Supreme Court Business Briefing

July 2011

www.mololamken.com

MOLOLAMKEN
SUPREME COURT BUSINESS BRIEFING

The Supreme Court's 2010 Term produced many decisions important to businesses in the United States and abroad. Contrary to the popular view that today's Court has a "pro-business" bent, the Court often ruled in favor of plaintiffs and against the businesses they were suing. For example, the Court issued several rulings expanding businesses' potential liability for securities fraud when they make public statements to their investors. Its rulings also expanded workers' rights against their employers under antidiscrimination and hour-and-wage statutes. Given those decisions—which address subject matters that cut across practically the entire U.S. economy—it is all the more important for businesses and the corporate counsel who represent them to stay current on the Supreme Court's docket.

Business executives and in-house counsel, however, rarely have time to wade through the Supreme Court's ever-more-sprawling opinions. With that in mind, we present the MoloLamken Supreme Court Business Briefing. This document identifies the cases that, in the view of our experienced litigators, have the greatest potential impact on a wide range of businesses. For each, we summarize the issue presented, what the Court decided, and why the decision matters for businesses. Our goal is to put potentially relevant issues on your radar screen, while keeping the discussion concise enough to be read between meetings. Of course, our firm is available to discuss any of the issues raised by these cases in more detail—particularly if your company is involved in, or a potential party to, litigation.

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 judges, juries, 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 with serious matters.

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

CONTENTS

Page

» *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (June 20, 2011)
(class actions — certification requirements) 4

» *AT&T Mobility LLC v. Concepcion*, No. 09-893 (April 27, 2011)
(class actions — arbitration) 5

» *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403 (June 6, 2011)
(class actions — loss causation and class certification) 6

» *Smith v. Bayer Corp.*, No. 09-1205 (June 16, 2011)
(class actions – federal injunctions against state-court actions) 7

» *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525 (June 13, 2011)
(securities fraud — who “makes” an untrue statement) 8

» *Matrixx Initiatives, Inc. v. Siracusano*, No. 09-1156 (March 22, 2011)
(securities fraud — materiality) 9

» *Microsoft Corp. v. i4i Limited Partnership*, No. 10-290 (June 9, 2011)
(patents — standard for invalidity) 10

» *Goodyear Dunlop Tires Operations, S.A. v. Brown*, No. 10-76, and
J. McIntyre Machinery, Ltd. v. Nicastro, No. 09-1343 (June 27, 2011)
(foreign companies — general and specific jurisdiction in state courts) 11

» *American Electric Power Co. v. Connecticut*, No. 10-174 (June 20, 2011)
(environment — displacement of federal common law) 12

» *Chamber of Commerce of the United States v. Whiting*, No. 09-115 (May 26, 2011)
(employment — immigration status) 13

» *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09–834 (March 22, 2011)
(Fair Labor Standards Act — scope of anti-retaliation provision) 14

» *Staub v. Proctor Hospital*, No. 09-400 (March 1, 2011)
(employment discrimination — causation) 15

Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (June 20, 2011)

class actions — certification requirements

Wal-Mart addressed the standards for certifying a class under Federal Rules of Civil Procedure 23(a) and 23(b)(2).

Under Rule 23(a), a case can be certified as a class action only when it involves "questions of law or fact common to the class." Rule 23(b) imposes additional requirements (including a requirement that common issues "predominate" as well as notice and opt-out procedures), depending on whether a class seeks damages or just declaratory or injunctive relief.

The plaintiffs in this case alleged that Wal-Mart had engaged in gender discrimination by delegating subjective authority to local supervisors, some of whom exercised that authority in a discriminatory manner. They sought certification of a class of all current and former female employees who had been employed by Wal-Mart at any time since December 26, 1998. They argued that the case involved sufficiently common questions to qualify as a class action under Rule 23(a) because Wal-Mart's centralized policies and corporate culture were responsible for subjective and discriminatory local decisions. They also contended that, even though they sought back pay, their case should not be treated as a damages class action for purposes of Rule 23(b) because that was not the primary relief they sought. The district court allowed the case to proceed as a class action, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court reversed. The Court first held that class certification was improper under Rule 23(a) because the case did not involve sufficiently common issues. Although some lower courts had treated the common-issues requirement as relatively undemanding—requiring proof only of one or more common issues—the Court held that commonality requires the plaintiff to demonstrate that class members have all suffered the same injury. Applying that requirement, the Court held that the plaintiffs had not presented sufficient evidence that Wal-Mart had any centralized policy of discrimination that would cause class members to suffer the same injury. As a result, even if Wal-Mart's delegation of authority produced some disparities in pay or promotions, class action treatment was inappropriate.

The Court also held that class certification was improper under Rule 23(b). Because the plaintiffs sought back pay, the Court concluded, the case could not be certified under the rule applicable to claims for declaratory and injunctive relief. The Court left open the possibility that monetary claims could proceed under that rule when they were truly "incidental" to declaratory or injunctive relief, but held that that was not the case here.

