

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abt1

REPORT

LOS ANGELES

WINTER 2018

U.S. SUPREME COURT UPDATE: PENDING CASES OF INTEREST IN OCTOBER TERM 2017 (PART 1)



John F. Querio

The United States Supreme Court has granted certiorari and added several cases to its October Term 2017 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 argued so far.



Melissa B. Edelson

ARBITRATION/CLASS ACTIONS

Do the collective-bargaining provisions of the National Labor Relations Act prohibit the

enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis?

Epic Systems Corp. v. Lewis, 823 F.3d 1147 (7th Cir. 2016), cert. granted, No. 16-285 (Jan. 13, 2017); *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016), cert. granted, No. 16-300 (Jan. 13, 2017); *National Labor Relations Board v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), cert. granted, No. 16-307 (Jan. 13, 2017).

The biggest arbitration case on the Supreme Court's docket this term is the so-called *Epic* trilogy, in which the

Supreme Court granted certiorari to address a circuit split concerning the interplay between the Federal Arbitration Act (FAA) (providing for enforceability of arbitration agreements, 9 U.S.C. § 2 (2012)) and section 7 of the National Labor Relations Act (NLRA) (providing for employees' right to collective action, 29 U.S.C. § 157 (2012)). The Second, Fifth, and Eighth Circuits have held that agreements requiring employees to arbitrate individually against employers are enforceable under the FAA and do not violate the NLRA; the Seventh and Ninth Circuits have found such agreements unenforceable.

All three cases arose when an employee filed a class or collective action in federal court despite having entered into an arbitration agreement with his or her employer requiring him or her to pursue work-related claims on an individual, rather than collective, basis. In *Epic Systems* and *Ernst & Young*, the Seventh and Ninth Circuits concluded that the class waivers in the arbitration agreements were unenforceable because they violated the employees' right under the NLRA to engage in concerted activities. Those courts reconciled this outcome with the FAA—and in particular with *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that class waivers in arbitration agreements are enforceable under the FAA—by way of the FAA's saving clause, under which an arbitration agreement is enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In *Murphy Oil*, an employee filed an unfair labor practice charge with the National Labor Relations Board (NLRB) after her wage and hour class action was dismissed because an employment arbitration agreement she signed contained a class action waiver. The NLRB invalidated the class waiver as an unfair labor practice that interfered with employees' right under the NLRA to engage in concerted legal activity.

The Fifth Circuit reversed, holding that the NLRA does not override the FAA and that use of class action procedures is not a substantive right under the NLRA.

The Supreme Court heard oral argument on October 2, 2017. In a rare twist, different departments of the federal government argued on opposing sides, with the Solicitor General supporting the employers' side and the NLRB supporting the employees' side. Justices Ginsburg, Breyer, Sotomayor, and Kagan seemed to be firmly with the employees and the NLRB, repeatedly questioning the employers' counsel and the Solicitor General about how their position could be reconciled with the NLRA's protections. However, Chief Justice Roberts and Justices Kennedy and Alito seemed to lean toward the employers, questioning the NLRB's counsel about what kinds of collective action are protected under the NLRA. In an exchange with the employees' counsel, Chief Justice Roberts noted that a decision in favor of the employees would invalidate employment arbitration agreements covering 25 million people. Moreover, while Justices Thomas and Gorsuch were silent during argument, Justice Gorsuch has a history of interpreting arbitration clauses in light of the federal presumption in favor of arbitration. *See, e.g., Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1201 (10th Cir. 2009) (Gorsuch, J., concurring).

If the Supreme Court does indeed rule for the employers in these cases, employers will have much more leeway to foreclose employees' class and collective action lawsuits by requiring employees to sign arbitration agreements with class action waivers as a condition of employment.

CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

Does the Alien Tort Statute, 28 U.S.C. § 1350, which gives federal district courts jurisdiction over civil lawsuits filed by non-U.S. citizens for wrongful acts that violate international law, allow lawsuits against corporations?

Jesner v. Arab Bank, PLC, 808 F.3d 144 (2d Cir. 2015), *cert. granted*, No. 16-499 (Apr. 3, 2017).

