MoloLamken

Supreme Court Business Briefing

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MOLOLAMKEN
SUPREME COURT BUSINESS BRIEFING

The COVID-19 pandemic caused massive disruption in the American economy this year, with far-reaching consequences for practically all businesses. Stay-at-home orders and social-distancing directives forced countless companies to restructure or halt their operations virtually overnight.

The impact on the Supreme Court was similarly profound. Unable to convene in public, the Court canceled its March and April argument sessions. Half of those cases were ultimately heard in May during a special series of telephone arguments. Those arguments were unusual, and not just because they took place by conference call rather than in person. For the first time, the Court made audio from its arguments available in real time. Tens of thousands of people listened as the arguments unfolded—a huge increase from the few dozen members of the public who can squeeze into the Court's physical courtroom.

For the remaining canceled arguments, the Court rescheduled the cases for the fall. Those cases include at least two major business disputes: a landmark copyright case between Google and Oracle over software interfaces, and a pair of lawsuits against Ford Motor Company testing the limits of state-court jurisdiction over out-of-state companies. Stay tuned for next year's edition to see how those cases turn out.

Of the cases the Court decided this year, the big one for both the business community and the public at large was *Bostock v. Clayton County*, where the Court held that the federal prohibition against employment discrimination on the basis of sex reaches discrimination based on sexual orientation and transgender status. The case was a landmark victory for LGBTQ employees in the workforce. But it also inspired a lively debate over how the Court should interpret a statute whose literal terms sweep more broadly than what legislators likely anticipated when they enacted it.

In a closely watched environmental case, the Court took a middle ground over the scope of the Clean Water Act. It held that some discharges of pollutants require a permit even if they do not flow directly into navigable waters, while reining in a more expansive interpretation adopted by some lower courts. In a major international arbitration case, the Court held that the treaty governing enforcement of foreign arbitral awards does not preclude a court from ordering arbitration even where one of the parties did not sign the arbitration agreement. And in a significant constitutional case involving the Consumer Financial Protection Bureau, the Court held that Congress may not restrict the President's authority to remove an agency head when the agency is run by a single individual rather than a multimember commission.

With those and other leading decisions in mind, we are pleased to present the tenth annual MoloLamken Supreme Court Business Briefing. We have identified cases with the greatest potential impact on a wide range of businesses. For each, we have distilled the facts and holdings to a concise summary and highlighted why the decision matters to business. Our aim is to allow busy people to stay current on the Supreme Court's docket and understand the potential impact of its decisions with a minimum of time and effort. We hope you find it informative.

ABOUT MOLOLAMKEN

MoloLamken is a law firm focused exclusively on representing clients in complex disputes and investigations. Our clients are based throughout the world.

Our founding partners, Steven Molo and Jeffrey Lamken, developed national reputations based on their courtroom successes while partners at large, full-service firms, where they held leadership positions. They formed the firm with an abiding belief that complex disputes and investigations are most effectively handled by smaller teams comprised of smart, highly experienced lawyers focused on results rather than process.

We provide experienced advocacy—for plaintiffs and defendants—before juries, judges, arbitral forums, and appellate courts, including the Supreme Court of the United States. We also represent clients in criminal and regulatory investigations, and we conduct internal investigations.

Our strength lies in the intellect, creativity, and tenacity of our lawyers and our experience in applying those attributes to achieve great results for clients in serious matters.

Learn more about our talented team by visiting us at www.mololamken.com.

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Bostock v. Clayton County, No. 17-1618

employment discrimination — LGBTQ employees

Bostock addressed whether federal employment-discrimination law protects employees from discrimination on the basis of sexual orientation or transgender status.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of . . . sex." *Bostock* involved three separate Title VII lawsuits. In two of them, the plaintiffs were men who alleged they were fired for being gay. In the third, the plaintiff alleged she was fired for being transgender. In all three cases, the employees argued that their firing was unlawful discrimination on the basis of sex under Title VII.

Three different U.S. Courts of Appeals reached different results. The Second Circuit held that discrimination based on sexual orientation violates Title VII, while the Eleventh Circuit held that it does not. The Sixth Circuit held that discrimination based on transgender status violates Title VII.

