The Supreme Court's 2015–2016 Term Marks a Turning Point for Class Actions

By Jennifer Quinn-Barabanov

After surprisingly divergent results from lower courts on several issues, whether consensus will ultimately emerge without Supreme Court intervention remains to be seen.

A Busy Class Action Docket Builds Expectations

Consistent with the U.S. Supreme Court's high level of interest in recent years, class actions were a key area of focus during its 2015–2016 term. The Supreme Court heard four class action-related cases: *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015) (No. 13-1339); *Tyson Foods, Inc. v. Bouaphakeo*, 135 S. Ct. 2806 (No. 14-1146); *Campbell-Ewald Company v. Gomez*, 135 S. Ct. 2311 (No. 14-857); and *DIRECTV, Inc. v. Imburgia*, 135 S. Ct. 1547 (No. 14-462).

Two of the cases, *Spokeo* and *Bouaphakeo*, raised questions about injury sufficient to support a class action. In *Spokeo*, the injury question was presented in the context of a standing challenge focused on the named plaintiff in a putative class action based on a federal statute providing statutory damages. In *Bouaphakeo*, a review of a final judgment after trial, the questions presented related to how classwide injury may be proved and whether a class can include uninjured members.

The two other cases, *Campbell-Ewald* and *Imburgia,* presented more procedural issues. In *Campbell-Ewald*, the Supreme Court addressed whether an offer of judgment that fully compensates a named plaintiff moots a claim for classwide relief. And in *Imburgia,* the Supreme Court again addressed the enforceability of class arbitration waivers, this time in the face of lower court resistance to its decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), which held that the Federal Arbitration Act, 9 U.S.C. §2, preempts state laws prohibiting class arbitration waivers in consumer contracts. 563 U.S. at 352.

Among the four cases, two, *Spokeo* and *Campbell-Ewald*, shared another characteristic: the plaintiffs' claims in both cases were based upon federal statutes that pro-

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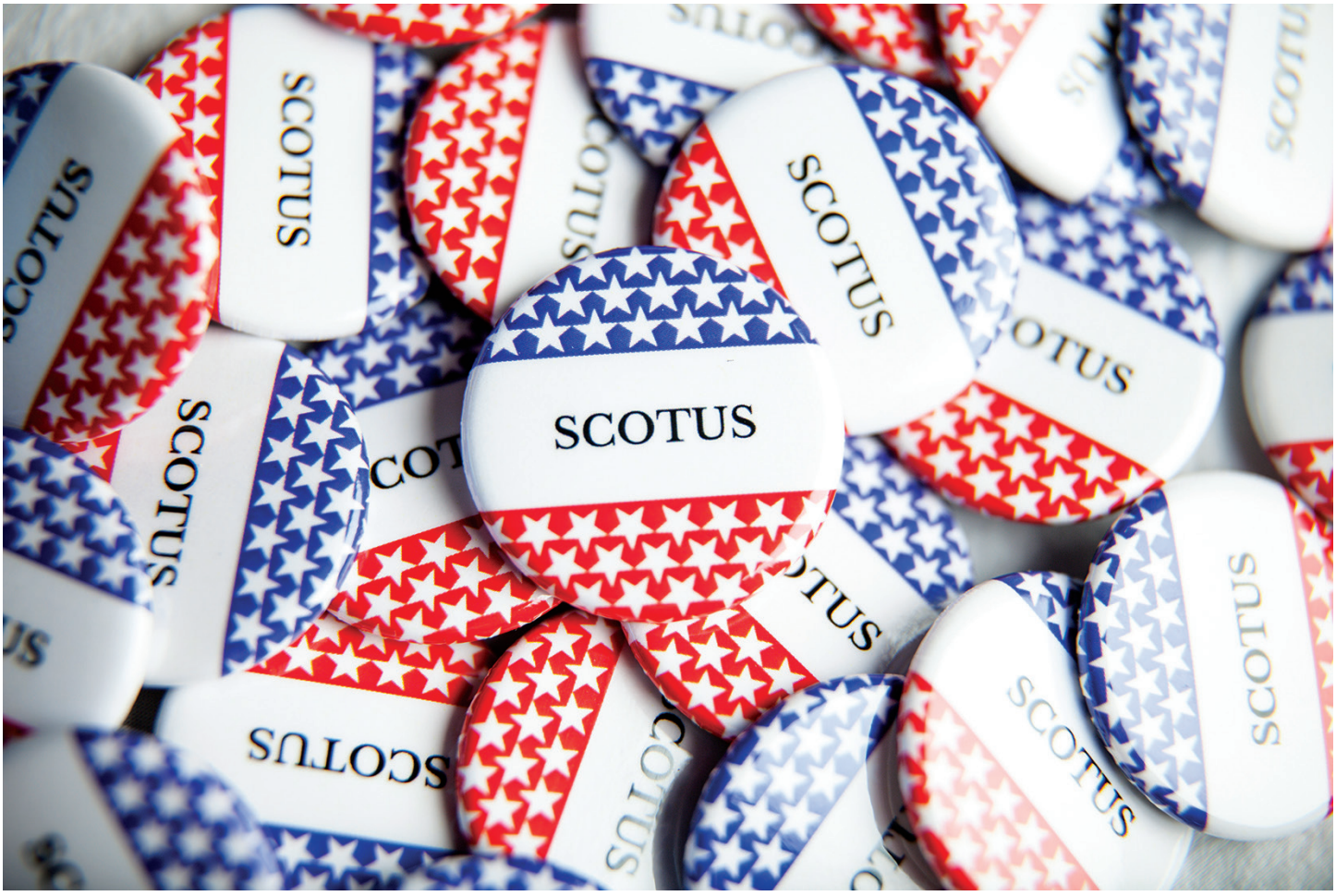

vide statutory damages per violation. Statutory damages cases such as these have proved to be a thorn in defendants' sides because of the size of the proposed classes frequently involved and the difficulty that defendants have often had demonstrating meaningful variation among class members sufficient to defeat class certification. *See generally* Petition for Writ of Certiorari, *Spokeo*, No. 13-1339 (S. Ct.) (May 1, 2014) (citing dozens of statutory damages class actions that have been certified).

Having reaped the benefits of several favorable decisions over the past several years, beginning with the Supreme Court's seminal decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), defendants were hopeful that a series of victories, particularly on the issues related to standing, classwide injury, and the mechanism for "picking off" named plaintiffs in statutory damage class actions, would further reshape the class action landscape in their favor. For the most part, these hopes were not realized. The only unequivocal defense victory came in *Imburgia*, a case that was all but a foregone conclusion based on the Supreme Court's previous ruling in *Concepcion*, 563 U.S. 333.

In light of these results and the unexpected death of Justice Scalia, a tough critic of the class action device, defendants may well look back at the 2015–2016 Supreme Court term as a turning point at which the tide turned in favor of class actions.

Spokeo Fails to Deliver a Death Blow to "No-Injury" Class Actions but Raises the Bar for "Concrete" Injury

Of the cases pending before the Supreme Court this past term, *Spokeo* was widely perceived as the most important because of its potential effect on what are commonly referred to as "no-injury" class actions, particularly those involving statutory damages. Although we cannot know for certain, *Spokeo* may also be the class action decision most affected by Justice Scalia's death. Whereas oral argument presaged a ruling based on statutory interpretation, the post-Scalia majority coalesced around a ruling distinguishing between the "concrete and particularized" components of the injury-in-fact requirement for Article III standing that was unexpected, with consequences that are less predictable.

In retrospect, some of the hype surrounding *Spokeo* and its potential effect on "no-injury" class actions of all kinds seems overblown. What the defense bar often refers to as "no-injury" class actions generally fall into two categories.

