Supreme Court Business Briefing

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MOLOLAMKEN
SUPREME COURT BUSINESS BRIEFING

The Supreme Court this Term mourned the passing of long-serving member Justice Ruth Bader Ginsburg, the Court's resident expert on civil procedure and author of important opinions on women's rights. In her seat, the Court welcomed Justice Amy Coney Barrett, a respected law professor at Notre Dame Law School and judge on the U.S. Court of Appeals for the Seventh Circuit.

Justice Barrett's arrival had a noticeable impact in some areas, particularly in clashes between religious organizations and state or local governments over COVID-19 restrictions. But Justice Barrett promptly dispelled any expectation that she might be beholden to the Administration that appointed her. She signed on to multiple orders summarily rejecting challenges to the results of the 2020 presidential election, and joined the Court's lopsided majority dismissing the latest challenge to Obamacare.

The Court's business docket reflected similar consensus. As usual, many of the Court's decisions were unanimous, even in cases with profound implications. In one decision, the Court sharply curtailed the Federal Trade Commission's ability to seek monetary relief for unfair or deceptive trade practices, rejecting a statutory interpretation the agency had pressed in courts across the country for decades. In another high-profile case, the Court rejected the National Collegiate Athletic Association's request for special treatment under the federal antitrust laws, affirming a lower court injunction that prohibited the organization from limiting the education-related benefits that schools could provide to student athletes.

Where the Court was divided, it was often in the context of disputes over the Constitution's structural provisions. In two cases, the Court found that Congress had impermissibly restricted the Executive Branch's oversight of its own officers—in one instance by limiting the President's authority to remove the head of the Federal Housing Finance Agency, and in another by preventing the Patent Office's Director from reviewing decisions of administrative patent judges. In a third case, the Court held that Congress had granted the judiciary too much authority by allowing plaintiffs to sue for violations of the Fair Credit Reporting Act without any showing of concrete harm. Those were all important decisions with profound implications for a variety of industries, even if the specific legal questions were more technical than some hot-button issues.

Still other decisions defy easy categorization. The Court delivered its most important copyright decision in years, holding that Google's copying of a portion of Oracle's Java application programming interface to build the Android smartphone operating system was a protected "fair use." And the Court limited the reach of a major computer crime law—a decision with important implications not only for federal criminal prosecutions, but also for trade secret cases and other business disputes where companies assert civil claims under the statute.

With those and other leading decisions in mind, we are pleased to present the eleventh annual MoloLamken Supreme Court Business Briefing. We have identified cases with the greatest potential impact on a wide range of businesses. For each, we have distilled the facts and holdings 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. They formed the firm 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.

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.

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

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AMG Capital Management, LLC v. Federal Trade Commission, No. 19-508

Federal Trade Commission Act — monetary remedies

AMG addressed whether Section 13(b) of the Federal Trade Commission Act authorizes the Federal Trade Commission to obtain equitable monetary relief from persons who engage in unfair or deceptive trade practices.

This case arose out of an enforcement action the FTC brought against Scott Tucker and several companies he managed. Tucker's businesses provided short-term loans to consumers over the Internet. The FTC alleged that disclosures to consumers about the terms of the loans were misleading. The FTC brought the action under Section 13(b) of the FTC Act, which authorizes the agency to seek "injunctions." But the FTC also sought monetary relief for consumers in the form of restitution and disgorgement.

The district court granted summary judgment to the FTC and ordered Tucker to pay $1.3 billion. The U.S. Court of Appeals for the Ninth Circuit affirmed. Tucker urged that, because Section 13(b) refers only to "injunctions," it does not authorize other remedies such as restitution and disgorgement. The court of appeals rejected that argument, holding that the statutory reference to "injunctions" implicitly authorizes equitable monetary relief.

The Supreme Court reversed. The Court held that the FTC cannot obtain restitution or other monetary remedies under Section 13(b). The Court explained that the text of the provision mentions only "injunctions," and injunctions simply are not the same as monetary relief. The Court rejected the FTC's argument that, whenever a statute refers to an "injunction," it implicitly authorizes other equitable relief such as disgorgement and restitution.

