RECENT DEVELOPMENTS IN APPELLATE ADVOCACY

Andre M. Mura, R. Aaron Chastain, Brian C. Miller, Joshua D. Lee, Kimberly A. Mello, Laura Bassini, and Catherine A. Chopin

Andre M. Mura is a partner in the Oakland, California, office of Gibbs Law Group LLP and of counsel with Girard Gibbs LLP. R. Aaron Chastain is an associate with Bradley Arant Boult Cummings LLP in Birmingham, Alabama. Brian C. Miller is a partner and Catherine A. Chopin is an associate with Royston Rayzor in Corpus Christi. Joshua D. Lee is a partner in the Chicago office of Schiff Hardin LLP. Kimberly A. Mello is a partner and Laura Bassini is an associate in the Tampa office of Greenberg Traurig, P.A.

I. INTRODUCTION

The U.S. Supreme Court's attention to legal questions that are of significance to the tort, trial, and insurance bar continued unabated during the 2014–15 Term. This Term produced important decisions on qualified immunity, federal civil procedure and jurisdiction, and preemption. In *Dart Cherokee Basin Operating Co. v. Owens*,[1] for example, the Court clarified that a notice of removal to federal court need not include evidentiary submissions; a plausible allegation that the amount in controversy exceeds the jurisdictional threshold suffices. In *Heien v. North Carolina*,[2] the Court held that a police officer's reasonable mistake of law may supply a reasonable suspicion that justifies a traffic stop under the Fourth Amendment. Looking ahead, the 2015–16 Term promises to yield important answers to questions concerning class action procedure and Article III, including, in *Campbell-Ewald Co. v. Gomez*,[3] whether a case becomes moot when the plaintiff receives a complete offer of relief. These cases, along with recent appellate decisions that the Supreme Court may yet review, are featured below.

II. CONSTITUTIONAL TORTS AND QUALIFIED IMMUNITY

During the 2014–15 Term, the Supreme Court continued to address problems in lower courts' qualified immunity analyses. The Court also considered the effect of a mistake of law on whether a Fourth Amendment violation has occurred. While the Court clarified that an objective standard should apply to excessive force claims by pretrial detainees, the Court left uncertain whether an objective or subjective standard applies to similar claims by post-conviction prisoners.

A. *Continuing Struggle with Lower Courts' Qualified Immunity Methodology*

Qualified immunity protects government officials from personal liability when their conduct does not violate clearly established federal statutory or constitutional rights.[4] In recent years, the Supreme Court has attempted to clarify when a right is clearly established. Four years ago, in *Ashcroft v. al-Kidd*, the Supreme Court explained that existing precedent must place the relevant "contours" of the right "beyond debate," such that every reasonable official would understand that the complained-of-conduct violates the right.[5] The Court explained that this standard usually

1. 135 S. Ct. 547 (2014).
2. 135 S. Ct. 530 (2014).
3. 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015).
4. *See, e.g.*, Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) (discussing elements of the defense).
5. 131 S. Ct. 2074, 2083–84 (2011).

requires controlling authority or a "robust consensus" of "persuasive authority."[6] The following year, in *Reichle v. Howards*, the Court said that when the impact of one of its decisions on a circuit's existing precedent is "far from clear," the officer is entitled to the benefit of the doubt, especially if other circuits have ruled for officers in similar situations.[7]

The Court made a notable, but perhaps underappreciated, statement in *Reichle* that it was "[a]ssuming arguendo" that a circuit's own "authority could be a dispositive source of clearly established law. . . ."[8] With that statement, the Supreme Court apparently signaled that the circuits should not rely exclusively on their own law to determine whether a right is clearly established.

The Court amplified this signal during the 2014–15 Term with similar statements in *Carroll v. Carman*[9] and *Taylor v. Barkes.*[10] The wording in *Taylor* is especially noteworthy, as the Court was "[a]ssuming for the sake of argument that a right can be 'clearly established' by circuit precedent *despite disagreement in the courts of appeals*. . . ."[11] Thus, if a circuit split could require Supreme Court resolution, defense counsel should argue that an official must prevail, even though a local circuit's precedent would alone weigh against qualified immunity.[12]

For example, in *Carroll*, the Third Circuit concluded that an officer clearly violated the Fourth Amendment by entering the plaintiffs' backyard and deck without a warrant while looking for a suspect.[13] Other circuits, however, held that officers did not violate the Fourth Amendment by approaching side and rear doors that appeared to be accessible to visitors.[14] The Supreme Court held that the officer in *Carroll* was entitled to qualified immunity because any right to have an officer approach a primary entrance first was not clearly established.[15]

In *Taylor*, the Third Circuit concluded that state prison officials had clearly violated a prisoner's Eighth Amendment rights by not implementing and enforcing adequate suicide prevention measures.[16] The Supreme Court noted that "[n]o decision of this Court" established any such rights

6. *Id.* (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).
7. 132 S. Ct. 2088, 2095–96 (2012).
8. *Id.* at 2094.
9. 135 S. Ct. 348 (2014).
10. 135 S. Ct. 2042 (2015).
11. *Id.* at 2045 (citations omitted) (emphasis added).
12. State appellate opinions, particularly those from the forum state, should also be considered. *See, e.g.*, Stanton v. Sims, 134 S. Ct. 3, 7 (2014) (finding denial of qualified immunity "especially troubling" because California state courts concluded that similar conduct was lawful).
13. *Carroll*, 135 S. Ct. at 349–50.
14. *Id.* at 351–52.
15. *Id.* at 352.
16. *Taylor*, 135 S. Ct. at 2044.

and that four other circuits' opinions suggested, if not held, that no such rights exist.[17] The Court held that the officials had qualified immunity because the rights at issue, if they existed, were not clearly established.[18]

