

Assessing The October 2009 Term – An Interesting And Productive Year For The U.S. Supreme Court

The annual web media briefing on the Supreme Court sponsored by the Washington Legal Foundation recently was held in Washington, DC. **Thomas C. Goldstein**, presiding co-leader of the firm-wide litigation management committee at the law firm, **Akin Gump Strauss Hauer & Feld LLP** and originator of **SCOTUS** blog covering the Supreme Court, introduced three panelists: **Lisa S. Blatt**, former assistant to the Solicitor General and head of the Appellate and Supreme Court practice at the law firm **Arnold & Porter**; **Paul M. Smith**, a Partner with the law firm **Jenner & Block LLP** where he chairs the Appellate and Supreme Court practice and Co-Chairs the Creative Content, Media and First Amendment, and the Election Law and Redistricting Practices; and **Viet D. Dinh**, a Professor of Law and Co-Director of Asian Law & Policy Studies at the Georgetown University Law Center.

Blatt: I'm going to talk about statutory interpretation before the Supreme Court with a focus on the *Monsanto* case and also offer some comments about the changing members of the Court. What is most interesting about the yet-undecided mail and wire fraud cases is the issue that continues throughout every term, i.e., when the court is considering whether to strike a statute as unconstitutional, they usually confront the issue of whether to narrowly construe it as a way to avoid the constitutional question. Motive analysis has come up a lot this term in some reasonably important cases. In the *Citizens United* case and in *Stevens v. United*, the court refused to narrow the statute. Yet in two other decisions, the court did give narrow constructions to the statute that criminalized the act of providing material support to known terrorist organizations and to the Bankruptcy Code's restrictions on debt relief agencies.

The *Monsanto* case is one that is the exception to almost all the rules on how the Court operates. In an 8-1 decision, the Court admonished a district court in a very fact-bound case by saying that it went too far in ordering a remedial injunction. But, in doing that, it didn't address the actual questions presented, which were: whether *Monsanto* was entitled to an evidentiary hearing before an injunction was entered or whether the traditional four-part test was misapplied in an injunction case. In this case *Monsanto* had developed a genetically engineered alfalfa plant resistant to a herbicide made by *Monsanto* for which it sought deregulation under a federal environmental statute, which the government had granted. A group of environmentalists, together with an alfalfa grower group, sought to invalidate the action on the grounds that the government had not provided an environmental impact statement under NEPA. The Court stated that the district court never should have enjoined the government in the first place. *Monsanto* won a complete victory. It is a very complicated case, but it will be very important as an administrative and environmental law precedent. What is so noteworthy is that there is a general rule that the Supreme Court does not take cases unless there is a conflict or an issue of exceptional importance like the constitutionality of a statute. Yet, the Court took this case and spent an enormous amount of resources to arrive at this opinion. What the case does show is the critical role that lawyers play in the *cert* process. The victory in this case was the

cert petition and getting it granted, because it definitely was not a typical *cert*-worthy case. This case demonstrates that if there is a judicious use of *amicus* support in the petition process, this can be successful in getting the Court's attention. The Court agreed with the brief presented by the **Washington Legal Foundation**, underscoring the importance of the case as an abuse of the district court's power to grant injunctions. It is a very impressive victory for the lawyers for the *amici* in that case.

Moving on to the changes in the Court! The Court is in a very smooth, yet bitter-sweet phase – saying goodbye to their oldest justice, yet having an excited anticipation regarding Elena Kagan. The conventional wisdom is that neither Elena Kagan nor Justice Sotomayor will make a huge change in the big ideological votes, such as abortion and affirmative action. But, a new justice always brings subtle changes to the Court. Justice Sotomayor has been incredibly impressive in her first year and has started to mark her own path.

It will be interesting to watch when Elena Kagan comes on the Court as to how that will contrast with Justice Sotomayor's vast experience as a judge. In Justice Sotomayor's questioning and in her opinions, her experience really comes through. However, Elena Kagan has spent her professional life either in political positions within the government or in academia. They really have quite different backgrounds, yet they are remarkably similar because they both are a 110 percent devoted to their work, and they will bring an ever-increasing active questioning from the bench.

Smith: I shall talk about two cases. The first is *American Needle*, an antitrust case involving what the NFL is and how to think of it in terms of antitrust. The second case is *Bilski*, not yet decided.

NFL Properties is a corporation created by the NFL to license trademarks to be used on clothing, etc. Since about 1963, they had given non-exclusive licenses, but around 2000, they decided to give exclusive licenses, which allowed Reebok to be the only entity that could license logos for hats. American Needle sued under the Sherman Act, saying that NFL Properties is effectively a combination in restraint of trade and a violation of Section One, thus raising the question of what the NFL is. Is it a single entity, or is it a group of companies that come together to form an agreement when they license their property? The Seventh Circuit said that it is a single entity because it makes sense to license those logos collectively.

The Supreme Court unanimously took a somewhat different view – in a typical Justice Stevens common sense opinion – a substance-over-form ruling. Section One of the Sherman Act, which requires that there be some combination or conspiracy or contract among multiple entities, is triggered when all the NFL teams get together and license their logos collectively, exclusively or non-exclusively. Football teams are pretty much independent operators. It is true that they have to get together to put out the product called NFL football, which is what the Seventh Circuit saw as most important, but to the Supreme Court they compete with one another all the time. The rule of reason would dictate that looking at all the facts and circumstances, the competitive benefits outweigh the competitive

harms. Left open are questions about how this will apply to other kinds of joint ventures when potential competitors get together to market their products collectively.

