

## What The Experts Said About High Court Rulings This Term

By Law360 Guest Experts

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*With the latest U.S. Supreme Court term now concluded, we take a look back at some first impressions from the experts when the most impactful decisions for corporate law were handed down.*

### **CalPERS v. ANZ Securities — June 26, 2017**

#### **A Significant Victory For Securities Class Action Defendants**

The U.S. Supreme Court's decision in California Public Employees' Retirement System v. ANZ Securities enables securities class action defendants to calculate their exposure to opt-out actions and other liability with much greater confidence and precision. The decision also has the potential to go even further in limiting securities class actions, say Susan Saltzstein and Robert Fumerton of Skadden Arps Slate Meagher & Flom LLP.

### **Maslenjak v. U.S. — June 22, 2017**

#### **High Court Citizenship-Stripping Ruling Has Unintended Effect**

Sensibly enough, in *Maslenjak v. United States*, the court unanimously decided that a naturalized American cannot be stripped of her citizenship in a criminal proceeding based on an immaterial false statement. But instead of simply stopping at that result, it invented a new standard of "materiality" that is likely to create havoc in future denaturalization cases, says Leon Fresco of Holland & Knight LLP.

### **Bristol-Myers v. Superior Court of California — June 19, 2017**

### **Tough Times For Forum Shoppers**

A trio of rulings from the U.S. Supreme Court has made this a difficult spring for forum-shopping lawyers. TC Heartland, BNSF Railway and now Bristol-Myers Squibb have enforced limits on exercise of personal jurisdiction over corporate defendants, sending an unmistakable message to lower courts, says Lawrence Ebner of Capital Appellate Advocacy PLLC.

### **No Personal Jurisdiction Pass For Federal Plaintiffs**

The Bristol-Myers Squibb ruling dealt a blow to plaintiffs attorneys seeking to manufacture personal jurisdiction by joining the claims of resident plaintiffs with those of nonresidents in state court. But some have suggested that the ruling does not apply to federal courts. This is an argument with no legs, says attorneys with Skadden Arps Slate Meagher & From LLP.

### **Matal v. Tam — June 19, 2017**

### **Why High Court Is Right About Offensive Trademarks**

As an Asian-American, I have had a lot of hateful and derogatory names thrown at me throughout my life, and yet I found the U.S. Supreme Court's decision in Matal v. Tam, rejecting the U.S. Patent and Trademark Office's ban on registering disparaging terms as unconstitutional, gratifying in many ways, says Jennifer Ko Craft of Dickinson Wright PLLC.

### **Amgen v. Sandoz — June 12, 2017**

### **High Court Interprets The Biosimilars Statute — What Now?**

The decision in Amgen v. Sandoz is a win for biosimilar makers, but may ultimately have a limited impact in most cases. The ruling also provides lessons for Congress, says Irena Royzman and Nathan Monroe-Yavneh of Patterson Belknap Webb & Tyler LLP.

### **High Court's Superficial Analysis In Biosimilars Ruling**

This ruling only scratched the surface. The "one size fits all" notice of commercial marketing rule may leave certain biosimilar litigants in ill-fitting suits, say attorneys with King & Spalding LLP.

### **Henson v. Santander — June 12, 2017**

### **Debt Collection Concerns Post-Henson V. Santander**

In Henson v. Santander Consumer USA, the court ruled that a company collecting debts it purchased for its own account would not be defined as a debt collector under the Fair Debt Collection Practices Act. While this certainty is a win for the debt collection industry, it's not the victory some believe it to be, says Craig Nazzaro of Baker Donelson Bearman Caldwell & Berkowitz PC.

### **Microsoft v. Seth Baker — June 12, 2017**

### **The Supreme Court Slams The Back Door On Rule 23(f)**

The U.S. Supreme Court's recent decision in Microsoft v. Baker affirmed that a plaintiff denied class-action certification and Rule 23(f) permission to appeal cannot create an appealable "final judgment" by voluntarily dismissing his or her claims with prejudice. This removes a powerful weapon in plaintiffs

counsel's arsenal, say Alexandra Laks and Claudia Vetesi of Morrison & Foerster LLP.

### **Kokesh v. SEC — June 5, 2017**

#### **What Kokesh V. SEC Means For Enforcement Actions**

According to members of Debevoise & Plimpton LLP — including former SEC Chair Mary Jo White — the ruling in Kokesh significantly reduces the U.S. Securities and Exchange Commission's leverage in settlement discussions for certain types of cases, among other impacts.

#### **SEC Disgorgement Limits Should Apply To FERC And CFTC**

The U.S. Supreme Court has held that U.S. Securities and Exchange Commission enforcement actions requiring disgorgement of ill-gotten gains are subject to a five-year statute of limitations. The same principles appear to apply equally to disgorgement claims by the Federal Energy Regulatory Commission and the U.S. Commodity Futures Trading Commission, say Daniel Mullen and Charles Mills of Steptoe & Johnson LLP.

