

# **SUPREME COURT BUSINESS REVIEW**

October Term 2018

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## *Kisor v. Wilkie*

### Administrative Law – Judicial Deference to Agency Interpretations of Regulations

Under the doctrine of *Auer* deference, federal courts generally defer to administrative agencies' reasonable interpretations of their own ambiguous regulations. Certain Justices had recently expressed doubts about that doctrine and, in *Kisor*, the Supreme Court granted certiorari to decide whether to overrule *Auer* deference.

The Court declined to overrule *Auer* as a matter of *stare decisis*, finding no sufficient “special justification” for overturning one of its precedents. But after acknowledging “mixed messages” in its prior decisions regarding when *Auer* deference is appropriate, the Court reinforced important limits on *Auer*'s application.

*First*, the Court explained that courts should not afford deference unless the agency regulation remains genuinely ambiguous after the court has exhausted all the “traditional tools” of construction. *Second*, courts must ensure that the agency's interpretation is reasonable. *Third*, the Court instructed that *Auer* applies only when the “character and context of the agency interpretation entitle[] it to controlling weight.” For example, the interpretation must represent the agency's official position, implicate the agency's substantive expertise, and reflect the agency's “fair and considered judgment.”

While *Kisor*'s most obvious effect is to preserve *Auer* deference, the opinion's focus on articulating the limits on its proper application seems likely to reduce the number of future cases in which deference is required. As a result, the decision should increase the ability of regulated parties to successfully challenge agency interpretations in court, and might incentivize agencies to enact clearer regulations. Future litigation can be expected to focus on the meaning of the various limitations set forth in the opinion.

**No. 18-15**

**Opinion Date: 6/26/19**

**Vote: 5-4**

**Author: Kagan, J.**

**Lower Court: Fed. Cir.**

*Kisor reaffirmed the doctrine of Auer deference, which generally requires courts to defer to agencies' reasonable interpretations of their own ambiguous regulations, but reinforced important limits on its scope.*

## Apple Inc. v. Pepper

### Antitrust – Prohibition on Indirect-Purchaser Claims

In *Apple*, the Supreme Court considered whether the prohibition on indirect-purchaser antitrust claims announced in *Illinois Brick Co. v. Illinois* barred iPhone owners from seeking to hold Apple liable for allegedly monopolizing the retail market for iPhone applications. Although all iPhone “apps” are sold through the App Store, the vast majority of these apps are created by independent developers, which set the price of their own apps and pay Apple a flat commission on each sale. Because Apple charges a commission to developers, and developers choose whether to pass on that cost to consumers, Apple argued that the consumers were indirect purchasers who could not assert claims under *Illinois Brick*.

The Court held that the iPhone owners qualified as permissible plaintiffs under *Illinois Brick*. In the Court’s view, the absence of an intermediary was dispositive: Because consumers purchased apps *directly* from Apple, they by definition fell outside *Illinois Brick*’s bar on suits by *indirect* purchasers. Making the *Illinois Brick* analysis turn on the pricing model used by the retailer, according to the Court, would blur the bright-line distinction between direct and indirect purchasers and enable retailers to evade the antitrust laws merely by adopting a commission-pricing model.

The Court’s ruling clarifies the scope of *Illinois Brick*’s indirect-purchaser bar, and could have significant practical consequences. Retailers that operate on a commission basis will likely be unable to invoke *Illinois Brick* as a bar to monopolization suits brought by consumers going forward. As a result, plaintiffs may seek to invoke *Apple* in pursuit of antitrust claims against other retailers that use this business model and have high market shares.

**No. 17-204**

**Opinion Date: 5/13/19**

**Vote: 5–4**

**Author: Kavanaugh, J.**

**Lower Court: 9th Cir.**

*Apple holds that Illinois Brick’s bar on antitrust lawsuits by indirect purchasers does not apply when the plaintiff purchased a product directly from a defendant retailer, even if the retailer was not responsible for setting the retail price.*

## *Henry Schein, Inc. v. Archer & White Sales, Inc.*

### Arbitration – Determination of Arbitrability

Under the Federal Arbitration Act (“FAA”), the parties to an arbitration agreement may decide that an arbitrator rather than a court will decide whether the agreement applies to a dispute in the first place. Even where parties have done so, however, several appellate courts have held that courts may nonetheless decide the threshold arbitrability question if they find the argument that the arbitration agreement applies to the dispute “wholly groundless.”

