Supreme Court Business Briefing

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MOLOLAMKEN
SUPREME COURT BUSINESS BRIEFING

The Supreme Court delivered a number of landmark rulings on highly charged social issues this Term. While in recent years the Court had often taken an incremental and consensus-oriented approach, this year a newly emboldened conservative majority took a different tack, handing down major decisions on controversial topics such as abortion, gun rights, and public funding for religious schools. That trend appears likely to continue, as the Court granted review in a major affirmative action case to be heard this fall.

The Court also confronted unfamiliar and unwanted scrutiny of its internal deliberations as someone leaked a draft opinion in the abortion case to the media. That highly unusual incident spurred protests, an internal investigation, and additional security for the Court's Justices.

While the Court's high-profile decisions this year will provoke no shortage of commentary, the Court's business docket was comparatively light. An unusually large portion involved arbitration. The Court held that a statute authorizing U.S. discovery in aid of foreign or international proceedings does not apply to private arbitrations, but only to proceedings before courts or other government tribunals. That decision shuts down a popular tool parties had used to gather evidence for international arbitrations. In another case, the Court held that federal arbitration law restricted California's authority to empower workers to sue for labor code violations as "private attorneys general." The Court also broadly interpreted an exemption from arbitration requirements for certain transportation workers, and it clarified the scope of federal court jurisdiction over petitions to confirm or vacate domestic arbitration awards.

In another important business decision, the Court held that the Occupational Safety and Health Administration lacked authority to impose a COVID-19 vaccine mandate, reasoning that the agency's statutory authority over workplace safety did not empower it to promulgate general health measures. That decision will not only complicate future agency efforts to combat the pandemic, but also call into question agency power to impose other far-reaching mandates in the absence of clear legislative guidance.

In another case, the Court issued a major environmental ruling under the Clean Air Act, paring back the Environmental Protection Agency's power to demand high-level changes to how States structure their power generation resources. Finally, the Court imposed new limits on remedies for discrimination by recipients of federal funding, holding that plaintiffs may not recover damages for emotional distress.

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

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Badgerow v. Walters, No. 20-1143

arbitration — federal jurisdiction

Badgerow addressed when federal courts have jurisdiction to confirm or vacate arbitration awards under the Federal Arbitration Act.

The FAA governs the enforcement of arbitration agreements and arbitral awards. It addresses both petitions to compel arbitration and petitions to confirm or vacate arbitral awards. For domestic arbitrations, however, the statute does not expressly grant federal courts jurisdiction to hear those petitions. Not surprisingly, disputes have arisen over whether petitions may be filed in federal rather than state court. In an earlier case, the Supreme Court held that, so long as the underlying dispute between the parties involves a claim under federal law, a party may file a petition to compel arbitration in federal court.

This case concerned whether the same rule applies to petitions to confirm or vacate arbitral awards. The case arose from an employment dispute between a financial advisor, Denise Badgerow, and her former firm. After the firm fired Badgerow, she initiated an arbitration, claiming that her termination violated federal law. When the arbitrators ruled for her employer, she sought to vacate the award in Louisiana state court. Her employer removed the case to federal court and petitioned to confirm the award. Badgerow challenged the federal court's jurisdiction to consider the petition.

The district court found that it had jurisdiction, and the U.S. Court of Appeals for the Fifth Circuit affirmed. The Fifth Circuit held that petitions to confirm or vacate arbitration awards were subject to the same jurisdictional rules as petitions to compel arbitration. It reasoned that, because the district court would have had jurisdiction over Badgerow's underlying federal employment claims, it also had jurisdiction to confirm or vacate the award.

The Supreme Court reversed. The Court held that its prior ruling addressing petitions to compel arbitration rested on statutory language that did not extend to petitions to confirm or vacate arbitral awards. When parties seek to confirm or vacate an arbitral award, the Court reasoned, they are essentially quarreling about the enforceability of their contractually agreed-upon method for resolving the dispute. Such quarrels, like other contract disputes, ordinarily involve only state law. Thus, the mere fact that the underlying claim may have arisen under federal law was not enough to give a federal court jurisdiction to confirm or vacate the award.

