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Up Next At High Court: Forum Shopping & TCPA Definitions

By **Katie Buehler**

Law360 (January 17, 2025, 8:12 PM EST) -- The U.S. Supreme Court will return to the bench Tuesday for a short argument session, during which the justices will consider the U.S. Food and Drug Administration's bid to limit forum shopping by manufacturers challenging agency decisions and how much deference district courts must give to Federal Communications Commission orders.

The court will also hear arguments over the appropriate test for analyzing the validity of excessive force claims under the Fourth Amendment, and whether plaintiffs or defendants have the burden of proving whether certain exemptions apply to lawsuit brought under the Employee Retirement Income Security Act.

Additionally, the justices will issue an orders list Tuesday.

Here, Law360 breaks down this week's oral arguments.

Forum Shopping

On Tuesday, the Supreme Court will consider whether manufacturers can challenge FDA decisions in any circuit as long as they're joined in their lawsuit by a local retailer.

The agency has asked the justices to reverse a Fifth Circuit panel decision allowing North Carolina-based R.J. Reynolds Vapor Co. to challenge the denial of its e-cigarette marketing application in the circuit that oversees Louisiana, Mississippi and Texas. The appellate panel found it had authority to hear the dispute because R.J. Reynolds was joined by Texas and Mississippi retailers who claim they want to sell the company's unapproved menthol vaping products.

However, the FDA argues that the involvement of local retailers in an appeal should have no influence over deciding the proper forum for the case because retailers are not legally allowed to challenge marketing application denials. The Tobacco Control Act permits only "adversely affected" parties to appeal final agency actions, the federal government claims, and under the ordinary understanding of that term, manufacturers alone are eligible to challenge denials.

R.J. Reynolds is therefore limited to filing its appeal in either the D.C. Circuit or its home court, the Fourth Circuit, the government said.

The manufacturer counters that retailers are proper "adversely affected" parties because marketing

application denials dictate what products they can sell and profit from. R.J. Reynolds claims the FDA is also trying to create additional bars to appealing its marketing application denials by requiring courts to assess whether each challenge, instead of the group, could individually bring claims in a specific forum.

Vivek Suri, of the U.S. Solicitor General's Office, will argue for the federal government, and Jones Day partner Ryan J. Watson will argue for R.J. Reynolds.

The case is Food and Drug Administration et al. v. R.J. Reynolds Vapor Co. et al., case number 23-1187.

Fax Definition

Also on Tuesday, the justices will hear arguments over whether a Hobbs Act provision giving federal appellate courts exclusive authority to review challenges to FCC orders required a California district judge to defer to the agency's interpretation of the Telephone Consumer Protection Act.

McLaughlin Chiropractic Associates Inc. has urged the Supreme Court to overturn a Ninth Circuit panel decision decertifying a class of plaintiffs in an action that accuses a McKesson Corp. unit of sending unsolicited marketing faxes. The panel held decertification was required because of the binding effect the FCC's updated guidance about what type of fax services are covered under the TCPA had on the trial court.

The medical practice argues that it isn't disputing the facial, preenforcement challenges to FCC orders must be brought in appellate courts, but that district courts also have leeway to consider the validity of those orders as they apply to private lawsuits. The Ninth Circuit's precedent stating otherwise raises serious due process issues for affected litigants and hinders courts from fulfilling their duty to independently interpret and apply the law.

McKesson, on the other hand, argues the precedent makes sense and serves to prohibit private litigants from pursuing collateral attacks against agency orders. Allowing individual trial courts to consider the validity of the agency's order would also undermine Congress' intent in providing finality and certainty to the meanings of orders under the Hobbs Act, it said.

The federal government, which will argue as amicus in this case, has thrown its support behind McKesson. It additionally argues that Congress considered situations in which private litigants would want to challenge the meaning of FCC orders, and that lawmakers set out the proper procedure for doing so in the Hobbs Act.

Gupta Wessler LLP principal Mathew W.H. Wessler will argue for McLaughlin Chiropractic, and Morrison Foerster LLP partner Joseph R. Palmore will argue for McKesson. Matthew Guarnieri, of the U.S. Solicitor General's Office, will argue for the federal government as amicus in favor of McKesson.

The case is McLaughlin Chiropractic Associates Inc. v. McKesson Corp. et al., case number 23-1226.

