

January 2013

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Recommended Citation

Campbell, John (2013) "Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law," *Wyoming Law Review*: Vol. 13: No. 2, Article 3.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol13/iss2/3>

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WYOMING LAW REVIEW

VOLUME 13

2013

NUMBER 2

UNPROTECTED CLASS: FIVE DECISIONS, FIVE JUSTICES, AND WHOLESALE CHANGE TO CLASS ACTION LAW

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INTRODUCTION

Five decisions by five men have fundamentally changed the class action world. These changes so alter accepted paradigms that a class action attorney who retired in 2009 would be almost useless today. In short order, principles central to whether a class action can be filed, where it must be filed, and whether it is likely to succeed were remade by five opinions supported by a bare majority of the United States Supreme Court. And in every case, these changes made it less likely that people previously protected by class actions would be protected in the future. This article chronicles these recent changes, identifies the potential risks created by the changes, and identifies the need for serious scholarly engagement in this brave new world of class actions.

Class actions are controversial.¹ Some class actions are undoubtedly better for the attorneys who file them than the class members involved. But, class actions can also be extremely effective.² When pressed, even those who have legitimate, serious concerns about class actions are forced to concede that some class actions can produce positive results.³ Consider a relatively typical class action as an example.

A national phone company decides to add a \$5 charge to its bills. It calls the fee a “municipal tax.” In reality, there is no tax; the fee is simply a profit generator. The next month, 10 million customers pay the deceptive charge, netting the

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¹ Nicole Ochi, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 *LOV. L.A. L. REV.* 965, 965 (2008).

² *See id.* at 966–67 (detailing the positive attributes of class actions).

³ *See id.*

company an additional \$50 million. Should the company be able to keep the money? Should the customers get refunds? The answers seem clear, and it seems equally clear that the only method for returning the money to all the customers is a class action. Individuals cannot and will not sue for \$5, and similarly, lawyers cannot and will not take each individual case. For both the individual and for any attorney seeking to earn a living, the individual claims are economically irrational. As Judge Posner once famously wrote, “only a lunatic or a fanatic sues for \$30.”⁴

A class action solves this dilemma. In a typical class action, the named plaintiff receives a small incentive for filing the claim.⁵ A typical fee might be \$1000. This serves as an incentive to spend the time to file a case and sit for a deposition. If the case is successful, the other class members recover damages without ever going to court or otherwise participating actively in the case. Meanwhile, the attorneys receive a fee from the total common fund, making the case economically rational to pursue. And the defendant is required to give back some or all of the money it collected and incur the costs of litigation, making it unlikely that the defendant will view the illegal behavior as profitable or desirable in the future. Similar and even more poignant examples of class actions that most people support might address widespread gender discrimination, a company’s decision to illegally alter retirement plans, a refusal to pay overtime that has been earned, or rate-jacking by credit card companies.

In situations like these, very few people would suggest the claims are frivolous, or that they should not be pursuable. Yet, the hypothetical claims described above are far less likely to be filed, and if filed, to succeed, than they were only a few years ago. A series of changes to the law have gone beyond curbing class action abuse and instead have begun to eliminate valid claims.

To be clear, this is no subtle drift; instead, the right to pursue a class action has been seriously, systematically and, as far as anyone can tell, permanently eroded.⁶ This process has not come at the hands of voters or through legislative reform. Instead, it has been exclusively accomplished by five powerful men. In a series of opinions, a bare majority of the United States Supreme Court has altered class action law so fundamentally that the decisions increase the likelihood that a

⁴ *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (explaining that the “realistic alternative to a class action” is no action at all).

⁵ See, e.g., Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL’Y J. 395, 397–99 (2006).

⁶ See generally, e.g., Sherry E. Clegg, Comment, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court’s Interpretation of Federal Rule of Civil Procedure 23(A)(2) in Wal-Mart v. Dukes*, 44 TEX. TECH L. REV. 1087 (2012).

variety of wrongs will go unchecked. These decisions, two of which were issued in 2013, suggest that reliance on private enforcement of a number of important laws may be misplaced.

This article is one of the first to address the newest decisions by the Supreme Court. In doing so, it addresses the wholesale policy changes that have been enacted, not by a legislature, but by five justices. The article is designed to ask a few fundamental questions. If class action policy is being fundamentally changed by a bare majority of the United States Supreme Court, what does this mean for society? And if these policies make it less likely that people will have remedies for things that society has deemed wrong, is this acceptable? If not, what alternatives exist to fill the gap left behind when private enforcement is curtailed?

I. A CHANGING TIDE IN CLASS ACTION LAW

In the last four years, the United States Supreme Court has issued five opinions that dramatically alter class action practice. As mentioned, each decision had a five-person majority. That majority consisted of Justices Scalia, Thomas, Roberts, Alito, and Kennedy. The first two decisions, *Stolt-Nielsen* and *AT&T*, eliminated a variety of class claims, including almost all class arbitrations and most class actions rooted in consumer contracts or employment settings.⁷ Next, the Court handed down *Wal-Mart v. Dukes*, a decision that doomed most discrimination class actions that sought to redress nationwide, or in many cases, even regional, wrongs.⁸ Finally, in the first four months of 2013, the Court issued two opinions, *Comcast* and *Genesis*.⁹ The former instructed federal courts to scrutinize class actions more zealously before certification, including weighing damage theories carefully, and the latter encouraged defendants to “pick off” class action plaintiffs by offering a judgment to the individual plaintiff, thereby precluding the plaintiff from pursuing the claim for the class.¹⁰

Although there are no data yet on exactly how class actions will be impacted by the five decisions described above, studies of reaction to the decision in *AT&T* suggest there will be at least some claim suppression. Similarly, common sense suggests that because class actions are harder to file, harder to win, and smaller in dollar value due to limitations on the realistic class size for any given case, there will be a chilling effect on meritorious claims.

⁷ See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

⁸ See generally *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

⁹ See generally *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

¹⁰ See generally *Genesis*, 133 S. Ct. 1523; *Comcast*, 133 S. Ct. 1426.

