ASSOCIATION OF BUSINESS TRIAL LAWYERS

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U.S. SUPREME COURT UPDATE: CASES OF INTEREST IN OCTOBER TERM 2020 (PART 2)

The United States Supreme Court decided a number of cases on its October Term 2020 docket that are of particular interest to the ABTL membership. This second installment of a two-part article summarizes cases that involve the most prominent issues of interest to civil litigators before the Court this past Term.

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ANTITRUST

The NCAA's eligibility rules regarding compensation of student-athletes violate federal antitrust law under full rule of reason review.

National Collegiate Athletic Association v. Alston, __ U.S. __, 141 S. Ct. 2141 (2021)

This case presented one of the most high-profile issues of the Supreme Court's Term: whether the NCAA's amateurism requirement violates the Sherman Act. Creating a conflict with several other circuits, the Ninth Circuit held that the NCAA's requirements surrounding compensation of student-athletes violate federal antitrust law. This ruling came on the heels of the Ninth Circuit's 2015 decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), cert. denied, 137 S. Ct. 277 (2016), which held that the NCAA violated the Sherman Act by not permitting schools to pay student-athletes the full cost of attendance. *O'Bannon* was the first decision by a federal court to determine that an aspect of the NCAA's amateurism rules violated the antitrust laws.

While *O'Bannon* was pending, NCAA Division I basketball and football players filed this class action, arguing that the NCAA student-athlete payment limits are an anticompetitive restraint of trade. The case was assigned to the district judge who presided over *O'Bannon*. The district court applied the rule of reason, which uses a burden-shifting framework to evaluate whether a defendant's restraint of trade is justified by procompetitive benefits that cannot be achieved through substantially less restrictive alternatives. The district court found that the student-athlete payment limits at issue restrain the market for student-athlete labor but that these limits also have procompetitive effects since amateur college sports could not exist without some such limits. The court concluded that the limits were more restrictive than necessary to maintain the distinction between college and professional sports because those limits include restrictions on education-related benefits even though the distinction between college and professional sports is that student-athletes do not receive unlimited payments unrelated to education. The district court issued a permanent injunction invalidating most NCAA limits on payments related to education, requiring the NCAA to permit some types of cash payments to student-athletes, and allowing individual athletic conferences to set limits for payments related to education and cash payments that the NCAA would not be permitted to cap. The Ninth Circuit affirmed, holding that the district court's changes to the NCAA rules would be virtually as effective as the NCAA's current rules.

In a unanimous opinion authored by Justice Gorsuch, the Supreme Court upheld the district court's injunction. Citing the NCAA's monopsony power in the market for student-athlete labor and the conceded anticompetitive effect its restrictions on student-athlete compensation had on the price and quantity of that labor, the Court held that those restrictions must be analyzed under full rule of reason analysis to determine whether they violate the Sherman Act. Conducting that analysis, the Court concluded that the district court struck the correct balance in upholding the NCAA's restrictions on student-athlete compensation that are unrelated to education but striking down such restrictions that are related to education, and in according the NCAA considerable leeway in defining the limits of education-related compensation and how its new rules would be administered. The Court confirmed that the NCAA's compensation rules need not be the least restrictive means of achieving the NCAA's asserted procompetitive objective of promoting amateurism in college sports, but held that the district court was correct to find that there are substantially less restrictive ways of achieving those objectives.

In a separate concurrence, Justice Kavanaugh went further and condemned the NCAA's business model as exploiting student-athletes without letting them enjoy any of the fruits of their labor. As he put it, "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law."

The Court's opinion and Justice Kavanaugh's concurrence have already produced seismic effects on the market for college sports and student-athlete labor. Shortly after the Court issued its opinion, the NCAA announced that it would start allowing student-athletes to receive compensation for their labor (not just education-related compensation). Where these developments will lead is anybody's guess, but it is fair to say that *Alston* will be seen as a watershed moment in college sports history.

