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U.S. SUPREME COURT UPDATE: CASES OF INTEREST IN OCTOBER TERM 2020

The United States Supreme Court has decided and is still considering a number of cases on its October Term 2020 docket that should be of particular interest to the ABTL membership. This two-part article summarizes cases that involve the most prominent issues of interest to civil litigators before the Court this Term. This first part discusses cases that have been decided or argued so far.

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CIVIL PROCEDURE

A state can exercise specific jurisdiction over an out-of-state defendant even where the plaintiff's claims do not arise out of the defendant's forum contacts as a strict causal matter, as long as the defendant's forum contacts have a close enough relation to the claims to make the exercise of jurisdiction reasonable.

Ford Motor Co. v. Montana Eighth Judicial District Court, __ U.S. __, 141 S. Ct. 1017 (2021)

These consolidated cases address whether state courts in Montana and Minnesota have specific personal jurisdiction over two lawsuits against Ford. In both cases, resident plaintiffs suffered in-state injuries in car accidents involving Ford vehicles. Though Ford sells vehicles in both states, the vehicles at issue were manufactured and sold in other states. These cases thus raise the question of how closely related a defendant's forum state contacts must be to a plaintiff's claim to allow the state's courts to exercise personal jurisdiction over the defendant, a question previously left open by the Court and over which state and federal courts across the country have divided.

A state court's exercise of personal jurisdiction is limited by the Fourteenth Amendment Due Process Clause to circumstances where the defendant has "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington* 326 U.S. 310, 316 (1945). General personal jurisdiction exists where a defendant is "at home" (i.e., incorporated or headquartered) in the forum state and permits the state's courts to hear any claim against the defendant. Specific personal jurisdiction permits a state's courts to hear only those claims that have some connection to the defendant's contacts with the forum state—in particular, where the claims "arise out of or relate to" the defendant's forum-state contacts, and it is not unreasonable for the defendant to litigate in the forum state. These cases delve into the "arise out of or relate to" test.

At the Supreme Court, Ford urged that the connection required between the defendant's forum state contacts and the plaintiff's claims should be causal—both factually and proximately. Plaintiffs countered that the test should be less stringent: if a defendant cultivates a market for a product in the forum state, the defendant may be sued there for injuries caused by the product, whether or not the precise item that caused the plaintiff's injury was manufactured or sold in the forum state.

The Supreme Court unanimously agreed with plaintiffs' position and held that the exercise of specific personal jurisdiction was appropriate on the facts of these cases. The Court's opinion emphasized that Ford's in-state activities of advertising the model of car involved in the accidents, supporting a network of dealerships to sell and service those models, distributing replacement parts for those models, and cultivating a market for those models all related to the plaintiffs' claims arising out of

the in-state accidents involving that model of car, whether or not a strict causal connection existed. The Court did not provide further detail regarding how far this "related to" prong of the test extends, although it did indicate that the analysis has "real limits" (*e.g.*, internet sales might yield a different result).

In opinions concurring in the judgment, Justice Alito expressed the view that this "related to" analysis should not be extended further than the fact pattern involved in these cases, while Justice Gorsuch (joined by Justice Thomas) decried the incoherence of the Court's modern personal jurisdiction jurisprudence and called for a wholesale rethinking of this area of law to take account of modern technology.

Does 28 U.S.C. § 1447(d) permit a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court when the removing defendant premises removal in part on the federal-officer removal statute, 28 U.S.C. § 1442, or the civil-rights removal statute, 28 U.S.C. § 1443?

BP P.L.C. v. Mayor and City Council of Baltimore, No. 19-1189 (cert. granted Oct. 2, 2020; argued Jan. 19, 2021)

Generally, appellate review of an order remanding a case removed from state court is not permitted. However, under 28 U.S.C.§ 1447(d), orders remanding a case removed pursuant to the federal-officer removal statute (28 U.S.C. § 1442) or the civil-rights removal statute (28 U.S.C. § 1443) are reviewable. Three circuits have permitted review of any issue in a district court's remand order where the removal was premised at least in part on the federal-officer removal statute or civil-rights removal statute, while six circuits have held that review is permitted only as to the federal-officer or civil-rights ground for removal.

