MoloLamken

# Supreme Court Business Briefing

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# MOLOLAMKEN
# SUPREME COURT BUSINESS BRIEFING

The Supreme Court's decisions this Term showed a marked emphasis on consensus-building, often resting on narrower grounds more likely to command a significant majority of the Court's members. With the untimely passing of Justice Scalia—and the Senate's unwillingness to confirm a successor—the Court found itself with an even number of Justices. When the Court divides 4-4 over a case, the lower court's decision is affirmed without opinion in an order that has no precedential significance, depriving lower courts and litigants of often much-needed guidance. Plainly sensitive to that prospect, the Court was at pains to muster a majority wherever it could, resulting in more modest and incremental rulings. That judicial modesty was palpable in the Court's business cases.

After a series of decisions viewed as hostile to class actions—many authored by Justice Scalia—the Court gave class plaintiffs a reprieve, holding that they could prove their claims through statistical evidence so long as the evidence would be permissible in suits by individual plaintiffs. And in a much-watched case over Congress's authority to protect consumers by granting private plaintiffs the right to sue for statutory damages, the Court issued a narrow decision that, while ordering further scrutiny of a particular plaintiff's claims, reaffirmed Congress's ordinarily broad authority in the area. Finally, the Court took a step back and a step forward in a line of recent decisions refusing to apply federal statutes extraterritorially. It held that the Racketeer Influenced and Corrupt Organizations Act does apply to conduct occurring abroad in some cases, but insisted that private plaintiffs suing under the Act allege a domestic injury.

Other decisions were harder to categorize. In a pair of important intellectual property opinions, the Court established a more flexible standard under which patent owners may seek enhanced damages for egregious infringement—but also made it easier for the Patent and Trademark Office to review and invalidate previously issued patents. The Court upheld the Federal Energy Regulatory Commission's aggressive efforts to promote conservation through demand-response rules. And finally, the Court provided greater clarity about when businesses and public officials could face criminal charges for allegedly exchanging political favors for campaign contributions or other benefits.

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

# ABOUT MOLOLAMKEN

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

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

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

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

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

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# *Bank Markazi v. Peterson,* No. 14-770

constitutional law — separation of powers

*Bank Markazi* addressed whether a statute that changes the law for a single pending case violates the separation of powers.

The case concerned nearly $2 billion of bonds in which Bank Markazi, the Central Bank of Iran, held an interest in Europe as part of its foreign currency reserves. The plaintiffs, who held default judgments against Iran, tried to seize the assets. Under ordinary legal principles, the assets would not have been attachable. While the case was pending, however, the plaintiffs' lawyers lobbied Congress to enact 22 U.S.C. §8772, a statute that changed the law solely for that one case, identified by docket number in the statutory text. "In order to ensure that Iran is held accountable for paying the judgments," the statute provided that, notwithstanding any other state or federal law, the assets "shall be subject to execution" upon only two findings—essentially, that Bank Markazi had a beneficial interest in the assets and that no one else did.

Relying on that statute, the district court ordered the assets turned over to the plaintiffs. The U.S. Court of Appeals for the Second Circuit affirmed. The court rejected the argument that §8772 violated the separation of powers by effectively dictating the outcome in a single pending case—even though the court recognized that there may be little practical difference between §8772 and a statute that simply directed the court to rule in the plaintiffs' favor.

The Supreme Court affirmed, holding that §8772 did not violate the separation of powers. Congress, the Court explained, may amend the law and make the change applicable to pending cases, even when the amendment determines the outcome in a particular case. The Court also held that a statute does not violate the separation of powers merely because Congress tailors the legislation to a specific controversy. Finally, the Court emphasized that the case involved foreign affairs, an area where courts have traditionally deferred to the political branches. The Chief Justice, writing for the dissent, disagreed and would have struck down the statute as an impermissible exercise of the judicial power by Congress. He accused the majority of giving Congress a blueprint for picking winners and losers in particular pending cases.

*Bank Markazi* could have far-reaching implications for a wide range of disputes, including business litigation. The decision suggests that the Court will not step in to prevent Congress from intervening in private legal disputes even when it passes legislation designed to change the outcome in a single pending case—at least not on separation-of-powers grounds. The decision thus invites parties to high-stakes disputes to include legislative lobbying as part of their litigation strategy.

