SULLIVAN & CROMWELL LLP

SUPREME COURT BUSINESS REVIEW

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[*] *S&C served as counsel of record and presented oral argument before the Supreme Court.*

Encino Motorcars, LLC v. Navarro

Administrative Law – Deference to Agency Rules

In *Encino Motorcars*, the Supreme Court considered whether "service advisors" at automobile dealerships are exempt from the Fair Labor Standards Act's overtime provisions. Beginning in 1978, the Department of Labor took the position that service advisors were exempt, and in 2008 the Department issued a notice of proposed rulemaking to that effect. But in 2011, the Department issued a final rule taking the opposite position—that service advisors are *not* exempt—while offering little explanation for its change in long-settled practice.

The Court held that the Department's 2011 regulation was not entitled to deference. The Court reiterated that, when an agency changes its policies, it must provide "a reasoned explanation for the change," with awareness that "longstanding policies" may have engendered serious reliance interests. The Court concluded that the Department had failed to meet those requirements in issuing its 2011 regulation, because the Department had offered only "conclusory statements" that the regulation was reasonable and appropriate. The Court therefore remanded for the Ninth Circuit to consider the meaning of the relevant FLSA exemption without deferring to the Department's 2011 regulation.

Encino Motorcars confirms that agencies must give reasoned explanations when they change policies, beyond simply saying that their new approaches are "reasonable" or "appropriate," and those explanations must account for reliance interests engendered by the agencies' previous views.

No. 15-415

Opinion Date: 6/20/16

Vote: 6-2

Author: Kennedy, J.

Lower Court: Ninth Circuit

An agency must provide a reasoned explanation when it changes its interpretation of a federal statute, and the explanation must account for reliance interests engendered by the agency's previous interpretation.

United States Army Corps of Engineers v. Hawkes Co.

Administrative Law – Judicial Review of Agency Action

The Clean Water Act prohibits the discharge of pollutants into "the waters of the United States" without a permit issued by the U.S. Army Corps of Engineers. To provide guidance to landowners, the Corps issues approved jurisdictional determinations ("JDs") that state whether a property contains such waters. In *Hawkes*, the Supreme Court held that the Corps' approved JDs constitute final agency action subject to judicial review under the Administrative Procedure Act.

Applying the two-part test of *Bennett* v. *Spear*, the parties agreed that approved JDs mark "the consummation of the agency's decisionmaking process," and the Court concluded that approved JDs also give rise to "direct and appreciable legal consequences." The Corps has agreed to be bound by its approved JDs in determining whether to bring civil enforcement proceedings, as has the EPA under a memorandum of understanding with the Corps.

The Court reaffirmed that private parties "need not await enforcement proceedings before challenging final agency action" when faced with "the risk of serious criminal and civil penalties," nor should parties have to incur the costs of an arduous permitting process before bringing suit. *Hawkes* therefore continues the recent trend of the Court's favoring pre-enforcement judicial review of significant agency action.

Justice Kennedy, joined by Justices Thomas and Alito, concurred to note that, if the Corps-EPA memorandum were non-binding as the Government had argued, the Clean Water Act's "ominous reach" would raise especially troubling "due process" concerns.

No. 15-290

Opinion Date: 5/31/2016

Vote: 8-0

Author: Roberts, C.J.

Lower Court: Eighth Circuit

Hawkes *is another in a line of rulings permitting regulated parties to seek immediate judicial review of agency determinations without awaiting enforcement actions.*

Husky International Electronics, Inc. v. Ritz

Bankruptcy Law – Actual-Fraud Exemption from Discharge

In *Husky International Electronics*, the Supreme Court considered the prohibition in Section 523(a)(2)(A) of the Bankruptcy Code against discharging debts "obtained by . . . false pretenses, a false representation, or *actual fraud*." The Court held—based on both the text of the provision and the historical meaning of the term "actual fraud"—that "actual fraud" is not limited to debts resulting from a false representation to a creditor. It also reaches other traditional forms of fraud, such as a fraudulent conveyance of property made to evade payment to creditors.

