



Class actions: A path through the darkness?

New directions for class-action lawyers in the era of a conservative-dominated Supreme Court

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Why are class actions necessary? As the American economy has grown, become more truly national (even global) in scope, and reached a feverish pace of activity, individual businesses impact more people's lives in more parts of the country, and those businesses are under increasing pressure to increase short-term profits by shaving costs. Sometimes, businesses cut too aggressively, breaking the law. This harms their stakeholders – employees, consumers, shareholders – and gives the businesses an unfair competitive advantage over their law-abiding competitors. Sometimes, government enforcement reins those companies in. But in the United States, government oversight is limited (relative, for example, to other industrialized democracies). Often, individuals seek remedies through individual actions. But that only leads to piecemeal, token enforcement of the law. And periodically, competitors sue to stop unlawful conduct by their peer companies. But country-club civility and fears of inciting retaliation generally lead businesses to look the other way when they see their competitors derive advantage by harming people.

With the deck seemingly stacked against the individual employee, consumer or shareholder, one begins to see the great need for a legal mechanism of sufficient strength and versatility to empower individuals to band together to hold rogue companies accountable for their actions. In 1966, that mechanism was born. Federal Rule of Civil Procedure 23 was enacted to ensure fair and robust application of the laws in which we as a

society take such pride. Soon thereafter, states followed suit with state-law analogues. Since then, class-actions have been a powerful procedural device for effectuating important substantive rights set forth in state and federal statutes, ranging from anti-discrimination laws to consumer protection statutes to antitrust laws and beyond.

In short, where companies are engaged in widespread unfair and illegal practices harming a large number of people, class actions are often the primary tool to stop them.

Class-actions' role in ensuring that companies follow the law

Class actions have achieved justice for working people in particular on a massive scale over the past half century. In the employment arena, discrimination class-action lawsuits in the 1980s, 1990s, and 2000s made significant inroads into eradicating discrimination in the workplace. Not only do class actions asserting Title VII and similar rights often compensate victims for the harms they have suffered in the past, but they have also led to systemic change in how companies hire, promote, and compensate their workers. Strong injunctive relief is a common feature of discrimination class-action settlements, leading to a reshaping of company HR policies. For example, class actions often force companies to rethink their recruiting strategies to embrace a more diverse array of potential hires, and they lead companies to be more thoughtful about how they evaluate, reward and promote employees – based on actual performance rather than in-group membership or affinity. Whereas in earlier years, large-scale discrimination against

women, people of color, older workers, or people with disability may have gone unchecked, Rule 23 and state-law equivalents have provided a shield against lawlessness. Untold millions of employees have benefited directly – through compensation and increased job opportunities – and indirectly – through the confidence of knowing that they work at a company that values actual performance and productivity rather than membership in a favored group or clique.

Similarly, in more recent years, the boom in wage-and hour class and collective action litigation has prompted thousands of companies to bring their pay practices into compliance with the law, and pay their employees proper wages. With the decline of unions in recent decades, employees' power to secure strong wages has eroded dramatically. Real wages have not kept pace with productivity increases or the cost of living, allowing corporations and their owners to reap disproportionate benefits from corporate successes, even where the workers at those corporations played a significant role in driving success. Again, the pressure to slash costs tempts some businesses to cheat their workers by misclassifying them as exempt (to squeeze free hours of work out of them), denying them normal meal and rest breaks, pressuring them to work off the clock, or simply not paying them at all (in the case of interns who are made to do productive work for free). Class actions and collective actions (under the FLSA) are crucial in evening the playing field between organized, highly resourced corporations and individual employees who otherwise would just have to put up with mistreatment.



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The Chamber's movement to weaken the people's best tool

Of course, workers and consumers agitating for justice can be a nuisance to the companies that would rather increase profits by overstepping the law. So in recent years, the U.S. Chamber of Commerce, conservative legislators, and some judges have pushed back against the class-action procedure. Some trace this movement back to the "Powell Memo" of 1971, when soon-to-be Supreme Court Justice Lewis Powell wrote to his friend, Director of the U.S. Chamber of Commerce. In that memo, Powell exhorted the Chamber to fight back against what he saw as a Leftist assault on the good name of American business. He urged the Chamber to become active on university campuses and in high schools, to evaluate textbooks, to challenge journalists who criticize business interests, to create a "steady flow of scholarly articles," to become more active in politics, to engage in litigation like "the most active exploiters of the judicial system" such as the ACLU, and to generally take "A More Aggressive Attitude." Powell concluded, "business and the enterprise system are in deep trouble, and the hour is late."

