

LEGAL TRENDS
AND THE SUPREME COURTS

United States and Ohio Supreme Courts Review/Preview



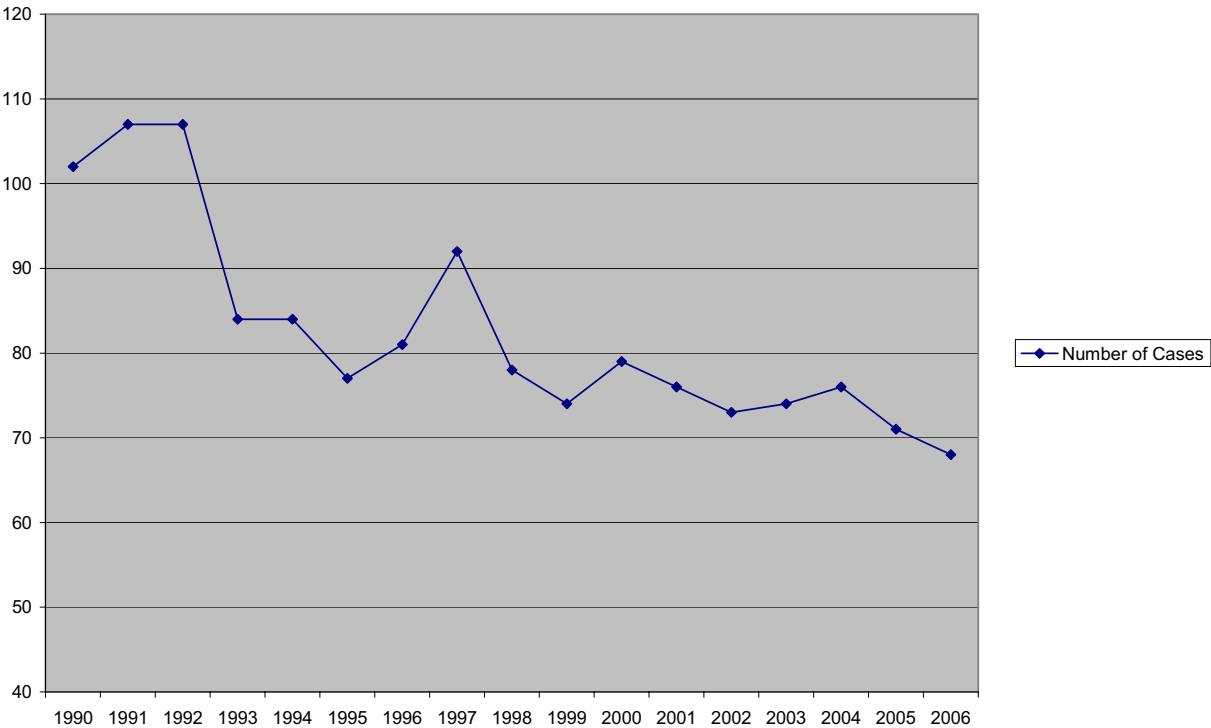
By:

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United States Supreme Court Round-Up October Term 2006

- **More closely-divided cases than usual**
24 cases (one-third of Court's docket) decided 5-4
Highest in a decade
- **Justice Kennedy is the key**
Kennedy cast the deciding vote in all of the 5-4 decisions.
- **Number of oral arguments continues to decline**

Total Number of Cases Decided After Argument



United States Supreme Court Round-Up October Term 2006

- **Docket weighted more heavily toward business cases.**

- **Pro-business interests tended to prevail**

Chamber of Commerce was on winning side in 13 of the 15 amicus briefs it filed.

- **Voting Alignments**

Highest Agreement: Alito and Roberts at 86%

SELECTED UNITED STATES SUPREME COURT CASES Decided October Term 2006

(1) *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)

Facts: The 1984 divestiture of AT&T's local telephone business left a system of regional service monopolies, sometimes called Incumbent Local Exchange Carriers (ILECs), and a separate long-distance market from which the ILECs were excluded. The Telecommunications Act of 1996 withdrew approval of the ILECs' monopolies. It also authorized them to enter the long-distance market. Under the new scheme, the ILECs had to share their networks with competitive local exchange carriers (CLECs). In this case, a class of subscribers of local telephone and/or high speed Internet services sued ILECs for claimed violations of § 1 of the Sherman Act. The complaint alleged that the ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs; and (2) by agreeing to refrain from competing against one another, as indicated by their common failure to pursue attractive business opportunities in contiguous markets and by a statement by one ILEC's chief executive officer that competing in another ILEC's territory did not seem right. The district court dismissed the complaint, finding insufficient allegations to state a claim under § 1, and concluding that plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions. The Second Circuit reversed, holding that the ILECs failed to show that there is no set of facts consistent with the allegations in the complaint under which plaintiffs would be able to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

Opinion (7-2, by Souter, J.): To state a claim under § 1 of the Sherman Act, a complaint must contain enough factual matter to suggest that an agreement was made. An allegation of parallel conduct and an assertion of conspiracy will not suffice. Federal Rule of Civil Procedure 8(a)(2) requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. In this case, this requirement simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. This requirement helps prevent groundless claims from increasing settlement value. The language of *Conley v. Gibson*, 355 U.S. 41, 45–46, preventing dismissal for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove not set of facts in support of his claim which would entitle him to relief,” is best forgotten as an incomplete, negative gloss on an accepted pleading standard. *Conley* did not provide the minimum standard of adequate pleading to govern a complaint's survival. Under the correctly-understood standard, the plaintiffs' complaint fails to state a claim and must be dismissed.

Dissent (Stevens, J.): Justice Stevens, joined for the most part by Justice Ginsburg, argued that the complaint sufficiently stated a claim. The complaint was consistent with the absence of an agreement, but it was also consistent with the *presence* of an agreement, and thus was sufficient to survive dismissal at this stage. Practical concerns about the cost of antitrust litigation should be handled by other case management options. Nothing in Rule 8(a)(2) counsels against following *Conley*'s language, which the Court has done a dozen times.

(2) *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499 (2007)

Facts: Tellabs’ shareholders sued Tellabs for securities fraud under Rule 10b-5, alleging that Tellabs and its executives made false statements that drove up Tellabs’ stock price, which then dropped precipitously when the falsity of the statements was revealed. Tellabs moved to dismiss under Rule 12(b)(6), arguing that the shareholders failed to plead facts showing a “strong inference” of scienter as required by the Private Securities Litigation Reform Act (PSLRA). The Seventh Circuit disagreed, and the Court granted certiorari to create a framework for the undefined term “strong inference” as used in the PSLRA.

Opinion (6-2-1, by Ginsberg, J.): Under the PSLRA’s heightened pleading requirements, any private securities complaint alleging that the defendant made a false or misleading statement must, among other things, “state with particularity facts giving rise to a strong inference that the defendant acted with” scienter. The Court’s task was to prescribe a workable construction of the “strong inference” standard, a reading geared to the PSLRA’s twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors’ ability to recover on meritorious claims.

The Court established the following framework. First, faced with a Rule 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all well-pleaded factual allegations in the complaint as true.

Second, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.

Third, and most significantly, in determining whether the pleaded facts give rise to a “strong” inference of scienter, the court must take into account plausible opposing inferences. The strength of inferences cannot be decided in a vacuum. The inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts? A court must consider plausible nonculpable explanations for the defendant’s conduct, as well as inferences favoring the plaintiff. A complaint will survive, the Court held, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.

The court of appeals did not apply this standard, and thus the Court remanded for further consideration.

Justices Scalia and Alito filed separate opinions, each concurring in the judgment.

Dissent (Stevens, J.): Justice Stevens believed the Court should adopt the probable cause standard in deciding whether a plaintiff has pleaded a “strong inference” of scienter in a securities fraud case.

(3) *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007)

Facts: Leegin designs and manufactures leather goods, including goods under the brand name “Brighton.” PSKS operated a clothing store that sold, among other things, Brighton products. In 1997, Leegin instituted the “Brighton Retail Pricing and Promotion Policy” and refused to sell to retailers who discounted Brighton goods below suggested prices. A year later, it started the “Heart Store Program.” This program offered the retailers incentives in exchange for an agreement to sell Brighton products at the suggested retail prices. PSKS joined the program. Leegin subsequently discovered that PSKS was discounting Brighton products and accordingly terminated PSKS. PSKS sued alleging an antitrust violation under *Dr. Miles*.

Opinion (5-4, by Kennedy, J.): *Per se* rules should be confined to restraints “that would always or almost always tend to restrict competition and decrease output,” that have “manifestly anticompetitive effects,” and that “lack any redeeming virtue.” *Dr. Miles* had adopted *per se* treatment for resale price maintenance, but it had not based its decision on economic analysis. Rather it reached that result by reference to common-law rules rejecting restraints on alienation, an approach that is no longer justified. Economics literature is “replete with procompetitive justifications for a manufacturer’s use of resale price maintenance.” In particular, such agreements can foster increased interbrand competition. That is not to say that such agreements are always pro-competitive. They could be used, for example, to facilitate a horizontal cartel among competing retailers. But, such agreements are not *always* or *almost always* used in an anticompetitive fashion. Hence, the rule of reason is the right approach. While the Court does not overrule its precedent lightly, it is willing to do so where subsequent cases have undermined the doctrinal underpinnings of the previous case. That has occurred here.

Dissent: The dissent, written by Breyer, agrees that if the Court were writing on a blank slate, the majority’s result may well be correct. The dissent disagrees, however, that it is appropriate to overturn *Dr. Miles*. According to the dissent, there have been no major changes in the American economic system with regard to the advisability of resale price maintenance, and the rejection of *Dr. Miles* thus unsettles the established reliance interest that has built up around that case.

(4) *Credit Suisse Securities (USA) LLC, v. Billing*, 127 S. Ct. 2383 (2007)

Facts: A group of investors sued investment banks, alleging that in acting as underwriters for initial public offerings (IPOs), they violated antitrust laws—including the Sherman Act, the Clayton Act as amended by the Robinson-Patman Act, and state antitrust laws—by not selling newly issued securities to a buyer unless the buyer committed (1) to buy additional shares of that security later at escalating prices (i.e., “laddering”); (2) to pay unusually high commissions on subsequent security purchases from the underwriters; or (3) to purchase from the underwriters other less desirable securities (i.e., “tying”). The district court dismissed the complaints because federal securities laws impliedly precluded application of antitrust laws to the conduct in question. The Second Circuit reversed, finding no implied preclusion and allowing the antitrust case to proceed.

Opinion (7-1 (Stevens, J. concurring in judgment only; Kennedy, J. not participating), by Breyer, J.): The securities law implicitly precludes the application of the antitrust laws to the conduct alleged in this case. In this context, there is a “clear repugnancy” between the securities law and the antitrust complaint. The law grants the SEC authority to supervise the activities in question in this case, and the SEC has exercised its authority to regulate such conduct. Most importantly for this case, securities law and antitrust law are clearly incompatible in this context. First, allowing an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market by adding antitrust considerations to the carefully-drawn lines the SEC has fashioned, in its expertise, between permissible and impermissible securities conduct. Second, there is no additional need for enforcement in this case beyond the capabilities of the SEC and securities law. Finally, the SEC considers competitive considerations in enforcing the securities laws.

