



Supreme Court Business Briefing

July 2015

MOLOLAMKEN SUPREME COURT BUSINESS BRIEFING



It is hard to recall a Term in which a Supreme Court described by many as “conservative” rendered so many decisions that defy that easy label. That pattern was no less visible in the Court’s business docket, where the Court repeatedly rejected efforts to limit liability and expanded opportunities for aggrieved plaintiffs to sue.

Among its most high-profile decisions of the Term, the Court allowed disparate impact suits under the Fair Housing Act, permitting plaintiffs to sue real estate developers or other defendants even without proof of intentional discrimination. The insurance industry breathed a sigh of relief when the Court, for the second time, left intact the Affordable Care Act, rejecting a challenge that would have thrown the Act’s insurance exchanges into disarray. The Court also recognized a constitutional right of same-sex marriage, a decision hailed by many multistate employers with diverse workforces that were eager to avoid a patchwork of state marriage laws.

That same trend ran through the Court’s less contentious cases as well. The Court delivered a pair of rulings expanding employees’ rights to sue for discrimination—adopting a broad conception of what counts as pregnancy discrimination in one case, and limiting employers’ defenses against claims of religious bias in the other. The Court handed securities plaintiffs a major victory in a case allowing suits for misleading statements of opinion. And the Court foreclosed a potential defense in patent disputes, holding that a good-faith belief of invalidity is no excuse for inducing infringement. Business interests scored some clear wins—as in one case overturning expensive EPA regulations of power plants—but those were a minority.

With those and other leading decisions in mind, we are pleased to present the fifth annual MoloLamken Supreme Court Business Briefing. We have identified cases with the greatest potential impact on a wide range of businesses. For each one, we have distilled the facts and holdings down to a concise summary and highlighted why the decision matters to business. Our aim is to allow busy people to stay current on the Supreme Court’s docket and understand the potential impact of its decisions with a minimum of time and effort. We hope you find it informative.

ABOUT MOLOLAMKEN



MoloLamken is a law firm focused exclusively on representing clients in complex litigation. We handle civil as well as criminal and regulatory matters across the country. We represent plaintiffs as well as defendants.

Our founding partners, Steven Molo and Jeffrey Lamken, developed national reputations based on their courtroom successes while partners at large, full-service firms, where they held leadership positions. With an abiding belief that complex litigation is most effectively handled by smaller teams comprised of smart, highly experienced lawyers focused on results rather than process, they formed the firm in the midst of the worst economic crisis since the Great Depression.

We provide experienced advocacy before juries, judges, and appellate courts, including the Supreme Court of the United States. We also represent clients in regulatory and criminal investigations and conduct internal investigations.

Our strength lies in the intellect, creativity, and tenacity of our lawyers and our experience in applying those attributes to achieve great results for clients in serious matters.

Learn more about our talented team by visiting us at www.mololamken.com.

CONTENTS



	Page
» <i>Commil USA, LLC v. Cisco Systems, Inc.</i> , No. 13-896 (patents — induced infringement)	4
» <i>Comptroller of the Treasury of Maryland v. Wynne</i> , No. 13-485 (state taxation — interstate commerce)	5
» <i>EEOC v. Abercrombie & Fitch Stores, Inc.</i> , No. 14-86 (employment — religious accommodations).....	6
» <i>King v. Burwell</i> , No. 14-114 (health insurance — Affordable Care Act)	7
» <i>Michigan v. EPA</i> , No. 14-46 (environmental regulation — Clean Air Act)	8
» <i>Obergefell v. Hodges</i> , No. 14-556 (constitutional law — same-sex marriage).....	9
» <i>Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund</i> , No. 13-435 (securities fraud — statements of opinion)	10
» <i>ONEOK, Inc. v. Learjet, Inc.</i> , No. 13-271 (federal preemption — Natural Gas Act).....	11
» <i>Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.</i> , No. 13-854 (patents — claim construction)	12
» <i>Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.</i> , No. 13-1371 (housing discrimination — disparate impact).....	13
» <i>Yates v. United States</i> , No. 13-7451 (white-collar crime — evidence tampering).....	14
» <i>Young v. United Parcel Service, Inc.</i> , No. 12-1226 (employment — pregnancy discrimination).....	15

Commil USA, LLC v. Cisco Systems, Inc., No. 13-896

patents — induced infringement

Commil addressed whether a good-faith belief that a patent is invalid is a defense to liability for inducing patent infringement.

The patent laws impose liability both on parties who infringe patents directly and on those who induce a third party to infringe. While direct infringement is a strict liability offense, the Supreme Court has required actual knowledge of the infringement before a party can be held liable for inducing another's infringement. The question in *Commil* was whether a good-faith belief that the patent is invalid is sufficient to preclude liability for inducing infringement.