In *Henry Schein*, the Supreme Court considered whether this “wholly groundless” exception is consistent with the FAA. The Court unanimously held that courts may not override an arbitration agreement that delegates the threshold arbitrability question to an arbitrator, even if they conclude the argument in favor of arbitration is “wholly groundless.” Relying on the statutory text, the Court reasoned that the FAA contains no “wholly groundless” exception and requires courts to enforce arbitration agreements as written. In doing so, the Court rejected policy arguments offered in support of the exception, including that it saves parties time and money and deters frivolous motions to compel arbitration. In short, when an arbitration agreement delegates the arbitrability question to an arbitrator, the Court held, the FAA requires courts to respect the parties’ decision as embodied in the agreement.

*Henry Schein* reaffirms the Court’s longstanding commitment to enforcing the FAA’s policy favoring arbitration, so long as the parties’ intent to arbitrate is “clear and unmistakable.”

**No. 17-1272**

**Opinion Date: 1/8/19**

**Vote: 9–0**

**Author: Kavanaugh, J.**

**Lower Court: 5th Cir.**

*After Henry Schein, a court may no longer address the threshold question of arbitrability when a contract delegates such authority to an arbitrator, even if the court finds the arbitrability claim “wholly groundless.”*

## *Lamps Plus, Inc. v. Varela*

### Arbitration – Consent to Class-Wide Arbitration

In *Lamps Plus*, the Supreme Court considered whether the drafter of an arbitration agreement may be deemed to have consented to class-wide arbitration based on a court’s determination that the agreement is ambiguous on that question. In this case, relying on the rule under California law that contracts are construed against the drafting party, the Ninth Circuit compelled an employer to engage in class-wide arbitration after finding that the plaintiff’s employment contract was ambiguous as to whether class arbitration was allowed.

The Supreme Court reversed. As a threshold matter, the Court held that because the district court had dismissed (rather than stayed) the federal case, the order compelling arbitration was appealable.

On the merits, the Court emphasized that a party cannot be compelled to engage in any form of arbitration without its unambiguous consent. In a prior decision, the Court had applied this principle to hold that class arbitration cannot be compelled where an agreement is *silent* on the issue, in part because there are “crucial differences” between class arbitration and traditional arbitration on an individualized basis. The Court here concluded that, for the same reasons, an agreement that is *ambiguous* as to whether it permits class arbitration does not sufficiently demonstrate the parties’ consent to such a proceeding. Because the rule that a contract is construed against its drafter applies only as a “last resort” and is motivated by public policy concerns, the Court determined that the Federal Arbitration Act’s consent requirement preempts the application of that rule to compel class-wide arbitration.

After this decision, courts will likely decline to compel class-wide arbitration where arbitration agreements are silent on the issue or contain merely general language that *can* be read to encompass class arbitration procedures. Future litigation will focus on what language (or perhaps extrinsic evidence) is sufficient to overcome the “default rule” of individual arbitration.

**No. 17-988**

**Opinion Date: 4/24/19**

**Vote: 5–4**

**Author: Roberts, C.J.**

**Lower Court: 9th Cir.**

*A district court’s dismissal of a federal lawsuit when compelling arbitration is immediately appealable.*

*Courts may not compel class arbitration where the agreement is ambiguous as to whether the parties have agreed to such arbitration.*

## Frank v. Gaos

### Class Actions – Permissibility of *Cy Pres* Settlements

*Frank* concerned a class action settlement negotiated by three named plaintiffs and defendant Google to resolve the class’s claims under the Stored Communications Act (“SCA”). While requiring Google to make certain disclosures, the settlement required no payments to absent class members. Instead, it awarded more than \$5 million in *cy pres* relief, *i.e.*, to nonprofit organizations whose work was determined to indirectly benefit those class members (along with more than \$2 million to class counsel). The Supreme Court granted certiorari to decide whether class action settlements that provide such *cy pres* awards, but no direct relief to class members, satisfy Federal Rule of Civil Procedure 23’s requirement that settlements binding class members be “fair, reasonable, and adequate.”

The Court did not reach the question it granted certiorari to decide. Instead, the Court remanded the case in light of the Court’s recent decision in *Spokeo, Inc. v. Robins*, which held that a plaintiff does not establish an injury in fact for purposes of Article III standing merely by identifying a violation of a statutory right for which Congress has authorized the plaintiff to bring suit. Because no court had considered whether the named plaintiffs’ SCA claims were sufficiently concrete and particularized to support standing after *Spokeo*, the Supreme Court remanded for the lower courts to address that issue.

