



Overview

The Supreme Court begins its Term on October 6, 2008. Once again, the nation's highest court will address questions that have a fundamental impact on both the American legal system and our daily lives. Consumer safety and corporate liability are major themes this term. In addition, the extent of unilateral executive power may once again be at stake. The Court will hear arguments about whether tobacco and drug companies can shield themselves from liability, whether the executive branch can detain an individual indefinitely without criminal charge or trial, and whether employers can retaliate against workers who report or participate in investigations related to sex-based discrimination.

Consumer Rights and Protections

This term, the Supreme Court will hear two cases that are critical to consumer protection and public health. Both deal with the preemption doctrine—specifically, whether or not federal regulatory approval can prevent an injured person from bringing a claim against a company under state law. Traditionally, preemption is the legal doctrine according to which federal law invalidates conflicting or inconsistent state law. It is rooted in the Supremacy Clause of the United States Constitution, which makes federal law the supreme law of the land. As a general rule, there is a strong presumption in favor of the validity of state law.

Altria Group, Inc. v Good (*Oral Arguments Monday, October 6, 2008*)

For years, the tobacco industry has sold and marketed “light” cigarettes that contain lower tar and nicotine levels as a “healthier” alternative to regular cigarettes. Many smokers presumed that these “light” cigarettes were less lethal, but in actuality, they were not getting less tar or nicotine yield. Consumers asserted that Altria, and its subsidiary Philip Morris, knew that its lighter cigarettes were not safer for consumers and used the designation as a way to deceive them into making purchases based on this false information.

At issue is the right of individual smokers to sue tobacco companies under state law over the marketing of so-called “light” cigarettes. Tobacco companies claim that the Federal Cigarette Labeling and Advertising Act (“the Act”), implemented by the Federal Trade Commission (“FTC”), prevents - or preempts - consumers from filing claims under

Maine's state deceptive practices law regarding advertisements for these "lower tar and nicotine" cigarettes.

The First Circuit ruled in favor of letting the claim against the tobacco companies proceed, so Altria petitioned for Supreme Court review. The court will address two separate but related issues, because Altria is trying to evade liability under two theories of preemption: express and implied. Express preemption is based on specific language in a statute, while implied preemption comes into play when there is no such language but a state law interferes with or contradicts federal law. Altria alleges that the claim is expressly barred by language in the federal cigarette labeling act and implicitly because a state law claim would be at odds with the goals of the FTC's national regulatory scheme. The plaintiffs who brought suit against the tobacco companies maintain that their claim is based on the requirement in the Maine law not to deceive rather than any regulatory question that might interfere with the FTC. Further, the plaintiffs note that the Supreme Court has never found an implied preemptive effect in the cigarette labeling act.

The tobacco industry's lawyers hope that the Court turns the purpose of the Act – consumer safety protection – on its head. They want to use it as a shield from liability. The FTC, which oversees cigarette advertisements, is far too overworked and far too under-funded to engage in any meaningful oversight. In this case, the federal government has submitted briefs in favor of the Plaintiffs. The FTC even went so far as to change one of its long-standing policies to support the Plaintiffs' arguments by making clear that it didn't endorse the methods that the manufacturers had used in calculating nicotine or tar levels, nor did it define the labels ("low" or "light") manufacturers used when detailing their results.

Wyeth v. Levine (*Oral Arguments Monday, November 3, 2008*)

Diana Levine, a lifelong musician and guitar player, went to the hospital with a migraine. She left with injuries that led quickly and irreversibly to the loss of her right hand. Ms. Levine received an anti-nausea drug, Phenergan. It was administered by the "IV push" method, resulting in an inadvertent introduction of the drug into an artery, which ultimately caused gangrene.

Ms. Levine filed suit in state court against the manufacturer of Phenergan, Wyeth, asserting that the drug's labeling provided an inadequate warning of the known dangers of the "IV push" method. Wyeth, however, argued that because the label had gone through FDA approval and included some indication of potential dangers, they were not subject to any liability based on a failure to warn. A jury nevertheless ruled in Ms. Levine's favor, and she was awarded \$7.4 million in damages. Wyeth appealed to the Vermont Supreme Court, but that court also rejected Wyeth's argument. The majority held that the "federal labeling requirements create a floor, not a ceiling, for state regulation." Finding that there was "no conflict between federal objectives and Vermont common law," Levine's state law claims were not preempted. Wyeth then appealed to the United States Supreme Court.

