

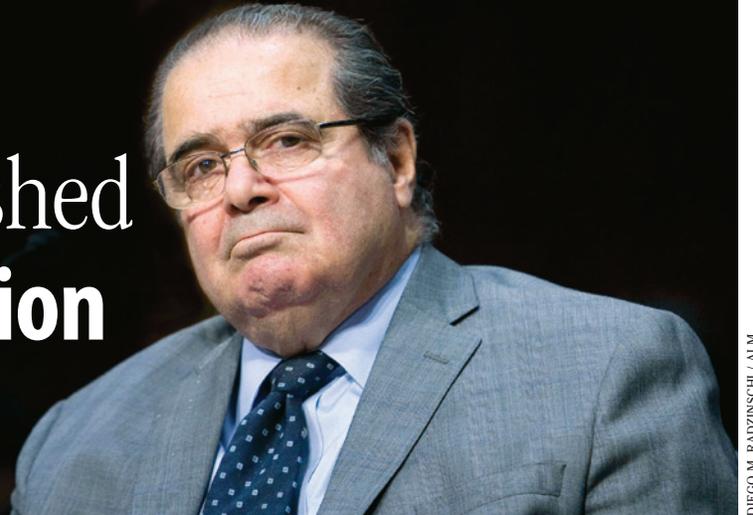
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### After Scalia, Court Shows Diminished Appetite for Class Action Appeals



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During his nearly 30 years on the U.S. Supreme Court, Justice Antonin Scalia shaped the court's jurisprudence in nearly every area of the law, but perhaps no area more dramatically than class actions. In the past five years, Justice Scalia authored opinions that strengthened the commonality requirement of Rule 23(a), the predominance requirement of Rule 23(b)(3), and the enforceability of class action waivers in arbitration agreements. Since Justice Scalia's passing on Feb. 13, 2016, the court has shown a diminished

appetite for class action appeals and has arguably retreated from some of his positions. Here, we examine Justice Scalia's class action legacy, consider recent developments following his death, and assess what the future holds for class action litigation at the Supreme Court.

#### Scalia's Class Action Jurisprudence

Justice Scalia's most consequential class action opinions are *Wal-Mart Stores v. Dukes*,<sup>1</sup> *Comcast v. Behrend*,<sup>2</sup> *AT&T Mobility v. Concepcion*,<sup>3</sup> and *American Express v. Italian Colors*.<sup>4</sup> In each, Justice Scalia wrote the majority opinion for a 5-4 court.

In *Wal-Mart*, Justice Scalia reframed the commonality requirement of Federal Rule of Civil Procedure 23(a).<sup>5</sup> According to Justice Scalia's opinion, "What matters [in the commonality analysis] is not the raising of common

questions [by the class] ... but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."<sup>6</sup> By focusing on common answers rather than common questions, Justice Scalia turned what was previously a low bar for class plaintiffs into a serious hurdle. And it was one that the class in *Wal-Mart*, which comprised 1.5 million current and former Wal-Mart employees who alleged gender discrimination, could not clear. The court found plaintiffs did not carry their burden of establishing that their common question—why was I disfavored?—was susceptible to a common answer.

*Wal-Mart* was also significant due to Justice Scalia's rejection of plaintiffs' attempt to prosecute a "Trial by Formula."<sup>7</sup> In certifying plaintiffs' claims for back pay, the Ninth Circuit had suggested that statistical sampling could

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replace individualized determinations of each employee's eligibility for back pay. The Circuit Court envisioned that a special master would determine Wal-Mart's liability as to a sample set of class members and then extrapolate the special master's findings to the remaining class members. Justice Scalia rejected this "novel project" on the ground that it would abridge Wal-Mart's right to litigate statutory defenses to individual claims.<sup>8</sup> Because many purported class actions relied on statistical sampling, some commentators believed that the Supreme Court's ruling would dramatically curtail future class actions.