Wal-Mart has enormous implications for national corporations facing class-action claims, particularly discrimination claims. Large corporations routinely delegate authority to local managers while relying on centralized policies and corporate culture to guide their decisions. The Court's ruling on commonality will preclude those routine but individual decisions from being used as a basis for class certification. The Court's Rule 23(b) ruling is also likely to discourage class actions by preventing plaintiffs from avoiding the rule's restrictions on damages claims.

Large corporations routinely delegate authority to local managers while relying on centralized policies and corporate culture to guide their decisions. The Court's ruling on commonality will preclude those routine but individual decisions from being used as a basis for class certification.

AT&T Mobility LLC v. Concepcion, No. 09-893 (April 27, 2011)

class actions — arbitration

Concepcion addressed whether companies can require consumers or other contracting parties to arbitrate disputes that arise out of a contract while prohibiting class actions in arbitration.

The plaintiffs in this case had signed up for cell phone service based on an offer of free cell phones. Although the plaintiffs did not pay for the phones, they were billed for sales tax based on the phones' retail value. The plaintiffs brought a class action in federal court, alleging that the "free phone" offer was fraudulent and deceptive.

The service contract the plaintiffs had signed required them to submit any disputes to arbitration and prohibited class actions. The company accordingly moved to compel arbitration. The plaintiffs opposed, claiming that the arbitration agreement was unenforceable because, under California law, arbitration agreements that prohibit parties from bringing claims for class-wide relief are unconscionable and unenforceable. The company responded that this California-law doctrine was preempted by the Federal Arbitration Act (FAA), which requires courts to enforce arbitration agreements except on "such grounds as exist at law or in equity for the revocation of any contract." The district court rejected that argument and allowed the class action to proceed. The U.S. Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court reversed. It held that the FAA preempts California's unconscionability doctrine because that state law stood as an obstacle to accomplishment of the FAA's objectives. Those objectives, the Court noted, strongly favor arbitration according to a contract's terms. The Court recognized that the FAA allows arbitration agreements to be invalidated based on generally applicable contract defenses. But it held that California's unconscionability doctrine would go too far to prevent parties from entering into enforceable contracts that provide for a specific type of arbitration. As a result, the Court held that the agreement the plaintiffs signed should be enforced according to its terms.

Concepcion is an important decision for any company that regularly contracts with consumers or other individuals who may seek to file a class action. Companies generally prefer arbitration to litigation in court because the absence of discovery and jury trials means that disputes are likely to be resolved less expensively and with a greater degree of predictability. *Concepcion* adds another important benefit to arbitration agreements by providing companies with a potent means of contracting away the specter of class-action liability.

More broadly, *Concepcion* strengthens the principle that arbitration agreements should be enforced according to their terms—even in the context of consumer contracts where the counterparty has little or no practical ability to negotiate the terms. The Court construed the FAA broadly, finding that it preempted California law even though the state law did not expressly discriminate against arbitration. That holding will doubtless discourage challenges to arbitration clauses in many contexts.

***Concepcion** adds another important benefit to arbitration agreements by providing companies with a potent means of contracting away the specter of class-action liability.*

 © 2011 MoloLamken LLP

Erica P. John Fund, Inc. v. Halliburton Co., No. 09-1403 (June 6, 2011)

class actions — loss causation and class certification

Halliburton addressed whether plaintiffs in a securities fraud suit must prove "loss causation" to have their case certified as a class action.

To prove loss causation, a plaintiff must show it lost money because of the defendant's material misrepresentations or omissions and not because of other factors such as overall stock market fluctuations. Although all courts require a plaintiff to show loss causation to prevail on the merits, the U.S. Court of Appeals for the Fifth Circuit also purported to require plaintiffs to make that showing to have their case certified as a class action.

The plaintiffs in this case alleged that Halliburton had made misrepresentations to the public affecting its stock price. They could not show that those representations had moved the stock price when made. And they could not show that their stock holdings went down in value when the alleged misrepresentations were corrected because of the correction as opposed to other factors. The district court therefore refused to allow the case to proceed as a class action, and the Fifth Circuit affirmed.

The Supreme Court reversed, holding that a district court can certify a securities fraud suit as a class action without considering plaintiffs' proof of loss causation. Whether class-action treatment is appropriate, the Court noted, depends on whether common issues predominate. Where a company's stock does not trade on a public market, for example, plaintiffs' right to recover may depend on individualized proof of whether they relied on the misstatements, making class treatment inappropriate. By contrast, where a company's stock trades on an efficient public market, class treatment is more likely appropriate because investors are presumed to rely on the integrity of the market price—a presumption known as the "fraud on the market" theory.

