

CLASS ACTIONS PART II: A RESPITE FROM THE DECLINE

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In a 2013 article, I explained that the Supreme Court and federal circuits had cut back significantly on plaintiffs' ability to bring class actions. As I explain in this article, that trend has subsided. First, the Supreme Court has denied certiorari in several high-profile cases. Second, the Court's most recent class action rulings have been narrow and fact specific. Third, the federal circuits have generally rejected defendants' broad interpretations of Supreme Court precedents and arguments for further restrictions on class certification. One explanation for this new trend is that defendants have been overly aggressive in their arguments, losing credibility and causing courts to push back. Another is that courts are retreating from the view that pressure on defendants to settle is itself a reason to curtail class actions. It remains to be seen, however, whether this trend is the new normal, or merely a respite from the decline of class actions.

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INTRODUCTION

In my 2013 article, *The Decline of Class Actions*,¹ I explained that the Supreme Court and the federal circuits have made it increasingly difficult for plaintiffs to litigate class actions. I did not declare the class action device dead, but I did express concern that it had been severely weakened.

As I noted in *Decline*, the Supreme Court had in the past several years issued a number of seminal decisions, including *Wal-Mart Stores, Inc. v. Dukes*,² *AT&T Mobility LLC v. Concepcion*,³ and *American Express Co. v. Italian Colors Restaurant*.⁴ Federal circuit courts had also introduced new limits on class actions, including cases imposing rigid standards for numerosity, frontloading of merits evidence, class definition, and many other topics.⁵ A recurring theme of both the Supreme Court and circuit cases was that class certification creates irresistible (and improper) pressure on defendants to settle even baseless claims.⁶

Reviewing the landscape four years later, I believe it is unlikely—any time soon—that the Supreme Court or the circuits will overrule the seminal decisions discussed in *Decline*. The plaintiffs’ bar, however, has been hoping that, even if those key precedents are not overruled, at least the case law will not get more onerous. And indeed, four years after my pessimistic article, the plaintiffs’ bar has reason for optimism. For lawyers, as for physicians, “the first goal . . . is to stop the bleeding.”⁷ In the class action field, that is now happening.

One obvious development is the February 13, 2016 death of Justice Scalia, the author of several of the Supreme Court’s restrictive class action opinions, including *Dukes*, *Concepcion*, and *Italian Colors*. The impact of Justice Scalia’s death has been significant, par-

¹ Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) [hereinafter *Decline*].

² 564 U.S. 338, 350 (2011) (setting a high hurdle for establishing commonality under Rule 23(a)(2)).

³ 563 U.S. 333, 352 (2011) (upholding arbitration and class action waiver clauses).

⁴ 133 S. Ct. 2304, 2312 (2013) (upholding class action waiver clause).

⁵ See *Decline*, *supra* note 1, at 745–823 (outlining these limits).

⁶ See, e.g., *Concepcion*, 563 U.S. at 350 (class actions entail “the risk of ‘in terrorem’ settlements”); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (class actions “may . . . create unwarranted pressure to settle nonmeritorious claims on the part of defendants”) (citation omitted); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (class actions may lead to “blackmail settlements” induced by “intense pressure to settle” (citations omitted)); *Decline*, *supra* note 1, at 741 & n.68, 753, 818.

⁷ *Hemorrhage*, HUM. DISEASES & CONDITIONS, <http://www.humanillnesses.com/origin/al/Gas-Hep/Hemorrhage.html> (last visited Aug. 29, 2017).

ticularly during the months before Justice Gorsuch was seated.⁸ In addition, there can be little doubt that eight years of judicial appointments by President Obama have shifted the political balance in the circuits.⁹

Nonetheless, personnel changes at the Supreme Court and the circuits are only part of the explanation. Many of the key Supreme Court developments discussed herein pre-date Justice Scalia's death, and some of the recent circuit decisions refusing to cut back on class actions were written by Republican-appointed judges.

In this article, I focus on three important developments:

First, in the past few years, the Supreme Court has denied certiorari in a host of high-profile class actions, notwithstanding urgent pleas by the business community that review by the Court was essential.

Second, in the past few years, the Supreme Court has taken a measured (and, in some instances, decidedly pro-plaintiff) approach to class actions. In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, the Court reined in the growing circuit trend to require substantial merits determinations at the class certification stage.¹⁰ And in three closely watched class action cases in the 2015 Term, *Tyson Foods, Inc. v. Bouaphakeo*,¹¹ *Campbell-Ewald Co. v. Gomez*,¹² and *Spokeo, Inc. v. Robins*,¹³ the Supreme Court issued rulings that rejected broad theories urged by the defendants.

Third, in the past few years, the circuits have frequently rejected defendants' interpretations of Supreme Court cases and other arguments that would have imposed strict, new limits on class certification.

⁸ For instance, only days after Justice Scalia's death, Dow Chemical withdrew a petition for certiorari in a case challenging a verdict of more than a billion dollars, choosing instead to settle the case for \$835 million. Dow stated that it was doing so because Justice Scalia's death had significantly reduced the odds that certiorari would be granted. See, e.g., Jef Feeley & Greg Stohr, *Scalia's Death Prompts Dow to Settle Suits for \$835 Million*, BLOOMBERG NEWS (Feb. 26, 2016), <https://bol.bna.com/scalias-death-prompts-dow-to-settle-suits-for-835-million/>.

⁹ See, e.g., Jeremy W. Peters, *Building Legacy, Obama Reshapes Appellate Bench*, N.Y. TIMES (Sept. 13, 2014), http://www.nytimes.com/2014/09/14/us/politics/building-legacy-obama-reshapes-appellate-bench.html?_r=0 ("For the first time in more than a decade, judges appointed by Democratic presidents considerably outnumber judges appointed by Republican presidents.").

¹⁰ 133 S. Ct. 1184, 1191 (2013).

¹¹ 136 S. Ct. 1036, 1049 (2016) (rejecting defendant's argument for categorical exclusion of aggregate statistical proof).

¹² 136 S. Ct. 663, 666 (2016) (rejecting defendant's use of Rule 68 "pick-off" strategy to moot claims of class representatives).

¹³ 136 S. Ct. 1540, 1545 (2016) (rejecting defendant's argument that risk of future harm cannot satisfy concreteness requirement for Article III standing in class action context).

As I explain below, one explanation for these developments is that courts have reacted negatively to overly aggressive advocacy by defendants. Another is that courts are simply taking a break from their strident approach, which has already resulted in significant cut-backs in class actions. Furthermore, I believe that courts have backed away from the oft-cited view that the pressure to settle is itself a reason to curtail class actions. While that theme still appears as a consideration in whether to grant review under Rule 23(f), it has all but disappeared as a rationale for restricting class actions. Instead, courts have adopted a more measured—and, in my view, more justified—approach: looking at each case based on its particular facts and circumstances.

It remains to be seen whether these developments represent the new normal, or instead are only a pause before the decline of class actions continues. Given the election of Donald Trump as President, and the likelihood that he will appoint jurists who may embrace further limits on class actions, there is reason for concern about the future.

Supreme Court Justice Neil Gorsuch, who was confirmed on April 7, 2017, is likely to take a conservative position on class actions similar to that of Justice Scalia, although perhaps without the same degree of zeal. Justice Gorsuch himself has stated that he is neither pro- nor anti-class action,¹⁴ but there is no shortage of articles attempting to predict his stance on class action issues.¹⁵ At bottom, he is unlikely to favor expanding class actions in a particular case absent a compelling basis in Rule 23. And he has shown that he is willing to

¹⁴ See Jessica Karmasek, *Trump's Pick for U.S. S.C. Denies He's Against Class Actions*, LEGAL NEWSLINE (Mar. 24, 2017, 4:00 PM), <http://legalnewsline.com/stories/511097344-trump-s-pick-for-u-s-sc-denies-he-s-against-class-actions> (“‘I represented class actions and people fighting class actions,’ [Gorsuch] said. ‘I ruled for and against class actions. It depends on facts presented to me.’”).

