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The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges

Paul G. Karlsgodt

Dustin M. Dow

THE PRACTICAL APPROACH: HOW THE ROBERTS COURT HAS ENHANCED CLASS ACTION PROCEDURE BY STRATEGICALLY CARVING AT THE EDGES

*Paul G. Karlsgodt and Dustin M. Dow**

I. INTRODUCTION

The United States Supreme Court has it out for class litigation, right? After all, this is the Court that issued "a death blow to class action" in 2011.[1] And three years later, the Court extinguished would-be class consumers by giving "financial institutions and employers a license to do wrong."[2] What is a plaintiff and his or her counsel to do, especially when *all nine* Justices target the class bar as unseemly racket?[3]

How about take a deep breath, for one thing. Reports of the death of the class action have been greatly exaggerated.[4] The Court has not killed the class action. Instead, since the beginning of Chief Justice Roberts' tenure, class-action litigation has continued its unrelenting *expansion.*

Without question, the Court has developed a reputation for being unfriendly to the class action procedure. You can't reverse certification of the largest class action ever[5] without expecting some blowback.[6] But the wide view of the Court's approach toward class actions does not show Justice Scalia, ax-in-hand, chopping down the Rule 23 tree. Rather, the Justices are pruning at the edges, selectively cutting back foliage to ensure the long-term viability of the procedure.

The Court's decisions in some areas have been more impactful over class-action practice than others. For instance, the Court's favorable stance toward enforcement of class waivers in arbitration agreements surely has affected the viability of class actions involving some business

* Paul Karlsgodt is the national chair of BakerHostetler's Class Action Defense practice team and litigation coordinator of the firm's Denver office. His practice focuses on data privacy and other consumer class actions. Dustin Dow is an employment and labor attorney who focuses his representation on class action work, including wage and hour cases under the Fair Labor Standards Act. He is the editor of BakerHostetler's annual class action review.

1. Debate, *A Death Blow to Class Action?*, N.Y. TIMES (June 20, 2011), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-classaction.

2. Herman Schwartz, *How Consumers Are Getting Screwed by Court-Enforced Arbitration*, NATION (July 8, 2014), http://www.thenation.com/article/180551/how-consumers-are-getting-screwed-court-enforced-arbitration.

3. *See generally* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (U.S. 2013).

4. Apologies to Mark Twain, whose actual death in 1910 prevented him from commenting on the procedural beauty of the class certification motion, realized by Rule 23's adoption in 1937. *See* FED. R. CIV. P. 23.

5. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2546 (U.S. 2011).

6. Laura Flanders, *The Supreme Court's Free Pass on Sexism For Wal-Mart*, GUARDIAN (June 21, 2011), http://www.theguardian.com/commentisfree/cifamerica/2011/jun/21/walmart-women-classaction ("Familiar with 'too big to fail?' Welcome, now, to 'too big to sue.'").

practices and in some industries. But it has not doomed the procedure altogether—particularly considering the Court unanimously affirmed certification of an arbitrator's decision granting class certification in 2013.[7] Even the "landmark" *Wal-Mart v. Dukes* employment class action in 2011 failed to drastically circumscribe class litigation.[8] Although *Wal-Mart* unquestionably affects the level of scrutiny that lower courts now give to the question whether to certify a case as a class action, the decision has not necessarily diminished the frequency with which class actions are actually pursued.

A majority of the Court is not so philosophically opposed to class actions that the Court appears bent on abolishing the procedure altogether. Several times within the past few years the Court has watched opportunities go by, despite opportunities to impose more restrictive constraints on the scope of class litigation. Defendants on the wrong side of class certification decisions keep asking the Court for review and reversal. With few exceptions, the Court has declined review. These certiorari denials are more than academic. They leave controversial class certification decisions in place on one hand and signal that the class-action industry continues to thrive in lucrative corners on the other hand.

This Article explores the practical impacts of the Court's class-action jurisprudence from 30,000 feet, observing that, with some notable exceptions, the Court has nibbled away at the rough edges of class-action procedure while passing on chances to dictate more drastic reform. Part II is a chronological summary of notable Roberts Court cases that have come to define its approach toward class litigation. Perhaps surprisingly, the Court eased its way to this point, neglecting to grant certiorari in any significant class-action cases for the first four years after the swearing in of Chief Justice Roberts in 2005. That changed in 2009 when the Court began to grant certiorari over a group of cases that are widely perceived as changing the landscape of class litigation.

In Part III, the Article examines the practical impacts of the Court's class-action decisions and its certiorari denials, concluding that the Court seems to be focused on fine-tuning class-action procedure rather than ending it. The Court's restrained attitude is reflected by a hesitancy to make broad pronouncements in the class action cases it decides and in its selectivity in choosing cases to begin with. Also in Part III, the Article

7. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2071 (U.S. 2013).
8. *Dukes*, 131 S. Ct. at 2561.

explores how the Court's reluctance to issue broad landscape-changing rulings has left breathing room for lower courts to fill in the doctrinal gaps. The Court has undeniably dictated a large amount of change in a few specific areas, especially in the arena of arbitration and class waivers. But the impact of change has been just as overstated regarding topics such as standard of review, federalism, merits consideration, employment, and overbroad classes—all areas that remain friendly enough to class actions that the procedure continues to thrive. Indeed, activity among the lower courts on class-action jurisprudence has often enabled the Court to approve of standards already in place, rather than write new class-action rules.

In Part IV, the Article examines the areas of class-action opportunities that the Court either has not addressed yet or simply has overlooked. In some cases, the Court's lack of action has enabled class-action practice to thrive, whereas in other areas, the Court's guidance may be needed to provide clearer guidelines, much in the way the Court has done with respect to class waivers in arbitration agreements.

The Article concludes by pointing out that this is not a Court that seems intent on ending class litigation or even significantly culling it. Instead, the Court appears quite comfortable pulling, tugging, and shaping the edges of class-action practice. Remarkably, though aggregate litigation looks different in many ways now than it did before the Roberts Court era, much of that change has come from the lower courts. The Supreme Court's influence is reflected mainly in its endorsement of lower court trends and the tone, rather than the direct mandates, of its opinions.

What we don't know—what we can't know—is how much more this Court will act to define the way class actions operate. Despite all that has been decided, there are many gaps that remain. True to its reputation as a decider of narrow issues, the Court has left much of those gaps to be filled by the work-horse lower courts that deal with class certification issues on a daily basis.

II. A CHRONOLOGY OF THE ROBERTS COURT AND CLASS ACTIONS

John Roberts was sworn in as Chief Justice just prior to the October 2005 Supreme Court term.[9] During the first four years of his tenure, the Supreme Court did not grant certiorari in any cases having a significant impact on class-action jurisprudence. That changed in 2009, when the

9. *Roberts Sworn In as Chief Justice*, FOX NEWS (Sept. 30, 2005), http://www.foxnews.com/story/2005/09/30/roberts-sworn-in-as-chief-justice/.

Supreme Court started a string of granting certiorari in several cases raising class-action-related issues each year.

A. 2009-2010

It was four years after Roberts was sworn in as Chief Justice in 2005 before the Court began to tackle class-action issues of any significance. During the October 2009 term, the Court issued its decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[10] on the Erie Doctrine issue of whether Rule 23 trumps state limitations on class actions that are "procedural." In *Shady Grove*, the court extended the Erie Doctrine by explaining the limits of state substantive law vis-à-vis Rule 23.[11] As pertinent to class actions, the thrust of *Shady Grove* is that a state law granting substantive rights cannot bar class certification under federal Rule 23 by including a provision that purports to preclude class actions.[12] The decision implicates the numerous state laws that grant substantive rights to various groups and individuals but, in exchange for those rights, bar any class-action claims forming under those laws.

Additionally, during the October 2009 term, the Court decided *Stolt-Nielson S.A. v. AnimalFeeds International Corp.*,[13] which was the first of many decisions addressing the interplay between private arbitration rights and collective redress through class procedure. The *Stolt-Nielsen* decision addressed the issue of whether courts could require arbitration on a class-wide basis, and the Court's answer was a strong "no."[14] That broad holding indicated that there must be a contractual basis to require class arbitration,[15] a theory the court revisited and expanded upon a few years later in *Oxford Health Plans LLC v. Sutter*.[16]

Another decision during the term, *Morrison v. Nat'l Australia Bank Ltd.*,[17] did not address class actions directly but did address jurisdictional issues that have great significance in class-action practice. *Morrison* defined the jurisdictional boundaries for securities fraud class actions under the Securities Exchange Act, limiting them to domestic

10. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 396 (2010).
11. *Id.* at 406-07.
12. *Id.* at 436.
13. Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 666 (2010).
14. *Id.* at 684.
15. *Id.* at 664.
16. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2067 (U.S. 2013).
17. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

securities.[18]

B. 2010-2011

In the October 2010 term, the Court issued decisions likely to have a lasting impact on the limiting of class actions. That year, the Court decided *AT&T Mobility LLC v. Concepcion*,[19] which significantly strengthened private arbitration agreements as a defense against class actions. The Court also issued the seminal *Wal-Mart Stores, Inc. v. Dukes*[20] decision, which not only gave teeth to Rule 23's commonality requirement and clarified the standard for deciding whether Rule 23(b)(2) certification is available in cases in which monetary remedies are sought, but was written in a tone that was openly antagonistic to class actions.

While perhaps more practically impactful on the future viability of class actions, at least in certain circumstances, *Concepcion* has been less publicly heralded—or maligned depending on your persuasion—than *Dukes*. *Dukes* remains the most politically controversial of the Court's class-action decisions, even though a critical analysis of the issues that the Court clearly decided shows that the decision actually broke little new ground compared to trends that were already developing in the lower courts.

The Court also issued two plaintiff-friendly decisions during the October 2010 term. In *Smith v. Bayer*,[21] the Court limited the reach of federal courts to dictate certification in state courts. The result is that a federal court may not enjoin a state court from adjudicating class claims even though the federal court may have previously denied Rule 23 certification on the same set of facts.[22] Finally, in *Erica P. John Funds v. Halliburton* (*Halliburton I*),[23] the Court declined to impose barriers to securities class actions by requiring plaintiffs to establish materiality on the merits as a prerequisite to class certification.

