Antitrust Law Daily

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U.S. Supreme Court Docket, October 2017 Term — Antitrust & Trade Regulation Cases

Pending Petitions	Docket No.	Subject	Status, Deadlines	Questions Presented
Apple Inc. v. Robert Pepper, et al	17-204 (8/2/2017)	Antitrust	Response due 9/6/17 Attorneys: Daniel M. Wall (Latham & Watkins LLP) for Apple Inc. Supreme Court Docket	Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense? Ninth Circuit decision (1/12/17)
Feldman v. American Dawn, Inc.	17-172 (7/31/17)	Antitrust	Response due 9/1/17 Attorneys: James Brandon Lieber (Lieber Hammer Huber & Paul, P.C.) for Andrew Feldman. Supreme Court Docket	Does an employee who loses his job as a result of an antitrust conspiracy have standing to pursue an antitrust claim arising from the violation? Is the loss of employment an antitrust injury? Eleventh Circuit decision (3/3/17)
Ogden v. Wells Fargo Bank, N.A.	17-137 (4/18/17)	RICO	Response due 8/28/17 Attorneys: Thomas Ogden (The Law Offices of Thomas Odgen, P.C.) for Millie Ogden. Supreme Court Docket	The circuits are split if RICO proximate cause is based on directness, foreseeability or some combination. As the "directness" test is draconian it is decimating RICO's evolution. Can RICO proximate cause be clarified as the *Anza* and *Hemi* dissents are confusing

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				everyone? *RJR Reynolds, Inc. v. E.U.,* held a predicate act's foreign reach defines RICO's extraterritoriality. Proximate cause, however, is analyzed on whim as it is not clear where the measurement is to start from (i.e., the enterprise's edge or from a component predicate act). Does *RJR Reynolds'* rationale of determining extraterritoriality by measuring from inside the enterprise, out, also control proximate cause analysis? Ninth Circuit decision (1/3/17)
Corcel Corporation, Inc. v. Ferguson Enterprises, Inc.	17-47 (7/5/17)	RICO	Response due 8/7/17, extended 9/6/17 Attorneys: Ricardo Corona (Corona Law Firm, P.A.) for Corcel Corporation, Inc. Supreme Court Docket	Whether, in applying the four-year statute of limitations in this civil RICO case, it was error for the district court and Eleventh Circuit Court of Appeals to adopt and apply a version of the separate accrual rule that effectively disregards *Rotella v. Wood*, 528 U.S. 549, 556 (2000) and instead dates the accrual of this RICO cause of action from the date of the discovery that the fraudulent scheme succeeded rather than from the date of discovery of injury to plaintiff. Whether, in applying the four-year statute of limitations in this civil RICO case, it was error for the district court and the Eleventh Circuit Court of Appeals to adopt and apply a version of the separate accrual rule that effectively disregards *Zenith Radio Corp. v. Hazeltine Research Inc.,* 401 U.S. 321, 339 (1971), and implicitly rejects the principle of that case than where the fact of future damages is speculative or their amount and nature

				unprovable no cause of action accrues with respect to such future damages until the date they are actually suffered. Eleventh Circuit decision (1/30/17)
Suture Express, Inc. v. Owens & Minor Distribution, Inc.	16-1487 (6/9/17)	Antitrust	Response due 7/13/17, extended 8/14/17 Attorneys: Sanford I. Weisburst (Quinn Emanuel Urquhart & Sullivan, LLP) for Suture Express, Inc. Supreme Court Docket	Whether, on a rule-of-reason tying claim, evidence that the tie increased prices or reduced quality in the tied market obviates the need for further inquiry into tying market power, or at a minimum reduces the amount of evidence from the tying market needed to establish tying market power. Whether antitrust injury may be found where an appreciable number of buyers, even if not all buyers, of the tied product suffered harm. Tenth Circuit decision (3/14/17)
HannStar Display Corporation v. Sony Electronics, Inc.	16-1457 (5/31/17)	Antitrust	Response due 7/6/17 Respondent Waiver Attorneys: James G. Kreissman, Harrison J. Frahn IV, and Elizabeth H. White (Simpson Thacher & Bartlett LLP) for HannStar Display Corporation Supreme Court Docket	Does state privilege law govern a state law claim for which state law supplies the rule of decision, where the claim is in federal court on the basis of diversity jurisdiction and no federal question claim is present? Ninth Circuit decision (9/1/16)
State of Ohio v. American Express Company	16-1454 (6/2/17)	Antitrust	Response due 7/6/17, extended 8/21/17 Select Amicus Briefs: Ahold U.S.A., Inc., John M. Connor, Discover Financial Services, Retail Litigation Center, Inc., Former federal antitrust officials, Southwest Airlines Co.,	Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of credit card platform suffice to prove anticompetitive effects and

