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Supreme Court Business Briefing

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SUPREME COURT BUSINESS BRIEFING

After two years of largely modest decisions, the Supreme Court was back in full force, delivering major rulings in the business arena and elsewhere. A few times, the Court strived to reach a middle ground, most notably in the *Masterpiece Cakeshop* case pitting freedom from discrimination against religious liberty. By and large, however, the Court showed little hesitation about handing down broad rulings with far-reaching impact. That trend is unlikely to abate any time soon given the announcement, on the last day of the Term, that the moderate Justice Anthony Kennedy would be retiring from the Court. President Trump's authority to nominate his successor presents an opportunity to influence the Court's business and other decisions for years to come.

The Court's willingness to break new ground was nowhere more obvious than in *South Dakota v. Wayfair.* Overruling fifty years of precedent, the Court held that States may require out-of-state retailers to collect tax on sales to state residents, even if they have no physical presence in the State. That decision has significant implications for e-commerce, although brick-and-mortar retailers will welcome the decision as leveling a perceived unfair playing field.

In other areas, the Court delivered some major victories for business defendants. The Court extended its long line of pro-arbitration cases to the employment field, holding that employers may insist that employees arbitrate disputes on an individual basis despite their right to act collectively under the labor laws. The Court also held that foreign corporations may not be sued for human rights abuses under the Alien Tort Statute, eliminating a costly category of litigation for many multinational companies that operate in the developing world. Finally, the Court rejected an antitrust suit against American Express over the anti-steering provisions it requires merchants to honor, raising the bar for claims of anticompetitive conduct in complex markets.

Businesses did not win every case. The Court held that investors suing over misstatements in public offerings could pursue certain claims in state court, rejecting calls to steer all such suits to federal court instead. In other cases, the impact will depend on the business. For example, the Court rejected a constitutional challenge to the inter partes review procedure for challenging patents. As a result, companies sued for infringement have multiple avenues for challenging the patent's validity, while businesses that own patents may have to defend them on multiple fronts.

With those and other leading decisions in mind, we are pleased to present the eighth 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 disputes and investigations. Our clients are based throughout the world.

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 disputes and investigations are 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—for plaintiffs and defendants—before juries, judges, arbitral forums, and appellate courts, including the Supreme Court of the United States. We also represent clients in criminal and regulatory investigations, and we 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.

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China Agritech, Inc. v. Resh, No. 17-432

class actions — statute of limitations

China Agritech addressed whether the filing of a class action tolls the statute of limitations for subsequently filed class actions.

Plaintiffs alleging fraud under the Securities Exchange Act of 1934 must file suit within two years of discovering the fraud. In *American Pipe & Construction Co. v. Utah*, however, the Supreme Court held that the filing of a class action tolls the limitations period for all persons encompassed within the proposed class until the date of any order refusing to certify the class. That doctrine permits class members to file their own individual actions in the event the court determines that class treatment is inappropriate. *American Pipe* did not address whether a similar tolling rule would apply if a class member subsequently filed another class action.

The Court confronted that issue in *China Agritech*. This case arose when a market report alleged that China Agritech, a publicly traded fertilizer manufacturer, had overstated its revenue. China Agritech's stock price dropped significantly, and eight days later, a group of plaintiffs filed a class action alleging violations of the Securities Exchange Act. The district court denied class certification on the ground that the plaintiffs had failed to show that China Agritech stock traded on an efficient market. Another group of plaintiffs then filed a second class action raising similar claims. The court again denied class certification, this time because the proposed class representatives were not typical or adequate. A new plaintiff then filed a third class action, asserting the same claims. That action was filed outside the two-year limitations period, but the plaintiff claimed that the earlier class actions tolled that period under *American Pipe*. The district court dismissed the action as untimely, but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that *American Pipe*'s tolling rule applies to subsequently filed class actions as well as individual actions.

The Supreme Court reversed. The Court explained that *American Pipe* was designed to promote efficiency by deferring individual claims until after the court rules on class certification. For class actions, the Court held, efficiency concerns cut the other way, favoring early filing so the court has full knowledge of all potential class representatives when selecting a lead plaintiff. The Court also reasoned that plaintiffs who file class actions only after the limitations period expires do not show the diligence required for equitable tolling. And it expressed concern that a contrary ruling would allow indefinite extensions of the limitations period through serial class actions.

