

Reproduced with permission from Product Safety & Liability Reporter, 39 PSLR 797, 07/25/2011. Copyright © 2011 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Supreme Court

Supreme Court Takes Aim at Class Actions, Jurisdiction, Preemption in Pro-Business Term

Coming off a term that was defined by major political and social issues, the U.S. Supreme Court shifted gears in its 2010–2011 term and focused on the changing face of litigation in the United States, much to the delight of the business community and the lawyers who represent those interests. The term included an unusually high number of product liability and product liability-related decisions, especially preemption rulings.

Without a lot of controversial and ideological cases, “this was the kind of term that, *looking back*, the cases will seem a lot more important,” Lisa S. Blatt, Arnold & Porter LLP, Washington, D.C., told BNA July 11. Blatt, who has argued more cases before the court than any other woman alive, explained that the justices made a lot of law this term by planting “little seeds.” “In that sense it was a practitioner’s term,” and also a “pretty significant term for business cases.”

Depending on who one asks, two of the court’s most talked about decisions, *AT&T Mobility LLC v. Concepcion*, 79 U.S.L.W. 4279 (U.S. 2011), and *Wal-Mart Stores Inc. v. Dukes*, 79 U.S.L.W. 4527 (U.S. 2011) (39 PSLR 663, 6/27/11), either launched a direct assault on plaintiffs’ ability to take on powerful corporations, or put a stop to leviathan suits fueled by ballooning litigation costs and attorneys’ fees in the age of electronic discovery.

“This is about closing the courthouse doors,” Erwin Chemerinsky, founding dean of the UC Irvine School of Law and author of several books on constitutional law, told BNA June 30. “A stunning number of cases involved losing access to the courts,” including both *Concepcion* and *Wal-Mart*, which directly limit the ability to bring class actions, he said.

But Andrew J. Pincus, Mayer Brown, Washington D.C., and co-director of Yale Law School’s Supreme Court Advocacy Clinic, said June 22 that proposed classes like that in *Wal-Mart* represent a “shocking development” in the class actions of today. When you get classes approaching the million-plaintiff mark, coupled with “monumental” electronic discovery costs, these are “not your father’s class actions,” he said.

And while cases like *Wal-Mart* and *Concepcion* dominated the headlines and rekindled the debate over the court’s perceived “pro-business” tilt, below the surface, decisions involving personal jurisdiction in a suit against a foreign machine manufacturer, and preemption of failure-to-warn claims over generic drugs elicited a wide array of reactions, ranging from surprise to confusion, from disappointment to relief. Following the various decisions, attorneys interviewed by BNA offered their expertise and insight. And, after the conclusion of a term that many characterized as generally uneventful, BNA asked a series of experts, including Supreme Court practitioners, legal scholars, and interest group advocates, to dig deeper and nominate individual opinions for a set of “Supreme Court Superlatives,” in an effort to shed light on themes that otherwise might have gone unnoticed.

Preemption Case Delivers Blow. Although the business community won its share of major cases this term, it also suffered a number of setbacks. However, most were comparatively minor.

Preemption proved to be a bit of a stumbling block in *Williamson v. Mazda Motor of Am. Inc.*, 79 U.S.L.W. 4098 (U.S. 2011) (39 PSLR 210, 2/28/11), with the court unanimously holding that state tort claims alleging that Mazda should have installed lap-and-shoulder seat belts in certain vehicle seating configurations could move forward, despite federal regulations giving manufacturers a choice of different types of restraints, including lap-only belts.

After *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), which rejected similar claims in the face of fed-

Least Popular With Business Community

Williamson v. Mazda Motor of America Inc.: By providing a choice in safety features, federal regulations do not automatically preempt state tort claims against manufacturers.

eral regulations related to air bags, the defense bar took that decision and ran with it, Allison Zieve, director, Public Citizen Litigation Group, Washington, D.C., explained to BNA. The holding was applied broadly so that a federal regulator's decision to provide manufacturers with several options regarding safety features effectively immunized them from state liability.

But that view of *Geier* was wrong, Zieve, who represented Williamson, pointed out. And the court said that you "have to look at what the agency was trying to accomplish and whether allowing state law to operate really does conflict" with those goals, she added.

