The Roberts Court's Legacy in Class Action Jurisprudence

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Richard D. Freer, *The Roberts Court and Class Litigation: Revolution, Evolution, and Work to be Done*, 51 **Stetson L. Rev**. ___ (forthcoming 2022), available on SSRN.

The rise in class action litigation has garnered significant scholarly and judicial attention over the past several decades, particularly in the United States. The Supreme Court of the United States under Chief Justice Roberts is perceived to be wary of, if not hostile to, class actions. A new paper by Richard Freer sheds light on the precise ways the Roberts Court has affected class action jurisprudence. The Court has released an average of more than two class action decisions a year since 2010, and in so doing, has revolutionized class action practice.

Freer offers a retrospective on three areas of jurisprudence that makes plain the important role the Roberts Court has played in class actions, especially over the past decade. He categorizes decisions as 'revolutionary', 'evolutionary' or 'work to be done'. By analyzing the corpus of cases in this way, Freer provides a compelling account of the Court's engagement with key class action issues.

The first category describes the revolutionary effect of *Wal-Mart Stores, Inc. v Dukes*. The Court rejected 35 years of lower-court interpretations of *Eisen v. Carlisle & Jacquelin* by requiring district judges to assess evidence relating to class certification, even if the evidence also bears on the merits of the action. The class representative must provide "significant proof" to the judge who undertakes a "rigorous analysis." The Court also hinted that expert witnesses at the certification hearing must meet the *Daubert* requirements. Freer observes that lower courts "have treated this hint as a command" and that the combination of the evidentiary rule and the higher evidentiary standard has resulted in expensive certification processes.

Wal-Mart also breathed new life into the commonality requirement under Rule 23(a)(2), which historically had not been a difficult threshold to overcome. The majority's approach "shifted the focus from common *questions* to common *answers*: there must be a common issue in the case such 'that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" This heightened commonality requirement has led to greater attention to Rule 23(a)(2) and to increased denials of class certification.

In the second category, Freer documents the evolution of Roberts Court case law on fraud-on-the-market class actions that has created new hurdles for shareholder plaintiffs. The fraud-on-the-market theory posits that shareholders' reliance on a corporation's public misrepresentations will be presumed so long as the class representative can demonstrate that the securities are traded in an efficient public market. The Court affirmed the theory in a number of cases, starting with *Erica P. John Fund, Inc. v. Halliburton Co*., continuing with *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, and most recently with *Goldman Sachs Grp., Inc. v Arkansas Teacher Retirement Sys* in June 2021. But in two decisions–Halliburton II and *Goldman Sachs*–the Court added the requirement that the misrepresentation had a price impact, even though the Court in *Amgen* had concluded that the representative need not prove the misrepresentation was material. Freer rightfully points out that the Court has ignored the relationship between price impact and materiality and has opened the door to a full-blown evidentiary inquiry at certification even further.

Finally, the Roberts Court has raised, but not answered, important questions in three areas of class action jurisprudence. First, class representatives must have standing under Article III of the Constitution even if they have a private right of action pursuant to a statute, but the Court has provided little guidance on the relationship between statutory and constitutional standing in Rule 23 cases. Second, the Court has not addressed questions of mootness, even when given the opportunity to do so in *Campbell-Ewald Co v. Gomez*. The Court did not answer whether an unaccepted settlement offer in the full amount of the class representative's loss renders their claim moot and non-justiciable as a matter of constitutional law. Relatedly, it failed to explain whether that representative retains an interest that would permit them to argue that the class should be certified. Freer lists a number of issues that flow from these questions and warrant the Court's attention. Lastly, though Roberts has stated that he has "fundamental concerns" about the use of *cy pres* remedies in class settlements, the Court did not seize the opportunity to clarify the limits of the doctrine in *Frank v. Gaos*. In all three–standing, mootness and *cy pres*–the Court has "staked out some topics on which its real work has yet to begin."

In his succinct paper, Freer confirms the prevailing view among class action scholars that the Roberts Court has been active on class action issues and has made certification more difficult. Should the Court take up the work it has left uncompleted, the evolution – perhaps even revolution – of class actions will be one of its lasting legacies.

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