A question that has recently split the federal circuit courts is whether the Alien Tort Statute (ATS) allows lawsuits against corporations. Adopted as part of the Judiciary Act of 1789, the ATS provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012).

Petitioners—nearly 6,000 non-U.S. citizens who were victims of terrorist attacks in Israel, the West Bank, and Gaza between 1995 and 2005—brought lawsuits under the ATS in federal court against Jordan-based Arab Bank. They claimed that Arab Bank had knowingly facilitated terrorism through its New York branch by maintaining accounts for known terrorists—accepting donations that it knew would be used to fund terrorism and distributing millions of dollars in "martyrdom payments" to families of suicide bombers.

In the Supreme Court, petitioners contend that their ATS claims against Arab Bank are supported by the statute's text, history and purposes. The ATS, they assert, confers jurisdiction upon federal courts to hear "tort" claims and, at the time Congress enacted the ATS, it was unquestionable that corporations could be held liable in tort. Moreover, while the ATS clearly limits the class of potential plaintiffs under the ATS—only aliens may sue—it does not do so for defendants, even though Congress limited classes of defendants in other provisions of the Judiciary Act of 1789. Additionally, petitioners argue the ATS's history and purposes reinforce the propriety of subjecting corporations to liability because Congress enacted the ATS to ensure that federal courts have jurisdiction over lawsuits alleging violations of the law of nations. Basic fairness, they maintain, requires corporate accountability in this context.

Arab Bank contends that the Supreme Court has directed courts to "provide a cause of action" under the ATS only for violations of "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of...18th century paradigms." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004). In other words, the Supreme Court has limited federal courts to recognizing causes of action only for

alleged violations of international law norms that are specific, universal, and obligatory. Arab Bank argues that there is nothing remotely resembling a specific, universal, and obligatory norm of corporate liability under international law, and that the international community has generally been reluctant to impose international law obligations on corporations. Arab Bank also notes that corporations may not be held liable in similar contexts under other U.S. laws, including the Torture Victim Protection Act and private suits seeking damages for domestic civil rights violations.

The Solicitor General filed an amicus curiae brief opposing Arab Bank's argument that the ATS forecloses corporate liability. But the government also questioned whether the *Jesner* lawsuits should go forward, asserting that the mere fact that the bank may have routed foreign transactions in dollars through its New York branch does not establish the kind of connection to the United States that the Supreme Court has required to overcome the presumption against extraterritoriality.

The Supreme Court heard oral argument on October 11, 2017. The Court was divided, with Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch appearing ready to hold that the ATS does not allow lawsuits against corporations for violations of international law. Chief Justice Roberts and Justice Alito seemed especially concerned with the potential international repercussions of providing a vehicle for corporate liability under the ATS. Justice Gorsuch repeatedly questioned whether petitioners' interpretation of the ATS was consistent with Congress's intent when it enacted the law in 1789. And Justice Kennedy appeared unpersuaded by petitioners' efforts to distinguish between conduct violating international norms and those who can be held liable for such conduct under the ATS. On the other hand, Justices Ginsburg, Breyer, and Sotomayor seemed to be firmly on petitioners' side, with Justice Kagan seeming to favor the approach advocated by the United States as amicus curiae—that corporate liability is not categorically prohibited under the ATS, but that Arab Bank should prevail in this case because its conduct failed to establish a sufficient connection to the United States.

If the Supreme Court does indeed rule for Arab Bank and hold that corporations cannot be held liable under the

ATS, it may signal an end to human rights litigation under the ATS.

PATENT LAW/SEPARATION OF POWERS

Does inter partes review, an adversarial process used by the Patent and Trademark Office to reexamine the validity of existing patents, violate the Constitution by extinguishing patent rights through a non-Article III forum without a jury?

Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 639 Fed.Appx. 639 (Fed. Cir. 2016), cert. granted, No. 16-712 (Jun. 12, 2017).

