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Supreme Court Business Briefing

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MOLOLAMKEN
SUPREME COURT BUSINESS BRIEFING

The Supreme Court's 2013 Term has been singled out for its unusual degree of consensus. The Court's business docket was no exception, with many cases decided unanimously or by lopsided margins. Even where the Court was divided, it tended to proceed on narrow grounds rather than staking out broad principles of law.

Civil procedure and patent law were two areas where the Court was particularly united. In a major jurisdictional ruling, the Court made it more difficult to sue foreign companies in U.S. courts over claims arising abroad. It also restricted contracting parties' leeway to avoid forum-selection clauses. Meanwhile, the Court ratcheted up the standards for definiteness in patent claims and stringently enforced the "abstract ideas" exception to patentability. All those cases were decided by unanimous or near-unanimous margins.

In the securities field, the Court passed up an opportunity to overrule its precedents endorsing the fraud-on-the-market theory that underlies most securities class actions. But it did not leave defendants empty-handed, as it recognized a new ground for opposing class certification. The Court issued two major environmental rulings reaffirming the Environmental Protection Agency's broad authority over air pollution, while cutting back the agency's jurisdiction over small businesses. The Court handed a victory to broadcasters by shutting down Aereo's television streaming service while avoiding a broader ruling that many cloud-technology providers had feared. Even the Court's ruling on the contraceptive mandate—likely its most contentious of the Term—was relatively measured, focusing only on closely held corporations and steering clear of the (even more contentious) debate over religious exemptions to antidiscrimination laws.

With those and other leading decisions in mind, we are pleased to present the fourth 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.

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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.

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Alice Corp. Pty. Ltd. v. CLS Bank International, No. 13-298

patents — eligible subject matter

The Court's analysis did not, as many technology companies had feared, imperil software patents as a class.

Alice addressed whether certain risk-management techniques implemented through software on a generic computer system were patent-eligible subject matter.

Section 101 of the Patent Act defines patent-eligible subject matter as "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." Laws of nature, natural phenomena, and abstract ideas, by contrast, are not patentable.

Alice Corp. owns the rights to several patents claiming the use of a third-party intermediary to mitigate the risk that only one party to a financial exchange agreement will satisfy its obligation. The patents claim: (1) a method for exchanging financial obligations, (2) a computer system configured to carry out the method, and (3) a computer-readable medium containing program code for performing the method. The claimed computer system and computer-readable medium, however, describe generic computer systems and components. Alice sued CLS Bank and other global currency transaction network operators for patent infringement. The district court held that none of the claims was eligible for patent protection under § 101 because they claimed an abstract idea. The U.S. Court of Appeals for the Federal Circuit, sitting *en banc*, affirmed in a heavily fractured decision.

The Supreme Court affirmed. The Court reiterated the two-step framework governing questions of patent eligibility: First, a court must determine whether the claim is directed toward a patent-ineligible concept such as an abstract idea; and second, it must examine whether the claim contains a sufficient "inventive concept" to transform the abstract idea into a patent-eligible application of that idea. Applying that framework, the Court concluded that Alice's claims were directed to an abstract idea—the concept of intermediated settlement. The Court next found that the other elements of the patent claims amounted to little more than a generic instruction to implement the abstract idea of intermediated settlement on a computer. The Court held that a purported computer implementation that is purely conventional and does not reflect an improvement in computing technology is not a sufficiently inventive concept to impart patent eligibility.

While recognizing important limits on patent-eligible subject matter, *Alice* is perhaps most significant for what it did not do. It did not, for example, break any new ground regarding so-called "business method" patents, which frequently implicate the abstract-ideas exception. Nor, as many technology companies had feared, did the Court's analysis imperil software patents as a class. Rather, the Court affirmed that the general rules it established in prior § 101 cases are sufficient to address the different types of patent claims courts must confront.

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

American Broadcasting Companies v. Aereo, Inc., No. 13-461

copyright — television retransmissions over the Internet

Aereo addressed whether the exclusive right to perform a work publicly under the Copyright Act applies to individualized retransmissions of television programming over the Internet.

