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SUPREME COURT CLASS ACTIONS

In the aftermath of U.S. Supreme Court Justice Antonin Scalia's death, "the media embraced the often-repeated refrain concerning the Court's corporate bias," Professor Linda S. Mullenix says. This narrative is not true, the author says. She analyzes the top court's class action predilections, and concludes Scalia's impact on the court's class action jurisprudence has been "largely overstated."

BNA Insights

False Narratives: Justice Scalia's Impact on Class Action Litigation



By Linda S. Mullenix

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Within a few weeks of Justice Antonin Scalia's death on February 13, 2016 various media embraced the often-repeated refrain concerning the Court's corporate bias, focusing on Justice Scalia's prominent role in shaping the Court's favorable predisposition in business cases. Nowhere was this theme more conspicuously trumpeted than in the commentators' dissection of Scalia's influence on the Court's class action jurisprudence.

No less prominent a scholar than James Surowiecki, writing in the March 7, 2016 issue of *The New Yorker* magazine, expounded on this thesis ("*The Financial Page: Courting Business*"). Commenting on the Court's conservative cohort, Surowiecki noted: "They have been skeptical of the use of class-action suits to achieve goals or enforce regulations." Surowiecki quoted Vanderbilt law Professor Brian Fitzpatrick — opining on two recent decisions upholding class action waivers in arbitration clauses — that "they have the potential to literally wipe out the class-action lawsuit."

This hyperbolic anti-class action narrative additionally provided the basis for an optimistic post-Scalia prediction. Again, quoting Fitzpatrick: "Scalia has done more than any other justice in making it difficult for consumers and employees to bring class-action suits. So his absence alone may make a difference." Capping off this account, Surowiecki (and others) noted that because Scalia's death had increased possible unfavorable outcomes for business, Dow Chemical had immediately settled a major class action lawsuit.

The problem with this narrative is that it simply is not true. It certainly is not nuanced. Justice Scalia was appointed to the bench in 1986. In the intervening thirty years, the Court decided approximately twenty-three class actions. In this universe of class action cases, well more than half of these decisions are fairly characterized as favoring plaintiffs' interests in class litigation. If anything, the Court has been more pro-plaintiff in its class action jurisprudence than pro-business. Correlatively, it is simply is not the case that the Court consistently has favored corporate interests. Moreover, many of the Court's class action cases were not decided as 5-4 split decisions, where Justice Scalia's vote made a decisive difference. Instead, many of the Court's class action decisions represent more unanimity than the prevailing narrative suggests.

The Supreme Court decided relatively few class action appeals during Justice Scalia's first decade on the

bench. Of the Court's class action decisions since 1997, Justice Scalia authored only five opinions. As will be discussed, four of these cases were decided by 5-4 votes. The fifth case (*American Express Co. v. Italian Colors Restaurant*) resulted in a split 6-3 decision; therefore, Scalia's vote did not make a difference in the outcome. Two other cases were resolved by 5-4 decisions, not authored by Scalia, in which he joined with the majority.

What, then, explains the exaggerated accounts of Justice Scalia's role in the Court's class action pronouncements? Critics, by focusing on four recent Scalia decisions, have skewed understanding of the Court's class action jurisprudence. At best, these contested decisions suggest specific issues where Scalia's absence *might* make a difference. But generally, Scalia's absence will have little impact on the Court's direction in class litigation, because his presence likewise had scant impact while he was on the Court. Thus, the plaintiffs' dire "sky is falling" class action narrative, coupled with the trial bar's jubilant reaction to Scalia's death, are both overstated.

Analyzing the Court's Class Action Predilections

Since Scalia's ascendency to the bench in 1986, the Court decided approximately twenty-three cases that directly implicate Rule 23 or class action issues. This analysis does not include — as either plaintiff or defendant-favoring decisions — the Court's two settlement class decisions, *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In both cases the Court repudiated settlement agreements negotiated by plaintiffs and defendants as failing to satisfy the requirement for adequacy of representation, among other Rule 23 problems. Arguably, then, the *Amchem* and *Ortiz* decisions are best characterized as protecting the interests of absent class members. However, neither decision realistically favors plaintiffs in pursuit of class litigation, or defendants in opposition. On the other hand, commentators inclined to spin Supreme Court jurisprudence to fit pre-conceived narratives are perfectly capable of cobbling some litigant-favoring bias embedded even in the Court's settlement class decisions.

In addition, the Court's May 16, 2016 decision in *Spokeo v. Thomas Robins* (No. 13-1339) is not yet ripe for inclusion in this tout-sheet of Scalia-era class action jurisprudence. The Court has remanded *Spokeo* to the Ninth Circuit for additional reconsideration on the standing issue central to that case. As such *Spokeo*, raising the problem of so-called no-injury class, is still a work in progress and may well return to the Court after the Ninth Circuit clarifies its standing analysis. Nonetheless, as a 6-2 split, this *Spokeo* decision accords with one of the central points of this article: that the absence of Justice Scalia's vote would not have made a difference in *Spokeo's* outcome, had Justice Scalia lived to cast his vote.