In *Comcast*, Justice Scalia gave Rule 23(b)(3)'s predominance requirement new teeth: Class plaintiffs seeking classwide damages would now have to establish at the *certification* stage that damages were capable of measurement on a classwide basis.<sup>9</sup> The *Comcast* plaintiffs had advanced four theories of damages, only one of which the district court accepted. Because plaintiffs' expert report did not isolate the damages resulting from the accepted theory, the court found that plaintiffs failed to proffer a methodology capable of establishing damages on a classwide basis. In other words, plaintiffs were required to establish that questions of individual damage calculations do not predominate, and could not postpone this inquiry to the merits stage. While some commentators questioned whether *Comcast* doomed all class actions requiring individual damages calculations, lower courts have responded by bifurcating liability and damages in many instances, trying liability on a classwide basis and damages individually.<sup>10</sup>

Justice Scalia also took on class actions through the vehicle of the Federal Arbitration Act (FAA). In *Concepcion*,<sup>11</sup> the court found that the FAA preempts state rules that condition the enforceability of arbitration agreements on the availability of class arbitration procedures. Justice Scalia reasoned that such rules are inconsistent with the FAA because class arbitrations (1) eliminate the benefits of arbitration, namely, informality, speed, and cost-effectiveness; (2) require procedural formality to protect/bind absent class members; and (3) increase risks to defendants through high-stakes, complex class arbitrations while denying defendants the right to appeal. Justice Scalia's *Concepcion* opinion essentially prevents states from devising rules that ensure the availability of class actions where plaintiffs contract that remedy away.

In *Italian Colors*,<sup>12</sup> the court held that, pursuant to the FAA, contractual waivers of class arbitrations are enforceable even where the cost of individually arbitrating federal statutory claims exceeds the potential recovery. Justice Scalia reasoned that the FAA requires rigorous enforcement of arbitration agreements absent a "contrary congressional command."<sup>13</sup> Because the antitrust statutes plaintiffs sued under in *Italian Colors* evinced no such congressional command, the court enforced the parties' waiver of class arbitrations, effectively ending plaintiffs' case. Justice Scalia's *Italian Colors* opinion may have been his gravest blow to class action plaintiffs. Notably, the Consumer Financial Protection Bureau responded to *Italian Colors* by proposing a rule (still under review) that would prohibit banks and financial service

companies from employing such waivers.

These four opinions firmly established Justice Scalia as the court's class action tamer, and it looked as though there was more to come this Supreme Court term. Then, on Feb. 13, 2016, Justice Scalia suddenly and unexpectedly passed away in his sleep on a hunting trip in Texas.

### Developments Since Scalia's Passing

Since then, we have seen several developments in the world of class action litigation. First, class action defendants have become more reluctant to leave their fate to the Supreme Court. The most striking example of this trend was Dow Chemical's decision to settle an antitrust class action pending before the Supreme Court for \$835 million. In a public statement explaining its decision, Dow alluded to Justice Scalia's death: "Growing political uncertainties due to recent events with the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class-action suits have changed Dow's risk assessment of the situation."<sup>14</sup>

Second, the court's appetite for granting certiorari in class action cases may have diminished, at least until the court once again has nine members. In late February, the court denied class action defendant Direct Digital's petition for writ of certiorari in a case that would have allowed the court to clarify whether class plaintiffs must show that class members can be ascertained in a reliable and administratively feasible manner.<sup>15</sup> In April, the court declined to hear an appeal concerning whether the Due Process Clause prohibits state courts from certifying classes based on "Trial by Formula" (essentially, whether Justice Scalia's reasoning in *Wal-Mart* applies

to state actions).<sup>16</sup> Both cert petitions had been closely watched and the Chamber of Commerce among others had urged the High Court to take up their review. Finally, in May, the court passed up an opportunity to clarify whether plaintiffs have standing to sue based on statutory violations where plaintiffs arguably suffer no concrete harm, an important question in consumer privacy class actions.<sup>17</sup> Rather than attempt to resolve this question, the court remanded the matter to the Ninth Circuit for further analysis of the injury-in-fact element of the standing requirement. To many, including Justice Ginsberg, the court appeared to be punting on the issue.<sup>18</sup>

However, shortly prior to Justice Scalia's passing, the Supreme Court granted cert in *Microsoft v. Baker*, No. 15-457 (cert granted Jan. 15, 2016). In this case, the Supreme Court will decide whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice. Thus, the court will take up at least one class action issue next term.

