

THE WATCH LIST

Other cases of interest to the business community

- *United States v. United Foods, Inc.* (whether government regulatory program that requires industry members to contribute funds for advertising violates the First Amendment).
- *New York Times Co. v. Tasini* (right of publishers under the Copyright Act to reproduce periodical in electronic form without obtaining permission of contributing freelance authors).
- *Cooper Industries Inc. v. Leatherman Tool Group Inc.* (standard of appellate review applicable to trial court's ruling on constitutionality of punitive damages award).
- *Reynolds Metals Co. v. Ellis* (whether medical-insurance plan may sue in federal court to recover payments made to a plan beneficiary who also received settlement from third party).
- *Correctional Services Corp. v. Malesko* (cert. filed) (whether private corporation may be sued under *Bivens*).

— Paul Watford

Spotlight: December Docket

Court's December Argument Calendar Includes Three Cases of Broad Interest to the Business Community

By Mark E. Haddad

During the first week in December, the Court will hear arguments in three cases of significant interest to regulated industries, companies facing litigation in multiple jurisdictions, and members of the news media.

On Monday, December 4, the Court will hear argument in a case involving the preemption of state tort laws by a federal medical device statute. The case may have a significant impact on industries regulated by the federal government.

In *Buckman Co. v. Plaintiffs' Legal Committee*, the Court will consider whether a state tort claim alleging "fraud on the agency" (in this case, the Food and Drug Administration) is either expressly or impliedly preempted by the Medical Device Amendments to the Federal Food, Drug and Cosmetic Act. In this case, medical device users claim that the manufacturer committed fraud on the FDA by applying for a license for one use of the device, knowing that physicians would use the device "off label" for another purpose as well.

Although the question turns on a statute peculiar to medical devices, the outcome could affect manufacturers of products regulated under similar schemes by federal agencies, such as automotive, agricultural, chemical, electronic, marine, consumer, and textile products. If the Court rules



photo by Franz Jantzen

that the state tort law claim is not preempted by federal law, then manufacturers would be subject to multiple state-law interpretations of whether the manufacturer's disclosures or nondisclosures in the regulatory process, while compliant with federal regulations, nonetheless can be considered "fraudulent" under state law.

On Tuesday, December 5, the Justices will turn to *Semtek International v. Lockheed Martin*, a case that is of particular importance to companies that have been confronted with multiple, overlapping lawsuits filed in numerous state and federal courts, all based upon the same or similar underlying facts, and all seeking to hold the defendant liable for the same conduct or practices. At issue in this case is whether state or federal res judicata (claim preclusion) law applies to a judgment entered by a federal court sitting in diversity juris-

diction.

Federal and state courts have been hopelessly divided on this issue for decades, applying a variety of different and inconsistent rules that have created substantial uncertainty regarding the preclusive effect of a federal court diversity judgment. The *Semtek* case presents the Court with the opportunity to resolve this split in authority and to provide a much needed uniform national approach that will promote consistency and predictability in this important area of the law.

The Court will hear arguments in a case of major interest to members of the news media on the same day *Semtek* is argued. In *Bartnicki v. Vopper*, the Court will confront a question it has left open in past cases: Do journalists have a First Amendment right to publish information that comes from a source who obtained the

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*Green Tree v. Randolph***Sidley & Austin in the Supreme Court**

On October 3, 2000, S&A's Carter Phillips argued before the U.S. Supreme Court in the case of *Green Tree Financial Corp. v. Randolph*. At issue was the enforceability of an arbitration provision in a financing agreement between S&A client Green Tree's financing agreement and Larketta Randolph, a borrower. The S&A Supreme Court Business Report asks what was at stake in the case.



Carter Phillips

Q: What were the issues in the case?

A: The first issue asked under what circumstances a court order compelling arbitration is a "final order" and therefore subject to appeal under Section 16 of the Federal Arbitration Act. The second was whether Green Tree's arbitration provision was somehow unenforceable or in violation of the Truth in Lending Act because it did not specifically identify the costs associated with arbitration or provide that the claimant will not bear the costs of arbitration.

Q: What is at stake for the business community in the Court's determination of whether an order compelling arbitration is a final order?

A: Section 16 of the FAA is

intended to prevent appellate litigation from impeding arbitration proceedings, which reflects the federal policy of liberally favoring arbitration. The majority of circuit courts have held that Section 16 allows an appeal of an order compelling arbitration when a suit is seeking only a determination as to whether arbitration is required in a particular case, which makes sense—the order is "final" because the only thing at issue before the court has been decided. On the other hand, these courts have held, when the suit seeks some relief other than a determination of arbitrability, an order compelling arbitration is not final. The 11th Circuit did not follow this bright-line majority rule when deciding *Green Tree*, and held that even

where a suit seeks some other relief, an order compelling arbitration may sometimes still be a "final" order. If this rule prevails, it would force parties to appeal when there is doubt, causing the very sort of delay and increased costs that the federal policy was designed to reduce.

Q: And what is a stake in the second issue?

A: The lower court ruled against Green Tree's arbitration agreement because it felt the agreement's silence on the question of costs "might" result in substantial costs which the claimant "might" be required to bear. Reversing the usual federal law presumption in favor of arbitration, the 11th Circuit assumed the worst, and assumed that arbitration would not proceed according to the law. This assumption threatens to impair dramatically the ability of parties to adopt arbitration agreements, since it means an agreement must anticipate all potential issues of cost and procedure lest an omission be construed against enforcement of the agreement.

Q: How did the Justices approach the first issue at oral argument?

A: The Justices had a lot of questions about whether Green Tree was properly positioned to raise the first issue. Justice Ginsburg in particular focused on the fact that the district court in this case dismissed the entire case, so that even though other relief had been sought, the order compelling arbitration was still a "final" judgment. We argued that the district court should have entered a stay on the other issues rather than dismiss them, and that the 11th Circuit should have treated it as a stay rather than a dismissal.

Q: And the second issue?

A: Here the focus of the Chief Justice and others was on whether a claimant could show that it was facing excessive costs, or merely speculating about what costs might be. The Justices repeatedly questioned our opponents why the burden should be on the party seeking arbitration under the agreement to show it was lawful rather than on the party seeking to repudiate the agreement to show it was somehow flawed. Justice Breyer pointed out that even state contract law would require resolving doubts in a reasonable way that would uphold the parties' agreement.

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information illegally?

The case involves a First Amendment challenge to the federal wiretapping statute, which prohibits disclosure of illegally intercepted communications even by those who had no involvement in the illicit taping of private telephone conversations or the theft of private e-mail messages. If the Court rules broadly in upholding the law, the case could re-

sult in significant new restrictions on the press's freedom to publish newsworthy information.

Many news stories are based on information provided by sources who obtained the information illegally — publication of the Pentagon Papers representing just one of the more prominent examples.

A coalition of television broadcasters, radio stations, newspapers, and magazines has

thus urged the Court to strike down portions of the wiretapping statute, by holding that the media have a First Amend-

ment right to publish an illegally intercepted communication, so long as the media played no role in the illegal interception itself.

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