A high court docket of marquee cases

A rich mix could become richer.

By Marcia Coyle
STAFF REPORTER

WASHINGTON—From Mickey Mouse and Victoria’s Secret to “three strikes” and cross burning, the U.S. Supreme Court opens its new term with a roster of issues as likely to grab headlines as to affect the law significantly.

Before the official start of the term on Oct. 7, the justices had already agreed to hear arguments in 39 cases — roughly half of the total cases to be decided. But that early batch includes:

• An unusually large number of tort-related challenges that could be crucial to how and where battles are waged between business and injured consumers.

• Attacks on two different “Megan’s laws” which mandate the registration of convicted sex offenders.

• Two challenges to California’s tough “three strikes” sentencing law with implications for many other states.

• The revisiting of hate crimes and the First Amendment, this time cross-burning in Virginia.

• Another potential chapter in the Rehnquist Court’s federalism revolution in Nevada’s challenge to the federal Family and Medical Leave Act.

• Major intellectual property questions surrounding the Sonny Bono Copyright Extension Act of 1998 and the federal Trademark Dilution Act.

• A property rights battle over Interest on Lawyers’ Trust Accounts (IOLTA), a critical source of funding for legal services for the poor.

“I think it’s a term that’s not dominated, at the moment, by a particular theme but by interesting cases, with each case on its own merits raising novel and subtle questions,” says Douglas Kmiec, dean of Catholic University School of Law.

The justices are expected this week to add cases to their argument docket from more than 1,000 filed with the Court during the summer. The term’s already high profile, say Court watchers, could soar if the justices agree to decide a pending affirmative action challenge to the admissions policy at the University of Michigan Law School. And many experts are keeping a close eye on the pipeline to the court, which may bring new cases triggered by the nation’s war on terrorism.

“We know the Ashcroft Justice Department has dug in its heels in certain areas because of terrorism investigations and those cases where it loses are going to be driven up the pipeline by the department,” says Thomas Baker of Florida International University School of Law. “It wouldn’t surprise me if this Justice Department petitions the Supreme Court to bypass courts of appeals.”

The docket is “quite extraordinary” in the number and importance of business cases, says former Acting Solicitor General Walter Dellinger of O’Melveny & Meyers, lead counsel or amicus counsel in several of them. The challenges reflect the corporate defense world’s strong preference to wage litigation in federal, not state, court, he says.

The largest block of these challenges has been dubbed “tort cases” but some are “tort” by coincidence, notes veteran litigator Mark Levy of Washington, D.C.’s Howrey Simon Arnold & White. Some could as easily fit into a discussion of civil procedure or federalism, he says.

For example, in Ford Motor Co. v. McCauley, No. 01-896 — a class action brought by users of a now-ended credit-card rebate program — the justices are asked how to calculate the amount in controversy required ($75,000) for federal diversity jurisdiction. Is it the value to each individual plaintiff?
or the cost to the defendant of complying with an injunction sought by the plaintiffs?

“It’s quite important in terms of litigation strategy,” says Levy. “Defendants want these cases, by and large, in federal courts, and if sued in state court, defendants want to remove them.”

Removal is at the heart of a product liability suit in *Syngenta Crop Protection Inc. v. Henson*, No. 01-757. The Court will decide whether the All Writs Act gives federal courts the authority to remove otherwise nonremovable state court claims because they threaten to interfere with federal court proceedings. A majority of circuits allow removal.

Corporate defense lawyers say the decision will have a significant impact on the viability of nationwide class action settlements, which sometimes are threatened by later-filed state court suits.

**CLASSIC TORT CASE**

The classic tort case is *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289. The issue is the constitutionality of a punitive damages award, here against State Farm for $145 million, 145 times the amount of compensatory damages. State Farm argues the award violates due process and was based wrongly on alleged nationwide business practices over 20 years.

The asbestos litigation crisis has arrived in the form of *Norfolk & Western Railway Co. v. Ayers*, No. 01-963. Six retired Norfolk employees allege they were injured by asbestos exposure on the job and sued under the Federal Employers’ Liability Act (FELA).

Norfolk is challenging the damages award over workers’ fear of developing cancer, emotional distress damages without any physical manifestation of emotional injury, says the railroad.

Norfolk counsel, Carter Phillips of Chicago-based Sidley Austin Brown & Wood, says, “The amount of damages for asbestosis is relatively limited, but the amount attributed to fear of cancer is potentially large.” He says the ruling is likely to influence state courts even though they won’t be bound by it.

Tort and federalism combine in *Sprietmsma v. Mercury Marine*, No. 01-706. The Court will decide whether the Federal Boat Safety Act of 1971 pre-empts state-law products liability and wrongful-death actions based on a theory that a boat propeller without a safety guard is defectively designed. A lower court held the state claims were pre-empted after finding that the Coast Guard had decided not to require boat manufacturers to install the guards.