C. 2011-2012

The October 2011 term was a hiatus for the Court in tackling class-

18. *Id.* at 273.
19. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (U.S. 2011).
20. Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541, 2550-51, 2557 (U.S. 2011).
21. Smith v. Bayer Corp., 131 S. Ct. 2368, 2371 (U.S. 2011).
22. *Id.* at 2373.
23. Erica P. John Funds, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2183 (U.S. 2011) [hereinafter *Halliburton I*].

action issues. However, the Court issued another pro-arbitration decision, *Compucredit v. Greenwood*,[24] which continued the trend of upholding agreements calling for individual arbitration in the face of arguments that individual arbitration unfairly deprived litigants of a "right" to pursue representative litigation in court.[25] The October 2011 term also saw the Court miss an opportunity to provide meaningful guidance on the requirements to obtain limited "issue" certification when it declined review of Judge Posner's decision in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc*.[26]

D. 2012-2013

The Court decided the most class-action-related cases in its October 2012 term, though these cases were arguably not nearly as influential over class-action practice as the 2010-2011 decisions. During the October 2012 term, the Court issued its decision in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,[27] which upheld a theme previously reinforced by the Court in *Halliburton I*:[28] that merits issues need not be proven as a prerequisite to class certification. And in *American Express Co. v. Italian Colors Restaurant* (*Amex III*),[29] the Court continued the trend of upholding arbitration clauses from attacks that preventing class-action treatment was unfair.

The most practically impactful decision that term was probably *Standard Fire Ins. Co. v. Knowles*,[30] in which the Court closed a key loophole in federal jurisdiction under The Class Action Fairness Act ("CAFA"). By closing this loophole, the Court prevented plaintiffs' attorneys from simply stipulating to less than the $5 million jurisdictional amount on behalf of a putative class to avoid removal.[31]

However, there were also a series of missed opportunities to provide meaningful guidance on issues of significance to class-action

24. Compucredit v. Greenwood, 132 S. Ct. 665, 673 (U.S. 2012).

25. Increasingly, arbitration agreements prohibit class arbitration, and the Court has held that a party cannot be compelled to arbitrate on a class basis unless it expressly agrees to do so. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 664 (2010).

26. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (U.S. 2012).

27. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1188-89 (U.S. 2013).

28. *Halliburton I*, 131 S. Ct. at 2183.

29. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (U.S. 2013).

30. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (U.S. 2013).

31. *Id.*

litigators. First, in *Comcast Corp. v. Behrend*,[32] the Court initially accepted review to address the standards for reviewing the reliability of expert testimony at the class certification phase. Instead, the majority's decision relied heavily on the conclusion that the defendant had waived the issue of whether a *Daubert* evidentiary standard[33] should apply to evaluating expert testimony at the class certification stage.[34] Although the decision does address a situation in which expert testimony may not support class certification (when the expert opinion is completely irrelevant to the question of whether common evidence exists), litigants were left with uncertainty regarding whether a *Daubert* analysis is required at the class certification phase.

Similarly, in *Genesis Healthcare Corp. v. Symczyk*,[35] the Court sought to answer whether a full offer of judgment to a named representative plaintiff mooted related class claims. But the Court relied on the fact that the parties had stipulated that the individual claim was moot rather than determining the circumstances under which mootness would occur in the first place.[36] As a result, the decision stands for the unremarkable proposition that if a case is moot, it's moot.

In a third case that ultimately hinged on a question of waiver or stipulation, the Court issued its *Oxford Health*[37] decision. There, the Court upheld an arbitrator's order as satisfying the lowest possible standard of review.[38] In doing so, the Court concluded that the defendant had stipulated to the arbitrator's jurisdiction to decide the issue, leaving open the much more practically relevant question of whether an arbitrator or a court should decide, in the first instance, whether the parties intended to allow class arbitration.[39]

Perhaps the two most impactful decisions on class-action practice during the 2012-2013 term did not decide class-action procedural issues at all but rather issues of federal subject matter jurisdiction. In *Clapper*

32. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (U.S. 2013) (Ginsburg, J., & Breyer, J., dissenting).

33. The *Daubert* standard is the evidentiary standard of reliability by which expert opinion evidence based on scientific knowledge is admitted at trial. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 582 (1993).

34. *Comcast*, 133 S. Ct. at 1435 ("In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.").

35. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1526-27 (U.S. 2013).

36. *Id.* at 1527.

37. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2065 (U.S. 2013).

38. *Id.* at 2065.

39. *Id.* at 2071.

v. Amenesty International USA,[40] the Court held that neither speculative future injuries nor costs incurred to mitigate or avoid the risk of those injuries, satisfy the Article III standing requirement. The *Clapper* decision has been applied by many lower courts, particularly in the data breach context, in rejecting class actions due to the lack of any injury-in-fact sufficient to support Article III standing. Similarly, the Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*,[41] limiting federal court jurisdiction under the Alien Tort Statute, continued the trend of closing the doors of U.S. courts to foreign litigants seeking to take advantage of the class-action procedure to vindicate collective rights, which began in *Morrison*.[42]

E. 2013-2014

During the October 2013 term, the Court accepted only two class-action-related cases. Even so, it denied certiorari in another two cases that provided perhaps the best opportunity yet to explore the question of issue certification. By accepting certiorari review in *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*),[43] the Court appeared poised to revisit, and possibly overrule, the *Basic Inc. v. Levinson*[44] presumption of reliance in securities fraud on the market class actions. However, in the end, the Court's decision did not drastically change the analytical framework set forth in *Basic*.[45] Instead, it simply held that a defendant should have an opportunity to rebut the presumption.[46] The Court also issued its second opinion interpreting CAFA during the term. In *Mississippi ex rel. Hood v. AU Optronics*,[47] the Court held that *parens patriae* cases brought by states on behalf of citizens are not "mass actions" subject to CAFA.[48]

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40. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (U.S. 2013).

41. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (U.S. 2013).

42. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 247 (2010).

43. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (U.S. 2014) [hereinafter *Halliburton II*].

44. Basic Inc., v. Levinson, 485 U.S. 224, 225 (1988).

45. *Halliburton II*, 134 S. Ct. at 2426.

46. *Id.* at 2404.

47. Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 737 (U.S. 2014).

48. Below, the Fifth Circuit had split from the Fourth, Seventh, and Ninth Circuits and agreed with the defendants that CAFA removal was permitted because the real parties in interest were individual consumers in Mississippi. Mississippi *ex rel.* Hood v. AU Optronics Corp., 701 F.3d 796, 803 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 2736 (U.S. 2013) ("At its core, this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative. By proceeding the way it has, the plaintiff class and its attorneys seek to avoid the rigors associated with class actions (and avoid removal to federal court). . . . Because this suit is

The Court passed up two chances to clarify class-action procedure when it declined review of the Sixth Circuit's decision in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*[49] and the Seventh Circuit's decision in *Butler v. Sears, Roebuck & Co*.[50] Both cases provided excellent opportunities to consider the question of "issue certification," or the extent to which class certification is proper when limited issues can be resolved on a class-wide basis, even if entire claims cannot.

F. 2014-2015

The docket for the Court's October 2014 term included only one case with significance to class actions: *Dart Cherokee Basin Operating Co. v. Owens*,[51] a CAFA case in which the Court held that defendants do not need to present evidence in support of a removal petition, but rather must merely plead facts sufficient to justify federal jurisdiction under the Class Action Fairness Act. The Court initially granted certiorari in another case, *Public Employees' Retirement System of Mississippi v. IndyMac MBS*,[52] which presented questions about the scope of the statute of limitations tolling under the *American Pipe* doctrine.[53] However, the Court dismissed review as improvidently granted after the parties reached a settlement.[54]

As of this writing, the Court has granted certiorari review of two significant class action cases for its October 2015 terms. In *Campbell-Ewald Company v. Gomez*,[55] the Court will revisit the issue of the extent to which an offer of complete relief to a named plaintiff can moot a putative class action. And in *Spokeo, Inc. v. Robins*,[56] the Court will also explore the boundaries of Article III standing in connection with statutory damages claims, which are fertile ground for class action

a mass action under the terms of the CAFA, removal is proper.").

49. *In re* Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (U.S. 2014).

50. Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (U.S. 2014).

51. Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 549 (U.S. 2014).

52. Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 1515 (U.S. Mar. 10, 2014) (No. 13-640).

53. *See generally* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

54. *IndyMac MBS*, 721 F.3d 95, *cert. dismissed*, 135 S. Ct. 42 (U.S. Sept. 29, 2014).

55. Campbell-Ewald Co. v. Gomez, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3637 (U.S. May 18, 2015) (No. 14-857).

56. Spokeo, Inc. v. Robins, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (U.S. Apr. 27, 2015) (No. 13-1339).

practitioners.

III. THE IMPACTS OF ROBERTS COURT DECISIONS ON DAY-TO-DAY CLASS ACTION PRACTICE

The Roberts Court has been reluctant to issue sweeping opinions that establish firm doctrinal rules governing class action practice. Instead, the Court more often has simply decided the case in front of it and left it to lower courts and lawyers to further fill in doctrinal gaps. Perhaps the clearest example of this type of jurisprudence in the class-action context was reflected in the *Comcast* decision.[57] In *Comcast*, the Court clearly decided that the Third Circuit had erred in accepting particular expert testimony as sufficient to support the conclusion that damages could be determined on a common, class-wide basis in the case before the Court.[58] However, it left unclear whether common proof of damages was always required in order to satisfy Rule 23(b)(3)'s predominance requirement.[59] In the wake of the decision, defendants began to argue that *Comcast* prevents certification any time damages are individualized. These arguments have been largely unsuccessful in the lower courts, which have interpreted *Comcast* as a narrow decision limited to its facts and antitrust context.[60]

Although it is difficult to extract explicit practice guidance from such narrowly-targeted decisions, some litigation lessons do emerge when the Court's jurisprudence is analyzed by the different categories of cases. Despite the many missed opportunities for the Court to provide meaningful guidance on practical issues that litigants in class actions face regularly, there are some areas of class-action practice that have changed significantly under the Court. These areas will be discussed below in greater detail.

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57. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432-33 (U.S. 2013).

58. *Id.* at 1433.

59. *Id.* at 1428.