The Supreme Court affirmed the Second and Sixth Circuits and reversed the Eleventh Circuit. The Court explained that an employer violates Title VII when it discriminates against an employee based on sex, even if other factors also play a role in the employer's decision. Even assuming that the statutory term "sex" refers to one's biological status, the Court reasoned, an employer who discriminates on the basis of sexual orientation or transgender status necessarily discriminates on the basis of sex: The employer treats the employee differently because of a trait—attraction to a particular sex or identification with a particular gender—that the employer would find unobjectionable in an employee of the opposite sex.

The Court acknowledged that Congress may not have foreseen or intended this result when it enacted Title VII in 1964. But the Court held that the plain text of the statute governed, regardless of lawmakers' subjective intent at the time. The Court thus concluded that Title VII prohibits discrimination against employees on the basis of sexual orientation or transgender status.

Bostock is a major victory for LGBTQ employees. Although many States already prohibit employment discrimination based on sexual orientation or gender identity, many others do not. After *Bostock,* LGBTQ employees nationwide are protected by federal employment-discrimination laws. Businesses will need to ensure that their human resources practices comply with the Court's ruling, although many companies already have policies that prohibit such discrimination. The Court's decision may also benefit employers by establishing a more uniform standard nationwide.

Bostock could have implications far beyond employment discrimination under Title VII. More than 100 other federal statutes prohibit discrimination because of sex. For example, the Affordable Care Act and the Fair Housing Act prohibit sex discrimination in health care and housing. Following *Bostock,* courts may well interpret those laws to prohibit discrimination based on sexual orientation or gender identity in the areas they govern.

*After **Bostock**, LGBTQ employees nationwide are protected by federal employment-discrimination laws.*

(Disclosure: MoloLamken LLP represented amici curiae *in this case.)*

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

antidiscrimination laws — causation

Comcast addressed the standard for causation that applies to claims of racial discrimination in contracting under 42 U.S.C. §1981.

This case arose after Comcast decided not to carry channels operated by Entertainment Studios Network, a media company owned by an African-American entrepreneur. ESN alleged that Comcast's decision was racially motivated. While Comcast offered legitimate business reasons for its decision, ESN contended that those explanations were pretextual, and that Comcast in fact systematically disfavored companies owned by African Americans. ESN sued Comcast under 42 U.S.C. §1981, a Reconstruction-era statute that prohibits racial discrimination in contracting.

The district court dismissed ESN's complaint, concluding that ESN did not plausibly allege that, but for racial animus, Comcast would have contracted with ESN. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that a §1981 plaintiff need only show that race played some role in the defendant's decisionmaking.

The Supreme Court vacated and remanded. It explained that, under well-settled tort principles, a plaintiff generally must show that its injury would not have occurred "but for" the defendant's unlawful conduct. The Court held that §1981 claims are subject to that traditional standard, requiring the plaintiff to prove that the defendant's racial discrimination was the "but for" cause of the plaintiff's injury. Defendants thus can avoid liability if they would have taken the same actions regardless of the plaintiff's race. The Court declined to apply the more flexible causation standard that applies to employment discrimination claims under Title VII, which requires only that discrimination be a "motivating factor" for the challenged action. The Court remanded the case to the Ninth Circuit for application of the correct standard.

Comcast is the latest in a series of recent Supreme Court decisions applying the "but for" standard in a variety of discrimination contexts, including age discrimination and retaliation claims. While *Comcast* involved a potential commercial contract between two businesses, the case's impact may be most significant in the employment context. Employees alleging racial discrimination often sue under §1981 as well as Title VII, in part because Title VII limits remedies in ways that §1981 does not. Under *Comcast*, however, it will be more difficult for a plaintiff to establish causation—and thus liability—under §1981.

At the same time, but-for causation does not require discrimination to have been the *only* factor in a defendant's decision—just that it made a difference. And where discriminatory motives played a significant role, defendants may have a difficult time persuading a jury to disregard them. Moreover, nothing in the Court's decision affects the more flexible causation standard that applies to employment-discrimination claims under Title VII. While *Comcast* raised the bar for certain discrimination claims, businesses should remain vigilant against any discrimination in their contracting practices.

Comcast *is the latest in a series of recent Supreme Court decisions applying the "but for" causation standard in a variety of discrimination contexts.*

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

environmental regulation — Clean Water Act

Maui addressed whether the Clean Water Act applies to discharges of pollutants that pass through groundwater before reaching navigable waters.