If it is true that there is a chilling effect on class actions claims, if it is true that at least some class actions serve to provide remedies to those who would otherwise be unable to pursue those remedies, and if it is true that class actions serve as a way to curb the behavior of some businesses, then the litany of decisions from the United States Supreme Court limiting class actions must be addressed. The possibility of denying remedies to people, despite legal support for their claims, is troubling. It suggests a widening gap between the law on the books and the law in practice, a situation that is not in keeping with some of our conceptions of the rule of law in the United States. Similarly, if corporations can turn multi-million dollar profits simply by engaging in questionable activities that extract small sums of money from consumers, this too must be examined. Economic principles suggest that if profit can be made from potentially illegal behavior that cannot be checked, then at least some businesses will engage in that behavior.

Part II provides a closer look at each of the five cases. Part III asks questions about the policy changes embedded in the decisions, suggests areas that require inquiry, and examines some examples of recent public enforcement law that might provide a way to fill the gap left behind if private enforcement diminishes.

II. FIVE DECISIONS, FIVE JUSTICES, AND WHOLESALE CHANGE TO CLASS ACTION LAW

Although this article focuses on judicial decisions that impact class actions, the story begins with a statute. The first contemporary effort to alter class action practice was the Class Action Fairness Act of 2005 (CAFA).¹¹ Then-President George W. Bush declared that CAFA “mark[ed] a critical step toward ending the lawsuit culture in our country.”¹² As one commentator explained, “[t]he statute’s method was to funnel more class actions away from the state courts and into the federal courts, and perhaps thereby to discourage class actions.”¹³ To highlight its purpose, Bush announced the law in Madison County, Illinois, a forum rated a “judicial hellhole” by the American Tort Reform Foundation.¹⁴ Primarily, the Act affected class action litigation in four ways: first, it broadened the scope of federal diversity jurisdiction to include most class action suits that are not directed at state governmental entities; second, it authorized removal from state courts; third,

¹¹ 28 U.S.C. §§ 1711–1715 (2011).

¹² Remarks on Signing the Class Action Fairness Act of 2005, 41 WEEKLY COMP. PRES. DOC. 265, 265 (Feb. 18, 2005), available at <http://www.gpo.gov/fdsys/pkg/WCPD-2005-02-21/pdf/WCPD-2005-02-21-Pg265.pdf>.

¹³ Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1555 (2008).

¹⁴ Am. Tort Reform Found., JUDICIAL HELLHOLES, <http://www.judicialhellholes.org/about/> (last visited May 6, 2013).

it changed the procedure for federal class actions; and fourth, it created regulation for settlements involving out-of-pocket costs and barred disparate impacts for geographically diverse class members.¹⁵

The effects of CAFA are still debated, but, overall, there is no reason to believe it significantly curbed legitimate class actions. Instead, CAFA simply moved the class actions to federal court.¹⁶ Regardless of one's views on whether CAFA produced benefits to society, at a minimum, both Republicans and Democrats supported it, and, at least ostensibly, it targeted class action abuses, not class actions as a whole.

Nonetheless, CAFA is mentioned here because it is important in understanding the new trend in class actions. Because CAFA placed many more class actions in federal court, it provided new opportunities for the United States Supreme Court to alter class action practice. And, the Court has shown an appetite for such cases, accepting many class action appeals and addressing fundamental features of the class action mechanism.

A. *Stolt-Nielsen S.A. v. Animalfeeds International, Corp.: A Drastic Change to Class Arbitration*

The first case to eliminate a significant body of class actions was *Stolt-Nielsen S.A. v. Animalfeeds International, Corp.*, a decision written by Justice Alito.¹⁷ The case stands for the proposition that class arbitration cannot be required of parties—even parties who signed an arbitration agreement—unless the parties explicitly provided for class arbitration. As a result, the thousands of contracts that were silent as to class arbitration are now almost uniformly read to prohibit class arbitration. This means that the vast majority of consumer and employment contracts are now interpreted to prohibit class arbitration.

Stolt-Nielsen was a 5-to-3 decision.¹⁸ As is the case in all the decisions considered in this article, there is a vigorous dissent. In this case, it was written by

¹⁵ Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA*, Exxon Mobil and Grable, 8 DEL. L. REV. 157, 157 (2006).

¹⁶ See Ochi, *supra* note 1, at 974 (suggesting that federal class actions based on diversity doubled shortly after CAFA was passed). See also FED. JUDICIAL CTR., PROGRESS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES ON THE IMPACT OF CAFA ON THE FEDERAL COURTS 4 (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/\\$file/cafa1107.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf) (comparing preliminary federal and state data in California and indicating that class action activity increased in California and that a larger proportion of that activity was in the federal court, most likely due to the CAFA effect).

¹⁷ *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1764 (2010).

¹⁸ *Id.* at 1763.

Justice Ginsberg and joined by Justices Breyer and Stevens.¹⁹ The essential facts and legal holdings follow.

The petitioners in *Stolt-Nielsen*, Stolt-Nielsen S.A. (Stolt) and other shipping companies, served much “of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers wishing to ship liquids in small quantities.”²⁰ The respondent, AnimalFeeds International Corp. (AnimalFeeds), “ship[ped] its goods pursuant to a standard contract known in the maritime trade as a charter party.”²¹ The charter party AnimalFeeds used contained an arbitration clause.²² AnimalFeeds brought a class action antitrust suit against Stolt and the other petitioners alleging a price-fixing conspiracy, and the suit was subsequently consolidated with pending actions brought by other charterers.²³ After a court ruling on arbitrability, the parties agreed that they must arbitrate their antitrust dispute.²⁴ AnimalFeeds sought arbitration on behalf of “a class of . . . purchasers of parcel tanker transportation services.”²⁵ The parties submitted the issue of whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, who were bound by class rules developed by the American Arbitration Association (AAA).²⁶

One of the class arbitration rules at AAA required an arbitrator to determine whether the arbitration clause permitted class arbitration.²⁷ The parties “designat[ed] New York City as the place of arbitration . . . [,] selected a panel of arbitrators[,] and stipulated that the arbitration clause was ‘silent’ with respect to class arbitration.”²⁸ The panel concluded the arbitration clause allowed for class arbitration.²⁹ AnimalFeeds appealed. A federal district court vacated the award.³⁰ The court concluded the arbitrators made the award in “manifest disregard” of the law because, if the arbitrators had conducted a choice-of-law analysis, they “would have applied the rule of federal maritime law requiring that contracts be interpreted in light of custom and usage.”³¹ The Second Circuit reversed,

¹⁹ *Id.* at 1763. Justice Sotomayor took no part in considering or deciding the case. *Id.*

²⁰ *Id.* at 1764.

