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Supreme Court

Class Action War Heads to SCOTUS; More Wins For Biz or Have Corporations Gone Too Far?

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The U.S. Supreme Court will be on the front lines of the class action war this upcoming term, experienced business law and class litigators on both sides of the ''v'' tell Bloomberg BNA.

Two cases in particular are ''existential threats to the class action device,'' Deepak Gupta of Gupta Wessler PLLC, a public interest law firm representing consumers and workers, said. He referred to *Spokeo Inc. v. Robins*, *review granted*, 135 S. Ct. 1892, 2015 BL 119588 (April 27, 2015) (No. 13-1339) (16 CLASS 520, 5/8/15), a consumer suit challenging a plaintiff's standing to sue; and *Tyson Foods Inc. v. Bouaphakeo*, *review granted*, 135 S. Ct. 2806, 2015 BL 179522 (June 8, 2015) (No. 14-1146) (16 CLASS 661, 6/12/15), a labor case challenging the class status of a group of workers.

''Those who support the class action device have good reason to be concerned because we're not writing on a blank slate here,'' Gupta said.

The Roberts Court is extremely pro-business, and has been increasingly hostile to class actions, Public Justice's executive director F. Paul Bland Jr., another plaintiff-friendly attorney, told Bloomberg BNA.

But Dentons' Robin Conrad, who led the U.S. Chamber of Commerce's public policy law firm for decades, said the perception of the Supreme Court as business-friendly is just a myth.

And Richard A. Samp and Cory Andrews of the Washington Legal Foundation, which supports policies in favor of business, said the Supreme Court's recent decisions have just been reining in abusive class actions, filed only to extort large settlements from companies.

While business advocates are hopeful that the court will continue that trend in the upcoming term, plaintiff-side attorneys said corporations may be asking the court for too much this time.

Pro-Business: Fact or Fable? The Roberts Court is incredibly favorable to the business community at the expense of consumers and workers, Bland said Sept. 10.

With the addition of Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., the court has been ''taking a really close look at class actions,'' Gupta—who represents the plaintiff in *Spokeo*—said Sept. 1.

''It's something the Chief mentioned when he was being considered for confirmation: that he thought there were issues important to the business community that the court hadn't been taking up,'' Gupta said. ''It had really been decades where the court had let Rule 23 and class action jurisprudence get developed in the lower courts.''

But that changed with the court's decision in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2011 BL 161238 (June 20, 2011) (12 CLASS 519, 6/24/11), and the trilogy of cases involving class action waivers in arbitration agreements that culminated in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 2011 BL 110648 (April 27, 2011) (12 CLASS 362, 5/13/11).

Wal-Mart made it particularly difficult to get a class certified and *Concepcion* nixed thousands of meritorious court cases, Bland said.

The Supreme Court said in *Wal-Mart* that a proposed class of over a million female Wal-Mart workers alleging pay and promotion discrimination couldn't be certified because they failed to establish enough of a common thread in the case to tie their claims together.

Concepcion nullified state law requiring the availability of classwide arbitration in some cases, saying it was inconsistent with the Federal Arbitration Act.

But Conrad said Sept. 10 that the fact that businesses have been ending up on the winning side of recent cases doesn't mean that the court is purposely putting its thumb on the scale in favor of corporations.

These pro-business decisions are really the result of the court's ''preference for a uniform set of legal rules, and for laws and regulations that produce predictable results,'' Conrad said in a 2009 law review article.

Those preferences are often shared by corporations that have wide-ranging operations, Conrad told Bloomberg BNA.

Making a Mockery. Conrad pointed to *Tyson* as an example of how the court is just trying to provide predictability.

Tyson is really about ensuring compliance with Federal Rule of Civil Procedure 23's class certification requirements, she said.

The case involves allegations by 3,000 Iowa meat-processing workers that they were inadequately compensated for time spent donning and doffing protective equipment and walking to and from the production floor.

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The big question in *Tyson* is whether plaintiffs can use statistical data to account for differences in class member working conditions, the WLF's Samp said. The Washington Legal Foundation filed amicus briefs in both *Spokeo* and *Tyson*.

The plaintiffs' expert videotaped workers donning and doffing protective equipment and came up with an average time each worker spent doing these activities.

''The real problem with the class in *Tyson* is that all of the individual employees had vastly different working conditions—some of them worked overtime, some of them did not,'' he said. ''The lower courts allowed the class to proceed on the false assumption that every employee worked the average amount of time.''