60. At the appellate court level, the Sixth and Seventh Circuits both held that *Comcast* required only a class-wide *injury*, not class-wide *damages*. *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (U.S. 2014); Butler v. Sears, Roebuck & Co., 727 F.3d 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (U.S. 2014). In 2014, the Seventh and Ninth Circuits issued decisions reaffirming the class-wide-injury view. *In re* IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599, 602 (7th Cir. 2014); Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1167 (9th Cir. 2014). In *Deepwater Horizon*, the Fifth Circuit concluded that "nothing in *Comcast* mandates a formula for [class-wide] measurement of damages in all cases." *In re* Deepwater Horizon, 739 F.3d 790, 815 (5th Cir. 2014). More recently, the First and Second Circuits have both held that *Comcast* did not require uniformity of injury or damages as a prerequisite to class certification. *See* Roach v. T.L. Cannon Corp., 778 F.3d 401 (2d Cir. 2015); *In re* Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015).

A. Arbitration

One area of unquestionable change during the Roberts era has been in the Court's consistent decisions upholding private arbitration over any right to collective redress. From the Court's first significant class-action-related decision in *Stolt-Nielsen* in 2009 to its *Amex III* decision in 2013, the Court has consistently upheld private arbitration clauses even in the face of attacks that they deprive litigants of class action procedure and, thereby, their right to justice.[61]

Concepcion was the first of a series of Supreme Court cases in which the Court held that the Federal Arbitration Act ("FAA") trumped common law theories that could be used to invalidate agreements as unconscionable for prohibiting class treatment of claims.[62] *Concepcion* made clear, in no uncertain terms, that state common law cannot be used to invalidate an arbitration agreement as in violation of state public policy, because it deprives a litigant of representative litigation procedures.[63] What's more, the *Concepcion* decision could have been based on a nuanced evaluation of the facts, but it was not.[64] The arbitration provision at issue in the case was decidedly consumer friendly.[65] For instance, it required AT&T to pay all non-frivolous arbitration costs; AT&T agreed to conduct arbitration in the customer's county; the customer had the choice of arbitration method (in-person, phone, or submissions) for claims of $10,000 or less; small-claims court was not barred; the arbitrator was not limited in the form of individual relief; and AT&T agreed to pay customers twice their attorneys' fees if they obtained more in arbitration than originally offered by AT&T.[66] But the Court's decision did not hinge on the fact that the fairness of the arbitration clause was at issue.[67] Instead, the Court held categorically that state laws holding arbitration clauses unconscionable are preempted by the FAA.[68] Lower courts following *Concepcion* have not necessarily read the decision that broadly, with some focusing on the specific consumer-friendly attributes of AT&T's arbitration clause as a means of distinguishing the Court's decision.[69] Nonetheless, *Concepcion* is

61. Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 663 (2010); Am. Express Corp. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (U.S. 2013).

62. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1742 (U.S. 2011).

63. *Id.* at 1755.

64. *Id.*

65. *Id.* at 1744.

66. *Id.*

67. *Id.* at 1746.

68. *Id.* at 1742.

69. *See, e.g.*, Feeney v. Dell Inc., 28 Mass. L. Rptr. 652, at *8 (Mass. Super. Ct. 2013), *rev'd*

probably the broadest, most generally stated, least fact-intensive decision of the Court thus far.[70]

Amex III built upon the *Concepcion* decision, which as previously discussed, clarified the preemptive force of the FAA vis-à-vis state common law.[71] In *Amex III*, the Court extended that concept to federal law.[72] Consistent with its holding in *Concepcion*, the Court "rigorously enforced" the terms of the arbitration agreement and found the FAA controlled in the face of federal, as well as state, statutes.[73] The Court noted that the only way to override the FAA's provisions is by finding a contrary congressional intent, which the Court noted did not exist in federal antitrust laws.[74]

The Court also rejected the "effective vindication" argument based on the idea that the economics of litigation would leave individual plaintiffs without a practically effective way of vindicating their rights absent a representative or group action procedure.[75] Although the plaintiffs determined the cost of individual arbitration outweighed their statutory remedies, the Court noted that this did not waive their right to pursue that remedy.[76] Rather, the Court determined that every claim brought under antitrust law is not guaranteed an affordable procedural path to adjudicate.[77]

The only decision that bucks the trend of decidedly arbitration-friendly decisions is the 2013 *Oxford Health* decision, where the Court upheld an arbitrator's decision to enforce class arbitration despite an arbitration agreement that was arguably vague on the issue of class arbitration.[78] However, the *Oxford Health* decision also turned on the analysis of a significant theme for the Roberts Court: the effect of a particular party's express waiver or consent.[79] In *Oxford Health*, the defendant waived the issue of whether the arbitrator had the power to decide the issue of arbitrability, leaving the Court only to decide whether the arbitrator's decision to enforce class arbitration passed the minimally exacting standard of whether the arbitrator's decision was arbitrary and

993 N.E.2d 329 (Mass. 2013).

70. *Concepcion*, 131 S. Ct. at 1742.

71. *Id.* at 1752; Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309-10 (U.S. 2013).

72. *Am. Express Co.*, 133 S. Ct at 2309-10.

73. *Id*.

74. *Id.* at 2309.

75. *Id.* at 2310.

76. *Id*. at 2308 n.5.

77. *Id.* at 2309.

78. Oxford Health Plans LLC v. Sutter*,* 133 S. Ct. 2064, 2071 (U.S. 2013).

79. *Id.* at 2071.

capricious, and avoiding the more generally impactful question of whether the decision should have been made by the arbitrator in the first place.[80]

Although originally viewed as a challenge to the Supreme Court's ruling in *Stolt–Nielsen*,[81] the Court noted a "stark contrast" between *Oxford Health* and *Stolt-Nielsen*.[82] In *Stolt-Nielsen* the parties stipulated that they had not reached an agreement on class arbitration, so the arbitrators did not have a contract to construe and could not identify any agreement authorizing class proceedings.[83] Thus, in *Stolt-Nielsen*, the Court did not find that the arbitrator misinterpreted the contract, but found that he abandoned his interpretive role.[84] Conversely, in *Oxford Health*, "the arbitrator did construe [a] contract . . ., and did find an agreement to permit class arbitration."[85]

The *Oxford Health* opinion leaves several key questions unanswered. First, the Court indicated that it "would face a different issue" had Oxford argued that the availability of class arbitration under the contract was a "question of arbitrability," an issue that the Court left open in *Stolt-Nielsen*.[86] The Court also quoted its opinion in *Green Tree Financial Corp. v. Bazzle*[87] to the effect that questions of arbitrability, which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," are appropriate for courts to decide or review de novo.[88]

Of all the Roberts Court's class-action-related decisions, its decisions dealing with arbitration seem to have the single biggest impact on limiting class-action litigation. Defendants who have direct contracts with the consumers and might be in a position to sue them are now able to limit their class action exposure. These decisions, combined with an increase in the usage of arbitration clauses in consumer and employment agreements, have undeniably impacted the viability of many class actions, especially those in the areas of consumer fraud, products, and

80. *Id.* at 2066.

81. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 663 (2010) (finding an arbitrator abused his powers by enforcing a class arbitration).

82. *Oxford Health*, 133 S. Ct. at 2070.

83. *Id.* at 2069-70.

84. *Id.* at 2070.

85. *Id.*

86. *Id.* at 2068 n.2; *see also Stolt-Nielsen*, 559 U.S. at 680 (making clear that the Court had not yet decided whether the availability of class arbitration is a question of arbitrability).

87. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) (plurality opinion).

88. *Oxford Health*, 133 S. Ct. at 2068, n.2 (quoting *Green Tree*, 539 U.S. at 452).

employment discrimination.[89] However, contrary to the predictions of some early commentators, they have not ended consumer class actions as we know them.[90] The difficulty in overcoming class arbitration waivers in certain areas has simply led the plaintiffs' bar to focus their efforts on new class-action litigation, where arbitration agreements are either prohibited or impractical (insurance, healthcare, data privacy, antitrust, and retail products), or are against corporate defendants that, for one reason or another, have not adopted class arbitration waivers.

Finally, despite the clarity and breadth of decisions like *Concepcion* and *Amex III*, some lower courts have continued to find ways to strike down specific class arbitration waivers.[91] In particular, the Supreme Court's *Concepcion* and *Amex III* decisions have failed to stem the class-action tide in the employment sector, even where arbitration agreements preclude collective actions. The National Labor Relations Board ("the Board"), which enforces the National Labor Relations Act ("NLRA"), has taken a firm position that Section 7 of the NLRA protects employees' rights to pursue collective actions, even if they have signed arbitration agreements that bar those very actions. The Board's theory is that the FAA's policy of favoring arbitration, as described in *Concepcion* and *Amex III*, is not sufficient to override the NLRA's policy of promoting collective action. After all, according to the Board's logic, "[T]he right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA."[92] *Concepcion*'s reasoning does not apply to NLRA collective actions, the Board argues, because *Concepcion* dealt with FAA preemption of state common law. And *Amex III* does not apply because the NLRA contains a Congressional command to preclude enforcement of class-action waivers.[93]

89. *See* David Segal, *A Rising Tide Against Class-Action Suits*, N.Y. TIMES (May 5, 2012), http://www.nytimes.com/2012/05/06/your-money/class-actions-face-hurdle-in-2011-supreme-court-ruling.html?_r=0.

90. *See* Editorial, *Gutting Class Action*, N.Y. TIMES (May 12, 2011), http://www.nytimes.com/2011/05/13/opinion/13fri1.html?_r=2.

91. *See* Jonathon L. Serafini, *The Deception of* Concepcion*: Saving Unconscionability after* AT&T Mobility LLC v. Concepcion, 48 GONZ. L. REV. 187, 212, 215 (2012) (citing courts that still rely on unconscionability as permitted by the FAA to find arbitration agreements waiving class procedures to be unenforceable as well as courts that find an absence of mutual assent in executing the agreement). Despite *Concepcion*, "[o]ther contract principles under state law, such as those governing the formation and interpretation of an agreement, may still pertain, subject to the overarching objectives of the FAA." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 24 A.3d 777, 792 (N.J. Super. Ct. App. Div. 2011).

92. *In re* Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *9 (2014).

93. *Id.* at *12, *21; *see also In re* D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274,

But what circuit courts recognized was that the Supreme Court was not writing in a vacuum when it decided *Concepcion* and *Amex III*. Although neither case expressly addressed the relationship between the FAA and the NLRA, lower courts interpreting the Board's position have taken their cues from *Concepcion* and *Amex III* to enforce class-action waivers beyond the parameters of those two cases. Indeed, every circuit court to consider it has rejected the Board's theory that class waivers in employment agreements are unenforceable based on NLRA policy.[94] Meanwhile, the Board continues to enforce the NLRA to require collective actions despite class waivers because it only views reversal by the Supreme Court as binding. But no cases have reached the Supreme Court because the Board, always on the losing side, has not petitioned for review. If, and when, the Supreme Court considers the collision of the FAA and the NLRA, it may be ready to write the next chapter on class-action waivers in arbitration agreements. Until then, circuit courts appear to be taking a uniform approach in expanding the Court's doctrine of enforcing arbitration agreements that bar class procedures.