²¹ *Id.*

²² *Id.* at 1765.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* (internal quotation marks omitted).

²⁶ *Id.* The AAA developed these rules after the Supreme Court’s decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). *Stolt-Nielsen*, 130 S. Ct. at 1765.

²⁷ *Stolt-Nielsen*, 130 S. Ct. at 1765.

²⁸ *Id.* at 1765–66.

²⁹ *Id.* at 1766.

³⁰ *Id.*

³¹ *Id.*

concluding that the arbitrators had not manifestly disregarded federal maritime law because AnimalFeeds “had cited no authority applying a federal maritime rule of custom and usage *against* class arbitration,” and similarly, that the arbitrators had not “manifestly disregarded New York law . . . since nothing in New York case law established a rule against class arbitration.”³²

The 5-to-3 majority held that, unless the parties have explicitly agreed to submit to class arbitration, imposing arbitration on those parties is fundamentally inconsistent with the Federal Arbitration Act (FAA).³³ In an opinion by Justice Alito, the majority held that, “instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers.”³⁴ Justice Alito asserted that the arbitration panel apparently based its decision on AnimalFeeds’s public policy argument for permitting class arbitration under the parties’ arbitration clause instead of determining whether the FAA, maritime, or New York law contained a “‘default rule’ under which an arbitration clause is construed as allowing class arbitration in the absence of express consent.”³⁵ The majority acknowledged that under FAA section 10(b), it could direct a rehearing by the arbitrators on the issue, but it concluded that since there could be only one possible outcome based on the facts, there was no need to direct a rehearing by the arbitrators.³⁶

After *Stolt*, courts began to conclude that they could not compel defendants to class arbitration.³⁷ As a result, the only way a class action could proceed in the face of an arbitration clause was if the ban on class actions (whether explicit or implied through silence) were found to be unconscionable. This happened increasingly throughout the country. But, in short order, the United States Supreme Court considered the issue and deemed class action waivers enforceable in most settings.

B. *AT&T Mobility LLC v. Concepcion: Class Action Waivers in Arbitration Clauses Are Broadly Enforceable*

The decision in *AT&T Mobility LLC v. Concepcion* is the most significant limitation on class actions that has ever been handed down. In the 1990s, it became common practice to include arbitration clauses in consumer and employment contracts. These clauses now appear in lending documents,

³² *Id.* at 1766–67.

³³ *Id.* at 1775.

³⁴ *Id.* at 1770.

³⁵ *Id.* at 1768–69.

³⁶ *Id.* at 1770.

³⁷ See, e.g., *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 490 n.2 (Mo. 2012) (en banc).

employment documents, credit card agreements, sales agreements for cars and manufactured homes, some hospital contracts, nursing home agreements, and many other contacts.³⁸ And, as discussed above, most explicitly or implicitly prohibit class arbitration and class actions.³⁹ As a result, if enforced, the clauses mean individuals must pursue their remedies alone, even if doing so would be economically irrational or if it would be next to impossible to find an attorney to pursue the claim. The result is that the claims are not pursued at all.⁴⁰ Similarly, pursuing the claims individually could make it far more difficult for the plaintiffs to identify patterns and practices of illegality because discovery in arbitration is typically more limited than it would be in a court.⁴¹ In addition, individual claims will almost never result in damages large enough to alter a business's practices. Finally, since the clauses will require individual arbitration, even large damage awards usually will be confidential because confidentiality is a common term in arbitration clauses.⁴²

All of these concerns led various courts, including the California courts, to decide that some class action waivers were unconscionable since they exculpated the defendant and denied remedies to a class of plaintiffs. California developed a rule called the *Discover Bank* rule, named after the California Supreme Court case that first held that class action waivers in small damage consumer claims could be unconscionable.⁴³ *AT&T* overturned the *Discover Bank* rule, holding

³⁸ See Robert B. Kershaw, *Mandatory Binding Arbitration – Goliath's New Offense*, MD. B.J., July–Aug. 2003, at 28, 30 (noting that businesses have put arbitration clauses in “virtually every conceivable type of contract”). See also Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 142 (1997) (indicating, even in 1997, that an arbitration clause “may not be an invincible shield against class action litigation, but it is surely one of the strongest pieces of armor available”); Yvette Ostolaza, *Overview of Arbitration Clauses in Consumer Financial Services Contracts*, 40 TEX. TECH L. REV. 37, 38 (2007) (noting that almost seventy percent of all financial service contracts had arbitration clauses before the wave of new cases making arbitration clauses more likely to be enforced).

³⁹ Ostolaza, *supra* note 38, at 50 (noting that thirty percent of arbitration clauses in 2007 explicitly prohibited class actions). This does not count all the clauses that are silent as to the matter, which is now read to be a prohibition. There is no evidence that any arbitration clauses affirmatively provide for class arbitration, meaning that close to one hundred percent of arbitration clauses prohibit class actions and class arbitration, either explicitly or through operation of *Stolt*.

⁴⁰ Judge Posner's famous observation bears repeating: “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

⁴¹ See W. Scott Simpson & Omer Kesikli, *The Contours of Arbitration Discovery*, 67 ALA. LAW. 280, 281 (2006) (explaining the limitations on arbitration discovery and the fact that courts have approved of this limited discovery).

⁴² Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 218 (2004) (“Many arbitration agreements provide that the arbitration proceedings and the award must be kept confidential.”).

⁴³ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

that class action waivers, regardless of the underlying alleged conduct, are generally enforceable under the FAA.⁴⁴ A more detailed review of the facts and the holding follows.

