

## 6 Supreme Court Cases Every BigLaw Attorney Should Watch

By **Jacqueline Bell**

Law360, Boston (June 3, 2016, 1:51 PM ET) -- While all eyes are on the U.S. Supreme Court's most controversial cases, the justices also have a number of opinions left to issue in lower-profile cases that could impact businesses including government contractors, car dealers, retailers and technology giants.



With Justice Antonin Scalia's death in February, the U.S. Supreme Court is left with eight justices, raising the prospect that the already divided court may be locked in tough battles. (Credit: Law360)

The Supreme Court has begun its annual race to issue rulings on all remaining cases left on its docket before the term ends in June. With Justice Antonin Scalia's death in February, the court is left with just eight justices, raising the prospect that the already divided court may be locked in tough battles to reach a clear consensus on a number of cases.

While some of the business-centered cases may not stir up public debate in the same way the high court's actions on immigration, abortion and affirmative action are sure to this term, those cases will certainly impact a wide range of corporations eager to get some clarity on the legal battles that have finally wound their way to the high court.

"Every case they take is important," said M.C. Sungaila, partner at Haynes and Boone LLP and chair of the Amicus Curiae Committee of the International Association of Defense Counsel. "To the extent the court views its role as developing the law — whether it's hot-issue cases, or more discrete cases, or niche areas of the law — its role is the same in providing clarity. I don't think the court looks at those cases as being any different in terms of the development of the law."

Here's Law360's cheat sheet on six Supreme Court cases every corporate lawyer should watch for as the high court term ends.

### **Universal Health Services v. U.S. ex rel. Escobar**

In a case that could potentially impact nearly any company that does business with the federal government, University Health Services is pressing the high court to reject or restrict a legal theory it calls a "**Frankenstein's monster**" that would allow companies to be held liable under the False Claims Act when they bill taxpayers while failing to strictly comply with government regulations.

The opposing sides have starkly different views of the so-called FCA theory of "implied certification," which holds that corporations implicitly certify adherence to regulations when billing taxpayers, and that noncompliances can constitute fraud punishable by the FCA's steep penalties and damages.

UHS gave the theory a horror movie moniker, while the whistleblowers call such rhetoric wildly overblown and describe the theory as essential to robust anti-fraud enforcement.

UHS' case, which the First Circuit **revived last year**, involves Medicaid regulations related to staffing at a Massachusetts mental health center. Whistleblowers accuse the center of poor supervision during treatment of their daughter, who died of a seizure in 2009. The center did not explicitly certify compliance with the staffing regulations, and it is not clear that any explicit conditions of payment were violated.

**At oral arguments in April**, left-leaning Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor made statements suggesting that the "implied certification" theory seems reasonable to them. It was less clear whether the justices think explicit conditions of payment must be violated to trigger FCA liability, but the court appeared likely to at least partly affirm a First Circuit ruling that strongly endorsed implied certification.

The case has potentially significant implications for health care providers, defense contractors and drugmakers, among others. Amicus briefs seeking to restrict the FCA have been lodged by the American Hospital Association, the U.S. Chamber of Commerce and the Pharmaceutical Research and Manufacturers of America. On the other side, briefs from two dozen states, senior group AARP and Sen. Chuck Grassley, R-Iowa, have urged the justices not to damage the law.

The case is Universal Health Services Inc. v. U.S. et al. ex rel. Escobar et al., case number 15-7, in the Supreme Court of the United States.

### **Encino Motorcars LLC v. Navarro**

California car dealer Encino Motorcars LLC has asked the U.S. Supreme Court to resolve a circuit split over whether the Fair Labor Standards Act exempts so-called "service advisers" at car dealerships from overtime pay, in a case that could impact the approximately 18,000 franchised auto dealers across the country.

A **Ninth Circuit ruling** found that service advisers — who diagnose what service or repairs cars need and then suggest additional work that's not immediately needed — should be eligible for overtime pay, concluding that language in a U.S. Department of Labor interpretive regulation only excludes salespeople and mechanics from overtime compensation.

That decision ran counter to previous opinions issued by the Fourth and Fifth Circuits, and the dealership argues that the long-standing FLSA exception for "salesmen, mechanics and partsmen" should apply to "service advisers" as well.

The high court appeared split **at oral arguments in April**, with some questions from justices including Justices Breyer and Ginsburg suggesting that the court's liberal wing was firmly of the view that service advisers should not be exempted from receiving overtime.

The case has the potential to impact about 18,000 franchised motor vehicle dealerships and

50,000 service advisers around the country, **according to an amicus brief** filed in November by the National Automobile Dealers Association.

The case is Encino Motorcars LLC v. Hector Navarro et al., case number 15-415, in the Supreme Court of the United States.

### **Halo Electronics Inc. v. Pulse Electronics Inc., Stryker Corp. v. Zimmer Inc.**

The Supreme Court is pondering whether to make it easier for courts to award enhanced damages in patent cases, **as it reviews two paired cases** brought by patent owners Halo Electronics and Stryker Corp.

The justices are scrutinizing a test **established by the Federal Circuit in 2007** that makes it difficult for patent owners to prove that they are entitled to triple damages. Halo and Stryker maintain the test is too difficult to meet and that the high court should instead give judges broad discretion to decide when to award enhanced damages.

If the court does decide to lower the bar for courts to award enhanced damages, patent owners would have significantly more leverage in infringement lawsuits and settlement negotiations.

Zimmer and Pulse, the accused infringers in the paired suits, **have urged the justices** to leave the current test intact, saying that Halo and Stryker are seeking a standard that "would permit district courts to impose enormous punitive damages with few limits and minimal oversight." That argument is also **backed by tech giants** including Dell Inc. and Facebook Inc.