B. Class Action Fairness Act

The Supreme Court's resolution of CAFA jurisdictional issues has significantly affected the ways in which both plaintiffs and defendants attempt to establish or refute federal jurisdiction in class actions. Though, unlike its arbitration decisions, the Court's decisions fall far short of answering many of the questions that continue to arise in the CAFA removal context. The Court's opinions on CAFA issues have all set forth clear rulings on defined legal issues, although the issues are somewhat narrowly focused.

In *AU Optronics*, the Court emphasized the importance of the fact that *parens patriae* actions are not "mass actions."[95] It also highlighted that fact's relevance to class actions in which there is parallel regulatory action.[96] However, these actions only represent a small subset of cases; therefore, the vast majority of class-action litigation continues to be driven by private attorneys.

Standard Fire Ins. Co. v. Knowles answered an oft-arising question

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at *16 (2012).

94. D.R. Horton, Inc. v. Nat'l Labor Relations Bd., 737 F.3d 344, 364 (5th Cir. 2013); Owen v. Bristol Care Inc., 702 F.3d 1050, 1052-53 (2013); Richards v. Ernst & Young, LLP, 734 F.3d 871, 873 (9th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 299 (2d Cir. 2013).

95. Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 744-45 (U.S. 2014).

96. *Id.* at 743-44.

of significant practical importance to litigants and lower court judges.[97] This case served to close a loophole that threatened one of the key objectives of CAFA, making federal jurisdiction available to defendants who found themselves knee deep in rural outposts of state-court jurisdictions where Rule 23 strictures on certification received short shrift.[98] Many plaintiffs' attorneys understood that a damages stipulation could both block federal removal and dissolve post-certification. *Standard Fire* snuffed out the tactic.[99]

A unanimous Court explicitly ruled that a named plaintiff's stipulation to seek less than a $5 million jurisdictional threshold in a putative class action could not be used to defeat federal removal jurisdiction under CAFA.[100] Because due process prevents a named plaintiff from binding unnamed class members prior to class certification, the Court recognized that a stipulation to seek less than $5 million is essentially meaningless.[101] Justice Stephen Breyer's opinion laid down a bright line: damages stipulations that do not bind unnamed class members must be ignored when analyzing the amount-in-controversy for removal jurisdiction under CAFA.[102] "To hold otherwise," Justice Breyer wrote, "would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'"[103]

However, although it answered a specific question of great importance to class-action practitioners, the express language of the *Standard Fire* opinion left open broader questions relating to the standards with which lower courts should judge whether CAFA's amount in controversy threshold have been met.[104]

Perhaps the biggest post-*Standard Fire* question focused on the standard of proof by which defendants had to show more than $5 million in dispute to trigger CAFA removal jurisdiction. Before *Standard Fire*, there was a split among circuit courts on whether a defendant had to show $5 million in controversy by either preponderance of the evidence

97. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1347 (U.S. 2013).

98. *Id.* at 1346, 1348.

99. *Id.* at syllabus.

100. *Id.*

101. *Id.* at 1348-49 ("a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified").

102. *Id.* at 1350.

103. *Id.*

104. *Id.*

(i.e., Sixth and Eighth Circuits) or as a matter of legal certainty (i.e., Ninth and Third Circuits).[105] *Standard Fire*, while striking down the particular tactic of using damages stipulations as artificial bypasses to CAFA jurisdiction, did not expressly address the level of required proof.[106] On the other hand, despite the lack of express language in the *Standard Fire* decision on the applicable standard, lower courts have taken the decision as at least a strong hint that the preponderance standard was the correct one. In *Rodriguez v. AT&T Mobility Services, LLC*,[107] the Ninth Circuit overruled its longstanding precedent that a defendant may remove pursuant to CAFA only when proving by a legal certainty that more than $5 million is in dispute.

The *Rodriguez* court reasoned that *Standard Fire* had undercut the framework that had previously established the Circuit's legal certainty test for CAFA removal.[108] As a result, the court found that *Standard Fire* effectively overruled prior Ninth Circuit precedent, bringing it in line with the majority rule that a defendant must prove the amount in controversy by a preponderance of the evidence.[109]

In other words, the *Rodriguez* court filled in *Standard Fire*'s doctrinal gaps in a similar way that the circuit courts used *Concepcion* and *Amex III* to respond to the NLRB's position on class waivers in arbitration agreements. That is, when the Court issues a class-action rule, it is often the underlying principle behind the decision that has as much influence going forward as the narrow ruling itself.

The Court's 2015 decision in *Dart Cherokee*[110] provided another solution to a common issue facing practitioners in removed cases under CAFA. There, the Court addressed the removal pleading standard and whether a defendant had to attach to a removal notice fact declarations or other "evidence" sufficient to prove jurisdiction. In fact, the defendant's burden is similar to a plaintiff's pleading burden—a short, plain statement will do.[111] Further, only if the amount in controversy is challenged is the defendant then required to prove jurisdiction exists by

105. *Compare* Frederick v. Hartford Underwriters Ins. Co., 683 F.3d 1242, 1246 (10th Cir. 2012) (rejecting the legal certainty test) *with* Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 999 (9th Cir. 2007) (confirming legal certainty regime in Ninth Circuit before *Standard Fire*).

106. *Standard Fire*, 133 S. Ct. 1345.

107. Rodriguez v. AT&T Mobility Serv., LLC, 728 F.3d 975, 982 (9th Cir. 2013).

108. *Id.* at 981.

109. *Id.*

110. Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 554 (U.S. 2014) ("It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court.").

111. *Id.* at 553.

a low preponderance of the evidence standard.[112] The Court's clear decision that pleading facts that, if true, would be sufficient to establish jurisdiction is enough to satisfy the pleading requirement significantly clarifies the procedure and avoids a situation where a removing defendant, out of an abundance of caution, had to prepare declarations and even expert testimony before removing a class action under CAFA.[113]

C. Jurisdictional Decisions

Many of the Court's key decisions impacting class-action practice are not decisions that directly touch on class-action procedure itself. By answering various questions relating to the scope of federal court jurisdiction, the Court has quietly made a substantial mark with significant class-action decisions that have effects well beyond the narrow facts of the cases before the Court.

1. Subject Matter Jurisdiction

The Court issued strong decisions limiting the subject matter jurisdiction of the federal courts over foreign litigants in the *Morrison* decision in 2010 and again in the *Kiobel* decision in 2013.[114] In both cases, the Court articulated and followed a specific legal framework for analyzing whether Congressional enactments should have extraterritorial reach.[115]

This approach culminated in *Kiobel*,[116] when the Court held that the presumption against extraterritorial jurisdiction of the U.S. Courts also applies to human rights cases filed under the Alien Torts Statute

112. *Id*.

113. Although it was much needed guidance from a practitioner's perspective, the direct holding in *Dart Cherokee* regarding the relevant CAFA removal standards was not particularly controversial. The more controversial aspect of the case came in the form of a significant dispute among the Justices on whether the Court should have heard the case at all. *Id.* In his dissent, Justice Scalia pointed out that although the district court may have improperly remanded the case to state court, the Tenth Circuit Court denied appellate review under the permissive review statute, 28 U.S.C. § 1453(c)(1). *Id.* Thus, the actual controversy before the Court was the propriety of the Tenth Circuit's review denial—not the merits of the district court's remand order. *Id.* at 558 (Scalia, J., dissenting) ("Because we are reviewing the Tenth Circuit's judgment, the only question before us is whether the Tenth Circuit abused its discretion in denying Dart permission to appeal the District Court's remand order.").

114. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 273 (2010); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1660 (U.S. 2013).

115. *Morrison*, 561 U.S. at 247; *Kiobel*, 133 S. Ct. at 1664-66.

116. *Kiobel*, 133 S. Ct. at 1660.

("ATS"). Prior to *Kiobel*, the ATS, a one-sentence, purely jurisdictional statute, was a frequently-used vehicle for bringing international class actions against both governmental and corporate defendants based on alleged human rights abuses occurring throughout the world.[117]

The *Kiobel* decision continues a trend of limiting jurisdiction over extraterritorial disputes.[118] In all, the Supreme Court has made it clear that a presumption against extraterritoriality applies absent clear Congressional authorization to the contrary.

The *Morrison* and *Kiobel* decisions, taken together, have significantly closed the doors of the federal courts, and favorable class-action procedure, to foreign litigants in two key areas of class-action litigation: securities and human rights.[119]

2. *Erie* Doctrine

Sometimes a class-action case comes along where the Court is presented with the opportunity to issue a ruling that appears to both expand and cut back on class-action procedure. *Shady Grove* presented that opportunity to the Court in 2010, resulting in an opinion that expanded class-action jurisdiction in the case, while potentially culling future class actions in other contexts.[120]

In a 5-4 decision with Justice Antonin Scalia writing for the majority, the Court held that as long as a federal plaintiff satisfies Rule 23 certification requirements, a class can be certified.[121] In *Shady Grove*, a New York law permitted recovery of a penalty for violating a state insurance law, but it did not permit recovery on a class basis.[122] The Supreme Court, following Scalia's lead, struck down the state class-action bar on *Erie* grounds because the state procedural rule was trumped by Rule 23.[123] Indeed, *Shady Grove* stands as one of the most significant pro class-action cases decided by the Court.

But there are limits to just how class-action-friendly the decision has turned out to be in practice. Justice John Paul Stevens' concurrence suggested that *Shady Grove* may not have gone as far as Justice Scalia

117. 28 U.S.C. § 1350 (2012); *see also* Gonzalo Zeballos & Paul Karlsgodt, *America's Closing Doors*, CDR MAG. (Dec. 6, 2013), http://www.cdr-news.co.uk/categories/expert-views/4624-americas-closing-doors.

118. *Kiobel*, 133 S. Ct. at 1669.

119. Zeballos & Karlsgodt, *supra* note 117.

120. Shady Grove Orthopedic Ass'n, P.A. v. Allstate Ins. Co., 559 U.S. 393, 416 (2010).

121. *Id.* at 394.

122. *Id.* at 397.