Ultimately, the foreign affairs aspect of the case may limit its application. The Court may be less willing to tolerate congressional interference in cases between private businesses. Much of the decision's reasoning, however, could apply broadly even to those disputes. *Bank Markazi* thus makes it important for businesses confronting sympathetic opponents in litigation to take steps to ensure that their opponents do not obtain relief from Congress that they could not obtain in court.

*(Disclosure: MoloLamken LLP represented the petitioner in this case.)*

***Bank Markazi** seems bound to encourage more disaffected litigants to seek relief from Congress if they do not like their prospects in court.*

# *Cuozzo Speed Technologies, LLC v. Lee*, No. 15-446

patents — *inter partes* review

***Cuozzo*** *ensures that inter partes review will remain a popular vehicle for challenging the validity of previously issued patents.*

*Cuozzo* addressed whether the U.S. Patent and Trademark Office's decisions to institute *inter partes* review proceedings are judicially reviewable, as well as the standard for interpreting patent claims in those proceedings.

The Leahy-Smith America Invents Act created a procedure called *inter partes* review that allows a party to ask the PTO to reexamine the validity of a previously issued patent. The Act provides that the PTO's initial decision whether to institute an *inter partes* review is "final and non-appealable." The Act also gives the PTO authority to issue regulations governing *inter partes* review. The PTO issued a regulation stating that, in such proceedings, the agency would construe a patent claim according to its "broadest reasonable construction." That standard contrasts with the one applied in courts, where claims are given their most reasonable construction as viewed by a person skilled in the art.

In this case, Garmin International, Inc. sought *inter partes* review of a patent held by Cuozzo Speed Technologies, Inc. The claims covered a speedometer that uses GPS to determine the speed limit at a driver's location and changes the display to alert the driver when she is driving too fast. The PTO instituted *inter partes* review. Applying the broadest reasonable construction standard, the PTO invalidated the claims as obvious in light of prior art. Cuozzo appealed. It urged that the PTO had improperly instituted review because Garmin had not expressly challenged two of the claims on the ground invoked by the PTO. It also argued that the PTO should not have applied the "broadest reasonable construction" standard and instead should have applied the same standard that courts use to construe patents. The U.S. Court of Appeals for the Federal Circuit affirmed.

The Supreme Court affirmed. The Court first held that the Act bars an appeal of the PTO's decision to institute *inter partes* review—at least where the appeal raises only a run-of-the-mill challenge to the PTO's application of the standards governing initiation of *inter partes* review. The Court emphasized, however, that its holding did not necessarily preclude constitutional challenges or challenges based on other provisions.

The Court also upheld the PTO's use of the broadest reasonable construction standard. It noted that the Act expressly delegated rulemaking authority to the PTO, and held that the PTO's adoption of the broadest reasonable construction standard was a reasonable exercise of that authority. The Court noted that the standard had long been applied in other proceedings before the PTO. And it explained that the standard protects the public interest: A rule requiring claims to be construed as broadly as reasonably possible discourages applicants from using vague or uncertain terms because it increases the risk that claims will be held invalid as obvious or anticipated by prior art.

*Cuozzo* ensures that *inter partes* review will remain a popular vehicle for challenging the validity of previously issued patents. The broadest reasonable construction standard—along with other procedural advantages—gives parties who have been or may be sued for infringement a strong incentive to challenge the patent's validity through *inter partes* review rather than in district court. Patent applicants, moreover, would be well advised to take the Court's cue to draft their claims more precisely and narrowly to reduce the risk of invalidation in *inter partes* review.

# *Federal Energy Regulatory Commission v. Electric Power Supply Association,* No. 14-840

energy regulation — demand response

*The survival of FERC's demand-response program in **Electric Power Supply Association** may provide incentives for major electricity consumers to find ways to reduce their consumption.*

*Electric Power Supply Association* addressed whether the Federal Energy Regulatory Commission ("FERC") acted within its statutory authority in issuing rules requiring compensation for "demand response" providers in wholesale electricity markets.

The Federal Power Act draws a line between federal and state authority to regulate the sale of electricity. It gives FERC the power to regulate wholesale electricity sales in interstate commerce, including wholesale prices and matters affecting such prices. The States, however, retain exclusive authority to regulate retail sales of electricity to end users.

Today, most wholesale electricity markets are managed by not-for-profit regional organizations that conduct auctions to set wholesale prices. The auctions balance supply and demand, both on a minute-by-minute basis and in forward auctions that sell energy products well in advance of anticipated demand. As in any market, prices rise at times of peak demand. Meeting peak demand requires injecting more electricity into the grid system, which strains the infrastructure.

