

大成 DENTONS

CLE SEMINAR FOR IN-HOUSE COUNSEL
KANSAS CITY | MAY 2019

Supreme Court in Review: *What's Happened, What's Coming, and What Matters*

Wade Carr, Senior Managing Associate
Kansas City
+1 816 460 2473
wade.carr@dentons.com



October 2018 Term and Beyond

- Key decisions to date
- Cases pending
- Cases to watch for October 2019 term

October 2018 Term

- A trio of arbitration decisions
- Securities liability
- Patents and trademarks
- Regulatory/administrative deference
- Antitrust
- Political hot buttons
 - Establishment Clause
 - Census and citizenship
 - Elections and gerrymandering

Decisions to Date

Securities Fraud

Lorenzo v. Securities and Exchange Commission

- 6-2 opinion issued on March 27, 2019
- SEC Rule 10b-5 liability
 - Subsection (b) prohibits “making” false statements—only the person who has “ultimate authority over the statement, including its content and whether and how to communicate it.”
 - Subsections (a) and (c) prohibit “employ[ing] any device, scheme, or artifice to defraud” and “engag[ing] in any act, practice, or course of business which operates . . . as a fraud or deceit.”
- Justice Breyer for the majority: Rule 10b-5(a) and (c) extends to someone who disseminates a false statement—e.g., distributing false statements made by a supervisor.

Patents

Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA Inc.

- 9-0 opinion issued on January 22, 2019
- Holding: confidential sales of an invention bar a subsequent patent application
 - 2011 statute bars patents for invention “in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention”
 - Ban applies to agreements to distribute, promote, market, and sell the invention
 - Agreements were made public but required the other company to keep the invention confidential
- Consistent with precedent before the 2011 law

Arbitration

Henry Schein Inc. v. Archer and White Sales Inc.

- 9-0 opinion issued on January 8, 2019
- Justice Kavanaugh's first opinion
- Holding: eliminated “wholly groundless” exception to arbitrability
 - Parties' contract can specify that an arbitrator—not the court—decides whether a case is subject to arbitration
 - No exception to this rule even if the court thinks the arbitrability claim is “wholly groundless”

Arbitration

New Prime Inc. v. Oliveira

- 8-0 opinion issued on January 15, 2019
- Holding: FAA's exception for "contracts of employment" for certain transportation workers extends to truck drivers with independent contractor agreements

Arbitration

Lamps Plus Inc. v. Varela

- 5-4 decision issued on April 24, 2019
- Lamps Plus data breach
 - Class action filed by employee whose data was used to file a fraudulent tax return
 - Employment contracts contained an arbitration clause covering any matters “relating to [the employee’s] employment”
- Holding from Chief Justice Roberts’ majority opinion:
 - Court had previously held silence does not permit class-wide arbitration
 - Ambiguous arbitration clause cannot be construed to allow class-wide arbitration
 - Courts should not construe any ambiguities against the drafter

Awaiting Decision

Administrative Law

Kisor v. Wilkie

- Argued on March 27, 2019
- Issue: whether courts should defer to an agency's interpretation of its own ambiguous regulations
 - So-called *Auer* or *Seminole Rock* deference, dating to 1945
 - May also signal future challenges to *Chevron* deference (statutory interpretation)
- Veterans benefits case with implications for virtually any other body of federal administrative law (FDA, environment, disability, immigration, etc.)

Trademark

lanca v. Brunetti

- Argued on April 15, 2019
- Issue: whether and when the USPTO can prohibit the registration of “immoral” or “scandalous” trademarks
- Facial challenge to the constitutionality of the Trademark Act

Antitrust

Apple, Inc. v. Pepper

- Argued on November 26, 2018
- Issue: whether antitrust liability extends to anyone who “delivers” goods
- iPhone users seeking treble damages from Apple for alleged price-fixing for App Store sales
 - Only “direct purchasers” can seek treble damages
 - Apple argues that app developers—not Apple—set the prices

Politically Charged Cases

- Establishment Clause
- Partisan gerrymandering (two cases: Maryland and North Carolina)
- Citizenship question on 2020 census

Looking Ahead

October 2019 Term

- Three Kansas Supreme Court decisions
- Title VII protections for LGBTQ employees
- Clean Water Act
- Second Amendment
- Abortion
- Affordable Care Act

Kansas Supreme Court

- Currently the most-reviewed court for the October 2019 term
- Three cases:
 - State ban of insanity defense
 - Preemption of identity theft law
 - Traffic stops and the Fourth Amendment

Title VII Protections for LGBTQ Employees

Three cases

- Issue: whether Title VII's ban on discrimination "because of sex" extends to discrimination based on sexual orientation

- Three Circuits have weighed in and are on review:
 - Second Circuit: Title VII does apply
 - Eleventh Circuit: Title VII does not apply
 - Sixth Circuit: Title VII does not apply

Environmental Laws

County of Maui, Hawaii v. Hawaii Wildlife Fund

- Issue: whether the Clean Water Act extends beyond navigable waters to include pollution that originates in non-navigable waters (e.g., contamination of groundwater)
- One of the highest profile cases taken up in recent history

Second Amendment

New York State Rifle & Pistol Association v. New York

- Issue: whether New York City's ban on transporting licensed, unloaded firearms outside city limits violates the Second Amendment
- First major Second Amendment case in over 10 years

Indiana's Abortion Restrictions

- Indiana law:
 - Prohibits abortions solely motivated by race, sex, or disability of the fetus; and
 - Requires abortion doctors to inform patients of the prohibition.
- Court has not yet decided whether to grant certiorari

Affordable Care Act

Texas v. United States

- Northern District of Texas declared the entire law unconstitutional in light of Congress's decision to repeal the individual mandate
- ACA is no longer being defended by USDOJ, but by a collection of 17 states
- Still being briefed in the 5th Circuit

Thank you

大成 DENTONS

Dentons US LLP
4520 Main Street
Suite 1100
Kansas City, MO 64111-7700
United States

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com.