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A legal update from Dechert's Appellate Group

## Supreme Court to Allow Citing of “Unpublished” Decisions as Precedent

The United States Supreme Court has adopted a new rule allowing federal court litigants to cite so-called “unpublished” decisions as precedent. Unless Congress intervenes, the new rule will take effect on January 1, 2007.

In the 1960s, courts began to designate some of their decisions as non-precedential and to omit them from official reports. With the rise of electronic databases, however, such decisions became easily available to online researchers and were sometimes cited as authority. Eventually, three federal circuit courts formally prohibited litigants from citing the decisions as precedent in briefs, motions, and other papers, and six other circuits discouraged citing them as precedent.

Whether it was proper to strip certain decisions of precedential value became a topic of vigorous debate. In 2000, a panel of the U.S. Court of Appeals for the Eighth Circuit, including the late Richard Arnold, a highly respected and distinguished judge, held in an otherwise routine case that issuing non-precedential decisions was unconstitutional because it was not authorized by Article III of the Constitution, the ultimate source of federal judicial power. Another respected, high-profile judge, Alex Kozinski of the Court of Appeals for the Ninth Circuit, became a leading spokesman on the opposite side, arguing that “unpublished” opinions should not be cited or considered precedential.

Last year, the Advisory Committee on the Federal Rules of Appellate Procedure considered, and ultimately recommended, a proposed rule

allowing citation of “unpublished” decisions, leading to last week’s action by the Supreme Court. Among the Advisory Committee members who supported the new rule were Samuel Alito and John Roberts, then judges on the Third and D.C. Circuits, respectively, and now members of the Supreme Court.

Barring any contrary action by Congress, the newly adopted provision will become Rule 32.1 of the Federal Rules of Appellate Procedure and will apply only to decisions issued on or after January 1, 2007.



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## Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at [www.dechert.com](http://www.dechert.com).

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