¹⁵ See, e.g., Ron Chapman, Jr. & Christopher Murray, *Gorsuch and the Future of Class Action Waivers*, LAW360 (Feb. 1, 2017, 1:28 PM), <https://www.law360.com/articles/887293/gorsuch-and-the-future-of-class-action-waivers> (concluding that employers seeking to enforce arbitration agreements “may have reason to be optimistic” given Justice Gorsuch’s past jurisprudence); Amy Howe, *A Closer Look at Judge Neil Gorsuch and Class Actions*, SCOTUSBLOG (Mar. 8, 2017, 2:07 PM), <http://www.scotusblog.com/2017/03/closer-look-judge-neil-gorsuch-class-actions/> (noting the importance to Justice Gorsuch that courts “stay in their lane”); Joseph H. Lang, Jr. & D. Matthew Allen, *Judge Gorsuch on Class Actions*, CLASSIFIED (Feb. 6, 2017), http://classifiedclassaction.com/judge-gorsuch-class-actions/?utm_source=mondaq&utm_medium=syndication&utm_campaign=view-Original (highlighting Justice Gorsuch’s class action rulings while on the 10th Circuit); *Client Alert: Judge Neil Gorsuch’s Potential Impact on the Development of Class Action Law*, GIBSON DUNN (Mar. 13, 2017), <http://www.gibsondunn.com/publications/Pages/Judge-Neil-Gorsuch-Potential-Impact-on-Development-of-Class-Action-Law.aspx> (predicting that Justice Gorsuch will rule based on the plain language of the Class Action Fairness Act).

import restrictive Rule 23(b)(3) concepts into Rule 23(b)(2).¹⁶ At the same time, it is not clear that Justice Gorsuch will have the same anti-class action agenda exhibited by Justice Scalia.¹⁷

In addition to the impact of Justice Gorsuch's appointment and the likelihood of further vacancies on the Supreme Court over the next four years, there are currently 144 vacancies on the lower federal courts,¹⁸ with many more vacancies likely over the next four years. With a string of conservative appointments at all levels of the federal bench, it is impossible to say how long the current reprieve will last. But even if it is only temporary, it is a welcome change from years of court decisions curtailing class actions.

Finally, although this Article focuses on case law developments, it should be noted that even if the current reprieve in the case law proves to be more than just ephemeral, Congress may step in and pass major legislation curtailing class actions. At the time this Article went to press, the Fairness in Class Actions Litigation Act of 2017¹⁹ had passed the House of Representatives and was pending in the Senate. The bill, which has drawn widespread criticism from the plaintiffs' bar and many scholars and commentators,²⁰ would significantly restrict

¹⁶ See *Shook v. Bd. of Cty. Comm'rs*, 543 F.3d 597, 604 (10th Cir. 2008) (applying manageability and cohesiveness in (b)(2) case). Other class action opinions authored by Justice Gorsuch prior to his appointment to the Supreme Court are not especially illuminating. They include *Hammond v. Stamps.com*, 844 F.3d 909, 912 (10th Cir. 2016) (holding that amount in controversy was sufficient to meet CAFA minimum for removal); *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1290 (10th Cir. 2011) (holding that order withdrawing approval for class action settlement is not a final decision for purposes of appeal); and *BP America v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1031 (10th Cir. 2010) (granting discretionary review of remand order).

¹⁷ See Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1636 & n.407 (2016) (discussing Justice Scalia's focus on class actions and citing his restrictive class action opinions).

¹⁸ *Current Judicial Vacancies*, U.S. Cts., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last updated Aug. 6, 2017). See Josh Katz, *Older Judges and Vacant Seats Give Trump Huge Power to Shape American Courts*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/interactive/2017/02/14/upshot/trump-poised-to-transform-american-courts.html?_r=0 (noting that President Trump "could soon find himself responsible for appointing a greater share of federal court judges than any first-term president in 40 years" and emphasizing his "huge power" to reshape the federal judiciary).

¹⁹ Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017).

²⁰ See, e.g., Howard M. Erichson, *New Republican Class Actions Bill Would Gut Class Actions, Not Improve Them*, HILL (Feb. 20, 2017, 1:40 PM), <http://thehill.com/blogs/pundits-blog/lawmaker-news/320360-new-republican-bill-would-gut-class-actions-not-improve-them> (calling the bill "a crass effort to gut class actions"); Simona Grossi, *The Fairness in Class Actions Litigation Act of 2017 (H.R. 985): A Few Thoughts*, SUMMARY JUDGMENTS (Feb. 22, 2017), <http://summaryjudgments.lls.edu/2017/02/the-fairness-in-class-actions.html> (criticizing the bill as undemocratic and unprofessionally drafted); Letter from The Leadership Conference on Civil & Human Rights to the U.S. House of

the class action device. Among other things, in its current form it would codify (or even expand) the heightened ascertainability requirement that has been adopted by some courts,²¹ would arguably preclude certification in cases involving individualized damages,²² and would create a higher threshold for class certification—requiring courts to conduct a frontloaded merits analysis contrary to the Supreme Court’s holding in *Amgen*.²³ It is almost certain that President Trump would sign the bill in its current form. Thus, there is reason for concern that, even if the case law trends remain favorable for class actions, Congress and the President will reverse this progress.

I

SUPREME COURT DENIALS OF CERTIORARI

In the past few years, the Supreme Court has denied certiorari in a number of high-profile cases that could have been effective vehicles to impose new limits on class actions. This trend stands in marked contrast to the Court’s prior approach as I recounted in *Decline*. As I explained there, looking at the case law as of 2013, it appeared that a majority of the Supreme Court was on a mission to rein in class actions. The Court not only granted certiorari in a significant number of class action cases, but also took an unusually aggressive role in shaping the issues to be decided.

For instance, when the Supreme Court granted review in *Wal-Mart Stores, Inc. v. Dukes*, a massive sex discrimination class action, it added its own issue for review (in addition to those raised by Wal-Mart): “Whether the class certification ordered . . . was consistent with Rule 23(a) [requiring a common issue of law or fact].”²⁴ This commonality issue had barely been mentioned in Wal-Mart’s petition for certiorari,²⁵ but the Court ended up devoting a major portion of its opinion establishing a new, strict test for commonality.²⁶ Likewise, in *Comcast Corp. v. Behrend*,²⁷ the Court granted review but rewrote the

Representatives (Mar. 8, 2017), <http://www.civilrights.org/advocacy/letters/2017/oppose-hr-985-the-fairness.html> (criticizing the bill’s drafting and arguing it will have a chilling effect on those who might otherwise bring class actions, like people of color and the elderly).

²¹ H.R. 985 § 1718(a). See *infra* Section III.D (discussing heightened ascertainability requirement).

²² See H.R. 985 § 1716 (requiring affirmative proof that each class member has suffered the same type and scope of injury as named plaintiffs in suits seeking money damages).

²³ See *id.* (“An order . . . that certifies a class seeking monetary relief . . . shall include a determination, based on a rigorous analysis of the evidence presented,” that the class members have all been similarly injured).

²⁴ *Wal-Mart Stores, Inc. v. Dukes*, 562 U.S. 1091 (2010).

²⁵ *Decline*, *supra* note 1, at 774.

²⁶ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–60 (2011).

²⁷ 133 S. Ct. 1426 (2013).

question presented.²⁸ Ultimately, the Court did not reach even its own rewritten question because it found that Comcast had failed to preserve the issue.²⁹ Usually, in such a circumstance, the Court would dismiss certiorari as improvidently granted,³⁰ but in *Comcast*, the Court proceeded to decide the case in Comcast's favor on the ground that plaintiffs' expert model was flawed and thus could not establish classwide damages.³¹

The Court also took a very aggressive role in the context of class action waivers and arbitration agreements, deciding *three* important cases on the topic—*Concepcion*, *Italian Colors*, and *DIRECTV, Inc. v. Imburgia*³²—since 2011.

In many of these seminal Supreme Court cases, the business community had mobilized substantial amicus support at the certiorari stage (as well as at the merits stage).³³ For instance, nine amicus briefs in support of certiorari were filed in *Dukes*, four were filed in *Concepcion*, and four were filed in *Italian Colors*. Multiple amicus briefs in support of certiorari were also filed in two of the three 2015 Term class action cases: seven in *Tyson Foods* and seven in *Spokeo*. While it is difficult to know the precise impact of these amicus briefs, it is reasonable to assume that they played a part in the Court's decision to hear so many class action cases given its limited docket.

But the surprising trend in the past few years is the number of class action cases that the Court has *refused* to hear, notwithstanding strong pleas from the business community. For instance, in *Butler v. Sears, Roebuck & Co.*,³⁴ Sears sought review of a Seventh Circuit decision upholding class certification in a case alleging defective (mold producing) front-loading washing machines. Sears sought review on issues of predominance under Rule 23(b)(3) and on whether a class may be certified when most class members did not experience the

²⁸ See *Decline*, *supra* note 1, at 753–54 & n.142 (contrasting the question upon which Comcast sought review with the question upon which the Court granted review).

²⁹ *Id.* at 754.

³⁰ See, e.g., Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1450–54 (distinguishing principled reasons to dismiss review as improvidently granted from unacceptable reasons); cf. *Visa, Inc. v. Osborn*, 137 S. Ct. 289 (2016) (dismissing certiorari as improvidently granted, noting that petitioners “‘persuaded us to grant certiorari’ on [one] issue . . . [but then] ‘chose to rely on a different argument’ in their merits briefing”) (citation omitted).

³¹ 133 S. Ct. at 1435.

³² 133 S. Ct. 463 (2015).