Husky International Electronics provides needed clarity in contested bankruptcy proceedings by resolving a circuit split over the "actual fraud" exemption from discharge. Creditors now may contest a discharge of debts by showing that the debtor has fraudulently conveyed property that could have been used to repay the debt, even if the debtor never made any false statement about that property to the creditor, and even if the fraudulent conveyance took place after the inception of the debt.

No. 15-145

Opinion Date: 5/16/16

Vote: 7–1

Author: Sotomayor, J.

Lower Court: Fifth Circuit

The Bankruptcy Code's exemption from discharge for debts "obtained by . . . actual fraud" applies to a debtor who has fraudulently conveyed property that could have been used for repayment, even if the debtor made no false representation about that property to the creditor.

Americold Realty Trust v. ConAgra Foods, Inc.

Civil Procedure – Removal to Federal Court

To remove a case from state court to federal court on the basis of diversity jurisdiction, the parties must be in complete diversity, meaning that no plaintiff is a citizen of the same state of any defendant. By statute, a corporation is a citizen of the states in which it is incorporated or has its principal place of business. In *Americold*, the Supreme Court addressed how to determine the citizenship of a legal entity *other* than a corporation—specifically, a real estate investment trust (REIT).

The Court reaffirmed the rule that an unincorporated legal entity takes the citizenship of each of its members. The Court reasoned that, for a REIT that holds and manages property for the benefit of its shareholders, its members are its shareholders. The trust is therefore deemed to be a citizen of any state in which one of its shareholders resides.

The Court rejected calls to treat trusts differently by limiting their citizenship solely to that of their trustees. If state law enables trusts to sue or be sued in their own name (rather than in the name of their trustees), the Court concluded, then they should be treated like other unincorporated legal entities for citizenship purposes.

Americold makes clear that REITs and other business trusts will be considered citizens of each of the states in which one of their members resides—making removal on diversity jurisdiction grounds more difficult for large entities. Trusts with broad shareholder bases seeking to file suit in federal court may wish to consider bringing suit in the name of one or more trustees, rather than on behalf of the trust itself.

No. 14-1382

Opinion Date: 3/7/16

Vote: 8–0

Author: Sotomayor, J.

Lower Court: Tenth Circuit

After Americold, *trusts with broad shareholder bases may find it more difficult to establish complete diversity in order to remove cases from state to federal court.*

Campbell-Ewald Co. v. Gomez

Class Actions – Effect of Full Settlement Offer

In *Campbell-Ewald*, the Supreme Court considered whether a putative class action becomes moot when a defendant offers to provide, but the named plaintiff refuses to accept, the full amount of relief sought by that particular plaintiff. The Court had reserved that question in *Genesis HealthCare Corp.* v. *Symczyk*.

The Court held that an unaccepted settlement offer does not moot the plaintiff's claim. Drawing from principles of contract law, the Court reasoned that a defendant's settlement offer lacks any legal effect once the plaintiff declines to accept it. Accordingly, once the offer lapses, the parties remain as adverse for Article III purposes as they were when the plaintiff filed suit.

Notably, the Court reserved decision on whether a defendant's *actual payment* of the sum demanded by a named plaintiff would moot the plaintiff's claim. The Court also reaffirmed the principle that a named plaintiff must maintain standing throughout every stage of the proceeding in order for a putative class action to remain justiciable.

Consequently, in any putative class or collective action where the named plaintiff's individual claims seek relatively modest damages or where recovery is capped by statute, defendants may wish to attempt to dispose of the case by paying the full amount of relief requested.

No. 14-857

Opinion Date: 1/20/16

Vote: 6–3

Author: Ginsburg, J.

