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Supreme Court

Class Actions at SCOTUS: The Term That Wasn't

By Perry Cooper

The prognostications from the plaintiffs' bar were dire. The U.S. Supreme Court could effectively wipe out class actions with the cases it had agreed to hear this term.

But now that the 2015-2016 term is over, some of those same attorneys are singing a different tune.

Samuel Issacharoff, professor of civil procedure and complex litigation at New York University School of Law, deems the top court's slate of class action cases that concluded in June ''the term that wasn't.''

''People were legitimately predicting that this term included several cases that posed an existential threat to the class action device,'' plaintiffs' attorney Deepak Gupta told Bloomberg BNA.

''Not only did that not turn out to be the case, but the era where the Supreme Court is interested in radically curbing the class device is over,'' he said. Gupta is founding principal of Gupta Wessler PLLC, a Washington public interest law firm representing consumers and workers.

But the plaintiffs' bar may have set themselves up for declaring a more significant victory than they actually won by exaggerating the risks to class actions in the first place, Archis A. Parasharami, a partner at defense firm Mayer Brown in Washington, said.

''The plaintiffs' bar's over-exuberance over the results in a case like *Spokeo* seem to stem from an unreasonable fear that these cases threatened all class actions to begin with,'' he told Bloomberg BNA.

Gupta and Parasharami represented the opposing parties in that much anticipated statutory standing case before the top court.

''But that would have been an unrealistic expectation from either side to begin with,'' Parasharami said.

Another plaintiffs' attorney, however, shrugged off Parasharami's comments as sour grapes, calling his comments ''a fascinating attempt at damage control'' on the part of the defense bar.

''As Donald Trump has proven, it is possible to claim anything, but the facts are the facts,'' Arthur Bryant, chairman of Public Justice, a consumer advocacy organization in Oakland, Calif., said.

''If you go and look at the briefs they did not get anything significant that they wanted,'' Bryant said.

Cases This Term. The Supreme Court heard three cases this term which were anticipated by both sides to have potentially significant class action implications.

In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (17 CLASS 80, 1/22/16), a case over unsolicited text messages, the court revisited the issue of whether a defendant can end a class action by ''picking off'' a named plaintiff by offering to settle his or her claims.

The court held that an unaccepted offer of judgment doesn't moot a plaintiffs' individual or class claims.

In *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 194 (2016) (17 CLASS 307, 3/25/16), a worker overtime case, the court held that plaintiffs may use statistical evidence to prove classwide injury as long as an individual could use that same evidence to prove his or her own claim.

It was a win for plaintiffs, but defense attorneys say the decision lays out a clear strategy for how plaintiffs' use of statistics may be challenged in future class cases.

Finally, *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016) (17 CLASS 555, 5/27/16), asked the court to decide whether a statutory injury alone, in this instance under the Fair Credit Reporting Act, is enough to give a plaintiff standing to pursue a class suit in federal court.

This case was particularly closely watched because of its implications for a host of other statutory cases and privacy suits.

The court said a ''bare procedural violation'' wouldn't satisfy concreteness, which the defense bar considers a win.

But plaintiffs' advocates consider the ruling a victory too because it also acknowledges that intangible injuries and the ''risk of real harm'' can satisfy that concreteness requirement.

Defense Overreach. Gupta said the defense bar tried to reach too far in its attempt to cripple class actions with these cases. They just weren't the right vehicles, he said.

''It almost seems as if the lower courts couldn't produce enough cert-worthy class action victories to satisfy the court's appetite for cases that would present an opportunity to really radically curtail class actions,'' he said.

Bryant also attributes the pro-plaintiff decisions to defense overreach. Bryant's organization filed an am-

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2015 - 2016 SCOTUS Term in Tweets

Class Plaintiffs' Bar Changes Its Tune

Campbell-Ewald v. Gomez (decided 1/20/16)

Before

Paul Bland @FPBland - 19 May 2015

If corp defense bar gets what it wants from #SCOTUS in Gomez, will wipe out many cases involving privacy injuries, wage & hour laws

CJ&D @centerjd - 15 Oct 2015

The little #SCOTUS case with "wide-reaching implications for #classaction lawsuits and access to justice"

After

Edelson PC @edelsonpc - 20 Jan 2016

Campbell-Edwald v. Gomez: a huge win for consumers across the country! #byepickoffs!