#### **Footnote In Kokesh Signals Bigger Changes On The Horizon**

The immediate effects of imposing a five-year statute of limitations on SEC disgorgement claims may be limited. A far more intriguing element of the Kokesh opinion is found in a footnote, which brings opportunities for real damage to the SEC's toolbox, say attorneys with Walden Macht & Haran LLP.

#### **How Kokesh Will Impact The FTC And Other Agencies**

The U.S. Supreme Court's recent decision in Kokesh v. Securities and Exchange Commission limits not just SEC enforcement actions, but also monetary relief sought by other agencies, like the Federal Trade Commission. A faithful application of this decision should lead to courts rejecting these agencies' long-standing practice of seeking penal monetary relief under their equitable authority, say Benjamin Mundel and Lucas Croslow of Sidley Austin LLP.

### **Town of Chester v. Laroe Estates — June 5, 2017**

#### **Town Of Chester: An Answer On Class-Member Standing?**

The decision in Town of Chester v. Laroe strongly suggests that before a damages class is certified under Rule 23(b)(3), all class members must prove Article III standing. Until the question is resolved once and for all, class action defendants would be wise to take advantage of this decision, says Jonah Knobler of Patterson Belknap Webb & Tyler LLP.

### **Advocate Health Care v. Stapleton — June 5, 2017**

#### **What To Know About High Court's ERISA Exemption Decision**

While the holding that church plans under the Employee Retirement Income Security Act include plans maintained by a church-affiliated organization is welcome news to most religious-affiliated employers, it also creates an opportunity for organizations sponsoring church plans to take another look at their status and their compliance with applicable legal requirements, say attorneys with Michael Best & Friedrich LLP.

### **Honeycutt v. U.S. — June 5, 2017**

#### **High Court Puts An End To Unfair Asset Forfeiture**

In this unanimous decision, the court held that the practice of imposing joint and several forfeiture liability is a step too far, endorsing what had been the minority view among federal courts of appeals. The Honeycutt ruling places an important limitation on Section 853 liability, say Harry Sandick and Joshua Kipnees of Patterson Belknap Webb & Tyler LLP.

### **Impression Products v. Lexmark — May 30, 2017**

#### **High Court Continues Expansion Of Patent Exhaustion**

The court's forceful, largely unanimous patent exhaustion ruling in *Impression Products v. Lexmark* is likely to clear up any clouds on the supply chain brought about by the Federal Circuit's previous decisions, say Vincent Yip and Peter Wied of LTL Attorneys LLP.

#### **Antitrust And Misuse Considerations Following Lexmark**

Since the *Lexmark* decision held contractual limitations to be outside the scope of a patentee's rights under the patent law, restrictions on sales of patented objects will be subject to unfair competition, antitrust and patent misuse law, says James Kobak, general counsel of Hughes Hubbard & Reed LLP.

#### **Patent Exhaustion Ruling Will Affect Many Industries**

The Supreme Court's recent expansion of the patent exhaustion doctrine raises potentially far-reaching implications that may range from lower prices for consumer products and lower profitability for companies, to higher prices for consumer products and higher profitability for companies, say Mark Baghdassarian and Friedrich Laub of Kramer Levin Naftalis & Frankel LLP.

### **BNSF Railway v. Tyrrell — May 30, 2017**

#### **Reaffirming Personal Jurisdiction Limits At High Court**

The U.S. Supreme Court's decision in *BNSF Railway Co. v. Tyrrell* is the latest in a series of recent efforts to curtail state court expansion of personal jurisdiction over nonresident defendants, say attorneys with Morrison & Foerster LLP.

#### **After The BNSF Decision, There's No Place Like 'At Home'**

Contrary to the claims of the plaintiffs bar, this finding does not deprive plaintiffs of the chance for a remedy: it restores balance between the parties, say Richard Dean and Michael Ruttinger of Tucker Ellis LLP.

#### **Potential Impact Of BNSF: 2 Areas To Watch**

The impact of this ruling will depend on how the lower courts apply it, and in particular, whether they heed the court's crystal-clear direction to strictly enforce the jurisdictional limits it has established, despite efforts to circumvent them, says Michael Paisner, chief counsel of litigation at Boeing Commercial Airplanes.

### **TC Heartland v. Kraft — May 22, 2017**

#### **Back To The Fourco: High Court's New, Old Patent Venue Test**

For nearly 30 years, courts have liberally construed the patent venue statute. But no more — the court has reinstated its 1957 *Fourco* interpretation of the statute. This decision in *TC Heartland* will have a profound and immediate impact on patent litigation, say Brian Ferguson and Rahul Arora of Weil

Gotshal & Manges LLP.