The Supreme Court criticized the Ninth Circuit's similar error in *City and County of San Francisco v. Sheehan*.[19] In that case, the defendant police officers were confronted with a mentally ill woman, armed with a knife, who had threatened to kill a social worker and the officers.[20] Fearing that the woman could gather more weapons or escape through a window, thereby presenting a greater risk, the officers entered her room to subdue her.[21] A struggle ensued, and the officers shot the woman.[22] The Ninth Circuit concluded that the officers' failure to accommodate the woman's illness violated clearly established law.[23] In concluding that the law was not clearly established, the Supreme Court cited opinions from three other circuits that contradicted the Ninth Circuit's conclusion.[24]

In each of those opinions, another problem existed: the circuit construed its precedent in the plaintiffs' favor, even though qualified immunity requires resolving reasonable doubts about the law in the defendant's favor.[25] In *Carroll*, the Supreme Court noted that, under the Third Circuit's precedent, an officer could enter "places visitors could be expected to go," such as an unfenced approach to a back door.[26] In *Taylor*, a key Third Circuit precedent was in favor of officials of a jail that had no suicide prevention procedures, let alone inadequate ones.[27] In *Sheehan*, the Ninth Circuit's precedent was not sufficiently conclusive to give the officers "fair notice" that they were violating the law by entering the mentally ill woman's room to subdue her.[28]

If a circuit's precedent "arguably supports" the defendant's position, qualified immunity should apply.[29] Plaintiffs' counsel should look for additional authorities that fill the gaps in existing precedent, and defense counsel should expose those gaps by identifying ambiguities, inconsistencies, and unresolved issues in that precedent.

17. *Id.* at 2044–45.
18. *Id.* at 2045.
19. 135 S. Ct. 1765 (2015).
20. *Id.* at 1770.
21. *Id.*
22. *Id.* at 1771.
23. *Id.* at 1775.
24. *Id.* at 1778.
25. *See Carroll*, 135 S. Ct. 348, 351 (2014); *Taylor*, 135 S. Ct. at 2045; *Sheehan*, 135 S. Ct. at 1777.
26. *Carroll*, 135 S. Ct. at 351.
27. *Taylor*, 135 S. Ct. at 2045.
28. *Sheehan*, 135 S. Ct. at 1777.
29. *Carroll*, 135 S. Ct. at 351; *see also Taylor*, 135 S. Ct. at 2045.

B. *Mistakes of Law and the Fourth Amendment*

In *Heien v. North Carolina*, the Supreme Court considered the relevance and effect of an officer's mistake of law on whether a Fourth Amendment violation occurred.[30] At issue was whether to suppress evidence of cocaine that a police officer found during a traffic stop.[31] The officer erroneously believed that state law required two working brake lights on the defendant's car, which only had one working brake light.[32] The Supreme Court held that the stop did not violate the Fourth Amendment because the officer's mistake was objectively reasonable.[33]

Although *Heien* was a criminal case, it is an important development affecting municipal liability cases under 42 U.S.C. § 1983. Although qualified immunity protects officials from liability when they "make reasonable but mistaken judgments about open legal questions[,]"[34] municipalities (such as cities and counties) cannot rely on their officials' qualified immunity as a defense.[35] At least in Fourth Amendment wrongful search and false arrest cases, *Heien* provides a means for raising the mistake-of-law issue in the context of whether a constitutional violation even occurred. This reduces the burden of addressing mistakes of law in other ways, such as whether a municipal policy (e.g., inadequate training) caused a constitutional violation.[36]

C. *Pretrial Detainee and Prisoner Excessive Force Litigation*

The Supreme Court clarified the liability rules in excessive force cases involving pretrial detainees, but in the process, may have muddied the rules in similar cases involving post-conviction prisoners.

In *Kingsley v. Hendrickson*, the Court considered whether "a pretrial detainee must show that the officers were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable."[37] The Court resolved a circuit split by holding that the objective standard is correct.[38]

The Court explained that liability requires deliberate conduct because negligent conduct does not violate a pretrial detainee's due process rights.[39] That state-of-mind requirement, however, does not require

30. 135 S. Ct. 530 (2014).
31. *Id.* at 534–35.
32. *Id.*
33. *Id.* at 540.
34. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011).
35. Owen v. City of Independence, 445 U.S. 622, 650 (1980).
36. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 60–61 (2011) (discussing municipal liability principles).
37. 135 S. Ct. 2466, 2470 (2015).
38. *Id.* at 2470, 2472.
39. *Id.* at 2472.

that the officer appreciate that he or she is violating the detainee's rights.[40] Rather, "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."[41]

The Court acknowledged that its decision "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners."[42] Because the Court reserved that issue, the possibility exists of an objective standard in pretrial detainees' excessive-force cases under the Fifth and Fourteenth Amendments and post-conviction excessive force cases under the Eighth Amendment.

Justice Scalia, in a three Justice dissent, questioned how, absent a subjective "intent to punish," the detainee's claim implicated a "right to process" under the Constitution.[43] He equated the majority's decision to using due process to federalize state tort law.[44]

Although Justice Scalia's view was in the minority, practitioners should consider that view in cases alleging due process violations, especially where state law provides a remedy. Because the Court's composition could substantially change in the next few years, Justice Scalia's argument may prove to be one worth preserving.

D. *Upcoming Constitutional Tort and Qualified Immunity Issues*

The Supreme Court's efforts in correcting and bringing uniformity to lower courts' qualified immunity analyses appear likely to continue. Already in the 2015–16 Term, the Court has reversed the Fifth Circuit for an improper qualified immunity analysis in *Mullenix v. Luna*.[45] In concluding that an officer had qualified immunity after shooting a suspect in a high-speed chase, the Court criticized the Fifth Circuit for defining the "clearly established right" with too much generality, for not recognizing the gaps in its own precedent, and for overlooking contrary precedent from other courts.[46] The Court appears to be sufficiently concerned with this area of the law that multiple additional grants of certiorari are likely in the next few Terms, if not in the current Term.