123. *Id.* at 416.

would have wanted in closing off state-based class-action bars under certain laws.[124] As Justice Stevens saw it, only those class action bars that were purely procedural were vulnerable to succumbing to the supremacy of Rule 23.[125] But where the provision barring class procedures was intertwined with the substance of the state class-action bar, Justice Stevens said that under *Erie*, the state class-action bar must stand.[126] Because *Shady Grove* garnered a slim 5-4 majority, Justice Stevens' concurrence, which narrowed the holding, may end up being more influential than Justice Scalia's opinion.[127] Perhaps most interesting is that *Shady Grove*, like *Wal-Mart* and *Comcast*, illustrates Justice Scalia's continuing interest in explaining not only how Rule 23 is supposed to work but also how it occupies an important place within federal civil procedure.[128] Where many might view Justice Scalia's *Wal-Mart* and *Comcast* opinions as an attempt to curtail Rule 23, *Shady Grove* shows how he attempts to amplify its reach beyond what state legislatures intend. *Shady Grove* remains a strong indicator that the Court is most interested in finding the right balance and tone for class litigation, rather than destroying it.

But *Shady Grove* was not all about expansion of class procedures. The decision—and the justices who signed onto the majority opinion—also indicated the Court's preference for finding Rule 23 certification to be a procedural mechanism as opposed to a substantive right.[129] That doctrinal position has important consequences for how lower courts view access to class litigation, particularly in other contexts such as in connection with class waivers.

3. Anti-Injunction Act

In *Smith v. Bayer Corp.*, the Court issued a decision that instructed class-action practitioners on the limits of federal power over state courts adjudicating parallel class actions.[130] In this case, a district court denied certification of a class of prescription drug purchasers.[131] The district court then enjoined a state court in a separate case from certifying a class

124. *Id*. at 424.
125. *Id.* at 416-17.
126. *Id.* at 423.
127. *Id.* at 416-36.
128. *Id.* at 406-07.
129. *Id.* at 408.
130. Smith v. Bayer Corp., 131 S. Ct. 2368, 2375-82 (U.S. 2011).
131. *Id.* at 2374.

based on a nearly-identical theory of the case.[132] The Eighth Circuit affirmed the injunction, reasoning that despite the Anti-Injunction Act, the relitigation exception of issue preclusion barred state-court certification of a class that had already been denied certification in federal court.[133]

The Supreme Court reversed.[134] Primarily, the Court pointed out that a state court can apply Rule 23 procedures in different ways than federal court, so there was no reason for the district court to assume that the certification questions were exactly the same in both cases.[135] In fact, "the West Virginia Supreme Court ha[d] *disapproved* the approach to Rule 23(b)(3)'s predominance requirement that the Federal District Court embraced" in *Bayer Corp*.[136] So, because the relevant legal standards were so different, there was no basis for the district court to circumvent the Anti-Injunction Act and interfere with the state-court proceeding.[137]

The lesson is that if plaintiffs can bring two related, yet separate, class actions in state and federal court, denial of certification in federal court does not necessarily doom the state-court class. The procedural complexity of *Smith* might limit its breadth because it is not easy to understand the interplay between state and federal court; but for those practitioners who put in the time to study the case, it can pay dividends in knowing how to craft, or combat, a class.

4. Mootness

In *Genesis Healthcare Corp. v. Symczyk*,[138] the Court yet again missed an opportunity to address an issue of great practical importance due to a party's waiver of an issue in the case before it.[139] *Genesis* raised the question whether a defendant in a representative action can avoid class- or group-wide exposure by "picking off" the representative plaintiffs' claim.[140] Specifically, the Court found that "the mere presence of collective-action allegations in the complaint cannot save the suit

132. *Id.* at 2373.
133. *Id.* at 2370-71.
134. *Id.* at 2372.
135. *Id.* at 2377.
136. *Id*. at 2378 (emphasis in original).
137. *Id.* at 2382.
138. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (U.S. 2013).
139. Although *Genesis* involved an attempt to "pick off" the claim of a representative plaintiff in an FLSA collective action and not a class action under Rule 23, the practice has become common in both contexts. *Id.* at 1527.
140. *Id.*

from mootness once the individual claim is satisfied," but that holding is limited in impact because of a concession that the offer did render the claims moot.[141]

In *Genesis*, the plaintiff brought a Fair Labor Standards Act ("FLSA") action to challenge Genesis's policy of automatically deducting 30 minutes per shift for meal breaks regardless of whether the employee actually took the break.[142] Simultaneously with its answer, Genesis served a Rule 68 offer of judgment, which included $7,500 for alleged unpaid wages and reasonable attorneys' fees, costs, and expenses.[143] The offer was left open for 10 days, during which time the plaintiffs did not respond.[144] Genesis then moved for dismissal, which the district court granted, finding that the plaintiffs' claims were moot.[145] The Third Circuit Court reversed the decision based on its' concern that the defendants could simply "pick off plaintiffs" in FLSA collective actions, and remanded to allow the plaintiff to seek "conditional certification."[146] However, all parties conceded, and the Third Circuit did not dispute, that once the Rule 68 offer of judgment was made, the named plaintiff's case became moot even though the offer was not accepted.[147]

Justice Elena Kagan's dissent in *Genesis* explained why the case may have limited application: the majority's reasoning relied on the truism that if a claim is moot, it's moot, and the majority's opinion left the underlying question of whether an offer actually rendered a plaintiff's individual or representative claims moot to the lower courts. As she stated, "[s]o a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home."[148] Indeed, shortly after *Genesis*, the Ninth Circuit held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot."[149]

Shortly before this Article was finalized for publication, the Court granted certiorari in another case raising the issue whether an offer of full relief could moot class claims, this time directly in the class context.

141. *Id.* at 1529.
142. *Id.* at 1527.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 1534 (Kagan, J., dissenting).
149. Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 954-55 (9th Cir. 2013).

In *Campbell-Ewald Co. v. Gomez*,[150] the Court may decide the standard under which a court should determine whether an offer of judgment to an individual plaintiff for the full amount of a statutory claim moots the plaintiff's ability to pursue class claims. Among the questions presented is "[w]hether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim" and "[w]hether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified."[151] On the other hand, the Court's recent history suggests a strong risk that one or more procedural barriers could ultimately prevent a ruling on that key issue. Time will tell.

D. Class Certification Decisions

Much commentary regarding the Court's tolerance for class actions has turned on its decisions affecting class certification standards. Particularly, criticism has targeted the seemingly severe limitations that *Dukes* placed on plaintiffs' abilities to certify classes, followed by *Comcast*'s even tighter squeeze.[152]

Those of us who have been in the trenches prosecuting or defending class actions from the beginning of the Roberts Court era to the present have no doubt seen significant changes in the ways that federal courts, and state courts following the federal courts' lead, address the class certification question. Prior to 2005, conventional wisdom among many judges was that class certification could be dealt with. Much of this attitude had its roots in a long-standing misinterpretation of the Court's 1974 decision in *Eisen v. Carlisle & Jacquelin*,[153] which many Courts interpreted as preventing any kind of critical analysis into any factual issues. Common refrains from plaintiffs' attorneys and courts included the likes of: assume the allegations in the pleadings are true; certify first and ask questions later; and variations in "damages" do not destroy predominance if "liability" can be determined on a class wide basis.

150. Campbell-Ewald Co. v. Gomez, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3637 (U.S. May 18, 2015) (No. 14-857).

151. Petition for a Writ of Certiorari, *Campbell-Ewald*, 83 U.S.L.W. 3637, 2015 WL 241891, at *i.

152. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 778 (2013); John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO. L. REV. 463, 465 (2013); Robert G. Bone, *The Misguided Search For Class Unity*, 82 GEO. WASH. L. REV. 651, 699 (2014).

153. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

There can be no doubt now that *Eisen* is "dead" in that these misinterpretations of the ruling have been discredited, and the idea of a "rigorous analysis" of class certification now actually means something. Courts increasingly require significant discovery before addressing class certification. Multiple-day evidentiary hearings are often held in the place of perfunctory decisions on the papers or after a brief oral argument. Expert testimony is increasingly scrutinized.

But a close look at the Court's class-certification decisions does not necessarily support the conclusion that the Supreme Court killed *Eisen*. The Court's decisions did not truly break new doctrinal ground that was significantly different than the ground already being broken by the lower courts at the time that they were decided. Moreover, rather than establishing black-letter rules, the common theme among most of the decisions is that they have turned on particular facts or idiosyncrasies in the lower court record. The Court has also declined numerous opportunities to set new, clear standards on the elements of class certification and the nature and quantum of proof required to satisfy those elements. And where the Court has articulated what appear to be firm rules, it often reflects a stamp of approval on standards that have been in place throughout the federal system for some time.

1. The Securities Cases

In one sense, the *Amgen*, *Halliburton I*, and *Halliburton II* decisions can be seen to represent the Court's endorsement of the black-letter rule that a plaintiff should not be required to prove an element on the merits as a precondition to class certification.[154] However, in all of these cases, the Court essentially applies existing legal principles to the facts to reach that result.[155]

In *Halliburton I*, for instance, the Court held that to certify a class of securities plaintiffs, proof is required to show the market efficiency regarding the particular stock at issue.[156] In *Amgen*, the Court held that 10b-5 securities plaintiffs can obtain class certification without proving the materiality of the alleged stock misrepresentation.[157] The Court also held that defendants are not entitled to present evidence of an absence of

154. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (U.S. 2013); *Halliburton I*, 131 S. Ct. 2179, 2183 (U.S. 2011); *Halliburton II*, 134 S. Ct. 2398, 2406 (U.S. 2014).

155. *Amgen Inc.*, 133 S. Ct. at 1191; *Halliburton I*, 131 S. Ct. at 2184-87; *Halliburton II*, 134 S. Ct. at 2402-05.

156. *Halliburton I*, 131 S. Ct. at 2185.