Commil's patent claimed a method for implementing wireless networks. Large wireless networks—such as those found on a college campus or business headquarters—must use multiple base stations to transmit data. As users move around, their devices must switch between base stations. *Commil*'s patent claimed an improved method for that process. *Commil* sued Cisco for infringing its patent, alleging direct infringement together with induced infringement stemming from Cisco's sale of its devices to customers who practiced the claimed method.

At trial, Cisco sought to introduce evidence that it had a good-faith belief that *Commil*'s patent was invalid. The district court excluded the evidence, but the U.S. Court of Appeals for the Federal Circuit reversed. That court had previously held that a defendant's good-faith belief that its product did not *infringe* a patent would preclude liability. In this case, the Federal Circuit extended that rule to a good-faith belief of *invalidity* as well.

The Supreme Court reversed. The mental state element for induced infringement, the Court held, concerns only the defendant's belief about whether there was infringement, not his belief about the validity of the patent. Infringement and validity, the Court emphasized, are separate issues. The Court expressed concern that allowing a defense of good-faith belief of invalidity would erode the statutory presumption that patents are valid and would unduly complicate patent litigation. The Court also noted that parties with a good-faith belief of invalidity can seek review by other means, for example, by requesting reexamination of a patent by the Patent and Trademark Office. Finally, the Court noted that a good-faith belief of invalidity is normally not a defense in other contexts, such as disputes over the validity of a law or contract.

Commil provides important guidance for patent litigation. In the Internet age, patent disputes often involve claims that a hardware manufacturer like Cisco induced infringement by third parties. *Commil* makes clear that defendants accused of inducing infringement cannot avoid liability merely by harboring a good-faith but ultimately incorrect belief that the patent is invalid. Given the number of grounds on which a defendant may contest validity, that holding eliminates a significant obstacle patent owners would otherwise face to enforcing their rights.

At the same time, *Commil* emphasizes the importance of alternative means of disputing validity. Rather than risk an adverse result in litigation, more parties will likely seek reexamination of a patent at the Patent and Trademark Office. *Commil* increases the importance of those agency proceedings as a forum for resolving validity disputes.

Commil makes clear that defendants accused of inducing infringement cannot avoid liability merely by harboring a good-faith but ultimately incorrect belief that the patent is invalid.

Comptroller of the Treasury of Maryland v. Wynne, No. 13-485

state taxation — interstate commerce

Wynne addressed the constitutionality of a state income tax that failed to provide credit for taxes paid to other States where the income was generated.

Like many States, Maryland imposes a state income tax on all income earned by its residents but provides a credit for taxes paid to other States—typically the State where the income was earned. In addition to that ordinary “state” income tax, Maryland also imposes a “county” tax on all income earned by its residents. As to that county tax, Maryland did not provide its residents with any credit for taxes paid to other States. Maryland also assessed a special tax, in lieu of the county tax, on income that nonresidents earned within Maryland.

The plaintiffs in this case were Maryland residents who held shares in an S corporation (an entity that does not pay taxes itself but whose owners are taxed on their shares of corporate earnings). The plaintiffs’ corporation earned income across the country, and the plaintiffs paid taxes to Maryland and 38 other States where the income was earned. The plaintiffs claimed a credit against the Maryland county tax for taxes they paid to other States, but the State initially disallowed the claim. The State’s highest court, however, held that the tax violated the dormant Commerce Clause.

The Supreme Court affirmed. The Court explained that the dormant Commerce Clause prohibits States from discriminating between transactions based on whether they include an interstate component. States thus may not tax an interstate transaction more heavily than a purely in-state transaction. Most important for present purposes, States also cannot impose tax regimes that favor in-state commerce over interstate commerce by subjecting interstate economic activity to double taxation. In determining whether a tax scheme violates that principle, courts have applied an “internal consistency” test that examines whether, if the challenged tax structure were adopted by every State in the Nation, it would place interstate commerce at a disadvantage compared to in-state commerce.

The Supreme Court held that Maryland’s county tax failed that test. If every State adopted Maryland’s scheme, the Court explained, a taxpayer who resided in one State but earned income in another would be taxed twice on that income—once by the State where the income was earned and a second time by her State of residency. In contrast, a taxpayer who earned her income solely within her State of residency would be taxed just once. Because Maryland’s county tax had precisely that effect, the Court held, it discriminated against interstate commerce in favor of in-state commerce. The county tax also discriminated against out-of-state investment: A Maryland resident with a choice between investing inside or outside the State would choose to invest within the State to avoid paying taxes to two States on the same income.

Wynne is significant because it protects out-of-state income from the threat of multiple taxation. That holding helps make it equally attractive for small business owners to engage in business transactions either inside or outside their State of residency, and ensures that businesses are not handicapped in attracting capital from outside the State. Although the Supreme Court has long held that corporations cannot be subjected to double taxation in the manner that Maryland attempted, the Court’s decision in *Wynne* extends those protections to individuals who conduct business through other entities such as S corporations as well. As a result, *Wynne* should help foster the free flow of goods, services, and capital across state borders.