The Court noted that another provision of the statute—Section 19—authorizes monetary relief. That provision, however, affords protections for defendants not found in Section 13(b). Under Section 19, for example, the FTC must first conduct an administrative hearing and must then prove in court that a reasonable person would have known the conduct was fraudulent. Section 19 also includes a statute of limitations. The absence of similar safeguards in Section 13(b) indicated that Congress did not intend for monetary relief to be available under that provision.

AMG will fundamentally change how the FTC seeks to recover money for consumers. In recent years, the FTC had overwhelmingly resorted to Section 13(b) to obtain monetary relief. That authority is now gone. As the Supreme Court noted, the FTC can still seek disgorgement and restitution under Section 19. But the agency must comply with the more rigorous standards of that provision.

The Supreme Court explained that, if the FTC considers Section 19's requirements too cumbersome, it can ask Congress for additional authority. The FTC has done just that, asking Congress to amend Section 13(b) to authorize restitution and disgorgement. It remains to be seen whether Congress will do so—and, if it does, whether it will afford defendants the heightened knowledge standard and other protections found in Section 19.

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

__AMG__ will fundamentally change how the Federal Trade Commission seeks to recover money for consumers.

City of Chicago v. Fulton, No. 19-357

bankruptcy — automatic stay

Fulton addressed whether creditors violate the Bankruptcy Code's automatic stay merely by retaining possession of the debtor's property after the debtor files for bankruptcy.

The filing of a bankruptcy petition generally imposes an "automatic stay" on creditors' efforts to collect from the debtor outside the bankruptcy case. Among other things, the automatic stay prohibits "any act . . . to exercise control over property" of the debtor's estate. A person who willfully violates the automatic stay can be liable for actual damages, attorney's fees, and even punitive damages.

While *Fulton* has broad commercial implications, the case arose in the context of the City of Chicago's impoundment of Robbin Fulton's car for failure to pay fines for motor vehicle infractions. Fulton later petitioned for Chapter 13 bankruptcy. Fulton asked the City to return the car, but it refused. The bankruptcy court ruled that the City had violated the automatic stay. The U.S. Court of Appeals for the Seventh Circuit affirmed. In its view, by retaining possession of a debtor's property after the debtor declared bankruptcy, the City had impermissibly exercised control over that property.

The Supreme Court vacated and remanded. The Court held that a person does not "exercise control over" a debtor's property in violation of the automatic stay simply by retaining possession of property it held before the debtor declared bankruptcy. The most natural reading of the provision, the Court explained, is that it prohibits affirmative acts that would alter the status quo as of the time the bankruptcy petition was filed. That conclusion was reinforced by a different Bankruptcy Code provision that expressly governs the turnover of estate property. That provision generally requires a person in possession of estate property to deliver it to the bankruptcy trustee, subject to some exceptions. Reading the automatic stay also to require the turnover of estate property, the Court reasoned, would effectively render the turnover provision superfluous.

Fulton makes clear that the Bankruptcy Code's automatic stay generally does not require creditors to return a debtor's property after the debtor declares bankruptcy. That does not mean a creditor can keep the property indefinitely. The creditor may still be required to hand over the property under the turnover provision. Turnover, however, generally requires a court order following an adversary proceeding, ensuring that the creditor has advance notice and an opportunity to object before the obligation to hand over the property becomes effective.

Fulton also leaves open whether other actions beyond the mere retention of property may violate the automatic stay. For example, the automatic stay generally prohibits acts to create, perfect, or enforce liens against estate property, as well as acts to collect, assess, or recover a claim against the debtor. A creditor that tells a debtor it will relinquish the debtor's property upon payment of some amount, or that takes some other action with respect to the property, may potentially run afoul of those prohibitions. *Fulton* declined to address those other provisions. Creditors should thus tread carefully and seek legal counsel before taking any action regarding debtor property in their possession.

Fulton *makes clear that the Bankruptcy Code's automatic stay generally does not require creditors to return a debtor's property after the debtor declares bankruptcy.*

Collins v. Yellen, No. 19-422

financial industry regulation — conservatorship

Collins addressed the powers and structure of the Federal Housing Finance Agency.

Congress created Fannie Mae and Freddie Mac to provide liquidity to the mortgage market by purchasing mortgages and pooling them into securities sold to investors. Both companies are owned by private shareholders. When the housing bubble burst in 2008, the companies appeared to be on the verge of collapse. Congress responded by enacting the Housing and Economic Recovery Act, which created the Federal Housing Finance Agency and empowered it to act as the companies' conservator or receiver.

