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Supreme Court

Some Politics Behind Dow Class Deal Announcement?

BY PERRY COOPER

Dow Chemical Co. announced Feb. 26 that it will settle a major antitrust class action pending before the U.S. Supreme Court in light of Justice Antonin Scalia's death less than two weeks ago. One prominent consumer advocate, however, says a fair amount of spin could be at play here.

Dow cited "growing political uncertainties due to recent events within the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class action suits" in its statement announcing the \$835 million deal (*Dow Chem. Co. v. Indus. Polymers Inc.*, U.S., No. 14-1091, *settlement announced 2/26/16*) (see related story).

But F. Paul Bland Jr., executive director of Public Justice, which often supports consumers in class action cases, said that there might be some politics behind the settlement's announcement.

"There's something political going on outside of the legal calculus that made them issue this press release saying, 'We settled this case because of Justice Scalia,'" Bland told Bloomberg BNA.

Dow is hoping the Senate will hold fast and not move forward on any nominee President Barack Obama may appoint to replace Scalia, Bland said. An Obama nominee isn't likely to be as hostile to class actions as Scalia was.

A Dow spokesperson didn't respond directly to requests about Bland's comments and instead referred Bloomberg BNA to its press statement. Other attorneys involved in the case also wouldn't comment.

Doesn't Change Calculus. It was already looking like the court wouldn't rule for Dow even if it took up the company's certiorari petition, Bland said.

Dow's petition challenged the plaintiffs' use of extrapolations to prove classwide impact and damages, calling it improper "trial by formula."

Bland acknowledged that Scalia was the author of the underlying ruling banning that practice, *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2011 BL 161238 (2011) (12 CLASS 519, 6/24/11), and that his death took away a very strong vote in Dow's favor had the court agreed to hear the suit.

But, he said, the top court heard oral argument three months ago in *Tyson Foods Inc. v. Bouaphakeo*, U.S., No. 14-1146, *argued 11/10/15* (16 CLASS 1243, 11/13/15), a case that raised similar arguments to those in *Dow*.

It appeared unlikely, Bland said, based on that argument, that the top court had the appetite to extend *Wal-Mart* further.

There was also a signal as far back as June that a settlement was in the works between Dow and the other antitrust parties when they filed—and then promptly withdrew—an emergency joint motion to hold the certiorari petition in temporary abeyance.

A case like this doesn't get settled in a day, or even in the two weeks since Scalia died, Bland said.

"Since I have a million cases that have been struggling and hanging on for years, I really hope that this Dow thing turns out to be right and that defendants start opening their checkbooks across the country and settle every case on the grounds that Justice Scalia's death changes everything," he said.

But so far, his phone hasn't been ringing off the hook with defendants offering settlements, he said.

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