In 2011, Congress established *inter partes* review in the Leahy-Smith America Invents Act (AIA), 35 U.S.C. §§ 311-318 (2012). *Inter partes* review reexamines the validity of a patent to determine whether it was properly granted. The AIA allows private third parties to remove patent cases from Article III courts and transfer them to the Patent Trial and Appeal Board (PTAB), an Article I tribunal within the Patent and Trademark Office (PTO). There, parties engage in motion practice, take discovery, examine witnesses, and proceed to a "trial" presided over by an administrative judge whose judgments are final and self-executing. Parties may appeal PTAB decisions only to the Federal Circuit. At issue before the Supreme Court is the constitutionality of this process.

Petitioner Oil States Energy Services, LLC filed a patent infringement suit against Greene's Energy Group, LLC in federal court. Oil States owns a patent that covers apparatuses and methods of protecting wellhead equipment from the pressures and abrasions involved in hydraulic fracturing ("fracking"). Greene's Energy petitioned the PTAB to institute *inter partes* review, arguing that Oil States's patent was anticipated by a previous patent application concerning an earlier invention. The district court proceeding and *inter partes* review proceeding continued in parallel, eventually reaching contrary outcomes as to whether the patent had been anticipated by the previous patent application. The PTAB concluded that the claims were unpatentable and denied Oil States's

application to amend its claims. Oil States appealed the PTAB's final judgment to the Federal Circuit, challenging both the merits of the decision and the constitutionality of *inter partes* review under Article III and the Seventh Amendment. Before briefing closed, however, the Federal Circuit rejected the same challenges to the constitutionality of *inter partes* review in a different appeal, thereby foreclosing Oil States's constitutionality arguments. *See MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015). The Federal Circuit thus summarily affirmed the PTAB in this appeal without issuing an opinion.

In the Supreme Court, Oil States argues that *inter partes* review violates both the separation of powers enshrined in Article III and the Seventh Amendment right to a jury trial by allowing an administrative agency to extinguish private property rights. This process, Oil States argues, impermissibly removes the responsibility for deciding common-law disputes between private parties over private property rights from Article III judges and juries to administrative agency employees who are beholden to executive branch officials. In response, Greene's Energy asserts that patents are quintessential public rights, rather than private rights, because patents confer rights that exist only by virtue of statute. Thus, Greene's Energy contends, Congress may delegate the adjudication of patent validity to non-Article III courts in non-jury trials. And, because the administrative scheme comports with Article III, the Seventh Amendment is not implicated.

The Supreme Court heard oral argument on November 27, 2017. None of the justices appeared strongly in favor of invalidating *inter partes* review. Justice Breyer questioned Oil States's counsel on the broader impact of finding *inter partes* review unconstitutional: "[I]t's the most common thing in the world that agencies decide all kinds of matters through adjudicatory-type procedures often involving private parties. So what's special about this one, or do you want to say it isn't special and all the agency proceedings are unlawful?" Justices Ginsburg, Sotomayor, and Kagan pressed Oil States's counsel on the specifics of why the PTO's error-correction mechanism was unconstitutional: "there must be some means by which

the Patent Office can correct the errors that it's made," stated Justice Ginsburg. "So what's the line? ...[W]hat are the procedures that are here that you think make this essentially adjudicatory?" questioned Justice Kagan. Nevertheless, despite the Court's apparent skepticism of Oil States's position, it appeared equally hesitant to agree with Greene's Energy's assertion that Congress has almost plenary power to define the boundaries of patent grants. "[H]ow can you argue that ...the PTO, here has unfettered discretion to take away that which it's granted," challenged Justice Sotomayor. The heaviest criticism about the *inter partes* review process came from Justice Gorsuch, who drew parallels between the grant of a patent and other property rights and seemed to question whether administrative adjudication is constitutional in any case where the decisionmaker is not an "adjunct" to an Article III court.

If the Supreme Court affirms, it will reinforce the AIA's purpose of enhancing the efficiency of resolving disputes over patent validity via the *inter partes* review process. If the Court reverses, however, it will throw a wrench into the adjudication of patent validity akin to the disruption to bankruptcy court procedures that ensued after the Court decided *Stern v. Marshall*, 564 U.S. 462 (2011), which revolved around the same Article III separation of powers issues that are at stake here. The Roberts Court has been very protective of Article III courts' powers against encroachment from Congress, but only time will tell whether it will continue to follow its recent pattern by striking down the *inter partes* review process as unconstitutional.