In this case, the Supreme Court held that plaintiffs need not prove loss causation to invoke the fraud-on-the-market theory and obtain class certification. Although plaintiffs must ultimately prove loss causation to prevail, the Court explained, such proof is not relevant at the class certification stage, where the focus is only on whether common issues predominate.

Halliburton is an important decision for all public corporations. Although the Court reaffirmed that securities fraud plaintiffs must prove loss causation to recover, its holding that no such showing is necessary at the class certification stage eliminates one means companies formerly had in the Fifth Circuit to end such suits at an early stage. And once a case has been certified as a class action, the stakes increase dramatically.

Halliburton, however, may pave the way for additional defenses to class certification. The Court specifically held open the possibility that class certification should be denied when the plaintiffs cannot establish, at the certification stage, that the misrepresentations had an impact on market price. Indeed, the Court acknowledged Halliburton's argument that if a misrepresentation does not affect market price, an investor could not have relied on the misrepresentation simply by purchasing stock at that price. The Court agreed with Halliburton that it should be allowed to pursue those arguments on remand. Defenses formerly cast in terms of loss causation may therefore still be viable so long as they are properly phrased in terms that relate to the class-certification requirements.

(Disclaimer: MoloLamken represented Halliburton in this case)

Although the Court reaffirmed that securities fraud plaintiffs must prove loss causation to recover, its holding that no such showing is necessary at the class certification stage eliminates one means companies formerly had in the Fifth Circuit to end such suits at an early stage.

Smith v. Bayer Corp., No. 09-1205 (June 16, 2011)

class actions – federal injunctions against state-court actions

Bayer addressed whether a federal court may issue an injunction prohibiting parties from pursuing a class action in state court on the ground that the federal court had previously found class treatment inappropriate.

The federal Anti-Injunction Act generally bars federal courts from enjoining state-court proceedings. The Act, however, contains a "relitigation exception" that allows a federal court to enjoin state-court proceedings where necessary to prevent parties from relitigating disputes they previously resolved in federal court.

This case stemmed from two suits filed by two different plaintiffs in West Virginia state court against Bayer Corporation. Both sought damages for Bayer's sale of an allegedly hazardous prescription drug called Baycol, and both sought certification as class actions. Bayer removed one of the suits to federal court, and that court ruled that the case should not be certified as a class action. The second state-court lawsuit could not be removed to federal court because there was no diversity of citizenship. At Bayer's request, however, the federal court issued an injunction prohibiting the state court from certifying that case as a class action. The U.S. Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court reversed, holding that the case did not fall within the Anti-Injunction Act's relitigation exception. That exception, the Court explained, applies only where the state proceeding involves both the same issue and the same party as the federal decision. Neither condition was met here.

Different issues were involved, the Court held, because state and federal law imposed somewhat different standards for class certification. And different parties were involved because the named plaintiffs in the two suits were different. Although both suits sought to be certified as class actions covering the same class of consumers, the Court held that that was not enough to establish identity of parties. Although unnamed class members may be bound by the results in a class action, the Court explained, that rule does not apply where a class has not been certified—and certainly not where class certification has been denied. In such cases, unnamed members of the proposed class remain free to seek class certification in separate actions.

Bayer's holding that federal courts may not enjoin state-court class actions, even when they have previously refused to certify similar suits, will make it more difficult for companies to manage the risks of class action litigation. The Supreme Court's decision may invite serial relitigation of class certification decisions because a denial of certification will not bind future plaintiffs seeking to represent the same class.

The Supreme Court's decision may invite serial relitigation of class certification decisions because a denial of certification will not bind future plaintiffs seeking to represent the same class.

Janus Capital Group, Inc. v. First Derivative Traders, No. 09-525 (June 13, 2011)

securities fraud — who "makes" an untrue statement

Janus concerns whether Securities and Exchange Commission Rule 10b-5, which prohibits "*mak[ing]* any untrue statement of material fact" in connection with the purchase or sale of securities, permits a private cause of action against individuals or entities that assist in preparing another party's allegedly false statement.

First Derivative Traders sued Janus Capital Group (JCG) and its wholly-owned subsidiary, Janus Capital Management LLC (JCM), under Rule 10b-5 for allegedly "caus[ing]" false statements to be made in mutual fund prospectuses that were filed by a third entity, Janus Investment Fund. Although JCM was the investment adviser and administrator of Janus Investment Fund, both JCM and JCG are separate legal entities from Janus Investment Fund, which is owned entirely by investors. The district court dismissed the complaint on the grounds that there was no allegation JCM or JCG, as opposed to Janus Investment Fund, "actually made" the misleading statements. The U.S. Court of Appeals for the Fourth Circuit reversed. It held that First Derivative Traders' allegations that JCG and JCM "participated in the writing and dissemination of the prospectuses" satisfied Rule 10b-5's requirement that defendants have "made" the false statements.

