

# WATCH REPORT

*An update on legislation, litigation and administrative activities affecting law and legal policy*

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## Democrats May Take a Middle Ground on Taxes

*There are some things that make Democrats positively tremble. For instance, they are scared of the “gun lobby.” The tax-cut lobby, not so much. But, given the option, the tenuous Democratic majority—filled with “red state Democrats”—would prefer to shed its image as “the party of tax and spend.”*

And so, considering that it campaigned in many places against “tax breaks for the rich,” incoming Democrats are taking a remarkably pragmatic approach to taxation.

Don't expect the sunset of the “death tax” to be extended anytime soon. While Republicans continue to argue that the automatic reemergence of the tax four years from now will threaten small businesses, the issue has become a shibboleth for congressional Democrats.

Democrats will also move early and often on politically motivated legislation—which will certainly be vetoed—to raise taxes on the oil companies.

On the other hand, serious discussions have been directed at a tax restructuring that would take tax increases from those earning over \$500,000 and redistribute them to whatever Democrats consider “the middle class.” Raising the maximum tax rate on those earning over \$500,000 to 39.6% would “raise” \$85 billion over four years, according to one calculation.

Also on the subject of Democratic tax “cuts,” Senate Finance Committee Chairman Max Baucus (D-Mont.) and Ranking Member Charles Grassley (R-Iowa) have jointly introduced a bill to repeal the Alternative Minimum Tax (AMT)—at an estimated cost of \$750 billion over three years. Unlike the “redistribution” proposal, however, everyone assumes that the cost of sunsetting the AMT will ensure that this bill is never more than an occasion for a press release.

In related news, the Internal Revenue Service's (IRS) own National Taxpayer Advocate's Office has blasted the IRS's use of three private firms to collect overdue taxes, arguing that the agency could do the same work more cheaply, without the security risks and concerns about the “psychological tactics” involved. Not unexpectedly, the report was met with enthusiasm by the IRS employees' union, which had lobbied to repeal the outsourcing program.

### ***Labor Unions: Good News/ Bad News; A Mixed Bag***

It was the best of times; it was the worst of times.

On one hand, there is no entity in Washington that scored a bigger victory on election night than the AFL-CIO. Long the central mainstay of the Democratic Party, the titular Democratic takeover of the House and Senate was a victory of, as much as anything else, organized labor. ►



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That having been said, labor unions face some enormous headaches in 2007:

## Legislative

It is no coincidence that one of two first House Democratic priorities in the “first hundred hours” was a phased increase in the minimum wage from \$5.15 an hour to \$7.25 an hour.

And the Bush administration’s response demonstrated that, at least on some subjects, the White House is a “quick learner.”

Specifically, the White House’s response was to accept the minimum wage increase, but to tie it to small business tax cuts intended to offset the financial hardship to small businesses that will be imposed by the extra \$2.10 levy. The strategy was first hatched in a conference call of the “death tax” coalition—and, when the minimum wage was tied to an extension of the death tax sunset in the 109th Congress—was successful in taking the minimum wage off the table for the remainder of 2006.

At press time, the House had passed the minimum wage bill at virtually the top of its agenda by a veto-proof vote of 315-to-116—without the tax cuts. But on the other side of the Capitol—where support could fall short of the two-thirds’ margin necessary to override a veto—Senate Finance Committee Chairman Max Baucus showed more flexibility in negotiating with the White House over add-ons to the House bill. The problem for the Montana moderate was that it was not clear whether the final decision on the bill sent down Pennsylvania Avenue would be “above Baucus’ pay grade.”

If congressional Democrats reject the minimum wage cut/tax cut package proposed by the administration, you can expect the issue to come up again and again—as a rider on appropriations bills and on other legislative priorities of George W. Bush and the congressional Republicans.

As a result, the minimum wage will probably be increased by \$2.10 sometime during the next two years. But, unless the Republicans are remarkably stupid, labor will be forced to pay some price for this long-sought legislative prize.

## Judicial

Everyone assumes the second piece of bad news for organized labor will come when the Supreme Court hands down its decision on the constitutionality of

Washington State’s statute limiting the use of union dues for political purposes:

### ***Evergreen Freedom Foundation v. Washington Education Association from the Washington State Supreme Court***

Following the U.S. Supreme Court’s 1986 “Beck decision”—allowing some limits on the use of union dues for political purposes—the voters of the state of Washington, in 1992, enacted a statute prohibiting the use of “agency fees” (fees required to be paid by union nonmembers as a condition of employment) for political purposes without the affirmative consent of the nonmember.