The Court will also consider whether a First Amendment retaliation claim can be based on a supervisor's mistaken belief that an employee supported a political candidate. In *Heffernan v. City of Patterson*, the Third

40. *Id.* at 2473.
41. *Id.* at 2473–74.
42. *Id.* at 2476.
43. *Id.* at 2478–79. Justice Alito also dissented, but he would have dismissed the certiorari petition as improvidently granted. *Id.* at 2479.
44. *Id.*
45. 136 S. Ct. 305 (2015).
46. *Id.* at 308–12.

Circuit concluded that the employee had no retaliation claim because the employee had not actually exercised a First Amendment right.[47] The outcome of that case may extend beyond the First Amendment to affect other types of employee retaliation claims as well.

III. FEDERAL JURISDICTION AND PREEMPTION

A. *Notice of Removal and Diversity Jurisdiction*

In *Dart Cherokee Basin Operating Co. v. Owens*, the Court addressed an apparent circuit split regarding the evidentiary requirements for notices of removal in diversity cases.[48] The Court held that a notice of removal does not require supporting evidence and need only include a plausible statement of the amount in controversy.[49]

Owens filed a putative class action in state court, alleging that Dart underpaid royalties on several oil and gas leases. Dart removed the case to federal court, alleging in its removal petition that the claimed underpayments would amount to at least $8.2 million, well in excess of the amount-in-controversy requirement for diversity jurisdiction in class action cases. Owens asked the district court to remand the case, arguing that the removal petition was legally deficient because its allegations regarding the amount in controversy were without support. In response, Dart submitted an affidavit to support its calculation of the amount in controversy. Owens, however, insisted that post-removal evidence could not be considered.[50]

Concluding that "reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy," the district court agreed with Owens and remanded the case.[51] Using the Class Action Fairness Act to seek review of the remand order,[52] Dart took an appeal to the Tenth Circuit. Over a dissent, the Tenth Circuit denied review.[53] The Supreme Court then granted certiorari to resolve a split among the circuit courts.

47. 777 F.3d 147 (3d Cir. 2015), *cert. granted*, 136 S. Ct. 29 (2015).

48. Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 552–53 (2014), *comparing* Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 200 (4th Cir. 2008) (a removing party's notice of removal need not "meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint"), *with* Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) ("the requisite amount in controversy . . . must be affirmatively established on the face of either the petition or the removal notice").

49. *Dart*, 135 S. Ct. at 551.

50. *Id.* at 551–52.

51. *Id.* at 552.

52. The Class Action Fairness Act provides an exception to the general rule that remand orders are "not reviewable on appeal or otherwise." 28 U.S.C. § 1453(c)(1).

53. *Dart*, 135 S. Ct. at 552.

The Court concluded that the plain language of the removal statute makes clear that a defendant removing a case to federal court need only file "a notice of removal 'containing a short and plain statement of the grounds for removal.'"[54] Because this language is borrowed from Federal Rule of Civil Procedure 8(a), courts should apply to a defendant's notice of removal the same liberal pleading standards that apply to the jurisdictional statement in a plaintiff's complaint.[55] Thus, when filing a notice of removal, "'defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants may simply allege or assert that the jurisdictional threshold has been met.'"[56] A defendant must submit evidence to support its jurisdictional allegations only if those allegations are put at issue by the plaintiff or the court.[57]

For its 2015–16 Term, the Court has granted certiorari to hear several cases that touch upon jurisdiction. Among those cases is *Conagra Foods, Inc. v. Americold Logistics, LLC*,[58] in which the issue is whether, for diversity jurisdiction, the citizenship of a trust is determined by looking exclusively to the citizenship of its trustees or by looking to the citizenship of both the trustees and the beneficiaries of the trust.

In *Conagra Foods*, the plaintiffs sued two Americold entities, one of which was a realty trust, in state court.[59] On the basis of complete diversity of the parties, the Americold entities removed the case to federal court. The plaintiffs did not challenge the removal, and the district court ultimately entered judgment in favor of the Americold entities.[60]

After the plaintiffs took an appeal of the judgment against them, the Tenth Circuit questioned, sua sponte, whether the Americold entities' notice of removal was sufficient, given that it did not establish the citizenship of each of the trust's beneficiaries.[61] Despite acknowledging that a majority of federal courts hold otherwise,[62] the Tenth Circuit concluded that, when a trust, as opposed to a trustee, is the party to a lawsuit, the trust's citizenship is linked to the citizenship of both the trustees *and* the beneficiaries.[63] Therefore, the Tenth Circuit held, because it did not offer

54. *Id.* at 553 (quoting 28 U.S.C. § 1446(a)).
55. *Id.*
56. *Id.* at 554 (quoting H.R. Rep. No. 112-10, at 16 (2011)).
57. *Id.*
58. 776 F.3d 1175, *cert. granted*, 136 S. Ct. 27 (2015).
59. *Id.*
60. *Id.* at 1176–77.
61. *Id.* at 1177.
62. *Id.* at 1178.
63. *Id.* at 1181 (citing Carden v. Arkoma Assocs., 494 U.S. 185 (1990) and Emerald Inv'rs Tr. v. Gaunt Parsippany Partners, 492 F.3d 192, 200–01 (3d Cir. 2007)).

evidence regarding the citizenship of the trust's beneficiaries, Americold failed to establish complete diversity.[64]

The question Americold has asked the Supreme Court to decide is "[w]hether the Tenth Circuit wrongly deepened a pervasive circuit split among the federal circuits regarding whether the citizenship of a trust for purposes of diversity jurisdiction is based on the citizenship of the controlling trustees, the trust beneficiaries, or some combination of both."[65]

