CLINICAL JURISPRUDENCE COLUMN

Supreme Court decisions in 2017 that affected your practice

Arbitration in health care and biosimilar pharmaceuticals top the past year's decisions

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IN THIS ARTICLE

Despite being short-handed (there were only 8 justices for most of the Term), the United States Supreme Court decided a number of important cases during its most recent Term, which concluded on June 27, 2017. Among the 69 cases, several are of particular interest to ObGyns.

1. Arbitration in health care

In *Kindred Nursing Centers v Clark,* the Court decided an important case involving arbitration in health care.[1]

At stake. The families of 2 people who died after being in a long-term care facility filed lawsuits against the facility, claiming personal injury, violations of Kentucky statutes regarding long-term care facilities, and wrongful death. However, during admission to the facility, the patients (technically, their agents under a power of attorney) signed an agreement that any disputes would be taken to arbitration. The facility successfully had the lawsuits dismissed.

Final ruling. The Supreme Court agreed that the case had to go to arbitration rather than to court, even though the arbitration clause violated state law. The Federal Arbitration Act (FAA) preempts state law. The Court has been very aggressive in enforcing arbitration agreements and striking down state laws that are inconsistent with the FAA. This case emphasizes that the FAA applies in the health care context.

The case suggests both a warning and an opportunity for health care providers. **The warning** is that arbitration clauses will be enforced; thoughtlessly entering into arbitration for future disputes may be dangerous. Among other things, the decision of arbitrators is essentially unreviewable. Appellate courts review the decisions of lower courts, but there is no such review in arbitration. Furthermore, arbitration may be stacked in favor of commercial entities that often use arbitrators.

The opportunity for health care providers lies in that it may be possible to

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include arbitration clauses in agreements with patients. This should be considered only after obtaining legal advice. The agreements should, for example, be consistent with the obligations to patients (in the case of the Kentucky facility, it made clear that accepting the arbitration agreement was *not* necessary in order to receive care or be admitted to the facility). Because arbitration agreements are becoming ubiquitous and rigorously enforced by federal courts, arbitration is bound to have an important function in health care.

2. Pharmaceuticals

Biologics and biosimilars

Biologics play an important role in health care. Eight of the top 10 selling drugs in 2016 were biologics.[2] The case of *Sandoz v Amgen* involved biosimilar pharmaceuticals, essentially the generics of biologic drugs.[3]

At stake. While biologics hold great promise in medicine, they are generally very expensive. Just as with generics, brand-name companies (generally referred to as "reference" biologics) want to keep biosimilars off the market for as long as possible, thereby extending the advantages of monopolistic pricing. This Term the Supreme Court considered the statutory rules for licensing biosimilar drugs.

Final ruling. The Court's decision will allow biosimilar companies to speed up the licensing process by at least 180 days. This is a modest win for patients and their physicians, but the legal issues around biosimilars will need additional attention.

Class action suits

In another case, the Court made it more difficult to file class action suits against pharmaceutical companies in state courts.[4] Although this is a fairly technical decision, it is likely to have a significant impact in pharmaceutical liability by limiting class actions.

3. The travel ban

The American College of Obstetricians and Gynecologists joined other medical organizations in an *amicus curiae* (friend of the court) brief to challenge President Trump's "travel ban."[5]

At stake. The brief argued that the United States "relies upon a significant number of health professionals and scientists who have entered the country through the immigration system."[5]

Final ruling. The Court allowed most of the travel ban to stay in place, but did permit entry into the United States by foreign nationals "with a close familial relationship," or pre-existing ties to US businesses or institutions (such as students who have been admitted to American colleges, workers who have accepted US employment, or lecturers invited to address American audiences).[6] Following the Term, the Administration issued a different travel ban, so the issue was taken off the Court's calendar for the moment. There undoubtedly will be additional chapters to come.

4. Birth certificates and same-sex marriage

In *Pavan v Smith*, the legal question concerned whether married same-sex couples may have both parents listed on the birth certificate of children born during the marriage.[7] Two same-sex couples conceived children through anonymous sperm donation and gave birth in Arkansas. The Department of Health in Arkansas issued birth certificates listing the mother's name, but refused to list the spouse on the birth certificate.

