The Business End Of Supreme Court's Current Term

Law360, New York (March 27, 2013, 7:17 PM ET) -- The current U.S. Supreme Court term continues the Roberts court's trend of close attention to business issues. Almost one half of this term's argued cases are of interest to the business community. The Supreme Court's docket ranges from affirmative action and class actions to tort litigation, government enforcement and intellectual property. Some cases already have been decided, and the others will be decided by the end of June.

Affirmative Action

On Oct. 10, 2012, the Supreme Court heard argument in Fisher v. University of Texas at Austin. Fisher presents the fundamental question whether the 14th Amendment's Equal Protection Clause prohibits a public university from using race in undergraduate admissions decisions. It has attracted high-profile interest from business leaders.

Under admissions policy at the University of Texas at Austin (UT), race sometimes is a factor in the evaluation of applicants. Ten years ago, in a 5-4 decision in Grutter v. Bollinger, the Supreme 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 author of the Grutter opinion, Justice Sandra Day O'Connor, retired and was replaced by Justice Samuel Alito. This shift in court personnel could affect how the Court considers and resolves the 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 and Arbitration

Proceeding by class action has an obvious and profound impact on the dynamic of litigation. In recent years, the Supreme Court has shown great interest in issues related to class actions. Remarkably, this term, the Supreme Court is considering five separate class action cases.

Two pending cases address issues involving class action arbitration. In Oxford Health Plans v. Sutter, the court is considering the authority of arbitrators to order class arbitration. In a prior case, the Supreme Court held that class action arbitration is so fundamentally different from bilateral arbitration that there must be a contractual basis for such a class arbitration. The issue before the Supreme Court is whether broad contractual language requiring arbitration is sufficient to infer consent to class arbitration, an issue on which the Courts of Appeals have split. And, in American Express Co. v. Italian Colors Restaurant, the court will examine a Second Circuit ruling

invalidating an arbitration agreement that barred class arbitration because the court believed that individual arbitration of the plaintiff's federal antitrust claim would be economically infeasible.

Two decided cases concerned the important issue of the threshold requirements for class action certification. In Comcast Corp. v. Behrend, ___ S. Ct. _____ (March 27, 2013), the court considered the showing that must be made regarding classwide damages. In a 5-4 decision by Justice Antonin Scalia, it rejected class certification for a putative class of more than two million individuals in an antitrust case on the ground that plaintiffs had not shown that their damages model could reliably establish damages on a classwide basis. And, in Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184 (2013), the court held, in a 6-3 decision by Justice Ruth Bader Ginsburg, that plaintiffs relying on the fraud-on-the-market theory in a securities action need not prove that the alleged misrepresentation was material as a prerequisite for class certification.

The fifth class action case concerned the Class Action Fairness Act of 2005 (CAFA), a federal statute that created new safeguards against abusive class actions in federal court. In Standard Fire Insurance Co. v. Knowles, ___ S. Ct. _____ (March 19, 2013), the court, in a unanimous opinion by Justice Stephen Breyer, held that a plaintiff in a putative class action cannot avoid removal to federal court under CAFA by stipulating that he seeks damages for the class of less than the $5 million jurisdictional minimum for CAFA removal. Because the plaintiff lacks the power, prior to certification, to bind members of the proposed class, the plaintiff's stipulation cannot reduce the value of the putative class members' claims.

Extraterritoriality of Alien Tort Statute

In the last three decades, plaintiffs have used the previously obscure Alien Tort Statute (ATS), first enacted in 1789, to sue corporations for alleged complicity in human rights abuses in other countries. In Kiobel v. Royal Dutch Petroleum, the court will decide whether this cause of action may be brought for claims regarding conduct outside the United States involving foreign plaintiffs and foreign defendants.

In Kiobel, plaintiffs from Nigeria are seeking to sue foreign oil companies in U.S. courts alleging 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 the initial oral argument, it became clear that a number of justices were troubled by a fundamental question — whether Congress intended the ATS to apply to conduct outside the United States. The court ordered the parties to address this threshold issue and heard re-argument in the case in early October.

If the court decides that the ATS does not apply to such extraterritorial claims, 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 fundamental to the initiation and resolution of many government cases. In Gabelli v. Securities and Exchange Commission, 133 S. Ct. 1216 (2013), the court unanimously held, in an opinion by Chief Justice John Roberts, that the general five-year statute of limitations applicable to civil penalty actions brought by the federal government (28 U.S.C. § 2462) begins to run when the fraud occurs, not when it is discovered. The case sets important limits for the permissible timing of government actions for claims sounding in fraud, both in SEC actions and in other contexts. Amicus briefs supporting the position adopted by the court's decision were filed by a range of business groups, including the American Bankers Association and the Securities Industry and Financial Markets Association.

