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Retail Cases To Watch In 2015

By **Jonathan Randles**

Law360, New York (January 02, 2015, 3:28 PM ET) -- A bevy of legal cases poised to have a substantial impact on the U.S. retail industry are set to be decided in 2015. From high-stakes appeals arising from merchants' long-running feud with banks over swipe fees to a case that may make it more difficult for the Equal Employment Opportunity Commission to bring sweeping litigation against employers, here are the cases that will captivate attorneys this year.

NACS v. Board of Governors of the Federal Reserve System

Retailers large and small were miffed when the Federal Reserve issued final rules capping the amount banks could charge merchants at 21 cents per debit card transaction, 75 percent higher than the 12 cent cap the regulator had originally proposed. The change followed a lobbying blitz led by industry heavyweights Visa Inc. and MasterCard Inc.

Merchants' frustration only grew when the D.C. Circuit in March signed off on the rule, concluding the Fed had reasonably interpreted the Dodd-Frank Act's so-called Durbin amendment. The amendment had directed the Fed to come up with rules that would ensure debit swipe fees were comparable to the actual cost incurred for processing a transaction.

Retailers including Wal-Mart Stores Inc. cried foul, arguing that although the cap was lower than the 44 cent charge that could come without such a rule, the final cap was still too high and violated the intent of the Durbin amendment. In August, the National Association of Convenience Stores, National Retail Federation and other trade groups petitioned the U.S. Supreme Court to review the case and overturn the decision.

“The strategic implications of locking in a fairly robust interchange fee in terms of how debit interchange functions in this country are profound,” said Jeffrey Shinder, managing partner of Constantine Cannon LLP's New York office. Shinder filed an amicus brief on behalf of 7-Eleven Inc., Starbucks Corp. and other merchants.

NRF claims merchants and customers will incur billions in fees if the cap is not reduced. In an unusual step, Sen. Dick Durbin, D-Illinois, has also filed a brief claiming the Fed got it wrong and misinterpreted the amendment that bears his name.

Despite strong opposition from retailers, it is not clear whether the Supreme Court would be interested

in taking up a case like this. The D.C. Circuit is, generally, highly regarded for its interpretation of government regulations, and its decision does not represent the type of circuit-court split that the Supreme Court usually settles.

"The stakes are obvious in terms of the huge amounts of money and massive overcharges this represents," Shinder said.

The case is NACS et al. v. Board of Governors of the Federal Reserve System, case number 14-200, in the Supreme Court of the United States.

In re: Payment Card Interchange

No legal issue from the past few years seems to rile up the retail industry more than the $7.25 billion class action settlement that was reached to resolve allegations that Visa and MasterCard charged merchants that accept the companies' cards excessive swipe fees. For better or worse, the settlement will continue to take center stage in 2015.

The Second Circuit is set to decide whether the settlement is reasonable or should be scrapped. The nation's largest retailers — a group that includes Wal-Mart,Amazon.com Inc., Target Corp. and Macy's Inc. — are challenging the settlement. The retailers argue that despite the hefty sum, the deal does nothing to address the credit card companies' dominant hold on the payment card industry.

Opponents of the deal also complain about what they describe as an overly broad release contained in the settlement that would force class members to sign away all future antitrust claims against Visa and MasterCard.

Briefing of the appeal is nearly finished, and although the Second Circuit has not yet set a date for oral arguments, the appeals court is expected to hear the case at some point during the first quarter of 2015, attorneys working on the case said.

The case, which originally was filed in 2005, has been making its way through the court system for nearly a decade. The landmark settlement was reached in 2012. No matter which side prevails on appeal, the Second Circuit's decision will likely give rise to a Supreme Court petition, attorneys say.

“This is a crucial issue for our industry,” Retail Litigation Center President Deborah White told Law360. “We think the decision was wrong in the Eastern District of New York, and we're glad to have a fresh set of eyes at the Second Circuit take a look at it.”

According to NRF, swipe fees end up being either their second or third highest cost of doing business, behind only salaries and employee health benefits.

Many retailers have cited swipe fees as their second or third highest cost, behind salaries and employee health benefits. Merchants pass on the cost of swipe fees to customers in the form of higher prices. NRF said swipe fees cost the average U.S. household approximately $400 annually — a problem for retail because that cost cuts into sales.

The case is In re: Payment Card Interchange, case numbers 14-349 and 14-443, in the U.S. Court of Appeals for the Second Circuit.

Joe Sierra v. Oakley Sales Corp., Sakkab v. Luxottica Retail North America

Employers were thrown for a loop when the California Supreme Court ruled earlier this year that workers' right to bring representative Private Attorneys General Act claims can't be waived through arbitration agreements.

Since then, federal judges have issued opinions rejecting that conclusion and ruling that California's rule regarding PAGA waivers is preempted by the Federal Arbitration Agreement. The Ninth Circuit will have its say on the matter in 2015.

The appellate court is scheduled to hear two cases that deal with the issue: Sierra v. Oakley Sales Corp. and Sakkab v. Luxottica Retail North America Inc. In both cases, the Retail Litigation Center has filed briefs arguing that PAGA is an attempt to circumvent arbitration and the FAA, something the Supreme Court has consistently rejected.

Arbitration clauses have found their way into most employment contracts and are widely used throughout the retail industry. The California Supreme Court's decision, which has been petitioned to the U.S. Supreme Court, could undermine the FAA, industry groups have argued.

Mayer Brown LLP's Andrew Pincus, who helped author amicus briefs in both cases for Retail Litigation Center and the U.S. Chamber of Commerce, said the Ninth Circuit's decision could give grounds for an additional Supreme Court appeal if it creates a split between the federal and California courts.

The Ninth Circuit's input could also make the California Supreme Court reconsider its prior decision as it relates to PAGA, Pincus said. PAGA, enacted in 2004, allows workers to sue over labor code violations on behalf of state authorities and retain 25 percent of any civil penalties recovered.

“The [California Supreme Court's] decision, to my mind, didn't really come to grips with a lot of the Federal Arbitration Issues,” Pincus said. “Seeing analysis not just from the federal district court, but the Ninth Circuit, could get the California Supreme Court to reconsider it's opinion.”

The case are Joe Sierra v. Oakley Sales Corp., case number 13-55891, and Sakkab v. Luxottica Retail North America, case number 13-55184, in the U.S. Court of Appeals for the Ninth Circuit.

Equal Employment Opportunity Commission v. Sterling Jewelers Inc.

Federal courts have been taking the EEOC to task for its failure to meet obligations during presuit investigations before the commission brings large-scale pattern-and-practice lawsuits against employers. The EEOC is hoping for better results at the appellate level this year.

The Second Circuit will consider an EEOC appeal seeking to overturn the dismissal of the commission's nationwide sex discrimination claim against Sterling Jewelers Inc. The EEOC's case was derailed after a district court determined that the EEOC hadn't shown it had conducted a nationwide probe to substantiate the claim.

The 19 EEOC charges underpinning the government's suit came from just eight of the roughly 1,700 stores Sterling has across the country, according to Sterling Jewelers. The outcome of the appeal could have a meaningful impact on how an agency that at times has seemed to follow a "shoot first, ask questions later" strategy investigates nationwide pattern-and-practice claims, said Dennis Duffy

of BakerHostetler.

“The employer should have the opportunity to focus on the evidence relied on by the commission,” Duffy said.

The case is Equal Employment Opportunity Commission v. Sterling Jewelers Inc., case number 14-1782, in the U.S. Court of Appeals for Second Circuit.

--Additional reporting by Ben James and Evan Weinberger. Editing by Kat Laskowski and Andrew Park.