China Agritech has significant implications for class action litigation. Plaintiffs may now be foreclosed from bringing a subsequent class action, even when the court refused to certify an earlier class action for reasons unique to that action. Because the amounts at stake in individual actions are often too small to be worth pursuing, a denial of class certification is now more likely to mean that the defendant avoids liability altogether. Corporate defendants might consider this a win, but the practical effect may be that more suits get filed sooner, within the limitations period, by plaintiffs not willing to trust that an earlier suit will be certified as a class action.

After ***China Agritech****, more suits may be filed sooner by plaintiffs not willing to trust that an earlier suit will be certified as a class action.*

Cyan, Inc. v. Beaver County Employees Retirement Fund, No. 15-1439

securities litigation — state court jurisdiction

Cyan addressed whether the Securities Litigation Uniform Standards Act strips state courts of jurisdiction to hear certain federal securities claims.

Following the stock market crash of 1929, Congress enacted two statutes to promote honest practices in the securities industry. The Securities Act of 1933 allows investors to sue issuers that make misstatements in connection with their public offerings of securities. The Securities Exchange Act of 1934 prohibits fraud in connection with the purchase or sale of securities more generally. Historically, suits under the 1933 Act could be brought in both state and federal courts, while suits under the 1934 Act could be brought only in federal court.

More recently, Congress enacted two more statutes directed to securities class actions. The Private Securities Litigation Reform Act of 1995 imposed new restrictions on federal securities class actions, including heightened pleading standards. Confronted with those restrictions, many plaintiffs opted to bring state-law class actions in state court instead. Congress responded with the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which generally prohibits plaintiffs from bringing securities class actions under state law and provides for removal of prohibited actions to federal court so they can be dismissed. Courts disagreed, however, over whether SLUSA prohibited plaintiffs from bringing *federal*-law class actions in state court under the 1933 Act.

In *Cyan*, three pension funds and an individual investor sued Cyan, a telecommunications company, in California state court. They claimed that Cyan violated the 1933 Act by making false statements in its initial public offering documents. Cyan moved to dismiss under SLUSA, but the state court denied the motion, and the state appellate courts denied review.

The Supreme Court unanimously affirmed. The Court found nothing in SLUSA that stripped state courts of their historic jurisdiction over 1933 Act claims. While Cyan relied on language in a conforming amendment in SLUSA, the Court found Cyan's construction of the amendment strained, and also found it implausible that Congress would make such a drastic change through a technical amendment. The Court also rejected Cyan's argument based on SLUSA's broader purposes. Acknowledging that Congress sought to limit state securities class actions to some extent, the Court refused to rely on that general purpose to expand the statute beyond its terms.

Cyan resolved uncertainty over the proper forum for 1933 Act claims in a way that preserves an important role for state courts in securities class action litigation. As a result of the decision, more plaintiffs are likely to pursue such claims in state court, and they may even frame their complaints around the 1933 Act to preserve state court jurisdiction. The 1933 Act applies only to public offerings, but claims under that statute still account for a significant number of securities lawsuits. Companies sued over an IPO may now be forced to defend the claims in state court.

***Cyan** preserves an important role for state courts in securities class action litigation.*

Digital Realty Trust, Inc. v. Somers, No. 16-1276

whistleblowers — anti-retaliation protections

Digital Realty addressed whether the anti-retaliation provision of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act extends to a whistleblower who reports a violation of the securities laws internally within the company, but not to the Securities and Exchange Commission.

Dodd-Frank, passed in the wake of the 2008 financial crisis, added a new whistleblower provision to the Securities Exchange Act of 1934. That provision allows for a cash award to a whistleblower who provides information to the SEC that leads to a successful enforcement action. It also contains an anti-retaliation provision that prohibits an employer from taking adverse actions against a whistleblower for certain protected activities.

Dodd-Frank defines "whistleblower" to mean "any individual who provides . . . information relating to a violation of the securities laws to the Commission." The SEC, however, adopted a broader definition in its administrative rules implementing Dodd-Frank. Under the SEC's rules, whistleblowers would often be protected from retaliation even if they reported wrongdoing only internally within the company.

