Sullivan & Cromwell LLP

Supreme Court Business Review

October Term 2019

Contents

GE Energy Power Conversion France SAS, Corp. v. *Outokumpu Stainless USA LLC*

Arbitration – Ability of Nonsignatories to Enforce International Agreements

In *GE Energy*, the Supreme Court considered whether a nonsignatory to an international arbitration agreement may compel arbitration through state-law principles of equitable estoppel, or whether any such effort conflicts with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). GE sought to compel arbitration pursuant to an agreement between Outokumpu's predecessor and a separate entity that subcontracted with GE to perform work related to that agreement. GE argued that, although it had not signed the agreement, it could nonetheless compel arbitration under the state-law doctrine of equitable estoppel. Reversing the court of appeals, the Court held that nothing in the Convention bars courts from allowing such nonsignatory enforcement under domestic equitable estoppel doctrines.

The Court interpreted the Convention to leave "to domestic law" the determination of "what disputes are arbitrable." Under domestic law, the Court explained, equitable estoppel may allow a nonsignatory to enforce a contract generally, and the Federal Arbitration Act permits courts to apply general equitable estoppel principles to arbitration agreements. Because the Convention itself is "silent on the issue of nonsignatory enforcement," the Court concluded that allowing courts to apply equitable estoppel did not "conflict with . . . the Convention."

The Court's decision clarifies the extent to which nonsignatories may enforce arbitration agreements against parties that signed the agreements in international matters, an issue that frequently arises in complex transactions involving multiple related contracts and subcontracts, with differing parties or differing dispute resolution clauses.

No. 18-1048

Opinion Date: 6/1/20

Vote: 9-0

Author: Thomas, J.

Lower Court: 11th Cir.

GE Energy *confirms that domestic doctrines allowing nonsignatory enforcement of arbitration agreements are applicable to international arbitration agreements, just as they are to domestic arbitration agreements.*

Ritzen Group Inc. v. *Jackson Masonry, LLC*

Bankruptcy – Appeals of Denials of Relief from Automatic Stays

Under the Bankruptcy Code, filing a bankruptcy petition automatically stays efforts to collect debts from the debtor outside of the bankruptcy. A creditor may move the bankruptcy court for relief from the stay while the bankruptcy is pending. The Bankruptcy Code provides that "final" orders in bankruptcy-court "cases and proceedings" are immediately appealable, and the Federal Rules of Bankruptcy Procedure require bankruptcy appeals to be filed within 14 days. *Ritzen Group* resolved whether a denial of relief from the automatic stay is a "final" order that is immediately appealable and subject to the 14-day filing deadline.

No. 18-938

Opinion Date: 1/14/20

Vote: 9-0

Author: Ginsburg, J.

Lower Court: 6th Cir.

After Ritzen Group sued Jackson Masonry in state court, Jackson Masonry filed for bankruptcy, automatically staying Ritzen Group's lawsuit. Ritzen Group sought relief from the stay from the bankruptcy court, which denied that request. Ritzen Group did not appeal that denial, but instead filed a proof of claim in the bankruptcy court, which was eventually disallowed. After the reorganization plan was approved, Ritzen Group appealed both the claim disallowance and the denial of relief from the stay, but the district court and Sixth Circuit rejected the appeal of the stay-relief denial as untimely.

Ritzen Group *holds that a bankruptcy court's order denying relief from an automatic stay is a final order that is immediately appealable and subject to a 14-day appeal filing deadline.*

The Supreme Court unanimously affirmed, holding that bankruptcy-court orders denying automatic-stay relief are "final" orders and thus immediately appealable and subject to the 14-day filing deadline. The Court reasoned that bankruptcy-court orders qualify as "final" when they "definitively dispose of discrete disputes within the overarching bankruptcy case." An order denying automatic-stay relief satisfies that standard because it "disposes of a procedural unit anterior to, and separate from, claim-resolution proceedings" in the bankruptcy. Such orders have sufficiently "large practical consequences," the Court explained, including determining whether a creditor can "go it alone outside bankruptcy," to qualify as resolving a separate "proceeding" within the bankruptcy.

Lucky Brand Dungarees, Inc. v. *Marcel Fashions Group, Inc.*

Civil Procedure – Validity of "Defense Preclusion" as a Form of Res Judicata

No. 18-1086

Opinion Date: 5/14/20

Vote: 9-0

Author: Sotomayor, J.

Lower Court: 2d Cir.