The Supreme Court reversed, holding that only a party "with ultimate authority over the statement including its content and whether and how to communicate it" can be said to have "made" the statement within the meaning of Rule 10b-5. In construing the term "make," the Court analogized the making of a statement to the making of a speech: It is common understanding that *even if* a speechwriter prepares the speech, it is the *speaker* who "makes" it. "Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit – or blame – for what is ultimately said." Thus, the Court concluded that the allegation that JCG and JCM were "significantly involved in preparing" the prospectuses was insufficient to impose liability on them.

The Court rejected the government's argument that the word "make" should be defined as "create," and that primary liability should extend to parties who play a significant role in the creation of false statements. The majority explained that, among other things, adopting such a broad interpretation of who may be charged with having "made" the false statement would undermine Court precedent holding that there is no private cause of action for aiding and abetting another's false statements under Rule 10b-5.

The Court's decision is significant in that it further limits the availability of private suits under Rule 10b-5 against parties—such as accountants, lawyers, and bankers—that assist in preparing prospectuses and other communications to investors but are not ultimately attributed with the statements contained in those documents. The Securities and Exchange Commission, however, retains authority to bring enforcement actions against a broader range of parties, including those who provide "substantial assistance" to another's making of the false statement.

The Court's decision is significant in that it further limits the availability of private suits under Rule 10b-5 against parties—such as accountants, lawyers, and bankers—that assist in preparing prospectuses and other communications to investors.

Matrixx Initiatives, Inc. v. Siracusano, No. 09-1156 (March 22, 2011)

securities fraud — materiality

Matrixx addressed whether pharmaceutical companies may be held liable for securities fraud when they fail to disclose reports of adverse reactions to their products, even though the number of reports is too small to be statistically significant.

The plaintiffs brought a class action against Matrixx Initiatives, Inc., the manufacturer of Zicam Cold Remedy, a zinc-based nasal spray or gel. Plaintiffs claimed that Matrixx committed securities fraud by making optimistic statements to investors about Zicam's financial prospects while failing to disclose that a small number of users had lost their sense of smell after using the product.

To prevail on a securities fraud claim, a plaintiff generally must show that the defendant made an untrue statement of a "material" fact or omitted to state a "material" fact necessary to make its other statements not misleading. The district court dismissed this suit, concluding that Matrixx's failure to mention the adverse reports was immaterial as a matter of law because the number of consumers who had lost their sense of smell was not statistically significant. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the absence of statistical significance did not preclude a finding of materiality.

The Supreme Court affirmed. In prior cases, the Court had held that an omission is material when there is a substantial likelihood that the disclosure would have been viewed by a reasonable investor as having significantly altered the "total mix" of information available. The Court recognized that this bar must not be set too low, lest management bury shareholders in insignificant information. The Court held, however, that materiality is an inherently fact-specific finding not susceptible to bright-line rules such as a statistical-significance test.

Such a test, the Court held, would artificially exclude relevant information because statistical significance is not the only reliable indicator of whether a product is causing adverse reactions. Here, for example, plaintiffs had alleged that Matrixx knew of published studies conducted decades earlier in which another zinc-based product had led to loss of smell. That evidence, even though not statistical in nature, was relevant to the materiality inquiry. The Court noted that scientists and regulators routinely act on the basis of information about a drug's potential dangers, even in the absence of statistically significant data. Reasonable investors, it stood to reason, could deem such evidence material as well.

The Supreme Court's ruling expands the potential liability of pharmaceutical companies for failure to disclose reports of adverse reactions. Such reports are a routine fixture in the pharmaceutical industry, even though many adverse reactions ultimately prove unrelated to a company's product. The Court's totality-of-the-circumstances approach provides little guidance to companies about when they must disclose such reports. It makes outcomes harder to predict when a company winds up in litigation, and makes it harder to win dismissal of a suit in the early stages of litigation. Companies in other industries should also expect courts to show little receptivity toward bright-line tests for materiality in other contexts.

*After **Matrixx**, companies should expect courts to show little receptivity toward bright-line tests for materiality.*

Microsoft Corp. v. i4i Limited Partnership, No. 10-290 (June 9, 2011)

patents — standard for invalidity

i4i addressed the standard of proof a challenger must meet when attempting to invalidate a patent in court.

i4i, a small Canadian software company, sued Microsoft, claiming that Microsoft Word infringed an i4i patent. In defense, Microsoft argued that i4i's patent was invalid because i4i had sold software that incorporated its claimed invention more than a year before applying for its patent—software that i4i had not presented to the Patent and Trademark Office (PTO) when applying for the patent. i4i insisted that this earlier software did not, in fact, incorporate its invention. Because no copies of the source code remained, it was unclear who was right, and the issue was submitted to the jury.