The first category consists of class actions based primarily on state law and includes diminished value or "price premium" claims, as well as data breach claims for which no evidence exists of identity theft or misuse of information after the alleged breach. Price premium and diminished value claims are typically brought by purchasers of a product allegedly prone to some kind of defect. The class is specifically defined to exclude those purchasers of a product that has manifested the defect because the class seeks to recover the

alleged difference between the value of the non-defective product that they thought they were buying and the product allegedly at risk of manifesting the alleged defect that they did purchase. The most high-profile example of this type of claim involved front-loading washing machines claimed to be less valuable because they were allegedly prone to develop mold and odors.

Although we cannot know for certain, *Spokeo* may also be the class action decision most affected by Justice Scalia's death.

After years of litigation involving multiple challenges to class certification, including two trips to the Supreme Court that failed to yield a substantive ruling on the "no-injury" question, Whirlpool obtained a defense verdict on the first such claim to proceed to trial, now pending on appeal before the Sixth Circuit. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*, 678 F.3d 409 (6th Cir. 2012) (affirming class certification); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) (granting certiorari, vacating, and remanding for further consideration based upon the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013)); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 857 (6th Cir. 2014) (reaffirming class certification after remand), *cert. denied*, 134 S. Ct. 1277 (2014); No. 1:08CV65001, 2014 WL 8061244 (N.D. Ohio, Oct. 31, 2014) (jury verdict and judgment for the defendant).

The second category of "no-injury" class actions involves claims for statutory damages. *Spokeo* falls within this second category because it involved a claim under the Fair Credit Reporting Act (FCRA) that carries a statutory penalty of between $100 and $1,000 per violation. *See* 15 U.S.C. §1681n(a)(1)(A). In these statutory damage class actions, plaintiffs pursue claims under statutes that do not require proof of actual damages, but instead, specify an amount of damages for each violation. In addition to the FCRA, examples of such statutes include, to name a few, the Telephone Communications Privacy Act (TCPA), 47 U.S.C. §227(b); the Electronic Communications Privacy Act, 18 U.S.C. §2520(c); the Truth in Lending Act (TILA), 15 U.S.C. §§1631–1632; the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692f; and the Video Privacy Protection Act, 18 U.S.C. §2710(b). *See generally* Petition for Writ of Certiorari, *Spokeo*, No. 13-1339, at 16–19 (S. Ct.) (May 1, 2014) (identifying statutes authorizing private rights of action and providing statutory damages). Plaintiffs in statutory damage class actions typically seek to recover on behalf of a class consisting of all those who were subject to the defendant's business practice. The scope of activities subject to regulation through statutes providing statutory damages creates the potential for extremely large classes, with potentially astronomical damages at stake.

Some courts have treated statutory damage provisions as representing a legislative determination that a violation of such a statute causes an injury, an approach that has made it significantly more difficult for defendants to defeat class certification based on variations related to whether and how putative class members have allegedly been injured.

The courts of appeal are divided on whether a violation of a duty created by a statute that provides for a private right of action is sufficient to satisfy Article III standing requirements, absent an allegation of some ensuing harm. The Ninth Circuit, including in the underlying decision challenged in *Spokeo*, as well as the Sixth, Seventh, Tenth, and D.C. Circuits, have held that a plaintiff need not allege more than a violation of a statutorily imposed duty as long as the statute also creates a private right of action. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (citing *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012)); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009) (concluding that "[n]o Article III (or prudential) standing problem ar[ose]" in a lawsuit alleging bare violation of FCRA); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (reversing the district court's denial of class certification for an FCRA claim because "individual losses, if any, are likely to be small… and hard to quantify [which] is why statutes such as the [FCRA] provide for modest damages without proof of injury"); *Day v. Bond*, 500 F.3d 1127, 1136 (10th Cir. 2007) ("It is long settled in the law that the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.") (internal quotations omitted); *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) ("[T]he violation of a statute can create the particularized injury required by Article III… when 'an individual right' has been 'conferred on a person by statute.'").

In contrast, the Second and Fourth Circuits have held that the breach of a statutory duty does not constitute an injury-in-fact sufficient for standing. *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (affirming the lower court's denial of class certification because the plaintiff failed to allege an injury-in-fact arising from the employer's alleged ERISA violation); *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (the theory "that the deprivation of [plaintiffs'] statutory right… is sufficient to constitute an injury-in-fact for Article III standing… conflates statutory standing with constitutional standing").

Although *Spokeo* is a statutory damages class action, the defense bar had hoped that in ruling on the standing question in *Spokeo*, the Supreme Court might undermine "no-injury" class actions of all types.

Turning to the specific facts of *Spokeo*, Robins brought a putative class action on behalf of a potentially enormous class, defined to include all persons who had information about them compiled or displayed by Spokeo's "people search engine" from 2006 through the date of trial. First Am. Compl. at ¶ 38, *Robins v. Spokeo, Inc.*, Civil Action No. 2:10-cv-05306-ODW-AGR (Feb. 16, 2011). Robins claimed that Spokeo's search results included false information about him, including that he held a graduate degree (he did not) and was married (he was not), and it overstated his work experience and personal wealth, when he was, in fact, unemployed. Robins claimed that this inaccurate informa-

tion diminished his employment prospects and caused him anxiety. Rather than claim actual damages, Robins sought statutory damages of between $100 and $1,000 for each allegedly willful violation experienced by class members.

The district court dismissed the case, holding that "[m]ere violation of the Fair Credit Reporting Act does not confer Article III standing… where no injury in fact is properly pled." *Robins v. Spokeo, Inc.*, 2011 WL 11562151, at *1 (C.D. Cal. Sept. 19, 2011). The Ninth Circuit reversed, holding that Robins satisfied Article III's injury-in-fact prerequisite for standing because "he allege[d] that Spokeo violated *his* statutory rights, not just the statutory rights of other people" and because his "personal interests in handling his credit information are individualized rather than collective." 742 F.3d at 413. Thus, the Ninth Circuit's ruling did not depend in any way on Robins' allegedly diminished employment prospects.

As framed by Spokeo, the question presented to the Supreme Court was "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." Pet. for Writ of Cert., *Spokeo*, No. 13-1339, at i (S. Ct.) (May 1, 2014).

Spokeo's argument that a statutory violation was insufficient to support constitutional standing rests on several grounds. According to Spokeo, the injury-in-fact requirement of Article III creates a "hard floor" for the exercise of federal jurisdiction that requires "concrete harm." Pet. Br. at 8 (citing *Summer v. Earth Island Inst.*, 555 U.S. 488. 497 (2009)). A "legal violation without concrete harm" is an "injury in law" that does not satisfy the injury-in-fact requirement. *Id.* As explained by Spokeo, "presumed [statutory] damages are limited to those who suffer concrete harm: their purpose is to ensure a recovery in situations in which there may be problems of proof, not to provide damages to uninjured plaintiffs." *Id.* Moreover, Robins' efforts to establish concrete injury by analogy to the law of defamation, or based on his allegedly diminished employment prospects, was flawed. *Id.* at 9–10. Alternatively, even if a statutory violation could satisfy the injury-in-fact requirement for constitutional standing, as a matter of statutory construction, the FCRA does not authorize an action by a plaintiff who has not demonstrated concrete harm. *Id.* at 10.

Supported by the Solicitor General of the United States, Robins argued that there was ample support for the conclusion that a violation of one's own statutory right created by Congress is sufficient to confer Article III standing without any allegation of further harm. Robins' most persuasive argument rested upon *Havens Realty Corp. v. Coleman*, in which the Supreme Court held that fair housing "testers" had standing to file claims based on inaccurate information provided about housing availability, even if they had no intention to buy or rent a home, because the Fair Housing Act created a "right to truthful housing information." 455 U.S. 363, 374 (1982). According to Robins, the FCRA creates a similar right to the provision of credit information that is the product of "'reasonable procedures to assure maximum possible accuracy of the information concerning [an] individual.'" Br. of the United States as Amicus Curiae Supporting Resp. at 2 (quoting 15 U.S.C. §1681e(b)).