''Class actions were never intended to serve situations where individuals are not similarly situated,'' Samp said.

He said the trouble with this ''trial-by-formula'' approach is it can allow class actions to get unruly.

''The case can't really go to trial if it would involve having to call 900 people as witnesses because then the whole point of a class action is lost,'' he said. ''You haven't increased efficiency in any way and so there really shouldn't be a class action.''

The court tried to rein in these cases in *Wal-Mart* by banning trial-by-formula, he said.

''The Rules Enabling Act very explicitly says that Rule 23 cannot be used to deny a defendant the right to defend against each individual claim,'' he said. That means plaintiffs can't take a random sample of class members and extrapolate that data to the whole class.

''That's the whole reason that the court has agreed to hear *Tyson*—to tell the courts that that kind of random sampling is never permissible,'' he said. ''That's just not what class actions are intended for.''

The Eighth Circuit distinguished *Wal-Mart* on the basis that the Tyson employees all worked at the same plant and used similar equipment, and because Tyson had a specific company policy on donning and doffing that applied to all class members. But Tyson argued that the type of equipment worn by each employee and each employee's individual routine varied widely.

Samp said cases like *Tyson* get certified with the knowledge that once certification is obtained the defendant will be forced to settle.

If *Tyson* is reversed, as the WLF argues it should be, ''Those sorts of forced settlements will be significantly decreased because there will be a decrease in class certification in cases where there are thousands of individual issues of fact that predominate,'' Samp said.

WLF's Andrews said he would be very surprised if the court decided to uphold *Tyson*. ''If the court allows Rule 23 to be interpreted in such a way that plaintiffs are not obligated to prove common damages and common injury in one stroke as the rule provides for, it will make a mockery of the class action device.''

Instead he sees *Tyson* as an example of the court defending its own precedents and saying to the lower courts, ''We really meant what we said [in *Wal-Mart*].''

But Gupta said Tyson's opening brief backs off of the second question on which the court granted cert.: whether it's appropriate to certify a class action when the class contains members who weren't injured, such as Tyson's workers who didn't work any overtime.

Tyson is ''sort of backing off the most aggressive implications of their own theory,'' Gupta said. ''From my perspective as someone who supports the use of the class device, it would be great if they don't reach Question 2. But I'm not so sanguine.''

Can Congress Create Article III Injury? Conrad said *Spokeo* is also about reining in abusive class actions.

But Gupta thinks that, instead of policing the lines of Rule 23, the court will be looking at ''the relationship between the class device and Article III, and what the Constitution has to say about the limits of federal courts.''

In that case, plaintiff Thomas Robins alleged that Spokeo Inc., a website that aggregates personal information about web users, violated provisions of the Fair Credit Reporting Act (15 U.S.C. § 1681) by posting inaccurate information about him and other potential class members.

The rub is that the inaccurate information was generally favorable to Robins. For example, he said the website claimed that he had more education and professional experience than he actually did.

Spokeo argues that Robins doesn't have standing to sue under Article III of the U.S. Constitution because he

Staying Classy

Two other cases on the court's docket this term bring up class issues, but their impacts aren't likely to be as significant as *Spokeo* and *Tyson*, court watchers told Bloomberg BNA.

The court will consider whether a proposed class action is mooted when the named plaintiff receives an offer of complete relief on his claim in *Campbell-Ewald Co. v. Gomez*, *review granted*, 135 S. Ct. 2311, 2015 BL 152292 (May 18, 2015) (No. 14–857) (16 CLASS 577, 5/22/15).

Since the court granted certiorari, three federal appellate courts, most notably the U.S. Court of Appeals for the Seventh Circuit, have held that it doesn't.

The court has also agreed to hear a ''real one-off,'' Gupta said, referring to *DIRECTV Inc. v. Imburgia*, *review granted*, 135 S. Ct. 1547, 2015 BL 78410 (March 23, 2015) (No. 14-462) (16 CLASS 347, 3/27/15).

The issue there is whether an arbitration provision in a DIRECTV customer agreement was properly found unenforceable under California contract law because of its bar on class claims.

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didn't suffer a ''concrete, particularized injury-in-fact,'' Andrews, of the Washington Legal Foundation, said.

The case ''raises the fundamental standing question of 'What does it mean to have suffered an injury? Does it have to be a real injury-in-fact or can it be an injury that was simply declared by Congress to be an injury entitling someone to $500 in statutory damages?' '' Samp said.