The Clean Water Act forbids the addition of a pollutant from a "point source" to "navigable waters" without a permit. That prohibition is expansive. The statute defines a point source to include any discernible, confined, and discrete conveyance, such as a pipe, ditch, or well. It defines a pollutant to include everything from chemicals to solid waste to heat. And while navigable waters do not include groundwater, they do include streams, rivers, and oceans.

In *Maui*, several environmental groups sued the County of Maui for violating the Clean Water Act. The County runs a wastewater reclamation facility that collects sewage, treats it, and pumps effluent into wells that reach hundreds of feet underground. Although the wells are about half a mile from the shore, much of the effluent seeps into groundwater and ultimately reaches the Pacific Ocean. As a result, the plaintiffs alleged, the County was discharging pollutants from point sources to navigable waters without the required permit.

The district court ruled in favor of the plaintiffs, and the U.S. Court of Appeals for the Ninth Circuit affirmed. Although the County did not discharge pollutants *directly* into navigable waters, the Ninth Circuit deemed it sufficient that pollutants reaching the ocean were "fairly traceable" to the County's wells.

The Supreme Court vacated and remanded. The Court held that the Ninth Circuit's "fairly traceable" standard was too expansive, threatening substantial liability even where the connection between discharge and navigable waters is attenuated. But the Court also rejected the argument, advanced by the County and many business groups, that the Clean Water Act encompasses only direct discharges into navigable waters and not discharges that pass through groundwater on their way to navigable waters. That interpretation, the Court observed, would create a statutory loophole: Polluters could avoid the need for a permit simply by cutting their pipes short a few feet from shore.

Instead, the Court took a middle ground. The proper test, it held, is whether a discharge through groundwater is the "functional equivalent" of a direct discharge into navigable waters. The Court listed a variety of potentially relevant factors, but emphasized that the time and distance a pollutant travels before reaching navigable waters are the most important considerations. The Court remanded the case for the Ninth Circuit to apply that new standard.

Maui mitigates, but does not resolve, uncertainty over the scope of the Clean Water Act's permit requirement for indirect discharges. Most pollutants released into the ground will reach navigable waters eventually. The Ninth Circuit's "fairly traceable" standard thus threatened to require permits for a wide range of activities, even where the connection to navigable waters was not readily apparent. The Supreme Court's "functional equivalent" standard reins in the Act's scope to some degree, but still invites fact-specific judgments. Any business that operates a facility where pollutants are released from a point source into the ground will need to carefully assess whether it should seek a permit under the Clean Water Act.

***Maui** mitigates, but does not resolve, uncertainty over the scope of the Clean Water Act's permit requirement for indirect discharges.*

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

international arbitration — nonsignatory enforcement

GE Energy addressed whether the New York Convention precludes a party to a dispute from compelling arbitration under an international arbitration agreement to which it was not a signatory.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the New York Convention, is a multilateral treaty that requires ratifying countries to recognize foreign arbitral awards and arbitration agreements. Article II of the Convention generally requires courts to refer a dispute to arbitration if "the parties" entered into a written agreement to arbitrate.

This case arose out of contracts for the construction of cold rolling mills at a steel plant owned by Outokumpu Stainless. The contractor, F.L. Industries, subcontracted with GE Energy Power Conversion France to supply motors for the equipment. When the motors failed, Outokumpu sued GE Energy for damages. GE Energy responded by moving to compel arbitration under arbitration clauses in the construction contracts. Although GE Energy was not a signatory to those contracts, it argued that it could compel Outokumpu to arbitrate under principles of equitable estoppel. That doctrine permits a defendant to compel arbitration under a contract, despite not being a signatory, if the plaintiff must rely on the contract to establish its claims.

The district court compelled arbitration, but the U.S. Court of Appeals for the Eleventh Circuit reversed. It reasoned that the New York Convention requires a court to refer a dispute to arbitration only where "the parties" agreed to arbitrate, and here GE Energy was not a signatory to the arbitration agreements.

The Supreme Court reversed. The New York Convention, it held, does not prohibit nonsignatories from enforcing arbitration agreements based on domestic doctrines like equitable estoppel. The Convention requires courts to refer disputes to arbitration when both parties are signatories to an arbitration agreement, but it does not prohibit courts from enforcing arbitration agreements in other circumstances when permitted by domestic law. The Convention's drafting history and post-ratification interpretations by other countries confirmed that interpretation.