Microsoft requested a jury instruction that, because the PTO had not considered i4i's earlier software when it issued the patent, Microsoft had to prove the patent's invalidity only by a "preponderance of the evidence"—*i.e.,* that it was "more likely than not" invalid. i4i, by contrast, asked that the jury be instructed that Microsoft had to prove invalidity by a more demanding "clear and convincing evidence" standard. The district court agreed with i4i. The jury found that Microsoft had not met that more demanding standard and awarded substantial damages for infringement. Microsoft appealed, but the U.S. Court of Appeals for the Federal Circuit affirmed, adhering to its long-standing precedent requiring the "clear and convincing evidence" standard.

The Supreme Court also affirmed. A defendant challenging a patent's validity, the Court held, must prove that the patent is invalid by clear and convincing evidence, even where the PTO did not consider the evidence of invalidity when issuing the patent. The Court acknowledged that the governing patent statute does not explicitly set forth any standard of proof. But it found that Congress had used terms that had acquired a settled meaning under the Court's own prior decisions, which imposed a rigorous standard of proof on those challenging a patent as invalid.

In *i4i*, the Supreme Court essentially maintained the status quo in patent litigation. The Federal Circuit had long applied the "clear and convincing evidence" standard. Although some had predicted a sea change in patent law when the Supreme Court granted review, no such change occurred.

The Court did clarify, however, that the fact that the evidence of invalidity was not before the PTO is not wholly irrelevant. Instead, the Court indicated, a defendant with new evidence of invalidity may be entitled to a jury instruction that the new evidence can carry greater weight in proving invalidity by clear and convincing evidence because it was not considered by the PTO. As a practical matter, it remains to be seen whether there is much difference between a jury instruction explicitly lowering the burden of proof and a jury instruction that the same burden of proof may be more easily satisfied. Patent challengers wishing to avoid the clear and convincing standard, moreover, can do so by seeking *inter partes* reexamination before the PTO, where the lower preponderance standard applies.

*In **i4i**, the Supreme Court essentially maintained the status quo in patent litigation. The Federal Circuit had long applied the "clear and convincing evidence" standard. Although some had predicted a sea change in patent law when the Supreme Court granted review, no such change occurred.*

Goodyear Dunlop Tires Operations, S.A. v. Brown, No. 10-76, and *J. McIntyre Machinery, Ltd. v. Nicastro*, No. 09-1343 (June 27, 2011)

foreign companies — general and specific jurisdiction in state courts

These cases addressed the scope of personal jurisdiction over foreign companies.

Goodyear concerned whether foreign subsidiaries of a U.S. parent corporation are subject to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State. In that case, a bus accident in France killed two children from North Carolina. The plaintiffs sued Goodyear USA and three of its foreign indirect subsidiaries in North Carolina state court, alleging that a defective Goodyear bus tire caused the crash. None of the subsidiaries was registered to do business in North Carolina; designed, manufactured, or advertised their products there; solicited business there; or shipped tires there. And although thousands of their tires were distributed in North Carolina by Goodyear USA affiliates, the type of tire involved in the accident was not. The parent corporation did not contest personal jurisdiction, but the subsidiaries did.

Justice Ginsburg for a unanimous Court held that the foreign subsidiaries were not amenable to suit in North Carolina. The Court only addressed "general jurisdiction"—the ability of a court to exercise jurisdiction over an entity because that entity has continuous and systematic contacts in that forum, even though the particular controversy is not connected to that forum. The Court held that the defendants' contacts with the forum State were insufficient to demonstrate the required continuous and systematic general business contacts with the State. In doing so, the Court rejected the plaintiffs' argument under the "stream of commerce" theory—that, because the defendants placed their tires in the stream of commerce and some of their tires ended up in North Carolina, the courts of that State could exercise general jurisdiction. The Court stated that the stream-of-commerce theory was relevant to specific jurisdiction—the ability of a court to exercise personal jurisdiction over an entity because of a connection between the forum and the controversy—but not general jurisdiction.

McIntyre concerned whether a party is subject to the specific jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury. In that case, the plaintiff filed a products-liability suit in New Jersey against an English manufacturer of a metal-shearing machine. The company did not market its goods to that State or ship them there. But the company had used a distributor to sell its machines in the United States. Company officials also traveled to the United States—but not New Jersey—to advertise its machines. And some of the machines ended up in New Jersey, including the one that injured the plaintiff. As in *Goodyear*, the plaintiff relied on the stream-of-commerce theory to establish personal jurisdiction. But because the plaintiff was injured in that State, he focused on specific rather than general jurisdiction.

Writing for a plurality of the Court—there was no majority opinion—Justice Kennedy rejected the plaintiff's stream-of-commerce theory. The plurality concluded that, even though the defendant directed marketing and sales efforts at the United States generally, it did not focus on New Jersey specifically. The company therefore did not intend to invoke or benefit from the protection of New Jersey laws and could not, consistent with due process, be subject to personal jurisdiction there. Two Justices concurred in judgment. They concluded that a defendant does not automatically subject itself to a State's courts simply because a plaintiff was injured in that forum. Absent any state-related design, advertising, advice, or marketing in that State, a defendant does not purposely avail itself of the privilege of conducting business in the State and cannot expect that its goods would be purchased by state residents.

