Justices' Business Docket Heating Up Next Term

Marcia Coyle, Supreme Court Brief

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From the business community's perspective, its biggest concerns did not make the U.S. Supreme Court's hot list last term. But the new term looks promising, according to some business leaders.

Just two words can make that community's day: class actions. And three class action-related cases are already on the October 2015 docket for arguments and decisions—all filed by businesses seeking relief.

"We observed last September that the business litigation docket wasn't necessarily where it was at in terms of most prominent or blockbuster cases," said Kate Comerford Todd, senior vice president and chief counsel for the U.S. Chamber Litigation Center. That assessment did not change as the October 2014 term progressed.

However, Todd added, "We're already looking ahead to 2015. That is shaping up with real opportunities for the business litigation docket."

One of the three class actions, she said, could help push back on a lot of claims having no underlying injuries. And the other two provide a "very, very important look at problems in how the lower courts are allowing class certifications."

Business, as usual, hopes to spin those cases into sweeping pronouncements by the justices, said some consumer lawyers closely watching the challenges. However, when the justices delve into the law and facts, the outcomes may well be narrower than business anticipates, they predicted.

However, at this early stage, and with more cases likely to be granted in the fall, "It's already shaping up to be a much more interesting business docket than last term," said Cory Andrews of the Washington Legal Foundation.

Class actions return

The case with the greatest potential for a ruling on standards for class certification is *Tyson Foods v. Bouaphakeo*.

The class includes hourly workers at a pork-processing facility who charge that Tyson Foods Inc. failed to pay them fully for time spent donning and doffing personal protective equipment and

walking to and from their work stations. The class was certified based on the existence of common questions about whether these activities were compensable "work."

At trial, the court allowed the plaintiffs to prove liability and damages with statistical evidence that presumed all class members were identical to an "average" employee. After the jury held for the class, the district court entered a $5.8 million judgment for the plaintiffs.

The justices agreed to decide two questions: whether differences among individual class members may be ignored—and a class certified under Rule 23, or a collective action certified under the Fair Labor Standards Act—when plaintiffs use statistical techniques that presume all class members are identical for damages and liability; and whether a class or collective action may be certified that contains hundreds of members who were not injured and have no legal right to damages.

"The first question is a revisit of *Wal-Mart v. Dukes*, where time and again the court has said you can't take shortcuts and defendants have the right to respond to individualized claims," Andrews said.

The second question, he added, has divided the circuits—whether all members of the class must have Article III injuries in fact, or just the named plaintiff or representative. "*Tyson* is a great case for that, because there are literally hundreds of people in the class who are potential beneficiaries of the payout but who never really suffered any injury whatsoever."

Sidley Austin's Carter Phillips represents Tyson, and the workers' counsel is Scott Michelman of Public Citizen Litigation Group.

The second case, *Spokeo v. Robins*, has been described as one of the most talked about privacy and consumer class action cases of the past year.

Thomas Robins alleged that the search-engine Spokeo Inc. posted inaccurate information about him on its public website, Spokeo.com, which aggregates publicly available information. Robins argues that Spokeo violated the Fair Credit Reporting Act by failing to provide him with mandatory notices and that the false information caused actual harm to his job prospects by reporting that he was wealthy and held an advanced degree when, in fact, he was trying to find a job.

Spokeo challenges the ruling by the U.S. Court of Appeals for the Ninth Circuit that Article III's injury-in-fact requirement was satisfied because of the statutory penalties under the Fair Credit Reporting Act. Robins had standing by virtue of the violations of his statutory rights, according to the appellate court.

"The defense bar is trying to portray a lot of statutory-damages remedies provided especially to consumers as no-injury types of remedies, and trying to use this case as a basis for sweeping away a lot of other similar statutory remedies," said Scott Nelson, also of Public Citizen Litigation Group. "When you look more closely, in most of those statutes, Congress has provided a remedy for something that's not extraordinary to view as an injury."

Mayer Brown's Andrew Pincus represents Spokeo; Deepak Gupta of Gupta Wessler is counsel to Robins.

The third class action-related case is *Campbell-Ewald v. Gomez*. The justices said they would decide whether a case is mooted in its entirety by a defendant's offer of judgment before a class is certified if the offer would fully satisfy the claim of the would-be class representative.

Gregory Garre of Latham & Watkins is counsel to Campbell-Ewald Co., and Michael McMorrow of Chicago's McMorrow Law represents Gomez.

Watch list

The business docket thus far also includes the following cases:

* *Merrill Lynch, Pierce, Fenner & Smith v. Manning*: Whether Section 27 of the Securities Exchange Act gives federal courts exclusive jurisdiction in this naked-short-selling case. Jonathan Hacker of O'Melveny & Myers for Merrill Lynch; Peter Stris of Los Angeles' Stris & Maher for Manning.

* *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*: Whether the Employee Retirement Income Security Act's reimbursement clause allows an insurance company to impose a lien against an accident settlement even though the money has been disbursed for legal fees and personal expenses of the insured and his child. Peter Stris of Los Angeles' Stris & Maher for Montanile; Hogan Lovells' Neal Katyal for National Elevator.

* *DirecTV v. Imburgia*: Whether the company's arbitration clause prohibiting classwide resolution of claims is valid. Christopher Landau of Kirkland & Ellis for DirecTV; Paul Stevens of Milstein Adelman in Santa Monica, California, for Imburgia.

* *Hawkins v. Community Bank of Raymore*: Whether the Equal Credit Opportunity Act applies to loan guarantors. Jay Shadwick of Duggan Shadwick Doerr & Kurlbaum, Overland Park, Kansas, for Hawkins; Greer Lang of Lathrop & Gage, Kansas City, Missouri, for the bank.

* *Gobeille v. Liberty Mutual Insurance*: Whether the Employee Retirement Income Security Act pre-empts requirements that self-funded insurers provide certain information to state databases. Vermont Solicitor General Bridget Asay for Gobeille; Seth Waxman of Wilmer Cutler Pickering Hale and Dorr for Liberty Mutual Co.

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