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STICKING TO BUSINESS: A REVIEW OF BUSINESS-RELATED CASES IN THE 1997-98 SUPREME COURT TERM*

Barbara K. Bucholtz[†]

The Supreme Court is *not* the Court of Final Consideration, . . . following every term, there's always the law reviews.¹

I. INTRODUCTION

One defining characteristic of the Court's business-related opinions last term was the absence of either radical departures from existing jurisprudence or bold decisions implicating contentious public policy and divisive constitutional issues.² Most of the business cases read like methodical exercises in statutory construction.³

* Based on remarks delivered at the Conference, *Practitioners' Guide to the October 1997 Term of the United States Supreme Court*, at the University of Tulsa College of Law, December 11, 1998.

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1. Louis Henkin, Professor of Law, Columbia University School of Law, remarks at A Roundtable on Constitutionalism, Constitutional Rights and Changing Civil Society, November 19, 1998, Benjamin N. Cardozo School of Law.

2. To the extent that there was headline-grabbing drama in the business cases, it was to be found in the areas of sexual harassment and discrimination. For an expanded discussion, see Vicki J. Limas, *Significant Employment Law Cases in the 1997-98 Term: A Clarification of Sexual Harassment Law and a Broad Definition of Disability*, 34 TULSA L.J. 307 (1999).

In this term the Court clarified existing standards and sustained its intolerance of sexual harassment in the workplace. In *Oncala v. Sundowner Off Shore Services*, the Court held that the protections against workplace sexual harassment under Title VII, extend to same-sex sexual harassment. See *Oncala*, 118 S. Ct. 998, 1002 (1998). In *Faragher v. City of Boca*, and in *Burlington Indus. v. Ellerth*, the court enunciated new guidelines for determining employer liability for supervisor harassment: employers are vicariously liable for actionable sexual harassment by a supervisor that results in tangible employment consequences for the employee. See *Faragher*, 118 S. Ct. 2275, 2293 (1998); *Burlington Indus.*, 118 S. Ct. 2257, 2270 (1998). If no tangible effects on employment could have been anticipated by the employee, the employer can raise its anti-harassment policy and its implementation of that policy as an affirmative defense. See *Faragher*, 118 S. Ct. at 2293; *Burlington Indus.*, 118 S. Ct. at 2270.

Discrimination in the workplace was also sanctioned under existing law this term. In *Oubre v. Entergy Operations, Inc.*, the Court found that an employee who signed a document releasing her employer from all claims was not barred from bringing a subsequent claim for age discrimination because the release did not conform to the provisions of the Older Workers Benefit Protection Act. See *Oubre*, 118 S. Ct. 838, 841 (1998). Also, in *Bragdon v. Abbott*, the Court held that an individual who tested positive for HIV was covered by the protective provisions of the Americans with Disabilities Act. See *Bragdon*, 118 S. Ct. 2196, 2213 (1998).

3. This is not to suggest that the outcomes of these exercises were foregone conclusions. For the definitive discussion of the proposition that for every canon of statutory construction in support of one result there is an equal and opposing canon which supports the opponent's view, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules on Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

Indeed, the Court as a whole evinced a marked preference for conservatism, sticking to the business of judicial restraint and reserving a cacophony of concurrences and dissents only for those majority or plurality opinions in which the author strayed from his or her assigned task of applying existing rules or ascertaining the legislative intent of particular statutory language.⁴

Another notable characteristic of the term was that some of the decisions likely to have the most significant impact on the business community were not, strictly speaking, business law cases. One landmark decision⁵ applied the seldom-invoked Eighth Amendment and found that compelling full forfeiture of unreported currency carried by an international traveler violated the Excessive Fines Clause of the Amendment.⁶ The case was important, because this was the Court's first application

4. See, e.g., *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). The Court was asked to construe the citizens' suit provision of the Emergency Planning and Community Right-to-Know Act of 1986. See *id.* at 1009. The specific issue was whether the court had jurisdiction to hear a case in which violations of the Act had occurred but had been rectified before suit was filed. See *id.* All members of the Court concurred in Justice Scalia's conclusion that a suit for violations that had subsequently been rectified was barred under Article III's standing analysis. See *id.* at 1019-32.

However, three of the Justices found that statutory construction of the Act's citizen-suit provision was the preferred ground for the decision. See *id.* at 1021-32. They expressly rejected Justice Scalia's insistence that the Court reach beyond statutory interpretation and ground the decision upon an innovative constitutional theory that Article III standing issues must be resolved at the outset. See *id.* at 1025-27 (Stevens, J., concurring). The concurring justices evinced a strong preference for statutory interpretation over unnecessary consideration of constitutional theory when, as here, the intent of Congress expressed in the Act offered sufficient grounds for the dispute. See *id.* at 1021-27, 1030-32.

Similarly, in *Baker v. General Motors Corp.*, four concurring justices agreed with Justice Ginsburg's conclusion that Article IV's Full Faith and Credit Clause did not extend beyond final judgments to reach an injunction. See *Baker*, 118 S. Ct. 657, 664 (1998) (Kennedy, J., concurring). However, they opined that the existing doctrine was sufficient to resolve the issue and they expressly refused to be led beyond the existing doctrine, and the narrow issue before it, into unchartered Constitutional terrain and Justice Ginsburg's discourse on broad exceptions to the doctrine. See *id.* at 672. Thus, *Baker* and *Steel* illustrate the present majority's minimalist approach of fashioning the issues narrowly and its preference for resolving those issues on the deferential grounds of statutory construction and legislative intent.

5. See *United States v. Bajakajian*, 118 S. Ct. 2028 (1998).

6. See *id.* A traveler and his family sought to board an airplane bound for Italy without notifying the customs service that he was transporting more than \$10,000 in currency. There was no dispute that this failure to report violated 31 U.S.C. § 5316(a)(1)(A). See *id.* at 2031. In fact, the traveler carried with him \$357,144 in currency. See *id.* at 2032. The government argued that the entire amount should be forfeited pursuant to 18 U.S.C. § 982(a)(1) which provides in pertinent part, "The Court, in imposing sentence on a person convicted of an offense in violation of section . . . 5316, . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense. . . ." See *id.* at 2031. The District Court found that the entire amount was subject to the statutory forfeiture because it was "involved in" the offense, but they concluded that this forfeiture would violate the Eighth Amendment because it was grossly disproportionate to the traveler's violation of the reporting statute at § 5316(a)(1)(A). See *id.*

On appeal, the Ninth Circuit split on the issue of whether the undisclosed currency was "involved in such offense" as required by § 982(a)(1) because the traveler's offense was the failure to report the currency not the transport of the currency. *Id.* (citing *United States v. Bajakajian*, 84 F.3d 334, 337 (9th Cir. 1996)). Thus, the appellate court ruled that the forfeiture was *per se* unconstitutional. However, the Ninth Circuit did affirm the District Court's decision, but lacked jurisdiction to consider the District Court's reduced assessment of a \$15,000 fine. See *id.* at 338.