This case concerned a Dodd-Frank anti-retaliation suit brought by a former employee of Digital Realty, a real estate investment trust. The plaintiff alleged that he had been terminated for reporting suspected violations of the securities laws to the company's senior management. He had not, however, reported his suspicions to the SEC. Digital Realty sought to dismiss the suit, arguing that the plaintiff was not protected by the statute. The district court denied the motion, deferring to the SEC's broader definition of "whistleblower." The U.S. Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court reversed. The anti-retaliation provision, it explained, protects only "whistleblowers." And Dodd-Frank specifically defines that term to include only individuals who provide information "to the Commission." The Court held that, because Congress's definition of "whistleblower" was clear and conclusive, the SEC's broader definition was not entitled to deference. The Court acknowledged that the statutory definition undoubtedly shields fewer individuals from retaliation than the SEC's definition would. But that result could not justify departing from the statute's plain text.

Digital Realty significantly narrows the scope of Dodd-Frank's anti-retaliation protections for persons reporting financial fraud. Statistics show that many employees, as well as auditors and attorneys, first report suspected fraud internally to company management. After the Court's decision, those persons will not be shielded by Dodd-Frank's anti-retaliation provision unless and until they take the further step of reporting to the SEC.

Nonetheless, as the Court noted, Dodd-Frank is not the only statute that prohibits retaliation against whistleblowers. Sarbanes-Oxley protects employees from retaliation in many cases even if they report information only internally. Companies should therefore continue to exercise extreme caution before taking adverse actions against whistleblowers even after *Digital Realty.*

Digital Realty *significantly narrows the scope of Dodd-Frank's anti-retaliation protections for persons reporting financial fraud.*

Epic Systems Corp. v. Lewis, No. 16-285

arbitration — employment disputes

Epic Systems addressed whether the National Labor Relations Act ("NLRA") prohibits the enforcement of agreements requiring employees to arbitrate claims against their employers on an individual basis.

The NLRA grants employees the right to form unions, to bargain collectively, and "to engage in other concerted activities for the purpose of . . . mutual aid or protection." The Federal Arbitration Act, meanwhile, requires courts to enforce agreements to arbitrate in most cases, even if they require arbitration on an individual rather than class-wide basis. In *Epic Systems*, the Supreme Court considered how to reconcile those two statutes, and in particular whether to extend its recent line of pro-arbitration cases to employment contracts covered by the NLRA.

The Court's decision arose out of three separate cases from the federal courts of appeals. In each one, employees had brought class actions against their employers claiming violations of the wage and hour requirements of the Fair Labor Standards Act. The employers responded by invoking clauses in their contracts with the employees that required resolution of the disputes in arbitration on an individual basis. The courts of appeals reached different results, with two holding that the NLRA's "concerted activities" provision entitled the employees to pursue class actions despite the arbitration clauses, and the third reaching the opposite result.

The Supreme Court sided with the employers, concluding that the Federal Arbitration Act requires enforcement of arbitration clauses even in the employment context. The employees invoked the Federal Arbitration Act's savings clause, which provides that arbitration agreements need not be enforced if they violate some generally applicable contract defense—in this case, they claimed, the "concerted activities" provision of the NLRA. The Court rejected that argument, holding that a rule that plaintiffs must be allowed to pursue claims on a collective basis was not generally applicable within the meaning of the savings clause. The Court also held that the NLRA's "concerted activities" provision did not implicitly repeal the mandates of the Federal Arbitration Act. The Court instead construed the provision to refer to activities that employees themselves undertake in the course of exercising their right to free association in the workplace, not to rules governing legal proceedings.

Epic Systems is the latest in a long line of pro-arbitration decisions from the Supreme Court. Employers should now seriously consider including arbitration clauses with class action waivers in their employment contracts. Plaintiffs often argue that such clauses effectively foreclose relief where the amount at stake for an individual plaintiff is modest—as is often the case for minimum wage and overtime claims. Arbitration clauses thus may sharply reduce an employer's exposure to costly class action litigation. They can also be drafted to yield additional benefits, for example, by mandating confidentiality of arbitral proceedings or by prohibiting arbitrators from granting preclusive effect to earlier decisions on claims brought by other employees.

Epic Systems does not guarantee that arbitration clauses will be enforced in all cases. The Federal Arbitration Act's savings clause still permits courts to set aside arbitration clauses based on contract defenses that are genuinely generally applicable, such as fraud, duress, or unconscionability. Employers must therefore take special care in drafting their arbitration clauses to ensure they do not run afoul of those state-law principles.

*Under **Epic Systems**, arbitration clauses may sharply reduce an employer's exposure to costly class action litigation.*

Jesner v. Arab Bank, PLC, No. 16-499

Alien Tort Statute — corporate liability

Jesner addressed whether corporations may be sued for human rights violations under the Alien Tort Statute.