To help keep prices down and ensure the grid's reliability, FERC issued a rule requiring market operators to enable "demand response." Demand response seeks to balance supply and demand by paying electricity consumers to *curtail* their use of power. A prior FERC rule had required market operators to accept bids from electricity consumers to decrease consumption, and to treat those offers just like bids from electricity generators to increase supply. In a later rule, FERC further required that demand-response providers receive as much compensation for *conserving* energy as generators do for *producing* it.

A coalition of energy companies sought judicial review of the later rule, and a divided panel of the U.S. Court of Appeals for the D.C. Circuit vacated it. The D.C. Circuit held that the demand-response program exceeded FERC's authority to regulate wholesale markets because it sought to reduce consumption by retail electricity customers—an area of exclusive state authority. The court also held that FERC's requirement that demand-response providers be paid the same as generators was arbitrary and capricious.

The Supreme Court reversed. The Court confirmed that, under the Federal Power Act, FERC's jurisdiction was limited to rules and practices that "directly affect" the wholesale market. But the demand-response rule met that standard: It addressed only transactions on the wholesale market. That the rule may have substantial effects on retail sales did not mean that FERC was impermissibly intruding on the States' power to regulate retail rates. The Court also held that FERC's decision to compensate demand-response providers at the same price paid to generators was adequately reasoned because both provide the same value to the wholesale market.

This case is important for several reasons. It confirms that FERC has broad authority to regulate wholesale electricity markets notwithstanding collateral impacts on retail markets outside its jurisdiction. And from a business perspective, the survival of the demand-response program may provide incentives for major electricity consumers to find ways to reduce their consumption during peak periods, reducing demand for generation facilities. Many economists warn, however, that FERC's decision to compensate demand-response providers as if they were generators overcompensates them and distorts needed incentives to invest in reliable generation.

*(Disclosure: MoloLamken LLP represented* amici curiae *in this case.)*

# *Gobeille v. Liberty Mutual Insurance Co.*, No. 14-181

federal preemption — ERISA

*Gobeille* addressed whether a state statute requiring healthcare providers and insurers to report data to a state healthcare database was preempted to the extent it applied to plans regulated by the Employee Retirement Income Security Act ("ERISA").

In an effort to better understand healthcare costs and to find ways to keep those costs down, a number of States have passed laws requiring healthcare insurers and providers to report information such as medical claims data, pharmacy claims data, and member eligibility requirements to a state-maintained "all-payer claims database." This case concerned Vermont's reporting statute.

Liberty Mutual is an ERISA plan covering employees in Vermont. It challenged the Vermont reporting law in federal court, urging that the statute was preempted by ERISA. ERISA contains a clause that preempts any state laws that "relate to any employee benefit plan." The district court held that Vermont's law was not preempted because it served Vermont's interest in regulating healthcare and did not interfere with the operation of Liberty's ERISA plan. A divided panel of the U.S. Court of Appeals for the Second Circuit reversed, holding that Vermont's statute was preempted because reporting data is a core ERISA function, and plan administrators must be shielded from potentially inconsistent state reporting regulations.

The Supreme Court affirmed. The Court noted that ERISA already imposes extensive reporting, disclosure, and recordkeeping requirements—requirements different from those required by the Vermont law. And the Court explained that the Secretary of Labor has authority to establish additional reporting requirements for ERISA plans. The Court thus found that reporting, disclosure, and recordkeeping are a central part of ERISA plan administration. The Court held that Vermont's reporting regime intruded upon that central matter of plan administration and could potentially interfere with the nationally uniform administration of the plan. As a result, the law was preempted.

Although a setback for state efforts to study healthcare costs, *Gobeille* is a significant victory for employer-provided benefit plans subject to ERISA. As a result of the decision, ERISA plans are freed from the potentially costly burden of complying with state rules requiring them to collect and report healthcare data, allowing them to retain more funds for providing member benefits.

*Gobeille* is perhaps most notable because it reaffirms the Supreme Court's expansive view of ERISA preemption. For example, the Court did not find that the challenged state statute actually imposed inconsistent or burdensome obligations on ERISA plans; rather, it found preemption necessary based on the mere "possibility" that a body of disuniform state requirements might develop. The Court likewise found it irrelevant that the statute's objectives had nothing to do with specialized issues relating to ERISA, such as the financial solvency of plans or the duties of plan fiduciaries. Merely regulating a function essential to ERISA plan administration sufficed to render the law preempted.