Aereo offered a service that retransmitted broadcast television programming, most of it protected by copyright. Using Aereo's website, subscribers could select a channel to watch. Aereo's system would then capture broadcast signals from the airwaves using an individual mini-antenna, make a copy on a hard drive directory dedicated to the subscriber, and then retransmit the programming to the subscriber over the Internet.

The Copyright Act grants owners the exclusive right to perform their works publicly. The Act's "Transmit Clause" defines public performances to include "transmit[ting] . . . a performance . . . of the work . . . to the public." Aereo claimed that, despite that clause, it did not need a license from copyright holders because it did not transmit performances "to the public." Instead, it argued, the performances were "private" because each transmission from its system was sent to just one subscriber from an individual mini-antenna and hard-drive copy. Broadcasters who owned copyrights disagreed and sued Aereo for infringement. The district court refused to enjoin Aereo's service, and the U.S. Court of Appeals for the Second Circuit affirmed.

The Supreme Court reversed. The Court first ruled that Aereo itself "performed" the copyrighted works rather than simply supplying equipment that allowed subscribers to perform them (a distinction that mattered because the broadcasters were pursuing only direct infringement claims against Aereo rather than claims based on consumer infringement). One of Congress's purposes in enacting the current Copyright Act in 1976, the Court noted, was to overturn prior cases that had held that cable systems do not "perform" the programs they carry. The Court ruled that Aereo's system was substantially similar to a cable system and should likewise require a license. The Court also ruled that Aereo transmitted the performances "to the public." Even though each transmission went to only one subscriber, the Court refused to look at the transmissions in isolation, holding instead that public performances include those effected through multiple transmissions, at least for television retransmission services like Aereo's.

Aereo is an important decision, not only for broadcasters, but also for cable and satellite service providers. Aereo performed substantially the same function as a cable system but without paying licensing fees. Aereo could thus compete with cable and satellite providers at lower cost. The decision preserves a more level playing field for television distribution services.

On the other hand, the Court's decision should have limited impact beyond the context of television retransmission services like Aereo's. Many technology companies had feared that a broad decision against Aereo would imperil widely accepted cloud technologies, such as "virtual locker" remote-storage services and remote DVRs. The Court, however, went out of its way to make clear that it was not casting doubt on cloud technologies. Whether a performance is "to the public," it explained, depends on the recipient's prior relationship to the work, strongly suggesting that services that merely allow customers to play back content they previously acquired are lawful. While that may be cold comfort to Aereo, it was welcome news to the rest of the technology industry.

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

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Atlantic Marine Construction Co. v. U.S. District Court, No. 12-929

venue — forum-selection clauses

Atlantic Marine addressed the enforcement of forum-selection clauses in federal court.

Atlantic Marine, a Virginia corporation, contracted with J-Crew Management, a Texas corporation, for work on a Texas construction project. The contract included a forum-selection clause requiring all disputes to be litigated in Virginia. When a dispute arose, J-Crew nonetheless sued in Texas federal court. Atlantic Marine moved to dismiss under either 28 U.S.C. § 1406(a) or Federal Rule of Civil Procedure 12(b)(3), which provide for dismissal when a suit is brought in a "wrong" or "improper" venue. In the alternative, Atlantic Marine moved to transfer the case to Virginia federal court under 28 U.S.C. § 1404(a), which allows such transfers "[f]or the convenience of parties and witnesses, in the interest of justice."

The district court denied both motions. It ruled that the forum-selection clause could be enforced only by a motion to transfer under § 1404(a). The court considered a variety of factors that courts typically apply to transfer motions, such as the parties' private interests in access to evidence and witnesses, the public interest in resolving disputes locally, and the deference owed to the plaintiff's choice of forum. The court held that transfer was unwarranted because it would be difficult or impossible for J-Crew to bring many of its witnesses to Virginia. The U.S. Court of Appeals for the Fifth Circuit denied Atlantic Marine's petition for mandamus.

The Supreme Court reversed. It agreed that a forum-selection clause cannot be enforced under § 1406(a) or Rule 12(b)(3). Those provisions, it explained, apply only where venue is "wrong" or "improper" under the federal venue laws—not merely where it is contrary to an agreement between the parties. Instead, forum-selection clauses that point to another federal court must be enforced by a motion to transfer under § 1404(a). (Forum-selection clauses pointing to a state or foreign forum, by contrast, can be enforced through the doctrine of *forum non conveniens*.)

