MoloLamken

Supreme Court Business Briefing

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SUPREME COURT BUSINESS BRIEFING

When Justice Kavanaugh took the bench in October 2018, some predicted that a new majority would take the Court in a sharply conservative direction. The reality has been far more nuanced. While Washington politics has become ever more partisan, the Court has largely charted its own course. For every case like the political gerrymandering decision that split the Court along traditional lines, there were many others in which unexpected lineups of Justices produced a variety of results.

The Court's business docket was no exception, with different combinations of Justices issuing plaintiff-friendly decisions in some contexts and defendant-friendly decisions in others. In *Apple*, for example, the Court handed private antitrust plaintiffs a notable victory: Rejecting an expansive view of its prior cases limiting suits by indirect purchasers, the Court allowed a suit against Apple for monopolizing the app market. In *Lorenzo*, the Court approved theories of liability for those who contribute to, but do not actually make, fraudulent statements—a decision with ramifications for both SEC enforcement actions and private securities fraud suits.

In *Food Marketing Institute*, on the other hand, the Court gave businesses a significant win, making it harder for media groups and other interested parties to obtain confidential business documents from federal regulators under the Freedom of Information Act. And in *Kisor*, the Court dialed back the deference owed to a federal agency's interpretation of its own regulations, strengthening the hand of businesses that find themselves in disputes with their regulators.

In the arbitration arena, the Court issued decisions that favored both sides. In one case, the Court recognized a broad exemption from arbitration for transportation workers. But in another, it reaffirmed that businesses can generally use arbitration clauses to avoid class actions in both courts and arbitral forums, overturning a decision that had construed ambiguity as consent to class arbitration. In still other cases, the Court issued decisions that favor some business interests while disfavoring others. Those cases include an important decision confirming the rights of trademark licensees following bankruptcy, and another holding that even the confidential sale of an invention may preclude the inventor from obtaining patent protection.

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

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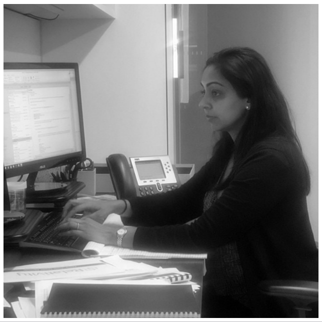

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We provide experienced advocacy—for plaintiffs and defendants—before juries, judges, arbitral forums, and appellate courts, including the Supreme Court of the United States. We also represent clients in criminal and regulatory investigations, and we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

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Apple Inc. v. Pepper, No. 17-204

antitrust — direct-purchaser rule

Apple addressed the scope of federal antitrust law's direct-purchaser rule.

Apple created and operates the App Store—an online marketplace where software applications for the iPhone are available for purchase. The vast majority of those apps are created by third-party developers. Through its proprietary technology and warranty policies, Apple restricts iPhone users to purchasing apps solely from the App Store. Although Apple keeps 30% of the purchase price, the third-party developers set the prices that customers pay to Apple when they buy an app.

iPhone users filed an antitrust class action against Apple, alleging that the company had monopolized the app market. Apple responded that the suit was barred by the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, which holds that only direct purchasers may sue under the federal antitrust laws. According to Apple, that rule foreclosed the suit because the plaintiffs were seeking to recover overcharges in prices that were set by app developers and that Apple merely passed on to consumers. The district court agreed with Apple and dismissed the suit. The U.S. Court of Appeals for the Ninth Circuit reversed, ruling that the consumers were Apple's direct purchasers regardless of which party set the price.

The Supreme Court affirmed. The Court explained that *Illinois Brick* announced a bright-line rule that prohibits only suits by indirect purchasers—purchasers that do not buy directly from, but are instead at least a further step removed from, the alleged monopolist. Under that rule, for example, a consumer cannot sue a manufacturer for monopolization if the consumer purchased a product indirectly through a retailer. Applying that rule in *Apple*, the Court held that the plaintiffs were direct purchasers, and were therefore permitted to sue, because they had transacted directly with Apple. The Court rejected Apple's argument that the claims were indirect because Apple merely passed on prices set by developers. *Illinois Brick*, the Court held, focuses on whether the plaintiff has a direct-purchaser relationship with the defendant, not on the process by which the price was set.

