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Rule 23: 3 Supreme Court Decisions and Their Impact on Federal Class Action Status

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Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions in federal court, was first enacted in 1937. Since then, federal courts have struggled to define the scope of such actions, including when they may be certified under the Rule and when they may be precluded. The United States Supreme Court heard and decided a number of cases this term considering these very issues. While all are significant in numerous respects, three are worth particular mention.

In 2011, the Supreme Court decided *Wal-Mart v. Dukes*, 564 U.S. –, 131 S.Ct. 2541 (2011), holding in a 5-4 decision that an enormous class of about 1.5 million current and former Wal-Mart employees alleging disparate impact discrimination claims under Title VII could not be certified under either Rule 23(a) or (b)(2). *See id.*, 564 U.S. at –, 131 S.Ct. at 2561. Most significantly, the majority held, after considering the merits of plaintiffs' expert testimony at the certification stage, that plaintiffs provided "no convincing proof of a companywide discriminatory pay and promotion policy," and, as a result, had "not established the existence of any common question" required by Rule 23(a)(2). *Id.*, 564 U.S. at –, 131 S.Ct. at 2256-57.

In the wake of *Dukes*, class-action practitioners were left to speculate whether *Dukes* was an exceptional decision limited to its unique facts or constituted a conscious effort by the majority to limit the reach of Rule 23. This term, the Court arguably answered that question. On March 27, 2013, the Court issued its opinion in *Comcast Corp. v. Behrend*, – U.S. –, 133 S.Ct. 1426 (2013), reversing certification of a class of more than 2 million current and former Comcast customers seeking damages for alleged antitrust violations. Justice Scalia, writing for the same five-member majority, emphasized that class actions are an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, – U.S. at –, 133 S.Ct. at 1432 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S.Ct. 2545 (1979)). He cited *Dukes* for the proposition that a plaintiff "'must affirmatively demonstrate his compliance' with Rule 23" before a class may be certified, and he concluded that plaintiff had not demonstrated that Rule 23(b)(3)'s "predominance criterion" – which "is even more demanding that Rule 23(a)" – was satisfied. *Id.* at 1432-33 (quoting in part *Dukes*, 564 U.S. at –, 131 S.Ct. at 2551-52.) Repeating *Dukes'*s declaration that class certification analyses "will frequently entail 'overlap with the

merits of the plaintiff's underlying claim,'" *id. at* 1432 (quoting in part *Dukes*, 564 U.S. at –, 131 S.Ct. at 2251), Justice Scalia examined the respondents' damage model and found that it failed to measure damages "resulting from the particular antitrust injury on which" they sought to impose liability. *Id.*, 564 U.S. at –, 131 S.Ct. at 1434. Because the Third Circuit "ran afoul of [Supreme Court] precedents requiring" analysis of pertinent merits issues (such as damages) in making class certification decisions and because "respondents' [damage] model falls far short of establishing that damages are capable of measurement on a classwide basis," the majority held that certification was improper. *Id.*, 564 U.S. at –, 131 S.Ct. at 1432-33, 1435.

Concerned about the "numerous problems with [the] current class action system" – including its perception that, because "most class actions [were] currently adjudicated in state courts" where "the governing rules are applied inconsistently," where "there is often inadequate supervision over litigation procedures and proposed settlements," and where "lawyers 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests" – Congress enacted the Class Action Fairness Act of 2005 ("CAFA"). S. Rep. 109-14 (2005) at *4, 2005 U.S.C.C.A.N. 3, at *5-6. (Then-Senators DeWine and Voinovich were co-sponsors of CAFA.) Among its various changes to federal court jurisdiction, CAFA vested federal district courts with original jurisdiction over any "civil" class action involving at least 100 plaintiffs where their aggregated damages exceeds "the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2), (d)(5). This scheme, however, left unanswered whether a putative class-action plaintiff could avoid federal court jurisdiction by stipulating that he and the class would not seek damages in excess of the $5,000,000 jurisdictional threshold.