AT&T Mobility LLC v. Concepcion was a 5-to-4 decision. Justice Scalia wrote the majority opinion.⁴⁵ Justice Thomas wrote a concurrence and joined in the majority's decision.⁴⁶ Justice Breyer wrote the dissent.⁴⁷

The cellular telephone contract between the Concepcions and AT&T Mobility LLC (AT&T) required arbitration of all disputes but prohibited class arbitration.⁴⁸ After being charged sales tax on the retail value of free phones provided under their AT&T service contract, the Concepcions sued AT&T in federal district court in California.⁴⁹ Their suit “was later consolidated with a putative class action alleging . . . that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.”⁵⁰ The district court denied AT&T's motion to compel arbitration.⁵¹ Applying the California Supreme Court's *Discover Bank* rule, the district court held the provision prohibiting class arbitration to be unconscionable.⁵² The Ninth Circuit agreed the provision was unconscionable under *Discover Bank*, holding that the FAA provision making arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” did not preempt its ruling.⁵³

Justice Scalia wrote the majority opinion, reversing in full.⁵⁴ The majority concluded that because the *Discover Bank* rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, . . . [it] is pre-empted by the FAA.”⁵⁵ Essentially, the court reasoned that the purpose of the FAA was to enforce agreements as written. The court explicitly held that even if enforcing the arbitration clause could prevent consumers from pursuing their rights, the FAA required the clause to be enforced.⁵⁶ The dissent argued that

⁴⁴ *Id.* at 1753. See *infra* notes 54–58 and accompanying text.

⁴⁵ *AT&T*, 131 S. Ct. at 1743–44.

⁴⁶ *Id.* at 1743.

⁴⁷ *Id.* at 1756.

⁴⁸ *Id.* at 1744.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1744–45.

⁵² *Id.* at 1745.

⁵³ *Id.* (quoting 9 U.S.C. § 2).

⁵⁴ See *id.* at 1745–53.

⁵⁵ *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 42, 67 (1941)).

⁵⁶ *Id.*

the FAA was designed to resolve disputes and that the FAA explicitly defers to state law.⁵⁷ The dissent also argued that enforcing the class action waiver would prevent consumers from pursuing their rights.⁵⁸

Since *AT&T*, courts have cited the case for the proposition that a class action waiver cannot be grounds for finding an arbitration clause unconscionable. The result is that even if a company were to confess illegality, and even if that illegality cheated thousands of people out of money, that company could not face a class action if it were wise enough to include an arbitration clause with a class action waiver in its contract.

Thus, as the law stands today, if AT&T were found to have cheated millions of customers, the only recourse for those customers would be to file individual arbitrations. And the only way AT&T would ever actually answer to all of its customers would be if each and every customer filed a claim. The same is true for high-interest lenders, credit card companies, banks, and any other company that includes a class action waiver and arbitration clause in its contracts.

C. Wal-Mart Stores, Inc. v. Dukes: *Nationwide Discrimination Claims Face Significant Challenges*

After eliminating a huge number of actions that arise from contracts in *AT&T*, the Supreme Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes*.⁵⁹ The decision likely spells the end of nationwide, and maybe even regional, class actions that address discrimination. In *Dukes* the Ninth Circuit en banc affirmed the certification of a class of roughly 1.5 million women who were employed, or previously employed, by Wal-Mart.⁶⁰ The case alleged that, compared with men, women were systematically underpaid for comparable jobs. In support of the claim, extensive data were produced showing that even when controlling for job title and number of years of service, women were paid less per hour than men in every single job position at Wal-Mart.⁶¹ The plaintiffs argued successfully to the trial and appellate courts that this information was common evidence that could allow a jury to conclude that all women at Wal-Mart were victims of discrimination.⁶²

The United States Supreme Court disagreed and decertified the class. The Court established a new, higher standard for what constitutes a “common question”

⁵⁷ See *id.* at 1757 (Breyer, J., dissenting).

⁵⁸ See *id.* at 1761.

⁵⁹ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

⁶⁰ *Id.* at 2549.

⁶¹ *Id.* at 2563–64 (Ginsburg, J., concurring in part and dissenting in part).

⁶² *Id.* at 2549–50 (majority opinion).

sufficient to support class certification.⁶³ And, for all practical purposes, the Court guaranteed that unless a company either has a written policy of discrimination or one manager who controls every employee in the company, nationwide and even many multi-state claims will fail.⁶⁴ A more detailed review of the case follows.

The Supreme Court decided *Dukes* in a 5-to-4 opinion written by Justice Scalia.⁶⁵ The suit was brought on behalf of 1.5 million former and current female employees of Wal-Mart, alleging that local managers had consistently and systematically discriminated against women.⁶⁶ As such, the class was seeking damages along with backpay.⁶⁷ After being certified under Federal Rule of Civil Procedure 23(a)⁶⁸ by both the district court and the court of appeals, the class filed suit alleging that Wal-Mart's managers had violated Title VII of the Civil Rights Act due to the company's pay and promotion practices.⁶⁹

The issue the Supreme Court addressed was whether the certification of the plaintiff class was consistent with standards set out in Federal Rules of Civil Procedure 23(a)⁷⁰ and (b)(2).⁷¹ The basis of the plaintiffs' case rested on the idea

⁶³ See *infra* notes 75–80 and accompanying text (explaining the Court's higher standard for a "common question").

⁶⁴ See *infra* note 80 and accompanying text (outlining the nearly impossible hurdles to employment class actions that *Dukes* created).

⁶⁵ *Id.* at 2546–47.

⁶⁶ *Id.* at 2547.

⁶⁷ *Id.*

⁶⁸ For a discussion of Rule 23 and the *Dukes* case (prior to the Supreme Court's opinion being issued), see generally John M. Husband & Bradford J. Williams, *The Sprawling Class Action After Dukes v. Wal-Mart: Unsettled Questions*, COLO. LAW., May 2011, at 49–50.

⁶⁹ *Dukes*, 131 S. Ct. at 2547.

⁷⁰ FED. R. CIV. P. 23(a) reads as follows:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

⁷¹ FED. R. CIV. P. 23(b)(2) reads as follows:

A class action may be maintained if Rule 23(a) is satisfied and if:

...

- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

that Wal-Mart employs a “corporate culture” in which a bias against women is projected, even if it is done so subconsciously.⁷² After the district court certified the proposed class, a divided Ninth Circuit Court of Appeals held, en banc, that the facts raised enough of a common question as to Wal-Mart’s treatment of its female employees.⁷³ The Ninth Circuit held the district court could try the case manageably by following an approach approved in an earlier Ninth Circuit decision, *Hilao v. Estate of Marcos*, in which damages calculations from a sample set of class members had been extrapolated and used to represent the whole.⁷⁴

The crux of the case was the commonality factor of a class action, as Wal-Mart attempted to prove that the 1.5 million plaintiffs could not qualify together as a class.⁷⁵ The Supreme Court majority rested its decision on the idea that the plaintiffs did not give sufficient evidence to satisfy the commonality requirement.⁷⁶ The Court articulated a particularly high burden for commonality, holding that “[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury”⁷⁷ The Court went on to explain that it was not enough to show that a company violated the same law for each plaintiff and class member.⁷⁸ The Court held the claim had to rely upon the same contention and then provided only one example of what would suffice—“the assertion of discriminatory bias on the part of the same supervisor.”⁷⁹

Based on this declaration of the law, the Court held that the multitude of jobs, levels, and timing of the female employees were too different to create common questions.⁸⁰ The takeaway from *Dukes* is not good for employment discrimination claims involving more than one supervisor. In *Dukes*, statistical data and expert testimony suggested that Wal-Mart had a culture of discrimination, but this was not sufficient. The Court seemed to require either a common supervisor or a nationwide policy of discrimination. But, in today’s workplace, every employer has an anti-discrimination policy on the books, whether it is followed or not. And, many employers will not have a single supervisor in charge of more than a few dozen employees. As a result, even if a company has a pervasive culture of discrimination, it is hard to imagine how to prove it under the new standards in *Dukes*. The result is that more discrimination claims will be state by state, or even

⁷² *Dukes*, 131 S. Ct. at 2548.

⁷³ *Id.* at 2549.

⁷⁴ *Id.* at 2550 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996)).

⁷⁵ *Id.* at 2547, 2550–51.

⁷⁶ *Id.* at 2555–56.

⁷⁷ *Id.* at 2551 (citation and internal quotation marks omitted).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *id.* at 2550–57.

supervisor by supervisor. And the more concrete result in *Dukes* was that even though there was overwhelming statistical evidence that women are underpaid and under-promoted by Wal-Mart, the Court could provide no remedy other than to invite each female employee to join a smaller class or file her own claim. No matter how the claimants proceeded, it is almost certain Wal-Mart will never be forced to defend all of its actions, even if they do run afoul of the law.

D. Comcast v. Behrend: *Merits Creep Into Class Certification*

In *Comcast v. Behrend* the Supreme Court announced new standards for what is required to certify a class.⁸¹ Justice Scalia delivered the opinion of the Court in a 5-to-4 decision.⁸²

In *Comcast*, approximately two million Comcast customers sought damages for alleged violations of antitrust laws.⁸³ They asserted that Comcast illegally eliminated competition, resulting in higher prices for the customers.⁸⁴ The class advanced several arguments as to how Comcast's actions caused damages, including theories of overbuilding to reduce competition in a particular metropolitan area.⁸⁵ The district court found the damage theory persuasive and certified the class.⁸⁶ The Third Circuit affirmed.⁸⁷

The Supreme Court reversed.⁸⁸ A bare majority found that the class did not meet certification requirements under Rule 23(b)(3).⁸⁹ Essentially, the Court held that the lower courts had failed to rigorously analyze the method for determining damages.⁹⁰ In reaching this conclusion, the Court again asserted that courts are free to dive into the merits to consider class certification.⁹¹ Indeed, the Court demanded a "rigorous" investigation of the elements of class certification.⁹²

The way the test was applied represents a significant increase in what claimants must show in order to certify a class. In *Comcast*, the plaintiffs produced an expert who estimated the difference between what customers paid in the

⁸¹ See generally *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

⁸² *Id.* at 1429.

⁸³ *Id.* at 1429–30.

⁸⁴ *Id.* at 1430.

⁸⁵ *Id.* at 1430–31.

⁸⁶ *Id.* at 1431.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1435.

⁸⁹ *Id.* at 1432–33.

⁹⁰ See *id.* at 1433.

⁹¹ See *id.* at 1432.

⁹² *Id.* at 1432.

allegedly anti-competitive market as compared to what they would have paid in a market that was functioning legally.⁹³ To calculate these damages, the expert included four anti-competitive behaviors in his calculations.⁹⁴ Each was a theory advanced by the plaintiff.⁹⁵ However, the expert did not, at the class certification stage, calculate the damages as they related to each theory individually.⁹⁶ In other words, the expert did not calculate what the damages would be if only one of the anti-competitive actions were taken and the resulting amount were compared to the actual price consumers were paying.⁹⁷ However, both the trial court and the appellate court certified the class nonetheless, reasoning that at the certification stage, the expert did not have to do the calculations.⁹⁸ It was enough that the calculations could be completed using a formula if the matter went to trial.⁹⁹ The Supreme Court rejected this argument, holding that the damages theory had to be fully fleshed out and had to be capable of measuring the damages of each class member.¹⁰⁰

The decision in *Comcast* came under fire from the dissent.¹⁰¹ Interestingly, the dissent pointed out that the parties were not even asked to brief the issue that was ultimately decided.¹⁰² The dissent stated, “[a]bandoning the question we instructed the parties to brief does not reflect well on the processes of the Court.”¹⁰³ The dissent then at least hinted that it thought the Court’s opinion was out of line with existing law. The dissent noted, “[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.”¹⁰⁴

The decision in *Comcast* does in fact represent a significant departure from what most class action attorneys believed was the law. For example, in many class actions, either by agreement or court order, merits discovery is put off until after class certification.¹⁰⁵ At a minimum, this means that the parties do not engage

⁹³ *Id.* at 1433–34.

⁹⁴ *Id.* at 1434.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1433.

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 1434–35.

¹⁰¹ *See id.* at 1435–41 (Ginsburg & Breyer, JJ., dissenting).