Apple sets clear limits on the direct-purchaser rule. By adhering to a standard that turns on the relationship between the parties rather than complex and potentially disputed economic factors, the Court provided predictability and clarity to parties in antitrust disputes. That predictability is increasingly important as markets and transactions become more complex. As the facts of *Apple* illustrate, consumers often acquire goods or services through transactions in which multiple parties may play a role in setting a price. The Court's holding provides a clear rule for determining which purchasers may sue to challenge anticompetitive conduct in such markets.

While the Supreme Court allowed the consumers' suit to proceed in *Apple, Illinois Brick* still bars federal antitrust claims by genuine indirect purchasers, even if they suffer serious indirect harm from a monopolist's actions. Many States have responded to *Illinois Brick* by amending or construing their state antitrust laws to permit suits by indirect purchasers. Those state remedies will continue to play an important role in private antitrust enforcement.

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

__Apple__ provides a clear rule for determining which purchasers may bring federal antitrust suits to challenge anticompetitive conduct in complex markets.

Food Marketing Institute v. Argus Leader Media, No. 18-481

Freedom of Information Act — disclosure exemptions

Food Marketing Institute addressed the scope of the Freedom of Information Act's exemption for confidential commercial or financial information.

To promote government transparency, the Freedom of Information Act ("FOIA") establishes a mechanism for private parties to request documents held by federal agencies. FOIA contains a number of exemptions. One applies to "commercial or financial information obtained from a person and privileged or confidential." Under that exemption, a federal agency can withhold certain confidential information that a private company previously submitted to the agency. For many years, courts interpreted that exemption narrowly to encompass only sensitive information whose disclosure would cause substantial competitive harm to the company that submitted it.

Food Marketing Institute arose out of a FOIA request that a South Dakota newspaper, the Argus Leader, submitted to the U.S. Department of Agriculture. The newspaper sought detailed information about retailer participation in the federal food-stamp program, including how much revenue each store derived from food-stamp redemptions. When the Department denied the request, the newspaper filed suit. The Department urged that the redemption data was competitively sensitive and that retailers had provided the information to the agency under assurances of confidentiality. The district court rejected the argument, finding the claim of competitive harm too speculative. The Food Marketing Institute, a trade association of grocery retailers, intervened and appealed, but the U.S. Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court reversed. The term "confidential," it explained, means "private" or "secret." The statutory exemption thus requires that the information be customarily kept private, or at least closely held, by the company submitting it. The exemption might also require that the information be communicated to the government under assurances of confidentiality. But the Court held that there is no further requirement that disclosure would threaten substantial competitive harm. It rejected the argument that FOIA's policy of government transparency justified such a requirement. Congress, the Court reasoned, sought to strike a balance between disclosure and other interests, such as encouraging private parties to share proprietary information that will help federal agencies better administer government programs.

Food Marketing Institute marks a major change in the interpretation of a FOIA exemption that is important to businesses. Courts had long interpreted the exemption narrowly along the lines of the substantial competitive harm test the Eighth Circuit applied here. As a result, companies that shared proprietary or sensitive information with federal agencies had to worry about the information being disclosed in response to FOIA requests. The Supreme Court's decision expands the exemption to protect a much wider range of private business information from disclosure. While the decision deals media organizations and government watchdogs a setback, it is a welcome development for companies that share sensitive business information with federal regulators.

***Food Marketing Institute** is a welcome development for companies that share sensitive business information with federal regulators.*

Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc., No. 17-1229

patents — "on sale" bar

Helsinn addressed whether the sale of an invention to a party that is contractually obligated to keep it confidential places the invention "on sale" within the meaning of the Patent Act, and thus makes it potentially unpatentable.

Every federal patent statute since 1836 has included a so-called "on sale" bar. The version in effect until 2011 prevented a person from receiving a patent if the invention was "in public use or on sale" in the United States more than one year before the date of the patent application. In the 2011 Leahy-Smith America Invents Act, Congress amended the statute to add a catch-all provision. The statute now precludes patentability for inventions "in public use, on sale, or otherwise available to the public" more than a year before the invention's effective filing date.

This case concerned Helsinn's patent for an anti-nausea drug. Nearly two years before it applied for the patent, Helsinn contracted with another company to distribute the drug. The contracts required the company to keep confidential any proprietary information it received from Helsinn. When Helsinn later sued Teva for infringing its patent, Teva asserted that the patent was invalid because the distribution agreement put the invention "on sale" more than a year before Helsinn applied for its patent. The district court held that the "on sale" bar did not apply, because the agreement had not made the invention available to the public. While the agreement itself was publicly disclosed, the specific dosage information for the patented drug was not. The U.S. Court of Appeals for the Federal Circuit reversed, holding that the "on sale" bar applies so long as the existence of the sale was public, even if the details of the invention subject to the sale remained confidential.