Badgerow could complicate the resolution of federal claims through arbitration. A party may end up petitioning to compel arbitration in federal court, disputing the merits before an arbitral tribunal, and then seeking to confirm or vacate the award in state court. State courts, moreover, have adopted varying standards for review of arbitral awards, some of which are less deferential to arbitrators than the standard a federal court would apply. *Badgerow* may therefore lead to less uniformity in the resolution of federal claims through arbitration.

Badgerow *could complicate the resolution of federal claims through arbitration.*

Cassirer v. Thyssen-Bornemisza Collection Foundation, No. 20-1566

foreign sovereign litigation — choice of law

Cassirer addressed how to decide what substantive law applies in a suit against a foreign sovereign.

The Foreign Sovereign Immunities Act establishes a default rule that foreign states and their agencies or instrumentalities are immune from suit in U.S. courts. The statute, however, sets forth exceptions to immunity. Where an exception applies, the foreign state is ordinarily liable to the same extent as a private party.

This case involved Claude Cassirer's efforts to recover a painting—Camille Pissarro's *Rue Saint-Honoré in the Afternoon, Effect of Rain*—that the Nazis had taken from his grandmother when she fled Germany in 1939. The family moved to the United States after the war and spent decades searching for the painting. They eventually located it in a Spanish state-controlled museum. Cassirer sued the museum in California federal district court, seeking to recover the painting based on California state-law property claims. The suit invoked an exception to sovereign immunity for expropriation.

The Spanish museum challenged the family's ownership of the painting, urging that the museum had purchased the painting without knowing it was stolen and then held the painting long enough to acquire title under Spanish law. The family responded that California law did not permit the museum to acquire good title to stolen property. The court thus had to decide whether Spanish or California property law controlled. That question turned on what "choice of law" rule applied—*i.e.*, what principles would determine which substantive property law governed the suit.

The museum argued that, because it was a foreign sovereign entity, the court should apply federal choice-of-law principles. The museum argued that those principles required the application of Spanish property law to this dispute. The Cassirers urged the court to apply California's more flexible choice-of-law principles, which, they claimed, would require application of California property law. The district court agreed with the museum. It applied federal choice-of-law principles to determine that Spanish property law governed. And it held that the museum was the rightful owner of the painting under Spanish law. The U.S. Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court vacated the Ninth Circuit's decision. It explained that, when a suit falls within an exception to immunity, the foreign state is liable to the same extent as a private party. Accordingly, the same choice-of-law principles that apply to suits against private parties should apply to suits against foreign states. California choice-of-law principles would apply to a state-law property suit against a private party, so those same principles governed this suit too. The Court remanded for the Ninth Circuit to apply those principles.

Although the Supreme Court did not decide whether California or Spanish property law governed, much less who owns the painting, *Cassirer* resolves an important threshold legal question for suits against foreign sovereigns. Plaintiffs and defendants can now evaluate state-law claims against foreign states with greater certainty over what law will apply.

Cassirer *resolves an important threshold legal question for suits against foreign sovereigns.*

City of Austin v. Reagan National Advertising of Austin, LLC, No. 20-1029

First Amendment — advertising regulation

City of Austin addressed the standard for determining whether laws restricting off-premises advertisements violate the First Amendment's protections for freedom of speech.

Austin, Texas has a sign code that treats billboards and other signs differently depending on whether the businesses or products they advertise are located at the same site as the sign or somewhere else. The sign code prohibits companies from building new off-premises signs or upgrading off-premises signs with new technologies like digital screens. By contrast, no such restrictions apply to on-premises signs.

This case arose after Austin denied Reagan National Advertising a permit to digitize off-premises billboards. Reagan challenged the sign code under the First Amendment, arguing that it was an impermissible content-based restriction of speech. The district court upheld the law, finding that it was a permissible content-neutral regulation that made distinctions based on the sign's location, not its subject matter. The U.S. Court of Appeals for the Fifth Circuit reversed. In that court's view, the sign code was content-based because its application turned on what businesses or products a sign advertised. Because the sign code was content-based, it could pass constitutional muster only if it was narrowly tailored to serve a compelling government interest. The court held that Austin's sign code did not meet that standard.