Lucky Brand arrived at the Supreme Court after nearly 20 years of trademark-infringement litigation between Lucky Brand Dungarees and the Marcel Fashions Group. Most recently, the Second Circuit had applied "defense preclusion" to bar Lucky Brand from relying on a release defense it had raised but not pursued in an earlier suit between the two companies. In doing so, the Second Circuit set out a four-part test for applying defense preclusion to bar a defendant from raising "an unlitigated defense that it should have raised earlier."

In a unanimous decision, the Court reversed the Second Circuit. The Court observed that it "has never explicitly recognized 'defense preclusion' as a standalone category of res judicata." As a result, defense preclusion would apply only in a situation meeting "the strictures of issue preclusion or claim preclusion." Because the parties agreed that issue preclusion did not apply, the Court analyzed whether Lucky Brand's release defense was barred by standard principles of claim preclusion, which turns on whether two suits share a "common nucleus of facts." The Court concluded that because the suits between Lucky Brand and Marcel involved "different conduct" and "different marks" occurring at "different times," the suits did not share a common nucleus of facts, and claim preclusion thus did not bar Lucky Brand's release defense.

In rejecting the Second Circuit's novel defense-preclusion test, the Court noted that "[t]here may be good reasons to question any application of claim preclusion to defenses." But the Court nevertheless left open "when (if ever) applying claim preclusion to defenses may be appropriate."

Lucky Brand *rejects "defense preclusion" as an independent form of res judicata, holding that such a doctrine can—if ever—bar defendants from raising certain defenses only when the subsequent case involves a common nucleus of facts.*

Seila Law LLC v. *CFPB*

Constitutional Law – President's Power to Remove Heads of Federal Agencies

The Dodd-Frank Act, enacted by Congress in 2010, provides that the newly created Consumer Financial Protection Bureau ("CFPB") would have a single director who serves a five-year term and can only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." In *Seila Law*, the Supreme Court held that this limitation on the President's removal authority violates the separation of powers by unconstitutionally isolating the CFPB Director from presidential oversight.

By vesting the full "executive power" in the President, the Court explained, Article II of the Constitution generally requires that the President maintain "unrestricted removal power" over lesser executive officers. Although the Court had previously recognized two limited exceptions to that rule—for expert agencies led by multiple officers balanced on partisan lines and inferior officers with narrowly defined duties—it found those exceptions inapplicable where, as with the CFPB, Congress vested a single executive officer with broad powers to promulgate binding rules, issue final administrative decisions, and seek large penalties in court. The Court described this structure as a "historical anomaly" that was "incompatible with our constitutional structure," because it made the CFPB Director not fully accountable to the President or Congress (and thus to voters).

The Court determined that the for-cause removal provision could be severed from the rest of the CFPB enacting statute, thus leaving the agency otherwise intact. This change will allow for greater shifts in CFPB policy goals and enforcement priorities following changes in presidential administrations.

Parties subjected to CFPB action prior to *Seila Law* may seek to contest the validity of such actions, and should at least preserve such challenges going forward. Beyond the CFPB, the Court's broad language about the importance of presidential removal powers may encourage challenges to similar removal protections for other agencies' leadership.

No. 19-7

Opinion Date: 6/29/20

Vote: 5-4

Author: Roberts, C.J.

Lower Court: 9th Cir.

Seila Law *strikes down statutory limitations on the President's ability to remove the Director of the CFPB. The Court otherwise left the agency in place but may have cast doubt on the validity of its past actions.*

Atlantic Richfield Co. v. *Christian*

Environmental Law – EPA's Exclusive Cleanup Authority Under CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") directs the Environmental Protection Agency ("EPA") to maintain a list of polluted "Superfund" sites and conduct or oversee their cleanup. Owners of land in a Montana Superfund site sued a successor to the company that caused the pollution, seeking "restoration damages" to fund their own remediation plan that was costlier than the one the defendant had agreed to with the EPA. In *Atlantic Richfield*, the Supreme Court considered whether CERCLA strips state courts of jurisdiction to consider such remedies, and whether the landowners were required to obtain EPA approval before they could obtain such relief.

First, the Court concluded that the state-law nuisance, trespass, and strict liability claims asserted by the landowners did not "arise under" CERCLA, and that CERCLA's jurisdictional provisions thus did not deprive state courts of jurisdiction to hear such claims.

Second, the Court held that the landowners were "potentially responsible parties" under CERCLA, even though they did not cause the pollution, and that they were thus required to seek EPA approval before undertaking any remediation activities. The Court found this conclusion compelled by CERCLA's plain text, which designates owners of "any site or area where a hazardous substance has been deposited" as potentially responsible parties. The Court reasoned that this interpretation comported with CERCLA's purpose of developing a "Comprehensive Environmental Response" to pollution under centralized EPA oversight rather than allowing for thousands of individual remediation plans.

