August 2006

THE SUPREME COURT: THE 2005-2006 TERM IN REVIEW

At press time in late June, the Supreme Court is getting ready to wrap up its 2005-2006 Term. Conveniently, however, most of the major business-related cases have been handed down. Here are the most important business-related decisions.

ANTITRUST

Robinson-Patman

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.
No. 04-905
argued October 31, 2005
decided January 10, 2006

Section 2(a) of the Clayton Act, as amended by Robinson-Patman, prohibits manufacturers from engaging in price discrimination among retailers with respect to the same commodity in cases where such discrimination would lessen competition or establish a monopoly.

But the reality is that industries like the truck industry revolve around competitive bidding by retailers—with each successful bidder receiving price concessions that vary over time and between dealerships. This case tested the very legality of that system of competitive bidding.

In particular, the Court addressed the question of whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination proscribed by Robinson-Patman, absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer.

By a 7-to-2 vote (with Ginsburg writing the opinion of the Court and Stevens and Thomas (!) dissenting), the majority construed Robinson-Patman in the narrowest possible way—allowing recovery only in cases where the complaining dealer "compete[d] with beneficiaries of the alleged discrimination *for the same customer*." [emphasis in original]

The "Tying Doctrine"

Illinois Tool Works Inc. et al. v. Independent Ink, Inc.
No. 04-1329
argued November 29, 2005
decided March 1, 2006

This case dealt with the question of whether the "patent tying doctrine" is still good law.

Traditionally, the "patent tying doctrine" has prohibited the requirement that a customer purchase a separate product as a condition of using a patented product. So when a subsidiary of Illinois Tool Works prepared a standard licensing agreement requiring customers of its patented bar code printing system to do so only "in combination with ink and ink supply systems supplied by [the subsidiary]," one customer sued.

Although the current parameters of the "tying doctrine" had, at their roots, trust-busting efforts against giants like Standard Oil, advocates and treatise writers alike have recently lobbied for the court-inflicted demise of the now-unpopular doctrine—calling the whole patent-tying concept "wobbly" and "moth-eaten."

In addition—if the doctrine were obliterated by judicial fiat—motion picture studios salivated at the prospect of requiring TV stations wishing to show their blockbusters also to air their less popular releases. So, ironically, for the Hollywood interests who had, shortly before, squawked interminably about the importance of "*stare decisis*," that concept had now become for them—shall we say—"less interesting."

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In an 8-to-0 unanimous decision authored by Stevens, the Court threw a large bone to the anti-tying-doctrine crowd. In particular, the Court will now require a "tying doctrine" plaintiff to demonstrate "market power," rather than merely inferring it from the existence of the patent.

Joint Ventures and the Sherman Act

Texaco Inc. v. Dagher et al.
No. 04-805
argued January 10, 2006
decided February 28, 2006

If ever there were an argument for lifetime judicial appointments, this would be it. The cost of gasoline had just gone over $3 a gallon, and the question before the Court was, essentially, whether Big Oil could get together (by forming two large joint ventures) in order to fix prices.

Not surprisingly, the Ninth Circuit had responded with a big, emphatic "no."

But in a ***unanimous*** (!) (8-to-0) decision, the Supreme Court reversed, holding that an oil company joint venture for the purpose of price-fixing was not *per se* illegal under the Sherman Act.

Clarence Thomas, writing for the Court, reasoned that "the pricing policy challenged here amounts to little more than price setting by a single entity . . . and not a pricing agreement between competing entities with respect to competing products." But, as we pointed out last October, what is really at stake is that "the Supreme Court does not like "*per se*" tests [and that a finding that this joint venture had no legitimate business justification] is something the Court has been reluctant to do."

Intellectual Property

Sufficiency of the Evidence

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Foods
No. 04-597
argued November 2, 2005
decided January 23, 2006

Under Rule 50(b) of the Federal Rules of Civil Procedure, a defendant seeking judgment as a matter of law can make a motion after the verdict— a motion recognized as mandatory everywhere but the Tenth Circuit, where the district court proceedings in this case took place.