The Supreme Court reversed. The Court held that Austin's differential treatment of on-premises and off-premises signs was content-neutral. Reading a sign solely to determine whether it advertises something located on-premises or off-premises, the Court reasoned, does not involve any meaningful assessment of the sign's message or content. Accordingly, the regulation was subject to less demanding scrutiny and merely had to serve a significant—rather than compelling—government interest. The Court remanded the case to the Fifth Circuit to consider whether the sign code satisfied that standard.

City of Austin gives government authorities a freer hand to regulate billboards and other outdoor advertising. Thousands of municipalities, many States, and even the federal government limit billboards and other off-premises signs for aesthetic and public safety reasons. Those laws can still be challenged if they are unduly restrictive, adopted for improper reasons, or unevenly applied. But after *City of Austin*, most such laws are likely to survive.

City of Austin may create challenges for businesses that make roadside billboards an important part of their advertising strategy. Billboards offer exposure to a diverse and captive audience that might not be reached through broadcast, print, and Internet advertising. Laws that make billboard space more scarce, whether by limiting construction or preventing upgrades that allow rotating digital displays, could increase costs to businesses that rely on that advertising medium.

City of Austin *gives government authorities a freer hand to regulate billboards and other outdoor advertising.*

Cummings v. Premier Rehab Keller, P.L.L.C., No. 20-219

antidiscrimination laws — remedies

Cummings addressed whether damages for emotional distress are available under the Rehabilitation Act or the Patient Protection and Affordable Care Act.

Congress has enacted several statutes that prohibit recipients of federal funds from discriminating on the basis of race, sex, disability, and other characteristics. Those statutes provide a right to sue, but do not define what remedies are available.

This case arose out of a lawsuit brought by Jane Cummings against Premier Rehab Keller, a business that provides physical therapy. Cummings is deaf and legally blind, and communicates primarily in American Sign Language. Cummings sought treatment at Premier Rehab and requested a sign-language interpreter to facilitate conversations. Premier Rehab refused, urging Cummings to communicate using written notes or gestures instead.

Cummings sued Premier Rehab, claiming disability discrimination in violation of the Rehabilitation Act and the Affordable Care Act. Premier Rehab was subject to those statutes' prohibitions on discrimination because it receives federal funds through the Medicare and Medicaid programs. The only damages Cummings sought were for emotional distress. The district court dismissed the suit, concluding that those damages were not available. The U.S. Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court affirmed. The Court explained that a company accepting federal funds effectively enters into a contract with the government, under which the company agrees to comply with the statute's requirements in exchange for the funds. Funding recipients who violate those requirements are on notice that they may be held liable for the "usual" remedies for breach of contract.

The question in this case boiled down to whether damages for emotional distress were a "usual" remedy for breach of contract. The Supreme Court held that they were not. It surveyed contract law and found that, while emotional distress damages were available in certain narrow circumstances, those were exceptions rather than the rule. Because emotional distress damages were not traditionally available for breach of contract, they were not available for violations of the Rehabilitation Act or the Affordable Care Act either.

Cummings narrows the scope of liability under federal antidiscrimination laws for businesses that receive federal funding. The Supreme Court had already held that those laws do not ordinarily authorize punitive damages. *Cummings* now eliminates emotional distress damages too. Businesses subject to those statutes are not off the hook—they remain subject to other forms of money damages as well as injunctive relief. But *Cummings* may deter many plaintiffs from filing suit where discrimination results in no measurable economic harm.

Cummings *narrows the scope of liability under federal antidiscrimination laws for businesses that receive federal funding.*

Hughes v. Northwestern University, No. 19-1401

ERISA — duty of prudence

Hughes addressed the standards of care for retirement plan administrators making investment options available to participants.

The Employee Retirement Income Security Act regulates employer-sponsored retirement plans. ERISA requires plan administrators to act with "care, skill, prudence, and diligence" in operating the plan. This case involved "defined contribution" plans in which employees make contributions to individual investment accounts and then choose how to invest the funds from a range of options offered by the plan.