APPELLATE PROCEDURE

District courts lack discretion to deny or reduce appellate costs deemed "taxable" in district court under Federal Rule of Appellate Procedure 39(e).

City of San Antonio, Texas v. Hotels.com, L.P., __ U.S. __, 141 S. Ct. 1628 (2021)

This case presents an everyday—but nonetheless important—question of appellate procedure: whether a district court has discretion to depart from the default rule that the losing party on appeal must pay all of the prevailing party's taxable costs, such as bond premiums.

The City of San Antonio brought a class action suit in district court on behalf of Texas municipalities against a group of online travel companies for failure to pay hotel occupancy taxes. The district court ruled for San Antonio and awarded unpaid taxes, interest, and penalties. The travel companies then voluntarily posted bonds to stay enforcement of the judgment after negotiating with San Antonio regarding the amount of the bonds. The district court approved the bonds and stayed enforcement of the judgment.

The travel companies appealed to the Fifth Circuit, which reversed and ordered San Antonio to pay the travel companies' appellate costs as taxed by the clerk. The travel companies sought approximately $900 in costs at the Fifth Circuit and did not seek other costs under Federal Rule of Appellate Procedure 39(e) (including their bond premiums) or request permission to seek further relief under Rule 39(e) on remand. Back in the district court, the travel companies sought over $2 million in interest and bond premiums under Rule 39(e). San Antonio objected and sought to reduce or strike the bond-related costs, but the district court rejected San Antonio's argument, relying on Fifth Circuit precedent that district courts have no discretion to reduce an award of appellate costs.

Relying on its earlier precedent, the Fifth Circuit affirmed and held that district courts lack discretion to reduce or strike appeal bond costs. In so deciding, the Fifth Circuit rejected the position of every other circuit that has confronted this question.

Often the largest single item of appellate costs is the premium the appellant must pay to secure a bond to stay enforcement of the judgment. Here, San Antonio argued the district court

should have broad equitable discretion to rely on the size of the premium and other factors to refuse to award the bond premiums as costs or to reduce that amount. The Supreme Court, in a unanimous opinion by Justice Alito, rejected that argument based on the text and structure of Federal Rule of Appellate Procedure 39. The Court held that Rule 39 vests discretion in the courts of appeals to deny, reduce, or allocate costs in a manner that deviates from the default rules established by Rule 39(a). But for that very same reason, the Court concluded that district courts cannot also possess discretion to do the same thing. The Court's opinion provides needed clarity regarding how losing parties on appeal should ask for taxable costs to be reduced or denied for equitable reasons.

CIVIL PROCEDURE

Class members whose credit reports containing false information were not disseminated to third parties lack Article III standing to sue in federal court for violation of the Fair Credit Reporting Act because they have not suffered concrete harm of the type traditionally recognized as providing a basis for a lawsuit in American courts.

TransUnion LLC v. Ramirez, __ U.S. __, 141 S. Ct. 2190 (2021)

This case is the latest iteration in the Supreme Court's ongoing project to rein in Article III standing, especially in consumer protection and class action litigation. In *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540 (2016), the Court held that Article III standing's injury-in-fact element requires the plaintiff to show that an alleged violation of law caused or presented a material risk of a concrete and particularized harm. In this case, the Court elaborated on that requirement in the class action context.

Plaintiff Sergio Ramirez sued TransUnion under the Fair Credit Reporting Act (FCRA), claiming that it erroneously included in his credit report a match of his name to a name on the government's terrorist watch list and that this report was provided to an auto dealer while he was attempting to obtain credit for a vehicle purchase, resulting in his humiliation and embarrassment. Ramirez sought to represent a class of 8,185 people whose TransUnion credit reports similarly included an erroneous match to a name on the watch list, but he stipulated that less than 25% of that class had a credit report disseminated to a third party during the class period. The district court certified the class, and the case proceeded to trial, resulting in a jury verdict of more than $60 million in damages. The Ninth Circuit reduced the punitive damages award but otherwise affirmed, concluding that all class members sufficiently demonstrated Article III standing and that the class was properly certified.