¹⁰² *Id.* at 1435.

¹⁰³ *Id.* at 1436 (citation and internal quotation marks omitted).

¹⁰⁴ *Id.* at 1437 (citation omitted).

¹⁰⁵ *See, e.g.,* John K. Arnold et al., *Recurring Issues in Consumer and Business Class Action Litigation in Texas*, 33 TEX. TECH L. REV. 971, 977–79 (2002).

in damages discovery until after a class certification hearing. This bifurcation of discovery is almost always sought by the defendant.¹⁰⁶ As a result, prior to class certification, attorneys who bring class actions typically prove only that damages are subject to calculation, and these same attorneys almost always cite the black letter law that individual damages do not defeat a class. The *Comcast* decision calls all of this into question, seeming to suggest that the damages calculations must be done before class certification, and that district courts are required to consider the merits of an expert at the class certification phase. This suggests a change in how discovery is carried out. Under *Comcast*, a case must be almost entirely developed before class certification can be pursued. *Comcast* also suggests that courts are now invited to engage in *Daubert* analysis and rigorous second-guessing of the plaintiffs' claims, rather than simply considering whether, if the evidence is persuasive to the jury, the plaintiffs could prove their case.

All of this suggests that judges who want to deny class certification will find new ways to do it that are not likely to be disturbed on review.

E. Genesis Healthcare Corp. v. Symczyk: Picking Off Plaintiffs Is Allowed

If *AT&T* was the decision that did the most to eliminate class actions, *Genesis Healthcare Corp. v. Symczyk* is the case that does the most to empower defendants to make those class claims that are filed disappear. In *Genesis*, Justice Thomas wrote the majority opinion in a 5-to-4 decision revolving around collective actions and Rule 68 of the Federal Rules of Civil Procedure.¹⁰⁷ The action originated under the Fair Labor Standards Act of 1938 (FLSA), under which an employee may bring an action for damages for specific violations of FLSA against an employer on behalf of himself and “similarly situated” employees.¹⁰⁸ This is called a “collective action.”¹⁰⁹ To be clear, a collective action is not a class action, but they are very similar.¹¹⁰ In a collective action, if a class is certified, the members are sent forms that give them the choice to opt into the class.¹¹¹ Those who opt in form the “class” of litigants.¹¹²

The issue in front of the Court was whether such an action can occur when the individual, original plaintiff has been offered a Rule 68 judgment for the full amount of his or her damages.¹¹³ This is an important question because some

¹⁰⁶ *See id.* at 977.

¹⁰⁷ *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1526–27 (2013).

¹⁰⁸ *Id.* at 1527.

¹⁰⁹ *Id.*

¹¹⁰ *Contra id.* at 1529.

¹¹¹ *See id.* at 1529–30.

¹¹² *See id.*

¹¹³ *Id.* at 1526–27.

defendants engage in this practice in an effort to “pick off” the named plaintiff, thereby defeating the prospects of a class action.¹¹⁴ In theory, if a defendant were to determine that it had potential liability to hundreds of class members, it might well decide that paying full damages to one or two named plaintiffs would be far cheaper than litigating the case and paying a settlement or verdict to the entire class.¹¹⁵ Plaintiffs, and their attorneys, resist this practice in the hopes of proceeding with the class action.¹¹⁶

Named plaintiff Symczyk was a registered nurse for Genesis Healthcare.¹¹⁷ In the original suit, Symczyk alleged that Genesis violated FLSA by automatically deducting thirty minutes per shift for meal breaks even if compensable work was performed during these breaks.¹¹⁸ Under Federal Rule of Civil Procedure 68, Genesis served an offer of judgment to Symczyk, to which she did not respond.¹¹⁹ As such, the offer was withdrawn, and Genesis submitted a motion to dismiss for lack of subject-matter jurisdiction.¹²⁰ Genesis argued that since complete relief had been offered to the sole plaintiff, the plaintiff’s claim was moot and the plaintiff had no ability to pursue a claim for other similarly situated employees.¹²¹

The district court found that no other individuals had joined the plaintiff’s (now respondent’s) suit and that the Rule 68 offer of judgment satisfied the individual claim.¹²² The Third Circuit reversed, finding that the process of collective actions would be thwarted if defendants were allowed to “pick off” individual claims.¹²³

The Supreme Court assumed, without deciding, that the offer of judgment from Genesis under Rule 68 mooted the individual claim.¹²⁴ The Court found that because an offer of judgment had been made, the individual plaintiff no longer held a personal interest in the claim, and that it was appropriately dismissed for lack of subject-matter jurisdiction.¹²⁵

¹¹⁴ *Id.* at 1527.

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* “Rule 68 permits a defendant to offer judgment to be taken against it in a specified amount; if the plaintiff fails to accept the offer and later obtains a judgment less favorable than the offer, then the plaintiff must pay the defendant’s costs incurred from the time of the offer.” Ian H. Fisher, *Federal Rule 68, A Defendant’s Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89, 89 (2001); *see also* FED. R. CIV. P. 68.

¹²¹ *Genesis*, 133 S. Ct. at 1527.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 1529.

¹²⁵ *Id.* at 1529–32.

Although the Supreme Court's decision in *Genesis* is ostensibly limited to FLSA claims, there is no doubt that defendants will attempt to apply the holding to class actions under Rule 23.¹²⁶ Extending *Genesis* would make pursuing many class actions far more difficult, if not impossible. Defendants could simply pay the claims of named plaintiffs (especially since those individual claims are often relatively small), and the class claim would be mooted. If the plaintiff's attorney found new representatives, the defendant could moot those claims too. The attorney's only choice would be to move for class certification much earlier, hopefully cutting off the right to "pick off" the plaintiff. However, as discussed above, with the increased standard for proving class certification under *Comcast*, an early motion is unlikely to be supported by sufficient evidence.

