

What's Going on in the High Courts?

Update on the United States Supreme Court and the Supreme Court of Texas

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United States Supreme Court – Statistics

- Cases of interest to business community up significantly during Roberts Court
- Business doesn't always win, but more likely to get its questions answered
- OT04 25/76 = 32.8%
- OT05 20/72 = 27.7%
- OT06 25/71 = 35.2%
- OT07 28/71 = 39.4%
- OT08 28/76 = 36.8%
- OT09 40/79 = 50.6%
- OT10 34/79 = 43.0%

United States Supreme Court – Questions

- “What do you think of Satan?”
Justice Scalia, oral argument in *Matrixx Initiatives v. Siracusano*.

- “Where is the 9,000-foot cow?”
Justice Breyer, oral argument in *AT&T Mobility LLC v. Concepcion*.

United States Supreme Court

Wal-Mart v. Dukes

- *Iqbal/Twombly* for class-certification stage
- (9-0) Certification under Rule 23(b)(2) for injunctive or declaratory relief is not available for backpay
- (5-4) Plaintiffs could not satisfy Rule 23(a)'s threshold showing of "questions of law or fact common to the class"
 - "Common contention . . . capable of classwide resolution" lacking here because of different decisionmakers and no uniform policy
 - not a "pleading standard," but rather a "rigorous analysis" of *proof* of commonality
 - Suggested *Daubert v. Merrell Dow Pharmaceuticals* (1993) would apply to such proceedings
- Significant change in law
 - Incidental backpay permitted under (b)(2). *Allison v. Citgo Petroleum Corp.* (5th Cir. 1998).
 - "The test for commonality is not demanding." *James v. City of Dallas* (5th Cir. 2001)
- If class action still open on appeal, consider GVR

United States Supreme Court

AT&T v. Concepcion

- Extends *Stolt-Nielsen*
- (5-4) Federal Arbitration Act preempts state rule making class-action waivers in arbitration agreements unconscionable
- Requiring classwide arbitration interferes with fundamental attributes of arbitration and is thus inconsistent with the FAA
 - Formality necessary to protect rights of absent parties; much slower; arbitration unsuited to risks of class litigation
- Notes the risk of “in terrorem” class action settlements

United States Supreme Court

Janus Capital Group v. First Derivative Traders

- Extends *Central Bank of Denver* and *Stoneridge* in declining to extend liability to secondary actors
- (5-4) Person who drafts but does not issue allegedly false statements in prospectus is not liable in private Rule 10b-5 action because they did not “make” misstatements
 - “[T]he maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.”
- Parties drafting disclosures may wish to carefully delineate each party’s role in drafting

United States Supreme Court

Chamber of Commerce v. Whiting

- (5-3) Federal immigration law does not expressly preempt an Arizona law requiring employers to use federal E-Verify program and suspending or revoking business licenses for violations
- (4-3) No implied preemption because state law does not conflict with federal law; it implements sanctions Congress expressly allowed
 - law “closely tracks [federal] provisions in all material respects,” and relies upon federal determinations of work authorization
- Same outcome likely for similar laws in Colorado, Mississippi, Missouri, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, West Virginia, Georgia and Indiana
- Other states may adopt similar laws

United States Supreme Court

Goodyear Dunlop Tires v. Brown

- Placing goods in “stream of commerce” reaching consumer not enough for general jurisdiction
- Company must be “essentially at home” in state
 - Need “continuous and systematic general business contacts”; “limited” and “sporadic” contacts at most support specific jurisdiction
- At least two “homes” (place of incorporation, principal place of business), probably others

United States Supreme Court

J. McIntyre Machinery, Ltd v. Nicastro

- Placing goods in “stream of commerce” not itself enough for specific jurisdiction
- Plurality: Need purposeful availment of privileges of doing business in state
 - What matters is defendant’s actions, not expectations
 - Not enough to market to US generally; conduct must be purposefully directed at forum state
- Concurrence: No “regular flow” or “regular course” of sales into state, no specific effort to sell into state
 - Refused to discuss whether “fast-paced globalization” expanded personal jurisdiction because not necessary to resolve this case; raised questions of marketing on websites but did not answer them

United States Supreme Court

Microsoft Corp v. i4i Limited Partnership

- Patent invalidity must be proved by clear and convincing evidence to overcome presumption of validity
 - *Even* where the evidence was not before Patent & Trademark Office examiner; no basis for “fluctuating standard of proof”
- Concurrences emphasized only applies to questions of fact and not law
- Very significant given volume of patent litigation
 - ~50 amicus briefs were filed in the case
- Good term for the Federal Circuit