Current and former employees of Northwestern University sued the school over how it managed its defined-contribution plans. The plaintiffs alleged that the plan administrator acted imprudently by failing to monitor and control excessive recordkeeping fees; by offering investment options that charged excessive management fees when otherwise identical options were available at lower cost; and by offering participants too many investment options, resulting in confusion and poor decisions. The district court dismissed the suit, and the U.S. Court of Appeals for the Seventh Circuit affirmed. The court of appeals reasoned that, because the university made over 400 investment options available to participants, including lower-cost alternatives, the plaintiffs could not sue merely because some of the options charged too much.

The Supreme Court vacated the Seventh Circuit's decision. The Court held that ERISA's duty of prudence imposes an ongoing obligation on plan administrators to monitor investment options and remove imprudent alternatives. The Court rejected the argument that the university could not have violated that duty merely because some investment options were reasonably priced and plan participants had the ultimate choice over which one to select. Plan administrators, the Court reasoned, must independently evaluate potential investments to determine which ones should be included in the menu of options. The Court remanded for the court of appeals to reevaluate whether the plaintiffs adequately alleged that the plan administrator violated the duty of prudence. The Court emphasized that, in doing so, the court of appeals should still give due regard to the plan administrator's reasonable judgments.

Hughes underscores the risks that employers face when offering retirement plans to their employees. Even where employees have a range of options, the Court's decision permits plan beneficiaries to sue if the administrator neglects to review those options to weed out imprudent alternatives. That holding may force retirement plan administrators to make difficult trade-offs between maximizing flexibility for participants and ensuring that all options are prudent.

Although the Court reiterated the importance of deference to plan administrators' reasonable judgments, its rejection of a safe harbor for plans with a menu of options exposes administrators to costly litigation. Employers offering retirement plans should be sure to seek legal counsel before proceeding.

***Hughes** may force retirement plan administrators to make difficult trade-offs.*

National Federation of Independent Business v. OSHA, No. 21A244

occupational safety — vaccine mandates

NFIB addressed whether the Occupational Safety and Health Administration had statutory authority to impose a COVID-19 vaccine mandate.

Federal law authorizes OSHA to issue occupational safety standards that are "reasonably necessary or appropriate to provide safe or healthful employment" and to ensure "safe and healthful working conditions." In November 2021, OSHA issued an emergency rule requiring most employers with at least 100 employees to mandate that their employees either be vaccinated against COVID-19 or else take a weekly COVID-19 test and wear a mask at work. Various States, businesses, and trade groups challenged the rule in multiple courts of appeals. One court of appeals stayed the rule, but another court dissolved the stay, holding that OSHA's rule was likely consistent with the agency's statutory authority.

Following expedited proceedings, the Supreme Court stayed OSHA's rule, holding that the agency likely lacked statutory authority to promulgate the vaccine mandate. The Court explained that it expected Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. In the Court's view, ordering 84 million Americans either to obtain a COVID-19 vaccine or to undergo weekly medical testing at their own expense was an exercise of such authority.

Congress, the Court noted, empowered OSHA to set workplace safety standards, not broad public health measures. Although COVID-19 is a risk in many workplaces, it can also spread at home, in schools, or anywhere else people gather. In the Court's view, allowing OSHA to regulate a daily risk that employees face both in and out of work would expand the agency's authority beyond ensuring safe working conditions. OSHA could regulate occupation-specific risks related to COVID-19, such as particularly crowded or cramped work environments. But the agency's rule failed to distinguish between occupational risk and risk more generally.

NFIB will impede federal agencies' efforts to respond to the COVID-19 pandemic using measures that are not clearly within their statutory authority. It also shifts much of the debate over vaccine mandates to the States, where different jurisdictions have taken different approaches, with some imposing mandates, some prohibiting them, and others leaving the decision up to employers.

At a broader level, *NFIB* confirms that the Court will insist on clear statutory authority before an agency imposes far-reaching legal changes. That principle may be business-friendly where an agency attempts to impose new restrictions on an industry. But it may also prevent federal agencies from adopting uniform nationwide rules, leaving businesses facing a patchwork of state regulations that increase compliance costs.