Wyeth may become the latest in a series of cases that have substantially altered consumer protection law in the United States. Last term, in a significant anti-consumer decision, the Court held that persons injured by a negligently manufactured medical device cannot bring state law claims against the manufacturer for damages if the device received pre-market approval from the federal Food and Drug Administration (“FDA”). In *Wyeth*, the Court will address the same preemption issues as it relates to labeling of prescription drugs.

Because the Supreme Court has agreed to hear *Wyeth*’s appeal this term, it seems likely that the Court’s most conservative members favor extending the preemption doctrine’s reach. If they succeed, pharmaceutical drug manufacturers will be shielded from liability and everyday Americans - like Diana Levine - who are harmed by their products will be left without a remedy. The Court is set to hear oral arguments in this case on Monday, November 3rd.

Anti-Discrimination Law

The Court will also hear a case this term that addresses the very real problem of sexual harassment in the workplace. Its effects are significant: as many as 1 in 10 women may leave a job as a result. Moreover, many women feel pressure not to report harassment for fear of retaliation and job loss. But, the law Congress passed to address this problem, Title VII, relies on the cooperation of employees who are willing to file complaints and act as witnesses. Thus, for the law to be effective, employers who retaliate must be held accountable.

***Crawford v. Metropolitan Government of Nashville and Davidson County* (Oral Arguments Wednesday, October 8, 2008)**

For more than 30 years, Vicky Crawford worked for the Metropolitan Government of Nashville and Davidson County (“Metro”) as a payroll coordinator. Metro asked her to cooperate in an internal investigation about another employee, Gene Hughes, who had become the subject of multiple sexual harassment claims. At the request of her employer, Crawford detailed how Hughes had repeatedly grabbed his crotch in front of her, asked to see her breasts, and on one occasion forcefully pulled her head toward his groin. But instead of firing Hughes, Metro fired Crawford and the other women who had told Metro their shocking stories.

In *Crawford*, the Court will review the Sixth Circuit’s interpretation of Title VII, a broad federal anti-discrimination law that expressly protects employees from discrimination based on sex. A three-judge panel ruled that Crawford’s actions were not protected by Title VII. Title VII protects employment discrimination based on race, color, religion, sex, and national origin. And, of paramount importance to this case, it also forbids employers from retaliating against workers who voice opposition to such discriminatory practices or who participate in any type of investigation conducted under the statute.

The Supreme Court's ruling will have a far-reaching impact on the future of sexual harassment claims. The statute was enacted to protect people like Vicky Crawford who report bad behavior to their employers. The Equal Employment Opportunity Commission, the agency tasked with investigating Title VII claims, and even the Solicitor General in the ultraconservative Bush administration agrees. But Metro has urged a very narrow reading of the statute, suggesting that because Crawford merely cooperated in the investigation and didn't make the initial complaint, she is somehow not covered. This reading would essentially condone Metro's retaliatory actions and would ultimately silence truthful, forthcoming employees. Let us hope that the Supreme Court has taken the case to strengthen Title VII's scope, and make certain that employers like Metro cannot insulate themselves from the protections afforded workers by federal law.

Additional Cases the Supreme Court May Consider

Executive Power

The Supreme Court may once again confront the limits of presidential power as it relates to the "War on Terror" and indefinite detainment. Though it has not yet taken up the Al-Marri case, there is a strong chance it will do so.

Al-Marri

Al-Marri, a citizen of Qatar who was legally residing in the United States and pursuing a master's degree at Bradley University in Peoria, Illinois, was arrested at his home. He subsequently pleaded not guilty to several charges relating to credit card fraud. Less than one month prior to his scheduled trial date for that charge and after he filed pre-trial motions to suppress evidence allegedly obtained by torture, Al-Marri was transferred to military custody pursuant to a presidential order declaring him an enemy combatant. The district court dismissed the criminal charges, and he was transferred to the Naval Consolidated Brig in South Carolina. Five years later, Al-Marri remains in military custody, where he is kept in solitary confinement and denied contact with his wife and children. He has not yet been formally charged.