This exhortation launched an aggressive but initially quiet movement. The fruits are now apparent – Fox News, foundations like Heritage and Olin that promulgate conservative scholarship, and the rise of "movement conservatives" in politics and law. The U.S. Supreme Court under Chief Justices Rehnquist and Roberts have turned their attention to class actions in a series of cases. The most well-known of these decisions, *Wal-Mart v. Dukes* (2011) 131 S.Ct. 2541, reversed certification of a gigantic 1.5-million-strong class of women alleging gender discrimination by the nation's largest private employer. The Court held that the female plaintiffs could not challenge subjective decisionmaking by individual store managers on a classwide basis – and therefore could not show commonality – because there was no "glue" holding

together the reasons for those decisions. Two years later, *Comcast Corp. v. Behrend* (2013) 133 S.Ct. 1425, addressed Rule 23's predominance standard, holding that the antitrust plaintiffs could not show predominance when it lacked a damages model that would generate common answers on the issue of damages to the class.

On a separate front, the Supreme Court addressed arbitration – a newly popular tool by which companies can evade liability altogether – in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 and *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304. These two decisions held that courts may not invalidate arbitration agreements including class-action waivers, even if the agreement would effectively preclude anyone from suing a wrongdoer because of the small value of the claims. In the wake of these decisions, more and more employers are requiring their employees to sign mandatory arbitration agreements containing class waivers.

Although these cases are certainly not helpful, they are by no means the death knell for the class-action device. There are undoubtedly more obstacles to successfully prosecuting class actions today than there were three years ago, but class-action lawyers are still getting classes certified, in wage-and-hour-cases, discrimination cases, consumer cases, and more. Even where class actions are barred by a forced arbitration agreement, plaintiffs' lawyers are finding ways to hold companies accountable for classwide misconduct. In short, the outlook for class actions may not be as dark as some may fear, and there are paths through (and around) the darkness.

Haven't we heard this tune before?

To put the doomsayers' message in perspective, it may be helpful to step back. The Supreme Court's recent class-action jurisprudence is not the first time that commentators have predicted the demise of class actions. For example,

back in 2005, when Congress enacted the Orwellianly named Class-action Fairness Act ("CAFA"), the Act's supporters hoped that it would simply weaken class actions and lead to "fairer" (read: pro-business) outcomes for litigants. CAFA did succeed in reducing the number of class actions filed in state court. At the same time, however, the number of class actions in federal court increased quite dramatically. Notably, the increase came mostly through original filings in federal court, not removals from state court. Based on these patterns, some have suggested that plaintiff-side class-action lawyers are continuing to have their pick of forum – just in federal and not state court. In addition, the total number of wage-and-hour class actions filed in federal court has increased dramatically. CAFA, as it turns out, has not prevented Americans from holding companies accountable for violations of the law.

It's not all one-way traffic: Well-argued cases are getting certified

Despite the dour predictions about the fate of class actions, plaintiffs' lawyers are still managing to get classes certified. Consider a trio of cases that were each vacated and remanded for further consideration in light of *Comcast: In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.* (6th Cir. 2013) 722 F.3d 838; *Butler v. Sears, Roebuck & Co.* (7th Cir. 2013) 727 F.3d 796 (Posner, J.), and *Ross v. RBS Citizens, N.A.* (7th Cir. 2012) 667 F.3d 900.

In *Whirlpool*, a products liability class-action involving moldy front-loading washing machines, the Sixth Circuit reaffirmed "the premise that there need be only one common question to certify a class." (722 F.3d at 853.) In spite of Whirlpool's arguments that class certification was inappropriate because the class included many uninjured class members and because too many individualized questions existed among the class, the court on remand affirmed the grant of class certification, finding that there were in fact primary



questions that would “produce in one stroke answers that are central to the validity of the plaintiffs’ legal claims.” (*Ibid.*)

In *Sears*, another case involving defective washing machines, Judge Posner – perhaps the leading conservative jurist not on the Supreme Court – reiterated that “[a]n issue ‘central to the validity of each one of the claims’ in a class action, if it can be resolved ‘in one stroke,’ can justify class treatment.” (727 F.3d at 800.) On the issue of predominance, he further admonished: “predominance requires a qualitative assessment too; it is not bean counting.” (*Ibid.*) In other words, common issues need not outnumber individual issues; they need only predominate. (*Ibid.*) Rule 23(b)(3) does not require common proof of damages. (*Ibid.*) Finding the requirements for class certification met, the panel reinstated the judgment granting class certification.

In the final case, *Ross v. RBS Citizens, N.A.* (7th Cir. 2012) 667 F.3d 900, the Seventh Circuit affirmed the district court’s grant of class certification to a class of assistant managers of bank branches on their misclassification claims, and to a class of hourly bank employees on their claims that they worked off the clock without being properly paid. After the Supreme Court vacated and remanded the case, the parties settled the case along with four other related class actions for \$11.5 million. It seems likely that if *Ross* had not settled, the decision would most likely have been reaffirmed on remand as well.