> ***Gobeille** makes clear that a state law regulating a function that is essential to ERISA plan administration is preempted, even if the law does not address a core concern of ERISA itself.*

# *Green v. Brennan,* No. 14-613

employment law — accrual of claims

*Green* addressed when the limitations period begins to run on an employee's constructive discharge claim under Title VII of the Civil Rights Act of 1964.

Under Title VII, a federal employee cannot bring a discrimination suit against his employer unless he first exhausts his administrative remedies. Federal regulations provide that, to do so, the employee must initiate contact with an Equal Employment Opportunity counselor within 45 days of the "matter alleged to be discriminatory." Similar language governs the accrual of discrimination claims against private employers.

Marvin Green is an African American who had worked at the U.S. Postal Service for 35 years. When he was passed over for a promotion, he complained that the denial was because of his race. Shortly after, Green's supervisors accused him of intentionally delaying the mail—a criminal offense. The Postal Service's Office of the Inspector General investigated and determined that no further action was warranted. Green's supervisors, however, continued to threaten him with criminal charges. On December 16, 2009, Green reached an agreement with the Postal Service: The Postal Service promised not to pursue criminal charges in exchange for his promise either to retire or to transfer to a less lucrative position in another State.

Green tendered his resignation on February 9, 2010, effective March 31. On March 22—41 days after he submitted his resignation but 96 days after entering into the December 16 settlement agreement—Green complained to an Equal Employment Opportunity counselor that he had been constructively discharged in violation of Title VII. He later sued the Postal Service. The Postal Service moved for summary judgment, arguing that Green had failed to make timely contact with the counselor. The district court granted the Postal Service's motion, and the U.S. Court of Appeals for the Tenth Circuit affirmed.

The Supreme Court vacated and remanded. The Court noted that, under the standard rule for statutes of limitations, the limitations period does not begin to run until the plaintiff has a complete and present cause of action on which he can sue for relief. The Court held that an employee does not have a complete and present cause of action for constructive discharge until he resigns. The Court thus construed the phrase "matter alleged to be discriminatory" to include the employee's resignation. As a result, the 45-day limitations period would not begin to run until after an employee resigns. The Court further held that an employee asserting constructive discharge is deemed to have resigned on the date he gives notice of his intent to resign, not on his last day of work. The Court remanded to resolve a factual dispute over when Green provided notice of his intent to resign.

*Green* provides a clear test for determining when constructive discharge claims under Title VII accrue. Although *Green* addressed a regulation that applies only to federal employees, the Court's reasoning would apply to private-sector claims as well. As the Court noted, the EEOC treats federal and private-sector limitations periods as identical in operation. In practice, the decision may expose employers to claims for constructive discharge based on conduct that occurred long before the employee's resignation. But the Court doubted that its decision provided any incentive for employees to delay: It noted that, because an employee asserting constructive discharge must prove a causal link between the allegedly discriminatory conduct and his resignation, employees have an incentive to bring their claims promptly.

***Green** provided a bright-line test for determining when constructive discharge claims under Title VII accrue.*

# *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, No. 14-1513

patents — enhanced damages

*Halo* addressed the standard for imposing enhanced damages for patent infringement under 35 U.S.C. §284.

Section 284 provides that, upon finding patent infringement, "the court may increase the damages up to three times the amount found or assessed." The statute itself provides no standard for determining when such enhanced damages may be imposed.

The U.S. Court of Appeals for the Federal Circuit had interpreted §284 to require the patent owner to make two showings. First, the patentee had to show that the infringer acted despite an "objectively high likelihood of infringement." That standard would not be met if the infringer could raise a substantial question regarding the validity of the patent or its liability for infringement, even if the infringer had not been aware of the arguable defense at the time of infringement. If the objective prong was satisfied, the patentee then had to satisfy the subjective prong. It had to show that the risk of infringement was known by the defendant or so obvious it should have been known. The patentee had to prove both prongs by "clear and convincing evidence." If the patentee made that showing, the judge would then decide whether to award enhanced damages. On appeal, the Federal Circuit would review the objective prong *de novo*, review the subjective-knowledge prong for substantial evidence, and review the ultimate decision to award enhanced damages for abuse of discretion.

In *Halo*, a jury found that Pulse had infringed Halo's patents, and likely had done so willfully. The district court, however, denied Halo's request for enhanced damages under the objective prong because Pulse's defenses were not objectively baseless. The Federal Circuit affirmed.