The Supreme Court agreed that the forfeiture at issue violated the Excessive Fines Clause. See *Bajakajian*, 118 S. Ct. at 2035. Specifically, it found the forfeiture to be the type of "fine" contemplated by the Clause because it was a payment to the government as a punishment for an offense. See *id.* at 2033 (citing *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). The Court agreed with the District Court that full forfeiture in this case would violate the Excessive Fines Clause. See *id.* at 2034. In so ruling, it fashioned a gross disproportionality test, instructing courts in application of the test of the "substantial deference" owed to the legislature in determining appropriate punishments for offenses and the inherent imprecision of the courts in determining the proportionality between crime and punishment. See *id.* at 2037. Applying the test to the instant case, the Court found that a forfeiture of the entire amount transported, \$357,144, would violate the Excessive Fines Clause, but it expressly refused to

of the Excessive Fines Clause.⁷ It was of particular importance to the business community because its application may not be limited to the kind of proceedings against an individual at issue in *Bajakajian*,⁸ but may extend to civil fines imposed against businesses for failure to file reports under a variety of statutes. Indeed, the Court expressly opened the door to excessive fine analysis in civil forfeiture cases as long as the fine imposed was, in part, punitive.⁹ Excessive fine analysis may even find its way into *BMW* punitive damage defenses as well.¹⁰

II. CIVIL PRACTICE CASES AND THE BUSINESS SECTOR

Civil Practice offered another non-business venue for decisions important to the business community. Three cases were particularly noteworthy: *General Electric Company v. Joiner*,¹¹ *Baker v. General Motors Corporation*,¹² and *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*.¹³

In *Joiner*, the Supreme Court revisited the expert testimony issue for the first time since its landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁴ In *Daubert*, the Court held that the Federal Rules of Evidence impose upon the trial court the duty to act as "gatekeeper" to "ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable."¹⁵ At the same time, the *Daubert* Court made clear that this duty did not extend to an evaluation of the

comment on the \$15,000 fine ordered by the District Court, an issue not raised on appeal. *See id.* at 2038.

A vigorous dissent, authored by Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, found the Thomas' opinion misguided in theory and flawed in application. *See id.* at 2046. The dissent argued that the majority's failure to defer to the legislature placed courts in the untenable predicament of ignoring the legislative conclusion that an across-the-board forfeiture is necessary where, as here, it is exceedingly difficult to connect currency with illegal activity. *See id.* at 2044. Hence, the dissent would have applied the forfeiture statute, in full, to any willful violation of the reporting statute. *See id.* at 2045.

7. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

8. *See Bajakajian*, 118 S. Ct. at 2035. *Bajakajian* involved a criminal in personam forfeiture. *See id.*

9. *See id.* at 2035 n.6 (citing *Austria v. U.S.*, 509 U.S. 602, 621-22 (1993)).

10. In *BMW v. Gore*, the Court invalidated a punitive damages award as grossly excessive and, therefore, in violation of the Due Process Clause of the Fourteenth Amendment. *See BMW v. Gore*, 517 U.S. 559, 585-86 (1996) (for an analysis of that case, see Barbara K. Bucholtz, *Taking Care of Business: A Review of Business-Related Cases in the 1995-1996 Supreme Court Term*, 32 *TULSA L.J.* 449, 452 (1997)). Like *Bajakajian*, and its precedent-setting Constitutional limitation of forfeitures, *BMW* was the first time a punitive damage award had been struck down on Constitutional grounds. *See id.* A survey of recent trial court decisions reveals *BMW*'s defining influence in framing the analysis for claims of excessive punitive awards. That analytical framework, like the grossly disproportionate test in *Bajakajian*, requires the reviewing court to compare, *inter alia*, the gravity of the defendant's offense (measured by the jury's compensatory award) with the amount of the punitive award. *See id.* at 575; *see Bajakajian*, 118 S. Ct. at 2036. For a summary of U.S. district court opinions applying the *BMW* framework, see Samuel A. Thumma, *Damages*, *NAT'L L.J.*, June 30, 1997 at B5. The analogue between *Bajakajian*'s Constitutional considerations under Eighth Amendment analysis, and those of *BMW* under the Fourteenth Amendment, portend the emergence of interesting defenses by business against government claims for forfeiture and fines under reporting statutes and against plaintiffs' compensatory and punitive damage claims.

11. 118 S. Ct. 512 (1997).

12. 118 S. Ct. 657 (1998).

13. 118 S. Ct. 956 (1998).

14. 509 U.S. 579 (1993).

15. *Id.* at 589.

credibility or weight of that testimony or evidence.¹⁶ Those evaluations are strictly within the purview of the jury.¹⁷ In *Joiner*, the Court was asked to address a question not resolved by *Daubert*: what standard of review should appellate courts apply to a trial court's exercise of its *Daubert* duty?¹⁸ In *Joiner*, the eponymous plaintiff sought damages from a former employer for the cancer he claimed he developed in his work-related exposure to PCBs (polychlorinated biphenyls).¹⁹ The trial court found that *Joiner's* expert witnesses were unable to link their conclusions that his exposure to PCB on the job promoted the development of his cancer, with the epidemiological animal studies upon which they claimed to rely.²⁰ Because the studies did not support the experts' analysis, their testimony was excluded.²¹ The appellate court reversed on two grounds: first, the Federal Rules of Evidence express a distinct preference for admission of evidence; and, second, it was up to the jury, not the judge, to choose between competing theories as long as any evidence in the record, including expert testimony, supported the theory.²² Writing for the majority, the Chief Justice determined that the proper standard of review for a *Daubert* challenge was an abuse of discretion standard.²³ This determination is simply an application of the general rule that a trial court's evidentiary rulings should be reviewed under an abuse of discretion standard.²⁴ Applying the standard to the *Joiner* case, the Chief Justice found that the trial court did not abuse its discretion in excluding the experts' testimony.²⁵ The trial court's ruling was consistent with its gatekeeper role to ensure that scientific testimony is reliable.²⁶ Because none of the animal studies cited by the experts demonstrated that PCBs promote the kind of small-cell cancer *Joiner* developed, those studies "were not a sufficient basis for the experts' opinions."²⁷ Hence the experts could point to no evidence suggesting that their opinions were reliable as scientific evaluations.²⁸