The Supreme Court acknowledged that courts considering transfer motions under § 1404(a) ordinarily consider a wide range of factors. In the Court's view, however, a forum-selection clause significantly alters the analysis. Where a plaintiff sues in violation of a forum-selection clause, its choice of forum should not receive the deference normally due. Moreover, the plaintiff's private interests in such matters as access to evidence and witnesses should receive no weight, because the parties implicitly waived such claims of inconvenience by agreeing to the forum-selection clause. The upshot is that a valid forum-selection clause should have controlling weight in all but the most exceptional cases.

Atlantic Marine does more than answer a technical procedural question about how to enforce forum-selection clauses. It also reaffirms the importance of such clauses as binding agreements that will be enforced in all but extraordinary circumstances. After *Atlantic Marine*, no degree of inconvenience to a plaintiff will override a valid forum-selection clause.

Corporate counsel drafting any sort of business agreement should give serious consideration to forum-selection clauses as a means of managing future disputes. Conversely, *Atlantic Marine* highlights the danger of treating such clauses as mere afterthoughts in contract negotiations.

*After **Atlantic Marine**, no degree of inconvenience to a plaintiff will override a valid forum-selection clause.*

Burwell v. Hobby Lobby Stores, Inc., No. 13-354

Religious Freedom Restoration Act — contraceptive mandate

Hobby Lobby addressed whether for-profit corporations could claim a religious exemption from the Affordable Care Act's contraceptive mandate.

The case involved closely held corporations that, while operated for profit, were run by families with strong religious beliefs. Under regulations implementing the Affordable Care Act, the companies had to provide insurance coverage for all FDA-approved methods of contraception. The companies objected, claiming that some of the methods amounted to abortion and that their religious beliefs prohibited them from providing coverage.

The Supreme Court ruled in favor of the companies. As the Court explained, the Religious Freedom Restoration Act (RFRA) prohibits the government from substantially burdening any "person's" exercise of religion unless the regulation is the least restrictive means of furthering a compelling government interest. The Court first ruled that closely held corporations are "persons" entitled to invoke the Act's protections, even when they are operated for profit. Congress, the Court observed, generally defined "person" to include corporations, and for-profit corporations no less than non-profit ones could operate in a manner that reflected religious beliefs. The Court also concluded that the Affordable Care Act's heavy financial penalties for noncompliance amounted to a substantial burden on religion.

The contraceptive mandate failed RFRA's strict scrutiny. The Court assumed that the government had a compelling interest in ensuring that employees have access to contraceptives. But the government had not shown that the contraceptive mandate was the least restrictive means of accomplishing that goal. The government had already established an exemption for certain *non-profit* religious entities by which the insurer itself would pay for contraceptives where the employer objected. That exemption, the Court reasoned, could be expanded to closely held for-profit companies as well, ensuring that employees retained contraceptive coverage without burdening the religious beliefs of their employers.

Hobby Lobby is clearly an important decision for closely held companies operated by individuals with strong religious beliefs. RFRA imposes a daunting burden on the government to justify regulations that interfere with religious beliefs. The Court's holding that for-profit corporations may invoke the statute's protections invites challenges to a range of laws. The decision continues the Court's recent trend of recognizing that natural persons often exercise rights—such as freedom of speech and free exercise of religion—through the corporate form.

For multiple reasons, however, the Court's ruling is unlikely to have broad practical ramifications. The Court declined to address whether large, publicly traded corporations could assert claims, limiting its holding to closely held corporations. The Court also focused narrowly on the contraceptive mandate while distinguishing other laws such as immunization and nondiscrimination mandates. Despite being one of the most high-profile cases of the Term, therefore, *Hobby Lobby*'s immediate significance for business is probably limited.

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Chadbourne & Parke LLP v. Troice, No. 12-79

securities litigation — federal preemption of state-law class actions

Troice addressed the extent to which the Securities Litigation Uniform Standards Act ("SLUSA") preempts state-law securities class actions.

SLUSA precludes plaintiffs from bringing state-law class actions that allege "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." It defines "covered security" to include only securities that are traded on a national exchange or issued by an investment company.