GE Energy makes it easier for nonsignatories to enforce international arbitration agreements. Complex business transactions often involve many parties, whose roles may change over time. Doctrines like equitable estoppel facilitate arbitration consistent with the intent of the parties, despite a technical mismatch between the parties to the dispute and the signatories to the agreement. *GE Energy* ensures that parties can continue to invoke those doctrines even where the international nature of the dispute brings the New York Convention into play. Expect this decision to result in a further increase in the number of international arbitrations, which has already risen by more than 50% over the past decade.

Of course, domestic doctrines still impose limits on nonsignatory enforcement. Arbitration is fundamentally a creature of consent, so a business seeking to enforce an arbitration agreement against a party with which it did not contract must ordinarily show that the other party consented in some manner to arbitration. Although *GE Energy* removes one obstacle, disputes are still sure to arise over nonsignatory enforcement. Businesses would be well advised to anticipate and head off those disputes through careful drafting of arbitration agreements in the first place.

GE Energy *makes it easier for nonsignatories to enforce international arbitration agreements.*

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

ERISA — statute of limitations

Intel addressed whether a plaintiff suing under the Employee Retirement Income Security Act is deemed to have "actual knowledge" of information he received in disclosure documents but did not read or does not recall reading.

Under ERISA, employee retirement plans are managed by fiduciaries who must administer the plans in the interest of participants and their beneficiaries. A participant or beneficiary who believes a fiduciary has breached that duty may sue for resulting losses. The suit must be filed within three years of when the plaintiff had "actual knowledge" of the breach.

In *Intel*, the plaintiff was a former Intel employee who participated in the company's retirement plans. He filed a class action against the plans' administrators, alleging they had breached their fiduciary duties by overinvesting in alternative assets such as hedge funds and commodities. The plan administrators argued that the suit was untimely because, more than three years before filing suit, the plaintiff had received numerous disclosure documents explaining the plans' investments. The plaintiff responded by claiming that he had not read, or did not recall reading, the disclosures, and thus did not have "actual knowledge" of their contents.

The district court granted summary judgment to the plan administrators. But the U.S. Court of Appeals for the Ninth Circuit reversed. Emphasizing that the statute requires "actual" knowledge, the court concluded that the plaintiff's testimony that he had not read, or did not remember reading, the documents created a dispute of fact as to when he *actually* knew of the allegedly imprudent investments.

The Supreme Court affirmed. It held that, to have "actual knowledge" of information, a person must in fact be aware of that information. The Court distinguished actual knowledge from "constructive knowledge," which focuses on what a person *should have known* through reasonable diligence. While many statutory deadlines run from the date a person should have known of the basis for his claim, the ERISA statute of limitations at issue requires actual knowledge. The statute of limitations thus does not start to run until the plaintiff is actually aware of the relevant facts—no matter how prominently those facts might be disclosed in documents the plan sends to participants.

Intel is a significant win for ERISA plaintiffs that will make it more difficult for retirement plan fiduciaries to avoid suit based on information buried in disclosure documents. Even where a plaintiff received multiple documents disclosing the basis for his claim, he can avoid summary judgment on a statute-of-limitations defense by testifying that he did not read or does not remember reading the documents. Of course, the court may disbelieve his testimony at trial, and differences among class members who received the disclosures may make it harder to maintain the suit as a class action. But the risk of enormous class-action liability may pressure defendants to settle, even where the claims relate to events from long ago.

The Court was careful to tie its holding to ERISA's specific reference to "actual knowledge." In contexts involving different statutory language, such as securities litigation, defendants will continue to invoke information in prospectuses and other SEC filings to head off suits. Thus, while a welcome development for ERISA plaintiffs, *Intel* does not reduce the standard for classic shareholder securities fraud claims, which often proceed alongside ERISA claims.

Intel *is a significant win for ERISA plaintiffs that will make it more difficult for retirement plan fiduciaries to avoid suit based on information buried in disclosure documents.*

Liu v. SEC, No. 18-1501

SEC enforcement actions — disgorgement

Liu addressed whether the Securities and Exchange Commission has authority to seek disgorgement in enforcement actions brought in federal court.

The case arose out of an SEC enforcement action against a married couple, Charles Liu and Xin Wang, who were accused of defrauding Chinese immigrant investors. Liu and Wang raised about $27 million from investors in connection with a federal program that permits noncitizens to apply for permanent residence in exchange for investments that create jobs in the United States. The investors thought their money was going toward a cancer treatment center. But Liu and Wang spent nearly $20 million on purported marketing expenses and salaries, and diverted a substantial portion to personal accounts and a company under Wang's control. Only a fraction of the money went toward a lease, property improvements, and a proton-therapy machine for the cancer treatment center.

