

Scalia's Death Leaves High Court in Limbo on Three Key Consumer Class Actions

February 17, 2016

While the sudden death of Supreme Court Justice Antonin Scalia creates an immediate vacancy on the bench, it also likely leaves the high court's docket in limbo on a number of key consumer class actions awaiting the Court's decision.

Many predict that President Obama will not be able to replace Scalia before the 2016 Presidential election, meaning that the seat may be vacant for the remainder of the term. Democrats have been urging the President to immediately nominate a successor, with Republicans imploring the President to give that right to the next Commander-in-Chief. Senate Majority Leader Mitch McConnell has stated that the Senate should not confirm a replacement until after the 2016 election.

Until a successor is confirmed, it means that the Supreme Court will be comprised of four reliable liberals, three reliable conservatives, and one Justice Kennedy, who typically leans to the right but has often acted as the Court's swing vote. With only eight justices, it is likely that we will see a number of important cases end in a 4-to-4 split this year, including several key cases relating to consumer class actions. In the case of a tie, the appeals court decision will be upheld, no precedent will be set, and the Supreme Court traditionally will not issue an opinion.

Here's a brief rundown of how Scalia's passing may affect three key consumer class actions in front of the Court this term.

Case: *Spokeo Inc. v. Robins* (Docket No. 13-1339) **Issue:** Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, but alleges a private right of action based on a bare violation of a federal statute. **Outcome in a split:** Plaintiff's win – would make a bare violation of a federal statute sufficient to confer Article III standing, thereby making it easier for plaintiffs to move forward in litigating cases alleging statutory violations.

Plaintiff, Thomas Robins, alleged that "people search engine," Spokeo, violated the Fair Credit Reporting Act (FCRA) by disclosing inaccurate personal information about him that harmed his employment prospects and violated his rights under the FCRA. Mr. Robins alleged that, as a result of the FCRA violations, he was "concerned that his ability to obtain credit, employment, insurance and the like will be adversely affected." Spokeo moved to dismiss on the ground that Robins lacked standing under Article III. Typically, a plaintiff must demonstrate "injury-in-fact" to have Article III standing, but the Ninth Circuit held in this case that Robins met the standing requirement "by virtue of the alleged violations of his statutory rights." Facebook, Google, eBay and Yahoo submitted a joint amicus brief in the case warning that if the Court upholds the Ninth Circuit's decision, it could result in a flood of "no-injury" litigation under the FCRA and several other wide-reaching federal statutes such, as the Telephone Consumer Protection Act (TCPA), and other privacy and data security actions.

Case: *Microsoft Corp. v. Baker* (Docket No. 15-457) **Issue:** Whether a federal court of appeals has

jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice. **Outcome in a split:** Plaintiffs' win – plaintiffs effectively would have the right to immediate review of a district court order denying a motion to certify a plaintiff class.

The case involves a dispute over a class action brought by Xbox 360 purchasers who alleged that the Xbox console contained a design defect causing game discs to become scratched. In 2012, the district court struck down the class allegations, finding that the defect was present in less than one percent of the total number of consoles purchased. This ordinarily would leave plaintiffs with the option of pursuing individual claims until final judgment, before the denial of class certification could be appealed. Instead, the plaintiffs moved to dismiss their claims with prejudice, a motion that would create a final judgment far more quickly, allowing a speedier appeal of the denial of class certification. The Ninth Circuit granted the motion finding the appeal could proceed. The Ninth Circuit eventually held that in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal of a class certification denial.

Case: *Tyson Foods, Inc. v. Bouaphakeo* (Docket No. 14-1146) **Issue:** Two key questions are before the Court: (1) whether differences among individual class members may be ignored, and a class certified, when plaintiffs use statistical techniques that presume that all class members are identical; and (2) whether a class may be certified if it contains many members who were not injured.

Outcome in Split: Plaintiffs' win – class actions could be certified absent a showing that specific legal claims predominate among the entire class.

In *Tyson Foods*, the district court certified a Rule 23(b)(3) class action and Fair Labor Standards Act (FLSA) collective action for claims alleging that Tyson Foods had not paid its employees for all time spent donning and doffing personal protective equipment and walking to and from their work stations. Under Rule 23, a court may not certify a damages lawsuit as a class action unless "there are questions of law or fact common to the class" that "predominate over any questions affecting only individual members." The FLSA imposes similar certification requirements on collective actions. Plaintiffs sought to prove injury and damages using statistical evidence that averaged donning and doffing time, even though employees used different equipment and it was undisputed that hundreds of employees were not entitled to any additional compensation. Tyson Foods contended that the average time was meaningless and that plaintiffs' changing times were different enough that they should not be able bring a class action suit. A jury found Tyson Foods liable, but awarded only about half of the damages that plaintiffs' statistical experts had calculated were due. On appeal, the Eighth Circuit affirmed.