That's a Wrap! United States Supreme Court Closes 2023 Term

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Authors:

Julia E. Browning
Stephen J. Marietta

With the close of the U.S. Supreme Court's October 2023 term, we offer this round-up, focusing on decisions of special interest from the business and commercial perspective.

Administrative

In a pair of cases, *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled the deference doctrine first articulated in *Chevron v. Natural Resources Defense Council*. That doctrine permitted federal courts to adopt an agency's reasonable interpretation of its originating statute. Now, federal courts must interpret statutes anew and are free to adopt their own interpretations. Though the Supreme Court did not overrule any cases that relied on *Chevron*'s deference framework, it invited the bar to challenge those decisions in the future. The impact of this case will be dramatic, as courts across the country will be reinterpreting (what used to be) settled understandings of countless statutes, including the Clean Air Act, the Clean Water Act, the Civil Rights Act, the Securities Exchange Act, and many more.

In another administrative case, the Court in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* held that the six-year statute of limitations for challenges under the Administrative Procedure Act accrues when a plaintiff suffers an injury from final agency action. That holding supplants the prior rule, which ended the statute of limitations six years after the agency action became final. In light of this ruling, plaintiffs should now find it easier to challenge older agency action. Indeed, in tandem with *Relentless* and *Loper Bright Enterprises*, the Court has left agencies' decisions less final and more open to attack.

Arbitration

The Court also issued a pair of decisions related to the Federal Arbitration Act.

First, in *Coinbase, Inc. v. Suski*, the Court held that, where parties have two contracts with differing provisions, a court must

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determine which provision governs. This case concerned parties that had two conflicting agreements – one containing an arbitration provision providing that an arbitrator must decide all disputes under the contract, including whether a disagreement is arbitrable; the other containing a forum selection clause providing that all disputes related to the contract must be decided in California courts. The Ninth Circuit held that the second contract's forum selection clause superseded the prior agreement, and the Supreme Court affirmed because a court must decide what the parties contractually agreed to. This case serves as a cautionary tale to carefully review supplemental agreements between the same parties to ensure consistency across arbitration provisions.

Second, while giving power to the courts in *Coinbase*, the Court in *Smith v. Spizzirri* made clear that courts do not have discretion to dismiss a suit when a party has requested a stay of proceedings pending arbitration under the Federal Arbitration Act (FAA). A dismissal, the Court held, violates the text, structure, and purpose of the FAA because the plain meaning of the word "stay" is a temporary suspension of legal proceedings and because the FAA is designed to give courts a supervisory role over arbitrations.

Bankruptcy

In *Harrington v. Purdue Pharma, L.P.,* the Court held that bankruptcy courts lack authority to approve non-consensual releases of non-debtors in a Chapter 11 plan. At issue was the Chapter 11 bankruptcy plan of Purdue Pharma, the manufacturer of OxyContin that is owned by several non-debtor members of the Sackler family. As liabilities were mounting from Purdue Pharma's role in the opioid epidemic, the Sackler family apparently drained the company of its assets for years to the tune of $11 billion. When the company eventually filed bankruptcy, the Sackler family pledged to return a portion of that money to the bankruptcy estate in exchange for a release of any existing or future opioid-related claims against the family (including fraud claims) and an injunction against the pursuit of any such claims, both of which were incorporated into the Chapter 11 plan. The Court held that nothing in the Bankruptcy Code authorizes this type of non-debtor release, which effectively grants the released parties a bankruptcy discharge without the need to file

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their own bankruptcy case. It further noted that the Sacklers' behavior flouted the Code's purpose, which requires debtors to act honestly and place all their assets on the table. The Court, however, stopped short of striking down *consensual* third-party releases in bankruptcy plans – expressing no view on that well-established practice. Going forward, non-debtor third parties seeking releases in Chapter 11 plans must garner the affirmative consent of potentially *all* claimants (or give claimants the ability to opt out of the proposed release) – a significant change to the Chapter 11 landscape.

In another bankruptcy matter, the Court interpreted who qualifies as a "party in interest" under § 1109(b) of the Bankruptcy Code, the provision that gives parties the right to be heard on any issue. In *Truck Insurance Exchange v. Kaiser Gypsum Co.*, the Court concluded that Congress intended the phrase "party in interest" to be interpreted broadly and held that an insurer with financial responsibility for bankruptcy claims is a "party in interest." Insurers can be directly and adversely affected by reorganization proceedings, the Court reasoned, and thus they "may raise and may appear and be heard on any issue" in a Chapter 11 case. Though *Truck Insurance* concerned an insurer that undoubtedly faced financial repercussions for bankruptcy claims, more peripheral parties can now likely argue that they, too, have a sufficiently direct interest that confers on them "party in interest" status.

Intellectual Property

The Court in *Vidal v. Elster* unanimously held that the U.S. Patent & Trademark Office did not violate the First Amendment when it refused to register the trademark "Trump Too Small." The Court grappled with the Lanham Act's "names clause," a prohibition on federal trademarks that consist of a name or identity of a particular individual without his or her consent. Tracing the history of the Lanham Act, the Court reasoned that this prohibition, although content based, was nonetheless constitutional because of the longstanding history and tradition of preventing confusion of trademark ownership. The Court cautioned, however, that its decision is narrow and that a historical approach will not necessarily be dispositive of other trademark-restriction challenges. That said,

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plaintiffs challenging trademark restrictions should not rely on those restrictions' content-based nature alone – particularly if the restriction existed at common law.

Labor and Employment

A unanimous Court ruled that whistleblowers asserting retaliation claims under § 1514A of the Sarbanes–Oxley Act of 2002 need not provide direct evidence of an employer's retaliatory intent. In *Murray v. UBS Securities, LLC*, a whistleblower claimed he was fired after he internally reported illegal and unethical conduct by higher-ups. The employer countered that the whistleblower's § 1514A claim failed because he produced no evidence of the company's retaliatory animus toward him. The Court ruled that nothing in the statutory text of Sarbanes-Oxley requires a showing of retaliatory intent, reasoning that 49 U.S.C. § 42121 – which § 1514A expressly adopts – creates a burden-shifting framework in which whistleblowers must prove only that retaliation "was a contributing factor in the unfavorable personnel action alleged in the complaint." As a result, employers defending against whistleblower suits may no longer raise an intent-based defense, while a whistleblower's evidentiary burden in these suits is now eased.

Securities

Lastly, the Court issued a pair of major securities decisions, each more favorable for defendants. First, in *Macquarie Infrastructure Corp. v. MOAB Partners L.P.*, the Court ruled that "pure omissions" of information required by Item 303 of Regulation S-K in securities filings are not actionable statements that can lead to liability under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Second, in *SEC v. Jarkesy*, the Court held that defendants facing civil penalties from the SEC for securities fraud are entitled to a jury trial under the Seventh Amendment. The upshot of these cases is that private plaintiffs claiming violations under § 10(b) must allege precise false or misleading statements made by a defendant; the SEC, meanwhile, must pursue traditional litigation in federal courts if the agency wishes to procure civil penalties from securities defendants.

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