In *Troice*, the plaintiffs claimed to have purchased *uncovered* securities—certificates of deposit not traded on any national exchange—in reliance on the issuing bank's misrepresentations that those CDs were backed by investments in covered securities. The plaintiffs brought state-law class actions against law firms and other entities that had provided services to the bank, alleging that they had aided and abetted its fraud. The district court concluded that the misrepresentations concerning the CDs' backing were sufficiently connected with transactions in covered securities for SLUSA to preclude the claims. The U.S. Court of Appeals for the Fifth Circuit reversed. It held that the misrepresentations were only tangentially related to the crux of the fraud—the issuing bank's scheme to represent the CDs as a "safe and secure" investment.

The Supreme Court affirmed. It held that SLUSA's required "connection" with a covered securities transaction does not exist unless the fraudulent misrepresentation or omission is material to a decision by someone—other than the fraudster—to buy or sell a covered security. Where a misrepresentation relates only to a plaintiff's decision to purchase or sell uncovered securities, by contrast, the Act does not apply. The Court dismissed concerns that its narrow interpretation of the "in connection with" language in SLUSA would curtail enforcement of other provisions of the federal securities laws. The Department of Justice and the SEC, the Court noted, have authority over "securities" generally, not just the "covered securities" referenced in SLUSA. The Court also explained that its interpretation of SLUSA would preserve the ability of private investors to obtain relief against aiders and abettors under state laws, since the federal securities laws generally preclude such claims.

Troice makes clear that law firms, accountants, and other professionals providing services to securities issuers may be subject to state-law class actions for aiding and abetting a securities fraud so long as the securities are not traded on a national securities exchange. The decision may ultimately have greater significance, however, in cases brought under § 10(b) of the federal Securities Exchange Act, which prohibits frauds "in connection with" the purchase or sale of a security. Defendants in such cases may argue that *Troice*'s narrow interpretation of that phrase in SLUSA also limits the types of frauds that are actionable under § 10(b).

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Daimler AG v. Bauman, No. 11-965

jurisdiction — foreign corporations

Even beyond its significance for foreign corporations, ***Daimler*** *is an important case for domestic companies that do business across state lines.*

Daimler addressed the circumstances in which a foreign corporation can be sued in the United States over events that occurred abroad.

Several Argentine plaintiffs sued the German automaker Daimler AG in California district court, alleging that a subsidiary had collaborated with Argentine security forces to imprison, torture, and kill them or their relatives in the 1970s and 1980s. The district court granted Daimler's motion to dismiss, holding that Daimler's contacts with California were insufficient to subject it to suit. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that Daimler was subject to jurisdiction because another indirect subsidiary—MBUSA—conducted business as a distributor in California, and MBUSA's contacts could be attributed to its corporate parent under an "agency" theory.

The Supreme Court reversed. The Court explained that it had long distinguished between two types of personal jurisdiction: specific and general. A court exercises specific jurisdiction when a suit arises out of the defendant's contacts with the forum. General jurisdiction, by contrast, allows a court to exercise jurisdiction over a defendant even with respect to claims having no connection with the forum. Because the plaintiffs' claims in *Daimler* arose out of alleged abuses in Argentina, only the latter type of jurisdiction was at issue.

Although the Supreme Court was skeptical of the Ninth Circuit's agency analysis, it assumed for the sake of argument that MBUSA's California contacts could be attributed to its corporate parent. Nonetheless, the Court held that those contacts were insufficient to subject Daimler to general jurisdiction. A party asserting general jurisdiction, the Court explained, must meet a demanding standard: The defendant's contacts with the forum must be so continuous and systematic that the defendant is essentially "at home" there. That test was not met in this case.

Daimler is significant for several reasons. The case's demanding standard—that a defendant is subject to general jurisdiction only if it is "at home" in the forum—means that general jurisdiction may be invoked only sparingly. Indeed, the Court indicated that a corporation typically is "at home" only in its State of incorporation and principal place of business, a test far narrower than the "doing business" standard some courts had previously applied. By curtailing jurisdiction over foreign disputes, the Supreme Court continued its trend of scaling back the role of U.S. courts in policing misconduct abroad—a trend that has also produced major decisions on securities fraud and human-rights litigation in recent years. Even beyond its significance for foreign corporations, *Daimler* is an important case for domestic companies that do business across state lines, since similar jurisdictional standards apply.