Concurrence in judgment only (Stevens, J.): Justice Stevens concurred on the basis that the case should be dismissed because the banks’ alleged conduct did not violate the antitrust laws.

Dissent (Thomas, J.): Justice Thomas dissented, disagreeing with the majority’s premise that the securities statutes “are silent in respect to antitrust.” Rather, both the Securities Act and the Securities Exchange Act contain broad saving clauses that preserve rights and remedies existing outside of the securities laws. The fact that these clauses are silent with respect to preclusion of the antitrust laws should not prevent the conclusion that the generally worded saving clauses achieve this result.

(5) *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S.Ct. 2162 (2007)

Facts: Ledbetter worked at Goodyear from 1979 to 1998 as a salaried employee. During much of that time, salaried employees received raises based on their supervisors' evaluations of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging discrimination. She contended that during the course of her employment, several supervisors had given her poor evaluations because of her gender. She further claimed that those discriminatory evaluations continued to affect the amount of her salary throughout her time at Goodyear, so that by the end of her time there she was being paid significantly less than similarly performing male colleagues. Goodyear maintained that the evaluations had not been discriminatory, but the jury found for Ledbetter and awarded back pay and damages.

On appeal, Goodyear asserted that the statute of limitations barred any recovery for pay decisions made more than 180 days before the EEOC filing. The Eleventh Circuit reversed jury verdict, finding that (1) a plaintiff cannot base a discrimination claim on pay decisions made outside the EEOC charging period, and (2) there was insufficient evidence that Goodyear had acted with discriminatory intent in connection with the two pay decisions within that time span.

Ledbetter obtain certiorari on the question of whether a plaintiff can recover for disparate pay she receives during the statutory period that resulted from pay decisions outside the statutory period.

Opinion (5-4, by Alito, J.): To succeed on a disparate treatment claim, the plaintiff must prove discriminatory intent. Here, Ledbetter does not even assert that the relevant Goodyear decisionmakers acted with discriminatory intent during the statutory period. Rather, she claims only that the effects of prior intentional discrimination were carried forward into the charging period. Under *United Airlines Inc. v. Evans*, 431 U.S. 553 (1977), however, continuing effects from past acts of discrimination do not make out a present violation. See also *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). Nor can Ledbetter shift the intent associated with prior pay decisions to the pay decisions within the statutory period.

The 180-day period is an important aspect of Title VII's congressionally-designed enforcement mechanism. It reflects Congress's strong preference for prompt resolution of such claims.

Bazemore v. Friday, 478 U.S. 385 (1986), does not save Ledbetter's claim. There, the employer intentionally adopted a pay scale that differentiated between white and African-American workers and paid the latter less. In such circumstances, each new paycheck reflects ongoing intentional discrimination. Here, however, the pay structure itself was facially nondiscriminatory, and there was no evidence that Goodyear adopted the pay structure in order to discriminate on the basis of sex.

Dissent (by Ginsburg, J.): The key question is what activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation. The majority holds that it is only the pay-setting decision itself. Another view, one that would be more faithful to the Court's precedent, is that both the pay-setting decision and the actual payment of a discriminatory wage are unlawful practices. Under the latter approach, each payment "infected by sex-based discrimination constitutes an unlawful employment practice." Thus, Ledbetter should be able to recover for the disparate pay she received during the 180-day period.

Pay claims are different from other discrimination claims, such as failure to hire or promote, because compensation disparities are often hidden from sight, making it difficult for plaintiffs to even know that the discrimination has occurred. This is particularly true where the victim of discrimination receives some raise, but just not as large as that received by her male counterparts.

The Court has ordered a cramped interpretation of Title VII, inconsistent with its remedial purposes. The ball is in Congress's court.

(6) *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007)

Facts: Weyerhaeuser and Ross-Simmons both operated sawmills in the Pacific Northwest. Ross-Simmons operated one sawmill since 1962. Weyerhaeuser entered the arena in 1980 and ultimately owned six sawmills in the region, together acquiring 65 percent of alder logs available for sale in the region. Weyerhaeuser made capital investments increasing the efficiency of its mills. Ross-Simmons did not make such investments in any significant measure. When the price of logs increased, Ross-Simmons went out of business in 2001. It filed suit under § 2 of the Sherman Act, alleging a “predatory bidding” theory in which Weyerhaeuser allegedly overpaid for alder sawlogs to cause sawlog prices to rise to artificially high levels as part of a plan to drive Ross-Simmons out of business. The district court concluded that the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) test for establishing predatory pricing by a seller did not apply to this claim of “predatory bidding” by a buyer. The district court instructed a jury that Ross-Simmons could prove its claim if the jury concluded that Weyerhaeuser “purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price.” The Ninth Circuit affirmed.

Opinion (9-0, by Thomas, J.): The *Brooke Group* test for predatory pricing applies to claims of predatory bidding as well. Under that test, a plaintiff must show that the prices complained of are below cost and that the alleged predator had a “dangerous probability of recouping its investment in below-cost pricing.” The cost of erroneous findings of predatory pricing are high; the mechanism by which such illegal activity is conducted (i.e., lowering prices) is the same mechanism by which firms stimulate healthy competition. A predatory bidding claim is analytically similar. In a predatory bidding scheme, instead of the seller reducing prices to eliminate competition and then raising them once the competition is eliminated, the buyer raises its prices to eliminate competition and then lowers them once the competition is eliminated. Thus, in a predatory bidding claim, the plaintiff must show that the predator’s bidding caused the cost of relevant output to rise above the revenues generated in the sale of those outputs. The plaintiff must also show that the predator “has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.” Because Ross-Simmons conceded that it had not satisfied the *Brooke Group* standard, the case was vacated and remanded.

(7) ***KSR Int'l Co. v. Teleflex, Inc.*, 127 S.Ct. 1727 (2006)**

Facts: Teleflex owned a patent for an adjustable automobile accelerator pedal assembly with an electronic pedal position sensor. KSR manufactured a similar accelerator pedal. Teleflex sued KSR for infringement, and KSR alleged in a counterclaim that the Teleflex patent was invalid because its subject matter was obvious under § 103 of the Patent Act and the Court's precedent. The District Court granted KSR's motion for summary judgment, finding that Teleflex's patent was obvious. The Court of Appeals for the Federal Circuit reversed. Applying its "teaching, suggestion, or motivation" (TSM) test, the court held that a question of fact existed on the obviousness of the Teleflex patent. The Court granted certiorari on the question of whether the Federal Circuit's rigid application of its TSM test was inconsistent with the Court's obviousness precedent.

Opinion (9-0, by Kennedy, J.): The Court began by rejecting the rigid approach to obviousness followed by the Court of Appeals. The Court's cases set forth an expansive and flexible approach inconsistent with the way the Court of Appeals applied its TSM test. If a person of ordinary skill can implement a predictable variation of the prior art, § 103 likely bars its patentability. Thus, a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions. In deciding whether a claim is obvious from the teachings of the prior art, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ. In applying its TSM test, the Federal Circuit's analysis devolved into a set of rigid and mandatory formulas, which is incompatible with the Court's precedents. The obviousness analysis cannot be confined by a formalistic conception of the words "teaching, suggestions, and motivation," or by overemphasis on the explicit content of issued patents.

From this view, the Federal Circuit's decision suffered primarily from three flaws. *First*, the Federal Circuit held that courts should look only to the problem the patentee was trying to solve in deciding obviousness. The question is not whether the combination of prior art was obvious to the patentee but whether the combination was obvious to a person with ordinary skill in the art. Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed. *Second*, the Federal Circuit erred in assuming that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem. Common sense teaches, however, that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle. *Third*, the Federal Circuit erred in concluding that a patent claim cannot be proved obvious merely by showing that the combination of elements from the prior art was "obvious to try." When there is a need to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense and thus obvious.

In applying the correct analysis to Teleflex's patent, it must be found obvious.

(8) *MedImmune v. Genentech*, 127 S.Ct. 1118 (2007)

Facts: The parties entered a licensing agreement covering, inter alia, a then-pending Genentech patent application. After the agreement was signed, the patent issued. Genentech sent a letter contending that a MedImmune drug infringed on the patent. MedImmune paid royalties under protest, but also filed a declaratory judgment action seeking a declaration that the patent was invalid and not infringed. The district court dismissed the suit based on Federal Circuit precedent holding that a licensee in good standing cannot meet Article III’s case or controversy requirement. The Federal Circuit affirmed.

Opinion (8-1, by Scalia, J.): The record establishes that not only is MedImmune contending that the patent is invalid, but also that it does not owe royalties under the licensing agreement. In particular, it contends that its product does not infringe the patent, and, if that is correct, under the contract’s own terms, no payments would be due.

A party has standing in a declaratory judgment action if “the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant” relief. Here, that standard is met even though MedImmune did not refuse to make royalty payments. Where the plaintiff’s self-avoidance of imminent injury is coerced by the threatened enforcement action of a private party, the court can accept jurisdiction. A plaintiff need not risk actual and trebled damages in an infringement suit in order to challenge the patent. Indeed, in *Altwater v. Freeman*, 319 U.S. 359 (1943), the Court expressly held that a licensee’s failure to cease its payment of royalties did not render non-justiciable a dispute over the validity of the patent.

Nor does Genentech fare any better with its claim that the contract in effect represents a “settlement.” Genentech asserts that allowing the licensee to continue to enjoy its immunity from an infringement action while also permitting it to pursue its own invalidity action violates the common law principle that a party cannot “at one and the same time challenge a contract’s validity while also continuing to reap its benefits.” But that principle does not even apply here. MedImmune is not “repudiating or impugning” the contract, but rather it is asserting that no royalties are due *under* the contract.

Dissent (by Thomas, J.): The majority is incorrect to assert that the claims here include a contractual dispute. MedImmune is not seeking a declaration of its rights under the contract, but rather is asserting a patent invalidity claim. Allowing MedImmune to do so while it is not presently threatened with suit inappropriately expands the scope of Article III jurisdiction.

(9) *Microsoft Corp. v. AT&T Corp.*, 127 S.Ct. 1746 (2007)

Facts: AT&T holds a patent on an apparatus for digitally encoding and compressing recorded speech. Microsoft Windows has the potential to infringe on AT&T’s patent because Windows incorporates software code that, when installed on a computer, enables the computer to process speech in a manner claimed by the patent. Microsoft makes master copies of Windows and sends them to foreign manufacturers who then make copies of the master and incorporate those copies into computers manufactured, sold, and used abroad. AT&T sued Microsoft, alleging that by delivering potentially infringing components abroad to create an infringing device, Microsoft violated the patent under § 271(f) of the Patent Act. Section 271(f) says in essence that infringement occurs whenever one “supplies or causes to be supplied in or from the United States . . . components of a patented invention” in such a manner as to induce infringement.