The Supreme Court vacated and remanded. The Court held that §284 grants district courts discretion to award enhanced damages based on the particular circumstances of the case. The Federal Circuit's multi-part test improperly constrained that discretion. Historically, courts had awarded enhanced damages where the infringement was willful, wanton, or malicious—*i.e.*, "characteristic of a pirate." The Court saw no reason why a defendant who engaged in such conduct should escape enhanced damages simply because it could later identify an objectively reasonable defense to infringement. Nonetheless, the Court emphasized that—consistent with historical practice—enhanced damages should be reserved for truly egregious cases.

The Court also rejected the Federal Circuit's "clear and convincing evidence" standard, holding that a plaintiff can meet its burden by a preponderance of the evidence—*i.e.*, a more-likely-than-not standard. Finally, the Court held that, on appeal, an enhanced damages award should be reviewed for abuse of discretion, not under the three different standards the Federal Circuit had employed.

*Halo* creates additional uncertainty and exposure for companies that find themselves the target of patent infringement suits. Defendants previously could resist enhanced damages by invoking twin requirements that included a purely objective prong, together with an elevated standard of proof. Now, their conduct will be judged under a general facts-and-circumstances type of analysis reviewed under a mere preponderance standard. Given the Court's repeated admonition that enhanced damages should be awarded only for truly outrageous conduct, however, it remains to be seen how substantial the impact will be.

*(Disclosure: MoloLamken LLP represented* amici curiae *in this case.)*

***Halo** eliminates multiple layers of defense to claims for enhanced damages, but reaffirms that such damages should be reserved for truly egregious cases of patent infringement.*

# *McDonnell v. United States,* No. 15-474

white-collar crime — public corruption

*McDonnell* addressed the meaning of the "official act" requirement in public corruption statutes.

The federal government often invokes the honest services fraud statute, 18 U.S.C. §1346, as well as the Hobbs Act, 18 U.S.C. §1951, to prosecute alleged bribe-taking or other political corruption by state or local officials. Both statutes require that the official accept something of value in return for an "official act."

In *McDonnell*, former Virginia governor Robert McDonnell was indicted for accepting gifts, loans, and other benefits from a Virginia businessman whose company manufactured nutritional supplements. The businessman allegedly wanted Virginia public universities to perform research on the supplements. The prosecution alleged that the defendant performed a number of official acts in exchange for the benefits—including arranging meetings with state officials, hosting events, and contacting other officials concerning the research. The trial court instructed the jury that the term "official act" encompassed any act that a public official customarily performed. The jury convicted, and the U.S. Court of Appeals for the Fourth Circuit affirmed.

The Supreme Court unanimously vacated and remanded. The Court held that official acts include only decisions or actions in connection with a formal exercise of governmental power akin to a lawsuit before a court, a determination before an agency, or a hearing before a committee on a specific question. The defendant, moreover, must make a decision or take an action on the specific question before the relevant body—either by performing the official act himself, by pressuring another official to do so, or by using his official position to provide advice that he knows or intends will form the basis for someone else's official act. Merely setting up meetings, talking to other officials, or organizing events is not enough.

Because the jury had not been instructed on those limitations, the Court vacated the conviction. The Court also remanded for the court of appeals to determine whether the government's evidence was insufficient to show an official act as a matter of law—a ruling that would entitle the defendant to dismissal of the charges.

*McDonnell* acknowledges that public officials necessarily interact with those who may benefit from their actions. The basic compact underlying representative government, the Court noted, assumes that public officials will hear from their constituents and act on their concerns. *McDonnell* provides greater clarity about when public officials—and private businesses with matters before them—could face criminal charges for allegedly exchanging political favors for campaign contributions or other benefits. The decision thus has broad implications for businesses that regularly interact with public officials.

***McDonnell** provides greater clarity about when businesses and public officials could face criminal charges for allegedly exchanging political favors for campaign contributions or other benefits.*

# *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning,* No. 14-1132

securities litigation — federal jurisdiction

*Manning* clarified when securities claims brought in state court may be removed to federal court under the Securities Exchange Act of 1934.

The plaintiffs in *Manning* were a group of shareholders in Escala Group, Inc., a company whose shares traded on the NASDAQ stock exchange. After Escala's stock price plunged, the plaintiffs blamed Merrill Lynch, claiming that it drove down the share price through a series of "naked" short sales. Typically, a trader borrows or arranges to borrow shares before short-selling them. In a "naked" short sale, however, the trader never does so. As a result, naked short-selling can be used to drive down a company's stock price artificially.