As a result, while such settlements may have practical benefits, it remains an open question whether courts may approve class action settlements that award funds to *cy pres* recipients but not class members. Given the Supreme Court’s interest in the issue, class action defendants should keep in mind that such settlements face an increased risk of being reversed on appeal.

**No. 17-961**

**Opinion Date: 3/20/19**

**Vote: 8-1**

**Author: Per Curiam**

**Lower Court: 9th Cir.**

*The permissibility of class action settlements that award funds to cy pres recipients but not class members remains an unsettled issue after Frank.*

## *Home Depot U.S.A., Inc. v. Jackson*

### Class Actions – Removal to Federal Court by Third-Party Defendants

In *Home Depot*, the Supreme Court considered whether a third party brought into a lawsuit to defend against a counterclaim asserted by the original defendant in the suit may remove the case to federal court. In this case, an individual defendant sued in state court responded by filing class-action counterclaims against third parties, including Home Depot. Home Depot then sought to remove the action to federal court, relying on federal statutes giving “defendants” the ability to do so when certain conditions are met.

The Supreme Court ruled that third-party counterclaim defendants lack statutory authority to remove cases to federal court. The Court first addressed the general removal statute, 28 U.S.C. § 1441(a), which authorizes “the defendant or the defendants” to remove “any civil action” over which a federal court would have original jurisdiction. Because courts look only to the plaintiff’s complaint when determining whether a federal court would have jurisdiction, the Court held that § 1441(a)’s reference to “defendants” includes only those parties named as defendants in plaintiff’s complaint, not third-party defendants later brought into the case by those original defendants.

The Court reached the same conclusion with respect to the Class Action Fairness Act’s removal provision, which authorizes “any defendant” to remove “[a] class action.” 28 U.S.C. § 1453(b). The Court concluded that Congress enacted the broader language of this provision to relax other restrictions on removal under the general removal provision, not to expand the universe of parties eligible to remove an action or change the meaning of the word “defendant.”

After *Home Depot*, parties who are named as defendants in state court lawsuits may attempt to assert class actions as counterclaims against third parties, rather than as standalone suits, thereby ensuring that such claims will remain in state court.

**No. 17-1471**

**Opinion Date: 5/28/19**

**Vote: 5–4**

**Author: Thomas, J.**

**Lower Court: 4th Cir.**

*After Home Depot, parties brought into state court lawsuits as third-party defendants may not remove those cases to federal court under the general or Class Action Fairness Act removal provisions.*

## *Nutraceutical Corp. v. Lambert*

### Class Actions – Deadline to Appeal Class Certification Orders

In *Lambert*, the Supreme Court considered whether the 14-day deadline imposed by Federal Rule of Civil Procedure 23(f) for a party to request permission to immediately appeal a district court’s class certification order may be extended through equitable tolling.

Here, plaintiff Lambert (with the district court’s permission) filed a motion for reconsideration more than 14 days after the district court issued an order decertifying a class, and did not file a petition for appellate review until after the denial of the motion for reconsideration. The Ninth Circuit deemed Lambert’s appeal request timely, concluding that the deadline was equitably tolled once Lambert told the district court (less than 14 days after the decertification order) he would seek reconsideration. Such extension on equitable grounds was permissible, the court reasoned, because the 14-day deadline was a non-jurisdictional time limit set by rule rather than statute.

The Supreme Court unanimously reversed, concluding that although the 14-day deadline is a non-jurisdictional claims processing rule, it nonetheless is “mandatory” and cannot be equitably tolled. The text of the governing rules, the Court explained, make clear that Rule 23(f)’s 14-day deadline is unalterable. In particular, Federal Rule of Appellate Procedure 26(b)(1) expressly states that a court of appeals “may not extend the time to file . . . a petition for permission to appeal,” and that language forecloses equitable tolling.

The Court left open the question whether a motion for reconsideration filed within 14 days of a class certification order could result in Rule 23(f)’s deadline starting upon the denial of that motion, as other courts of appeals have held. But this decision may encourage parties facing adverse class certification rulings to file a petition for permission to appeal within 14 days, rather than seeking reconsideration, to avoid inadvertently forfeiting appeal rights.

**No. 17-1094**

**Opinion Date: 2/26/19**

**Vote: 9–0**

**Author: Sotomayor, J.**

**Lower Court: 9th Cir.**

*Rule 23(f)’s 14-day deadline to seek permission to appeal class certification orders is mandatory and cannot be extended for equitable reasons.*

## *Obduskey v. McCarthy & Holthus LLP*

### Fair Debt Collection Practices Act – Nonjudicial Foreclosure

The Fair Debt Collection Practices Act (“FDCPA”) imposes prohibitions on conduct by “debt collector[s].” The Act generally defines a “debt collector” as “any business the principal purpose of which is the collection of any debts” but specifies that “[f]or the purpose of section 1692f(6), [the] term [debt collector] also includes . . . any business the principal purpose of which is the enforcement of security interests.”