Another viable path for litigating successful class actions is to characterize the company’s wrongdoing, as much as possible, as a discrete, company-wide policy. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (7th Cir. 2012) 672 F.3d 482, Judge Posner provided further support for the longstanding notion (now controversial in some circles) that where a case presents predominant common issues and otherwise satisfies the requirements of Rule 23, it should be certified. As a proponent of Chicago School law

and economics analysis, Judge Posner powerfully elucidated a clear explanation of the efficiencies that class actions achieve in the legal system. In *McReynolds*, the Seventh Circuit reversed denial of class certification of a class of African-American stockbrokers who had sued the company for race discrimination. *McReynolds* had alleged, among other things, that the company’s policy allowing stockbrokers to form teams on their own discriminated against African-American stockbrokers because white stockbrokers tended to form teams with other white stockbrokers, to the exclusion of African-American stockbrokers. Cast in one light, these allegations could be seen as similar to the ill-fated challenge to subjective decision-making in *Wal-Mart*. Judge Posner recognized as much, noting that “to the extent that these regional and local managers exercise discretion regarding the compensation of the brokers whom they supervise, the case is indeed like *Wal-Mart*.” (672 F.3d at 489.) Nonetheless, he found that the presence of a discrete “teaming” policy was enough of a company-wide policy to allow a determination of liability on plaintiffs’ disparate impact theory on a classwide basis. (*Id.* at 490.)

In a similar vein, the plaintiffs in *Winfield v. Citibank, N.A.* (S.D.N.Y. 2012) 843 F.Supp.2d 397, obtained conditional certification in a collective action in a wage-and-hour case in which they alleged that they were not properly compensated for hours worked off the clock. Although the case involves the standard for conditional certification under the Fair Labor Standards Act, and not Rule 23, the case is still instructive. *Citibank* had pressed a *Dukes*’ argument, contending that the plaintiffs had not shown that there was any unlawful common policy or practice at issue, and instead had only shown that they were victims of “anomalous FLSA violations committed by individual, rogue managers.” (*Id.* at 405.) The court rejected this argument, finding that the plaintiffs showed proof that defendant

had a “dual-edged” policy of strictly limiting overtime while imposing rigorous sales quotas that bankers could not attain in a regular forty-hour workweek. (*Id.* at 404.)

An arbitration agreement isn’t necessarily a “get out of jail free” card

Forced arbitration agreements and class waivers are, unfortunately, real and increasingly frequent obstacles. More often than not, these agreements preclude victims of unlawful conduct from litigating class actions in court – generally leaving them without a remedy. A bar to pursuing these cases as class actions in court, however, is not a bar to pursuing them at all. Where a forced arbitration agreement does not include an explicit class waiver, plaintiffs may be able to argue that the agreement contemplated class arbitration. In *Jock v. Sterling Jewelers Inc.* (2d Cir. 2011) 646 F.3d 113, for example, the plaintiffs succeeded in pursuing a class arbitration by persuading the arbitrator that the parties had contemplated class arbitration, even though the arbitration agreement did not explicitly address class arbitration. The Second Circuit held that the arbitrator had not exceeded her authority in determining that the arbitration agreement permitted the plaintiffs to pursue class arbitration. More recently, the Supreme Court affirmed the principle that the Federal Arbitration Act allows only very limited judicial review of arbitrators’ awards in *Oxford Health Plans LLC v. Sutter* (2013) 133 S.Ct. 2064.

Even where a forced arbitration agreement contains an explicit class waiver, there are still ways for plaintiffs’ lawyers to pursue the case. One new tactic that is emerging is for victims to band together to file “mass arbitrations.” If plaintiffs cannot file a class action in court, and they cannot file a class arbitration, then why not give defendants what they are asking for – dozens or even hundreds of individual arbitrations?



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Mass arbitrations are costly and difficult to orchestrate for plaintiffs' counsel, but they may be an even worse nightmare for the defendants who must fight them off. Once sued through mass arbitration, some defendants end up changing their tune and asking to litigate or settle the claims on a class-wide basis. Anecdotally, some defendants who have been targets of mass arbitrations have even stopped using class waivers, because of the burden and cost of defending these kinds of actions.

Despite the success the Powell Memo has had in giving big business the confidence to frame the academic, political, and legal debate, leading to a weakening of individual rights and economic power, the class-action procedure remains very

much a robust and powerful litigation tool to hold companies accountable for wrongdoing. With careful, creative, intelligent lawyering, we can assist our clients in their quest for justice, and find paths through the darkness.



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