

Supreme Court

Banking

SCOTUS Will Review Fair Housing Case That May Shape Bias Class Suits Against Lenders

The U.S. Supreme Court Nov. 7 said it will consider a case that tests whether the Fair Housing Act (FHA) allows race discrimination claims under a disparate impact analysis (*Magner v. Gallagher*, U.S., No. 10-1032, cert. granted 11/7/11).

The case, an appeal from a ruling by the U.S. Court of Appeals for the Eighth Circuit, is being watched by consumer advocates and lenders because of possible fallout for fair lending enforcement and class actions in connection with claims of lending bias.

Class suits, as well as enforcement actions by the Department of Justice, have argued that facially neutral loan policies can have, and have had, a disproportionate and adverse effect on credit availability for protected classes.

The Eighth Circuit's September 2010 decision has been on the radar screen for many who say it could shed new light on whether the FHA allows the same type of disparate impact claims often used in the employment law context.

Answer Needed, St. Paul Says. In its decision, the Eighth Circuit said the City of St. Paul, Minn., may be liable under the FHA for enforcing its housing code in a way that harmed racial minorities.

Lawyers for St. Paul asked the justices to hear an appeal, saying a clear answer on the availability of disparate impact claims under the FHA is long overdue and much-needed.

Jonice Gray Tucker, a partner with BuckleySandler in Washington, D.C., who defends financial institutions in fair lending cases, Nov. 7 said the court's decision to hear the case "will have significant implications for financial institutions as both the Department of Justice and private litigants have taken increasingly aggressive positions in pursuing such claims in recent years."

"The better legal view is that disparate impact claims may not be brought under the FHA. I am optimistic that the Supreme Court's ruling will eliminate the use of the disparate impact theory in FHA cases, or alternatively, set forth strict parameters for pursuing such claims that will moderate the use of this theory in the future," Tucker told BNA.

The justices did not elaborate on their decision to hear the FHA case. However, they granted a motion by the International Municipal Lawyers Association to file a friend of the court brief.

Meanwhile, Watch Wal-Mart. Although argument in the FHA case is months away, recent Supreme Court jurisprudence is having a noticeable impact on several active fair lending disputes.

In June, the justices decided *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), holding plaintiffs failed to meet the commonality requirements needed for class certification in an employment discrimination case against the retailing giant.

The *Wal-Mart* decision has been applied in two recent class certification rulings involving lenders.

In each case, judges said the plaintiffs failed to meet the commonality requirement in Rule 23(a) of the Federal Rules of Civil Procedure (12 CLASS 966, 10/28/11; 12 CLASS 967, 10/28/11).

However, experts say the true impact of the *Wal-Mart* ruling on class litigation will take time to sort through.

Although *Wal-Mart* makes it easier to short-circuit a class action, it could complicate efforts to settle disputes because of the high degree of commonality also required for judicial approval of those accords.

By R. CHRISTIAN BRUCE

Labor

SCOTUS GVRs Labor Case, Raises Question Whether *Concepcion* Applies to State Cases

The U.S. Supreme Court told the California Supreme Court Oct. 31 to reconsider its holding that an employee must be permitted to pursue administrative adjudication before submitting a claim to arbitration in light of the high court's decision last spring in *AT&T Mobility LLC v. Concepcion* (*Sonic Calabasas A Inc. v. Moreno*, U.S., No. 10-1450, granted, vacated, remanded 10/31/11).

The petitioner, automobile dealership *Sonic-Calabasas A Inc.*, had requested the U.S. Supreme Court grant its petition, vacate the California Supreme Court's judgment and remand for further consideration in light of *Concepcion*, 131 S. Ct. 1740 (2011) (12 CLASS 362, 5/13/11).

In *Concepcion*, the U.S. Supreme Court held in a 5-4 opinion that the Federal Arbitration Act preempted a California state law rule that prohibited most class action waivers in consumer arbitration agreements.

This case arose after Frank Moreno filed a claim through the California Labor Commissioner seeking unpaid vacation wages from *Sonic-Calabasas A*, even though the parties had an agreement to submit all disputes to binding arbitration.

The California Superior Court in Los Angeles denied the dealership's motion to compel arbitration, holding the employee must be able to proceed first to the Labor Commissioner before the matter could be arbitrated.

The appeals court reversed, but the California Supreme Court reinstated the trial court's decision. The California Supreme Court concluded California's public policy favoring the informal adjudication of wage claims through an administrative process was violated

by an agreement that required employees to arbitrate their claims.