In *Obduskey*, the Supreme Court considered whether a business principally engaged in “the enforcement of security interests” is subject to *all* of the provisions of the FDCPA, or only those contained in Section 1692f(6). In this case, after receiving notice that a law firm initiated a nonjudicial foreclosure proceeding on his residence, a homeowner sued the law firm for violating a provision of the FDCPA. The lower courts dismissed the suit, concluding that, in seeking to enforce a security interest, the law firm was a “debt collector” only for purposes of Section 1692f(6), which the firm had not been accused of violating.

The Supreme Court unanimously affirmed. Allowing that a nonjudicial foreclosure proceeding could fall within the general definition of “the collection of any debts,” the Court reasoned that Congress’s further specification that a business enforcing security interests would “also” be a debt collector for limited purposes necessarily excluded such a business from the more general definition of “debt collector.” The Court found further support for this conclusion in the legislative history, which suggested that the partial application of the Act’s provisions to businesses enforcing security interests represented a compromise between versions that would have fully included or fully excluded those businesses from the definition of “debt collector.”

Notably, the Court limited its holding to nonjudicial foreclosure proceedings, and warned that actions not required by state foreclosure law “might transform a security-interest enforcer into a debt collector subject to the main coverage of the Act.”

**No. 17-1307**

**Opinion Date: 3/20/19**

**Vote: 9-0**

**Author: Breyer, J.**

**Lower Court: 10th Cir.**

*A business principally engaged in nonjudicial foreclosure proceedings is subject only to the provisions of Section 1692f(6) of the FDCPA, not the Act in its entirety, at least so long as its actions are confined to those required by state foreclosure law.*

## Cochise Consultancy Inc. v. U.S. ex rel. Hunt

### False Claims Act – Statute of Limitations in Qui Tam Suits

Section 3731 of the False Claims Act (“FCA”) requires that *qui tam* actions seeking to recover for fraudulent payment claims submitted to the government must be brought within the later of two limitations periods: (a) six years after the violation, or (b) three years after the relevant government official learns of the facts underlying the violation (but not later than ten years after the violation). In *Cochise*, the Supreme Court considered whether the second limitations period can apply when the government declines to intervene in the FCA action, and, if so, whether that three-year limitations period starts when the relator or the government learns of the relevant facts.

On the first question, the Court held that the limitations period in Section 3731(b) applies in actions where the government declines to intervene. Because Section 3731 provides that both limitations periods apply to “a civil action under section 3730,” and Section 3730 includes relator-initiated actions regardless of whether the government chooses to intervene, the Court concluded that the Section 3731(b) limitations period is available in relator actions where the government declines to intervene.

Turning to the question of whose knowledge of the facts underlying the violation starts the clock under Section 3731(b), the Court relied on the plain import of the provision’s reference to “the official of the United States charged with responsibility to act.” The Court found no basis for concluding that the statutory phrase “the official of the United States” could encompass a private individual, and thus concluded that the relator’s knowledge of the relevant facts does not start the limitations clock under Section 3731(b).

As a practical matter, the effect of *Cochise* will be to extend the period of time in which defendants are subject to potential *qui tam* liability in FCA actions, even if the government does not choose to intervene.

**No. 18-315**

**Opinion Date: 5/13/19**

**Vote: 9–0**

**Author: Thomas, J.**

**Lower Court: 11th Cir.**

*Cochise will likely operate to extend the time in which private relators may bring False Claims Act suits, even where the government declines to intervene.*

## *Food Marketing Institute v. Argus Leader Media*

### Freedom of Information Act – Commercial Information Exemption

In *Argus*, the Supreme Court considered the scope of Exemption 4 to the Freedom of Information Act (“FOIA”), which shields from public release “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Beginning with a 1974 decision by the D.C. Circuit, many courts had held that information cannot be deemed “confidential” under Exemption 4 absent a showing that disclosure of that information would cause “substantial competitive harm” to the person who disclosed it to the government. The Court granted certiorari in *Argus* to decide whether this rule comported with the terms of the statute.

The Court held that a showing of “substantial competitive harm” is not required to trigger Exemption 4. The Court observed that the plain language of Exemption 4 imposes no such requirement, and it rejected courts’ reliance on excerpts of legislative history purportedly indicating that Congress was concerned about competitive harm when it enacted Exemption 4.