The Supreme Court affirmed. The Court's precedents applying prior versions of the statute had suggested that a sale need not make an invention available to the public for the "on sale" bar to apply. And the Federal Circuit—which has exclusive jurisdiction over patent appeals—had long held that the "on sale" bar applies even where the sale of the invention was secret. The Supreme Court concluded that, when Congress reenacted the "on sale" language in the America Invents Act, it adopted the earlier judicial construction of that phrase. The Court rejected Helsinn's argument that the addition of the phrase "otherwise available to the public" limited each of the preceding terms in the statute to disclosures that make the invention available to the public. The Court noted that, if Congress had intended to overturn the settled judicial interpretation of "on sale," it would have chosen a less oblique way of doing so.

Helsinn underscores that inventors must take care in deciding how and when to commercialize inventions for which they may seek patent protection. It is understandable that inventors may want to have distribution arrangements for new products in place as early as possible. Because those agreements may put the invention "on sale" for purposes of the Patent Act, however, inventors would be well advised to file their patent applications before or shortly after entering into such agreements.

Helsinn *underscores that companies must take care in deciding how and when to commercialize inventions for which they may seek patent protection.*

Iancu v. Brunetti, No. 18-302

trademarks — immoral or scandalous marks

Brunetti addressed whether federal law's prohibition on registering "immoral" or "scandalous" trademarks violates the First Amendment's protections for freedom of speech.

Federal law allows for registration of trademarks. While not a prerequisite to enforcement, registration confers important benefits. Among other things, it creates a legal presumption that the trademark is valid and that the registrant owns it. Several categories of trademarks, however, are not eligible for registration. For example, an applicant cannot register a trademark if it is merely descriptive of the goods on which it is used, or if it is likely to cause confusion. The trademark statute also prohibits registration of any trademark that comprises "immoral" or "scandalous" matter. In an earlier case, *Matal v. Tam*, the Supreme Court struck down a similar prohibition on registering "disparaging" marks. *Brunetti* concerned whether the bar on "immoral" or "scandalous" marks should meet the same fate.

Erik Brunetti, a fashion designer, founded a clothing line that uses the trademark FUCT. While Brunetti represented that the mark "is pronounced as four letters, one after the other: F-U-C-T," the Patent and Trademark Office refused to register the mark due to its resemblance to a well-known profanity. Brunetti challenged the denial in federal court, and the U.S. Court of Appeals for the Federal Circuit ruled in his favor. Applying the Supreme Court's decision in *Matal v. Tam*, the court concluded that the prohibition on registering immoral or scandalous trademarks violates the First Amendment's protections for freedom of speech.

The Supreme Court affirmed. The Court held that the prohibition violates the First Amendment because it discriminates based on viewpoint. The terms "immoral" and "scandalous" impermissibly distinguish between two opposing sets of ideas, allowing registration of marks aligned with conventional moral standards, but denying registration of marks hostile to them. The Court rejected the government's argument that the ban on "scandalous" trademarks could be interpreted to refer only to the *mode* of expression—capturing only lewd, sexually explicit, or profane expressions. The dictionary definition of "scandalous" covered far more than just lewd or profane expressions. Adopting the government's interpretation, the Court reasoned, would amount to rewriting the statute rather than interpreting it.

Brunetti permits registration of a potentially substantial category of "immoral" or "scandalous" trademarks. The decision reaffirms the Court's robust commitment to freedom of speech, even in the commercial sphere.

For some of those trademarks, however, Congress may end up having the last word. In a concurring opinion, Justice Alito noted that Congress could adopt a more carefully tailored statute that prohibits registration only of marks containing vulgar terms that play no real part in the expression of ideas. While Brunetti's clothing line won this round, congressional sensibilities may ultimately render his victory short-lived.

__Brunetti__ permits registration of a potentially substantial category of "immoral" and "scandalous" trademarks.

Jam v. International Finance Corp., No. 17-1011

international organizations — immunity

Jam *opens the door slightly to suits against international organizations.*

Jam addressed the scope of the immunities that international organizations enjoy under the International Organizations Immunities Act of 1945.