United States Supreme Court

PLIVA v. Mensing

- (5-4) state tort labeling claims are preempted for generic drugs, but not for brand-name drugs under *Wyeth v. Levine*
 - Generic drug manufacturers cannot comply with state law labeling requirements while complying with federal law requiring their labels be like brand-name drug labels
 - Unlike brand-name drugs, cannot unilaterally change their labels without getting brand-name label changed
- Irrelevant that generic manufacturers could have petitioned the FDA to change the brand-name label
- Dissent: “75 percent of all prescription drugs dispensed in this country” are generics

United States Supreme Court

American Electric Power v. Connecticut

- (4-4) Some plaintiffs have standing to sue
- (8-0) Clean Air Act and EPA greenhouse gas regulations displace any federal common-law action to abate CO₂ emissions from power plants
 - “the need for such an unusual exercise of law-making by federal courts disappears” “when Congress addresses a question” through legislation
 - CAA “‘speaks directly’ to emissions of carbon dioxide from” stationary sources
 - Because CAA is “an exercise of the legislature’s ‘considered judgment’ concerning the regulation of air pollution,” even “were EPA to decline to regulate carbon-dioxide emissions,” would be “no warrant . . . to upset the agency’s expert determination”
- In considering “[t]he appropriate amount of [emissions] regulation” in a sector, “must weigh” “the environmental benefit potentially achievable, our Nation’s energy needs and the possibility of economic disruption”
- Court “endorse[d] no particular view of the complicated issues related to carbon-dioxide emissions and climate change

United States Supreme Court Discrimination/Retaliation Cases

- Broad readings of anti-retaliation provisions
 - *Thompson v. North American Stainless*: fiancé of complainant could sue for Title VII retaliation
 - *Kasten v. Saint-Gobain Performance Plastics*: “fil[ing] any complaint” under the Fair Labor Standards Act includes oral complaints
 - Prof. Pamela Karlan: The Court “seems to care about retaliation, ‘but it never seems to find actual discrimination.’”
- *Staub v. Proctor Hospital*: employer is liable for discrimination though it lacked animus if supervisor with animus intends to cause adverse employment action and act is proximate cause of injury

United States Supreme Court Under the Radar

Smith v. Bayer Corp.

- Even when can't invoke collateral estoppel against copycat litigation, can invoke *stare decisis*

Schindler Elevator Corp v. United States ex rel. Kirk

- Majority opinion emphasizes “broad” and “wide-reaching” nature of public disclosure bar

Sorrell v. IMS Health Ins.

- Gives commercial speech full First Amendment protection

Talk America, Inc. v. Michigan Bell Telephone

- Justice Scalia's concurrence questions deferring to agency's interpretation of its own regulations under *Auer v. Robbins* because it encourages adoption of vague regulations

Nevada Commission on Ethics v. Carrigan; Goodyear Dunlop Tires v. Brown

- Court now routinely holds respondent has waived arguments not raised in brief in opposition to cert

TEXAS SUPREME COURT

NAFTA Traders Inc. v. Quinn 339 S.W.3d 84 (Tex. 2011)

V&E

- U.S. Supreme Court, in *Hall Street* (2008) ruled that the FAA does not allow the parties to expand the scope of review and that the grounds for modification/vacatur in the FAA are exclusive.
- Arbitration clause in *NAFTA Traders* attempted to limit arbitrator's authority and provided that arbitrator did not have authority to render a decision that contains a "reversible error of state or federal law."
- TAA, unlike the FAA as construed in *Hall Street*, does not bar agreement to limit the powers of an arbitrator or to let a court review the arbitrator's award for reversible error.
- FAA does not preempt the TAA on question of whether expanded judicial review of arbitration award is permitted.

TEXAS SUPREME COURT

Takeaways from *NAFTA Traders*

V&E

- “As a fundamental matter, *Texas law* recognizes and protects a broad freedom of contract. We have repeatedly said that ‘if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.’”
- Note to U.S. Supreme Court: *Hall Street* was wrong.
- Don’t mess with Texas – or the TAA.

TEXAS SUPREME COURT

Other Arbitration Decisions



- *In re Rubiola*, 334 S.W.3d 220 (Tex. 2011) (orig. proceeding)
 - A party who did not sign an arbitration agreement (non-signatory) can compel arbitration if named as a party to the agreement and the claim is subject to arbitration under the agreement.
 - A party denied the right to arbitrate under an agreement subject to the FAA does not have an adequate appellate remedy in Texas and thus is entitled to mandamus relief.
- *Ellis v. Schlimmer*, 337 S.W.3d 860 (Tex. 2011):
 - If party moves to compel arbitration under the TAA and the motion is denied, the movant has a right of interlocutory appeal under the TAA unless the non-movant shows the FAA preempts the TAA.
- *CMH Homes v. Perez*, 340 S.W.3d 444 (Tex. 2011)
 - Order appointing an arbitrator is not an order “directing arbitration to proceed” so that it would be subject to interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 51.016.
 - However, the court of appeals should have treated the interlocutory appeal as a petition for writ of mandamus; no separate “petition for mandamus” needed to be filed.