Considering the ordinary meaning of the statute’s plain terms—and rejecting the suggestion in some cases that FOIA exemptions should be construed “narrowly”—the Court held that, at the least, the information at stake must be actually and customarily kept private to qualify as “confidential” under Exemption 4. The Court further noted that information might not be considered confidential unless the government also provided an assurance of confidentiality, but ruled that it did not need to resolve that question.

Following *Argus*, commercial information submitted to the government will be protected, at a minimum, when it is (i) customarily and actually treated as private by its owner and (ii) provided to the government under an assurance of privacy. The likely result is an expanded scope of protection under Exemption 4, given the elimination of the need to show substantial competitive harm.

**No. 18-481**

**Opinion Date: 6/24/19**

**Vote: 6–3**

**Author: Gorsuch, J.**

**Lower Court: 8th Cir.**

*After Argus, persons and companies no longer need to demonstrate that disclosure would inflict substantial competitive harm in order to show that information may be withheld as “confidential” under FOIA Exemption 4.*

## *Helsinn Healthcare S.A. v. Teva Pharmaceuticals, Inc.*

### Intellectual Property – The “On-Sale Bar” to Patentability

U.S. patent law has long prohibited persons from obtaining a patent for an invention that is already “on sale.” The “on-sale bar” Congress enacted in the Leahy-Smith America Invents Act of 2011 (“AIA”) bars a patent on an invention that was “in public use, on sale, or otherwise available to the public” before the patent application was filed.

In *Helsinn*, the Supreme Court considered whether the AIA’s on-sale bar can apply to a “secret sale” of an invention, *i.e.*, a commercial sale to a third party who is required to keep the invention confidential. Teva, a generic pharmaceutical manufacturer, argued that a drug patent issued to petitioner Helsinn, a pharmaceutical firm, was invalid under the AIA’s on-sale bar. Helsinn had sold the drug’s distribution and marketing rights to a U.S. firm before applying for a patent, and that sale was disclosed in a press release. Teva argued that this publicly disclosed sale triggered the on-sale bar, even though the patented formulations were never disclosed to the public.

The Supreme Court unanimously agreed that the AIA’s on-sale bar can apply even where an invention is not sold to the public. The Court explained that its pre-AIA decisions had never required a sale to the public to invoke the on-sale bar, and that the Federal Circuit had consistently held that secret sales bar patents. The Court presumed that Congress knew of these judicial constructions of “on sale,” and thus intended to maintain the existing interpretation when it used the same term in the AIA. The Court rejected Helsinn’s reliance on the phrase “otherwise available to the public”—which Congress added for the first time in the AIA—reasoning that had Congress intended to overturn a “settled body of law,” it would have done so in a less “oblique” way.

*Helsinn* makes clear that, to ensure patent protection, inventors should file a patent application for a claimed invention prior to entering into any sale of that invention.

**No. 17-1229**

**Opinion Date: 1/22/19**

**Vote: 9-0**

**Author: Thomas, J.**

**Lower Court: Fed. Cir.**

*Helsinn holds that any sale or commercial exploitation of an invention before filing a patent application, even if the sale is confidential and the invention is not disclosed to the public, could invalidate the patent.*

## *Iancu v. Brunetti*

### Intellectual Property – Limitations on Trademark Registration

Two Terms ago, in *Matal v. Tam*, the Supreme Court held that the Lanham Act’s bar on the registration of “disparaging” trademarks violated the First Amendment because it discriminated on the basis of viewpoint. In *Brunetti*, the Court considered the constitutionality of a neighboring provision of the Lanham Act prohibiting the registration of “immoral or scandalous” trademarks. The Court held that this provision also violates the First Amendment.

The Court’s analysis centered on the core tenet from *Tam*: Because the government may not discriminate against speech based on the ideas or opinions it conveys, viewpoint-based trademark registration bars are unconstitutional. Relying on the plain meaning of the terms “immoral” and “scandalous,” the Court reasoned that the provision at issue permitted registration of trademarks that accorded with conventional moral standards, but not those that defied society’s sense of morality and propriety. Because the provision on its face “distinguishes between two opposed sets of ideas” and singles one out for unfavorable treatment, the Court explained, it unconstitutionally discriminates on the basis of viewpoint in violation of the First Amendment.

