GIBSON DUNN

To Our Clients and Friends:

The COVID-19 pandemic made this an unprecedented Term at the Supreme Court. The Court heard telephonic oral arguments in May, issued opinions well into July, and deferred ten cases until the October 2020 Term. Despite all of this, the Court's business docket continued largely uninterrupted.

Gibson Dunn has previously published its annual Roundup of all the Court's decisions in the Term just ended, with a preview of next Term. A copy is available here. This summary focuses on the decisions most directly affecting business litigation.

- **Business Docket:** The Supreme Court decided a number of significant business cases this Term. Among those cases were several notable categories:
  - Seven cases involved intellectual property issues, most of which focused on trademark or copyright questions.
  - Four cases presented significant questions of administrative law or the constitutionality of administrative agencies.
  - Four cases involved labor and employment issues.
  - Three cases involved the Employee Retirement Income Security Act (ERISA).
  - Three cases involved environmental law issues.

  Throughout the Term, Gibson Dunn's Appellate and Constitutional Law Practice Group prepared short, same-day client alerts summarizing nineteen of the Court's most significant business decisions. We provide copies of each of them here.

- **Spotlight on Gibson Dunn:** Four different Gibson Dunn attorneys argued a total of five cases at the Supreme Court this Term. Ted Olson argued *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, and *Department of Homeland Security v. Regents of the University of California*. Miguel Estrada argued *Comcast Corp. v. National Association of African American-Owned Media*. Matthew McGill argued *Opati v. Republic of Sudan*. And Amir Tayrani argued *Monasky v. Taglieri*. No other firm had more lawyers present oral arguments this Term.

- **Looking Ahead:** The Supreme Court already has granted a number of significant business cases for the 2020 Term. The Court will tackle cases involving copyright, personal jurisdiction, ERISA preemption, the constitutionality of the Patient Protection and Affordable Care Act, the constitutionality of the Federal Housing Finance Agency, and the constitutionality of Delaware's constitutional provision requiring partisan balance in the Delaware judiciary, among other important issues.

As always, Gibson Dunn's Appellate and Constitutional Law Practice will monitor the Court's work and report on significant business decisions that affect our clients. We look forward to another interesting Supreme Court Term beginning in October 2020.

APPELLATE AND
CONSTITUTIONAL LAW
PRACTICE

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Supreme Court Holds That The PTO’s Recovery Of “Expenses” Under The Patent Act Does Not Include Attorney’s Fees

***Peter v. NantKwest, Inc.*,**
No. 18-801

Decided December 11, 2019

Today, the Supreme Court unanimously held that a provision in the Patent Act requiring the Patent and Trademark Office to recover all “expenses” from a patent applicant who challenges the denial of a patent application does not permit the recovery of attorney’s fees.

Background:

Section 145 of the Patent Act allows a patent applicant to challenge an adverse decision of the Patent and Trademark Office (“PTO”) in federal district court. The applicant, however, must pay the PTO “[a]ll the expenses of the proceedings” regardless whether the applicant prevails. 35 U.S.C. § 145. NantKwest sued the PTO Director under Section 145 to challenge the denial of its patent application. After the district court granted summary judgment to the PTO and the Federal Circuit affirmed, the PTO moved for reimbursement of “expenses” under Section 145. For the first time in the 170-year history of Section 145, the PTO sought reimbursement for the pro rata salaries of its in-house attorneys and a paralegal who worked on the case. The district court declined the PTO’s request, holding that the word “expenses” in Section 145 is not clear enough to rebut the “American Rule”—the background principle that each party is responsible for its own attorney’s fees. On appeal, the Federal Circuit initially concluded that the PTO was entitled to attorney’s fees, but on rehearing en banc, affirmed the district court’s decision and denied the PTO’s fee request.

“[T]he term ‘expenses’ alone has never been considered to authorize an award of attorney’s fees with sufficient clarity to overcome the American Rule presumption.”

Justice Sotomayor,
writing for the unanimous Court

Issue:

Whether the Patent Act provision requiring a patent applicant to pay "[a]ll the expenses of the proceedings" incurred by the PTO in an action under 35 U.S.C. § 145 authorizes the PTO to recover the salaries of its in-house legal personnel.

Court's Holding:

No. The term "expenses of the proceedings" in Section 145 does not encompass the salaries of the PTO's in-house legal personnel because that language is not a clear enough indication of congressional intent to overcome the background American Rule presumption against fee shifting.

What It Means:

- The Court's ruling means that unsuccessful challengers under Section 145 of the Patent Act should not be required to pay the attorney's fees of PTO lawyers and legal staff, thus limiting the possible costs of litigating actions under Section 145. A statutory provision providing for the recovery of "expenses" alone generally does not authorize the recovery of attorney's fees.
- The Court's holding also likely prevents the PTO from collecting attorney's fees from applicants challenging the denial of trademark registration under 15 U.S.C. § 1071(b)—the Lanham Act's similarly worded analogue to Section 145.
- Beyond the Lanham Act, the collateral consequences of the Court's holding are likely to be limited. At oral argument, the PTO stated that it was aware of no other federal cost-shifting provision that uses the word "expenses" standing alone.
- More broadly, the Court's opinion reaffirms that the American Rule presumption against fee shifting applies to all statutes, even those (like Section 145) that require expenses or costs to be shifted to unsuccessful litigants.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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Supreme Court Holds That Unread ERISA Plan Disclosures Do Not Give Participants Actual Knowledge Of The Information Disclosed

***Intel Corp. Investment Policy Committee v. Sulyma*, No. 18-1116**

Decided February 26, 2020

Today, the Supreme Court unanimously held that a fiduciary's disclosure of plan information alone does not trigger ERISA's three-year limitations period in fiduciary breach cases. "Actual knowledge" sufficient to trigger this limitations period requires participants be "aware of" the disclosed information.

"[T]o have 'actual knowledge' of a piece of information, one must in fact be aware of it."

Justice Alito,
writing for the unanimous Court

Background:

Section 413(2) of the Employee Retirement Income Security Act of 1974 (ERISA) requires that claims for breach of fiduciary duty be brought no later than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). Absent "actual knowledge," breach of fiduciary duty claims under ERISA must be brought within six years of the breach or violation. In 2015, Christopher Sulyma, a former Intel employee, sued multiple retirement plans, claiming that his retirement plans improperly overinvested in alternative investments. More than three years, but less than six years, before that suit was filed, Sulyma received disclosures that explained the investments Sulyma claimed were imprudent. The Ninth Circuit held that the disclosures did not trigger the three-year bar because Sulyma testified he had not read the disclosures and Intel had not established Sulyma had subjective awareness of what was disclosed. The United States filed an *amicus* brief in support of Sulyma defending that position and participated in oral argument.

Gibson Dunn submitted an *amicus* brief on behalf of the National Association of Manufacturers, the Chamber of Commerce of the United States, the Securities Industry and Financial Markets Association, the American Benefits Counsel, the ERISA Industry Committee, and the American Retirement Association in support of petitioner:

Intel Corp. Investment Policy Committee

Issue:

Whether the ERISA three-year limitations period in Section 413(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit when all relevant information was disclosed to the plaintiff more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read, or could not recall having read, the information.

Court's Holding:

No. A plan participant has "actual knowledge of the breach" only if the participant was "aware of" the relevant plan information. Disclosure of plan information alone does not trigger the three-year limitations period in Section 413(2).

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What It Means:

- Applying the ordinary meaning of "actual knowledge," the Court reasoned that a plaintiff cannot have "actual knowledge" of materials he has not read, "however close at hand the fact might be." The Court acknowledged that the plain meaning of "actual knowledge" would substantially diminish protections for ERISA fiduciaries, but held that this policy consideration was best left to Congress.

- As a result of the Court's opinion, retirement plans and employers may now be subject to more lawsuits and greater litigation costs because participants need only allege that they did not read plan documents to expand the ERISA statute of limitations from three to six years.

- The Court emphasized that today's opinion does not preclude a showing of "actual knowledge" through inference from circumstantial evidence, nor does it preclude defendants from contending that evidence of "willful blindness" supports a finding of "actual knowledge." Litigating these issues will require individualized factual inquiries that may pose an obstacle to class certification.

- The Court left open what a plaintiff must "actually know" about a defendant's conduct to trigger the three-year limitations period.

- This "actual knowledge" standard may be helpful to corporations and other defendants in securities and fraud cases. Relying on this holding, defendants may argue that a plaintiff must establish awareness of relevant information to prove scienter.