Brandon C. Fernald

@BrandonCFernald - 20 Jan 2016

Class action dodged a bullet at the US Supreme Court today in Campbell-Edwald v. Gomez. ow.ly/XkCoK

Tyson Foods v. Bouaphakeo (decided 3/22/16)

Before

Daniel C. Girard

@DanielCGirard - 8 Jun 2015

Class action battle with Tyson vs low wage workers in S. Ct.: not liking the odds on this one--

Deepak Gupta

@deepakguptalaw - 9 Nov 2015

Another nail in the class action coffin? What's at stake in Tyson Foods, being argued before #SCOTUS tomorrow: afj.org/blog/tyson-foo...

After

Joshua Block

@JoshACLU - 22 Mar 2016

With decisions in Tyson & Campbell-Ewald, it looks like defense class action bar seriously overreached this term.

Ian Millhiser

@imillhiser - 22 Mar 2016

Whoa! SCOTUS just sided with class action plaintiffs for the second time this term. It's morning in American again.

Spokeo Inc. v. Robins (decided 5/16/16)

Before

Adam M. Tamburelli

@TamburelliLaw - 27 April 2015

SCOTUS grants cert in Spokeo. The implications could be huge for consumer class actions.

Paul Bland @FPBland - 30 Oct 2015

#SCOTUS decision in Spokeo case could savage laws protecting consumer privacy. Prof Chemerinsky on stakes: abajournal.com/mobile/article...

After

Jay Edelson @jayedelson - 16 May 2016

#scotus rejects #spokeo's real world injury test, sends case to 9th for analysis. 90% win for consumers. Congrats team; much more work to do

Paul Bland @FPBland - 16 May 2016

Supreme Court decision in Spokeo is overwhelmingly a win for consumers! I explain here: publicjustice.net/8665-2/ Pls retweet and share!

A BNA Graphic/twee13g1

  CLASS ISSN 1529-0115

icus brief on behalf of the plaintiffs in each of the three class action cases.

The defense bar ''saw that they had a court that was historically extraordinarily antagonistic to class actions and they decided they were going to go for everything they could,'' he said.

''Prior decisions asked for changes in interpretations to Rule 23 itself,'' Bryant said, referring to the federal rule that governs class actions.

''The arguments being made in the cases this year went way beyond class actions and all would have dramatically changed fundamental areas of the law and affected lots of things other than class actions in all sorts of ways,'' Bryant said.

''I think that overreach accounts significantly for the results in the litigation,'' he said.

Changes After Scalia's Death. Justice Antonin Scalia's death February 13 also may account for at least part of the court's shift in favor of class plaintiffs, Gupta and Bryant said.

But looking at the votes in the three class cases, it's hard to see how Scalia's voice would have made a difference in the outcomes.

Scalia's vote doesn't appear to have been determinative in any of the class cases decided this term, Parasharami said.

''I think that has not gone as unremarked upon as you think, given that the evidence is right there on the face of the opinions,'' he said.

Campbell-Ewald came down before Scalia's death 6-3 with Scalia joining the dissent.

The other two came down after his death. The breakdown in *Tyson Foods* was 6-2 with Chief Justice John G. Roberts Jr. joining Justice Anthony M. Kennedy's majority opinion. *Spokeo* was also 6-2.

'Sign of Institutional Paralysis.' Gupta, who represented the plaintiff in *Spokeo*, said that opinion provides one piece of evidence for how the court will function without Scalia on the bench.

The *Spokeo* ruling, which he called a ''heavily negotiated document,'' provides ''a fascinating window into this new coalition that seems to have formed on the court between Kagan, Breyer, the Chief and Kennedy. It is a product of a committee,'' Gupta said.

But it wasn't designed to provide any specific guidance to the lower courts, Gupta said. ''It's designed to make it look like the Supreme Court is capable of reaching decisions.''

Other non-class decisions this term, such as its ruling on challenges to the Affordable Care Act's contraceptive mandate, are also proof of this. ''The court doesn't want to admit that it is in a state of institutional paralysis, or at least four core justices in the middle don't want to admit that.''

Still, Gupta called the *Spokeo* decision ''a stay of execution.'' The court stopped short of what he viewed as the defense push to bar all statutory damages suits.