In this case, a group of fossil fuel energy companies removed a state court action brought by municipalities seeking damages arising from climate change allegedly caused by the energy companies' activities. The removal was based on multiple grounds, including federal question and federal common law grounds. Because the municipalities' complaint included allegations related to the energy companies' fossil fuel production at the direction of federal officers, the energy companies also premised removal on the federal-officer removal statute. The district court remanded the case, and the energy companies appealed. The Fourth Circuit held that appellate review was limited to the federal-officer ground for removal, and the Supreme Court granted certiorari to resolve the circuit split on this issue. Though the question presented is a matter of subject matter jurisdiction, the outcome of this case will determine whether the future of climate change litigation is in state or federal courts.

At oral argument, several of the justices expressed concern about appellate review of the entire remand order, noting the potential for inclusion of a barely colorable federal-officer removal ground in a defendant's notice of removal in order to bootstrap other removal grounds into an appeal of any remand order. However, several of the justices also questioned the municipalities' counsel vigorously about the fact that the text of section 1447(d) and Supreme Court precedent support the energy companies' position.

The energy companies and their amici have noted their interest in the Court issuing a ruling as to whether climate change litigation is a question of federal common law, but it is unclear whether the Court will rule on this issue, especially since only eight justices are participating in this case due to Justice Alito's recusal.

CONSUMER PROTECTION

The definition of an "automatic telephone dialing system" in the Telephone Consumer Protection Act of 1991 does not encompass all devices that can "store" and "automatically dial" telephone numbers because the definition requires that the device "us[e] a random or sequential number generator."

Facebook, Inc. v. Duguid, __ U.S. __, 141 S. Ct. 1163 (2021)

The Telephone Consumer Protection Act of 1991 (TCPA) prohibits the use of an automatic telephone dialing system (ATDS) to make calls to cellular phones without consent. The TCPA defines an ATDS as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator . . . and . . . to dial such numbers." 47 U.S.C. § 227(a)(1). The question in this case is whether an ATDS includes devices that can store and automatically dial telephone numbers even if such devices do not use a random or sequential number generator. This question is significant because if an ATDS does include such devices, nearly all modern telephones—including the 265.9 million smartphones in the United States—would fall into the definition, meaning their owners could potentially violate the TCPA inadvertently on a nearly constant basis.

Plaintiff sued Facebook in district court claiming Facebook violated the TCPA by sending security-related text messages to him without his consent. The district court granted Facebook's motion to dismiss on the ground that plaintiff had failed to allege

that Facebook's text messages were sent using an ATDS. Based on its earlier decision in *Marks v. Crunch San Diego*, LLC, 904 F.3d 1041 (9th Cir. 2018)—which held a device may be an ATDS if it has the capacity to dial stored numbers automatically, even if it does not use a random or sequential number generator—the Ninth Circuit reversed the trial court's dismissal.

The Supreme Court unanimously reversed the Ninth Circuit, holding that a device must have the capacity to store or generate phone numbers using a random or sequential number generator to qualify as an ATDS under the TCPA. The Court relied on normal rules of statutory construction, including the series qualifier canon, the statutory context, and the purpose of the TCPA. To plaintiff's claims that random or sequential number generators are "senescent technology," the Court responded that this was a matter for Congress to address.

A wave of class action litigation under the TCPA has risen in the past few years, much of which is now threatened by the Court's holding in this case. It remains to be seen whether this case will spell the death knell for that litigation or if Congress will amend the TCPA to codify the construction advocated by plaintiff here.

Section 13(b) of the Federal Trade Commission Act does not authorize the Federal Trade Commission (FTC) to seek equitable monetary relief such as restitution and disgorgement.

