

U.S. SUPREME COURT UPDATE: PENDING CASES OF INTEREST IN OCTOBER TERM 2017 (PART 2)



John F. Querio

This is the second part of a two-part article summarizing cases on the United States Supreme Court's October Term 2017 docket that involve the most prominent issues of interest to civil litigators before the Court this Term.

ANTITRUST LAW



Melissa B. Edelson

Under the “rule of reason,” did the Government’s showing that American Express’s anti-steering provisions stifled price competition on the merchant side of the credit card platform suffice to prove anticompetitive effects and thereby shift to American Express the

burden of establishing any procompetitive benefits from the provisions?

United States v. American Express Co., 838 F.3d 179 (2d Cir. 2016), cert. granted sub nom. *Ohio v. American Express Co.*, No. 16-1454 (Oct. 16, 2017)

In Sherman Act restraint-of-trade cases not encompassed by the per se rules prohibiting horizontal agreements among competitors to suppress competition, courts evaluate the lawfulness of a particular practice under the “rule of reason,” which asks whether a restraint’s procompetitive benefits outweigh its anticompetitive effects. In such cases, the

plaintiff bears the initial burden to demonstrate that the challenged restraint is anticompetitive. If the plaintiff makes that showing, the burden shifts to the defendant to establish a procompetitive justification. Here, the Supreme Court will decide whether retail merchants met their burden under the rule of reason by showing that American Express’s anti-steering provisions—which bar merchants from steering customers to cards with lower fees at the point of sale—stifle price competition on the merchant side, but not on the cardholder side, of the credit card platform.

In 2010, the United States and seventeen states (collectively, the Government) sued Visa, MasterCard, and American Express, alleging that each company’s anti-steering provisions violated section 1 of the Sherman Act, 15 U.S.C. § 1 (2006), because they stifled competition in the prices charged to merchants. Only American Express proceeded to trial. The district court held that the anti-steering provisions violated section 1 under the rule of reason. It began its analysis by defining the relevant market as the credit and charge card network services that American Express provides to merchants. The district court rejected American Express’s position that the market definition should include services to cardholders as well as fees charged to merchants. Next, the court concluded that the Government had met its burden by establishing a prima facie case that the challenged restraint adversely affects competition. It found that American Express has market power because it controls 26.4% of the market for network services, and “cardholder insistence” makes it so that merchants cannot practically refuse to accept American Express cards without many of their customers choosing to shop elsewhere. Additionally, the district court found that American Express’s anti-steering provisions caused actual harm to competition in the market for merchant services by ensuring that there is virtually no check on the networks’ ability to charge higher prices to merchants. After concluding that the Government had met its burden, the

district court determined that American Express had failed to prove procompetitive benefits and entered judgment in the Government's favor.

The Second Circuit reversed, holding that the district court erred by defining the relevant market to include only network services provided to merchants. The relevant market, it concluded, must also include the market for credit provided to cardholders. The Second Circuit then held that the Government had failed to carry its burden of proving anticompetitive effects because it did not establish that merchants and cardholders were worse off overall. The district court erred by focusing on harm to merchants without accounting for benefits to cardholders.

In the Supreme Court, the Government contends that it met its burden under the rule of reason when it provided *direct* evidence that American Express's anti-steering provisions caused industrywide increases in merchant prices above levels that would exist if there were greater competition among the four main credit card networks. The Government also argues that the Second Circuit erred by defining the relevant market to include both merchants and cardholders, as such a definition conflicts with the traditional market definition test, Court precedent, consumer protection goals, and administrative concerns. In response, American Express contends the Government failed to meet its burden of proving that American Express's anti-steering provisions harmed competition, as its proffered evidence related solely to prices charged to merchants, instead of showing reduced output or quality for merchants and cardholders.