Congress passed the International Organizations Immunities Act ("IOIA") in 1945, granting international organizations the "same immunity from suit . . . as is enjoyed by foreign governments." When Congress passed that statute, foreign governments enjoyed virtually absolute immunity from suit. Later, however, the State Department and then Congress narrowed the immunity of foreign governments. The Foreign Sovereign Immunities Act of 1976, for example, denies immunity for actions based on a foreign state's commercial activities with a sufficient connection to the United States. The question in *Jam* was whether international organizations should receive the same broad immunity that foreign governments enjoyed when Congress passed the IOIA in 1945, or only the narrower immunity that foreign governments have today.

This case concerned the International Finance Corporation, an international organization that invests in the private sector in less developed countries. About a decade ago, it financed construction of a power plant in Gujarat, India. A group of local farmers and fishermen sued in federal court, alleging that the power plant polluted the surrounding air, water, and land. The International Finance Corporation argued that it was immune from suit under the IOIA. The district court agreed, reading the statute to grant the broad immunity that foreign governments had in 1945. The U.S. Court of Appeals for the D.C. Circuit affirmed.

The Supreme Court reversed. The IOIA's "same immunity" provision, it held, is best read as dynamically linking international organizations' immunity to the immunity that foreign governments presently enjoy. The Court invoked the "reference canon" of statutory construction, under which a statute's general reference to a subject adopts the present law on that subject rather than the law in existence at the moment the statute was passed. The Court also relied on the State Department's interpretation, noting that Executive Branch interpretations of foreign immunities should be given special weight. Accordingly, the Court held that the International Finance Corporation may be subject to suit, to the same extent as a foreign government, for claims arising out of its commercial activities connected to the United States.

By rejecting absolute immunity, *Jam* opens the door slightly to suits against international organizations. Companies that do business with those organizations or are adversely affected by their actions now have greater opportunity for recourse in U.S. courts. But obstacles still remain. For example, the Supreme Court noted that the IOIA is only a default provision and that some international organizations—such as the United Nations and the International Monetary Fund—have more absolute protections under specific laws. Moreover, even foreign governments are still presumptively immune from suit absent a statutory exception to immunity, and plaintiffs may have difficulty meeting the limited statutory exceptions. Companies that do business with international organizations should be aware of those risks and, where possible, insist on broad contractual waivers of immunity in any transaction.

Kisor v. Wilkie, No. 18-15

administrative law — deference to agencies

Kisor addressed whether courts must defer to an administrative agency's interpretation of its own ambiguous regulations.

Federal agencies issue countless regulations, not all of which are clear. In *Auer v. Robbins*, the Supreme Court held that federal courts generally must defer to an administrative agency's reasonable interpretation of its own ambiguous regulation. In recent years, however, *Auer* deference has been criticized by many judges and commentators.

In *Kisor*, a veteran sought retroactive disability benefits from the Department of Veterans Affairs ("VA"). The agency denied his request on the ground that he had not presented "relevant" service records as required by a VA regulation. The veteran challenged that decision, arguing that the agency had taken too narrow a view of "relevant" service records. The U.S. Court of Appeals for the Federal Circuit affirmed. It concluded that the regulation was ambiguous as to what service records qualify as "relevant," and that the VA's interpretation of the regulation was reasonable. Accordingly, the court held that *Auer* deference required it to uphold the agency's interpretation. The veteran sought further review, asking the Supreme Court to overrule *Auer*.

The Supreme Court vacated and remanded. The Court declined to overturn *Auer*, finding that the special justification needed to overrule its precedents was absent. At the same time, the Court emphasized several limits on *Auer* deference. First, a court may not defer to an agency interpretation unless it finds that the regulation is genuinely ambiguous after exhausting the traditional tools of legal interpretation. Second, the agency's interpretation must be reasonable, meaning that it must fall within the zone of ambiguity remaining after the court has applied those tools of interpretation. Third, the interpretation must reflect the agency's official position and not merely informal views of agency staff. The interpretation must also reflect the agency's substantive expertise. Finally, the interpretation must reflect the agency's fair and considered judgment: Deference is not appropriate where an interpretation is adopted as a convenient litigating position. Because the Federal Circuit did not consider the VA's interpretation in light of those principles, the Supreme Court remanded the case for further consideration.

On balance, *Kisor* is a significant win for regulated businesses. Federal regulators often invoke *Auer* deference as a thumb on the scale in their disputes with regulated parties. Although the Court did not overrule *Auer*, the numerous limits it emphasized may so pare back the doctrine that it will be far easier for regulated businesses to challenge federal agencies' interpretations of their own regulations.

