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# Term in Review

*Civil Cases*

## Term Features Victories for Business, Divisive Rulings on Constitutional Matters

The U.S. Supreme Court's 2006-2007 term gave the business community much to cheer about, but also handed it a significant defeat, according to academics and attorneys interviewed by BNA.

Unlike the preceding term, when experts unanimously tapped *Hamdan v. Rumsfeld*, 74 U.S.L.W. 4579 (U.S. 2006), as the most important ruling, no one opinion garnered consensus as the term's blockbuster. Instead, the court's generally consistent pro-business output shared the spotlight with the more publicly watched constitutional rulings on race-based public school placements, partial birth abortion, campaign finance, and student speech rights.

A U.S. Chamber of Commerce press release issued June 28, the date of the court's final opinion, summed up business's view of this past term. Robin Conrad, an attorney who serves as the executive vice president of the National Chamber Litigation Center, announced: ''We've been representing the business community before the Supreme Court for 30 years, and this is our strongest showing since the inception of NCLC.''

**Further Limits Set on Punitive Damages.** One of the cases with important consequences for business was *Philip Morris U.S.A. v. Williams*, 75 U.S.L.W. 4101 (U.S. 2007). The dispute arose when the widow of smoker Jesse Williams, on behalf of his estate, sued cigarette giant Philip Morris USA for negligence and deceit. At trial, she told the jury that it should ''think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been,'' and that 10 of every 100 smokers will die from smoking-related causes, one-third of whom would have smoked Marlboro cigarettes. The jury awarded $821,000 compensatory damages and $79.5 million punitive damages on the deceit claim.

The Supreme Court held that juries may not impose punitive damages on a defendant for injuring persons not before the court. In one of the 5-4 splits of the term, Justice Stephen G. Breyer wrote for the majority that a defendant has no chance to defend against alleged injuries to nonparties, and such ''standardless'' awards would magnify the risks of arbitrariness, uncertainty, and lack of notice against which the 14th Amendment's due process clause guards.

The opinion was important ''because the court drew some new limits on punitive damages,'' Paul M. Smith, Jenner & Block, Washington, D.C., told BNA. He added, however, that ''we will have to wait and see'' how significant the change will be. Smith's active Supreme Court practice has included cases involving congressional redistricting, First Amendment rights, and states' 11th Amendment immunity.

Law professor Erwin Chemerinsky, Duke University, somewhat echoed the view that the full effect of the court's opinion remains to be seen. Explaining, Chemerinsky said: ''Justice Breyer's majority opinion says that a jury cannot use punitive damages to punish a defendant for harms to third parties. But a few paragraphs later, the opinion says that a jury can consider harm to third parties in determining the reprehensibility of the defendant's conduct. The opinion is thus quite unclear: It says harm to third parties cannot be the basis for punitive damages, but that harm to third parties can be considered in determining reprehensibility (the most important factor in assessing punitive damages). This is going to cause great confusion for juries around the country.''

*Philip Morris* was a good result for the defense bar, despite the confusion, according to Michael A. Pope, a defense attorney with McDermott Will & Emery in Chicago. When plaintiffs' attorneys are uncertain about a result as to punitive damages, they will place less reliance on that factor in settlements and in their pleadings, he said.

Smart plaintiffs' counsel's primary objective is to hold on to a verdict, and plaintiffs' attorneys would be better off refining their arguments and techniques with respect to compensatory damages rather than focusing on punitives, Pope said.

Walter E. Dellinger III, O'Melveny & Myers, Washington, D.C., agreed with others that the court has more work to do in terms of clarifying the scope of punitive damages, ensuring that they are awarded only when and to the extent necessary to carry out the objectives of punishment and deterrence, and making certain that they are not so unpredictable that they have an adverse

**INSIDE SUPREME COURT TODAY**



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**Significant Civil Cases of the 2006-2007 Term**

- *Bell Atlantic Corp. v. Twombly*
- *Credit Suisse Securities (USA) LLC v. Billing*
- *Federal Election Commission v. Wisconsin Right to Life Inc.*
- *Global Crossing Telecommunications Inc. v. Metrophones Telecommunications Inc.*
- *Gonzales v. Carhart*
- *KSR International Co. v. Teleflex Inc.*
- *Ledbetter v. Goodyear Tire & Rubber Inc.*
- *Leegin Creative Leather Products Inc. v. PSKS Inc.*
- *Massachusetts v. Environmental Protection Agency*
- Medimmune Inc. v. Genentech Inc.
- *Morse v. Frederick*
- *Parents Involved in Community Schools v. Seattle School District No. 1*
- *Philip Morris U.S.A. v. Williams*
- *Safeco Insurance Company of America v. Burr*
- *Tellabs Inc. v. Makor Issues & Rights Ltd.*
- *Watters v. Wachovia*
- *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*

effect on investment. Dellinger is also a law professor at Duke University and a former solicitor general.

*Philip Morris* made the ''top five Supreme Court opinions for business'' list of Maureen E. Mahoney, Latham & Watkins, Washington, D.C., who appears regularly before the Supreme Court. ''Due process scrutiny of punitive damage awards is one of the most important protections that the court's recent precedents afford to American business,'' she told BNA. She noted, however, that ''this interpretation of the due process clause remains controversial with some members of the court and there was no guarantee that Chief Justice [John G.] Roberts [Jr.] and Justice [Samuel A.] Alito [Jr.] would be willing to adhere to those precedents.'' *Philip Morris* ''puts that question to rest,'' Mahoney said.

**No Dearth of 'Top Business Cases.'** *Philip Morris* was not among the top five business cases cited by Thomas C. Goldstein, who heads the Supreme Court practice at Akin Gump Strauss Hauer & Feld, Washington, D.C. Instead, his list featured a securities case (*Tellabs Inc. v. Makor Issues & Rights Ltd.*, 75 U.S.L.W. 4462 (U.S. 2007)), two antitrust cases (*Leegin Creative Leather Products Inc. v. PSKS Inc.*, 75 U.S.L.W. 4643 (U.S. 2007), and *Bell Atlantic Corp. v. Twombly*, 75 U.S.L.W. 4337 (U.S. 2007)), a patent case (*KSR International Co. v. Teleflex Inc.*, 75 U.S.L.W. 4289 (U.S. 2007)), and the ''global warming'' case (*Massachusetts v. Environmental Protection Agency*, 75 U.S.L.W. 4149 (U.S. 2007)), the only significant defeat for business interests.

Kenneth S. Geller, Mayer, Brown, Rowe & Maw, Washington, D.C., a co-author of a treatise on practicing before the Supreme Court, offered a somewhat different ''top five'' business cases list. He included *KSR*, *Bell Atlantic*, and *Leegin*, but he also cited *Philip Morris* and *Ledbetter v. Goodyear Tire & Rubber Inc.*, 75 U.S.L.W. 4359 (U.S. 2007), an employment discrimination case. Geller based his list ''largely on what I thought would be the practical effects of the decisions,'' he told BNA.

Geller went so far as to place *Philip Morris*, *Bell Atlantic*, and *Ledbetter* among the top cases overall, business aside.

Two other business cases—an antitrust case not on Goldstein's list (*Credit Suisse Securities (USA) LLC v. Billing*, 75 U.S.L.W. 4449 (2007)), and a consumer credit case of interest to the financial services and insurance industries (*Safeco Insurance Company of America v. Burr*, 75 U.S.L.W. 4386 (U.S. 2007)—made it on the list of the term's significant business cases for Richard Samp, chief legal counsel at the Washington Legal Foundation, Washington, D.C. Samp also named *Bell Atlantic* and *KSR* among his top cases.

The *Safeco* opinion provided needed guidance relating to the Fair Credit Reporting Act requirement that companies send notice to consumers who experience an ''adverse action'' based on a consumer credit report. The court resolved a circuit split by declaring that willful failure to comply with the requirement covers not only knowing violations, but also reckless ones. Further, the court made clear that initial rates charged for new insurance policies can constitute ''adverse actions'' for FCRA notice purposes.

The WLF describes itself as ''the nation's preeminent center for public interest law, advocating free-enterprise principles, responsible government, property rights, a strong national security and defense, and a balanced civil and criminal justice system.'' According to Samp, an overall theme characterizing the term's business cases was the court's attention to litigation abuse. This concern did not reflect a liberal/conservative divide, Samp said. Instead, the court was simply ''aware that too many suits are being filed with no thought other than to browbeat corporate defendants.'' Plaintiffs that survive a motion to dismiss use that leverage as a way to gain a monetary settlement, Samp explained. Limits on standing and more stringent pleading requirements in some instances targeted litigation driven by lawyers rather than by injured plaintiffs, he said.

Roy T. Englert Jr., Robbins, Russell, Englert, Orseck & Untereiner, Washington, D.C., an appellate litigator and antitrust lawyer who argues frequently before the Supreme Court, agreed with the general proposition that the court, by imposing various limitations on standing and pleading, could be seen as closing the courthouse door. He pointed out, however, that two important exceptions as to standing rule out a comprehensive trend. For example, in the global warming case, the court recognized that the unique status of states gives them special standing to allow challenges of the sort launched by Massachusetts.

Another exception merits attention as well, Englert said. In *Global Crossing Telecommunications Inc. v. Metrophones Telecommunications Inc.*, 75 U.S.L.W. 4188 (U.S. 2007), the court held that pay phone service providers have a private cause of action for damages under the Telecommunications Act against long-distance carriers that refuse to compensate them for providing callers ''free'' access to the long-distance carrier. [Englert argued and won that case.]

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**Flurry of Securities Cases.** The two securities cases decided by the court this term have received a great deal attention from the securities bar, but two securities attorneys contacted by BNA split over which was the more important ruling.

In *Tellabs*, the court held that the ''strong inference'' of scienter that federal securities fraud plaintiffs must plead under the 1995 Private Securities Litigation Reform Act requires that the complaint, when read as a whole, allege facts from which an inference of fraudulent intent is ''cogent and at least as compelling'' as any plausible opposing inference. That standard was tougher than some courts of appeals had imposed, but not as rigorous as the government sought.

According to securities practitioner Willis H. Riccio, Adler Pollock & Sheehan, Providence, R.I., *Tellabs* was the term's most important securities case. It embraces a stricter standard of intent, ''thus reducing the number of suits with less than cogent predicates, some of which are more inclined towards forcing settlements than true investor protection,'' Riccio said.