Following *Williamson*, legal experts interviewed by BNA said the decision could be instructive for attorneys examining preemption claims in product liability cases by pointing them to look more closely at the federal agency record and rulemaking process (39 PSLR 211, 2/28/11).

In particular, some observers wondered how the *Williamson* decision would affect another hotly disputed preemption question: whether federal regulations bar claims that vehicle makers should have used laminated glass, rather than tempered glass, in the side windows of vehicles. The type of glass can affect the risk of ejection. "They've left to another day that particular issue," Professor Nicholas Wittner, Michigan State University College of Law, said at the time.

Several months after *Williamson*, the court declined to review a Texas Supreme Court decision that a regulatory provision governing seat belts in motor coaches, and a second regulation, FMVSS 205, providing choices in window glass, do not preempt state tort actions (39 PSLR 564, 5/30/11). The denial of certiorari in the Texas case, *MCI Sales & Service Inc. v. Hinton*, sends a "clear message that glass claims are not preempted under FMVSS 205," Thomas K. Brown, who represented injured passengers and survivors of those killed in a bus crash that prompted the Texas suit, told BNA.

Attorneys were also surprised by the 8-0 result in *Williamson*. "There was no indication from the oral argument that it was going to be unanimous," Martin N. Buchanan, Niddrie, Fish & Buchanan, San Diego, an attorney for the Williamson family, told BNA after the decision. And Professor Catherine M. Sharkey, New York University School of Law, told BNA that she was surprised so many of the justices "would sign on to an opinion that rests so heavily on the agency's contemporaneous explanation, and its current explanation before the court, as to whether there should be preemption." It is a type of analysis she has written about and calls "sensible."

Sharkey said, "To me . . . the surprising feature of the lineup . . . is that the dissenters in *Wyeth v. Levine*—Alito, Scalia and Roberts—would be joining the majority. My read on the *Wyeth* case is that there was a big fight between the majority and the dissent about how

broadly or narrowly to read *Geier*. It's a puzzle," Sharkey said.

Court Reins in Class Actions. Most observers agreed that corporations should chalk this term up as a major victory. Chemerinsky went a step further and said that this was one of the "most pro-business terms we've seen since the mid-1930s."

The opinion in *Wal-Mart*, which denied certification to a class estimated at close to 1.5 million former and current female employees in a gender discrimination suit, may have avoided "Armageddon" for employers, Carter G. Phillips, Sidley Austin LLP, Washington D.C., told BNA July 6.

Most Popular With Business Community

Wal-Mart Stores Inc. v. Dukes: Avoided employment discrimination "Armageddon" for national corporations by rejecting certification of largest class action in history.

Phillips, who has more than 70 Supreme Court arguments under his belt and also worked on an amicus brief in support of *Wal-Mart*, said that the discrimination claims in that case could have been brought "against every Fortune 500 company in the United States." Rather than alleging a singular corporate policy furthering discrimination against women, the plaintiffs claimed that discriminatory decisions made by independent local managers had a disparate impact on female employees, relying on statistical data, anecdotal evidence, and expert testimony from a sociologist for support.

Impact on Product Liability Cases? Attorneys interviewed by BNA following *Wal-Mart* varied in their views on how the decision might affect product liability and consumer class actions.

Scott Nelson of the Public Citizen Litigation Group, which submitted an amicus brief in support of the plaintiffs, said, "I don't see a lot of implications for product-liability class actions or consumer class actions generally, for a couple of reasons. Most of those class actions are brought under Rule 23(b)(3), and much of this decision in the *Wal-Mart* case concerned the availability of (b)(2) class actions. The commonality part of the decision obviously applies to any class action But again, I think in most product and consumer class actions there's a much more obvious common issue of the legality of the defendant's conduct, which the court found lacking in the employment context, given the claim here of subjective decision-making, which it felt apparently was not a claim of a singular type of action that could be a legal wrong to all these members of the class."

John Vail, Center for Constitutional Litigation, which submitted an amicus brief on behalf of the American Association for Justice in support of the plaintiffs, told BNA that the decision "advances a debate in the lower courts about what kind of factual showing is necessary at the certification stage." Justice Antonin Scalia's indication that class certification can involve overlap with the merits of a plaintiff's claim is important in the product-liability context, he said.