The plaintiffs in *Jesner* included thousands of foreign nationals who alleged that they or their family members had been injured by terrorist attacks in the Middle East over a ten-year period. They sued Arab Bank, a Jordanian financial institution, claiming that it had helped finance the attacks. In particular, they claimed that Arab Bank's New York branch had processed dollar-denominated transactions that benefited terrorists and that the branch was used to launder money for a Texas-based charity affiliated with Hamas.

The plaintiffs relied on the Alien Tort Statute, a federal statute dating back to 1789 that grants federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." In recent decades, plaintiffs have invoked that statute to bring claims against corporations for human rights abuses, often concerning events that transpired overseas in developing countries. In this case, however, the U.S. Court of Appeals for the Second Circuit held that the Alien Tort Statute does not apply to claims against corporations rather than natural persons.

The Supreme Court, in a fractured decision, affirmed. Justice Kennedy, writing for a plurality, found substantial doubts over whether currently prevailing international law imposes liability on corporations—doubts that weighed against reading corporate liability into the Alien Tort Statute. He also emphasized that courts should be reluctant to create or extend private rights of action without clear guidance from Congress, and that human rights lawsuits against foreign corporations threatened diplomatic strife. Justice Alito and Justice Gorsuch wrote separately to emphasize those latter points. The Court thus held that foreign corporations may not be sued under the Alien Tort Statute. Justice Sotomayor and three other Justices dissented.

Jesner is another blow to plaintiffs seeking to hold corporations liable for human rights abuses. Five years ago, the Supreme Court held in *Kiobel v. Royal Dutch Petroleum Co.* that the Alien Tort Statute does not apply to conduct that occurs wholly outside the United States. Together, *Kiobel* and *Jesner* substantially cut back the scope of the statute, curbing a category of lawsuits that had imposed substantial litigation and public relations costs on multinational corporations.

The decision does not give corporations a free pass on human rights violations. The Court repeatedly limited its holding to suits against *foreign* corporations; it remains to be seen whether suits against United States corporations will meet the same fate. And while the Court refused to imply a new cause of action under the Alien Tort Statute, other federal laws may still apply, such as the Anti-Terrorism Act, which provides an express cause of action for terrorism claims by U.S. nationals against corporate defendants. Ultimately, the Court's decision was driven more by a reluctance to imply new causes of action under the cryptic Alien Tort Statute than by broader concerns about corporate liability. The decision thus may do more to shift human rights litigation against corporations to new and different legal theories than to eliminate it altogether.

Jesner *curbs a category of lawsuits that had imposed substantial litigation and public relations costs on multinational corporations.*

Lucia v. Securities and Exchange Commission, No. 17-130

Appointments Clause — administrative law judges

Lucia considered whether the Securities and Exchange Commission's administrative law judges ("ALJs") are officers of the United States for purposes of the Appointments Clause.

Under the Constitution's Appointments Clause, principal officers of the United States must be nominated by the President and confirmed by the Senate, while inferior officers may be appointed by the President, the courts, or department heads. Mere employees, by contrast, can be hired through other means such as the civil service process. *Lucia* concerned how to classify the SEC's ALJs—adjudicators who preside over the SEC's in-house administrative enforcement actions.

The SEC brought enforcement proceedings against Raymond Lucia and his investment company, alleging that Lucia had used a misleading slideshow to deceive potential clients for a retirement savings strategy he called "Buckets of Money." The ALJ who heard Lucia's case concluded that he had violated the Investment Advisers Act and imposed a $300,000 penalty as well as a lifetime bar from the industry. The Commission upheld the ALJ's decision. The U.S. Court of Appeals for the D.C. Circuit affirmed, rejecting Lucia's argument that the ALJ lacked authority to hear his case because he had been chosen for the position by SEC staff rather than being appointed pursuant to the Appointments Clause. The court held that the ALJ was a mere employee, so his selection did not have to comply with that clause.

The Supreme Court reversed. To qualify as an officer rather than a mere employee, the Court explained, an individual must occupy a continuing position established by law and exercise significant authority. The SEC's ALJs satisfied that test. The ALJs received a career appointment to a position created by statute. And they exercised significant authority by taking testimony, conducting trials, ruling on the admissibility of evidence, punishing contempt, and issuing decisions that contained factual findings and legal conclusions. The Court held that Lucia was entitled to a new hearing before a different ALJ whose appointment conformed to the Appointments Clause.