He sees the injury question as a particular concern in *Spokeo*, where ''there quite clearly was no actual injury.''

Questioning the injury in *Spokeo* is tantamount to second-guessing Congress, which allows plaintiffs to sue anyone who willfully violates the FCRA by publishing incorrect information, Gupta said.

Gupta considers the question of what constitutes an injury a ''philosophical question, almost a question of metaphysics.''

''It's a kind of question that society has to decide through the political branches,'' he said. ''If Congress says, 'We regard the following thing as an injury. If this happens to you, there should be a cause of action,' it's very difficult for the courts to superintend that kind of decision.''

Samp doesn't see it as second-guessing Congress. ''Congress should not be understood to have tried to overrule the Constitution; rather all Congress said was, 'If in fact you were injured, we will provide you a remedy that includes a dollar judgment that doesn't necessarily correspond to your actual dollar proof of your injury.' ''

Would Statutes Survive *Spokeo* Reversal? If the court reverses *Spokeo*, where does that leave statutes such as the FCRA and the Telephone Consumer Protection Act (47 U.S.C. § 227), which covers robocalls and fax blasts, that provide statutory damages for harms Congress has deemed injuries?

Legitimate class actions would still have a shot, Andrews said.

''What it means is that a bare violation of the statute and nothing more isn't going to get you into federal court,'' he said. ''However, there are lots of examples that one can think of and cases that one can point to where the violation of those laws did result in concrete, particularized harm to the plaintiff.''

''In those cases the plaintiff will still be able to bring suits even if the court rejects the notion that a bare statutory violation suffices to gain access to the courthouse,'' Andrews said.

Samp suggested that Robins' case would have been viable if he could have demonstrated that as a result of the incorrect information, he wasn't considered for a job he might otherwise have been offered.

But Gupta said the future of suits under those statutes depends on what the court says.

''The court would have to devise some test for when there's an injury and when there's not,'' he said. ''The court just has never done that before.''

Such a test could spawn a wave of satellite litigation about how to apply whatever test the court announces, he said.

''It would really rip a hole through the fabric of American law and through the U.S. Code if you start second-guessing all these determinations,'' Gupta said. ''It's a really, really tough case. My hope is that, even if some members of the court want to go to a certain place, it will just be too difficult to go there.''

Terrified but Hopeful. Bland, of Public Justice, said that he's hopeful too—terrified, but still hopeful.

In general, the Supreme Court has been solicitous of allowing corporations to avoid liability, he said.

The decisions to review *Tyson* and *Spokeo* this term certainly allow the court to continue that trend. As Gupta put it, ''The decisions to grant these cases are not pro-plaintiff grants.''

''I think it's reasonable to expect that the people that voted to grant cert. didn't do it to go along with the status quo,'' he said.

But corporations may have gone too far this time, Bland said. What they are asking for is really radical, he said.

Just a couple of terms ago, the justices refused to go along with the business community when it sought to effectively eliminate securities class actions, Bland said. He referred to *Halliburton Co. v. Erica P. John Fund Inc.*, 134 S. Ct. 2398, 2014 BL 172975 (June 23, 2014) (15 CLASS 707, 6/27/14).

Conrad, however, doesn't see it that way. All the grumbling from plaintiffs' attorneys over the court's class action jurisprudence is just natural resistance, she said, adding that the same thing happened before when the court tried to rein in abusive practices.

But the protests aren't limited to plaintiffs' attorneys.

A majority of the court seems to have an ''appetite for big bold class action decisions'' that limit the device, Gupta said. In response, there's been an unprecedented willingness for the minority justices on the court to call out the majority's agenda-setting decisions, he said.

He pointed to Justice Elena Kagan's dissent in *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2013 BL 163177 (June 20, 2013) (14 CLASS 739, 6/28/13), where the majority upheld class waivers in arbitration agreements between merchants and credit card company American Express.

''To a hammer, everything looks like a nail,'' Kagan wrote. ''And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.''

That and similar dissents are remarkable ''because they call the court out on what it's doing,'' Gupta said. ''It's not just a disagreement about the merits, it's about the court's motivations in granting cert. in these cases in the first place.''

Roberts is deeply concerned about the legitimacy of the court and doesn't want it to be seen as just another corrupt institution that just does what the Koch brothers want, Bland said.

It remains to be seen how *Spokeo* and *Tyson* will fit into the court's—and Roberts's—legacy. Both high-stakes cases are set to be heard by the justices in November.

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