Weil

WEIL'S SCOTUS TERM IN REVIEW

By Appeals & Strategic Counseling
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INTRODUCTION

Weil's Appellate & Strategic Counseling group welcomes you to its inaugural edition of **Weil's SCOTUS Term in Review**. Here, we summarize and analyze the cases from the 2022 Supreme Court term that are most germane to our clients' businesses.

The Supreme Court's business-related cases largely maintained the status quo, without significantly changing the law. The Court adopted the majority approach on many of the issues before it, and it left many critical questions unanswered, including the scope of immunity under Section 230 of the Communications Decency Act and the extraterritorial scope of the Lanham Act. These issues will be the subject of significant litigation in the lower courts and may ultimately have to be resolved by the Court in future cases. The one notable exception is *Mallory v. Norfolk Southern Railway Co.*, in which the Supreme Court held that, as a matter of Due Process, a State could require an out-of-state business to consent to general personal jurisdiction as a condition of doing business in that state. That is a significant shift, although the Court left open the question of whether such a mandate violates the dormant Commerce Clause.

Interestingly, this Term saw fewer 6-3 decisions—with the Republican appointed Justices in the majority and the Democrat appointed Justices in dissent—than many observers had anticipated. The Court seemed to favor incremental changes in the law rather than more dramatic reshaping. There are some obvious exceptions to this trend, including the decision regarding affirmative action. But in many cases—including *Slack Technologies* and *Gonzalez*, discussed below—the Court largely avoided disruption of existing initiatives or prevailing judicial practice.

CASES REVIEWED

JURISDICTION & PROCEDURE

Axon Enterprise, Inc. v. FTC; *SEC v. Cochran*: Court Allows Collateral Challenges in District Court to Agency Proceedings

Held: Parties subject to administrative proceedings may file suit in federal district court to enjoin those proceedings based on arguments that the agency's structure or existence is unconstitutional (Kagan, J.).

The plaintiffs were the subjects of administrative proceedings by the FTC and the SEC, and filed suits in federal district court collaterally challenging the constitutionality of those proceedings. The government sought to dismiss the actions as premature and filed in the wrong place. The government argued that the parties were required to raise those constitutional arguments in the agency proceeding itself and in a subsequent petition to a circuit court to review the agency's decision, but that the agency's proceedings were not yet complete. The Supreme Court rejected that argument. Instead, the Court allowed parties to immediately challenge the constitutionality of an agency proceeding in district court, even while administrative proceedings are ongoing.

This decision allows parties to forgo agency adjudication of certain constitutional challenges and provides a powerful new tool for companies faced with enforcement proceedings in administrative courts. The Supreme Court in recent years has taken a more scrutinizing view of the constitutionality of agency proceedings, and after *Axon*, companies may now bring collateral challenges to the constitutionality of administrative proceedings even while those proceedings remain ongoing—potentially terminating the proceedings on constitutional grounds years before they would have been resolved on the merits.

Coinbase, Inc. v. Bielski: An Appeal of a Denial of Motion to Arbitrate Stays Trial Court Proceedings

Held: An appeal from a denial of a motion to compel arbitration in federal court automatically stays district court proceedings pending appeal (Kavanaugh, J.).

The Court addressed the question of whether a defendant's appeal from the denial of a motion to compel arbitration, under 9 U.S.C. § 16, automatically stays district court proceedings while the appeal remains pending. The majority held that the answer was yes, relying on the Court's prior decision in *Griggs v. Provident Consumer Discount Co.* In *Griggs*, the Court held that an appeal "divests the district court of its control over those aspects of the case involved in the appeal." Applying that principle to an interlocutory appeal of an order denying a motion to compel arbitration, the Court observed that "the question on [such an] appeal is whether the case belongs in arbitration or instead in the district court," and thus "the entire case is essentially 'involved in the appeal.'" Accordingly, the principle from *Griggs* controlled and requires an automatic stay of all proceedings pending resolution of an appeal from an order denying arbitration.

The Court's decision provides much needed clarity on an important issue and preserves the benefits parties bargain for by entering into an arbitration agreement. As the majority noted—and as discussed by Weil in its *amicus* brief on behalf of the Chamber of Commerce and the NFIB Small Business Legal Center in support of Coinbase—those benefits are "efficiency, less expense, less intrusive discovery, and the like." Litigants seeking to enforce arbitration agreements can now rest assured they will not be required to potentially forgo those benefits at the discretion of the district court judge in order to appeal an order denying a motion to compel arbitration. This is particularly impactful in putative class actions, where the cost and burden of having to proceed through discovery during the interlocutory appeal might otherwise lead to coercive settlements. *Coinbase* thus makes arbitration agreements even more valuable than they already were for businesses seeking to avoid runaway litigation risks.