Lucia calls into question the validity of ALJ appointments not just within the SEC, but across government. Many agencies use ALJs to hear enforcement actions, and those ALJs are often hired in a manner typical for civil servants rather than constitutional officers. Any business that finds itself facing a hostile audience in agency proceedings should examine grounds for challenging the appointment of the adjudicator or other agency staff involved in the case.

Lucia's constitutional holding was not a complete surprise, particularly after the government abandoned its defense of the ALJs in the Supreme Court. But the Court's remedial holding—that the petitioner was entitled to an entirely new hearing before a different ALJ—threatens equally far-reaching consequences. Previously, multiple agencies (including the SEC) had tried to mitigate the potential fallout from *Lucia* by re-appointing their ALJs in a manner consistent with the Appointments Clause and then having their ALJs reconsider and potentially ratify their own prior decisions. After *Lucia*, parties will surely challenge the adequacy of that approach. *Lucia* thus threatens to disrupt agency enforcement proceedings for years to come.

*After **Lucia**, any business that finds itself facing a hostile audience in agency proceedings should examine grounds for challenging the appointment of the adjudicator.*

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, No. 16-111

antidiscrimination law — religious exemptions

Masterpiece Cakeshop addressed whether a baker who refused to create a wedding cake for a same-sex couple could claim an exemption from state antidiscrimination laws under the Free Speech and Free Exercise Clauses of the First Amendment.

The case arose out of a Colorado baker's refusal on religious grounds to create a wedding cake for a same-sex couple. The couple brought a discrimination complaint against the baker under the Colorado Anti-Discrimination Act, which prohibits discrimination in places of public accommodation on the basis of various characteristics, including sexual orientation. The Colorado Civil Rights Commission ruled in favor of the same-sex couple, rejecting the baker's claim that application of the antidiscrimination law violated his rights to free speech and free exercise of religion under the First Amendment. The Colorado Court of Appeals affirmed.

The Supreme Court reversed in a 7-2 decision that avoided many of the broader issues presented. The Court reaffirmed that, as a general rule, a business owner's religious or philosophical objections are not a sufficient basis for an exemption from generally applicable antidiscrimination laws. The baker argued that this general rule should not apply because, in designing a custom wedding cake, a baker uses his artistic skills to make an expressive statement that amounts to an endorsement of the wedding in his own voice. The Court ultimately did not reach that argument, however, because it held that the Colorado Civil Rights Commission had violated the baker's free exercise rights by failing to give neutral and respectful consideration to his claims.

The Court pointed in particular to comments a commissioner had made during the administrative hearing that disparaged the baker's free exercise claim as "one of the most despicable pieces of rhetoric that people can use" and compared it to arguments made to justify slavery and the Holocaust. The Court also noted that the Commission had denied the baker's claim despite ruling in favor of three other bakeries that had refused requests to create wedding cakes with messages disapproving of same-sex marriage. The Court thus concluded that the Commission had violated the baker's free exercise rights by rejecting his claim based on hostility to his religious views.

Masterpiece Cakeshop is most directly relevant to businesses that seek to operate in a manner consistent with their owners' religious beliefs. Although the case was a victory for the particular baker at issue, much of the language in the Court's opinion suggests that such outcomes will be the exception to the rule. The Court's reaffirmation that religious beliefs are not generally a sufficient basis for an exemption from generally applicable antidiscrimination statutes suggests that businesses that seek to claim such exemptions do so at their peril.

The case also underscores the difficulties that businesses may face when confronting conflicting claims of individual rights. Businesses often find themselves trying to reconcile such claims among management, employees, customers, and others. The Court's decision is a useful reminder that, however businesses seek to navigate those shoals, courts are more likely to uphold their decisions if they remain respectful toward all parties and avoid intemperate and hyperbolic rhetoric in rejecting the claims with which they disagree.

Masterpiece Cakeshop *underscores the difficulties that businesses may face when confronting conflicting claims of individual rights.*

Ohio v. American Express Co., No. 16-1454

antitrust — anti-steering provisions

American Express addressed whether a credit card issuer's contractual anti-steering provisions that prohibited merchants from discouraging consumers from using its credit cards violated federal antitrust laws.

