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Business Cases in the US Supreme Court

The U.S. Supreme Court recently closed its 2012 term with its usual headline-grabbing flurry of June decisions. Several of those decisions, as well as many more that received less publicity, will affect business interests. In a broad range of substantive areas, the Court issued decisions that will affect a wide array of business relationships, including those with other businesses, customers, employees and government regulators.

Class Action Litigation and Arbitration

This term, the Supreme Court decided five cases addressing class action litigation. The Court's decisions show a keen interest in the procedures that govern the class action mechanism, especially as that mechanism intersects with arbitration.

In *Oxford Health Plans v. Sutter*, the Court reaffirmed the great deference due to arbitrators by unanimously upholding an arbitrator's interpretation of an arbitration agreement as authorizing class-wide arbitration, even though the agreement contained no explicit language to that effect. Because the parties agreed that the arbitrator could decide whether class arbitration was available, the only question was whether the arbitrator had "(even arguably) interpreted the parties' contract." Because he had, his decision was upheld. The Court left open the question whether a party contesting the arbitrator's ability to decide that issue is entitled to *de novo* court review of the arbitrator's determination.

In *American Express Co. v. Italian Colors Restaurant*, the Court held that a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act even if the cost of proving an individual claim in arbitration exceeds the potential recovery. The Court, in a 5-3 opinion by Justice Antonin Scalia, found that the judicially created "effective vindication" exception to the FAA could not be applied where the cost of establishing a claim in an individual arbitration surpassed the potential reward.

The Court's willingness to enforce contractual terms, and its deference to an arbitrator's interpretation of those terms, highlight the importance of careful drafting of arbitration clauses.

The Court decided two cases concerning the requirements for class action certification. In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Court held, in a 6-3 decision by Justice Ruth Bader Ginsburg, that securities plaintiffs relying on the fraud-on-the-market theory need not prove that the alleged misrepresentation was material before obtaining class certification. In *Comcast v. Behrend*, the Court held, in a 5-4 opinion by Justice Scalia, that plaintiffs must, at the certification stage of a class action, establish damages measurable on a "classwide" basis and must connect these damages to their theories of liability.

In its unanimous opinion in *Standard Fire Insurance Co. v. Knowles*, the Court rejected an attempt to circumvent the Class Action Fairness Act of 2005 (CAFA), a federal statute that created new safeguards against abusive class actions. The Court 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.

Intellectual Property

The Court decided several intellectual property cases that affect companies that own patents, copyrights or trademarks.

In *Association for Molecular Pathology v. Myriad Genetics, Inc.*, the Court addressed the patentability of human genes. Myriad Genetics, the defendant, had identified precisely and then isolated two genes, mutations of which can substantially increase the risks of breast and ovarian cancer. Myriad obtained patents based on this discovery, but a group of researchers, medical patients and advocacy groups sought a declaration that the patents were invalid. The Court, in a unanimous opinion by Justice Clarence Thomas, sided with the plaintiffs and declared Myriad's patents invalid. It explained that Myriad merely discovered and isolated a naturally occurring DNA segment — a portion of the genetic code that resides in all humans. Absent manipulation of some sort, the DNA segment was a product of nature, which is not patentable. In a partial victory for Myriad, the Court stated that synthetically created DNA (known as complementary DNA) is patent eligible because it is not naturally occurring. The Court's narrow decision explicitly left open many questions regarding the interaction between patent law and the human genome, leaving much uncertainty for businesses in this industry.

In *Federal Trade Commission v. Actavis, Inc.*, the Supreme Court held, in a 5-3 opinion by Justice Stephen Breyer, that antitrust claims challenging so-called "reverse payment agreements" between brand-name drug manufacturers and potential generic competitors must be subjected to rule-of-reason analysis. In many instances, brand-name manufacturers have sued potential generic competitors under the Hatch-Waxman Act for patent infringement. Settlement terms in some of those cases have allegedly included a payment from the brand-name manufacturer to a generic competitor — in *Actavis*, an alleged overpayment to the generic company for co-promotion services — as well as an agreement on the date the generic manufacturer may begin to manufacture and market its generic version pursuant to license. The Federal Trade Commission argued that these terms were presumptively unlawful restraints on trade, and the companies argued that such payments are generally lawful in most circumstances. The middle ground adopted by the Supreme Court — application of the fact-dependent rule-of-reason test — is likely to make it more difficult to settle Hatch-Waxman Act litigation and to increase the number of antitrust challenges to patent litigation settlements that allegedly include a reverse payment.

In a pair of cases, the Supreme Court addressed the application of intellectual property law after the protected property is sold. In *Bowman v. Monsanto Co*., the Supreme Court unanimously determined that a farmer who purchases a Monsanto-patented, weed-resistant seed is entitled to plant the seed directly purchased from Monsanto, but not to plant the offspring of the originally purchased Monsanto seed. Under the doctrine of patent exhaustion, an authorized sale gives the purchaser a right to use or resell a patented article. The Court held that the purchaser is not permitted to make additional copies of that article, including planting and harvesting patented seeds, without the patent holder's permission. The Court explicitly declined to elaborate on the scope of its holding, including whether the doctrine of patent exhaustion would apply broadly where self-replication of a patented article might occur outside the purchaser's control or might be a necessary aspect of using the item for another purpose.