B. *Tax Injunction Act and Preemption*

In *Direct Marketing Ass'n v. Brohl*, the Court addressed the question of whether the Tax Injunction Act (TIA)[66] divests federal courts of jurisdiction to enjoin state enacted use tax reporting requirements. The Court held that it does not.[67]

In order to protect its tax revenues, Colorado requires retailers that do not collect Colorado sales or use tax to notify Colorado consumers of their obligation to pay sales taxes and report tax information to the Colorado Department of Revenue.[68] Seeking to enjoin Colorado from enforcing the notice and reporting requirements against non-resident retailers, Direct Marketing filed suit against the director of the Colorado Department of Revenue. The district court concluded that Colorado's notice and reporting requirements discriminate against, and place undue burden on, interstate commerce. Accordingly, the district court permanently enjoined enforcement of Colorado's use tax notice and reporting requirements against non-resident retailers.[69]

The Tenth Circuit vacated the injunction. It held that, regardless of any alleged restriction on interstate commerce, because the requested relief "would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue," the TIA divested the district court of jurisdiction.[70]

The Supreme Court reversed. The TIA prohibits federal courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[71] After reviewing various provi-

64. *Id.* at 1182.
65. Pet. for Writ of Cert., Americold, LLC v. Conagra Foods, Inc., 2015 WL 2438833 (May 15, 2015).
66. 28 U.S.C. § 1341.
67. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1127 (2015).
68. *Id.* at 1127–28.
69. *Id.* at 1128.
70. Direct Mktg. Ass'n v. Brohl, 735 F.3d 904, 913 (10th 2013).
71. 28 U.S.C. § 1341.

sions of the Tax Code, the TIA, and the Anti-Injunction Act, the Court concluded that, when used in relation to tax laws, the terms "assessment," "levy," and "collection" have specialized meanings relating to the official recording and collection of tax liabilities.[72] These activities are distinct from the information gathering activities that take place before, and lay the groundwork for, the assessment and collection of taxes.[73] Moreover, in the context of the TIA, "restrain" is synonymous with "enjoin." To hold otherwise would unduly expand the reach of the TIA.[74] Thus, because the district court's order enjoining enforcement of Colorado's use tax notice and reporting requirement, merely inhibited, but did not prohibit, Colorado's assessment and collection of taxes, the TIA did not divest the district court of authority to enjoin Colorado from enforcing the notice and reporting requirements against out-of-state retailers.[75]

In *Oneok, Inc. v. Learjet, Inc.*, the Court was asked to determine the extent to which the Natural Gas Act preempts state regulations of natural gas retail sales. The Court held that the Natural Gas Act does not preempt state laws that are aimed at regulating retail, as opposed to wholesale, natural gas rates, even if those state laws might have a tangential impact on wholesale gas rates.[76]

The Natural Gas Act gives the Federal Energy Regulatory Commission exclusive jurisdiction to regulate rates for wholesale distribution of natural gas by interstate pipelines.[77] The Natural Gas Act reserves to the states, however, the authority to regulate retail natural gas rates.[78]

The plaintiffs in *Oneok* were entities that bought natural gas at retail from interstate pipelines. The plaintiffs sued the pipelines, alleging that the pipelines had violated state antitrust laws by illegally manipulating natural gas retail rates.[79] The pipelines moved for summary judgment, arguing that because the alleged misconduct also would have affected natural gas wholesale rates, the Natural Gas Act preempted the plaintiffs' state law antitrust claims. The district court granted the pipelines' motion.[80] The Ninth Circuit reversed, finding that, in light of Congress's express intent to preserve the states' right to regulate retail natural gas sales, the Act did not preempt state law claims aimed at obtaining damages

72. *Direct Mktg.*, 135 S. Ct. at 1120–31.
73. *Id.* at 1129, 1131 ("[T]he Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection.").
74. *Id.* at 1132–33.
75. *Id.* at 1134.
76. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594 (2015).
77. 15 U.S.C. §§ 717(b), 717d(a).
78. 15 U.S.C. § 717(b).
79. *Oneok*, 135 S. Ct. at 1598.
80. *Id.*

for excessive retail prices, even if the same alleged misconduct also affected wholesale prices.[81]

The Supreme Court granted certiorari to resolve a conflict among lower courts as to whether the Natural Gas Act preempts retail customers' state law antitrust claims when those claims challenge conduct that also affects wholesale rates.[82] The Court affirmed the Ninth Circuit's holding. In doing so, the Court made clear that, because "the Natural Gas Act 'was drawn with meticulous regard for the continued exercise of state power,'" the most important factor in determining whether a state law is preempted by the Natural Gas Act is "the target at which the state law aims."[83] Because the plaintiffs' state law claims were aimed at the pipeline's alleged manipulation of retail rates, those claims fell "firmly on the States' side of [the] dividing line" and were not preempted by the Natural Gas Act.[84]

IV. FEDERAL CIVIL PROCEDURE AND EVIDENCE

A. *Multidistrict Litigation and Final Appealable Orders*

As is normally the case, this past year's Supreme Court Term had its share of cases concerning important topics in the realm of civil and appellate procedure and evidentiary issues. In *Gelboim v. Bank of America Corp.*,[85] the Court tackled the intersection of the well-known finality rule of 28 U.S.C. § 1291 (restricting appeals to the appellate courts to "final decisions of the district courts") and the multidistrict litigation procedures enacted by Congress in 28 U.S.C. § 1407. The *Gelboim* plaintiffs had filed a complaint in the Southern District of New York alleging a claim on behalf of a putative class for antitrust violations by a number of banks working in concert.[86] The case was consolidated for pretrial proceedings with sixty other similar cases under the multidistrict litigation procedures; however, the district court dismissed the *Gelboim* plaintiffs' complaint with prejudice.[87]

