2007 United States Supreme Court Year in Review

SPEAKERS:
Richard A. Schneider
John D. Shakow
Elizabeth Semancik White

Tuesday, October 16, 2007
12:30 – 1:30 p.m. Eastern time

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Mr. Schneider was lead trial and appellate counsel in the Scott and Engle landmark tobacco class actions. In addition to these landmark mass tort product liability cases, Mr. Schneider has tried various Title VII cases.

Mr. Schneider is a frequent lecturer on United States Supreme Court decisions, class actions, discovery and evidence issues. Mr. Schneider is listed in the Best Lawyers in America.

Mr. Schneider is a Trustee of the United States Supreme Court Historical Society and a member of the Board of Trustees of Mercer University. Mr. Schneider attended the United States Naval Academy Preparatory School and the United States Naval Academy from 1974 to 1977. He graduated with high honors from Auburn University with a B.A. in English in 1978. In 1981, Mr. Schneider graduated, summa cum laude, from Mercer University’s Walter F. George School of Law.

Mr. Schneider founded the Georgia Institute of Continuing Legal Education’s annual course on the opinions handed down by the United States Supreme Court each year.

John Shakow is a Counsel in the FDA/Healthcare Practice Group in the Washington, D.C. office of King & Spalding. Mr. Shakow’s practice focuses on regulatory and litigation issues related to drug pricing and price reporting, including day-to-day counseling, strategic planning, internal investigations, civil litigation and defense in government investigations.

He counsels numerous pharmaceutical manufacturers and health care providers with regard to their rights and obligations under the Medicaid, Medicare, Federal Supply Schedule, Public Health Service 340B and related programs, and regularly assists clients in interactions with CMS, HRSA, HHS OIG and the VA. He often conducts in-depth pricing assessments and works with clients to develop and implement government price calculation and reporting policies, procedures and methodologies.

Mr. Shakow also provides fraud and abuse counseling in all aspects of pharmaceutical sales, marketing and promotion. He is a frequent speaker at pricing and price reporting conferences and symposia.

Mr. Shakow graduated from the University of Virginia School of Law in 1997 and earned his BA in Economics and Public Policy from Swarthmore College in 1991.
Speaker Biographies

Elizabeth Semancik White is an associate with King & Spalding’s Tort Litigation and Environmental Law Practice Group. She represents clients in a variety of tort claims, with a particular focus on claims in the toxic tort field and appellate work involving a variety of product liability actions. Ms. White has represented clients throughout the United States in both state and federal court.

Before joining King & Spalding, Ms. White served as a law clerk to the Honorable Henry H. Whiting, Sr., Justice for the Supreme Court of Virginia. Ms. White is a 2000 graduate of the University of Virginia School of Law, and a 1997 graduate of the University of Virginia College of Arts and Sciences where she was a Jefferson Scholar and graduated Phi Beta Kappa with a Distinguished Major in English and American Studies.

Ms. White is a board member, committee co-chair, and officer in the Georgia Association of Women Lawyers; a member of the Junior League of Atlanta; co-chair of the Atlanta Jefferson Scholar Regional Selection Committee; and a trustee of the University of Virginia School of Law Class of 2000. She also plays French Horn with the Callanwolde Concert Band.

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The 2006-07 Supreme Court term was particularly applauded by the business community for its strong pro-business holdings. The Court decided 68 cases after argument, along with four summary dispositions without argument. Out of these 72 cases total, it rendered 24 5-4 decisions (33%), the highest percentage in at least a decade. Most of these decisions were dominated by the Court’s five more conservative members. The share of unanimous opinions fell from last term, with only 18/72 (25%) unanimous decisions (not including 10 opinions unanimous in judgment only) compared to last term’s 37/82 (45%) unanimous decisions.

The greatest agreement was between Chief Justice Roberts and Justice Alito, who agreed in full in 88% of the cases they both heard. Justice Kennedy voted with the majority in all 24 of the Court’s 5-4 decisions. Justice Alito voted with the 5-4 majority 71% of the time. As in the Court’s last term, Justice Stevens dissented more frequently than any justice—26 times this term. Once again, most of the Court’s cases were from the Ninth Circuit—21 out of 72 cases (29%)—more than any other federal Court of Appeals. The Court vacated or reversed the Ninth Circuit in 18 out of 21 cases. The Eleventh Circuit accounted for only 5/72 (7%) of this term’s cases.
Justice Breyer delivered the opinion for the unanimous Court in this putative class action involving the federal officer removal statute.

Plaintiffs claimed that the cigarette manufacturer designed its cigarettes to deliver more tar and nicotine than its use of the labels “light” and “lowered tar and nicotine” implied.