(Disclosure: MoloLamken LLP represented an amicus curiae in this case)

*By protecting
out-of-state income
from multiple
taxation, **Wynne**
should help foster
the free flow of
goods, services,
and capital across
state borders.*

EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86

employment — religious accommodations

Abercrombie addressed when an employer can be liable under Title VII of the Civil Rights Act of 1964 for failing to accommodate an employee's or job applicant's religious practices.

Title VII prohibits an employer from refusing to hire someone "because of" that person's religion, including any aspect of that person's religious practices. *Abercrombie* concerned whether an employer could be held liable for making an employment decision based on a job applicant's religious practices, even if the employer did not have actual knowledge of the applicant's need for a religious accommodation.

In this case, a Muslim wearing a headscarf had applied for a job at an Abercrombie & Fitch retail store. Abercrombie, however, maintained a "Look Policy" that governed its employees' dress. Among other things, the policy prohibited "caps" or other headwear. The store managers decided not to hire the applicant because her headscarf would violate the Look Policy. While evidence showed that the managers at least suspected that the applicant wore the headscarf for religious reasons, the applicant never expressly told them so.

The Equal Employment Opportunity Commission brought a Title VII claim against Abercrombie on the applicant's behalf. The district court granted the EEOC summary judgment on the issue of liability, but the U.S. Court of Appeals for the Tenth Circuit reversed. The Tenth Circuit held that an employer cannot be liable under Title VII for failing to accommodate a religious practice unless the employer has actual knowledge that the applicant required a religious accommodation.

The Supreme Court reversed. The Court noted that Title VII, by its terms, prohibits an employer from failing to hire an applicant because of her religion, including a religious practice. Under that standard, the Court explained, an employer may not make an applicant's religious practice a motivating factor in an employment decision, whether or not the applicant expressly demands a religious accommodation or otherwise makes the employer aware of her need for a religious accommodation. The Court rejected the Tenth Circuit's contrary rule as imposing a knowledge requirement not found in the text of the statute. The Court also rejected Abercrombie's argument that its policy was not discriminatory because it treated religious practices no less favorably than secular practices. Title VII, the Court explained, requires otherwise neutral policies to give way to the need for a religious accommodation.

Abercrombie is an important decision for any employer. The Court's ruling exposes employers to liability for failing to accommodate a religious practice even where a plaintiff cannot prove the employer had actual knowledge of the need for a religious accommodation. *Abercrombie* also makes clear that merely maintaining neutral policies is not sufficient. After *Abercrombie*, employers would be well advised to avoid hiring, firing, or other employment decisions that may infringe upon potentially religious practices, even if the employer merely suspects a religious motive.

Abercrombie leaves some important issues unresolved. For example, Title VII does not require a religious accommodation if it would impose an "undue hardship" on the employer's business. *Abercrombie* did not address the scope of that defense. Nonetheless, *Abercrombie* clearly shifted the law in employees' favor.

After **Abercrombie**,
employers would
be well advised to
avoid hiring, firing,
or other employment
decisions that
may infringe upon
potentially religious
practices, even
if the employer
merely suspects a
religious motive.

King v. Burwell, No. 14-114

health insurance — Affordable Care Act

King addressed whether the health care subsidies provided by the Affordable Care Act are available to individuals purchasing health insurance through federal rather than state exchanges.

To increase the availability of health insurance, the Affordable Care Act provides for “exchanges” where consumers can purchase insurance. The Act initially calls for States to establish those exchanges. If a State does not do so, however, the federal government steps in and establishes the exchange. The Act provides for tax credits to help low-income individuals purchase insurance on those exchanges. But those subsidies apply only on “an Exchange established by the State.”

The *King* litigation was brought by residents of Virginia, which has a federal exchange. Pressing a literal reading of the statute, they claimed that the Act’s tax credits apply only to state-run exchanges and therefore were not available in Virginia. Without those subsidies, the plaintiffs’ cost of health insurance would exceed eight percent of their income, exempting them from the Act’s mandate to purchase insurance. The district court dismissed the suit, and the U.S. Court of Appeals for the Fourth Circuit affirmed, relying on an IRS regulation that interpreted the Act to cover all exchanges.

The Supreme Court affirmed. The Court refused to defer to the IRS’s interpretation, concluding that Congress would not have meant to leave a question of such deep economic and political significance to the IRS’s discretion. Nonetheless, reading the statute as a whole, the Court interpreted the Act to cover both state and federal exchanges. The Court noted, for example, that another provision of the Act used the phrase “the State that established the Exchange” to refer to both federal and state exchanges. And still other provisions assumed that tax credits would be available on both types of exchanges.