The FHFA promptly placed Fannie and Freddie into conservatorship. It then negotiated agreements on their behalf for additional financing from the U.S. Treasury. When even that funding seemed to fall short, the FHFA renegotiated the deal into a "net worth sweep" under which the companies would pay nearly all their net worth to the Treasury each quarter (payments that could be greater or less than their formerly fixed obligations).

Several shareholders sued. They argued that the FHFA exceeded its authority as conservator by effectively nationalizing the companies. They also claimed that the FHFA's structure was unconstitutional because the President could remove its Director only for cause, not at will. The district court rejected both claims, but the U.S. Court of Appeals for the Fifth Circuit reversed in part.

The Supreme Court reversed in part and remanded. The Court held that the statutory challenge to the FHFA's actions was barred by the Recovery Act's anti-injunction clause, which prohibits courts from taking "any action to restrain or affect" the FHFA's powers as conservator or receiver. Because agreeing to the net worth sweep fell within the agency's authority as conservator, the anti-injunction clause applied.

The Court agreed with the shareholders that the restrictions on removing the Director violated the separation of powers by interfering with the President's oversight of the Executive Branch. The Court remanded for further consideration of what remedy, if any, was appropriate.

Collins's broad construction of the anti-injunction clause has far-reaching implications. Many statutes authorize financial regulators to appoint conservators or receivers for troubled financial institutions and restrict review of their decisions. Although the Court's ruling relies on the particular wording of the Recovery Act, it invites aggressive actions by other conservators and receivers and highlights the regulatory risks that financial institutions and their investors face.

Meanwhile, the Court's constitutional ruling means that the FHFA's policies are more likely to shift with changing Administrations. Indeed, the day after the Supreme Court's decision, President Biden fired the FHFA's Director and appointed a new Acting Director in his stead.

Collins *invites aggressive actions by other conservators or receivers and highlights the regulatory risks that financial institutions and their investors face.*

Ford Motor Co. v. Montana Eighth Judicial District Court, No. 19-368

personal jurisdiction — out-of-state companies

Ford addressed the circumstances in which an out-of-state company's in-state business activities are sufficient to establish personal jurisdiction over the company in state courts.

The Fourteenth Amendment's Due Process Clause limits state courts' power to exercise jurisdiction over out-of-state defendants. When a defendant is "at home" in a State—for example, because it is incorporated or has its principal place of business there—state courts have "general jurisdiction" over all claims against it. Otherwise, state courts may exercise only "specific jurisdiction" where the plaintiff's claims "arise out of or relate to" the defendant's contacts with the State.

This case arose out of two separate accidents involving Ford vehicles. One plaintiff was killed after the tread separated from one of her tires, causing her car to crash. The other plaintiff was injured after his air bag failed to deploy in a collision. The plaintiffs brought product liability suits against Ford in their local state courts in Montana and Minnesota. Ford moved to dismiss for lack of personal jurisdiction. Although Ford concededly sold many vehicles in both States, it argued that it was not subject to specific jurisdiction in these suits because the particular vehicles involved in the accidents had been designed, manufactured, and sold in other States. The Montana and Minnesota Supreme Courts both rejected that argument.

The U.S. Supreme Court affirmed. It explained that Ford had availed itself of the privilege of conducting business in Montana and Minnesota by selling and servicing thousands of vehicles in each State, including the same models that injured the plaintiffs. Ford had also extensively advertised and promoted Ford vehicles in each State. That was enough, the Court held, to find that the plaintiffs' claims related to Ford's contacts with the States, making specific jurisdiction proper.

The Court rejected Ford's argument that a strict causal connection between a defendant's in-state activities and the plaintiff's claims was necessary. Specific jurisdiction, the Court explained, exists where claims *either* "arise out of" *or* "relate to" the defendant's contacts with a State. So long as a company actively serves a market for a product in a State, the Court held, it is subject to jurisdiction there when a product malfunctions and injures someone—even if the particular product that malfunctioned was originally manufactured or sold somewhere else.

Ford is the latest in a series of decisions clarifying the bounds of personal jurisdiction over out-of-state defendants. Although several recent decisions had restricted state court jurisdiction, *Ford* confirms that state courts may exercise jurisdiction over out-of-state defendants in appropriate cases. A company that engages in extensive business in a State can be sued in that State when its products injure residents there, even if the specific injury was not caused by the company's in-state activities.