Credit card companies like American Express facilitate transactions between card-holding consumers and merchants. In doing so, they offer separate but interrelated services to cardholders and merchants, providing what is known as a "two-sided transaction platform." To encourage cardholders to make more purchases with its cards, American Express offers rewards programs superior to those offered by competitors such as MasterCard or Visa. To fund those programs, it charges merchants higher transaction fees than other companies. Some merchants sought to avoid those higher charges by encouraging consumers to use a different credit card at the point of sale. In response, American Express began including "anti-steering" provisions in its contracts with merchants that prohibited such practices.

The United States and several States sued American Express, alleging that its anti-steering provisions violated the Sherman Act's prohibition on unreasonable restraints of trade. Under that statute, while certain practices such as price-fixing among competitors are unlawful per se, most restrictions are evaluated under a "rule of reason" analysis. Under that framework, the plaintiff must prove that a restraint has a substantial anticompetitive effect that harms consumers in the relevant market. The district court found that the anti-steering agreements had such an effect here because they increased merchant fees. The U.S. Court of Appeals for the Second Circuit reversed, holding that the district court had improperly focused solely on the impact on merchant fees without sufficiently considering the impact on cardholders.

The Supreme Court affirmed. The Court explained that the product that credit card companies sell is transactions, and thus the relevant market must include both the merchant and cardholder sides of the transaction. A price increase on only one side would not by itself demonstrate an anticompetitive effect. The Court concluded that the government had presented no evidence that the market for credit card transactions considered as a whole was impaired by the anti-steering provisions. To the contrary, the Court noted that, during the time the anti-steering provisions have been in place, the credit card market has expanded and improved in quality.

By requiring proof of anticompetitive effects on a two-sided transaction platform as a whole, *American Express* raises the bar for antitrust suits. While the rule of reason analysis is highly case-specific, a number of *amici* pointed out that two-sided platforms are common in e-commerce, with ride-sharing, rental-exchange, and electronic-payment services sharing many of the features of the market in this case. *American Express* will likely complicate analysis and proof in antitrust cases involving these increasingly important areas of the economy.

By requiring proof of anticompetitive effects on a two-sided transaction platform as a whole, ***American Express*** *raises the bar for antitrust suits.*

Oil States Energy Services, LLC v. Greene's Energy Group, LLC, No. 16-712

patents — inter partes review

Oil States addressed the constitutionality of inter partes review—an administrative mechanism for reconsidering and canceling issued patents.

Inter partes review is a procedure that Congress created in 2012 to allow the U.S. Patent and Trademark Office to cancel patents that were wrongly issued. Any person can seek to initiate an inter partes review by filing a petition with the Patent Office asserting that one or more claims of a patent are invalid because they are obvious or not novel. If the Patent Office agrees that the challenge should proceed, it examines the patent claims' validity through a litigation-like process in which parties conduct discovery, file briefs, and present oral argument. Ultimately, the Patent Trial and Appeal Board, sitting in a three-member panel of administrative patent judges, issues a decision on the validity of the challenged claims. That decision is reviewable by the U.S. Court of Appeals for the Federal Circuit.

In this case, an oilfield services company sued another company in district court for infringing a patent for protecting wellhead equipment used in fracking. The defendant responded by challenging the patent's validity in that suit. The defendant also challenged the patent by initiating inter partes review proceedings before the Patent Office. Although the validity challenge did not succeed in the infringement litigation, the Patent Office concluded that the patent's claims were invalid. The Federal Circuit upheld the Patent Office's decision. The court rejected arguments that canceling an issued patent through administrative proceedings violates the patent holder's constitutional right to have the issue decided in court.

The Supreme Court affirmed. The Court explained that the government's decision to grant a patent is a matter involving "public rights"—the grant of a public franchise. And under the Court's precedent, the government has wide latitude to adjudicate issues pertaining to public rights in administrative bodies outside the court system. The Court explained that the grant of a patent is qualified by the limitations of the Patent Act, which provides for later reconsideration in inter partes review. As a result, the Patent Office retained the authority to cancel a patent.

At the same time, the Court emphasized the narrowness of its decision. The Court noted that the patent holder had not raised the question whether inter partes review could be applied retroactively to patents issued before the procedure was created. Nor had the patent holder asserted a due process challenge. The Court thus cautioned that its decision should not be construed as implicitly addressing those issues.

