

APPELLATE ALERT

HOT CASES ON THE U.S. SUPREME COURT'S DOCKET — 2004 TERM



Akin Gump's appellate and litigation strategy practice group has an active Supreme Court practice and closely monitors the Court's docket. This Term, the Court already has agreed to hear several cases that may be of interest to the business community. Those cases and the questions presented in them are set forth here. This discussion also offers a brief description of the cases and an explanation of their importance. As the Court adds cases to its docket this Term, we will send further alerts as appropriate.

Kelo v. City of New London (Land Use/Fifth Amendment Takings Clause)

Question Presented: Whether the Takings Clause of the Fifth Amendment to the U.S. Constitution authorizes government to exercise its eminent domain power to seize private property for the purposes of private economic development projects.

Discussion: *Kelo* is a landmark case addressing the scope of the Takings Clause of the Fifth Amendment, which authorizes the government to seize private property in the exercise of its eminent domain power for "public use," so long as the government pays the property owner "just compensation." Increasingly, state and local authorities are seeking to use their eminent domain power to foster private economic development projects. In *Kelo*, the Court will decide whether and under what circumstances such action counts as a constitutionally permissible public use.

Kelo arises from a Takings Clause challenge to the seizure of private property by a Connecticut city in furtherance of a large-scale private economic development project, which would include a hotel and office and retail space. The city contends that its action would serve a "public use" within the meaning of the Takings Clause, because it would help to revitalize the city by stimulating growth and promoting economic welfare.

The highest court in Connecticut agreed with the city. Whether the Supreme Court will agree as well is uncertain. To be sure, the Court has traditionally granted government broad leeway

in the exercise of its eminent domain power. But in its prior cases, the Court typically has addressed the exercise of that power by government for what are more obvious “public uses,” such as highway construction. In *Kelo*, the Court is confronted with a new twist: the exercise of eminent domain power to facilitate private economic development.

***Lingle v. Chevron USA, Inc.* (Economic Regulation/Fifth Amendment Takings Clause)**

Question Presented: Whether a law that caps the maximum rent that an oil company can charge dealers who lease its service stations constitutes a Fifth Amendment taking without just compensation.

Discussion: *Lingle* is important because it may force the Court to delineate when it is that economic regulation crosses the line and becomes an economic taking by imposing too great a restriction on what land owners can do with their property.

Lingle arises out of a challenge to a Hawaii law that limits the amount of rent that oil companies can charge dealers who lease company-owned service stations. The purpose of the Hawaii law (which mirrors the laws of over a dozen states) is to control gasoline prices. Chevron argued that the law amounted to a “regulatory taking” of private property without “just compensation” in violation of the Fifth Amendment. The 9th Circuit ruled in favor of Chevron, and the state petitioned for Supreme Court review.

The Court previously has recognized that a taking for Fifth Amendment purposes can occur even if the government does not physically occupy property through the exercise of eminent domain; economic regulation also can constitute a taking without just compensation if it substantially deprives the property of its economic use. But for nearly a century, the Court has liberally construed the Takings Clause to give governments broad authority to institute economic regulations without running afoul of Fifth Amendment constraints. Thus, for example, the Court has sustained Takings Clause challenges to rent control laws brought by landlords. In *Lingle*, the Court may well impose some clearer limits on such laws.

***Cooper Industries v. Aviall Services, Inc.* (Environmental Law/Superfund Site Clean-up)**

Question Presented: Whether a party that is potentially responsible under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the cleanup of property contaminated by hazardous waste may seek contribution under CERCLA from other potentially responsible parties to undertake or pay for the costs of the cleanup before the federal government has demanded that the property be cleaned up.

Discussion: *Cooper Industries* raises important questions regarding the pace and process of the cleanup of environmentally contaminated sites under CERCLA. Also known as the Superfund law, CERCLA authorizes the Environmental Protection Agency (EPA) to designate contaminated sites for government cleanup and to seek money from current and former owners for the cleanup. As a practical matter, however, many contaminated sites never become subject to EPA cleanup orders.

In *Cooper Industries*, a potentially responsible party under CERCLA took matters into its own hands. It cleaned up its site voluntarily; the EPA had not demanded that the site be cleaned up. The party subsequently sought contribution for the costs of the cleanup from a former owner of the site.

The 5th Circuit ruled in favor of the party that initiated the cleanup. The company on which the contribution obligation was imposed petitioned for Supreme Court review. At the Court, the EPA has sided with the petitioner. It takes the position that while a potentially responsible party under CERCLA can clean up a site and seek contribution from prior owners even if the EPA has not demanded that it do so, the party must, at a minimum, work with the EPA in advance to ensure a thorough cleanup. On the other side are many states and localities, which seek to encourage voluntary environmental cleanup by private parties, even if the EPA has not insisted on cleanup, as a means of promoting economic development and the health and welfare of the community.

KP Permanent Make-Up, Inc. v. Lasting Impression, Inc. (Intellectual Property/Trademark Infringement)

Question Presented: Whether the “classic fair use” defense to a trademark infringement suit requires the alleged infringer to demonstrate an absence of likelihood of consumer confusion.