Lower Court: Ninth Circuit

A defendant's unaccepted offer to provide the full relief sought by a named plaintiff in a class or collective action does not moot the plaintiff's claim. It remains an open question, however, whether actual payment *of such relief would warrant dismissal on mootness grounds.*

Tyson Foods, Inc. v. Bouaphakeo

Class Actions – Use of Sampling Evidence

In *Tyson Foods*, the Supreme Court considered whether representative or statistical evidence may be used to prove classwide liability and thus establish that common questions predominate over individual issues. The Court declined to adopt a broad rule prohibiting or authorizing the use of such evidence in all putative class actions. It held instead that, at least in the context of a wage-and-hour case, sampling evidence can be used to establish liability to a class if the same evidence can be used to show liability to an individual in an individual suit. Because the Court's decision in an earlier wage-and-hour case allows individuals to use representative evidence when an employer has not kept detailed records of time worked, the Court held that the putative class could use such evidence in this case.

The Court declined to decide whether plaintiffs relying on representative evidence must demonstrate that a damages award can be apportioned so that no uninjured class member will recover, because the record in this case did not yet reflect how the damages award would be disbursed to class members. Chief Justice Roberts, joined by Justice Alito, wrote separately to state his view that it would violate Article III for any damages award to compensate uninjured class members, such that any award that could not be so apportioned must be vacated.

In light of *Tyson Foods*, a putative class wishing to rely on representative evidence will need to demonstrate that such evidence could be used establish liability in an individual case. Defendants should challenge such evidence at the class certification stage, including on *Daubert* reliability grounds and by contesting any model that cannot identify and exclude uninjured plaintiffs.

No. 14-1146

Opinion Date: 3/22/16

Vote: 6–2

Author: Kennedy, J.

Lower Court: Eighth Circuit

A putative class may use sampling evidence to establish liability to the class—at least in a wage-and-hour case—if that same evidence could reliably be used to establish liability in an individual case. Class action defendants should challenge any damages model or award that may result in compensating uninjured class members.

McDonnell v. United States

Criminal Law – Bribery

The federal bribery statute, 18 U.S.C. § 201, prohibits public officials from accepting anything of value in exchange for being "influenced in the performance of any official act." The statute defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official." In *McDonnell*, the Supreme Court considered whether an "official act" includes "arranging a meeting, contacting another public official, or hosting an event—without more."

The Court unanimously held that it does not. To prosecute an official under the statute, the Government must identify a "question, matter, cause, suit, proceeding or controversy"—which means a formal exercise of governmental power, akin to a lawsuit, administrative determination, or hearing. The exercise of authority must be "specific" and "focused," and must be "pending" or within the official's specific duties. Typical meetings, calls, and events do not qualify as formal exercises of official authority.

Nor do those types of conduct, standing alone, qualify as a "decision" or "action" on more formal matters. The official must do more than participate in a meeting, call, or event. He must actually make a decision or take action, or agree to do so, on the relevant matter—for instance, by using his position to exert pressure or influence on another official.

No. 15-474

Opinion Date: 6/27/16

Vote: 8–0

Author: Roberts, C.J.

Lower Court: Fourth Circuit

McDonnell *clarifies that a public official's actions in setting up meetings, talking to other officials, or hosting events cannot serve as the basis for a bribery conviction without a more direct connection to a specific exercise of official authority.*

Universal Health Services v. Escobar

False Claims Act – Implied False Certification

In *Escobar*, the Supreme Court considered whether False Claims Act plaintiffs may establish liability on an "implied false certification" theory, based on allegations that a defendant failed to disclose its noncompliance with a relevant statutory, regulatory, or contractual requirement. Without deciding whether the mere submission of a claim warrants compliance with all applicable legal requirements, the Court held that a defendant may be liable when it (1) submits a claim to the Government that makes specific representations about the goods and services it provided, and (2) fails to disclose its noncompliance with an applicable requirement in a way that makes its specific representations misleading.

