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BUSINESS CASES

Some Important Wins

THE RECENTLY concluded term's business cases often pitted businesses against states. Like others caught up in the "federalism revolution," businesses often—but with exceptions—found themselves on the losing end. Other noteworthy business cases of the past term pitted business against business. Outside of the employment area, the business cases produced more wins, and more important wins, than losses.

Many people do not think of *FMC v. South Carolina State Ports Authority*, 122 S. Ct. 1864 (2002), as a "business case," but the court's 5-4 decision shut off one particular business's claim and will frustrate other businesses. The majority held that state sovereign immunity barred a cruise ship company's claim, raised before a federal administrative agency, that South Carolina had improperly denied the company permission to berth a ship in Charleston, S.C. Noting the strong resemblance between the agency's procedures and civil litigation in federal courts, the court held that state sovereign immunity inherent in the Constitution bars such

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proceedings against states, even though such proceedings are not covered by the text of the 11th Amendment. Justice Stephen Breyer's dissent complained of the decision's potential to undermine laws that protect individual citizens, but businesses too may face new roadblocks in litigation-like disputes they previously could have brought before federal agencies.

A rare defeat for state sovereign immunity came in *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002). Verizon and WorldCom had a dispute about whether telephone calls to local access numbers of Internet service providers (ISPs) should be treated as "local traffic" even though the ISPs connect customers to distant Web sites. The dispute affected the parties' obligations to each other under interconnection agreements required by the Telecommunications Act of 1996. The Public Service Commission of Maryland (PSC) ruled in favor of WorldCom. Verizon then sued the PSC's members and others in federal court. The lower courts dismissed the case, finding no basis for federal jurisdiction, but the Supreme Court unanimously reversed. It held that the case presented a federal question about the validity of the PSC's order and that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), allowed suit against the individual PSC commissioners because

the complaint alleged an ongoing violation of federal law and sought relief properly characterized as prospective.

Verizon was less successful in *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002). That case pitted the incumbent local exchange carriers against new entrants to local telecommunications markets. In major rule-making under the Telecommunications Act, the FCC had determined among other things that it had the authority to impose on the states a rate-making methodology for certain aspects of local telecommunications and that the methodology it would employ—known as TELRIC for "total element long-run incremental cost"—should use forward-looking costs.

In 1999, the Supreme Court had upheld the FCC's authority to impose a methodology on the states. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). This past term, the case reached the court a second time, and the court, by a 7-1 vote, upheld the methodology against the incumbents' arguments that the act and the takings clause of the Fifth Amendment required a historical-cost methodology or at least one not based on hypothetical costs. By a 6-2 vote, the court also resolved a narrower statutory issue against the incumbents.

The 'Tahoe' takings decision

The takings clause took center stage in *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), another big victory for state and local government over

businesses and other owners of property. By a 6-3 vote, the court held that two moratoria lasting 32 months on development in the Lake Tahoe Basin did not constitute a per se taking requiring the government to pay just compensation to landowners. Regulatory takings claims based on moratoria of limited duration, the majority held, must satisfy an inquiry into such factors as whether the regulation interferes with the property owner's reasonable, investment-backed expectations.

States and businesses squared off sharply against each other in *Rush Prudential HMO Inc. v. Moran*, 122 S. Ct. 2151 (2002), and the states won a key victory. *Rush Prudential* was a pre-emption case in which a health maintenance organization (HMO) argued that only Congress, not the states, may require HMOs to provide services deemed medically necessary by an independent reviewer from outside the HMO itself.

There was, however, substantial basis to argue that the Employee Retirement Income Security Act of 1974 (ERISA) provided the exclusive method for employees, enrolled in HMOs through their employers' benefit plans, to challenge the HMOs' benefit determinations. Under that argument, state efforts to supplement ERISA's remedies with independent-review provisions would have been pre-empted. The 5-4 majority held, however, that a savings clause in ERISA, which preserves state laws that "regulat[e] insurance," applied to the Illinois independent-review statute at issue and that congressional intent to pre-empt the statute was not so clear as to override the savings clause.

The term's second ERISA case, *Great-West Life & Annuity Insurance Co. v. Knudson*, 122 S. Ct. 708 (2001), was also a disappointment for the business community. By a 5-4 vote, the court held that an employee benefit plan could not sue a plan beneficiary to enforce a plan reimbursement obligation applicable to beneficiaries who received

duplicative recovery from a third party. Congressional authorization of "other equitable relief" in certain ERISA actions, the court held, excludes remedies that were not "typically" available in proceedings in equity.

Two patent cases this term pitted businesses against each other. In the more heralded case, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S. Ct. 1831 (2002), the court unanimously rejected the U.S. Court of Appeals for the Federal Circuit's "complete bar" rule, which precluded a patentee from arguing that an allegedly infringing device was "equivalent" to the patentee's device if the relevant element of the patent application had been amended to narrow a claim to comply with any aspect of the Patent Act. Though patentees were relieved by the decision, the court reaffirmed that "prosecution history estoppel" remains available on a case-by-case basis. In *Holmes Group Inc. v. Vornado Air Circulation Systems Inc.*, 122 S. Ct. 1889 (2002), the court held, 7-2, that the regional circuits, not the Federal Circuit, have jurisdiction over the appeal in a case in which the complaint did not allege a claim arising under federal patent law but the answer contained a patent-law counterclaim. The decision rejected years of contrary Federal Circuit authority.

Four wins for business

Other noteworthy business cases produced four wins for the business community. Perhaps most significant was *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002), in which the court, by a 5-4 vote, struck down a federal statute placing restrictions on the commercial speech of pharmacies. The statute exempted "compounded" drugs—mixed by pharmacists under a physician's prescription to meet individual patients' needs—from the rigorous new drug approval process if the pharmacy satisfied certain conditions. One condition was that the prescription

being filled was "unsolicited" and the pharmacy doing the compounding did not "advertise or promote the compounding" of any particular drug. Those restrictions, the court held, violate the First Amendment because they are more extensive than necessary to serve the government's legitimate interests.

Also a win for business, though the actual petitioner was a local police department, was *Barnes v. Gorman*, 122 S. Ct. 2097 (2002), which held that punitive damages may not be awarded in disability-discrimination lawsuits brought under § 504 of the Rehabilitation Act and § 202 of the Americans With Disabilities Act. The court's decision will be helpful to business in other settings involving punitive damages. The court recognized that punitive damages "are not embraced" within the general rule that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

The 5-4 decision in *Hoffman Plastic Compounds Inc. v. NLRB*, 122 S. Ct. 1275 (2002), held that the National Labor Relations Board lacks the authority to award back pay to an undocumented alien (fired by his employer in violation of the National Labor Relations Act) who had never been legally authorized to work in the United States. The court held that a back-pay award would be inconsistent with federal immigration policy.

In *TRW Inc. v. Andrews*, 122 S. Ct. 441 (2001), the court held unanimously that a plaintiff who wishes to bring an "improper disclosure" claim against a credit reporting agency under the Fair Credit Reporting Act must do so within two years of the allegedly improper disclosure, not within two years of

discovery of the disclosure, unless certain exceptional situations identified in the statute apply. **NLJ**