The *Joiner* opinion converts the *Daubert* reliability test into an effective evidentiary weapon for businesses defending themselves in toxic tort or product liability litigation. It might also be employed to challenge economic theory in antitrust cases.²⁹ In addition, it gives trial courts guidance in sorting through the problematic arena of tort liability premised upon the dangers of manufactured substances which are otherwise useful to a modern industrialized society. *Joiner* is

16. *See id.*

17. *See Joiner*, 118 S. Ct. at 518.

18. *See id.* at 515.

19. *See id.* at 516.

20. *See id.*

21. *See id.* at 518.

22. *See id.* at 516 (citing *Joiner v. General Electric Co.*, 78 F.3d 524, 529-33 (11th Cir. 1996)).

23. *See General Electric Co. v. Joiner*, 118 S. Ct. 512, 517 (1997).

24. *See id.* (citing *Old Chief v. United States*, 117 S. Ct. 644, 647 n.1 (1997) as the most recent of a line of cases dating back to 1878 which applied this general rule).

25. *See id.* at 519.

26. *See id.* at 517.

27. *Id.* at 518.

28. *See id.*

29. *See, e.g.*, Charles Weller, *Antitrust*, NAT'L L.J., August 24, 1998 at B6, col.1.

not the last word on *Daubert*. Next term, in an Eleventh Circuit case, the Court will be asked to decide whether *Daubert* applies to technical and experiential expertise, or whether it is limited to traditional notions of scientific expertise. That case, *Kumho Tire Co. v. Carmichael*,³⁰ will resolve a split in the circuits on the issue. Industry has argued strenuously that *Daubert* should also apply to testimony premised upon technical expertise.³¹

Another evidentiary issue resolved by the Court this term will influence business litigation. In *Baker v. General Motors Corporation*, the Court held that a permanent injunction, to which both parties stipulated in a case brought in one state was not enforceable in the courts of another state under full faith and credit analysis.³² The full faith and credit issue was implicated by the interrelationship of three different lawsuits in three different states.³³ Ronald Elwell, a GM employee who specialized in the problem of vehicular fires often testified on behalf of his employer, GM, in products liability litigation.³⁴ Elwell eventually left GM under less than amicable circumstances.³⁵ Subsequently, Elwell was deposed in a Georgia products liability case involving a fire in a GM pickup truck's fuel system.³⁶ In the Georgia case, Elwell testified on behalf of the plaintiff over GM's objections.³⁷ Shortly thereafter, Elwell sued GM in Michigan alleging breach of contract and wrongful discharge.³⁸ GM counterclaimed alleging breach of fiduciary duty and wrongful disclosure of confidential information in connection with Elwell's testimony in the Georgia case.³⁹ The parties reached a settlement which included an agreement to stipulate to the entry of a permanent injunction, foreclosing Elwell's testimony against GM in any litigation and his disclosure of confidential information obtained during the course of his GM employment.⁴⁰ The injunction made an exception for the pending Georgia case.⁴¹

In the *Baker* case, plaintiffs brought a wrongful death action against GM in Missouri alleging that their mother, a passenger in a Chevrolet Blazer, died as the result of an engine fire caused by an allegedly faulty fuel pump in the Blazer.⁴² The Bakers subpoenaed Elwell as a deponent and an expert witness and, over GM's objections, the federal district court held his testimony could be compelled.⁴³ The court's ruling was premised, in part, on the public policy exception to the Full Faith and Credit Clause.⁴⁴ The Eighth Circuit reversed primarily on the basis that,

30. *Carmichael v. Samyong Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 2339 (1998).

31. See Marcia Coyle, *Class Actions, "Daubert" Top of '98-'99 Docket*, NAT'L L.J., October 5, 1998, at B1.

32. See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 666-67 (1998).

33. See *id.* at 661-62.

34. See *id.* at 660-61.

35. See *id.* at 661.

36. See *id.*

37. See *id.*

38. See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 661 (1998).

39. See *id.* at 658.

40. See *id.*

41. See *id.* at 662-63.

42. See *id.* at 662.

43. See *id.*

44. See *id.* at 662-63.

assuming a public policy exception, Missouri's public policy favored full faith and credit.⁴⁵ In a lengthy exegesis on full faith and credit jurisprudence, which four concurring justices declined to follow, Justice Ginsburg ruled that full faith and credit makes final judgments in one state conclusive evidence in sister states. It does not extend beyond final judgments to include the kind of injunction at issue in *Baker*; injunctions which "interfere with litigation over which the ordering state had no authority."⁴⁶ The concurring justices found the injunctions exception fashioned by Ginsburg to be both unnecessary and ill-advised. They found sufficient grounds for the Court's holding under existing doctrine and narrower analysis. Under traditional Full Faith and Credit analysis, the initial inquiry is whether the state where the injunction was issued would give it preclusive effect.⁴⁷ GM failed to meet its burden of showing that Michigan would give the injunction preclusive effect. Justice Kennedy, in his concurrence, in which Justices O'Connor and Thomas joined, found that under existing Michigan precedent it was reasonable to conclude that Michigan would not give preclusive effect to an injunction which would bind the Bakers, who were not parties to the Michigan case.⁴⁸ According to Justice Kennedy, traditional analysis obviates the necessity of fashioning broad exceptions to full faith and credit analysis of the issue.⁴⁹ Ginsburg reasoned that:

Michigan's judgment, however, cannot reach beyond the Elwell-GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered. Michigan has no power over those parties, and no basis for commanding them to become interveners in the Elwell-GM dispute. Most essentially, Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.⁵⁰

Justice Ginsburg's opinion appears to rest on several theories and to introduce unnecessarily broad exceptions to existing analysis. Future litigants should anticipate a narrower, fact specific resolution of the issue.

