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## The Legal Intelligencer

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# Preview of the U.S. Supreme Court's Upcoming Term

The Supreme Court will continue its recent trend of answering important questions in intellectual property litigation:

Stephen A. Miller

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***Editor's note: This article is the second of a two-part series***

The Supreme Court will continue its recent trend of answering important questions in intellectual property litigation:

In November, the court will address a case - *Already LLC v. Nike* - that involves many of the same justiciability principles at issue in the class action/damages cases discussed supra. It is common practice, when confronted with a claim for trademark or patent infringement, for the alleged infringer to respond to the lawsuit with a counterclaim challenging the validity of the trademark or patent at issue. In this case, Nike sued Already LLC for trademark infringement, and Already counterclaimed with a challenge to the validity of the disputed trademark. Nike apparently decided that the risk of a declaration of invalidity outweighed any damages it might incur from Already's infringement. Consequently, Nike delivered a self-styled "covenant not to sue" to Already regarding any of its current or prior products, and then moved the district court to dismiss the entire case with prejudice. Already objected to dismissal of its counterclaim, but both the district court and the U.S. Court of Appeals for the Second Circuit held that Nike's dismissal of the underlying complaint divested the district court of subject-matter jurisdiction to adjudicate Already's counterclaim. The Supreme Court will attempt to resolve a split of authority on this issue between the Second and Ninth circuits. Its decision will significantly affect the decision-making calculus of companies considering whether to initiate infringement lawsuits.

A second intellectual property case requires the court to revisit a question on which it deadlocked two years ago. In *Kirtsaeng v. John Wiley & Sons*, a Thai immigrant partially financed his graduate school education in mathematics by selling in California international editions of textbooks that he acquired lawfully in Thailand and caused to be shipped to himself in California. In doing so, he relied on Section 109(a) of the Copyright Act, which allows an owner of a copy "lawfully made under this title" to sell the copy without requiring permission of the copyright owner. The Southern District of New York, however, held not apply to copies manufactured outside of the United States — a question on which deadlocked 4-4 in 2010 in *Costco Wholesale v. Omega*. Justice Elena Kagan will be in the case, inasmuch as she was the only current justice who did not participate in the 2010

## CRIMINAL LAW

The court always considers a wide array of interesting criminal law issues, and this term is no different. For example, *Bailey v. United States* asks whether — before executing a search warrant — officers may detain an individual who is not physically located at a premises to be searched. In two other cases, the court will re-examine the contours of its 1983 decision in *United States v. Place*, in which it held that a drug-detection dog's "sniff" did not constitute a search; the court will determine this term (1) whether a dog's alert on the outside of a car provided probable cause to search the vehicle, and (2) whether a dog's alert at the front door of a private home constituted a search (and, if so, whether probable cause, reasonable suspicion or some other standard must be satisfied prior to conducting that search). Finally, in *Smith v. United States*, the court will decide which party in a criminal trial bears the burden of proving withdrawal from a conspiracy beyond a reasonable doubt.

## MISCELLANEOUS

The court will also consider interesting questions relating to antitrust law, affirmative action, the Takings Clause, sovereign immunity, human rights law and maritime law:

- **Antitrust law:** In *FTC v. Phoebe Putney Health System*, the court will address whether the "state action doctrine" precludes application of federal antitrust laws to the sale of a hospital system authorized by a local government entity.
- **Affirmative action:** The court returns to the viability of racial preferences in the context of higher education in *Fisher v. University of Texas*. The case presents the specific question whether the University of Texas's use of race runs afoul of limitations on that practice established by the court in *Grutter v. Bollinger* (2003).
- **Takings Clause:** In *Arkansas Game & Fish Commission v. United States*, the court will analyze an interesting use of the Takings Clause to recoup property damages from the federal government where the government is immune from an ordinary negligence suit. Here, the federal government's (admitted) negligent management of a dam resulted in periodic flooding of nearby forest and recreational park land over an eight-year period. The Federal Circuit dismissed the plaintiff's taking claim on the theory that a taking can only result from intentional government action; thus, inasmuch as the federal government never intended to flood the plaintiff's land, as a matter of policy, then there could be no Fifth Amendment violation. The Supreme Court will address whether the federal government's subjective intent is an element of a claim under the Takings Clause.
- **Sovereign immunity:** In *United States v. Bormes*, the court will determine whether Congress waived the federal government's sovereign immunity from claims under the Fair Credit Reporting Act.
- **Human rights law:** The first case in which the court will hear argument in October is *Kiobel v. Royal Dutch Petroleum*, which addresses whether corporations may be sued under the Alien Tort Statute for human rights violations occurring outside the United States (and, if so, under what tort causes of action). When this case was argued in February, the justices started to address the question whether corporations (as opposed to individuals) could be sued under the statute. The court delayed that decision and ordered reargument in October, however, with instructions for the parties to address a question that suggests the justices might want to execute a more dramatic rollback of the statute: whether federal courts can adjudicate any lawsuits seeking relief for violations of international law occurring outside of the United States.
- **Maritime law:** On its face, *Lozman v. City of Riviera Beach, Fla.*, does not concern riverboat casinos, but that is where its impact might be most profoundly felt. The case addresses whether a floating structure (here, a house) indefinitely moored to shore — from which it receives power and other utilities — and not intended for use in maritime transportation or commerce constitutes a "vessel" under federal maritime law. If so, slip-and-fall injuries in casino riverboats might be subject to the Jones Act (permitting negligence lawsuits against ship owners) and the Longshore and Harbor Workers Act (providing predetermined damages for workplace injuries of vessel employees).

**Stephen A. Miller** practices in the commercial litigation group at Cozen O'Connor's Philadelphia office. Prior to joining Cozen O'Connor, he clerked for Justice Antonin Scalia on the Supreme Court and served as a federal prosecutor for nine years in the Southern District of New York and the Eastern District of Pennsylvania.

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