Even if "real-world harm" were required, Robins argued that the alleged harm to his financial interests was sufficient to satisfy Article III's injury-in-fact requirement. *Id.* at 12–13. Alternatively, Robins relied upon an analogy to the common law of defamation as providing support for permitting a claim based upon publication of false information absent special harm. Resp. Br. at 13. And, if Article III were satisfied, Spokeo's argument that the FCRA did not authorize his claim would be meritless "because the FCRA authorizes a plaintiff to choose between actual *or* statutory damages. Actual damages are not a gateway to statutory damages." *Id.* at 15.

Based on the oral argument, it was clear that the Supreme Court was unlikely to adopt the Ninth Circuit's reasoning, which Justice Kagan characterized as "not a good opinion." Tr. at 59:21. While Justices Ginsburg and Sotomayor seemed receptive to the argument that a mere statutory violation, absent some alleged consequential real-world harm satisfies Article III, others were not. *See* Amy Howe, *Argument Analysis: Second Time Around No Easier for Justices in Standing Case* (Nov. 2, 2015), http://www.scotusblog.com/2015/11/argument-analysis-second-time-around-no-easier-for-justices-in-standing-case/. More conservative justices, such as Chief Justice Roberts, posited hypotheticals involving situations in which a statutory violation might not result in actual harm, such as publishing an unlisted phone number inaccurately. Tr. at 31:10–33:24. Several justices seemed open to holding that Robins had suffered real-world injury based on the publication of false information; however, a ruling on that basis would skirt the question presented, which presumed the absence of concrete harm. Apparently searching for a potential middle road that could permit Robins to proceed without opening the courthouse door to everyone who has experienced a statutory violation, several justices asked questions focused on whether the FCRA could fairly be read to authorize actions only by those who had false information about them published. *E.g.,* Tr. at 43:6–14.

Some courts have treated statutory damage provisions as representing a legislative determination that a violation of such a statute causes an injury, an approach that has made it significantly more difficult for defendants to defeat class certification based on variations related to whether and how putative class members have allegedly been injured.

In a 6–2 decision written by Justice Alito, the Supreme Court reversed and remanded

for further proceedings to decide whether Robins satisfied the concreteness component of the injury-in-fact requirement for standing. *Spokeo v. Robins*, 136 S. Ct. 1540, 1545 (2016). According to the majority, the Ninth Circuit's decision "was incomplete" in that it focused only on the particularity, not on the concreteness of Robins' alleged injury. *Id.*

Early decisions suggest that courts faced with substantially similar facts regarding alleged informational injuries can reach diametrically opposite results.

The majority started from the premise that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1547–48 (quotation and citations omitted). Injury in fact, the "first and foremost" prerequisite for standing, requires "a plaintiff to show that he or she has suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Though often referenced together, concreteness and particularity are separate, distinct components of injury in fact. *Id.*

According to the majority, the Ninth Circuit's decision was based on findings that Robins' injury was "particularized," meaning that it affected him "in a personal and individual way." *Id.* (citations omitted). The Ninth Circuit failed to address the distinct concreteness component. *Id.* (citations omitted).

The majority undertook to define concreteness, both in terms of what it is, and what it is not. It is "de facto… it must actually exist;" it is "real" and not "abstract." *Id.* at 1549 (internal quotations and citations omitted). It "is not, however, necessarily synonymous with 'tangible.'" *Id.* The majority recognized that "the risk of real harm" could be sufficiently concrete and that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.* at 1550, 1549. However, concreteness is *not* a "bare procedural violation" of a federal statute. *Id.* at 1550. The Supreme Court elaborated: "[A] plaintiff does not automatically satisf[y] 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 concrete injury even in the context of a statutory violation." *Id.*

In determining whether an intangible harm is an injury in fact, courts should look to (1) history to discern whether the claimed harm has a "close relationship to a harm that has traditionally been recognized as providing a basis for a lawsuit in English or American courts;" and (2) Congress, which can "elevat[e] to the status of legally cognizable harms concrete *de facto* injuries that were previously inadequate in law." *Id.* at 1548 (internal quotations and citations omitted).

As for Robins' FCRA claims, the Supreme Court noted that "not all inaccuracies cause harm or present any material risk of harm." *Id.* at 1550. As an example of potentially "harmless" FCRA violations, the Supreme Court pointed to procedural violations that still yield accurate information and publication of an inaccurate zip code. *Id.* Without expressing any opinion pertaining to the ultimate merits, the Supreme Court remanded the case for a determination "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.*

Justice Thomas concurred to explain his view that the injury-in-fact requirement applies less rigorously when a private plaintiff seeks to vindicate private, as opposed to public, rights. *Id.* at 1552 (Thomas, J. concurring). In his view, "'[p]rivate rights' are rights 'belonging to individuals, considered as individuals.'" *Id.* at 1551 (quoting 3 W. Blackstone, Commentaries *2). A plaintiff is not required to assert "an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Id.* at 1552. On the other hand, "'public rights'—[are] rights that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity.'" *Id.* (quoting 4 Blackstone Commentaries *5). A private plaintiff seeking to enforce public rights conferred by statute "must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population." *Id.* at 1553 (citations omitted). On remand, Justice Thomas would have the district court determine if the FCRA "created a private duty owed to Robins to protect *his* information." *Id.* at 1554. If so, then he has standing. *Id.* If the FCRA simply gives rise to a duty to implement procedures owed to all consumers, Robins would need to demonstrate "individualized harm." *Id.*

Justice Ginsburg's dissent, joined by Justice Sotomayor, objected that the majority overstated the distinction between concreteness and particularity as separate requirements for injury in fact. *Id.* at 1555 (Ginsburg, J. dissenting). In their view, remand was unnecessary because Robins' allegation that the false information published about him harmed his employment prospects was not a generalized grievance but specific to him and sufficient to confer Article III standing. *Id.* at 1555–56.

Perhaps the best evidence of the uncertain effect of the Supreme Court's ruling is that both plaintiffs and defendants declared it a victory. Alison Frankel, *Early* Spokeo *Fallout: Privacy Defendants Try to Capitalize*, http://blogs.reuters.com/alison-frankel/2016/05/20/early-spokeo-fallout-privacy-defendants-try-to-capitalize/ (May 20, 2016). Plaintiffs argued the statement that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact" conferred victory to them. *Id.* at 1549. Defendants seized upon the holding that a "bare procedural violation" of a federal statute, without more, is not sufficiently concrete to support standing to declare defendants victorious. *Id.* at 1550. The narrow distinction between these two statements will most likely be drawn in cases involving failure to provide disclosures or accurate information required by statutes, which plaintiffs characterize as "informational injury." Early decisions suggest that courts faced with substan-

tially similar facts regarding alleged informational injuries can reach diametrically opposite results. *Compare McLaughlin v. Wells Fargo Bank, N.A.*, No. C 15-02904 WHA, 2016 WL 3418337, at *5–6 (N.D. Cal. June 22, 2016) (refusing to dismiss TILA claim based on inaccurate mortgage statements that allegedly hindered plaintiff's ability to consider her financial options), *with Jamison v. Bank of America, N.A.*, No. 2:16-cv-00422-KJM-AC, 2016 WL 3653456, at *4 (E.D. Cal. July 6, 2016) (dismissing TILA claim involving substantially similar facts and alleged injury). *See also Church v. Accretive Health, Inc.*, ___ Fed. Appx. ___ 2016, No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (unpublished) (holding that "through the FDCPA, Congress created a new right—the right to receive the required disclosures—and a new injury—not receiving such disclosures.").