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***Credit Suisse* and *Tellabs* indicate that the court ''has figured out that favoring plaintiffs' lawyers doesn't necessarily produce much for consumers and what is produced is immensely costly.''**

JOHN F. OLSON
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John F. Olson, Gibson Dunn & Crutcher, Washington, D.C., said *Tellabs*'s ''moderately strong pleading standard'' fits a pattern of cases indicating that a ''substantial majority of the court is increasingly skeptical of expanding private securities fraud class actions.'' Justice Ruth Bader Ginsburg's opinion deferring to Congress ''seemed to have come from a different pen than her opinion'' in *United States v. O'Hagan*, 521 U.S. 642 (1997), which broadly construed Section 10(b) of the 1934 Securities Exchange Act in endorsing the misappropriation theory of insider trading securities fraud, Olson said.

In Olson's view, however, *Credit Suisse* outranked *Tellabs* as the more important securities case of the term. In *Credit Suisse*, investors' claims that underwriters of initial public offerings of securities had violated the antitrust laws by imposing anticompetitive conditions on buyers' participation in the IPOs were clearly incompatible with, and thus impliedly precluded by, the federal securities laws. The court ''emphatically endorsed the principle that the SEC's expertise in our national securities markets trumps even competing federal assertions of jurisdiction over those markets'' by the plaintiffs' bar and the Justice Department's Antitrust Division, Olson said.

*Credit Suisse* leaves little room ''for securities claims masquerading as antitrust claims, but I think there is still room for purer antitrust claims and I would never underestimate the creativity of the plaintiffs' bar,'' Olson said. Riccio saw the case as leaving no room for securities-linked antitrust claims.

Asked whether he agreed with Chemerinsky's assertion, in a Center for American Progress press conference, that this was the ''most overwhelmingly, consistently conservative term'' of the court ''in recent memory, perhaps since the 1930s,'' Riccio concurred ''totally.'' But Olson said that such a view ''oversimplifies the analysis.'' *Credit Suisse* and *Tellabs* indicate that the court ''has figured out that favoring plaintiffs' lawyers doesn't necessarily produce much for consumers and what is produced is immensely costly.''

Looking to the future, Olson predicted that the court will have to grapple with parties' assertion of a right to payment of their counsel fees in federal investigations and prosecutions, apparently alluding to the challenge to the Justice Department's ''Thompson Memorandum'' presented by an accounting firm's former employees in *Stein v. KPMG LLP*, 486 F.3d 753, 75 U.S.L.W. 1709 (2d Cir. 2007). The Thompson memorandum embodied a now-superseded Justice Department policy of treating corporations as cooperative with prosecutors if they waived attorney-client privilege. Some critics of the policy also said DOJ leaned on corporations to not pay employees' legal fees during investigations and prosecutions as a way of pressuring the employees to settle or cooperate with government officials.

For his part, Riccio said that the issue of whether self-regulatory organizations such as NASD are government actors subject to due process and other constitutional constraints in conducting parallel investigations of members would be an ''intriguing'' one for the court to take up.

**Antitrust Opinions: No Bright Lines, More Facts.** On the antitrust front, Robert M. Langer, head of the antitrust and trade regulation practice group at Wiggin and Dana, Hartford, Conn., submitted that *Leegin* was the key case of the term, and perhaps the most important since *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *Leegin* held that vertical price restraints in the form of resale price maintenance agreements between manufacturers and distributors are not per se illegal under Section 1 of the Sherman Act, but instead should be analyzed under the rule of reason in deciding whether those measures are anticompetitive. In reaching that conclusion, the court overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Langer, who filed an amicus brief in the case, saw *Leegin* as being consistent with *GTE Sylvania*'s holding that vertical nonprice restraints are not per se illegal: Both recognize that ''vertical restraints are likely to enhance not inhibit interbrand competition.'' *Leegin* ''will permit the lower courts to explore those situations where vertical pricing restraints may continue to be problematic, but in so doing, companies that wish to establish minimum pricing requirements for their products can now do so without fear that the per se label will attach to their conduct,'' Langer said. ''*Leegin* finally brings common sense and rational decisionmaking to an area of the law that has struggled mightily with an economically unsound bright-line test for almost a century.''

The opinion means that business ''will have substantially greater freedom to manage product placement strategies,'' according to Latham & Watkins' Mahoney. She also posited that the ''Chicago School of Law and Economics has made its mark,'' adding that the Supreme Court ''is continuing to reshape antitrust doctrines to conform to sound economic principles.''

Englert, who characterized *Leegin* as a ''relatively easy case,'' said economists generally agree that ''per se illegal'' was the wrong rule, and in other cases the court ''hasn't worried much about stare decisis.'' What was striking, though, was ''how ideological *Leegin* was,'' Englert said. It was surprising to see Breyer so vehemently in dissent, even to the point of reading his opinion from the bench, he said.

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***Twombly* is the most important case because its emphasis on pleading facts ''will influence all federal litigation, not just antitrust litigation.''**

ANTITRUST ATTORNEY KY EWING

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Antitrust practitioner Ky Ewing, Washington, D.C., saw *Twombly* as the most important antitrust trust case of the term, but ''only by a thin margin'' over *Leegin*. *Twombly* held that allegations of defendants' parallel conduct unfavorable to competition must be supported by factual allegations suggesting ''plausible'' grounds for inferring an actual illegal agreement, as opposed to lawful identical, independent actions.

''Properly read and applied, *Twombly* will give courts a way to prevent abusive discovery while still allowing sufficient leeway for cases only partially known at the time of complaint,'' Ewing said. It is the most important case because its emphasis on pleading facts ''will influence all federal litigation, not just antitrust litigation,'' he said. In *Twombly*, the court said that the oft-quoted statement in *Conley v. Gibson*, 355 U.S. 41 (1957), that a ''complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'' is ''best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.''

According to Mahoney, ''most plaintiffs will be able to satisfy the new standard.'' But '' some will not,'' she said, and ''they will no longer be able to rely on access to discovery to clear the bar.'' The cost savings to business ''should be substantial,'' she speculated.

Langer said that *Twombly* ''may quickly become the most cited decision by the U.S. Supreme Court in many years.'' While he sympathized with the court's concern of eschewing settlements driven by the need to avoid expensive discovery, he said ''less draconian methods'' were available than imposing a test of whether the facts pleaded made out a ''plausible'' illegal conspiracy rather than merely a ''conceivable'' one.

However, A. Douglas Melamed, WilmerHale, Washington, D.C., contended that *Twombly*, although ''not an easy case,'' was correctly decided. The plaintiffs ''alleged that an agreement could be inferred from the observed behavior. It was thus appropriate for the court to determine whether that behavior was sufficient to give rise to that inference,'' he said. The ruling ''wisely tempered theory with a recognition of reality''—the huge discovery costs borne by defendants, he added.

Ewing sounded a similar note in suggesting that the court generally ''is trying very hard to be practical.'' Langer saw a trend in the court's movement away from bright line tests.

As for the future, Ewing said that the court ''should set its sights on Section 2 [of the Sherman Act, barring monopolization], and lead the world away from the current trend of prohibiting 'dominant' firms (so found on the basis of market shares) from activities that their competitors are allowed to engage in.'' Ewing said that ''all the economic studies show that one cannot predict the extraction of supra-competitive rents from market share.''

Langer urged revisiting the long-neglected merger area. Melamed agreed that the elements of unlawful horizontal mergers need addressing, as well as the standard for determining when conduct that excludes rivals is anticompetitive. The court's antitrust cases too often have involved ''formalistic or boundary issues,'' or ones that ''arise rarely or are easy,'' he said.

One easy antitrust case, Melamed said, was *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, 75 U.S.L.W. 4091 (U.S. 2007), which held that the same test for assessing predatory pricing claims under Section 2 applies to predatory bidding claims: The plaintiff must show that the competitor has set prices below cost and has a dangerous probability of recouping its losses.

**Congress Responds to Employment Bias Ruling.** Labor and employment cases were a small part of the court's docket this past term, and only one ruling—*Ledbetter*—found its way onto the top five business cases lists of several seasoned Supreme Court observers.

In *Ledbetter*, another pro-business decision, the court held 5-4 that the time for filing an employment discrimination charge with the Equal Employment Opportunity Commission under Title VII of the 1964 Civil Rights Act is not extended by the continuing effects of the employer's discrimination.

Duke's Chemerinsky, among others, decried the harshness of the ruling, saying that ''it may make pay discrimination claims under Title VII almost impossible.''

But Amar Sarwal, general litigation counsel at the U.S. Chamber of Commerce, characterized *Ledbetter* as ''very straightforward,'' and Englert described it as the ''most exaggerated ruling of the term.'' The court simply linked the limitations period for filing an EEOC charge to a discrete act and ruled that the later effects of past discrimination do not automatically restart the clock, Englert said. The court did not rule out equitable tolling or eliminate other ways to mitigate any harsh effects, because those issues were not before the court, he said. He also noted that the plaintiff employee opted to pursue the Title VII claim but dropped her Equal Pay Act claim, which would have been timely.

*Ledbetter* generated responses from Congress, too. The House Education and Labor Committee June 27 approved a bill (H.R. 2831) intended to overturn the Supreme Court's opinion. The legislation would amend Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act to specify that the time limit for filing pay discrimination claims begins to run each time an employee receives a paycheck that manifests discrimination, not simply when the employer makes a discriminatory pay decision. See 76 U.S.L.W. 2009.

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**Patent Case Retained Test for 'Obviousness.'** The term's leading patent case for many, *KSR*, generated a fair amount of interest even before the 2006-2007 term began. Supreme Court watchers viewed it as a continuation of the court's recent willingness to grant review in more patent cases—three this past term.

*KSR* involved obviousness, governed by 35 U.S.C § 103(a). Under this bedrock principle of patent law, a patent is obvious, and thus invalid, when differences between the claimed invention and prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.

The question before the Supreme Court was whether the Federal Circuit erred in holding that a claimed invention cannot be held ''obvious,'' and thus unpatentable under Section 103, in the absence of some proven ''teaching, suggestion, or motivation'' (TSM) that would have led a person of ordinary skill in the art to combine the relevant prior art teachings in the manner claimed.

The court decided that the judicially created test for proving a patent ''obvious'' is a valid yardstick for measuring obviousness but that the Federal Circuit applied it too rigidly in a dispute over an automobile part patent. Writing for a unanimous court, Justice Anthony M. Kennedy pointed out that Supreme Court precedent has ''set forth an expansive and flexible approach inconsistent with the way the Court of Appeals applied its TSM test here.''

''For over a half century, the Court has held that a patent for a combination which only unites old elements with no change in their respective functions . . . obviously withdraws what is already known into the field of its monopoly and diminishes the resources available to skillful men,'' the court said.

It faulted the Federal Circuit for holding that courts and patent examiners should look only to the problem the patentee was trying to solve, assuming that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem, and wrongly concluding that patent examiners and courts will fall prey to hindsight bias.