Nonetheless, *Kisor* is not all good news for businesses. By making it easier to *challenge* agency interpretations, *Kisor* also makes it harder to *rely* on them. Businesses that are satisfied with an agency's interpretation of its regulation may now find the interpretation rejected at the behest of a public interest group or other third party. Even interpretations that courts have deferred to in the past might be vulnerable to challenge.

***Kisor** makes it easier for regulated businesses to challenge federal agencies' interpretations of their own regulations.*

Lamps Plus, Inc. v. Varela, No. 17-988

arbitration — class arbitration

Lamps Plus addressed whether courts can order arbitration on a classwide basis when an agreement is ambiguous as to whether the parties consented to class arbitration.

This case arose out of a dispute between Frank Varela and his employer, Lamps Plus. Varela's tax information, as well as the tax information of 1,300 other Lamps Plus employees, was disclosed to a hacker impersonating a company official. After a fraudulent tax return was filed in Varela's name, Varela sued Lamps Plus on behalf of the entire class of employees whose information had been compromised. Varela, however, had signed an arbitration agreement with Lamps Plus. Lamps Plus moved to compel arbitration of Varela's claim on an individual basis.

The district court granted the motion, but it ordered arbitration to proceed on a classwide rather than an individual basis. The U.S. Court of Appeals for the Ninth Circuit affirmed. The Ninth Circuit found that the parties' agreement was ambiguous as to whether it authorized arbitration on a classwide basis. Applying principles of state contract law, the Ninth Circuit construed the ambiguity against the drafter of the agreement, Lamps Plus.

The Supreme Court reversed. The Court explained that a court can order arbitration only if the parties agreed to it. Traditionally, arbitration is meant to resolve disputes more efficiently and less expensively by forgoing the formalities of court litigation. In the Supreme Court's view, class arbitration lacks those benefits because it entails many of the procedural complexities arbitration is meant to displace. The Court had therefore held in previous cases that courts may not infer that parties consented to class arbitration from mere silence—an affirmative indication in the contract was necessary. In *Lamps Plus*, the Court extended that rule to contracts that are merely ambiguous as to whether they permit class arbitration. Absent clear language, the Court held, a court may not infer that parties agreed to class arbitration.

After *Lamps Plus*, companies' ability to avoid class actions through arbitration agreements is clearer than ever. In many situations that present the specter of mass claims, such as consumer and employment relations, companies can require parties to agree to arbitrate as a condition of doing business. In recent years, companies have often used arbitration clauses to foreclose class actions where the collective damages to the class might be significant, but the amount at stake for any individual is not worth pursuing. Plaintiffs responded by seeking class treatment in arbitration instead. The Court's more recent cases sharply limited that strategy.

Even before *Lamps Plus*, the Supreme Court had held that courts may not infer consent to class arbitration from mere silence. But that holding left room for creative plaintiffs to seek class treatment by pointing to elliptical language in arbitration agreements and invoking state-law canons of construction to resolve ambiguities in their favor. *Lamps Plus* curtails that strategy, creating a new barrier to class actions—not just in court but in any forum.

*After **Lamps Plus,** companies' ability to avoid class actions through arbitration agreements is clearer than ever.*

Lorenzo v. SEC, No. 17-1077

securities fraud — dissemination of false statements

Lorenzo addressed whether an individual who disseminates false or misleading statements to investors with the intent to defraud can be liable for securities fraud even if the individual is not the "maker" of the statements.

Securities and Exchange Commission Rule 10b-5 contains three prohibitions. It makes it unlawful, in connection with the purchase or sale of a security, "(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact . . . , or (c) To engage in any act, practice, or course of business which operates . . . as a fraud or deceit." In *Janus Capital Group, Inc. v. First Derivative Traders*, the Supreme Court held that only the "maker" of a false statement—the person with ultimate authority over the contents of the statement and whether and how to communicate it—can be liable under subsection (b).

Lorenzo arose out of SEC administrative proceedings against Francis Lorenzo, an investment banker, for sending false and misleading emails to investors in connection with a debenture offering. The emails, which had been written and approved by Lorenzo's boss, falsely stated that the company issuing the debentures had more than $10 million in assets, when in fact its assets were worth less than $400,000. The Commission found that Lorenzo had violated Rule 10b-5. On review, the U.S. Court of Appeals for the D.C. Circuit agreed with Lorenzo that he could not be liable under subsection (b) because he was not the "maker" of the false statements: Lorenzo's boss, not Lorenzo, had ultimate authority over the content and communication of the emails. But the court sustained the Commission's finding that, by knowingly disseminating false information to investors, Lorenzo had violated subsections (a) and (c).