Discussion: The federal Lanham Act allows the holder of a protectible trademark to sue any person who uses the trademark in connection with the sale of its own product in a manner that is likely to cause consumer confusion between that product and the product to which the trademark is attached. The Lanham Act also allows an alleged trademark infringer to defend itself by claiming that its challenged conduct constituted a “classic fair use” — that is, it used the trademark holder’s mark only to describe the infringer’s product in good faith and not to describe the holder’s product.

In *KP Permanent Make-Up*, the alleged infringer invoked the classic fair use defense in response to a claim that it had infringed a trademark of a competitor. The trial court granted summary judgment for the defendant on the basis of the classic fair use defense. The 9th Circuit reversed, holding that, in order to prevail on summary judgment, a defendant who invokes the classic fair use defense must still demonstrate a likelihood of absence of consumer confusion from its use of the holder’s trademark.

Supreme Court affirmance of the 9th Circuit’s decision will tend to increase the costs to defendants of trademark infringement litigation. This is so because it is often difficult for defendants to demonstrate lack of consumer confusion on summary judgment. The upshot, then, is that defendants generally will be forced either to proceed to trial to vindicate their conduct or settle the litigation.

Smith v. City of Jackson, Mississippi (Civil Rights/Employment)

Question Presented: Whether disparate impact claims are cognizable under the Age Discrimination in Employment Act (ADEA) regardless of the defendant’s intent.

Discussion: The case is vitally important to employers who are subject to the ADEA, which prohibits employers with 20 or more employees from discriminating against employees 40 years or older on the basis of age. A holding by the

Court that disparate impact claims are cognizable under the ADEA will subject employers to potential liability for ostensibly neutral practices that affect older workers more adversely than younger workers.

The circuit courts are split as to whether the ADEA prohibits only intentional age discrimination, or whether it also prohibits neutral employment practices that have a disparate impact on employees based on their age, regardless of the employer's intent. The regulations of the federal Equal Employment Opportunity Commission (EEOC), which is charged with enforcing the ADEA, have long stated that employers violate the ADEA if they adopt facially neutral employment practices that have a disparate impact on employees based on age.

In *Smith*, the 5th Circuit rejected the EEOC's interpretation and joined those circuits that have held that the ADEA requires proof of discriminatory intent. In light of that conclusion, the 5th Circuit dismissed a suit brought by municipal employees who claimed that a city's facially neutral salary plan had an unlawful disparate impact in that it resulted in older workers receiving far smaller pay raises than younger workers.

The Supreme Court in *Smith* will resolve this circuit split and decide whether the ADEA, like the federal civil rights law prohibiting discrimination on the basis of race and gender in the workplace, recognizes disparate impact claims, or whether the ADEA is different, and recognizes only claims based on proof of discriminatory intent.

Exxon Corp. v. Allapattah Services, Inc., and Ortega v. Star-Kist Foods, Inc.
(Civil Procedure/Federal Jurisdiction/Class Actions)

Question Presented: Whether federal district courts may exercise supplemental jurisdiction over state law diversity jurisdiction claims of plaintiffs who do not satisfy the amount-in-controversy requirement of the federal diversity statute if the related claims of another plaintiff meet that requirement.

Discussion: These consolidated cases raise important issues regarding the scope of federal court jurisdiction over state law claims. Federal courts have "diversity" jurisdiction to hear state law claims where the amount in controversy is at least \$75,000. The supplemental jurisdiction statute authorizes federal district courts to exercise diversity jurisdiction over state law claims for which diversity jurisdiction would not otherwise exist, so long as those claims are "so related" to state law claims over which the court has jurisdiction that they "form part of the same case or controversy."

Exxon arises out of a class action brought by 10,000 dealers who owned or operated Exxon service stations and who claim that Exxon overcharged them on credit card transactions. Exxon's potential exposure in the case is \$1.3 billion. The 11th Circuit held that the district court properly exercised supplemental jurisdiction over the claims of class members who did not satisfy the \$75,000 amount-in-controversy requirement because their claims were sufficiently related to the claims of the class members who did satisfy that requirement. Like other circuits, the 11th Circuit said that the supplemental jurisdiction statute was intended to overrule a 1967 Supreme Court decision that had required each plaintiff in a class action to satisfy the amount-in-controversy requirement. Other circuits have reached a different result, however, and so the Supreme Court in *Exxon* will have to resolve that conflict.

Ortega is not a class action. It is a personal injury suit brought by a young girl and her family arising from injuries the girl suffered when she cut herself on a can of tuna fish. The 1st Circuit upheld federal jurisdiction over the girl's

claims because they were likely to exceed the \$75,000 amount-in-controversy requirement, but it denied supplemental jurisdiction over her family's claims (which were based on emotional distress) on the grounds that those claims were unlikely to meet that requirement. In reviewing that decision, the Supreme Court will determine the extent to which the supplemental jurisdiction statute opens federal courts to state law claims that are not brought as class actions.

CONTACT INFORMATION

If you have questions or wish to learn more about these cases, please contact:

Rex S. Heinke310.229.1030rheinke@akingump.comLos Angeles
Edward P. Lazarus310.552.6449elazarus@akingump.comLos Angeles
Michael C. Small.....310.552.6645msmall@akingump.com.....Los Angeles

Austin Brussels Dallas Houston London Los Angeles Moscow New York
Philadelphia Riverside Riyadh (Affiliate) San Antonio San Francisco Washington, D.C