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**''The court has sent a signal in several recent cases that it thinks the patent system is out of balance in favor of patent owners, and that it believes patents should be less powerful and easier to challenge.''**

MARK A. LEMLEY
STANFORD LAW SCHOOL PROFESSOR

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Samp, of the Washington Legal Foundation, characterized the Supreme Court's position as a signal to the Federal Circuit that ''some stroke of genius'' is required for a claim to be patentable. Someone ''can't just say here are two and two, and I combined them.''

Akin Gump's Goldstein explained that he included *KSR* as a ''top five'' business case because how the TSM test works in determining ''obviousness'' is ''such a fundamental patent question.'' [Goldstein served as counsel of record for Teleflex, the prevailing party in the case.]

Mark A. Lemley, who is a professor at Stanford Law School and director of the Stanford Program in Law, Science and Technology, agreed that the case is very important. ''The court has sent a signal in several recent cases that it thinks the patent system is out of balance in favor of patent owners, and that it believes patents should be less powerful and easier to challenge,'' Lemley told BNA.

Lemley, who is also of counsel to Keker & Van Nest, San Francisco, ventured that *KSR* could ''end up being the most important'' of the flurry of patent rulings from the 2005-2006 and 2006-2007 terms ''because it has the potential to affect virtually every patent in force today.'' He added, however: ''Unfortunately, while it's clear the court thinks the Federal Circuit has been too lenient in upholding patents, it is less clear exactly what test the court believes should be used.''

*Medimmune Inc. v. Genentech Inc.*, 75 U.S.L.W. 4034 (U.S. 2007) was also an important opinion, Lemley said. In that case, the court held that the limitation on federal jurisdiction in Article III of the Constitution to ''cases'' and ''controversies'' and the ''actual controversy'' requirement of the Declaratory Judgment Act do not require a patent licensee to terminate or breach its license before it may seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed. Writing for eight justices, Justice Antonin Scalia said that neither the Constitution nor the statute requires the licensee to ''bet the farm'' before seeking a declaration of its actively contested legal rights.

In Lemley's view, the case ''may lead to more accused infringers filing lawsuits preemptively.'' Noting the absence of patent cases so far on the court's docket for the upcoming term, and only one possible grant in the wings, Lemley also ventured that ''after two years of activity, the court may give patent law a rest next year.''

Latham & Watkins' Mahoney also tagged *KSR* as a ''top five'' business case, telling BNA that ''the threshold standards for patentability have a wide ranging impact on every corner of American business.'' The opinion also ''typifies the court's hands-on approach to reshaping the patent doctrines established by the Federal Circuit,'' she said.

Assessing the general messages of the term's business-related opinions, Mahoney advised: ''Patent owners beware. This court is substantially less receptive to broad patent protection than the Federal Circuit.''

The same ''beware'' applies to the plaintiffs' bar, Mahoney said. ''In general, plaintiffs' lawyers thrive on lax pleading standards and broad interpretations of statutory remedies that drive up settlement values,'' she observed. ''Time and again, this court rejected the lax standards they advocated, usually by broad margins.'' The message is that this court ''will faithfully enforce the remedies that Congress enacts but it rarely allows relief that has not been plainly authorized,'' Mahoney said.

**'Global Warming' Case Was Perhaps 'Top' Overall.** Only *Massachusetts v. EPA*—the global warming case—straddled boundaries to appear on experts' ''top five'' generally and ''top five for business'' lists, including Mahoney's, Goldstein's, and Geller's. The case also marked the term's only major defeat for business interests. The court held that the Environmental Protection

**Looking at Some Numbers.**

Akin Gump's Goldstein, who keeps track of not only the Supreme Court's opinions but also of the court's statistical groupings, reported at a term review sponsored by the American Constitution Society for Law and Policy that there were 24 opinions decided on a 5-4 basis and that Justice Kennedy was in the majority in all of them. Statistically, Roberts and Alito had the closest voting records. Goldstein noted to BNA that there seemed to be no opinions in which a justice had a majority and then ''lost it or had it taken away.''

Chemerinsky also remarked on Kennedy's presence in the majority of all of the 5-4 decisions. ''I know of no other instance in which that has happened,'' Chemerinsky said. He also noted that ''the conservatives won almost every major case where the court was ideologically divided,'' with Roberts and Alito being ''the very conservative justices that conservatives hoped for and liberals feared.''

Agency acted arbitrarily in denying a rulemaking petition to designate four ''greenhouse gas'' emissions from new automobiles as ''air pollutants'' under the Clean Air Act.

Justice John Paul Stevens, writing for the five-justice majority, also determined that the usual test for Article III standing—an immediate or imminent, concrete injury that is fairly traceable to the challenged action and likely redressable by a favorable decision—was altered by the facts of the case. States ''are not normal litigants for the purposes of invoking federal jurisdiction,'' because they have a stake in protecting their quasi-sovereign interests, the court said. And, in any event, Massachusetts can meet even the ''most demanding standards of the adversarial process,'' given that the rise in sea level caused by global warming has already begun to ''swallow'' some of the state's coastal lands and threatens future loss as well.

Mahoney ventured that ''EPA regulation of carbon dioxide emissions will presumably have far reaching effects on the automobile industry, and American business more generally.''

The opinion is ''in the top tier in terms of importance,'' Professor Lisa Heinzerling, Georgetown University Law Center, said, and not only because she was on the briefs for Massachusetts. Climate change ''is the most important environmental issue of our time,'' and the Supreme Court ''not only said EPA has the authority to do something about it, but also that it must give a good reason if it refuses to do anything about it,'' she said.

The opinion also is significant because it sets a tone for the climate change debate, Heinzerling said. The court ''doesn't hem and haw about whether climate change is occurring, but appears to take this as a proven fact,'' she explained.

**Important Constitutional Cases, Too.** Among other top cases of the term generally, Akin Gump's Goldstein chose, in no particular order, the partial birth abortion case (*Gonzales v. Carhart*, 75 U.S.L.W. 4210 (U.S. 2007)), the campaign finance case (*Federal Election Commission v. Wisconsin Right to Life Inc.*, 75 U.S.L.W. 4503 (U.S. 2007)), and the race-in-the-public-schools case (*Parents Involved in Community Schools v. Seattle School District No. 1*, 75 U.S.L.W. 4577 (U.S. 2007)).

In the *Seattle School District* case, the court scuttled two race-based school diversity-target efforts by public elementary and high schools, one in Seattle, the other in a Kentucky region encompassing Louisville. A five-justice majority, in an opinion by the chief justice, declared the plans unconstitutional. Finding no compelling state interest in the racial classification, the court said that earlier precedent upholding a law school admissions program that considered race as one of the many factors determining an applicant's fate, does not apply out of the higher education context or when, as here, race is the only factor in the calculus.

Justice Kennedy dropped out of the majority, however, to say that diversity can serve as a compelling interest and to stress that the problem of de facto resegregation is not irrelevant. Dissenters lamented that the court's ruling undermines the landmark school desegregation ruling *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

**When we look back in 50 years, when the country may be ''majority non-white,'' the case ''will be seen as striking for the court's inability to see how diversity will be important in shaping society.''**

DAVID C. FREDERICK
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL

Mahoney agreed with Goldstein that the Seattle school case was a highlight of the non-business docket. Although the court's constitutional analysis ''did not really break new ground,'' the case ''still may be the most important case of the term,'' Mahoney speculated. ''On a practical level, many school systems will have to be overhauled in the wake of the decision,'' she explained. Plus, ''on a doctrinal level, the opinion suggests that the Roberts court is not likely to overrule *Grutter v. Bollinger*,'' 539 U.S. 306, 71 U.S.L.W. 4498 (2004), which upheld the University of Michigan law school admission policy. Some had predicted that the earlier opinion would be jettisoned, Mahoney reported. The court ''could have kept its distance from *Grutter*,'' but instead, ''it seems to treat *Grutter* as a given and as the benchmark for measuring the constitutionality of other race conscious plans,'' she said.

David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, Washington, D.C., characterized the school cases as ''hugely important.'' The court did not appear to take into account the changing demographics of American society, Frederick, a frequent Supreme Court advocate, told BNA. When we look back in 50 years, when the country may be ''majority non-white,'' the case ''will be seen as striking for the court's inability to see how diversity will be important in shaping society.'' The country is currently going through tremendous demographic change, and ''the constitutional rules imposed in these cases will likely confine locally elected

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officials'' as to how they will be able to address important demographic and diversity issues, Frederick said.

**BCRA Challengers Prevail on 'As-Applied' Basis.** The campaign finance case, *Wisconsin Right to Life Inc.*, was another of the term's highlights, most commenters agreed. A splintered majority held in a 5-4 ruling that a Wisconsin anti-abortion group had a First Amendment right to sponsor television and radio advertisements referring to a federal candidate despite the 2002 Bipartisan Campaign Reform Act's restrictions on funding of political ads.

Speaking through the chief justice, the court carved out a major exception to BCRA's prohibition on corporate and labor union funding of TV and radio ads that mention a candidate, in the jurisdiction where the candidate is running for federal office, within 30 days of a federal primary election or 60 days of a federal general election. Funding for such ads can be regulated only if the message is ''the functional equivalent of express advocacy'' for a candidate, the court said. It explained that the only ads in this category are those ''susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.''

The court ruled less than four years ago in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 72 U.S.L.W. 4015 (2003), that the provision was not unconstitutionally overbroad to the extent that the speech involved was the ''functional equivalent'' of express advocacy for or against a candidate, and that the facial challenge failed because it did not show that all enforcement of the law should be barred.

In a brief opinion last year involving the same plaintiff, however, the court held that *McConnell* did not preclude an as-applied challenge by an affected party, *Wis. Right to Life Inc. v. FEC*, 546 U.S. 410, 74 U.S.L.W. 4116 (2006). In the most recent ruling, the fractured majority effectively upheld WRTL's as-applied challenge.

Commenters generally assessed the ruling as a clear win for those favoring less regulation of campaign financing and predicted that it would have a major impact on future federal elections. For example, Duke's Chemerinsky speculated that the ruling ''will mean vastly more corporate ads before the 2008 election.''

In a panel discussion of the court's term sponsored by the American Constitution Society for Law and Policy, Michael A. Carvin, of Jones Day, Washington, D.C., characterized BCRA as an ''affront to the First Amendment.'' When the statute refers to a ''corporation,'' it doesn't mean big companies like ExxonMobil, he said. Rather, the statute addresses groups like the American Civil Liberties Union, the National Organization for Women, or Right to Life, he said. ''There is no connection between keeping Americans off the air during campaign season and getting rid of corruption in politics,'' he said.

Sen. John McCain (R-Ariz.), a primary author of the statute, issued a statement following the decision acknowledging that although he respected the court's decision, ''it is regrettable'' that the court ''carved out a narrow exception by which some corporate and labor expenditures can be used to target a federal candidate in the days and weeks before an election.''