			and United States Public Interest Research Group Education Fund, Inc. Brief in Opposition: United States Attorneys: Eric E. Murphy, State Solicitor of Ohio Supreme Court Docket	thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions? Second Circuit decision (1/5/17)
Alban v. Nippon Yusen Kabushiki Kaisha	16-1415 (5/23/17)	Antitrust	Response due 6/26/17 Respondent Waiver Attorneys: Warren T. Burns (Burns Charest LLP) for Jill M. Alban Supreme Court Docket	Whether—in direct conflict with this Court's decisions and the decisions of other federal courts of appeals—the Third Circuit's decision failed to apply the appropriate standards of deference to (a) the opinion of the Commission and the United States that the Shipping Act does not preempt state antitrust claims when defendants have not filed their agreement with the Commission, and/or (b) to the factual and/or regulatory or policy considerations that undergrid that preemption determination. Whether the Third Circuit improperly refused to apply a presumption against preemption of state laws of general applicability under the Shipping Act, in conflict with this Court's decisions and the decision of the Ninth Circuit in *Pacific Merchant Shipping Association v. Aubrey*, 918 F. 2d 1409 (9th Cir. 1990). Third Circuit decision (1/18/17)
American National University of Kentucky, Inc. v. Commonwealth of	16-1372 (5/9/17)	State Unfair Trade Practices	Response due 6/15/17 Respondent Waiver Attorneys: Mark T. Hurst (Stoll Keenon Ogden PLLC) for	Whether the Due Process Clause prohibits the delegation of fact-finding to an adverse party on an issue that is decisive of a deprivation of property? Whether this matter

Kentucky			American National University of Kentucky, Inc. Supreme Court Docket	should be vacated and remanded in light of the Court's recent due-process holdings in *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. _, 197 L.Ed. 2d 585 (2017), and *Nelson*, which the courts below did not have occasion to consider? Ky. App. decision (8/12/16)
Top Flite Financial Inc. v. Bridging Communities, Inc.	16-1336 (5/3/17)	Privacy	Response due 6/5/17 Conference 9/25/17 Attorneys: C. Thomas Ludden (Lipson Neilson Cole Seltzer & Garin, P.C.) for Top Flite Financial Inc. Supreme Court Docket	Respondents Bridging Communities, Inc. and Gamble Plumbing & Heating, Inc. had the burden of showing that a class should be certified under Federal Rule of Civil Procedure 23(b)(3). To meet this burden, Respondents had to show that questions whose answers would be resolved in common as to the entire class would predominate over questions that would need to be answered on an individualized, party-by-party, basis. After discovery was completed, Respondents did not introduce any evidence showing that the material issue of whether non-party InfoUSA had obtained consent from each proposed class member would be answered through common evidence. Did the failure of Respondents, as the moving party, to introduce any evidence on this issue justify denial of the motion for class certification? The Sixth Circuit held that the District Court was speculating in denying class certification because there was no evidence showing that the issue of whether InfoUSA had obtained consent to send facsimiles would be answered on a common or individualized basis. Did this decision