Opinion (8-1, by Ginsberg, J.): This case poses two questions: First, when, or in what form, does software qualify as a “component” under § 271(f). Second, were “components” of the foreign-made computers involved in this case “supplie[d]” by Microsoft “from the United States”? Abstract software code is an idea without physical embodiment, and as such, it does not match § 271(f)’s categorization: “components” amenable to “combination.” The program “Windows,” abstracted from a tangible copy, no doubt is information, but it is not itself a combinable component of a device. Rather, one must place the abstract software on a tangible medium in order to make a “component.” In sum, a copy of Windows, not Windows in the abstract, qualifies as a “component” under § 271(f).

The next question is whether Microsoft “supplie[d] . . . from the United States” components of the computers here involved? Under a conventional reading of § 271(f)’s text, the answer would be “No” for the foreign-made copies of Windows actually installed on the computers were “supplie[d]” from places outside the United States. Section 271(f) prohibits the supply of components “from the United States . . . in such a manner as to actively induce the combination of *such components*.” (emphasis added). Under this formulation, the very components supplied from the United States, and not the copies thereof, trigger § 271(f) liability when combined abroad to form the patented invention at issue. Here, the copies of Windows actually installed on the foreign computers were not themselves supplied from the United States.

The Court also rejected the argument that similarities between this case and *Deepsouth Co v. Laitram Corp.*, 406 U.S. 518 (1972), require a different result because § 271(f) was a Congressional reversal of the result in *Deepsouth*, where the Court refused to find infringement based on a parties’ shipment of component parts overseas for the assembly of an infringing device. There, the Court followed the traditional patent rule that no infringement occurs when a patented product is made and sold in another country. But the items exported in *Deepsouth* were kits containing all the physical, readily assemblable parts of an infringing shrimp deveining machine (not intangible sets of instructions), and those parts themselves (not foreign-made copies of them) would be combined abroad by foreign buyers. Thus, Congress’s repudiation of *Deepsouth* with § 271(f) did not call for a different result here.

Dissent (Stevens, J.): Justice Stevens believed the case was similar enough to *Deepsouth* that Congress intended to prohibit Microsoft’s conduct. He found it difficult to understand how a disk with software inscribed on it is a “component” but that the most important ingredient of that component—the computer code—is not also a component.

SELECTED UNITED STATES SUPREME COURT CASES October Term 2007

(1) 06-43 - *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*

Question Presented: Whether an alleged secondary actor in a securities-fraud scheme can be treated as a primary actor for the purposes of imposing liability for damages stemming from that scheme.

Facts: The case arises from claims that Stoneridge Investment Partners filed on behalf of a class of purchasers of Charter Communications securities alleging that Scientific Atlanta, Inc. and Motorola, Inc. engaged in a scheme to help Charter Communications (a cable television company) artificially inflate its financial statements to boost the price of its stock. The scheme involved the purported sale of TV set-top boxes—a sham transaction that netted about \$17 million in phony revenues and resulted in the indictment of two of Charter’s officers and a cease-and-desist-order by the Securities and Exchange Commission. Based on those transactions, the Charter Communication shareholders sought to impose 10b-5 liability on Scientific Atlanta and Motorola. The district court dismissed the investors’ claims, concluding they were barred by *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), in which the Court held that there is no aiding and abetting liability under the securities laws.

Opinion (5-3, by Kennedy, J.): After *Central Bank*, Congress did not amend the securities laws to impose aiding and abetting liability. Rather, in the PSLRA it directed the SEC to prosecute aiders and abettors. Thus, in order to pursue a private claim against a secondary actor, the plaintiff must show that each of the elements of 10b-5 is met *by that actor*. Here, plaintiffs cannot meet the reliance element as defendants had no duty to disclose, and their allegedly deceptive acts were not communicated to the public. Nothing about the structure of the transactions made it necessary for Charter to report the transactions in the way it did. It was Charter, not defendants, who made the allegedly misleading statements in their financial statements. If plaintiffs were allowed to expand reliance to include reliance upon the transactions that those financial statements reflect, 10b-5 liability would extend to the whole marketplace in which the company operates. Not only is there no support for such a rule, but it would undermine Congress’s determination that the SEC should pursue aiders and abettors. Moreover, it would expose overseas firms with no exposure to U.S. securities laws to risk based solely on their decision to engage in business with U.S. companies, deterring them from doing business here. It is Congress, not the Court, that should decide if and when 10b-5 liability will extend to aiders and abettors.

Dissent (Stevens, J.): This case is critically different from *Central Bank* because there the Bank had not engaged in any deceptive act, but here the defendants had. Thus, the Court’s concerns about an overly-dramatic expansion of 10b-5 liability are misplaced. Such liability will extend only to those actors *who are themselves engaged in deceptive conduct*. Nor would imposing liability here be contrary to congressional intent. To be sure, there is no aider and abettor liability, but the conduct here should be sufficient to make the defendants liable *as primary securities law violators*.

(2) 06-457 – *Rowe v. New Hampshire Motor Transport Ass’n*

NEED TO ADD OPINION

Question Presented: Whether the Federal Aviation Administration Authorization Act (FAAAA) preempts a Maine state law requiring businesses that deliver tobacco to obtain licenses and mandating that retailers who sell tobacco use only those delivery services that provide proof that the products will not be given to minors.

Facts: This case arises from a challenge to the Maine law by three non-profit trade associations whose members deliver packages. The associations alleged that the law forced them to alter their package-processing procedures, that those new procedures were more expensive, and that the Maine law was preempted by the FAAAA’s preemption provisions. The district court granted summary judgment to the trade associations, holding that the FAAAA indeed preempted Maine’s law. The court of appeals affirmed. It held that the FAAAA preempted states from using their police power to force carriers to change their standard package-processing procedures. The court noted that the language of the FAAAA’s preemption provisions, as well as the statutory scheme’s structure and legislative history, reflected Congress’s intent that the statute be given broad preemptive effect.

Opinion (basically unanimous, by Breyer, J.): The state law is preempted. The FAAAA forbids states from “enact[ing] or enforc[ing] a law ... related to a price, route, or service of any motor carrier.” The Court interpreted similar language in *Morales v. Trans World Airlines*, 504 U.S. 374, in the context of the Airline Deregulation Act of 1978. Under *Morales*’s interpretation of such language, preemption may occur even if a state law has only an indirect effect on rates, routes, or services, and such preemption occurs when a state’s laws have a significant impact related to Congress’s deregulatory objectives. At the same time, *Morales* said that such language would not preempt laws that affected rates only tenuously, remotely, or peripherally, without the Court saying where or how to draw the precise line.

The Maine laws are preempted under *Morales*. They have a significant and adverse impact on motor carrier services and impose the very burdens on interstate commerce that Congress sought to eliminate in enacting the FAAAA’s preemption provisions. Nor can Maine overcome this preemption by claiming that it enacted the law to protect its citizen’s health by helping prevent cigarettes from falling into minors’ hands. The federal preemption provision does not create a public health exception – to the contrary, it explicitly lists a set of exceptions that does not include public health. Nor does the legislative history support Maine. That is not surprising as the kind of regulation at issue here threatens to substantially interfere with commercial carriage of goods. Moreover, there are other legislative options open to the state to achieve its stated purposes. This case is no more borderline than *Morales* was. The laws are preempted.

(3) 06-179 – *Riegel v. Medtronic, Inc.*

Question Presented: Whether the express preemption provision of the Medical Device Amendments to the Food, Drug, and Cosmetic Act, *see* 21 U.S.C. § 360k(a), preempts state-law claims seeking damages for injuries caused by medical devices for which the Food and Drug Administration had granted pre-market approval.

Facts: The case involves a New York man, Charles Riegel, who was seriously injured when a prescription medical device used to open coronary arteries burst while a doctor was attempting to insert it. Riegel and his wife sued Medtronic, alleging various claims, including defective design, labeling, and manufacturing, as well as negligence and strict liability. The district court granted partial summary judgment to Medtronic, concluding that the majority of Riegel’s damages claims were preempted.

Opinion (8-1 by Scalia, J.): The MDA’s pre-emption provision bars common law claims challenging the safety or efficacy of a medical device marketed in a form that received FDA premarket approval. The MDA preempts any state law claim based on a state requirement that is “different from or in addition to any requirement applicable under this chapter,” and “which relates to the safety or effectiveness of the device ...” The FDA premarket approval process imposes “requirements applicable” to the medical device for purposes of the pre-emption provision. Indeed, the FDA requires that a device that has received premarket approval be marketed without significant deviations from the specifications in the device’s approval application. Plaintiffs’ New York common law claims seek to impose “requirements” different from or in addition to those imposed by the FDA. Plaintiffs are wrong to suggest that common law duties are not “requirements.” Thus, state law claims can provide damages remedies only to the extent that they are premised on a violation of FDA regulations. Accordingly, plaintiffs’ claims, which do not meet this requirement, are preempted.

(4) 06-1322 – *Federal Express Corp. v. Holowecki*

Question Presented: Federal law requires employees who think they have been subjected to unlawful employment discrimination must file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before taking their case to court. This case presents the following issue: Whether filing an “intake questionnaire” with the EEOC satisfies the charge requirement.

Facts: In this case, a group of Federal Express employees claimed the company had discriminated against them on the basis of age. Although one of the employees—Patricia Kennedy—completed an EEOC intake questionnaire, the EEOC never notified FedEx that it was the subject of a discrimination charge. When the employees filed a lawsuit, FedEx contended that the questionnaire did not constitute a charge within the meaning of the EEOC’s regulations and therefore that the workers had not fulfilled the requirement that they file a “charge” at the EEOC at least 60 days before bringing suit. The district court agreed with FedEx and dismissed the employees’ claims.

The court of appeals reversed. The court noted that the EEOC’s regulations require a minimal amount of information in a charging document, and that the completed questionnaire satisfied that requirement. Agreeing with other circuits that had examined the issue, the court also concluded that the charge “must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate” the EEOC’s “investigatory and conciliatory process.”

Opinion (7-2 by Kennedy, J.): The EEOC regulations defining “charge” are reasonable so far as they go, and are therefore entitled to deference under *Chevron*. The problem is that the regulations do not provide a comprehensive definition. For example, § 1626.8(a) identifies information a charge “should contain” including the names and addresses of employee and employer and an allegation that the employee was a victim of age discrimination. But, § 1626.8(b) qualifies these statements by saying that a charge is “sufficient” if it merely meets the requirements of § 1626, i.e., it is “in writing and ... names the prospective respondent and ... generally allege[s] the discriminatory act[s].” In short, the regulations are somewhat ambiguous, as evidenced by the varying positions adopted by the courts of appeals.

The EEOC submitted that although the regulations may not completely answer the question, it has adopted an internal position under which it treats a filing as a charge so long as it is a request by the employee for the EEOC to take whatever action is necessary to vindicate the employee’s rights, a position that is also embodied in its compliance manual. While this interpretation is not entitled to *Chevron* deference, it is still afforded the lesser *Skidmore* deference. As the agency has been at least relatively consistent in its interpretation, that interpretation will be afforded deference. And under the agency’s test, its determination that the filing here constitutes a charge is reasonable.

(5) 06-856 – *LaRue v. DeWolff Boberg & Assocs.*

Question Presented: Whether section 502(a)(2) of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2), authorizes a participant in a defined contribution pension plan to sue to recover losses to the plan caused by a fiduciary breach when the losses are attributable to the participant’s individual plan account.