Despite the fact that numerous other consolidated cases remained active, these plaintiffs appealed the dismissal, arguing that it constituted a

81. *Id.* at 1599.
82. *Id.*
83. *Id.* (quoting Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind., 332 U.S. 507, 517–18 (1947)).
84. *Id.* at 1600 (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 514 (1989)). This holding, however, is limited to the issue of "field" preemption. The parties did not raise, and the Court did not decide, whether "conflict" preemption would bar the plaintiff's claims. *Id.* at 1602.
85. 135 S. Ct. 897 (2015).
86. *Id.* at 901, 903.
87. *Id.* at 901.

final judgment for the purposes of 28 U.S.C. § 1291.[88] The Second Circuit dismissed the appeal, however, holding that it lacked appellate jurisdiction given that the district court's judgment was not final.[89]

After granting a writ of certiorari, the unanimous Supreme Court reversed the Second Circuit and directed that the appeal be reinstated. Through an opinion authored by Justice Ginsberg, the Court held that "[c]ases consolidated for MDL pretrial proceedings ordinarily retain their separate identities, so an order disposing of one of the discrete cases in its entirety should qualify under § 1291 as an appealable final decision."[90] The Court looked to the language of the multidistrict consolidation statute[91] and found language corroborating its holding: "Section 1407 refers to individual 'actions' which may be transferred to a single district court, not to any monolithic multidistrict 'action' created by transfer."[92] Furthermore, the Court found that a contrary rule would create confusion about when a plaintiff in a dismissed case should take its notice of appeal because the end of pre-trial consolidated proceedings does not necessarily come with a single, definite order.[93]

The harshest result from *Gelboim* may be its retroactive application in circuits that had previously held that the dismissal of a single case consolidated for pretrial purposes under the multidistrict litigation procedures was not a final, appealable judgment. Under binding Supreme Court precedent, the rule is that the Court's interpretation of federal law is controlling "and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[94] Litigants in those dismissed cases presumably have missed their time to appeal, even though any such appeal would have been dismissed by the appellate court at the time under then existing circuit law.

B. *Notice Pleading*

Another significant opinion regarding civil procedure from this past Term came in the short per curiam decision in *Johnson v. City of Shelby*.[95] In *Johnson*, police officers for the City of Shelby, Mississippi, brought a complaint alleging a constitutional violation arising from their allegedly improper termination in retaliation for revealing criminal activities by

88. *Id.* at 901–02.
89. *Id.* at 902.
90. *Id.* at 904.
91. 28 U.S.C. § 1407.
92. *Gelboim*, 135 S. Ct. at 904.
93. *Id.* at 905.
94. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993).
95. 135 S. Ct. 346 (2014).

one of the city's alderman.[96] The district court granted summary judgment for the defendants, holding that the plaintiffs' failure to invoke 42 U.S.C. § 1983 as the basis for their cause of action was fatal to their claims. On appeal, the Fifth Circuit affirmed.[97]

The Supreme Court granted certiorari and summarily reversed.[98] The Court's per curiam opinion cited to the oft-repeated text of Federal Rule of Civil Procedure 8 requiring only "'a short and plain statement of the claim showing that the pleader is entitled to relief.'"[99] According to the Court, this requirement indicates that the federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted."[100] The Court rejected the Fifth Circuit's statement that pleading a claim as a cause of action under § 1983 was "'not a mere pleading formality,'"[101] holding instead that the Fifth Circuit's reasoning was flawed in that the alleged notice function served by pleading § 1983 was not even implicated under the facts of the case.[102]

The *Johnson* case is important in that it demonstrates post-*Bell Atlantic Corp. v. Twombly*[103] and *Ashcroft v. Iqbal*[104] that the notice pleading standard of the Federal Rules of Civil Procedure still controls. The Court summarily rejected the analysis of the Fifth Circuit that would require a plaintiff to plead a specific cause of action by name, rather than merely pleading the facts necessary to support that cause of action. Litigants would be well served to take notice that, going forward, motions to dismiss under Rule 12(b)(6) must do more than simply point out that a claim incorrectly names the substantive cause of action.

C. *Inquiring into the Validity of a Verdict*

The Court issued a significant decision regarding the evidentiary rules in *Warger v. Shauers*.[105] There, the plaintiff in a civil automobile accident case argued that he was denied a fair trial because one of the jurors (who proved to be the foreperson) was biased due to her personal experience as a parent of a driver at fault in a significant automobile accident—a fact that the juror did not reveal in questioning on voir dire.[106] To prove the juror's alleged lie about her impartiality, the plaintiff submitted an affidavit

96. *Id.* at 346.
97. Johnson v. City of Shelby, 743 F.3d 59 (5th Cir. 2013).
98. *Johnson*, 135 S. Ct. 346.
99. *Id.* at 346 (quoting FED. R. CIV. P. 8(a)(2)).
100. *Id.*
101. *Id.* at 347 (quoting *Johnson*, 743 F.3d at 62).
102. *Id.*
103. 550 U.S. 544 (2007).
104. 556 U.S. 662 (2009).
105. 135 S. Ct. 521 (2014).
106. *Id.* at 524.

from one of the other jurors that recited the foreperson's statements about her daughter's automobile accident during deliberations.[107] Based upon this evidence, the plaintiff moved for a new trial, alleging that, under *McDonough Power Equipment, Inc. v. Greenwood*, he had shown that a juror had "failed to answer honestly a material question on *voir dire*, and . . . that a correct response would have provided a valid basis for a challenge for cause."[108] The district court denied the new trial motion, holding that Federal Rule of Evidence 606(b)—which provides that "[d]uring any inquiry into the validity of a verdict," evidence "about any statement made or incident that occurred during the jury's deliberations" is inadmissible—precluded consideration of the affidavit.[109] The Eighth Circuit affirmed.[110]