McCain added, however, that it was important to recognize that the ruling does not affect BCRA's ''principal provision''—the ban on federal officeholders or candidates soliciting soft money contributions for their parties to spend on their campaigns.

Some observers said that the new test is vague and will have to be fleshed out by the lower courts and through regulations issued by the Federal Election Commission, the agency responsible for enforcing campaign finance laws.

In a related matter, the FEC and congressional campaign reformers agreed July 13 to a compromise with the lawyer for conservative organizations challenging the ad restrictions. The agreement is significant because it outlines the boundaries of political ads sponsored by corporations and unions that all sides indicate will be allowable in future campaigns. Acceptable ads will include those that discuss—and even criticize—the positions of incumbent lawmakers on issues before Congress.

The compromise also makes clear that legal challenges to restrictions on ads may continue to be reviewed by the courts on an ''as-applied'' basis. BCRA challengers have so far been unsuccessful in convincing courts to rule that the limits are unconstitutional on their face. (See related story at 76 U.S.L.W. 2054.)

**Courts Upholds Curbs on Student Speech.** Another free speech case, *Morse v. Frederick*, 75 U.S.L.W. 4487 (U.S. 2007), also prompted comments. The court held that a public high school principal did not violate a student's First Amendment speech rights when she seized his banner inscribed ''BONG HiTS 4 JESUS'' on a sidewalk across the street from the school during a school-sponsored event, and suspended him for displaying it. The principal reasonably interpreted the banner as advocating illegal drug use, and her actions were appropriate, given the special characteristics of the school environment and the important governmental interest in stopping student drug use, the court said.

Comparing the dissenting opinion in *Morse* to that in the campaign finance case, Mayer Brown's Geller found it ''quite interesting that many of the liberal justices thought that the First Amendment grants more protection to student speech promoting drug use while under school supervision during school hours than to advertising by interest groups seeking to mobilize public support for a position of great civic importance.'' Others ''have commented on this as well,'' Geller added.

**Federal Partial-Birth Abortion Ban Passes Muster.** The question of abortion never ceases to generate divisiveness, and that was true again this past term. In *Gonzales v. Carhart* the court held 5-4 that the federal nationwide ban on so-called partial-birth abortions is constitutional.

Seven years ago, the court struck down a Nebraska partial-birth abortion ban on the ground that it imposed an undue burden on women's 14th Amendment right to a previability abortion because it failed adequately to distinguish between the prohibited procedure and the most common second-trimester abortion method, and lacked an exception allowing the procedure when necessary to preserve the mother's health. But Justice Kennedy said that the 2003 Partial-Birth Abortion Ban Act avoids vagueness problems by spelling out ''anatomical landmarks'' on the fetal body and setting physician intent requirements that provide reasonable notice of the particular abortion procedures prohibited.

He added that the mother's health exception requirement cannot be interpreted to preclude regulation of abortion methods that further the government's interest in protecting and respecting fetal life when there is un-

certainty in the medical community about whether a particular abortion method is ever medically necessary.

The *Carhart* dissenters charged that the reconstituted court's ''alarming'' decision disrespected precedent, gutted the long-standing health exception requirement, and showed an unconcealed ''hostility'' to abortion rights.

Chemerinsky predicted that the ruling will likely lead state legislatures to enact more restrictive abortion laws.

Pamela C. Karlan, a professor at Stanford Law School, emphasized this hostility at an American Constitution Society for Law and Policy forum, noting that the majority talks about ''moms'' rather than ''women'' and refers to ''abortionists,'' not ''doctors.''

At the same forum, former solicitor general Drew S. Days III, now a professor at Yale Law School, said the court's opinion reflects antiabortion groups' success in shifting the focus of the abortion conversation.

**What's Coming Up for Business?** Turning to the future, Mahoney observed that the court has already granted review in some very important business cases. As an example, she cited *Stoneridge Investment Partners LLC v. Scientific-Atlanta Inc.*, 443 F.3d 987 (8th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3511 (U.S. March 26, 2007) (No. 06-43). This case ''will establish the scope of securities fraud remedies, which are a constant source of financial exposure,'' Mahoney said. Another case, *Sprint/United Management v Mendelsohn*, 466 F.3d 1223 (10th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3661 (U.S. June 11, 2007) (No. 06-1221), ''will determine what sources of proof an employee can use in employment discrimination cases, another major source of damage exposure,'' she said.

**Walter Dellinger, O'Melveny & Myers, suggested that *Watters v. Wachovia Bank NA*, another of this past term's business cases, offers a glimpse as to how the preemption question might play out.**

Englert also mentioned *Stoneridge*, saying that it deserves to be highlighted as the ''biggest business case of the [upcoming] term so far.'' He also cited *Rowe v. New Hampshire Motor Transport Ass'n*, 448 F.3d 66, 74 U.S.L.W. 1717 (1st Cir. 2006), *cert. granted*, 75 U.S.L.W. 3694 (U.S. June 25, 2007) (No. 06-457), and *Riegel v. Medtronic Inc.*, 451 F.3d 104, 74 U.S.L.W. 1717 (2d Cir. 2006), *cert. granted*, 75 U.S.L.W. 3694 (U.S. June 25, 2007) (No. 06-179), as important cases with implications beyond their respective transportation and product liability contexts.

Mahoney noted that she has a petition for certiorari pending in *Quanta Computer Inc. v. LG Electronics Inc.*, 453 F.3d 1364 (Fed. Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3369 (U.S. Nov. 30, 2006) (No. 06-937) and that the court has asked for the views of the solicitor general. ''The case presents important questions concerning the scope of the patent exhaustion doctrine and hopefully this will be one of the business issues the court resolves in the next term,'' Mahoney said.

Dellinger ventured that one of the most important issues for American business is going to be the scope of federal preemption of state regulation.

On one side are state attorneys general, who have become increasingly active, especially after the states' big tobacco settlement. They are pushing state regulatory authority, arguing that Washington isn't doing the job, Dellinger said. On the other side, U.S.-based multinational corporations can't compete if they have to deal with 50 different state regulatory regimes, particularly against the European Union, which has one regulatory system covering all of Europe. This picture reverses the situation of 50 years ago, when the United States had the largest common market ever known, and Europe was balkanized, Dellinger noted.

Dellinger suggested that *Watters v. Wachovia Bank NA*, 75 U.S.L.W. 4176 (U.S. 2007), another of this past term's business cases, offers a glimpse as to how the preemption question might play out. In this case, the court held that states cannot subject operating subsidiaries of national banks to state licensing, reporting, and visitorial regimes for mortgage lenders. Justice Ruth Bader Ginsburg explained in the 5-3 ruling that the federal regime created by the National Bank Act and Office of the Comptroller of the Currency regulations preempts the state schemes. [Justice Clarence Thomas did not participate.]

Dellinger pointed out that the chief justice, along with Scalia, joined a dissenting opinion by Stevens. The interesting split is between Roberts, who tends to favor state autonomy, and Alito, who is more sympathetic toward federal preemption, Dellinger said, noting that Alito sided with the majority in this case.

There is not enough information yet to know whether Roberts will be more inclined to lean toward the views of Scalia and Thomas, who are willing to support states when they see that deference is required, Dellinger said. Kennedy's approach is more compatible with the interests of business than that of Scalia and Thomas, who favor states' rights, he said. Business needs a predictable, stable environment, which makes it easier to plan and to gain investment, Dellinger explained. A single national regulatory system is a key component of such a climate, he said.

Englert agreed that preemption concerns are important, but didn't want to exaggerate that importance. Like Dellinger, he noted the ''odd split'' in *Watters*. Business is ''holding its breath'' to see whether the chief justice will repeat the same ''very pro state power'' stance he took in that case, Englert said.

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## Supreme Court Term in Review 2006-2007—Civil Cases

| Subject | Case Name/ U.S. Law Week story and opinion cites | Docket Number Decision Date | Holding |
|---|---|---|---|
| **Antitrust—Immunity** | *Credit Suisse Securities (USA) LLC v. Billing* (75 U.S.L.W. 1755, 4449). | No. 05-1157 6/18/07 | Investors' claims that underwriters of initial public offerings of securities conspired to compel investors, as a condition of IPO participation, to agree to aftermarket purchases at higher prices (''laddering''), tying of purchases of other inferior securities, and paying excessive commissions in violation of Section 1 of the Sherman Act and the commercial bribery provisions of the Robinson-Patman Act are clearly incompatible with, and thus impliedly precluded by, the federal securities laws. |
| **Antitrust—Monopolization** | *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* (75 U.S.L.W. 1483, 4091). | No. 05-381 2/20/07 | The two-prong test adopted in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), for determining whether a competitor has adopted a predatory pricing scheme, which requires a showing that the competitor's prices are below cost and that the competitor had a dangerous probability of recouping its losses, applies to predatory bidding claims as well. |
| **Antitrust—Price Fixing** | *Leegin Creative Leather Products Inc. v. PSKS Inc.* (76 U.S.L.W. 1003, 75 U.S.L.W. 4643). | No. 06-480 6/28/07 | Vertical minimum resale price maintenance agreements between manufacturers and distributors of goods are subject to rule of reason analysis in determining whether they are agreements in restraint of interstate commerce in violation of Section 1 of the Sherman Act, overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which held such agreements per se illegal. |
| **Antitrust—Procedure** | *Bell Atlantic Corp. v. Twombly* (75 U.S.L.W. 1691, 4337). | No. 05-1126 5/21/07 | Customers' allegations that regional phone companies engaged in conscious parallelism to thwart market entry by new competitors and avoided each other's turf, coupled with a bare assertion of a conspiracy to restrain trade, did not state a claim for a ''contract, combination . . . or conspiracy, in restraint of trade or commerce'' in violation of Section 1 of the Sherman Act in the absence of additional facts setting a context in which it is plausible—not just possible—to infer an actual illegal agreement to restrain trade, as distinct from lawful independent action. |
| **Banking—State Regulation** | *Watters v. Wachovia Bank NA* (75 U.S.L.W. 1628, 4176). | No. 05-1342 4/17/07 | State licensing, reporting, and visitorial regimes for mortgage lenders are preempted by the National Bank Act and Office of the Comptroller of the Currency regulations to the extent they apply to operating subsidiaries of national banks. |
| **Bankruptcy—Attorneys' Fees** | *Travelers Casualty & Surety Company of America v. Pacific Gas & Electric Co.* (75 U.S.L.W. 1565, 4131). | No. 05-1429 3/20/07 | State law, contract-based claims for attorneys' fees derived solely from litigating bankruptcy law issues are permitted under federal bankruptcy law. |
| **Bankruptcy—Conversion** | *Marrama v. Citizens Bank of Massachusetts* (75 U.S.L.W. 1503, 4113). | No. 05-996 2/21/07 | Section 706(a) of the Bankruptcy Code, which provides that a Chapter 7 debtor ''may'' convert his proceedings to a Chapter 13 case ''at any time,'' does not give debtors an absolute right to convert, but rather, when read together with Section 706(d), creates a right to convert that may be forfeited by the debtor's bad faith. |
| **Civil Procedure—Forum Non Conveniens** | *Sinochem International Co. v. Malaysia International Shipping Corp.* (75 U.S.L.W. 1517, 4126). | No. 06-102 3/5/07 | A federal district court does not need to address jurisdictional issues or other nonmerits matters before dismissing a case under forum non conveniens principles. |
| **Civil Procedure—Removal** | *Powerex Corp. v. Reliant Energy Services Inc.* (75 U.S.L.W. 1757, 4437). | No. 05-85 6/18/07 | Federal appellate review of a foreign subsidiary's claim that it is foreign state with Foreign Sovereign Immunities Act protection from a price-fixing suit is barred by 28 U.S.C. § 1447(d), which states that ''[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise,'' because, even though case was properly removed, the district court remanded it on grounds that can be plausibly characterized as lack of subject matter jurisdiction. |
| **Civil Procedure—Removal** | *Watson v. Philip Morris Cos.* (75 U.S.L.W. 1740, 4412). | No. 05-1284 6/11/07 | A federal agency's detailed direction, supervision, and monitoring—i.e., regulation—of a company's activities does not make the company a person acting ''under'' a federal officer or agency authorized to remove related claims to federal court under 28 U.S.C. § 1442(a). |
| **Civil Rights—Attorneys' Fees** | *Sole v. Wyner* (75 U.S.L.W. 1724, 4394). | No. 06-531 6/4/07 | A plaintiff who wins a preliminary injunction but ultimately loses on the merits is not a ''prevailing party'' eligible for an award of any attorneys' fees under the federal civil rights attorneys' fees statute, 28 U.S.C. § 1988(b). |