The Supreme Court affirmed. The Court held that Lorenzo's conduct fell within the plain meaning of subsections (a) and (c): By disseminating false information with the intent to defraud investors, he had "employ[ed]" a "device, scheme, or artifice to defraud," and had "engage[d]" in an "act, practice, or course of business which operate[d] . . . as a fraud or deceit." The Court rejected Lorenzo's argument that liability for false statements can be imposed only under the provision that specifically refers to false statements—subsection (b). The Court and the Commission had long recognized that there is considerable overlap among the subsections of Rule 10b-5, and that they should not be read as governing mutually exclusive categories of conduct. The Court's interpretation was bolstered by the fact that, under a contrary interpretation, Lorenzo's plainly fraudulent conduct might otherwise fall outside the ambit of Rule 10b-5 altogether.

Lorenzo is a potential source of concern for professionals who assist in preparing prospectuses and other communications to investors—and a potential boon to private securities-fraud plaintiffs. In the wake of *Janus*, several courts of appeals had held that liability for false statements could arise only under subsection (b) of Rule 10b-5. That approach often limited the liability of the accountants, lawyers, and bankers who help prepare and disseminate investor communications on their clients' behalf: Those parties would not be considered the "makers" of any false statements in those communications. While the Commission could still assert claims against such professionals for aiding and abetting another person's false statements, private plaintiffs could not. *Lorenzo*, however, opens the door to private Rule 10b-5 suits for the knowing dissemination of false statements under subsections (a) and (c), whether or not the defendant is the "maker" of the statements under subsection (b).

***Lorenzo** is a potential source of concern for professionals who assist in preparing prospectuses and other communications to investors—and a potential boon to private securities-fraud plaintiffs.*

Merck Sharp & Dohme Corp. v. Albrecht, No. 17-290

product liability — federal preemption

Merck addressed whether, in a product liability suit, a judge or a jury should decide a preemption defense based on the Food and Drug Administration's refusal to approve a change to a prescription drug label.

Plaintiffs in product liability suits often argue that a drug manufacturer's label was deficient under state law because it did not adequately warn of potential risks. Under federal law, however, the FDA regulates the safety information appearing on prescription drug labels and has authority to reject proposed changes. State-law claims are preempted where it is impossible for a party to comply with both state and federal law. In *Wyeth v. Levine*, the Supreme Court held that a drug manufacturer may assert a preemption defense against a state-law claim that it failed to warn of a particular risk if there is "clear evidence" that the FDA would have rejected a change to the drug's label to warn of that risk.

In *Merck*, users of the osteoporosis drug Fosamax alleged that Merck had breached a state-law duty to warn of an increased risk of a particular type of bone fracture. Merck argued that the claims were preempted because the FDA would not have allowed it to add such a warning to the Fosamax label at the time. Merck noted that the FDA had rejected a 2008 proposal to add a warning about stress fractures generally, and that the FDA required a warning about the specific bone fractures at issue only in 2010 after further analysis. The district court agreed with Merck and held the claims preempted. The U.S. Court of Appeals for the Third Circuit vacated and sent the case back for trial. In its view, whether the FDA would have rejected a proposed label change was a question of fact to be answered by the jury.

The Supreme Court vacated and remanded, holding that a preemption defense under *Wyeth* is a question of law for the judge, not a jury, to decide. The Court explained that whether there is a conflict between federal and state law, such that a defendant cannot comply with both, is a legal rather than a factual question. Even when the inquiry involves subsidiary factual disputes, the judge may resolve it. The Court also clarified that, to prove preemption in a warning label case like this one, the manufacturer must show both that it fully informed the FDA of the justification for the warning allegedly required by state law, and that the FDA refused to approve the warning.

By holding that preemption is a question of law for the judge, *Merck* permits drug manufacturers to assert a preemption defense without enduring the expense and unpredictability of a jury trial. Where a defense turns on a legal question, the defendant can often obtain resolution early in the case. And judicial rulings are often perceived to be more predictable than jury verdicts, particularly on the sorts of technical matters involved in preemption disputes.