Mallory v. Norfolk Southern Railway Co.: Supreme Court Condones All-Purpose "Consent" Jurisdiction Over Companies Registered to Do Business

Held: A State may require a company to consent to the all-purpose jurisdiction of its courts as a condition for registering to do business in that State (Gorsuch, J.).

The Court addressed whether Pennsylvania state courts have jurisdiction over a railroad by virtue of it having registered to do business in Pennsylvania as an out of state corporation. Pennsylvania expressly makes it a condition of registering that a corporation must also consent to general jurisdiction, but otherwise general jurisdiction would not have been available on the facts of the case.

Writing for the majority, Justice Gorsuch ruled in favor of the plaintiffs. The Court observed that the Supreme Court has long held that States and their courts may exercise all-purpose (i.e., general) personal jurisdiction over any individual who is properly served within their territorial boundaries, via so-called "tag jurisdiction," even if they are merely passing through the State. Justice Gorsuch reasoned that exposing companies to all-purpose personal jurisdiction in any State in which they are registered to do

"Not every case poses a new question. This case poses a very old question indeed—one this Court resolved more than a century ago . . ." (Gorsuch, J.)

business is no different. Because consent has always been recognized as a valid ground for the exercise of all-purpose jurisdiction, the majority viewed its decision as doing nothing more than reaffirming that principle.

Notably, the majority was comprised of an unusual lineup, combining Justices typically viewed as the most conservative with those perceived as the most liberal (Gorsuch, Thomas, Alito, Sotomayor, and Jackson). The Justices typically viewed as more moderate joined together in the dissent (Roberts, Kagan, Kavanaugh, and Barrett).

The decision has significant and far-reaching implications. All States require a company wishing to do business within their borders to register, and all of those States require the company to appoint an agent to receive service of process within the State. If that is sufficient to expose a company to all-purpose jurisdiction, then companies could now effectively be sued in court in the United States for virtually any case. Pennsylvania has one of the more explicit business registration statutes when it comes to consent, but other States are likely to amend their registration statutes going forward to conform. In any event, Pennsylvania could quickly become a magnet for plaintiffs seeking to hale corporate defendants into court in an unfavorable forum, because plaintiffs can now do so without having to establish any connection between the corporation and Pennsylvania beyond its registration.

BUSINESS LIABILITY

Slack Technologies v. Pirani: Court Upholds Longstanding Traceability Requirement for Securities Registration Claims

Held: Section 11 of the Securities Act requires a plaintiff to plead and prove that he purchased shares traceable to the allegedly defective registration statement (Gorsuch, J.).

The defendant in this securities case sought dismissal on the ground that Section 11 of the Securities Act—regarding false or misleading statements in registration statements—requires that the plaintiff plead and prove that it actually purchased shares subject to the registration statement. Endorsing the approach that most lower courts had previously adopted, the Supreme Court focused on the text and context of the statute, observing that when Section 11 gives standing to holders of "such securit[ies]" to sue, it is referring to those securities actually issued pursuant to a false or misleading registration statement, and not merely the same general class of securities. In doing so, the Court noted that while direct listings are a recent development, the scope of Section 11 is not—the traceability requirement has been consistently applied by the lower courts for more than 50 years. However, the Court did note that it was not resolving whether Section 12 of the Securities Act—which imposes liability for false or misleading statements in a prospectus—entails a similar requirement.

The decision confirms that plaintiffs under Section 11 must establish traceability to the challenged registration statement. Given this decision, it would not be surprising to see more companies opting to offer securities via direct listing in an effort to mitigate Section 11 exposure and force putative plaintiffs to meet the heightened pleading and proof requirements of Section 10(b) of the Securities Exchange Act. Companies defending against Section 11 lawsuits, particularly those arising out of direct listings, should carefully scrutinize the pleadings and the evidence to determine whether plaintiffs have adequately alleged and proven that the shares at issue are traceable to the challenged registration statement. Lastly, defendants should also be aware that plaintiffs may continue to advance the minority view that claims under Section 12 do not require that they "trace" their securities back to a false or misleading prospectus.

Gonzalez v. Google / *Twitter v. Taamneh*: Twitter and Google Off the Hook for Terrorist Attacks; Section 230 Questions Remain Open

Held: Social media companies are not liable for aiding and abetting ISIS terrorist attacks that the victims' families claimed were caused by the platforms' algorithms that promoted terrorist content (Thomas, J.).

In two highly-anticipated cases implicating the scope of Section 230 of the Communications Decency Act—the law that shields internet platforms from liability for third-party content they publish on their websites—the Court side-stepped that contentious legal issue, instead delivering the platforms a major win by rejecting the underlying theory of liability. Families of the victims of terrorism had sued two major internet platforms (YouTube and Twitter), arguing that they were liable for aiding and abetting under the Anti-Terrorism Act because their platform algorithms had promoted other terrorist content to people who were watching videos that ISIS (the terrorist group that had perpetrated the terrorist attacks in question) had uploaded to the platforms.