The Securities Exchange Act authorizes the SEC to seek "equitable relief" in federal court. Invoking that authority, the SEC sued Liu and Wang, demanding that they "disgorge" the amounts they received from investors. Ruling in favor of the SEC, the district court ordered Liu and Wang to disgorge almost the entire $27 million they received from investors, and held them jointly and severally liable. The U.S. Court of Appeals for the Ninth Circuit upheld that ruling.

The Supreme Court vacated and remanded. Liu and Wang argued that disgorgement did not qualify as "equitable relief" because it amounted to a penalty to deter wrongdoing. The Supreme Court disagreed. Surveying precedent, it found that equity courts had traditionally imposed remedies that deprived wrongdoers of their ill-gotten gains. Although those remedies had gone by different names, the Court found that history sufficient to support the SEC's authority to seek disgorgement in enforcement actions.

Nonetheless, the Court imposed several significant limits. Disgorgement, it held, may not exceed a defendant's net profits, so legitimate expenses must be deducted. Moreover, defendants are generally liable only for their own profits, not jointly and severally liable for profits received by others. Finally, disgorged funds must be returned to victims, at least where it is possible to do so. Because it was not clear whether the award in this case complied with those limits, the Court remanded for further proceedings.

By approving disgorgement as an equitable remedy, *Liu* handed a significant win to the SEC and investors. Between 2010 and 2018, the SEC obtained $13.8 billion in disgorgement and distributed 75% of it to defrauded investors. The Court's decision preserves those remedies for investors, along with the corresponding financial risk to businesses facing SEC enforcement actions.

The Court's decision, however, leaves many questions unresolved. The Court indicated that a court need not deduct expenses that were themselves "wholly fraudulent," and that joint and several liability could be permissible where the defendants were "partners" in wrongdoing. The Court also left open whether disgorged funds can be transferred to the U.S. Treasury when it is not feasible to disburse them to victims. Those issues remain to be litigated in future cases.

*By approving disgorgement as an equitable remedy, **Liu** handed a significant win to the SEC and investors.*

Maine Community Health Options v. United States, No. 18-1023

Affordable Care Act — government payments to insurers

Maine Community Health addressed whether insurers could recover payments the federal government had promised under the Affordable Care Act, but refused to pay because it had not appropriated the necessary funds.

The Affordable Care Act called for the creation of health-benefit exchanges where individuals can purchase health insurance. To encourage insurance companies to participate in those exchanges, the ACA created a temporary "Risk Corridors" program. Under that program, if a participating insurer lost money beyond a certain threshold, the federal government promised to pay the insurer. Conversely, insurance companies that earned profits beyond a certain threshold had to pay the government a corresponding amount.

Over the three-year life of the Risk Corridors program, insurers incurred losses totaling more than $12 billion. The government, however, never paid them in full. Instead, each year, the appropriations bill for the agency running the program included a rider that prohibited the appropriated funds from being used to pay the insurers' losses.

Several insurers sued the government for damages. One of the insurers initially prevailed; others did not. On appeal, the U.S. Court of Appeals for the Federal Circuit ruled for the government. It agreed with the insurers that the ACA created an obligation for the government to pay them. But it concluded that the later appropriations riders impliedly repealed or suspended that obligation.

The Supreme Court reversed. It held that the ACA's mandatory language—directing that the government "shall pay" insurers for their qualifying losses—obligated the government to pay the insurers in full. The Court also held that Congress had not impliedly repealed that obligation through the appropriations riders. Congress's failure to appropriate sufficient funds to pay government obligations, the Court explained, did not repeal or discharge those obligations.

Maine Community Health is a major win for health insurers, allowing them to recover billions of dollars in payments that Congress promised but then tried to withhold. A ruling against the insurers would have fostered significant doubts about the reliability of the government's promises in connection with the ACA and the insurance markets it sought to create.

While the insurers prevailed here, parties with claims against the federal government in other contexts still face significant risks. Plaintiffs suing the government often confront jurisdictional restrictions, damages limitations, and sovereign immunity impediments that do not apply to suits between private businesses. *Maine Community Health* turned on the mandatory "shall pay" language in the ACA. Parties doing business with the government in other contexts should carefully consider the unique challenges that disputes with the government may pose.