The lower court and the Eighth Circuit allowed removal to federal court under the federal officer removal statute, based on defendant’s claim that it was “acting under” the direction of a federal officer in using terminology and a tar and nicotine measurement system that was mandated by the Federal Trade Commission.

Complying with federal law is not the same thing as acting under the direction of a federal officer. PM is not analogous to a federal government contractor that often is allowed to remove to federal court under the “federal officer” removal statute. The Court ruled that Philip Morris was simply complying with federal regulations, not assisting the federal government in performing one of its functions.

The Court did not address the theory that cigarette manufacturers can assert a conflict preemption defense against state law tort claims that criticize manufacturers for complying with the FTC method for measuring tar and nicotine delivery under specified conditions.

In this individual smoker case, a jury awarded $800,000 in compensatory damages and $79.5 million in punitive damages—a ratio of roughly 100 to 1. The trial court remitted the punitive award by half, but the Oregon appellate courts reinstated the whole amount, even in the face of a remand for reconsideration under State Farm Mut. Automobile Ins. Co. v. Campbell (which generally limits punitive damages to a single digit multiplier of compensatory damages).

Plaintiff’s lawyer had argued to the jury that punitive damages should be set by considering how many other cigarette victims there were out there, just like the plaintiff.

The Court found that basing punitive damages on the potential claims of other persons not before the Court was a taking of property without due process.

Justice Breyer wrote for the majority in this 5-4 decision.

The Court fashioned a rule which permits juries to consider the risk of harm to persons other than the plaintiff for the purpose of assessing reprehensibility but which forbids juries from considering harm to others in selecting the amount of punitive damages. The dissenting justices found this distinction hard to grasp.
Justice Kennedy delivered the opinion in this 5-4 decision.

Leegin owns the popular Brighton brand, and established a policy forbidding retailers from selling below its minimum retail price. When plaintiff retailer discounted Brighton merchandise 20%, Brighton stopped selling to the store.

Since 1911 under Dr. Miles Medical Co. v. John D. Park & Sons, it has been per se illegal for a manufacturer and a retailer to agree on a minimum retail price. Such vertical restraints have been believed to be anticompetitive and harmful to consumers, who presumably would want retailers to compete on price and sell the goods for less than the suggested price.

The manufacturer lost at trial and sought to set aside Dr. Miles on appeal. It failed at the 5th Circuit and prevailed 5-4 in the Supreme Court.

The Court held the test now should be rule of reason, not per se illegal because there are some circumstances where minimum retail prices can be procompetitive.

Dissent concluded that there was no reason to disturb stare decisis and this well-settled chestnut of antitrust law.

In the context of a Sherman Act Section 1 antitrust conspiracy case, the Court departed from the classic rules of notice pleading, overruled the long-standing liberal standing of Conley v. Gibson (a complaint should not be dismissed if there is any set of facts which could be proved to support it), and determined that an antitrust conspiracy plaintiff must allege facts suggesting that an agreement was made—merely alleging that defendants acted in parallel is not sufficient by itself to infer that an illegal agreement to act in parallel was made.

Parallel conduct alone is not illegal—competitors who copy each other and intentionally act in exactly the same way are not guilty of a conspiracy unless they entered into an agreement to act in parallel. Since parallel conduct alone is not illegal, the complaint must allege something in addition to parallel conduct to state a claim—and thus must allege facts showing an agreement or must allege facts that plausibly suggest why the particular parallel conduct in question would likely not be occurring unless there were an agreement.

The Court ruled, in a 7-2 decision (Stevens and Ginsburg dissenting) that a plaintiff must allege “enough facts to state a claim for relief that is plausible on its face. . . .”

Plaintiffs offered arguments as to how the conduct in question could suggest an agreement, and the Court came up with counter arguments as to how the conduct could be unilaterally driven. The Court appeared to suggest that the existence of a counterargument rendered the conspiracy argument implausible.
In this antitrust case, the Court unanimously held that the same test for assessing predatory pricing claims under § 2 of the Sherman Act applies to predatory bidding claims. In either case, the plaintiff must show that the competitor set prices below cost and has a dangerous probability of recovering its losses by later driving up output prices or driving down input prices.

Predatory pricing is a scheme in which a company reduces the sale price of its product to drive its competition out of business and then raise prices to a supracompetitive level. Predatory bidding is this same exercise on the buy (input) side of the market.

The plaintiff sawmill claimed that the defendant drove it out of business by bidding up the price of saw-logs to a level that prevented it from being profitable. The lower court rejected the defendant’s proposed predatory bidding jury instructions that incorporated elements of the test applied to predatory pricing claims. The Supreme Court vacated and remanded.

Justice Thomas wrote the opinion for the unanimous Court.