To date, only a few putative statutory damage class actions have been dismissed for lack of standing based upon *Spokeo*. *E.g., Jamison*, 2016 WL 3653456, at *4; *Gubula v. Time Warner Cable, Inc.*, No. 15-cv-1078-pp, 2016 WL 3390415, at *4–6 (holding that the plaintiff did not allege concrete injury in a case where cable company allegedly violated data retention requirements imposed by the Cable Communications Policy Act but did not use or disclose apparently accurate information); *Tourgeman v. Collins Fin. Svcs.*, No. 08-CV-1392 CAB(NLS), 2016 WL 3919633, at *2 (S.D. Cal. June 16, 2016) (holding standing not satisfied where the plaintiff never received a letter allegedly violating the FDCPA until after the litigation was filed). Several plaintiffs whose claims have been dismissed seem likely to be able to cure identified pleading defects by adding additional allegations to demonstrate the concreteness required by *Spokeo*. *E.g., Sartin v. EKF Diagnostics*, No. 16-1816, 2016 WL 3598297, at *4 (E.D. La. July 5, 2016) (declining to dismiss a pre-*Spokeo* complaint with prejudice to permit re-pleading regarding alleged injury). In the future, the plaintiffs' bar will likely undertake greater efforts to identify named plaintiffs who have experienced more than a bare procedural violation to avoid potential dismissal. From a defense perspective, one potentially disturbing trend in cases applying *Spokeo* to date is some courts' reliance upon congressional findings in enacting a statute as evidence of a "material risk of harm" that satisfies the injury-in-fact requirement. *E.g., Altman v. White House Black Market, Inc.*, No. 1:15-cv-2541-SCJ, 2016 WL 3946780, at *5–6 (N.D. Ga. July 13, 2016) (citing congressional findings regarding risk of identity theft in holding standing satisfied based on alleged receipt providing too many credit card digits in violation of the Fair and Accurate Credit Transactions Act). Such reasoning is inconsistent with *Spokeo*, which required that the plaintiff show the risk of harm to him or her, despite congressional recognition of the generalized risk of harm associated with inaccurate information in enacting the FCRA. 136 S. Ct. at 1545. Such flawed reasoning, if widely adopted, has the potential to swallow the rule that a statutory violation alone is insufficient.

For "no-injury claims" that are not based on federal statutes, it is fair to ask whether defendants necessarily benefit from *Spokeo*. A federal court's determination that a plaintiff lacks standing under *Spokeo* does not necessarily defeat a claim; it can simply result in remand to a state court that has more liberal standing requirements. *E.g.*, *Kahn v. Children's National Health Center*, No. TDC-15-2125, 2016 WL 2946165, at *7 (D. Md. May 19, 2016). If the state court is perceived as a less favorable forum, this could be a hollow victory for a defendant.

Interestingly, *Spokeo's* greatest impact may ultimately be felt at the class certification stage. By raising the bar for concrete injury, *Spokeo* forces named plaintiffs to allege that they have personally experienced a material risk of harm—allegations that may undermine the commonality and therefore the scope of the proposed class.

Robins' claims demonstrate the pressure points that can potentially be exploited by defendants. Robins alleged that Spokeo published false information about him, but the proposed class was not limited to members who had experienced a similar alleged injury. It included all persons who had information compiled about them over a period of years. At oral argument, Justice Kagan posited the following question to Robins' counsel:

> You said you—you need for the information to be inaccurate to have standing here. That is going to mean that the class, as you've defined it, is not going to be certified. And I think that that's the right answer, but I just want to make sure that we're on the we're on the same page here.

Tr. at 46:19–24.

Robins' counsel agreed, but provided the following explanation for the proposed class definition:

To date, only a few putative statutory damage class actions have been dismissed for lack of standing based upon *Spokeo*.

> [T]his is going to come up later this term in the Tyson [*Bouaphakeo*] case. [T]he class has to be defined as broadly as it was because of what's called a failsafe problem. You can't identify a class by an element of the cause of action, and that's because it harms defendants' rights. So if we had alleged the class here was everybody who had inaccurate information, it would be a trick against them, because if they defeated the claim, the class would be empty, and they would get no res judicata. So at certification, we're going to have to narrow the class, and we're going to have to come up with common proof because we can't identify the class by the allegation. So what happens is, take the algorithm issue. So we will have to allege under (b)(3), 23(b)(3), that a common algorithm led to all the inaccuracies. But if they do, that is a certifiable class.

Id. at 46:25–47:19.

Notwithstanding counsel's avowed concern for defendants' rights, Robins' response begs two critical questions. First, can a plaintiff assert claims on behalf of a proposed class defined in a manner that does not limit membership to individuals with standing? And second, if a plaintiff attempts to define the class in a way

that limits membership to individuals with standing, (which would, in many instances, likely reduce class size), how can plaintiffs do so without creating a fail-safe class, meaning that class membership would need to be litigated on an individualized basis? In Robins' case, if application of a flawed algorithm, a procedural violation, is insufficient, then class membership should depend on whether the information published about each class member was in fact false—an individualized determination that should defeat predominance. These thorny questions will undoubtedly be litigated in future cases.

From a defense perspective, one potentially disturbing trend in cases applying *Spokeo* to date is some courts' reliance upon congressional findings in enacting a statute as evidence of a "material risk of harm" that satisfies the injury-in-fact requirement.

Bouaphakeo Provides Guidance on Use of Statistical Evidence but Leaves the Status of Uninjured Class Members Unresolved

Whereas in *Spokeo* the Supreme Court's inquiry focused on the injury (if any) experienced by the named plaintiff, in *Bouaphakeo*, the Supreme Court appeared poised to examine the question whether plaintiffs must prove that every class member was harmed by the defendant's allegedly unlawful activity to obtain a classwide judgment. Specifically, *Bouaphakeo* raised two aspects of this question: (1) whether a class can be certified under Rule 23 based on the use of statistical evidence after the Supreme Court's ruling in *Wal-Mart*, which prohibits a "trial by formula," *see* 131 S. Ct. at 2561; and (2) whether a judgment in favor of a class that includes members who have not suffered an injury and have no right to damages can withstand scrutiny.

The defense bar's hopes for *Bouaphakeo* focused primarily on a favorable ruling resolving the question of whether a class can include uninjured members because it arises frequently in defense challenges to class certification of many types of claims, not only those under the Fair Labor Standards Act (FLSA). Some courts of appeal have not been receptive to defense objections that certified classes including uninjured members are impermissibly overbroad. *Compare Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676–77 (7th Cir. 2009) ("as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."), *and Krell v. Prudential Ins. Co. of Am.* (*In re Prudential Ins. Co. of Am.*), 148 F.3d 283, 307 (3d Cir. 1998) (absentee class members are not required to show they are injured and have standing as long as named plaintiffs can do so), *and Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009), *with In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (Rule 23 requires that plaintiffs can prove, "through common evidence, that all class members were in fact injured").

The *Bouaphakeo* plaintiffs, workers at an Iowa pork-processing plant, brought claims against Tyson under the FLSA, alleging that its compensation system, which credited all workers with a set number of minutes to don, doff, and clean required protective gear and walk to their work stations, did not credit the full amount of time required to perform these activities. If fully credited, plaintiffs claimed, they worked over 40 work hours per week, entitling them to overtime pay. *See* 29 U.S.C. §207; Iowa Code §91A.1, *et seq.*

According to Tyson, the class of over three thousand workers was improperly certified despite significant differences in the type of protective gear used, the amount of time allegedly required to don and doff, the amount of time credited for such activities, and the baseline number of hours worked, which resulted in enough difference to call into question whether overtime was even an issue for some class members. Some employees' claims were certified under Rule 23; others' claims were certified as a collective action under the FLSA. Tyson moved to decertify the class in light of the Supreme Court's *Wal-Mart* decision, on the ground that the plaintiffs had failed to show that questions of liability or damages were "capable of classwide resolution… in one stroke." 131 S. Ct. at 2551.

The district court refused to decertify the class, permitting the plaintiffs to rely upon an expert's study of the average amount of time purportedly required to perform all donning and doffing activities and calculations of the total hours worked by each class member, based on the assumption that each in fact spent the average amount of time. *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07–cv–04009–JAJ, 2011 WL 3793962 (N.D. Iowa, Aug. 25, 2011).