Goodyear and *McIntyre* both demonstrate that a company does not subject itself to general or specific jurisdiction merely by putting its products in a national stream of commerce that might result in sales in a particular State. Rather, the company must do something more to purposely avail itself of the benefits and protections of a particular State that would subject it to specific jurisdiction. Because *McIntyre* is a plurality opinion, there is still substantial uncertainty about when a company will be subject to specific jurisdiction based on sales in a particular State. At some point, if enough products end up in the State where a plaintiff alleges injury, a court might conclude that the company has purposely availed itself of the State's benefits and protections.

***Goodyear** and **McIntyre** both demonstrate that a company does not subject itself to general or specific jurisdiction merely by putting its products in a national stream of commerce that might result in sales in a particular State.*

American Electric Power Co. v. Connecticut, No. 10-174 (June 20, 2011)

environment — displacement of federal common law

In *American Electric Power*, the Supreme Court addressed whether federal common law provides a cause of action against greenhouse gas emitters for their contribution to global warming.

Several States, New York City, and various land trusts sued five major power companies in federal district court, alleging that their power plants' carbon dioxide emissions contributed to global warming, which in turn threatened public health and lands owned by the plaintiffs. The plaintiffs asked the district court to set a cap on the defendants' annual carbon dioxide emissions, but the district court dismissed the case.

The U.S. Court of Appeals for the Second Circuit reversed, holding that the plaintiffs had stated a claim under the federal common law of nuisance. The court of appeals rejected the defendants' argument that the Clean Air Act, which authorizes the Environmental Protection Agency (EPA) to regulate greenhouse gas emissions, displaced that right of action. Until EPA actually issues a rule regulating greenhouse gases, the Second Circuit concluded, the Clean Air Act does not speak directly to the issue, leaving the federal common law right of action intact.

The Supreme Court reversed. It held that the Clean Air Act bars federal common law actions to limit greenhouse gas emissions. Although federal courts may sometimes fashion federal common law where Congress has not spoken, they may not do so if Congress enacts a statute speaking directly to an issue. Congress did so here, the Court held, because the Clean Air Act authorized EPA to regulate greenhouse gas emissions, including emissions from the defendants' power plants. It was irrelevant that EPA had not yet issued any rule limiting those greenhouse gas emissions. What mattered was that Congress had given EPA the *power* to set such limits, thereby taking away whatever power the federal courts may have had to do so.

American Electric Power requires that federal limits on greenhouse gas emissions be set by EPA through its rulemaking process, rather than imposed by courts on a case-by-case basis. The same should hold true in other contexts too: If Congress has given EPA authority to issue environmental regulations, courts cannot impose their own restrictions as a matter of federal common law, even if EPA has not yet exercised its power. For the time being, that means some businesses—like the power plants here—avoid federal limits on their greenhouse gas emissions.

American Electric Power leaves open, however, the possibility that *state* nuisance law may allow courts to limit greenhouse gas emissions, despite EPA's power to do so under the Clean Air Act. The Supreme Court expressly left that question for the Second Circuit to address on remand. The Court noted, though, that it had previously held that the Clean Water Act does not preempt similar suits. If state greenhouse gas nuisance actions are ultimately allowed, *American Electric Power* may have little practical effect. Carbon dioxide emitters like the power plants here could still find themselves subject to court-imposed limits. Indeed, depending on the scope of state nuisance law, businesses may even be held liable for damages traceable to their greenhouse gas emissions.

American Electric Power *requires that federal limits on greenhouse gas emissions be set by EPA through its rulemaking process, rather than imposed by courts on a case-by-case basis.*

Chamber of Commerce of the United States v. Whiting, No. 09-115 (May 26, 2011)

employment — immigration status

The question in *Whiting* was whether the Immigration Reform and Control Act (IRCA) preempts state laws that punish businesses that employ illegal aliens by revoking their business licenses (including articles of incorporation), effectively precluding them from conducting business in the State.

The State of Arizona had enacted a statute that allows state courts to suspend or revoke licenses necessary to do business in the State if an employer knowingly or intentionally employs an illegal alien. The statute defined "license" broadly to include not only typical occupational licenses but also such things as a company's general business license, articles of incorporation, or certificate of partnership.