Atlantic Richfield narrows the ability of owners of polluted land to impose their own remediation plans. But if they can obtain EPA approval of such plans, this decision allows landowners to seek to compel such relief in state court.

No. 17-1498

Opinion Date: 4/20/20

Vote: 7-2

Author: Roberts, C.J.

Lower Court: Montana Supreme Court

After Atlantic Richfield, *owners of land located within federally designated Superfund sites cannot seek to impose their own plans for remediation of such land unless they first obtain EPA approval.*

Intel Corporation Investment Policy Committee v. *Sulyma*

ERISA – "Actual Knowledge" for Statute-of-Limitations Purposes

No. 18-1116

Opinion Date: 2/26/20

Vote: 9-0

Author: Alito, J.

Lower Court: 9th Cir.

Under the Employee Retirement Income Security Act ("ERISA"), plaintiffs generally have six years to file suit from the date of an alleged breach of fiduciary duty. But if a plaintiff has "actual knowledge" of an alleged breach, she must file suit within three years of discovering the breach. In *Sulyma*, the Supreme Court held that to be charged with "actual knowledge," a plaintiff must in fact *be aware* of the alleged breach, rather than simply have access to information from which she *could have become* aware of those same facts.

Sulyma brought a putative class action alleging that Intel's retirement plan fiduciaries breached their fiduciary duties by overinvesting in alternative assets. The fiduciaries argued that the suit was barred by ERISA's three-year statute of limitations because Sulyma received disclosures detailing the plan's investments more than three years before he filed suit. Sulyma testified that he did not remember reviewing the disclosures and only became aware of the investment decisions at a later time.

Sulyma *reduces the ability of fiduciaries to rely on ERISA's three-year statute of limitations, even if they provide plan disclosures to beneficiaries.*

The Court unanimously ruled in favor of Sulyma, holding that a plaintiff does not have "actual knowledge" of information in disclosures the plaintiff received but did not read or cannot recall reading. Relying on the plain meaning of "actual knowledge," the Court reasoned that the phrase "mean[s] what it says"—a plaintiff "must in fact be aware" of the information to start the statute-of-limitations clock. The Court also looked to other sections of ERISA where Congress was explicit when it intended to tie a limitations period to when a plaintiff "*should have* acquired actual knowledge" of a breach.

Although the Court reiterated that fiduciaries may still use circumstantial evidence to show that a plaintiff in fact knew of an alleged breach, *Sulyma* makes clear that fiduciaries may not rely on disclosures alone to invoke the commencement of the three-year limitations period.

Thole v. *U.S. Bank N.A.*

ERISA – Article III Standing for Vested Beneficiaries of Defined-Benefit Plans

In *Thole*, the Supreme Court considered whether vested participants in a defined-benefit pension plan have Article III standing to sue for fiduciary mismanagement under ERISA. The plaintiffs claimed that plan fiduciaries violated ERISA's duties of loyalty and prudence by poorly investing the plan's assets. But the Court concluded that the plaintiffs lacked Article III standing because they had no concrete stake in the suit: The plaintiffs had "been paid all of their monthly pension benefits so far" and were "legally and contractually entitled to receive those same monthly payments for the rest of their lives." Win or lose, the plaintiffs' benefit amounts would remain the same.

The Court based its ruling on the characteristics of defined-benefit plans, under which "retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan." It distinguished such plans from defined-contribution plans, where "retirees' benefits are typically tied to the value of their accounts." The Court rejected the plaintiffs' attempted analogy to trust law, reasoning that "the ultimate amount of money received by [trust] beneficiaries"—unlike the plaintiffs—"will typically depend on how well the trust is managed." The Court likewise declined to find representative standing or standing based on ERISA's private cause of action because neither theory excused the plaintiffs from showing a concrete stake in the suit.

Finally, the Court left open whether defined-benefit plan participants could have standing to assert claims that mismanagement was "so egregious" that it increased the risk that the plan would not be able to pay future benefits. But the Court noted that this increased-risk-of-harm theory, if it could ever apply, might not be available where the benefits "are guaranteed in full" by the government, as is often the case.

No. 17-1712

Opinion Date: 6/1/20

Vote: 5-4

Author: Kavanaugh, J.

Lower Court: 8th Cir.