AMG Capital Management, LLC v. Federal Trade Commission, __ U.S. __, 2021 WL 1566607 (Apr. 22, 2021)

Section 13(b) of the Federal Trade Commission Act authorizes the FTC to seek preliminary and permanent injunctions. A majority of the circuits have held that section 13(b) also authorizes the FTC to seek equitable monetary relief, such as restitution and disgorgement. Though the Seventh Circuit previously held the same view, it recently rejected the availability of monetary relief under section 13(b) in *FTC v. Credit Bureau Center*, *LLC*, 937 F.3d 764 (7th Cir. 2019), creating a circuit split.

In this case, Scott Tucker managed businesses that provided short-term "Delaware Model" loans to consumers online—loans that automatically renew with no affirmative action by the consumer. The FTC filed suit against Tucker and his companies, alleging violations of section 5 of the Federal Trade Commission Act (prohibiting unfair or deceptive acts or practices) and seeking preliminary and permanent injunctive relief, disgorgement, and restitution under section 13(b). The district court found that Tucker and his companies had violated section 5 and awarded $1.27 billion in restitution to the FTC, which the FTC was not required to return to consumers if direct redress was impracticable. The Ninth Circuit affirmed this award, noting that it had repeatedly held that section 13(b)'s authorization of injunctive relief permits district courts to grant any additional equitable relief necessary to accomplish justice, including restitution.

Tucker and his companies urged the Supreme Court to follow the Seventh Circuit's interpretation and overturn the Ninth Circuit's affirmance of the restitution award. They pointed out that allowing the FTC to seek monetary relief under section 13(b) allows the FTC to avoid the procedural protections provided in section 19, which expressly authorizes the FTC to seek monetary relief for consumers. To obtain relief under section 19, the FTC must either (1) prove that the defendant engaged in conduct that violated the FTC's rules related to unfair or deceptive acts or practices, or (2) issue a cease and desist order to the defendant and prove in district court that a reasonable person would have known under the circumstances that the conduct was dishonest or fraudulent. In contrast, under section 13(b), the FTC is required only to show that it has reason to believe there is a violation of any law enforced by the FTC.

The Supreme Court unanimously ruled against the FTC in an opinion by Justice Breyer. The Court reasoned that the operative term "injunction" in section 13(b) does not encompass retrospective monetary relief and that the structure of the Federal Trade Commission Act—in particular, Congress's subsequent enactment of section 19's more cabined monetary remedy—weighs heavily against the FTC's position.

The Court's ruling removes a key enforcement tool that the FTC has used for many years to police consumer fraud, and there is already growing pressure in Congress to fill this gap. Thus, the Court may not have the last word on this issue.

CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

(1) Is the presumption against extraterritorial application of the Alien Tort Statute displaced by allegations that an American company generally conducted oversight of its foreign operations at its headquarters and made operational and financial decisions there, even though the conduct alleged to violate international law occurred in—and the plaintiffs suffered their injuries in—a foreign country? (2) Is a domestic corporation subject to liability under the Alien Tort Statute?

Nestlé USA, *Inc. v. Doe*, No. 19-416 & *Cargill*, *Inc. v. Doe*, No. 19-453 (cert. granted July 2, 2020; argued Dec. 1, 2020)

These consolidated cases present the latest iteration in the Supreme Court's ongoing project of narrowing the scope of the Alien Tort Statute (ATS) in the context of litigation against domestic corporations involving allegations of aiding and abetting human rights violations in foreign countries.

Plaintiffs allege that they were trafficked from Mali into Côte d'Ivoire and enslaved on cocoa plantations as children. They brought suit in district court under the ATS against Nestlé and Cargill, alleging that those corporations aided and abetted child slavery. Nestlé and Cargill moved to dismiss plaintiffs' ATS claim, arguing that domestic corporations cannot be held liable under the ATS and that plaintiffs' allegations were insufficient to establish the mens rea and wrongful act elements of aiding and abetting. The district court dismissed the case on all of these grounds, but the Ninth Circuit vacated and remanded, holding that corporations can be held liable under the ATS and that plaintiffs' allegations supported the inference that Nestlé and Cargill had the requisite mens rea (i.e., a purpose to facilitate child slavery).