Facts: Petitioner was a participant in a defined contribution benefit plan. He alleged that the plan administrator had failed to follow his investment instructions resulting in approximately \$150,000 in damages, and that the administrator’s actions were a breach of fiduciary duty under ERISA. The lower courts dismissed his claim relying on *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, which they read as holding that ERISA § 502(a)(2) provides remedies only for entire plans, not for individuals.

Opinion: (9-0 in the judgment, but only 5 signing on to opinion by Stevens, J.): Although §502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account. Section 502(a)(2) provides for suits to enforce the liability-creating provisions of §409, concerning breaches of fiduciary duties that harm plans. The principal statutory duties imposed by §409 relate to the proper management, administration, and investment of plan assets, with an eye toward ensuring that the benefits authorized by the plan are ultimately paid to plan participants. The misconduct that petitioner alleges falls squarely within that category, unlike the misconduct in *Russell*. There, the plaintiff received all of the benefits to which she was contractually entitled, but sought consequential damages arising from a delay in the processing of her claim. *Russell’s* emphasis on protecting the “entire plan” reflects the fact that the disability plan in *Russell*, as well as the typical pension plan at that time, was a defined benefit plan. Misconduct by such a plan’s administrators will not affect an individual’s entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. For defined contribution plans, however, fiduciary misconduct need not threaten the entire plan’s solvency to reduce benefits to a given participant. Whether a fiduciary breach diminishes plan assets payable to all participants or only to particular individuals, it creates the kind of harms that concerned §409’s draftsmen. Thus, *Russell’s* “entire plan” references, which accurately reflect §409’s operation in the defined benefit context, are beside the point in the defined contribution context.

(6) **06-989 – *Hall Street Associates, L.L.C. v. Mattel, Inc.***

Question Presented: Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeals, that the Federal Arbitration Act (“FAA”) precludes a federal court from enforcing the parties’ clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?

Facts: Petitioner, Hall Street, leased its property to respondent, Mattel. After the property’s well water became contaminated, Hall Street brought suit against Mattel. During the course of the litigation the parties executed an arbitration agreement, which authorized de novo judicial review of the arbitrator’s legal rulings. This level of judicial review was more expansive than the level that the FAA authorized. The arbitrator initially found for Mattel. Applying de novo review, the district court overturned a central legal conclusion on which the arbitrator’s judgment rested. On remand, the arbitrator ruled in favor of Hall Street. The district court affirmed.

Ninth Circuit Decision: The Court of Appeals reversed. Relying on a recent precedent, the court concluded that parties cannot agree to a standard of judicial review of an arbitrator’s decision broader than the review standards permitted by the FAA.

Arguments for Affirmance: Arbitration is designed to foster efficient and cost-saving conflict resolution. If parties could contract for broad judicial review, the benefits of arbitration would be negated because arbitration would be followed by a burdensome and protracted judicial-review process. Permitting a broad standard of review, furthermore, lessens the distinction between arbitration and adjudication. It also allows parties to contract for federal jurisdiction.

Arguments for Reversal: The central purpose of the FAA is to enforce the terms of the parties’ arbitration agreement. Failing to allow parties to choose a standard of review different from the default standard in the FAA frustrates this purpose. The courts have, moreover, allowed parties to waive affirmative defenses provided by the FAA, such as statutes of limitations. Parties should thus be able also to waive a lenient standard of review.

(7) **06-6663 – *Kentucky Department of Revenue v. Davis***

Question Presented: Whether a Kentucky tax law violates the dormant commerce clause because it taxes interest accrued on bonds issued out-of-state, but exempts from taxation interest earned on bonds issued in Kentucky.

Facts: This case arises from a challenge to the law by two Kentucky taxpayers, who contended that the law violates the Commerce Clause because the tax discriminates against those who hold out-of-state bonds. The state trial court disagreed, and, relying on the market-participant doctrine, ruled that the law was constitutional.

State Appellate Court Decision: The state appeals court reversed. The court determined that the law clearly afforded more favorable tax treatment to in-state bonds over those issued out of state. The court rejected the lower court’s use of the market-participant doctrine to save the law, noting that the issue was not whether Kentucky acts as a market participant when it issues bonds, but rather the fact that Kentucky only taxes extraterritorial bonds. The Kentucky Supreme Court denied review.

Arguments for Affirmance: The state appellate court’s decision is consistent with the Supreme Court’s Commerce Clause jurisprudence. Although Kentucky is acting as a market participant when it issues bonds, it abandons that role when it decides to tax the income from bonds issued outside its borders and to exempt from taxation the income on bonds issued from within.

Arguments for Reversal: Forty-one states have laws similar to Kentucky’s, and state and local governments depend heavily on the issuance of bonds to fund public projects. The tax exemption is critical to states’ ability to secure the financing for these projects. Additionally, the Kentucky law is not the type of “economic protectionism” that the Commerce Clause seeks to prohibit; rather, it is an example of a law enacted by “a sovereign . . . acting on its own behalf in the service of its citizens in a manner that favors itself over other sovereign states.”

(8) 06-937 – *Quanta Computer v. LG Electronics*

Question Presented: Whether the Federal Circuit erred by holding, in conflict with decisions of this Court and other courts of appeals, that respondent’s patent rights were not exhausted by its license agreement with Intel Corporation, and Intel’s subsequent sale of product under the license to petitioners.

Facts: Respondent LGE purchased a portfolio of patents and claims that every computer that contains Intel computer chips infringes some of these patents. Intel agreed to pay LGE in exchange for the right to make, use, or sell its products free from LGE’s patent claims. Petitioners are computer manufacturers who purchased Intel chips and other equipment. In another agreement with LGE, Intel agreed to send a notice to its customers stating that they did not have a license from LGE to use Intel products in combination with other products. LGE brought suit against the petitioners for patent infringement based on this combination theory. The district court dismissed the claims under the patent exhaustion doctrine, finding that LGE’s patent rights had been exhausted in the sales.

Federal Circuit Decision: The Federal Circuit held that the patent exhaustion doctrine applies only to “unconditional” sales, and that the “notice” Intel agreed to send to its customers imposed a “condition” on the sale. The Federal Circuit implied that petitioners had agreed to such a “condition” by failing to object to Intel’s “notice” under New York’s version of the U.C.C. “battle of the forms” provision. It also held that, even if the sales in question were not “conditional,” the exhaustion doctrine would not apply to LGE’s method claims because the sale of a device does not exhaust a patentee’s rights in its method claims.

Arguments for Affirmance: The exhaustion doctrine applies only to non-conditional sales, and this sale was conditional, as evidenced by the notice that Intel delivered to petitioners. Also, the sale of a device does not exhaust a patentee’s rights in its method claims, i.e., claims regarding a patent teaching a method of accomplishing a specific function.

Arguments for Reversal: A patent holder’s rights are extinguished upon the sale of a patented good. However, a patent holder may restrict a licensee’s use of a patented good. In this case and in cases over the last 14 years, the Federal Circuit eviscerated the distinction between a sale, which exhausts rights, and a license, which does not, and with it has eviscerated the exhaustion doctrine.

(9) 06-1037 – *Kentucky Retirement v. EEOC*

Question Presented: Whether any use of age as a factor in a retirement plan is “arbitrary” and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act?

Facts: The EEOC filed suit against Kentucky Retirement Systems, the Commonwealth of Kentucky, and the Jefferson County Sheriff’s Office, arguing that the eligibility requirements and the manner in which disability retirement benefits are calculated under the State retirement plan authorized by the Kentucky General Assembly violate the Age Discrimination in Employment Act (“ADEA”). The case involves a public employee retirement plan that includes normal and disability retirement benefits. A member who is eligible for normal retirement benefits based on attained age plus a minimum service requirement, or based on service alone, is not eligible for disability retirement benefits. Because age may be a factor in determining eligibility for normal retirement, it is an indirect factor in determining eligibility for disability retirement. Moreover, the calculation of disability retirement benefits is based upon actual years of service plus the number of years remaining before the member reaches retirement age or eligibility based on years of service alone; age may thereby be an indirect factor in determining the amount of disability retirement benefits.

Sixth Circuit Decision: The Sixth Circuit, en banc, held that the EEOC had established a prima facie case of facial discrimination, overruling earlier panel precedent that had found no facial age discrimination in an early retirement plan, and remanded the case to the district court for further proceedings.

Arguments for Affirmance: The plan meets the ADEA’s test for prima facie facial discrimination because the plan “excludes still-working employees over age fifty-five from a particular employment benefit because of their age” and because “employees who become disabled when they are still ‘young enough’ to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age.”

Arguments for Reversal: The ADEA states in its purpose section that it prohibits “arbitrary” discrimination, and the use of age in such an indirect manner in a retirement benefits system is not arbitrary. The Sixth Circuit only considered whether the system used age as a factor, and did not consider whether the system contained “arbitrary” discrimination. Finding facial discrimination in this situation is inconsistent with the purpose and design of the ADEA, as, unlike cases such as *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this case involves no stigmatizing and inaccurate stereotyping about older workers.

(10) 06-1431 – *CBOCS West v. Humphries*

Question Presented: Is a race retaliation claim cognizable under 42 U.S.C. § 1981 (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens”)?

Facts: Humphries was an associate manager at Cracker Barrel. When an African-American colleague was fired, he complained that the firing was based on discrimination. A meeting was scheduled to discuss the complaint, but before the meeting, Humphries himself was fired. Humphries filed suit under Title VII and § 1981 for retaliation that interfered with his employment contract. The Title VII claim was dismissed for procedural defects.

Seventh Circuit Decision: The Seventh Circuit held that a retaliation claim is cognizable under § 1981, and Humphries presented a prima facie case of retaliation sufficient to survive summary judgment. Judge Easterbrook dissented, finding that § 1981 does not include retaliation claims and that doing so is not necessary, as it was under Title VII, as an ancillary claim to make effective the principal norm against discrimination.

Arguments for Affirmance: The text of the statute and the legislative history shows Congress’s intent to include retaliation claims under § 1981. In 1991, Congress expanded the definition of “make and enforce contracts” to include many activities, showing a broad range of protection under the statute.

Arguments for Reversal: The text of the statute leaves out any reference to retaliation, and the legislative history, to the extent it suggests a different result, cannot trump the text. In fact, the legislative history supports a finding that Congress did not intend to include retaliation claims. There is a conceptual difference between discrimination and retaliation. Retaliatory terminations are not racially motivated; the motivation behind the retaliatory termination, by definition, is the protected activity, which in most situations is some form of complaint. Allowing for retaliation claims under § 1981 would allow parties, like the plaintiff in this case, to file claims that sound under Title VII after Title VII’s limitations period has run.