The most immediate impact of *Oil States* is to preserve a widely used procedure for challenging the validity of patents. As a result, patentees and accused infringers will continue to litigate the validity of patents in parallel court and administrative proceedings. But the decision's full impact remains unclear. The Court's decision not to address whether it would be constitutional to apply inter partes review to patents that issued before Congress created the procedure is already spawning new challenges. And more broadly, it is far from clear that the Court would extend the reasoning of *Oil States* to administrative agencies deciding the fate of more traditional property rights—an issue that prompted some of the Justices to write separate opinions.

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

Oil States *ensures that patentees and accused infringers will continue to litigate the validity of patents in parallel court and administrative proceedings.*

South Dakota v. Wayfair, Inc., No. 17-494

interstate commerce — state sales taxes

Wayfair addressed whether a State can require a seller that has no physical presence in the State to collect and remit tax on sales to state residents.

The Constitution's Commerce Clause limits the authority of States to take actions that interfere with interstate commerce. The Supreme Court previously construed that clause to prohibit a State from requiring out-of-state vendors with no physical presence in the State to collect and remit sales tax on products they sold to state residents. In the 1967 case *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, the Court applied that rule to a mail-order retailer that shipped products to Illinois residents but had no stores, employees, or property in the State. The Court reaffirmed that holding in the 1992 case *Quill Corp. v. North Dakota*.

In *Wayfair*, the Court decided whether it should adhere to those precedents in an era where Internet-based businesses routinely ship products across state lines. South Dakota had enacted a statute that, subject to certain exceptions, required retailers to collect and remit sales tax even if they had no physical presence there. The State sued several out-of-state retailers who had failed to remit sales tax, seeking a declaration that the law was valid and an injunction requiring the retailers to comply. The state trial court granted summary judgment to the retailers based on the Supreme Court's precedents, and the South Dakota Supreme Court affirmed.

The Supreme Court vacated and remanded, concluding that *National Bellas Hess* and *Quill* were wrongly decided and should be overruled. Under the Commerce Clause, the Court held, a business need not have a physical presence in a State to support application of the State's taxing authority. The physical presence test had produced arbitrary distinctions: An out-of-state vendor with a single warehouse in the State could be forced to collect sales taxes, while a large company that sold goods nationwide through a sophisticated website with a virtual showroom could not. The explosive growth of Internet commerce exacerbated the resulting market distortions, giving online retailers an artificial advantage over their brick-and-mortar competitors. The physical presence rule also interfered with States' legitimate authority to collect taxes that support important public functions.

Wayfair upends a half-century-old limitation on state taxing authority. The financial implications for e-commerce are significant: Some sources estimate that the physical presence rule was costing States between $8 and $33 billion in tax revenue every year. As the dissent noted, however, that impact may be exaggerated. Some large Internet retailers like Amazon already collect any applicable sales tax on every product they sell. *Wayfair* may therefore have the greatest impact on small Internet start-ups that now face significant administrative costs complying with a complicated web of state tax laws.

The decision leaves some questions unanswered. South Dakota's sales tax covered only businesses that sold more than $100,000 of goods or services into the State or engaged in 200 or more separate transactions. The Court left open whether a statute that did not include such an exemption for *de minimis* sales would impermissibly burden interstate commerce. The Court also declined to decide whether a State could apply its sales taxes retroactively. Those issues will surely be litigated in future disputes.

Wayfair *may have the greatest impact on small Internet start-ups that now face significant administrative costs complying with a complicated web of state tax laws.*

Trump v. Hawaii, No. 17-965

immigration — suspension of entry

Trump addressed the validity of the President's executive order restricting the entry of foreign nationals from certain countries perceived to be security risks.

The Immigration and Nationality Act authorizes the President to suspend the entry of an alien or class of aliens into the United States whenever he finds that their entry would be detrimental to the interests of the United States. Following his election, President Trump invoked that authority in a series of executive orders that sharply restricted the entry of nationals from certain countries deemed to pose security risks, most of which had predominantly Muslim populations. Those orders led to a number of lawsuits around the country challenging the orders on both statutory and constitutional grounds.

In this case, the plaintiffs argued, among other things, that the challenged order was unconstitutional because it was motivated by religious bias. In support, they pointed to statements that Trump and his advisors had made on the campaign trail and elsewhere suggesting an intent to target Muslims. The district court issued a nationwide injunction barring enforcement of the order, and the U.S. Court of Appeals for the Ninth Circuit affirmed, concluding that the order violated various statutory provisions without reaching the constitutional issue.