The Chamber of Commerce and other business and civil rights groups sued to prevent Arizona from enforcing the law. They claimed that the state law was preempted by the federal immigration laws, specifically IRCA. IRCA expressly preempts state and local laws that impose civil or criminal sanctions on businesses that employ illegal aliens, but it contains an exception for "licensing and similar laws." Although Arizona's statute was nominally a licensing law, the plaintiffs contended that it went beyond what Congress had intended to allow and was inconsistent with the federal government's authority over immigration. The district court rejected that argument and upheld the state statute, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court also affirmed, upholding the law. Arizona's law, the Court held, fell squarely within the federal statute's exemption for "licensing and similar laws" and did not otherwise intrude on federal authority over immigration. A statute providing for the revocation of business licenses, the Court reasoned, was no less a "licensing law" than one providing for the granting of such licenses. The Arizona law was thus precisely the type of provision Congress meant to preserve.

In a portion of the opinion joined only by a plurality of the Court, four Justices reasoned that the Arizona law did not conflict with federal law, and so was not impliedly preempted, because it closely tracked IRCA's provisions. Among other things, the Arizona statute relied exclusively on the federal government's determination whether a person is an unauthorized alien, prohibited only knowing or intentional employment of illegal aliens, and established a presumption of compliance when an employer uses "E-Verify," an electronic verification system set up by the federal government. That analysis, however, leaves open whether state statutes may be preempted if they go beyond the requirements imposed by federal law. Justice Thomas did not join that portion of the plurality opinion, joining only the judgment.

The Court also upheld Arizona's requirement that employers use the E-Verify system to determine workers' employment eligibility. Although federal law forbids the Secretary of Homeland Security from making E-Verify mandatory, it says nothing about States requiring use of the system. Arizona's E-Verify requirement also did not conflict with federal law because, despite its mandatory nature, the only consequence of an employer's failure to use the system was the same as under federal law: loss of a presumption that the employer complied with the law. The Court left open, however, whether a State could lawfully impose consequences beyond those imposed by federal law.

The Court's decision has broad ramifications for employers in many States. As the Court observed, a number of States have enacted statutes similar to Arizona's. The Court's opinion indicates that those other statutes are also likely to be upheld so long as they can reasonably be classified as licensing laws. Although employment of illegal aliens is prohibited under federal law, state statutes like Arizona's can have drastic repercussions: Revocation of a company's articles of incorporation or general business license effectively prevents it from doing business in the State—a sanction the law's opponents had referred to as the "business death penalty."

*Although employment of illegal aliens is prohibited by federal law, **Whiting** confirms that States retain the power to impose certain additional, drastic penalties on businesses, including revocation of a company's articles of incorporation or general business license.*

Kasten v. Saint-Gobain Performance Plastics Corp., No. 09–834 (March 22, 2011)

Fair Labor Standards Act — scope of anti-retaliation provision

Kasten addressed whether the anti-retaliation provision of the Fair Labor Standards Act of 1938 (FLSA) protects individuals who make oral complaints about a company's practices or only those who make written complaints.

The FLSA sets forth rules concerning minimum wages, maximum hours, and overtime pay. It also prohibits an employer from retaliating against an employee "because such employee *has filed any complaint*" under or related to the FLSA.

Kevin Kasten complained to his supervisors at Saint-Gobain that the company's placement of time clocks violated the FLSA because it resulted in employees not being compensated for time spent donning protective gear. Kasten made those complaints orally, but otherwise complied with Saint-Gobain's internal grievance-resolution process. After Kasten was fired, he sued under the FLSA's anti-retaliation provision. The district court entered summary judgment for Saint-Gobain on the grounds that, while Kasten had made verbal complaints, he had not "filed any complaint" within the meaning of the FLSA's anti-retaliation provision. The U.S. Court of Appeals for the Seventh Circuit affirmed.

The Supreme Court reversed, holding that an oral complaint is protected conduct under the FLSA's anti-retaliation provision. After consulting a wide range of sources, the Court found the statutory text inconclusive as to whether the phrase "filed any complaint" includes oral complaints. The Court acknowledged that "filed" often connotes written submissions, but found that "any complaint" suggests great breadth; thus, the phrase in isolation is open to competing interpretations.

The Court therefore turned to the purpose and context of the FLSA's anti-retaliation provision. It found that the FLSA's role in protecting workers who may have difficulty reducing their complaints to writing, the need for administrative flexibility in receiving complaints (via hotlines, interviews, etc.), and a company's desire to have informal as well as formal grievance procedures, all supported the conclusion that the FLSA protects persons who have made oral complaints against retaliation. The Court further noted that its interpretation is consistent with the position taken by the EEOC, which administers the FLSA. Importantly, however, the Court imposed a limitation on its holding: A complaint—verbal or otherwise—is "filed" with an employer only where a reasonable, objective person would have understood the employee to be putting the employer on notice that he is asserting his rights under the FLSA.

The majority expressly reserved the question whether the FLSA's anti-retaliation provision requires that the complaint be made to the *government* rather than merely to one's employer. Two dissenting Justices—Justices Scalia and Thomas—opined that the FLSA does not cover internal complaints to employers at all.