(11) 06-1457, 06-1462 – *Morgan Stanley Capital Group v. Pub Util. Dist. 1, American Elec. Power Serv. Corp. v. Pub. Util. Dist. 1*

Question Presented:

In American Elec. Power Serv. Corp. v. Pub. Util. Dist. 1:

The Federal Power Act (“FPA”), 16 U.S.C. §§ 791a et seq., sets forth the standards by which the Federal Energy Regulatory Commission (“FERC”) regulates wholesale energy rates. In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), this Court determined that, under the FPA, FERC may undo a valid wholesale energy contract only in the extraordinary circumstance when the contract is contrary to the public interest. In conflict with *Mobile* and *Sierra*, and with decisions of the D.C. and First Circuits, the Ninth Circuit in the decision below held that FERC may nullify voluntary wholesale energy contracts—absent the requisite showing of public necessity—if FERC determines in hindsight that the negotiated rate is unreasonable or that, absent the challenged contracts, retail rates for energy would be slightly lower. Thus, this petition presents the following questions:

1. Whether the Ninth Circuit misapplied this Court’s holdings in *Mobile* and *Sierra* and created conflicts with the D.C. and First Circuits when it reversed FERC’s decision to uphold valid wholesale energy contracts absent any showing that the public interest required their abrogation.
2. Whether the Ninth Circuit misapplied the *Mobile-Sierra* doctrine by determining that the *Mobile-Sierra* public interest criteria apply only to sellers, but not to buyers, under wholesale power contracts, in direct conflict with *Mobile*, *Sierra*, and the decisions of other circuits.

In Morgan Stanley Capital Group v. Pub Util. Dist. 1:

Whether the Ninth Circuit erred by failing to abide by this Court’s decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), which preclude the Federal Energy Regulatory Commission from retroactively undoing valid, bilaterally negotiated, arms-length wholesale energy contracts that have, at most, minimal impact on retail rates.

Facts: As a result of the Western power shortage of 2000, several Western public utilities entered electricity purchasing agreements, where the public utilities would purchase power from the Petitioner suppliers at favorable rates for future delivery. The public utilities, moreover, resold some of this electricity at a profit during the shortage. Once the power shortage eased and prices dropped, the Western public utilities filed complaints with the Federal Energy Regulatory Agency (FERC) for reformation or avoidance of these purchasing agreements. FERC refused to alter the electricity purchasing agreements and the public utilities appealed to the Ninth Circuit Court of Appeals.

Ninth Circuit Decision: For over 50 years, the U.S. Supreme Court’s decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), have guided the analysis of when the FERC should reform a wholesale electric purchasing contract. FERC applied this analysis, known as the *Mobile-Sierra* doctrine, and concluded that it should not void the contracts at issue.

The Ninth Circuit, however, recognized two new limitations on the *Mobile-Sierra* doctrine. First, it held that *Mobile-Sierra* could not apply when the contracts were made in a dysfunctional market, such as the Western energy market during the 2000 power shortage. And second, the court ruled that in deciding whether the contract posed an excessive burden on ratepayers, FERC should have determined whether the wholesale contract fell outside a “zone of reasonableness” such that retail rates would be higher than if the contract had not exceeded the “zone of reasonableness.”

Arguments for Affirmance: The text of the Federal Power Act, which governs FERC’s authority, expressly requires that all rates be “just and reasonable,” and the *Mobile-Sierra* doctrine did not purport to replace this statutory command with the “public interest” doctrine followed by FERC in this case. The Ninth Circuit’s holding was faithful to the Federal Power Act’s language and should be affirmed.

Arguments for Reversal: The Ninth Circuit’s decision conflicts with the U.S. Supreme Court’s *Mobile-Sierra* doctrine, which interprets the Federal Power Act at issue in this case. The FERC properly interpreted and applied the *Mobile-Sierra* doctrine, while the Ninth Circuit improperly modified that doctrine. The Ninth Circuit’s modification, moreover, would cause uncertainty in the enforceability of wholesale power contracts and other deleterious effects on the power markets.

(12) 07-219 – *Exxon Shipping Co. v. Baker*

Question Presented: An Alaska federal jury awarded \$5 billion in punitive damages against Exxon under federal maritime law for the accidental grounding of the tanker Exxon Valdez and the resulting oil spill. The award did not punish for harm to the environment, which other proceedings had fully redressed, but only for lost income and similar economic harm to commercial fishermen and other private parties. Applying the Due Process Clause, the Ninth Circuit reduced the award to \$2.5 billion—still 123 times the compensatory damages awarded and five times what the court found was the total, fully compensated loss to all private economic interests.

The questions presented are:

1. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?
2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?
3. Is this \$2.5 billion punitive damages award, which is larger than the total of all punitive damages awards affirmed by all federal appellate courts in our history, within the limits allowed by (1) federal maritime law or (2) if maritime law could permit such an award, constitutional due process?

Facts: In 1989, the Exxon Valdez ran aground in Alaska, spilling hundreds of thousands of barrels of oil and causing severe environmental and economic damage. After settling with the federal and state governments on various regulatory and criminal claims, Exxon went to trial with private fisherman who claimed economic losses to their businesses. A jury found that the ship's captain, and thus Exxon itself, was reckless in operating the ship, and awarded \$20.3 million in compensatory damages and \$5 billion in punitive damages. After several appeals to the Ninth Circuit, that court settled on a \$2.5 billion punitive award, more than 123 times the amount of compensatory damages.

Ninth Circuit Decision: The Ninth Circuit upheld the \$2.5 billion award. In various previous appeals, the court rejected many of the arguments Exxon now makes on certiorari. In its final opinion, the Ninth Circuit agreed with the district court's calculation of "total losses" amounting to \$500 million dollars and that the resulting 5:1 ratio did not violate Constitutional standards.

Arguments for Affirmance: The lower courts properly imputed the recklessness of the ship's captain to Exxon, consistent with most states' laws on reckless behavior and punitive damages. The Clean Water Act, which regulates statutory discharge standards, did not impede the plaintiff's tort claims. And lastly, nothing in maritime law counsels against punitive damages in an appropriate case.

Arguments for Reversal: The Ninth Circuit's decision first contradicts prevailing maritime law, which holds that the reckless acts of the ship's captain cannot be imputed to the ship's owner. Thus punitive damages can only appropriately be awarded against the ship's captain and not Exxon. The punitive damage award is also contrary to the Clean Water Act, which represents a comprehensive scheme for compensating those injured and deterring those responsible for the type of conduct that occurred here, thus making a punitive damage award unnecessary. And lastly, the award contravenes various maritime law principles.

(13) 06-923 – *Metlife v. Glenn*

Question Presented: Whether the fact that the claim administrator of an ERISA plan also funds the plan benefits, without more, constitutes a “conflict of interest” that must be weighed in a judicial review of the administrator’s benefit determination and, if so, how should that conflict be taken into account on judicial review of a discretionary benefit determination?

Facts: Glenn worked as a Sears sales manager. After she started feeling fatigued, she went to a doctor who diagnosed her with cardiomyopathy. Based on that diagnosis she claimed a total disability under the Sears long term disability plan. Metlife administers that plan for Sears, and it “has the responsibility of Claim Fiduciary for the provision of full and fair review of claim denials.” Metlife also underwrites the insurance policy that pays the claims. Metlife determined that Glenn was totally disabled. Over the course of the next couple of years, she began responding well to treatment. Under the plan, Metlife would periodically monitor the situation to determine whether the disability still existed. Eventually, based on positive reports from her treating physician, along with medical record review by their own personnel, Metlife determined that Glenn was no longer totally disabled. Glenn appealed that determination within Metlife. After additional review, Metlife again determined that she was not totally disabled. Glenn then sued under ERISA. In connection with her claim, she argued that the Metlife determination should receive lessened or no deference as a result of the conflict of interest that Metlife faces as both the administrator of the plan and the entity that pays the claims.

The district court agreed that a conflict of interest existed, but nonetheless found in favor of Metlife. On appeal, the Sixth Circuit determined that the district court had given insufficient weight to the conflict of interest, and it reversed.

Arguments for Affirmance: As the entity that both pays the claims and determines the existence of a disability, Metlife has an inherent, pervasive and unavoidable conflict of interest. In the face of that conflict of interest, limiting court review of administrator decisions to the “arbitrary and capricious” standard stated in the plan would provide insufficient protection to the plan participants, and would thwart the congressional objectives underlying ERISA. The law of trusts, from which ERISA evolved, has long recognized the appropriateness of more searching judicial review when the allegation is that a trustee was on both sides of a particular transaction, thus raising the specter of self-dealing.

Arguments for Reversal: ERISA explicitly authorizes fiduciaries to both evaluate and pay claims, thus consolidation of functions within a single entity, standing alone, does not place fiduciaries in the prohibited position of “deal[ing] with the assets of the plan in [their] own interest.” This is confirmed by trust law. Where the trust document expressly contemplates that the trustee will be in a conflict position, courts typically do not take that conflict into account in reviewing trustee actions. Moreover, as a practical matter, Metlife does not have a conflict of interest, as insurance companies and the employers who sponsor ERISA-regulated plans share strong commercial incentives to treat claimants fairly and to pay meritorious claims. And here, none of the employees making the benefit determination have any financial or other interest in denying benefit claims. In addition, even if the Court employs a heightened standard of review, the benefits decision here still survives. The record confirms that it was a reasonable decision, fully consistent with the plan documents, based solely on the available medical evidence.

(14) 06-1505 – *Meacham v. Knolls Atomic Power Lab.*

Question Presented: Whether an employee alleging disparate impact under the Age Discrimination in Employment Act, 29 U.S.C. § 623, bears the burden of persuasion on the “reasonable factors other than age” defense.

Facts: Knolls Atomic Power Law engaged in a reduction in force. In connection with that reduction in force, the managers rated each of their workers on a variety of subjective factors including things like “criticality and “flexibility.” The managers were not given any instruction on how to avoid discrimination in their assessments. Based on these reviews, 73% of the workers identified for possible termination were over forty, although only 58% of the employer’s workers were above that age. Moreover, of those 39 employees actually let go, all but one was over forty. A statistician testified that the likelihood of that occurring based on mere chance was less than 1 in 348,000.

Some of the terminated workers brought suit claiming age discrimination. They won a jury verdict, which was affirmed on their initial appeal. The Supreme Court vacated the appellate decision, however, and remanded for reconsideration in light of its newly-announced decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005).

On remand, the circuit court determined that the verdict could not stand. The case turned on who bore the burden of persuasion on the “reasonable factors other than age” (RFOA) defense. Under the ADEA, an employer is not liable if it relies on a RFOA in making the adverse employment decision. The circuit court concluded that under *Smith v. City of Jackson*, the employee bore the burden of persuasion in showing that an RFOA did not exist. Because there was no evidence in the record, the employer necessarily must win.

Arguments for Affirmance: *City of Jackson* requires that the employee bear the burden of persuasion on the RFOA issue. *City of Jackson* applied and extended an earlier case, *Wards Cove*, to the ADEA context. In *Wards Cove*, the Court adopted a burden shifting test for disparate impact claims under Title VII. If the plaintiff demonstrates a disparate impact, the burden shifts to the employer to proffer a business justification. Once the employer does so, however, the burden of persuasion shifts back to the plaintiffs to show that the proffered business justification is not the real reason for the employer’s decision. In *City of Jackson*, the Court concluded that the ADEA replaces the so-called “business necessity” test with a “reasonableness test.” Accordingly, because the RFOA defense is playing the same role as the business necessity test under the *Wards Cove* framework, the same burden shifting analysis should apply, and plaintiffs should bear the burden of persuasion. Moreover, public policy also supports this same result.