The case is important for two reasons, says Sprietsma’s counsel Leslie Brueckner of Trial Lawyers for Public Justice: “If these claims are pre-empted, then no victims of propeller guard accidents will have any right to seek any recovery for their injuries in any court in America. And, more broadly, it’s important because if agency inaction can wipe out tort remedies, then federal pre-emption could expand enormously to include claims involving all sorts of dangerous products that federal agencies study and then for whatever reasons decline to regulate.”

Under the federalism umbrella covering the relationship between the national and state governments, the Court will take up three very different types of challenges.

In *Nevada Dept. of Human Resources v. Hibbs*, No. 01-1368, Nevada argues that Congress exceeded its power when it applied the federal Family and Medical Leave Act (FMLA) to states. Nevada contends that it is immune to suits under the act. *Hibbs* is the Court’s first examination of Congress’ use of its power under § 5 of the 14th Amendment to remedy discrimination against a suspect class — women — says Wendy Weiser of NOW Legal Defense and Education Fund. The Court has barred suits against states over age and disability discrimination.

Weiser says that “the future of the FMLA really depends on Justice Sandra Day O’Connor’s view of the proper balance between states’ rights and women’s rights.”

In *Pierce County v. Guillen*, No. 01-1229, the Court will examine a decision by the Washington Supreme Court striking down a federal law, on federalism grounds, that barred the discovery or admission into evidence in federal or state courts of documents compiled by a local government in connection with federal highway safety programs. Local governments agree to that condition in exchange for federal funds.

*Pierce* is the Court’s first case to consider Congress’ spending power in the justices’ federalism revolution, says Weiser, who calls
the spending power “one of the last strongholds of congressional power” for subjecting states to civil rights law.

And in Cook County v. U.S., ex rel. Chandler, No. 01-1572, the Court will decide whether local government entities are “persons” subject to qui tam actions and treble damages under the federal False Claims Act. Just two years ago, the justices held, 7-2, that states were not “persons” under the act.

Civil rights groups, Weiser says, worry about any extension of sovereign immunity to local governments and its implications for civil rights enforcement.

In the intellectual property field, Eldred v. Ashcroft, No. 01-618, the biggest copyright case in decades, asks whether the 20-year extension of terms of copyrights in the Copyright Extension Act of 1998 violates the copyright clause and the First Amendment. At stake when the act was passed was the copyright on Mickey Mouse, among others. High-powered lawyering is present on both sides in a slew of amici briefs.

Moseley v. Victoria Secret Catalogue, No. 01-1015, is the Court’s first major effort to give meaning to the 1995 Trademark Dilution Act, says Dellinger. Mosely owned an adult-novelty shop in Kentucky called Victor’s Secret.

**CRIMINAL CASES**

The criminal docket is dominated by challenges of state registries for sex offenders and “three strikes “sentencing.

In Connecticut Dept. of Public Safety v. Doe, No. 01-1231, the state seeks to overturn a ruling by the 2nd U.S. Circuit Court of Appeals striking down that state’s “Megan’s law” because it violated due process. The appellate court said offenders are not given hearings to determine their dangerousness before being listed on the registry. In Smith v. Doe, No. 01-729, the 9th Circuit that held Alaska’s registration law violated the ex post facto clause of the Constitution as applied to offenders whose crimes were committed before the law’s enactment.

The Connecticut case is the more important because a ruling will affect more states. All 50 states and the District of Columbia have sex-offender registration and notification statutes.

The justices consider whether “three strikes” sentencing laws are cruel and unusual punishment in violation of the Eighth Amendment as applied to two inmates in separate California challenges: Lockyer v. Andrade, No. 01-1127, and Ewing v. California, No. 01-6978. Leandro Andrade was given 50 years in prison for a third offense of stealing movie videos. Gary Ewing is serving 25 years to life for a third offense of stealing three golf clubs.

“How much deference do you give to states in sentencing in noncapital areas?” asks Catholic University’s Kmiec. “There’s not a lot of precedent really inviting the Court to be anything other than deferent here.”

The justices agreed to decide whether a conspiracy ends automatically when the government frustrates its objectives. U.S. v. Recio, No. 01-1184. The 9th Circuit said a drug conspiracy ended when the police arrested a courier and seized the drugs. Two men arrested in a subsequent government sting could not be charged with the original conspiracy, said the court. The Bush administration says the 9th Circuit decision will hamper not only drug-conspiracy investigations but also terrorism investigations.

In Miller-El v. Cockrell, No. 01-7662, the Court will revisit a line of precedents involving the use of race-based peremptory jury strikes by prosecutors.