The plaintiffs sued Merrill Lynch in New Jersey state court, alleging that its naked short sales violated state statutory and common law. While the plaintiffs did not bring any claims under federal law, their complaint expressly referred to an SEC regulation restricting naked short sales.

Merrill Lynch removed the case to federal district court, asserting jurisdiction under Section 27 of the Securities Exchange Act of 1934. That provision grants federal jurisdiction over suits "brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder." The district court denied the plaintiffs' motion to remand to state court, but the U.S. Court of Appeals for the Third Circuit reversed. The plaintiffs' claims, it held, could not be removed under Section 27 because they were brought under state law and did not necessarily raise any federal issue.

The Supreme Court affirmed. Section 27 of the Exchange Act, it held, provides for federal jurisdiction only where a plaintiff's claims "arise under" federal law—the same standard that governs federal jurisdiction under the general federal-question statute, 28 U.S.C. §1331. As the Third Circuit had held, the plaintiffs' claims in *Manning* did not arise under federal law. Even though the complaint referred to SEC regulations, it sought relief only under state law, and the state statutes and common law invoked did not depend on any federal violation.

*Manning* is a significant boon to plaintiffs in securities litigation. Plaintiffs often prefer to litigate securities fraud suits in state court, particularly given pleading requirements and other restrictions Congress has imposed on federal suits over the past few decades. *Manning* smooths the road for plaintiffs to continue bringing claims in state court. So long as a plaintiff refrains from expressly pleading a federal cause of action or a state-law claim that necessarily raises a federal issue, *Manning* permits the suit to remain in state court—even if the plaintiff expressly alludes to federal law.

Nonetheless, the decision may not disadvantage defendants as much as might first appear. Many securities cases are brought as class actions that are removable to federal court under a separate statute, the Securities Litigation Uniform Standards Act of 1998. Moreover, the Court did not restrict the scope of "arising under" jurisdiction—it merely held that that same standard applied under Section 27 of the Exchange Act as well. Defendants still have potent tools to steer securities claims to federal court.

***Manning** is a significant boon to plaintiffs in securities litigation, although defendants still have potent tools to steer securities claims to federal court.*

# *RJR Nabisco, Inc. v. European Community,* No. 15-138

RICO — extraterritoriality

*RJR Nabisco* addressed the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act ("RICO").

RICO makes it unlawful to engage in a "pattern of racketeering activity," a term defined to include violations of various federal and state criminal laws known as "predicate acts." RICO also provides a private cause of action for victims and authorizes treble damages and attorney's fees. Although the statute was originally enacted to combat organized crime, its breadth has led plaintiffs to assert RICO claims against businesses for a variety of alleged misconduct.

This case began when the European Community and 26 of its member states sued RJR Nabisco, a United States corporation, for allegedly participating in a global money-laundering scheme. The complaint alleged that RJR Nabisco violated RICO by committing numerous predicate acts, including money laundering, mail fraud, and wire fraud.

RJR Nabisco moved to dismiss. It argued that RICO does not apply to conduct that occurs outside the United States and that the alleged predicate acts all occurred abroad. The district court agreed. But the U.S. Court of Appeals for the Second Circuit reversed, holding that RICO applies extraterritorially.

The Supreme Court reversed. The Court first agreed with the Second Circuit that RICO's substantive prohibitions apply to at least some conduct abroad. Congress clearly expressed its intent that RICO apply extraterritorially, the Court explained, by including violations of statutes that expressly apply to foreign conduct as RICO predicate acts. The Court found those express references sufficient to overcome the normal presumption that federal statutes apply only to conduct within the United States. Where the predicate statute applies abroad, the Court held, so does RICO.

Despite that holding, the Court ruled against the European Community. The provision of RICO creating a private right of action, the Court held, contained no similar indication of extraterritorial scope. According to the Court, it was not sufficient that a private plaintiff prove violations of the statute's substantive provisions. To invoke RICO's private right of action, the plaintiff also had to prove that the injury from the predicate acts was suffered in the United States rather than abroad. Because the European Community was pursuing a claim only for injury suffered overseas, it could not bring suit under RICO's private right of action.

*RJR Nabisco* is the latest in a series of decisions curtailing the territorial scope of federal statutes. In *Morrison v. National Australia Bank Ltd.*, the Court sharply limited the reach of the federal securities laws. And in *Kiobel v. Royal Dutch Petroleum Co.*, the Court imposed similar limits on the Alien Tort Statute.