The Court recognized that excluding federal exchanges would seriously undermine the Act’s objectives. If tax credits were not available in States with federal exchanges, large numbers of residents would not be required to obtain insurance because the cost would exceed eight percent of their income. That result would undercut the Act’s goal of universal coverage. It would also skew insurance pools toward high-risk individuals because consumers could wait to purchase insurance until they became seriously ill—producing a “death spiral” that had doomed prior efforts at health insurance reform.

While much of the litigation over the Affordable Care Act has reflected ideological divides, the disputes have important business implications. *King* is significant for any business in the health care industry, particularly health insurers. Insurers need to be able to assess risks reliably when they price insurance. By insisting that the Act be interpreted consistent with its basic objectives, the Court avoided casting insurance markets into disarray and causing serious uncertainty for health insurers.

The Court’s decision has broader implications as well. *Amici* in the case argued that the Act’s subsidies make individuals less dependent on their jobs for health coverage, encouraging entrepreneurship. They also argued that subsidies allow small businesses to offer competitive benefits packages, creating a more balanced job market. While the Act will no doubt continue to be a source of controversy, *King* returns the debate over the Act’s basic philosophy—and its implications for business—to Congress.

By insisting that the Affordable Care Act be interpreted consistent with its basic objectives, King avoided casting insurance markets into disarray and causing serious uncertainty for health insurers.

Michigan v. EPA, No. 14-46

environmental regulation — Clean Air Act

Michigan v. EPA addressed whether the Environmental Protection Agency reasonably interpreted a provision of the Clean Air Act to prohibit it from considering costs when determining whether to regulate mercury and other toxic emissions from power plants.

Congress enacted 42 U.S.C. §7412 as part of the Clean Air Act Amendments of 1990 to control emissions of hazardous air pollutants. Although that section requires the EPA to set standards for over 180 specified pollutants, the statute carves out emissions from power plants. For those emissions, the statute directs the EPA to study the pollutants' effect on the public health and regulate power plants only if it finds that regulation is "appropriate and necessary."

The EPA completed its study and found it "appropriate and necessary" to regulate emissions from power plants under §7412. The agency interpreted that statutory standard to prohibit it from considering the costs imposed by its regulations in making that initial decision about whether to regulate power plants. The EPA later relied on its decision to establish specific standards for power plant emissions.

A group of petitioners, including 23 States, challenged the EPA's regulations. They argued that the EPA's interpretation of the statute was unreasonable because a determination about whether a regulation is "appropriate and necessary" must include consideration of costs. The U.S. Court of Appeals for the D.C. Circuit rejected that argument and upheld the regulations.

The Supreme Court reversed, holding that the EPA's construction of the statute was unreasonable. The Court explained that the broad statutory phrase "appropriate and necessary" surely encompassed consideration of costs. The Court distinguished a different air pollution statute that it had previously construed to prohibit cost considerations. That statute allowed the EPA to consider only "the public health"—a standard narrower than §7412's reference to "appropriate and necessary" regulation.

Michigan v. EPA has the immediate effect of sparing the energy industry from the costs of complying with the demanding regulations the EPA had attempted to impose—costs the EPA itself had estimated at \$9.6 billion per year. More broadly, the decision makes clear that agencies generally must consider the costs of the regulations they impose, unless Congress has put those considerations off limits.

Ultimately, however, the decision may only delay the EPA's regulatory efforts. As the dissent noted, the agency did consider costs at later stages of its analysis and concluded that the regulations it imposed were justified despite those costs. The Court's ruling, therefore, might merely require the EPA to import that cost analysis into its threshold decision about whether to regulate power plants in the first place. The decision thus may be more of a reprieve than a lasting victory for the energy industry.

Michigan v. EPA
makes clear that
agencies generally
must consider
the costs of the
regulations they
impose, unless
Congress has put
those considerations
off limits.

Obergefell v. Hodges, No. 14-556

constitutional law — same-sex marriage

Obergefell addressed whether same-sex couples have a constitutional right to marry.

Two years ago, the Supreme Court invalidated part of the federal Defense of Marriage Act that had defined marriage as the legal union of one man and one woman for all federal purposes. Following that decision, courts had divided over whether the Constitution also required States to recognize same-sex marriages. Taking one side of that circuit split, the U.S. Court of Appeals for the Sixth Circuit held that it did not.

The Supreme Court reversed. Extolling the historical and continuing importance of marriage to the fabric of society, the Court reaffirmed that marriage is a fundamental right protected by the Fourteenth Amendment, essential to the liberty, autonomy, and dignity of individuals.

The Court concluded that extension of the fundamental right to marry to same-sex couples could not await resolution by the political process. Instead, the Court held that the Fourteenth Amendment's Due Process and Equal Protection Clauses require that States license same-sex marriages and recognize same-sex marriages performed out-of-state.

Obergefell is important for obvious social and political reasons. But the case also has significant implications for business interests. Most businesses are likely to embrace the Court's decision. Nearly four hundred employers and their representatives—including leading companies such as Coca-Cola, Google, and American Airlines—filed *amicus* briefs in the case urging the Court to require States to recognize same-sex marriages. Those companies pointed to the substantial problems they faced complying with disparate state marriage laws—particularly when an employee validly married in one State is forced to relocate for business reasons to another State that might not recognize the employee's marriage.

