MAYER, BROWN, ROWE & MAW LLP'S
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Today and on March 22, 2004, Supreme Court granted certiorari in several cases of interest to the business community. The briefing schedule in *Cherokee Nation* v. *Thompson* has not yet been determined. In the other cases discussed below, amicus briefs in favor of petitioners will be due on Thursday, May 13, 2004, and amicus briefs in favor of respondents will be due on Thursday, June 17, 2004.

1. ***Age Discrimination in Employment Act — Disparate Impact Claims.*** The Age Discrimination in Employment Act ("ADEA") essentially prohibits employers from considering the age of an employee or potential employee who is forty or older when making employment-related decisions. The Supreme Court granted certiorari in *Smith* v. *City of Jackson, Mississippi*, No. 03-1160, to determine whether "disparate impact" claims are cognizable under the ADEA.

In contrast to "disparate treatment" claims, which require plaintiffs to prove that their age played an actual role in an adverse employment decision, disparate impact claims may be proven by evidence that an employer's policies or practices adversely affected persons who are forty or older as compared with persons under forty. The plaintiffs in *Smith* — a group of municipal police and public safety officers — seek to prove that the City of Jackson's pay-scale discriminates on the basis of age by showing through statistical analysis that employees over forty years of age receive proportionally smaller wage increases than do persons under forty. A divided panel of the Fifth Circuit joined the First, Seventh, Tenth, and Eleventh Circuits in holding that disparate impact claims may not be brought under the ADEA. By contrast, the Second, Eighth, and Ninth Circuits have all held that disparate impact claims are legally cognizable under the Act.

The Court's decision will be important to all private employers with more than 20 employees as well as to all state and municipal governments.

Any questions about this case should be directed to Richard Katskee (202-263-3227) in our Washington, D.C. office.

2. ***Federal Income Tax — Damage Awards — Contingent Fee Agreements.*** As a general rule, taxpayers cannot avoid paying federal income taxes by assigning to another person income not yet received. See *Helvering v. Horst*, 311 U.S. 112 (1940); *Lucas v. Earl*, 281 U.S. 111 (1930). There is a conflict among the circuits regarding whether fees paid to an attorney under a contingent fee arrangement violate this "anticipatory assignment" prohibition, and thus are taxable as income of a plaintiff who has obtained a damages judgment or settlement.

The Supreme Court granted certiorari in *Commissioner of Internal Revenue* v. *Banks*, No. 03-892, and *Commissioner of Internal Revenue* v. *Banaitis*, No. 03-907, to resolve that issue. In each case, the United States Tax Court held that the taxpayer had improperly excluded from

gross income the damages recovered in settling a tort suit, including legal fees owed to the taxpayer's attorney under a contingent fee agreement. On appeal, both the Sixth Circuit, in *Banks*, and the Ninth Circuit, in *Banaitis*, reversed the Tax Court's judgment with respect to the attorney's fees. The Ninth Circuit based its holding on the fact that, under Oregon law, the attorney had obtained via the contingent fee agreement "property interests that cannot be extinguished or discharged by the parties to the action except by payment to the attorney." 340 F.3d 1074, 1083 (2003). The Sixth Circuit, by contrast, did not rest its holding on state lien law, but held more broadly that contingent fee agreements, by their nature, do not violate the "anticipatory assignment" rule. See 345 F.3d 373, 385-386 (2003).

This case is of interest to all businesses that face litigation, because plaintiffs calculating the amount for which they are willing to settle their tort claims may factor into that calculation the total amount of income tax they will have to pay on the settlement award.

Mayer, Brown, Rowe & Maw LLP is co-counsel for the respondent in *Banks*. Any questions about these cases should be directed to Russell Young (312-701-7745) in our Chicago office.

3. ***Government Contracts — Agencies' Obligation To Fulfill Contractual Obligations Using Appropriated Funds Internally Allocated For Other Purposes***. Like contracts promulgated under many other federal statutes, contracts entered into between the United States Indian Health Service ("IHS") and Indian tribes under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450 *et seq*., make the agency's financial obligations "subject to the availability of appropriations." On March 22, 2004, the Supreme Court granted certiorari in and consolidated two related cases — *Cherokee Nation* v. *Thompson*, No. 02-1472, and *Thompson* v. *Cherokee Nation*, No. 03-853 — to address whether a government agency may escape contractual obligations when the agency would be required to reallocate internally its appropriated funds in order to fulfill its contractual obligations.

The IHS is statutorily responsible for providing primary health care for American Indians and Alaska Natives. 25 U.S.C. §§ 13, 1601. Under the ISDA, at the request of a Tribe the IHS must contract with the Tribe to "plan, conduct, and administer" the health-care programs. 25 U.S.C. § 450f(a). The ISDA funds these "self-determination contracts" with appropriated funds, and is required to pay the Tribe not only the sum that the agency would itself have expended to provide primary health care, but also certain additional direct and indirect "contract support costs." Pursuant to the terms of these contracts, however, the IHS's obligation to pay these contract support costs is "subject to the availability of appropriations," and the agency is statutorily prohibited from reducing funding for programs directly serving tribes to make funds available to cover these additional costs.

In directly conflicting decisions, the Tenth Circuit held that the government was not legally liable to two Tribes for contract support costs because the funds earmarked for that purpose had been spent (though the agency's budget was not exhausted) (see *Cherokee Nation* v. *Thompson*, 311 F.3d 1054 (10th Cir. 2002)), whereas the Federal Circuit ruled in favor of the Tribes on the same issue (see *Thompson* v. *Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003)).

This case is important to any business that contracts with the federal government, because many government contracts are entered "subject to the availability of appropriations." Historically, this limitation has been interpreted to allow an agency to escape contractual obligations if Congress specifically addressed the amount of funds allocated to that contract or program, but otherwise to create a vested contractual right on the part of the private party to unallocated funds appropriated to the agency. If the government were to succeed in this litigation, agencies could evade such contractual obligations by spending appropriated funds on other agency priorities and then asserting that no allocated funds are available.

The briefing schedule has not been finally determined because of the consolidation order, but amicus briefs in support of the non-governmental parties are likely to be due in early June, 2004, and amicus briefs in support of the government will likely be due in August. Any questions about this case should be directed to David Gossett (202-263-3384) in our Washington office.

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