Unlike those prior cases, *RJR Nabisco* both expands and restricts liability under RICO. The decision extends the statute's prohibitions to certain conduct occurring abroad. But it allows private suits only where the plaintiff can prove a domestic injury. That limitation is likely to significantly reduce the potential RICO liability of U.S. companies operating in foreign markets—including their exposure to treble damages and attorney's fees.

***RJR Nabisco*** *both expands and restricts liability under RICO.*

# *Spokeo, Inc. v. Robins,* No. 13-1339

civil procedure — standing

*Spokeo* addressed the extent to which Congress can confer standing upon a private plaintiff by creating a statutory right and a private cause of action to enforce it.

*Spokeo* arose under the Fair Credit Reporting Act. That statute requires consumer reporting agencies to follow reasonable procedures to assure the accuracy of consumer reports and to comply with various other requirements. It provides that any person who willfully fails to comply may be held liable for statutory damages of $100 to $1,000 per violation.

The defendant, Spokeo, Inc., operates a website that allows users to search for information about other individuals by name, email address, or phone number. The plaintiff, Thomas Robins, alleged that Spokeo had violated the Act by providing inaccurate information about his marital status, age, and other personal details. He brought a class action on behalf of similarly situated individuals. But he did not claim to have suffered any harm beyond the violation of his statutory rights. Spokeo moved to dismiss on the ground that Robins had not alleged the injury-in-fact necessary to confer standing to sue. The district court granted the motion, but the U.S. Court of Appeals for the Ninth Circuit reversed, concluding that Robins had standing.

The Supreme Court vacated and remanded. Even if Robins had an individual and particularized interest in his suit, the Court held, he also had to allege some "concrete" harm to satisfy Article III of the Constitution. The Court recognized that Congress may protect intangible rights by creating statutory causes of action. It held that Congress can create a statutory right to protect consumers from a mere risk of harm. And it made clear that both historical practice and Congress's judgment are important factors in evaluating whether an injury is sufficiently concrete. But the Court emphasized that Congress cannot premise standing on a bare procedural violation absent some concrete harm. As an example, the Court noted that publishing an incorrect ZIP code may violate the Act but cause no real injury. Because the Ninth Circuit had not considered whether Robins suffered any concrete harm, the Court remanded the case.

Financial institutions, technology companies, and other corporations with a high degree of consumer contact are likely to invoke *Spokeo* in defending against consumer claims. Congress has enacted numerous consumer-protection statutes, such as the Truth in Lending Act, the Electronic Communications Privacy Act, and the Real Estate Settlement Procedures Act. Those statutes often provide for statutory damages without requiring any proof of tangible harm. Accordingly, claims are often brought as class actions seeking statutory damages. The stakes in those cases are often high.

By reaffirming that a plaintiff must show concrete harm, *Spokeo* confirms the limits on Congress's authority to create standing. But the decision fell far short of what many defendants had hoped for. The Court reaffirmed that Congress may often create standing by creating statutory rights not traditionally recognized as grounds for suit, including intangible rights and rights based on a mere risk of harm. Notably, Justice Thomas—hardly a reliable ally of the plaintiffs' bar—concurred in an opinion that emphasized Congress's broad authority to create standing for disputes between private parties. Thus, despite the limitations the Court reaffirmed, the opinion overall was a significant win for plaintiffs that appears to leave most federal statutory causes of action on solid ground.

*Despite the limitations the Court reaffirmed, **Spokeo** was a significant win for plaintiffs that appears to leave most federal statutory causes of action on solid ground.*

# *Tyson Foods, Inc. v. Bouaphakeo,* No. 14-1146

class actions — statistical sampling

*Tyson Foods* addressed the circumstances in which a party can use statistical sampling to prove a legal claim in a class action.

Employees sued Tyson Foods under the Fair Labor Standards Act, claiming that the company failed to pay them overtime for time spent putting on and taking off protective gear at a pork processing plant. Tyson Foods did not record the amount of time its employees spent changing. As a result, the plaintiffs relied on an expert who studied how long a sample group of employees spent and then extrapolated an average for other employees. Over the company's objection, the district court allowed that evidence and certified the class. A jury returned a verdict for the plaintiffs.

