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The Changing Landscape: The Supreme Court, Class Actions and Arbitrations

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July 19, 2016

Supreme Court's Renewed Interest in Class Actions and Arbitration

1. FAA – 1947; Rule 23

   (1966-2000 8 decisions; last 5 years 15 decisions)

2. Ancient History

   a) *Prima Paint* – Severability, Fraud in the Inducement

   b) *Allied Bruce Terminex* – FAA applies in state court to state law claim

   c) *Buckeye Check Casing* – Challenge to contract as a whole – for arbitration

Supreme Court's Renewed Interest in Class Actions and Arbitration

3. Recent History

a) *Green Tree v. Randolph* – Failure to mention arbitration costs does not make agreement unenforceable – Federal Statutory Rights "costs" dicta.

b) *Green Tree v. Bazzle* – Arbitration Clause did not preclude class arbitration – decision for arbitrator.

c) *Buckeye Check Cashing* – Validity of contract is issue for arbitrator.

d) *Stolt-Nielsen* – Despite *Bazzle*, party cannot be compelled to arbitrate absent agreement to do so.

Supreme Court's Renewed Interest in Class Actions and Arbitration

cont'd.

e) *Concepcion'* – State law may not invalidate arbitration clause under § 2 if law is an obstacle to purpose of FAA or changes fundamental elements of arbitration.

f) *CompuCredit v. Greenwood* – CROA is silent on arbitration, FAA requires agreement to be enforced as written.

g) *Marmet v. Brown* – West Vir. prohibited arbitration of personal injury and wrongful death claims – invalid as a "categorical rule."

Supreme Court's Renewed Interest in Class Actions and Arbitration

cont'd.

h) *Wal-Mart v. Dukes* - Commonality requires a common answer not a common question. Actions under Rule 23(b)(2) can seek monetary relief only if it is incidental.

i) *Genesis v. Healthcare v. Symczyk* - Plaintiff must have a "legally cognizable interest" or "personal stake" in the litigation. Actual controversy must exist "at all stages of review, not merely at the time the complaint is filed."

Supreme Court's Renewed Interest in Class Actions and Arbitration

cont'd.

j) *Comcast v. Behrend* – Plaintiff must be able to show at the certification stage that damages can be measured on a class wide basis.

k) *American Express Co. v. Italian Colors Restaurant* – Held that a court cannot invalidate a contractual waiver of class arbitration rights simply because it would cost plaintiffs more to arbitrate their claims individually than they could hope to recover.

Supreme Court's Renewed Interest in Class Actions and Arbitration

cont'd.

The court's majority allowed only a narrow escape hatch from waivers, such as if the contract impinged on certain statutory rights or "perhaps" if the arbitration forum imposed such high fees and administrative expenses that they alone made "access to the forum impracticable."

2015-2016 Term

4 Major Cases Impacting Class Actions and Arbitration

1. *Campbell-Ewald*
2. *Tyson Foods, Inc.*
3. *Direct TV*
4. *Spokeo*

Campbell-Ewald v. Gomez (Rule 68)

Background:

- U.S. Navy hired Campbell-Ewald to develop a multi-media recruiting campaign
- The campaign included sending text messages to individuals who had agreed to receive Navy marketing materials
  - A list of 18-24 year old consenting users was developed
  - Gomez was 40 years old and alleged he had not consented to receive the material

Campbell-Ewald v. Gomez (Rule 68)

cont'd.

- Filed suit under TCPA
- Before time to file class certification motion filed an offer of judgment which was not accepted

- **Issue:** Whether a case becomes moot, and therefore beyond Article III jurisdiction, when the named plaintiff receives an offer of complete relief under FRCP 68.

Campbell-Ewald v. Gomez (Rule 68)

- ***Genesis v. Healthcare v. Symczyk* (2013):** A case is no longer justiciable when the named plaintiff's claim becomes moot.
- **Holding:** An unaccepted settlement offer or offer of judgment does not moot a plaintiff's case under FRCP 68.
  - **Majority Opinion:** Majority Contractual Analysis
  - **Concurring Opinion:** Offer, without more, is insufficient
  - **Dissenting Opinion:** If full relief tendered, case is moot for Article III purposes

Campbell-Ewald v. Gomez (Rule 68)

- **Unresolved**: What result 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?
- **Unresolved:** "Is an unaccepted offer to satisfy the named plaintiff's individual claim sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated"?
- **Applications**

Depositing Funds

Chen v. Allstate

- *Allstate* deposited full amount in bank escrow account pending entry of final judgment of court directing payment of funds.
- District court held such offer and tender did not moot claim.
- Ninth Circuit – *Allstate* consented to complete individual relief even though it did not admit liability.

Depositing Funds

cont'd.

- Plaintiff did not "actually receive" anything.
- Class representative must be "afforded a fair opportunity to show that certification is warranted."
- If defendant offers complete relief on individual claims but "fails to offer complete relief on the plaintiff's class claims, a court should not enter judgment on the individual claims."