³³ Repeat amicus players on behalf of the business community include the U.S. Chamber of Commerce (Chamber), the Defense Research Institute (DRI), the Washington Legal Foundation (WLF), and the Product Liability Advisory Council (PLAC). See *infra* notes 39, 54–55, 59, and 61.

³⁴ 702 F.3d 359 (7th Cir. 2012), *vacated*, 133 S. Ct. 2768 (2013).

alleged product defect.³⁵ The Supreme Court granted review, vacated the judgment, and remanded in light of *Comcast*.³⁶ On remand, the Seventh Circuit adhered to its earlier opinion upholding class certification.³⁷ Sears again petitioned for certiorari,³⁸ and eight amicus briefs were filed in support of certiorari.³⁹ Yet, the Court denied certiorari, with no Justice dissenting.⁴⁰

Another moldy washing machine case had a parallel history. In *Whirlpool Corp. v. Glazer*, the Supreme Court initially granted review of, vacated, and remanded a Sixth Circuit decision upholding class certification, also in light of *Comcast*.⁴¹ When the Sixth refused to reverse its ruling,⁴² Whirlpool again sought certiorari,⁴³ supported by the same eight amici who filed briefs in *Sears*.⁴⁴ The Supreme Court denied certiorari in that case as well, again with no dissent.⁴⁵

Given the Supreme Court's heavy focus on class actions in recent years, the Court's denial of review in these cases surprised many on both the plaintiff and the defense sides. These denials pre-dated Justice Scalia's death; thus, there were clearly four potential votes for certiorari, the number required to grant review, among the conservative Justices (Roberts, Scalia, Thomas, and Alito).

Moreover, given all of the firepower supporting the petitioners in *Sears* and *Whirlpool*, it was logical to think that the Court would be persuaded that the issues were important. This was especially so given

³⁵ Petition for Writ of Certiorari at 1–6, *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (No. 12-1067).

³⁶ 133 S. Ct. 2768, *remanded to* 727 F.3d 796 (7th Cir. 2013).

³⁷ 727 F.3d at 802.

³⁸ Petition for Writ of Certiorari, *Sears*, 133 S. Ct. 2768 (2013) (No. 13-430).

³⁹ Brief for the Association of Home Appliance Manufacturers as Amicus Curiae Supporting Petitioners, *Sears*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431); Brief for the Chamber of Commerce of the U.S., et al. as Amici Curiae Supporting Petitioners, *Sears*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431); Brief for DRI – The Voice of The Defense Bar as Amicus Curiae Supporting Petitioners, *Sears*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431); Brief for Pacific Legal Foundation as Amicus Curiae Supporting Petitioners, *Sears*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431); Brief for the Product Liability Advisory Council, Inc., as Amicus Curiae Supporting Petitioners, *Sears*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431); Brief for Retail Litigation Center, Inc., as Amicus Curiae Supporting Petitioners, *Sears*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431); Brief for the Technology Association of America et al. as Amici Curiae Supporting Petitioners, *Sears*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431); Brief for Washington Legal Foundation et al. as Amici Curiae Supporting Petitioners, *Sears*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431).

⁴⁰ 134 S. Ct. 1277 (2014).

⁴¹ *Whirlpool*, 678 F.3d 409 (6th Cir. 2012), *vacated*, 133 S. Ct. 1722, *remanded to* 722 F.3d 838 (6th Cir. 2013).

⁴² 722 F.3d 838, 845 (6th Cir. 2013).

⁴³ Petition for Writ of Certiorari, *Whirlpool*, 134 S. Ct. 1277 (2014) (No. 13-431).

⁴⁴ See sources cited *supra* note 39.

⁴⁵ 134 S. Ct. 1277 (2014).

that the amici predicted dire and profound consequences from the failure to grant review. Illustrative is the combined brief filed by the Chamber in *Sears* and *Whirlpool*. The Chamber, which touts itself as “the world’s largest business organization representing the interests of more than 3 million businesses,”⁴⁶ argued that, if the rulings were allowed to stand, they would “dramatically increase the class-action exposure” faced by the business community.⁴⁷ The Chamber also invoked the unfair pressure to settle:

In light of the costs of discovery and trial, certification unleashes “hydraulic” pressure to settle. That pressure is generally less rooted in the merits of the plaintiffs’ claims than in the economic rationality of defendants, meaning that class certification—particularly certification based on a loose application of Rule 23’s essential prerequisites—dramatically increases the chances that plaintiffs with even meritless claims will obtain an unwarranted payout.⁴⁸

Yet, despite these and similar arguments by petitioners and amici, the Court denied review without dissent.

Similarly, in *Mullins v. Direct Digital, LLC*,⁴⁹ petitioner Direct Digital sought review on whether a class can be certified when a significant number of class members cannot be ascertained.⁵⁰ The so-called heightened ascertainability requirement—requiring plaintiffs to demonstrate an administratively feasible means of identifying class members⁵¹—had divided the courts, with the Seventh Circuit in *Mullins* expressly rejecting Third Circuit decisions,⁵² including *Marcus v. BMW of North America, LLC*, that had imposed such a requirement.⁵³ Direct Digital thus had a strong argument for certiorari, based on the acknowledged circuit conflict. Nor could there be any serious doubt that the issue was important. A strict ascertainability requirement provided a powerful vehicle to curtail small claims class actions. The Chamber once again filed an amicus brief in support of certiorari, citing the “clear split” among the circuits, and advising the Court that

⁴⁶ *About the U.S. Chamber*, CHAMBER, <https://www.uschamber.com/about-us/about-the-us-chamber> (last visited Aug. 29, 2017).

⁴⁷ Brief for Chamber of Commerce of the U.S., *supra* note 39, at 2.

⁴⁸ *Id.* at 20 (citation omitted) (quoting *Newton v. Merrill Lynch*, 259 F.3d 154, 165 (3d Cir. 2001)).

⁴⁹ 795 F.3d 654 (7th Cir. 2015).

⁵⁰ Petition for Writ of Certiorari at i, *Direct Dig., LLC, v. Mullins*, 136 S. Ct. 1161 (2016) (No. 15-549).

⁵¹ *See infra* Section III.D.

⁵² 795 F.3d at 657.

⁵³ 687 F.3d 583, 592–94 (3d Cir. 2012). *But see infra* notes 161–65 and accompanying text (noting that the Third Circuit itself has retreated on heightened ascertainability).

the issue “call[ed] out for immediate review.”⁵⁴ Several other amici also urged the Court to grant review.⁵⁵ Again, the Supreme Court, without dissent, denied review.⁵⁶

Still another example is *Rikos v. Procter & Gamble Co.*⁵⁷ In *Rikos*, a consumer fraud case, the primary issue was whether a district court, in certifying a class, must evaluate whether there is a “common injury” that cohesively binds the plaintiffs.⁵⁸ The Chamber, in an amicus in support of certiorari, noted that while the decision was an “outlier,” review was necessary because “all it takes is one overly permissive circuit for abusive litigation to take hold.”⁵⁹ The International Association of Defense Counsel (IADC) also filed an amicus brief in support of certiorari.⁶⁰ Yet, the Court denied review.⁶¹

What explains the Court’s denial of certiorari in these cases? My own sense is that, at least for now, the Court has lost interest in announcing major new limits on class actions. It is not uncommon for the Supreme Court to target an area, focus on it rigorously in several cases, and then decline to hear other cases. A similar scenario took place in the area of punitive damages; the Court granted review and decided a number of punitive damages cases, and then became much

⁵⁴ Brief for the Chamber of Commerce of the U.S. as Amicus Curiae Supporting Petitioner at 4, *Direct Dig., LLC v. Mullins*, 136 S. Ct. 1161 (2016) (No. 15-549).

⁵⁵ See Brief for Atlantic Legal Foundation as Amicus Curiae Supporting Petitioner, *Direct Dig.*, 136 S. Ct. 1161 (2016) (No. 15-549); Brief for DRI – The Voice of the Defense Bar as Amicus Curiae Supporting Petitioner, *Direct Dig.*, 136 S. Ct. 1161 (2016) (No. 15-549); Brief for the Product Liability Advisory Council, Inc. as Amicus Curiae Supporting Petitioner, *Direct Dig.*, 136 S. Ct. 1161 (2016) (No. 15-549).

⁵⁶ 136 S. Ct. 1161 (2016).

⁵⁷ 799 F.3d 497 (6th Cir. 2015).

⁵⁸ *Id.* at 505.

⁵⁹ Brief for the Chamber of Commerce of the U.S. as Amicus Curiae Supporting Petitioner at 18, *Rikos*, 136 S. Ct. 1493 (2016) (No. 15-835).

⁶⁰ Brief for International Association of Defense Counsel as Amicus Curiae Supporting Petitioner, *Rikos*, 136 S. Ct. 1493 (2016) (No. 15-835).