Third, in at least one case, the court appears to have retreated from positions Justice Scalia staked out in a seminal class action decision—although Justice Scalia's anticipated dissent in this case would not have changed the outcome. In *Tyson Foods v. Bouaphakeo*, the Supreme Court deviated from the course Justice Scalia set in *Wal-Mart*, and rejected a broad categorical exclusion of statistical sampling and representative evidence in class actions.<sup>19</sup> Writing for a 6-2 majority, Justice Kennedy stated that *Wal-Mart* "does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability."<sup>20</sup> Kennedy

explained that whether such evidence is admissible is not based on the form of the proceeding, i.e., class versus individual action, but whether the evidence is reliable for the purpose for which it is introduced.<sup>21</sup> If the representative evidence could have sustained a jury finding of liability in an individual action had each class member brought such an action, then it is a permissible means of establishing liability in a class action as well. In *Tyson Foods*, for instance, the court found class plaintiffs' representative evidence reliably established the average time employees at a pork processing plant spent donning protective gear. The court explained that this would have been a reliable means of establishing the hours worked by an individual employee if used in individual actions because, unlike the class members in *Wal-Mart*, the employees in *Tyson Foods* each worked in the same facility, performed the same work, and were paid under the same policy. However, despite Justice Kennedy's attempt to square *Wal-Mart* and *Tyson Foods*, the Supreme Court appears to be taking a more relaxed view of the use of representative evidence in class actions.

### What the Future Holds

Predicting the future direction of the Supreme Court is never easy, but it is particularly difficult to do so with a vacancy on the court that looks likely to go unfilled until after November's election. One thing is certain though: Whoever replaces Justice Scalia will be hard pressed to do more than he did to combat the proliferation of class actions. Consequently, at least in the near term, class plaintiffs will be more likely to take their chances before the Supreme Court in the belief that whoever comes next can only be

more sympathetic than Justice Scalia. Class defendants, on the other hand, may take their cue from Dow Chemical and avoid resorting to the Supreme Court until they have more clarity on its future make up.



1. 564 U.S. 338 (2011).
2. 133 S. Ct. 1426 (2013).
3. 563 U.S. 333 (2011).
4. 133 S. Ct. 2304 (2013).
5. 564 U.S. 338. Notably, there was an easy way for the Supreme Court to resolve this case more narrowly: The *Wal-Mart* plaintiffs had sought certification under Rule 23(b)(2), even though they were primarily seeking damages, not injunctive relief. The court unanimously agreed that the case should have been brought under Rule 23(b)(3) instead—which means that the majority did not need to address the commonality issue at all.
6. *Id.* at 350 (internal quotation marks omitted) (quoting Richard A. Nagareda, "Class Certification in the Age of Aggregate Proof," 84 N.Y.U. L. Rev. 97, 132 (2009)).
7. *Id.* at 367.
8. *Id.*
9. 133 S. Ct. at 1432-33.
10. See, e.g., *In re Whirlpool Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) ("Where determinations on liability and damages have been bifurcated, the decision in Comcast ... has limited application.").
11. 563 U.S. 333.
12. 133 S. Ct. 2304.
13. *Id.* at 2309.
14. Jef Feeley & Greg Stohr, "Scalia's Death Prompts Dow to Settle Suits for \$835 Million," Bloomberg, Feb. 26, 2016, available at <http://www.bloomberg.com/news/articles/2016-02-26/dow-cites-scalia-s-death-in-settling-urethanes-case-for-835m>.
15. Petition for a Writ of Certiorari, *Direct Digital v. Mullins*, No. 15-549 (U.S. Oct. 26, 2015).
16. Petition for a Writ of Certiorari, *Wal-Mart Stores v. Braun*, No. 14-1123 (U.S. March 13, 2015).
17. *Spokeo v. Robins*, 136 S. Ct. 1540 (2016).
18. *Id.* at 1555 (2016) ("I part ways with the Court, however, on the necessity of a remand to determine whether Robins' particularized injury was 'concrete.'").
19. 136 S. Ct. 1036 (2016).
20. *Id.* at 1048.
21. *Id.*