The Court emphasized, however, that not every undisclosed violation will support an FCA claim. It is not enough that the particular violation would entitle the Government to refuse payment, nor is it dispositive whether the relevant legal requirement was designated as an express condition of payment. What matters, according to the Court, is whether the requirement the defendant violated is one that the defendant knows would *actually* be material to the Government's decision to pay the claim. The Court emphasized that this materiality standard is "rigorous" and "demanding," consistent with the principle that the FCA should not be used to punish "garden-variety breaches of contract or regulatory violations."

By allowing FCA plaintiffs to proceed under the implied false certification theory, *Escobar* permits potential liability for defendants who do not disclose relevant violations of legal or contractual requirements when submitting claims for payment. But the Court's demanding materiality requirement, coupled with the plausibility and particularity requirements of Rules 8 and 9(b), should limit the circumstances in which such a theory prevails.

No. 15-7

Opinion Date: 6/16/16

Vote: 8–0

Author: Thomas, J.

Lower Court: First Circuit

Defendants faced with implied false certification claims under the False Claims Act should defend on the ground that any undisclosed legal violation would not have affected the Government's decision to pay the submitted claim.

DirecTV, Inc. v. Imburgia

Federal Arbitration Act – Preemption of State Law

In *DirecTV*, the Supreme Court again considered whether a California court had failed to "place arbitration contracts on equal footing with all other contracts" when it refused to enforce a mandatory arbitration clause in a customer service agreement. The agreement mandated arbitration unless the "law of [the customer's] state" declared class-arbitration waivers unenforceable. The California Court of Appeal held that the arbitration clause was unenforceable because California law declared class-arbitration waivers unenforceable at the time the agreement was made, even though the Supreme Court subsequently invalidated that California rule in *AT&T Mobility* v. *Concepcion*.

Although the Supreme Court ultimately (though skeptically) accepted the California Court of Appeal's interpretation of the agreement as incorporating even invalid state-law doctrines, it concluded that California courts would not interpret contracts other than arbitration agreements that way. The Court reviewed California cases interpreting other kinds of contracts and determined that California courts normally would conclude that a contract's reference to state law includes only *valid* state law at the time of interpretation. By departing from that interpretive method, the Court held, the California Court of Appeal had impermissibly disfavored enforcement of the arbitration clause, in violation of the Federal Arbitration Act (FAA).

DirecTV is the most recent in a line of cases in which the Court has vigorously enforced the FAA's policy favoring arbitration agreements. It signals the Court's willingness to look behind the expressed reasoning of state-court decisions refusing to enforce arbitration clauses, even when such decisions are purportedly based on the application of state contract law.

No. 14-462

Opinion Date: 12/14/15

Vote: 6–3

Author: Breyer, J.

Lower Court: California Court of Appeal

Under DirecTV, *state courts may not use state-law contract principles to invalidate arbitration agreements when they have not applied the same principles to other kinds of contracts.*

OBB Personenverkehr AG v. Sachs

Foreign Sovereign Immunities Act – Commercial-Activity Exception

Under the Foreign Sovereign Immunities Act, foreign states and their instrumentalities are immune from suit in American courts unless one of the Act's enumerated exceptions applies. In *OBB Personenverkehr*, the Supreme Court interpreted the commercial-activity exception, which withdraws foreign sovereign immunity in cases "based upon a commercial activity carried on in the United States by [a] foreign state." In this case, the U.S. plaintiff sued an Austrian-owned railway in California federal court for injuries she suffered when boarding a train in Austria. She contended that her suit was "based upon" her online purchase of a rail pass in the United States.

The Court held that the suit did not fall within the FSIA's commercial-activity exception. According to the Court, a suit is "based upon" domestic commercial activity when that activity constitutes the "gravamen" of the case. In applying the exception, courts should "zero[] in on the core" of a suit, identifying the particular conduct that forms the "foundation" of the case. If that conduct occurred abroad, then the commercial-activity exception does not apply. In this case, the allegedly unsafe conditions in Austria—not the domestic rail pass purchase—formed the "foundation" of the plaintiff's suit.