In a 5-4 opinion by Justice Kavanaugh, the Supreme Court reversed. The majority held that while the 1,853 class members whose credit reports had been disseminated to third parties had Article III standing to pursue an FCRA claim (because they had suffered a concrete harm akin to common-law defamation), the 6,332 class members whose credit reports had not been so disseminated had not suffered any concrete injury-in-fact and so lacked Article III standing. The Court did not address class certification and left it to the lower courts on remand to decide how the class should proceed.

The Court's opinion is likely to stand as a significant impediment to many consumer protection class actions in federal court, especially those based on bare violations of statutory or regulatory requirements without any proof of concrete injury to the class. However, the true significance of this ruling may be that it accelerates the trend of plaintiffs bringing such actions in state court, where standing requirements are much looser.

SECURITIES LAW

A defendant in a securities class action can rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson* by pointing to the generic nature of the alleged misstatements to show that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality. But the defendant bears the ultimate burden of persuasion to rebut the *Basic* presumption.

Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System, __ U.S. __, 141 S. Ct. 1951 (2021)

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Supreme Court established a presumption of classwide reliance in securities fraud class actions where an alleged misrepresentation by the defendant is material. This *Basic* presumption was

founded on the efficient market hypothesis (i.e., the theory that in an efficient market with well-functioning trading infrastructure and information pathways, all relevant information is quickly incorporated into the price of a company's stock). Plaintiffs now routinely invoke this presumption in order to secure class certification in class actions premised on fraudulent misrepresentations by the securities issuer. More recently, in *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258 (2014), the Court clarified that a defendant must have an opportunity to rebut the *Basic* presumption at the class certification stage by showing that the alleged misrepresentation did not have an impact on the price of the relevant security.

This case addressed (a) whether a defendant may rebut the *Basic* presumption by pointing to the generic nature of the alleged misstatements, even though the evidence is also relevant to the substantive element of materiality (which is a merits issue and generally not a suitable ground for opposing class certification), and whether a defendant seeking to rebut the presumption has the (b) ultimate burden of persuasion or only a burden of production.

These questions arose out of a securities class action against Goldman Sachs and three of its former executives. Plaintiffs were Goldman Sachs shareholders who alleged that, prior to the 2008 economic downturn, defendants engaged in securities fraud by making statements that they had "extensive procedures and controls that are designed to identify and address conflicts of interest" and that their "clients' interests always come first," all while laboring under undisclosed conflicts of interest. The district court granted class certification, concluding that defendants failed to rebut the *Basic* presumption even though they presented evidence that Goldman's stock price did not decline on dates when the press reported on Goldman conflicts of interest. The Second Circuit reversed, holding that the district court should have applied a preponderance-of-the-evidence standard in assessing whether defendants bore their burden of persuasion to rebut the *Basic* presumption and that the district court failed to consider some of defendants' price impact evidence. On remand, the district court again granted class certification. This time, the Second Circuit affirmed, noting that defendants' attempt to rebut by highlighting the generic and aspirational character of the alleged misstatements would impermissibly allow defendants to litigate the merits issue of materiality at the class certification stage.

The Supreme Court vacated the Second Circuit's opinion, in an opinion by Justice Barrett. The Court held that district courts must consider the generic nature of the alleged misstatements in assessing whether those statements had any impact on the stock price, and confirmed that defendants do bear the burden of persuasion to rebut the *Basic* presumption by showing lack of price impact (although the Court made clear that it thought the allocation of this burden should rarely make any difference). Because it was unclear whether the Second Circuit had considered the generic nature of defendants' alleged misrepresentations, the Court remanded for the Second Circuit to undertake that inquiry.