In surveying the post-1986 universe of class action cases (excluding *Amchem*, *Ortiz*, and *Spokeo*), the Court's decisions have been characterized as plaintiff-favoring if the majority affirmed class certification, articulated a rule or standard supporting plaintiffs in pursuit of class litigation, or repudiated defendants' attempts to curtail class action or aggregate litigation. Of the twenty decisions relating to class litigation, thirteen advanced the interests of class action plaintiffs. In contrast, seven decisions supported defense opposition to class proceedings.

The Court's Plaintiff-Favoring Class Action Decisions

The most prominent example of the Court's pro-plaintiff stance has been demonstrated by the Court's continued endorsement of the fraud-on-the-market presumption in securities class litigation, first announced in *Basic v. Levinson*, 485 U.S. 224 (1988). Justices Kennedy, Scalia, and Rehnquist took no part in that decision. In the decades since Scalia joined the bench, the Court has upheld the plaintiff-favoring fraud-on-the-market presumption four times.

In at least three appeals since *Basic*, where the Court had every opportunity to repudiate or limit the *Basic* presumption, the Court has steadfastly declined to do so. See *Halliburton Co. v. Erica P. Fund*, 134 S. Ct. 2398 (2014); *Amgen Inc. v. Connecticut Retirement Plans*, 133 S. Ct. 1184 (2013); and *Erica P. Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011) (plaintiffs need not prove loss causation to obtain class certification). Notably, a unanimous Court agreed on the two *Halliburton* decisions; the *Amgen* decision was a 6-3 vote, with Scalia dissenting. Nonetheless, Scalia's vote did not make a difference in the outcome of any of these fraud-on-the-market cases, nor will his absence therefore affect any future re-visitation of this issue.

In a series of cases implicating federalism issues, the Court announced rulings that have supported class action plaintiffs. For example, in a unanimous decision, the Court held that a state court judgment settling shareholders' federal securities claims has preclusive effect in federal courts. *Matsushita Elec. Industrial Co., Ltd. v. Epstein*, 516 U.S. 367 (1996). In 2010, in a plurality opinion authored by Scalia, the Court upheld the supremacy of Federal Rule of Civil Procedure 23 over a conflicting New York state rule that would have limited plaintiffs' ability to pursue class litigation (and that thereby favored defendants). *Shady Grove Orthopedic*

Associates P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010). In essence, the Court in *Shady Grove* saved the federal class action rule against incursions by state legislatures and courts.

And, the following year, the Court held that a federal court exceeded its authority under the relitigation exception to the Anti-Injunction Act by enjoining a state court from considering a plaintiff's request for class certification. *Smith v. Bayer Corp.*, 564 U.S. 299 (2011). This ruling effectively permitted a state class action plaintiff to proceed with its class litigation, unimpeded by federal interference. The Court could have killed off parallel state court class litigation if it wanted to, but it chose not to. *Smith v. Bayer* was decided by a unanimous Court.

Through a series of rulings, the Court has expanded the ability of litigants to pursue class litigation. Thus, in 2005, the Court finally eliminated the so-called *Zahn* rule that previously prohibited class plaintiffs from aggregating damages to satisfy the amount in controversy requirement for diversity class actions. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005). This pro-plaintiff ruling enabled plaintiffs to take advantage of the supplemental jurisdiction statute to pursue class litigation. This ruling, of course, was superseded by the Class Action Fairness Act of 2005, which permitted aggregation of damages. In *Devlin v. Scardelletti*, the Court ruled that a non-named class member need not intervene in the class proceedings in order to subsequently bring an appeal. 536 U.S. 1 (2002).

And in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court held that where an arbitration clause that did not clearly preclude class arbitration, the Federal Arbitration Act did not foreclose class arbitration; this issue was one of state contract law. Although the Court subsequently would recast its stance on classwide arbitration, at least initially the Court gave a green light to this possibility when an arbitration clause was silent on the issue.

In 2014, a unanimous Court agreed that a *parens patrie* action by the state of Mississippi was not a mass action subject to removal to federal court under the Class Action Fairness Act of 2005. *Mississippi ex rel. v. AU Optronics Corp.*, 134 S. Ct. 736 (2014). Arguably, this decision favored consumers pursuing collective relief through the auspices of their state attorneys-general. At any rate, the Court dealt a blow to corporate defendants seeking to evade collective litigation in state courts by removing such actions into federal court under CAFA provisions.