Scalia's forecast on "whether expert witnesses need to pass *Daubert* in order to have their testimony considered for purposes of class certification" is another big issue in the product-liability arena, Vail said. "The district court ruled no, and Scalia says, 'We're not passing on that, but we don't think that's so,'" Vail said.

Son of *Twiqbal*. Although most Supreme Court watchers agreed that there was no heir apparent to *Ashcroft v. Iqbal*, 77 U.S.L.W. 4387 (U.S. 2009), or *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 75 U.S.L.W. 4337 (2007)—the pleading standards cases that have already become two of the most cited opinions in the court's history—there may have been some distant cousins that could significantly affect the practices of many attorneys.

First, a keen understanding of the *Wal-Mart* decision may prove useful in class certification disputes under Rule 23(a). While the court's unanimous decision that individualized relief, such as claims for back pay, are not appropriate for certification under Rule 23(b)(2) was important, its discussion of Rule 23(a) may prompt lower courts to start engaging in more independent analysis of commonality before they even get to Rule 23(b), Kannon K. Shanmugam, head of the Supreme Court practice at Williams & Connolly LLP, Washington, D.C., told BNA.

The decision "put[] some teeth into a requirement that had historically largely lain dormant," he said. However, that's not to say that the court's decision was entirely clear.

Cases Every Lawyer Should Study

***Wal-Mart Stores Inc. v. Dukes*:** By emphasizing commonality considerations under Rule 23(a), the opinion is terra nova for arguments over how much "glue" is needed to hold class actions together.

***J. McIntyre Machinery Ltd. v. Nicaastro*:** Plaintiffs' lawyers must consider the decision when choosing the proper forum for product liability suits against foreign companies.

While the court said there needs to be some sort of "glue" holding individual class members' claims together to support commonality under Rule 23(a), that is "not a concept that drives you to an outcome," Sidley's Phillips told BNA. Rather, the outcome of future cases may ultimately rest on the strength of attorneys' arguments and how well they use *Wal-Mart* to their advantage.

Or, certification may simply depend on the judge's inclination to give plaintiffs the benefit of the doubt, Shanmugam said. But, either way, he had "no doubt" that the case will be cited in nearly every class certification brief filed in federal court.

"I think the comparison of *Dukes* to *Twombly/Iqbal* is an interesting one," Robin Conrad, executive vice president of the National Chamber Litigation Center, Washington, D.C., told BNA. "Certainly, *Dukes* will become 'the' class action precedent to cite in certification briefs. But like *Twiqbal*, I think *Dukes*' legacy will be keeping frivolous cases out of the courts rather than preventing meritorious cases from proceeding," she explained.

Jurisdiction Cases. In *J. McIntyre Mach. Ltd. v. Nicaastro* 79 U.S.L.W. 4684 (U.S. 2011) (39 PSLR 687, 7/4/11), the court was expected to answer questions about stream-of-commerce jurisdiction that have been lingering since its competing plurality opinions in *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102 (1987). Instead, "we wound up with another plurality opinion," Public Citizen's Zieve told BNA.

The case involved the British manufacturer of a metal cutting machine that injured the plaintiff in New Jersey. While six justices concluded that the New Jersey Supreme Court had erred by finding personal jurisdiction over the foreign company, only a four-justice plurality, led by Justice Anthony M. Kennedy, addressed the proper standard. Kennedy's opinion sided with Justice Sandra Day O'Connor in *Asahi*, who said:

The "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.

The two concurring justices in *Nicaastro*, Justices Stephen G. Breyer and Samuel A. Alito Jr., agreed with the outcome, but said that it was "unwise to announce a rule of broad applicability without full consideration of the modern-day consequences," opting instead to wait for a case that would allow the court to weigh in on internet marketing and sales issues.

"Litigants and lawyers could really use a clear test" when it comes to the issue of stream-of-commerce jurisdiction, Zieve, who helped author a brief in support of the plaintiff, told BNA.