⁶¹ *Rikos v. Procter & Gamble Co.*, 136 S. Ct. 1493 (2016). Also relevant (although involving a motion to dismiss rather than an issue of class action procedure) is *In re Avandia Mktg., Sales Practices, & Prod. Liab. Litig.*, 804 F.3d 633 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 2409 (2016). In that putative class action, GlaxoSmithKline challenged a decision by the Third Circuit refusing to dismiss a complaint alleging RICO injury. Petition for Writ of Certiorari at 1–2, *In re Avandia*, 136 S. Ct. 2409 (2016) (No. 15-1078). PLAC and WLF filed briefs in support of certiorari, criticizing the Third Circuit’s “expansive and unworkable interpretation of RICO’s injury requirement for standing” (PLAC) and plaintiffs’ use of RICO to “inappropriately . . . force the settlement of doubtful claims” (WLF). Brief for PLAC as Amicus Curiae Supporting Petitioner at 2, *In re Avandia*, 136 S. Ct. 2409 (2016) (No. 15-1078); Brief for WLF as Amicus Curiae Supporting Petitioner at 2, *In re Avandia*, 136 S. Ct. 2409 (2016) (No. 15-1078). The Supreme Court denied certiorari in that case as well, also without dissent. *In re Avandia*, 136 S. Ct. 2409 (2016).

less interested in the topic.⁶² Having given so much attention to class actions in recent years, the Justices may simply be ready for a break from the topic, and thus not especially eager to add class action cases to the docket. Of course, the Justices could also be stepping back to see how the lower courts apply cases such as *Dukes*, *Concepcion*, and *Amgen*.

Relatedly, while the threat of “blackmail pressure to settle” may at one time have been persuasive, that mantra has lost its punch. Various amici have invoked it so many times in recent years that, I believe, the Court has become numb to it. Indeed, that argument has become increasingly tenuous because, as I have noted elsewhere, defendants are more willing than ever to go to trial in large, bet-the-company class action cases.⁶³ For example, after the Court denied review in *Whirlpool*, the company went to trial and *won*.⁶⁴ Although the Supreme Court has not explicitly disparaged the “blackmail settlement” rationale, it has come close.⁶⁵ Recently, other courts have explicitly disparaged the rationale.⁶⁶

Moreover, it is my opinion that, wholly apart from the unpersuasive reliance on the “pressure to settle,” the business community has suffered a lack of credibility in its amicus strategy. When numerous amicus briefs are filed in one class action after another, trumpeting the same parade of horrors for businesses, the message inevitably

⁶² The Court has decided only two punitive damages cases since its 2003 opinion in *State Farm v. Campbell*, 538 U.S. 408 (2003). See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (discussing punitive damages in maritime law context); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (discussing impermissibility of awarding punitive damages for harm to nonparties).

⁶³ See Klonoff, *supra* note 17, at 1641–50 (2016) (laying out several explanations for an increase in trials).

⁶⁴ Laura Northrup, *Ohio Jury Finds Whirlpool Not Liable for Moldy Front-Loading Washers*, CONSUMERIST (Oct. 30, 2014), <https://consumerist.com/2014/10/30/ohio-jury-finds-whirlpool-not-liable-for-moldy-front-loading-washers/>.

⁶⁵ See *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1199–1201 (2013) (stating, in response to defendant’s “seeking [the Court’s] aid in warding off ‘in terrorem’ settlements” by requiring proof of materiality at the class certification stage, that “[w]e do not think it appropriate for the judiciary to . . . reinterpret [] Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits” (quoting *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) (alteration in *Amgen*))).

⁶⁶ See, e.g., *In re Oppenheimer Rochester Funds Grp. Sec. Litig.*, 318 F.R.D. 435, 440 (D. Colo. 2015) (characterizing the argument about “unfair [] pressure [] . . . to settle for reasons wholly unrelated to the merits” as “transparent hyperbole”); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 572 (S.D.N.Y. 2014) (noting that the alleged “pressure” to settle “is common to virtually all class actions, so that if it were a sufficient argument to defeat certification, virtually no class actions would ever be certified”).

gets diluted.⁶⁷ After all, the Court grants review and oral argument in only about 60–80 cases per year out of more than 7,500 petitions filed.⁶⁸ The Chamber’s brief in *Rikos* illustrates the problem of overstated arguments. Even though the Chamber admitted that the case was an “outlier,” it claimed that this one flawed case would lead to an avalanche of bad decisions.⁶⁹

Interestingly, the Chamber’s aggressive amicus strategy on behalf of the business community appears to be deliberate and recent. Its litigation arm, the U.S. Chamber Litigation Center, was created in 1977, but it was completely revamped in 2010 because “inside the [Chamber] some clamored for a more aggressive approach.”⁷⁰ The Center hired a number of former Bush Administration officials to write amicus briefs, and as a result “the Chamber became more active before the Supreme Court and throughout the U.S. court system.”⁷¹ It is possible that this deliberate strategy has backfired and that the Chamber would have been better off filing fewer, more carefully targeted amicus briefs.

To be sure, the Court will continue to grant review in class action cases that meet the high standards for certiorari. Thus, in January 2017, it granted review to decide whether arbitration agreements that bar class actions are unlawful under the National Labor Relations Act and thus unenforceable under the Federal Arbitration Act.⁷² The circuits are indisputably in conflict on the question.⁷³ Also in January 2017, it granted review to decide whether tolling under *American Pipe*

⁶⁷ Cf. *Æsop, The Shepherd Boy & the Wolf*, LIB. OF CONGRESS: ÆSOP FOR CHILDREN, <http://read.gov/aesop/001.html> (last visited Aug. 29, 2017) (commonly known as “The Boy Who Cried Wolf”).

⁶⁸ See Kedar S. Bhatia, *Likelihood of a Petition Being Granted*, DAILYWRIT (Jan. 10, 2013), <http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/> (presenting statistics on likelihood of certiorari petition being granted in 2011–2012 and over ten-year period).

⁶⁹ See *supra* note 59 and accompanying text.

⁷⁰ John Shiffman, *Chamber of Commerce Forms Its Own Elite Law Team*, REUTERS, <http://www.reuters.com/investigates/special-report/scotus/#sidebar-chamber> (last visited June 16, 2017).

⁷¹ *Id.*

⁷² *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 127 S. Ct. 809 (2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 127 S. Ct. 809 (2017); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

⁷³ See Ron Chapman, Jr. & Christopher Murray, *Supreme Court Jumps into Class Action Waiver Fight*, NAT’L L. REV. (Jan. 13, 2017), <http://www.natlawreview.com/article/supreme-court-jumps-class-action-waiver-fight> (noting “split between the Second, Fifth, and Eighth Circuits on one side and the Seventh and Ninth Circuits on the other”). The Court delayed arguments in these cases until October 2017, presumably because of the potential for a 4–4 split before Justice Gorsuch took the bench.

& Construction Co. v. Utah⁷⁴ applies to a three-year time limit contained in section 3 of the 1933 Securities Act.⁷⁵ The Court had granted review on that issue in 2014,⁷⁶ but the parties settled before the Court could resolve the case.⁷⁷ And in January 2016, the Court granted review in *Microsoft Corp. v. Baker* to determine whether a federal court of appeals has jurisdiction to review an order denying class certification where plaintiffs have sought to obtain immediate review by voluntarily dismissing their individual claims with prejudice.⁷⁸

Thus, I am not suggesting that the Court is now *denying* review simply because a case raises a class action issue. What I am suggesting, however, is that the Court will not reach out and decide a case merely because the business community says the case is important and invokes the mantra of blackmail pressure to settle. For now at least, the Court does not appear to be on a conscious mission to scale back class actions.

II

RECENT SUPREME COURT CLASS ACTION RULINGS

A. *The Court's 2013 Amgen Opinion*

In *Decline*, I discussed the trend among various circuits in favor of frontloading evidence (and resolving merits issues) at the class certification stage.⁷⁹ These cases have led some courts to essentially require mini-trials at the class certification stage, even when no merits discovery has occurred. In its 6–3 decision in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,⁸⁰ the Supreme Court reined in that approach, drawing a sharp distinction between the district court's role at the class certification stage and its role at the summary judgment stage. The Court cautioned against “put[ting] the cart

⁷⁴ 414 U.S. 538, 550 (1974) (holding that “the filing of a timely class action complaint commences the action for all members of the class as subsequently determined”).

⁷⁵ *In re Lehman Bros. Sec. Litig.*, 655 F. App'x 13 (2016), *cert. granted sub nom.* Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 811 (2017). This case was decided on June 26, 2017. Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017); *see infra* notes 125–30 and accompanying text (discussing decision).

⁷⁶ *Pub. Emps.' Ret. Sys. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515, *cert. dismissed*, 135 S. Ct. 42 (2014).