In other respects, the decision may prove more helpful to plaintiffs. The Court emphasized that preemption is a demanding defense. Because manufacturers generally may add warnings based on new evidence without the FDA's advance approval, it may often be difficult to show that a warning required by state law was truly prohibited by federal law. Finally, while *Merck* arose in the specific context of drug labeling, the case has broader implications for any company that faces product liability claims in a federally regulated industry.

Merck *permits drug manufacturers to assert a preemption defense without enduring the expense and unpredictability of a jury trial.*

Mission Product Holdings, Inc. v. Tempnology, LLC, No. 17-1657

bankruptcy — rejection of executory contracts

Mission Product Holdings *makes clear that rejection of an executory contract in bankruptcy does not rescind the counterparty's contractual rights.*

Mission Product Holdings addressed the effect of a debtor's rejection of an executory contract in bankruptcy.

Section 365 of the Bankruptcy Code provides that a debtor or trustee may "reject" any executory contract—that is, a contract under which some performance remains due on both sides. Rejection relieves the debtor of any further obligation to perform, but is defined to constitute a "breach" of the contract. Several provisions of Section 365 address the effect of rejection for specific kinds of contracts. For example, when a license agreement for a patent or copyright is rejected, Section 365(n) allows the licensee to retain its rights under the agreement by continuing to pay royalties. Section 365(n) does not apply to trademarks, however, leaving open whether a trademark licensee retains its right to use the trademark if the debtor rejects the license agreement.

In *Mission Product Holdings*, a clothing company in bankruptcy opted to reject an agreement licensing its trademarks to a distributor. The clothing company then argued that its rejection of the contract terminated the distributor's right to use the trademarks. The bankruptcy court and the U.S. Court of Appeals for the First Circuit agreed. They reasoned that, because Section 365 expressly allows some licensees to retain their rights after rejection, the absence of a similar provision for trademark licensees must mean that rejection of trademark licenses extinguishes their rights.

The Supreme Court reversed. It emphasized that Section 365 defines rejection as a "breach" of the underlying contract. When a contract is breached under ordinary contract law, the non-breaching party generally retains its rights under the contract. The Court concluded that the same should be true when a debtor breaches a contract by rejecting it in bankruptcy. Accordingly, the Court held that rejection of a trademark license agreement does not revoke the licensee's right to use the trademark. The licensee may choose to terminate the agreement and give up its rights, but rejection does not automatically have that effect. The Court concluded that Section 365's provisions addressing other types of contracts did not call for a different result in the trademark context, as those provisions all reinforced the general rule that contractual rights survive rejection. The Court also declined to limit Section 365 based on trademark-specific concerns, explaining that the statute applies generally to all kinds of executory contracts.

Mission Product Holdings provides a clear rule: A debtor's rejection of an executory contract in bankruptcy does not rescind the counterparty's rights under the contract. That rule is not limited to trademark licenses, but applies generally to all executory contracts.

That said, the rule may present special challenges in the trademark context. A trademark licensor generally must exercise quality control over goods and services sold under its trademark to maintain the mark's value and validity. A debtor that rejects a trademark license thus may still have to expend resources to maintain its mark, or else risk losing the mark's value. And while counterparties may retain their rights under a rejected contract, they must decide whether those rights are worth the price of continuing to perform (and pay) when the debtor has stopped performing. *Mission Product Holdings* thus offers clarity for contracting parties, but does not eliminate the difficult economic decisions that accompany bankruptcy.

New Prime Inc. v. Oliveira, No. 17-340

arbitration — employment disputes

New Prime addressed whether the Federal Arbitration Act's exception for certain "contracts of employment" applies to independent-contractor arrangements.

The Federal Arbitration Act ("FAA") generally requires courts to enforce parties' arbitration agreements by staying litigation and compelling arbitration according to the terms of an arbitration agreement. The FAA excludes, however, disputes involving "contracts of employment" of seamen, railroad employees, and other transportation workers.

In this case, a truck driver filed a class action against his trucking company in federal court, alleging minimum-wage violations. The company moved to compel arbitration on the ground that the parties had agreed to arbitrate any disputes between them. The driver objected that the FAA did not apply because he was a transportation worker and his claims arose from his "contract of employment." The company did not dispute that the driver qualified as a transportation worker. But it argued that the FAA's "contracts of employment" exclusion did not apply because the driver was an independent contractor, not an employee. The district court and the U.S. Court of Appeals for the First Circuit both sided with the driver and refused to compel arbitration.