After granting certiorari, a unanimous Supreme Court affirmed. The Supreme Court first held that Rule 606(b)(1) applies to a juror's statements when a party is seeking to use them to prove that another juror lied during voir dire.[111] The Court reasoned that a request for a new trial necessarily involved "an inquiry into the validity of the verdict" under the text of the rule.[112] The Court found that this interpretation of Rule 606(b)(1) also was consistent with longstanding federal evidentiary common law predating the enactment of the rule, which held that juror affidavits were not admissible to show an act of juror misconduct meant to undermine the validity of a judgment.[113]

V. CLASS ACTIONS

The Supreme Court is poised to clarify the boundaries of the Article III injury requirement in class action cases. In October and November 2015, it heard three cases that each involve challenges to whether a class could be certified or maintained consistent with Article III. The decisions in these cases could potentially provide plaintiffs with an easier path in class litigation, or could render the maintenance of class actions an uphill battle.

A. *Class Injury and Certification*

"It is axiomatic that federal courts cannot order money to be paid to an uninjured plaintiff."[114] At least, that is the basis for Tyson's argument

107. *Id.*
108. *Id.* at 524–25 (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)).
109. *Id.* at 525.
110. Warger v. Shauers, 721 F.3d 606 (8th Cir. 2013).
111. *Warger*, 135 S. Ct. at 525–26.
112. *Id.* at 525.
113. *Id.* at 526–27.
114. Brief for Petitioner at 44, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 381 (2015) (No. 14-1146).

in *Tyson Foods, Inc. v. Bouaphakeo*[115] that the jury verdict, awarding a class of employees over $5.5 million as compensation for unpaid overtime, should be overturned and the class decertified.[116] The case arose from hourly employees' claims that the time spent cleaning, donning, and doffing equipment was not adequately compensated by "K-Code" time—extra minutes paid by Tyson for such tasks.[117] The employees filed a class action alleging state violations of the Fair Labor Standards Act (FLSA).[118] Notwithstanding differences in the type of clothing and equipment worn by members of the class, the trial court granted conditional certification, finding that there was a common question of law as to whether Tyson's compensation system violated the FLSA.[119] Tyson continually resisted class certification, however, contending, among other things, that not only did each employee suffer different damages, but also that many suffered no damage at all and lacked Article III standing.[120]

The Eighth Circuit was unpersuaded by Tyson's argument.[121] The Court concluded that Tyson "exaggerates the authority for its contention" and, even if the claim had merit, Tyson invited any error by requesting a jury instruction directing the jury to treat undamaged plaintiffs as class members.[122] The jury instruction provided that "[a]ny employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages."[123] The dissent squarely disagreed with this interpretation, countering that Tyson simply sought to hold the employees to their evidentiary burden of proof.[124] The dissent also took issue with the fact that the expert testimony established that, at the very minimum, 212 members of the class did not suffer any damages, yet "all were apparently included as beneficiaries of the single damages verdict returned by the jury."[125]

Before the Supreme Court, Tyson argues that in cases where plaintiffs are unable to offer proof that all class members are injured, they must

115. Pet. for Writ of Cert., *Bouaphakeo*, 136 S. Ct. 381 (No. 14-1146).

116. Bouaphakeo v. Tyson Foods, Inc. (*Bouaphakeo III*), 765 F.3d 791, 794, 796 (8th Cir. 2014).

117. Bouaphakeo v. Tyson Foods, Inc. (*Bouaphakeo II*), No. 5:07-cv-04009, 2012 WL 4471119, at *1 (N.D. Iowa Sept. 26, 2012).

118. 29 U.S.C. § 207(a)(1) provides that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

119. Bouaphakeo v. Tyson Foods, Inc. (*Bouaphakeo I*), 564 F. Supp. 2d 870, 904 (N.D. Iowa 2008).

120. Brief for Petitioner at 33–34, 52, *Bouaphakeo*, 136 S. Ct. 381 (2015) (No. 14-1146).

121. *Bouaphakeo III*, 765 F.3d at 798.

122. *Id.* at 797–98.

123. *Id.* at 798.

124. *Id.* at 803 (Beam, J., dissenting).

125. *Id.* at 804.

ensure that the presence of uninjured members does not contribute to the size of a damage award and that uninjured plaintiffs cannot recover damages.[126] Otherwise, according to Tyson, "certification in the absence of evidence that all class members were actually injured will inevitably (and impermissibly) allow courts to exceed their constitutional power to remedy injuries."[127] The employees counter that as long as one member of the class has standing, "[t]he presence of class members with no compensable damages poses no Article III problem."[128] The employees also argue that requiring proof that each plaintiff suffered an injury would be inefficient and contrary to the congressional intent of allowing collective actions under the FLSA.[129]

Oral argument was held on November 10, 2015, and a decision is expected in 2016.