Two decisions this Term also favored plaintiff's interests in class litigation. In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Court held (on a 5-4 vote) that a consumer's complaint was not rendered moot by an unaccepted offer of judgment. Scalia was among the four dissenters; but his absence from the Court would not have affected a change in the result because he was in the minority. And, in *Tyson Foods, Inc. v. Bouphaekeo*, 136 S. Ct. 1036 (2016), the Court upheld use of expert witness statistical testimony concerning classwide liability and damages in a Fair Labor Standards Act collective class action. This was the first post-Scalia class action decision, decided on a 6-2 vote. Again, Scalia's absence made no difference in the outcome.

The Court's Defendant-Favoring Class Action Decisions

Among the Court's class action decisions since 1986, in the universe of twenty cases, seven decisions are fairly characterized as defendant-favoring – notably, far fewer than those supporting plaintiffs. Nevertheless, the pro-corporate narrative prevails in popular accounts of the Court's class action jurisprudence.

The most notable universe of pro-defendant rulings pertains to the Court's stance on class action waivers in arbitration clauses. After the Court's initial endorsement of classwide arbitration in *Bazzle v. Green Tree Financial*, corporate defendants regrouped to draft more specific anti-class action arbitration clauses. The Court, in four decisions, has consistently upheld such class action waivers as against prohibitive state law and the effective vindication rule. *Stolt-Nielsen S.A. v. AnimalFeeds, Int'l. Corp.*, 559 U.S. 662 (2010); *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); and *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

In reviewing the class action waiver cases, however, it is noteworthy that Justice Scalia's vote would not have made a difference in most of these cases, even though he was in the majority. *Italian Colors* and *DirectTV* were both decided on 6-3 votes. *Stolt-Nielsen* was decided on a 5-3 vote. In other words, the dissenters could not muster enough votes to prevail over the majority, and the presence or absence of Scalia's vote in any of these cases would not have made a difference because there were still enough votes in the majority to carry the decision. The only case where Scalia's vote affected the outcome was *Concepcion*, decided on a 5-4 split, and Scalia authored the majority's opinion. Notwithstanding this scorecard, the negative narrative concerning Scalia's undue influence dominates accounts of the Court's pro-corporate bias.

Three other recent class action decisions have contributed to the pro-business narrative, and all were 5-4

decisions by a divided Court. These include *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). In *Wal-Mart*, the majority repudiated class certification of an employment discrimination class that was based on expert witness testimony concerning classwide liability and damages. The Court found commonality lacking among class members' employment experience, setting forth heightened standards for establishing Rule 23(a)(2) commonality. In his majority opinion, Scalia also famously questioned the utility of "trial by formula;" that is, the use of statistical sampling techniques to prove classwide commonality. In *Comcast*, an antitrust litigation, Scalia (again writing for the majority) rejected the plaintiff's expert witness regression model for proving classwide damages. And in *Genesis Healthcare*, the Court held that a Fair Labor Standards Act case was not viable when a plaintiff's claim was rendered moot by the plaintiff's individual acceptance of an offer of judgment.

In absence of Scalia's vote these three cases would have resulted a 4-4 split; therefore, the outcome might have been different with the addition of a liberal justice sympathetic to class litigation. But it bears observation that Scalia's *Wal-Mart* dicta relating to "trial by formula" and the use of expert statistical evidence, and the follow-up *Comcast* decision on statistical modeling, have now been substantially qualified by the Court's *Tyson Foods* decision this Term. In addition, the Court's *Genesis Healthcare* decision effectively has been eviscerated by the Court's *Campbell-Ewald* decision, also issued this Term. However pro-business these opinions initially were, the Court's majority subsequently has rendered these decisions toothless.

And a Few Words on *Spokeo*

As indicated above, it is premature to characterize the Court's May 16th decision in *Spokeo* as either plaintiff or defendant-favoring, although Court watchers will leap to such pronouncements. *Spokeo* was an appeal from a Ninth Circuit decision supporting a class certification under the Fair Credit Reporting Act. In essence, the Ninth Circuit had held that the plaintiff's allegation of injury was sufficient to satisfy statutory standing. In a 6-2 decision, the Court's majority remanded the case back to the Ninth Circuit for reconsideration, indicating that the Ninth Circuit had failed to consider the "concreteness" requirement of Article III injury-in-fact analysis.

It is, of course, possible to top spin the *Spokeo* decision as a either pro-plaintiff or pro-defendant result. Thus, on the one hand the Court, in declining to outright repudiate the Ninth Circuit's class certification, saved statutory class actions for another day. Plaintiffs may rejoice, then, in having avoided some potentially expansive judicial pronouncements concerning "no-injury" classes that would have affected future such cases. Plaintiffs may claim a victory in *Spokeo* and anticipate a favorable Ninth Circuit reconsideration.