Accordingly, plaintiffs seeking to invoke the FSIA's commercial-activity exception must show that the "gravamen" of their claims is conduct within the United States, and courts must look behind the plaintiffs' pleadings in making that determination.

No. 13-1067

Opinion Date: 12/1/15

Vote: 9–0

Author: Roberts, C.J.

Lower Court: Ninth Circuit

The focus of the Foreign Sovereign Immunities Act's commercial-activity exception is on where the "gravamen" of the alleged conduct occurred. If domestic commercial activity is not at the core of a plaintiff's claim, the exception does not apply.

Cuozzo Speed Technologies, LLC v. Lee*

Intellectual Property – Inter Partes Review of Patents

In *Cuozzo*, the Supreme Court considered two important features of the inter partes review (IPR) system developed by the U.S. Patent Trial and Appeal Board pursuant to the 2011 America Invents Act (AIA).

First, the AIA authorizes challengers to petition for IPR of existing patent claims, and the Board decides to institute IPR proceedings if there is a "reasonable likelihood" that the challenger would prevail. The Supreme Court agreed with the Board that its decision to institute IPR is not subject to judicial review in cases where the grounds for such a challenge are closely related to the application and interpretation of statutes governing IPR proceedings. According to the Court, judicial review is only available for constitutional questions or challenges based on other statutes unrelated to IPR.

Second, the Court held that the Board may continue to give patent claims in IPR their "broadest reasonable construction," a practice that the Court viewed as a reasonable exercise of the PTO's rulemaking authority under the AIA. The Court acknowledged that this claim construction standard differs from the standard applied in district courts and the International Trade Commission (which construe patent claims according to their ordinary meaning), but concluded that the inconsistency is a product of Congress's providing two different tracks for the review and adjudication of patent claims.

No. 15-446

Opinion Date: 6/20/2016

Vote: 6-2 and 8-0

Author: Breyer, J.

Lower Court: Federal Circuit

Cuozzo declined to disturb the current challenger-friendly inter partes review system. It restricts judicial review of the Board's decision to institute IPR, and affirms the Board's decision to give patent claims their "broadest reasonable construction," making them more likely to encroach on prior art and thus be invalid.

* S&C served as counsel for and presented oral argument on behalf of petitioner in this case.

Halo Electronics, Inc. v. Pulse Electronics, Inc.*

Intellectual Property – Enhanced Damages for Patent Infringement

In *Halo Electronics*, the Supreme Court overruled the Federal Circuit's "*Seagate* test" for awarding enhanced damages in cases of patent infringement pursuant to 35 U.S.C. § 284. That test required a patent holder seeking enhanced damages to show by clear and convincing evidence that (1) the infringer acted despite an "objectively high likelihood" of infringement, and (2) the risk of infringement was "either known or so obvious that it should have been known to the accused infringer."

The Supreme Court held that *Seagate*'s "unduly rigid" test was inconsistent with Section 284's text and historical application. The Court held instead that district courts have discretion to award enhanced damages in "egregious cases" of patent infringement, judged by a preponderance of the evidence. On appeal, district courts' enhanced-damages rulings should be reviewed for abuse of discretion.

By making enhanced damages easier to obtain when patent holders can show culpable infringement, *Halo Electronics* will help to curb the trend of "efficient infringement" and incentivize prospective consensual licensing. At the same time, the Court emphasized that enhanced-damages awards should be reserved for "egregious cases," an inquiry that should be informed by historical precedent. As a result, litigants seeking or challenging future enhancements should focus their arguments on whether the alleged misconduct historically would have justified enhanced damages.

Nos. 14-1513 and 14-1520

Opinion Date: 6/13/16

Vote: 8–0

Author: Roberts, C.J.