At stake. The couples brought suit claiming a constitutional right to have both parents listed. In particular, they noted that under Arkansas law, the woman who gives birth is deemed to be the mother. When the woman is married, the husband's name is "entered

FAST TRACK

Arbitration agreements are bound to play an ever-greater role in health care

Other interesting decisions of the 2016–2017 Supreme Court Term

- In an important First Amendment decision, the Court held that it is a violation of the Freedom of Religion to deny a church-related school access to generally available state grant funds solely because of its religious status (in this case the program funded playground surfacing grants).[1]
- In several cases, it was apparent that the Court is uncomfortable with the way death penalty cases are handled in some states.[2]
- Juries may be questioned about racial bias that was expressed during jury deliberations—a substantial change for many courts.[3]
- The failure of the Patent and Trademark Office (PTO) to register the trademark for the band "The Slants" was a First Amendment violation. One reason that this case was watched was because of the effort of the PTO to deregister the trademark of the Washington Redskins.[4]
- The Court considered 9 cases involving revoking citizenship, deportation, and cross-border liability (an extraordinary number). Two cases that could change the nature and process of deportation were held over to the next Term for reargument.
- Individualized educational plans under the federal Individuals with Disabilities Education Act (IDEA) must target more than trivial progress for the students.[5]

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2. McAllister S. Death-penalty symposium: A court increasingly uncomfortable with the death penalty. SCOTUSblog.com. http://www.scotusblog.com/2017/06/death-penalty-symposium-court-increasingly-uncomfortable-death-penalty/. Published June 29, 2017. Accessed November 2, 2017.
3. Pena-Rodriguez v Colorado, 580 US 15 606 (2017).
4. Matal v Tam, 582 US 15 1293 (2017).
5. Endrew F v Douglas County School District, RE–1, 580 US 15 827 (2017).

on the certificate as the father of the child."[8] The same-sex parents argued that a 2015 decision of the Supreme Court, which held that the Constitution requires states to recognize same-sex marriages, made it clear that same-sex couples should have the benefits of marriage.[9] Eventually the case wound its way to the Supreme Court.

Final ruling. The Court held that if the state ordinarily lists the names of both husband and wife on such certificates, then same-sex couples are entitled to have birth certificates listing both parents. The Court noted that laws are unconstitutional if they treat same-sex couples differently than opposite-sex couples. Based on this principle, the Court held that parental birth certificate registration is part of the "constellations of benefits" linked to marriage that the Constitution affords same-sex couples. This ruling applies as a matter of constitutional right in all states.

5. Sexual offenders and social media

States struggle to protect children from convicted sex offenders. North Carolina, for example, made it a felony for sex offenders (who had completed their sentences) to use social media sites that "permit minor children to become members or create and maintain personal web pages."[10]

At stake. In *Packingham v North Carolina*, the Court was asked to decide whether this statute violates the First Amendment (free speech) rights of sex offenders.[11]

Final ruling. The Court held that the North Carolina limitation on sex offenders' use of social media was too broad. It noted the wide range of political, employment, news, personal, commercial, and religious websites that are off limits to sex offenders under the statute—hardly narrowly tailored. It suggested, however, that it probably would be constitutional for a state to prohibit sex offenders "from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."[11]

It was important in this case that the defendant had already served his entire sentence and was "no longer subject to the supervision of the criminal justice system."[11] If he had still been in prison, the state could limit or prohibit his Internet use. Even if he had been on probation or parole (under the supervision of the criminal justice system) the restrictions may well have been permitted. In addition, the state could impose new, narrowly tailored restrictions.

This case is also a reminder that ObGyns are very important in the efforts to eliminate child sexual abuse. All states have laws that require the reporting of known or suspected sexual abuse. In addition to complying with the law, such reports are often critical to discovering and ending the abuse.

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6. Transgender rights

The Court had accepted a "transgender bathroom case" in *Gloucester County School Board v G.G.*[12]

At stake. This case essentially challenged the Obama Administration's requirement that schools allow transgender students to use the restrooms in which they feel most comfortable. It was one of the most anticipated cases of the Term, but it essentially disappeared. Following the presidential election, the Department of Education rescinded the earlier guidance on which the case was based.

Final ruling. The Court returned the case to the Fourth Circuit for reconsideration. This issue, however, may reappear before the Court in the form of a claim that the states must provide this accommodation as a matter of federal statutory right, or even Equal Protection.

Summary of the Term

The Term was notable for the level of agreement. With 69 decided cases, 41 (69%) were unanimous. In 59 cases (85%), there was a strong consensus, with no more than 2 justices dissenting. Only 7 decisions (10%) were 5 to 4. Justice Kennedy was, as usual, the deciding vote in most of the close cases. He voted in the majority in 97% of the decisions. Justice Gorsuch took the place of Justice Scalia (who passed away in February 2016), so arguably the Court is ideologically close to where it has been for a number of years. Despite rumors that Justice Kennedy would announce his resignation from the Court, neither he nor any other justice has left. The Supreme Court began its new Term on October 2, 2017, with a full complement of 9 justices.

What's to come

The Court will add cases through much of its new Term, but it has already accepted cases dealing with arbitration agreements (again); public employees' union dues; immigration (again); the privacy of information held by mobile phone companies; a constitutional challenge to political gerrymandering; bakeries and gay-marriage ceremonies; whistleblowers and Dodd-Frank regulations; sports gambling and the NCAA; and more.

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FAST TRACK

ObGyns are very important in the efforts to eliminate child sexual abuse. Physicians' reports are often critical to discovering and ending the abuse.