While *Ford* involved state court actions, it has implications for suits in federal court as well. In general, federal courts may exercise personal jurisdiction over defendants only to the same extent as state courts in the same State. *Ford* thus provides important guidance for both forums.

*Under **Ford**, a company that engages in extensive business in a State can be sued in that State when its products injure residents there, even if the specific injury was not caused by the company's in-state activities.*

Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System, No. 20-222

securities class actions — presumption of reliance

Goldman Sachs addressed the presumption of reliance in securities class actions.

To pursue damages through a class action, plaintiffs ordinarily must show that issues common to the class predominate over individual issues. In a securities fraud case, that requirement would normally preclude class certification if class members had to prove that they each relied on the misrepresentations. In *Basic Inc. v. Levinson*, however, the Supreme Court held that plaintiffs may invoke a rebuttable presumption of reliance by claiming that they relied on the integrity of the market price for a security. The presumption is based on the "fraud on the market" theory, which posits that the security's market price reflects all publicly available information about the company, including the company's public misrepresentations. The *Basic* presumption is critical to maintaining a case as a class action.

In this case, investors sued Goldman Sachs over statements the company made about its conflict of interest policies. Goldman claimed in securities filings that "[o]ur clients' interests always come first" and that "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest." Plaintiffs alleged that, in fact, Goldman had engaged in seriously conflicted transactions, including by allowing a prominent hedge fund to select mortgages for a Goldman securitization and then bet that the securitization would fail. Once the market learned about the arrangement, Goldman's stock price dropped.

Plaintiffs moved to certify the class, invoking the *Basic* presumption of reliance. Goldman sought to rebut the presumption on the ground that its statements were too generic to have affected its stock price. The district court certified the class, and the U.S. Court of Appeals for the Second Circuit affirmed.

The Supreme Court vacated and remanded. The Court first held that the generic nature of a statement is relevant to class certification. A defendant could argue, for example, that there is a mismatch between a generic misrepresentation and a more specific later disclosure that causes a price drop. In that case, the misrepresentation may have had no impact on the stock price, precluding a finding that class members relied on an inflated stock price for purposes of class certification. The Court was uncertain whether the Second Circuit had considered evidence about the generic nature of the statements for such purposes and accordingly remanded for further consideration.

In a separate ruling, the Court agreed with the Second Circuit that a defendant seeking to rebut the *Basic* presumption bears the ultimate burden of persuasion on that issue, and not merely the burden of producing some evidence in support of its position.

Goldman Sachs offers something for both plaintiffs and defendants in securities class actions. By making clear that the generic nature of a representation is relevant at the class certification stage, *Goldman Sachs* provides defendants another means of challenging securities fraud claims at an early stage of litigation. The Court's ruling on the burden of persuasion, by contrast, favors plaintiffs. Where the competing evidence is in equipoise, the burden of persuasion will determine whether a case can proceed as a class action.

Goldman Sachs *offers something for both plaintiffs and defendants in securities class actions.*

Google LLC v. Oracle America Inc., No. 18-956

copyright fair use — software

Google involved the application of copyright law's fair use doctrine to a software application programming interface.

Oracle owns a copyright in the application programming interface ("API") for its Java SE software platform. An API is a tool that enables programmers to call up prewritten code to perform tasks in the programs they write, rather than writing their own code from scratch. It typically includes both "declaring code," which names each task and locates it in the API's overall organizational scheme, and "implementing code," which actually performs the tasks.

Google created the Android software platform for smartphones. When Google created Android, programmers were already familiar with the Java programming language. To make it easy for programmers to develop new applications for Android, Google copied declaring code from Oracle's Java API. Google then wrote its own implementing code.

Oracle sued Google for copyright infringement. Google argued that its copying of the Java declaring code was a non-infringing "fair use." The Copyright Act does not identify what specific uses are fair, but it sets forth four factors to consider on a case-by-case basis: the purpose and character of the use, the nature of the work, the amount copied, and the impact on market value. A jury found that Google's copying was fair use. The U.S. Court of Appeals for the Federal Circuit reversed. In that court's view, Google's verbatim copying of the Java declaring code was not fair use as a matter of law.