B. *Statutory Violations and Article III Standing*

Does a defendant's statutory violation by itself constitute an injury that confers Article III standing? This is the question that the Supreme Court will address in *Spokeo, Inc. v. Robins*,[130] a case that involves a putative class action in which the plaintiff seeks damages for an alleged violation of the Fair Credit Reporting Act (FRCA).[131] In relevant part, FRCA requires consumer reporting agencies that provide information for employment purposes to follow "reasonable procedures to assure maximum possible accuracy of" their reports.[132] Plaintiff Robins filed a putative class action against Spokeo after he discovered that Spokeo's webpage, which allows users to obtain others' personal information, contained false information about his education and wealth, purportedly injuring his credit and employment prospects, and causing him anxiety, stress, concern, and worry.[133]

Robins alleged that Spokeo willfully violated this provision, which he contends allows him not only to recover actual damages or statutory damages "of not less than $100 and not more than $1,000," but also to seek punitive damages.[134] Spokeo moved to dismiss Robins' complaint, claiming that he has not suffered an injury in fact.[135] The district court agreed,

126. Brief for Petitioner at 49, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 381 (2015) (No. 14-1146).
127. *Id.* at 49–50.
128. Brief for Respondent at 52, *Bouaphakeo*, 136 S. Ct. 381 (No. 14-1146).
129. *Id.* at 55–56 (No. 14-1146).
130. Pet. for Writ of Cert., Spokeo, Inc. v Robins, 135 S. Ct. 1892 (2015), No. 13-1339.
131. Robins v. Spokeo, Inc. (*Robins I*), 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011).
132. 15 U.S.C. § 1681e(b).
133. Robins v. Spokeo, Inc. (*Robins II*), 742 F.3d 409, 410–11 (9th Cir. 2014).
134. 15 U.S.C. § 1681n(a)(1)–(2).
135. *Robins I*, 2011 WL 597867, at *1.

classifying his claims as mere possible future injuries insufficient to confer jurisdiction on the court under Article III.[136]

The Ninth Circuit disagreed. The court was persuaded, in part, by the fact that FCRA provides a private cause of action, but, recognizing that Congress cannot confer standing where there is no identifiable and individual right, also delved into key issues of whether Spokeo's alleged FCRA violation injured Robins in a way that would provide courts with subject matter jurisdiction.[137] Central to the court's conclusion that the alleged violations did provide subject matter jurisdiction was the fact that Mr. Robins claimed his individual statutory rights were violated, which the court concluded with minimal analysis was sufficiently concrete and particularized to be subject to congressional evaluation.[138]

Before the Supreme Court, Spokeo maintains that Robins has not suffered a "real world" injury.[139] In its view, the decision of the Ninth Circuit "eviscerate[s] Article III's standing requirements by rendering the injury-in-fact requirement an empty formality."[140] Spokeo warns that allowing plaintiffs to sue over technical statutory violations will result in them exercising government authority to obtain financial benefits, and this is only amplified by the class action device.[141] According to Spokeo, eliminating individualized issues and allowing no-harm class certification for statutory damages would not only be contrary to Article III standing, but would also lead to billions of dollars in potential exposure in what is essentially a private party government enforcement action.[142] In return, quoting from the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, Robins argues that "[s]tatutory rights are as worthy of judicial protection as common law and constitutional rights because 'there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.'"[143] Robins takes the position that, as a wronged consumer,[144] his right under FCRA to have Spokeo take reasonable procedures to assure maximum accuracy of his personal information is sufficiently concrete to satisfy Article III.[145] As a backup argument, Rob-

136. *Id.*
137. *Robins II*, 742 F.3d at 412–13.
138. *Id.* at 413.
139. Brief of Petitioner at 2, *Robins*, 135 S. Ct. 1892 (No. 13-1339).
140. *Id.*
141. *Id.* at 30–33.
142. *Id.* at 34–35.
143. Brief of Respondent at 24, Spokeo, Inc. v. Robins (Aug. 31, 2015) (No. 13-1339) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992)).
144. This argument is based on the language of the FCRA, which states that "[a]ny person who willfully fails to comply with any requirements imposed under this subchapter with respect to any consumer is liable to that consumer. . . ." *Id.* at 32 (No. 13-1339) (quoting 15 U.S.C. § 1681n(a)(1)(A)).
145. *Id.* at 31–32.

ins also contends that he has suffered a "wallet injury" that meets Spokeo's "real world" injury test because he was entitled to damages as soon as Spokeo invaded his legal rights.[146] With respect to Spokeo's class action argument, Robins characterizes this as a non-issue based on policy arguments with no bearing on Article III standing.[147]

Oral argument was held on November 2, 2015, and a decision is also expected in 2016.

C. *Offers of Relief and Mootness*

On January 20, 2016, the Supreme Court decided in *Campbell-Ewald Co. v. Gomez*[148] that a rejected offer of judgment to the representative plaintiff, which fully satisfies his or her injury, cannot moot the putative class action. Jose Gomez brought a putative class action against Campbell-Ewald Co. for violations of the Telephone Consumer Protection Act (TCPA).[149] Gomez alleged that he received an unsolicited text message from Campbell-Ewald, which is a marketing consultant hired by the Navy to develop and execute a multimedia recruiting campaign that included sending messages to users who had provided consent to solicitation.[150] In the complaint, Gomez sought $1,503 for each unsolicited text message, costs and attorney fees, and an injunction.[151] Before Gomez filed a motion for class certification, Campbell-Ewald filed a notice of offer of judgment, offering to allow an injunction to be entered against it, as well as $1,503 for each unsolicited text message, but did not offer attorney fees.[152] On the same day, Campbell-Ewald presented Gomez with a settlement offer on the same terms.[153] Gomez moved to strike and quash the offer and for class certification. Campbell-Ewald responded by moving to dismiss on the basis that the offer of judgment fully satisfied Gomez's individual claims, rendering the case moot.[154] Relying on the relation-back doctrine, under which the court considers a motion for class certification as relating