In a unanimous opinion written by Justice Thomas, the Court in *Twitter* rejected that theory on the merits, holding that the plaintiffs had failed to state a claim. Synthesizing longstanding principles of civil aiding-and-abetting law, the Court explained that such liability requires "conscious, voluntary, and culpable participation in another's wrongdoing." The Court held that the allegations did not meet that standard, because the only affirmative conduct alleged was that the platforms "set[] up their algorithms to display content relevant to user inputs and user history." There was

"The phrase 'aids and abets' in § 2333(d)(2), as elsewhere, refers to a conscious, voluntary, and culpable participation in another's wrongdoing." (Thomas, J.)

no allegation that the platforms singled out ISIS for "special treatment"; the platforms' "relationship with ISIS and its supporters" was no different than their relationship with other users: "arm's length, passive, and largely indifferent."

In *Gonzalez*, the Supreme Court had granted certiorari to decide whether an internet platform is immune from liability pursuant to Section 230 when it provides algorithmic recommendations of allegedly tortious third-party content. The Court, however, ultimately declined to decide the reach of Section 230, instead concluding that its decision in *Twitter* likely compelled the dismissal of the suit without regard to Section 230. The ruling in *Gonzalez* thus leaves Section 230 where it stands, with lower courts having adopted a broad construction of the statute, including a consensus that recommending or notifying users about third-party content is protected by Section 230.

Questioning by the Justices at oral argument signaled that artificial intelligence may be the next frontier in the battle over the scope of Section 230, including just how far the Ninth Circuit's "neutral tools" test for determining whether a platform is a "publisher" of third-party content extends. For now, a plaintiff's claim does not cease to treat the platform as the publisher of third-party content if the plaintiff alleges that the third party merely took advantage of neutral, non-tortious tools that are part of the platform infrastructure available to any third party with content hosted on the platform.

INTELLECTUAL PROPERTY

Amgen v. Sanofi: Court Endorses Full Scope Enablement Requirement

Held: To satisfy the enablement requirement under Section 112 of the Patent Act, a specification must enable the full scope of the invention as defined by its claims (Gorsuch, J.).

In a unanimous opinion, the Supreme Court affirmed the Federal Circuit's invalidation of Amgen patents that had functionally claimed a "genus" of antibodies defined by their function, rather than by their structure. The Court agreed with the Federal Circuit that the patents were invalid for lack of enablement because the specifications failed to provide adequate guidance for making and using the claimed antibodies.

Relying on precedent dating back to the 19th Century, the Court reaffirmed that the specification must "enable the full scope of the invention as defined by its claims," and "[t]he more one claims, the more one must enable." The Court acknowledged that "a specification may call for a reasonable amount of experimentation to make and use a patented invention," and "[w]hat is reasonable in any case will depend on the nature of the invention and the underlying art." But the Court held that the Amgen patents failed to provide the requisite guidance to enable the full scope of its broad claims. In particular, although "Amgen had identified the amino acid sequences of 26 antibodies" in the patents, its claims covered "potentially millions" of antibodies with the claimed function. And the specification's guidance for identifying antibodies "amount[ed] to little more than two research assignments," to engage in painstaking "trial-and-error" testing.

The Court's decision maintains the status quo, reaffirming the same enablement standard that has existed since the 1800s and that the Federal Circuit has long applied. Weil argued in favor of this outcome in its *amicus* brief on behalf of several small and medium biotechnology companies.

Abitron Austria GmbH v. Hetronic Int'l, Inc.: Court Adopts—But Does Not Define—Narrow View of Territorial Application of Lanham Act

Held: The Lanham Act does not have extraterritorial force, and instead extends only to claims where the infringing *use*—and not merely the effect—in commerce is domestic (Alito, J.).

This case involved alleged infringement of the plaintiff's trademark in a variety of countries; the plaintiff sought damages for all of the defendant's infringing acts, worldwide. The Court considered the territorial limits of the Lanham Act in two steps. First, the Court concluded that because there is no express provision of the Lanham Act that gives it extraterritorial force, the statute does not apply beyond the territorial boundaries of the United States. Second, the Court considered whether applying the Lanham Act to trademark infringements that occur outside of the United States but have effects on commerce within the United States, qualified as an impermissible extraterritorial use of the statute. The Court held that the relevant question for extraterritoriality purposes is the location of the relevant *conduct*, which, under the Lanham Act, is the location of the infringing use in commerce.

"The ultimate question regarding permissible domestic application turns on the location of the conduct relevant to the focus. And the conduct relevant to any focus the parties have proffered is infringing use in commerce . . ." (Alito, J.)