The Supreme Court heard oral argument on February 26, 2018. Both sides received tough questions, with many of the Justices focusing on the relevant market definition. Justices Kennedy and Gorsuch seemed to favor American Express's proffered market definition of "credit card transactions" including both consumers and merchants, with Justice Gorsuch challenging the Government's representative—"I don't believe you have" "any evidence that, on a net basis, consumers pay more"—and Justice Kennedy questioning the wisdom of looking at only the merchants' side in "this two-sided market." On the other hand, Justices Breyer, Sotomayor, and Kagan seemed skeptical of American Express's repeated assertions—in response to their questions focusing on anticompetitive effects—that when the market is defined broadly to include "credit card transactions," the Government failed

to produce any evidence of harm to consumers in addition to showing harm to merchants. "It seems to me obvious," said Justice Breyer, that "[w]hen you tell the dealer that he can't tell the customer that he's charging a lower price, that's anticompetitive right then and there."

While the Supreme Court has decided a number of important antitrust cases in recent years, they have mostly involved the limits and operation of the various per se prohibitions on horizontal and vertical agreements in restraint of trade. By contrast, this case will give the Supreme Court its first opportunity in a number of years to examine the application of the rule of reason analysis and explain how it operates in one of the most important markets of the 21st century economy.

APPELLATE PROCEDURE

The entry of a final decision in an action consolidated with other actions for pretrial proceedings within a single judicial district is immediately appealable.

Hall v. Hall, __ U.S. __, 138 S. Ct. 1118 (2018)

The Supreme Court granted certiorari in this case to resolve a four-way circuit split concerning whether the rule announced in *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015)—that entry of a final decision in one of several consolidated cases in multidistrict litigation is immediately appealable—extends to consolidated cases within a single judicial district.

The case arose out of a family dispute over property in the U.S. Virgin Islands. Ethlyn Hall sued her son and his law firm for conversion, malpractice, fraud, and related torts. Mrs. Hall died before trial, and her daughter was substituted as plaintiff. The son and his law firm answered the amended complaint, asserting various defenses and a counterclaim against the daughter in her representative capacity. The son also filed a separate action against the daughter individually, and the district court consolidated the actions and tried them together. The jury returned a verdict against the daughter in both cases, and the district court entered separate final judgments in each case. However, the daughter then moved for a new trial in the action against her individually and filed a notice of appeal in her representative capacity in the action originally brought by Mrs. Hall. The son and his law firm moved to dismiss

the appeal, arguing that the judgment in Mrs. Hall's case was not appealable because a final judgment had not yet been entered in the son's action against the daughter. A year later, the district court granted the daughter's motion for new trial in the action against her in her individual capacity. The Third Circuit dismissed the daughter's appeal for lack of appellate jurisdiction because that action had been consolidated with the son's action against the daughter for all purposes, and that latter action was not yet final.

In a unanimous opinion by Chief Justice Roberts, the Supreme Court reversed. It held that when one of several cases consolidated under Federal Rule of Civil Procedure 42(a) is finally decided, that decision confers the immediate right to appeal, regardless of whether other consolidated cases remain pending. The opinion focused on the meaning of "consolidation" as used in Rule 42(a), explaining that for "[o]ver 125 years, this Court, along with the courts of appeals and leading treatises, interpreted [consolidation] to mean the joining together—but not the complete merger—of constituent cases." *Hall*, 138 S. Ct. at 1125. Rule 42, which was expressly modeled on its statutory predecessor (enacted by Congress in 1813), would not have "silently and abruptly reimagine[d]" consolidation "into something sharply contrary to what it had been" for more than a century. *Id.* at 1129-30. Thus, a losing party in one of several consolidated cases—whether the consolidation was for discovery, for trial, or for all purposes—is free to immediately appeal once his or her case is finally decided.

CLASS ACTIONS

Whether the rule of *American Pipe & Construction Co. v. Utah* tolls the statute of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period.

Resh v. China Agritech, Inc., 857 F.3d 994 (9th Cir. 2017), cert. granted, No. 17-432 (Dec. 8, 2017)

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the

class who would have been parties had the suit been permitted to continue as a class action." Thus, under *American Pipe*, the statute of limitations is tolled during the pendency of a putative class action, allowing absent class members to bring individual claims if the class fails. At issue before the Supreme Court in this case is whether *American Pipe* tolling applies only to subsequent actions brought by previously absent class members on an individual basis, or instead extends to subsequent class actions filed by previously absent class members.