⁷⁷ *See* Lawrence Hurley, *U.S. Top Court, in Reversal, Dismisses IndyMac Securities Case*, REUTERS (Sept. 29, 2014), <http://www.reuters.com/article/usa-court-securities-idUSL2N0RU1L120140929>.

⁷⁸ 797 F.3d 607 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 890 (2016). This case was decided on June 12, 2017. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *see infra* notes 123–24 and accompanying text (discussing decision).

⁷⁹ *See Decline*, *supra* note 1, at 747–51.

⁸⁰ 133 S. Ct. 1184 (2013).

before the horse,”⁸¹ and emphasized that Rule 23 is not a “license to engage in free-ranging merits inquiries at the certification stage.”⁸² It explained that “Rule 23(b)(3) requires a showing that *questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.*”⁸³ Even two of the conservative Justices (Roberts and Alito) joined Justice Ginsburg’s opinion for the Court.⁸⁴ Importantly, the Court gave short shrift to defendant’s argument that a plaintiff needed to prove materiality at the class certification stage because certification places unfair pressure on defendants to settle. The Court was sending a clear message that class certification decisions should focus on the requirements of Rule 23, not on the strength of the underlying claims.

B. 2015 Term

In the 2015 Term, the Supreme Court decided three closely watched class action cases: *Tyson Foods v. Bouaphakeo*,⁸⁵ *Campbell-Ewald Co. v. Gomez*,⁸⁶ and *Spokeo v. Robins*.⁸⁷ Each of these cases had the potential to weaken the class action device, and many observers viewed the granting of certiorari in those cases—*three* in one term—as a signal that the Court was poised to do further significant damage.⁸⁸ But in each case, the Court rejected broad arguments urged by defendants.

Tyson Foods, which addressed the propriety of plaintiffs’ use of statistical evidence, was brought as a class action for state law claims and as a collective action for claims under the Fair Labor Standards Act.⁸⁹ The members of those aggregate actions were workers at a pork-processing facility who alleged entitlement to overtime based upon the time involved in “donning and doffing” protective gear and walking to and from their work areas.⁹⁰ To prove their case, given *Tyson Foods*’s failure to preserve relevant records, plaintiffs relied on an expert study that purported to calculate the average donning and

⁸¹ *Id.* at 1191.

⁸² *Id.* at 1194–95.

⁸³ *Id.* at 1191 (second emphasis added).

⁸⁴ *Id.* at 1190.

⁸⁵ 136 S. Ct. 1036 (2016).

⁸⁶ 136 S. Ct. 663 (2016).

⁸⁷ 136 S. Ct. 1540 (2016).

⁸⁸ See, e.g., Zoe Niesel, *What’s Coming for Class Actions*, WAKE FOREST L. REV. BLOG (Jan. 31, 2016), <http://wakeforestlawreview.com/2016/01/whats-coming-for-class-actions/> (“By taking up *Tyson Foods v. Bouaphakeo*, *Spokeo v. Robins*, and *Campbell-Ewald v. Gomez*, the Court could be signaling that a shift against class actions is underway which could have significant consequences for plaintiffs seeking class certification.”).

⁸⁹ 29 U.S.C. §§ 207(a), 216(b) (2012).

⁹⁰ *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1041 (2016).

doffing time based on a non-random sample of employees.⁹¹ At trial, the expert admitted that there was significant variation among class members because they performed different jobs, used different equipment, and put on different quantities of protective gear depending on the specific work performed.⁹² Another plaintiff expert used the average to calculate classwide damages but conceded that many of the employees did not suffer injury because they did not work more than forty hours per week.⁹³ The jury found for the plaintiffs, and a divided Eighth Circuit panel affirmed.⁹⁴

The Supreme Court, in a 6–2 decision, rejected the aggressive argument by Tyson Foods and several of its amici for “[a] categorical exclusion” of statistical proof in class actions, noting that such a ruling “would make little sense.”⁹⁵ The Court explained that statistical proof “is used in various substantive realms of the law,”⁹⁶ and is sometimes “‘the only practical means to collect and present relevant data’ establishing a defendant’s liability.”⁹⁷ According to the Court, “[i]n a case where representative evidence is relevant in proving a plaintiff’s individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class.”⁹⁸ Applying those principles, the Court found that, because Tyson Foods had failed to keep proper records, statistical proof would have been admissible in an individual case.⁹⁹ Thus, such evidence was properly admitted in the aggregate trial.

This ruling has been characterized as a narrow one that, ultimately, is not harmful to plaintiffs.¹⁰⁰ If anything, a few commentators view it as an important *pro-plaintiff* ruling that has the potential to

⁹¹ *Id.* at 1043–44.

⁹² Brief of Petitioner at 11, *Tyson Foods v. Bouaphakeo* (2015) (No. 14-1146).

⁹³ *Id.* at 13.

⁹⁴ *Tyson Foods*, 136 S. Ct. at 1044–45.

⁹⁵ *Id.* at 1046.

⁹⁶ *Id.* (citing Brief for Complex Litigation Law Professors as Amicus Curiae Supporting Respondents at 5–9, *Tyson Foods*, 136 S. Ct. 1036 (No. 14-1146); Brief for Economists and Other Social Scientists as Amici Curiae Supporting of Respondents at 8–10, *Tyson Foods*, 136 S. Ct. 1036 (No. 14-1146)).

⁹⁷ *Id.* (citation omitted).

⁹⁸ *Id.*

⁹⁹ *Id.* at 1046–47.

¹⁰⁰ See, e.g., D. Matthew Allen, *Sample This! Tyson Employee Class Wins Significant but Narrow Supreme Court Victory*, CLASSIFIED (Mar. 22, 2016), <http://classifiedclassaction.com/tyson-employee-class-wins-significant-narrow-supreme-court-victory/> (explaining that the Court rejected crafting a broad rule against sampling evidence); Philip M. Oliss, Troy M. Yoshino, Amy L. Brown, & Kristin Bryan, *What the Narrow Tyson Ruling Means for Class Actions*, LAW360 (Mar. 23, 2016), <http://www.law360.com/articles/774960/what-the-narrow-tyson-ruling-means-for-class-actions> (characterizing the holding in *Tyson Foods* as “narrow,” “tailored,” and of “limited applicability”).

greatly expand plaintiffs' ability to use statistical evidence in class actions.¹⁰¹

Also in *Tyson Foods*, the petitioner raised the issue of whether an aggregate action may be maintained "when the class contains hundreds of members who were not injured and have no legal right to any damages."¹⁰² The Court did not address the Article III question, concluding that it was not "fairly presented [in *Tyson Foods*], because the damages award ha[d] not yet been disbursed, nor [did] the record indicate how it [would] be disbursed."¹⁰³ This language suggests that perhaps the Article III problem would arise only if a court intended to distribute funds to uninjured people.

Finally, *Tyson Foods* is notable because the Court offered a plaintiff-friendly definition of predominance from Newberg's treatise on class actions, one that indicated that individualized damages do not automatically defeat class certification.¹⁰⁴ This language supports the argument that *Comcast Corp. v. Behrend*¹⁰⁵ should not be read to bar class actions merely because damages are individualized.¹⁰⁶

The second case, *Campbell-Ewald Co. v. Gomez*,¹⁰⁷ involved a tactic whereby a defendant attempts to "pick off" a class representative under Federal Rule of Civil Procedure 68¹⁰⁸ by offering the full judgment sought by the representative. The goal is to moot not only the representative's own claim but also the putative class action complaint, with the hope that new class representatives will not emerge. Gomez was the class representative in a putative class action alleging that Campbell-Ewald violated the Telephone Consumer Protection Act (TCPA),¹⁰⁹ which bars "using any automatic telephone dialing

¹⁰¹ See, e.g., Robert G. Bone, *Tyson Foods and the Future of Statistical Adjudication*, 95 N.C. L. REV. (forthcoming 2017) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860332## ("*Tyson Foods*, when properly understood, authorizes statistical adjudication well beyond the Fair Labor Standards Act claim at issue in the case.>").

¹⁰² Brief of Petitioner, *supra* note 92, at i.

¹⁰³ *Tyson Foods*, 136 S. Ct. at 1050.

¹⁰⁴ *Id.* at 1045 (quoting 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:50 (5th ed. 2012)) ("The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregate-defeating, individual issues.'").

¹⁰⁵ 133 S. Ct. 1426 (2013).

¹⁰⁶ See *infra* notes 145–47 and accompanying text (discussing how defendants have argued that the existence of individualized damages, by itself, defeats class certification and how courts have rejected that argument).

¹⁰⁷ 136 S. Ct. 663 (2016).

¹⁰⁸ Rule 68(a) provides that "a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." FED. R. CIV. P. 68(a). The offer lapses if it is not accepted "within 14 days." *Id.* Rule 68(b) states that "[a]n unaccepted offer is considered withdrawn." FED. R. CIV. P. 68(b).