The Supreme Court reversed. Applying the four statutory factors, the Court held that Google's copying was fair use. The Court observed that declaring code is inherently bound up with uncopyrightable ideas of task division and organization. The code's value came not so much from the creativity of the code itself, but from the fact that a large number of programmers had invested the time and effort to learn the language. Google, moreover, had put the code to a highly transformative use by opening up new opportunities for developing applications for the smartphone environment. Google copied only a relatively small portion of code—about 0.4 percent of the entire Java API. Finally, the Court concluded that Google's copying did not harm the market for Java SE, citing evidence that Oracle could not have competed in the smartphone market regardless. Taking all those factors together, the Court held that Google's copying was fair use.

Google represents a win for software developers who rely on the liberal reuse of functional software code. Software developers often share, modify, and enhance previously developed code to create new products and functionality. Reuse of APIs, in particular, helps foster seamless interoperability and compatibility of programs across devices and platforms. Critics may argue that *Google* reduces incentives to write innovative and intuitive programming languages in the first place. But much of the industry now expects that functional code may be reused without obtaining permission from the copyright holder. *Google* indicates that such actions are likely to be deemed fair use.

Google *represents a win for software developers who rely on the liberal reuse of functional software code.*

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

Minerva Surgical, Inc. v. Hologic, Inc., No. 20-440

patents — assignor estoppel

Minerva addressed the doctrine of assignor estoppel, which generally bars a person who assigns a patent to another party from later challenging the patent's validity.

This case began when an inventor, Csaba Truckai, applied for a patent for a moisture-permeable medical device used to treat abnormal bleeding. Truckai's company sold the pending application to another company, which sold it to a third company named Hologic. Truckai later founded a new company, Minerva, and developed a similar medical device that was *not* moisture-permeable. In response, Hologic amended the application it had acquired from Truckai to cover both permeable and non-permeable devices. It obtained a patent and sued Minerva for infringement.

Minerva responded by arguing that Hologic's patent was invalid. Hologic, in turn, invoked the doctrine of assignor estoppel, which generally precludes a party from disputing the validity of a patent it previously assigned to another party. Having assigned the underlying patent application, Hologic urged, Minerva could not now turn around and challenge the patent's validity. The district court agreed with Hologic. The U.S. Court of Appeals for the Federal Circuit affirmed. In that court's view, assignor estoppel barred Minerva's invalidity defense even though Hologic had allegedly expanded the scope of the patent beyond the application Truckai had assigned.

The Supreme Court vacated and remanded. The Court rejected Minerva's argument that it should eliminate the doctrine of assignor estoppel entirely. Nonetheless, the Court narrowed the doctrine's scope. Emphasizing assignor estoppel's roots in centuries-old principles of fairness, the Court held that assignor estoppel should apply only where an assignor contradicts an earlier express or implied representation about the patent's validity.

Where an inventor assigns a patent, the Court reasoned, the inventor implicitly warrants the patent's validity and cannot contradict that warranty by later arguing the patent is invalid. By contrast, where an inventor assigns only a pending application and the assignee then materially expands the patent's claims, no similar contradiction arises. Because the Federal Circuit had not applied that distinction, and because it was unclear whether Hologic's amendment had in fact materially expanded the patent application's scope, the Court remanded for further proceedings.

Minerva is a win for businesses that acquire patents from inventors. With the core of the assignor estoppel doctrine intact, purchasers can remain confident that the party from whom they purchased a patent cannot later turn around and attack the patent. That certainty also provides indirect benefits to inventors by producing a more robust market and higher prices for patent assignments.

That said, the Court's holding offers less predictability than the more absolute positions that the Federal Circuit adopted and that Minerva proposed. It permits an assignor to challenge a patent in some circumstances, such as where an assignee materially expands an application's scope. Courts and litigants will have to ask whether, on the particular facts of a case, an assignor's challenge contradicts an earlier express or implied warranty of validity. That modest limitation, however, should not undermine the core benefits that assignor estoppel provides.

*After **Minerva**, purchasers can remain confident that the party from whom they purchased a patent cannot later turn around and attack the patent.*

National Collegiate Athletic Association v. Alston, No. 20-512

antitrust — college sports

NCAA addressed the application of antitrust principles to college sports organizations.