### **7 Things To Think About After TC Heartland**

So now what? Attorneys with Klarquist Sparkman LLP address what will happen to pending lawsuits, declaratory judgment cases, venue transfer, foreign defendants and several other practical issues.

### **TC Heartland Considerations For Hatch-Waxman Cases**

The TC Heartland decision may be felt strongly in the districts of New Jersey and Delaware, which are home to more than 75 percent of Hatch-Waxman cases. Brands and generics alike will be faced with important, strategic decisions that may reshape the landscape of Hatch-Waxman litigation in the years to come, says Mark Deming of Polsinelli PC.

### **What TC Heartland Could Mean For MDL Panel Patent Cases**

In 2016, intellectual property cases accounted for less than 5 percent of those pending before the Judicial Panel on Multidistrict Litigation. But the U.S. Supreme Court's TC Heartland decision may spark a significant uptick, says Timothy Sendek of Lathrop Gage.

### **Water Splash v. Menon — May 22, 2017**

#### **How High Court Resolved The Service-By-Mail Circuit Split**

In *Water Splash Inc. v. Menon*, the U.S. Supreme Court held that the Hague Convention does not preclude service by mail on defendants residing in foreign countries. Attorneys with Jones Day review how the court resolved this long-standing question for many jurisdictions.

### **Kindred Nursing Centers v. Clark — May 15, 2017**

#### **Nursing Homes Still Face Arbitration Agreement Uncertainty**

An arbitration agreement that is properly drafted and executed can provide businesses, specifically those in the long-term care industry, with a cost-effective route to dispute resolution. However, even with the decision in *Kindred Nursing Centers v. Clark*, businesses should be aware of state court views regarding the enforceability of these agreements, say Eugene Giotto and Gabrielle Lee of Cozen O'Connor.

### **Midland Funding v. Johnson — May 15, 2017**

#### **A Closer Look At Midland Funding V. Johnson**

The ruling in *Midland Funding v. Johnson* is certainly a win for creditors — especially those that purchase distressed debt and participate in bankruptcy proceedings. Yet, a closer analysis of the majority opinion reveals a number of issues meriting careful consideration, say attorneys with K&L Gates LLP.

### **Bank of America v. Miami — May 1, 2017**

#### **High Court Establishes New Theory Of Municipal Standing**

The opinion in *Bank of America v. City of Miami* conceivably established a right for cities to prospectively sue lenders, builders, developers and others in the industry. That power is — at least potentially — enormous, say Philip Stein and James Ward of Bilzin Sumberg Baena Price & Axelrod LLP.

### **Lewis v. Clark — April 25, 2017**

#### **Tribes Really Need More Than Sovereign Immunity Defense**

While Lewis v. Clarke may provide cause for concern for tribal employees and for tribes that may be obligated to indemnify them, tribes can protect themselves by carefully reviewing and assessing their risk management programs and the sufficiency of their liability insurance policies, say Erica Dominitz and Venus Prince of Kilpatrick Townsend & Stockton LLP.

#### **Lewis V. Clarke And The Future Of Tribal Immunity**

Whether this decision is wise from a practical standpoint depends on which side one takes in the larger debate regarding sovereign immunity. The unfairness of having tort victims go uncompensated may be eliminated, but the potential of liability may chill the performance of tribal employees with important duties, says Forrest Tahdoahnippah of Dorsey & Whitney LLP.

#### **A Look At The Impact Of Lewis V. Clarke Thus Far**

Because most tribes already have general liability insurance to cover the tortious actions of their employees, the impact of the U.S. Supreme Court's decision in Lewis v. Clarke might be lessened. However, the breadth of the court's opinion should give tribal interests pause to reflect on just how far the decision reaches, says Matthew Fletcher of Michigan State University College of Law.

### **Haeger v. Goodyear — April 18, 2017**

#### **Haeger V. Goodyear: Just Put The Cookie Back In The Jar**

The court's ruling in Haeger v. Goodyear illustrates how manufacturers and their lawyers get away with withholding evidence. If the chances of getting caught are low, and the penalty is merely that you go back to where you started, there is little incentive to play fair, says Jeb Butler of Butler Tobin LLC.

### **Coventry Health Care of Missouri v. Nevils — April 18, 2017**

#### **A Closer Look At 'Preemptive' Federal Contract Terms**

Subrogation of insureds' third-party claims is not a subject that excites too many lawyers, but the U.S. Supreme Court's decision in Coventry Health Care of Missouri Inc. v. Nevils will be of interest to anyone who tracks the court's federal preemption jurisprudence, says Lawrence Ebner of Capital Appellate Advocacy PLLC.