Nonetheless, *Daimler* leaves open significant questions over *specific* jurisdiction in suits arising out of misconduct or injury in the United States. That issue has sharply divided the Court in recent years, particularly in cases where a foreign company sells goods into a "stream of commerce" that end up producing an injury in the United States. Until the Court clarifies the due-process boundaries of specific jurisdiction as well, personal jurisdiction will remain a hotly disputed issue in many cases.

EPA v. EME Homer City Generation, L.P., No. 12-1182

environmental law — interstate air pollution

This case addressed whether the Environmental Protection Agency acted within its statutory authority when it promulgated a rule regulating interstate air pollution.

Under the Clean Air Act, the EPA is responsible for establishing air quality standards nationwide. Those standards are initially implemented by States, but are subject to EPA oversight and approval. The Act's "good-neighbor" provision requires the agency to regulate emissions from upwind States that contribute significantly to nonattainment (or interfere with the maintenance of attainment) of air quality standards in downwind States. After the EPA's prior rule implementing that provision was invalidated, the agency promulgated the Cross-State Air Pollution Rule, commonly known as the Transport Rule, to establish cost-based limitations for emissions of certain air pollutants in various States. The U.S. Court of Appeals for the D.C. Circuit vacated the rule on the ground that it exceeded the EPA's statutory authority.

The Supreme Court reversed, holding that the Transport Rule was a permissible interpretation of the Act's good-neighbor provision. The Court first rejected the argument that the rule was invalid because it did not afford States a sufficient opportunity to devise their own plans to ensure compliance. The EPA, the Court reasoned, had permissibly stepped in after finding the state plans noncompliant.

The Court next rejected the argument that the EPA's rule was invalid because, under the Act, the agency must regulate emissions from upwind States in proportion to their contributions to nonattainment downwind. Because the statute did not explicitly address the EPA's method of apportionment, the agency had discretion to design a reasonable approach. The Court deemed a strictly proportional methodology unworkable in light of the complex nature of air pollution, as many different upwind States may contribute to air quality problems in many different downwind States. The Court also held that the EPA could consider the costs of compliance in apportioning responsibility, opining that a State that had not yet adopted even low-cost controls could reasonably be assigned greater responsibility for remediation. Finally, the Court rejected the argument that the EPA's regulations were invalid because the agency had restricted emissions more than necessary to achieve attainment. Some degree of over-correction was inevitable, and any truly unnecessary over-control could be remedied through an as-applied challenge without striking down the entire rule.

Homer City has significant implications for any company subject to air pollution or other environmental regulations. Despite industry warnings that the EPA's interstate air pollution regulations were among the most costly ever imposed, the Court afforded the agency substantial leeway. While the decision leaves open the possibility of as-applied challenges, the essence of the Transport Rule seems likely to remain intact. By highlighting the deference that agency rules receive on judicial review, particularly for complex and technical subjects, the case underscores the importance of attempting to achieve the best possible outcomes in agency rulemakings in the first instance.

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

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Halliburton Co. v. Erica P. John Fund, Inc., No. 13-317

securities litigation — fraud-on-the-market theory

Halliburton addressed the "fraud on the market" theory of reliance in securities class actions.

Plaintiffs bringing securities-fraud claims cannot recover damages unless they prove that they relied on the defendant's misrepresentations. Since the Supreme Court's 1988 decision in *Basic v. Levinson*, plaintiffs have been allowed to satisfy that reliance requirement by invoking the fraud-on-the-market theory. Under that theory, courts presume that the price of a security traded in an efficient market reflects all public, material information about the company, including any misrepresentations, and that plaintiffs rely on the misrepresentations indirectly by relying on the integrity of the market price. The fraud-on-the-market presumption is critical to certification of class actions: Without it, each plaintiff would have to prove reliance individually; individual issues would predominate; and class certification would be improper.