In invalidating the provision, the Court rejected the government’s argument that the provision could be narrowed to prohibit only registration of trademarks that are offensive or shocking because of their *mode* of expression, not because of the viewpoint they express. Although courts may interpret ambiguous statutory language to avoid constitutional doubts, the Court concluded that there was no ambiguity in the provision at issue, and thus the Court could not rewrite it.

Although *Tam* and *Brunetti* apply robust First Amendment protections to the trademark registration context, four Justices in separate opinions signaled to Congress that it may try to fashion a narrower, viewpoint-neutral prohibition on obscene or vulgar trademarks.

**No. 18-302**

**Opinion Date: 6/24/19**

**Vote: 6–3**

**Author: Kagan, J.**

**Lower Court: Fed. Cir.**

*Brunetti invalidated on First Amendment grounds the Lanham Act’s prohibition on registering “immoral or scandalous” trademarks.*

## *Rimini Street, Inc. v. Oracle USA, Inc.*

### Intellectual Property – Awards of Costs in Copyright Cases

The Copyright Act gives federal district courts discretion to award “full costs” to the prevailing party in copyright litigation. The federal statute governing awards of costs generally sets out six categories of litigation expenses that qualify as “costs.” 28 U.S.C. §§ 1821, 1920. In *Rimini Street*, the Supreme Court considered whether the Copyright Act’s reference to “full costs” authorizes courts to award litigation expenses beyond the six categories of costs specified in the general costs statute.

The Court unanimously held that the term “full costs” in the Copyright Act does not authorize recovery of costs other than the six categories specified in the general costs statute. The Court explained that the general costs statute “creates a default rule” for the more than 200 subject-specific federal statutes that authorize awards of costs. As a result, courts may not award expenses beyond the six categories unless Congress expressly authorizes it in the applicable subject-specific statute. The Court held that the Copyright Act’s reference to “full costs” is not such an express authorization, reasoning that “full” is a term of quantity or amount that does not expand the categories of expenses that may be awarded as costs.

*Rimini Street* eliminates uncertainty over cost recovery in copyright litigation. Because the six categories of costs in the general costs statute do not encompass several common types of litigation expenses, including for expert witnesses, jury consultants, and e-discovery, the decision may incentivize litigants to minimize those expenses in copyright cases and reduces the costs the losing party must pay.

**No. 17-1625**

**Opinion Date: 3/4/19**

**Vote: 9-0**

**Author: Kavanaugh, J.**

**Lower Court: 9th Cir.**

*Rimini Street clarifies that the “full costs” that may be awarded to a prevailing party in copyright cases encompass only the six categories of “costs” specified by Congress in the general costs statute.*

## *Jam v. International Finance Corp.*

### International Law – Immunity of International Organizations

In *Jam*, the Supreme Court interpreted a provision of the International Organizations Immunities Act of 1945 (“IOIA”) that grants international organizations such as the World Bank and the International Monetary Fund the “same immunity from suit . . . as is enjoyed by foreign governments.” 22 U.S.C. § 288a(b). When the IOIA was enacted, foreign governments had virtually absolute immunity in U.S. courts. But today, under the Foreign Sovereign Immunities Act of 1976 (“FSIA”), foreign governments may be subject to suit under one of several statutory exceptions to immunity, including an exception for suits based on commercial activity that has a sufficient nexus to the United States. The question in *Jam* was whether the IOIA guarantees international organizations the virtually absolute immunity foreign governments had when the IOIA was enacted, or the more limited immunity foreign governments have today.

The Court held that the immunity international organizations enjoy under the IOIA mirrors the more limited immunity foreign governments enjoy under the FSIA. Drawing on other statutes with similar language, the Court reasoned that, as opposed to defining immunity in a static way, the IOIA’s “same as” formulation continuously links the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The Court also relied on the “reference” canon of statutory interpretation, which holds that a statute referring to a general body of potentially evolving law—as opposed to a specific statutory provision—adopts that body of law as it exists at the time a question under the statute arises.

Although *Jam* may expose international organizations that engage in activities falling within the FSIA’s commercial activity exception to more lawsuits in the United States, the Court made clear that immunity under the IOIA is only a default rule. The charters of international organizations may specify a greater level of immunity, as many charters do.

**No. 17-1011**

**Opinion Date: 2/27/19**

**Vote: 7-1**

**Author: Roberts, C.J.**

**Lower Court: D.C. Cir.**

*Jam may expose international organizations that engage in commercial activities to more litigation in the United States.*

## *Fort Bend County v. Davis*

### Labor and Employment – Title VII Administrative Charge Requirement

Title VII requires that an employee seeking to bring an employment discrimination suit in federal court first file a charge with the EEOC. In *Fort Bend County*, the Supreme Court addressed a deep circuit split over whether this statutory requirement constitutes a jurisdictional prerequisite that can serve as a basis for dismissing the employee’s lawsuit at any time, or a claims-processing rule that the employer must raise in a timely manner.