## Supreme Court Term in Review 2006-2007—Civil Cases – Continued

| Subject | Case Name/ U.S. Law Week story and opinion cites | Docket Number Decision Date | Holding |
|---|---|---|---|
| **Consumer Credit—Fair Credit Reporting Act** | *Safeco Insurance Company of America v. Burr* (75 U.S.L.W. 1725, 4386). | Nos. 06-84 & 06-100 6/4/07 | A willful failure for purposes of the Fair Credit Reporting Act covers not only a knowing violation, but also a reckless disregard of the statutory duty to notify a consumer when taking an adverse action against that consumer on the basis of information in a consumer credit report. The initial rate charged for a new insurance policy may constitute an ''adverse action,'' which the FCRA defines to include any ''increase in any charge for . . . any insurance, existing or applied for,'' 15 U.S.C. § 1681a(k)(1)(B)(i), and which triggers the requirement to inform the affected consumer. |
| **Elections—Campaign Finance** | *Federal Election Commission v. Wisconsin Right to Life Inc.* (75 U.S.L.W. 1775, 4503). | Nos. 06-969 & 06–970 6/25/07 | The Bipartisan Campaign Reform Act ''electioneering communication'' restriction, which criminalizes any labor union's or corporation's broadcast, cable, or satellite ad that clearly refers to a federal candidate, is paid for with general treasury funds, and runs in the candidate's jurisdiction within 30 days of a federal primary election or 60 days of a federal general election, 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A), violates the First Amendment's free speech clause as applied to a corporate anti-abortion group's advertisements urging citizens to contact their senators (one of whom was up for re-election) regarding a U.S. Senate filibuster that the group opposed. |
| **Employee Benefits—Plan Termination** | *Beck v. PACE International Union* (75 U.S.L.W. 1743, 4399). | No. 05-1448 6/11/07 | A determination by the Pension Benefit Guaranty Corporation that the Employee Retirement Income Security Act provision setting forth the permissible methods of terminating a single-employer benefit plan, 29 U.S.C. § 1341(b)(3)(A), does not include merger as a method of termination is reasonable. An employer in bankruptcy that terminated its defined-benefit plan without really considering merger as an option therefore did not breach its fiduciary obligations under ERISA. |
| **Employment Discrimination—Procedure** | *Ledbetter v. Goodyear Tire & Rubber Co.* (75 U.S.L.W. 1713, 4359). | No. 05-1074 5/29/07 | The 180-day time period a female employee had for filing a charge with the Equal Employment Opportunity Commission claiming a violation of Title VII of the 1964 Civil Rights Act was triggered by the discrete act of setting her pay lower because of her sex, and the continuing effects of that act, such as her receipt of lower paychecks reflecting that discrimination, did not create a current violation of the statute and extend the limitations period. |
| **Environment—Air** | *Massachusetts v. Environmental Protection Agency* (75 U.S.L.W. 1583, 4149). | No. 05-1120 4/2/07 | Massachusetts' loss of coastland from rising sea levels associated with global warming that is linked to domestic automobile greenhouse gas emissions gives it standing to challenge the Environmental Protection Agency's refusal to initiate rulemaking on such emissions; EPA's rationale for inaction—its lack of authority to regulate such emissions and its determination that doing so now would in any event be unwise—is inadequate in light of the broad definition of ''air pollutant'' in 42 U.S.C. § 7602(g), which embraces such emissions, and the agency's failure to engage the text of Section 7521(a)(1), which requires it to consider whether an air pollutant ''cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' |
| **Environment—Air** | *Environmental Defense v. Duke Energy Corp.* (75 U.S.L.W. 1582, 4167). | No. 05-848 4/2/07 | The Fourth Circuit's determination that the word ''modification'' must have the same definition under the Clean Air Act's Prevention of Significant Deterioration provisions as under the New Source Performance Standards implicitly invalidated a PSD regulation using a different definition, thereby bringing into play Section 307(b) of the statute, which restricts judicial review of regulations' validity during enforcement proceedings when, as here, review could have been obtained in the District of Columbia Circuit following the Environmental Protection Agency's rulemaking. The Fourth Circuit's judgment is therefore vacated and remanded for further proceedings. |

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## Supreme Court Term in Review 2006-2007—Civil Cases – Continued

| Subject | Case Name/ U.S. Law Week story and opinion cites | Docket Number Decision Date | Holding |
|---|---|---|---|
| **Environment—Hazardous Substances** | *United States v. Atlantic Research Corp.* (75 U.S.L.W. 1744, 4408). | No. 06-562 6/11/07 | A potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act that voluntarily cleans up a contaminated site can seek cost recovery from other liable parties under Section 107(a), even though *Cooper Industries Inc. v. Aviall Services Inc.*, 543 U.S. 157, 73 U.S.L.W. 4041 (2004), precludes it from seeking contribution under Section 113(f) because it was not itself sued in an enforcement action. |
| **Environment—Solid Waste** | *United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority* (75 U.S.L.W. 1648, 4277). | No. 05-1345 4/30/07 | County flow ordinances that require all solid waste generated within the respective counties to be delivered to a publicly owned waste processing facility do not violate the commerce clause, notwithstanding private waste haulers' contention that the ordinances discriminate against interstate commerce by forcing them to pay more for waste disposal than at out-of-state facilities. |
| **Environment—Water** | *National Association of Home Builders v. Defenders of Wildlife* (75 U.S.L.W. 1776, 4543). | Nos. 06-340 & 06–549 6/25/07 | Federal agencies' duty under Section 7(a)(2) of the Endangered Species Act to ''insure'' that actions they authorize, fund, or implement are not likely to jeopardize the continued existence of any endangered or threatened species or to destroy or adversely affect its habitat does not apply to the Environmental Protection Agency's decision under Section 402(a) of the Clean Water Act to transfer the National Pollutant Discharge Elimination System permitting program to a state. |
| **Foreign Affairs—Sovereign Immunity** | *Permanent Mission of India to United Nations v. New York City* (75 U.S.L.W. 1762, 4433). | No. 06-134 6/14/07 | A Foreign Sovereign Immunities Act exception to the general rule of foreign country immunity from suit in U.S. courts under which a foreign state is not immune in any case in which ''rights in immovable property situated in the United States are in issue,'' 28 U.S.C. § 1605(a)(4), authorizes a federal court to exercise its jurisdiction over New York City's suit to compel India and Mongolia to pay taxes on property that they use to house some of their United Nations diplomatic employees. |
| **Health Care—Abortion** | *Gonzales v. Carhart* (75 U.S.L.W. 1633, 4210). | Nos. 05-380 & 05-1382 4/18/07 | The federal 2003 Partial-Birth Abortion Act, which criminalizes abortion procedures in which a ''living fetus'' is deliberately delivered to the point that either its entire head or any part of its trunk past the navel is ''outside the body of the mother,'' followed by an ''overt act, other than completion of the delivery, that kills the partially delivered living fetus,'' is not unconstitutionally vague and does not impose an undue burden on women's 14th Amendment due process right to a previability abortion, even though it lacks an exception allowing the procedure to preserve the woman's health. |
| **Immigration—Removal** | *Gonzales v. Duenas-Alvarez* (75 U.S.L.W. 1428, 4053). | No. 05-1629 1/17/07 | A ''theft offense'' that renders certain aliens removable under the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(G), 227(a)(2)(A), includes the crime of aiding and abetting a theft offense. |
| **Labor—Dues and Fees** | *Davenport v. Washington Education Association* (75 U.S.L.W. 1765, 4423). | Nos. 05-1589 & 05-1657 6/14/07 | A state law requiring unions to receive affirmative authorization from a nonmember before spending his or her agency fees, collected in lieu of union dues, for political purposes does not violate the First Amendment's free speech clause as applied to public employee unions. |
| **Labor—Fair Labor Standards Act** | *Long Island Care at Home Ltd. v. Coke* (75 U.S.L.W. 1747, 4416). | No. 06-593 6/11/07 | The Department of Labor's application of the Fair Labor Standards Act's ''companionship services'' exemption to employees of third-party agencies outside the patient's family is reasonable and entitled to deference. |
| **Legislatures—Speech and Debate** | *Office of Senator Dayton v. Hanson* (75 U.S.L.W. 1704, 4327). | No. 06-618 5/21/07 | The U.S. Supreme Court does not have jurisdiction under Section 412 of the 1995 Congressional Accountability Act, which authorizes court to review ''any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision'' of the statute, to hear appeal from office of U.S. senator claiming speech and debate clause immunity from suit brought by former employee for damages associated with dismissal, because neither of the lower courts' rulings can be considered constitutional holdings. |