The securities-fraud action against Halliburton in this case resulted in two trips to the Supreme Court. The district court initially denied class certification on the ground that the plaintiffs had failed to establish loss causation (a causal connection between the misrepresentation and the plaintiffs' loss) and therefore could not invoke the fraud-on-the-market presumption. The U.S. Court of Appeals for the Fifth Circuit affirmed, but the Supreme Court vacated that judgment and held that loss causation need not be proved at the class-certification stage. On remand, Halliburton argued that class certification was improper because it had rebutted the fraud-on-the-market presumption. Halliburton pointed to evidence that the alleged misrepresentations did not affect Halliburton's stock price, and that the plaintiffs therefore could not have relied on the alleged misrepresentations when they relied on the market price. The district court declined to consider that argument and certified the class, and the Fifth Circuit affirmed.

The Supreme Court vacated and remanded. The Court rejected Halliburton's argument that *Basic*'s fraud-on-the-market presumption should be overruled. Halliburton, it ruled, had not shown the "special justification" necessary to overrule longstanding precedent. Even if markets are not perfectly efficient, the Court noted, public information generally affects stock prices, and most investors rely on a security's market price. The Court further concluded that, at the class-certification stage, plaintiffs do not have the burden of proving that a misrepresentation affected the price of the security.

Nonetheless, the Court agreed with Halliburton that a defendant may rebut the presumption of reliance at the class-certification stage by showing that the alleged misrepresentation did not affect the security's price. The fraud-on-the-market theory allows plaintiffs to establish reliance through a presumption that they relied on the market price. But where the defendant can show that the alleged misrepresentation had no price impact—thus proving that the plaintiffs could not have relied on it by virtue of their reliance on the market price—the presumption of reliance is overcome. The Court saw no reason to preclude defendants from making that showing at the class-certification stage.

Halliburton is a significant case for all publicly traded companies facing the risk of securities class actions. Had the Court overruled the fraud-on-the-market presumption, it would have precluded class certification in the vast majority of cases. The Court's more modest ruling acknowledged the realities of market behavior and is unlikely to result in fewer securities class actions being brought.

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Lawson v. FMR LLC, No. 12-3

whistleblowers — anti-retaliation

Lawson concerned the scope of the anti-retaliation protection afforded to whistleblowers under the Sarbanes-Oxley Act of 2002.

Sarbanes-Oxley was passed in the wake of the collapse of Enron in an effort to protect investors and restore confidence in the U.S. financial markets. One section of the Act protects whistleblowers. It provides that "[n]o [public] company . . . or any . . . contractor . . . of such company . . . may discharge" or otherwise retaliate against "an employee in the terms and conditions of employment" because that person engaged in certain protected activities, such as alerting a supervisor to potential violations of the securities laws.

The plaintiffs in *Lawson* were employees of a private company, FMR, that advised certain Fidelity mutual funds. When the employees discovered that the funds were listing inaccurate information in SEC draft documents and applying cost accounting methodologies that led to expense overstatements, they voiced their concerns and were subsequently fired. They filed suit, alleging unlawful retaliation. FMR moved to dismiss, arguing that Sarbanes-Oxley's anti-retaliation provision protects only employees of public companies, not employees of companies that merely *contract* with public companies. The district court rejected that interpretation, but the U.S. Court of Appeals for the First Circuit reversed, holding that the statute protects only employees of the public company itself.

The Supreme Court reversed. It first looked to the statutory text, which provides that "no . . . contractor . . . may discharge . . . an employee." In that context, the Court concluded, the ordinary meaning of "an employee" is the contractor's own employee. The Court further noted that the types of retaliatory measures proscribed—such as discharge, demotion, and suspension—are actions typically taken by an employer against its own employees. Likewise, the types of remedies afforded to whistleblowers—including reinstatement and back pay—can only be afforded by the employee's own employer. The Court rejected FMR's argument that Congress had intended the prohibition on retaliation by contractors to reach only a contractor hired as an "ax-wielding specialist" to take action against the public company's employees, as "illustrated by George Clooney's character in the movie Up in the Air." Looking to the legislative history, the Court found that Congress was clearly concerned about protecting outside professionals like accountants and lawyers from retaliation for reporting frauds by the public companies they serve.

Lawson makes clear that Sarbanes-Oxley's anti-retaliation provision extends not only to public companies, but to the myriad private companies that contract with and provide services to them. Private companies would be well advised to ensure that they have adequate internal controls and procedures in place to address whistleblower complaints when they arise.