Lower Court: Federal Circuit

Halo Electronics *establishes a new test, evidentiary burden, and standard of review for enhanced damages in cases of patent infringement. By making deliberate infringement more costly, the decision incentivizes prospective licensing.*

* S&C served as counsel for petitioners in the consolidated case, *Stryker* v. *Zimmer*, and presented oral argument on behalf of the petitioners in both cases.

Kirtsaeng v. John Wiley & Sons, Inc.

Intellectual Property – Attorney's Fees in Copyright Cases

The Copyright Act's fee-shifting provision, 17 U.S.C. § 505, provides that district courts "may . . . award a reasonable attorney's fee to the prevailing party." In *Kirtsaeng*, the Supreme Court addressed how district courts should decide whether to award such fees. Specifically, the Court considered whether, as the Second Circuit had held, district courts "should give substantial weight to the objective reasonableness of the losing party's position."

The Court said yes, because affording substantial weight to the reasonableness of parties' positions encourages useful copyright litigation: when a litigant, whether plaintiff or defendant, is clearly correct, the likelihood of recovering attorney's fees will give him an incentive to litigate the case to judgment. Conversely, when both parties' positions are reasonable, they both can litigate without significant risk of being held liable for fees, absent other overriding circumstances (such as litigation misconduct or a history of infringement). Although objective reasonableness is an "important factor," the Court stressed that it is not "controlling" and does not create a "presumption" against a fee award. Rather, district courts must take into account all relevant circumstances when deciding whether to exercise their discretion to award attorney's fees.

Kirtsaeng increases the potential cost of litigating weak copyright claims or defenses for both plaintiffs and defendants, and thus lowers the pressure on parties with strong legal arguments to settle. Although litigants in fee disputes should focus on the relative legal merits of the losing party's position, they should continue to raise all potential circumstances in their favor.

No. 15-375

Opinion Date: 6/16/16

Vote: 8–0

Author: Kagan, J.

Lower Court: Second Circuit

Kirtsaeng *encourages parties with strong legal positions in copyright cases to stand on their rights.*

Green v. Brennan

Labor and Employment – Limitations Period for Constructive-Discharge Claims

Under EEOC regulations, before a federal employee may sue for a violation of Title VII, the employee must consult with an EEO counselor within 45 days of "the date of the matter alleged to be discriminatory." In *Green*, the Supreme Court addressed when that 45-day clock starts to run for an employee alleging a "constructive" discharge—*i.e.*, that intolerable working conditions caused the employee to resign. The Court concluded that the 45-day clock does not run from the employer's last discriminatory act. Rather, it begins to run when the employee provides notice that he intends to resign.

The Court found nothing in Title VII to displace the "standard rule" that a limitations period commences when the plaintiff has a "complete and present cause of action." Applying that rule to constructive-discharge claims—which require discriminatory acts and resignation in response to those acts—the Court reasoned that a constructive-discharge claim accrues once the employee gives notice of his resignation. The Court's conclusion aligns the commencement of the limitations period for constructive-discharge and wrongful-discharge claims: the clock for wrongful-discharge claims starts when the employer gives notice of termination.

Although the 45-day period at issue in *Green* applies only to federal employees, the decision suggests that its rule will also govern private-sector constructive-discharge claims. In theory, *Green* allows an employee to resign and claim constructive discharge long after the last alleged discriminatory act, but the Court indicated that undue delay in resigning will be evidence that working conditions were not in fact intolerable.

No. 14-613

Opinion Date: 5/23/16

Vote: 7–1

Author: Sotomayor, J.

Lower Court: Tenth Circuit

The limitations period for constructive-discharge claims begins to run when the employee gives notice of his intent to resign, just as the limitations period for wrongful-discharge claims begins to run when the employer gives notice of its intent to terminate.