The third Civil Practice case implicating important business interests was *Lexecon*.⁵¹ In that case, Justice Souter delivered the virtually unanimous opinion⁵²

45. See *Baker v. General Motors Corp.*, 86 F.3d 811, 819-20 (8th Cir. 1996) (citing *Baker*, 118 S. Ct. at 662).

46. *Baker*, 118 S. Ct. at 665.

47. See *id.* at 671 (Kennedy, J., concurring). "If the state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater efficacy'" *Id.*, (citing *Haring v. Prosis*, 462 U.S. 306, 313 n.6 (1983) (quoting *Union & Planters' Bank v. Memphis*, 189 U.S. 71, 75 (1903))).

48. See *Baker*, 118 S. Ct. at 671 (Kennedy, J., concurring).

49. See *id.*

50. *Id.* at 666.

51. See *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998).

52. See *id.* at 958. Justice Scalia joined Souter's opinion except for Part II.C which analyzed the relevant legislative history and found it to be inconclusive on the issue but suggestive of the Court's conclusion that a pretrial assignment does not confer authority on the assignee court to try the case, as well. See *id.* at 963-64.

of the Court that 28 U.S.C. § 1404(a) does not confer upon a court assigned to conduct pretrial proceedings in multidistrict litigation the authority to then assign the trial to itself.⁵³ The instant cause of action arose out of a previous class action against Charles Keating, the American Continental Corporation and its subsidiary, Lincoln Savings and Loan and other defendants, including Lexecon, Inc., a consulting firm charged with giving bank regulators misleading information about the corporate parent's and subsidiary's financial condition.⁵⁴ Several other cases were consolidated with that case and transferred to federal court in Arizona for pretrial proceedings under 28 U.S.C. § 1407(a).⁵⁵ Section 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer cases that share common factual issues "to any district for coordinated or consolidated pretrial proceedings,"⁵⁶ but imposes a duty on the Panel to remand any such action to the original district at or before the conclusion of such pretrial proceedings.⁵⁷ During pretrial proceedings in the Arizona court, the class action parties reached a settlement including the dismissal of all claims against Lexecon.⁵⁸

Subsequently, Lexecon filed suit in Illinois alleging that Milberg Weiss Bershad Hynes & Lerach and Cotchett, Illston & Pitre (here, collectively, "Milberg"), law firms in the class action against Lincoln S&L, et al., had defamed, maliciously prosecuted, and otherwise engaged in tortious activity against Lexecon.⁵⁹ Upon motion by Milberg, the Lexecon claim was transferred to Arizona for consolidation with the remaining claims in the class action.⁶⁰ The Arizona judge assigned to pretrial proceedings in the Lexecon litigation dismissed two of the state law claims but deferred ruling on Milberg's summary judgment motions pending the completion of discovery.⁶¹ He also deferred ruling on Lexecon's motion to refer the case back to the Panel for remand to the Illinois court and Milberg's cross motion that the Arizona court retain the case and self-assign the trial to itself pursuant to 28 U.S.C. § 1404(a).⁶² Section 1404 gives trial courts authority to transfer cases to serve the ends of justice and the convenience of the parties.⁶³ The Arizona court subsequently granted Milberg's § 1404 motion, denied Lexecon's motion to refer, and granted Milberg's summary judgment motion on all remaining issues except a defamation claim. On appeal, the Ninth Circuit noted an apparent conflict in the applicable law but ruled in favor of Milberg's § 1404 motion for self-assignment.⁶⁴ The remaining defamation claim was tried in the Arizona Court and resolved in favor of Milberg.⁶⁵

53. *See id.* at 958.

54. *See id.*

55. *See id.*

56. *Id.* at 961.

57. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 961 (1998).

58. *See id.* at 958.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 961 (1998).

64. *See id.* at 958.

65. *See id.*

Lexecon appealed, asserting that the Arizona court should have referred the case to the Panel for trial assignment, but Lexecon did not challenge Arizona's jurisdiction to self-assign.⁶⁶ A divided Ninth Circuit affirmed the Arizona district court on all counts.⁶⁷ The circuit's majority opinion noted that the Panel's Rule 14(b) provided support for Arizona's self-assignment by permitting the transferee court to order a case transferred to itself or another district court.⁶⁸ The majority also sought support for its interpretation in the relatively common practice of self-assignment sanctioned in other circuits.⁶⁹

In reversing, the Supreme Court invoked the plain meaning rule: "If language is plain and unambiguous it must be given effect" and "words are to be taken in their ordinary meaning unless they are technical terms or words of art."⁷⁰ The Court found the relevant term "shall" in § 1407(a) to be plain, unambiguous and—according to its ordinary meaning—mandatory in the following provision: "Each action so transferred shall be transferred by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred. . . ."⁷¹

In finding no latitude for self-assignment in the provision, Souter opined, "If we do our job at reading the Statute whole, we have to give effect to this plain command."⁷² Invoking another canon of statutory construction, that the provisions of a statute must be construed together,⁷³ Justice Souter rejected Milberg's argument that § 1407 addresses the Panel's authority while § 1404 addresses the assignee court's authority.⁷⁴ Such a construction creates an inherent contradiction in the law and "rejects that central tenet of interpretation, that a statute is to be considered in all its parts when construing any one of them."⁷⁵ Premised upon these fundamental rules of statutory construction the court refused to entertain Milberg's invitation to read fine distinctions and to draw subtle inferences from the plain meaning of § 1407's "straightforward language imposing the Panel's responsibility to remand. . . ."⁷⁶

Businesses involved in multidistrict litigation may or may not draw comfort from this bright line ruling which abrogates existing precedent in some jurisdictions. However, the decision's rationale is illustrative of the Court's preference in business-related cases and cases in other fields that impact the business community, for methodical application of settled canons for construing legislative intent, for drawing issues narrowly, and for rendering opinions which eschew broad policy considerations and unchartered constitutional analysis.

As noted at the outset of this article,⁷⁷ with the exception of employment cases

66. *See id.* at 959-60.

67. *See id.* at 960.

68. *See id.* at 961.

69. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 963 (1998).

70. Llewellyn, *supra* note 3, at 403-04 and accompanying text.

71. *Lexecon*, 118 S. Ct. at 962.