The Fourth Circuit heard Mr. Al-Marri's case earlier this year. Originally, a three judge panel of the Fourth Circuit consisting of two judges appointed by President Clinton and a dissenting district judge appointed by President George W. Bush, ruled in favor of Al-Marri and against indefinite detainment and the aggrandizement of executive power. But, following this decision, the entire Fourth Circuit voted to take up the case *en banc*, meaning that the earlier panel decision would be revisited by the Circuit in full. The *en banc* decision of the Fourth Circuit handed down last spring is highly illustrative of the cavalier type of new justice the Bush administration has pushed in the war on terror. Judge Traxler, a moderate Clinton appointee originally appointed as a district judge by President George H.W. Bush, was the swing vote in a two-part decision (both handed down on a slim 5-4 majority) that, in effect, overruled the earlier panel. The court held that Al-Marri, who had been classified as an "enemy combatant," could be indefinitely

detained under the powers granted to the President by Congress in the Authorization for Use of Military Force (AUMF) passed shortly after September 11, 2001. But Judge Traxler also joined the other four Clinton-appointed judges in holding that Al-Marri had at least the right to challenge the evidence the government had against him. Ultimately, the ruling granted the president the unprecedented power to subject designated enemy combatants to indefinite military detention – including persons legally residing in the United States who have "never affiliated with an enemy nation, fought alongside any nation's armed forces, or borne arms against the United States anywhere in the world."

Lawyers for the detainee have asked the Supreme Court to rule that no federal law and no part of the Constitution allows the president to order indefinite detentions and deny the historic right of *habeas corpus*. If the Court takes the case this fall, it would again return to addressing core constitutional principles that it has, so far, upheld despite the Bush Administration's efforts.

Cook v. Rumsfeld/Witt v. Department of Justice

The Don't Ask Don't Tell ("DADT") policy prohibits anyone who demonstrates a propensity or intent to engage in homosexual acts from serving in the military; prohibits a LGBT person from disclosing his or her sexual orientation; and prohibits a persons from speaking about their same-sex relationships. Two recent court of appeals decisions addressing the military's DADT policy have created a circuit split and may warrant the Court's attention this fall. The two circuits arrive at divergent conclusions on how to apply the seminal privacy-rights case of 2003, *Lawrence v. Texas*. In *Lawrence*, the Supreme Court struck down a Texas law that criminalized private consensual sex between persons of the same sex and overturned a prior case upholding such laws, *Bowers v. Hardwick*. But the Court, in overturning *Bowers*, did not make clear exactly which standards should be applied in reviewing these types of privacy rights cases. The standard used often determines whether the law is upheld or struck down.

Although a reading of *Lawrence* seems to clearly indicate that courts should apply a heightened scrutiny test – a highly protective standard that will, in most cases, strike down discriminatory laws and regulations – most lower courts have failed to interpret it this way.

The majority-Republican appointed First Circuit did not apply the more protective standard. In *Cook v Rumsfeld*, the court applied the much less strict "rational basis" test when analyzing DADT. This approach says as long as the law or regulation is a rational way to achieve a purported legitimate end, the law is upheld. For plaintiffs challenging bad laws, it is a very difficult hurdle. In *Cook*, former military service members challenged the policy after they were forced to leave under the policy. But, finding ample justification for the policy under the low rational basis threshold, DADT was upheld.

The Ninth Circuit, however, took a different approach. Last May, in *Witt v. Department of Justice*, that court ruled in *Witt* that the DADT policy should be subject to the more stringent scrutiny standard. It returned the case back to the trial court to consider arguments about whether the policy is truly necessary to protect DADT's stated

purpose - unit cohesion. But the government also has the option of asking the Ninth Circuit to rehear the case *en banc*. Originally, it was heard by a standard three-judge panel. Upon request, the Circuit as a whole can vote to rehear a case. If it does this, the larger, 15-judge panel could yield an entirely different result - 11 Reagan/Bush I and II judges sit on the bench. Currently, neither *Cook* nor *Witt* is yet on the Court's docket, but because both privacy rights cases are pivotal to ensuring equal treatment for gay and lesbian members of our military, we will continue to monitor any developments.