__NFIB__ will impede federal agencies' efforts to respond to the pandemic using measures that are not clearly within their statutory authority.

Siegel v. Fitzgerald, No. 21-441

bankruptcy — uniformity

Siegel addressed whether Congress violated the uniformity requirement of the Constitution's Bankruptcy Clause by enacting a fee increase that applied to debtors in all but two States.

In 1978, Congress created the U.S. Trustee Program to relieve bankruptcy judges from various administrative responsibilities of running bankruptcy cases, such as organizing creditors' committees and supervising tax filings. It transferred those responsibilities to U.S. Trustees who operate within the Department of Justice. North Carolina and Alabama resisted the change, and Congress allowed the bankruptcy courts in those two States to continue as before, in what is now known as the Administrator Program.

The two programs have different funding sources. The Trustee Program is funded primarily by fees paid by debtors who file Chapter 11 bankruptcy cases. The Administrator Program is funded by the judiciary's general budget. The Judicial Conference issued a standing order meant to ensure that debtors in the Administrator Program would pay the same fees as debtors in the Trustee Program. In 2017, however, Congress enacted a fee increase for the Trustee Program, but the Judicial Conference did not promptly adopt a commensurate increase for the Administrator Program.

This case arose out of Circuit City's bankruptcy in Virginia. Circuit City's remaining assets were being sold off through a liquidating trust. Congress's 2017 fee increase resulted in the trust paying over $500,000 more in fees than if the case had been filed in North Carolina or Alabama. The trustee argued that the disparate fees violated the Constitution's Bankruptcy Clause, which requires that federal bankruptcy laws be "uniform" throughout the United States. The bankruptcy court agreed, but the U.S. Court of Appeals for the Fourth Circuit reversed.

The Supreme Court reversed. The Court explained that, while the Bankruptcy Clause's uniformity requirement is not absolute, Congress exceeded its bounds here. Congress could enact a bankruptcy law that applied only in a particular geographic area if it was responding to a geographically limited problem. But Congress's imposition of higher fees on debtors in every State but North Carolina and Alabama resulted only from Congress's own prior decision to create a dual bankruptcy system funded through different mechanisms. The Bankruptcy Clause barred Congress from arbitrarily burdening one set of debtors in that manner.

After *Siegel*, stakeholders in recent Chapter 11 bankruptcy cases may wish to consult counsel to see if they are entitled to monetary relief. The Supreme Court did not address the appropriate remedy for the unconstitutional fee. But some courts have held that debtors in the Trustee Program from 2017 to 2021 may be entitled to a refund. Both debtors and creditors could argue that they should receive funds paid to the Trustee Program that would otherwise have been available for distribution.

*After **Siegel**, stakeholders in recent Chapter 11 bankruptcy cases may wish to consult counsel to see if they are entitled to monetary relief.*

Southwest Airlines Co. v. Saxon, No. 21-309

arbitration — employment disputes

Southwest addressed the scope of the Federal Arbitration Act's exemption for workers engaged in foreign or interstate commerce.

The FAA generally requires courts to enforce arbitration agreements, including arbitration clauses in employment contracts. But it exempts employment contracts for transportation workers "engaged in foreign or interstate commerce." *Southwest* involved the exemption's application to airline ramp supervisors. Ramp supervisors supervise ramp agents who load and unload cargo on airplanes, and frequently help load and unload cargo themselves. But ramp supervisors do not accompany the cargo in flight across state or national borders.

This case arose when Latrice Saxon, a ramp supervisor for Southwest Airlines, brought a class action against the company for alleged wage violations. Because Saxon's employment contract contained an arbitration clause, Southwest sought to compel arbitration. Saxon opposed arbitration, arguing that ramp supervisors fell within the FAA's exemption for workers engaged in foreign or interstate commerce. The district court ordered arbitration. The U.S. Court of Appeals for the Seventh Circuit reversed, holding that workers who load cargo onto vehicles bound for interstate or international travel qualify for the exemption.