### **McLane v. EEOC — April 3, 2017**

#### **McLane V. EEOC's Impact On Employer Subpoena Responses**

In McLane v. U.S. Equal Employment Opportunity Commission, all eight justices agreed that the proper standard of review of an EEOC subpoena enforcement decision is abuse of discretion, not de novo review. The question now becomes whether the court's ruling will affect how employers and employment lawyers respond to EEOC subpoenas, says Mark Wiletsky of Holland & Hart LLP.

### **Star Athletica v. Varsity — March 22, 2017**

### **Star Athletica V. Varsity: Ceci N'est Pas Une ... Useful Article**

It is refreshing to encounter a copyright decision that does not contain the terms “fair use” or “Digital Millennium Copyright Act,” and to think about the actual intellectual property that copyright is supposed to protect. Does copyright extend to an artistically crafted pipe, or only a picture of the pipe? The U.S. Supreme Court has given us just such an opportunity, says Jacqueline Charlesworth, of counsel at Covington & Burling LLP and former general counsel of the U.S. Copyright Office.

### **NLRB v. SW General — March 21, 2017**

#### **Limiting Presidential Powers At The High Court**

The ruling in National Labor Relations Board v. SW General certainly has the potential to genuinely impact the Trump administration. However, the real consequences of the court’s ruling to employers, unions and others with business before the board may become apparent after NLRB general counsel Richard Griffin’s four-year term expires in November, say Steven Swirsky and Laura Monaco of Epstein Becker & Green PC.

### **Pena-Rodriguez v. Colorado — March 6, 2017**

#### **Will Pena-Rodriguez V. Colorado Apply To Civil Cases?**

The court has held that no-impeachment rules must yield to the Sixth Amendment’s right to an impartial jury in a criminal investigation. Though Pena-Rodriguez has much to recommend to the civil side of the jury system, the analysis in the opinion may not be easily extended, say M. Christian King and Wesley Gilchrist of Lightfoot Franklin & White LLC.

### **Life Technologies v. Promega — Feb. 22, 2017**

#### **High Court's Patent Guidance On Exporting Component Parts**

While the Supreme Court’s decision in Life Technologies v. Promega continues the general trend of narrowing the extraterritorial reach of U.S. patents, the ruling is different than most recent opinions involving patents. Here, the court has embraced a bright-line patent law rule, says Clifford Ragsdale Lamar of Butler Snow LLP.

### **Shaw v. U.S. — Dec. 12, 2016**

#### **High Court Eschews Technicalities In Bank Fraud Law Ruling**

The court’s focus in Shaw on the practical, rather than the technical, continues the approach that the court took in Loughrin — that legal “niceties” should not dictate the interpretation of the bank fraud statute, says A. Katherine Toomey of Lewis Baach PLLC.

### **Samsung v. Apple — Dec. 6, 2016**

#### **Samsung V. Apple: Impacts Beyond Damages**

In *Samsung v. Apple*, the Supreme Court decided its first design patent case in over a century. The intellectual underpinnings of what seems on the surface to be a simple decision may, in fact, turn out to have a broader disruptive impact, say Courtland Reichman and Bahrad Sokhansanj of McKool Smith Hennigan PC.

### **Salman v. U.S. — Dec. 6, 2016**

#### **The Personal Benefit Test Post-Salman**

In its first opinion addressing the scope of insider trading liability in nearly 20 years, the Supreme Court limited its holding in *Salman* to gifts to friends or relatives, providing little clarity about the scope of the personal benefit requirement outside of that context, say attorneys with Paul Weiss Rifkind Wharton & Garrison LLP.

#### **Salman Insider Trading Case A Hollow Win For Prosecutors**

The dominant narrative about *Salman v. U.S.* is that it was a big win for federal prosecutors. That is only part of the story, says professor Michael Guttentag of Loyola Law School.

### **State Farm v. Rigsby — Dec. 6, 2016**

#### **When Punishing FCA Seal Violations, Avoid Taxpayer Harm**

The 8-0 decision in *State Farm Fire and Casualty v. Rigsby* has placed responsibility for penalizing seal violations under the False Claims Act squarely where it belongs: at the discretion of the district court whose order was broken, says Scott Oswald of The Employment Law Group.

#### **FCA Seal Opinion Lacks Needed Guidance**

This unanimous decision is disappointingly narrow, leaving intact a circuit split regarding how a district court should decide whether to dismiss a *qui tam* suit for a seal violation, says Lawrence Ebner of Capital Appellate Advocacy PLLC.

### **Bravo-Fernandez v. U.S. — Nov. 29, 2016**

#### **Bravo-Fernandez: Did The Court Incentivize Overcharging?**

The unanimous decision by the Supreme Court in the case of *Juan Bravo-Fernandez and Hector Martinez-Maldonado v. United States* appears to be a setback for criminal defendants, potentially providing prosecutors with another incentive to charge overlapping counts based on a single predicate offense, say Justin Shur and Lisa Bohl of MoloLamken LLP.

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