In February 2011, Theodore Dean and other shareholders filed a class action (the "*Dean* action") against China Agritech, Inc., a holding company whose subsidiaries manufactured and sold organic fertilizers in China. The *Dean* plaintiffs brought securities fraud claims against China Agritech and sought class certification. After class certification was denied, the *Dean* plaintiffs settled their individual claims, and their action was dismissed. Three weeks later, in October 2012, another set of plaintiffs—represented by the same counsel that had filed the *Dean* action—filed an almost identical class action on behalf of the same putative class against China Agritech (the "*Smyth* action"). Class certification was subsequently denied in the *Smyth* action because the named plaintiffs were found to be inadequate and atypical class representatives, and the *Smyth* plaintiffs settled their individual claims against China Agritech.

Michael Resh filed the instant class action in June 2014 asserting claims nearly identical to those alleged in *Dean* and *Smyth* on behalf of the same putative class at issue in the *Dean* and *Smyth* actions. China Agritech moved to dismiss the action as time-barred. The district court agreed and dismissed the action in its entirety, concluding that *American Pipe* tolling permitted the *Resh* plaintiffs to bring their individual claims despite the running of the limitations period but not to bring another class action. The Ninth Circuit reversed, holding that three recent Supreme Court decisions—*Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)—compelled its conclusion that the *Resh* plaintiffs could assert their tolled claims on behalf of the class under Federal Rule of Civil Procedure 23.

In the Supreme Court, China Agritech contends that *American Pipe* tolls the statute of limitations for absent class members during the pendency of a putative class

action only with respect to subsequent individual, rather than class, claims. *Shady Grove, Smith, and Tyson Foods*, it argues, do not support the Ninth Circuit's ruling, as nothing in those cases requires or even permits extending *American Pipe* tolling to subsequent class actions. Nor can the Ninth Circuit's decision be reconciled with fundamental principles of equitable tolling, class action procedure, and the separation of powers. The Ninth Circuit's rule, China Agritech asserts, eviscerates the requirements of plaintiff diligence and extraordinary circumstances that justified tolling in *American Pipe*. In response, the *Resh* plaintiffs contend that Supreme Court precedent confirms that a timely class action suspends the limitations period for all class members, whether they subsequently assert their claims individually or on a class basis. To hold otherwise would violate Rule 23 and the Rules Enabling Act.

The Supreme Court heard oral argument on March 26, 2018 and appeared divided on whether to limit *American Pipe* tolling to subsequent individual claims or extend it to subsequent class actions. Right from the start, China Agritech faced challenging questions from Justices Sotomayor and Kagan, who voiced concerns about China Agritech's proposed rule: "[Y]our regime [would] encourag[e] the very thing that *American Pipe* was trying to avoid, which is to have a multiplicity of suits being filed and encouraging every class member to come forth and file their own suit," said Justice Sotomayor. "[W]e don't want to have a million individual suits but instead want to encourage a class," suggested Justice Kagan. Chief Justice Roberts also expressed concern on this front: "[S]o what they all have to do is . . . file individual claims, . . . every member of the class?" On the other hand, Chief Justice Roberts seemed equally uneasy with the notion that class actions might stack indefinitely: "[I]f you allow the second [class action], you've got to allow the third and then the fourth and the fifth. And there's no end in sight." Justice Gorsuch echoed this point, asking "[C]an you stack them forever?"

The Court's decision in this case will provide further clues to whether the Roberts Court's perceived hostility to class actions is more illusory than real.

INTERSTATE COMMERCE & SALES TAX

Whether the Supreme Court should abrogate *Quill Corp. v. North Dakota's* physical presence requirement

for states to impose sales tax on sales by out-of-state companies to in-state residents.

State v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017), cert. granted, No. 17-494 (Jan. 12, 2018)

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Supreme Court reaffirmed its decision in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), which prohibited a state from imposing sales tax on vendors with no physical presence in the state. In the twenty-six years since *Quill* was decided, several members of the Court have called for its reexamination, including Justices Kennedy, Thomas, and Gorsuch. See *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring); *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Thomas, J., dissenting); *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). Indeed, Justice Kennedy wrote separately in *Direct Marketing Ass'n* specifically to call for a reexamination of *Quill* and *Bellas Hess*. Given the "dramatic technological and social changes that ha[ve] taken place in our increasingly interconnected economy," he wrote, "it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *Direct Mktg. Ass'n*, 135 S. Ct. at 1134-35.