Montanile v. Bd. of Trustees of Nat. Elevator Ind. Health Benefit Plan

Labor and Employment – ERISA Plan Fiduciary Powers

In *Montanile*, the Supreme Court clarified the limits of the "appropriate equitable relief" ERISA plan fiduciaries may seek against plan participants when attempting to enforce the terms of an ERISA plan. The case involved a common subrogation provision under which a plan will cover the medical expenses of a participant injured by a third party, on the condition that the participant reimburse the plan if he subsequently recovers from the third party. To enforce such a provision, plan fiduciaries typically sue to enforce an equitable lien upon settlement funds or any property traceable to settlement proceeds. At issue in *Montanile* was whether ERISA also authorizes fiduciaries to attach the general assets of a plan participant who obtained a settlement but spent the proceeds on nontraceable items.

The Court held that ERISA does not authorize such a suit. Because the Act authorizes plan fiduciaries to sue only for "appropriate equitable relief," it contemplates solely those remedies that were available in pre-merger courts of equity. Drawing on historical treatises, the Court explained that plaintiffs could enforce an equitable lien against an identified fund or traceable items bought from that fund. But if the fund was dissipated on nontraceable items, the lien was destroyed, and any available remedy against a defendant's general assets was legal rather than equitable. As a result, ERISA does not authorize such a remedy.

Montanile incentivizes plan fiduciaries to act promptly to ensure appropriate reimbursement following a settlement, putting parties on notice and bringing suit when necessary. If fiduciaries fail to act until a settlement fund is dissipated on nontraceable items, they may be unable to recover under the Act.

No. 14-723

Opinion Date: 1/20/16

Vote: 8–1

Author: Thomas, J.

Lower Court: Eleventh Circuit

ERISA plan fiduciaries seeking to enforce a reimbursement agreement should act promptly after learning of a settlement in order to avoid dissipation of the settlement assets.

RJR Nabisco, Inc. v. European Community

RICO – Extraterritorial Application

In *RJR Nabisco*, the Supreme Court considered the extent to which the Racketeer Influenced and Corrupt Organizations Act (RICO) applies to conduct outside the United States.

RICO defines racketeering activity to include a number of predicate acts that may be based on foreign conduct. The Court therefore held that some of RICO's substantive prohibitions (those on employing a pattern of racketeering) can apply extraterritorially—but only to the extent that the underlying predicate statutes in a particular case themselves apply extraterritorially.

The Court reached a different result for the provision of RICO, 18 U.S.C. § 1964(c), that creates a private right of action. The Court found no clear indication that Congress intended private suits to cover conduct occurring overseas, so Section 1964(c) does not overcome the presumption against extraterritoriality. Accordingly, private civil RICO plaintiffs "must allege and prove a *domestic* injury to [their] business or property."

RJR Nabisco will insulate defendants, including multinational corporations, from private civil RICO claims based on injuries suffered abroad. But the Government may still enforce extraterritorial RICO violations resulting in foreign injuries, so long as the underlying predicate statutes themselves apply to foreign conduct.

No. 15-138

Opinion Date: 6/20/16

Vote: 4-3

Author: Alito, J.

Lower Court: Second Circuit

Defendants can now obtain dismissal of private civil RICO claims asserting injuries suffered outside the United States.

The Government may still prosecute such suits, but only to the extent the underlying predicate statutes apply to foreign conduct.

Merrill Lynch v. Manning

Securities Litigation – Exclusive Federal Jurisdiction

In *Merrill Lynch*, the Supreme Court interpreted Section 27 of the Securities Exchange Act, which grants exclusive federal jurisdiction over suits "brought to enforce" a "duty created by [the Exchange Act] or the rules and regulations thereunder." Rejecting the tests offered by both parties, the Court concluded that Section 27 is governed by the same "arising under" test that governs the scope of federal-question jurisdiction under 28 U.S.C. § 1331.