Excessive Force

On Wednesday, the court will debate the proper test for evaluating excessive force claims under the Fourth Amendment.

Janice Hughes Barnes, whose son, Ashtian Barnes, was shot and killed when he was pulled over for

driving a rental car that had unpaid toll fees, has asked the justices to reverse a Fifth Circuit panel decision tossing claims of excessive force lodged against Houston cop Roberto Felix Jr. The appellate panel found that Felix acted within reason when he shot Ashtian Barnes, who attempted to drive off when Felix was standing on the car's running board.

Instead of considering the totality of the circumstances, as prescribed by Supreme Court precedent, the Fifth Circuit applied the more restrictive moment-of-the-threat test and improperly ignored Felix's own actions — like standing on the running board — that contributed to him being in a life-threatening situation. The moment-of-the-threat test is used by the Second, Fourth and Eighth circuits as well, Janice Barnes said.

Felix, however, contends that Janice Barnes is wrongly attempting to apply a heightened standard of review to his actions during the traffic stop. Under her suggested test, courts would analyze excessive force claims with the benefit of hindsight, something the Supreme Court has ruled they cannot do.

Texas and 14 other states agree and will argue as amicus in favor of Felix. The states claim the Fifth Circuit's test complies with Supreme Court precedent and adequately takes into account the danger a situation poses to innocent bystanders and the threat imposed by the suspect's actions. There is no need for the Supreme Court to "fundamentally rewrite" its test for analyzing excessive force claims, the states argued.

The federal government, on the other hand, will argue in support of Janice Barnes. The Fifth Circuit erred to fully consider Felix's conduct prior to the life-threatening situation, the U.S. Department of Justice argued. While the circumstances at the moment force should be the primary factors in a court's analysis, judges are required to also consider the officer's prior engagement with the suspect and anything else that led up to the moment of allegedly excessive force.

Hogan Lovells senior associate Nathaniel A.G. Zelinsky will argue for Barnes, and Williams & Connolly LLP partner Charles L. McCloud will argue for Felix. Zoe A. Jacoby, of the U.S. Solicitor General's Office, will argue for the federal government as amicus in favor of Barnes, and Lanora C. Pettit, of the Texas Attorney General's Office, will argue for the state as amicus in favor of Felix.

The case is Barnes v. Felix et al., case number 23-1239.

ERISA Exemptions

Also on Wednesday, the justices will consider whether plaintiffs accusing retirement plan managers of violating the ERISA's prohibition on engaging in certain transactions must also plead why exemptions to that provision don't apply.

Casey Cunningham and a group of Cornell University employees have urged the Supreme Court to overturn a Second Circuit panel decision preventing their ERISA class action from continuing due to their failure to rebut the university's claim that it was exempt from the act's prohibition against transactions constituting the furnishing of goods, service or facilities to a party in interest.

Cunningham claims the Second Circuit's decision misreads the plain language of ERISA, which establishes exemptions to the prohibition as affirmative offenses that defendants have the burden to prove. The appellate court's ruling would place an almost insurmountable burden on plaintiffs by requiring them to prove a fiduciary is not exempt from the provision without the benefit of discovery. The rule is also

"vague" and "ill-defined" because it doesn't provide plaintiffs with an idea of what evidence is required to properly rebut any exemption a fiduciary might assert.

But Cornell University defends the appellate court's ruling, saying it protects ERISA plan fiduciaries from being subjected to burdensome discovery by overzealous plaintiffs who have no viable claims to pursue. As a preliminary step, plaintiffs should be required to prove that the transaction they're challenging isn't exempt.

The federal government will argue as amicus in favor of Cunningham, claiming exemptions are affirmative defenses that defendants have the burden of proving. Just because the prohibition provision cross-references the exemption provision doesn't mean Congress meant to include proof of nonexemption as an element of a plaintiffs claim, the government argues.

Xiao Wang, director of the University of Virginia Law School's Supreme Court Litigation Clinic, will argue for Cunningham, and Mayer Brown LLP partner Nicole A. Saharsky will argue for Cornell University. Yaira Dubin, of the U.S. Solicitor General's Office, will argue for the federal government as amicus in favor of Cunningham.

The case is Cunningham et al. v. Cornell University et al., case number 23-1007.

--Editing by Jay Jackson Jr.