The question is this: If a litigant fails to make a Rule 50(b) motion in a district court located in the Tenth Circuit, is he precluded from raising a sufficiency-of-the-evidence issue on appeal?

In a 7-to-2 opinion (with Thomas writing the opinion of the Court and Stevens and Kennedy dissenting), the Court held that a failure to file a Rule 50(b) motion—even when it was discretionary and the litigant had filed a comparable Rule 50(a) motion before the verdict—deprived the appeals court of any basis for reviewing a sufficiency-of-the-evidence claim.

There is, however, good news for ConAgra: It is now free to pursue a legal malpractice claim.

Patents

eBay Inc. et al v. MercExchange L.L.C.
No. 05-130
argued March 29, 2006
decided May 15, 2006

This case—while not legally earth-shattering—dealt, practically, with the question not far short of whether eBay should be permanently shut down for patent infringement.

A jury in the U.S. District Court for the Eastern District of Virginia found that MercExchange held valid patents that included, *inter alia*, "a business method patent for an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants." The jury, further, found that eBay had infringed on MercExchange's patent, but the Court refused to grant permanent injunctive relief.

Although the U.S. Circuit Court of Appeals for the Federal Circuit reversed—holding that the "general rule [is] that courts will issue permanent injunctions against patent infringement absent exceptional circumstances," a unanimous Supreme Court reversed (with, however, seven justices writing or joining concurrences).

In an opinion by Clarence Thomas, the Court applied the "traditional four-factor test": (1) irreparable injury; (2) inadequate alternative remedies; (3) appropriateness in view of "balance of hardships"; and (4) the public interest not being disserved.

Civil Rights

Racial Discrimination

Domino's Pizza, Inc. et al. v. McDonald
No. 04-593
argued December 6, 2005
decided February 22, 2006

This is a "Ninth Circuit goes to the woodshed" case.

John McDonald—a black man—sued Domino's Pizza under 42 U.S.C. § 1981 for various damages resulting from the alleged racial animus of Domino's agents.

The problem is: 42 U.S.C. § 1981 deals with damages arising from contractual relations. Any contract with Domino's was not with McDonald, but with JWM Investments—a company that McDonald owned. And JWM itself had already settled for $45,000.

So the question remains: Can McDonald get a second bite of the apple by suing for interference with a contract with which he, himself, was not in privity?

This wasn't particularly a nail-biter. Every circuit that had looked at the issue had required privity.

And McDonald was reduced to arguing that 42 U.S.C. § 1981 should be read to protect "people" —never a particularly attractive argument in the High Court.

Not only was the 8-to-0 decision for Domino's unanimous, short, and curt, it spanked the errant Ninth Circuit by, gratuitously, pointing out that its decision repudiating the lower court was "[c]onsistent with our prior case law, and . . . required by the plain text of the statute . . . ."

Sexual Harassment

Arbaugh v. Y&H Corp. d/b/a The Moonlight Café
No. 04-944
argued January 11, 2006
decided February 22, 2006

Plaintiff Arbaugh sued New Orleans' Moonlight Café after an owner allegedly made comments about her breasts and reached his hand up her skirt to grab her.

During the jury trial, the defendant failed to raise any question of whether the federal sexual harassment rules applied to it—or whether it was exempt by virtue of the fact that it did not employ 15 or more persons for at least 20 weeks during the period covered by the suit.

But when it did raise the issue two weeks after the judgment, the district court held that it never had jurisdiction and dismissed the suit.

So the question is whether Moonlight's status as a small business was a jurisdictional bar to adjudication—or whether it is just another fact to be proven and decided by the jury.

To no one's surprise, the Supreme Court ruled, in an 8-to-0 opinion penned by Justice Ginsburg, that the restaurant's paucity of employees did not deprive the federal courts of jurisdiction—and could, therefore, not be raised defensively late in the lawsuit.