157. *Amgen Inc.*, 133 S. Ct. at 1197.

materiality at the class certification stage to defeat certification.[158]

Emphasizing that the presence or absence of materiality must be determined on an objective basis, the Court further stated that certification examines for issues that are common to all class members: "As to materiality, therefore, the class is entirely cohesive: It will prevail or fall in unison. In no event will the individual circumstances of particular class members bear on the inquiry."[159] *Halliburton I* allowed the Court to decide *Amgen* in this manner because a fraud-on-the-market theory presumes that an efficient market will rely on material misrepresentations aired to the general public.[160]

Both *Halliburton I* and *Amgen* hinted at, but did not address, the *Basic, Inc. v. Levinson* presumption—which presumes reliance for a class of investors alleging financial losses because of misleading stock information.[161] That question was reserved for *Halliburton II*.[162] While *Halliburton II* did not overturn the *Basic* reliance presumption, the Court did hold that before a class can be certified, defendants must be provided a chance to rebut the *Basic* presumption.[163]

In the end, the trio of cases laid down procedural markers for plaintiffs and defendants battling certification in securities cases; but the decisions did not offer much in the way of practical takeaways for general class-action practitioners aside from more cases to cite for the long-standing proposition (which even *Eisen* can still be fairly cited to support) that a plaintiff does not have to *prove* any of the elements of his or her claims on the merits as a prerequisite to class certification.[164]

2. *Dukes*: Class-Action Killer or Reflection of Contemporary Standards?

Dukes has been referred to as the "death of *Eisen*."[165] More

158. *Id.* at 1204.

159. *Id.* at 1191.

160. *Id.* at 1192.

161. *Id.* at 1192 (citing Basic Inc. v. Levinson, 485 U.S. 224, 245-47 (2013)); *Halliburton I*, 131 S. Ct. at 2181-82 (citing *Basic*, 485 U.S. at 245-47); *Basic*, 485 U.S. at 247.

162. *Halliburton II*, 134 S. Ct. 2398, 2407 (U.S. 2014).

163. *Id.* at 2404.

164. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 157-58 (1974); *Amgen Inc.*, 133 S. Ct. at 1191; *Halliburton I*, 131 S. Ct. at 2183; *Halliburton II*, 134 S. Ct. at 2406.

165. *See* Paul Karlsgodt, *Class Action CLE Recap: Insights on the 2012-13 Supreme Court Term From the Bench and Both Sides of the Bar*, CLASSACTIONBLAWG (May 14, 2013), http://classactionblawg.com/2013/05/14/class-action-cle-recap-insights-on-the-2012-13-supreme-court-term-from-the-bench-and-both-sides-of-the-bar/; *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2564 n.6 (U.S. 2011).

accurately, *Dukes* was simply the first time that the Supreme Court, like many lower courts before it, expressly stated that *Eisen* should not be interpreted to prevent any examination of facts in assessing class certification simply because those facts might be relevant to merits questions that may overlap with class certification questions. In fact, just prior to *Dukes*, there was a growing body of circuit decisions that had already rejected the idea that questions overlapping with the merits were off limits, including the Ninth Circuit's decision below in *Dukes*[166] itself (which is discussed in more detail below). In 2006, for instance, the Second Circuit rejected the premise that a district court had to avoid merits considerations when it made class certification decisions.[167] What's more, the court applied a rigorous Rule 23 approach with respect to the 23(b)(3) predominance inquiry that the Supreme Court later reflected in *Dukes* and *Comcast*.[168]

Likewise, the Third Circuit in 2008 said that *Eisen* did not preclude a court from looking at merits issues when making a class certification decision.[169] Rather, *Eisen* merely barred "a merits inquiry that is not necessary to determine a Rule 23 requirement."[170] Citing *de rigueur* class certification standards, the court explained that "[b]ecause the decision whether to certify a class 'requires a thorough examination of the factual and legal allegations,' the court's rigorous analysis may include a 'preliminary inquiry into the merits,' and the court may 'consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take.'"[171] Thus, the idea that a merits inquiry could overlap a class certification examination was well entrenched before *Dukes* because lower courts understood the limitations of *Eisen*.

A second key contribution attributed to *Dukes*, which was more of a trend already started within the lower courts, was its rejection of the idea of "trial by formula." However, district courts had also rejected plaintiffs' attempts to improperly conduct trial-by-formula class certification well before Justice Scalia cast a more highly publicized

166. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010).

167. *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 42 (2d Cir. 2006), *clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007) ("we decline to follow the dictum in *Heerwagen* suggesting that a district judge may not weigh conflicting evidence and determine the existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits").

168. *Id.*

169. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 317 (3d Cir. 2008) (as amended Jan. 16, 2009).

170. *Id.*

171. *Id.* (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 166 (1974)).

dark shadow over the practice in the *Dukes* opinion. In fact, in a 2009 Title VII case similar to *Dukes*, the Eastern District of Michigan denied class certification because plaintiffs' theory of the case relied on vague statistical proof that different managers throughout a large company engaged in discriminatory employment practices.[172] But as in *Dukes*, two years later, the vast discrepancies among the various locations "undermine[d] a conclusion that the statistics are sufficient to demonstrate that there is a common, class-wide discriminatory impact against the putative class members."[173] In addition, the court determined that Rule 23(b)(2) certification would have been completely improper because the plaintiffs sought far more than just injunctive relief—they sought back pay and front pay in the form of substantial money damages.[174] So a major thrust of *Dukes* was actually applied as a matter of course by a district court two years before Justice Scalia's opinion purportedly shook up the class-action bar, and therefore, *Dukes* represents more of a stamp of approval on the trend in the lower courts rather than a sea change in the standards impacting class-action practice.

The main original contribution of the *Dukes* opinion to class action jurisprudence was to give teeth to the commonality element of Rule 23(a).[175] Before *Dukes*, courts widely accepted the notation that just about any common issue would satisfy the commonality element, so the element was being litigated less and less frequently. Justice Scalia challenged this conventional wisdom by using the commonality element as the primary vehicle for finding that the class in *Dukes* should not have been certified even under Rule 23(b)(2), which does not require the more exacting "predominance" of common issues.[176] After *Dukes*, what used to be a foregone conclusion now requires some analysis. However, in the context of damages class actions, where predominance is required anyway, giving the commonality element teeth does not significantly change the practical challenges of seeking or defending class certification.

Much of the remainder of Justice Scalia's majority opinion in *Dukes* is little more than a teaser. The Court unanimously held—like the

172. Serrano v. Cintas Corp., No. CIV. 04-40132, 2009 WL 910702, at *6 (E.D. Mich. Mar. 31, 2009), *aff'd sub nom*. Davis v. Cintas Corp., 717 F.3d 476 (6th Cir. 2013).

173. *Id.*

174. *Id.* at *10 ("If the nature of the damages calculations is individualized and if the proposed class members have an ability to bring individual actions, the damages claims 'necessarily predominate over requested declaratory or injunctive relief" and the requested damages cannot be recovered pursuant to Rule 23(b)(2).").

175. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550-51 (U.S. 2011).

176. *Id.* at 2559.

Eastern District of Michigan—that Rule 23(b)(2) certification was inappropriate in the specific case before it because the plaintiffs' ultimate goal was the recovery of monetary relief in the form of back pay.[177] The Court recognized that the test for whether Rule 23(b)(2) certification is appropriate is whether monetary relief is "incidental" to the injunctive or declaratory relief sought. However, *Dukes* was an easy case, therefore the Court did not go further in setting a framework for determining whether relief is "incidental" in a broader sense.[178] The Court also suggested, but did not decide, that expert testimony should be subject to a *Daubert* standard in order to be accepted at the class certification phase.[179] Instead, Justice Scalia engaged in pages of detailed scrutiny of the specific expert testimony presented by the plaintiffs to support their theory of class-wide discrimination, an approach that would later be repeated in the *Comcast* case.[180] Similarly, the Court "disapproved" of the idea of a "trial by formula" but did not provide a specific rule prohibiting statistical proof as a proxy for common evidence in class actions, nor did it set forth any standards by which the reliability of statistical proof should be evaluated.[181] In short, Justice Scalia did not hide his disdain for class actions, but he fell far short of announcing any bright-line rules or legal standards that would substantially curtail class actions in the future.

On the other hand, there is little doubt that *Dukes* provided the foundational language upon which many class certification decisions since have been based, either granting or denying certification, even if the formal holding of the decision is somewhat narrow in scope. When the final word on the Court's treatment of class actions is written, *Dukes* will no doubt figure prominently.

Indeed, *Dukes* already provides decisional framework for lower courts that both grant and deny class certification motions. In one of the more noteworthy post-*Dukes* cases, the Third Circuit relied on *Dukes'* aggressive pursuit of commonality to deny certification when plaintiffs could not establish a reliable means of identifying class members.[182] Without adequate identification, they could not show any common questions were capable of common answers, as required by *Dukes*.[183]

177. *Id.* at 2557.
178. *Id.*
179. *Id*. at 2553-54.
180. *Id.* at 2553-57.
181. *Id.* at 2561.
182. Carrera v. Bayer Corp., 727 F.3d 300, 312 (3d Cir. 2013).
183. *Id.* at 310.

In that case, *Carrera v. Bayer Corp.*,[184] plaintiffs sought to certify an advertising class based on claims that Bayer falsely advertised its One-a-Day WeightSmart dietary supplement ("WeightSmart"). Bayer objected to class certification, arguing that it would be impossible to ascertain the members of the class due to a lack of proof about whether putative class members had, in fact, purchased the product.[185]

The court held that the plaintiff was required to demonstrate an "administratively feasible" means of identifying who purchased WeightSmart—one that did not require mini-trials or individualized fact-finding as to each putative member of the class.[186] The plaintiff sought to satisfy his burden by relying on retailer records and affidavits submitted by class members attesting to their purchases of WeightSmart.[187] The court rejected both methods, reasoning that the plaintiff had failed to demonstrate any evidence that retailer records existed that would allow for the identification of purchasers and that affidavits are insufficient to prove membership in the class.[188]

The language of *Dukes*, however, can also be used to support class certification. As the Court explained, "for purposes of Rule 23(a)(2), even a single common question will do" to support certification.[189] In September 2014, the Ninth Circuit relied on that language to certify a class of employees who alleged their employer's policy of requiring off-the-clock, unpaid, overtime work violated state law.[190] The employer argued certification was improper after *Dukes* because too many individualized questions overwhelmed the common issues and threatened to violate the employer's right to due process.[191] But the Ninth Circuit disagreed.[192] It emphasized that *Dukes* requires only a single common question, and in *Jimenez*, there were at least three common issues that targeted the employer's liability: whether there was an unofficial company policy of discouraging reporting of overtime; whether the company knew about it; and whether it stood idly by while employees worked without getting paid.[193]

Moreover, the Ninth Circuit pointed out that none of the trial-by-

184. *Id.* at 304.
185. *Id.*
186. *Id.* at 307.
187. *Id.* at 308.
188. *Id.*
189. Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541, 2556 (U.S. 2011).
190. Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1165 (9th Cir. 2014).
191. *Id.* at 1164.
192. *Id.*
193. *Id.* at 1163-64.

formula problems in *Dukes* prevented certification in *Jimenez* because a statistical sampling method of certification could be used "so long as the use of these techniques is not expanded into the realm of damages."[194]

Dukes' subsidiary holding—that Rule 23(b)(2) classes cannot pursue non-incidental monetary relief on an individual basis—has also been widely recognized by courts, although it was not a controversial issue prior to *Dukes*.[195] Since *Dukes*, however, some courts have tightened restrictions on the scope of 23(b)(2) classes they will permit to be certified.[196]

3. *Comcast*: Extension of *Dukes*, or Not?