TEXAS SUPREME COURT

V&E

Marsh USA Inc. v. Cook, 2011 WL 2517019 (Tex. 2011)

Enforceability of Covenant Not to Compete

- A covenant not to compete is enforceable if “it is reasonable in time, scope and geography” and as a threshold matter “it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made” Tex. Bus. & Com. Code § 15.50(a).
- The threshold inquiry has two subparts:
 - (a) whether there is an otherwise enforceable agreement between the parties (i.e., when the covenant is part of an agreement that contains mutual, non-illusory promises); and
 - (b) whether the covenant is “ancillary to or part of” that agreement.

TEXAS SUPREME COURT

V&E

Marsh USA Inc. v. Cook, 2011 WL 2517019 (Tex. 2011)

- In *Light* (Tex. 1994), the Court had held that for a covenant to be “ancillary or part of” an otherwise enforceable agreement, the consideration given by the employer in the otherwise enforceable agreement must **give rise to** the employer’s interest in restraining the employee from competing
- *Marsh* eliminates *Light*’s “give rise to” requirement, holding that there need only be a nexus between the covenant not to compete and the otherwise enforceable agreement.
- After *Marsh*, a covenant not to compete in Texas is ancillary or part of an otherwise enforceable agreement if the consideration for the covenant is reasonably related to an interest worth of protection, such as trade secrets, confidential information, or goodwill.
- Bottom line: Stock given to an employee, in exchange for the employee’s promise not to compete, is reasonably related to the company’s legitimate interest in protecting its goodwill and is sufficient consideration for covenant.

This is a sea change in Texas law. See Dissent (now any financial incentive given to an employee can justify a covenant not to compete).

TEXAS SUPREME COURT

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Italian Cowboy Partners v. Prudential, 341 S.W.3d 323 (Tex. 2011)

- **The “fraudulent inducement” problem**
 - contract is subject to avoidance on grounds of fraudulent inducement
 - If a contract is induced by fraud, defrauded party can sue in “tort,” recover “benefit of the bargain” damages, and in certain instances, recover “exemplary damages”
- **Contracting around “fraudulent inducement” claims**
 - A “standard merger clause” stating that one party or both parties have made “no representations or promises, except as expressly set forth herein” does not preclude fraudulent inducement claim
 - But, if you add language in which one or both contracting parties expressly state that they are “not relying” on any promise or statement made by the other party, fraudulent inducement claim is barred
- **Dissent**
 - “The Court’s preference for a disclaimer of reliance over a disclaimer of representations is simply a mystery.”
 - Decries the Court’s “denial of freedom of contract.”

TEXAS SUPREME COURT

V&E

Haygood v. De Escabedo, 2011 WL 2601363 (Tex. 2011)

Medicare Coverage Limits Personal Injury Damages and Evidence of Those Damages.

- 2003 Tort Reform statute provides that “recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.” Tex. Civ. Prac. & Rem. Code § 41.0105.
- In personal injury case, twelve health care providers billed the plaintiff in excess of \$110,000 for medical services, but because plaintiff was covered by Medicare, providers adjusted their bills with credits of over \$80,000.
- Under tort reform statute, not only was recovery of medical expenses limited to amounts owed or paid (roughly \$30,000, not \$110,000), trial court properly excluded evidence of medical expenses only to amounts owed or paid (*i.e.*, \$30,000).

TEXAS SUPREME COURT

A little election politics....

V&E

- *Texas Department of Public Safety v. Cox Texas Newspapers, L.P.*, 2011 WL 2586861 (Tex. 7/1/2011)
 - Are DPS travel vouchers for Governor Perry's security detail subject to disclosure under the Texas Public Information Act? Maybe, in part.
- *Andrade v. NAACP of Austin*, 2011 WL 2601351 (Tex. 7/1/2011)
 - Voters had standing to bring equal protection challenge to electronic voting system that does not produce a contemporaneous paper record of each vote
 - But their claim failed on the merits because use of a paperless, electronic voting scheme did not severely restrict the right to vote but instead constituted a reasonable, non-discriminatory restriction.