As a result of the Court's decision, employers are now free to abide by the same policies and offer the same benefits packages to all of their employees, regardless of their sexual orientation or State of employment. And employers need not worry about disparate marriage laws as an obstacle to the mobility of their workforce across state lines. That uniformity and certainty will likely reduce costs and administrative burdens previously associated with disparate state marriage laws. Thus, even beyond its profound significance to same-sex couples, the decision has important business benefits.

Nonetheless, some businesses—particularly those with religious missions—may find that the decision poses new obstacles. Although the Court emphasized the right of those who adhere to religious doctrines to advocate against same-sex marriage, the Chief Justice's dissent highlighted difficulties that may arise. As he noted, the Solicitor General acknowledged that some religious institutions might lose their tax-exempt status if they opposed same-sex marriage. Other issues may arise for business owners who do not wish to provide services for same-sex marriage celebrations. The extent to which private businesses must respect the newly recognized rights of same-sex couples to marry remains to be decided in future cases.

*After **Obergefell**, employers are free to abide by the same policies and offer the same benefits packages to all of their employees, and need not worry about disparate marriage laws as an obstacle to the mobility of their workforce across state lines.*

Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, No. 13-435

securities fraud — statements of opinion

Omnicare addressed which statements of opinion are actionable under the securities laws.

The Securities Act of 1933 requires an issuer of securities to file a registration statement containing information about the offering. Section 11 authorizes purchasers of the securities to bring suit if “any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”

Omnicare arose out of a registration statement filed by the country’s largest provider of pharmacy services for nursing home residents. In the registration statement, *Omnicare* represented that it “believe[d]” its contracts were both “in compliance with applicable federal and state laws” and “legally and economically valid.” Pension funds that purchased *Omnicare* stock sued, alleging that those statements were misleading because certain *Omnicare* business practices violated state anti-kickback laws. The district court dismissed the suit, but the U.S. Court of Appeals for the Sixth Circuit reversed.

The Supreme Court vacated and remanded. The Court explained that, while a statement of fact is actionable if it was objectively false when made, the same logic does not apply to a statement of opinion, which is merely a statement of the speaker’s belief. That distinction foreclosed the plaintiffs from showing that *Omnicare*’s opinions were false, because the plaintiffs had conceded that the opinions were honestly held.

Nonetheless, the Court held that the plaintiffs could seek to hold *Omnicare* liable on the alternative theory that it had omitted facts necessary to make its statements of opinion not misleading. A reasonable investor, the Court held, may understand an opinion to convey facts about how the speaker formed the opinion or the basis for holding that view.

Although the Court made clear that a plaintiff could not withstand a motion to dismiss merely by making a conclusory allegation that the defendant lacked a reasonable basis for an opinion, the plaintiffs in this case had alleged more—including that an attorney had warned *Omnicare* about the heightened legal risks. The Court remanded the case for application of that new standard.

Omnicare is a significant plaintiffs’ victory from a Court that has often been hostile to securities claims in recent years. The Court’s holding exposes a wide range of opinions to scrutiny where plaintiffs can show that the speaker lacked an adequate basis for the opinion—for example, because the speaker ignored contrary information or conducted a patently inadequate investigation. Issuers will need to be mindful that merely couching statements in terms of the speaker’s belief or opinion will not shield them from liability.

Although *Omnicare* is a Section 11 case, its reasoning likely also applies to securities fraud claims under Section 10(b) of the Securities Exchange Act, which applies to a broader range of transactions. The Court’s decision is thus likely to have a substantial impact on a wide range of securities litigation.

Omnicare exposes
a wide range of
opinions to scrutiny
under the securities
laws where plaintiffs
can show that the
speaker lacked an
adequate basis for
the opinion.

ONEOK, Inc. v. Learjet, Inc., No. 13-271

federal preemption — Natural Gas Act

ONEOK addressed whether state-law antitrust claims challenging conduct that affects both federally regulated wholesale rates and state-regulated retail rates are preempted by the federal Natural Gas Act.

Historically, the natural gas trade could be broken down into three basic components: a driller extracted gas from the ground; a pipeline company delivered the gas to local distributors in the wholesale market; and local distributors sold the gas to businesses and residential customers in the retail market. The Natural Gas Act gives the Federal Energy Regulatory Commission authority over the wholesale component of that market. The States, however, retain authority over the final, retail component.

In *ONEOK* (pronounced “One Oak”), the plaintiffs were a group of manufacturers, hospitals, and other institutions that purchased natural gas directly from interstate pipelines for their own consumption. They alleged that they had overpaid in those retail transactions because the pipelines had manipulated natural gas prices, and they sought relief under state antitrust laws.