Maine Community Health *is a major win for health insurers, allowing them to recover billions of dollars in payments that Congress promised but then tried to withhold.*

Ritzen Group, Inc. v. Jackson Masonry, LLC, No. 18-938

bankruptcy — automatic stay

Ritzen addressed whether a bankruptcy court's order denying relief from the automatic stay is immediately appealable.

The filing of a bankruptcy petition generally imposes an "automatic stay" that suspends litigation and other efforts to collect from the debtor outside the bankruptcy case. A creditor can still pursue its claims within the bankruptcy case, which may encompass many discrete disputes involving different creditors. But a creditor that wants to pursue its claims outside the bankruptcy case must first obtain relief from the automatic stay from the bankruptcy court.

In this case, Ritzen had sued Jackson in state court for breach of contract. While the suit was pending, Jackson filed for bankruptcy, which automatically stayed the litigation. Seeking to proceed with the state-court case, Ritzen asked the bankruptcy court for relief from the automatic stay. The bankruptcy court denied relief. Ritzen did not immediately appeal that order. Instead, Ritzen pursued its breach-of-contract claim in the bankruptcy case. The bankruptcy court disallowed the claim, finding that Jackson had not breached the contract. The court then confirmed Jackson's reorganization plan, concluding the bankruptcy case.

After confirmation, Ritzen appealed the bankruptcy court's order denying relief from the automatic stay. The district court and the U.S. Court of Appeals for the Sixth Circuit both rejected the appeal as untimely. They concluded that Ritzen was required to appeal the order immediately, rather than waiting until after the entire bankruptcy case had concluded.

The Supreme Court affirmed. It explained that, under the Bankruptcy Code, parties have 14 days to appeal from final judgments, orders, and decrees in bankruptcy cases and proceedings. The Court concluded that adjudication of a request for relief from the automatic stay is a discrete bankruptcy court "proceeding." Accordingly, an order conclusively denying relief from the stay is a final order that must be appealed within 14 days.

Ritzen provides guidance for what constitutes a final order in the bankruptcy context, requiring an immediate appeal. Courts have already applied the decision beyond the automatic stay. Businesses involved in bankruptcies—whether as debtors or creditors—should be watchful for potentially final orders to ensure that claims are not lost simply by failing to file a timely appeal.

The economic turmoil caused by the COVID-19 pandemic makes bankruptcy protection more important than ever. By halting litigation, however, the automatic stay can delay creditors' recoveries and allow collateral to decline in value. Businesses with claims against bankrupt companies will often want relief from the stay, allowing them to pursue their claims in separate lawsuits rather than as part of a sprawling bankruptcy case. *Ritzen* makes clear that creditors denied relief from the automatic stay must act promptly to preserve their appeal rights.

***Ritzen** makes clear that creditors denied relief from the Bankruptcy Code's automatic stay must act promptly to preserve their appeal rights.*

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

constitutional law — separation of powers

Seila addressed whether restrictions on the President's power to remove the Director of the Consumer Financial Protection Bureau are constitutional.

Created in the wake of the 2008 financial crisis, the CFPB is an independent agency responsible for regulating consumer debt products, such as credit cards and loans. It administers more than 18 federal laws, including the Fair Debt Collection Practices Act and Fair Credit Reporting Act. Unlike other independent agencies run by commissions with multiple members, the CFPB is headed by a single Director. The statute creating the CFPB provides that the Director cannot be removed by the President except for inefficiency, neglect of duty, or malfeasance.

This case arose when the CFPB issued a civil investigative demand to Seila Law, seeking information about the firm's provision of debt-relief services. The firm refused to comply. It argued that the demand was invalid because the CFPB's structure—with a single Director removable only for cause—violated the constitutional separation of powers.

The CFPB sought to enforce the demand in district court. The district court granted that request, and the U.S. Court of Appeals for the Ninth Circuit affirmed. Noting that the Supreme Court had upheld for-cause removal restrictions in other contexts, the Ninth Circuit concluded that limiting presidential authority to remove the CFPB Director was likewise constitutional.