At trial, Tyson presented evidence related to the variation among class members. The plaintiffs' expert conceded that even if her calculations were correct, the class included more than 200 members who would not qualify for overtime pay, meaning that they were uninjured. The jury apparently did not fully credit the plaintiffs' average-time study because it awarded the plaintiffs far less than the amount that the plaintiffs' expert had calculated. The verdict raised questions about how it would be allocated among class members, some of whom were undeniably not entitled to damages. After the verdict, the trial court again rejected Tyson's motion for decertification as well as a motion for judgment as a matter of law. 2012 WL 4471119 (N.D. Iowa, Sept. 26, 2012).

A divided panel of the Eighth Circuit affirmed, holding that the plaintiffs' use of statistical evidence was permissible under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which it interpreted to permit proof of liability in an FLSA action based on a reasonable inference when complete records did not exist. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797 (8th Cir. 2014), *reh'g denied*, 593 F. App'x 578 (8th Cir. 2014).

In Tyson's view, the district court impermissibly permitted the plaintiffs to try the case by "'prov[ing]' classwide liability and damages with purportedly 'common' statistical evidence that erro-

neously presumed that all class members were identical to a fictional 'average' employee," Pet'r's Br., *Tyson's Foods, Inc. v. Bouaphakeo*, No. 14-1146 (8th Cir., Aug. 7, 2015) at 3, and in so doing, deprived Tyson of due process by preventing it from raising defenses it could have asserted in individual trials. *Id.* at 37. These averages were not probative of any individual class member's claim, but rather, masked individual differences among class members, some of whom were above, and others who were below the purported average. *Id.* at 35 (citing *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 261, 266 (3d Cir. 2011)). Tyson essentially contended that *Mt. Clemens* was irrelevant unless and until an employee carried his or her burden of establishing that he or she has performed uncompensated work. In other words, *Mt. Clemens* permits proof of the amount of damages by "just and reasonable inference," but it does not authorize the use of averaged data to establish liability for employees engaged in significantly different activities. Pet'r's Br. at 41 (citing *Mt. Clemens*, 328 U.S. at 686–87).

During briefing, Tyson backed away from its initial position that "a class action (or collective action) can never be certified in the absence of proof that all class members were injured." *Id.* at 49. Instead, Tyson argued that courts lack authority under Article III to award damages to uninjured class members and criticized the district court for failing to apply a fair and effective mechanism for culling uninjured class members prior to judgment. *Id.* at 49–54.

In urging that the judgment below be affirmed, the workers, supported by the United States as *amicus curiae*, heavily relied on *Mt. Clemens*. According to the workers, their reliance on statistical evidence was both necessary and permissible under *Mt. Clemens* because of Tyson's failure to maintain records of the hours worked in violation of several legal obligations to do so, including those imposed by the FLSA. Resp't Br. at 1–2. Since the substantive law governing their claims—*i.e., Mt. Clemens*—authorized plaintiffs to prove their claims by inference, Rule 23 did not preclude their reliance on such evidence.

In addition, the workers raised questions about whether Tyson preserved its objections to class certification raised before the Supreme Court. Most notably, the workers argued that Tyson successfully opposed their proposal to bifurcate trial "so individual backpay amounts would be calculated separately after the common-liability phase" and requested a verdict form containing a lump sum award." *Id.* at 14, 19, 20.

In a 6–2 decision issued after Justice Scalia's death, the Supreme Court affirmed the Eighth Circuit's decision.

Writing for the majority, Justice Kennedy declined to adopt "broad and categorical rules governing the use of representative and statistical evidence in class actions," such as a blanket prohibition. *Tyson v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016). Instead, the Court adopted a framework for analysis: "Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the [elements of the] underlying cause of action." *Id.* The permissibility of using representative evidence did not turn on the form of the action, whether class or individual. *Id.* at 1046. If the evidence would be relevant to prove an individual claim, "that evidence cannot be deemed improper merely because the claim is brought on behalf of a class," and to hold otherwise would violate the Rules Enabling Act, which requires that the use of the class action device cannot "abridge… any substantive right." *Id.* at 1046 (quoting 28 U.S.C. §2072(b)). Since an individual plaintiff would have been able to rely upon representative statistical evidence to "fill an evidentiary gap created by the employer's failure to keep adequate records" under *Mt. Clemens*, the class was permitted to do so as well. *Id.* at 1047.

The majority rejected Tyson's argument that the use of statistical evidence deprived it of the ability to litigate individual defenses that defeated predominance. The majority characterized Tyson's defense that the statistical evidence was unrepresentative as one that was "'common to the class,'" reflecting a concern not that the class exhibited "'some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action'"—a question that should be addressed in the context of summary judgment, not class certification. *Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U Law Rev. 97, 107 (2009)). The majority distinguished *Wal-Mart*, the source of the admonition against "trial by formula," on the ground that because the *Wal-Mart* plaintiffs were not subjected to a classwide policy, no individual could have relied upon statistical evidence related to the class as proof of an individual claim. *Id.* at 1048 (citing *Wal-Mart*, 131 S. Ct. at 2541).

Moreover, the majority pointed out that Tyson had failed to file a *Daubert* motion challenging the admissibility of the statistical evidence. *Id.* at 1049. Once the evidence was admitted, its "persuasiveness" was an issue for the jury. *Id.* The majority accused Tyson of "seek[ing] to profit" from a problem of its "own making," caused by Tyson's opposition to a bifurcated trial. *Id.* at 1050.

The majority did not address whether a class could be certified that includes uninjured members, since Tyson "abandoned" that issue during briefing. *Id.* (citing Pet. Br. at 49). While recognizing the "great importance" of the "question whether uninjured class members may recover," the question was not ripe for review because the district court had not yet adopted or applied a methodology for disbursing the award. *Id.* The case was remanded for further proceedings on both the disbursement question and to determine whether Tyson had invited the error. *Id.*

Chief Justice Roberts wrote a concurring opinion, joined in relevant part by Justice Alito, agreeing that the district court should properly decide the allocation of damages in the first instance, but also expressing serious concern that it would not be possible to devise a methodology that awarded damages only to those class members who were injured. *Id.* at 1051–52. The chief justice asserted that Tyson's actions, whether they invited error or not, could not overcome Article III's prohibition against "order[ing] relief to any uninjured plaintiff, class action or not." *Id* at 1053.

Justice Thomas, joined by Justice Alito, dissented. Justice Thomas asserted that the district court failed to engage in the requisite "rigorous analysis" to determine whether the proffered statistical evidence was "sufficiently probative of the individual issue to make it susceptible to classwide proof." *Id.* at 1053 (Thomas, J. dissenting). In his view, the class should not have been certified be-

cause it did not satisfy Rule 23's predominance requirement. *Id.* at 1054. The variation in the amount of time that each class member took donning and doffing made the inquiry into whether class members worked more than 40 hours without receiving overtime inherently individualized. *Id.*

Most importantly, Justice Thomas criticized the majority for "redefining the predominance standard" less rigorously than in the Court's previous decisions, particularly *Comcast v. Behrend*, 133 S. Ct. 1426 (2013). According to Justice Thomas, the majority's endorsement of certification despite individualized issues related to damages and affirmative defenses represented "the opposite" of its conclusion in *Comcast*, in which the Court held that "the lack of a common methodology for proving damages [was] fatal to predominance because '[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.'" *Id.* at 1056–57 (quoting *Comcast*, 131 S. Ct. at 1433). Similarly, the majority's contention that Tyson's failure to challenge the admissibility of the plaintiffs' expert testimony under *Daubert* left the jury to determine the value of that evidence flew in the face of *Comcast's* conclusion that failure to file a *Daubert* motion did "not preclude defendants from 'argu[ing] that the evidence failed to show that the case is susceptible to awarding damages on a class-wide basis.'" *Id.* at 1060 (quoting *Comcast*, 133 S. Ct. at 1432 n.4).