The defendants argued that the plaintiffs’ state-law claims were barred by the doctrine of “field preemption”—a doctrine that applies when federal regulation so thoroughly occupies a particular field that any state laws addressing the subject are displaced. The federal Natural Gas Act, the defendants urged, occupied the field of wholesale natural gas markets and therefore precluded the plaintiffs’ claims. The district court agreed, but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the Natural Gas Act did not preempt state-law claims challenging price manipulation in state-regulated retail markets even if the manipulation also raised prices in federally regulated wholesale markets.

The Supreme Court affirmed. The Court acknowledged that it had previously described the Natural Gas Act as occupying the field of wholesale natural gas markets. But the Court rejected a test for field preemption that would displace state laws whenever they affected those markets in any way. Instead, the Court held that, where a state law affects both state-regulated retail prices and federally regulated wholesale prices, a court must consider the “target” at which the state law aims.

The antitrust suits at issue, the Court explained, targeted the retail rates the plaintiffs had paid for their natural gas, not federally regulated wholesale rates. The Court thus held that the state-law claims were not preempted. The Court noted, however, that its holding was limited to the theory of field preemption. The defendants had not argued, and the Court did not consider, whether the state antitrust suits might be preempted under the separate doctrine of conflict preemption, which applies when there is an affirmative conflict between state and federal law.

ONEOK has significant implications for any company that participates in the distribution of natural gas—and potentially well beyond. The Court’s decision eliminates a potential bright line between areas of federal and state regulation, requiring businesses to navigate around varying federal and state laws. More broadly, the Court’s test could extend to other industries such as electricity or telecommunications, where the same conduct can affect both state-regulated and federally regulated components of a market. Although the Court did not preclude preemption in cases where there is an affirmative conflict between state and federal law, the Court’s narrowing of field preemption increases the legal risks for businesses in a variety of industries.

ONEOK announced
a new test for
field preemption
and eliminated a
potential bright line
between areas of
federal and state
regulation in the
natural gas industry.

Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc., No. 13-854

patents — claim construction

Teva addressed the standard under which an appellate court reviews a district court’s subsidiary factual findings when construing the claims of a patent.

Teva owned a patent covering a method for manufacturing Copaxone, a drug used to treat multiple sclerosis. Sandoz tried to market a generic version of Copaxone, and *Teva* sued for patent infringement. Sandoz argued that the patent was invalid, asserting that the patent’s phrase “molecular weight” was indefinite because it was susceptible to three different interpretations.

The district court took evidence from experts on the meaning of “molecular weight.” It concluded that a person skilled in the art would have understood the term to refer only to one of the three interpretations, and thus held that the claim was definite.

The U.S. Court of Appeals for the Federal Circuit reversed. It reviewed all aspects of the district court’s claim construction *de novo*—*i.e.*, without deference—including the district court’s factual findings regarding the expert evidence. Based on that independent review, the court concluded that the term “molecular weight” was indefinite.

The Supreme Court vacated and remanded. The Court acknowledged that claim construction is ultimately a legal issue reviewed *de novo*. But it explained that claim construction may sometimes require subsidiary factual findings, for example, to resolve disputes between experts over how a person skilled in the art would have understood a claim term. Federal Rule of Civil Procedure 52, the Court noted, provides that a district court’s “[f]indings of fact . . . must not be set aside” by an appellate court unless they are “clearly erroneous.” Rule 52 by its terms contains no exception for factual findings made during claim construction, and the Court declined to create one.

The Court noted an important limitation on its holding. Where a district court construes a claim based solely on evidence intrinsic to the patent—namely, the claim language, the patent’s specification, and its prosecution history—the entire decision is reviewed *de novo*. The construction of written instruments, the Court explained, is legal in nature. Where, however, the district court looks to extrinsic evidence such as expert testimony, the court of appeals can overturn its factual findings only under the demanding clear error standard of Rule 52.

Teva is a significant decision in patent law, but its impact may prove limited. While the decision increases the level of deference the Federal Circuit must apply in some cases, the Court made clear that its holding does not apply where a district court relies solely on intrinsic evidence, and district courts in fact often construe claims based on the intrinsic evidence alone. Indeed, under Federal Circuit precedent, intrinsic evidence is considered the best guide to claim construction, and resort to extrinsic evidence may be unnecessary where the intrinsic evidence provides a sufficiently clear answer.

Federal Circuit decisions since *Teva* have borne out those limits. Indeed, after *Teva*, the Federal Circuit has continued to apply *de novo* review, even if a district court made factual findings based on extrinsic evidence, where the court of appeals deemed the intrinsic record sufficiently “clear.” Ultimately, therefore, *Teva* may change the outcome only in a minority of cases.

While **Teva** increases the level of deference the Federal Circuit must apply to district courts’ claim constructions in some cases, the decision is likely to change the outcome only in a minority of appeals.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., No. 13-1371

housing discrimination — disparate impact

Inclusive Communities addressed whether disparate impact claims are cognizable under the Fair Housing Act.