Arguments for Reversal: The RFOA defense is a statutory affirmative defense. As with virtually all affirmative defenses, the defendant bears the burden of proof on the defense. Indeed, according to petitioners, “Congress’s formulation of the defense – as an exemption from the general prohibitions of a statute – marks it as a classic example of an affirmative defense upon which the defendant bears the burden of proof. Moreover, the Court has read similar language in the ADEA and the Equal Pay Act, including the RFOA’s immediate neighbor, the bona fide occupational qualification defense as affirmative defenses on which the employer bears

the burden. Furthermore, to the extent that the statute is ambiguous, the EEOC has construed the RFOA as creating an affirmative defense, a construction that is entitled to deference. *City of Jackson* and *Wards Cove* do not require a different result.

BUSINESS DECISIONS FROM THE OHIO SUPREME COURT

2006-2008

I. TORTS & TORT REFORM

Arbino v. Johnson & Johnson, 2007-Ohio-6948: 5-2 (Moyer, C.J. (auth.); Pfeifer, J., dissenting; O'Donnell, J., dissenting in part)

Legislation capping the amount of noneconomic damages that may be awarded to personal injury plaintiffs and placing limits on the amount of punitive damages that may be awarded in Ohio tort actions does not violate the constitutional rights of injured parties to trial by jury, to a remedy at law for their injuries, or to due process and equal protection of the laws, nor does it violate provisions of the Ohio Constitution that guarantee open courts and the separation of powers between the legislative and judicial branches of government.

Facts: Case arose out of a product liability action (Evra birth control patch) filed against Johnson & Johnson in federal court in Toledo. During pretrial proceedings, Arbino filed a motion for summary judgment asking the federal court to declare unconstitutional provisions of Ohio Senate Bill 80—legislation enacted by the General Assembly in 2004 which took effect in April 2005—imposing caps on the potential amounts of noneconomic and punitive damages she could recover from Johnson & Johnson. The federal court in turn submitted four “certified questions of state law” to the Supreme Court of Ohio regarding whether specific Revised Code sections adopted or amended as part of S.B. 80 are unconstitutional because they violate plaintiffs' constitutional rights.

One of the challenged provisions, R.C. 2315.18, limits the amount of “noneconomic” damages (damages for intangible injuries such as pain and suffering, loss of consortium, disfigurement, mental anguish, etc.) that may be awarded to a plaintiff in a personal injury suit to the greater of \$250,000 or three times the amount of “economic damages” awarded to the same plaintiff based on the same injuries, up to an absolute maximum of \$350,000. The bill makes an exception to those limits for plaintiffs who suffer permanent disability or the loss of a limb or bodily organ system. Another challenged provision in the bill, R.C. 2315.21, prohibits Ohio courts from awarding a plaintiff punitive damages that exceed two times the amount of his or her compensatory damages from the same defendant (*i.e.*, caps punitive damages at a 2:1 ratio to compensatory damages).

Holding: Breaking from past precedents (at least five) striking down earlier tort reform laws, the Court found Senate Bill 80, in particular the caps on non-economic and punitive damages, to be constitutional. The Court noted that over the past 30 years the legislature has repeatedly passed bills attempting to rein in what it perceived to be arbitrary and unpredictable damage awards in personal injury lawsuits because it believed such awards were a threat to the state's economic health, yet in each instance the legislature's enactments were ultimately overturned by the Supreme Court based on findings that certain provisions in those bills violated constitutional rights of injured parties. *State decisis* did not apply here because S.B. 80 is a different legislative enactment, one that has been more narrowly tailored by the legislature to address the constitutional defects identified by the Court previously.

As to the noneconomic damages caps, in enacting the caps the legislature remedied constitutional flaws found in earlier tort reform bills by exempting from the caps any plaintiff who has suffered “[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system,” or “[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.” Similarly, the portion of the bill limiting punitive damages was drafted to avoid a constitutional flaw identified by the Court in a previous bill by leaving the determination of punitive damages in the hands of jurors, rather than transferring that power to trial judges.

In addressing whether the challenged statutes violate a plaintiff's constitutional right to trial by jury by limiting the amount of jury-determined damages a court may actually award to a successful plaintiff, the Court noted that in a number of instances, for example, under the Consumer Sales Protection Act, the “General Assembly demonstrated a clear policy choice to modify the amount of jury awards,” in that instance by allowing awards to be trebled.” “We have never held that the legislative choice to *increase* a jury award as a matter of law infringes upon the right to a trial by jury; the corresponding *decrease* as a matter of law cannot logically violate that right.” “By limiting noneconomic damages for all but the most serious injuries, the General Assembly made a policy choice that noneconomic damages exceeding set amounts are not in the best interest of the citizens of Ohio.”

In rejecting Arbino's arguments that the challenged statutes violated her constitutional rights to due process and equal protection of the laws, the Court cited the reports and studies before the legislature “demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit, logical conclusion is that the uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system.” Arbino’s challenge was reviewed under a rational basis test, and the Court “grant[s] substantial deference to the predictive judgment of the General Assembly' under a rational-basis review. Further, as the United States Supreme Court has stated, ‘it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.’”

While tort reform has been and remains “a contentious issue across the country,” the Court reaffirmed that “the General Assembly is charged with making the difficult policy decisions on such issues and codifying them into law. This court is not the forum to second-guess such legislative choices; we must simply determine whether they comply with the Constitution. In that function, we cannot say that the General Assembly's action lacked all rational relation to the legitimate state interest of improving the state's civil justice system and its economy. The limitations were aimed at reducing the uncertainty associated with the existing tort system and the negative consequences resulting from it.”

***Welling v. Weinfeld* (2007), 113 Ohio St. 3d 464: 5-2 (Pfeifer, J. (auth.); O'Connor, J. and Lanzinger, J. dissent).**

Ohio recognizes a false light cause of action.

Facts: Owner of a party center, where banquets and weddings are held, brought a tort action against her neighbors, alleging that her neighbors use of yard and farm equipment during party center events constituted a nuisance, trespass, invasion of privacy, interference with business relations, and intentional infliction of emotional distress. Neighbors filed counterclaim for invasion of privacy based upon events that transpired after the spring of 2000, when someone vandalized the party center. Plaintiff suspected that the culprit was the defendants' son, and plaintiff created handbills, printed on 8 1/2-by-11-inch paper, offering a reward for information regarding the perpetrator. The handbill read:

\$500.00
REWARD
for any information which leads to the
conviction of the person(s) responsible
for throwing a rock through the window
of Lakeside Center Banquet Hall
(also known as the "Party Center")
in the Dee Mar Allotment, in Perry
Township, on Monday, May 8th or
Tuesday, May 9th, 2000.

Plaintiff admitted that she had no proof that defendants were responsible for the damage yet she distributed the handbills at two locations outside the neighborhood that were of special significance to the defendants: at the Pepsi bottling plant where defendant and his son worked and at the school where defendants' children attended. The defendants alleged that plaintiff's distribution of the handbills spread wrongful publicity about them that unreasonably placed them in a false light before the public.

Holding: Under the invasion of privacy tort adopted by the Ohio Supreme Court in 1956, there was no recognition of a cause of action based upon publicity that places a person in a false light before the public. Noting that a majority of jurisdictions in the United States have recognized false-light invasion of privacy as a distinct, actionable tort, the Court adopted the tort for Ohio as well: "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. (Restatement of the Law 2d, Torts (1977)).

What is the difference between defamation and false light? "Certainly situations may exist in which persons have had attributed to them certain qualities, characteristics, or beliefs that, while not injurious to their reputation, place those persons in an undesirable false light. However, in situations such as these, victims of invasion of privacy would be without recourse under

defamation law. False light therefore provides a viable, and we believe necessary, action for relief apart from defamation.”

Terry v. Caputo, 2007-Ohio-5023: 6-1 (O'Donnell, J. (auth.); Pfeifer, J. dissents).

Ohio legal standard for mold exposure tort.

Facts: Public employees in Ottawa County filed action against county and property management company, alleging that defendants' negligence in allowing mold to grow in workplace caused employees' health problems, including chronic respiratory problems, headaches, fatigue, and joint pain.

Holding: To present a prima facie case involving an injury caused by exposure to mold or other toxic substance, a claimant must establish (1) that the toxin is capable of causing the medical condition or ailment, i.e., general causation, and (2) that the toxic substance in fact caused the claimant's medical condition, i.e., specific causation. Court holds that because establishing general causation and specific causation in cases involving exposure to mold or other toxic substances involves a scientific inquiry, causation must be established by the testimony of a medical expert. Without expert testimony to establish both general causation and specific causation, the Court held, a claimant cannot establish a prima facie case of exposure to mold or other toxic substance. The Court extends its adoption of *Daubert* in *Valentine v. Conrad* (2006), 110 Ohio St. 3d 42.

Dissent: Justice Pfeiffer, in dissent, would have affirmed the appellate court, which concluded that medical expert testimony does not have to be that of a physician, and that the testimony of plaintiffs' expert industrial hygienist, in combination with the other evidence, was sufficient to withstand summary judgment on specific causation.

II. TRIAL PRACTICE AND PROCEDURE

Glozzo v. Univ. Urologists of Cleveland, Inc. (2007), 114 Ohio St. 3d 141: 6-1 (Lanzinger, J. (auth.); Pfeifer, J. dissents).

Service of process defense is not waived when raised on eve of trial, where no Rule 12 motion was filed in the case. A party's active participation in the litigation of a case does not constitute waiver of a pled defense of insufficiency of service.

Facts & Holding: In this medical malpractice suit, service of the Complaint was not completed within one year, as required by Civil Rule 3(A). Nine days before trial date, defendant moved to dismiss due to failure to perfect service of process. Motion was granted, reversed by Court of Appeals. That decision was reversed by Ohio Supreme Court, citing Civ. R. 12 and *First Bank of Marietta v. Cline* (1984), 12 Ohio St. 3d 217. "The only way in which a party can voluntarily submit to a court's jurisdiction *** is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading."

Dissent: Justice Pfeifer argues that the purpose of process – put the other party on notice that a lawsuit has been filed – had been met and the rules should be interpreted accordingly.

Hall v. BancOne Mgt. Corp. (2007), 114 Ohio St. 3d 484: 6-1 (O'Donnell, J. (auth.); Lanzinger, J. dissents).

A “disqualified” juror cannot be rehabilitated,

Facts: Former lobbyist for Bank One was fired and filed a sex and age discrimination suit. During voir dire, plaintiff challenged juror because two of his sons were employed by Bank One, one as manager of a Columbus-area branch. Plaintiff moved to exclude juror for cause under R.C. 2313.42(E), which authorizes a challenge for cause against any prospective juror whose child is employed by a party in a case. After additional questioning, during which juror stated he felt no loyalty to Bank One, trial court indicated that juror could remain on jury.

