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A Favorable Term for Business Cases

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The last U.S. Supreme Court term's most far-reaching victory for business interests may well turn out to be *Bush v. Gore*.^[FOOTNOTE 1] Although the legal issues in that case obviously have little direct relevance to business, the decision had the practical effect of helping the far more business-friendly of the two candidates enter the White House and direct an array of policies that affect business.

In more conventional business cases, the business community scored an impressive number of victories -- and only a few serious defeats -- in the decisions of the U.S. Supreme Court. The Court's decisions covered a wide range of areas of law. Some will have ramifications across the entire business community, whereas others affect only particular industries.

Arbitration is a fast, flexible and inexpensive alternative to litigation that many companies favor. For that reason, arbitration law -- and the proper interpretation of the Federal Arbitration Act (FAA) -- is important to the business community. The Court decided three arbitration cases this past term, with generally favorable results for business litigants.

The most important arbitration decision was *Circuit City Stores Inc. v. Adams*,^[FOOTNOTE 2] in which the Court held by a 5-4 margin that the FAA covers all employment contracts except for the contracts of seamen, railroad employees and other transportation workers. The dissenters argued, in contrast, that all employment contracts were exempt. The dispute centered on the language of § 2 of the FAA, which excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce." A contrary result would have been a major setback for the many businesses that routinely include arbitration provisions in their employment contracts.

In *Green Tree Financial Corp.-Alabama v. Randolph*,^[FOOTNOTE 3] the Court ruled, 5-4, in the business litigants' favor on the important question of whether an agreement to arbitrate is rendered unenforceable if it is silent about the allocation of the costs of arbitration. In answering the latter question with a "no," the majority rejected the argument that such silence effectively precludes some claimants -- who may be unwilling to tolerate the risk that they will lose and be required to pay the opposing party's costs and fees -- from vindicating their federal statutory rights in the arbitral forum. The

majority relied narrowly, however, on the sparse record of such prejudice in this case, thus leaving open the possibility of a different outcome when the record is stronger.

The only loss for business in an arbitration case was equally narrow. In *Eastern Associated Coal Corp. v. United Mine Workers*,^[FOOTNOTE 4] the Court held unanimously that it was not against public policy for a court to enforce an arbitral award reinstating an employee truck driver who had twice tested positive for marijuana. In so ruling, however, the Court pointed out that the employee had not used drugs while on the job and emphasized the other stringent conditions imposed by the arbitrator on the reinstated employee. Still, the decision will make it more difficult for businesses to take disciplinary action against employees in safety-sensitive positions who use illegal drugs.

FEDERAL PRE-EMPTION

Most businesses would prefer to be subject to one government regulator rather than to 51 or more. For that reason, business litigants in a wide range of industries often resort to the doctrine of federal pre-emption, which is rooted in the Constitution's supremacy clause.

This term, the Court had only two pre-emption cases, and business litigants went undefeated. In *Buckman Co. v. Plaintiffs' Legal Committee*,^[FOOTNOTE 5] the Court held that "fraud on the agency" claims are impliedly pre-empted by the Medical Device Amendments. This case has broad importance because the "fraud on the agency" theory had been used increasingly to circumvent express preemption provisions in various contexts.

In the other pre-emption case, *Lorillard Tobacco Co. v. O'Reilly*,^[FOOTNOTE 6] the Court held by a 5-4 vote that the Federal Cigarette Labeling and Advertising Act pre-empts regulations promulgated by the Massachusetts attorney general governing outdoor and point-of-sale cigarette advertising.

COMMERCIAL SPEECH

There were two notable commercial speech decisions, both favorable to business. In the *Lorillard* case, the Court also held that two sets of Massachusetts regulations violate the First Amendment because the regulations are more extensive than necessary to serve the asserted government interest. One invalidated regulation prohibits outdoor advertising of smokeless tobacco and cigars within 1,000 feet of a school or playground; the others prohibit certain types of indoor advertising within 1,000 feet of a school or playground.