Not surprisingly, the Washington Education Association’s response to this—a six-page letter requiring nonmembers to write to its counsel within thirty days in order to “opt out”—was found by the state trial court to be noncompliant with the voter-approved statute.

But, in a 6-to-3 decision, the state’s highest court found that the statute was violative of the First Amendment. The court’s rationale was, essentially, that, balancing the competing “free speech” interests of the union and nonmembers, complying with the statute would be more expensive for the union than opting out would be for the nonmembers.

With even union friends questioning the strange rationale of the Washington court—and following a January 10 oral argument before the U.S. Supreme Court during which Justices seemed to signal their sympathy with the statute—the assumption is that the High Court will reinstate the voter-approved Washington statute. And everyone assumes the chief question will be how much “collateral damage” the unions suffer as a result of the Court’s ruling.

## Negotiations

But issues like the minimum wage and even the expansion of the Beck doctrine are just frittering around the

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edges, compared to the unions' major problem: the fact of corporate hard times in unionized "rust belt" industries—and the fact that those hard times are being largely blamed on improvident wage and benefit concessions to union negotiators.

Just as a starter, contracts between the United Auto Workers (UAW) and Ford, Chrysler, and General Motors all come up for renegotiation this year. All three of these companies see their survival as resting on the imperative of getting rid of overpriced workers and dumping extravagant benefit plans, particularly for retirees.

## ***Parliamentary Procedure Rears Its Ugly Head in the Senate***

There is good news for those who relish the days when legislative strategy in the U.S. Senate had all the mind-numbing intricacy and complexity of a chess game: Parliamentary procedure is back!

This comes after a stint when an unsophisticated younger crop of senators—many of them trained under House rules that grant few rights to the minority—threatened to effectively abolish the Senate rules through the invocation of the "nuclear option." The idea—as a disgraced former Hatch staffer opined on the radio—was that it was demographically impossible for Republicans to soon lose control of the Senate.

Well, the "impossible" has become a reality, and Senate Republicans are now forced to fall back on procedure in a Congress where the Democrats dominate both Houses.

They are in a position to do so by virtue of the fact that the caucus of Senate conservatives—called the "Senate Steering Committee"—although newly chaired by freshman and relative newcomer Jim DeMint (R-S.C.), is staffed by the Senate's foremost procedural warrior, Edward Corrigan. Corrigan is also head of the weekly convocation of Senate staffers, the "Conservative Working Group," and the biweekly meeting of defense and foreign policy conservatives, called the "Stanton Group."

Freshman DeMint's opening salvo came at the end of the 109th Congress, as he backed down a senator with four decades of seniority (Ted Stevens (R-Alaska)), one with three decades of service (Thad Cochran (R-Miss.)), and one with two decades of experience (Kay Bailey Hutchison (R-Tex.)) in order to kill the \$400 billion omnibus appropriations bill.

This was accomplished by threatening to filibuster the three sequential motions needed to send any Senate bill to a House-Senate conference committee: the motion to disagree with the House, the motion to request a conference, and the motion to authorize the chair to appoint conferees. Each of these motions would have been filibusterable.

Aside from saving billions of dollars that the omnibus bill proposed for pork-barrel spending, the move also forces the Democrats to slog through the thousands of intricacies of the federal budget during the first one hundred days of the 110th Congress. And all but the most intransigent appropriators now concede that the DeMint gambit worked brilliantly on a variety of levels.

Spurred by his success with the appropriations measure, DeMint aimed his sights at the so-called bipartisan ethics bill crafted by incoming Majority Leader Harry Reid (D-Nev.) and Minority Leader Mitch McConnell (R-Ky.). McConnell had botched things, lending his name to a "compromise" substitute that—despite being forced through a year before—failed to really reflect his own and GOP priorities of much of his caucus.

To begin with, McConnell had lent his name to a proposal that would, for the first time, require reporting of "grassroots" lobby expenditures (i.e., expenditures of public policy groups used to influence public opinion). For a senator like McConnell—who had litigated all the way to the Supreme Court to establish that McCain-Feingold's limits on public policy pronouncements were unconstitutional—it is hard to see how this could have been regarded as acceptable.