Depending on where you think Justices Breyer and Alito will ultimately come down on this issue, this decision will have a tremendous effect "on choices of cases that lawyers bring and consumers' access to the justice system," Zieve said. With the issue still open, plaintiffs' lawyers should "think long and hard about forum" before filing a suit.

Gary Born, an expert on international litigation and arbitration, told BNA after the decision that Kennedy's opinion is more restrictive than O'Connor's in *Asahi*. The plurality opinion "aspired to restate, and sharply limit, the scope of both specific personal jurisdiction and the stream of commerce doctrine—apparently requiring a specific intention to submit to the forum's jurisdiction by 'targeting' the forum market," a narrower view than O'Connor's, he said.

Looking to the future, Wittner said, "Once a case does go up before the court that involves . . . a modern, novel means of sales, especially internet sales, . . . that will be very interesting." He continued, "My concern is that it's going to take another decade or so for something to come up. These cases take a long time to percolate. . . . My suspicion is we'll see something within the next several years, and it will be an internet sale issue."

In contrast, in *Goodyear Dunlop Tires Operations SA v. Brown*, 79 U.S.L.W. 4696 (U.S. 2011) (39 PSLR 687, 7/4/11), a unanimous Supreme Court agreed that North Carolina courts did not properly apply the high bar in general jurisdiction cases—"confusing or blending" specific and general jurisdictional rules—and therefore incorrectly found personal jurisdiction over foreign corporations in a lawsuit involving a fatal bus accident in

Paris allegedly caused by the defendants' tires, which were manufactured abroad by foreign Goodyear subsidiaries. *Goodyear* involved the death of two 13-year-old boys from North Carolina who were headed by bus to Charles de Gaulle Airport on a trip with fellow soccer players.

The Goodyear Tire & Rubber Co. did not contest personal jurisdiction in North Carolina; the case dealt with whether the three foreign subsidiaries could be sued in the state because they did not design, manufacture, or advertise their products in North Carolina or have any place of business or employees there.

Justice Ruth Bader Ginsburg, writing the majority opinion, said the foreign subsidiaries did not have the required "continuous and systematic" affiliation with North Carolina to allow for general jurisdiction.

More Questions Than Answers. Many of the same reasons that *Nicastro* warrants significant attention from attorneys also reveal why it will have many people scratching their heads.

"This is a very important issue," Mayer Brown's Geller said. "The law has been very unclear on stream-of-commerce jurisdiction since the early 1980s," and it "is even more important now in the internet age." This decision did not provide much guidance, he added.

Personal jurisdiction in this context has been the "subject of a steady stream of litigation in lower courts," Williams & Connolly's Shanmugam told BNA. "I think that will continue," he said, because it will be "hard for lower courts to decipher a principle that commanded a majority of the court."

Most Baffling

J. McIntyre Machinery Ltd. v. Nicastro: The court's failure to definitively address the questions left open by *Asahi* will lead to more litigation and confusion over personal jurisdiction.

PLIVA Inc. v. Mensing: The decision could signal a turning point in the court's preemption jurisprudence that may cause lower courts to struggle with its application.

In addition to *Nicastro*, several commenters also homed in on Justice Clarence Thomas's opinion in *PLIVA Inc. v. Mensing*, 79 U.S.L.W. 4606 (U.S. 2011) (39 PSLR 657, 6/27/11), as not only producing a strange result, but possibly marking a shift in the court's preemption outlook altogether—a move that could cause significant confusion in the lower courts.

By a vote of 5-4, the court held that state failure-to-warn claims against the makers of generic pharmaceuticals are preempted by federal law. The court held that rules requiring generic drugs to use the same warning labels as their name-brand counterparts make it impossible for the manufacturers to comply with both state and federal law simultaneously.

Both the majority and the dissent agreed that, in light of the court's decision in *Wyeth v. Levine*, 555 U.S. ___, 77 U.S.L.W. 4165 (2009) (37 PSLR 274, 3/9/09), which allowed the same types of claims against name-brand drugmakers, the outcome was perplexing at best.

But perhaps most confounding was Thomas's embrace of impossibility preemption in light of his outspo-

ken criticism of elements of implied preemption doctrine.

In the past, Thomas "has expressed concerns about the doctrine of conflict preemption, at least in the object or frustration of purpose [contexts]," former U.S. Solicitor General Gregory G. Garre, Latham & Watkins LLP, Washington, D.C., told BNA.