Holding: In holding that trial court should have disqualified juror, the Supreme Court held that “the statute requires a trial court while empanelling a jury to try the validity of a principal challenge and to excuse a prospective juror for good cause if it finds those challenges valid. These statutorily identified challenges require an objective determination of facts, the validity of which is left to the court. Notably, they do not involve any subjective analysis regarding fairness or impartiality.” “[A]dopting the position advocated by Bank One would render the entirety of R.C. 2313.42 superfluous. R.C. 2313.42(A) lists ten specific principal challenges, including many that existed at common law, and it further states that they “are *good* causes for challenge.” (Emphasis added.)

“If the legislature had intended a trial court to exercise discretion with respect to these specific challenges, it could have omitted the word “good” or it could have provided for the exercise of judicial discretion, but it did not do so. We cannot add words to a statute to conform it to a meaning not intended by the General Assembly. And we are required to give effect to the words used in statutes.”

Byrd v. Smith, 110 Ohio St. 3d 24, 6-1 (Lanzinger (auth.); O'Donnell dissent).

A non-movant’s affidavit that is contrary or inconsistent with the affiant’s prior deposition does not create a “fact issue” sufficient to withstand summary judgment.

Facts: Case involves a claim for uninsured/underinsured motorists coverage – employee was seeking coverage under a commercial policy issued to his employer, he had testified at deposition that he was not acting within the scope of his employment when he was involved in the auto accident at issue. Between the time of plaintiffs’ deposition and the summary judgment briefing, the Supreme Court had reversed Scott-Pontzer in a case called Galatis and held that corporate insurance policies did not provide uninsured/underinsured motorists coverage to employees when not acting in the scope of their employment. In its summary judgment papers, defendant insurer cited Galatis as well as plaintiff’s testimony that he was not acting in scope of employment when he was injured. In opposition to summary judgment motion, plaintiffs filed an affidavit stating that he considered himself to be “working” for his employer when he was injured.

Holding: Under the Court’s earlier precedent, it was clear that a *movant’s* submission of an affidavit inconsistent with a prior deposition could not be used to obtain summary judgment for the movant. Lower courts had split on how to handle non-movant’s use of an affidavit that conflicts with earlier deposition testimony. In resolving the case, the court set out a three-part test: 1) the trial court must first consider whether the affidavit “contradicts” or “merely supplements” the deposition; 2) if a *movant’s* affidavit is inconsistent, the movant is not entitled to summary judgment (previously established rule); and 3) if an opposing party’s affidavit contradicts a prior deposition, the affidavit cannot *defeat* summary judgment absent a “sufficient explanation.” Applying the three-pronged analysis, the Court concluded that the affidavit was inconsistent with the deposition testimony, but remanded for consideration of whether plaintiff offered “sufficient explanation” for the inconsistency – i.e., that the deposition did not “fully explore” scope of employment, which was “not relevant” prior to *Galatis*.

III. CONSTITUTIONAL LAW

State ex rel. Ohio General Assembly v. Brunner (2007), 114 Ohio St. 3d 386 (six separate opinions, Justices Moyer, Lundberg Stratton, and O'Connor concur in lead opinion authored by Justice Cupp).

New Governor could not “veto” bill already “approved” by former Governor, when 10-day veto period expired before new Governor took office.

Facts: Original action filed by Senate President Harris and Speaker Husted to declare SB 117 a valid law. SB 117 did three important things: (1) revised the Consumer Sales Protection Act to cap non-economic damages, in response to the Ohio Supreme Court’s decision in *Whittaker*; (2) clarified that public nuisance claims fall under Ohio’s Products Liability Act; and (3) revised rules relating to discovery in bad faith related to insurance coverage, overriding rule announced by the Supreme Court in 2001 *Boone* decision that a party could get attorney client or work product materials in an insurance claim; SB 117 requires party to make some showing to support bad faith claim

S.B. 117 passes both Houses on December 14, 2006. On December 21, 2006, the Ohio House of Representatives adjourned for the legislative session. On December 26, 2006, the Ohio Senate—and thus the General Assembly—adjourned for the session. On Wednesday, December 27, 2006, 13 days after the General Assembly passed S.B. 117, Governor Taft was presented with the bill. The clerk of the Ohio Senate had conferred with members of the governor's staff to coordinate an appropriate date for the presentation of the bill, along with other bills, and it was determined that December 27 would be the date of presentment. On the last business day of Governor Taft's term of office, Friday, January 5, 2007, the governor filed S.B. 117 with the office of Ohio secretary of state Ken Blackwell. As noted in the Governor's Office Bill Record, the secretary of state received and signed the bill. On January 8, new Secretary of State Jennifer Brunner reconveyed the bill to new Governor Ted Strickland upon his request on the first day of their terms of office. The governor then returned the bill on the same day to the Secretary of State with his veto.

Holding: Under Section 16, Article II of the Ohio Constitution, the Governor has ten days to veto a bill submitted to him when the legislature has adjourned, but when does 10-day period start? Court held that under Section 16, Article II of the Ohio Constitution, the ten-day period for the governor to act upon S.B. 117 began to run on the date that the General Assembly adjourned, which was December 26, 2006. The time for the governor to act upon the bill thus expired at the latest on Saturday, January 6, 2007, and the attempted veto by the governor on Monday, January 8, 2007, was without effect. When the Legislature adjourns before presenting a bill to the governor, the ten-day limit for a veto begins to run from the date the legislative session was adjourned, not the date on which the bill was presented to the governor.

Dicta suggests that the constitutional requirement for presentment “forthwith” eliminates concerns that the ten-day period could be manipulated by the General Assembly.

***American Financial Services Association v. City of Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043 (November 20, 2006): 5-2 (O'Donnell, J. (auth.))**

Cleveland predatory lending law was in conflict with general laws of the State, and thus not a valid exercise of local home rule powers.

Facts: Case involves an ordinance enacted by Cleveland to regulate predatory lending, which in some ways went further than Ohio law by regulating loans with interest rates lower than those regulated by the State. Spilt in authority below – Second District said that predatory lending was not a proper subject for regulation by local ordinance, but the Eighth District held that a similar local ordinance was within a city's home-rule power.

Holding: State law requires lenders to make certain disclosures to mortgagors on certain loans. Question was whether the home rule amendment (Ohio Const. Section 3, Art. XVIII), which authorizes municipalities “to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws,” barred similar lending law enacted by Cleveland. Under familiar home rule test, Court must first determine “whether the matter in question involves an exercise of local self-government or local police power.” Parties agreed that these local acts invoke local police powers. Accordingly, the Court had to consider whether the state statutes at issue are “general laws” and, if so, whether the local ordinances are in conflict with them. The Court concluded that predatory lending statutes are general laws – part of “a comprehensive and uniform statewide enactment setting forth a police regulation,” and that the local ordinances conflict with state law, as they seek to put restrictions on loans that the State has decided not to regulate.

***City of Cincinnati v. Baskin*, 112 Ohio St. 3d 279, 2006-Ohio-6422: 7-0 (Resnick, J. (auth.))**

Cincinnati's ordinance banning the possession of certain semiautomatic firearms does not violate Ohio's home rule amendment.

Holding: Applying a similar analysis as that used in *American Financial*, the Court held that the Cincinnati ordinance, a clear exercise of police power, was not in conflict with the general law of Ohio that “no person shall knowingly acquire, have, carry, or use any dangerous ordnance,” R.C. 2923.17(A), even where the Cincinnati ordinance prohibited the possession of certain types of semiautomatic firearms that are not prohibited under state law. The statutory prohibition against the possession of firearms designed to fire more than 31 cartridges without reloading did not “authorize” conduct “prohibited” by an ordinance prohibiting the possession of firearms designed to fire more than 10 cartridges without reloading.

IV. THE WORKPLACE

Leininger v. Pioneer Nat'l Latex, 2007-Ohio-4921: 6-1 (Lanzinger, J. (auth.); Pfeifer, J. dissents).

Ohio does not recognize a public policy claim for wrongful discharge based upon age discrimination.

Facts: Plaintiff was fired at the age of 60, after having been employed as a human resources administrator by defendant for 19 years. Some of her job duties were later assigned to a 21-year-old. Her statutory age discrimination claim under RC 4112.02 was time barred, so she sought to assert a public policy-based age claim, citing 4112 and other parts of the Revised Code establishing a state public policy against age discrimination.

Holding: A public policy exception to the employment-at-will doctrine was first recognized by the Ohio Supreme Court in 1991, with the Court holding in a case called *Greeley* that “[p]ublic policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute.” Later, *Greeley* was extended, and claims for wrongful discharge were allowed for employment terminations that violated public policy as expressed in sources other than the Revised Code. “ ‘Clear public policy’ sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments, but may also be discerned as a matter of law based on other sources, such as the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law.”

Here, plaintiff could show that state law manifested a clear policy against age discrimination – citing to 4112 was likely enough to do so. But plaintiff failed to show the second step of the analysis, that without a common-law tort claim for wrongful discharge based on age, Ohio's clear policy against age discrimination would be compromised. The Court held that it was unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct. Indeed, four separate statutes provide remedies for age discrimination.

Plaintiff contended that the short six-month statute of limitations of R.C. 4112.02 detracts from the remedial scheme of R.C. Chapter 4112. The period within which a claim must be brought, however, is a policy decision best left to the General Assembly.

Bickers v. W. & S. Life Ins Co., 2007-Ohio-6751: 5-2 (Cupp, J. (auth.); Moyer, C.J., and Pfeifer, J., dissent).

No common-law cause of action exists for wrongful discharge in violation of Ohio public policy for employee who is terminated while receiving workers' compensation.

Facts: Bickers was injured in 1994 in the course of her employment with Western & Southern Life Insurance Company. She filed a claim for workers' compensation, and the claim was allowed for multiple conditions. Following the injury, and directly related to the allowed

conditions in the workers' compensation claim, Bickers experienced periods of inability to work. In 2002, Western & Southern terminated Bickers while she was still receiving temporary total disability benefits related to her workers' compensation claim.

Bickers did not file a statutory claim of retaliation under R.C. 4123.90, but later filed a tort lawsuit against Western & Southern for wrongful discharge. Among other things, Bickers alleged that she had been wrongfully terminated while receiving temporary total disability benefits in violation of the state's public policy barring discrimination against workers' compensation claimants. In support of that claim, Bickers relied on a 2003 Supreme Court of Ohio decision, *Coolidge v. Riverdale Local School Dist.*, in which the Court held that the non-renewal of a schoolteacher's contract for absenteeism caused by a workplace injury for which she was still receiving workers' compensation benefits was contrary to the public policy of the state.

Holding: An employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act. The Court distinguished *Coolidge* as follows: "Bickers' claim has afforded us the opportunity to revisit the *Coolidge* decision. Having duly considered the *Coolidge* opinion and the circumstances presented by Bickers, we limit *Coolidge* to holding that terminating a teacher for absences due to a work-related injury while the teacher is receiving workers' compensation benefits is a termination without 'good and just cause' under R.C. 3319.16. Because Bickers is not a teacher protected by a contract covered by R.C. 3319.16, Bickers is not entitled to the benefit of the holding in *Coolidge* and may not assert a wrongful-discharge claim in reliance on *Coolidge*. Bickers is an at-will employee. Because *Coolidge* does not create a cause of action for an at-will employee who is terminated for nonretaliatory reasons while receiving workers' compensation, the trial court properly dismissed Bickers' claim."