Handicap

United States v. Georgia et al.
No. 04-1203
argued November 9, 2005
decided January 10, 2006

The plaintiff in this suit is a disabled incarcerated coke dealer and felon who, after unsuccessfully trying to shoot his girlfriend, got out of his wheelchair to beat her. He is seeking $600,000 (per criminal) in damages because the prison failed to adequately accommodate the handicapped.

In a unanimous result, with the decision written by Antonin Scalia (and a concurrence by Justices Stevens and Ginsburg), the Supreme Court held that the Eleventh Amendment does not prevent the plaintiff from bringing that suit.

In so holding, the Court broke, even further, from its holding that the Eleventh Amendment prohibits Title I employment discrimination suits under the Americans With Disabilities Act (ADA). And—just as the changing composition of the Court seemed to threaten the narrow 2004 decision that Title II ADA court-related suits were not barred by the Eleventh Amendment—the Court consolidated and made permanent that precarious 5-to-4 decision. [*Tennessee v. Lane*, 541 U.S. 509 (2004)]

The chief similarity between this case and *Lane* is the compelling factual contexts: Lane was a paraplegic who was required to crawl up a flight of stairs on his hands and knees in order to avoid incarceration for contempt of court.

Goodman is also a paraplegic who was placed in maximum security strictly because of his disability —in a cell not large enough for him to turn around or get out of his wheelchair to go to the bathroom. Still, you have to wonder how a man capable of lunging at this girlfriend was not similarly capable of lunging at the commode.

ARBITRATION

Illegal Contracts

Buckeye Check Cashing, Inc. v. Cardegna et al.
No. 04-1264
argued November 29, 2005
decided February 21, 2006

If there was a court that came out of *Bush v. Gore* looking worse than the U.S. Supreme Court, it was the Florida Supreme Court. And once again, the nation's highest court has waded into a field of jurisprudence for the purpose of slapping down the Sunshine State's ranking tribunal.

At question is whether an arbitration clause survives an illegal contract.

And there is really no question what the answer is: The courts (out of self-interest) love arbitration. The Federal Arbitration Act gives the arbitrator jurisdiction over a contract containing an arbitration clause—unless the question is over the legality of the arbitration clause itself. And six circuits have unanimously held that an arbitration clause survives an illegal contract that contains it, guided by the "queen of arbitration decisions," *Prima Paint Corporation v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967).

So, it can hardly be a shocker that the Supreme Court, by a 7-to-1 vote, overturned the Florida Supreme Court's decision voiding an arbitration clause in a usurious contract based on "public policy."

THE ELEVENTH AMENDMENT

Bankruptcy

Central Virginia Community College et al. v. Katz, Liquidating Supervisor for Wallace's Bookstores, Inc.
No. 04-885
argued October 31, 2005
decided January 23, 2006

This is just more evidence that the shrinking Eleventh Amendment—once robust—is settling into decrepit old age.

The question at issue was whether state-run colleges could be sued by a bankruptcy trustee to recover "preferential transfers"—notwithstanding the Eleventh Amendment's limits on suits against states.

Most observers—including this one—believed that Rubicon had been effectively crossed when the Court allowed Tennessee to be sued under federal legislation granting student loan recipients the right to sue states for bankruptcy-like relief. [*Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440]

But, since the Court's resolution of *Hood* was accomplished "[w]ithout reaching [the] question [of] . . . whether th[e Bankruptcy] Clause gives Congress the authority to abrogate States' immunity from private suits," the Court, in a 5-to-4 liberal/conservative-bloc decision written by Justice Stevens, spent 22 pages quoting *Hood* to reach the conclusion for which *Hood* did not stand.

Sovereign Immunity

Northern Insurance Company of New York v. Chatham County, Georgia
No. 04-1618
argued March 1, 2006
decided April 25, 2006

This admiralty suit by an insurance company against a county government arose when a malfunctioning drawbridge struck the plaintiff's client's boat.