The Supreme Court vacated and remanded. The Court explained that the separation of powers generally requires that the President be able to hold executive officials accountable, including by removing them at will. While the Court has sometimes upheld for-cause removal restrictions, those cases involved either multimember expert bodies like the Federal Trade Commission or inferior officers with limited duties. The CFPB, by contrast, is led by a single individual who wields significant executive authority. The Court held that insulating such a powerful executive officer from presidential control is unconstitutional. The Court thus struck down the CFPB Director's removal protections, while leaving the Director's regulatory and enforcement authority intact.

By making the CFPB's Director removable at will, *Seila* subjects the agency to greater presidential control. Going forward, businesses can expect the CFPB to exercise its broad regulatory and enforcement powers in ways that hew more closely to each administration's policy priorities, even if the Director was appointed by a different President.

The Court's decision creates considerable uncertainty, however, about the fate of past CFPB actions. Regulations issued and enforcement actions taken while the Director was unconstitutionally insulated from presidential control may be subject to challenge. While the Director might be able to ratify many of those actions, it is questionable whether she may do so with retroactive effect. Regulated businesses thus may wish to consider raising separation-of-powers arguments in litigation involving the CFPB or other agencies with similar limitations on the President's removal authority.

By making the Director of the Consumer Financial Protection Bureau removable at will, ***Seila*** *subjects the agency to greater presidential control.*

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

ERISA — standing to sue

Thole addressed whether participants in a defined-benefit retirement plan have standing to sue for mismanagement of the plan's assets.

Employee retirement plans generally fall into two categories: defined-benefit plans and defined-contribution plans. A defined-benefit plan pays retirees a fixed amount each month regardless of the plan's performance. By contrast, in a defined-contribution plan (such as a 401(k) plan), benefits are tied to the value of a retiree's account, which can depend on the plan's performance.

In *Thole*, the plaintiffs were former U.S. Bank employees who participated in the bank's defined-benefit retirement plan. They sued the bank under the Employee Retirement Income Security Act, alleging that it breached its fiduciary duties by investing the plan's assets in the bank's own mutual funds and by paying itself excessive management fees. They claimed that the plan lost nearly $750 million as a result. Despite those losses, the plaintiffs continued to receive their fixed benefit payments each month.

The district court dismissed the case. The U.S. Court of Appeals for the Eighth Circuit affirmed, holding that the plaintiffs lacked statutory standing to sue under ERISA.

The Supreme Court affirmed on constitutional grounds. Article III of the Constitution, it explained, requires plaintiffs suing in federal court to have "standing"—a concrete stake in the outcome of the litigation. The Court held that the plaintiffs had not satisfied that requirement. They had received all of their monthly benefits so far. And because their plan was a defined-benefit plan, they were entitled to receive the same fixed payments for the rest of their lives, whether they won or lost their lawsuit. As a result, the Court concluded, they had no concrete stake in the litigation and lacked Article III standing.

The Court left open the possibility that participants in a defined-benefit plan could sue if the mismanagement was so egregious that it substantially increased the risk that the plan would fail and be unable to pay future benefits. But the Court held that the plaintiffs had not adequately alleged that theory in this case.

Thole makes it significantly harder for participants in defined-benefit retirement plans to sue for mismanagement of plan assets. Retirees may find themselves unable to hold plan managers accountable until it is too late to remedy the problem. Plan managers will welcome this additional line of defense against costly lawsuits.

That said, *Thole* does not give plan managers free rein. The Department of Labor can sue to enforce managers' fiduciary duties even if plan participants cannot. The Court's decision is also unlikely to impede suits by participants in defined-contribution plans, where mismanagement may have a direct impact on the benefit payments participants receive.

***Thole** makes it significantly harder for participants in defined-benefit retirement plans to sue for mismanagement of plan assets.*

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

patents — inter partes review

Thryv addressed whether a patent owner may appeal the Patent Office's determination that a petition for inter partes review is timely.

Inter partes review is a frequently used administrative process that allows the Patent Office to reconsider the validity of a previously issued patent. Defendants accused of infringing a patent often respond by requesting inter partes review, because it permits them to challenge the patent under a lower standard of proof than applies in federal court litigation. The process, however, is subject to a time limitation: The Patent Office may not institute inter partes review if the challenger waited more than one year after being served with a complaint accusing it of patent infringement. The statute provides that the Patent Office's decision whether to institute inter partes review is "final and nonappealable."