The Court's opinion is available here.

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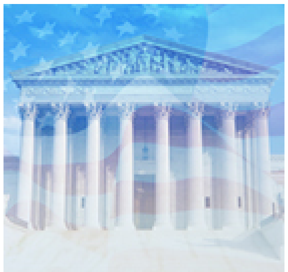

Supreme Court Unanimously Holds That A Plaintiff Suing For Discrimination Under 42 U.S.C. § 1981 Must Allege But-For Causation

***Comcast Corp. v. National Association of African American-Owned Media*, No. 18-1171**

Decided March 23, 2020

Today, the Supreme Court held 9-0 that a plaintiff who sues for racial discrimination under 42 U.S.C. § 1981 must plead facts plausibly showing that the discrimination was a "but-for" cause of the challenged action.

Background:

The Civil Rights Act of 1866—codified, in relevant part, at 42 U.S.C. § 1981—prohibits discrimination in the making and enforcement of contracts. Entertainment Studios Network (ESN) sued Comcast, alleging that Comcast's decision not to carry several ESN television channels was motivated by racial bias. The district court dismissed the complaint three times, the final time without leave to amend. The Ninth Circuit reversed, holding that ESN stated a claim under Section 1981 simply by alleging that race was a "motivating factor" in, rather than a but-for cause of, Comcast's decision.

Issue:

Whether a plaintiff who brings a claim for racial discrimination under 42 U.S.C. § 1981 must allege that the challenged action would not have occurred but for the discrimination.

Court's Holding:

Yes. To survive a motion to dismiss, a plaintiff suing for racial discrimination under 42 U.S.C. § 1981 must plead facts plausibly showing that race was the but-for cause of challenged action.

"[A] plaintiff bears the burden of showing that race was a but-for cause of its injury. And, while the materials the plaintiff can rely on to show causation may change as a lawsuit progresses from filing to judgment, the burden itself remains constant."

Justice Gorsuch,
writing for the unanimous Court

Gibson Dunn represented the winning party:

Comcast Corporation

Gibson Dunn Named
Appellate Firm of the Year

What It Means:

- The Court unanimously held that a Section 1981 plaintiff must plausibly allege but-for causation in the complaint. ESN conceded that a plaintiff ultimately must prove but-for causation to prevail on the merits at summary judgment or at trial, but argued that a less stringent, motivating-factor standard should apply at the pleading stage. The Court disagreed, holding that the same but-for standard applies at all stages of litigation for a Section 1981 claim, and remanded for the Ninth Circuit to determine whether ESN's complaint met that standard.

- The Court reasoned that but-for causation is the default rule against which Congress is presumed to have legislated. Section 1981's language, structure, and history, as well as the Court's own precedent, persuaded the Justices that this default rule applies to Section 1981 claims. The Court also held that the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), does not alter the pleading standard for Section 1981 claims.

- The Court's decision restores uniformity to the law interpreting Section 1981 and other federal anti-discrimination statutes. Before the Ninth Circuit's opinion, no other court of appeals had held that a Section 1981 plaintiff could prevail without pleading but-for causation.

- The Court's ruling also means that Section 1981 cannot be used to avoid the limits on the type of relief and damages that are available under Title VII for claims that are proven using a motivating-factor standard.

The Court's opinion is available here.

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Supreme Court Holds That Superfund Site Landowners Need EPA Approval To Obtain State-Law Cleanup Remedies

Atlantic Richfield Co. v. Christian, et al.
No. 17-1498

Decided April 20, 2020

Today, the Supreme Court held 7-2 that landowners at Superfund toxic waste sites must obtain EPA approval before seeking damages under state law for cleanup beyond what EPA has ordered.

"Interpreting 'potentially responsible parties' to include owners of polluted property . . . ensure[s] the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones."

Chief Justice Roberts,
writing for the Court

Background:

In the 1970s, Atlantic Richfield purchased a now-defunct copper-smelting operation in Montana and has since spent more than $450 million cleaning up the site under a cleanup plan created by the Environmental Protection Agency ("EPA") pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

In 2008, nearby private landowners filed state-law claims against Atlantic Richfield in Montana state court, seeking around $50 million in "restoration damages" to pay for cleanup above and beyond what EPA had ordered. Atlantic Richfield argued that CERCLA bars the restoration-damages claims for three reasons: (1) the landowners' claims are, in effect, a challenge to EPA's plan and CERCLA Section 113 strips state courts of jurisdiction over such claims; (2) the landowners are "potentially responsible parties" under CERCLA § 122 who must get EPA approval for any remedial action; and (3) CERCLA preempts such state-law claims. The Montana Supreme Court rejected each of Atlantic Richfield's arguments.

Issues:

(1) Is a state-law claim for restoration damages in state court—seeking cleanup remedies that conflict with EPA-ordered

remedies—a “challenge” to EPA’s cleanup plan that is
jurisdictionally barred by CERCLA Section 113?

(2) Is a landowner at a Superfund site a “potentially responsible party” that must seek EPA’s approval under CERCLA Section 122 before engaging in remedial action??

Court’s Holding:

(1) No. CERCLA Section 113 strips state courts of jurisdiction only over claims brought under CERCLA, not those brought under state law.

(2) Yes. The landowners are potentially responsible parties because hazardous substances have “come to be located” on their properties. Thus, under CERCLA Section 122, the landowners cannot take “remedial action” on their lands without EPA approval.

What It Means:

- The Court’s decision provides certainty to companies with potential Superfund-cleanup exposure by making clear that EPA has exclusive authority to control both the cleanup efforts and the scope of responsible parties’ potential Superfund liability. The decision prevents landowners from imposing additional cleanup obligations or liabilities absent explicit EPA approval.
- The Court’s interpretation of “potentially responsible party” means that Superfund-site landowners will need to obtain EPA authorization before significantly altering their land. But they need not obtain EPA approval to undertake minor modifications, such as “planting a garden, installing a lawn sprinkler, or digging a sandbox.”
- The Court’s decision does not block landowners from bringing state-law claims seeking money damages for contamination on their land, so long as those damages are not earmarked for cleanup efforts at a Superfund site.
- The Court declined to address whether CERCLA preempts state-law cleanup remedies that go above and beyond EPA’s cleanup plan.

The Court's opinion is available here.

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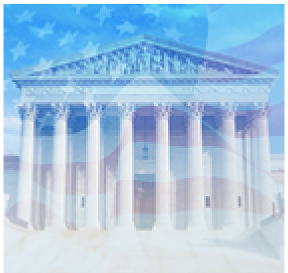

Supreme Court Holds That PTAB's Timeliness Decisions For Instituting Inter Partes Review Are Not Judicially Reviewable

Thryv, Inc. v. Click-To-Call Technologies, LP
No. 18-916

Decided April 20, 2020

Today, the Supreme Court held 7-2 that the Patent Trial and Appeal Board's decision whether a petition for inter partes review is time-barred is not judicially reviewable.

Background:

The Leahy-Smith America Invents Act permits any person who is not the patent owner to petition the Patent Trial and Appeal Board (the "Board") for inter partes review ("IPR") to reexamine claims in an existing patent and cancel any claim the Board finds unpatentable in light of prior art. The Board may institute an IPR if certain conditions are met, including that the petition was not "filed more than 1 year after the date on which the petitioner . . . is served with a complaint alleging infringement." 35 U.S.C. § 315(b). The Board's decision whether to institute an IPR is "final and nonappealable." *Id.* § 314(d).

Click-to-Call owns a patent that was previously the subject of an infringement complaint filed in 2001 against Thryv and later voluntarily dismissed. In 2012, Click-to-Call again sued Thryv for infringing the patent, and Thryv petitioned for IPR less than a year later. Click-to-Call challenged the petition as untimely under § 315(b), but the Board, disagreeing, instituted IPR and issued a final written decision finding several claims unpatentable. Click-to-Call appealed the institution decision to the Federal Circuit, which ruled that § 314(d) does not apply to timeliness determinations and held that the petition for IPR had been untimely.

"The agency's application of § 315(b)'s time limit, we hold, is closely related to its decision whether to institute inter partes review and is therefore rendered nonappealable by § 314(d)."

Justice Ginsburg,
writing for the Court

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Issue:

Whether 35 U.S.C. § 314(d) permits judicial review of the Board's determination that a petition for IPR was timely under § 315(b).

Court's Holding:

No. The Board's determination of timeliness under § 315(b) is closely related to its decision whether to institute IPR and is therefore rendered nonappealable by § 314(d).