While this opinion clarifies some open questions of federal securities class action procedure, on its own it may not have much impact. Its significance lies more in what it reveals about the direction the Supreme Court is going in federal securities class action law. The Court's opinion demonstrates the majority's continuing skepticism of securities class actions and a desire to rein them in, but also possibly a reluctance to make any radical moves in this area.

TAKINGS

A state law granting labor union organizers the right to access a landowner's private property for limited times without permission or compensation effects a per se physical taking of the landowner's right to exclude under the Takings Clause of the Fifth Amendment.

Cedar Point Nursery v. Hassid, __ U.S. __, 141 S. Ct. 2063 (2021)

California law permits union organizers to access the premises of an agricultural employer for 3 hours per day for up to 120 days each year in order to try to unionize farmworkers. Organizers are not required to request consent from or give notice to the employer/property owner; they are required only to file a Notice of Intent to Take Access with California's Agricultural Labor Relations Board (ALRB). In this case, union organizers invoked this authority 62 times in one year—sometimes conducting protests at 5:00 a.m. on the property of Cedar Point Nursery. Fowler Packing Company, a large produce grower, denied access to organizers on three consecutive days, resulting in

organizers filing an unfair labor practice charge against Fowler with the ALRB. Cedar Point and Fowler sought declaratory and injunctive relief in district court, arguing that enforcement of the regulation effects an uncompensated taking under the Fifth and Fourteenth Amendments. The district court dismissed for failure to state a plausible Takings Clause claim.

On appeal, the Ninth Circuit affirmed, holding that there was no "classic taking in which government directly appropriates private property" and that there was no *per se* physical taking because no permanent physical invasion was authorized by the regulation. The Ninth Circuit emphasized the fact that the regulation permitted entrance onto property only for limited periods of time. Eight judges dissented from the denial of rehearing en banc.

The Supreme Court reversed the Ninth Circuit, in a 6-3 opinion authored by Chief Justice Roberts. The Court held that the California law effects an uncompensated *per se* physical taking of the landowners' right to exclude others from their property, and thus requires payment of just compensation under the Takings Clause. The majority rejected the state's argument that only a law effecting a permanent physical invasion of property could constitute a *per se* physical taking, concluding that temporary physical invasions equally amount to *per se* physical takings, with the difference in duration accounted for in the calculation of the amount of compensation due. The majority also dismissed the dissent's concern that its holding would imperil health and safety inspection access regulations on the basis that such regulations are consistent with longstanding background restrictions on property rights and thus do not constitute physical takings requiring the payment of just compensation.

The Court's opinion constitutes a ringing endorsement of private property rights, especially the right of a property owner to exclude others' access to its property. Future Takings Clause challenges to other aspects of state regulation of property rights (for instance, beachfront access for the public in California) will therefore likely find a sympathetic audience in the *Cedar Point* majority.

UPDATE ON PART 1

In *BP P.L.C. v. Mayor & City Council of Baltimore*, __ U.S. __, 141 S. Ct. 1532 (2021), the Supreme Court held, in a 7-1 opinion written by Justice Gorsuch, that 28 U.S.C. § 1447(d) permits 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.

In *Nestlé USA, Inc. v. Doe*, __ U.S. __, 141 S. Ct. 1931 (2021), the Supreme Court held, in an 8-1 opinion by Justice Thomas, that the plaintiffs could not sue Nestlé and Cargill under the Alien Tort Statute (ATS) for allegedly aiding and abetting child slavery on cocoa plantations in Africa because that would violate the presumption against extraterritoriality given that the plaintiffs pled no more than general corporate activity by Nestlé and Cargill in the United States.

In separate opinions, Justices Thomas, Alito, Gorsuch, and Kavanaugh stated or strongly indicated that they would hold in a future case that federal courts may not recognize new causes of action under the ATS that were not already in existence when the ATS was enacted in 1789. Justices Alito and Gorsuch also stated their view that domestic U.S. corporations are not immune from liability under the ATS.

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