Future lower court decisions about whether representative evidence supports class certification are likely to vary considerably.

The effect of *Bouaphakeo* on future class actions other than those in the FLSA context remains to be seen.

Although the majority and the dissent agreed that the appropriate test for determining whether representative evidence can be relied upon to support class certification is whether that evidence could be relied upon by an individual plaintiff to support his or her claim, *Bouaphakeo* demonstrates that this test does not yield consistent results. While the majority held that the statistical evidence would have been admissible to prove an individual class member's claim, Justice Thomas pointed out that one of the named plaintiffs testified that he spent less than the average amount of time donning and doffing protective gear, and therefore, he could not have properly relied on such evidence. *Bouaphakeo*, 136 S. Ct. at 1057. As a result, future lower court decisions about whether representative evidence supports class certification are likely to vary considerably.

Justice Thomas will likely prove to be correct in predicting that the majority's interpretation of "predominance" will generate greater tolerance for class certification despite individualized issues related to damages and affirmative defenses. *See, e.g., St. Bernard Parish Gov't v. U.S.*, 126 Fed. Cl. 707, 738 (2016) (citing *Bouaphakeo* to support the conclusion that predominance requirement was satisfied and certification of a class of thousands of owners of diverse properties in case alleging unlawful taking of properties based on Army Corps of Engineers' failure to maintain canal to prevent storm surge). While defendants can rely on *Comcast* as a counterweight to such an approach, the majority's failure even to mention *Comcast* in *Bouaphakeo* suggests that the *Comcast* decision may increasingly be viewed as one limited to its peculiar facts, where predominance was not satisfied because the proffered evidence of classwide damages did not align with the theory of liability. *Comcast*, 133 S. Ct. at 1433–35; *See id.* at 1437 (Ginsburg, J. dissenting) ("The Court's ruling is good for this day and case only."). While *Comcast* makes clear that defendants are not required to file *Daubert* motions to exclude expert testimony proffered in support of class certification to argue that such testimony fails to provide common proof, *id.* at 1432 n. 4, *Bouaphakeo* demonstrates the substantial risk of failing to do so. *But see In re Celexa and Lexapro Marketing and Sales Practices Litig.*, ___ F.R.D. ___, No. CV 13-13113-NMG, 2016 WL 3102004, at *10, 12 (D. Mass.) (June 2, 2016) (holding that predominance is not satisfied where expert opinion is offered as classwide proof of causation and damages based on flawed assumptions without ruling on a *Daubert* challenge). As a result, pre-certification *Daubert* challenges, which have become increasingly common in recent years, seem destined to become even more important.

In addition to *Daubert* motions, the majority's opinion suggests that defendants should pursue summary judgment as an appropriate vehicle for defeating a class that has been defined too broadly to include uninjured members. *Bouaphakeo*, 136 S. Ct. at 1047 (citation omitted). From defendants' perspective, this approach is highly unfavorable because it arguably suggests that overbreadth does not necessarily need to be resolved at the certification stage but can be deferred until a resolution on the merits, after plaintiffs gain settlement leverage resulting from a grant of certification and defendants have incurred substantial additional expense. Even so, the apparent endorsement of a summary judgment approach is odd coming from a majority apparently favorably inclined toward class actions. Followed to its logical conclusion in *Bouaphakeo*, a summary judgment motion based on the argument that plaintiffs' statistical evidence failed to demonstrate that all class members were injured could have led to the dismissal of more than 3,000 claims based on the improper inclusion of just over 200. Many district courts would likely be reluctant to reach such a result, particularly when Rule 23 provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1). As a practical matter, summary judgment motions filed based on a failure of classwide proof of injury, particularly any filed before the close of discovery, might serve only to provide free advice to plaintiffs about how a defective class definition might be remedied to withstand challenge. Even so, defendants should seize upon the Supreme Court's apparent endorsement of summary judgment as a remedy for overbreadth and rely upon it when plaintiffs cannot demonstrate that all class members have been injured in cases seeking damages.

Campbell-Ewald: Whether, When, and How to "Pick Off" Named Plaintiffs to Defeat Class Actions Remains Unclear

Similar to *Spokeo*, *Campbell-Ewald* involved a statutory damage claim, specifically, a claim under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. §227. *Campbell-Ewald* addressed the defense tactic of trying to "pick off" the named plaintiff near the outset of a putative class action to resolve the case before embarking on costly classwide discovery. The underlying rationale for this tactic is practical: if the named plaintiff drops his or her claim, the putative class action will likely go away. *Campbell-Ewald* presented the question whether a defendant can make an offer that the named plaintiff cannot legitimately refuse, thereby forcing resolution of the claim on an individual, rather than a classwide basis.

The Supreme Court previously addressed how an offer of complete relief would affect a representative's claim in the context of a collective action brought under the FLSA in *Genesis Healthcare v. Symczyk*, 133 S. Ct. 1523 (2013). The *Genesis Healthcare* majority concluded that the plaintiff had conceded that the defendant's offer of complete relief had mooted her individual claim and as a result, she could no longer pursue a collective action because she lacked a continuing "personal interest" in the outcome. *Id.* at 1529, 1532. Notably, four justices dissented, arguing that an unaccepted offer of judgment cannot moot an individual plaintiff's claim. *Id.* (Kagan, J. dissenting).

Campbell-Ewald involved TCPA claims brought against a government contractor that assisted U.S. Navy recruiting efforts. Gomez alleged that he received a recruiting-related text message sent by Campbell-Ewald to more than a 100,000 recipients even though he had not "opted in" to receive it, as required by the TCPA. The TCPA authorizes statutory damages of $500 per violation, which can be trebled for knowing and willful violations. 47 U.S.C. §227(b)(3)(B). Gomez filed a putative class action on behalf of himself and other recipients of the Navy's recruiting messages who did not consent to receive them, seeking statutory damages for himself and the class, injunctive relief, and attorneys' fees. *Campbell-Ewald* is typical of TCPA class actions in that the number of messages at issue was large, and thus, the potential damages were extremely high.

Before any motion for class certification was filed, Campbell-Ewald made a Rule 68 offer of judgment and tendered what it called a "separate settlement offer" to Gomez that included payment of $1,503, more than three times the amount that he would be entitled to under the TCPA, costs, and a stipulated injunction prohibiting Campbell-Ewald from violating the TCPA. The offer did not include attorneys' fees, which Gomez had requested, but are not authorized by the TCPA, class certification, or classwide relief. Gomez failed to accept the offers, which caused them to expire by their terms.

Campbell-Ewald moved to dismiss Gomez's individual and class claims as moot, which was denied. The district court ultimately granted Campbell-Ewald summary judgment on derivative sovereign immunity grounds (a holding beyond the scope of this article that was reversed by the Ninth Circuit, which was in turn reversed by the Supreme Court).

The Ninth Circuit held that an unaccepted offer of judgment under Rule 68 did not moot an individual claim. *Gomez v. Campbell-Ewald*, 768 F.3d 871, 874–75 (9th Cir. 2014) (citing *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)).

As certified, the two class action-related questions presented for Supreme Court review were "(1) Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim;" and "(2) Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified." Petition for Writ of Certiorari, *Campbell-Ewald*, No. 14-857, at i (Jan. 16, 2015).

Campbell-Ewald argued that the answer to the first question, whether a case becomes moot, is an unequivocal yes. If a plaintiff is offered "complete relief," meaning all of the relief that he or she could obtain through a favorable judgment on the merits, then the adversity and "personal" stake required for an Article III "case or controversy" are absent, and the case is moot. Assertion of a class claim does not alter this result because a "plaintiff's class claim became moot when his individual claim did." Pet. Br. at 11 (citing *Genesis Healthcare*, 133 S. Ct. at 1531). Campbell-Ewald argued that such an outcome would be consistent with Rule 23's adequacy of representation requirement because "[a] named plaintiff who already has secured complete relief on his claims, and therefore lacks a personal stake in the outcome, occupies a fundamentally different position than class members." *Id.* at 34.