146. *Id.* at 36 (No. 13-1339).
147. *Id.* at 54 (No. 13-1339).
148. Campell-Ewald Co. v. Gomez (*Gomez III*), 136 S. Ct. 663 (2016).
149. Gomez v. Campbell-Ewald Co. (*Gomez II*), 768 F.3d 871, 874 (9th Cir. 2014). The TCPA prohibits any person from making a call using an automatic telephone dialing system or artificial or prerecorded voice, except in the case of an emergency, without the consent of the party being called. 47 U.S.C. § 227(b)(1).
150. *Id.*
151. Gomez v. Campbell-Ewald Co. (*Gomez I*), 805 F. Supp. 2d 923, 926 (C.D. Cal. 2011).
152. *Id.*
153. *Id.*
154. *Id.* at 927. The parties agreed that once the class was certified, an offer of judgment could not moot the case. *Id.*

back to the time the original class complaint was filed, the district court ruled that Gomez's claims were not moot.[155]

The Ninth Circuit agreed. In doing so, the court relied on its decision in *Diaz v. First American Home Buyers Protection Corp.*,[156] which was released after the district court ruled on Campbell-Ewald's motion to dismiss. In *Diaz*, the Ninth Circuit recognized that the Sixth and Seventh Circuits have held that an unaccepted offer of judgment for complete relief moots a plaintiff's claims, reasoning that when such an offer is made, there is no longer a dispute to litigate.[157] Despite this, the court was persuaded by the reasoning of Justice Kagan in her dissent to *Genesis Healthcare Corp v. Symczyk*[158] that an unaccepted offer of judgment cannot moot a case because "[a]s every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.'"[159] Based on this, the Ninth Circuit held in *Diaz* that an unaccepted offer of judgment does not render a claim moot, even where it would wholly satisfy the plaintiff's claim,[160] and the Court reaffirmed this holding in likewise deciding that Campbell-Ewald's offer of judgment did not moot Gomez's claims.[161]

Before the Supreme Court, Campbell-Ewald argued that no Article III case or controversy existed because, by offering Gomez everything he could secure through a judgment in his favor, no adversity existed, and he lacked a personal stake in the outcome.[162] Campbell-Ewald also argued that because the offer was made before class certification, the class claim similarly became moot.[163] Gomez countered by arguing that the offer was not all encompassing because it did not include attorney fees. Gomez argued that if the court retained jurisdiction after an offer of judgment to enter judgment, "then by definition an Article III case or controversy continue[d] to exist after the defendant offer[ed] 'complete relief'" and that it would be "absurd to claim that a district court may enter judgment *after* a case has become moot."[164] Gomez also argued that Article III does not demand adversity between the parties at all times, citing as examples guilty pleas, consent decrees, confessions of error by the solicitor

155. *Id.* at 929.
156. 732 F.3d 948, 952 (9th Cir. 2013).
157. *Id.* (citing O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 574–75 (6th Cir. 2009); Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991)).
158. 133 S. Ct. 1523, 1533–34 (2013) (Kagan, J., dissenting).
159. *Id.* (quoting Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill, 119 U.S. 149, 151 (1886)).
160. *Diaz*, 732 F.3d at 954–55.
161. *Gomez II*, 768 F.3d at 875.
162. Brief of Petitioner at 10, Campbell-Ewald Co. v. Gomez, 135 S. Ct. 2311 (2015) (No. 14-857).
163. *Id.* at 11 (No. 14-857).
164. Brief of Respondent at 10–11, *Gomez*, 135 S. Ct. 2311 (No. 14-857).

general, and ex parte litigation.[165] The Court decided "Gomez's claim was not effaced by Campbell's unaccepted offer to satisfy his individual claim."[166] The Court reasoned that the offer of judgment had no efficacy after its rejection.[167] Accordingly, because Gomez's stake in the outcome was unchanged by the rejected offer of judgment, the putative class action was not moot.

Looking ahead, the Supreme Court's grant of certiorari to review a recent Ninth Circuit decision promises to provide an important decision on federal procedure. In *Baker v. Microsoft Corp.*,[168] the plaintiffs brought claims on behalf of a putative class against Microsoft Corporation related to alleged defects with Microsoft's Xbox 360 video game console. The district court struck the plaintiffs' class action allegations from the complaint.[169] The plaintiffs sought interlocutory review of the decision denying class certification pursuant to Federal Rule of Civil Procedure 23(f), but the Ninth Circuit denied the petition. Following that ruling, the named plaintiffs stipulated to the dismissal of their claims with prejudice in order to create a final judgment that could be appealed.[170]

On appeal from the dismissal order, Microsoft argued that the appeal should be dismissed for lack of subject matter jurisdiction.[171] According to Microsoft, allowing plaintiffs to create a final judgment that would provide a basis for an immediate appeal following an adverse interlocutory ruling on class certification undermined the Supreme Court's holding in *Coopers & Lybrand v. Livesay* that, even if a plaintiff could show that denial of class certification was the "death knell" of his case, such an order was not appealable.[172] The Ninth Circuit rejected that argument, however, relying on its earlier holding in *Berger v. Home Depot USA, Inc.* that "'in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal'" of a class certification denial.[173] Microsoft petitioned the Supreme Court for review, arguing that the Ninth Circuit ruling conflicts with decisions of five other circuits. The Court will hear the case next Term.

165. *Id.* at 11 (No. 14-857).
166. *Gomez III*, 136 S. Ct. at 670.
167. *Id.*
168. 797 F.3d 607 (9th Cir. 2015).
169. Baker v. Microsoft Corp., 851 F. Supp. 2d 1274, 1276 (W.D. Wash. 2012).
170. *See* Plaintiffs' Motion to Dismiss Case with Prejudice at *1, Baker v. Microsoft Corp., Case No. 2:11-cv-00722 (W.D. Wash. Oct. 19, 2012), ECF No. 35 ("After the Court has entered a final order and judgment, Plaintiffs intend to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations.").
171. *Baker*, 797 F.3d at 612.
172. 437 U.S. 463, 463–64 (1978).
173. *Baker*, 797 F.3d at 612 (quoting Berger v. Home Depot USA, Inc., 741 F.3d 1061, 1064 (9th Cir. 2014)).