In *U.S. v. United Foods Inc.*,^[FOOTNOTE 7] the Court held that a federal marketing order compelling objecting mushroom growers to pay assessments used principally to fund generic advertising aimed at promoting sales of mushrooms violates the First Amendment. In addition to allowing certain other agricultural producers to avoid compelled assessments, the decision enhances the constitutional protection enjoyed by businesses against compelled commercial speech.

TAKINGS AND AGENCY CASES

Palazzolo v. Rhode Island[FOOTNOTE 8] involved a property owner who claimed that state agency regulations prohibiting him from filling salt marshes on his property resulted in a deprivation of "all economically beneficial use" of his property. In a strong affirmation of property rights, the Court held, 5-4, that a landowner is not barred from claiming that a restriction effects a regulatory taking just because it was enacted before he took title to the land. The Court also held that, once a state land-use agency makes clear the extent of development permitted by wetland regulations and the property owner complies with reasonable state law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications.

This term, the Court addressed two important issues of administrative law, with mixed results for business litigants. In *Whitman v. American Trucking Associations*,[FOOTNOTE 9] the Court held that the Clean Air Act does not unconstitutionally delegate legislative decision-making authority to the Environmental Protection Agency without providing an "intelligible principle" to guide agency decision-making. The case generated substantial interest and anticipation because the U.S. Court of Appeals for the D.C. Circuit had struck down the statute on nondelegation grounds. A Supreme Court affirmance would have cast into doubt the legitimacy of many other agencies' exercise of delegated authority.

In *U.S. v. Mead Corp.*,[FOOTNOTE 10] the Court held that a ruling letter of the U.S. Customs Service on a tariff classification has no claim to Chevron deference[FOOTNOTE 11] because there is no indication that Congress intended these letters to carry the force of law. The Court held, however, that under *Skidmore v. Swift & Co.*[FOOTNOTE 12] a ruling letter is eligible to claim respect according to its persuasiveness. The Court's strong pronouncement that different kinds of agency decisions receive different levels of deference, depending on several factors, will affect a wide range of agency rulings. Although a projected decrease in the predictability of the law may trouble some businesses, others will cheer the greater latitude *Mead* gives them to challenge bureaucrats' legal interpretations.

Two environmental law cases were mixed for businesses. In another aspect of *Whitman*, the Court held that the Clean Air Act does not permit the EPA to consider implementation costs when setting air-quality standards. It validated a long-standing D.C. Circuit precedent opposed by many businesses. Although they were municipal and local governments, the petitioners in *Solid Waste Agency v. U.S. Army Corps of Engineers*[FOOTNOTE 13] won a victory for business by persuading the Court to trim in the outer limits of the U.S. Army Corps' regulatory authority under the Clean Water Act. The Court held that the act does not confer authority to regulate isolated intrastate waters solely because those waters serve or potentially could serve as the habitat of migratory birds.

OTHER BUSINESS CASES

The only Title VII case this term was a significant loss for business. In *Pollard v. E. I. du Pont de Nemours & Co.*[FOOTNOTE 14] the Court unanimously held that front pay is not an element of compensatory damages, and therefore not subject to the statutory cap for compensatory damages. Now businesses will generally be liable for greater amounts in discrimination cases.

In *Cooper Industries Inc. v. Leatherman Tool Group Inc.*,[FOOTNOTE 15] the Court held that a district court's determination of the constitutionality of a punitive damages award should be reviewed under a de novo standard rather than merely for abuse of discretion. This result is generally a welcome one for business in that it will increase the likelihood that appellate courts will reduce excessive jury awards.

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FN1 531 U.S. 98 (2000).

FN2 121 S. Ct. 1302 (2001).

FN3 121 S. Ct. 513 (2000).

FN4 121 S. Ct. 462 (2000).

FN5 531 U.S. 341 (2001).

FN6 121 S. Ct. 2404 (2001).

FN7 121 S. Ct. 2334 (2001).

FN8 121 S. Ct. 2448 (2001).

FN9 121 S. Ct. 903 (2001).

FN10 121 S. Ct. 2164 (2001).

FN11 See *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) (agency's interpretation is entitled to deference).

FN12 323 U.S. 134 (1944).

FN13 531 U.S. 159 (2001).

FN14 121 S. Ct. 1946 (2001).

FN15 121 S. Ct. 1678 (2001).