72. *Id.*

73. *See Llewellyn, supra* note 3, at 402 and accompanying text.

74. *See Lexecon*, 118 S. Ct. at 963.

75. *Id.* at 962.

76. *Id.* at 964.

77. *See supra* note 2 and accompanying text.

raising sexual harassment or discrimination issues, most business cases avoided issues of broad public appeal.⁷⁸ And the decisions rendered in business-related cases

78. Indeed, several cases have little appeal to the business community, generally, because the issues raised were exclusively germane to a particular industry or a narrow issue only tangentially related to the business sector at large.

For example, in *AT&T Co. v. Central Office Tel., Inc.*, 118 U.S. 1956 (1998), a purchaser of "bulk" long distance services for subsequent resale to end users of the services contracted with a long-distance services provider for services. *See id.* at 1959. The provider, a "common carrier" under the Communications Act, must file "schedules" or "tariffs" of all of its charges with the Federal Communications Commission (FCC) pursuant to § 203 of the Act. *See id.* Additionally, the FCC requires common carriers to charge resellers, like the purchaser, the same rates, under the same conditions, it applies to other customers. *See id.* at 1959, construed in 47 U.S.C. § 153(h). The purchaser experienced significant problems under the contract and eventually it withdrew from the contract before it expired and filed suit in federal court alleging certain state law claims including breach of contract and of implied covenants of good faith and fair dealing arising from provider's failure to meet certain obligations it undertook in addition to those which were identified in its filed tariff. *See id.* at 1961. The appellate court affirmed a jury verdict in favor of the purchaser on the state law claims and, like the trial court, rejected the provider's counterclaim that the state law claims were preempted by the Communications Act's filed tariff provisions at § 203. *See id.* at 1962. The Supreme Court reversed on the basis that all of the purchaser's claims were covered by, and therefore preempted by, the Act. *See id.* at 1965. The Court ruled that, under the filed-rate doctrine, a purchaser may not claim that preferential treatment should be accorded to it. *See id.* at 1963. Its exclusive remedy is found at § 202 of the Act which precludes claims for services not included in provider's filed-tariff. *See id.* at 1963-64.

In a case relevant to businesses that contract with Native American tribes, the Supreme Court held that the contracting tribe was subject to suit on the contract only where Congress had authorized the suit or when the tribe had expressly waived its sovereign immunity. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 118 U.S. 1700, 1705 (1998). Sovereign immunity is not limited to activities within Indian territory but extends to the tribe's commercial relationships beyond that territory. *See id.* at 1701. While the broad sweep of tribal immunity is not supported by "a reasoned statement of doctrine" in precedent cases, and while "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," in deference to Congressional failure to abrogate it, the Court elected to apply it. *Id.* at 1703-04. For an expanded discussion of Supreme Court decisions relating to Native Americans during this term, see Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term*, 34 TULSA L.J. 329 (1999).

In a mortgagee foreclosure action, the Supreme Court held that the right to rescind under the Truth-in-Lending Act, expired, under the terms of that Act, three years after the loan agreement was executed. *See Beach v. Ocwen Fed. Bank*, 118 S. Ct. 1408, 1409 (1998). Thereafter, rescission could not be raised as an affirmative recoupment defense by mortgagor to mortgagee's foreclosure action. *See id.* The terms of § 1635(f) of the Act provide that "the obligor's right of rescission shall expire three years after the date of consummation of the transaction" making clear the legislative intent that the right is extinguished after the designated three year period, hence it is not merely a limitation of actions statute precluding use of the right to bring suit after three years; the limitation extinguishes its use as a defense to foreclosure as well. 15 U.S.C. § 1635(f); *see also Beach*, 118 S. Ct. at 1411.

Judgment creditors can take some comfort from the Court's opinion in *United States v. Estate of Romani*, where the Court resolved an apparent conflict between the federal priority statute (which provides, at 31 U.S.C. § 3713(a) that federal tax claims should be "paid first" from the assets of decedent's estate which are insufficient to cover all of decedent's debts) and the Federal Tax Lien Act of 1966, 26 U.S.C. § 6321 (which provides that federal tax liens are not valid against other lien holders or secured creditors, unless appropriately filed with the authorities designated by § 6323(f)(1)(B)). *See United States v. Estate of Romani*, 118 S. Ct. 1478, 1480-81 (1998). The Court sought to harmonize the apparent conflict by reading the priority statute as governed by Congressional policy embodied in amendments of the tax lien statute which have the effect of offering secured creditors and non-governmental lien holders some protection against tax liens of which they have no notice. *See id.* at 1486. Thus, an unrecorded federal tax lien has no priority over a judgment lien previously perfected under state law. *See id.* at 1488.

In another tax case, the Court adopted an agency interpretation of a statutory term as reasonable when there was no definitional statute and no plain meaning of the subject term. *See Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue*, 118 U.S. 1413, 1415 (1998). The case concerned the "fresh start" provisions of the Tax Reform Act of 1986. *See id.* Prior to the 1986 Act, property and casualty (PC) insurers were permitted a full deduction for estimates of losses incurred but unpaid ("loss reserves"). *See id.* However, the 1986 Act required PC insurers to discount unpaid losses to present value which would have the effect of underestimating 1986 loss reserves. *See id.* at 1415-16. Section 1023(e)(3)(A) provided a transitional rule permitting PC insurers to exclude the difference between undiscounted and discounted 1986 loss reserves from taxable income. *See id.* at 1415. But the "fresh start" provision excepted "reserve strengthening" from the loss reserve exclusion. *See id.* at 1417-18. Regulations promulgated by the Treasury Department defined "reserve strengthening" as an amount added to "an unpaid loss reserve in a taxable year beginning in 1986." *Id.* Finding that there was no plain meaning of the term "reserve strengthening" in general usage or in the insurance industry and no applicable definition in other federal statutes, the Court found the Treasury's

exhibit a notable preference for judicial restraint.

Key business cases in the recent term addressed issues in environmental law,⁷⁹ intellectual property,⁸⁰ benefits⁸¹ and other employment issues,⁸² debtor-creditor law,⁸³ antitrust,⁸⁴ and export law.⁸⁵ These cases are considered important because they affect a broad range of business interests.