Intellectual Property

This term features several intellectual property cases of significance to companies that own patents, copyrights or trademarks.

Two patent cases are pending. The first case is at the intersection of patent law, antitrust law, and the law of settlement. It involves so-called "reverse payment agreements" between brand-name drug manufacturers and potential generic competitors. The case is of enormous significance to the pharmaceutical industry. In many instances, brand-name manufacturers have sued potential generic competitors under the Hatch-Waxman Act for patent infringement.

In Federal Trade Commission v. Actavis Inc., the court is considering the federal government's contention that, under federal antitrust law, a settlement of Hatch-Waxman litigation is presumptively unlawful if the settlement includes a payment from the brand-name manufacturer to a generic competitor as well as an agreement on the date the generic competitor will enter the market. In contrast, most Courts of Appeals have held that such Hatch-Waxman settlements are lawful if (1) the settlement agreement does not exceed the exclusionary scope of the patent, (2) the litigation to enforce the patent was not a sham, and (3) the patent was not procured by fraud.

The second patent case, Association for Molecular Pathology v. Myriad Genetics Inc., presents the 21st century question whether human genes are patentable. The outcome of this case will have a substantial impact on businesses that conduct genetic research. It also may have far-reaching implications for scientific advancement, including in the field of personalized medicine.

In addition to these pending patent cases, the court already has decided significant copyright and trademark cases this term.

In Kirtsaeng v. John Wiley & Sons Inc., ___ S. Ct. ____ (March 19, 2013), the court held, in a 6-3 opinion by Justice Breyer, that the first-sale copyright 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. The case is important to businesses on both sides of the issue. Content owners argued that applying the first-sale doctrine to overseas goods would weaken intellectual property protection and further a gray market in copyrighted goods. Retailers and auction sites, meanwhile, argued that not applying the first-sale doctrine to goods manufactured and acquired abroad would unjustifiably inhibit legitimate sales. The court concluded that the copyright statute does not provide a geographical limitation on the first-sale doctrine.

In Already LLC v. Nike Inc., 133 S. Ct. 721 (2013), the court considered the issue of federal court jurisdiction when a trademark owner, during the course of litigation, agrees not to assert a claim against an accused infringer. Nike filed a trademark suit, and the accused infringer filed a countersuit. Ultimately, Nike unconditionally and irrevocably committed to not asserting trademark claims against the defendant. It moved to dismiss its claims with prejudice and to dismiss Already's counterclaim without prejudice. The district court dismissed the case on the ground that there no longer was a case or controversy, and the Second Circuit affirmed. The Supreme Court unanimously agreed in a decision by Chief Justice Roberts. The court held that a trademark owner's unequivocal assertion of non-enforcement moots the competitor's action to declare the trademark invalid when the competitor faces no realistic prospect of trademark enforcement. In a concurrence by Justice Anthony Kennedy, four justices cautioned that the case should be read narrowly and that there are limits to voluntary cessation as a strategy for terminating trademark litigation.

Same-Sex Marriage

The Supreme Court also will decide two important cases regarding same-sex marriage. In Hollingsworth v. Perry, the court will consider the constitutionality of California's

Proposition 8, which sought to invalidate a California Supreme Court decision approving same-sex marriage. And, in United States v. Windsor, the court will consider whether the federal Defense of Marriage Act's requirement that spousal benefits under federal law not be available to same-sex marriages is unconstitutional. Both cases include questions about standing, which may prevent the court from reaching the merits.

The same-sex cases have attracted extensive interest from the business community. Over 200 employers, including leading corporations, joined an amicus brief in United States v. Windsor urging the court to overturn DOMA's limitations on recognition of same-sex marriage. The companies explained that DOMA impairs their relationships with their employees and burdens their business interests because it requires administering multiple benefits regimes. And 100 companies similarly filed an amicus brief in Hollingsworth arguing that Proposition 8's prohibition of same-sex marriage imposes a harmful stigma on employees in same-sex relationships and harms a wide range of business interests, including morale, recruitment and retention.

Other Cases

Numerous other business cases also are on the Supreme Court's docket this term, ranging from preemption and takings to antitrust, and they will be decided by the end of June. Meanwhile, the court's next term, beginning on the first Monday in October, already promises continued emphasis on cases of importance to the business community. The court has granted certiorari in three consolidated cases, Chadbourne & Parke LLP v. Troice, Proskauer Rose LLP v. Troice, and Willis of Colorado Inc. v. Troice, which present an important question regarding the scope of the Securities Litigation Uniform Standards Act.

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