¹⁰⁹ 47 U.S.C. § 227 (2012).

system” to send a text message to a cell phone without the recipient’s consent.¹¹⁰ Prior to the deadline for the motion for class certification, Campbell-Ewald proposed to settle Gomez’s individual claims for their full value.¹¹¹ Gomez did not accept the offer, and it thus lapsed. Campbell-Ewald thereafter argued that the unaccepted offer mooted Gomez’s individual claims (as well as those of the putative class).¹¹² The district court and the Ninth Circuit rejected that argument. In a 6–3 decision, the Supreme Court held that the unaccepted offer of judgment did not moot the case and that defendant’s contrary argument was unsupported by Rule 68.¹¹³ Limiting the case to its facts, the Court noted: “We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.”¹¹⁴

The third case, *Spokeo v. Robins*,¹¹⁵ involved a putative class action filed by respondent Robins under the Fair Credit Reporting Act (FCRA),¹¹⁶ claiming that the web site known as “Spokeo” posted inaccurate information about him, thereby harming his prospects for finding work.¹¹⁷ The defendant argued that Robins had not suffered actual injury. The district court dismissed the case for lack of standing, but the Ninth Circuit reversed, holding that Robins had adequately alleged that his statutory rights had been violated.¹¹⁸ Although the Court reversed in a 6–2 ruling, the opinion did not break new ground. The majority reasoned that the Ninth Circuit erred in its Article III analysis by focusing solely on particularity and not on concreteness. According to the Court, the fact that Congress has “identif[ied] and elevat[ed]” intangible interests “does not mean that a plaintiff automatically satisfies the injury-in-fact requirement”¹¹⁹ Yet, the Court stated that even a “risk of real harm” can satisfy the concreteness requirement.¹²⁰ The dissenters agreed with most of the majority’s legal analysis but merely disagreed about the need for a remand under the specific facts.¹²¹ Had the Court issued a sweeping opinion, the case

¹¹⁰ 136 S. Ct. 663, 666–67 (citing 47 U.S.C. § 227(b)(1)(A)(iii) (2012)).

¹¹¹ *Id.* at 667–68 (citing FED. R. CIV. P. 68).

¹¹² *Id.* at 668.

¹¹³ *Id.* at 670–71.

¹¹⁴ *Id.* at 672.

¹¹⁵ 136 S. Ct. 1540 (2016).

¹¹⁶ 15 U.S.C. § 1681 (2012).

¹¹⁷ *Spokeo*, 136 S. Ct. at 1544–46.

¹¹⁸ *Id.* at 1544.

¹¹⁹ *Id.* at 1549.

¹²⁰ *Id.*

¹²¹ *See id.* at 1555.

could have eliminated many statutory damages class actions (which, according to the business community, were classic “settlement pressure” cases).¹²² But the Court left open the possibility that many such cases can still go forward.

These decisions cannot be explained by Justice Scalia’s death. He participated in the 6–3 *Campbell-Ewald* decision, joining Chief Justice Roberts’s dissent. And while both *Tyson Foods* and *Spokeo* postdated his death, his vote would not have changed the outcome in either case because both were 6–2 decisions.

All three decisions avoided establishing sweeping, bright-line tests. None of the them even alluded to the pressure to settle as a guiding principle or in any way suggested that class actions are typically abusive and unfair. Although *Spokeo* was resolved against the plaintiff, the decision left open a path for the plaintiff’s case to go forward after review on remand. Both *Tyson Foods* and *Campbell-Ewald* were plaintiff victories, and in both cases the Court was critical of defendants’ overly aggressive arguments. In short, what began as a potential watershed Supreme Court term for class actions ended with a whimper.

C. 2016 Term

In the 2016 Term, the Supreme Court decided three cases that could negatively impact class actions. Nonetheless, I do not view these decisions—either individually or collectively—as reflecting any sort of anti-class action agenda on the part of the Court.

First, in *Microsoft v. Baker*,¹²³ the Court unanimously held that a class representative cannot voluntarily dismiss his or her case with prejudice after a denial of class certification (and subsequent denial of Rule 23(f) review) and then appeal the class certification decision as a final judgment. The majority, in an opinion by Justice Ginsburg, determined that the tactic was an improper end-run around Rule 23(f) and the final judgment rule. The three concurring justices believed that the outcome was justified because there was no Article III case or controversy.¹²⁴ The case simply reflects the Court’s rejection of an attempt

¹²² See, e.g., John Nadolenco, Archis A. Parasharami & Joseph P. Minta, *Too High a Price? The Perilous Combination of Statutory Damages and Class Certification*, 18 CLASS ACTION 1 (2011), <https://m.mayerbrown.com/Files/Publication/f1fed2fc-e4e1-48ea-8da0-9dbdd0e2887a/Presentation/PublicationAttachment/0a7523a3-6f13-4566-a573-5dc9645a9ed1/10563.pdf> (“[S]tatutory damages provisions sometimes create a risk of staggeringly large awards The threat of such awards can place intense settlement pressure on defendants in class actions.”).

¹²³ 137 S. Ct. 1702 (2017).

¹²⁴ See *id.* at 1715–16 (Thomas, J., concurring in the judgment) (“I agree with the Court that the Court of Appeals lacked jurisdiction over [plaintiff’s] appeal, but I would ground

to circumvent the final judgment rule and the limited grounds for interlocutory review under Rule 23(f).

Second, in *California Public Employees' Retirement System v. ANZ Securities, Inc.*,¹²⁵ the Court held (in a 5–4 decision) that tolling under *American Pipe*¹²⁶ does not apply to section 11 of the Securities Act of 1933 because the time limit is a statute of repose, which “supercedes the application of a tolling rule based in equity.”¹²⁷ The Court’s opinion did not question the general validity of *American Pipe* tolling but simply held that tolling does not apply to the particular statute at issue.

Third, in *Bristol-Myers Squibb Co. v. Superior Court of California*,¹²⁸ the Court (in an 8–1 decision) took a narrow view of personal jurisdiction, holding that there was no personal jurisdiction over Bristol-Myers in a suit by more than 600 plaintiffs claiming injuries from the company’s blood-thinning drug, Plavix. The Court found no connection between the relevant plaintiffs (who were not California residents) and California, and thus no basis for specific jurisdiction. The case was not a class action, although the rationale could conceivably apply to class actions as well as non-class aggregated cases.¹²⁹ The decision does not reflect anti-aggregation sentiment, but is simply another case in which the Court has taken a narrow view of personal jurisdiction.¹³⁰

III

RECENT CIRCUIT COURT DECISIONS REJECTING PROPOSED NEW LIMITS

On multiple occasions in recent years, the circuits have rebuffed efforts by defendants to push Supreme Court and prior circuit precedents to their limits. Like the Supreme Court’s recent decisions, most recent circuit decisions have been fact specific and have avoided the adoption of broad, bright-line rules that would severely restrict class

that conclusion in Article III of the Constitution instead of 28 U.S.C. § 1291.”). Justice Gorsuch did not participate in the case.

¹²⁵ 137 S. Ct. 2042 (2017).

¹²⁶ 414 U.S. 538 (1974); see *supra* notes 74–75 and accompanying text.

¹²⁷ *ANZ Sec.*, 137 S. Ct. at 2052.

¹²⁸ 137 S. Ct. 1773 (2017).

¹²⁹ *Cf. id.* at 1789 n.4 (Sotomayor, J., dissenting) (“The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”).

¹³⁰ See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (adopting narrow view of general jurisdiction).

actions.¹³¹ Given space constraints, I offer several examples without purporting to be exhaustive.

A. *Interpretation of Amgen, Tyson Foods, Campbell-Ewald, and Spokeo*

The circuits have not been reticent about applying the teachings in *Amgen* and, as a result, supporting class certification in various cases. For instance, in *Rikos v. Procter & Gamble Co.*,¹³² the Sixth Circuit cited *Amgen* and criticized Procter & Gamble for “misconstru[ing] Plaintiffs’ burden at the class-certification stage.”¹³³ In *Suchanek v. Sturm Foods, Inc.*,¹³⁴ the Seventh Circuit cited *Amgen* and noted, in reversing a decision denying class certification, that “‘Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win.’”¹³⁵ In *Alcantar v. Hobart Service*,¹³⁶ the Ninth Circuit likewise cited *Amgen* in reversing a denial of class certification on the ground that the district court “ask[ed] too much” of the plaintiffs in weighing the merits of their common contentions at the class certification stage.¹³⁷ And in *Williams v. Jani-King of Philadelphia, Inc.*,¹³⁸ the Third Circuit cited *Amgen* and emphasized that “the class certification stage is not the place for a decision on the merits.”¹³⁹

With respect to the 2015 Term cases, although plaintiffs have suffered some circuit court defeats as a result of *Tyson Foods, Campbell-Ewald*, and *Spokeo*,¹⁴⁰ the overall response to those cases has been nuanced and mildly favorable for plaintiffs. For instance, two circuits

¹³¹ Of course, there are exceptions to this trend. For instance, in *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249 (3d Cir. 2016), the Third Circuit imposed new requirements for numerosity, citing pressure on defendants to settle after certification.