What It Means:

- The Court reaffirmed the holding of *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016), that § 314(d) bars review of questions "closely tied to the application and interpretation of statutes related to" the decision to institute IPR. That category includes § 315(b) timing decisions.
- As in *Cuozzo*, the Court did not establish the outer boundary of § 314(d)'s prohibition against appealability or foreclose the possibility of mandamus review in extraordinary cases. But the Court again disapproved review of Board decisions preceding the issuance of a final written decision.
- Today's ruling extends a series of decisions interpreting the America Invents Act, a statute in which the Court continues to take particular interest (deciding six cases in the last five Terms).

The Court's opinion is available here.

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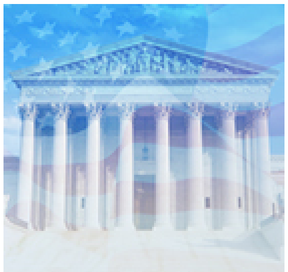

Supreme Court Holds That Clean Water Act May Require Permits For Some Indirect Discharges Of Pollutants Via Nonpoint Sources

County of Maui v. Hawaii Wildlife Fund, No. 18-260

Decided April 23, 2020

Today, the Supreme Court held 6-3 that the Clean Water Act requires a permit for the indirect discharge of pollutants from point sources to navigable waters via nonpoint sources, such as groundwater, if the discharge is the functional equivalent of a direct discharge.

"Whether pollutants that arrive at navigable waters after traveling through groundwater are 'from' a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge."

Justice Breyer,
writing for the Court

Gibson Dunn submitted an *amicus* brief on behalf of Energy Transfer Partners, L.P. in support of petitioner County of Maui

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Background:

The County of Maui disposes of treated wastewater by injecting it into groundwater through wells. Some of the wastewater eventually reaches the Pacific Ocean. Several environmental groups sued the County under the Clean Water Act, which prohibits the "discharge of any pollutant" into navigable waters without a permit. 33 U.S.C. §§ 1311(a), 1342. This permitting requirement applies only to pollutants discharged into navigable waters from a "point source"—that is, "any discernible, confined and discrete conveyance" such as a "pipe" or "container." *Id.* § 1362(12), (14). The requirement does not apply to the discharge of pollutants from nonpoint sources such as groundwater. Although the County's wastewater entered the Pacific Ocean from a nonpoint source (groundwater), the district court held that the County was required to obtain a permit because the wastewater originated in a point source (the well). The Ninth Circuit affirmed, holding that the indirect discharge of pollutants through a nonpoint source into navigable waters requires a permit if the pollutants are "fairly traceable" from the point source to navigable waters. After the Ninth Circuit's decision, the EPA issued a new interpretive statement announcing its position that the Act does not require permits for any discharge via groundwater, although it might require permits for other indirect discharges. The United States defended that position and supported the County as an *amicus curiae*.

Issue:

Does the Clean Water Act require a permit for the discharge of pollutants that originate from a point source but are conveyed to navigable waters by a nonpoint source?

Court's Holding:

Sometimes. If the discharge is functionally equivalent to a direct discharge from a point source into navigable waters, then the Clean Water Act requires a permit.

What It Means:

- The Court purported to find its own "middle ground" between the positions of the parties. The Court rejected the Ninth Circuit's "fairly traceable" test, the environmental groups' test requiring a permit if a discharge from a point source "proximately caused" pollutants to enter navigable waters, the EPA's groundwater-specific position, and the County's bright-line rule that indirect discharges via nonpoint sources never require a permit.

- The Court did not apply its standard to the facts of the case, and it expressly left open the question of when an indirect discharge is "functionally equivalent" to a direct discharge. The Court explained that the lower courts can resolve this question in "individual cases" using "the traditional common-law method."

- The Court directed judges to consider the Act's "underlying statutory objectives," and identified seven factors that may be relevant: (1) how long it takes the pollutants to reach navigable waters, (2) how far they travel, (3) what materials they flow through, (4) the extent to which they are diluted or chemically changed in transit, (5) the portion of the discharge that reaches navigable waters, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) whether the pollutants maintain their specific identity. The Court stated that the first two factors, time and distance, will be "the most important" in most but not all cases.

- The Court emphasized that "Congress thought that the problem of groundwater pollution, as distinct from navigable water pollution, would primarily be addressed by the States or perhaps by other federal statutes." Statements like this may support a narrow interpretation of the Court's new standard in cases involving groundwater.

The Court's opinion is available here.

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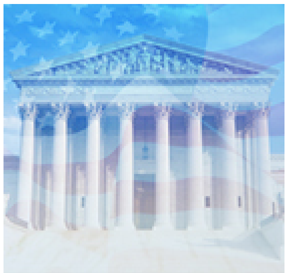

Supreme Court Holds That Courts Can Order Trademark Infringers To Disgorge Profits Without Proof Of Willful Infringement

Romag Fasteners, Inc. v. Fossil, Inc.,
No. 18-1233

Decided April 23, 2020

Today, the Supreme Court unanimously held that under the Lanham Act, proof of willful trademark infringement is not a precondition to a mark holder's recovery of the infringer's profits.

Background:

Romag Fasteners, Inc. sells magnetic snaps used in handbags, including handbags manufactured and distributed by Fossil, Inc. Romag sued Fossil for trademark infringement under the Lanham Act after discovering that Fossil's Chinese manufacturer had used counterfeit snaps bearing the Romag mark. Among other remedies, Romag sought an award of Fossil's profits from sales of the infringing handbags under Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a). A jury found Fossil liable for trademark infringement. The jury also found that, although Fossil acted "in callous disregard" of Romag's trademark rights, Fossil did not willfully infringe Romag's trademarks. The district court held that Romag's failure to prove willful infringement barred an award of profits under Section 35(a), and the Federal Circuit affirmed.

Issue:

Whether, under Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a), willful infringement is a precondition for an award of an infringer's profits for a violation of Section 43(a), id. § 1125(a).

Court's Holding:

No. A trademark defendant's state of mind is a "highly important consideration" in determining whether to award profits, but willfulness is not an "inflexible precondition" to such an award.

"[W]e do not doubt that a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on [an] inflexible precondition to recovery."

Justice Gorsuch,
writing for the Court

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Appellate Firm of the Year

What It Means:

- The Court’s decision resolves a split between circuits as to the role that a finding of willfulness plays in determining whether to award a disgorgement of profits in trademark infringement cases, and brings the circuits that had promulgated categorical rules (such as the Second, Eighth, Ninth, and Tenth Circuits) into line with the circuits that have considered willfulness to be only a factor to consider in making the determination. It therefore strengthens the hands of trademark owners in seeking monetary remedies from parties found liable for creating a likelihood of consumer confusion, but also confirms that willfulness is a “highly important” factor for courts to consider.
- It remains to be seen whether the Court’s decision will meaningfully increase the number of profits awards in cases involving reckless, negligent, or innocent infringement.
- The Court’s decision does not alter the express statutory requirement that willfulness be proven to obtain an award of profits in trademark dilution cases brought under Section 43(c) of the Lanham Act, 15 U.S.C. U.S.C. § 1125(c).

The Court's opinion is available here.

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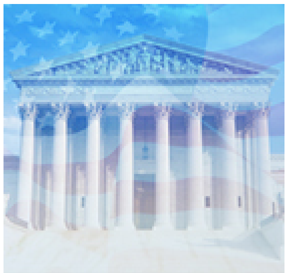

Supreme Court Holds That The Federal Government Must Reimburse Health Insurers For $12 Billion In Losses

***Maine Community Health Options v. United States*, Nos. 18-1023, 18-1028, 18-1038**

Decided April 27, 2020

Today, the Supreme Court held 8-1 that Congress failed to effectively repeal the government's obligation to make more than $12 billion in payments to insurers under the Patient Protection And Affordable Care Act risk corridors program, and insurers may sue to recover the missed payments.

"Th[e] holdings reflect a principle as old as the Nation itself: The Government should honor its obligations."

Justice Sotomayor,
writing for the Court

Gibson Dunn Named
Appellate Firm of the Year

Background:

The Patient Protection And Affordable Care Act ("ACA")—President Obama's signature health care reform legislation—established "exchanges" on which previously uninsured individuals could purchase health insurance. To mitigate the risk to insurers and encourage them to participate in the new exchanges, the ACA created a three-year "risk corridors" program. Under the program, insurance companies that paid more in health care costs than they received in premiums would receive funds from the government to offset a fixed portion of their losses, while insurance companies that collected more in premiums than they paid in costs would pay back a fixed portion of their profit to the government.