But Parasharami, who represented Spokeo, said that broadly shutting down statutory injury suits was never what the case was about from the defendants' perspective.

The plaintiffs' bar views *Spokeo* as a win because they had unrealistic fears about what the case was about to begin with, he said.

''There wasn't any attempt by us to argue that intangible—meaning non-monetary harms—were off the table,'' he said.

Parasharami also said the *Spokeo* decision gave the defendants exactly what they asked for: A clear statement that violation of a statute alone is not necessarily enough to pursue a class suit.

Bryant agreed that the case was technically a win for the defendants, but said, ''I don't think the defense bar wants more wins like this!''

Boomerang Issues Possible. Parasharami said he expects questions left open this term to find their way back to the Supreme Court in the next few years.

Campbell-Ewald left open whether an actual tender of relief would moot the claims. Several lower courts have been reluctant to accept the tender argument in subsequent cases (17 CLASS 651, 6/24/16).

But Parasharami said there is still a ''glimmer of an opportunity there to follow up on the exception.''

He pointed to Roberts' dissent, saying ''the Chief Justice seems to believe strongly that in an appropriate case the tender approach is one that could have legs.''

Spokeo also leaves a number of issues to be sorted out. He said defendants will continue to raise questions about plaintiffs' ability to sue because ''we believe in a lot of cases, the named plaintiff or enormous segments of the putative class are without Article III standing.''

Another issue still outstanding is one the *Tyson Foods* opinion didn't address: the ''no-injury'' question raised initially by the defendants, that is, whether a class can be certified when it includes uninjured class members.

The majority opinion said it is an important question but *Tyson Foods* was the wrong case for the court to resolve it, Parasharami said.

''But Justice Kennedy has invited the issue to return to the court in an appropriate case,'' he said. The defense bar should heed Kennedy's call to raise the ''no-injury'' argument in appropriate cases, he said.

Gupta, however, called this lingering issue the *Tyson Foods* ''table scraps.''

He said plaintiffs are less concerned about the court revisiting that argument because the five-justice anti-class action majority that prevailed in recent years doesn't exist anymore.

Class Battle Deferred. As for the upcoming term, the court has so far agreed to review only one class case, *Microsoft Corp. v. Baker*, U.S., No. 15-457, *review granted* 1/15/16 (17 CLASS 256, 3/11/16).

That case asks the court to consider the propriety of the plaintiffs' decision to voluntarily dismiss, with prejudice, their allegations that the Xbox 360 video game system is defective, in order to guarantee their right to appeal an unfavorable class certification decision.

Gupta said the court may reject this plaintiffs' tactic for the same reason it rejected defendants' pick-off attempts in *Campbell-Ewald*. ''The court doesn't want litigants to be engaging in gamesmanship and playing these cute little games,'' he said.

Aside from that case, Bryant said he doesn't expect the court to have much of an appetite for additional class issues while the court is down a justice. And that will likely be the reality through next term given the upcoming presidential election and the Senate's refusal to

act on President Obama's nomination of Merrick Garland.

''They are hesitant to take up any sticky issues because they know there's a split,'' he said. ''From there it depends on who is appointed.''

Professor Issacharoff agreed that the court as it is currently composed doesn't have the same ''conservative impulse to check class actions that came from Justice Scalia.''

He pointed to the large number of petitions for review that have been denied in cases involving class action issues since Scalia's death.

Issacharoff wrote opposition briefs on behalf of class plaintiffs in two cases that asked the court to tighten up on ascertainability, the test to determine class membership (17 CLASS 249, 3/11/16).

Petitions for review in both those cases were rejected.

New Epicenter: Appeals Courts. For now, it appears that the circuit courts are the effective courts of last resort for federal issues involving class and other cases, Bryant said.

Issacharoff agreed that the circuits are where class action law is being developed now.

One focus of particular interest at the moment in the circuit courts, Issacharoff said, is differing ways of handling large, consolidated class cases.

He pointed to the Fifth Circuit's rulings in the Deepwater Horizon oil spill litigation (16 CLASS 567, 5/22/15), and the Third Circuit's approval of the National Football League concussion settlement (17 CLASS 597, 6/10/16).

''The courts of appeals have become very sophisticated,'' he said. ''If you read between the lines of Justice Kennedy's opinion in *Tyson Foods*, there's an acknowledgement that there's where the action has shifted.''

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