## Supreme Court Term in Review 2006-2007—Civil Cases – Continued

| Subject | Case Name/ U.S. Law Week story and opinion cites | Docket Number Decision Date | Holding |
|---|---|---|---|
| **Patents—Declaratory Judgments** | *MedImmune Inc. v. Genentech Inc.* (75 U.S.L.W. 1410, 4034). | No. 05-608 1/9/07 | The limitation on federal jurisdiction in Article III of the U.S. Constitution to ''cases'' and ''controversies'' and the ''actual controversy'' requirement of the Declaratory Judgment Act do not require a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed. |
| **Patents—Infringement** | *Microsoft Corp. v. AT&T Corp.* (75 U.S.L.W. 1650, 4307). | No. 05-1056 4/30/07 | The U.S. firm that exports master versions and electronic transmissions of infringing software that are used by foreign licensees to make copies of the software for use in foreign-assembled computers, but are not themselves ever installed in such computers, has not ''supplie[d] . . . from the United States . . . components of a patented invention'' within the meaning of Section 271(f) of the Patent Act, and thus is not liable as an infringer under that section's exception to the general rule against extraterritoriality of U.S. patent law. |
| **Patents—Obviousness** | *KSR International Co. v. Teleflex Inc.* (75 U.S.L.W. 1651,4289). | No. 04-1350 4/30/07 | The judicially created teaching, suggestion, or motivation test is valid for determining whether a patent is ''obvious'' and therefore unpatentable under 35 U.S.C. § 103, but may not be applied in excessively rigid manner. |
| **Railroads—FELA** | *Norfolk Southern Railway Co. v. Sorrell* (75 U.S.L.W. 1412, 4045). | No. 05-746 1/10/07 | The same causation standard applies to both railroad and employee negligence in Federal Employers' Liability Act cases. |
| **Religion—Establishment Clause** | *Hein v. Freedom From Religion Foundation Inc.* (75 U.S.L.W. 1784, 4560). | No. 06-157 6/25/07 | Federal taxpayers lack Article III standing to challenge, on establishment clause grounds, actions of executive branch officials that are taken under an executive order creating faith-based and community initiatives. |
| **Schools—Disabled Persons** | *Winkelman v. Parma City School District* (75 U.S.L.W. 1700, 4329). | No. 05-983 5/21/07 | Parents have enforceable rights under the Individuals with Disabilities Education Act independent of those conferred on their disabled child and thus can be ''parties aggrieved'' who can pursue IDEA claims on their own behalf, and without an attorney, with respect to the substantive issue of whether their child is receiving the ''free appropriate public education'' mandated under the statute. |
| **Schools—Discrimination** | *Parents Involved in Community Schools v. Seattle School District No. 1* (76 U.S.L.W. 1010, 4577). | Nos. 05-908 & 05–915 6/28/07 | Two public school districts' use of race as a ''tiebreaker'' for deciding which students will be admitted to oversubscribed high schools or as the sole criterion in considering transfer requests and making certain elementary school assignments violates the 14th Amendment's equal protection clause, because the districts showed neither a compelling interest—such as remedying the effects of past intentional discrimination by the state—to justify the use of racial classifications nor that their use of race is narrowly tailored to address their asserted objectives in diversity, avoidance of racial isolation, and blunting the effects of racially segregated housing patterns. |
| **Schools—Financial Aid** | *Zuni Public School District No. 89 v. Department of Education* (75 U.S.L.W. 1636, 4198). | No. 05-1508 4/17/07 | In determining which school districts should be statistically ''disregarded'' in calculating whether a state's public school funding program ''equalizes expenditures'' throughout the state so as to authorize an offset of federal financial assistance by a reduction in state aid to local districts under the federal Impact Aid Act, the secretary of education may identify districts to be disregarded by reference to the number of the district's pupils as well as to the size of the district's expenditures per pupil. |
| **Schools—Freedom of Speech** | *Morse v. Frederick* (75 U.S.L.W. 1784, 4487). | No. 06-278 6/25/07 | A public high school principal did not violate a student's First Amendment speech rights when she seized his banner inscribed ''BONG HiTS 4 JESUS'' on a sidewalk across the street from school during a school-approved event and suspended him for displaying it, given her reasonable interpretation of the banner as advocating illegal drug use, the special characteristics of the school environment, and the important governmental interest in stopping student drug abuse. |
| **Schools—Freedom of Speech** | *Tennessee Secondary School Athletic Association v. Brentwood Academy* (75 U.S.L.W. 1778, 4458) | No. 06-427 6/21/07 | A state-sponsored high school athletic league's ban on member schools' use of ''undue influence'' in recruiting middle school athletes prevents hard-sell tactics that could exploit young students, distort competition, and value athletics over academics, and thus does not violate the First Amendment rights of voluntary members. |

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## Supreme Court Term in Review 2006-2007—Civil Cases – Continued

| Subject | Case Name/ U.S. Law Week story and opinion cites | Docket Number Decision Date | Holding |
|---|---|---|---|
| **Securities—Fraud** | *Tellabs Inc. v. Makor Issues & Rights Ltd.* (75 U.S.L.W. 1780, 4462). | No. 06-484 6/21/07 | The ''strong inference'' of scienter that plaintiffs must plead under Section 21D(b)(2) of the 1995 Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(2), requires that the complaint, when read as a whole and taken as true, allege facts from which the inference of fraudulent intent is cogent and at least as compelling as any plausible opposing inference. |
| **Taxation—Procedure** | *EC Term of Years Trust v. United States* (75 U.S.L.W. 1656, 4304). | No. 05-1541 4/30/07 | Section 7426(a)(1) of the Internal Revenue Code is the exclusive remedy for third-party wrongful levy claims, thereby precluding a trust that missed the Section 7426(a)(1) deadline from pursuing a refund claim under 28 U.S.C. § 1346(a)(1) as a way to challenge the Internal Revenue Service's levy upon a third party's property to collect taxes owed by another taxpayer. |
| **Taxation—Procedure** | *Hinck v. United States* (75 U.S.L.W. 1704, 4352). | No. 06-376 5/21/07 | Section 6404(h) of the Internal Revenue Code vests exclusive jurisdiction in the Tax Court to review interest abatement determinations by secretary of treasury. |
| **Telecommunications—Telephone Service** | *Global Crossing Telecommunications Inc. v. Metrophones Telecommunications Inc.* (75 U.S.L.W. 1638, 4188). | No. 05-705 4/17/07 | The Federal Communications Commission reasonably determined that a long-distance telephone carrier's refusal to compensate a pay phone service provider for allowing callers ''free'' access to the carrier is a ''practice . . . that is unjust or unreasonable'' under Section 201(b) of the Telecommunications Act, for which the pay phone service provider may sue for damages under Section 207. |
| **Torts—Punitive Damages** | *Philip Morris USA v. Williams* (75 U.S.L.W. 1493, 4101). | No. 05-1256 2/20/07 | The 14th Amendment's due process clause bars juries from imposing damages upon a defendant for injuring persons not before the court, but juries may properly take the breadth of harm caused into account in assessing the reprehensibility of a defendant's conduct—one of three elements gauging whether an award of punitive damages is grossly excessive. |
| **United States—Employees** | *Wilkie v. Robbins* (75 U.S.L.W. 1783, 4529). | No. 06-219 6/25/07 | A rancher's allegations that the cumulative impact over time of harassment and intimation by government employees seeking an easement across his property caused him harm are not actionable under either *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), or the Racketeer Influenced and Corrupt Organizations Act. |
| **United States—False Claims** | *Rockwell International Corp. v. United States* (75 U.S.L.W. 1589, 4138). | No. 05-1272 3/27/07 | The False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), is jurisdictional, and bars suits under Section 3730 unless brought by the attorney general or an ''original source,'' thus barring a qui tam suit by a former nuclear weapons facility engineer who lacked ''direct and independent knowledge'' of the allegations in the amended complaint required to qualify as an ''original source'' because he no longer worked at the plant when the events at issue occurred, and his theory of the case was at odds with that alleged in the amended complaint that he filed jointly with the government. |
| **United States—Limitations** | *BP America Production Co. v. Burton* (75 U.S.L.W. 1350, 4023). | No. 05-669 12/11/06 | The six-year statute of limitations for federal government contract actions, 28 U.S.C. § 2415(a), applies only to court actions, not administrative proceedings. |
| **United States—Territories** | *Limtiaco v. Camacho* (75 U.S.L.W. 1590, 4145). | No. 06-116 3/27/07 | Assessed valuation, not appraised valuation, is the proper basis for calculating the ceiling on public indebtedness imposed by Section 11 of the Organic Act of Guam, 48 U.S.C. § 1423a, which limits such indebtedness to 10 percent of the ''aggregate tax valuation'' of property on Guam. |
| **United States—Westfall Act** | *Osborn v. Haley* (75 U.S.L.W. 1431, 4066). | No. 05-593 1/22/07 | The U.S. attorney general's certification under the Westfall Act, 28 U.S.C. § 2679(2), that a federal employee was acting within the scope of employment when an alleged tort occurred conclusively authorizes removal of the suit to federal court and bars remand to state court even if the district court rejects the certification, which is not rendered invalid by the government's denial that allegedly tortious events ever occurred. |

# Cases Docketed

## Cases Recently Filed

Listed below are cases recently placed on the Appellate Docket of the Supreme Court. Each entry gives the number and caption of the case, the date it was filed with the court, the procedure followed in seeking review if other than certiorari, the court below, a citation to, or the date of, the lower court's opinion, and the general subject matter of the case.

**07-51** Henry v. United States, 7/3/2007 (D.C. Cir., 472 F.3d 910). Criminal Law—Sentencing—Expert testimony—Hearsay—Ineffective assistance of counsel.

**07-52** Metropolitan Government of Nashville and Davidson County, Tenn. v. Tuttle, 7/10/2007 (6th Cir., 1/18/07). Civil Procedure—Waiver of right to request new trial.

**07-53** McKenzie-Adams v. Connecticut, 7/10/2007 (Conn., 281 Conn. 486, 915 A.2d 822). Criminal Law—Consensual sexual relations between teacher and two students who were of age of consent.

**07-54** Verma v. Arizona, 7/10/2007 (Ariz. Ct. App., 10/10/06). Criminal Law—Jury inquiry on definition of ''willfully''—Right not to testify.

**07-55** Arey v. United States, 7/9/2007 (4th Cir., 3/8/07, unpublished). Criminal Law—Sentencing—Upward adjustment beyond guideline range.

**07-56** Estate of Lowe v. Apex Tax Investment Inc., 7/13/2007 (*In re Application of County Collector*, Ill., 867 N.E.2d 941). Taxation—Real property taxes—Tax sale—Due process.

**07-57** Christian v. United States, 6/8/2007 (4th Cir., 3/19/07, unpublished). Criminal Law—Refusal to grant mistrial—Refusal to strike or give curative instruction.

**07-58** Eichholz v. U.S. District Court for Southern District of Georgia, 5/16/2007 (*In re Eichholz*, 11th Cir.. 1/10/07, unpublished). Attorneys—Suspension—Due process.