After insurance companies had provided coverage and had set future premium rates, the Department of Health and Human Services announced that it would administer the program in a budget-neutral manner, using "payments in" from profitable insurers to make "payments out" to insurers who suffered losses. Congress later enacted language in an appropriations law limiting other sources of funding for payments out. Insurance companies who suffered losses on the exchanges sued the government in the Court of Federal Claims alleging that they were owed billions of dollars collectively in additional payments out. The Federal Circuit held that the insurers had received all payments due under the program because the appropriations law had “repealed or suspended” the government’s obligation to make additional payments.

Issue:

Did Congress limit the government’s obligation to make payments to insurers under the ACA’s risk corridors program by enacting an appropriations law restricting the sources of funds available to satisfy that obligation?

Court's Holding:

No. Although Congress may enact legislation repealing its obligation to make future payments, Congress did not clearly repeal its obligation under the ACA to make risk corridor payments, and the health insurers properly brought suit for damages under the Tucker Act in the Court of Federal Claims.

What It Means:

- The ruling means that insurers can seek more than $12 billion in damages for missed payments under the risk corridors program, to be paid from the Judgment Fund—a standing appropriation by Congress of funds available to pay "final judgments, awards, compromise settlements, and interest and costs” awarded against the federal government. 31 U.S.C. § 1304(a)(1).

- The decision recognizes that “Congress can create an obligation directly through statutory language” that is “neither contingent on nor limited by the availability of appropriations or other funds.” For the same reason, Congress's decision to cut funding for an obligation does not necessarily repeal the obligation absent manifest evidence of intent to repeal.

- The decision also clarifies the circumstances under which the government may be sued under the Tucker Act to enforce a statutory obligation. The Tucker Act waives the government’s immunity to monetary claims “founded . . . upon . . . any Act of Congress or . . . upon any express or implied contract with the United States,” 28 U.S.C. § 1491(a)(1), but does not create a cause of action. The Court endorsed longstanding Federal Circuit precedent holding that a statute’s use of the phrase “shall pay” “often reflects congressional intent ‘to create both a right and a remedy’ under the Tucker Act.”

The Court's opinion is available here.

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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GIBSON DUNN

Supreme Court Casts Doubt On “Defense Preclusion”

***Lucky Brand Dungarees v. Marcel Fashions Group, Inc.*, No. 18-1086**

Decided May 14, 2020

In a case brought under federal trademark law, the Supreme Court held 9-0 that preclusion does not bar a defendant from raising new defenses in response to new claims.

“Any … preclusion of defenses must, at a minimum, satisfy the strictures of issue preclusion or claim preclusion.”

Justice Sotomayor,
writing for the unanimous Court

Gibson Dunn Named
Appellate Firm of the Year

Background:

The doctrine of claim preclusion prevents parties from raising an issue that could have been raised in a prior action between the parties. Claim preclusion typically applies to offensive accusations, and applies only when the later action advances the same claim as the earlier action. This case concerned whether claim preclusion can bar a defense not raised in a prior action.

In 2001, Marcel Fashions Group (“Marcel”) sued Lucky Brand Dungarees Inc. (“Lucky Brand”) for infringement of Marcel’s “Get Lucky” trademark. In a settlement agreement, Lucky Brand agreed not to use the phrase “Get Lucky,” and Marcel released any claims regarding Lucky Brand’s use of its own marks. In 2005, Lucky Brand sued Marcel for violating its trademarks, and Marcel counterclaimed that Lucky Brand had continued to use the phrase “Get Lucky.” The district court permanently enjoined Lucky Brand from imitating the “Get Lucky” mark. In 2011, Marcel sued Lucky Brand, alleging that Lucky Brand’s use of its own marks containing the word “Lucky” infringed the “Get Lucky” mark in violation of the permanent injunction. Lucky Brand moved to dismiss on the ground that Marcel had released its claims in the settlement agreement. The district court granted the motion, but the Second Circuit vacated, holding that “defense preclusion” barred the release defense because it could have been litigated in the 2005 action but was not.

Issue:

When, if ever, does claim preclusion apply to a defense raised in a successor suit?

Court's Holding:

Claim preclusion does not bar a new defense when the later suit raises different claims than the earlier suit.

What It Means:

- The Court determined that Marcel's 2011 claim was different than its 2005 claim—in 2005 Marcel alleged infringement by use of the "Get Lucky" phrase, whereas in 2011 Marcel alleged infringement by use of Lucky Brand's own marks. Because identity of claims is a necessary predicate to any application of claim preclusion, that determination resolved the dispute.
- The Court thus left unresolved whether claim preclusion sometimes bars a new defense. However, the Court stated in dicta that "[t]here may be good reasons to question any application of claim preclusion to defenses," noting that a defense may go unraised for various reasons unrelated to the merits. There likely will be continued litigation over this issue.
- The Court emphasized that the identity-of-claims requirement is particularly important for trademark disputes, which "often turn[] on extrinsic facts that change over time." This acknowledgment is consistent with the Court's recent trend against establishing bright-line rules in trademark law, as seen in the Court's recent decision in *Romag Fasteners, Inc. v. Fossil, Inc.*

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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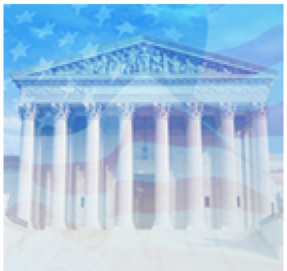

Supreme Court Holds That Amendments To The Foreign Sovereign Immunities Act Retroactively Authorized Punitive Damages Against Foreign State Sponsors Of Terrorism

***Opati v. Republic of Sudan*, No. 17-1268**

Decided May 18, 2020

Today, the Supreme Court held 8-0 that the Foreign Sovereign Immunities Act ("FSIA") amendments of 2008 authorize punitive damages in suits against foreign states based on conduct predating the amendments.

> *"Even if we assume . . . that Sudan may claim the benefit of* Landgraf's *presumption of prospectivity, Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using § 1605A(c)'s new federal cause of action."*
>
> Justice Gorsuch, writing for the Court

Background:

In 1998, al Qaeda set off truck bombs outside the United States embassies in Kenya and Tanzania, killing or injuring thousands. Victims sued Sudan under the FSIA's "terrorism exception" to sovereign immunity, claiming that the nation materially supported the bombings by sheltering al Qaeda. As originally enacted in 1996, the terrorism exception did not create a cause of action against foreign states, leaving these claims to proceed under state-law causes of action. But in 2008, Congress amended the exception to (1) create a private cause of action against foreign states for punitive damages and other remedies, 28 U.S.C. § 1605A(c); and (2) allow claims based on pre-amendment conduct to proceed under this cause of action, 2008 National Defense Authorization Act § 1083(c). The district court ultimately awarded the plaintiffs billions of dollars in damages, including $4.3 billion in punitive damages. But the D.C. Circuit held that the 2008 FSIA amendments did not authorize punitive damages for pre-amendment conduct with sufficient clarity to overcome the presumption against retroactive legislation. Because the claims against Sudan arose out of pre-amendment conduct, the court vacated the punitive damages award. The United States supported the plaintiffs as *amicus curiae*.

Gibson Dunn represented the winning parties:

Monicah Okoba Opati, et al.

Gibson Dunn Named
Appellate Firm of the Year

Issue:

Does the Foreign Sovereign Immunities Act permit recovery of punitive damages from foreign states for terrorist acts occurring prior to the passage of the current version of the statute in 2008?

Court's Holding:

Yes. The plain text of the 2008 amendments permits plaintiffs proceeding under § 1605A(c)'s federal cause of action to seek and win punitive damages for past conduct.

What It Means:

- Under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), courts generally presume that legislation operates only prospectively unless Congress clearly states that the law applies retroactively. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Supreme Court limited the reach of that presumption in litigation against foreign states under the FSIA, holding that the presumption did not apply to the original FSIA's codification of "restrictive" sovereign immunity. But today, the Court held that the 2008 FSIA amendments authorize punitive damages for past conduct with sufficient clarity to satisfy the presumption even assuming it applied.

- The Court rejected Sudan's suggestion that special constitutional concerns raised by retroactive punitive damages support a "super-clear statement" requirement beyond the normal presumption against retroactivity. The Court explained that when litigants believe the retroactive application of a statute raises constitutional questions, "the better course is . . . to challenge the law's constitutionality, not ask a court to ignore the law's manifest direction."

