

July 10, 2024

The Supreme Court's Business Docket: October Term 2023 in Review

Last week, the Supreme Court concluded its most consequential Term in years, with a flood of decisions on contentious issues ranging from abortion access to the regulation of social media companies and gun possession to presidential immunity. The Court's business docket was no less active. While the Consumer Financial Protection Bureau narrowly [survived](#) a constitutional challenge to its funding mechanism, the Court's conservative majority elsewhere struck body blows to the administrative state—including the long-anticipated reversal of the *Chevron* doctrine of judicial deference to agency interpretation of ambiguous statutes. Beyond this headline-grabbing showstopper, the Court issued a string of commercially significant decisions, affecting bankruptcy, arbitration, securities, and employment law. We summarize below the key business decisions from this Term and flag a few key cases to watch in the coming Term.

1. Administrative Law. In [Loper Bright Enterprises v. Raimondo](#), a six-Justice majority overturned the foundational *Chevron* doctrine, under which courts have long deferred to federal agencies' reasonable interpretations of ambiguous statutes in the rulemaking context. Writing for the majority, the Chief Justice concluded that this rule of deference cannot be squared with a statutory mandate that reviewing courts "decide all relevant questions of law" in challenges to agency conduct. Going forward, judges reviewing agency rulemaking must apply the "full interpretive toolkit" and exercise their independent judgment to identify the "best reading" of ambiguous statutes.

While *Chevron*'s demise marks a significant inflection point in U.S. administrative law, its impact should not be overstated. To begin, *Chevron* had not supplied the basis for a decision by the Court in nearly a decade, and its scope had steadily eroded for years before that. Moreover, the *Loper Bright* majority acknowledged that, even in the post-*Chevron* era, some measure of deference may still be appropriate where statutes specifically endow agencies with the authority to interpret statutory terms or prescribe rules. Nor does the decision expressly modify the judicial review of agency discretion in other settings, such as the "*Auer* deference" that courts afford to the SEC in the interpretation of its own regulations. Finally, the majority emphasized that while *Chevron* may be gone, the precedents that relied upon application of the doctrine remain good law. Thus, although *Loper Bright* will significantly weaken the rulemaking discretion of federal agencies—and likely energize industry efforts to push back on regulatory initiatives—the full scope of its impact will fall unevenly across the administrative landscape over the coming years.

If your address changes or if you do not wish to continue receiving these memos, please send an e-mail to Publications@wlrk.com or call 212-403-1443.

In [*Corner Post, Inc. v. Board of Governors of the Federal Reserve System*](#), the Court's conservative bloc held that the six-year period for challenging agency rulemaking is triggered when a plaintiff suffers injury, not when a regulation is initially issued. Justice Barrett's majority opinion rejected the more stringent measure as contrary to the federal statute of limitations, upending precedent in the D.C. Circuit, among others. Together with *Loper Bright*, the decision will facilitate future challenges to agency rulemaking, allowing new entrants in regulated business sectors to invite judicial re-examination of longstanding regulations.

In [*Securities and Exchange Commission v. Jarkesy*](#), the Court halted the SEC's practice of pursuing civil penalties in fraud enforcement actions before its in-house administrative law judges. The decision marks yet another blow to the viability of administrative adjudicative schemes, which have been a frequent target of the Court in recent years. In the decision under review, the Fifth Circuit had blocked the SEC's practice as violative of the Seventh Amendment right to a jury trial, the so-called nondelegation doctrine, and the Take Care Clause of Article II. The Chief Justice's opinion for the majority focused only on defendants' jury trial rights, holding that the punitive nature of the civil penalties sought by the SEC implicated the Seventh Amendment. As Justice Sotomayor observed in dissent, the Court's logic applies broadly to hundreds of statutes authorizing dozens of agencies to impose civil penalties—presenting another potential line of defense for the targets of in-house enforcement by regulators.

In [*Starbucks Corp. v. McKinney*](#), an eight-Justice majority trimmed the power of the National Labor Relations Board (NLRB) to enjoin employers pending administrative enforcement proceedings. The decision broke with the Third, Fifth, and Sixth Circuits, which had required preliminary injunctions to issue upon a showing that the NLRB's legal theory was "substantial and not frivolous." Rejecting that government-friendly rule, the Court instead agreed with the Fourth, Seventh, Eighth, and Ninth Circuits that injunctions enforcing the labor statute are subject to judicial scrutiny under the traditional four-factor test—which requires a demonstration of irreparable harm and likelihood of success on the merits. The decision will surely blunt what had been a potent weapon in the NLRB's enforcement arsenal.

2. Securities Law. A unanimous Court in [*Macquarie Infrastructure Corp. v. Moab Partners, L.P.*](#) confirmed that pure omissions—those that do not render any affirmative statement made by a company misleading—are not actionable as securities fraud, even if disclosure of the omitted facts was independently required by law. In the decision on appeal, the Second Circuit had

held that a failure to comply with Item 303 of Regulation S-K—which requires companies to disclose known trends or uncertainties under certain circumstances—gave rise to liability under Rule 10b-5. Writing for the Court, Justice Sotomayor emphasized that non-disclosure constitutes securities fraud *only* where disclosure was necessary to ensure that a statement affirmatively made was clear and not misleadingly incomplete. The decision rebuffs an effort to bootstrap violations of disclosure regulations into securities fraud, suggesting that the Court will continue to apply longstanding principles of securities law in policing issuers' disclosures.