- **Key Implications**
  - An unaccepted settlement offer or offer of judgment for full relief does not moot a plaintiff's claim.

Tyson Foods, Inc. (Statistical Evidence)

Factual background:

- Plaintiff employees at pork processing plant
- Work required them to wear certain protective gear, but different gear across departments
- Tyson lacked records logging time each employee spent donning and doffing
- Expert estimated the average time spent for various types of employees for donning protective gear and these times were added to timesheets to determine which employees worked more than 40 hours

Tyson Foods, Inc. (Statistical Evidence)

cont'd.

- Jury awarded $2.9 million to the class in unpaid wages
- Eighth Circuit affirmed

- **Issue Presented:**

  Whether the class should have been certified, where the plaintiff's primary method of proving injury consisted of an expert study.

Tyson Foods, Inc. (Statistical Evidence)

- **Holding:** Courts may certify a class where certification relies on an inference from representative evidence.
  - No "general rule" on statistical or representative evidence
  - Missed opportunity by Tyson at trial level – did not challenge credibility of expert evidence – no *Daubert* motion
  - Distinguished *Wal-Mart*
    - Worked different positions
    - In *Tyson*, all worked in same facility

Tyson Foods, Inc. (Statistical Evidence)

- **Key Takeaways:**
  - Statistical or representative evidence may be admissible to support class certification under certain circumstances
  - Defense counsel should challenge statistical evidence at the trial level – *Daubert*
  - Rebut by presenting evidence that impact may vary as to each class member to rebut common issues and predomination

Direct TV v. Imbingity

Factual Background:

- **Customer Services Agreement contained:**
  - Binding Arbitration clause under FAA
  - "neither you nor us shall be entitled to join or consolidate claims in arbitration"
  - If "law of your state" makes waiver of class arbitration unenforceable the entire arbitration provision is unenforceable

Direct TV v. Imbingity

- **California Court of Appeals Holding**
  - Under California law, absent federal overlay, agreement to waive was unenforceable. *Discovery Bank.*
  - Since provision for FAA to govern was “general” and provision for “state law” was specific, there was an ambiguity.
  - Ambiguity construed against Direct TV as drafter.

Direct TV v. Imbingity

Issues Presented:

Does a reference to state law in an arbitration clause include state law that has been declared invalid?

- Contract Not Ambiguous
  - *Discovery Bank* rule was "invalid" California law
  - No indication contract was intended to incorporate "invalid" California law
- Holding of Court of Appeals applied only to FAA preempted provision
- No other case included adoption of "invalid" state law

Direct TV v. Imbingity

cont'd.

- *Discovery Bank* rule was an obstacle to accomplishment of Congress' purposes in adopting FAA

- Court of Appeals decision does not rest upon "such grounds as exist . . . for revocation of **any** contract"

Spokeo, Inc. v. Robins

Background:

- Spokeo operated a website providing information about individuals and reported that Robins had a graduate degree, was wealthy and other information which Robins alleged was inaccurate.
- Robins sued under FCRA alleging his job prospects were hampered and it caused him anxiety and stress.
- District Court dismissed for failure to allege violation of FCRA caused the plaintiff's actual damages.

Spokeo, Inc. v. Robins

cont'd.

- Ninth Circuit reversed holding where "statutory cause of action" does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering "actual damages" and that the violation of the statutory right is sufficient to satisfy the injury in fact requirement of Article III.

Issue Presented:

Whether an injury in fact and actual damages are required for Article III standing or is the mere violation of a statute sufficient?

Spokeo, Inc. v. Robins

Holding

- Article III standing "requires a concrete injury even in the context of a statutory violation."

- Bare procedural violation is insufficient to demonstrate standing.

- For standing injury in fact has two elements - must be concrete and particularized. Ninth Circuit opinion only concerned particularization not concrete injury.

Spokeo, Inc. v. Robins

cont'd.

- A "particularized injury" is one that "must affect the plaintiff in a personal and individual way."

- A "concrete injury" must be de facto – must actually exist. It must be real and not abstract.

Spokeo, Inc. v. Robins

cont'd.

- "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedure violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."

Spokeo, Inc. v. Robins

cont'd.

- 6-2 decision with concurrence by Justice Thomas
  - Statutorily created private rights – no harm beyond invasion of right
  - Statutorily created public – concrete, individual harm distinct from general population
  - *Mabary v. Hometown Bank* – after *Spokeo?*

Spokeo, Inc. v. Robins

Evaluation and the Crystal Ball

2015-2016 Term

1. *Campbell-Ewald* – Dubious Utility
2. *Tyson Foods – Limited Impact*
3. *Direct TV* – Hardly a Surprise
4. *Spokeo* – A Game Changer?

Other Areas of Interest

CFPB – Arbitration Rules

D.R. Horton Style Cases – Headed to Supreme Court?