"It is possible that the decision emphasizes an important doctrinal shift in conflict preemption," Garre said. "The court seems to be turning to the impossibility part of the doctrine, and it remains to be seen whether or not the court will see this as a conventional application of the impossibility prong, or whether this opinion will ultimately invigorate conflict preemption doctrine in a different or new direction," Garre added.

Of course, it "may just be that this is sort of a relatively discrete situation," Garre acknowledged. "But it may be a doctrinal turning point as well. We'll just have to see."

"I continue to be baffled by the Supreme Court's federal preemption jurisprudence," the NCLC's Conrad said. But, she added, if there was one clear trend, it was that "implied preemption arguments are almost universally doomed to failure.

"At least that's what I thought until Justice Thomas . . . surprisingly returned to the implied preemption fold in *PLIVA*" after "denouncing implied obstacle preemption" in *Wyeth*, Conrad said.

As to the practical effects of the decision, an attorney supportive of the plaintiffs told BNA that the ruling undermines Congress's entire approach to generic drugs, which seeks to put them on an equal footing with their name-brand equivalents. On the other hand, an attorney representing the generic drug industry focused on the continued availability of low-cost generic drugs to consumers.

Brian Wolfman, co-director of the Institute for Public Representation, Georgetown University Law Center, Washington, D.C., told BNA after the decision that a different outcome for generic and name-brand manufacturers could not have been what Congress had in mind when it passed the Hatch-Waxman Amendments, which created an expedited process for bringing generic drugs to market. "And, it will put doctors in an ethical bind: Do they prescribe generic drugs that will save their patients (and their insurers) money? Or do they prescribe the brand-name drug to avoid destroying their patients' state-law rights to tort compensation?"

But Jay P. Lefkowitz, Kirkland & Ellis LLP, New York, who represented PLIVA Inc. and several other defendants, told BNA, "At the end of the day, the real winners here are consumers: They ultimately bear the costs associated with this kind of litigation, and today's result will significantly curtail unnecessary lawsuits and litigation abuse."

The court took the case despite the recommendation of the U.S. Solicitor General, who advised the court not to grant certiorari and said failure-to-warn claims were not preempted.

Special Mention: Product Liability. The court decided two other product liability cases this term: one involving successive class actions, and the other dealing with the preemptive effect of a special vaccine statute.

In *Smith v. Bayer Corp.*, 79 U.S.L.W. 4515 (U.S. 2011) (39 PSLR 628, 6/20/11), the court held that a federal district court could not enjoin a West Virginia state court

from considering class certification in a Baycol suit against Bayer Corp., after the federal court had declined to certify a class pursuing similar state law claims regarding the cholesterol drug.

In a unanimous opinion written by Justice Elena Kagan, the Supreme Court said a federal court cannot enjoin a class action from proceeding in state court when a class was never certified in federal court and when the two courts' standards for class certification differ, or there are different parties.

The U.S. Court of Appeals for the Eighth Circuit had affirmed the injunction as a proper exercise of the district court's power under the Anti-Injunction Act's relitigation exception, which authorizes a federal court to enjoin state court proceedings "to protect or effectuate its judgments." But Kagan said that the relitigation exception is "designed to implement well-recognized concepts of claim and issue preclusion." To have a preclusive effect, the federal court order must decide the same issue as the one before the state court. Additionally, only parties to a suit may be bound by a judgment, subject to a handful of limited exceptions. "[T]his case does not even strike us as close," Kagan said. "The issues in the federal and state lawsuits differed because the relevant legal standards [for certifying class actions] differed. And the mere proposal of a class in the federal action could not bind persons who were not parties there."

Kevin M. Clermont, Cornell University Law School, Ithaca, N.Y., who has written about the preclusive effects of class certification, told BNA the court's decision essentially holds that the issue of the preclusive effect of a certification denial will be decided by state courts adjudicating pleas of *res judicata*, rather than by the enjoining federal court. The decision, he said, "opens the door to people trying to bring similar cases again and again This repetitive litigation problem will continue to exist."