Accordingly, the Exchange Act vests federal district courts with exclusive jurisdiction when (i) the Act or an implementing regulation "creates the cause of action asserted," or (ii) a claim brought under state law "necessarily raise[s]" an issue of the Act's meaning that is disputed, substantial, and may be decided by a federal court "without disturbing any congressionally approved balance of federal and state power." To fall into the second category, the Court explained, it is not enough that the complaint refers to purported violations of the Act or its implementing regulations; the plaintiff must show a violation of the Act or an implementing regulation to prevail in the suit.

The Court's decision will make it more difficult for defendants in some courts (specifically, the Fifth and Ninth Circuits) to remove to federal court cases in which the plaintiff nominally alleges only state-law claims, even if such claims appear to rest on violations of the Exchange Act or its implementing regulations. The decision may have ramifications for other federal statutes with the same "brought to enforce" language as Section 27, including the Securities Act of 1933 and the Investment Company Act of 1940.

No. 14-1132

Opinion Date: 5/16/16

Vote: 8–0

Author: Kagan, J.

Lower Court: Third Circuit

The test for exclusive federal jurisdiction under the Securities Exchange Act is the same as the test for whether a claim "arises under" federal law. Defendants seeking removal must show that proving a violation of an Exchange Act requirement is necessary for the plaintiffs to succeed on their claims.

Spokeo, Inc. v. Robins

Standing Doctrine – Injury in Fact

In *Spokeo*, the Supreme Court addressed the injury-in-fact requirement for Article III standing. Plaintiff Thomas Robins brought a putative class action alleging that Spokeo, which operates an online search engine, had published inaccurate information about him in violation of the Fair Credit Reporting Act (FCRA). Spokeo contended that Robins lacked an injury in fact because its violation of the FCRA had not caused him any actual harm.

The Court reiterated that an injury in fact for Article III purposes must be both particularized and concrete. In focusing on concreteness, the Court acknowledged that intangible injuries can qualify, but agreed with Spokeo that "a bare procedural violation, divorced from any concrete harm," is not an injury in fact. A plaintiff thus does not "automatically satisf[y] the injury-in-fact requirement" whenever a statute grants a right and a private cause of action.

"In determining whether an intangible harm constitutes injury in fact," the Court explained, "both history and the judgment of Congress play important roles." Courts must consider whether there is a common-law analogue for the suit and whether Congress tied the statutory right and private cause of action to actual injury. The overarching inquiry, the Court stressed, is whether the statutory violation either causes harm to the plaintiff or gives rise to a material risk of identifiable harm.

Spokeo makes clear that a plaintiff must do more than point to a statutory violation to show Article III standing. The decision may be particularly important in the class action context, as it prevents named plaintiffs from bringing suit based on mere procedural violations that do not cause or threaten real harm. Moreover, even if the named plaintiff can show such harm, an individualized inquiry may be necessary to determine whether putative class members have suffered similar harms, thereby potentially defeating Rule 23's predominance requirement.

No. 13-1339

Opinion Date: 5/16/16

Vote: 6–2

Author: Alito, J.

Lower Court: Ninth Circuit

Plaintiffs must point to at least a material risk of concrete harm to have standing to sue based on procedural statutory violations.

The effects of the decision may be especially significant in putative class actions seeking class relief for intangible or procedural injuries.

S&C's Supreme Court and Appellate Practice

Sullivan & Cromwell has one of the premier appellate practices in the country. 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. This past Term, S&C lawyers served as counsel of record for the petitioners in *Cuozzo Speed Technologies, LLC* v. *Lee* and *Stryker Corp.* v. *Zimmer, Inc.* (a case consolidated with *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*), as well as counsel for numerous *amici curiae*. S&C's appellate practice draws on the experience of 15 former U.S. Supreme Court clerks and more than 100 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
- false claims
- intellectual property
- labor and employment
- products liability
- tax law

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 with any questions about Supreme Court or other appellate matters.

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