But, rather than use his veto to block its inclusion in an amendment with his name on it, McConnell allowed the "grassroots" provision to be included in the Reid/McConnell package—and then offered an amendment to strike it from his own proposal. The "grassroots" requirement was a paradigm—though by no means the only one—in a bill directed to regulate lobbyists, but not the ethically challenged congressmen who caused the scandals in the first place.

DeMint understood that the only way to cause trouble for an ethics bill is to "out-ethics" the moralists. So he offered a draconian definition of the types of earmarks that would be regulated by the bill, including "nonlegislative" earmarks that are attached to conference reports. And, in a surprise move, the leadership was

unable to table the DeMint amendment – losing a 46-to-51 vote and forcing the Senate to a standstill.

So contentious became the wrangling that the Senate was forced to vote on a rare “motion to instruct” the Sergeant at Arms to request the presence of absent senators—an infrequent parliamentary procedure that results when a senator refuses to allow a quorum call to be suspended. Even relatively seasoned senators like Charles Schumer (D-N.Y.) were scratching their heads trying to figure out what was going on.

Following disposition of the DeMint amendment, Steering Committee member and former Budget Committee Chairman Judd Gregg (R-N.H.) then offered an amendment to reinstate the “line-item veto”—an amendment that led Senator Majority Leader Harry Reid (D-Nev.) to threaten to kill his own bill.

All of this caused one senator to publicly state how largely House-trained younger senators “yearn for the House procedures.” All but the most naïve Senate Republicans breathed a sigh of relief that they hadn’t gotten what they had asked for.

### ***What the Republicans Think about Why They Are Where They Are***

The problem with “Monday morning quarterbacking” in Washington is that every analyst construes events in a way that will further his or her own interests. Having said that, it is probably helpful to know—if not necessarily what happened to Republicans on election day—what some Republicans think happened to them.

And, in this regard, the GOP commissioned a poll from Luntz, Maslansky in Alexandria, Virginia, to dissect the election results. Certainly contrary to most conventional wisdom, the resultant December 2006 study played down the impact of an unpopular president and an unpopular war in Iraq. “You can’t blame this election solely on George W. Bush,” argued Luntz. “The results of 2006 were larger than Iraq – it was, as Strother Martin said to Paul Newman in *Cool Hand Luke*, ***‘a failure to communicate.’***” [emphases in original added]

Luntz goes on to argue that the election was decided by “a non-traditional type of [moderate] swing voter.” These voters—which he dubs the “Republican Rejecters”—(1) were angry and wanted change, (2) “don’t like political games,” (3) “didn’t see themselves in Republican candidates,” and (4) “lost hope.” Roughly a quarter defected because of “illegal immigration”—and

another quarter because of “unethical behavior,” according to Luntz, who did not list the war in Iraq among any of the major causes of dissatisfaction.

The Luntz study—which, right or wrong, reflects the spin some in Washington are trying to place on the elections—seems to implicitly reject the notion that Republicans lost because their disaffected base stayed home on election day. In addition, it pretty well ignores the impact of the war and, if believed, will certainly be a disincentive to any significant change in U.S. policy with respect to Iraq.

Rather, if believed, the Luntz analysis will result in “reform,” “contrition,” “hope,” “vision,” a “Middle Class Agenda,” “cooperation” with the Democrats, and, most of all, “communication”.

### ***House Adopts Pay/Go Rules***

In one of the first moves of the new Democratic leadership, the House adopted so-called pay-go rules—comparable to those that existed during the final years of the Clinton administration, but were allowed to expire by Republicans during the 107th Congress.

Under “pay-go,” tax cuts and appropriations and entitlement increases are normally allowed only if sponsors can produce a budget “offset” to eliminate the impact on the deficit.

One is tempted to say that the battle over “pay-go” represents a split between the “deficit hawks” of the Republican Party and the supply-side fiscalists. Unfortunately, in practice, budget-busting omnibus appropriations bills almost always receive the 60 votes necessary to waive the Budget Act—and tax cuts frequently don’t.

So, while facially neutral, “pay-go” is, as Republicans realized in the 107th Congress, practically speaking, an anti-tax-cut “reform”—a fact that probably explains why only forty-eight Republicans supported it in the House, even though it had been conspicuously featured on a list of potential “budget process reforms” back when the GOP was in power. This, incidentally, is thirty-four fewer Republican House members than supported the increase in the minimum wage—and twenty fewer than supported the Democrats’ “blue-state-tilted” pork barrel plan to “implement the recommendations of the 9/11 commission.”