**07-59** Barrow v. Greenville Independent School District, 7/11/2007 (5th Cir., 480 F.3d 377). Schools—Refusal to recommend teacher for promotion—Determination of final policymaker.

**07-60** Acosta v. United States, 5/14/2007 (2d Cir., 470 F.3d 132). Criminal Law—Carrying firearm during commission of crime of violence—Jury instructions—Double jeopardy—Constructive amendment of indictment—Civil rights violations.

**07-61** Mathias v. United States, 7/12/2007 (4th Cir., 482 F.3d 743). Criminal Law—Armed Career Criminal Act—Violent felony—Escape other than by force or violence.

**07-62** Tran v. Tennessee, 7/16/2007 (Tenn. Crim. App., 5/2/06). Criminal Law—Death penalty—Determination of mental retardation.

**07-63** Li v. Los Angeles County, Calif., 7/11/2007 (9th Cir., 2/28/07, unpublished), pro se. Employment Discrimination—Retaliation—Failure to hire.

**07-64** Palisades Charter High School v. Knapp, 6/26/2007 (Cal. Ct. App., 1/20/07). Schools—Charter schools—Tort claims.

**07-65** Parkdale International v. United States, 7/16/2007 (Fed. Cir., 475 F.3d 1375). International Trade—Calculation of antidumping duties—Retroactivity—Reasonable reliance on existing law.

**07-66** Montes v. California, 7/16/2007 (*Montes v. Superior Court of State of California*, Cal. Ct. App., 2/7/07). Criminal Law—Wiretapping—Informant privilege—In camera review of wiretap affidavits.

**07-67** Kotula v. United States, 7/16/2007 (*United States v. Harris*, 6th Cir., 10/10/06, unpublished). Criminal Law—Tax conspiracy—Coconspirator statements in form of civil deposition and trial testimony—Severance—Jury instructions.

**07-68** Diaz v. Tilton, 7/16/2007 (*Diaz v. Alameida*, 9th Cir., 2/27/07, unpublished). Criminal Law—Habeas corpus—Scope of federal court review—Dismissal of hold-out juror during deliberations.

**07-69** Catawba Indian Tribe of South Carolina v. South Carolina, 7/16/2007 (S.C., 372 S.C. 519, 642 S.E.2d 751). Native Americans—State ban on video poker—Tribal consent.

**07-70** Williamson v. Haynes Best Western of Alexandria Inc., 4/12/2007 (La., 940 So. 2d 648). Civil Procedure—Appellate review—Due process.

## Subject Matter Summary

A subject matter summary of some of the cases recently docketed on the Appellate Docket of the Supreme Court is given below. The summary includes for each case (1) the Supreme Court docket number and caption of the case; (2) an indication of the subject matter; (3) the court below, a citation to or date of its opinion or order, and the caption of the case in the court below when it differs significantly from the caption in the Supreme Court; (4) a capsule statement of the lower court's ruling; (5) the principal questions presented by the case; and (6) the procedure followed in seeking review, the date of filing in the Supreme Court, and counsel for petitioner or appellant.

### Civil Procedure

**07-49 In re Choi**

*Full faith and credit to out-of-state judgment.*

Ruling below (Va., 10/13/06):

Demurrers to suit to enforce District of Columbia judgment are sustained without further leave to amend.

Questions presented: (1) May courts of adjacent suburban Virginia refuse to give full faith and credit to judgment from District of Columbia, in violation of Article IV, Section 1 of Constitution and Full Faith and Credit Act, 28 U.S.C. § 1738? (2) May courts of Virginia, which has one of nation's strictest recordation acts that gives priority to judgment recorded before earlier deed of conveyance, avoid giving full faith and credit to District of Columbia judgment by comparing its date of recordation, not to later-recorded transaction challenged but rather by comparing judgment from District of Columbia instead to date of recordation of underlying deed of trust pursuant to which deed of trust challenged deed of conveyance, executed via foreclosure, was issued? (3) When that type of comparison with underlying deed of trust rather than deed of conveyance that is challenged has never been made to defeat any Virginia judgment creditor in history of Virginia, is radical and hitherto unheard of type of comparison mere pretext to avoid giving that full faith and credit to District of Columbia judgment which Constitution and Full Faith and Credit Act require? (4) In such case, should this court exercise its jurisdiction to mandate full faith and credit for District of Columbia judgment and prohibit discrimination exhibited by failure to give full faith and credit and enjoin any further such behavior against District of Columbia judgment creditor, petitioner, who recorded her judgment prior to only deed and transaction she asks be set aside and held void, one not recorded until after her judgment?

Petition for mandamus and/or prohibition filed 7/11/07, by John D. Hemenway, of Washington, D.C.

### Civil Rights

**06-1577 Prince George's County, Md. v. Miller**

*Arrest—Probable cause—Qualified immunity.*

Ruling below (4th Cir., 1/22/07):

Police detective whose affidavit, which allegedly included material misrepresentations and omissions, resulted in arrest warrant for, and ultimately arrest of, 37-year-old black man for crime that detective indisputably believed had been committed by much younger white man is not qualifiedly immune from arrestee's civil rights action, given test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), which asks whether (i) facts alleged, taken in light most favorable to party asserting injury, show that law enforcement officer's conduct violated constitutional right, and (ii) if so, whether that right was clearly established at time of events at issue; considering facts alleged in light most favorable to plaintiff, reasonable jury could conclude that affidavit underlying arrest warrant contained misrepresentations and omissions made deliberately or with reckless disregard for whether they made affidavit misleading; misrepresentations and omissions were material given that affidavit containing omitted material and stripped of misrepresentations (i) would have asked magis-

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trate to issue warrant for arrest of white suspect with same name as black civil rights plaintiff who was subsequently arrested and (ii) would have omitted all information pertaining to plaintiff; ''corrected'' affidavit would not have provided probable cause to arrest plaintiff and would not have been executed against him; at time of events at issue in this case, it was clearly established that Constitution does not permit police officer deliberately, or with reckless disregard for truth, to make material misrepresentations or omissions to seek warrant that would otherwise be without probable cause.

Questions presented: (1) Did Fourth Circuit misapply principles set forth in *Franks v. Delaware*, 438 U.S. 254 (1978), in excising more than material false statements alleged in complaint by excising allegations of negligence to determine if there remained sufficient content in officer's affidavit to support finding of probable cause, and did it err by not considering petitioners' argument that alleged false statements were not material or essential to probable cause? (2) Assuming Fourth Amendment violation, did Fourth Circuit, contrary to *Anderson v. Creighton*, 483 U.S. 635 (1987), err in not considering that officer is entitled to qualified immunity because it was not apparent in light of pre-existing law that officer who utilized local criminal computer database and obtained match for first and last name of *white male* suspect given to him by victim of crime to apply for facially valid arrest warrant, would have known computer data erroneously identified *black male* with same first and last name as that of alleged white male suspect, which subsequently would cause mistaken arrest of black male?

Petition for certiorari filed 5/15/07, by Rajesh A. Kumar, of Upper Marlboro, Md.

## Criminal Law

**06-1583 Pelto v. Florida**

*Defenses—Insanity—Jury instructions.*

Ruling below (Fla. Dist. Ct. App., 949 So. 2d 241):

Defendant's conviction is affirmed without opinion.

Question presented: Given that state may require defendant in criminal case to prove he is insane by clear and convincing evidence (defined as evidence that is precise, explicit, lacking in confusion, and of such weight that it produces firm belief or conviction without hesitation), but that it may not do so when jury instructions as to this burden do not advise jury that it must still determine whether state has established, beyond reasonable doubt, defendant's requisite state of mind for murder, did jury instructions in this case deprive defendant of his 14th Amendment due process right to have state prove all essential elements, beyond reasonable doubt, of charge against him?

Petition for certiorari filed 5/25/07, by James T. Miller, of Jacksonville, Fla.

**06-1585 Latham v. Michigan**

*Ineffective representation by trial and appellate counsel.*

Ruling below (Mich. Cir. Ct., 11/4/05):

Defendant's motion for relief from judgment is denied without opinion.

Question presented: Did Michigan courts fail to apply legal standards established by this court to evaluate petitioner's request for evidentiary hearing to provide record support for her claim that she was deprived of her right to appeal by ineffective representation of her first appellate attorney, who failed to properly request evidentiary hearing in support of petitioner's claim that she was deprived of reasonable probability of acquittal by ineffective representation of her trial counsel, who failed to present petitioner's defense and refused to permit her to testify, when properly supported request for such evidentiary hearing was first presented to state appellate court on motion for reconsideration, and subsequently denied by state courts at every level, in violation of Fifth, Sixth, and 14th Amendments?

Petition for certiorari filed 5/29/07, by John F. Royal, of Detroit, Mich.

**06-1599 Coy v. Texas**

*Confrontation—Hearsay—Adequacy of counsel's objection.*

Ruling below (Tex. App., 8/15/06, unpublished):

Defendant's objection to hearsay evidence did not preserve error on confrontation clause grounds; defendant's claim of ineffective assistance of counsel, based on counsel's failure to preserve error on confrontation clause grounds, fails because record does not demonstrate that defense counsel's performance fell below objective standard of reasonableness and because there are number of conceivable reasons why counsel might have declined to object on confrontation grounds.

Questions presented: (1) Was defendant's Sixth Amendment right to confront witness abridged when Texas Court of Appeals, Seventh District, in affirming Texas state trial court, concluded that *Crawford v. Washington*, 541 U.S. 36, 72 U.S.L.W. 4229 (2004), did not apply to preclude admission of hearsay testimony although defendant's attorney timely and specifically objected to admission of hearsay testimony? (2) Did failure of defendant's attorney to specifically use words ''confrontation clause'' in objection made at trial abridge rights of defendant to confront witness against him because, according to *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004), failure to use words ''confrontation clause'' constitutes ''plain error'' and thereby deprived defendant of effective counsel, prejudiced defense, and denied defendant fair trial according to *Crawford* and *Davis v. Washington*, 74 U.S.L.W. 4356 (U.S. 2006)?

Petition for certiorari filed 5/29/07, by Michael J. Coy, pro se, of Pflugerville, Tex.

**06-1604 Ness v. United States**

*Money laundering—Concealment.*

Ruling below (2d Cir., 466 F.3d 79, 75 U.S.L.W. 1230, 80 Crim. L. Rep. 74):

Design to give unlawful proceeds appearance of legitimate wealth is not necessary to establish concealment element of 18 U.S.C. § 1956(a)(2)(B)(i), which criminalizes ''transportation, transmission, or transfer'' of certain funds ''designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity''; evidence that ''transportation money laundering'' defendant employed complex and secretive means to move vast amounts of narcotics proceeds from drug traffickers in United States to other figures abroad, including clandestine meetings, use of coded language, and scrupulous avoidance of paper trail, was sufficient to show that he intended to conceal illegal origin of such funds within meaning of 18 U.S.C. § 1956(a)(2)(B)(i).