The Court found that the FLSA's role in protecting workers who may have difficulty reducing their complaints to writing, the need for administrative flexibility in receiving complaints, and a company's desire to have informal as well as formal grievance procedures, all supported the conclusion that the FLSA protects persons who have made oral complaints against retaliation.

Staub v. Proctor Hospital, No. 09-400 (March 1, 2011)

employment discrimination — causation

Staub concerned the circumstances in which an employer may be held liable for discrimination based on the bias of a supervisor who influenced—but did not make—the ultimate employment decision.

The plaintiff in this case, a member of the Army Reserve, worked as a technician in a hospital. Two of his supervisors were allegedly hostile to his Reserve obligations and issued a disciplinary warning and complaint that were allegedly motivated by that hostility. Eventually, the hospital's vice president of human resources fired the plaintiff based on his supervisors' actions, although there was no evidence that the vice president himself harbored any anti-military bias.

The plaintiff sued the hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which prohibits discriminatory employment actions based on a service member's military obligations. He acknowledged that the vice president bore no hostility to his military service, but contended that the other supervisors did, and that those supervisors' actions influenced the vice president's ultimate decision. The jury agreed. But the U.S. Court of Appeals for the Seventh Circuit reversed. The court of appeals noted that the plaintiff had brought what is known as a "cat's paw" claim—a claim that the plaintiff suffered an adverse employment action at the hands of someone acting under the influence of another individual's bias. The court of appeals held that the hospital could not be held liable for such a claim unless the individual who ultimately made the firing decision was "wholly dependent" on the biased individual's advice—the proverbial "cat's paw."

The Supreme Court reversed. Consulting general principles of agency law, the Court concluded that, if a supervisor motivated by animus performs an act that is *intended* to cause an adverse employment action, and if that act in fact *proximately causes* the employer's ultimate employment action, then the employer may be held liable. That principle was sufficient to support the jury's verdict in this case, the Court explained, because the jury could have found that the biased supervisors' actions in issuing the disciplinary warning and lodging the complaint were intended to, and did, cause the vice president's decision to fire the employee. The employer, in turn, could be held liable for those biased supervisors' actions, even though they were not the ones who ultimately made the decision to terminate the plaintiff.

Staub has broad implications for employers nationwide. As the Supreme Court noted, the text of USERRA is similar to the text of Title VII, which prohibits discriminatory employment actions based on race, religion, or sex. Thus, the standard the Court articulated for claims in the military-discrimination context is also likely to be applied to all sorts of discrimination claims. Moreover, although the standard for intent and causation adopted by the Court was not as permissive as some plaintiffs' advocates had hoped, it is significantly broader than the standard formerly applied by some courts of appeals, such as the Seventh Circuit.

In light of the Supreme Court's decision, companies need to be aware that they can be held liable for adverse employment actions, even if the company official who ultimately makes the decision is unbiased, when the decision was influenced by the bias of others.

*After **Staub**, companies need to be aware that they can be held liable for adverse employment actions, even if the company official who ultimately makes the decision is unbiased, when the decision was influenced by the bias of others.*

WHAT THEY SAY ABOUT US

■ "Formidable." —NEW YORK OBSERVER ■ "Two superstars are opening their own boutique, MoloLamken." —THE AMERICAN LAWYER ■ "Known for his sophisticated business litigation where clients find, 'he gets results'." —CHAMBERS AND PARTNERS ■ "Tackles both criminal and civil litigation. Sources call him, 'a great commercial litigator — hardworking and always on the go'." —CHAMBERS AND PARTNERS ■ "He moves easily between criminal cases — defending Symbol Technology CFO Ken Jaeggi — and civil — pursuing The Donald for Deutsche Bank and chasing Madoff Money." —LAW DRAGON 500 LEADING LAWYERS IN AMERICA ■ "One of the 'Fab Fifty' lawyers, 45 and under, who have made their marks already." —THE AMERICAN LAWYER ■ "He was a tireless worker and always prepared.... I've watched Perry Mason for years, but I never thought I'd get to witness it... took this guy down the yellow brick road and slam dunked him." —CLIENT COMMENTING TO THE ILLINOIS LEGAL TIMES ■ "A knack for delivering high profile victories...." —CRAIN'S CHICAGO BUSINESS ■ "Bright, highly informed, and gutsy." —CHAMBERS AND PARTNERS ■ "Brings with him years of experience in the courtroom where he is known for his tenacity and attention to detail." —CHICAGO TRIBUNE ■ "As hot as they get in the Supreme Court bar." —LAW DRAGON 500 LEADING LAWYERS IN AMERICA ■ "A smart trial lawyer ...market commendations for his 'close attention to detail'." —CHAMBERS AND PARTNERS ■ "...off to a good start." —AMLAW LITIGATION DAILY ■ "Shows up regularly on high-profile dockets." —THOMSON REUTERS NEWS + INSIGHT