III. THE FIVE CLASS ACTION DECISIONS DEMAND STUDY AND RETHINKING OF CURRENT ROLES

Taken as a whole, the five decisions discussed in this article represent serious changes in class action law that occurred breathtakingly quickly. There has never been such dramatic change in class actions in only three years. *Stolt* was handed down in April of 2010. By April 2013, *Genesis* was issued. And during that time, the Court eliminated class arbitration, allowed the banning of class actions through the use of form arbitration clauses, made the certification of many discrimination claims almost impossible, heightened the evidentiary standard for class certification, and encouraged the "picking off" of plaintiffs.

The impact of these decisions cannot be fully known, but what is clear is that it demands immediate study. It demands study both because it could cause significant changes in whether and how individuals can vindicate their rights, and because these changes, enacted by only five men, will implicate the behavior of corporations and millions of Americans.

There is some early indication that the decisions by the Court will impact class action filings. A year after *AT&T* was handed down, Public Citizen wrote a report, entitled *Justice Denied*, in which it chronicled the impact *AT&T* had on class actions.¹²⁷ The report concluded that "[t]he decision provided corporations with a tool to insulate themselves from facing meaningful accountability for cheating large numbers of consumers out of amounts too small to make pursuing

¹²⁶ Indeed, only two days after the decision, articles appeared in various online journals suggesting that the holding could be applied to class actions too. See, e.g., Alan S. Kaplinsky et al., *Supreme Court Ruling on Employee's Lawsuit Will Also Affect Rule 23 Class Action Cases*, JD SUPRA LAW NEWS (Apr. 18, 2013), <http://www.jdsupra.com/legalnews/supreme-court-ruling-on-employees-lawsu-98339>.

¹²⁷ See PUBLIC CITIZEN & NAT'L ASS'N OF CONSUMER ADVOCATES, JUSTICE DENIED: ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT'S *CONCEPCION* DECISION ARE PLAINLY EVIDENT (2012), <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>.

individual cases economically feasible.”¹²⁸ The report used Westlaw’s KeyCite to identify seventy-six potential class actions that were dismissed by courts citing *AT&T*.¹²⁹ And, of course, the report could not capture the hundreds of cases that were not filed or were voluntarily dismissed.

Just as the plaintiffs’ bar decries these decisions, the defense bar has welcomed the decisions. This suggests that those in the know view the decisions as likely to reduce the likelihood of success in class actions. For example, Gibson Dunn, one of the largest law firms in the world and an experienced defender of complex class actions for some of the most valuable companies on earth, produced an end-of-year report in 2012 that addressed class actions.¹³⁰ The report states that corporations will be litigating class actions in a “new world.”¹³¹ And that in this “new world,” the companies “will have powerful weapons available to them that should help level the playing field”¹³² Interestingly, the article goes on to suggest that these decisions are not “the death knell” for class actions; rather, the report predicts that plaintiffs’ lawyers will “continue to explore new theories and develop novel arguments.”¹³³

Regardless of Gibson Dunn’s predictions, and regardless of whether plaintiffs’ attorneys will stubbornly continue to file as many class actions as they did the year before, precedent matters. The decisions handed down by the Supreme Court will drive some attorneys to find other ways to make a living, will drive others to turn down class actions that will now be considered a closer call on class certification, and will continue to require many class actions to be rejected simply because the arbitration clause at issue is likely to be enforced. And, even if the class action is filed, there is an increased risk that plaintiffs will be “picked off” and the case will not proceed. The result is that many meritorious claims will either never get started, die on the vine, or, even if they do succeed, provide relief to a more narrowly drawn class. If one believes that some of these cases would have provided legitimate relief to class members and would have caused companies to evaluate their policies, then there needs to be real discussion about what can be done.

A. *Call for Careful Study*

When CAFA was enacted, scholars studied it extensively. They provided constructive suggestions on how to interpret its jurisdictional provisions, studied class action filing rates and how they were impacted, and measured whether the

¹²⁸ *Id.* at 4.

¹²⁹ *Id.*

¹³⁰ See GIBSON DUNN, 2011 YEAR-END UPDATE ON CLASS ACTIONS (2012), <http://www.gibsondunn.com/publications/Documents/2011YearEndClassActionsUpdate.pdf>.

¹³¹ *Id.* at 1.

¹³² *Id.*

¹³³ *Id.*

outcomes in federal court were different from those in state court.¹³⁴ These studies contributed to the development of CAFA law and precedent. Today, research is needed to determine the impact the decisions at issue will have on class actions. Specifically, will filings decrease or will individual cases be split into multiple cases, resulting in a numerical increase in cases, but a reduction in the total number of class members covered by claims? Within this research, there will be a need to separate “class actions” into types. The decisions are likely to curb discrimination claims, consumer claims, and probably employment claims in general. But, if history proves true, they may have little to no impact on securities class actions. Will defendants employ the “pick off” strategy more often? Will courts deny class certification more often? These and many other questions will need to be considered through careful data analysis.

This research will need to be grounded in solid statistical analysis, but it must also be tied into the practicing bar. Otherwise, the numbers could be misleading. For example, what if employment discrimination claims actually increase in the coming years? Does this mean that *Dukes* has given plaintiffs new hope? Or, does it mean that large firms that used to file nationwide class actions are now gathering individual plaintiffs in a variety of states and filing multiple claims to cover those states? Could it be that fifteen smaller class actions are used to achieve some of the coverage a nationwide discrimination claim would have accomplished in the past?

And how do we measure the quality of class actions? Are some of the best attorneys going to start looking for other types of lucrative work? Will class actions become something fewer people specialize in? How do firms that depend on class actions for their income view the new decisions? The actions of such firms, and whether they diversify their practice areas, will be critical to understanding how these decisions are impacting behavior.

In short, as research begins, it will be most successful if it measures not only filing numbers and results, but also the behavior and attitudes of large firms that file and defend class actions. These studies will provide critical information about how the Supreme Court’s radical alterations to class actions are impacting law and society.

B. Filling the Private Enforcement Gap

Although the precise impact of the decisions cannot be measured yet, I see no way that these decisions will do anything other than curb class filings and limit private enforcement of a variety of laws. In addition to studying the impact of the

¹³⁴ See generally, e.g., Clermont & Eisenberg, *supra* note 13; Joseph, *supra* note 15; Steven M. Puzis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115 (2006).

decisions, there is an immediate need to consider how the enforcement gap could be filled. Waiting on the data is not practical: if there really is a reduced ability to pursue valid claims, this should trouble anyone who respects the law.