Ironically, for all of the “budget process reform” that has been considered and instituted over the year—most of which would serve primarily to facilitate higher taxes

and higher spending—the one device that has consistently been central to killing expensive new programs—the Senate “hold”—was, at press time, slated to be effectively eliminated as part of the Senate-passed “ethics reform” legislation.

## ***John Dingell—He’s Back***

The name of John Dingell (D-Mich.)—the incoming Chairman of the House Committee on Energy and Commerce—will surely strike terror in the heart of anyone who has ever received a “Dingell-gram.” This is a euphemism for a demand that an agency or corporation produce huge amounts of internal documents in search of embarrassing or incriminating information, in order to prepare Dingell to humiliate the senders before a national TV audience and call for their prosecution and/or removal from office.

Anyone who thought the 80-year-old Dingell had lost his edge was surely disabused of this notion when, in the opening days of the 110th Congress, he fricasseed the GOP-controlled Federal Communications Commission (FCC) with a list of “significant concerns” over the FCC’s approval of the merger between AT&T and BellSouth.

Suffice it to say that the concept of antitrust enforcement had become something of an anachronism under the Bush administration. And the two Democratic members of the FCC—who had thought they had scored a massive achievement by eking modest compromises out of AT&T as a condition of the merger—were greatly surprised to have suddenly become the target of an excoriating missive by “the chairman.”

For better or worse, FCC officials are taking this opening salvo as an indication that Dingell intends to keep the agency on a tight leash, using subpoenas, documentary demands, and oversight hearings.

## **THE JUDICIARY**

### **Congress and the Judiciary**

#### ***The Courts Lobby Congress***

Once characterized as the “cloistered” branch, there is, increasingly, nothing cloistered or reticent about a federal judiciary where the Chief Justice goes on Nightline and associates promote their books and debate one

another in a public forum over the relevance of foreign law to judicial decision making.

Chief Justice Roberts elevated the issue of federal judicial salaries by declaring in his annual report that the failure of Congress to adjust judges’ pay has become a constitutional crisis. It remains doubtful that the Congress will have the courage to take this on when it is debating whether to raise the minimum wage to \$7.25 an hour.

For the most recent evidence of that, one need look no farther than the current engagement of federal judges in opposition to mandatory minimum sentences for cocaine dealers. Incoming House Judiciary Committee Chairman John Conyers (D-Mich.) created an opening by announcing hearings on various anomalies arising from legislatively mandated sentencing, starting from the disparity between hard sentences for dealing in crack cocaine, as opposed to lighter sentences for trafficking in the powder variety of cocaine.

This has led to a number of public pronouncements against mandatory minimums in general—from judges ranging from the Fourth Circuit’s Reagan-nominated William Wilkins to Clinton-nominated District Judge Nancy Gertner.

Part of the pent-up frustration comes from the contentious relations between federal judges and outgoing House Judiciary Committee Chairman F. James Sensenbrenner (R-Wis.)—a man who had no problem “investigating” the sentencing patterns of federal judges who had the temerity to criticize legislation expanding mandatory minimum sentencing.

This was at the same time that Sensenbrenner was pushing expansive new “gang” legislation—patterned after the Racketeer Influenced and Corrupt Organizations (RICO) Act—to impose twenty-year mandatory minimum sentences on any formal or informal group of people who commit two or more offenses from a long list of fairly innocuous crimes (including gun-related paperwork violations).

But if the judges think that the departure of Sensenbrenner from power foretells a “brave new world” of flexible sentencing, they may be deluding themselves. Incoming House Judiciary Committee Chairman John Conyers is at the left wing of his party’s left wing, and even he is only willing to consider Jesuitical issues like the sentencing distinctions between crack cocaine and powder cocaine.

In the House, there is no way that Speaker Nancy Pelosi (D-Cal.) would force her “red state Democrats” to vote on any but the most esoteric measures to ease criminal sentencing. In the Senate, liberal Republicans like Arlen Specter (R-Pa.)—who will wield the balance of power in that institution—are some of the strongest proponents of mandatory sentencing. And finally, a White House struggling to overcome plummeting approval ratings would be more than happy to wield its veto pen in order to demonstrate that it is not “soft on crime.”