				impermissibly shift the burden of proof on the motion for class certification from Respondents to Petitioner? Petitioner offered evidence that there was a significant question regarding the standing of the potential class members that would need to be answered on an individualized basis. Respondents did not offer any evidence to rebut this showing. Did the Sixth Circuit err by nonetheless finding that common issues predominated over this individualized issue? The decision on a motion for class certification is reviewed on an abuse of discretion standard. Did the Sixth Circuit appropriately defer the decision by the District Court or did the Sixth Circuit instead substitute its own judgment for that of the District Court in what amounted to a de novo review of the decision on this motion? Sixth Circuit decision (12/15/16)
S.G.E. Management, LLC v. Torres	16-1309 (5/2/17)	RICO	Respondent Brief (7/27/17) Attorneys: James C. Ho (Gibson, Dunn & Crutcher LLP) for S.G.E. Management, LLC. Supreme Court Docket	Must a RICO fraud plaintiff prove reliance, in order to establish causation—as this Court held in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), and as the Second, Ninth, Tenth, and Eleventh Circuits have since reaffirmed? Or is reliance no longer required—as the Fourth Circuit and now the Fifth Circuit have held? To certify a RICO fraud class action, must the plaintiff show that reliance is a common issue because virtually all class members would have relied—as the Second, Ninth, and Tenth Circuits have all held? Or is it sufficient to

				show merely that it "follows logically" that some class members would have relied—as the Fifth Circuit has now held? Fifth Circuit decision (9/30/16)
SolidFX, LLC v. Jeppsen Sanderson, Inc.	16-1303 (4/25/17)	Antitrust	Response due 5/30/17 Respondent Waiver Attorneys: Kenzo Kawanabe (Davis Graham & Stubbs LLP) for SolidFX, LLC. Supreme Court Docket	Whether a monopolist who asserts ownership of a valid intellectual property right has absolute immunity from antitrust liability, even where the monopolist has conceded that its intellectual property did not relate to its anticompetitive conduct? Tenth Circuit decision (10/31/16)
Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.	16-1220 (4/3/17)	Antitrust	Respondent Brief (6/5/17) Petitioner Reply Brief (6/13/17) Attorneys: William A. Isaacson (Boies Schiller Flexner LLP) for Animal Science Products, Inc. Supreme Court Docket	Whether the Second Circuit, in conflict with the decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. § 1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits. Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit). Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid

				Sherman Antitrust Act claim involving purely domestic injury. Second Circuit decision (9/20/16)
Evergreen Partnering Group, Inc. v. Pactiv Corporation.	16-1148 (3/17/17)	Antitrust	Response due 4/21/17 Respondent Waiver Response Requested 5/16/17 Time to file Response to Petition extended to 7/17/17 Conference for consideration of petition, originally set for 5/25/17, has been put over to the Fall term Select Amicus Briefs: Law Professors and Antitrust/Industrial Organization Scholars Attorneys: Richard Wolfram for Evergreen Partnering Group, Inc. Supreme Court Docket	Whether Kodak's Rule 56 standard or the more stringent "tends to exclude the possibility of independent action" standard articulated in *Matsushita* applies where the alleged conduct, unlike in *Matsushita*, is not inherently procompetitive and is not economically or otherwise irrational. Did the court of appeals in this case improvidently apply the heightened "tends to exclude" test to Petitioner's concerted refusal to deal claim, in circumstances in which it was not warranted, and thus erroneously deny the plaintiff its right to have its case heard by the trier of fact? First Circuit decision (8/3/16)
Power Ventures, Inc. v. Facebook, Inc.	16-1105 (3/9/17)	Advertising	Response due 4/12/17 Respondent Waiver Attorneys: Thomas Lee (Hughes Hubbard & Reed LLP) for Power Ventures, Inc. Supreme Court Docket	Whether an online company given consent by users of an online social networking service to access data shared or stored by the users on the service, but is prohibited access by the service, "intentionally accesses a computer without authorization . . . and thereby obtains information from [a] protected computer" in violation of 18 U.S.C. §1030(a)(2)(c) of the Computer Fraud and Abuse Act of 1986. Ninth Circuit decision (12/9/16)