III. ENVIRONMENTAL LAW

A major pro-business decision was enunciated in *United States v. Bestfoods*.⁸⁶ In that case, the Court considered the extent of a parent corporation's liability for the costs of cleaning up hazardous waste sites created by a subsidiary, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁸⁷ Section 107(a)(2) of the Act provides that "any person who at the time

interpretation was entitled to deference because it appeared to be a reasonable accommodation between the competing interests of fairness to the PC industry on the one hand and the capacity of the service to administer its provisions without permitting abuse through unwarranted padding of 1986 loss reserves, on the other hand. *See id.*

In a credit union case, the Court struck down an agency in *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, and entered the competitive fray between commercial banks and credit unions. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 U.S. 927 (1998). The Court first addressed a threshold issue and held that banking associations had standing to challenge an agency interpretation of federal legislation governing credit unions because, as competitors of credit unions, they were within the zone of interests "arguably to be protected" by the legislation. *Id.* at 933 (citing 5 U.S.C. § 702, § 10(a) of the Administrative Procedure Act). The National Credit Union Administration interpreted § 109 of the Federal Credit Union Act to permit credit unions to have members in unrelated employment groups as long as each group shared a common associational bond. *See id.* at 930. Section 109, however, expressly states that "[f]ederal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district." *Id.* at 930.

Banking associations filed suit alleging that the agency interpretation was contrary to the express provisions of the applicable law. *See id.* Following a lengthy procedural history, the case reached the Supreme Court. It ruled on the merits that when the agency interpretation has failed to "give effect to the unambiguously expressed intent of Congress," its interpretation must be rejected. *Id.* at 938 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The Court found Congress intended that members of credit unions have a common employment-related geographical bond. *See id.* at 939. That intent was unambiguously expressed in the statute; therefore, the agency interpretation was in error. *See id.* at 938-39. The Court buttressed its conclusion by application of well-settled canons of statutory construction: finding the agency interpretation impermissibly renders the term "common bond" surplusage and violates the canon that similar language within a statute must be given the same meaning. *See id.* at 939.

As this brief synopsis indicates, the common denominator among these otherwise disparate cases is the Court's distinct preference for the exercise of judicial restraint through the use of the canons of statutory construction to resolve business-related disputes.

79. *See United States v. Bestfoods*, 118 S. Ct. 1876 (1998); *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003 (1998).

80. *See Quality King Distrib. v. L'Anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998); *Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279 (1998).

81. *See Eastern Enter. v. Apfel*, 118 S. Ct. 2131 (1998); *Geissal v. Moore Med. Corp.*, 118 S. Ct. 1869 (1998); *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 118 S. Ct. 542 (1997).

82. *See Air Line Pilots Assoc. v. Miller*, 118 S. Ct. 1761 (1998); *Allentown Mack Sales and Serv. v. NLRB*, 118 S. Ct. 818 (1998); *Textron Lycoming Reciprocating Engine Division AVCO Corp. v. United Auto. Implement Workers of Am. Local 787*, 118 S. Ct. 1626 (1998).

83. *See Fidelity Fin. Serv., Inc. v. Fink*, 118 S. Ct. 651 (1998); *Cohen v. De La Cruz*, 118 S. Ct. 1212 (1998); *Kawaauhau v. Geiger*, 118 S. Ct. 974 (1998).

84. *State Oil Co. v. Khan*, 118 S. Ct. 275 (1997).

85. *United States v. United States Shoe Corp.*, 118 S. Ct. 1290 (1998).

86. 118 S. Ct. 1876.

87. 42 U.S.C. § 9601 (1995).

of disposal of any hazardous substance owned or operated any facility” may be liable for cleanup costs.⁸⁸ A unanimous Court followed well-settled principles of corporate governance law and ruled that liability for the clean-up of subsidiary-generated waste sites attached only in one of two situations.

A. *Derivative Liability*

Because of the fundamental principle that a parent corporation is not liable for the acts of its subsidiaries, a parent is only derivatively liable under circumstances which call for the piercing of the corporate veil pursuant to state law. Vicarious liability, then, attaches whenever the parent uses the subsidiary as a sham “to perpetrate fraud or subvert justice.”⁸⁹ Thus, pursuant to traditional canons of statutory construction, state common law principles (like the rule that derivative liability of a parent corporation attaches only where the corporate veil should be pierced) can only be abrogated by a statute that directly addresses the subject matter of the common law rule. Because CERCLA does not address this fundamental common law rule, it is unchanged by CERCLA.⁹⁰ Therefore when (but only when) the corporate veil may be pierced, may a parent corporation be charged with indirect, vicarious, or derivative CERCLA liability for subsidiary actions.⁹¹ “Hornbook law” dictates that neither control through ownership of subsidiary stock nor duplication of the membership of the two corporate boards or their management creates the necessary predicate for piercing the veil in order to reach the parent.⁹²

B. *Direct Liability:*

A parent may be liable for its own actions in controlling the polluting facility. “Under the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution.”⁹³ Put another way, parenthood is no shield from liability where the parent “operates” the facility.⁹⁴ Thus, a parent who meticulously observes all corporate formalities with its subsidiary but directly supervises and controls the operations of the subsidiary’s polluting facility is directly liable under CERCLA.⁹⁵ In defining the CERCLA term “operating,” the Court was at pains to make a clear distinction between control of the subsidiary, which may give rise to derivative liability, and control of facility operations, which may result in direct liability. By blurring the two kinds of liability, the district court

88. 42 U.S.C. § 9607 (1995).

89. *Bestfoods*, 118 S. Ct. at 1884.

90. *See id.* at 1885.

91. *See id.* at 1886.

92. *See id.* at 1884.

93. *Id.* at 1886.

94. *See id.*

95. *See United States v. Bestfoods*, 118 S. Ct. 1876, 1886 (1998).

failed to make this critical distinction.⁹⁶ The Sixth Circuit also erred in limiting direct liability to exclusive or joint venture involvement. CERCLA mandates no such formal arrangement. Rather, direct liability for “operating” the polluting facility requires a fact-driven inquiry into the specific activities of parental personnel and an assessment of whether those activities meet “accepted norms of parental oversight of a subsidiary’s facility.”⁹⁷ “Activities that involve the facility but which are consistent with the parent’s investor status, such as monitoring of the subsidiary’s performance, . . . finance and capital budget decisions and articulation of general policies should not give rise to direct liability.”⁹⁸ However, activities by parental supervisors or dual officers that serve the interests of the parent at the expense of the subsidiary are a benchmark of direct involvement.⁹⁹ The contextual background of *Bestfoods* was the familiar tale of a failed polluting subsidiary whose polluted real estate was sold and resold, each transaction creating yet another level or source of potential liability. Faced with the liability labyrinth created by these transactions, circuits were split on the reach of parental liability under CERCLA.¹⁰⁰ *Bestfoods* resolves the split and, in so doing, meets the expectations of the business community by extending principles of longstanding corporate governance to a major piece of federal legislation in the environmental arena.