In this case, Click-To-Call owned a patent relating to technology for anonymous telephone calls. The patent's exclusive licensee sued Thryv for infringing the patent, but the suit was voluntarily dismissed. Many years later, Thryv petitioned for inter partes review of the patent. Click-To-Call responded that the petition was untimely because it was filed more than one year after the infringement suit. The Patent Office rejected that argument, reasoning that the earlier suit did not trigger the one-year time bar because it was dismissed without prejudice. The Patent Office instituted inter partes review and eventually found thirteen of the patent's claims unpatentable.

Click-To-Call appealed the Patent Office's timeliness determination to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit held that Click-To-Call could challenge the ruling despite the statute's declaration that Patent Office decisions on whether to institute review are "nonappealable." The court then held that Thryv's petition was untimely in light of the earlier infringement suit.

The Supreme Court vacated and remanded with instructions to dismiss for lack of jurisdiction, holding that Click-To-Call was prohibited from appealing the Patent Office's timeliness decision. The Court held that the statutory prohibition on appeals generally applies to any Patent Office determination made in instituting an inter partes review, at least where the grounds for appeal are closely tied to the statutes relating to the institution decision. The Court concluded that the one-year time limitation met that standard, as it imposed a condition on the Patent Office's authority to institute review. Accordingly, a patent owner cannot contest the timeliness of a petition for inter partes review on appeal.

Since Congress created inter partes review in 2011, it has been a popular vehicle for companies to challenge patents they are accused of infringing. *Thryv* encourages that approach by making it harder for patent owners to oppose review. A patent owner may still urge the Patent Office to deny review because the challenger's petition was filed too late. But if that effort fails, the patent owner cannot renew its timeliness objection on appeal.

The Court's reasoning indicates that other issues relating to institution of inter partes review may likewise be unappealable. Patent owners should therefore present their strongest possible objections to institution before the Patent Office at the outset—they may not get a second chance.

*Under **Thryv**, a patent owner cannot contest the timeliness of a petition for inter partes review on appeal.*

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

trademarks — Internet domain names

Booking.com addressed the eligibility of Internet domain names for federal trademark registration.

Booking.com is a company that offers travel-reservation services through its website located at booking.com. The company applied to register a trademark for the name "Booking.com." The U.S. Patent and Trademark Office refused, ruling that the name was generic and therefore ineligible for registration. The word "booking" merely referred to the services the company offered. And in the PTO's view, adding ".com" to an otherwise generic name did not create an eligible trademark.

Booking.com sought review in district court, which rejected the PTO's decision. Citing evidence of consumer perception, the court held that consumers would understand "Booking.com" to refer to Booking.com's service specifically, not just any travel website. The name therefore qualified for registration. The U.S. Court of Appeals for the Fourth Circuit affirmed.

The Supreme Court likewise affirmed. The Court rejected the PTO's position that combining a generic term with ".com" necessarily produces another generic term. Instead, whether "Booking.com" was generic turned on whether consumers understood the term to refer to online travel-reservation services as a class, or to Booking.com's service in particular. The evidence showed that consumers understood Booking.com to refer to a specific service. Consumers would not describe another travel website, like Travelocity, as a "Booking.com." Nor would a consumer ask a frequent traveler to recommend her favorite "Booking.com" provider. Accordingly, the Court held that "Booking.com" was not generic and was eligible for trademark registration.

The Court distinguished prior cases finding names like "Wine Company" or "Grain Company" ineligible. Because only one company can occupy an Internet domain name at a time, adding ".com" to a word tends to identify a specific provider in a way that adding "Company" or "Inc." does not. The Court also denied that its decision would hinder competition, explaining that other travel companies could still incorporate terms like "booking" into their own, distinct names.

After *Booking.com*, businesses that offer goods or services online would be well advised to seek federal trademark registration for their domain names. Federal registration confers important benefits, including a presumption that the mark is valid. Registration is not automatic, however. As the Court explained, eligibility turns on consumer perception. A company must be prepared to prove that consumers identify the domain name with its specific business.

Registration, moreover, is only one step in protecting a trademark. Disputes over whether competing names are confusingly similar will also arise. The Court recognized that Internet domain names are a crowded space and that a trademark like "Booking.com" would not necessarily preclude competitors from using similar names like "ebooking.com" or "hotel-booking.com." Businesses seeking to protect their brands should prepare for contentious disputes with similarly named competitors.

*After **Booking.com**, businesses that offer goods or services online would be well advised to seek federal trademark registration for their domain names.*

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