¹³² 799 F.3d 497 (6th Cir. 2015).

¹³³ *Id.* at 505.

¹³⁴ 764 F.3d 750 (7th Cir. 2014).

¹³⁵ *Id.* at 758 (citation omitted).

¹³⁶ 800 F.3d 1047 (9th Cir. 2015).

¹³⁷ *Id.* at 1053.

¹³⁸ 837 F.3d 314 (3d Cir. 2016).

¹³⁹ *Id.* at 322.

¹⁴⁰ See, e.g., *Bank v. All. Health Networks, LLC*, No. 15-4037-cv, 2016 WL 6128043, at *1–2 (2d Cir. Oct. 20, 2016) (holding (post-*Campbell-Ewald*) that by accepting an offer of judgment, plaintiff lacked standing to pursue class certification on behalf of the class, and declining to leave the case open for an opportunity to substitute a new class representative); *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002–03 (11th Cir. 2016) (dismissing suit (post-*Spokeo*) alleging violation of New York statute because of failure to allege concrete injury); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (same); *DiCuio v. Brother Int’l Corp.*, 653 F. App’x 109, 113 (3d Cir. 2016) (citing *Tyson Foods* and refusing to allow the use of company maintenance reports that were not representative of the class in a consumer class action).

have cited *Tyson Foods* as support for the proposition that individualized damages do not automatically defeat class certification.¹⁴¹ And two circuits have held, post-*Campbell-Ewald*, that even if a “pick off” successfully moots a class representative’s individual case, the representative should be given an opportunity to seek class certification.¹⁴² These latter decisions, of course, remove all incentive for defendants to make offers of judgment as a way to derail class actions. And post-*Spokeo*, a number of circuits have found no Article III concerns with allegations of purely intangible injuries or mere risk of harm.¹⁴³

B. Damages and Class Certification

In *Comcast*, the Supreme Court ruled that Rule 23(b)(3)’s predominance requirement was not satisfied because “respondents’ [damages] model [fell] far short of establishing that damages are capable of measurement on a classwide basis.”¹⁴⁴ After *Comcast*, defendants began to argue (contrary to pre-*Comcast* case law) that the existence of individualized damages, by itself, defeated class certification. Even prior to *Tyson Foods*’s discussion of the issue,¹⁴⁵ defendants had virtually no success in selling that interpretation of *Comcast* to the circuits. Examples of decisions rejecting the argument include *Roach v. T.L. Cannon Corp.*,¹⁴⁶ and *Neale v. Volvo Cars of North*

¹⁴¹ See *Ibe v. Jones*, 836 F.3d 516, 529 (5th Cir. 2016) (recognizing this takeaway from *Tyson Foods*, although finding that class certification inappropriate on the facts of the case because of the difficulty in calculating damages); *Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1155 (9th Cir. 2016) (explaining that under *Tyson Foods* the need for individual damages does not alone defeat class certification).

¹⁴² See *Richardson v. Bledsoe*, 829 F.3d 273, 286 (3d Cir. 2016); *Chen v. Allstate*, 819 F.3d 1136, 1147 (9th Cir. 2016); see also *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541, 546–47 (7th Cir. 2017) (settlement offer accompanied by deposit of offered funds with court did not moot class representative’s individual claims). *But see Bank*, 2016 WL 6128043, at *1–2 (holding that class representative “lack[ed] standing to pursue the class claims” after his individual claims were mooted by successful Rule 68 pick-off).

¹⁴³ See, e.g., *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017) (reversing district court’s dismissal of data breach case on standing grounds; allegation of substantial risk of identity theft was sufficient under Article III); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App’x 384, 388 (6th Cir. 2016) (finding a substantial risk of harm enough for Article III standing); *Church v. Accretive Health, Inc.*, 654 F. App’x 990, 993 (11th Cir. 2016) (explaining that “injury need not be tangible to be concrete”); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 272–73 (3d Cir. 2016) (finding an intangible injury sufficient to establish Article III standing).

¹⁴⁴ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013).

¹⁴⁵ See *supra* notes 95–99 and accompanying text (discussing *Tyson Foods*’s treatment of damages and class certification).

¹⁴⁶ 778 F.3d 401, 407–08 (2d Cir. 2015) (characterizing *Comcast*’s holding as “narrow[]” and as “‘simply’ requir[ing] that a damages calculation reflect the associated theory of liability” (citation omitted)).

America, LLC.¹⁴⁷ Again, the fact that defendants have been almost universally unsuccessful in their sweeping reading of *Comcast* is notable.

C. *Impact of Dukes*

Dukes has no doubt had an impact on class action jurisprudence. In a number of cases, courts have relied on *Dukes* to reverse class certification in injunctive suits under Rule 23(b)(2) where a significant component of the case involves damages.¹⁴⁸ Similarly, several circuits have held that employment class actions involving decentralized decision making cannot go forward under *Dukes* because of a lack of commonality.¹⁴⁹ But the impact of *Dukes* has been less profound than one might have predicted when it was decided in 2011.

In a recent article, I pointed out that numerous courts have approved Rule 23(b)(2) public interest class actions involving juveniles, prisoners, immigrants, and disabled people notwithstanding *Dukes*.¹⁵⁰ Moreover, *Dukes* has by no means meant the end of employment discrimination class actions. As one commentator has observed, “[c]ourts throughout the nation have continued to certify class actions in employment cases since *Dukes*”¹⁵¹ A prominent example is *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,¹⁵² in which the Seventh Circuit, in a decision by Judge Posner, reversed the district court’s denial of class certification in a race discrimination case involving 700 African-American brokers currently or formerly employed by Merrill Lynch.¹⁵³ The court relied on two company-wide policies that allegedly resulted in a disparate impact.¹⁵⁴ It described *Dukes* as a case where “there was no company-wide policy to challenge . . . —the only relevant corporate policies were a policy

¹⁴⁷ 794 F.3d 353, 374–75 (3d Cir. 2015) (emphasizing that “the predominance analysis [in *Comcast*] was specific to the antitrust claim at issue”).

¹⁴⁸ See, e.g., *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013) (denying certification for monetary relief in light of *Dukes*); *Nationwide Life Ins. Co. v. Haddock*, 460 F. App’x 26, 29 (2d Cir. 2012) (same).

¹⁴⁹ See, e.g., *Davis v. Cintas Corp.*, 717 F.3d 476, 488–89 (6th Cir. 2013) (rejecting a class action alleging gender discrimination under a “largely subjective hiring system”); *Bennett v. Nucor Corp.*, 656 F.3d 802, 814–16 (8th Cir. 2011) (finding no commonality in a race discrimination claim).

¹⁵⁰ See Klonoff, *supra* note 17, at 1590–91 (explaining that public interest class actions have fared well, even after *Dukes*).

¹⁵¹ R. Paul Yetter et al., *The Impact of Wal-Mart v. Dukes on Employment Law Class Actions and FLSA Collective Actions*, YETTER COLEMAN LLP (Oct. 10, 2013), <http://www.yettercoleman.com/wp-content/uploads/2013/10/The-Impact-of-Wal-Mart-v.-Dukes-on-Employment-Law-Class-Actions-and-FLSA-Collective-Actions.pdf>.

¹⁵² 672 F.3d 482 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338.

¹⁵³ *Id.* at 492.

¹⁵⁴ *Id.* at 489–90.

forbidding sex discrimination—and a policy of delegating employment decisions to local managers—[and thus] there was no common issue to justify class treatment.”¹⁵⁵ Other employment cases have similarly distinguished *Dukes*.¹⁵⁶

D. Ascertainability

Under the Third Circuit’s “ascertainability” requirement, “[i]f class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.”¹⁵⁷ As noted earlier,¹⁵⁸ in *Mullins v. Direct Digital, LLC*,¹⁵⁹ the Seventh Circuit rejected the Third Circuit’s ascertainability jurisprudence, and the Supreme Court declined to review that decision.¹⁶⁰ What is particularly interesting, however, is that even the Third Circuit has retreated in the face of overly aggressive advocacy by defendants.

In *Byrd v. Aaron’s Inc.*,¹⁶¹ the Third Circuit reversed the denial of class certification on ascertainability grounds.¹⁶² The case alleged damages from spyware installed on leased computers. The putative class included purchasers or lessees of computers, along with their “household members.” The court held that the inclusion of “household members” should not derail certification because “‘household members’ is a phrase that is easily defined and not, as Defendants argue, inherently vague.”¹⁶³ Notably, the court criticized defendants for “seiz[ing] upon [the] lack of precision [in the case law] by invoking the ascertainability requirement with increasing frequency in order to

¹⁵⁵ *Id.* at 488.