In *Standard Fire Ins. Co. v. Knowles*, – U.S. –, 133 S.Ct. 1345 (March 19, 2013), the Supreme Court answered this question. Writing on behalf of a unanimous Court, Justice Breyer held that any such stipulation could not be binding on the putative class because "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before [it] is certified." *Id.*, – U.S. –, 133 S.Ct. at 1348-49. The jurisdictional analysis established by the statutory scheme requires federal district courts to make an independent assessment of the aggregated value of the proposed class members' claims at the time the case is filed to determine whether the $5,000,000 threshold is satisfied. *Id.*, – U.S. at –, 133 S.Ct. at 1348-50. Federal courts must therefore "ignore [any such] nonbinding stipulation" in determining whether jurisdiction exists. *Id.*, – U.S. –, 133 S.Ct. at

1350. On its face, *Standard Fire* limits one way that potential class plaintiffs may seek to limit removal of their state-court class claims to federal court.

Finally, the Supreme Court held that – at least in some contexts – class-action waiver clauses in arbitration agreements are enforceable, barring parties to the agreement from subsequently pursuing class-action claims in court. In *American Express v. Italian Colors Restaurant*, – U.S. –, 133 S.Ct. 2304 (2013), merchants sought to pursue class antitrust claims against American Express. Their merchant agreement contained a clause that required arbitration of all disputes between the parties and, in particular, provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." *Id.*, – U.S. at –, 133 S.Ct. at 2308. Writing for the same five-member majority in *Dukes* and *Comcast*, Justice Scalia concluded that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and the Court's precedent interpreting the FAA reflected the "overarching principle that arbitration is a matter of contract." *Id.*, – U.S. at –, 133 S.Ct. at 2309. Absent any "contrary congressional command" overruling application of the FAA to a given type of dispute, federal courts are required to enforce the terms of arbitration agreements. *Id.* (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. –, 132 S.Ct. 665, 668-69 (2012)) (quoting in turn *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332 (1987)). The majority found no legislative intent to exempt antitrust laws from the sweep of the FAA's mandate, and it held that "congressional approval of Rule 23 [does not] establish an entitlement to class proceedings for the vindication of statutory rights." *Id.* Most significantly, the majority found that the judicial exception courts previously invoked to invalidate arbitration agreements that prevented the "effective vindication of a federal statutory right" did not apply to invalidate the class-action waiver in this case. *Id.*, – U.S. at –, 133 S.Ct. at 2310-11 (internal quotation marks omitted). Invoking *AT&T Mobility LLC v. Concepcion*, 563 U.S. –, 131 S.Ct. 1740 (2011), Justice Scalia found that while the exception would apply to an arbitration agreement that categorically precluded the assertion of certain statutory rights, an agreement to waive the right to bring or participate in a class action did not eliminate the merchants' individual rights to bring antitrust claims, despite the fact it might make it economically infeasible to do so: "But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *American Express*, – U.S. at –, 133 S.Ct. at 2310-11 (emphasis in original). As a result, the provisions in the merchant agreement waiving class-action claims were enforceable in this case.

To be sure, these three cases are only a few of the cases decided by the Supreme Court in this and prior terms interpreting Rule 23 and affecting class action claims.

And other decisions by the Supreme Court make clear that Rule 23 remains a viable avenue for plaintiffs in a number of contexts. For example, in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds,* – U.S. – , (2013), also decided this term, the Supreme Court affirmed certification of a substantial securities fraud class pursuant to Rule 23(b)(3). It is certainly wrong to say that the class action is dead. But it would also be wrong to contend that recent decisions have not limited Rule 23 in significant ways. While the full impact of all of these decisions remains to be seen, it is indisputable that these cases will have a substantial effect on at least some of those who seek – or need – to utilize a class action to vindicate their rights in federal or state court. How expansive those effects will be depends, at least in part, on us.