The National Collegiate Athletic Association is the central governing body for U.S. college athletics. The NCAA has adopted rules restricting the compensation that member schools can provide to student athletes. Those rules sharply restrict compensation unrelated to education. They also place limits on education-related benefits, such as tutoring, graduate scholarships, and paid internships.

In this case, current and former student athletes sued the NCAA, alleging that the NCAA's compensation limits constituted price-fixing that unduly restrained trade in violation of federal antitrust law. The district court agreed in part. It issued an injunction prohibiting the NCAA from limiting education-related benefits. But the court found that the NCAA's interest in differentiating college sports from professional sports, based on college athletes' status as students, justified its limits on compensation unrelated to education. The U.S. Court of Appeals for the Ninth Circuit affirmed the injunction.

The Supreme Court also affirmed. The Court rejected the NCAA's argument that it should be exempt from the "rule of reason" standard that usually governs antitrust review. Rule-of-reason review is a fact-intensive analysis to assess a restraint's actual effect on competition. The NCAA argued that its rules should be subject only to abbreviated, deferential review because the NCAA is a joint venture that requires collaboration among its members. The Court disagreed, explaining that abbreviated review is appropriate only where a restraint is so likely—or unlikely—to harm competition that searching analysis is unnecessary. Merely acting as part of a joint venture does not meet that standard. For similar reasons, the Court held that the NCAA's claim that it is a noncommercial enterprise did not exempt it from rule-of-reason review.

The Supreme Court also rejected the NCAA's challenge to the scope of the district court's injunction. The Court emphasized that courts must exercise caution when fashioning antitrust remedies. But it found that the district court had done so in this case by, for example, enjoining only limits on education-related benefits and allowing the NCAA to define those benefits and regulate how they may be provided.

NCAA represents a major shift for college sports and its rules about amateurism. By subjecting the NCAA's educational-benefit rules to rigorous scrutiny, the Court made clear that there is no general antitrust exemption for college sports. Although the Court did not rule on the NCAA's other compensation restrictions, Justice Kavanaugh wrote a separate concurrence calling even those restrictions into doubt. Indeed, little more than a week after the Court's decision, the NCAA also lifted its prohibitions on college athletes selling the rights to their names, images, and likenesses.

The case also has implications for antitrust litigation generally. By making clear that rule-of-reason review presumptively applies even to joint ventures and noncommercial enterprises, the Court's decision subjects defendants in those contexts to searching, fact-intensive scrutiny in antitrust litigation—and the costs and burdens that come with it. On the other hand, the case is an important reminder that courts must give business judgments due weight both when determining antitrust liability and when crafting appropriate remedies.

***NCAA** represents a major shift for college sports and its rules about amateurism.*

Nestlé USA, Inc. v. Doe, No. 19-416

Alien Tort Statute — extraterritoriality

Nestlé addressed the scope of the Alien Tort Statute where a U.S. corporation allegedly aids and abets human rights abuses overseas.

The Alien Tort Statute grants federal courts jurisdiction to hear certain claims by noncitizens alleging violations of international law. Plaintiffs have often invoked that statute to sue corporations for human rights abuses in developing countries. In recent decisions, however, the Supreme Court has held that the statute applies only to domestic claims, and does not permit claims where the relevant conduct occurred overseas.

In this case, six individuals from Mali alleged that they had been trafficked into Ivory Coast to work as child slaves on cocoa farms. Invoking the Alien Tort Statute, they sued two U.S. companies, Nestlé USA and Cargill, for aiding and abetting that child slavery by purchasing cocoa from the farms and providing them financial and technical resources. The district court dismissed the suit on the ground that the relevant conduct occurred overseas. The U.S. Court of Appeals for the Ninth Circuit reversed, reasoning that Nestlé and Cargill had made financing decisions in the United States.

The Supreme Court reversed. The Court reiterated that the Alien Tort Statute does not apply to conduct occurring outside the United States. As the Court noted, nearly all the conduct that allegedly aided and abetted the forced labor in this case—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast, not the United States. While the plaintiffs alleged that the companies made or approved operational decisions in the United States, the Court deemed those allegations insufficient. In the Court's view, pleading mere "general corporate activity" like "operational decisions" in the United States does not render the claims domestic.

By holding that general allegations of domestic corporate activity do not bring overseas human rights abuses within the ambit of the Alien Tort Statute, *Nestlé* continues a trend of construing the statute narrowly. Human rights litigation under the Alien Tort Statute is notoriously costly and time-consuming for defendants, and often generates bad publicity. The Court's latest ruling will be welcome news to companies that do business with suppliers in countries with spotty human rights records.