The Supreme Court reversed. The Immigration and Nationality Act, it held, grants the President broad authority to suspend the entry of foreign nationals and does not contemplate a searching inquiry into the persuasiveness of the findings supporting the order. In any event, the Court held, the President had articulated sufficient grounds here, based on deficiencies in the affected countries' information-sharing practices and other national security concerns. The Court further held that the order did not run afoul of a statutory provision prohibiting discrimination in the allocation of immigrant visas, concluding that the visa provision did not supersede the President's statutory authority to suspend entry.

The Court also rejected the constitutional challenge. It gave little weight to the earlier comments by the President and his advisors, stating that the order would be upheld so long as it could reasonably be understood to result from a legitimate justification. The Court found such a justification here, noting that the facially neutral order was expressly premised on legitimate security concerns and that the restrictions on majority-Muslim nations were limited to countries previously designated as security risks by Congress or prior administrations.

While the Court's decision has obvious diplomatic and political repercussions, its important business ramifications should not be overlooked. A group of 115 companies filed an *amicus* brief in the Supreme Court urging that the President's order hindered the ability of American companies to attract talented employees and made it more difficult for them to compete in the international marketplace. The Court's decision does little to allay those fears. By interpreting the President's authority broadly in relation to other immigration statutes, the decision increases the uncertainties facing companies that rely on immigrants or foreign visitors in their businesses.

__Trump__ increases the uncertainties facing companies that rely on immigrants or foreign visitors in their businesses.

WesternGeco LLC v. ION Geophysical Corp., No. 16-1011

patents — damages

WesternGeco addressed whether a patent owner may recover lost profits for foreign sales when a company exports components designed for use in a patented invention.

The Patent Act generally applies only to infringement that occurs within the United States. Nonetheless, a company may be liable for certain domestic conduct even if the ultimate use or sale of the product occurs abroad. Section 271(f) provides that a company infringes a patent if it ships components of the patented invention from the United States for assembly abroad. The Patent Act provides that patent holders should generally receive full compensation for infringement of their patents, and courts have construed that provision to mean that a patent holder may recover lost profits when an infringer exploits an invention for its own gain. The Court had not previously addressed whether that remedy was available for foreign sales in a suit under § 271(f).

In this case, WesternGeco held patents to a system for surveying the ocean floor. ION Geophysical Corp. manufactured component parts in the United States that were shipped overseas and then assembled into a system that infringed WesternGeco's patents. WesternGeco sued ION for infringement under § 271(f). A jury found for WesternGeco and awarded damages that included $93 million in lost profits for foreign sales. The U.S. Court of Appeals for the Federal Circuit reversed the lost-profits award. Citing the general presumption that U.S. laws do not apply outside the United States, it held that the Patent Act does not allow recovery for lost sales abroad.

The Supreme Court reversed and remanded. The Court explained that, where Congress has not provided any clear indication that a statute applies extraterritorially, a court must identify the statute's focus and ask whether the conduct relevant to that focus occurred within the United States. In this case, the Court found, the focus of the Patent Act's damages provision is the underlying acts of infringement, and in a suit under § 271(f), that infringement is the domestic conduct of exporting components from the United States. Because that conduct occurred in the United States, awarding lost profits as compensation for the infringement constituted a permissible domestic application of the statute rather than an improper extraterritorial one.

WesternGeco significantly expands the damages available to patentees, allowing them to recover for lost sales in foreign countries in certain circumstances even though their U.S. patents would otherwise have no force there. Because a patentee's lost profits may often be substantially greater than alternative remedies such as a reasonable license fee, the availability of that remedy in suits brought under § 271(f) gives patent owners an additional point of leverage in infringement litigation and licensing negotiations.

Nonetheless, lost profits are not available in all cases. As the Court was careful to note, for example, issues such as proximate cause may limit or preclude that remedy. Even in suits under § 271(f), therefore, patent owners seeking lost profits should be careful to build a strong evidentiary record to support that relief.

WesternGeco *significantly expands the damages available to patentees, allowing them to recover for lost sales in foreign countries in certain circumstances.*

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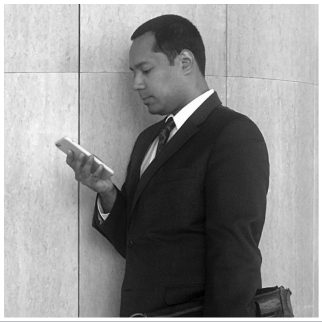

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