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MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
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Today the Supreme Court granted certiorari in five cases of interest to the business community. Absent extensions, which are likely, amicus briefs in support of the petitioners will be due on August 10, 2006, and amicus briefs in support of the respondents will be due on September 14, 2006.

1. Antitrust—Sherman Act § 2—Predatory Buying. In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that an antitrust plaintiff alleging predatory selling must prove that the defendant: (1) sold its end product at a price level too low to cover its costs; and, (2) had a dangerous probability of recouping its losses once the predation succeeded. The Supreme Court today granted certiorari in *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co., Inc.*, No. 05-381, to address whether the two-part *Brooke Group* standard also applies to predatory *buying* claims.

The case arises out of a claim that for a period of time Weyerhaeuser paid too much for a certain raw material with the goal of forcing competitors out of business by raising their costs. In upholding a $78.8 million judgment for the plaintiff, the Ninth Circuit concluded that the objective, two-part *Brooke Group* test did not apply to predatory buying claims because of its belief that "benefits to consumers and stimulation of competition do not necessarily result from predatory [buying] the way they do from predatory [selling]." *Confederated Tribes of Siletz Indians of Oregon* v. *Weyerhaeuser Co.*, 411 F.3d 1030, 1037 (9th Cir. 2005). Instead, the Ninth Circuit held that liability for predatory buying may be imposed on a simple jury finding that the defendant purchased more raw materials "than it needed," or paid a higher price for them "than necessary," so as to prevent competitors from obtaining those materials "at a fair price." *Id.* at 1040.

The issue that the Supreme Court has agreed to review is of considerable significance to the business community. As the Solicitor General stated in its brief recommending that certiorari be granted, the Ninth Circuit's ruling—by allowing treble damages for predatory buying to rest on a jury's subjective assessment that too many inputs were bought or that input prices were too high—"threatens to chill procompetitive conduct by firms in a wide variety of markets." Brief for the United States as Amicus Curiae, at 19. Moreover, the chilling effect of the decision below may extend well beyond predatory buying claims because, "[t]o the extent that the court of appeals approved jury instructions that dispensed with any objective standard for distinguishing predation from aggressive competition, the court of appeals' decision encourages the utilization of equally vague and standardless jury instructions in other Section 2 cases." *Id.* at 20.

Mayer Brown Rowe & Maw LLP is counsel of record for Weyerhaeuser Company in this case. Any questions about this case should be directed to Andy Pincus (202-263-3220) in our Washington, D.C. office.

2. Antitrust—Sherman Act § 1—Pleading Standard—Conspiracy—Parallelism. Section 1 of the Sherman Act prohibits each "conspiracy [] in restraint of trade." 15 U.S.C. § 1.

Rule 8(a) of the Federal Rules of Civil Procedure requires a plaintiff "to make a short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court granted certiorari today in *Bell Atlantic Corp.* v. *Twombly*, No. 05-1126, to decide whether a claim under Section 1 of the Sherman Act can survive a motion to dismiss if the complaint alleges parallel conduct and that the conduct is the result of a conspiracy but does not allege facts that, if true, would establish the existence of the purported conspiracy.

Respondents consumers of local telephone and/or high speed internet services who alleged that the petitioners, incumbent telephone companies, refrained from entering each other's established markets and resisted new entrants' efforts to enter their markets. The complaint alleged that the companies' parallel behavior demonstrated that they had entered a conspiracy to limit competition. However, the complaint alleged no facts that, if proven, would tend to establish the existence of an agreement among the defendants.

The United States District Court for the Southern District of New York granted petitioners' motion to dismiss for failure to state a claim, holding that allegations of parallel conduct, without factual allegations that would tend to establish the existence of a conspiracy, fail to state a claim of under Section 1 of the Sherman Act. 313 F. Supp. 2d 174, 182. The United States Court of Appeals for the Second Circuit, in a decision reported at 425 F.3d 99, reversed, holding that allegations of parallel conduct coupled with a bare allegation of conspiracy are sufficient to state a claim, because "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy." *Id.* at 114. The Second Circuit's decision arguably conflicts with decisions of the First, Sixth, and Tenth Circuits, each of which have required that a Section 1 plaintiff allege specific facts, other than mere parallelism, to support a conspiracy allegation.

This case is of significant interest to the business community because a lower pleading standard for antitrust plaintiffs invites frivolous suits that impose enormous costs on companies, inducing them to settle meritless claims for conduct that is the result of competition, not conspiracy.

Mayer Brown Rowe & Maw LLP is counsel in this case for BellSouth Corporation, one of the petitioners. Any questions about this case should be directed to Richard Favretto (202-263-3250) in our Washington, D.C. office.

3. Patent Act—Obviousness. The Patent Act, at 35 U.S.C. § 103(a), states that the government may not grant a patent for an invention that, at the time of its creation, would have been "obvious" to "a person having ordinary skill in the art." The Supreme Court granted certiorari today in *KSR International Co.* v. *Teleflex Inc.*, No. 04-1350, to determine whether the Federal Circuit has applied the proper legal standard when judging whether an innovation is "obvious," and thus ineligible for patent protection.

This case arises from a patent for a gas-pedal used in cars. The patent combines two elements: an "adjustable" gas-pedal and an electronic sensor. When Teleflex, the patent holder, sued KSR to prevent it from selling such gas pedals to auto manufacturers, KSR challenged the patent, claiming that it failed to satisfy the nonobviousness requirement.

