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Significant Business Cases Slated for Decision in the Supreme Court Term

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Monday, October 6 will mark the beginning of the new term of the U.S. Supreme Court (October Term 2008). The most notable development is that, after years of a shrinking docket, the Court is beginning to step up the pace. As of October 1, the Court has granted 53 cases for argument. By comparison, the Court had granted only 43 cases at the same point last year, on its way to a mere 67 merits opinions in October Term 2007 (one of the lowest totals in decades). The Court's docket will not likely ever reach the past heights of the 1970's and early 1980's, when the Court typically decided between 120 and 150 cases in a term, in part because of changes in its jurisdiction. But this development is promising for business litigants, who have fared well in the Roberts Court.

The Supreme Court's upcoming docket includes a number of cases affecting the business community, most notably in environmental, employment, arbitration, communications, trade, and antitrust law, as well as punitive damages and preemption.

Environmental Law: The Court will decide four environmental law cases of potential significance. The case with the broadest impact for business is *Burlington No. Santa Fe. R. Co. v. United States, et al.,* No. 07-1601. In *Burlington*, the Court will determine the standards for apportioning liability among potentially responsible parties in actions brought by state and federal government under CERCLA. The courts of appeals in prior cases had previously concluded as a matter of federal common law that CERCLA liability is joint and several unless the harm shown is divisible under the Restatement (Second) of Torts, section 433. The Ninth Circuit accepted that standard, but held that CERCLA liability is "super-strict." Accordingly, the Ninth Circuit effectively adopted a presumption in favor of joint-and-several liability in actions brought by the government for clean-up costs. Should the Supreme Court reject the Ninth Circuit's approach, downstream landowners, operators, and arrangers may well avoid paying for clean-up costs created by the conduct of previous owners and operators – an important and far-reaching development. The Court also granted a companion petition that presents the question of the scope of arranger liability under CERCLA.

The other cases granted by the Court concern the Clean Water Act and the National Environmental Policy Act. In *Entergy Corp. v. EPA,* No. 07-588, and consolidated cases, the Court will decide whether the Clean Water Act authorizes EPA to compare costs and benefits in determining what constitutes the best technology available for minimizing the adverse environmental impact of cooling water

intake structures (which are used in electrical power plants and other industrial facilities). The case presents an interesting question of whether cost-benefit analysis is so presumptively contrary to federal environmental laws as to overcome principles of deference to agency statutory interpretations, and, thus, could have significant ramifications for the EPA's use of cost-benefit analysis in other contexts. *Coeur Alaska v. Southeast Alaska Conservation Council,* No. 07-984, concerns the respective jurisdictions of the EPA and the Army Corps of Engineers under the Clean Water Act. The Court will decide whether the Corps may exercise its statutory authority to issue a dredge-and-fill permit if the fill material contains pollutants subject to strict statutory limitations administered by the EPA. Finally, in *Winter v. NRDC*, No. 07-1239, the Court will resolve various questions surrounding the Navy's obligations under the National Environmental Policy Act to assess the impact on marine mammals of SONAR used in training exercises. While some of the issues presented are specific to the national security context, the Court may also more broadly decide the showing of irreparable injury necessary for plaintiffs to secure preliminary injunctions in environmental cases.

Employment Law: The Court has granted one Title VII case and two ERISA cases. In *Crawford v. Metropolitan Government of Nashville and Davidson County*, No. 06-1595, the Court will decide whether an employee who discloses adverse information in an employer's internal investigation of a discrimination claim has "opposed" discriminatory practices or participated in an investigation within the meaning of Title VII, and therefore can bring a claim against the employer to redress retaliation. The EEOC supports the plaintiff. *AT&T Corp. v. Hulteen*, No. 07-543, presents the question of whether a company pension plan may lawfully deny service credit for pregnancy leaves taken prior to the passage of the 1978 Pregnancy Discrimination Act ("PDA") (*i.e.,* whether the PDA will be given retroactive effect). The United States, at the invitation of the Court, filed a brief at the petition stage urging that the petition be granted, and agreed with AT&T that the plaintiff's perpetuation-of-discrimination theory was invalid and that the PDA could not be applied retroactively. *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan*, No. 07-636, will determine what methods are valid under ERISA to waive a divorcing spouse's claims to pension benefits.