Thole *makes clear that beneficiaries of defined-benefit plans lack Article III standing to sue for fiduciary mismanagement under ERISA in the ordinary course, but leaves open whether such claims may be able to proceed on an increased-risk-of-harm theory.*

Rodriguez v. *FDIC*

Federal Tax – Distribution of Refunds for Affiliated Corporate Filers

The IRS allows an affiliated group of corporations to file a consolidated federal tax return, and any refund due is paid to the group's designated agent. But IRS regulations do not specify how the members of the group should distribute the refund among themselves. In disputes over refunds, certain federal courts had applied a federal common law rule (the *Bob Richards* rule, named for the Ninth Circuit decision first announcing it) that the refund belongs to the group member responsible for the losses that led to it. Some courts had even held that this rule *always* applies unless a tax allocation agreement *unambiguously* specifies a different result.

In *Rodriguez*, the Supreme Court unanimously struck down the *Bob Richards* rule as an inappropriate exercise of federal common lawmaking. The Court explained that there are only "limited" areas in which federal judges may craft rules of decision, such as when doing so is necessary to protect uniquely federal interests. The Court could identify no such federal interest in how an affiliated group of corporations distributes a federal tax refund among its members. The Court explained that state law is well suited to resolve disputes over property rights, including in cases such as this one that involve both federal bankruptcy and tax disputes.

Rodriguez thus eliminates one default rule of construction that certain federal courts had applied when deciding disputes regarding the distribution of a federal tax refund within an affiliated group of corporations. Affiliated corporate groups filing consolidated federal tax returns may wish to increase clarity and predictability regarding the distribution of refunds by adopting tax allocation agreements, which will be subject to generally applicable state-law rules of contract interpretation.

Beyond the tax context, litigants may seek to rely on the broader principles outlined in *Rodriguez* to challenge the validity of federal common law rules applied in other areas.

No. 18-1269

Opinion Date: 2/25/20

Vote: 9-0

Author: Gorsuch, J.

Lower Court: 10th Cir.

Rodriguez *does away with the judicially devised* Bob Richards *rule, making clear that disputes over the distribution of a federal tax refund issued to an affiliated group of corporations filing a consolidated return will be determined according to state law.*

Maine Community Health Options v. *United States*

Insurance – Implied Repeal of Federal Government Payment Obligations

No. 18-1023

Opinion Date: 4/27/20

Vote: 8-1

Author: Sotomayor, J.

Lower Court: Fed. Cir.

To incentivize insurers to participate in the health-insurance exchanges established under the Affordable Care Act ("ACA"), Congress enacted the "Risk Corridors" program, which provided that the government would compensate health insurers for losses incurred during the first three years they participated in those exchanges. In appropriations bills in each of those years, however, Congress expressly prohibited the use of funds to make Risk Corridors payments. Insurers that had suffered losses sued in the Court of Federal Claims, asserting a right to payment, but the Federal Circuit held that the appropriations bills "repealed or suspended" the government's obligation to pay.

The Supreme Court reversed. *First*, the Court determined that the plain language of the Risk Corridors statute imposed an obligation on the government to pay insurers according to the statutory formula, regardless of whether Congress appropriated funds to make the payments. *Second*, the Court rejected the argument that Congress had implicitly repealed this obligation when it passed the appropriations bills. Although a finding of implied repeal is a "rarity" in any area, the Court explained, that is even more true in the appropriations context. Here, Congress had "merely appropriated a less amount than that required to satisfy the Government's obligation." *Finally*, the Court concluded that the insurers could bring their suit under the Tucker Act because they merely sought past-due money damages, rather than prospective or ongoing relief, and the Risk Corridors statute does not provide an alternative path to relief.

Maine Community Health Options was a substantial victory for health insurers who experienced losses in the first several years of the ACA marketplaces. The decision also reinforces the high burden Congress faces in attempting to avoid obligations via appropriations bills and leaves open the opportunity for private parties to enforce such non-repealed obligations in court.

Maine Community Health Options *makes clear that, if a statute imposes a sufficiently clear payment obligation on the government, courts should require an equally clear indication from Congress before concluding that such obligation has been avoided.*

Romag Fasteners, Inc. v. *Fossil Group, Inc.*

Intellectual Property – Profits Awards in Trademark-Infringement Suits

No. 18-1233

Opinion Date: 4/23/20

Vote: 9-0

Author: Gorsuch, J.

Lower Court: Fed. Cir.

The Lanham Act allows a successful plaintiff in a trademark-infringement action to recover damages, costs, and the defendant's profits "subject to," among other things, "the principles of equity." In *Romag*, the Supreme Court considered a rule adopted by some courts that a finding of "willful" infringement is a prerequisite to recovery of a defendant's profits.

Relying principally on the lack of any such categorical requirement in the plain text of the statute, the Court rejected a categorical willfulness requirement for recovering a defendant's profits. The Court emphasized that the Lanham Act prescribes specific mental-state requirements in many other provisions, further supporting the notion that Congress did not intend such an atextual mental-state requirement for determining whether profits may be awarded.