Both the district court and the Eleventh Circuit had held that, while the Eleventh Amendment was inapplicable, there was nevertheless a "common law" defense of sovereign immunity.

In a unanimous decision, the Supreme Court reversed, arguing that a defendant that is not an "arm of the State" for purposes of the Eleventh Amendment, is also barred from asserting other sovereign immunity defenses.

THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

Private Causes of Action

Anza et al. v. Ideal Steel Supply Corp.
No. 04-433
argued March 27, 2006
decided June 5, 2006

In this case, a steel supplier sued its chief competitor under RICO for tax fraud against the government—using federal mail and wire fraud statutes as RICO predicates.

The question before the Court was whether a private party who did not rely on the fraudulent misrepresentations forming the basis of the RICO predicates could nevertheless sue under RICO—based on the competitive disadvantage created by Anza's failure to pay taxes. The answer is "no."

This is because RICO requires a "*direct* relation between the [violation and the injury]." [emphasis added] And, while the government suffers "direct" injury from failure to pay taxes, the injury suffered by competitors as a result of reduced prices is simply not direct enough.

This case represents the most recent effort by the Supreme Court to curtail some of the more serious litigative abuses of this poorly drafted statute.

Hobbs Act

Scheidler et al. v. National Organization for Women, Inc., et al.
No. 04-1244
argued November 30, 2005
decided February 28, 2006

This strange case has bounced up and down in the federal courts for well over a decade—and it may be far from resolution.

At issue is whether the Racketeer Influenced and Corrupt Organizations Act (RICO)—which can be invoked by two violations of the federal-extortion-related Hobbs Act—can be used to shut down your political opposition.

On February 26, 2003, the Supreme Court resoundingly said "no." And the Seventh Circuit proceeded to ignore it. And, while it is not unusual for the federal bench to ignore the High Court (the Ninth Circuit does it all the time), normally, the courts have the grace to wait until a new litigant comes along.

So, in an 8-to-0 decision written by Stephen Breyer that could hardly have been a surprise to anyone, the Supreme Court, on February 28, reiterated that physical violence unrelated to robbery or extortion falls outside the Hobbs Act—and, hence, outside RICO.

Tort Reform

Securities Class Action Litigation

Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit
No. 04-1371
argued January 18, 2006
decided March 21, 2006

The 1998 Securities Litigation Uniform Standards Act (SLUSA) limits securities class action suits alleging a misrepresentation or omission "in connection with the purchase or sale of [a . . . security]."

So the clever litigants in *Dabit* sued Merrill Lynch in a state-law-based diversity suit because they claimed that its faulty research caused them to foolishly hold on to their securities.

No purchase; no sale; no problem. Right?

Well, tragically for Dabit, he belatedly learned a lesson that Wall Street had known for 70 years: that the term "purchase or sale" doesn't actually mean "purchase or sale."

The High Court, not surprisingly, interpreted the words of SLUSA in the same way the SEC had long interpreted the same words under section 10(b) of the 1934 Act and under Rule 10b-5: to require that the financial transaction have something to do with corporate shares of some sort or another—and, after the Court's 2003-2004 Term decision in *Securities & Exchange Commission v. Edwards*, No. 02-1196, probably not even that.

So, in an 8-to-0 decision crafted by Justice Stevens, the Court showed the corporate boardroom that the SEC's very broad definition of its own jurisdiction can have a bright side—and that even a very dark cloud can have a silver lining.

Incidentally, the good SEC-related judicial news for corporate America just keeps coming: On June 23, the U.S. Court of Appeals for the District of Columbia ruled unanimously that the agency exceeded its authority in its hedge fund regulation efforts.

