

MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
JUNE 27, 2005

Today the Supreme Court granted certiorari in two cases of interest to the business community. Barring extensions, amicus briefs in support of the petitioners will be due on August 11, 2005, and amicus briefs in support of the respondents will be due on September 15, 2005. Any questions about these cases should be directed to David Gossett (202-263-3384) in our Washington, D.C. office.

1. Antitrust — Sherman Act — Joint Venture Pricing Decisions. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.” The Supreme Court granted certiorari in two consolidated cases — *Texaco v. Dagher*, No. 04-805, and *Shell Oil v. Dagher*, No. 04-814 — to decide whether an agreement by the owners of a *bona fide* joint venture as to the price that will be charged for the joint venture’s products may be treated as a *per se* violation of Section 1 of the Sherman Act.

These consolidated cases arise from a joint venture between Texaco and Shell Oil in which the two companies merged some of their gasoline refining and marketing operations. During discovery, evidence was adduced suggesting that, in the course of establishing the joint venture, the two companies agreed that the joint venture would sell their respectively branded gasoline at the same wholesale price. In the decision below, reported at 369 F.3d 1108, the Ninth Circuit reversed the district court’s grant of summary judgment in favor of the joint venture’s owners, holding that the alleged agreement under which the joint venture would sell Texaco and Shell gasoline at a single price could constitute a *per se* violation of the Sherman Act prohibition against “combination . . . in restraint of trade.” According to the Ninth Circuit, in order to avoid antitrust liability, the joint venture owners would need to demonstrate — under the “ancillary restraints” doctrine — that the alleged price fixing agreement, if proven, was reasonably necessary to achieve the joint venture’s legitimate goals.

The Ninth Circuit’s decision arguably conflicts with Supreme Court precedent and with decisions of the First and Eleventh Circuits, which have held that the formation and conduct of joint ventures is subject to “rule of reason” rather than *per se* analysis. The Ninth Circuit’s decision greatly expands the scope of *per se* analysis and, concomitantly, the threat of treble damages. Thus, if the Supreme Court were to agree with the Ninth Circuit, this case could significantly impair companies’ willingness to enter joint ventures.

2. Civil RICO — “Reasonable Reliance” Requirement for Mail and Wire Fraud Cases. RICO, the Racketeer Influenced and Corrupt Organizations Act, makes it a crime for “any person employed by or associated with any enterprise engaged in * * * interstate or foreign commerce, to conduct or participate * * * in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). “Racketeering activity” is defined to include any act that would constitute federal mail or wire fraud. 18 U.S.C. § 1961(1)(B). Under

Supreme Court Docket Report

section 1964(c) of the Act, “[a]ny person injured in his business or property by reason of a violation of section 1962” may bring a civil action under RICO. The Supreme Court granted certiorari in *Bank of China v. NBM L.L.C.*, No. 03-1559, to consider whether the “by reason of” language in section 1964(c) requires a civil RICO plaintiff alleging mail or wire fraud as a predicate act to establish “reasonable reliance.”

Petitioner Bank of China filed suit in the Southern District of New York, alleging that the respondents fraudulently obtained large sums of money from the Bank over a period of several years. In its instructions to the jury, the district court explained that to establish its common-law fraud claim, the Bank needed to prove that it reasonably relied on the respondents’ alleged misrepresentations. As to the mail and wire fraud allegations underlying the Bank’s civil RICO claims, however, the district court refused to give a similar instruction. The jury found for the Bank on its civil RICO claim, resulting in a judgment against the respondents of over \$100 million. The Second Circuit vacated and remanded on the basis of alleged defects in the jury instructions, holding that where mail or wire fraud is the predicate act for a civil RICO claim the plaintiff must show reasonable reliance. *See* 359 F.3d 171. To support that conclusion, the court invoked *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), in which the Supreme Court held that proximate cause is an element of a cause of action under section 1964(c).

This case will help to define the breadth of liability under civil RICO, and thus will have important ramifications for many members of the business community. Plaintiffs hoping to win treble damages under RICO routinely allege violations of the federal mail and wire fraud statutes as predicate acts. A holding that those plaintiffs must prove that they reasonably relied on any alleged mail or wire fraud would significantly limit the claims that could successfully be brought under civil RICO.

* * * * *

On June 27, 2005, the Supreme Court issued its final decisions from the 2004 Term, and formally recessed for the summer. Thus, barring the unforeseen, the Court will next issue an order list on Monday, October 3, 2005 — and the next issue of Mayer Brown’s Docket Report will be forthcoming shortly thereafter. In the meantime, we’d like your input on two issues:

First, we’d love to hear any feedback you might have about these Docket Reports. Please send your comments to David Gossett at dgossett@mayerbrownrowe.com, or feel free to call him at (202) 263-3384.

Second, because of the time-sensitive nature of the Docket Report we prefer to distribute it via e-mail — though for the foreseeable future we will continue to distribute it via the U.S. Postal Service to those who prefer to receive a hard copy. If you currently receive the Docket Report by regular mail and would like to start receiving it via e-mail in the fall, please let us know by e-mailing SupremeCourtDocket@mayerbrownrowe.com.

MAYER, BROWN, ROWE & MAW LLP WORLDWIDE

BRUSSELS
 Square de Meeus 35
 B1000 Brussels, Belgium
 +322.502.5517

HOUSTON
 700 Louisiana Street
 Suite 3600
 Houston, Texas 77002-2730
 713.221.1651

PALO ALTO
 Two Palo Alto Square
 3000 El Camino Real
 Suite 2-300
 Palo Alto, California 94306
 650.331.2000

CHARLOTTE
 214 N. Tryon Street, Suite 3800
 Charlotte, North Carolina 28202
 704.444.3500

LONDON
 11 Pilgrim Street
 London EC4V 6RW
 +44.0.20.7248.4282

PARIS
 13 Avenue Hoche
 75008 Paris, France
 +33.1.53.53.43.43

CHICAGO
 190 South LaSalle Street
 Chicago, Illinois 60603-3441
 312.782.0600

LOS ANGELES
 350 South Grand Avenue
 25th Floor
 Los Angeles, California 90071-1503
 213.229.9500

WASHINGTON
 1909 K Street, N.W.
 Washington, D.C. 20006-1101
 202.263.3000

COLOGNE
 Kaiser-Wilhelm-Ring 27-29
 50672 Cologne, Germany
 +49.221.577.1100

MANCHESTER
 Canada House
 Chepstow Street
 Manchester M1 5FW
 +44.161.236.1612

**INDEPENDENT MEXICO CITY
 CORRESPONDENT**
 Jáuregui, Navarrete, Nader y Rojas, S.C.
 Torre Arcos
 Paseo de los Tamarindos No. 400-B
 Floors 7, 8 and 9
 Col. Bosques de las Lomas
 05120 Mexico, D.F.
 +525.267.45.00

FRANKFURT
 Bockenheimer Landstrasse 98-100
 D-60323 Frankfurt/Main, Germany
 +49.69.79.41.00

NEW YORK
 1675 Broadway
 New York, New York 10019-5820
 212.506.2500