Congress passed the Fair Housing Act to address residential segregation in inner cities. Among other things, the Act makes it unlawful to refuse to sell or rent housing, or to “otherwise make [housing] unavailable,” based on a person’s race. There is no dispute that the Act covers “disparate treatment” claims—that is, claims that a defendant intentionally discriminated against someone on the basis of race. But the Act does not specifically state whether it also covers “disparate impact” claims—that is, claims that a defendant’s housing practices had an unjustified discriminatory effect, even absent a discriminatory motive.

The Texas Department of Housing and Community Affairs distributes low-income housing tax credits to developers. An organization known as the Inclusive Communities Project filed a disparate impact suit under the Fair Housing Act to challenge the Department’s method of allocating tax credits. The suit alleged that the Department’s method resulted in the distribution of too many low-income housing credits for inner-city areas and too few for suburban neighborhoods, exacerbating segregated housing patterns.

After a bench trial, the district court found the Department liable. The U.S. Court of Appeals for the Fifth Circuit reversed, holding that disparate impact claims are cognizable under the Federal Housing Act but that the plaintiff had failed to prove a violation.

The Supreme Court affirmed in relevant part, holding that disparate impact claims are cognizable under the Fair Housing Act. While conceding that the statute’s text did not definitively resolve the issue, the Court noted that other antidiscrimination statutes—such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967—had previously been construed to allow such claims. The Court concluded that the Act’s reference to practices that “otherwise make [housing] unavailable” suggested a focus on the effects of housing practices, and not merely the defendant’s intent.

Inclusive Communities confirms that the Fair Housing Act allows lawsuits alleging racial discrimination without proof of discriminatory intent. Although the case was brought against a state agency, the Fair Housing Act applies to a wide range of private businesses involved in the real estate market, including private developers and real estate agencies. The decision is a potent reminder that even well-intentioned policies may give rise to liability if they produce discriminatory effects without a sufficient business justification.

While reaffirming that the Fair Housing Act encompasses disparate impact claims, the Court’s opinion was also conspicuously pragmatic. The Court took pains to emphasize the limitations on the scope of such claims. The Court stressed that plaintiffs must prove a causal relationship between the challenged practice and the discriminatory effects, and that defendants must have an opportunity to prove that a challenged practice is justified by legitimate business considerations. That language is sure to be invoked by businesses facing novel or expansive disparate impact theories.

*While reaffirming that the Fair Housing Act encompasses disparate impact claims, the Court’s opinion in **Inclusive Communities** was also conspicuously pragmatic.*

Yates v. United States, No. 13-7451

white-collar crime — evidence tampering

Yates addressed the meaning of the term “tangible object” in the Sarbanes-Oxley Act’s criminal prohibition on evidence tampering.

The Sarbanes-Oxley Act of 2002 was enacted in response to numerous high-profile business collapses and associated misconduct by outside auditors. One provision of the Act, 18 U.S.C. §1519, makes it a crime to knowingly tamper with or destroy “any record, document, or tangible object” with the intent to impede a federal investigation.

Yates involved a commercial fisherman on an expedition for grouper in the Gulf of Mexico. The defendant’s boat was boarded by a state officer who had authority to enforce federal fishing laws. Federal conservation laws required that any grouper less than 20 inches long be released. While on board, the officer found a number of fish that fell short of 20 inches, and he segregated them into crates. The officer issued a civil citation and told the defendant to keep the undersized fish in the crates. The defendant, however, ordered a crew member to toss the undersized fish overboard and replace them with larger ones.

The defendant was convicted of violating §1519. The U.S. Court of Appeals for the Eleventh Circuit affirmed, holding that the fish were “tangible objects” and thus fell within the statute’s scope.

The Supreme Court reversed, although no opinion mustered the five votes necessary for a majority. The plurality acknowledged that, based on the dictionary definition of the words, a fish is an “object” that is “tangible.” But it declined to interpret the words “tangible object” that broadly for purposes of §1519.

The plurality explained that words may have different meanings depending on the context in which they are used. Section 1519 prohibits destruction of “records,” “documents,” and other “tangible objects,” reflecting Congress’s focus on corporate and accounting deception and cover-ups. Interpreting “tangible object” to encompass fish, the plurality stated, would untether §1519 from its “financial-fraud mooring.”

Employing several canons of statutory construction and considering §1519’s caption, title, and placement within the Sarbanes-Oxley Act, the plurality held that “tangible object” covers only “objects one can use to record or preserve information, not all objects in the physical world.” The plurality bolstered its conclusion by noting that, if there were any remaining ambiguity in the text, the Court was required to resolve it in favor of lenity to the criminal defendant. Justice Alito concurred in the judgment, adopting a rationale similar to the plurality’s but without joining its reasoning in full.