- The Court remanded for the lower courts to address, in the first instance, the availability of retroactive punitive damages under state-law causes of action against foreign sovereigns. This question remains important for non-American plaintiffs, who are ineligible for the federal cause of action under the current terrorism exception.

- The Court's decision continues Gibson Dunn's record of successfully representing victims of international terrorism before the Supreme Court. In *Bank Markazi v. Peterson*, 136 S. Ct.

1310 (2016), Gibson Dunn successfully represented victims of terrorism against a claim by the Central Bank of Iran challenging the constitutionality of a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772, that had made available for postjudgment execution nearly $2 billion in assets held in New York for Iran's Central Bank.

The Court's opinion is available here.

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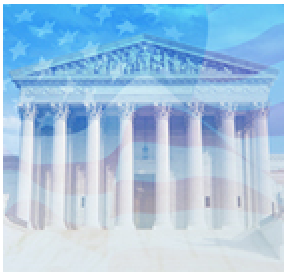

Supreme Court Holds That ERISA Defined-Benefit Pension Plan Participants Do Not Have Article III Standing To Sue For Fiduciary Breach

***Thole v. U.S. Bank, N.A.*,**
No. 17-1712

Decided June 1, 2020

Today, the Supreme Court held 5-4 that participants in defined-benefit pension plans lack Article III standing to sue under ERISA for alleged breach of fiduciary duties because, whether or not they prevail in the action, they will receive the same payments for the rest of their lives.

"If [petitioners] were to win this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The [petitioners] therefore have no concrete stake in this lawsuit."

Justice Kavanaugh,
writing for the majority

Background:

Section 502(a)(2) and (a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(2) and (a)(3), authorize civil actions for breach of fiduciary duty with respect to employee pension benefit plans. Petitioners are participants in U.S. Bank's defined-benefit pension plan, which guarantees lifetime fixed periodic payments. Although petitioners have received all payments to which they are entitled, they sued U.S. Bank for breach of fiduciary duty, alleging that plan fiduciaries did not appropriately manage the plan's assets, causing the assets to fall below the minimum funding level that ERISA requires, and that investment of plan assets in mutual funds offered by a U.S. Bank subsidiary caused the plan to pay higher investment fees than it would have paid for other, similar mutual funds. U.S. Bank moved to dismiss, arguing that petitioners lacked Article III standing because they did not suffer an injury-in-fact. The district court granted the motion. The Eighth Circuit affirmed, but not on Article III grounds. The Court held that ERISA does not permit defined-benefit plan participants to sue for alleged breach of fiduciary duty when they have received all benefits to which they are entitled under the plan.

Issues:

Whether an ERISA defined-benefit plan participant or beneficiary can demonstrate Article III standing to bring claims alleging breach of fiduciary duty under ERISA Section 502(a)(2) or (a)(3) when the participants and beneficiaries have received all benefits to which they are contractually entitled.

Court's Holding:

No. A participant or beneficiary in a defined-benefit ERISA plan who has received all vested benefits—and who has not shown a "substantially increased risk that the plan and employer would both fail"—cannot show the requisite injury-in-fact for Article III standing to sue for alleged breach of fiduciary duty.

What It Means:

- Explaining that "[t]here is no ERISA exception to Article III," a majority of the Court—the Chief Justice and Justices Thomas, Alito, Gorsuch, and Kavanaugh—held that petitioners lacked Article III standing "for a simple, commonsense reason: They have received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives." Petitioners also did not plausibly allege that "plan underfunding" created a "substantially increased risk" that the plan or employer "would both fail," thereby jeopardizing future pension benefits.

- The Court rejected petitioners' argument, based on trust-law principles, that they have an equitable or property interest in the plan's assets, or the "financial integrity" of the plan. The benefits of trust beneficiaries depend on how well the trust is managed. By contrast, "a defined-benefit plan is more in the nature of a contract," and "[t]he plan participants' benefits are fixed and will not change, regardless of how well or poorly the plan is managed."

- The Court also held that petitioners lacked standing to sue "as representatives of the plan itself" because they had not been "legally or contractually appointed to represent the plan." Going forward, fiduciary breach claims concerning defined-benefit plans likely will need to be brought by the Department of Labor or co-fiduciaries.

- The Court's ruling means that beneficiaries of ERISA defined-benefit pension plans generally will not be able to sue for breach of fiduciary duty unless the plan has failed to make required benefits payments, or it is likely that the alleged misconduct will render the plan insolvent.

- Although the Court was careful to distinguish defined-contribution plans, today's opinion could impact other types of ERISA claims. For example, in cases challenging the administration of health benefits, the Court's ruling may cast doubt on plaintiffs' attempts to evade the limits on class certification by claiming class-wide breaches of fiduciary duty without tying those allegations to a class-wide deprivation of benefits.

The Court's opinion is available here.

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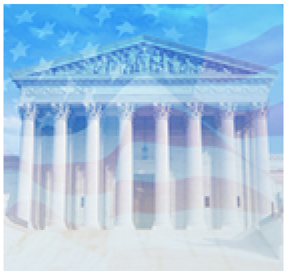

Supreme Court Upholds The Appointments Of The Members Of The Puerto Rico Financial Oversight And Management Board

***Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC,* Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521**

Decided June 1, 2020

Today, the Supreme Court held that the appointments of the members of the Financial Oversight and Management Board for Puerto Rico did not violate the Appointments Clause of the United States Constitution.

Background:

The Appointments Clause of the United States Constitution enables the president to appoint principal "Officers of the United States" only with the "Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. But in the Puerto Rico Oversight, Management, and Economic Stability Act, Congress allowed the President to appoint members of the Financial Oversight and Management Board for Puerto Rico *without* Senate confirmation. The statute, enacted in 2016 to address Puerto Rico's fiscal emergency, empowered Board members to initiate and oversee a massive restructuring of Puerto Rico's public debt. The statute created the Board within the government of Puerto Rico pursuant to Congress's Article IV power to "make all needful Rules and Regulations respecting the Territory … belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, and provided that the Board was not part of the federal government.

Creditors moved to dismiss certain restructuring proceedings on the ground that the Board's members were unconstitutionally appointed. The district court denied the motions, but the First Circuit reversed, holding that Board members are Officers of the United States because they exercise significant authority traced exclusively to federal law.

The Appointments Clause "has never been understood to cover those whose powers and duties are primarily local in nature and derive from the [Territories Clause]."

Justice Breyer,
writing for the Court

Gibson Dunn Represented Respondents/ Cross-Petitioners:

Aurelius Investment, LLC and Assured Guaranty Corp.

Gibson Dunn Named
Appellate Firm of the Year

Issue:

Did the appointments of the members of the Financial Oversight and Management Board for Puerto Rico violate the Appointments Clause?

Court's Holding:

No. Because the Board members' statutory duties are primarily local in nature and exercised under the Territories Clause, they are not "Officers of the United States."

What It Means:

- The Court first concluded that the Appointments Clause applies to all Officers of the United States, including those who exercise power in or related to Puerto Rico. The Appointments Clause, the Court observed, contains "no Article IV exception."
- The Court ultimately determined, however, that Board members are not Officers of the United States because they exercise "primarily local powers and duties" under Article IV. The Court emphasized the long history of territorial officials with primarily local responsibilities being selected via methods that would not satisfy the Appointments Clause's requirements.
- The Court acknowledged that the Board has "broad investigatory powers," but determined that these powers are backed by Puerto Rican law, not federal law. The Court also acknowledged that some Board actions "may have nationwide consequences," but reasoned that the same is true of many actions taken by Governors or other local officials. In short, the Court summarized, the Board possesses "considerable power," but that power primarily concerns local matters.
- The decision leaves many questions unanswered about the degree and kind of federal responsibility necessary to make a nominally "territorial" official an Officer of the United States. It also is uncertain how courts will determine whether the duties exercised by an official with both federal and local responsibilities are "primarily local."

The Court's opinion is available here.

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GIBSON DUNN

Supreme Court Holds That The New York Convention Permits The Use Of Equitable Estoppel To Enforce An Arbitration Agreement Among Nonsignatories

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC
No. 18-1048

Decided June 1, 2020

Today, the Supreme Court unanimously held that the New York Convention permits the use of state-law equitable estoppel doctrines to compel arbitration between parties that did not sign the arbitration agreement.