¹⁵⁶ See, e.g., *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113–14 (4th Cir. 2013) (explaining that a putative class may still meet the commonality requirement if there is an allegation of a company-wide policy of discrimination, even when the complaint alleges discretion); *Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1153–54 (9th Cir. 2016) (rejecting *Dukes*’s application to a small group of salespersons alleging one type of injury caused by one actor).

¹⁵⁷ *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

¹⁵⁸ See *supra* notes 52–56 and accompanying text (explaining the Seventh Circuit’s rejection of the Third Circuit’s heightened ascertainability requirement).

¹⁵⁹ 795 F.3d 654, 657–58 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) (rejecting the Third Circuit approach because it goes beyond the adequacy of the class and looks into the validity of individual claims).

¹⁶⁰ The Third Circuit’s ascertainability requirement was also rejected in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), *petition for cert. filed*, No. 16-1221, 2017 WL 1353282 (U.S. Apr. 10, 2017), and *In re Petrobras Sec.*, 862 F.3d 250 (2d Cir. 2017).

¹⁶¹ 784 F.3d 154 (3d Cir. 2015).

¹⁶² *Id.* at 158–59.

¹⁶³ *Id.* at 170–71.

defeat class certification.”¹⁶⁴ It noted that the doctrine was “narrow” and that “[i]f defendants intend to challenge ascertainability, they must be exacting in their analysis”¹⁶⁵ Clearly, the court was stating, in judicious terms, that defendants had been too aggressive in relying on ascertainability as a basis for defeating class certification.

E. Standing of Unnamed Class Members

As noted above,¹⁶⁶ *Tyson Foods* did not decide whether a class action that includes uninjured class members can go forward. Defendants have been aggressive in the circuits in arguing that a class with some uninjured class members is barred by Article III of the Constitution. While defendants have had some success,¹⁶⁷ several circuits have rejected the argument.¹⁶⁸ As the Seventh Circuit put it, “How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified.”¹⁶⁹ Or, as the Third Circuit put it: “[U]nnamed, putative class members need not establish Article III standing.”¹⁷⁰ This standing issue would have been low-hanging fruit to any circuit that was determined to cut back on class actions in a dramatic fashion. The fact that a number of circuits have refused to embrace defendants’ arguments is noteworthy.

F. Arbitration Clauses

The Supreme Court’s most recent arbitration cases—*Concepcion*, *Italian Colors*, and *DIRECTV*—have made it very difficult for plaintiffs to circumvent arbitration agreements and class action waivers. Not surprisingly, a number of circuit cases have relied on those authorities in rejecting efforts by plaintiffs to avoid such agreements

¹⁶⁴ *Id.* at 162.

¹⁶⁵ *Id.* at 165.

¹⁶⁶ See *supra* notes 95–99 and accompanying text (discussing *Tyson Foods*’s treatment of damages and class certification).

¹⁶⁷ See, e.g., *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006) (explaining that, although unnamed class members were not required to “submit evidence of personal standing,” it was essential that the class “be defined in such a way that anyone within it would have standing”); *accord Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

¹⁶⁸ See Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383, 387–91 (2014) (discussing circuit split); Joshua D. Snyder, *Tyson Foods and “Uninjured Class Members” in Antitrust Class Actions*, ANTITRUST SOURCE, Dec. 2015, at 5 (same).

¹⁶⁹ *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014).

¹⁷⁰ *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015).

and waivers.¹⁷¹ Nonetheless, there have been some surprising pro-plaintiff developments at the circuit level.

Most importantly, contrary to several other circuits,¹⁷² the Seventh and Ninth Circuits have held that arbitration agreements and class action waivers in employment cases are unenforceable under the National Labor Relations Act (NLRA),¹⁷³ and that the Federal Arbitration Act (FAA)¹⁷⁴ does not require a contrary conclusion. For example, in *Lewis v. Epic Systems Corp.*,¹⁷⁵ the Seventh Circuit determined that the FAA “work[s] hand in glove” with the NLRA.¹⁷⁶ The Ninth Circuit has reached a similar conclusion,¹⁷⁷ and the Supreme Court has granted review as noted above.¹⁷⁸ Regardless of the outcome, the point for present purposes is that, even in the arbitration area, with several sweeping Supreme Court cases to grapple with, some circuits have been unwilling to enforce arbitration agreements and class action waivers in employment cases.

G. Consumer Class Actions

As discussed above, the Supreme Court declined to review the Sixth and Seventh Circuit “moldy washing machine” cases, thus leaving these important precedents intact. In *Sears*, the Seventh Circuit (in an opinion by Judge Posner) recognized that predominance is not “determined simply by counting noses: that is, [by] determining whether there are more common issues or more individual issues”¹⁷⁹ The court also recognized that it is “more efficient” to decide common liability issues once than to litigate them “separately

¹⁷¹ See, e.g., *Rueli v. Baystate Health, Inc.*, 835 F.3d 53, 64–65 (1st Cir. 2016) (enforcing arbitration clause in wage and hour context, noting that group arbitration could be sought); *Kaspers v. Comcast Corp.*, 631 F. App’x 779, 782 (11th Cir. 2015) (enforcing arbitration agreement between Comcast and customers alleging that services were not received).

¹⁷² E.g., *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (holding a mutual arbitration agreement must be enforced because the NLRA does not contain a congressional command exempting the statute from application of the FAA and because the NLRB’s interpretation does not fall under the FAA’s “saving clause”); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 292 (2d Cir. 2013) (per curiam) (same); see also *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 775–76 (8th Cir. 2016) (same).

¹⁷³ 29 U.S.C. §§ 151–169.

¹⁷⁴ 9 U.S.C. § 1.

¹⁷⁵ 823 F.3d 1147 (7th Cir. 2016), cert. granted, 127 S. Ct. 809 (2017).

¹⁷⁶ *Id.* at 1157.

¹⁷⁷ See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016), cert. granted, 127 S. Ct. 809 (2017) (finding that the right of employees to pursue claims together is so central to the NLRA that the FAA does not mandate enforcement of a waiver of that right).

¹⁷⁸ See *Lewis*, 137 S. Ct. 809 (2017) (granting certiorari); *Morris*, 137 S. Ct. 809 (2017) (same); *supra* notes 72–73 and accompanying text.

¹⁷⁹ *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).

in hundreds of different trials.”¹⁸⁰ In *Whirlpool*, the Sixth Circuit noted that “[u]se of the class method [was] warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery.”¹⁸¹

In *Reyes v. Netdeposit, LLC*,¹⁸² a 2015 case involving allegations of a fraudulent telemarketing scheme and unauthorized debits from bank accounts, the Third Circuit reversed the denial of class certification. In so holding, the court reasoned: “Class actions are often the only practical check against the kind of widespread mass-marketing scheme alleged here.”¹⁸³ It noted that “[t]he individual claims arising from such conduct are usually too small to justify suit unless aggregated in a class action.”¹⁸⁴

In *Rikos v. Procter & Gamble Co.*,¹⁸⁵ another case that the Supreme Court declined to review,¹⁸⁶ the Sixth Circuit upheld class certification in a case alleging that Procter & Gamble’s probiotic, Align, did not work as advertised. The court found that the common question—whether Align is snake oil that does not work for anyone—is one that “will yield a common answer for the entire class that goes to the heart of whether P & G will be found liable under the relevant false-advertising laws.”¹⁸⁷

All four cases recognized that small-claim consumer cases were especially suitable for classwide litigation. These cases are the antithesis of hostility to class actions.

* * *

Like the Supreme Court’s recent opinions, the recent circuit cases, for the most part, do not reflect hostility to class actions. In general, they are cautious, narrow, and generally unreceptive to defendants’ requests to impose sweeping new limits on class actions. Exceptions can be found, but the overall tenor of the recent case law is notable. Importantly, the “pressure to settle” rationale for limiting class actions has all but disappeared from circuit court decisions in the past few years.

¹⁸⁰ *Id.* at 799.

¹⁸¹ *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013).

¹⁸² 802 F.3d 469 (3d Cir. 2015).

¹⁸³ *Id.* at 491.

¹⁸⁴ *Id.*

¹⁸⁵ 799 F.3d 497 (6th Cir. 2015).

¹⁸⁶ *See supra* note 61 and accompanying text (discussing the Court’s denial of certiorari).

¹⁸⁷ *Rikos*, 799 F.3d at 508–09.

CONCLUSION

For those (such as myself) who believe that the class action device is a valuable tool in many kinds of cases, the reprieve I have described in the Supreme Court and the circuits is a welcome change from years of adverse case law. How long this reprieve will last, however, is anyone's guess.