The other noteworthy environmental case, *Steel Company v. Citizens for a Better Environment*, held that the citizen-suit provision of the Emergency Planning and Community Right-to-Know Act of 1986 did not confer standing on citizen-plaintiffs for past violations of the Act by a steel company that rectified its violations prior to the filing of the citizen suit.¹⁰¹ While six concurring justices objected to Justice Scalia’s fashioning of the rationale under Article III standing as a mandatory threshold issue, all justices agreed that the courts had no jurisdiction, under the plain language of the statute, to hear a citizen suit for wholly past violations.¹⁰²

IV. INTELLECTUAL PROPERTY

The major intellectual property case this term has serious implications for international trade. In *Quality King Distrib. v. L’Anza Research Int’l Ins.*, the Court shunned policy arguments and, in a tightly woven tapestry of textual analysis that cross-referenced relevant sections of the Copyright Act of 1976, found that the Act did not protect the copyright owner from imported copies.¹⁰³ L’Anza, a producer of upscale hair care products, marketed its products domestically through exclusive

96. *See id.* at 1887-89.

97. *Id.* at 1889.

98. *Id.* (quoting Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA*, 72 WASH. U.L.Q. 223, 282 (1994)).

99. *See Bestfoods*, 118 S. Ct. at 1889.

100. *See id.* at 1884.

101. *See Steel*, 118 S. Ct. at 1020.

102. *See id.* at 1020-32.

103. *See Quality King Distrib. v. L’Anza Research Int’l Ins.*, 118 S. Ct. 1125, 1131-33 (1998).

retailers and by advertising in trade magazines.¹⁰⁴ The exclusivity arrangements apparently allowed L'Anza to charge high prices for its products.¹⁰⁵ L'Anza maintained its exclusivity by copyrighting the labels that appear on its products.¹⁰⁶

L'Anza also marketed its products abroad, but at a much lower price and without extensive promotion.¹⁰⁷ In this case, L'Anza's United Kingdom distributor resold the products to a Malta distributor who, in turn, sold them to Quality King who imported them into the U.S. and sold them at discounted prices to unauthorized retailers.¹⁰⁸ These imports undercut the exclusivity of L'Anza products upon which it relied for its domestic pricing policies.¹⁰⁹ L'Anza brought suit alleging Quality King's importation activities violated L'Anza's exclusive right to distribute its products under its copyrighted labels.¹¹⁰ Noting that the case was unusual because L'Anza sought copyright protection for its marketing policy rather than for its copyrighted labels, the Court commenced its rigorous statutory analysis of the issue with 17 U.S.C. § 106(3).¹¹¹ This section gives a copyright owner the exclusive right to distribute its copyrighted material but the right is expressly limited by the provisions in §§ 107 through 120 of the Act.¹¹² In that regard, § 109(a) provides that, notwithstanding the exclusive right granted by § 106(3), the owner of a lawfully made copy of the copyrighted material is entitled to sell the copy without the permission of the copyright owner.¹¹³ Section 109(a) codifies the "first sale" doctrine enunciated in *Bobbs-Merrill Co. v. Straus*,¹¹⁴ where the Court held that the exclusive right to sell is limited to the "first sale" of the copyrighted material.¹¹⁵ L'Anza acknowledged that, because of the "first sale" doctrine, it would have no recourse under the Act against domestic distributors who purchased copies lawfully made under the Act.¹¹⁶ But it argued that imported copies were covered by § 602(a) of the Act.¹¹⁷ That section protects L'Anza's domestic marketing strategy from subversion by imported and discounted copies.¹¹⁸ Hence, the issue before the court was whether the right granted by § 602(a) is also limited by the provisions of §§ 107 through 120 and, thus, by the "first sale" doctrine described in § 109(a).¹¹⁹

Employing various tools of statutory construction, the Court stated that § 602(a)¹²⁰ provides in relevant part, "[i]mportation into the United States, without the

104. *See id.* at 1127.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.* at 1128.

109. *See Quality King Distrib. v. L'Anza Research and Int'l Ins.*, 118 S. Ct. 1125, 1129 (1998).

110. *See id.*

111. *See id.* at 1128.

112. *See id.* at 1129.

113. *See id.* at 1128.

114. 210 U.S. 339 (1908).

115. *See Quality King Distrib.*, 118 S. Ct. at 1126.

116. *See id.*

117. *See id.* at 1130-31.

118. *See id.*

119. *See id.* at 1127.

120. *See id.* at 1127, 1133-34.

authority of the owner of copyright under this title, of copies . . . that have been acquired outside the United States is an infringement of the exclusive right to distribute . . . under Section 106. . . ."¹²¹ Thus, the Court said § 602(a) does not prohibit the unauthorized importation of copyrighted materials, it simply deems such importation an infringement of the owner's § 106 rights. But, as noted earlier, § 106 rights are limited by §§ 107 through 120 and include, therefore, the limitation of the "first sale" doctrine of § 109. Since the limited right to exclusivity under § 106 "does not encompass resales by lawful owners, the literal text of § 602(a) is simply inapplicable to both domestic and foreign owners of L'Anza's products who decide to import them and subsequently resell them in the United States."¹²² The Court rejected L'Anza's arguments and those of the Solicitor General, as *amicus curiae*.¹²³ It specifically refused to view § 602's reference to § 106 as surplus language. Rather, it employed the canon that all sections of the Act must be construed as consistent if possible.¹²⁴ The Court also invoked the plain meaning rule.¹²⁵ It expressly refused to be drawn into arguments about the wisdom of congressional failure to protect domestic producers from imports of copyrighted materials not authorized by the copyright owner.¹²⁶ The Court stated that such debates are not "relevant to our duty to interpret the text of the Copyright Act."¹²⁷

