

What's Happening with Redskins Trademark Case?

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For the past few years, the first question us trademark lawyers get asked at cocktail parties is, “What’s going to happen to the REDSKINS trademark?” – and now lawyers and football enthusiasts will have to wait until at least 2017 for the final answer.

In October 2015, the Redskins appealed the Eastern District of *Virginia*’s ruling that the **REDSKINS** federal trademark registrations violate Section 2(a) of the **Lanham Act** – which prohibits the registration of marks deemed to be disparaging. The appeal is currently pending before the U.S. Court of Appeals for the Fourth Circuit.

In the meantime, on September 29, the *U.S. Supreme Court* granted certiorari in the separate case of **Lee v. Tam**, on appeal from the Federal Circuit, which also considers whether a trademark registration may be denied on the grounds that it is disparaging to an ethnic group (in this case, the mark is **THE SLANTS**, found to disparage Asian-Americans). In the *Lee v. Tam* case, on the docket for the Spring 2017 term, the Court will consider whether the Federal Circuit was correct in holding that the “disparagement” provision of Section 2(a) violates the free speech clause of the First Amendment, or whether the USPTO was correct in its stance that the provision furthers legislative policy and does not hinder speech.

Upon learning of the Court’s decision to hear *Lee v. Tam*, the Redskins went for a legal “Hail May pass” and filed a petition for certiorari before judgment by the Fourth Circuit, in an attempt to have the case heard by the Supreme Court alongside *Lee v. Tam*. The Court denied the petition without comment (which is customary); the denial was not unexpected, given that it very rarely grants requests to cut an appeals court out of the loop, unless a case is of “such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination” under the Court’s Rule 11.

The Court’s decision to deny certiorari without judgment would have left the Redskins’ current fate to the Fourth Circuit, but that will now have to wait until after the Supreme Court rules in *Lee v. Tam*. On October 18, the Fourth Circuit granted the Redskins’ request to postpone the hearing in that court, which had been scheduled for December 9, until the Supreme Court issues its decision in *Lee v. Tam*. The Department of Justice (representing the USPTO) did not oppose the request, and the Court of Appeals granted the postponement without any indication of future scheduling – leading to the presumption that the case will resume once *Lee v. Tam* is decided, and the Fourth Circuit’s decision will be guided by the Court’s ruling.

Stay tuned until spring...

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National Law Review, Volume VI, Number 306

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