The Supreme Court affirmed. It held that the FAA's "contracts of employment" exclusion covers independent-contractor arrangements as well as formal employer-employee relationships. Although the law today often distinguishes between employees and independent contractors, the Court explained that a statute's words should be given their ordinary meaning at the time of enactment. And when the FAA was enacted in 1925, a "contract of employment" simply meant an agreement to perform work. That definition, the Court concluded, readily includes independent-contractor relationships.

New Prime is a departure from the Supreme Court's recent spate of pro-arbitration decisions. It may result in significantly greater litigation exposure for transportation companies. Businesses often seek to shield themselves from costly class action litigation by requiring their workers and customers to agree to individualized arbitration. By holding that independent-contractor transportation workers are exempt from the FAA, *New Prime* limits transportation companies' ability to take advantage of that approach.

New Prime has major implications for arbitration agreements in the transportation industry, including for ride-sharing services like Uber and Lyft. Still, the decision leaves open several important questions. The Court did not address who qualifies as a transportation worker under the FAA—an issue that may spur future litigation. The Court's decision was also limited to judicial authority to compel arbitration under the FAA. It did not address other potential grounds for enforcing arbitration agreements, such as state law or the federal courts' inherent authority to stay litigation in favor of alternative dispute resolution. Thus, while *New Prime* limits transportation companies' ability to enforce arbitration agreements with their workers, it does not shut the door entirely.

***New Prime** limits transportation companies' ability to compel arbitration of disputes with their workers.*

Tennessee Wine & Spirits Retailers Association v. Thomas, No. 18-96

interstate commerce — residency requirements

Tennessee Wine & Spirits addressed the constitutionality of a state law imposing residency restrictions on applicants for retail liquor store licenses.

Tennessee imposed demanding residency requirements on individuals and companies seeking to obtain or renew licenses to operate liquor stores within the State. The State required that an applicant for an initial license have resided in Tennessee for two years, and that a person seeking to renew a license have resided in Tennessee for ten years. It further provided that a corporation could not obtain a license unless all of its stockholders were Tennessee residents.

In this case, two companies applied for licenses to operate liquor stores in Tennessee. Neither applicant satisfied Tennessee's residency requirements: One was owned by Maryland residents, while the other was owned by Tennessee residents who had only recently moved to the State. The Tennessee Wine & Spirits Retailers Association—a trade association of in-state liquor stores—threatened to sue the Tennessee Alcoholic Beverage Commission if it granted the licenses. The Commission in turn filed an action to determine whether the State's residency requirements were constitutional. The district court struck down the requirements, and the U.S. Court of Appeals for the Sixth Circuit affirmed. The trade association sought Supreme Court review, but only as to the two-year residency requirement.

The Supreme Court affirmed. The Constitution's dormant Commerce Clause, the Court explained, prohibits state laws that unduly restrict interstate commerce. That prohibition includes laws that discriminate against out-of-state goods or economic actors without a legitimate purpose. Tennessee's two-year residency requirement favored Tennessee residents over nonresidents in violation of those principles.

The Court rejected the trade association's argument that the law was nevertheless constitutional under the Twenty-First Amendment, which repealed Prohibition but recognized States' authority to regulate alcohol. While the Twenty-First Amendment grants States authority to regulate the health and safety risks of alcohol, the Court held, it does not permit protectionist measures that discriminate against interstate commerce with only attenuated health and safety benefits. Tennessee's residency requirement was just such a measure: It protected Tennessee residents from competition while doing little or nothing to advance the State's interests in curbing alcohol abuse. As a result, the Twenty-First Amendment did not shield the law from ordinary dormant Commerce Clause principles.

Tennessee Wine & Spirits reaffirms the Supreme Court's robust commitment to protecting the interstate marketplace from economic protectionism. Most immediately, the ruling expands consumer choice and increases competition in the market for alcohol products. Although States retain significant authority to regulate alcohol sales, including through laws that preserve the traditional three-tier distribution system, they cannot use those powers in a way that protects in-state interests with no significant health or safety benefits. More generally, *Tennessee Wine & Spirits* confirms that the Court has little tolerance for state efforts to protect local interests against interstate competition, even in highly regulated industries.

Tennessee Wine & Spirits *confirms that the Supreme Court has little tolerance for state efforts to protect local interests against interstate competition, even in highly regulated industries.*

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