The Court unanimously held that Title VII’s pre-suit administrative charge requirement is a claims-processing rule that can be waived if the employer does not timely raise it. The Court explained that the term “jurisdictional” is generally reserved for describing the classes of cases a court may consider and the persons over whom it may exercise authority. In recent decisions attempting to clarify the more limited scope of rules that will fall within this category, the Court has declined to characterize a rule as jurisdictional unless Congress expressly places it within a jurisdictional provision or does not indicate disagreement with a “long line” of Supreme Court decisions describing the rule as jurisdictional. Because Title VII has a separate jurisdictional provision and does not contain any other congressional indication that its pre-suit administrative charge requirement affects the scope of a court’s authority, the Court held that the requirement speaks only to an employee’s procedural obligations. As a result, if an employer does not timely object to an employee’s failure to comply with that obligation, the requirement is waived.

After *Fort Bend County*, employers must object to an employee’s failure to file an administrative charge in a timely manner or that defense will be waived.

**No. 18-525**

**Opinion Date: 6/3/19**

**Vote: 9–0**

**Author: Ginsburg, J.**

**Lower Court: 5th Cir.**

*Title VII’s pre-suit administrative charge requirement is a claims-processing rule that must be timely raised by an employer to avoid waiver.*

## *New Prime Inc. v. Oliveira*

### Labor and Employment – Scope of the Federal Arbitration Act

In *New Prime*, the Supreme Court interpreted a statutory exception to the Federal Arbitration Act (“FAA”)—which generally requires courts to enforce arbitration agreements—for “contracts of employment of . . . workers engaged in foreign or interstate commerce.” When the defendant interstate trucking company moved to compel arbitration of a putative class action filed by an independent contractor truck driver, the driver opposed arbitration on the ground that his operating agreement with the company fell within this statutory exception. The Supreme Court agreed to consider two questions.

*First*, the Court addressed whether a court or arbitrator should determine the exception’s applicability. Although the contract contained a delegation clause granting the arbitrator the authority to resolve threshold disputes of arbitrability, the Court explained that courts could not enforce even that delegation clause if the contract fell within the FAA exception. As a result, a court must first determine whether that statutory exception applies.

*Second*, the Court considered whether the arbitration agreement at issue constituted a “contract[] of employment,” even though the plaintiff driver was an independent contractor rather than an employee. The Court concluded that the driver’s agreement fell within the exception. Citing contemporaneous sources, the Court ruled that at the time Congress enacted the FAA, “contract of employment” had a broad meaning that encompassed all agreements to work, including those involving independent contractors.

The Court did not address who counts as a “worker[] engaged in foreign or interstate commerce,” nor did it address whether the parties’ agreement might be enforceable under state law or a court’s inherent authority.

**No. 17-340**

**Opinion Date: 1/15/19**

**Vote: 8–0**

**Author: Gorsuch, J.**

**Lower Court: 1st Cir.**

*New Prime makes clear that courts, not arbitrators, must decide the applicability of the FAA’s statutory exception for “contracts of employment of . . . workers engaged in foreign or interstate commerce,” and that this exception applies to contracts with independent contractors as well as employees.*

## *Merck Sharp & Dohme Corp. v. Albrecht*

### Products Liability – Impossibility Preemption Defense

In *Wyeth v. Levine*, the Supreme Court recognized an “impossibility” preemption defense to state law claims that a drug manufacturer failed to adequately warn consumers of risks associated with using the drug. Specifically, such state law failure-to-warn claims are preempted when there is “clear evidence” that the Food and Drug Administration (“FDA”) would not have approved the warning that the lawsuit would require under state law. In *Merck*, the Court considered two questions related to this preemption defense: (i) what showing the “clear evidence” standard requires; and (ii) whether a judge or a jury should decide the preemption issue.

On the first question, the Court held that the “clear evidence” standard requires showing that the drug manufacturer fully informed the FDA of the justifications for the warning that would be required by state law, and that the FDA nonetheless informed the drug manufacturer that it would not approve changing the drug’s label to include the warning. The Court clarified that this “clear evidence” standard is not a factual burden of proof like “clear and convincing evidence,” but rather requires a showing of an irreconcilable conflict between state and federal law, which is a legal issue, not a factual one.