In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court held, in a 6-3 opinion by Justice Breyer, that copyright law's 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. The case is important to businesses on both sides of the issue. Content owners had 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 a contrary rule would unjustifiably inhibit legitimate sales. The Court concluded that the copyright statute does not provide a geographical limitation on the first-sale doctrine.

Finally, in *Already, LLC v. Nike, Inc.*, 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. The Court unanimously 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.

Statute of Limitations in Government Enforcement Cases

In *Gabelli v. Securities and Exchange Commission*, the Court unanimously held 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 Securities and Exchange Commission 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.

Administrative Law

In *City of Arlington v. Federal Communications Commission*, the Supreme Court resolved a long-standing dispute over the circumstances when agency administrative decisions are entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*. Arlington argued that courts should not defer to an agency's determination whether Congress has granted it interpretive authority over the statutory ambiguity at issue, *i.e.*, an agency's determination regarding the scope of its own jurisdiction. In a 6-3 decision, Justice Scalia's opinion for the Court argued that the line between an agency's jurisdictional and non-jurisdictional statutory interpretations is a "mirage"; the *Chevron* framework applies to both. According to Justice Scalia, the only relevant question is "whether the agency has stayed within the bounds of its statutory authority." Both the Court's holding and its approach will be important to businesses evaluating and challenging agency regulations.

Preemption

Returning to an issue that it has considered previously, the Supreme Court again ruled in favor of manufacturers in questions surrounding FDA preemption of state torts related to pharmaceutical labels. In a 5-4 decision authored by Justice Samuel Alito, the Court in *Mutual Pharmaceutical Co. v. Bartlett* held that federal law preempts state-law design-defect claims against generic drug manufacturers that turn on the adequacy of a drug's warnings. Federal law prohibits generic manufacturers from redesigning a drug or from changing the drug's labeling. Nevertheless, the First Circuit had held that state-law design-defect claims were not preempted because generic manufacturers could

meet both state and federal law by withdrawing from the market and not selling the products. The Court disagreed, holding that "if the option of ceasing to act defeated a claim of impossibility, impossibility preemption would be 'all but meaningless.'" The Court closed its opinion with an invitation to Congress to offer "'explicit' resolution of the difficult pre-emption questions that arise in the prescription drug context," acknowledging that the issues have "repeatedly vexed the Court — and produced widely divergent views — in recent years."

Extraterritoriality of Alien Tort Statute

Plaintiffs in recent years increasingly have invoked the Alien Tort Statute (ATS) to sue corporations for alleged violations of international law committed abroad. In *Kiobel v. Royal Dutch Petroleum Co.*, the Court substantially narrowed the scope of the ATS when applied to conduct outside the United States. The plaintiffs in *Kiobel*, Nigerian nationals residing in the United States, sued foreign oil corporations, alleging that the companies had violated international law by assisting the Nigerian government in violent suppression of popular demonstrations. Because the alleged misconduct had occurred entirely outside the United States, however, the Court held that the plaintiffs could not invoke the ATS to seek redress in U.S. courts.

Although the Court's opinion in *Kiobel* markedly reduces the exposure of foreign corporations to liability under the ATS for acts committed abroad, it does not entirely close the door on such claims. The Court allowed that, in some cases, the alleged misconduct, though undertaken outside the United States, might give rise to an actionable ATS claim in U.S. courts if the claims bear a sufficient connection to the United States. Even in such a case, however, a company can argue that corporations (as opposed to natural persons) may never be sued under the ATS, an issue the Court declined to resolve in *Kiobel*.

Employment Law

In two 5-4 decisions, the Supreme Court again tightened restrictions on employee claims of discrimination under Title VII of the Civil Rights Act of 1964.

In *Vance v. Ball State University*, the Court narrowed the class of people who qualify as "supervisors" for the purpose of holding an employer vicariously liable for workplace harassment. The Court held that the term "supervisor" includes only those who can take "tangible employment actions" against the claimant — actions the Court identified as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The Court majority claimed that its definition would make litigation more efficient by allowing supervisory status to be decided, as a matter of law, well before trial.

In *University of Texas Southwestern Medical Center v. Nassar*, the Court held that a "but for" causation standard applies to Title VII employee retaliation claims, rather than the more lenient "motivating factor" standard that applies to discrimination claims. The Court defended this stricter standard as a response to the "ever-increasing frequency" of retaliation claims, which threatens a tide of "frivolous claims, which would siphon resources" away from combating true workplace harassment.