Just two years after the *Dukes* decision, the Court seemed poised to issue its next game-changing class certification decision when it accepted review in *Comcast*.[197] *Comcast* reinforced the trend established in *Dukes* that, to certify a class, plaintiffs must be able to demonstrate that a case is susceptible to resolution by common proof.[198] Again, Justice Scalia wrote for the majority in a factually detailed decision that was seemingly broad in scope in making class certification more difficult.[199] The *Comcast* decision held that *Dukes*' requirement that trial courts undertake a "rigorous analysis" applied not just to the four elements of Rule 23(a), but to Rule 23(b)'s as well—including predominance.[200] The majority concluded that an action cannot be certified under Rule 23(b)(3) for class treatment when it is evident that "individual damage calculations will inevitably overwhelm questions common to the class."[201]

Defendants seized upon this language in arguing to the lower courts that the predominance element can never be satisfied when there are individualized damages issues. Several lower courts have declined to give *Comcast* this broad interpretation, pointing out that the Court's decision was impacted significantly by the fact that the lower court had approved certification of a class to decide both the question of liability

194. *Id.* at 1167.

195. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (U.S. 2011).

196. *See* Sepulveda v. Wal-Mart Stores, Inc., 464 F. App'x 636, 637 (9th Cir. 2011) (changing result from reversal to affirming certification denial on rehearing because *Dukes* "explicitly adopted the 'not incidental' test for certification under Rule 23(b)(2).").

197. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1431 (U.S. 2013).

198. *Dukes*, 131 S. Ct. at 2551; *Comcast*, 133 S. Ct. at 1432.

199. *Comcast*, 133 S. Ct. at 1429.

200. *Id.* at 1432.

201. *Id*. at 1433.

and the question of damages.[202]

In the end, a synthesis of the Court's decisions on the class certification standards cases provides a helpful tone emphasizing the need for a rigorous analysis to ensure that the plaintiff can prove common issues through common evidence. It also provides some strong illustrations of issues that will prevent class certification. However, not one case announced any significant new rule or mode of analysis. Instead, the emphasis that *Dukes* and *Comcast* placed on closely analyzing class certification methods have re-confirmed the importance for lower courts to strictly follow the Rule 23 requirements when making certification decisions. But neither *Dukes* nor *Comcast* significantly altered those requirements through their direct holdings. The decisions do emphasize that the details matter—quite possibly now more than ever before.

IV. MISSED OPPORTUNITIES

Perhaps the most significant feature of the Court when it comes to class actions is the number of opportunities that the Court has passed up to address issues of significance to trial courts and practitioners. Through denials of certiorari or limited holdings, the Court has declined to address a variety of key issues including issue certification, the standards governing admissibility of expert testimony at the class certification phase, the standards governing approval of class-action settlements, and the standards governing FLSA collective actions.

A. Issue Certification

The Supreme Court denied certiorari in *McReynolds*[203] in 2012 and

202. Among the notable lower-court limitations of *Comcast* are the "moldy washing machine" cases. In those cases, both the Seventh and Sixth Circuit held, on remand orders from the Supreme Court for reconsideration in light of *Comcast*, that *Comcast* did not require denial of certification even though only a tiny percentage of the putative class members experienced the defective washing machines at issue in the cases. As Judge Posner explained, *Comcast*'s focus on predominance and tying damages theory to class-wide measurement did not change the fact that plaintiffs alleged a uniform liability question that could be certified: "There is a single, central, common issue of liability: whether the Sears washing machine was defective." Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (U.S. 2014); *see also In re* Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied* 134 S. Ct. 1277 (U.S. 2014) ("To the extent that *Comcast Corp.* reaffirms the settled rule that liability issues relating to injury must be susceptible of proof on a classwide basis to meet the predominance standard, our opinion thoroughly demonstrates why that requirement is met in this case.").

203. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir.

Allstate v. Jacobsen[204] in 2014. In both cases, plaintiffs sought to certify classes on liability that merely set the stage for further individualized damages claims.[205] The Seventh Circuit and the Montana Supreme Court condoned both attempts as permissible under Rule 23.[206] The certiorari denial kept this door open for plaintiffs' attorneys who could use issue certification to drive large settlements.

B. Daubert *and Expert Admissibility Standards*

Following *Dukes*, the Court had various opportunities to address issues surrounding expert evidence standards. For example, in *Comcast*, the Court originally accepted certiorari to address "[w]hether a district court may certify a class action without resolving whether the plaintiff class had introduced *admissible* evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[207] This led the parties to devote a majority of their briefing to the question of whether a *Daubert* analysis is required before a court can accept expert testimony submitted in support of a motion for class certification, which is an issue of great importance to class-action practitioners and trial courts.[208] However, as Justices Ginsburg and Breyer pointed out in dissent, arguing that review should have been dismissed altogether, the Court was ultimately unable to resolve that question because the defendant had not preserved its objections to the admissibility of the proffered expert testimony.[209] As a result, Justice Scalia's majority opinion does not address *Daubert* at all, but rather concludes that the expert's opinion in that particular case did not pass muster because it did not address the right issues.[210]

When the Court denied certiorari of the *Whirlpool* washing

2012), *cert. denied*, 133 S. Ct. 338 (U.S. 2012).

204. Jacobsen v. Allstate Ins. Co., 310 P.3d 452 (Mont. 2013), *reh'g denied* (Oct. 8, 2013), *cert. denied*, 134 S. Ct. 2135 (U.S. 2014).

205. *McReynolds*, 672 F.3d at 483; *Jacobsen*, 310 P.3d at 468.

206. *McReynolds*, 672 F.3d at 492; *Jacobsen*, 310 P.3d at 479. Interestingly, the Ohio Supreme Court arrived at a contrary conclusion, recently holding that pursuant to *Dukes'* logic, a class may not be certified as to a single issue solely for the purpose of setting up individualized damage claims. Cullen v. State Farm Mut. Auto. Ins. Co., 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 27 (rejecting certification of claims for declaratory relief that "merely lay a foundation for subsequent determinations regarding liability or that facilitate an award of damages").

207. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (U.S. 2013) (Ginsburg, J., & Breyer, J., dissenting) (emphasis added).

208. *Id.*

209. *Id.* at 1435-36.

210. *Id.* at 1426.

machine cases, after vacating and remanding the first time around, it signaled that *Comcast* did not have the full breadth to limit facially unwieldy classes that the defense bar was hoping for. On remand, both the Sixth and Seventh Circuits concluded that *Comcast* did not preclude class certification just because some—if not most—of the purchasers of defective washing machines may never have experienced any problems.[211] The Supreme Court left these decisions standing by denying certiorari, indicating that at least in the consumer products sector, plaintiffs' attorneys have wide latitude to establish common injuries without having to worry about *Comcast*'s influence on potentially varied damages.[212]

C. Settlement Standards: A Potential New Class-Action Target

For a Supreme Court noticeably curious about the contours of class-action procedure, principles of class settlements appear to be fertile ground for carving clearer boundaries. Indeed, in November 2013, Chief Justice Roberts indicated on the record that the Court may begin looking into the appropriateness of a certain type of settlement. Frequently, because settlements involve negligible-at-best remedies for individual class members, settlement agreements will specify that the monetary benefit be distributed to a third party. These *cy pres* remedies are designed to provide an "as near as possible" benefit to the class members. Increasingly, however, they are coming under fire as a symbol of abusive class litigation that benefits plaintiffs' attorneys and defendants while leaving class members with little to no individual relief.[213]

And so it was especially noteworthy when the Chief Justice wrote a four-page statement accompanying a certiorari denial in *Marek v. Lane*.[214] Marek challenged Facebook's "Beacon" program, a feature that automatically collected user data and activity and posted it to people's

211. *In re* Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (U.S. 2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (U.S. 2014).

212. *Whirlpool*, 722 F.3d 838; *Butler*, 727 F.3d 796.

213. *See* Martin H. Redish, Peter Julian, & Samantha Zyontz, Cy Pres *Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010); *see also* U.S. CHAMBER INST. FOR LEGAL REFORM, THE NEW LAWSUIT ECOSYSTEM: TRENDS, TARGETS, AND PLAYERS (2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf.

214. Marek v. Lane, 134 S. Ct. 8, 8 (U.S. 2013) (Statement of Roberts, C. J.).

profiles.[215] The program caused a public relations misstep, prompting Facebook to reprogram Beacon so that it did not automatically report the data without affirmative user consent.[216]

Several individuals sued Facebook in a putative class action, alleging federal and state privacy law violations and seeking damages and equitable relief, including an injunction to shut down Beacon.[217] The putative class was limited to individuals whose information was publicly disclosed during the month that Beacon's automatic settings triggered the alleged violations.[218] Before class certification, the named plaintiffs settled in exchange for Facebook's promise to suspend Beacon and $9.5 million.[219] Plaintiffs' class counsel received nearly a quarter of the fund, and named plaintiffs received "modest incentive payments."[220] The remaining $6.5 million—rather than distributed to unnamed class members—was "earmarked" for a *cy pres* remedy.[221] The parties agreed that the *cy pres* remedy would fund an organization, run in part by Facebook, devoted to educating the public about online privacy.[222]

Megan Marek and three unnamed class members challenged the settlement as not serving the interests of the class.[223] The district court and a divided Ninth Circuit panel rejected the objection.[224]

Chief Justice Roberts explained that while he agreed with denying the petition, the growing specter of *cy pres* remedies in class settlements presented "fundamental concerns surrounding the use of such remedies in class litigation, including when, if ever, such relief should be considered."[225] "In a suitable case," Chief Justice Roberts wrote, "this Court may need to clarify the limits on the use of such remedies."[226]

Specifically, Chief Justice Roberts' "fundamental" concerns turn on familiar class-action issues for the Court such as assessing the fairness of the remedy, what roles the judge and parties should play in shaping the remedy, and protection of the class-members interests.[227] Are they

215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 9. The parties also agreed to expand the settlement class to parties injured after Facebook altered the opt-in requirement following the initial roll-out month.
223. *Id.*
224. *Id.* (citing Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012)).
225. *Id.*
226. *Id.*
227. *Id.*

adequately protected by the selected organization's goals?[228] Most importantly, Chief Justice Roberts signaled that settlement fairness may be the next issue on the Supreme Court's class-action agenda.[229] *Cy Pres* issues are often fact-sensitive, and so a body of appellate case law is unlikely to form based on Chief Justice Roberts' statement. However, the Supreme Court could well be willing and interested in laying out general principles to limit the remedy in the same manner that it has waded into Rule 23 certification.[230]

D. Limits on Class-Action Cutbacks in the Employment Sector

Whatever boundary lines the Court has drawn around class litigation, they have largely been limited to circumscribing the scope of Rule 23 actions. And as already discussed, those limits are more theoretical than practical considering the enduring growth of the class litigation industry. But the Court has yet to seriously wade into fashioning certification rules for class litigation under an equally-potent class device—the Fair Labor Standards Act ("FLSA").