Defendants should seize upon the Supreme Court's apparent endorsement of summary judgment as a remedy for overbreadth and rely upon it when plaintiffs cannot demonstrate that all class members have been injured in cases seeking damages.

According to Gomez, Campbell-Ewald's position was internally inconsistent. If an offer of judgment mooted a plaintiff's claim for relief, then a court could not enter judgment because it would not have a "case or controversy" before it. If a court simply dismissed a case on the basis of an *offer* (which, in accordance with Rule 68, is not legally binding if it is not accepted within 14 days), then a court would effectively send the plaintiff away without any relief at all. According to Gomez, this presented an irreconcilable "horns of a dilemma." Resp. Br. 10–11. Campbell-Ewald disagreed, arguing that courts routinely enter judgments absent continuing adversity, for example, in cases involving plea agreements. *Id.* at 18–23.

Gomez also contested the characterization of the offer at issue as providing "com-

plete relief" because it did not certify a class or provide classwide relief, and as the proposed class representative, Gomez could not properly sacrifice the interests of the proposed class in favor of his own. *Id.* at 31–35. Lastly, Gomez argued that his continuing interest in sharing his legal fees with other class members and potentially receiving an incentive payment in any settlement for serving as the class representative prevented his claim from becoming moot. *Id* at 37.

In a 6–3 decision, authored by Justice Ginsburg, the Supreme Court held that an unaccepted offer of settlement, conveyed either as an offer of judgment under Federal Rule of Civil Procedure 68 or otherwise, does not moot a plaintiff's claim.

At oral argument, Gomez's question about how a court could grant enforceable relief in a moot case seemed to gain little traction. Justice Breyer, a *Genesis Healthcare* dissenter, who might be expected to favor Gomez's position, in a colloquy debating the distinction between a judgment and a dismissal, queried: "Fine. Give him judgment on the merits. Who cares?" and emphasized his desire to be "practical." Tr. at 49:8–9, 50:16.

Several justices expressed concern about whether an offer of judgment was sufficiently definitive to force resolution of the case through a dismissal or judgment. Some explored whether safeguards could be added to a defendant's tender of "complete relief" to prevent disposition of the case before the plaintiff had any relief in hand. *See, e.g.,* Tr. at 5:22–7:2. Justice Breyer explored a possible middle road of requiring the offer to be paid into the registry of the court before the case was terminated. *Id.* at 50:15–52:6.

In a 6–3 decision, authored by Justice Ginsburg, the Supreme Court held that an unaccepted offer of settlement, conveyed either as an offer of judgment under Federal Rule of Civil Procedure 68 or otherwise, does not moot a plaintiff's claim. The majority explicitly adopted the reasoning of Justice Kagan's *Genesis Healthcare* dissent to conclude that "an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation." *Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 668 (2016). Neither of the defendant's unaccepted offers created any entitlement to relief. *Id.* at 671. As the Court explained, "[W]ith no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset." *Id.* at 670–71.

Since Gomez's individual claim was not moot, he could continue to pursue claims on behalf of the class because "[w]hile a class lacks independent status until certified, *see Sosna v. Iowa*, 419 U. S. 393, 399 (1975), a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* at 672.

The majority declined to provide any guidance about whether or how a settlement offer could give rise to a sufficiently definitive entitlement to relief to moot a plaintiff's claim, reasoning:

> We need not, and do not, now decide whether the result would be different 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. That question is appropriately reserved for a case in which it is not hypothetical.

Id.

Justice Thomas concurred in the judgment but relied upon a different analysis based on the common law of tender, which he argued, provided the origins of Rule 68 offers of judgment. *Id.* at 674. Under the common law of tender, he reasoned, a defendant must produce the disputed sum unconditionally to a plaintiff. *Id.* at 675. Since a tender was deemed to admit liability, at common law it could not be effectuated by a defendant who continued to deny liability. *Id.* While "we need not decide today whether compliance with every common-law formality would be necessary to end a case," Justice Thomas agreed that "a bare offer" was insufficient to moot a claim. *Id.* at 677, 674.

According to the dissenters, Justices Roberts, Scalia, and Alito, "federal courts exist to resolve real disputes, not to rule on a plaintiff's entitlement to relief already there for the taking." *Id.* at 678 (Roberts, J. dissenting). The appropriate question for the dissenters "is not whether there is a contract; it is whether there is a case or controversy under Article III. If the defendant is willing to give the plaintiff everything he asks for, there is no case or controversy to adjudicate, and the lawsuit is moot." *Id.* at 682. Characterizing the majority's decision as "limited to its facts," Justice Roberts noted that "the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court… [a] question for another day—assuming there are other plaintiffs out there who, like Gomez, won't take 'yes' for an answer." *Id.* at 683.

Not surprisingly, the Supreme Court's decision precipitated a spate of efforts by defendants to walk through the door left open by the majority's decision—to moot plaintiffs' claims by paying the disputed amount. Some defendants have followed the roadmap drawn by Justice Thomas, tendering payment to a plaintiff, typically in a certified check or escrow account. Notably, such tenders typically do not include the admission of liability that Justice Thomas suggested might be necessary to render them effective. Other defendants have followed Justice Roberts' suggestion, filing Rule 67 motions seeking permission to deposit the contested amount in the district court's registry.

Perhaps surprisingly, few of these efforts have been successful. *Grice v. Colvin*, No. GJH-14-1082, 2016 WL 1065806 (D. Md. March 14, 2016) (holding that a refund mooted individual and putative class claims); *Demmler v. ACH Food Cos., Inc.*, Civil Action No. 15-13556 (D. Mass. June 9, 2016) (same).

Courts have been especially unwilling to dismiss putative class claims based on either of these strategies, seizing upon language from the majority opinion that "a

would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." 136 S. Ct. at 672.

The Ninth Circuit, the only circuit to date that has addressed the settlement strategies left open by *Campbell-Ewald*, refused to dismiss either the named plaintiff's or the putative class claims based upon an offer of complete relief that included depositing money into an escrow account payable to the plaintiff upon order of the district court. *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1138 (9th Cir. 2016). Distinguishing the Supreme Court's ruling in *Genesis Healthcare* as based on the FLSA and inapplicable to Rule 23 class actions, the Ninth Circuit applied prior precedent holding that a named plaintiff who has been provided complete relief, mooting his or her individual claims, can still seek class certification. 819 F.3d at 1138 (citing *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091–92 (9th Cir. 2011)). Alternatively, the Ninth Circuit held that the named plaintiff's claims were not moot because the relief had been offered but had not actually been received. *Id.* "Assuming arguendo a district court could enter a judgment according complete relief on a plaintiff's individual claims over the plaintiff's objections, thereby mooting those claims, such action is not appropriate" before a named plaintiff has "a fair opportunity to move for certification." *Id.* at 1138–39.

Most district courts have followed the Ninth Circuit's approach, declining to find either the named plaintiff's or the putative class' claims moot based on the need for the named plaintiff to have a fair opportunity to seek class certification. *E.g., Bais Yaakov of Spring Valley v. Graduation Source, LLC*, No. 14-cv-3232, 2016 WL 872914, at *1 (S.D.N.Y. Mar. 7, 2016); *Fauley v. Royal Canin U.S.A., Inc.*, 143 F. Supp. 3d 763, 765 (N.D. Ill. 2016); *Bridging Cmty's, Inc. v. Top Flite Fin.*, Inc., No. 09-14971, 2016 WL 1388730 (E.D. Mich. Apr. 6, 2016); *Ung v. Universal Acceptance Corp.*, 2016 WL 3136858 (D. Minn. June 3, 2016).