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Tennessee Secondary School Athletic Association (TSSAA) regulates interscholastic sports among its members. TSSAA sanctioned Brentwood Academy, a private school and member of TSSAA, because its football coach sent 8th grade boys a letter violating TSSAA’s rule against using “undue influence” in recruiting middle school students for athletic programs. Brentwood filed a § 1983 action against TSSAA, asserting free speech and due process claims against the prohibition on such recruiting.

Held: TSSAA’s rule against recruiting did not violate the 1st Amendment or Brentwood’s due process rights.

An athletic league’s interest in enforcing its rules may warrant curtailing the speech of its voluntary members. Hard recruiting tactics directed at middle school students could lead to exploitation, distorted competition and improper prioritization of athletics over academics.

TSSAA’s sanction was preceded by an investigation, meetings, correspondence, a written determination, a hearing before the TSSAA director and advisory panel, and a de novo review by the TSSAA board. Thus, it did not violate due process rights.

Stevens delivered the opinion of the Court, with several concurrences.

- Held: Local school boards violated the Equal Protection Clause of the 14th Amendment when they voluntarily adopted race-based programs to redress de facto racial segregation in their school districts.
- Reason: The district’s use of the race of students in assignment them to particular schools was not sufficiently “narrowly tailored” to advance a “compelling” objective as required under strict scrutiny (required when race is at issue).
- The schools used race as a tie-breaker when determining to which school students were assigned if the requested school was “racially imbalanced.” This was not part of a broader effort to enhance other types of diversity, and instead focused solely on racial diversity. In addition, the definitions of race only considered whether students were “white” or “non-white” (in 1 school) or “black” or “other” (in another).
- Four justices in the majority also attacked the objective of the districts’ plans, asserting that “racial balance is not be achieved for its own sake.”
- Chief Justice Roberts wrote for the majority in this 5-4 decision.


- Various states and organizations petitioned EPA to regulate automobile emissions of greenhouse gases (GHGs) under § 202 of the Clean Air Act. EPA declined to do so.
- Held: (1) EPA could not permissibly determine that GHGs do not “cause or contribute to” pollution that endangers public health and welfare; and (2) Massachusetts had standing to bring the case.
- “A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For where carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a greenhouse gas.”
- Massachusetts had standing since it demonstrated the following “concrete and particularized injuries”: (i) a loss in public territories due to a rise in sea level, and (ii) a sovereign interest in protecting the “earth and air in its jurisdiction.”
- This will certainly lead to a variety of legislation regarding GHGs, global warming, and climate change.
Morse v. Frederick, 127 S. Ct. 2618 (2007)

- A high school student brought a § 1983 action claiming that his 1st Amendment rights were violated when he was suspended for waving a banner stating “BONG HITS 4 JESUS” while at an off-campus school-approved and -sanctioned event.
- Held: Since schools can safeguard their students from speech reasonably regarded as encouraging illegal drug use (see, e.g., the Safe & Drug-Free Schools and Communities Act), the school’s actions did not violate the student’s 1st Am. rights.
- Since the event was school-sponsored and -supervised, school rules applied. The banner was displayed across the street from the school, and plainly visible to students at the school. The school reasonably interpreted the banner as encouraging or celebrating illegal drug use.
- Justice Roberts delivered the opinion in this 5-4 decision.


- An injured employee sued its railroad employer under the Federal Employers’ Liability Act (FELA).
- Contrary to most workers comp statutes, which provide relief without regard to fault, FELA only allows workers to recover damages if they show that their injury resulted “in whole or in part from the negligence of any of the officers, agents, or employees” of the railroad.
- The Court rejected a Missouri pattern jury instruction which applied a different standard to a railroad’s negligence (liable if its negligence contributed “in whole or in part” to its employee’s injury), than to an employee’s contributory negligence (the employee could be contributorily negligent only if his negligence “directly contributed to cause” the injury).
- Held: FELA “does not abrogate the common-law approach,” so the same causation standard applies to both a claim of negligence and an affirmative defense of contributory negligence. Although the Court declined to consider what that uniform standard should be, Souter, joined by Scalia and Alito, would have reached that issue and rejected the “relaxed” (watered-down proximate cause) standard of negligence endorsed by many courts.
- Roberts delivered the opinion, in which the others joined or concurred.
Alito delivered the opinion in this 5-4 decision.

Plaintiff, a retiree, sued her former employer, claiming that gender-based poor performance reviews she received earlier in her career resulted in lower pay than her male co-workers throughout her career.

Held: Later effects of past discrimination do not restart the 180-day clock for filing an EEOC charge.

The Court affirmed summary judgment for the employer on plaintiff’s Title VII pay discrimination claims, which were time-barred. Plaintiff did not file suit until after she retired, although the unlawful practices at issue were the individual performance reviews she received earlier in her career. The later-received pay checks were merely results of the allegedly intentionally discriminatory acts of years earlier.