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Nautilus, Inc. v. Biosig Instruments, Inc., No. 13-369

patents — definiteness of patent claims

Nautilus addressed the standard for determining whether patent claims meet the Patent Act's "definiteness" requirement.

Section 112(b) of the Patent Act requires that a patent include "claims particularly pointing out and distinctly claiming the subject matter which the inventor . . . regards as the invention." That provision is known as the "definiteness" requirement. The U.S. Court of Appeals for the Federal Circuit had previously interpreted that standard to require only that a patent claim be "amenable to construction" and not "insolubly ambiguous."

The plaintiff in *Nautilus* had a patent covering a heart-rate monitor for exercise equipment. The patent purported to measure the electrical signals accompanying heartbeats through the use of two electrodes "mounted . . . in spaced relationship with each other." The district court held that the term "spaced relationship" was indefinite, but the Federal Circuit reversed, holding that the term could have sufficient meaning to satisfy its "amenable to construction" and "insolubly ambiguous" standard.

The Supreme Court vacated and remanded. It observed that § 112's definiteness requirement entails a "delicate balance" between ensuring that the public has sufficiently clear notice of what is claimed in the patent and the inherent limitations of language when attempting to craft a claim. The Court recognized that patents must tolerate "[s]ome modicum of uncertainty" to create adequate incentives for innovation, but cautioned that patents must be precise enough for the public to differentiate between what is claimed and what remains open to all.

The Court held that the Federal Circuit's "amenable to construction" and "insolubly ambiguous" standard failed to strike that balance because it allowed excessive ambiguity and fostered uncertainty that could discourage innovation and competition. Applied literally, that standard would uphold a claim whenever a court could ascribe *some* meaning to its language. The Court instead held that a claim is sufficiently definite only if, viewed in light of the specification and the prosecution history, it "inform[s] those skilled in the art about the scope of the invention with reasonable certainty." The certainty required "is not greater than is reasonable, having regard to [the patent's] subject-matter." The Court explained that this standard would provide the clarity needed to inform the public of what a patent claims while accounting for the reality that absolute precision is unattainable.

Nautilus could have a significant impact on both patent prosecution and infringement litigation. The Federal Circuit's generous standard for definiteness had previously given patent applicants powerful incentives to inject ambiguity into their claims so they could be read expansively or narrowly as litigation needs required. The Court's decision puts the onus on patentees to draft claims that reasonably inform the public of the scope of their inventions. And the Court's clear indication that the definiteness requirement should be given teeth is sure to make the issue more heavily litigated in future infringement actions. On the other hand, the Court recognized that the Federal Circuit's "insolubly ambiguous" standard may have been inapt "shorthand" for a more rigorous inquiry that was applied in practice. It therefore remains to be seen whether the Court's new "reasonable certainty" standard will yield results that differ substantially from those under the prior test.

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

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Republic of Argentina v. NML Capital, Ltd., No. 12-842

sovereign immunity — post-judgment discovery

NML addressed the scope of a foreign sovereign's immunity from post-judgment discovery under the Foreign Sovereign Immunities Act.

The case arose out of a long-running dispute between Argentina and NML Capital, a hedge fund that had purchased defaulted Argentine bonds at a discount after the country defaulted on its external sovereign debt in 2001. NML obtained judgments on the bonds and is presently owed about $2.5 billion. In connection with its post-judgment collection efforts, NML issued subpoenas to two private banks seeking information about Argentina's worldwide assets and financial transactions. Argentina moved to quash the subpoenas, arguing that discovery into its foreign assets would violate the Foreign Sovereign Immunities Act.

The district court denied the motion, and the U.S. Court of Appeals for the Second Circuit affirmed. As the Second Circuit explained, the Foreign Sovereign Immunities Act provides two distinct immunities—immunity to *sovereigns* from the jurisdiction of U.S. courts, and immunity to *sovereign property* from execution and attachment. The former immunity could not help Argentina, because Argentina had expressly waived its immunity from jurisdiction in the bond indentures governing its sovereign debt. And although the second immunity might ultimately stand as an obstacle to execution against specific property, the court ruled that a plaintiff did not have to prove it could overcome those obstacles simply to obtain information about the sovereign's assets.