South Dakota responded to Justice Kennedy's invitation by enacting a law aimed at challenging *Quill's* physical presence requirement. In early 2016, South Dakota enacted S.B. 106, 2016 Leg., 91st Sess. (S.D. 2016), which requires out-of-state sellers to collect and remit sales tax based not on their physical presence in South Dakota but on their economic connection to the State. The law provides a cause of action for the State to sue out-of-state retailers who fail to comply, and South Dakota subsequently sued four retailers that had failed to comply with the new law, seeking a declaratory judgment confirming the law's validity. The state trial court granted the retailers' summary judgment motion after South Dakota conceded that it could prevail only by convincing the United States Supreme Court to abrogate *Quill's* physical presence requirement, and the South Dakota Supreme Court affirmed.

In the United States Supreme Court, South Dakota contends that the physical presence rule is incorrect under the governing test—articulated in *Complete Auto Transit*,

Inc. v. Brady, 430 U.S. 274, 279 (1977)—for determining the constitutionality of state taxes on out-of-state entities challenged under the Dormant Commerce Clause. Were this test applied to the law at issue here, South Dakota claims, the law would pass with flying colors. Moreover, the justifications *Quill* articulated for upholding the *Bellas Hess* physical presence rule—*stare decisis*, the value of leaving a bright-line rule undisturbed, and the practical difficulties of collection—no longer outweigh the rule’s harms in the digital age where e-commerce is ubiquitous. The physical presence requirement, South Dakota argues, is causing serious harm by depriving states of critical revenue and brick-and-mortar stores of a level playing field. On the other hand, the retailer respondents assert that Congress, not the Supreme Court, is the appropriate institution to address this issue and that principles of *stare decisis* strongly weigh against abrogating the physical presence requirement. The state sales and use tax systems, they contend, remain just as complex and burdensome as when the Court decided *Quill* and thus continue to justify the retention of the physical presence rule.

The Supreme Court heard oral argument on April 17, 2018. The Court appeared divided, with many of the Justices focusing on which branch—Congress or the judiciary—should be determining whether to impose a sales tax collection scheme on internet retailers. “[I]f there are two options...option A is to eliminate *Quill*...[and] Option B is a congressional scheme that deals with all of these problems...which is preferable?” questioned Justice Alito. “Is there anything we can do to give Congress a signal that it should act more affirmatively in this area?” asked Justice Sotomayor. “This is a very prominent issue which Congress has been aware of for a very long time and has chosen not to do something about,” added Justice Kagan. Justice Kennedy spoke only briefly to suggest that the Court should act now because if the issue were left to Congress, Congress would be acting “against the background in which this Court has made an incorrect resolution of the law.” “[W]hy shouldn’t the Court take responsibility to keep our case law in tune with the current commercial arrangements . . . [instead of asking] Congress to overturn our obsolete precedent?” added Justice Ginsburg.

How the Court decides this case will determine the fate of billions of dollars in potential sales tax revenue and will affect the bottom line of remote retail giants

nationwide—including Amazon, which charges sales tax when selling its own inventory but does not do the same for sales by third-party vendors, which represent roughly half of Amazon’s business.

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In *Jesner v. Arab Bank, PLC*, No. 16-499, 2018 WL S.Q. 1386 (2018), the Supreme Court held, in a 5-4 decision written by Justice Kennedy, that foreign corporations are not subject to liability under the Alien Tort Statute.

In *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365 (2018), the Supreme Court held, in a 7-2 decision written by Justice Thomas, that the decision to grant or review a patent is a matter involving public rights, and thus *inter partes* review by the Patent Trial and Appeal Board does not violate Article III or the Seventh Amendment.

In *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), the Supreme Court held, in a unanimous opinion written by Justice Ginsburg, that the Dodd Frank Act’s anti-retaliation provision does not apply to an individual who has reported a violation of the securities laws internally but not to the SEC.

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