Nonetheless, the decision was not all good news for corporate defendants. Nestlé and Cargill had asked for a more categorical ruling that the Alien Tort Statute does not apply to corporations at all. In separate opinions, five members of the Court disagreed with that position. Thus, while the Court rejected claims with only a tenuous connection to the United States, it left the door open to human rights claims against U.S. corporations where the claims have a more substantial connection to the United States.

__Nestlé__ leaves the door open to human rights claims against U.S. corporations where the claims have a substantial connection to the United States.

TransUnion LLC v. Ramirez, No. 20-297

standing — class actions

TransUnion addressed Article III's standing requirement in the context of a consumer class action.

To bring suit in federal court, a plaintiff must satisfy the standing requirement of Article III of the Constitution. To do so, a plaintiff must show that he suffered a concrete harm. In a class action, each class member must have standing to recover damages.

In this case, Sergio Ramirez brought a class action against TransUnion, a credit reporting agency, for violations of the Fair Credit Reporting Act. TransUnion had placed an alert on the credit reports of Ramirez and 8,184 other consumers that wrongly identified them as potential terrorists, drug traffickers, or other serious criminals. TransUnion flagged the individuals solely because they shared the same first and last names as persons on a government watch list, without conducting any further inquiry. TransUnion disseminated the reports of 1,853 of the consumers to potential creditors. For the other 6,332 class members, TransUnion merely kept their erroneous credit reports on file.

Ramirez alleged on behalf of the class that TransUnion had violated the statute by failing to follow reasonable procedures to ensure the accuracy of information in consumers' credit files. A jury agreed and awarded the class members statutory and punitive damages totaling $60 million. The U.S. Court of Appeals for the Ninth Circuit reduced the damages award, but otherwise affirmed.

The Supreme Court reversed and remanded. The Court explained that, to show a concrete harm that satisfies Article III, a plaintiff must allege a type of injury that bears a close relationship to those traditionally recognized as the basis for private lawsuits in American courts. Primary examples include physical, monetary, and reputational harms, as well as disclosure of private information. The Court concluded that the 1,853 class members whose reports had been shared with potential creditors satisfied that requirement. But the other 6,332 class members did not. The mere presence of inaccurate information in an internal credit file, the Court held, does not constitute a concrete harm. Those class members therefore could not pursue their claims in federal court, even if they satisfied the statutory requirements.

TransUnion gives business defendants new protections against federal lawsuits, particularly class actions. Many federal statutes provide consumers with causes of action for violations of federal law, and they often provide for statutory damages that do not require proof of actual harm. The Supreme Court's decision makes clear that class members must nevertheless show a concrete injury to have standing to assert those claims in federal court.

The Court's decision, however, may prove to be a mixed blessing for defendants. Article III's standing requirements apply only in federal courts. Many state courts apply far more lenient standards. After *TransUnion*, plaintiffs may choose to bring class actions in state courts under state consumer protection laws, potentially denying out-of-state defendants the federal forum they often prefer.

***TransUnion** gives business defendants new protections against federal lawsuits, particularly class actions.*

United States v. Arthrex, Inc., No. 19-1434

Appointments Clause — administrative patent judges

Arthrex addressed whether the Patent Office's administrative patent judges ("APJs") are properly appointed under the Constitution's Appointments Clause.

Under the Appointments Clause, principal officers must be appointed by the President and confirmed by the Senate. Inferior officers, by contrast, may be appointed by the President alone, by the courts, or by department heads. This case concerned the application of those principles to the Patent Office's APJs—administrative judges who conduct various Patent Office proceedings, including "inter partes reviews" to reconsider the validity of previously issued patents. APJs are appointed by the Secretary of Commerce. Their decisions, however, are not reviewable by any superior executive officer. Instead, parties can seek review only in the courts.

Arthrex owned a patent for a novel surgical device used to reattach soft tissue to bone. One of its competitors, Smith & Nephew, petitioned for inter partes review of the patent. A panel of APJs found the challenged patent claims invalid. On appeal to the U.S. Court of Appeals for the Federal Circuit, Arthrex argued that the APJs who heard its case were improperly appointed. Because no superior officer had authority to review their decisions, Arthrex urged that the APJs were principal officers who must be appointed by the President and confirmed by the Senate. The court of appeals agreed. To remedy the problem, the court attempted to convert administrative patent judges into inferior officers by eliminating their statutory tenure protections, increasing the Secretary's oversight by permitting him to remove APJs at will.

