, 133 S. Ct. at 2309 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

  ATRR ISSN 0003-6021

the extent allowed by state law, holding that such terms are preempted by the FAA may cut against the FAA's purposes.[49]

However the Supreme Court rules, *Imburgia* is unlikely to have significant long-term effects on antitrust litigation beyond those already set in motion by *Concepcion* and *Italian Colors*. It is already clear that state law cannot impose class-based proceedings where an arbitration clause precludes consolidation. Even if the Court holds that the terms of DirecTV's 2007 arbitration clause are sufficient to escape FAA preemption, the effects of such a ruling will necessarily be cabined by the peculiar nature of the contract at issue. In the context of consumer contracts, which are usually drafted by one party, future disputes regarding the availability of class mechanisms can be avoided through artful drafting.

* * *

In sum, the Supreme Court's current term promises to be significant for antitrust class actions. As antitrust practitioners mark the 50th anniversary of the historic Rule 23 amendments in the new year, they would do well by their clients to keep a close watch for the High Court's decisions in *Tyson*, *Campbell-Ewald*, and *Imburgia*.

[49] *Cf. id.* ("This text [of the FAA] reflects the overarching principle that arbitration is a matter of contract.")