Tyson Foods moved to set aside the verdict, arguing that the district court should not have certified the class because the common issues among class members did not predominate—individual dressing and undressing times necessarily varied. The district court denied the motion, and the U.S. Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court likewise affirmed. Under Federal Rule of Civil Procedure 23(b)(3), the Court noted, a court asked to certify a class must find that common questions of law or fact predominate over individual ones. According to Tyson Foods, the plaintiffs had manufactured common issues by relying on a representative sample rather than individualized proof. But the Supreme Court disagreed.

Even outside the class action context, the Court noted, a statistical sample can be used to establish a claim or defense, so long as the evidence is reliable and probative of the party's claim. That was the situation here: Even if the employees had pursued their claims individually, they could have relied on statistical evidence to estimate the amount of time they spent changing clothes. As the Court explained, that evidence was no less admissible merely because the case had been brought as a class action. Whether a representative sample may be used to establish classwide liability, the Court explained, will depend on the purpose for which it is used and the nature of the cause of action.

*Tyson Foods* is a significant setback for class action defendants. Following the Supreme Court's 2011 decision rejecting a gender discrimination class action that relied on statistical evidence in *Wal-Mart Stores, Inc. v. Dukes*, many observers had predicted that the Court would be hostile to the statistical evidence here as well. *Tyson Foods* confirms an important limitation on that earlier decision: Statistical evidence is often sufficient to prove a claim even in an individual action, and when that is so, the fact that the claim is brought as a class action instead does not render the statistical evidence inadmissible.

*Tyson Foods* will likely shift many of the disputes over statistical evidence in class actions to the decision to admit or exclude particular expert testimony. Under the Federal Rules of Evidence, district courts have substantial discretion to admit or exclude expert testimony based on its reliability. By expanding the circumstances in which statistical evidence is permissible, *Tyson Foods* is likely to shift the focus of litigation to the reliability of particular statistical evidence.

***Tyson Foods*** *confirms that statistical evidence is often sufficient to prove a claim, both for individual actions and for class actions.*

# *Universal Health Services, Inc. v. United States ex rel. Escobar,* No. 15-7

## False Claims Act — implied false certification

*Universal Health* addressed whether the "implied false certification" theory can be a basis for liability under the False Claims Act.

The False Claims Act imposes civil liability on any person who knowingly presents a "false or fraudulent claim for payment" to the federal government. The statute does not define "false or fraudulent." Courts had disagreed over whether that element could be established under the "implied false certification" theory. According to that theory, when a defendant submits a claim to the government, it impliedly certifies that it has complied with all conditions for payment. If the defendant fails to disclose that it has violated a material statutory, regulatory, or contractual requirement, the defendant has made a misrepresentation that renders the claim false or fraudulent.

In this case, the plaintiff brought a False Claims Act suit against Universal Health Services, Inc., which operated a mental health facility in Massachusetts. The complaint alleged that Universal Health had submitted claims to Massachusetts' Medicaid program but failed to disclose that its staff was not licensed to perform mental health services, as regulations required. The district court dismissed the suit on the ground that none of the regulations violated was a condition of payment. The U.S. Court of Appeals for the First Circuit reversed. It held that the Massachusetts Medicaid regulations clearly imposed conditions of payment and that the conditions were material because the government would have been entitled to refuse payment if it had known of the violations.

The Supreme Court vacated and remanded. It held that the implied false certification theory can be a basis for liability under the False Claims Act. But the claim for payment must make specific representations about the goods or services provided. And the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements must make those representations misleading.

The Court rejected Universal Health's argument that the implied false certification theory should apply only where the government has designated compliance with the particular legal obligation an express condition of payment. But the Court also rejected the government's argument that every undisclosed violation of an express condition of payment automatically triggers liability. Instead, the Court held, liability turns on strict application of the Act's materiality and scienter requirements. To be actionable, a misrepresentation about compliance with legal requirements must be material to the government's actual decision whether to pay the claim. The Court remanded for the lower courts to determine whether Universal Health's failure to disclose its noncompliance with the regulations governing mental health services was so important that the Medicaid program would not have paid the claims if it had known of the violations.

*Universal Health* is a mixed bag. On the one hand, the Supreme Court's acceptance of the implied false certification theory expands False Claims Act liability beyond cases involving express misrepresentations. On the other hand, the Court repeatedly stressed that liability is not to be imposed for insignificant regulatory or contractual violations. The Court made clear that the rigorous materiality standard it announced would allow many cases to be resolved on a motion to dismiss or at summary judgment.

***Universal Health** upheld the "implied false certification" theory of liability under the False Claims Act but made clear that the Act imposes a rigorous materiality requirement.*

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