When class certification has been denied, however, mootness has been found and the case has been dismissed. *Leyse v. Lifetime Entm't Servs., LLC*, ___ F.Supp.3d ___, ___, No. 13 CIV 5794(AKH), 2016 WL 1253607, at *2 (Mar. 17, 2016) (finding dispute moot where motion for class certification had previously been denied, leaving only individual claim for resolution).

Other decisions have found the individual claims to be moot even when no certification motion has been filed and then evaluated whether the class claims fall within the "inherently transitory" exception to the mootness doctrine. *E.g., South Orange Chiropractic Center, LLC v. Cayan LLC*, No. CV15-13069-PBS, 2016 WL 1441791, at *5 (D. Mass. April 12, 2016) (holding that "[o]n this record… the plaintiff no longer has the requisite 'live claim'"). In *South Orange Chiropractic Ctr.,* the court permitted the class claims to move forward, holding that statutory damages class claims fall within the "inherently transitory" exception to the mootness doctrine because defendants would otherwise rely upon the "nifty stratagem" of picking off named plaintiffs to thwart class claims and evade review. *Id.* at 6–7 (quoting *Boris Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 48 (1st Cir. 2015)). Notably, another court in the same district held the inherently transitory exception inapplicable to consumer claims based upon an allegedly inaccurate representation of a product as "all natural" when the named plaintiff failed to make a showing of a widespread defense practice of picking off named plaintiffs asserting this type of claim to evade review. *Demmler v. ACH Food Cos., Inc.*, Civil Action No. 15-13556, slip op. at (D. Mass. June 9, 2016).

From a defense perspective, these early decisions that have addressed the potential avenues for mooting class claims left open by *Campbell-Ewald* have been disappointing. Rather than focusing on the adequacy and completeness of the relief provided, decisions have focused on whether pre-certification motion tenders can moot named plaintiffs' individual claims at all, with most courts finding that they cannot. And, there are troubling signs that named plaintiffs with moot claims, particularly those involving statutory damages, may be permitted to pursue Rule 23 class claims nonetheless. Although a closely divided *Genesis Healthcare* Court precluded a named plaintiff with a moot claim from continuing to pursue an FLSA collective action, Justice Scalia's replacement could potentially tip that balance in a future decision involving Rule 23 class actions.

Imburgia: Reaffirms the Validity of Class Action Waivers in the Face of State Court Resistance

In *Imburgia*, the Supreme Court addressed the enforceability of a contractual class arbitration waiver that predated the Supreme Court's decision in *Concepcion*. *DIRECT TV v Imburgia*, 136 S. Ct. 463 (2016). *Concepcion* held that the Federal Arbitration Act (FAA), 9 U.S.C. §2, preempts state laws, including that of California, that prohibit class arbitration waivers. 563 U.S. 333, 352 (2011).

Not surprisingly, the Supreme Court's decision precipitated a spate of efforts by defendants to walk through the door left open by the majority's decision—to moot plaintiffs' claims by paying the disputed amount.

The *Imburgia* arbitration provision specifically provided that (1) if the class arbitration waiver "is prohibited by the law of your state," then the entire arbitration provision "is unenforceable;" and (2) the arbitration provision is governed by the FAA. 136 S. Ct. at 466. The California Court of Appeal, which rendered the underlying decision subject to review, concluded that the reference to "the law of your state" meant the law of California, which prohibits class action waivers, without regard to federal law, reflected in *Concepcion*, which requires that such waivers be enforced. *Id.* at 467.

In a 6–3 decision, the Supreme Court reversed.

The Court's analysis began with a rebuke. Noting that "[l]ower court judges are certainly free to note their disagreement" with *Concepcion*, Justice Breyer, writing for the

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majority, directed that they must follow it: "The fact that *Concepcion* was a closely divided case has no bearing on that undisputed obligation." *Id.* at 468. "The Federal Arbitration Act is the law of the United States, and *Concepcion* is an authoritative interpretation of that Act," Justice Breyer emphasized. *Id.*

Having said that, the Supreme Court acknowledged that *Concepcion* was not dispositive of the question of the enforceability of the class arbitration waiver provision at issue in *Imburgia*. *Id.* at 468. The Supreme Court recognized that parties can agree to have different laws govern different contractual provisions and that the California court was the final arbiter of which law applied to the arbitration provision as a matter of state contract law. And, the Supreme Court acknowledged that when DIRECTV drafted the contract, it likely expected that the class action waiver would not be enforceable under California law then in effect.

However, the Supreme Court concluded that the state court's decision was subject to review to determine whether it "places arbitration contracts on an equal footing with all other contracts," meaning whether it "in fact rests upon 'grounds that exist at law or equity for the revocation of any contract.' 9 U.S.C. §2." *Imburgia*, 136 S. Ct. at 468 (quoting *Buckeye Cash Checking v. Cardenga*, 546 U.S. 440, 443 (2006)). According to the Supreme Court, the specific question subject to this "equal footing" analysis was the California court's conclusion that the "law of your state" should properly be interpreted to include "*invalid* California law" at the time it rendered its decision. *Id.* at 469.

Proceeding from this starting point, the Supreme Court not surprisingly held that the California court's decision failed this standard for several reasons. The majority found that the arbitration provision was not ambiguous in that the "ordinary meaning" of the "law of your state" is "valid state law." *Id.* As a result, there was no basis for interpreting the contract against DIRECTV as the drafter. *Id.* In addition, California law suggests that contract interpretation typically takes into account subsequent changes in the law. *Id.* And, most importantly, several aspects of the California court's decision seemed uniquely applicable to arbitration, rather than an outgrowth of generally applicable principles of contract interpretation. *Id.* at 470–71. In short, the majority appeared to be convinced that the California court's decision was based on a desire to evade *Concepcion*, rather than legitimate precedent. Since the California decision did not place the *Imburgia* arbitration provision on an "equal footing" with other contracts, it was preempted by the FAA. *Id.* at 471.

In a dissent joined by Justice Sotomayor, Justice Ginsburg decried the majority's decision as yet another step "to disarm consumers, leaving them without effective access to justice." *Id.* Noting that in the 25 years since ruling that arbitration contracts must be enforced, just as other contracts, consistent with their terms, the Supreme Court had never overturned a decision on the ground that a state court had misapplied state contract law in interpreting an arbitration provision, Justice Ginsburg characterized the majority decision as "a dangerous first." *Id.* at 473 (citing *Volt Information Svcs. v. Board of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 478 (1989)).

Notwithstanding Justice Ginsburg's dissent, *Imburgia* reinforces the strong foundation set in *Concepcion* for enforcing class arbitration waivers in consumer class actions. The Supreme Court's willingness to evaluate whether a state court has analyzed a class arbitration waiver "on an equal footing" with other types of contract provisions also serves as a caution to state courts that efforts to evade *Concepcion*'s requirements on state law grounds are not immune to Supreme Court review.

Conclusion

Lower courts have begun applying the Supreme Court's 2015–2016 rulings, with surprisingly divergent results on several issues, most notably including standing post-*Spokeo* and the ability to moot a statutory damage claim before a plaintiff moves for class certification based on *Campbell-Ewald*. Whether consensus will ultimately emerge without Supreme Court intervention remains to be seen.

Another legitimate question is whether class actions will continue to receive such intense attention from the Supreme Court in the coming years. The Supreme Court granted review before Justice Scalia's death in one class action case that will be heard during the 2016–2017 term, *Microsoft Corp. v. Baker*, *cert. granted* (U.S. Jan. 16, 2016) (No. 15-457) (granting petition to review whether the court of appeals has jurisdiction under Article III and 28 U.S.C. §1291 to review an order denying class certification after a plaintiff has voluntarily dismissed his claims with prejudice). In the short term, the continuing vacancy on the Supreme Court might discourage it from granting review in other class action matters if there is a concern that it may not be able to reach a majority decision, rather than a 4–4 deadlock. And, of course, before the term is over, the Supreme Court will likely have a new justice, whose views will determine whether the 2015–2016 term was an aberration, or the beginning of a lasting, more pro-class action trend. FD