The most obvious solution would be for the decisions of the Court to be revisited in comprehensive legislation. But class action reform that actually makes class actions easier to file will never be popular, and given the relative inability of Congress to pass laws, even when a majority of Americans supports them, it seems unlikely Congress will act on a class action rights bill anytime soon.

This leaves only one other serious possibility. As is the case in a number of countries that do not have class actions (such as the countries in the European Union), private enforcement must be replaced by public enforcement. In the United States, depending on the area of law, this necessarily would involve a variety of enforcement agencies, including the Equal Employment Opportunity Commission (EEOC), the Federal Trade Commission, the Securities and Exchange Commission, the newly formed Consumer Financial Protection Bureau (CFPB), the Environmental Protection Agency, state attorney generals, and a variety of state bodies that correlate to their federal counterparts.

For this alphabet soup of enforcement to be effective, these public bodies will need to fully embrace, and perhaps reimagine, their roles. For example, the EEOC has access to all the data compiled in the *Dukes* case and introduced into the public record. As a result, the EEOC knows that women at Wal-Mart are systematically underpaid. The EEOC does not need to file a class action to pursue an enforcement action, and the EEOC is not subject to any arbitration clause that any employer might require its employees to sign. Instead, the EEOC can take a variety of actions, including investigation, and when appropriate, bringing claims to trial against companies like Wal-Mart. In the absence of private class actions, the EEOC should do more of this.

The same will be true for other agencies. For example, the newly created CFPB has immense power to regulate a variety of lending contexts, including payday loans, credit cards, and mortgage lending.¹³⁵ This power must be recognized and used.

As an example, consider payday lenders. I can offer a personal example. Over the past five years, I was involved in two class action cases in Missouri that settled for over \$30 million, providing significant recovery to over 150,000 people.¹³⁶

¹³⁵ See generally *About Us*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited May 6, 2013).

¹³⁶ See generally *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917 (8th Cir. 2009); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90 (Mo. Ct. App. 2008).

Those cases alleged that payday lenders, who were charging over 469% interest, were breaking the law.¹³⁷ The cases were able to proceed despite arbitration clauses that prohibited class actions because Missouri law permitted courts to hold the class action waivers unconscionable.¹³⁸ But, under *AT&T*, that result is highly unlikely today.¹³⁹

As a result, there are another one thousand payday lenders in Missouri who are engaging in the same behavior that was previously alleged to be illegal.¹⁴⁰ But the payday lenders will not be sued in class actions because they are all smart enough to include class action waivers in their contracts. And, since individual claims would only total \$500 (the cap on such loans in Missouri), there is almost no chance individual claims can be pursued.¹⁴¹ As a result, payday lenders will operate under the status quo, even if that status quo is illegal. Because of the United States Supreme Court's decision in *AT&T*, there is *no* option for private enforcement. However, the CFPB has the right to impact how payday lenders do business in the entire country. The CFPB can require underwriting, limit renewals, or demand meaningful disclosures. And in some ways, this action would be better than state-by-state class actions. The only question that remains is whether the CFPB and those like it will step in and engage in more public enforcement in order to fill the private enforcement void.

There are some promising signs that public enforcement is becoming more prevalent already. For example, before British Petroleum will ever answer to individuals in class actions or individual lawsuits stemming from the *Deepwater Horizon* oil spill, it first agreed to pay \$20 billion due to pressure from the federal government.¹⁴² This was a perfect example of public enforcement leading the way. Similarly, state attorney generals and the federal government have leveraged over \$30 billion in settlements from mortgage servicers who have carried out wrongful foreclosures and the like.¹⁴³ These same attorney generals hammered insurance

¹³⁷ See *Hooper*, 589 F.3d at 919–20; *Woods*, 280 S.W.3d at 92, 96.

¹³⁸ See *Woods*, 280 S.W.3d at 99; Appellee's Brief at 31, *Hooper*, 589 F.3d 917 (No. 08-3252), 2008 WL 5485468.

¹³⁹ See generally PUBLIC CITIZEN & NAT'L ASS'N OF CONSUMER ADVOCATES, *supra* note 127.

¹⁴⁰ See RICHARD J. WEAVER, COMM'ROF FIN., REPORT TO GENERAL ASSEMBLY PURSUANT TO SECTION 408.506, RSMo. 1 (2013), available at <http://finance.mo.gov/Contribute%20Documents/2013PaydayLenderSurvey.pdf>.

¹⁴¹ See *id.* at Exhibit B.

¹⁴² See, e.g., Joe Nocera, Op-Ed., *BP Makes Amends*, N.Y. TIMES, Jan. 10, 2012, at A23 ("At the urging of President Obama, BP also agreed to set up a \$20 billion fund to compensate anyone who could show that they'd been economically harmed by the accident.")

¹⁴³ See, e.g., Nelson D. Schwartz & Shaila Dewan, *\$26 Billion Deal Is Said To Be Set for Homeowners*, N.Y. TIMES, Feb. 9, 2012, at A1.

companies for millions of dollars for failing to pay out death benefits, caused the tobacco industry to pay out billions for deceiving consumers, and brought their own claims against various companies for defrauding their states.¹⁴⁴

All of this suggests that public enforcement can be an effective tool in addressing wrongs that class actions would also address. In fact, public enforcement has some advantages, such as subpoena power, the right to conduct investigations that would run afoul of private attorney ethical rules, and the ability to address nationwide trends.

And so, as the new decisions take hold, and as practitioners adjust their behaviors based on how courts interpret the Supreme Court's decisions, there is opportunity—opportunity to study the impact the Supreme Court's recent decisions will have on class actions and opportunity to invigorate the role of public agencies to protect the rights of citizens.

¹⁴⁴ See, e.g., Barry Meier, *12 Years On, Tobacco Suit Due in Court*, N.Y. TIMES, Jan. 31, 2011, at B1; Leslie Scism, *Insurer Reaches Settlement over Death Benefits*, WALL ST. J., Feb. 3, 2012, at C2.