The Supreme Court affirmed. The Court held that employees who physically load and unload cargo on vehicles traveling in interstate commerce qualify as workers "engaged in foreign or interstate commerce," even if they do not cross state or national borders themselves. Because ramp supervisors frequently load and unload cargo as part of their regular duties, the Court held that they fall within the statutory exemption from arbitration.

Even so, the Court rejected the argument that the exemption applied broadly to all employees of companies like Southwest that transport goods in interstate or foreign commerce. The Court held that the exemption depends on the type of work an employee actually performs, not the employer's general line of business.

Southwest sharpens the boundaries of the FAA's exemption for transportation workers. Many companies have sought to protect themselves from costly class action litigation by requiring employees to arbitrate disputes. After *Southwest*, transportation companies cannot rely on the FAA to compel arbitration of disputes with employees who directly handle goods bound for interstate transportation. At the same time, the Court refused to extend the exemption to all employees of businesses that ship goods across borders. As a result, transportation companies can still compel arbitration of many employees' claims.

The Supreme Court did not address whether "last mile" delivery drivers—those who transport goods locally after they have finished crossing state lines—fall within the FAA's exemption. With the recent pandemic-spurred explosion in package deliveries by companies like Amazon, that question will become increasingly important.

Southwest *sharpens the boundaries of the Federal Arbitration Act's exemption for transportation workers.*

Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., No. 20-915

copyright — registration

Unicolors addressed when errors in an application for copyright registration are excused under the Copyright Act's safe-harbor provision.

Unicolors, a textile manufacturer, sued H&M, a clothing retailer, for infringing Unicolors' copyrights in various fabric designs. The jury found for Unicolors, but H&M challenged the verdict on the ground that Unicolors had not properly registered its copyrights. Under the Copyright Act, a copyright holder must have a valid registration to sue for infringement. H&M argued that Unicolors' registration was invalid because Unicolors had filed a single application seeking to register 31 separate works. A single application can register multiple works only if the works were included in the "same unit of publication." H&M argued that Unicolors failed that requirement because it had made some of the designs available for sale only to select customers, while making others available to the general public.

The district court rejected H&M's argument. The Copyright Act provides a safe harbor under which a registration remains valid even if it contains inaccurate information, so long as the registrant did not have "knowledge that it was inaccurate" at the time. The court found that Unicolors fell within the safe harbor because it did not know that it failed to satisfy the "same unit of publication" requirement. The U.S. Court of Appeals for the Ninth Circuit reversed. In that court's view, the safe harbor excused only mistakes of fact, not mistakes of law.

The Supreme Court vacated the Ninth Circuit's decision. The safe-harbor provision, it observed, refers only to "knowledge" of an inaccuracy—it does not distinguish between legal and factual errors. Applicants, moreover, include artists, novelists, and other persons in creative fields who lack legal training. The Court saw no suggestion that Congress intended to forgive those applicants' factual mistakes but not legal ones.

Unicolors eliminates a potential loophole for copyright infringers to evade liability. The Court's decision helps ensure that meritorious suits will proceed, even if the copyright holder accidentally checked the wrong box on the registration documents as a result of a legal error.

Unicolors is welcome news for small businesses and individual creators who may not have the resources to hire attorneys to assist them with copyright registration. As the Supreme Court noted, however, courts need not accept every claim that a copyright holder was unaware of a legal requirement—a claim that may seem less credible if the copyright holder has extensive experience registering copyrights. Copyright holders should therefore remain careful when applying for registration, even after *Unicolors*.

***Unicolors** eliminates a potential loophole for copyright infringers to evade liability.*

Viking River Cruises, Inc. v. Moriana, No. 20-1573

arbitration — private attorney general suits

Viking addressed whether the Federal Arbitration Act preempts a state law that allows workers to bring claims for labor code violations as "private attorneys general."

The FAA requires courts to enforce arbitration agreements on the same terms as other contracts. In prior cases, the Supreme Court has enforced arbitration agreements even if they preclude plaintiffs from bringing class actions in court. The Supreme Court has also held that defendants ordinarily may not be forced to arbitrate on a class-wide basis, because such proceedings would defy the traditionally informal, bilateral nature of arbitration. Given those holdings, businesses have often sought to use arbitration clauses to avoid class action liability.