In *Brueswitz v. Wyeth*, 79 U.S.L.W. 4067 (U.S. 2011) (39 PSLR 212, 2/28/11), the court dealt a blow to a family who alleged their daughter developed a seizure disorder caused by an especially reactive type of childhood pertussis vaccine. The court, in a 6-2 decision with the majority opinion by Justice Antonin Scalia, said the National Childhood Vaccine Injury Act expressly preempts all design defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects.

The girl's parents had argued that the statute bars recovery only for unavoidable side effects. They contended their daughter's reaction was avoidable, because a safer vaccine design was available. Whether a side effect was avoidable must be determined on a case-by-case basis, they argued, so their claims are viable. But the court rejected their position. The text of the statute supports the conclusion that all design defect claims are preempted, it said. The structure of the statute reinforces the textual interpretation, it added.

Justice Sonia Sotomayor, joined by Ginsburg, dissented. Sotomayor said that the court "imposes its own bare policy preference over the considered judgment of Congress."

Looking at possible implications of the decision, David M. Gossett, Mayer Brown LLP, Washington, D.C., who submitted an amicus brief on behalf of the U.S. Chamber of Commerce supporting manufacturer Wyeth, told BNA, "The case is clearly of great interest

and importance to vaccine makers as well as everyone who has been following the ongoing debate about whether certain childhood vaccines cause autism." Gossett suggested that this decision will likely preclude those claims.

"The case is unlikely to have much of an impact on other areas of preemption law," Gossett said, "although it does demonstrate that the court is willing to give effect to express-preemption provisions when Congress chooses to include them in statutes."

Zieve told BNA that the decision "leaves a regulatory [vacuum], such that vaccine manufacturers cannot be held accountable to patients for failing to improve their products when science and technology show there to be better, safer ways to design vaccines." Public Citizen Litigation Group signed onto an amicus brief supporting the petitioners.

Justice Elena Kagan recused herself; while Kagan served as solicitor general, her office submitted an amicus brief urging the court to hear this vaccine case and arguing for preemption.

Special Mention: Pharmaceutical Cases. Two other pharmaceutical decisions, while not specifically product liability cases, caught the attention of practitioners.

In *Sorrell v. IMS Health Inc.*, 79 U.S.L.W. 4591 (U.S. 2011), the court held 6-3 that a Vermont statute that bars pharmacies from selling or disclosing information that identifies physicians and the medications they prescribe for marketing purposes, and forbids drug manufacturers' use of such information to market their products, violates the First Amendment's Free Speech Clause.

By targeting a specific type of speech—drug marketing—by a disfavored speaker—pharmaceutical companies—the law ran afoul of traditional First Amendment doctrine, the court held. However, the court went a step further, noting that even under a less exacting commercial speech standard, the statute was problematic because the state's justifications—protection of medical privacy and the reduction of health care costs—were insufficient.

Because the law allowed the same data to be provided for purposes other than marketing—such as academic research—privacy concerns were not adequately addressed by the restrictions, the court said. Further, even if marketers were able to increase sales of their name-brand drugs successfully, effectively driving up overall health care costs, persuasiveness "provides no lawful basis for quieting" speech, it held.

"This was a case that was pitched as a case about doctors' prescribing history, but it turned out to be a case about the First Amendment right of pharmaceutical companies to market their drugs," Arnold & Porter's Blatt told BNA. Because this is "such an area of active government regulation and criminal prosecution, if the case is not a warning bell to the government, it should be," she added.

In a securities case, *Matrixx Initiatives Inc. v. Siracusano*, 79 U.S.L.W. 4187 (U.S. 2011), a unanimous high court ruled that shareholders were entitled to proceed with their claims that drug manufacturer Matrixx Initiatives Inc. failed to disclose material information when it made rosy statements about Zicam, a key product, without also disclosing that the cold remedy may have caused a small number of users to lose their sense of smell. The court said a reasonable investor probably

would have viewed the information as significantly altering the total mix of information available and that the information could be material—even though the number of users who allegedly suffered the side effect was not “statistically significant.”

BY TOM P. TAYLOR

JULIE A. STEINBERG, MARTINA S. BARASH, AND
JESSIE KOKRDA KAMENS CONTRIBUTED REPORTING.