Federal Powers

Spending Clause

Rumsfeld et al. v. Forum for Academic and Institutional Rights, Inc. et al.
No. 04-1152
argued December 6, 2005
decided March 6, 2006

Choose your own metaphor. But, "Too many cooks spoil the broth" would work just fine. Probably never—at least not since the Inquisition—had such an aggregation of legal talent joined in such a misguided enterprise with such a predictably counterproductive result.

The issue was the constitutionality of the Solomon Amendment—a funding rider cutting off educational monies for universities that, in whole or in part, deny access to military recruiters. In particular, a coalition formed by the nation's "prestige" law schools (FAIR) claimed that the language required schools to give up their First Amendment rights in order to bathe in federal largesse.

Cooler heads cautioned that the nation's law schools—for all their collective legal acumen—were digging themselves into a hole. Harvard professor Laurence Tribe pointed out, in print, that a good portion of the nation's civil rights laws were predicated on the proposition that you can restrict the constitutional rights of recipients by offering to shower them with taxpayer financing—and that the university-wide restrictions can reach to academic schools and departments other than the one receiving the money.

But the likes of NYU, Harvard, and Yale were hardly to be deterred by the likelihood of doom. And on March 6, by a unanimous (8-to-0) vote, the Court held not only that Congress could condition spending on military access to campus— but that it

could ***order*** law schools to grant on-campus military interviews with no "carrot" whatsoever.

In other words, on the road to resolution, the Court passed over the obvious, discrete, non-controversial holding in order to reach a major, scary, non-obvious conclusion that achieved the same result. Coming as just about the first major action by new Chief Justice John Roberts, this may say something about the direction of the Court.

THE DORMANT COMMERCE CLAUSE

Standing

DaimlerChrysler Corp. et al. v. Cuno et al.
No. 04-1704
argued March 1, 2006
decided May 15, 2006

Respondent, a taxpayer, challenged an investment tax credit and 10-year property tax exemption given to DaimlerChrysler in order to lure the company to Toledo. Specifically, Cuno argued that the tax benefits discriminated against out-of-state companies, in violation of the Dormant Commerce Clause, and also violated equal protection requirements.

In the Supreme Court's jurisprudential voyage between Scylla and Charybdis, the Court seemed condemned to make a horrific choice:

- It could slaughter its favorite legal doctrine—the one that it had lovingly cared for with a fondness and attention bestowed on no other: the expansive reading of the Dormant Commerce Clause, or

- It could declare, as unconstitutional, the keystone of supply-side fiscalism: the use of tax incentives to attract and foster private investment.

Instead, as predicted by us, the Court took a third route: It declared that plaintiffs lacked standing to challenge the tax incentives.

Of course, all of this may simply put off until another day the inevitable confrontation between Rehnquistism and Reaganomics.

THE ENVIRONMENT

Clean Water Act

Rapanos v. United States
No. 04-1034
decided June 19, 2006

This is probably the most important non-decision of the Term: It combines a ruling that is really, really important with the added element that no one has any idea what it means.

The Rapanoses had asked the Court to overturn the federal government's regulation of wetlands, either because, in terms of the Clean Water Act, they weren't "navigable" and were a long, long way from anything that was—or because the regulation was out-and-out unconstitutionally excessive.

Four justices flatly rejected the Rapanoses' pleas. They were the usual suspects: Ginsburg, Breyer, Souter, and Stevens.

Four other members—led by Justice Scalia—would have slashed the government's jurisdiction to "relatively permanent bod[ies] of water connected to traditional interstate navigable waters." As with *S. D. Warren Co.*—the Term's other major environmental case (which follows)—these justices reached their conclusion by pulling out a desk dictionary.

The "swing vote"—Anthony Kennedy—in a lone concurrence, opined that the Corps of Engineers may have exceeded its authority, but, at any rate, not to the extent that Scalia felt it had. Kennedy's test was whether there was a "significant nexus to [navigable waters or waters that] could reasonably be made [navigable]."

Well, now that that's settled, the Sixth Circuit can proceed to try to figure out whether it's actually been reversed or not.