In dissent in both cases, Justice Ginsburg echoed her successful appeal to Congress in *Ledbetter v. Goodyear Tire & Rubber Co.* for swift legislative action to "restore the robust protections against workplace harassment the Court weakens today."

Same-Sex Marriage and Affirmative Action

Three of the most prominent decisions of the term involved same-sex marriage and affirmative action. The decisions, although not directly addressing business issues, drew strong interest from the business community.

In *United States v. Windsor*, the Supreme Court, in a 5-4 decision by Justice Kennedy, declared unconstitutional the Defense of Marriage Act's (DOMA) denial under federal law of spousal benefits to same-sex couples lawfully married under state law. Over two hundred employers filed an *amicus* brief in the cases arguing that DOMA impairs their relationships with their employees and burdens their business interests because it requires administering multiple benefits regimes. Although the decision appears to ease some of these burdens facing businesses, it leaves unanswered important questions regarding employee benefit plans. Businesses should review their employee benefit plans and consider updating them in light of the decision and any federal regulatory guidance issued in response to it.

In *Hollingsworth v. Perry*, the Court, in a 5-4 decision by Chief Justice John Roberts, held that the official sponsors of California's Proposition 8 lacked standing to appeal a ruling that the proposition was unconstitutional. The effect of the decision was to reinstate same-sex marriage in California. One hundred companies filed an *amicus* brief in the case arguing that Proposition 8 harmed a wide range of business interests, including morale, recruitment and retention of employees.

In *Fisher v. University of Texas at Austin*, the Supreme Court considered the Fifth Circuit's decision to uphold as constitutional the race-conscious admissions policy of the University of Texas at Austin (UT). The Supreme Court reversed, holding narrowly that the Fifth Circuit had not applied the proper standard of review and declining the petitioner's invitation to issue a broad ruling on affirmative action generally. The 7-1 majority opinion by Justice Kennedy did not evaluate the UT admissions policy nor did it reconsider — despite the petitioner's request for the Court to do so — its seminal opinions in *Grutter v. Bollinger* and *Regents of Univ. of Cal. v. Bakke*. Rather, the Court remanded the case to the Fifth Circuit, instructing the Court of Appeals to reexamine UT's admission policy under the demanding "strict scrutiny" standard previously articulated in *Grutter* and *Bakke*. Fifty-seven leading American companies filed an *amicus curiae* brief in support of UT stating that they "care deeply about what kind of education and training those institutions offer their students." Businesses interested in the Court's views on affirmative action will not have to wait long; next term, the Court will consider in *Schuette v. Coalition to Defend Affirmative Action* whether a state constitutional amendment prohibiting affirmative action violated the Equal Protection Clause.

Preview of Next Term

In the last few months, the Supreme Court already has agreed to hear many of the cases that it will decide in its 2013 term, which begins on the first Monday in October. Some that are likely to be of interest to the business community are listed below:

- In *National Labor Relations Board v. Noel Canning*, the Court will evaluate the limits on the president's so-called recess appointments power — that is, the power to temporarily fill vacancies in government positions, without Senate approval, while the Senate is in recess. A ruling against the NLRB could call into question actions taken by federal agencies in which vacancies have been filled pursuant to recess appointment, including the Consumer Financial Protection Bureau.

- The Court will resolve a circuit split over the types of state-law class action claims that are precluded by the Securities Litigation Uniform Standards Act in three consolidated cases, *Chadbourne & Parke LLP v. Troice*, *Proskauer Rose LLP v. Troice* and *Willis of Colorado Inc. v. Troice*.
- In *Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, the Court may decide whether the Fair Housing Act recognizes disparate impact claims. Although the case before the Court concerns claims regarding discrimination in housing, it also may affect claims regarding discrimination in residential lending. It is not clear whether the case will remain on the Court's docket; counsel recently asked the Court to extend the briefing schedule because of ongoing settlement discussions.
- In *DaimlerChrysler AG v. Bauman*, the Court will determine under what circumstances the existence of a U.S. subsidiary requires a foreign parent corporation to litigate in a U.S. court.
- In *Atlantic Marine Construction Co. v. U.S. District Court*, the Court will decide whether a district court has discretion to refuse to transfer a case to the venue specified in a contractual forum-selection clause.
- In *Mississippi ex rel. Hood v. AU Optronics Corp*., the Court will consider whether a defendant may remove an action to federal court under the Class Action Fairness Act when a state is the plaintiff.
- In *UBS Financial Services Inc. of Puerto Rico v. Unión de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan*, the Court will determine the standard of appellate review applicable to dismissals pursuant to Federal Rule of Civil Procedure 23.1 of shareholder derivative suits for failure to allege particularized facts sufficient to establish futility of pre-suit demand.[1]

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1 Skadden represented Actavis, Inc. in *Federal Trade Commission v. Actavis, Inc.*, and represents UBS Financial Services Inc. of Puerto Rico in its case next term. In addition, Skadden filed *amicus* briefs in several of the cases described above.