Question presented: As Sixth, Seventh, and Tenth Circuits have held, does money laundering statute reach conduct ''designed to conceal or disguise'' illegal proceeds by making illegitimate funds appear legitimate, or, as Second, Third, Fifth, and Eleventh Circuits have held, is ''designed to conceal or disguise'' requirement met by any conduct that hides money regardless of whether or not conduct was designed to create appearance of legitimate wealth?

Petition for certiorari filed 6/1/07, by Walter Dellinger, Mark S. Davies, Scott M. Edson, and O'Melveny & Myers LLP, all of Washington, D.C., and Vivian Shevitz, of South Salem, N.Y.

**06-1618 Mincy v. Klem**

*Ineffective assistance of counsel.*

Ruling below (3d Cir., 3/29/07):

Unsuccessful habeas corpus petitioner's application for certificate of appealability on ineffective assistance of counsel claims is denied for failure to make substantial showing of denial of constitutional right; district court's conclusion that remaining claims are procedurally defaulted does not appear to be debatable.

Questions presented: (1) Did district court err in concluding that defense counsel was not constitutionally ineffective in numerous ways, including failing to interview, obtain statements from, and call several important alibi and fact witnesses at trial as well as failing to properly and adequately impeach victim and other prosecution witnesses? (2) Did district court err in concluding that petitioner's other claims of counsel ineffectiveness lacked merit? (3) Has petitioner demonstrated both cause for procedural default of certain ineffective assistance of counsel claims as well as actual prejudice? (4) Did district court err in concluding that state post-conviction relief act court correctly refused to hold evidentiary hearing into petitioner's claims of ineffectiveness?

Petition for certiorari filed 5/31/07, by William C. Costopoulos, and Costopoulos, Foster & Fields, both of Lemoyne, Pa.

**06-1621 Langford v. Jones**

*Prosecutorial misconduct—Sufficiency of evidence—Jury instructions—Ineffective assistance of counsel.*

Ruling below (6th Cir., 1/9/07):

Unsuccessful habeas corpus petitioner's application for certificate of appealability is denied for failure to make substantial showing of denial of constitutional right.

Questions presented: (1) Does it deny due process and right of confrontation for prosecutor to tell jury that important defense witness was out in hallway laughing about story she told, when prosecutor never presents witness to alleged witness conduct? (2) Are lower courts using correct standard to find ''overwhelming'' evidence, to thereby find all errors to be harmless and deny certificate of appealability, in case that is far from overwhelming and resulted in hung jury at first trial without these errors? (3) In case based on word of one witness testifying under agreement with prosecution, was it constitutional to exclude evidence of benefits witness would get from deal? (4) In homicide case with substantial evidence of accessory after fact, and much weaker evidence of involvement in killing, does it deny due process to deny defense request to instruct jury on crime of accessory after fact? (5) When defendant wishes to testify, does

''waiver by inaction'' of personal right to testify require that someone inform defendant that this is time to speak up if he does wish to testify? (6) Did failure to object to errors, and failure to expose major change in testimony between first and second trials, amount to ineffective assistance of counsel? (7) Did state and federal courts improperly refuse to hold evidentiary hearing on petitioner's claims of ineffective assistance of counsel and denial of right to testify?

Petition for certiorari filed 4/6/07, by James Sterling Lawrence, pro se, of Royal Oak, Mich.

## Environment

**07-48 Seiber v. Oregon**

*Protection of nesting sites—Regulatory taking—Valuation—Jury trial.*

Ruling below (Ore. Ct. App., 12/27/06):

State's seven-year ban on cutting timber on 40-acre portion of 200-acre property, because portion was habitat of spotted owl, affected only 20 percent of property, did not interfere with any then-existing logging transactions in regulated area at time it was imposed, left owner free to sell future contingent logging interests in regulated area, was part of regulatory plan developed to ensure maintenance of forestland consistent with sound management of wildlife and scenic resources and to ensure continuous benefits of those resources to future generations of Oregonians, and thus was not regulatory taking under criteria of *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), under which plaintiffs' economic harm, including their investment-backed expectations, must be weighed against public benefit to be derived from survival of spotted owl as species.

Questions presented: (1) When evaluating claim concerning regulatory takings of commercial timber under just compensation clause of Fifth Amendment and standard of *Penn Cent. Transp. Co. v. New York City*, must court consider effect of government regulation on value of particular timber taken from tract, or instead on value of entire tract of real estate, including timber not taken? (2) Do Fifth and Seventh Amendments to U.S. Constitution, taken together, guarantee right of jury trial in regulatory takings cases in state courts?

Petition for certiorari filed 7/9/07, by Phillip D. Chadsey, Charles F. Adams, and Stoel Rives LLP, all of Portland, Ore.

## Immigration

**07-47 Lie v. Gonzales**

*Removal—Asylum—Timeliness.*

Ruling below (3d Cir., 9/14/06):

Court denies alien's petition for review of Board of Immigration Appeals' dismissal of alien's appeal of immigration judge's denial of alien's motion to reopen removal proceedings, court having concluded that no credible evidence supports alien's claim that he should be granted asylum, withholding of removal, and relief under Convention Against Torture based on his fear of future persecution as ethnic Chinese Christian should he be returned to Indonesia.

Question presented: Did court of appeals properly sustain BIA decision rejecting petitioner's appeals of adverse decision of IJ denying petitioner's motion to reopen and reconsider his removal proceedings, when decision of IJ contained serious factual errors, BIA's decision raised serious ethical problems due to conflict of interest that arose as result of BIA's untimely determination that it had no jurisdiction over petitioner's original appeal, and when court of appeals rendered determination regarding merits of petitioner's underlying asylum claim when BIA never had any jurisdiction to adjudicate merits of asylum claim because it asserted that it never had jurisdiction over petitioner's original appeal?

Petition for certiorari filed 5/7/07, by Sandra Greene, of York, Pa.

## Insurance

**07-28 Vintilla v. Safeco Insurance Co.**

*Payment of disputed claim.*

Ruling below (6th Cir., 3/2/07):

Insurer's settlement of third party's claim within policy limits but without insured's consent did not violate Ohio law or terms of policy, which provided that insurer will pay bodily injury or property damages ''for which any insured becomes legally responsible because of an auto accident,'' and that insurer ''will settle or defend, as we consider appropriate, any claim or suit asking for these damages''; insurer was not state actor, and thus unconsented settlement did not violate insured's due process rights.

Questions presented: (1) Did arbitrary and capricious payment by insurer of disputed claim for damages constitute breach of automobile accident liability policy and violate insured's due process rights under Fifth and 14th Amendments? (2) Did arbitrary and capricious payment by insurer of controverted damage claim violate public policy?

Petition for certiorari filed 5/8/07, by John R. Vintilla, of Cleveland, Ohio.

## Motor Carriers

**07-27 Dmitruk v. George and Sons' Repair Shop Inc.**

*Negligence—Proximate cause—Failure to deploy reflective warning signals while stopped.*

Ruling below (10th Cir., 2/21/07):

Although proximate cause in negligence suit is ordinarily question for jury, district court properly granted summary judgment to defendant that failed to place reflective warning signals behind stopped semi-truck, as required by Colorado statute and federal regulations, when nothing in record suggested that placement of signals would have prevented decedents' slamming into rear of truck that was plainly visible and flashing its hazard lights while pulled onto side of interstate exit ramp on clear day.

Question presented: Should jury decide whether failure to deploy warning triangles was proximate cause of accident?

Petition for certiorari filed 7/5/07, by Thomas L. Hause, and Washington Law Group, both of Seattle, Wash.

## United States

**07-29 J&G Sales Ltd. v. Sullivan**

*Regulation of firearms—BATFE ''demand letter'' to licensed dealers for information from dealers' records.*

Ruling below (*J&G Sales Ltd. v. Truscott*, 9th Cir., 473 F.3d 1043):

Under 18 U.S.C. § 923(g)(5)(A), which requires federally licensed firearms dealers, ''when required by letter issued by [Bureau of Alcohol, Tobacco, Firearms and Explosives], and until notified to the contrary in writing by the [BATFE], [to] submit on a form specified by the [BATFE], for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as [BATFE] in such letter may specify,'' BATFE was authorized to issue demand letter requiring licensed dealer, who in 1999 had been linked to 10 or more crime gun trace requests for secondhand firearm with period from time of sale to time of use in crime of three years or less, to provide from dealer's records for such firearms (i) name of manufacturer and/or importer, (ii) acquisition date, (iii) model, (iv) caliber or gauge, and (v) serial number.

Question presented: Does ''demand letter'' to federally licensed firearms dealers requiring them to provide agency with information from records maintained by dealers exceed agency's authority under 18 U.S.C. § 923(g)(5)(A) in view of statutory scheme enacted by Congress?

Petition for certiorari filed 6/15/07, by Richard E. Gardiner, of Fairfax, Va.

**07-50 Braunstein v. U.S. Postal Service**

*FTCA and Bivens claims—Limitations—Attorneys' fees.*

Ruling below (9th Cir., 4/12/07, unpublished):

Claims against Postal Service under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and Federal Tort Claims Act for malicious prosecution and intentional and negligent infliction of emotional distress accrued no later than when, following dismissal of criminal case against plaintiff without prejudice, limitations period expired for prosecuting him for alleged criminal acts, and limitations period for filing his *Bivens* and FTCA claims expired two years later, prior to his filing this action, notwithstanding his contention that this court's decision regarding his Hyde Amendment motion for attorneys' fees constituted ''favorable termination'' of his prosecution that triggered limitations period.

Questions presented: (1) Did Ninth Circuit err in affirming district court's judgment that petitioner's claims under *Bivens* and FTCA based on United States' prosecution of petitioner (that Ninth Circuit previously determined was ''frivolous'' in *United States v. Braunstein*, 281 F.3d 982 (9th Cir. 2002)) began to accrue prior to ''favorable termination'' of *United States v. Braunstein* and were therefore barred by Arizona's two-year statute of limitations? (2) Did Ninth Circuit err in holding that district court's finding in *United States v. Braunstein*, on petitioner's motion for attorneys' fees pursuant to ''Hyde Amendment,'' that government's prosecution was ''well-grounded in fact'' and ''substantially justified'' prevent petitioner from asserting *Bivens* or FTCA claim until that holding was reversed by Ninth Circuit in *United States v. Braunstein*?

Petition for certiorari filed 7/11/07, by Philip H. Stillman, and Flynn & Stillman, both of Cardiff, Calif.

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