The Supreme Court affirmed. The Court initially noted a dispute over whether the federal rules authorize discovery into extraterritorial assets at all, given that U.S. courts lack authority to execute against such property. But the Court declined to resolve that dispute as beyond the scope of the question presented, and instead assumed without deciding that such discovery is ordinarily permissible. The sole question, therefore, was whether the Foreign Sovereign Immunities Act specified a different rule when the judgment debtor was a sovereign. Hewing closely to the statute's text, the Court ruled that the Act provided no such immunity from the extraterritorial discovery that NML sought.

NML reduces the impediments for judgment creditors seeking discovery into a sovereign judgment debtor's finances. The Court rejected policy arguments advanced by Argentina and the United States that immunity should be interpreted more broadly to promote international comity. Such concerns, the Court opined, were better directed to Congress.

Nonetheless, the decision will not necessarily open the discovery floodgates. The Court specifically noted that its ruling did not cast doubt on other doctrines such as governmental privilege that could shield sensitive documents from scrutiny. It also emphasized that district courts retain broad discretion to limit discovery on grounds such as burden and comity. Even after *NML*, therefore, courts are likely to scrutinize discovery demands closely under those traditional standards when the discovery is sought against a foreign sovereign.

*Even after **NML**, courts are likely to scrutinize discovery demands closely when the discovery is sought against a foreign sovereign.*

Utility Air Regulatory Group v. EPA, No. 12-1146

environmental law — greenhouse gases

This case addressed the Environmental Protection Agency's authority to regulate greenhouse gas emissions from stationary sources under the Clean Air Act.

Seven years ago, the Supreme Court ruled that the Clean Air Act authorized the EPA to regulate greenhouse gas emissions from motor vehicles if it found that such emissions contribute to climate change. The agency did so. And in this case, the agency relied on that earlier finding to claim authority over stationary sources such as factories as well. That ruling was significant because the Act's pollution thresholds (which apply across the board without regard to the type of pollutant) threatened to sweep in an enormous number of small businesses solely because of their emissions of greenhouse gases. The agency further ruled that stationary sources that were already subject to its permitting requirements because they emitted *different* pollutants would be required to adopt "best available control technology" for greenhouse gases as well. Various parties challenged those rules, but the U.S. Court of Appeals for the D.C. Circuit upheld them.

The Court endorsed the EPA's efforts to regulate greenhouse gas emissions with respect to those entities primarily responsible for the pollution.

The Supreme Court affirmed in part and reversed in part. The Court first held that the Clean Air Act did not compel the EPA's determination that, because the agency had previously concluded that greenhouse gas emissions were "air pollutants" in the broader sense of the term, it was also required to regulate those emissions from stationary sources. In the Court's view, the Act not only permitted but compelled a narrower interpretation: Requiring permits for sources based solely on greenhouse gas emissions at the low statutory thresholds would be unworkable as it would cover an extraordinary number of entities. Although the EPA had tried to avoid that result by increasing the statutory emission thresholds for greenhouse gases, the Court rejected that tailoring as an impermissible attempt to rewrite the statute.

By contrast, the Court upheld the EPA's rule that a stationary source had to adopt the "best available control technology" for greenhouse gases if it was already subject to the Act's permitting requirement on account of its emission of *different* pollutants. The provision governing that requirement, the Court explained, was less open-ended than the one governing the permitting requirement, and applying that provision to sources already subject to the permitting requirement would not have the same unworkable results as expanding the permitting requirement to cover thousands of otherwise unregulated sources.

Utility Air Regulatory Group is an important decision for any business that emits greenhouse gases—big or small. Despite losing on the first issue, the EPA largely got what it wanted. As the agency explained, the large stationary sources already subject to the permitting requirement (those on which the agency prevailed) account for roughly 83% of emissions, while the additional smaller sources the agency sought to regulate (those on which it lost) account for only 3%. While the statutory interpretation issues may have been somewhat arcane, the bottom line is straightforward: The Court endorsed the agency's efforts to regulate greenhouse gas emissions with respect to those entities primarily responsible for the pollution. Any business subject to the Act's permitting requirements should plan for further costs of compliance as the agency carries out its new mandate to regulate greenhouse gases.

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