Dissent: Chief Justice Moyer read *Coolidge* as applying to retaliation claims other than just those brought by a teacher receiving workers' compensation. "While the public policy in *Coolidge* manifested itself in a case about good-and-just-cause termination, it was still manifested in the statutory and common law. Moreover, our opinion plainly invoked the idea of public policy exceptions to at-will employment and noted the same idea should protect someone like *Coolidge* who was not an at-will employee. . . . Unless we explicitly overrule *Coolidge*, there is no reason to deprive Bickers of the benefit of this clear public policy just because she was an at-will employee."

***Groob v. KeyBank*, 108 Ohio St. 3d 348, 2006-Ohio-1189: 4-3 (Lanzinger (auth.); Pfeifer (auth.) dissents, joined by Lundberg-Stratton and Farmer (sitting by assignment)).**

No special relationship existed between prospective borrower and bank to create a fiduciary duty.

Facts: After defendant bank denied plaintiff's request for a loan to purchase an established business, the husband of the bank officer who handled the request purchased the business. Plaintiffs sued bank officer and bank, asserted tortious interference with prospective economic advantage and breach of fiduciary duty

Holding: Court held that “a bank dealing at arm’s length with a prospective borrower does not have a fiduciary duty to that prospective buyer unless special circumstances exist.” Appellees ask this court to impose a fiduciary duty on a bank whenever it receives confidential information from a prospective customer. We decline to do so.”

No respondeat superior liability for bank. For employer to be liable under respondeat superior, employee’s tort “must be committed within the scope of employment.” “Merely being aided by employment status is not enough” to establish respondeat superior.

V. CONTRACTS/ARBITRATION CLAUSES

Preferred Capital, Inc. v. Power Engineering Group, Inc. (2007), 112 Ohio St. 3d 429: 5-2 (Moyer, C.J. (auth.); Lundberg Stratton, J. (auth.) and Lanzinger, J. dissent).

Invalidating a floating forum-selection clauses, i.e. clauses that do not name a specific jurisdiction but determine jurisdiction based upon some fact about the parties at the time the cause of action arises.

Facts: Case involved lease agreements for telecommunications equipment. The leases required included a forum-selection clause stating: “This agreement shall be governed by * * * the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignees' principal offices are located * * * and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State * * * .”

Holding: In Ohio, a contract between two commercial entities, a forum-selection clause with no reference to a specific jurisdiction or jurisdictions is valid absent a finding of fraud or overreaching or a finding that enforcement of the clause would be unreasonable and unjust. Typically, clauses like these between sophisticated commercial entities would be upheld, but here it was not. The Court held that the “clause is unreasonable because even a careful reading of the clause by a signatory would not answer the question of where he may be forced to defend or assert his contractual rights. At the time the contract was entered into, the appropriate forum would have been New Jersey; where lessor was located. But the very next day, the lease was assigned to another entity Capital and the appropriate forum became Ohio. Nothing prevented that entity from assigning its interest and changing the forum yet again. It is one thing for a contract to include a waiver of personal jurisdiction and an agreement to litigate in a foreign jurisdiction. It is quite another to contract to litigate the same contract in any number of different jurisdictions, located virtually anywhere. Court was troubled by the fact that the lessor possessed undisclosed information of its intent to assign its interest in the contract almost immediately to a company in a foreign jurisdiction.

Dissent: Stratton (author) and Lanzinger dissented: “Lessees did not know exactly where they might have to litigate their contract. Nonetheless, that is exactly the agreement the parties made. I see no sound public-policy reason to void the forum-selection clause agreed to by these commercial entities, when there was no fraud or overreaching and the parties were on notice that the contract contained a floating forum-selection clause.”

***Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St. 3d 185, 2006-Ohio-657: 5-2 (Pfeifer (auth.); Lanzinger (auth.) dissents joined by Lundberg-Stratton).**

“Arbitrability could be determined by inquiring whether the action could be maintained without reference to the contract or relationship at issue.”

Facts: Doctors and medical groups filed class action alleging that insurer United Healthcare conspired with other insurers to maintain artificially low reimbursement rates for physicians, in violation of Ohio antitrust laws. Insurer moved to stay and compel arbitration based on an arbitration clause in the provider agreements between the physicians and insurer. The clause requires binding arbitration of disputes “about the parties’ business relationship.”

Holding: Issue in the case is whether parties “agreed to submit the dispute at issue to arbitration.” Question of arbitrability is one for the court, not the arbitrator. Ohio law favors arbitration whenever possible, but here the Supreme Court agreed with the trial court that the price-fixing conspiracy claim did not “arise out of or relate to” the provider agreements and did not involve a dispute regarding the parties’ business relationship. Price-fixing conduct had nothing to do with the parties’ provider agreements. Court looked to federal law for guidance, followed federal rule that a claim is not arbitrable if it can be maintained without reference to the contract or relationship at issue.

VI. TRADE SECRETS

Al Minor & Associates, Inc. v. Martin, 2008-Ohio-292: 7-0 (O'Donnell, J. (auth.))

The use of protected trade secret information by a former employee who had memorized it during his employment violated Ohio's trade secrets law.

Facts: Robert Martin, an at-will pension analyst for Al Minor & Associates, a company providing third-party pension administration services, resigned and opened his own pension analyst business. He began soliciting clients including a number of companies that he recalled from memory as being current or former clients of Minor. Minor filed suit in the Franklin County Court of Common Pleas, alleging that Martin's successful solicitation of 15 of its clients violated provisions of state law that prohibit the "misappropriation of trade secrets." The trial court ruled in favor of Minor, and the 10th District Court of Appeals affirmed. Because that decision was in conflict with a decision by the 8th District on the same issue, the Supreme Court agreed to review the case to resolve the conflict.

Holding: A unanimous Supreme Court affirmed, holding that protected trade secret information does not lose its character as a trade secret under the Uniform Trade Secrets Act (UTSA), R.C. 1333.61(D), merely because a former employee memorized it rather than writing it down or copying it in some other tangible medium. "In 1994, the General Assembly enacted the UTSA, R.C. 1333.61 through 1333.69, which defines a 'trade secret' as: '[I]nformation, including ... any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'" "Neither R.C. 1333.61(D) nor any other provision of the UTSA suggests that, for purposes of trade secret protection, the General Assembly intended to distinguish between information that has been reduced to some tangible form and information that has been memorized." "The legislature, when enacting R.C. 1333.61(D), could have excluded memorized information from the definition of a trade secret or added a requirement that such information be reproduced in physical form in order to constitute a trade secret. But it did not, and we are not in a position to read such language into the statute."

JUSTICES OF THE OHIO SUPREME COURT

<u>2002</u>	<u>2006</u>	<u>2007</u>
Moyer	Moyer	Moyer
Pfeifer	Pfeifer	Pfeifer
Stratton	Stratton	Stratton
Resnick	Resnick	Cupp
Douglas	O'Connor	O'Connor
Cook	O'Donnell	O'Donnell
Sweeney	Lanzinger	Lanzinger

**KEY BUSINESS DECISIONS FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

2007-2008

I. ARBITRATION

***Michigan Family Resources v. Service Employees International Union Local 517*, 475 F.3d 746 (6th Cir. 2007) (*en banc*) (Sutton, J.)**

Adopting an extremely deferential standard of review, the *en banc* Sixth Circuit held that labor arbitration awards must be affirmed so long as the arbitrator was “arguably construing or applying the contract.”

Where disputes are committed to arbitration through a collective bargaining agreement, an arbitration award rarely will be overturned by a federal court. Citing United States Supreme Court precedent, the Sixth Circuit noted that “[t]he courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.”

In view of this authority, the Sixth Circuit now asks the following questions in a labor arbitration appeal: Did the arbitrator act “outside his authority” by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator “arguably construing or applying the contract”? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made “serious,” “improvident” or “silly” errors in resolving the merits of the dispute.

The same principles seemingly apply to any matter committed to arbitration – federal courts will not do much to help reverse a bad arbitration award save for rare circumstances.

II. PUNITIVE DAMAGES

***Chicago Title Insurance Corp. v. Magnuson*, 487 F.3d 985 (6th Cir. 2007) (Edmunds, J.)**

Federal courts are authorized to reduce, or to eliminate entirely, a punitive damages award that does not satisfy the due process requirements for such awards set forth in *BMW v. Gore*, 517 U.S. 599 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003)

In a case between the nation’s two largest title insurance companies, one of which hired away an employee of the other subject to a non-competition agreement, the jury awarded the plaintiff \$43 million, including \$32 million in punitive damages. On appeal, the Sixth Circuit held that in this case, even where state law grounds for awarding punitive damages had been established, federal due process minimums for awarding punitive damages were not met, meaning that no award of

punitive damages was appropriate. That was so because the harm in the case was economic, not physical, the plaintiff was not a financially vulnerable victim, the wrongdoing did not involve trickery or deceit, and the conduct involved an isolated incident, not repeated misconduct.

Chicago Title is an indicator that federal and state courts are starting to apply *BMW* and especially *State Farm* more aggressively to limit or reduce altogether large punitive damages awards.

III. ERISA & CLASS ACTIONS

***Bridges v. American Electric Power Co.*, 498 F.3d 442 (6th Cir. 2007) (Cook, J.)**

In a breach of fiduciary duty action brought under the Employee Retirement Income Security Act (“ERISA”), a former employee has “participant” standing even where the employee has “cashed out” his defined-contribution plan.

Former American Electric Power employee was the named plaintiff in an ERISA breach of fiduciary duty class action against AEP based upon a drop in AEP’s stock price, which lowered the value of an AEP Savings Plan, of which the former employee was a participant. By the time the employee moved for class certification, however, he had divested himself of his investment in the Savings Plan. Accordingly, the company argued, and the district court agreed, that the former employee ceased to be a “participant” in the Plan, as that term is used in 29 U.S.C. § 1132(a)(2) (establishing that only the Secretary of Labor, *a participant*, a beneficiary, or a fiduciary may bring a civil action to enforce a fiduciary’s duties under 29 U.S.C. § 1109).

The Sixth Circuit reversed, holding that the former employee did have statutory standing to bring the suit. The parties agreed that the former employee “had standing until the moment in March 2004 when he liquidated his plan holdings,” and the fact of the liquidation did not, in the Sixth Circuit’s view, change the former employee’s “participant” status. Relying on a recent decision from the Seventh Circuit, the Sixth Circuit was persuaded by the fact that “if the plaintiff[] wins [his] case by obtaining a money judgment, . . . the receipt of that money will constitute the receipt of a plan benefit.” (quoting *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007)). In the words of the Seventh Circuit, “[t]he statute authorizes suits for benefits,” and “[t]he benefit in a defined-contribution plan is . . . whatever is in the retirement account when the employee retires or whatever would have been there had the plan honored the employee’s entitlement, which includes an entitlement to prudent management.”

Given the large number of ERISA class actions permeating our federal courts, this is an important yet unhelpful precedent to businesses that operate ERISA plans.