Has SCOTUS Tipped Hand on State Court Application of *Concepcion*? The U.S. Supreme Court's GVR summary disposition calls into question the position of some plaintiffs' advocates who have suggested the *Concepcion* decision does not reach state court decisions.

Justice Clarence Thomas—who provided the critical fifth vote in *Concepcion*—has said in multiple opinions that Section 2 of the Federal Arbitration Act does not apply in state court, they say (12 CLASS 364, 5/13/11). The *Concepcion* case arose from federal district court, and Thomas may have joined the four *Concepcion* dissenters if the case had come from state court, these commentators have said.

But one such commentator, **F. Paul Bland, a senior attorney at Public Justice**, told BNA Oct. 31 that it is easy to over-read the significance of a GVR order.

"They're very different from a summary reversal," he said. "It's more equivalent to saying 'did you consider this before you ruled.'"

Moreno was represented by Miles F. Locker of Locker Folberg LLP in San Francisco.

Sonic Calabasas A was represented by John P. Boggs of Fine Boggs & Perkins LLP in Long Beach, Calif.

BY JESSIE KOKRDA KAMENS

Discrimination

Supreme Court's Commonality Discussion In *Wal-Mart v. Dukes* Faulty, Speaker Says

SEATTLE—A recent decision by the U.S. Supreme Court that effectively ended a sex discrimination class action against Wal-Mart Stores Inc. marks "the end of class actions as we know it," and raises questions that will leave plaintiffs' attorneys scratching their heads, a law professor said Nov. 3 at the annual conference of the American Bar Association's Section of Labor and Employment Law.

Eric Schnapper, a professor at the University of Washington School of Law who has been involved in more than 70 Supreme Court cases, discussed the high court's recent rulings in the area of labor and employment law.

He directed much of his attention to *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (12 CLASS 519, 6/24/11), in which female Wal-Mart employees sued the company on behalf of themselves and a nationwide class of about 1.5 million female employees. The plaintiffs alleged violations of Title VII of the 1964 Civil Rights Act by way of local managers' alleged disproportionate use of their discretion over pay and promotion decisions in men's favor and the company's alleged allowance for this discretion. The court held that certification of the class was improper.

Commonality Discussion Confusing. In Part II of the court's majority opinion in *Wal-Mart*, Justice Antonin Scalia wrote that the plaintiffs did not satisfy Federal Rule of Civil Procedure 23(a)(2)'s commonality prerequisite for class certification. Scalia said they did not show that their claims depended upon a common contention, which "must be of such a nature that it is capable of classwide resolution—which means that deter-

mination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

Schnapper described this section of the opinion as "meandering" and inconsistent. He said *Wal-Mart* leaves plaintiffs in the dark as to what the actual meaning of the commonality requirement is and what evidence they need to satisfy it.

At points, the opinion reads as if the plaintiff must show at the certification stage that discrimination is an employer's standard operating procedure and may not proceed with mere evidence that discrimination is pervasive, Schnapper said. He added, assuming that pattern-or-practice cases that do not involve a centralized employer directive still are viable, the court's opinion does not clarify the extent to which plaintiffs must show that discrimination takes place.

Wal-Mart does not explain what types of statistical evidence are sufficient to meet the commonality prerequisite, Schnapper added, questioning whether plaintiffs will be required to provide separate data regarding each of an employer's regions, stores, or supervisors that a proposed class covers.

He also found indecisive the court's expressed "doubt" as to the district court's finding that the standard for gauging the admissibility of expert witnesses' testimony under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), does not apply to such testimony at the class certification stage.

Additionally, Schnapper criticized as imprecise the court's treatment of the *Wal-Mart* plaintiffs' anecdotal evidence in the form of 120 affidavits reporting instances of discrimination—about one for every 12,500 class members. The court said this evidence was not enough to show that the whole company operates under a general discrimination policy. Schnapper questioned what ratio of individual accounts to number of class members plaintiffs need to achieve and what effect anecdotal evidence of overtly discriminatory remarks has at the certification stage.

Schnapper said Part III of the *Wal-Mart* opinion, in which the court held that claims for individualized monetary relief—including the *Wal-Mart* plaintiffs' claims for back pay—may not be certified under Rule 23(b)(2) and are appropriately certified under Rule 23(b)(3), is relatively straightforward.

Rule 23(b)(3) permits certification of a class where "questions of law or fact common to class members predominate over any questions affecting only individual members." The extent to which such class actions will survive Rule 23(b)(3) analysis depends on the meaning of "predominate," Schnapper said. He added that one way to assess predominance is to measure the time that would be spent conducting individualized determinations of every class member's eligibility for relief, but that in actuality employers do not spend much time on such determinations.

BY ELLIOTT T. DUBE