While arising in the unusual context of federal conservation laws, *Yates* has significant implications for corporations and executives facing federal criminal investigations. *Yates* substantially narrows the universe of conduct for which a corporation or its officers can be criminally charged under §1519. That provision can no longer be used as a catch-all prohibition on evidence tampering, but applies only to the alteration or destruction of objects used to record or preserve information. Nonetheless, businesses facing federal investigation remain subject to a host of other prohibitions on obstruction of justice and—needless to say—would be well advised not to destroy potential evidence of any sort once on notice of a government investigation.

Yates significantly narrows the universe of conduct that can be charged as evidence tampering under the Sarbanes-Oxley Act.

Young v. United Parcel Service, Inc., No. 12-1226

employment — pregnancy discrimination

Young addressed the legal framework for proving a claim for pregnancy discrimination under Title VII of the Civil Rights Act of 1964.

The Pregnancy Discrimination Act amended Title VII to clarify that Title VII’s prohibition against sex discrimination applies to discrimination based on pregnancy. Among other things, it amended the statute to provide that “women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”

The plaintiff, Peggy Young, was a driver for UPS. Her job required her to lift heavy packages. When she became pregnant, Young’s doctor told her she could not lift more than 20 (later 10) pounds. Unable to continue working as a driver, Young asked to be temporarily assigned to a “light duty” position that would not require heavy lifting. UPS told Young she did not qualify for an accommodation. As a result, Young stayed home without pay during her pregnancy.

Young sued UPS under Title VII. She argued that UPS had violated the provision requiring pregnant women to be “treated the same” as other similarly situated employees because it had denied her an alternative assignment while affording accommodations to three other groups of employees who also could not continue to work as drivers: those who suffered on-the-job injuries, those with permanent disabilities under the Americans with Disabilities Act, and those who lost their Department of Transportation certifications.

The district court granted summary judgment for UPS, and the U.S. Court of Appeals for the Fourth Circuit affirmed. The Fourth Circuit held that Young was not similarly situated to the three groups of employees she had identified. Instead, the court concluded that Young was more like employees whose lifting limitations arose from off-the-job injuries, who were not eligible for accommodation under UPS’s policies.

The Supreme Court vacated and remanded. The Court adopted a burden-shifting approach for pregnancy discrimination claims similar to the one used in other employment discrimination contexts. A pregnant employee, it held, must make an initial showing that she was denied an accommodation afforded to others “similar in their ability or inability to work,” even if not similar in all respects. If the employee makes that showing, the employer must provide a legitimate, nondiscriminatory reason—other than mere cost or inconvenience—for denying the accommodation. The worker may then attempt to show that the explanation is pretextual and that the employer intentionally discriminated against her because of her pregnancy. The fact that an employer accommodates many other employees with similar limitations, for example, may suggest that its reasons for not accommodating pregnant workers are pretextual.

Young makes it easier for employees to press pregnancy discrimination claims under Title VII. An employee can take her case to a jury by showing that her employer does not have a good enough reason for denying her an accommodation offered to other employees who are similarly unable to perform certain duties, even if she is not comparable to those other employees in all respects. After *Young*, businesses would be well advised to offer pregnant workers the same accommodations they offer to any large group of employees who are similarly limited in their ability to work.

After Young, businesses would be well advised to offer pregnant workers the same accommodations they offer to any large group of employees who are similarly limited in their ability to work.

CONTACT US



We believe complex litigation—at every stage—is best handled through a collaborative effort undertaken by the firm and the client.

Whether mapping out a discovery plan, developing an investigation strategy, preparing for trial, or analyzing issues for an appeal, the emphasis is on teamwork and communication.

The value proposition we offer is simple:

First, we listen. Rather than begin by telling clients the answer, we take time to understand the problem. Then we develop a strategy all agree will be the most likely to bring about a successful result.

Second, we bring experienced judgment to every level of the representation. Our team consists exclusively of people who can contribute meaningfully from the start. We do not have a summer associate program or generally look to hire recent law school graduates.

Third, we are focused on the value our representation brings to clients and results. And we structure fee arrangements that reward them.

Fourth, we are committed to using technology and alternative staffing structures that allow us to draw on needed subject matter expertise on a case-by-case basis and allow us to focus on what we do best—develop and execute on winning strategies as advocates.

If you believe we might be of assistance with a complex litigation matter, please contact:

Steven Molo	212.607.8170	smolo@mololamken.com
Jeffrey Lamken	202.556.2010	jlamken@mololamken.com



“All-Star litigation shop.”

—LAW360

NEW YORK
540 Madison Avenue
New York, NY 10022
T: 212.607.8160
F: 212.607.8161

WASHINGTON, D.C.
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
T: 202.556.2000
F: 202.556.2001

CHICAGO
300 North LaSalle Street
Chicago, IL 60654
T: 312.450.6700
F: 312.450.6701

www.mololamken.com