So the bottom line is that the judiciary has once again stuck out its collective neck and, if this is possible, even further imperiled any residual perception that it is nonpolitical—all on behalf of legislation that is never going to be passed.

## The Supreme Court

### Cases Decided

#### We Told You So: High Court Overturns \$79.5 Million Punitive Damage Award

Within the next month, the Supreme Court, belatedly, should be handing down decisions on a large number of cases on which it, belatedly, granted cert. And, next month, the *Watch Report* will discuss what the Court has done to date—and what it says about the new makeup and dynamics.

But at press time, the Court had just handed down its opinion in *Philip Morris USA v. Williams*, No. 05-1256 (2007), and it is probably worthwhile to briefly mention the opinion here.

The justices, by a 5-to-4 decision, overturned a \$79.5 million punitive damage award against Philip Morris on due process grounds—and specifically the lower court’s consideration of damages to persons not party to the suit.

This was hardly a surprise. Last fall, a summary of the Court by the National Legal Center said this: “On the surface [the *Philip Morris* case] looks remarkably like ... a case that keeps bouncing back to the Supreme Court so that justices can yell at the obstinate lower court for not implementing what we all thought was settled law.”

What was surprising was:

- the narrowness of the decision; and

- the fact that Thomas and Scalia joined Ginsburg and Stevens in an odd-fellow coalition in dissent.

Ironically, Stevens and Ginsburg reached their decision, apparently, because they just didn’t like tobacco companies. Stevens said Philip Morris engaged in “a campaign of deceit in distributing a poisonous and addictive substance ....”

Thomas, on the other hand, once more employed “conservative jurisprudence” to achieve a liberal result, arguing for “more respectful treatment to the proceedings and dispositions of state courts ....”

More about this, next month.

### Supreme Court Issues What May Be the First of a Series of Patent Law Rebuffs to the Federal Circuit

*MedImmune Inc. v. Genentech, Inc.*

No. 05-608

from the Court of Appeals for the Federal Circuit

Since it was created to resolve some intellectual property issues and other fairly arcane disputes of interest to the federal government, the Federal Circuit Court of Appeals has been on a fairly long leash—in part, because no one else wanted to think about much of the brain-aching esoterica that came before that court.

But the appellate court has used its very broad discretion to create lines of cases that—to put it mildly—haven’t always pleased everyone.

And, in what could be the first of several rebuffs to the heretofore largely unsupervised appeals court judges, the Supreme Court held on January 9 that a patent licensee need not refuse to pay royalties in order to challenge the validity of a patent.

Article III of the Constitution requires that a patent infringement case—like any other case brought before the courts—involve a justiciable controversy. And twice the Federal Circuit has recently held that the courts can therefore only hear a challenge to the validity of a patent by a patent licensee if (1) the licensee has ceased to pay royalties, or (2) the licensor has breached the agreement in some way.

The problem for MedImmune—a biotech company based in Gaithersburg, Maryland—was that the patent license that it was challenging was central to the production of a drug that accounted for 80% of its income. And this was in addition to the danger that MedImmune could be liable for treble damages if the patent were found valid.

In particular, MedImmune's primary money-maker was Synagis—developed in 1998 to treat childhood respiratory illnesses—and developed with a process patented by Genentech following protracted litigation, which specified that Genentech had the right to receive royalties from MedImmune and others.

So MedImmune continued to pay royalties, but also sued. And, not unpredictably, the Federal Circuit held that MedImmune's insistence on complying with a potentially invalid agreement denied the court a justiciable controversy.

But the Supreme Court, in an 8-to-1 opinion, reversed.

Writing for the Court, Associate Justice Antonin Scalia stated that a litigant shouldn't be required to "bet the farm" in order to challenge a patent's validity. For this proposition, the Court cited its own 1943 patent precedent, coupled with a series of cases where litigants were allowed to challenge a statute without breaking it.

So what does this all mean?

Certainly, everyone, including the Solicitor General in an amicus brief, has pointed out the present Supreme Court's propensity toward holdings that promote technological innovation. And, in a biotechnology field where more than one questionable patent has served as a stumbling block to important research, the Court clearly believed it was striking a blow on behalf of medical progress.

In addition, the Court may be sending a larger message that it feels that the Federal Circuit has been too favorable toward patent holders. In this regard, it is significant that the Court will soon hand down a decision on *KSR International Co. v. Teleflex, Inc.*, No. 04-1350—another Federal Circuit patent appeal that could bring into even starker relief the Supreme Court's dissatisfaction with the Federal Circuit's stewardship.