This case involved California's Labor Code Private Attorneys General Act. PAGA authorizes employees alleging labor code violations to seek civil penalties on behalf of the State. An employee can bring both an "individual" PAGA claim to recover penalties for violations she personally suffered, and "representative" PAGA claims to recover penalties for violations suffered by other employees.

A former sales representative at a cruise line sued her employer under PAGA, asserting both an individual PAGA claim for a delay in delivering her final paycheck and representative PAGA claims for violations with respect to other employees. The cruise line moved to compel arbitration based on an arbitration clause in her employment contract that waived her right to bring class actions and PAGA claims. The trial court denied the motion, and the California Court of Appeal affirmed, holding that the waiver violated state public policy.

The Supreme Court reversed. The Court held that the FAA does not categorically preclude state courts from invalidating waivers of claims brought under a state private attorney general statute. Although a plaintiff bringing a PAGA claim acts on behalf of another party—the State—that fact alone does not undermine the bilateral nature of arbitration the same way class actions do. Nor do PAGA claims involve the procedural complexities of class actions that the Court has deemed incompatible with the informal nature of arbitration.

Nonetheless, the Court found a more subtle defect. California law prohibited parties from agreeing to arbitrate an individual PAGA claim separately from any representative PAGA claims. In the Court's view, that all-or-nothing rule impermissibly infringed on parties' freedom to decide which claims to arbitrate. Federal law thus required the individual claim to be arbitrated as required by the parties' contract. And because California law did not permit the plaintiff to litigate her representative claims separately from her individual claim, the Court held that the representative claims had to be dismissed.

Viking will impede private attorney general suits under current California law. But the long-term implications are less clear. The Court's reasoning opens the door for States to design private attorney general statutes that survive arbitration clauses by not requiring representative claims to be paired with individual ones. Even before *Viking*, many States had been considering private attorney general statutes to ensure enforcement of state laws where any single plaintiff's claim would be too small to justify a suit. The Court's decision will likely accelerate those efforts.

***Viking** opens the door for States to design private attorney general statutes that survive arbitration clauses.*

West Virginia v. Environmental Protection Agency, No. 20-1530

environmental regulation — climate change

West Virginia addressed whether the Environmental Protection Agency could require States to shift their power generation resources away from coal and toward cleaner sources of energy.

The Clean Air Act grants the EPA various powers to regulate air pollution. In recent years, the EPA has used that authority to reduce carbon emissions that contribute to climate change. One of the statute's provisions empowers the agency to set emission limits based on the "best system of emission reduction" available for an emissions source. In the past, the agency has used that authority to impose limits based on source-specific measures such as scrubbers or filtration systems.

In 2015, the EPA issued a rule known as the Clean Power Plan that adopted a more expansive interpretation of that authority. The EPA determined that site-specific emission control measures at coal-fired power plants were inadequate to achieve the necessary reduction in greenhouse gas emissions. The agency instead determined that the "best system of emission reduction" available was a reallocation of power generation resources away from coal and toward cleaner energy sources such as natural gas, wind, and solar. The agency adopted emission limits that would require coal plant operators either to reduce the coal plant's own production of electricity, build or invest in cleaner energy sources, or purchase emission credits as part of a cap-and-trade program.

The Supreme Court stayed that rule in 2016. After a change in presidential administration, the EPA tried to repeal the rule, arguing that it exceeded the agency's statutory authority. The U.S. Court of Appeals for the D.C. Circuit vacated the repeal decision, agreeing with the agency's initial view of its authority.

The Supreme Court reversed, holding that the EPA lacked authority to adopt the Clean Power Plan. The Court held that the "major questions" doctrine requires an agency to have clear congressional authorization when it purports to exercise authority with profound economic and political significance. Here, the EPA sought to restructure the Nation's overall power grid by forcing a shift throughout the grid from one type of energy source to another. The agency had never asserted that kind of authority before. And the Court held that the Clean Air Act's reference to the "best system of emission reduction" was too vague to support such a transformative change.