> *"[T]he Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law."*
>
> Justice Thomas,
> writing for the unanimous Court

Background:

ThyssenKrupp entered into a series of contracts with F.L. Industries to buy three cold rolling mills for use in the manufacture of steel products. Each contract contained a clause calling for arbitration of all "disputes arising between both parties" to be arbitrated in Germany. The contracts defined "Parties" to include the "Buyer" (ThyssenKrupp) and "Seller" (F.L. Industries). They further defined "Seller" and "Parties" to include subcontractors.

F.L. Industries subcontracted with GE Energy to supply motors for the mills. The motors allegedly failed, and Outokumpu (who purchased the manufacturing plant from ThyssenKrupp) sued GE Energy in Alabama state court. After removing the case to federal court, GE Energy moved to compel arbitration in Germany under the arbitration agreement in the ThyssenKrupp-F.L. Industries contracts and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The district court compelled arbitration, ruling that the contracts were signed, written agreements between ThyssenKrupp and F.L. Industries and that GE Energy, as a subcontractor, was not excluded from the arbitration provision.

The Eleventh Circuit reversed, holding that because the New York Convention applied only to parties that actually sign the arbitration agreement the Convention precluded the use of equitable estoppel doctrines to compel arbitration among parties that did not sign the arbitration agreement.

Issue:

Whether the New York Convention permits the use of equitable estoppel to compel arbitration between parties that did not actually sign the arbitration agreement.

Court's Holding:

Yes. The New York Convention does not preclude parties who did not sign an arbitration agreement from seeking to compel arbitration under state-law equitable estoppel doctrines.

What It Means:

- The Court’s analysis focused on the text of the New York Convention, a 1958 treaty designed to facilitate the recognition and enforcement of international arbitration agreements. Because the New York Convention is silent on whether parties who did not sign an arbitration agreement can compel arbitration, the Court concluded that nothing in the Convention’s text prohibits the application of equitable estoppel. The Court’s decision therefore aligned the enforcement of international arbitration agreements under the New York Convention with the enforcement of domestic arbitration agreements under the Federal Arbitration Act, which permits parties to use equitable estoppel and other state-law doctrines when seeking to enforce arbitration agreements.
- The Court’s decision is consistent with the Court’s broader trend of favoring the resolution of disputes through arbitration. The Court also noted that its decision is consistent with the weight of authority from other countries that have signed the New York Convention and that permit enforcement of arbitration agreements by nonsignatories.
- The Court did not elaborate on the conditions that must be satisfied to compel arbitration under equitable estoppel, or the body of law governing those conditions. Instead, the Court remanded the case for the lower courts to determine those issues.

The Court's opinion is available here.

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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GIBSON DUNN

Supreme Court Holds That Title VII's Prohibition On Discrimination Because Of Sex Includes Sexual Orientation And Transgender Status Discrimination

***Bostock v. Clayton County, Georgia*, No. 17-1618;**

***Altitude Express, Inc. v. Zarda*, No. 17-1623; and**

***R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107**

Decided June 15, 2020

Today, the Supreme Court held 6-3 that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses employment discrimination because of a person's sexual orientation or transgender status.

Background:

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). Donald Zarda was a former skydiving instructor at Altitude Express. Gerald Bostock worked as a child welfare services coordinator for Clayton County, Georgia. Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes and originally presented as a male, but later told her employer that she planned to live and work as a woman. All three were fired allegedly because of their sexual orientation or transgender status, and they initiated sex discrimination claims against their former employers under Title VII. In Zarda's case, the Second Circuit held that discrimination based on sexual orientation is a "subset of sex discrimination." In Bostock's case, the Eleventh Circuit held that Title VII does not apply to discrimination based on sexual orientation and affirmed the

"[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

Justice Gorsuch,
writing for the majority

dismissal of Bostock's Title VII claim. And in Stephens' case, the Sixth Circuit held that Title VII applies to discrimination on the basis of transgender status.

Issue:

Whether discrimination against an employee because of sexual orientation or transgender status constitutes prohibited discrimination within the meaning of Title VII.

Court's Holding:

Yes. Title VII's prohibition on discrimination based on sex encompasses sexual orientation and transgender status. An employer violates Title VII when it discharges an employee in part because of sexual orientation or transgender status.

What It Means:

- Justice Gorsuch's majority opinion, which was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan, was grounded in the text and the ordinary public meaning of the statutory terms at the time of enactment. Justice Gorsuch reasoned that Title VII's prohibition on employment discrimination "because of . . . sex" necessarily encompasses discrimination on the basis of sexual orientation or transgender status because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," slip op. 9, and therefore an employer who fires an employee based on sexual orientation and transgender status "inescapably *intends* to rely on sex in its decisionmaking," *id.* at 11.

- Justice Gorsuch acknowledged that Title VII's prohibition on discrimination "because of . . . sex" may have been originally *intended* to cover only gender-based discrimination, not discrimination based on sexual orientation or transgender status. Echoing the late Justice Scalia's reasoning in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where the Court held that same-sex sexual harassment can violate Title VII, Justice Gorsuch explained that even if Title VII's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address, the fact that a statute is applied in a new context does not render its meaning ambiguous.

- In dissent, Justice Alito, joined by Justice Thomas, emphasized that there is no evidence that the members of Congress who voted for Title VII in 1964 would have contemplated that it prohibited discrimination based on sexual orientation or transgender status. In a separate dissent, Justice Kavanaugh stated that he believed the majority's interpretation violated the separation of powers because the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not the courts.

- The Court's opinion expressly cabins its reach to Title VII, perhaps reducing the likelihood that the decision will have an impact in other areas involving different statutes, such as Title IX or the Americans with Disabilities Act. The Court also noted that it was not addressing questions about "sex-segregated bathrooms, locker rooms, and dress codes." Slip op. 31. And the Court acknowledged that the Religious Freedom Restoration Act of 1993 "might supersede Title VII's commands in appropriate cases." *Id.* at 32. These issues are likely to arise in future cases.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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GIBSON DUNN

Supreme Court Rejects DHS's Decision To Terminate DACA

***Department of Homeland Security, et al., v. Regents of the University of California, et al. and related cases*, Nos. 18-587, 18-588, and 18-589**

Decided June 18, 2020

Today, in a 5-4 decision, the Supreme Court held that DHS's decision to terminate the Deferred Action for Childhood Arrivals policy is unlawful.

"[W]hen so much is at stake, . . . the Government should turn square corners in dealing with the people."

Chief Justice Roberts, writing for the Court

Background:

Since 2012, the Deferred Action for Childhood Arrivals ("DACA") policy has enabled undocumented individuals who arrived in the United States as children—including nearly 700,000 current recipients—to live and work here without fear of deportation, so long as they qualify and remain eligible for the policy. In September 2017, Acting Secretary of Homeland Security Elaine Duke terminated DACA based on the Attorney General's determination that the policy was unlawful.

Respondents challenged DHS's action, contending that the decision to rescind DACA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), because DHS failed to explain or consider the costs of its policy change, and relied on an incorrect legal premise, *i.e.*, that DACA is unlawful.

Gibson Dunn represented six individual DACA recipients in obtaining and defending on appeal the first nationwide preliminary injunction halting the termination of DACA. The Supreme Court granted certiorari to review the Ninth Circuit's decision affirming that injunction and two other district court decisions enjoining or vacating DHS's action. Gibson Dunn partner Ted Olson represented DACA

Gibson Dunn Represented Respondents:

DACA Recipients
Dulce Garcia;
Miriam Gonzalez Avila;
Saul Jimenez Suarez;
Viridiana Chabolla Mendoza;
Norma Ramirez;
and
Jirayut Latthivongskorn

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Best Lawyers LAW FIRM OF THE YEAR U.S.News APPELLATE PRACTICE 2020 recipients, businesses, and nonprofits challenging the policy in presenting oral argument before the Supreme Court.

Issue:

Does the APA or the Immigration and Nationality Act ("INA") preclude judicial review of the Secretary's decision to terminate DACA? If the decision is reviewable, was it "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA?

Court's Holding:

The Court held that DHS's decision to terminate DACA is subject to judicial review and violated the APA.

What It Means:

- The Court's decision reinstates DACA for the immediate future, granting a significant victory to hundreds of thousands of individuals that currently enjoy or may be eligible for relief. As a result of the preliminary injunction obtained by Gibson Dunn, the large majority of DACA recipients have been able to renew their DACA applications during the more than two-year period since DHS announced its decision to terminate the program. Today's decision secures that victory and restores the opportunity for new applicants to apply to the program for the first time. The decision also reinstates key aspects of the DACA policy, including the ability of DACA recipients to seek advance parole so that they can travel abroad with assurances that they will be permitted to return to the United States.