The Court also rejected the argument that the statute's reference to "principles of equity" imported a willfulness requirement because equity courts had historically required such a showing before awarding profits in trademark-infringement cases. The Court concluded that the relevant history of this supposed requirement was muddled, and that in any event, Congress would not likely have chosen to hide this rule in the general phrase "principles of equity" while prescribing mental states with much greater specificity elsewhere in the Lanham Act.

Although rejecting a categorical rule, the Court acknowledged that a trademark defendant's mental state is a "highly important consideration in determining whether an award of profits is appropriate." As a result, although *Romag* may make it easier for trademark plaintiffs to obtain profits awards, lower courts may still require a showing of knowledge or intention before granting such relief as a practical matter.

After Romag, *a plaintiff need not necessarily prove willful trademark infringement to be awarded a defendant's profits, but courts as a practical matter may still require some heightened knowledge or intent before granting such relief.*

Thryv, Inc. v. *Click-To-Call Technologies, LP*

Intellectual Property – Judicial Review of Inter Partes Review Institution Decision

No. 18-916

Opinion Date: 4/20/20

Vote: 7-2

Author: Ginsburg, J.

Lower Court: Fed. Cir.

The inter partes review ("IPR") process allows a patent challenger to request that the Patent Trial and Appeal Board ("PTAB") reconsider the validity of an earlier granted patent. The PTAB's decision whether to institute review is governed by the Leahy-Smith America Invents Act ("AIA"). Under § 315(b), a petition for review must be filed within one year after the petitioner "is served with a complaint alleging infringement of the patent." Section 314(d), in turn, makes the PTAB's decision "whether to institute" IPR "final and nonappealable." In *Thryv*, the Supreme Court considered whether the patent owner may appeal the PTAB's decision to institute IPR on the ground that the challenger's petition was untimely.

Under Thryv, *the Patent Trial and Appeal Board's decision to institute inter partes review is not subject to judicial review on the ground that the challenger's petition for review was untimely.*

The Court held that the PTAB's decision to institute IPR is not subject to judicial review based on § 315(b)'s time bar. Reaffirming its decision in *Cuozzo Speed Technologies, LLC* v. *Lee*, the Court concluded that § 314(d) forecloses appeal of decisions that are grounded in "statutes related to" the PTAB's decision to institute IPR. A challenge based on § 315(b)'s time bar, the Court reasoned, constitutes an appeal of the PTAB's decision to institute IPR because the time bar is "closely tied to the application and interpretation of statutes related to" that decision. The Court found that "[t]he AIA's purpose and design"—especially Congress' "concern[s] about overpatenting" and "weed[ing] out bad patent claims efficiently"—"strongly reinforce[d] [its] conclusion" because resources are better spent resolving patentability than litigating § 315(b)'s timeliness requirement.

After *Thryv*, the PTAB essentially has final say over whether to institute IPR. Notably, under both *Thryv* and *Cuozzo*, "appeals that implicate constitutional questions" may still be subject to judicial review. The Court also left open whether mandamus is available for "extraordinary case[s]."

U.S. Patent & Trademark Office v. *Booking.com B.V.*

Intellectual Property – Trademarking Combinations of Generic Words with ".com"

A generic name—*i.e.*, the name of a class of products or services—is ineligible for federal trademark registration. In *Booking.com*, the Supreme Court considered whether the combination of a generic word and ".com" is eligible for such registration. Booking.com, a company that provides hotel reservations and other services through a website of the same name, sought to register "Booking.com" as a trademark. The U.S. Patent and Trademark Office ("PTO") denied registration as a generic term, but the district court and Fourth Circuit sided with Booking.com.

The Court affirmed, holding that a term, taken as a whole, is generic "only if the term has that meaning to consumers." If Booking.com is generic, the Court reasoned, one would expect consumers to understand Travelocity, a similar service, to be a type of "Booking.com," or expect a frequent traveler to have a favorite "Booking.com" provider. However, the courts below had determined (and the PTO did not dispute) that consumers do not in fact perceive "Booking.com" to signify hotel-reservation services as a class. In the Court's view, that "resolve[d] this case: Because 'Booking.com' is not a generic name to consumers, it is not generic."

The Court rejected the PTO's "nearly *per se*" rule that the combination of a generic term and ".com" is itself a generic term, absent exceptional circumstances. The Court distinguished its prior holding that a generic corporate designation added to a generic term (*e.g.*, "Cotton Company") does not confer trademark eligibility because ".com" conveys an "association with a particular website," which only one entity can have. The Court also rejected the argument that registration of combinations of generic terms and ".com" will hinder competition, reasoning that such trademarks will often be "weak" marks and that the doctrine of fair use will further protect against infringement claims. The Court made clear, however, that it is not adopting a *per se* rule in favor of registration; rather, whether any "generic.com" term is generic will depend on how consumers perceive it.