DODD-FRANK ACT/WHISTLEBLOWER RETALIATION

Does the whistleblower anti-retaliation provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) protect individuals who have not reported alleged misconduct to the Securities and Exchange Commission (SEC) and thus fall outside the Act's definition of "whistleblower?"

Digital Realty Trust, Inc. v. Somers, 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, No. 16-1276 (Jun. 26, 2017).

Section 922(a) of the Dodd-Frank Act defines a “whistleblower” as an “individual who provides...information relating to a violation of the securities laws to the [Securities and Exchange] Commission.” 15 U.S.C. § 78u-6(a)(6) (2012). Under the Act, a “whistleblower” is protected from retaliation if he: provides information to the SEC; initiates, testifies, or assists in any investigation or administrative action of the SEC related to such information; or “mak[es] disclosures that are required or protected” under various other federal securities laws. 15 U.S.C. § 78u-6(h)(1)(A).

In his suit against petitioner Digital Realty Trust, Inc., respondent Paul Somers alleged that, shortly before being fired, he had complained to senior management that his supervisor had violated certain provisions of the Sarbanes-Oxley Act of 2002. He claimed that Digital Realty violated the Dodd-Frank Act’s anti-retaliation provision by firing him for internally reporting the alleged misconduct. Digital Realty moved to dismiss the Dodd-Frank Act claim, asserting that Somers was not a “whistleblower” under the anti-retaliation provision because he did not report a securities law violation to the SEC.

The district court denied the motion. It found the language in the statutory definition ambiguous and thus deferred to the SEC’s regulatory interpretation of “whistleblower,” under which an employee who makes an internal report of a violation qualifies for protection under Dodd-Frank’s anti-retaliation provision. Siding with a Second Circuit opinion (which disagreed with a Fifth Circuit opinion), the Ninth Circuit affirmed the district court’s denial of the motion to dismiss. Deferring to the interpretation of the SEC, the Ninth Circuit reasoned that the anti-retaliation provision should be read to provide protections to those who report internally, as well as to those who report to the SEC, because a contrary interpretation would make little practical sense and undercut congressional intent.

In the Supreme Court, Digital Realty contends that the Ninth Circuit erred by expanding the definition of

“whistleblower” beyond what the statutory text allows. In response, Somers argues that the Ninth Circuit was correct to defer to the SEC’s interpretation of “whistleblower” under the doctrine of *Chevron* deference. Congress, Somers notes, expressly charged the SEC to administer the Dodd-Frank Act’s whistleblower retaliation provision, and the SEC invoked that authority in construing the statute to protect internal whistleblowing.

The Supreme Court heard oral argument on November 28, 2017. Several of the justices appeared highly skeptical of Somers’s argument for a broad reading of “whistleblower.” Indeed, pushback from Justice Gorsuch was immediate: “I’m just stuck on the plain language here, and maybe you can get me unstuck,” the justice said. “How much clearer could Congress have been?” Even the Court’s more liberal justices seemed unwilling to support a broad reading: “What’s the big deal?” questioned Justice Breyer. “[H]e’s protected under Sarbanes-Oxley, isn’t he?” Justices Ginsburg and Kagan pointed to the statutory wording: “You have this definitional provision, and it says what it says. And it says that it applies to this section,” stated Justice Kagan. “If the statute gives a definition, you follow the definition in the statute unless it would lead not merely to an anomaly, but to an absurd result,” echoed Justice Ginsburg. The Court spent considerable time on the issue of *Chevron* deference, and, regardless of the outcome of this case, the contending positions are likely to set the stage for the next skirmish in the ongoing battle between the textualist and the purposivist wings of the Supreme Court, with some justices—notably including the Court’s newest member, Justice Gorsuch—looking solely to the statute’s text to interpret its meaning, and others examining Congress’s intent in enacting the statute at issue to determine how it should apply to the facts of a given case.

John F. Querio is a partner and *Melissa B. Edelson* is an appellate fellow at Horvitz & Levy LLP in Los Angeles. Richland LLP in Los Angeles.