The decision clarifies that the territorial limits on the Lanham Act turn on the location of the offending conduct, that is, the allegedly infringing use of the trademark. The Court, however, did not elaborate on how to determine where the "use" takes place. In concurrence, Justice Jackson opined that the unlawful "use" of a trademark "does not cease at the place the mark is first affixed," but rather "can occur wherever the mark serves its source identifying function." Justice Jackson provided the decisive fifth vote for the majority over the dissent—who

advocated for an effects-based test—and so it remains unclear how much limiting force the Court's decision will actually have on the territorial scope of the Lanham Act.

OTHER CASES OF INTEREST

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College: Court Puts End to Affirmative Action in Public Universities

Held: College admissions programs that expressly factor race into the decision whether to admit a student violate the Equal Protection Clause of the Fourteenth Amendment (Roberts, C.J.).

In these two cases, the plaintiffs challenged college admissions programs at Harvard and the University of North Carolina that gave preferential weight to members of certain racial minorities. The Court held that such programs are unconstitutional, because the schools failed to justify their race-based classifications under the strict scrutiny standard. Specifically, the Court held that the programs were not operated in a way to permit meaningful judicial review, the schools failed to articulate a meaningful connection between the means employed and the goal of achieving racial diversity, and the schools impermissibly used race as a "negative" factor in excluding certain students from admission.

Although the case will have the most direct impact on affirmative action admissions programs at colleges and universities, it also raises questions as to whether businesses' diversity, equity, and inclusion initiatives may implicate federal laws that prohibit race based discrimination by private individuals and employers in terms similar to that of the Equal Protection Clause. The Court did not address the effect of its decision on cases arising under those statutes, but individuals who believe they were deprived of a job opportunity by virtue of a business's diversity, equity, and inclusion initiatives are likely to cite this decision in support of their claim. Whether and to what extent this decision supports such a claim will have to be litigated in the lower courts.

National Pork Producers Council v. Ross: Justices Decline to Go "Hog" on California Law

Held: A California law prohibiting the in-state sale of pork from a pig that had been "confined in a cruel manner" did not violate the Dormant Commerce Clause (Gorsuch, J.)

California has adopted a law that prohibits the sale of pork in California if the pigs were kept under "cruel" conditions. Out-of-state pork producers sued, arguing that the law violated the Dormant Commerce Clause because it effectively operated as extraterritorial regulation of the breeding of pigs nationwide: They contended that all pork producers would need to alter their pig-breeding methods to come into compliance, even if the producer was outside of California.

In a confusing and splintered decision, the Court rejected the challenge and upheld the law. Three Justices held that because the law does not facially discriminate against out-of-state businesses or regulate interstate transportation, there was no basis for striking it down. The remaining six Justices agreed that the law does not facially discriminate against out of state businesses, but held that the law could still be struck down if it unduly burdened interstate commerce in a way that was not counterbalanced by in state benefits. Four Justices (partially overlapping with both of the previous groups) held that if such balancing is appropriate, the challengers had failed to adequately allege a substantial burden on interstate commerce. And four Justices (the dissent) would have allowed the challenge to proceed.

Because the narrowest ground for the decision controls, the law going forward remains that businesses may challenge a state law on Dormant Commerce Clause grounds by asserting that the law substantially burdens interstate commerce and that the in-state benefits do not outweigh the out-of-state costs. Ultimately, the decision preserves the existing framework for Dormant Commerce Clause challenges and leaves for another day the question whether a law may ever be struck down for unduly burdening interstate commerce. But the decision will make it more difficult for companies to challenge overreaching state laws on the grounds that they violate the Commerce Clause.

Bartenwerfer v. Buckley: Weil Scores Unanimous Victory on Bar Against Bankruptcy Discharge of Fraudulently-Obtained Liabilities

Held: The Bankruptcy Code bars an individual debtor from discharging a liability obtained by actual fraud, regardless of the debtor's culpability in the fraud (Barrett, J.).

The case involved the interpretation of Section 523(a)(2)(A) of the Bankruptcy Code, which prevents the discharge of claims for "money . . . obtained by . . . actual fraud." A debtor sought to discharge a claim, even though it had been obtained by fraud, on the ground that she was not personally culpable in the fraud. In unanimously ruling for the creditor—represented by Weil—the Court held that the provision, "[b]y its terms," precludes the discharge of debts that are tainted by fraud. The Court's straightforward decision resolved a circuit split over the dischargeability of such debts in favor of creditors.

The decision makes it harder for debtors to discharge certain debts, thus providing more protection and certainty for creditors. To ensure maximum recovery, creditors should closely review and analyze their holdings to determine whether they may have been obtained by fraud. In short, the Court's decision in *Bartenwerfer* will facilitate the ability of fraud victims to obtain full compensation for their injuries.

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