Environment/Clean Water Act

S. D. Warren Co. v. Maine Board of Environment Protection et al.
No. 04-1527
argued February 21, 2006
decided May 15, 2006

Warren—who sought approval for five dams it operates on the Presumpscot River in Maine—brought this action challenging a requirement that it receive approval from the state under section 401 of the Clean Water Act.

That section requires state approval of "any activity . . . which may result in any discharge into the [country's] navigable waters." And, since Warren's dams redeposited water into the Presumpscot without the addition of any pollutants, it reasoned that it hadn't "discharged" any-thing that would bring it under the scope of the Act.

Nevertheless, a unanimous Court, after consulting *Webster's New International Dictionary*, determined that Warren was discharging water—and was therefore covered by the Act and the state approval requirement. As we predicted last fall, given a line of earlier cases dealing with the same issue, this outcome can hardly come as a shock.

JURISDICTION OF THE FEDERAL COURTS

Banks

Wachovia Bank, National Association v. Schmidt et al.
No. 04-1186
argued November 28, 2005
decided January 17, 2006
28 U.S.C. § 1348 provides, in part

> All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

This case tackled the question of whether a large bank with branches in many states is "located" in every state with a branch—thereby defeating federal diversity in those states and denying the bank a diversity-related forum in the federal courts in most cases.

In a unanimous opinion, the High Court held that a national bank, for purposes of that section, was a resident of the state appearing in its articles of association.

Pleading

Martin et ux. v. Franklin Capital Corp.
No. 04-1140
argued November 8, 2005
decided December 7, 2005

In this diversity action against a landlord over the effects of "toxic mold"—plus loss, theft, or destruction of personal property—the Fourth Circuit had denied diversity based on the failure of the defendant/remover/petitioner to "show the nonexistence of an affiliated [non-diverse] entity."

This was a little too much for the Supreme Court, which held unanimously and not surprisingly that a party removing on the basis of diversity does not have to negate in his pleadings the possibility of any person who might defeat diversity.

THE FEDERAL COURTS

Legal Fees

Lincoln Property Co. et al. v. Roche et ux.
No. 04-1140
argued November 8, 2005
decided December 7, 2005

28 U.S.C. § 1447(c) provides that a federal court, in a remand order, "may require payment of just costs and any actual expenses, including attorney fees." The question is what "may" means—a question about which the Supreme Court concedes there is "little guidance" in statute.

After this automobile financing case bounced up and down in the federal courts a few times over the issue of how to determine whether the diversity amount had been satisfied, the winners asked for attorneys' fees, which they were denied by both the district court and the court of appeals.

In a unanimous decision, the Supreme Court affirmed, holding (1) that "may" may mean "may"; and (2) that the fact that the defendant had a reasonable basis for assuming he might be successful at removal was a valid consideration for the court to deny fees and costs.

THE FIRST AMENDMENT

Campaign Finance

Wisconsin Right to Life, Inc. v. Federal Election Commission
No. 04-1581
decided January 23, 2006

Once again, American constitutional jurisprudence has tripped on a footnote.

First, a footnote in the campaign-related decision of *Buckley v. Valeo*, 424 U.S. 1 (1976), raised the possibility that the Court would revisit the Constitution if that decision didn't work out. This prompted a generation of largely fruitless litigation over whether the *Buckley* case had been empirically demonstrated to be mistaken.

Now, based on a footnote in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), Wisconsin Right to Life has asked the courts to decide that McCain-Feingold's limit on "electioneering communications," while not unconstitutional on its face, is unconstitutional as applied to Wisconsin Right to Life.

The Supreme Court's *per curiam* opinion came just as the Court was transitioning from *McConnell* "swing-voter" Sandra Day O'Connor to a replacement voter likely to "swing" the other way. And, in what appears to be a "holding pattern," the Court sent the case back to a three-judge district court panel in order to think about it some more.

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