On the second question, the Court held that a judge, not a jury, must decide the preemption issue. The Court reasoned that the issue often involves using legal skills to evaluate the nature and scope of an agency’s determination, an inquiry judges are better equipped to conduct.

*Merck* clarifies the specific showing a drug manufacturer must make to establish impossibility preemption under *Wyeth*, and removes this important defense to state law failure-to-warn claims from the purview of lay juries in all jurisdictions.

**No. 17–290**

**Opinion Date: 5/20/19**

**Vote: 9–0**

**Author: Breyer, J.**

**Lower Court: 3d Cir.**

*Under Merck, drug manufacturers’ impossibility preemption defense to state law failure-to-warn claims is a legal question for the judge, not a factual question for the jury.*

## Lorenzo v. SEC

### Securities Litigation – Misstatement Liability

In its earlier decision in *Janus Capital Group, Inc. v. First Derivative Traders*, the Supreme Court held that a defendant could be held liable under SEC Rule 10b-5(b)—which prohibits “mak[ing]” false statements or omissions in connection with the purchase or sale of a security—only if the defendant had ultimate authority over the content and transmission of the allegedly false statement. In *Lorenzo*, the Court considered whether the vice president of an investment banking company who merely transmitted a false statement made by someone else, and thus did not “make” that statement under *Janus*, could nonetheless be held liable under other provisions that prohibit “employ[ing] any device, scheme, or artifice to defraud” (Rule 10b-5(a)) or “engag[ing] in any act, practice, or course of business” operating “as a fraud” (Rule 10b-5(c)).

The Court held that such a defendant could be held liable under Rule 10b-5(a) and (c). The Court based its holding primarily on the plain language of these provisions, which it found sufficiently broad to encompass the defendant’s conduct in knowingly transmitting a false statement made by another to investors with the intent to defraud. The Court rejected the argument that Rule 10b-5(b) provides the exclusive basis for imposing liability predicated on misstatements, interpreting the three subparts of the Rule as overlapping in their coverage, rather than mutually exclusive.

*Lorenzo* expands the scope of securities liability, particularly in the Second, Eighth, and Ninth Circuits, which had ruled that liability under subparts (a) and (c) must be based on conduct beyond mere misstatements. But the Court also recognized that borderline factual scenarios—such as dissemination by tangential actors, like mailroom clerks—could present harder questions. Future litigation can be expected to focus on the kinds of factual distinctions that might warrant a different outcome.

**No. 17-1077**

**Opinion Date: 3/27/19**

**Vote: 6–2**

**Author: Breyer, J.**

**Lower Court: D.C. Cir.**

*Lorenzo ruled that a defendant may be held liable under Rule 10b-5(a) and (c) for disseminating false statements with the intent to defraud, even if the defendant did not “make” the statement under Rule 10b-5(b).*

## North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust

### Taxation – Limits on State Taxation of Trusts

Under the Due Process Clause of the Fourteenth Amendment, a state’s taxation authority is limited to persons, property, or transactions that have a “minimum connection” with the state. Applying this requirement in the context of trusts, the Supreme Court has previously upheld state taxes imposed on trust income distributed to an in-state resident or based on the presence of an in-state trustee. The question in *Kaestner* was whether a state can tax undistributed trust income based solely on the in-state residence of one of the trust’s beneficiaries.

The Court unanimously held that such a tax exceeds a state’s taxation authority under the Due Process Clause. Stressing the particular facts of the tax at issue, the Court held that a trust beneficiary’s in-state residence does not create the requisite “minimum connection” with a trust administered out of state by a non-resident trustee where the in-state beneficiaries (i) “received no income from the Trust,” (ii) “had no right to demand income from the Trust,” and (iii) “had no assurance that they would eventually receive a specific share of Trust income.” Emphasizing that the focus of the due process inquiry is “the particular relationship between the resident and the trust assets that the State seeks to tax,” the Court held that the Constitution requires the resident to “have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset.”

Because the Court cabined its ruling to the trust at issue and expressly declined to consider any other state taxation regimes, its opinion leaves open what precise relationship between an in-state beneficiary and the trust assets would permit state taxation.

**No. 18-457**

**Opinion Date: 6/21/19**

**Vote: 9-0**

**Author: Sotomayor, J.**

**Lower Court: N.C. Sup. Ct.**

*Kaestner makes clear that a state cannot tax a trust administered out of state by a non-resident trustee based solely on the presence of an in-state beneficiary, where the beneficiary has received no income from the trust, has no right to demand trust income, and has no guarantee of ever receiving such income.*

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