No. 19-46

Opinion Date: 6/30/20

Vote: 8-1

Author: Ginsburg, J.

Lower Court: 4th Cir.

Booking.com *holds that combinations of generic words and ".com" may be eligible for federal trademark registration, depending on consumers' perception of the combined term.*

Bostock v. *Clayton County*

Labor & Employment – Title VII Anti-Discrimination Provisions

In *Bostock* and two consolidated cases, the Supreme Court considered whether Title VII of the Civil Rights Act of 1964, which forbids employment discrimination "because of . . . sex," applies to discrimination based on sexual orientation or gender identity. The Court held that taking adverse employment action against an employee "merely for being gay or transgender" violates Title VII. The Court reasoned that, under its "ordinary public meaning" when enacted, Title VII made an employer liable for discrimination "[s]o long as the plaintiff's sex" was *one* but-for cause of the adverse employment decision, even if the employer could also point to some *other* factor that supposedly contributed to the adverse action.

Applied here, the Court reasoned that "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." As a result, "[s]ex plays a necessary and undisguisable role in the decision," and it is thus forbidden by Title VII. The Court framed a simple test: If "changing the employee's sex would have yielded a different choice by the employer," the employer's action violates the law.

Because it found the text of Title VII unambiguous, the Court deemed irrelevant whether people "in 1964 would have expected Title VII to apply" to discrimination based on sexual orientation or gender identity. The Court similarly concluded that the fact that Congress had declined to amend Title VII to add sexual orientation as a protected class could not undo the otherwise clear import of Title VII's plain language.

In states that did not already have such protections, employees may now challenge employment decisions as discrimination based on sexual orientation or gender identity. All employers should review and update their employment policies to ensure that they expressly prohibit such discrimination.

No. 17-1618

Opinion Date: 6/15/20

Vote: 6-3

Author: Gorsuch, J.

Lower Court: 11th Cir.

Bostock *confirms that Title VII's prohibition on employment discrimination "because of . . . sex" forbids discrimination based on sexual orientation or gender identity, meaning employers cannot fire employees "simply for being homosexual or transgender."*

Kelly v. *United States*

Public Corruption – Regulatory Power Defense

No. 18-1059

Opinion Date: 5/7/20

Vote: 9-0

Author: Kagan, J.

Lower Court: 3d Cir.

In *Kelly*, the Supreme Court unanimously overturned the convictions for wire and federal-program fraud of two associates of then-New Jersey Governor Chris Christie based on their involvement in the "Bridgegate" scandal. The convictions stemmed from defendants' realignment of two lanes of the George Washington Bridge as a form of political retribution against the mayor of Fort Lee, New Jersey, for the mayor's refusal to support Christie's 2013 reelection campaign.

The Court recognized that "[t]he evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power." But the Court explained that "the federal fraud statutes at issue do not criminalize all such conduct." Rather, those statutes punish *property* fraud and thus require the government to prove that "an object" of defendants' dishonesty was to obtain "money or property."

The Court rejected both of the government's attempts to make that showing. *First*, the Court concluded that defendants had not taken the Port Authority's property by "commandeering" the lanes on the bridge. Instead, the Court characterized the lane realignment as a "run-of-the-mine exercise of regulatory power [that could not] count as the taking of property." *Second*, the Court determined that defendants had not deprived the Port Authority of money through "the costs of compensating" Port Authority employees "who performed work relating to the lane realignment." The Court recognized that misuse of government "employees' time and labor" could support a property fraud conviction, but concluded that the Port Authority employees' services and their associated costs were not the "object of the fraud," as opposed to merely "an incidental (even if foreseen) byproduct."

Kelly continues the Court's resistance to an expansive use of federal fraud statutes in white collar and corruption proceedings. A key issue after *Kelly* will be whether misuse of employees' time or labor resulting in an economic loss is the primary objective of the fraud or simply a byproduct.

Kelly *reaffirms that prosecutions under federal property fraud statutes must be limited to fraud in which acquisition of "money or property" is a core object of the criminal conduct, rather than a mere byproduct of a dishonest use of regulatory power.*

Comcast v. *National Association of African American-Owned Media*

Race Discrimination – Causation Standard Under § 1981

No. 18-1171

Opinion Date: 3/23/20

Vote: 9-0

Author: Gorsuch, J.

Lower Court: 9th Cir.