West Virginia imposes limits on the EPA's authority to force a shift toward cleaner energy sources. That decision may be a respite for coal plant operators in the near term. Nonetheless, the decision focuses attention back on Congress to come up with workable solutions to tackle climate change. And many companies already face considerable pressure from state regulators and their own shareholders to reduce emissions.

More broadly, the Court's embrace of the major questions doctrine offers regulated industries a potent weapon for challenging agency actions. After *West Virginia*, agencies must carry a heavy burden to justify regulations that impose sweeping industry-wide changes based on novel interpretations of their authority.

West Virginia *imposes limits on the EPA's authority to force a shift toward cleaner energy sources.*

ZF Automotive US, Inc. v. Luxshare, Ltd., No. 21-401

international arbitration — discovery

ZF Automotive addressed whether a party may ask a United States court to order discovery in support of an international arbitration.

Congress has long authorized U.S. courts to assist foreign and international adjudicative bodies by compelling testimony or document production from persons within the United States. The current version of the statute, 28 U.S.C. §1782, authorizes discovery for use in a proceeding in a "foreign or international tribunal." This case concerned whether that provision authorizes discovery in aid of an international arbitration rather than a court proceeding.

This case arose out of two separate disputes. In one, a Hong Kong company purchased two business units from a Michigan automotive parts supplier. The acquisition agreement provided for arbitration before a private dispute-resolution organization in Germany. After allegedly discovering fraud, the purchaser sought discovery from the seller in Michigan. The district court granted the request, and the U.S. Court of Appeals for the Sixth Circuit declined to stay the order, holding that the arbitral forum was a "foreign or international tribunal" under the statute.

In the second dispute, a Russian fund brought an investor-state arbitration against Lithuania, claiming expropriation of certain investments. The fund invoked a bilateral investment treaty that authorized arbitration before an ad hoc tribunal under the rules of the U.N. Commission on International Trade Law. The fund sought discovery from two third parties in New York. The district court authorized that discovery, and the U.S. Court of Appeals for the Second Circuit affirmed.

The Supreme Court reversed both decisions. The Court held that private arbitral tribunals do not count as "foreign or international tribunals" within the meaning of §1782. In context, it reasoned, the phrase "foreign or international tribunals" refers only to courts or other entities that exercise governmental authority. Neither tribunal here met that standard. The German arbitration institute was clearly private. And the ad hoc UNCITRAL tribunal was also private, even though it derived authority from a bilateral investment treaty.

ZF Automotive largely eliminates parties' ability to compel discovery in the United States in support of international arbitrations. Although the Court left open the possibility that some arbitral tribunals might still qualify as governmental, as a practical matter the Court's reasoning appears to exclude most international arbitral forums in common use today.

By eliminating an important discovery tool that many courts had previously endorsed, the Court's decision makes it harder to obtain relevant evidence in international arbitrations, particularly from third parties beyond the tribunal's jurisdiction. The Court's ruling precludes resort to §1782 even where the arbitral tribunal would welcome the assistance. The resulting regime may streamline proceedings somewhat, but it also puts the United States at odds with several foreign jurisdictions that permit judicial assistance in international arbitrations.

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

ZF Automotive *makes it harder to obtain relevant evidence in international arbitrations.*

CONTACT US

We believe complex disputes and investigations—at every stage—are best handled through a collaborative effort undertaken by the firm and the client.

Whether mapping out a discovery plan, developing an investigation strategy, preparing for trial, or analyzing issues for an appeal, the emphasis is on teamwork and communication.

The value proposition we offer is simple:

First, we listen. Rather than begin by telling clients the answer, we take time to understand the problem. Then we develop a strategy all agree will be the most likely to bring about a successful result.

Second, we bring experienced judgment to every level of the representation. Our team consists exclusively of people who can contribute meaningfully from the start.

Third, we are focused on the value our representation brings to clients and results. And we structure fee arrangements that reward them.

Fourth, we are committed to using technology and alternative staffing structures that allow us to draw on needed subject matter expertise on a case-by-case basis and allow us to focus on what we do best—develop and execute on winning strategies as advocates.

If you believe we might be of assistance with a complex dispute or investigation, please contact:

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