A much-watched patent case is the *Bilski* case, which involves whether you can patent business methods. This phenomenon started about 10 to 15 years ago when, in the *State Street* case, the Federal Circuit essentially endorsed patenting ways of calculating results on your computer from data inputs, i.e., essentially patenting a series of mathematical calculations into a final share price – a way of hedging risks. But what is patentable subject matter? It has to be any new and useful process, machine, manufacturer, or a composition of matter.

The word at issue in *Bilski* and in the business method context is the word *process*. What is a process? It has been understood to exclude just an abstract idea, a law of nature, a mathematical formula untethered to any particular machine or other tangible activity. You can't patent a mathematical formula or an abstract idea.

Essentially, there are two kinds of business method patents. There is *Bilski*, which essentially patents a human activity, a way of organizing human contact and the people of the business. Then there are software patents, which essentially patent the way that you do your calculations, manipulate data and run your business through the vehicle of a computer. The *Bilski* patent is viewed by most everyone, except perhaps Judge Newman who wrote a dissent in the federal circuit, as falling into the human activity side of the aisle.

What's at issue in this case is a method of hedging risk, in which everybody's risks are all completely hedged. This isn't a new idea, but the Court didn't reach that question. It addressed the concept of having an intermediary who hedges risks between a buyer and a seller, which is not limited to any particular commodity or anything tangible. It is basically a concept, not a machine or a process of the kind that people have typically viewed as patentable.

Ultimately, it is very likely that the Court is going to say that this is not patentable subject matter, which is essentially what the federal circuit said. It is unlikely that the Court is going to do a great deal more than that or change the law with respect to the much more important area of computer software because the issue is not really there.

Dinh: I am going to talk about the newly decided *Holder vs. Humanitarian Law Project* and briefly touch on the arbitration cases. The *Holder* case stems from the U.S.A. Patriot Act's amendment, the *materials support* statute, which is the single most prevalent statute being used in the global war on terror.

The most interesting part of this decision, despite all the controversy on both sides, despite how the Ninth Circuit had conducted itself in this 12-year-long litigation, is that amongst the members of the Court, there is surprising agreement. Justice Breyer, in dissent, and Justice Scalia, in the majority, agree on the essential facts and law. No one disputes that the acts in question are innocuous and otherwise protected activities. Nobody disputes that these are foreign terrorist organizations involved. The only question is what do we make of this prohibition?

The Court was unanimous in rejecting the Ninth Circuit's holding that this law was unconstitutionally vague. The only difference between the majority and the dissent is that the majority accepts the Congressional and the executive's assertions that giving such innocuous and otherwise protected activities to foreign terrorist organizations, or in coordination with them, would have an adverse effect on our war on terror, and the dissent says that we require more from our government before we intrude into constitutionally protected activities.

In the abstract, Justice Breyer, in dissent, does have a very good point. Constitutional protection exists for a reason. It is a negative prohibition on governmental regulation or criminalization. If it is protected, then we demand a lot more from the government than just an assertion that it would be good for our governmental policy. In this case, it was the compelling interest of preventing terrorist attacks or criminalizing terrorist activity versus intruding into constitutionally protected conduct, especially of the highest order like First Amendment activities. In this case the Court used the criminal paradigm, instead of the war paradigm, i.e., authorizing executive detention, condemning material support rather than actual terrorist activity. Justice Stevens's vote in support of the majority was something of a surprise, justifiable in view of his support of protecting the traditional criminal paradigm.

I now will spend a couple of minutes on some cases dealing with access to the Court at large, or, stated more broadly, to what extent should the Court be an agent of change or an agent of dispute resolution within our society. Seemingly boring cases (*Stolt-Nielsen* and *Rent-a-Car*) dealing with the Federal Arbitration Act can be made interesting within this broader framework. How can it be interesting? This term, the Court dealt with a very exciting question: If an arbitration clause is completely silent on whether there can be class action arbitration, then what is the scope of the arbitration? Is there class action arbitration or is there not?

The Court held that when it is completely silent, then there is no class action. Why this is important is because the Court has taken *cert* in a case next year, the *AT&T* case, in which the form contract for all our cell phones has a mandatory arbitration clause. But it is a mandatory arbitration clause that not only is not silent on class action, but expressly says that there would be no class action arbitration. The challenge is that this clause is unconscionable.

The other exciting arbitration case deals with the unconscionability of an arbitration clause, but not just any arbitration clause. The arbitration of an arbitrability clause – that is, whether this case is arbitrable – is itself arbitrable, and then to get more complex, who decides that question of arbitrability regarding arbitrability?

This decision does have a more practical impact than just a pleading rule, which is why it is such a divided opinion (five to four). It turned into the broader question that the Court is engaging in when it decided *Twombly* and *Iqbal* and various cases over the years as to what exists as the proper forum for dispute resolution. Is it the court, or is it the alternative resolution mechanisms?