**At oral arguments in February**, the justices appeared inclined to discard the Federal Circuit's strict test, but seemed torn over exactly what the new standard should be.

The cases are Stryker Corp. v. Zimmer Inc., case number 14-1520, and Halo Electronics Inc. v. Pulse Electronics Inc. et al., case number 14-1513, in the U.S. Supreme Court.

### **Cuozzo Speed Technologies LLC v. Lee**

This patent fight examines a new system created by the America Invents Act for challenging patents issued by the U.S. Patent and Trademark Office.

Cuozzo Speed Technologies LLC, the first company to have a patent invalidated by the new Patent Trial and Appeal Board at the USPTO, argues that the new system should use the same standard district courts use to review patents.

The new system is "surprisingly lethal" for patents, Cuozzo argues, citing statistics that 85 percent of the board's final decisions have invalidated at least some part of the challenged patent. The board has received nearly 5,000 petitions challenging patents since it opened its doors in late 2012.

For its part, the U.S. Patent and Trademark Office **told the justices** that while Congress intended AIA reviews to be a low-cost alternative to litigation, it did not intend the board to always reach the same outcome a court would.

If the court sides with Cuozzo, **challenged patents could be more likely to survive** the reformed review process. The case will hinge on the high court's view of what Congress had in mind when it created the new system.

**At oral arguments in April**, justices appeared torn, with Justice Breyer saying the new review system may help eliminate bad patents, and Chief Justice John Roberts calling it "bizarre" that it does not use the same standard as district courts.

The case is *Cuozzo Speed Technologies LLC v. Lee*, case number 15-446, in the U.S. Supreme Court.

### **RJR Nabisco Inc. v. The European Community**

The Supreme Court **is weighing** whether the Racketeer Influenced and Corrupt Organizations Act can apply to conduct outside the U.S., in a case that could potentially impact a wealth of multinational corporations.

This litigation has been working its way to the Supreme Court for over 15 years, so long that the initial parties to the case now come before the high court with different names and in different forms. The litigation was first launched by the European Community, now called the European Union, accusing the former food and tobacco behemoth RJR Nabisco Inc. of a money laundering scheme. The original RJR Nabisco tobacco and food conglomerate disbanded in 1999, but the then-European Community targeted its succeeding business units for money laundering in the litigation, which now involves R.J. Reynolds Tobacco Co. and related affiliates.

**RJR is appealing** a Second Circuit finding that the Racketeer Influenced and Corrupt Organizations Act does allow for indictment of conduct outside the U.S., arguing that the ruling could open the door for plaintiffs to to the U.S. to file their civil RICO claims and pave the way for the U.S. to be turned into a "Shangri-La for lawyers around the world."

The National Foreign Trade Council, which represents the interests of more than 300 corporate members, including Wal-Mart Stores Inc. and Microsoft Corp., also filed a brief with the high court arguing that if the appeals court ruling is allowed to stand, it "would substantially increase litigation exposure for U.S. companies doing business abroad" and "impose new and substantial burdens on foreign companies investing in the United States."

For its part, the European Union argues that Congress clearly enacted RICO with the intention and understanding that it would be used to attack corrupt conduct that occurs outside of the U.S.

"Congress made clear that RICO's prohibition includes such crimes as international money laundering and financial support of terrorist groups. Limiting RICO to domestic enterprises would thus be illogical and self-defeating," the EU said.

At oral arguments in March, the justices seemed divided on whether RICO could be applied in situations like the one presented in the RJR case — with Justices Ginsburg and Kagan seemingly on the side of the EU, while Chief Justice Roberts and Justice Samuel Alito appeared to be more inclined to limit RICO's application. Justice Sotomayor is recused from the case, because she was involved in a proceeding at an earlier stage in the litigation.

The case is *European Community v. RJR Nabisco Inc.*, case number 15-138, in the U.S. Supreme Court.

### **Dollar General Corp. v. Mississippi Band of Choctaw Indians**

Dollar General is urging the Supreme Court to limit the control tribal courts can exert over nontribe members, including corporations hit with tort claims.

Dollar General appealed a Fifth Circuit ruling allowing a \$2.5 million lawsuit in the tribe's court over the alleged sexual assault of an underage intern by a store manager at the Dollar General store on the Mississippi Band of Choctaw Indians' reservation. The Fifth Circuit found that the company was subject to the jurisdiction of the tribal court.

In an **August brief**, Dollar General argued that the court has repeatedly held that tribes generally lack regulatory authority over nonmembers, and that even the limited laws that could be applied to outsiders can't be enforced through criminal prosecutions in tribal court.

Dollar General claims that U.S. legal tradition doesn't allow tribal courts to hear claims like the tort claims at issue in this case. According to that tradition, the Constitution and the Supreme Court — which don't apply to tribal courts — should have supremacy, and a neutral forum should be available for suits against noncitizens of a sovereign, such as a state or a tribe, the retailers claims.

The federal government urged the justices to rebuff Dollar General's bid to avoid the lawsuit in tribal court, arguing the company should have known it could be subject to tribal jurisdictions and claiming the company's dismissive attitude toward tribal courts is off-base.

**During oral arguments** on Dec. 7, the high court appeared split on how much control tribal courts can exert over nontribe members, with several justices, including potential swing vote Justice Anthony Kennedy, expressing concern that tribal courts may lack due process.

The case is Dollar General Corp. et al. v. Mississippi Band of Choctaw Indians et al., case number 13-1496, in the Supreme Court of the United States.

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