The FLSA[231] provides a class litigation structure for employment-related claims based on wage-and-hour disputes. As a centerpiece of the New Deal, Congress enacted the FLSA in 1938 as a means to allow one employee to sue on behalf of other "similarly situated" employees.[232] It is distinct from Rule 23 in that class members—i.e., employees—must affirmatively opt in to the litigation by written consent that is filed with the court.[233]

That procedural difference has created a thriving industry in which FLSA collective actions have increased by 438 percent since 2000.[234]

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228. *Id.*

229. *Id.*

230. In 2010, the Court reversed a district court's enhancement, by 75 percent, of an attorney's fee award pursuant to a fee-shifting statute in a civil rights class action. Perdue v. Kenny A., 559 U.S. 542 (2010). Although *Perdue* was a class action, the legal reasoning behind the decision was limited to federal fee-shifting statutes and did not indicate any broad applicability to class-action settlement funds generally. *See* Lambrecht v. Taurel, No. 1:08-CV-68-WTL-TAB, 2010 WL 2985946, at *2-3 (S.D. Ind. June 8, 2010), *report & recommendation adopted*, No. 1:08-CV-68-WTL-TAB, 2010 WL 2985943 (S.D. Ind. July 27, 2010) (holding that *Perdue* did not apply to a common-fund class-action settlement).

231. 29 U.S.C. § 216(b) (2012).

232. *Id.*

233. *Id.*

234. Ed Silverstein, *Record Number of Federal Wage and Hour Lawsuits Filed Under the Fair Labor Standards Act*, INSIDE COUNSEL (May 21, 2014), http://www.insidecounsel.com/2014/05/21/record-number-of-federal-wage-and-hour-lawsuits-fi. A record 8,126 FLSA cases were filed between April 1, 2013, and March 31, 2014, a nearly 5 percent

Indeed, from 1991 to 2012, the increase in FLSA lawsuits (1,327 to 8,148) had eclipsed the 500 percent threshold according to 2014 Government Accountability Office figures.[235] The rapid increase has followed the 1989 Supreme Court *Hoffman-LaRoche v. Sperling*[236] decision, which bestowed certification discretion to district court judges and led to a two-step certification process that has developed among the lower courts.[237]

At the outset, plaintiffs seek "conditional certification," a relatively easy bar to clear that leads to class-wide certification and the commencement of costly discovery. During the post-conditional-certification stage, discovery often involves in-depth examination of the employees who opt in to the action, exploring the extent to which they are similarly situated. Relevant inquiries often include probing the actual job duties of the different employees and searching through corporate files for evidence of a company policy that violates the FLSA in a way that is common to the class. The burden and expense places downward pressure on employers to settle, and creates incentives for plaintiffs' attorneys to file collective actions without reliable knowledge as to the merits.[238]

After class discovery, the decertification or final certification stage determines whether the action will proceed on a class basis. Although the technical requirements differ from Rule 23, the examination of the appropriateness of class treatment at the decertification stage is fundamentally similar to Rule 23.[239] In other words, after discovery, courts examine whether the class is sufficiently similar to justify class

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increase from the prior year.

235. *Federal Wage Structure: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 113th Cong. (2014) (statement of Andrew Sherrill, Director, Education, Workforce, and Income Security, United States Gov. Accountability Office), 2014 WL 3612663.

236. Hoffman-LaRoche v. Sperling, 493 U.S. 165, 165 (1989).

237. The foremost approach was developed at the district court level without any roadmap or guidance from appellate courts. *See* Lusardi v. Xerox Corp., 118 F.R.D. 351, 358-59 (D.N.J. 1987).

238. LINDBERGH PORTER, JR., NAT'L EMP'T LAW COUNCIL, THE FLSA TWO-STEP IS ONE TOO MANY: THE APPLICATION OF *DUKES* AND THE RULES ENABLING ACT TO COLLECTIVE ACTIONS 2 (2013), *available at* http://www.nationalemploymentlawcouncil.org/nonmember/agenda_PDFs/2013/Wage_and_Hour_Litigation.pdf ("Conditional certification places enormous pressure on employers to settle claims prior to obtaining a ruling on decertification, much less the merits.").

239. "Indeed, despite the difference between a collective action and a class action and the absence from the collective-action section of the Fair Labor Standards Act of the kind of detailed procedural provisions found in Rule 23, there isn't a good reason to have different standards for the certification of the two different types of action." Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) (internal citation omitted).

litigation.

Although the Supreme Court has outlined the proper procedures for Rule 23 certification, it has never addressed this two-step FLSA certification process. Impliedly, the Court condoned it when it denied certiorari of two cases in 2010 and 2011 that offered the Court a chance to curtail the culture of certify first, ask questions later. The Court's silence thus far has enabled this class-friendly method to persist, leading to increasingly aggressive class-action filings.[240]

In 2009, *Family Dollar Stores, Inc. v. Morgan* expressly presented the FLSA certification procedure issue to the Court.[241] The petition for certiorari noted that the Court had recently "dramatically clarified how Rule 23(b) class actions operate."[242] Accordingly, the petitioners requested that the Court "intervene to provide similar guidance concerning the procedural standards that should govern § 216(b) class actions."[243]

The Court, evidently, was not convinced that FLSA certification procedures needed curtailment or refining. In October 2009, the Court denied certiorari, leaving in place an Eleventh Circuit opinion,[244] which approved of the two-step certification process that was derived almost entirely from a 1987 District of New Jersey case.[245] Two years later, the Court again denied certiorari when another collective action presented an opportunity to clarify the procedural outline for certification.[246]

The refusal by the Court to engage in FLSA certification is curious considering its apparent interest in class litigation. Time and again, the Court has defined the contours of Rule 23 certification, focusing intently on due process. The difference may be in the opt-in structure of FLSA, which removes due process concerns regarding class members who affirmatively agree to class representation. But the approach does not

240. *See* Petition for a Writ of Certiorari at *22, Family Dollar Stores, Inc. v. Morgan, 558 U.S. 816 (2009), 2009 WL 1061250 ("Continuing uncertainty over how the executive exemption applies to retail store managers forces employers to settle rather than risk their business model on litigation of one collective action on behalf of thousands of employees before one jury."); *see also* Petition for a Writ of Certiorari, HCR ManorCare, Inc. v. Zouhary, 132 S. Ct. 1146 (U.S. 2012), 2011 WL 5928338 (presenting the question whether the "two-step procedure" is "in conflict with the joinder requirements of the Federal Rules of Civil Procedure, specifically those of Rules 20 and/or 23.").

241. Petition for a Writ of Certiorari at *i, *Family Dollar Stores*, 558 U.S. 816.

242. *Id.* at *29.

243. *Id.* at *30.

244. Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 (2008).

245. Lusardi v. Xerox Corp., 118 F.R.D. 351, 370-71 (D.N.J. 1987).

246. Hertz Corp. v. Myers, 132 S. Ct. 368 (U.S. 2011); Petition for Writ of Certiorari, Hertz Corp. v. Myers, 132 S. Ct. 368 (U.S. 2011), 2011 WL 2165435.

address the due process implications for defendants who face obstacles in litigating individualized defenses when looking down the barrel of a Rule 23 or FLSA action. Fairness is as much of a component of a Rule 23 defense as it is a defense of a sprawling wage-and-hour action under FLSA. The Court's reluctance to wade into FLSA procedure illustrates the limits it is not yet willing to place on class litigation, particularly in the employment context.

V. CONCLUSION

There can be little question that class-action practice has changed over the past decade. However, there is significant room for debating how significant the Supreme Court's role was in dictating this change. The Court's decisions reflect a tone of encouragement for reform and, in some cases, limited correction of abuses of the class-action vehicle; but the Court has for the most part not mandated drastic changes to class-action procedure.

The future of jurisprudence in the Court is murky. Notwithstanding several opportunities to address key class-action issues, the volume of class-action cases selected for review has slowed in recent years following an active period between 2009 and 2012. This may merely be a lull or a sign that the Court has said all it intends to say on class actions. Of course, this is not a situation that calls for a channeling of Charles Holland Duell.[247] It is not hard to imagine that the Court could—and will—continue to chisel away at the contours of class litigation, whether bolstering certification requirements under Rule 23 or providing something resembling guidance for FLSA certification. Indeed, we already know the Court expects to address issues of standing and mootness in connection with class litigation in the October 2015 term.

What we have seen so far is a Court that understands the economic significance of high-stakes class litigation and is determined to patrol the outer boundaries. From a practical standpoint, that means that much class-action territory is still in play. *Wal-Mart v. Dukes* did not kill the class action. And the Court's general silence to date on FLSA certification has not removed the decertification weapon from defendants' arsenals. If anything, the Court's attention to class litigation

247. Charles Holland Duell was the former United States Commissioner of Patents who reportedly said in 1902 that "everything that can be invented has been invented." *See* Dennis Crouch, *Tracing the Quote*, PATENTLY-O (Jan. 6, 2011), http://patentlyo.com/patent/2011/01/tracing-the-quote-everything-that-can-be-invented-has-been-invented.html.

has shed new light on what can and cannot be achieved either through class litigation or by agreements designed to forestall it. The legal system and litigants are better off with that clarity.