Section 1981 of the Civil Rights Act of 1866 guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." In *Comcast*, plaintiff Entertainment Studios Network ("ESN"), an African American-owned television-network operator, argued that Comcast violated this provision when, citing lack of demand, it declined to carry ESN's channels. The issue before the Supreme Court was what causation standard applies to ESN's claim. The Court unanimously held that a plaintiff bringing a race-discrimination claim under § 1981 must show that any injury would not have occurred "but for" the plaintiff's race.

Examining § 1981's text, history, and structure, the Court found no reason to depart from the "general rule" that a "plaintiff bears the burden of showing that race was a but-for cause of its injury" and that the "burden itself remains constant" throughout the lawsuit. The Court expressly declined to import into § 1981 the causation test from Title VII of the Civil Rights Act of 1964, which requires a plaintiff to show only that discrimination was a "motivating factor" in a challenged employment decision. The Court emphasized differences in the text and histories of the two statutes, finding no evidence "that Congress meant them to incorporate the same causation standard."

Notably, the Court left open the question whether § 1981 protects the right to equal contractual outcomes or an equal contracting process. In a separate concurrence, Justice Ginsburg urged against limiting § 1981 to outcomes, reasoning that "the language of the statute covers the entirety of the contracting process." Otherwise, she explained, a defendant could discriminate under § 1981 "so long as it occurs in advance of the final contract-formation decision."

Comcast thus clarifies that plaintiffs must meet a stricter but-for test to establish race discrimination for § 1981 claims.

Comcast *holds that at all stages of litigation, a plaintiff bringing suit under § 1981 must establish that race was the "but-for" cause of the plaintiff's injury; showing that race was a "motivating factor" is insufficient.*

Liu v. *SEC*

Securities Litigation – Disgorgement in SEC Civil Enforcement Actions

No. 18-1501

Opinion Date: 6/22/20

Vote: 8-1

Author: Sotomayor, J.

Lower Court: 9th Cir.

The SEC is authorized by statute to obtain "equitable relief . . . for the benefit of investors" in securities fraud actions it pursues in federal court. For decades, courts have agreed that the SEC may invoke this authority to seek disgorgement of the proceeds of a defendant's fraud. But in a recent case, *Kokesh* v. *SEC*, the Supreme Court described SEC disgorgement as "bear[ing] all the hallmarks of a penalty," raising the question whether that remedy is authorized by the statute's reference to "equitable relief," which historically has excluded punitive remedies.

In *Liu*, the Court ruled that the SEC may seek disgorgement as a form of "equitable relief," but only in an amount that does not exceed a wrongdoer's net profits and if it is awarded for the benefit of victims. When so limited, the Court reasoned, disgorgement is consistent with the long history of equity courts stripping wrongdoers of ill-gotten gains. Importantly, those equity courts avoided transforming the remedy into a penalty by restricting the award to the wrongdoer's "net profits . . . after deducting legitimate expenses."

Although the Court left open many details of how courts should calculate permissible awards, it gave guidance on three issues. *First*, the Court directed lower courts to consider whether disgorged funds *must* be returned to investors, rather than deposited into a Treasury fund, to satisfy the statutory requirement that such relief be awarded "for the benefit of investors." *Second*, the Court suggested that imposing disgorgement on a joint-and-several liability basis is likely impermissible, absent evidence of concerted wrongdoing. *Third*, the Court held that courts must assess whether a wrongdoer's expenses are legitimate in determining whether they are deductible—for instance, whether they have "value independent of fueling a fraudulent scheme"—rather than summarily deeming them "fraudulent."

The Court's opinion does not address whether these limitations will have any application in administrative proceedings.

Liu *upholds the SEC's authority to seek disgorgement as a remedy in federal court proceedings, but limits the scope of that remedy to a defendant's net profits to be awarded for the benefit of victims.*

These limitations may meaningfully reduce future disgorgement awards in SEC civil actions.

S&C's Supreme Court and Appellate Practice

Sullivan & Cromwell has one of the premier appellate practices in the country, as recognized by *Legal 500*, *The National Law Journal*, which has named the practice to its Appellate Hot List, and *Law360*, which has named S&C an Appellate Practice Group of the Year. S&C lawyers have achieved success for the Firm's clients in cases before the U.S. Supreme Court, federal courts of appeals and administrative agencies, state supreme and appellate courts, and numerous international tribunals. S&C's appellate practice draws on the experience of 11 former U.S. Supreme Court clerks and more than 160 clerks to judges on all 13 federal courts of appeals and many state courts and international tribunals.