In response to this case, the House has passed a bill (H.R. 2831) intended to overturn this opinion by amending Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act to specify that the time limit for filing pay discrimination claims begins each time the employee receives a paycheck manifesting discrimination.

Under the 1995 Private Securities Litigation Reform Act, a securities fraud plaintiff must state with particularity facts giving rise to the “strong inference” of the defendant’s scienter to survive summary judgment. The heightened pleading requirements were adopted to curb perceived abuses of securities fraud private actions.

In applying the pleading standard, courts must do more than simply consider the reasonableness of plaintiff’s allegations. They must, considering the complaint in its entirety, engage in a comparative evaluation, considering not just inferences favoring the plaintiff, but also “plausible opposing inferences” (that is, nonculpable explanations for the defendant’s conduct).

To qualify as “strong,” an inference of scienter must be more than merely plausible; it must be powerful, cogent and “at least as compelling as any opposing inference of nonfraudulent intent one could draw from the facts alleged.”

Ginsburg (8-1) (Stevens dissenting)
May a patent licensee pursue a declaratory judgment action against the patent holder without first breaching the license, that is, may it “pay and sue?”

More specifically, what is the standard for determining whether a declaratory judgment action has satisfied the federal ‘case or controversy’ requirement in a patent license case?

Federal jurisdiction lies where the plaintiff’s self-avoidance of imminent injury is coerced by the threatened enforcement action of a private party.

A justiciable case or controversy may exist regarding the validity of a patent despite the continuing existence of a patent license agreement. Such an agreement does not constitute settlement of the dispute over the patent.

Justice Scalia (8-1) (Thomas dissenting)

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No infringement occurs when a patented product is made and sold in another country. It is a violation of the Patent Act, however, for one in the United States to supply the components of a patented invention for combination abroad.

AT&T holds a patent on a computer used to digitally encode recorded speech. Microsoft Windows contains software code which, when installed, enables a computer to process speech in the same way. Microsoft sells a master version of Windows to foreign manufacturers, who install copies of the software. AT&T sued for infringement.

Because Microsoft does not export the copies of Windows actually installed on the foreign computers, the component rule does not apply and Microsoft is not liable for patent infringement. It is irrelevant that copies are easily made from the master version, and then actually installed on the foreign computers.

Abstract software code, such as the master version, is only an idea without physical embodiment, and therefore is not a “component” that can be illegally combined. A copy of the software on a CD-Rom would be a component.

Ginsburg (7-1) (Stevens dissenting, Roberts took no part)

- Section 203 of the Bipartisan Campaign Reform Act prohibits corporations, labor unions and banks from running broadcast ads that refer to a federal candidate within 30 days of a primary election or 60 days of a general election in the jurisdiction where the candidate is running.

- Because §203 burdens political speech, the government has the burden of demonstrating that it (1) furthers a compelling governmental interest and (2) is narrowly tailored to achieve that interest.

- By its terms, the Court held, §203 can inappropriately prohibit speech that is not ‘express campaign speech’ or its functional equivalent, but is instead mere issue advocacy.

- The interests that justify restricting corporate campaign speech do not justify restricting issue advocacy. Therefore, §203 unconstitutionally violated the 1st Amendment rights of WRTL.

- Chief Justice Roberts (5-4) (Souter, Stevens, Ginsburg & Breyer dissenting)

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**United Haulers v. Oneida-Herkimer Solid Waste Management Authority, 127 S. Ct. 1786 (2007)**

- Private trash haulers—forced by local “flow control” ordinances to pay a public Authority to dispose of waste collected in the counties, but who could do so out-of-state for less—sought to have the ordinances invalidated as violative of the “dormant” Commerce Clause.

- Laws that discriminate against out-of-state economic interests to the benefit of in-state interests, motivated by economic protectionism, are per se invalid.

- Preference for a public waste authority, however, does not implicate the dormant Commerce Clause. Government’s responsibilities to protect the health and welfare of its citizens sets it apart. Rationales other than economic protectionism.

- Further, the burden of these ordinances will fall on the taxpayers of the counties that enacted them, not on out-of-state interests.

- Justice Roberts (6-3) (Alito, Stevens & Kennedy dissenting)
A private individual pursuing a *qui tam* suit under the False Claims Act must be the government's "original source" of the allegations. To satisfy the "original source" requirement, the relator must have "direct and independent knowledge of the information on which the allegations are based."

Because the relator in this case left Rockwell before the alleged acts occurred, he could not have "direct and independent knowledge" sufficient to qualify as the "original source."

The relator's prediction of the possibility of the outcome leading to the false claims is not enough to confer standing as the original source (likely didn't help that his prediction was incorrect).

Justice Scalia (6-2) (Stevens & Ginsburg dissenting, Breyer took no part)


**Questions**

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