On the other hand, *Spokeo* most likely immediately will be misinterpreted as a pro-defendant victory, with commentators incorrectly spinning *Spokeo* as the Court's repudiation of the "non-injury" class. *Spokeo* correlatively will be spun as the Court's requiring a showing of injury for a plaintiff to proceed with class litigation. Nothing could be further from the truth; the Court has decided no such thing. It merely reiterated its construction of standing requirements, and remanded the case to the Ninth Circuit to complete an analysis which, the Court stated, elided that court.

Betting odds favor a Ninth Circuit reaffirmation of its prior decision; therefore, *Spokeo* may be destined to return to the Court. However, the issue of the so-called "no injury class" may have to await a more perfect vehicle for a clear ruling on this issue. Whatever may be the inevitable post-*Spokeo* developments, it is nonetheless fair to conclude that the absence of Scalia's vote had no impact on *this Spokeo* decision and would not have changed the outcome. The vote was 6-2. Scalia's vote would have made it 7-2 or, in a highly unlikely scenario, 6-3.

Evaluating Scalia's Class Action Scorecard

As indicated above, Scalia's impact on the Court's class action jurisprudence has been largely overstated, and the prevailing narrative of the Court's pro-corporate bias in the class arena largely misconceived. Since the *Amchem* and *Ortiz* decisions, Scalia has authored exactly five class action opinions: *Italian Colors*; *Concepcion*; *Comcast*; *Shady Grove*; and *Wal-Mart*. Scalia's reputation as the Court's leading class action bogeyman largely rests on this corpus. *Italian Colors* and *Concepcion* both deal with class action waivers, the bête-noire of the Court's current majority.

As indicated above, *Italian Colors* was decided on a 6-3 vote, so Scalia's vote with the majority did not make a difference. The *Wal-Mart* and *Comcast* decisions, focusing on the controversial use of expert statistical sampling to prove classwide commonality, have now been cabined by the Court's rulings in *Tyson Foods*. That leaves Scalia's *Shady Grove* decision, which arguably saved Federal Rule 23 from a Rules Enabling Act challenge and evisceration by state authorities.

Among the universe of twenty cases, two other decisions during Scalia's tenure were resolved on a 5-4 split,

with Scalia joining the majority. Would the absence of Scalia's vote make a difference for those cases? One decision was *Exxon Mobil v. Allapattah*, which overruled the *Zahn* non-aggregation rule for diversity class actions. Because this entire problem has been mooted by the Class Action Fairness Act, it is difficult to care about Scalia's historical vote.

A second 5-4 split during Scalia's tenure occurred in *Genesis Healthcare*. Scalia joined to make a fifth vote ruling that an FLSA action was not viable when a plaintiff's claim was mooted by an accepted offer of judgment. Scalia's vote made a difference in that case, because the Court reversed course in this Term's *Campbell-Ewald* decision, where Scalia found himself among four dissenters (and the *Genesis Healthcare* dissenters now in the majority: Justices Breyer, Ginsburg, Kagan, and Sotomayor). In so doing, the Court's majority reclaimed a pro-plaintiff view of class litigation, repudiating the so-called corporate antipathy to it.

In the final analysis, are there class action issues where Scalia's absence will matter in future possible appeals? Such speculation rests on an unstated prediction that Scalia's seat might be filled with a liberal justice. The most likely subject for reconsideration, then, will be the fate of class action waivers in arbitration clauses. The Court's recent decisions all resulted from a closely split Court, with Scalia providing a fifth vote supporting these provisions. If a liberal justice replaced Scalia, current class action waiver jurisprudence might undergo revision.

A second area in which a liberal Court might flex more pro-plaintiff muscle concerns the use of expert witness statistical evidence in support of classwide proof. However, as indicated above, the Court already has made inroads on Scalia's *Wal-Mart* and *Comcast* decisions, even with him still on the bench. In his waning days on the Court, his colleagues already had begun to cabin Scalia's pronouncements in those decisions.

In conclusion, the prevailing narrative about the Court's pro-business class action agenda seems largely unfounded. This narrative focuses on an extremely narrow set of cases, cherry-picking colorful pronouncements from Scalia opinions such as "trial by formula." This analysis fails to evaluate the Court's class action jurisprudence during Scalia's entire tenure on the Court, or his actual role in its development.

What explains this persistent false narrative? The plaintiff's trial bar (and its fellow travelers in academe) encourages demonization of a Court that actually supports class action litigation more than it impedes it. The false narrative enables the call for restoration of a more liberal Court. The narrative empowers James Surowiecki, concluding his speculation on Scalia's demise, to opine: "But let's hope that, when a successor is finally appointed, it is someone willing to give ordinary citizens the day in court that Scalia worked so hard to deny them." This appeal would ring hollow without the pro-corporate, anti-consumer narrative to support it.

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