S&C lawyers' appellate experience has spanned the Firm's practice areas, including:

- antitrust
- banking
- bankruptcy
- corporate and securities
- criminal procedure
- environmental
- ERISA
- false claims
- intellectual property
- labor and employment
- products liability
- tax

Clients turn to S&C for their high-stakes appeals because of the Firm's extensive appellate expertise and its deep understanding of their industries, issues, and concerns. What sets S&C's appellate practice apart is that its lawyers have handled virtually every phase of civil and criminal litigation on behalf of clients. Because of that broad experience, they are able to work collaboratively with trial teams to frame arguments persuasively at any level.

Please contact any member of the Firm's appellate practice, including co-heads Brendan Cullen and Judson Littleton, with any questions about Supreme Court or other appellate matters.

Meet the Editors

Judson Littleton

Mr. Littleton is a partner in S&C's Litigation Group and co-head of the Firm's Appellate Practice. His diverse practice focuses on Supreme Court and appellate work, complex commercial litigation, and criminal defense and investigations. Prior to joining the Firm, Mr. Littleton served as a trial attorney in the Civil Division of the U.S. Department of Justice, where he litigated cases involving a wide range of constitutional and statutory issues and received the Attorney General's Distinguished Service Award, the Department's second-highest award for employee performance. Mr. Littleton also previously served as a Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice, where he worked on numerous cases before the U.S. Supreme Court and federal courts of appeals. He clerked for Chief Justice John G. Roberts, Jr. of the U.S. Supreme Court and for Judge A. Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit. Mr. Littleton is a member of the Edward Coke Appellate Inn of Court and the Supreme Court Historical Society. He was recognized by *The National Law Journal* as one of its 2019 D.C. Rising Stars.

Julia Malkina

Ms. Malkina is a partner in S&C's Litigation Group. She joined the Firm in 2015 after serving as a law clerk to Justices Sandra Day O'Connor (Ret.) and Stephen G. Breyer of the U.S. Supreme Court, a Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice, and a law clerk to then-Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit. Ms. Malkina's practice comprises appellate court litigation, trial court litigation, and regulatory proceedings in a number of areas, including securities, commodities, and criminal law. She was named a 2020 Rising Star by the *New York Law Journal* for her representations in precedent-setting cases across those areas. Ms. Malkina also represents clients pro bono in criminal matters both at the trial court level and on appeal. She is a member of S&C's Women's Initiative Committee, which seeks to recruit, retain, and advance the Firm's women lawyers.

New York
Telephone: +1 212 558 4000
Facsimile: +1 212 558 3588
125 Broad Street
New York, NY 10004-2498
United States

Washington, D.C.
Telephone: +1 202 956 7500
Facsimile: +1 202 293 6330
1700 New York Avenue, N.W. Suite 700
Washington, DC 20006-5215
United States

Los Angeles
Telephone: +1 310 712 6600
Facsimile: +1 310 712 8800
1888 Century Park East
Los Angeles, CA 90067-1725
United States

Palo Alto
Telephone: +1 650 461 5600
Facsimile: +1 650 461 5700
1870 Embarcadero Road
Palo Alto, CA 94303-3308
United States

Beijing
Telephone: +86 10 5923 5900
Facsimile: +86 10 5923 5950
Suite 501
China World Office 1
One Jian Guo Men Wai Avenue
Beijing, 100004
China

Hong Kong
Telephone: +852 2826 8688
Facsimile: +852 2522 2280
28th Floor
Nine Queen's Road Central
Hong Kong
China

Tokyo
Telephone: +81 3 3213 6140
Facsimile: +81 3 3213 6470
Otemachi First Square East Tower 16F
5-1, Otemachi 1-chome
Chiyoda-ku, Tokyo 100-0004
Japan

London
Telephone: +44 20 7959 8900
Facsimile: +44 20 7959 8950
1 New Fetter Lane
London EC4A 1AN
England

Paris
Telephone: +33 1 7304 10 00
Facsimile: +33 1 7304 10 10
51 rue La Boétie
Paris, 75008
France

Frankfurt
Telephone: +49 69 4272 5200
Facsimile: +49 69 4272 5210
Neue Mainzer Strasse 52
Frankfurt am Main, 60311
Germany

Brussels
Telephone: +32 2896 8000
Facsimile: +32 2896 8099
Boulevard du Regent 35
1000 Brussels
Belgium

Melbourne
Telephone: +61 3 9635 1500
Facsimile: +61 3 9654 2422
101 Collins Street
Melbourne, Victoria 3000
Australia

Sydney
Telephone: +61 2 8227 6700
Facsimile: +61 2 8227 6750
The Chifley Tower
2 Chifley Square
Sydney, New South Wales 2000
Australia