- Although Dreamers may continue to live and work in the United States, they should be aware that this administration or a future administration could revoke DACA, provided that the agency meets the requirements for reasoned decisionmaking. The Court also did not decide the legality of the DACA policy. Unless Congress enacts permanent legislation to allow Dreamers to continue living and working in the country without fear of deportation, Dreamers' fate will remain uncertain.

- The Court held that the decision to rescind DACA was subject to judicial review notwithstanding the provision of the APA that precludes judicial review of agency decisions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), the Court held that this provision barred judicial review of an agency's decision not to prosecute or initiate an enforcement proceeding. The Court determined that *Chaney* did not apply here because DHS's decision to grant DACA to individuals went beyond simple non-enforcement and instead "created a program for conferring affirmative immigration relief."

- On the merits, the Court limited its analysis to the explanations that Acting Secretary Duke provided in her original September 2017 memorandum terminating DACA. The Court declined to consider a later memorandum in which Duke's successor, Secretary Kirstjen Nielsen, offered "additional explanation" for the September 2017 memorandum. The Court explained that limiting judicial review of agency action to "the grounds that the agency invoked when it took the action" promotes "agency accountability, "ensur[es] that parties and the public can respond fully and in a timely manner to an agency's exercise of authority," and "instills confidence that the reasons given are not simply convenient litigating positions." In light of this holding, an agency that seeks to provide "new justifications" for a prior policy decision may now be required to issue "a new decision" before a court can consider those justifications.

- The Court found two defects in Acting Secretary Duke's explanation of DHS's policy change: She never considered alternatives to the outright rescission of DACA, and she never addressed the effect of the termination of DACA on the reliance interests of DACA recipients and their families, schools, and employers. The Court emphasized that before rescinding a policy "in full," an agency must consider available alternatives, including a partial repeal. And while it was up to DHS to determine whether reliance on DACA was warranted, and what weight to give that reliance, DHS never made that determination.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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GIBSON DUNN

Supreme Court Limits Disgorgement Remedy In SEC Civil Enforcement Actions

***Liu v. Securities and Exchange Commission*, No. 18-1501**

Decided June 22, 2020

Today, the Supreme Court held 8-1 that although the SEC may seek disgorgement in civil enforcement actions, the remedy must be limited to the wrongdoer's net profits and be awarded for the benefit of victims.

Background:

When alleging securities fraud in a civil action, the SEC is authorized to seek civil penalties and any "equitable relief" that "may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). Here, the SEC alleged that Petitioners misappropriated millions of dollars of investor money after soliciting funds for the construction of a cancer-treatment center. Finding for the SEC, the district court imposed a civil penalty and ordered disgorgement equal to the full amount Petitioners raised from investors less the amount that remained in the corporate accounts for the project.

Petitioners objected that the disgorgement award failed to account for their business expenses. Petitioners relied on *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which held that a disgorgement order in an SEC enforcement action imposes a "penalty" for purposes of the applicable statute of limitations. Because courts of equity historically could not impose punitive sanctions, Petitioners reasoned, the court lacked statutory authority to impose the disgorgement remedy. But the Ninth Circuit disagreed, concluding that the proper amount of disgorgement was the entire amount raised minus the money paid back to investors.

"[A] disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5)."

Justice Sotomayor, writing for the Court

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Issue:

Whether, and to what extent, disgorgement is statutorily authorized “equitable relief” in an SEC civil enforcement action.

Court's Holding:

A disgorgement award in an SEC civil enforcement action is “equitable relief” so long as it does not exceed a wrongdoer’s net profits and is awarded for victims.

What It Means:

- The Supreme Court held that a disgorgement remedy may constitute “equitable relief” under 15 U.S.C. § 78u(d)(5), but only if limited to the wrongdoer’s net profits and awarded for victims. This holding, the Court noted, was consistent with the “circumscribed” power of courts of equity to strip wrongdoers of ill-gotten gains. The Court therefore vacated the Ninth Circuit’s judgment and remanded with instructions to ensure that any legitimate business expenses are deducted from the disgorgement award.

- The opinion casts doubt on several SEC disgorgement practices that have appeared in recent decades. The Court observed that disgorgement awards are “in considerable tension” with equity practice when they (1) order the funds deposited in the U.S. Treasury instead of disbursing them to victims; (2) impose joint-and-several liability; or (3) decline to deduct business expenses that are legitimate or that have value independent of fueling a fraudulent scheme. The Court left those questions to the Ninth Circuit to address on remand.

- The Court’s decision reinforces the need, in a variety of contexts, to examine and apply traditional limits on awarding “equitable relief.” The Court examined traditional equitable practice in concluding that courts of equity would not award more than the wrongdoer’s net profits to the victims of the offense.

The Court's opinion is available here.

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GIBSON DUNN

Supreme Court Holds That Consumer Financial Protection Bureau's Structure Is Unconstitutional

***Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7**

Decided June 29, 2020

Today, the Supreme Court held 5-4 that the single-Director structure of the Consumer Financial Protection Bureau violates the Constitution's separation of powers, but ruled 7-2 that the proper remedy is to sever the Director's statutory for cause removal restriction, thereby making the Director removable by the President at will.

"[A]n independent agency led by a single Director . . . lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."

Chief Justice Roberts,
writing for the Court

Gibson Dunn submitted an *amicus* brief on behalf of the Center for the Rule of Law in support of petitioner:

Seila Law LLC

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Background:

The Consumer Financial Protection Bureau ("CFPB") was created as an independent federal agency by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The CFPB enforces 19 federal consumer-protection statutes and is headed by a single Director who is removable by the President only "for cause," not "at will" for mere policy disagreements with the President. The CFPB served a civil investigative demand on petitioner, a law firm that provides debt-collection services, and later sought to enforce that demand in federal court. Petitioner argued that the demand was invalid because the CFPB's structure violated the Constitution's separation of powers by vesting too much executive power in a single Director who does not answer to the President. The district court and the U.S. Court of Appeals for the Ninth Circuit both rejected the challenge, concluding that the CFPB is constitutionally structured.

Petitioner then sought and obtained Supreme Court review, supported by the United States and the CFPB itself, both of which agreed that the agency's structure unconstitutionally limited the President's removal authority. The parties disagreed, however, on whether the proper remedy for the constitutional violation was to sever the Director's statutory "for cause" removal restriction, thereby making the Director answerable to the President, or instead to invalidate the entire statute creating the CFPB. The Supreme Court appointed amicus curiae counsel to defend the constitutionality of the CFPB's structure, as the United States declined to do so.

Issue:

Whether the CFPB's structure as a powerful agency headed by a single Director removable by the President only "for cause" violates the Constitution's separation of powers, and, if so, whether severing the statute's "for cause" removal restriction to make the Director removable "at will" by the President cures the unconstitutionality.

Court's Holding:

The CFPB's structure as a powerful federal agency headed by a single Director removable by the President only "for cause" violates the Constitution's separation of powers. The violation is cured by severing the "for cause" removal restriction and making the Director answerable to the President.

What It Means:

- The Court's decision recognizes a significant limitation on Congress's ability to create so-called "independent" agencies. Agencies that execute federal law and are headed by a single Director, including financial regulators, now cannot be "independent" of the President, but instead must be subject to the President's constitutional duty to control the federal officers who assist the President in executing federal law. The reasoning of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which provides the constitutional rationale for "independent" agencies, is limited to "multimember expert agencies that do not wield substantial executive power," such as the Federal Trade Commission as it existed in 1935.

- Because the CFPB's Director is now answerable to the President, the CFPB's regulatory and enforcement activities now should more closely align with the President's policy objectives. The Court's decision gives the President greater power to execute federal consumer-protection law, and makes the President accountable for the CFPB's performance.

- The Court's prospective remedy of severing the statutory provision that limited removal of the CFPB Director "for cause" may mean that the agency can continue to operate without significant disruptions.

- The Court did not address whether a civil investigative demand issued by a Director unconstitutionally insulated from removal but later purportedly ratified by an Acting Director who was accountable to the President is enforceable. The Court remanded the case for the lower courts to decide the ratification issue in the first instance.