3. Bankruptcy. In *Harrington v. Purdue Pharma L.P.*, a sharply divided Supreme Court held that bankruptcy courts lack power to authorize the non-consensual release of claims against non-debtors outside the asbestos context. (Our prior memo on the case is [here](#).) Writing for a bare majority, Justice Gorsuch held that the Bankruptcy Code could not be read to grant this power, notwithstanding the policy arguments in favor of such releases that were emphasized in Justice Kavanaugh's forceful dissent. The Court was careful to note the limits of its decision, which does not affect already-consummated plans, plans that pay creditors in full on their claims, consensual releases, non-debtor releases of asbestos claims, or the settlement or release of causes of action assertable by the debtor and not creditors. While *Purdue* eliminates a tool frequently used to resolve spiralling tort claims against non-debtor affiliates, we expect that companies will continue to use other bankruptcy powers to resolve mass tort claims.

4. Arbitration. This Term, the Court maintained its steady focus on arbitration, with two unanimous decisions resolving procedural questions regarding the role of courts in the arbitration of claims. In *Coinbase, Inc. v. Suski*, the Court ruled that a court, not an arbitrator, must decide which contract governs when parties have multiple agreements that conflict on the question of who should resolve arbitrability disputes. Hewing to traditional contract-law principles, Justice Jackson's opinion for the Court reasoned that, before referring disputes to arbitrators, district courts must first determine the bounds of what the parties agreed to arbitrate. *Coinbase* thus increases the risk that parties will find themselves litigating the availability of arbitration, particularly where disputes arise from complex commercial relationships that may involve multiple contractual arrangements and differing provisions bearing upon arbitrability.

In *Smith v. Spizzirri*, the Court held that where a litigant has successfully compelled arbitration under the Federal Arbitration Act (FAA), the district court must stay, rather than dismiss, the litigation. The practical consequence of this rule is that decisions compelling arbitration will not be appealable as of right—in contrast to rulings that decline to compel arbitration,

which are subject to immediate appeal under the FAA, and which trigger an automatic stay of litigation under last Term’s decision in [Coinbase, Inc. v. Bielski](#). The net effect is to tilt the procedural advantage toward enforcement of arbitration agreements, consistent with a long line of prior decisions from the Court.

5. Employment Law. In [Murray v. UBS Securities, LLC](#), the Court clarified the burden of proof for an employee invoking the whistleblower protections of the Sarbanes-Oxley Act of 2002, which shields employees of publicly traded companies who report suspected violations of securities law and mail and wire fraud statutes. The Court held that whistleblower employees need not prove that their employers acted with “retaliatory intent.” Writing for a unanimous Court, Justice Sotomayor reasoned that the provision’s mandatory burden-shifting framework could not be squared with such a requirement. The *Murray* decision clarifies the showing needed to establish employer liability for whistleblower claims: the whistleblower employee must first make a *prima facie* case that her protected activity was a contributing factor in an adverse employment action. The burden then shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior.

The *Murray* decision will likely resonate beyond the Sarbanes-Oxley Act to whistleblower protection statutes generally, requiring employers to be meticulous in their design and implementation of effective procedures for addressing whistleblower reports, as we have repeatedly emphasized in past guidance, including [here](#) and [here](#).

In [Muldrow v. City of St. Louis, Missouri](#), the Court addressed the standard for establishing Title VII discrimination claims premised on the forced transfer of plaintiff employees. The Court held that, in addition to establishing an improper discriminatory intent, employees must show “some harm” from the forced transfer with respect to an identifiable term or condition of employment. However, the Court rejected the heightened standards adopted in some Circuits, holding that the employee “need not show that the injury satisfies a significance test.” For the plaintiff in the case before the Court, a discrimination claim could thus be proved up “several times over” through a showing that she was transferred to a less prestigious position involving more administrative work, less regular hours, and the loss of a take-home car. While the Court has previously emphasized that Title VII protects against even non-economic injuries, *Muldrow* serves as a reminder of the importance of documenting the business rationale for job transfers to protect against the risk of unfounded claims of workplace discrimination.

* * * * *

The Court has already granted certiorari in several cases to be decided during October Term 2024 that could have significant effects on commercial litigation and the business community.

In [*Facebook, Inc. v. Amalgamated Bank*](#), the Court will consider whether “risk factors” disclosures in annual SEC filings must also identify whether disclosed risks have previously materialized, even where a company has concluded that the materialization poses no threat to its business. In the case at issue, for example, a divided panel of the Ninth Circuit held that stockholders could proceed with their claims based on a disclosure concerning the risk of improper third-party misuse of customer data, because the defendant had failed to reveal an immaterial instance where a third party had, in fact, misused customer data. Much like the *Moab Partners* appeal from this past Term, *Facebook* reflects another front in the plaintiffs’ bar’s continuing campaign to expand securities litigation deeper into the realm of omissions.

In another significant securities appeal, the Court in [*NVIDIA Corp. v. E. Ohman J:or Fonder AB*](#) will examine when stockholders can plead fraud through reliance on internal company documents and expert opinion. The case presents an opportunity for the Court to tighten pleading standards in securities litigation, in a decision that could blunt two tactics favored by plaintiffs seeking to satisfy their statutory obligation to allege securities fraud with particularity.

Finally, in [*Medical Marijuana, Inc. v. Horn*](#), the Court will address whether plaintiffs asserting civil claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act may receive treble damages for economic harm resulting from personal injuries. The decision promises to resolve a circuit split, in which the Second and Ninth Circuits have permitted plaintiffs to use the onerous provisions of the RICO Act to supercharge personal injury claims that would traditionally be pursued under tort law.

We will continue to closely monitor developments when the Court returns from its summer recess and, as the Court’s next Term progresses, will note decisions and certiorari grants that warrant careful attention from the business community.

John F. Savarese
Kevin S. Schwartz
Noah B. Yavitz
Adam L. Goodman
Akua F. Abu