Arbitration: Having previously held that an employee may agree to arbitration of federal statutory claims, the Court will now decide in *14 Penn Plaza LLC v. Pyett*, No. 07-581, whether a collective bargaining agreement that requires arbitration of employees' federal antidiscrimination claims is enforceable. *Vaden v. Discover Bank,* No. 07-773, will resolve whether the presence of a federal question in the underlying dispute gives rise to jurisdiction under the Federal Arbitration Act, even if the petition to compel arbitration does not itself raise a federal question.

Communications: In *Federal Communications Commission v. Fox Television Stations*, No. 07-582, the Supreme Court will review a Second Circuit decision striking down the FCC's change of its indecency standard – to apply to unrepeated, fleeting expletives during a broadcast – as arbitrary and capricious under the Administrative Procedure Act. The FCC is seeking to have the Supreme Court decide the case strictly under the deferential review standards of the APA. The broadcasters are seeking to position the case to be decided under (or in light of) stricter First Amendment standards.

Trade: The Court will address the statute authorizing antidumping duties in *United States v. Eurodif S.A.*, No. 07-1059. The case may give guidance on when a contract for the provision of manufacturing services abroad constitutes a sale of merchandise in the United

States that is subject to the antidumping statute.

Antitrust: *In Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the Supreme Court held that a telecommunications carrier's regulatory duty to provide competitors access to its network facilities does not create an antitrust duty to deal with competitors that is actionable under Section 2 of the Sherman Act. Now, in *Pacific Bell Telephone Co. v. linkLine Communications*, No. 07-512, the Court will resolve a question not decided by *Trinko*: namely, whether "price squeeze" claims may be brought under Section 2 against such a regulated entity. The plaintiff linkLine alleged that Pacific Bell created a price squeeze by setting a wholesale price for DSL internet services and equipment that made it impossible for linkLine to compete profitably against Pacific Bell in the retail market. An unusual feature of this case is that the Department of Justice and the Federal Trade Commission are divided on the question. The Department of Justice has sided with Pacific Bell on the merits in urging the Court to reject price squeeze claims. The Federal Trade Commission issued a statement opposing the grant of certiorari because (among other things) it disagreed with the Department's analysis, characterizing the Ninth Circuit's recognition of price squeeze claims as "unquestionably correct."

Punitive Damages: In *Philip Morris, USA v. Williams*, 127 S. Ct. 1057 (2007), the Supreme Court held that the Due Process Clause protects defendants against punitive damages awarded for injuries to parties not before the Court, and remanded to the Oregon Supreme Court to apply that standard to a $79.5 million punitive damages award against Philip Morris. On remand, the Oregon Supreme Court held that Phillip Morris had forfeited its constitutional claim as a matter of state law by submitting improper jury instructions. *In Philip Morris, USA v. Williams*, No. 07-1216, the Court will now decide whether state law of procedural default may properly be invoked after the U.S. Supreme Court finds error in the state court's definition of federal constitutional standards. While this case may be decided on narrow or case-specific grounds, it has potential significance in many arenas where the Supreme Court supervises the enforcement of constitutional law in the state courts.

Preemption: The Court will hear two major business cases involving federal preemption. In *Wyeth v. Levine*, No. 06-1249, the question is whether state tort law duties to provide warning labels different from those approved by the Federal Drug Administration are preempted. No express statutory preemption clause is invoked. The petitioner (Wyeth) argues implied conflict preemption on the grounds that it could not comply simultaneously with state and federal law, and that the state tort duties present an obstacle to achievement of FDA's balancing of drug safety and effectiveness when it approved the label. The staggering number of *amici curiae* briefs underscores the contentiousness of the issue: 21 *amici* filed in support of respondent at the merits stage, while eight others supported the drug company petitioner. The United States has filed in support of Wyeth, arguing that state tort law is preempted when the FDA approves a label after being informed of the relevant risks. *Altria Group, Inc. v. Goode,* No. 07-562, will determine (among other things) whether state law challenges to cigarette advertising regarding nicotine and tar yields are preempted under the Federal Cigarette Labeling and Advertising Act.

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Many of the foregoing cases are fully briefed, but others still present opportunities for amicus intervention. For further information on these cases or our Supreme Court practice, please contact the individuals listed below.

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