

In light of Justice Scalia’s Death, Dow Chemicals Settles Instead of Taking Its Chances in Front of the Supreme Court

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In a [statement](#) released on February 26th, Dow Chemicals announced the \$835 million settlement of a pending class-action lawsuit citing “growing political uncertainties due to recent events within the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class action suits.” The suit in question—a class action lawsuit alleging illegal urethane price fixing—has already been decided by a lower court in favor of the plaintiff class with damages totaling \$1.06 billion. Prior to settlement, Dow filed a writ of certiorari with the Supreme Court, requesting review of the lower court’s verdict for improper application of class-action lawsuit standards. However, it appears that the passing of Justice Scalia has revised [Dow’s risk assessment](#) to the tune of \$835 million.

The Passing of Justice Scalia

Justice Antonin Scalia, widely known as a staunch critic of the use of class actions, was a reliable vote in favor of Dow’s position. Two of his opinions, *Comcast v. Behrend* and *Wal-mart v. Dukes*, which were specifically cited by Dow in their press release, have been seen as restricting the use of class actions by requiring stricter standards for forming a class. Both opinions were also narrowly decided, with a 5-4 margin.

The passing of Justice Scalia and the resulting vacancy on the Supreme Court has created a new set of possible outcomes for Dow. A liberal appointee would likely create a five-justice majority affirming the lower court. Even if a moderate justice were appointed, the uncertainty of a swing vote could still create significant risk of the same outcome. Alternately, if Congress makes good on its [promise to stall](#) filling the vacancy and the current justices align as in *Comcast* and *Wal-Mart*, it would result in a 4-4 split. Such a tie, while creating no precedent, would still result in the lower court’s holding controlling the outcome of this case—leaving Dow Chemical out \$1.06 billion.

Cases in the Pipeline

The impact of the changes in the Supreme Court is unlikely to affect Dow Chemical alone. Dow’s petition for a writ of certiorari has been on-hold pending a decision in a previously filed class-action lawsuit, *Tyson Foods v. Bouaphakeo*. Another class-action lawsuit, *Microsoft Corp. v. Baker*, has been granted review for this term as well. The successor class-action lawsuit in the landmark *Wal-Mart* case is also pending a grant of certiorari.

It is likely that the outcomes of these cases, made more contentious by the death of Justice Scalia and the new court vacancy, will have a determinative impact on whether companies will continue to confidently litigate class actions or opt for cost-saving settlements.