On remand, the district court again dismissed the case, applying the "focus" test set forth in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) to determine that the ATS claim was impermissibly extraterritorial. Plaintiffs' allegations against Nestlé and Cargill included U.S.-based decisionmaking, provision of funds originating in the United States, provision of supplies and training to Ivorian cocoa farmers, publication of statements of opposition to child slavery, and opposition to a bill that would have required Nestlé's and Cargill's cocoa to be "slave-free." The district court held that the "focus" of plaintiffs' claims was the alleged conduct of Nestlé and Cargill that aided and abetted child slavery in Côte d'Ivoire and that this alleged conduct did not "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality.

The Ninth Circuit again reversed, holding that the "focus" of an ATS claim is not the location where the injury or principal offense occurred but, instead, where any conduct that might constitute aiding and abetting occurred. On the basis of an allegation that Nestlé and Cargill provided money to farmers in exchange for their loyalty to Nestlé or Cargill as an exclusive supplier, the court held that the "focus" test was satisfied and the claims were not impermissibly extraterritorial.

At oral argument, most of the justices seemed reluctant to adopt Nestlé's and Cargill's argument that corporations are not subject to liability under the ATS. However, almost all of the justices also expressed serious doubts that plaintiffs' allegations satisfied the "focus" and "touch and concern" tests and seemed inclined to rule that plaintiff's ATS claim was barred by the presumption against extraterritoriality. Whether this case is the final nail in the coffin for ATS human rights litigation remains to be seen.

INTELLECTUAL PROPERTY

The fair use doctrine protects a program developer's use of a software interface to create a new computer program where, as here, the use is transformative.

Google LLC v. Oracle America, *Inc.*, __ U.S. __, 141 S. Ct. 1183 (2021)

This is the marquee intellectual property case on the Supreme Court's docket this Term. It asks whether software interfaces—lines of computer code that allow developers to utilize prewritten libraries of code to perform particular tasks in creating new computer programs—are protected by copyright law and, if so, whether the fair use doctrine provides a defense to copyright infringement claims arising from the use of such software interfaces to create new computer programs.

Google and Oracle have been locked in litigation for years over copyright infringement claims related to Sun Microsystems' Java platform (which Oracle purchased in 2010), and in particular Java's software interfaces. Google used Java software interfaces to develop its Android smartphone platform with Sun's blessing, but once Oracle acquired Sun, it sued Google for patent and copyright infringement. Google defended against the copyright claim on the ground that the Java software interfaces were not copyrightable and that, even if they were, Google's incorporation of them into Android was fair use. When the jury hung on the fair use defense after a first trial, the district court granted Google judgment as a matter of law on the ground that the software interfaces were not copyrightable. The Federal Circuit reversed, holding that they were copyrightable, and the Supreme Court declined to take the case up in that interlocutory posture. On remand, after a second trial, the jury found in Google's favor on its fair use defense, but the Federal Circuit again reversed and ruled that Google did not engage in fair use as a matter of law.

The Federal Circuit's copyrightability holding deepened an existing circuit split, and that factor, along with the importance of the questions presented to the future of the software industry,

likely prompted the Supreme Court to grant certiorari. However, the Court ended up bypassing the copyrightability issue by assuming that software interfaces are copyrightable without deciding that question. Instead, the Court held that Google's use of the Java software interfaces was protected under the fair use doctrine as a matter of law.

The Court first determined that fair use presents a mixed question of law and fact under which the jury finds the underlying, real-world facts, but the court expounds the law and applies it to the facts found by the jury. The Court then applied the four-factor fair use test by examining the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use on the potential market for or value of the copyrighted work. Relying largely on the fact that Google's developers who used the Java software interface to create the Android platform engaged in transformative use, the Court concluded that these factors all pointed in favor of Google.

The Court's opinion will have significant implications for the future of the software industry, and it should ensure the continued existence of a healthy breathing space for the use of software interfaces to create new computer programs and operating systems.

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