Finding the purported invention obvious, the district court invalidated the patent. In an unpublished opinion, the Federal Circuit reversed, reaffirming its prior precedent with respect to combination patents. According to the Federal Circuit, a combination is obvious, and thus not patentable, only when there is proof of a specific "suggestion, teaching, or motivation" in the prior art that would have led a person of ordinary skill to combine the elements in the manner described. Insofar as it makes such proof the exclusive means of demonstrating obviousness, the Federal Circuit's approach places a high burden on anyone challenging a patent as "obvious." By contrast, existing Supreme Court precedent holds that "[c]ourts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements." *Sakraida* v. *Ag Pro, Inc.*, 425 U.S. 273, 281 (1976).

The question is of what constitutes an "obvious"—and therefore not patentable—invention is of tremendous interest to all businesses that hold, license, or contest patents. If the Supreme Court reverses, a large number of patents, particularly combination patents, will be called into question. By contrast, if the Supreme Court affirms, such patents will be relatively immune to challenge, at least on obviousness grounds. Any questions about this case should be directed to David Gossett (202-263-3384) in our Washington, D.C. office.

4. Title VII—Limitations Period on Pay Discrimination Claims. Title VII of the Civil Rights Act of 1964 generally imposes on employment discrimination claims a limitation period of 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). With regard to pay discrimination claims, in which employees may have received allegedly disparate pay for years after their salaries were initially determined, the case often turns on when the alleged discrimination "occurred." The Supreme Court today granted certiorari in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, No. 05-1074, to decide whether and under what circumstances a plaintiff may bring a pay discrimination claim when disparate pay, received during the limitations period, is the result of intentionally discriminatory pay decisions occurring outside the limitations period.

While employed by defendant Goodyear, petitioner Ledbetter's salary was determined through annual reviews, which adjusted her previous year's salary based on performance assessments. Ledbetter brought suit against Goodyear under Title VII, alleging that the reviewers had discriminated against her on account of her sex, and that the disparate pay had persisted into the limitations period by serving as the basis for subsequent adjustments. In the decision below, reported at 421 F.3d 1169, the Eleventh Circuit reversed the trial court's judgment for Ledbetter. It held that where an employer periodically reviewed and re-established the challenged pay level, a Title VII plaintiff could successfully assert a claim only if the discriminatory decision was made during the 180-day limitations period or, perhaps, at the last periodic review prior to the limitations period. In so ruling, the court acknowledged its disagreement with the recent holdings of other circuits in *Forsyth* v. *Fed'n Employment & Guidance Serv.*, 409 F.3d 565 (2d Cir. 2005), *Shea* v. *Rice*, 409 F.3d 448 (D.C. Cir. 2005), and *Hildebrandt* v. *Illinois Dep't of Natural Res.*, 347 F.3d 1014 (7th Cir. 2003), which allow plaintiffs to bring Title VII claims for disparate pay received during the limitations period regardless of when the discriminatory pay decision was made.

The decision of the Court will likely be of significance to those affected by Title VII's regulations. The 180-day requirement imposes a short limitations period, and if it is interpreted according to the Eleventh Circuit's restrictive standard, it would foreclose many disparate pay claims. If, by contrast, the Court endorses the alternative standard adopted in other circuits, it would force employers to litigate discriminatory pay claims based on events many years past, so long as the disparate pay continues to be received by the plaintiff. Any questions about this case should be directed to David Gossett (202-263-3384) in our Washington, D.C. office.

5. Clean Air Act—Authority and Obligation to Regulate Greenhouse Gasses Emitted by New Vehicles. Section 202(a)(1) of the Clean Air Act (CAA) authorizes the Environmental Protection Agency (EPA) to regulate "the emission of any air pollutant from any class . . . of new motor vehicles" which would, in the EPA's judgment, "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The CAA defines "air pollutant" to include "any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air," and defines "effects on welfare" to include "effects on . . . climate." 42 U.S.C. §§ 7602(g), (h). Today the Supreme Court granted certiorari in *Massachusetts* v. *EPA*, No. 05-1120, to decide whether, under these provisions, the EPA has the authority and obligation to regulate the emission of greenhouse gasses by new cars and light trucks.

The case arises from a petition filed by several parties requesting that the EPA set regulatory standards for certain gasses emitted by new vehicles and thought to cause global warming. Citing a lack of statutory authority to regulate greenhouse gasses and host of policy considerations, the EPA declined to issue such regulations. After the EPA refused to act, several states and environmental groups petitioned the United States Court of Appeals for the D.C. Circuit for review.

In a fractured decision, reported at 415 F.3d 50, the D.C. Circuit sustained the agency's refusal to act. Each member of the three-judge panel issued a separate opinion. Judge Sentelle found that the petitioners had failed to allege particularized harm and thus had failed to establish standing to challenge the EPA's decision. Judge Randolph, who filed the judgment of the court, found that the petitioners had made sufficient allegations of standing to survive summary judgment, and assumed *arguendo* that the EPA had statutory authority to regulate greenhouse gasses, but held that the agency was entitled to take into account the policy considerations upon which it had relied and had thus properly exercised its discretion in refusing to issue regulatory standards. Judge Tatel dissented, holding that the agency had the authority to regulate greenhouse gasses and that it had impermissibly considered non-statutory factors when declining to issue the regulations sought.

The case is, obviously, of great importance both to the motor vehicle industry and those regions of the country that depend upon it, as well as to environmental groups and their allies. If the Supreme Court reverses the decision below, it could open a new era of environmental regulation. The case is also significant, more generally, to other potentially regulated entities. If the Supreme Court affirms the decision below, it could limit the range of entities with standing to

challenge regulatory decisions and could expand the range of considerations an agency may take into account when deciding whether to issue regulations. Any questions about this case should be directed to David Gossett (202-263-3384) in our Washington, D.C. office.

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