- Justice Thomas, joined by Justice Gorsuch, concurred in part in the Court's constitutional holding and dissented in part from the Court's severability holding. Justice Thomas and Justice Gorsuch argued that the Court should "reconsider *Humphrey's Executor in toto*" in a future case. As he has done previously, Justice Thomas also questioned the Supreme Court's modern severability precedents and argued that the Court need not have addressed the severability question in this case.

- Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented in part and would not have found a constitutional violation. The four dissenters argued that the Constitution allows for for-cause removal limits and says nothing about the President's removal power, that financial regulators historically have had a degree of independence from Presidential oversight, and that the Court's precedents have sustained other independent agencies. But the dissenters agreed that the Director's statutory removal restrictions were severable.

- The Court's decision caps nearly a decade of litigation over the constitutionality of the CFPB's structure. Gibson Dunn pioneered this litigation and handled the first constitutional challenge to the CFPB's structure that produced a major separation of powers decision and ultimately resulted in the vacatur of a $109 million penalty imposed by the unconstitutionally structured agency. *See PHH Corp. v. CFPB*, 839 F.3d 1 (2016) (Kavanaugh, J.), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). Gibson Dunn is also handling an en banc Fifth Circuit appeal that will further test the important issue of ratification that the Supreme Court expressly left open. *See CFPB v. All American Check Cashing, Inc.*, No. 18-60302 (5th Cir.).

The Court's opinion is available here.

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GIBSON DUNN

Supreme Court Holds That Adding ".com" To A Generic Term Can Create A Protectable Trademark

***U.S. Patent and Trademark Office v. Booking.com B.V.*, No. 19-46**

Decided June 30, 2020

Today, the Supreme Court held 8-1 that under the Lanham Act, the combination of an otherwise generic term and a top-level Internet domain (such as ".com") can create a protectable mark if consumers recognize the mark as a brand name.

Background:

Under the Lanham Act, 15 U.S.C. § 1051 *et seq*., generic terms may not be registered as trademarks, but terms that are "merely descriptive" of goods or services may be registered if the public has come to understand them as identifying the trademark owner's goods or services. Booking.com, a hotel reservation website, applied to register the mark BOOKING.COM. The U.S. Patent and Trademark Office (PTO) determined that "booking" is the generic term for hotel reservation services and denied registration. Booking.com sought judicial review, and the district court overturned the denial. The court held that the mark was protectable because combining the generic term "booking" with the top-level domain name ".com" resulted in a descriptive term, and survey evidence showed that most consumers recognize BOOKING.COM as a brand name, not merely a product category. A divided Fourth Circuit panel affirmed.

Issue:

Whether the addition by an online business of a generic top-level domain (".com") to an otherwise generic term can create a protectable trademark under the Lanham Act.

"Whether any given 'generic.com' term is generic . . . depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class."

Justice Ginsburg, writing for the Court

Gibson Dunn submitted an *amicus* brief on behalf of Salesforce.com, Inc. et al. in support of respondent:

Booking.com B.V.

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Court's Holding:

Yes. The addition of ".com" to an otherwise generic term can create a protectable trademark where the evidence shows that consumers understand the combined term as identifying or distinguishing a particular supplier's goods or services.

What It Means:

- The Court grounded its decision in the "principle that consumer perception demarcates a term's meaning." Slip op. at 7 n.3. That principle applies even to marks that combine generic elements. The Court thus adopted an evidence-based approach consistent with the position advocated in Gibson Dunn's *amicus* brief in this case.

- The Court rejected the PTO's reliance on *Goodyear's India Rubber Glove v. Goodyear Rubber Co.*, 128 U.S. 598 (1888), a pre-Lanham Act case in which the Supreme Court held that combining a generic term with a corporate designation such as "Company" or "Inc." cannot create a protectable common-law trademark. Rather than interpret *Goodyear* as a bright-line rule, the Court said, "whether a term is generic depends on its meaning to consumers," thereby relegating *Goodyear* to stand for the "more modest" principle that "[a] compound of generic elements is generic if the combination yields no additional meaning to consumers capable of distinguishing the goods or services." Slip op. at 10.

- The Court also rejected the PTO's argument that Booking.com's position would grant it a monopoly on the use of the term "booking." The Court reasoned that trademark law doctrines such as fair use will provide adequate protection against any potential anti-competitive effects of the ruling, and mark holders still must show a likelihood of consumer confusion to prevail on any trademark infringement claims against competitors.

- The Court's decision eschews a bright-line rule that all ".com" marks are protectable, and makes clear that courts and the PTO must consider all relevant evidence in determining how consumers understand a particular term, including consumer surveys, dictionaries, and usage by consumers and competitors. The decision thus continues the Court's recent trend against establishing bright-line rules in trademark law, as noted in our May 14, 2020 alert on the Court's decision in *Lucky Brand Dungarees v. Marcel Fashions Group, Inc*.

The Court's opinion is available here.

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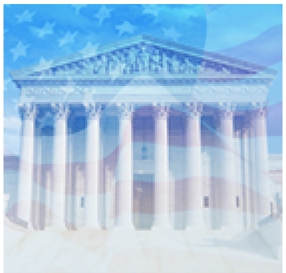

Supreme Court Upholds TCPA's Robocall Ban, But Strikes Government-Debt Exception As Unconstitutional Under First Amendment

***Barr v. American Association of Political Consultants, Inc.*, No. 19-631**

Decided July 6, 2020

Today, the Supreme Court held 6-3 that the federal-debt-collection exception to the TCPA's robocall ban violates the First Amendment, but also held 7-2 that the proper remedy is to sever the exception—leaving in place the entirety of the TCPA's 1991 ban on robocalls.

Background:

The Telephone Consumer Protection Act of 1991 (TCPA) generally prohibits robocalls to cell phones and home phones. In 2015, Congress amended the Act to exempt robocalls to cell phones for collecting debts owed to or guaranteed by the federal government—including student-loan and mortgage debts—from the TCPA's general prohibition.

Plaintiffs—a group of political and nonprofit organizations seeking to make robocalls—sued the U.S. Attorney General arguing that the 2015 government-debt exception violates the First Amendment by unconstitutionally favoring debt-collection speech over political and other speech. As relief, the plaintiffs sought to invalidate the TCPA's entire robocall ban for cell phones, rather than only the 2015 government-debt exception. Plaintiffs' theory was that the exception undermines the credibility of the purported privacy interest supporting the entire robocall ban.

The district court held that the 2015 government-debt exception was a content-based speech regulation, but that it survived strict scrutiny given the government's compelling interest in collecting debt. The Fourth Circuit reversed, holding that the government-debt exception failed strict scrutiny. Applying traditional severability principles, the

"Congress has impermissibly favored debt-collection speech over political and other speech . . . As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech."

Justice Kavanaugh,
writing for a plurality of the Court

Fourth Circuit then concluded that the government-debt exception should be severed from the statute, leaving the TCPA’s robocall ban in effect.

Issue:

1. Whether the government-debt exception from the TCPA’s robocall ban for cell phones violates the First Amendment.

2. If so, whether the TCPA’s entire robocall ban is unconstitutional.

Court's Holding:

1. The government-debt exception is a content-based speech restriction that impermissibly favors debt-collection speech over political and other speech in violation of the First Amendment.

2. The TCPA’s robocall ban stands because the government-debt exception is severable from the remainder of the statute.

What It Means:

- The TCPA’s robocall ban remains in effect as it existed before 2015, prohibiting virtually all automated voice calls and text messages to cell phones. Six Justices (writing a total of three opinions) agreed that the 2015 government-debt exception was content based and that the government, in attempting to defend the content-based speech restriction, failed to sufficiently justify treating government-debt-collection speech differently from other important categories of robocall speech, such as political speech and issue advocacy.

- Seven Justices agreed that the 2015 government-debt exception could be severed from the remainder of the statute to preserve the underlying 1991 robocall restriction. Not only has the Communications Act (of which the TCPA is part) had an express severability clause since 1934, the Court explained, but also, even without the severability clause, the presumption of severability would still apply—and the remainder of the restriction is capable of functioning independently without the narrow government-debt exception.

- As in *Seila Law LLC v. Consumer Financial Protection Bureau* (No. 19-7), Justices Gorsuch and Thomas dissented from the Court’s severability holding. Justice Gorsuch wrote, “[s]evering and voiding the government-debt exception does nothing to address the injury” of barring plaintiffs from engaging in political speech robocalls. Slip. op. 6 (Gorsuch, J., concurring in the judgment in part and dissenting in part). Justice Gorsuch and Justice Thomas argued that the Court should reconsider its severability doctrine.

The Court's opinion is available here.

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