The *KSR* case will look at even more controversial pro-patent-holder decisions by the Federal Circuit—dealing with (and limiting) statutory prohibitions on patents for inventions that are "obvious." This it did by holding that an innovation could only be "obvious" if the challenger could demonstrate that there was some "suggestion, teaching, or motivation" that would have led a person of ordinary skill in the art to combine the relevant prior art teachings in the manner claimed."

Suffice it to say that it is not at all clear that this "suggestion, teaching, or motivation" requirement is statutorily mandated—or even allowable.

## Cases Docketed

### Court Agrees To Hear Case on Race Discrimination

*BCI v. Coca-Cola Bottling Co. of Los Angeles*

No. 06-341

from the Ninth Circuit Court of Appeals

One of seven cases added to the Court's docket on January 5, this case was brought by a black Coca-Cola employee—who was supposedly fired for insubordination after refusing to work over the weekend when he was scheduled to have days off—but who claims that his actual dismissal was motivated by a supervisor's racial bias, who, in turn, convinced a Human Resources manager to fire him.

The Ninth Circuit, which reversed the federal district court's dismissal of the action, argued that the district judge had been overly persuaded by the fact that the supervisor made no express firing recommendation to the Human Resources manager.

But, if one had to bet, one would have to assume that the Supreme Court took the case to, once again, rebuke the Ninth Circuit for interfering with the discretion of the trier of fact.

### Court Grants Cert. to a Second Tobacco Case

*Watson v. Philip Morris*

No. 05-1284

from the Eighth Circuit Court of Appeals

Certainly, one of the prongs in the multiprong strategy to outlaw tobacco is the plan to bring large numbers of harassment suits against cigarette manufacturers. In addition to the recently decided *Philip Morris USA v. Williams*, another suit will reach the Supreme Court this Term.

In January, the Supreme Court agreed to hear a challenge to an Eighth Circuit ruling that a deceptive advertising suit based on Philip Morris's alleged misrepresentations concerning its "lite" cigarettes could be removed to federal court.

In particular, the district court had held—and the Eighth Circuit upheld the proposition—that the Federal Trade Commission's (FTC) jurisdiction over advertising meant that Philip Morris (now "Altria") was a "person acting under" a federal officer.

Everyone assumed that Philip Morris would prevail against Williams in the punitive damages suit. But the proposition that Altria is, in fact, an agent of the federal government may be another matter.

## Cases Denied Cert.

### Always Wrong, But Never in Doubt: High Court Refuses To Revisit Kelo

*Didden v. Village of Port Chester*

No. 06-652

from the Second Circuit Court of Appeals

cert. denied January 16, 2007

Nothing that the Supreme Court has done in the last decade has triggered as much outrage as its 2005 decision in *Kelo v. City of New London*—where it decided that the Constitution’s requirement that eminent domain be for “public use” did not prohibit a town from seizing land and turning it over to a developer for a privately owned project.

Thirty-four states passed legislation prohibiting towns from mimicking *New London*, and one activist lobbied to persuade the town of Weare, New Hampshire, to seize the home of Associate Justice David Souter in order to build a “Freedom Hotel.”

Given that both Chief Justice John Roberts and Associate Justice Samuel Alito replaced dissenters in the *Kelo* case, any reconsideration of that case would have required a change of heart on the part of one of the members of the majority. Nevertheless, many conserva-

tives had been hopeful that the outrage over *Kelo*—coupled with the egregious facts in this new case—might have provoked rethinking on the part of at least one member of the majority.

In *Didden*, a landowner who had negotiated with CVS Pharmacies in order to build an outlet on his property instead had his land acquired by eminent domain in order to build a competing Walgreens. This was made even more egregious by accusations that the town-approved larger developer’s owner had improperly demanded a financial stake in CVS as a condition for not seizing Didden’s property by eminent domain.

There was one wrinkle that may have muddied the usefulness of *Didden* as a test case: Both lower courts based their decisions on the failure of Didden to file his suit within three years of the adoption of the redevelopment plan.

Of course, it may also be that the nonprevailing Justices were waiting for the retirement of a member of the *Kelo* majority before taking another shot at protecting property rights.

And finally—and perhaps more likely—it may be that all of the public outrage over *Kelo* has had absolutely no impact on the opinions of the Justices who participated in that case.



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