The Supreme Court vacated the Federal Circuit's decision. The Court agreed that administrative patent judges exercised authority that was inconsistent with their appointment as inferior officers. In the Court's view, only principal officers could issue final decisions for the Executive Branch with no review by any superior officer. APJs had that authority, yet they were not appointed by the President and confirmed by the Senate. The Court, however, fashioned a different remedy. Instead of eliminating tenure protections, the Court held that the statutory provisions that limit review of APJ decisions could not constitutionally be applied to prevent the Patent Office's Director from reviewing a decision. The Court then remanded the case so the Director could decide whether to review it.

Arthrex will affect a significant number of patent disputes. Inter partes review has been a popular mechanism for challenging patents, with more than a thousand proceedings filed each year. Many inventors have complained about the fairness of those proceedings and the lack of oversight over APJs. By permitting the Patent Office's Director to review APJ decisions, the Supreme Court created a new avenue for review in a large number of cases.

The practical impact of that new review mechanism, however, remains to be seen. Although the Supreme Court empowered the Director to review APJ decisions, it did not require him to exercise that authority in every case. Whether the decision will improve oversight of APJs will thus depend largely on how the Director chooses to use his new review power.

*Whether **Arthrex** will improve oversight of administrative patent judges will depend largely on how the Patent Office's Director chooses to use his new review power.*

(Disclosure: MoloLamken LLP represented Arthrex in this case.)

Van Buren v. United States, No. 19-783

Computer Fraud and Abuse Act — exceeding authorized access

Van Buren addressed whether a person violates the Computer Fraud and Abuse Act by accessing, for an improper purpose, computer files that the person is otherwise entitled to access.

The CFAA subjects to criminal liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access" and uses the access to obtain information. Although Congress originally targeted the statute at "hackers" who had no right to access information at all, the government began invoking it to prosecute individuals who abused their access to computer systems by obtaining, for improper purposes, information they were otherwise authorized to access.

In this case, Nathan Van Buren was a police sergeant who was authorized to use a state law enforcement database to obtain license plate information. At a friend's request, he used his patrol-car computer to search the database for plate information belonging to someone the friend purportedly suspected of being an undercover officer. Unbeknownst to Van Buren, the friend was working for the FBI. When Van Buren provided the information, the federal government charged him with a felony violation of the CFAA. The government argued that running the license plate search violated the "exceeds authorized access" clause because it breached a department policy that permitted access only for law enforcement purposes. A jury convicted Van Buren. The U.S. Court of Appeals for the Eleventh Circuit affirmed.

The Supreme Court reversed. The Court held that the CFAA's "exceeds authorized access" clause does not cover someone who is authorized to access particular information on a computer but does so for a prohibited purpose. Instead, an individual "exceeds authorized access" only when he accesses a computer with authorization but then obtains information from a particular area of the computer—such as a file, folder, or database—that is off limits to him. Because Van Buren was authorized to retrieve license plate information in the state database, he did not violate the CFAA by retrieving that information for an improper purpose.

The government's broader construction, the Court noted, would criminalize large swaths of commonplace activity. Under the government's reading, an employee would commit a federal offense by using a work computer to send personal emails or read the news in violation of a company policy prohibiting personal use. Similarly, a website user would commit a federal offense by embellishing an online dating profile or using a pseudonym on Facebook in violation of the website's terms of service. Those broad applications underscored the implausibility of the government's interpretation.

Van Buren limits the government's authority to bring criminal charges under the CFAA. But the case also has important ramifications for business disputes. In addition to imposing criminal liability, the CFAA also provides a civil remedy for violations. Businesses have often invoked that remedy in commercial disputes—particularly trade secret misappropriation cases where departing employees misuse their access to company computers to obtain confidential information for competitors. Other federal or state laws may still apply to those situations. But *Van Buren* limits the utility of the CFAA in trade secret and similar commercial disputes.

***Van Buren** limits the utility of the Computer Fraud and Abuse Act in trade secret and similar commercial disputes.*

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