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The 2012 U.S. Supreme Court Term: Business Cases to Watch

The U.S. Supreme Court's new term began on the first Monday of October, its first public meeting since the Court's high-profile health care decision in June, and there already are a number of cases that will have a significant impact on business interests.

Affirmative Action

In *Fisher v. University of Texas at Austin*, the Court will consider a landmark affirmative action case confronting the question whether the 14th Amendment's Equal Protection Clause prohibits the University of Texas at Austin (UT) from using race in undergraduate admissions decisions.

Under UT's admissions policy, race sometimes is a factor in the evaluation of applicants. Nine years ago, in *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School's use of race as one of a number of factors in its admissions policy. In the *Fisher* case, the litigant challenging the UT policy argues that it is invalid under *Grutter* — and, alternatively, that *Grutter* should be overruled.

The Court's personnel has changed significantly since its 5-4 decision in *Grutter*. Justice O'Connor, the author of the *Grutter* opinion, has been replaced by Justice Alito. Two other members of the majority (Justices Souter and Stevens) also have left the Court (and been replaced, respectively, by Justices Sotomayor and Kagan). Justice Kagan is recused from the new case.

The *Fisher* case is important to the business community because businesses recruit extensively from UT and other public universities. A group of 57 leading American companies filed an *amicus curiae* brief supporting UT. The companies explained that they "are directly affected by the admissions policies at UT and similar colleges and universities," and that they "care deeply about what kind of education and training those institutions offer their students."

Class Action Litigation

The Court has granted *certiorari* in a trio of cases which could have a significant impact on class action litigation.

Two of the cases will allow the Court to provide additional clarity on the requirements of class action litigation in the wake of its decision in *Wal-Mart Stores, Inc. v. Dukes* (2011). In *Dukes*, the Court emphasized a plaintiff's burden in proving commonality in the class before obtaining class certification. Now, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Court will decide whether, before certifying a class in a securities case, a district court must require plaintiffs relying on the fraud-on-the-market theory to prove that the misrepresentation was material and allow defendants to present evidence rebutting the theory. And, in *Comcast v. Behrend*, the Court will address whether a class may be certified without first resolving whether the plaintiff has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

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The third class action case will require the Court to address the Class Action Fairness Act of 2005 (CAFA). In *The Standard Fire Insurance Co. v. Knowles*, the Court will decide whether a plaintiff in a putative class action can avoid removal to federal court under CAFA by stipulating that he seeks damages for the class for less than the $5 million jurisdictional minimum for CAFA removal. The question before the Court will be whether such a tactic improperly undermines the federal removal provision of CAFA and violates the due process rights of absent class members.

Extraterritoriality of Alien Tort Statute

In the last three decades, in the wake of a widely noted Second Circuit opinion, plaintiffs have used the Alien Tort Statute (ATS) to sue corporations for alleged complicity in human rights abuses in other countries. In *Kiobel v. Royal Dutch Petroleum*, the Court will consider the availability of this cause of action against corporations for actions outside the United States.

In *Kiobel*, plaintiffs from Nigeria are seeking to sue foreign oil companies in U.S. courts on allegations that the companies violated international law in aiding torture by the Nigerian government. Last term, the Court heard argument on the scope of the ATS, including whether corporations can be sued under the statute. At oral argument in February, it became clear that a number of justices were troubled by a fundamental question — whether Congress intended the ATS, which was adopted in the very first Congress in 1789, to apply to conduct outside the United States. The Court ordered the parties to address this threshold issue and set it for re-argument this term.

If the Court decides that the ATS does not apply to extraterritorial conduct, it will dramatically narrow plaintiffs' use of the statute in litigation against corporations.

Statute of Limitations in Government Enforcement Cases

The statute of limitations for government enforcement actions is of obvious importance to the dynamic and disposition of such cases. In *Gabelli v. Securities and Exchange Commission*, the Court will consider the default five-year statute of limitations applicable to civil penalty actions brought by the federal government (28 U.S.C. § 2462). In *Gabelli*, the SEC seeks penalties for alleged unlawful conduct that occurred more than five years before the SEC filed suit. The Court will review the Second Circuit's holding that the five-year limitations period does not begin until the SEC discovers or should have discovered the claim. The case will have important implications for the permissible timing of government actions for claims sounding in fraud, both in SEC actions and in other contexts.

Intellectual Property

The Court will consider two intellectual property cases of significance to companies that own copyrights and trademarks.

The first case raises a question at the intersection of copyright and international trade. In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court will try a second time to decide whether the first-sale doctrine — which allows a purchaser of a copyrighted good in the United States to resell the good without the copyright owner's permission — applies to copyrighted material manufactured and acquired abroad and then imported into the United States. In 2010, the Court split 4-4 on this issue, with Justice Kagan recused. The case is important to businesses on both sides of the issue. Content owners argue that applying the first-sale doctrine to overseas goods will weaken intellectual property protection and further a gray market in copyrighted goods. Retailers and auction sites, meanwhile, argue that not applying the first-sale doctrine to goods manufactured and acquired abroad will unjustifiably inhibit legitimate sales.

The second IP case presents an issue about federal court jurisdiction when a trademark owner, during the course of litigation, agrees not to assert a claim against an accused infringer. In *Already, LLC v. Nike, Inc.*, Nike filed a trademark suit, and the accused infringer filed a counter-suit. Nike ultimately committed that it would not assert trademark claims against the defendant. The district court dismissed the case on the ground that there no longer was a case or controversy, and the Second Circuit affirmed. The case will determine whether an assertion of non-enforcement will be an effective option to terminate trademark litigation (and perhaps other intellectual property litigation as well).

More Cases Ahead

The Supreme Court will continue to grant *certiorari* on new cases as the term progresses. The Court currently has agreed to hear 39 cases and, in recent years, it generally has heard approximately 65 to 75 cases. Two blockbuster issues that the Court appears likely to address this term are the constitutionality of the Defense of Marriage Act's prohibition on recognizing same-sex marriages and the constitutionality of the Voting Rights Act.