A similar exercise in textual construction resolved another dispute over the Copyright Act. In *Feltner v. Columbia Pictures Television, Inc.*, the Court held that the use of the term "court" in § 504(c) of the Act, when taken in conjunction with the use of the term in other sections, suggests that Congress intended the term "court" to mean the judge rather than the jury.¹²⁸ Therefore the Copyright Act did not grant a statutory right to a jury trial on the assessment of statutory damages.¹²⁹ Nevertheless, the Court ruled that, under longstanding constitutional analysis, the copyright owner is entitled to a jury trial, including a jury determination of the damages, under the Seventh Amendment.¹³⁰ Historically, copyright damage claims were tried by juries; therefore these claims were covered by the amendment.¹³¹

V. BENEFITS AND OTHER EMPLOYMENT ISSUES¹³²

In *Geissal v. Moore Medical Corporation*, the Court applied the plain meaning rule to the question of whether federal law requires an employer to give a terminated

121. *Quality King Distrib. v. L'Anza Research and Int'l, Inc.*, 118 S. Ct. 1125, 1130 (1998).

122. *Id.*

123. *See id.* at 1134.

124. *See id.* at 1131-32.

125. *See id.* at 1133.

126. *See id.* at 1127, 1133.

127. *Id.* at 1134.

128. *See Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279, 1283 (1998).

129. *See id.*

130. *See id.* at 1288.

131. *See id.*

132. Discrimination and sexual harassment cases are discussed *supra* note 2.

qualified employee continuation health insurance coverage, even if he was also covered by his wife's group plan at the time he elected continuation coverage.¹³³ The Consolidated Omnibus Budget Reconciliation Act (COBRA) amended the Employer Retirement Income Security Act of 1974 (ERISA) to provide that a employee covered by an employer's health plan may elect continued coverage after certain "qualifying events" such as termination.¹³⁴ The employee in the instant case elected continued coverage prior to his termination.¹³⁵ At the time of election, he was also covered by his wife's group health plan.¹³⁶ Over the employer's objection, the Court found that the plain meaning of the relevant provision, § 1162(2)(d) of COBRA, gave the employee continued coverage because on the date of his election he was already covered by his wife's plan.¹³⁷ The relevant portion of § 1162(2)(D) states that COBRA coverage may cease on "[t]he date on which qualified beneficiary first becomes, after the date of the election . . . covered under any other group health plan."¹³⁸ The Court found "no justification for disparaging the clarity of [that Section]."¹³⁹

Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California resolved a statute of limitations dispute under the Multi-Employer Pension Plan Amendment Act of 1980 (MPPAA).¹⁴⁰ The MPPAA requires employees who withdraw from an underfunded plan to pay a withdrawal assessment to the fund either in a lump sum prepayment, or according to an installment schedule established by the trustees of the Fund.¹⁴¹ If the employer fails to meet its obligation in this regard, the MPPAA, at 29 U.S.C. § 1451(f)(1), provides that the Fund has a cause of action against the employer.¹⁴² However, the right to bring the cause is subject to a six-year statute of limitations.¹⁴³ The statute of limitations runs, according to § 1451(f)(6) "from the date on which the cause of action arose."¹⁴⁴ The question before the Court was when the limitation period began to run on the Fund's cause of action.¹⁴⁵ Using traditional doctrine to ascertain the applicable date, the Court found that a cause arises when the plaintiff can file suit and obtain relief.¹⁴⁶ In the absence of indications that Congress intended another triggering date, the Court determined that the cause arises, not when the employer withdraws from the fund, but when the employer first defaults on the installment payment schedule established by

133. See *Geissal v. Moore Med. Corp.* 118 S. Ct. 1869, 1874 (1998).

134. See *id.* at 1872-73.

135. See *id.* at 1871.

136. See *id.*

137. See *id.* at 1875-76.

138. *Id.* at 1871.

139. *Geissal v. Moore Med. Corp.*, 118 S. Ct. 1869, 1876 (1998).

140. See *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 118 S. Ct. 542, 545 (1997).

141. See *id.*

142. See *id.*

143. See *id.* at 549.

144. *Id.*

145. See *id.* at 545.

146. See *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 118 S. Ct. 542, 549 (1997).

the Fund.¹⁴⁷ Actions filed after that date are not entirely barred but installment payments due more than six years prior to the filing of the suit are not recoverable.¹⁴⁸

In an unusual takings case, the Supreme Court held that an economic regulation, such as the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), can effect an unconstitutional taking when, as in the instant case, "the economic impact of the regulation, its interference with reasonable investment backed expectation and the character of the government action" offends notions of "justice and fairness."¹⁴⁹ Applying this three-pronged test to the case of *Eastern Enterprises v. Apfel*,¹⁵⁰ the Court found that the assessments imposed on coal operators to create a new employer benefit fund under the Coal Act imposed a significant economic burden on Eastern Enterprise (\$50 to \$100 million) far in excess of its proportional relationship to the present plan.¹⁵¹ Considering the facts that it withdrew from mining operations in 1965, that it did not participate in the formulation of subsequent benefit plans, and that during its mining operation years benefits were insubstantial compared with today's benefits, the assessment creates a substantial interference with Eastern's reasonable investment-based expectations.¹⁵² Thus the government action here "implicates fundamental principles of fairness underlying the takings clause," and the Act's assessment against Eastern "effects an unconstitutional taking."¹⁵³

The Court considered three other employment cases as well. In *Air Line Pilots Association v. Miller*, the Court ruled that nonunion employees can challenge the amount of a fee the union charges for representing them without having to exhaust their administrative remedies in arbitration before filing suit.¹⁵⁴ It found no legal basis for compelling exhaustion where, as here, nonunion members had not agreed to arbitrate.¹⁵⁵

In *Allentown Mack Sales and Services v. National Labor Relations Board*, the Court reversed an NLRB decision finding that an employer lacked a good-faith reasonable doubt as to its employees' support of the union; therefore its internal poll of the employees constituted an unfair labor practice.¹⁵⁶ The Court reviewed the employer's circumstantial evidence in support of its assertion that it had a good-faith reasonable doubt and found that evidence incontrovertibly established the employer's good-faith reasonable doubt.¹⁵⁷ The Court also reviewed the Board's reasonable doubt and good-faith standard, and a deeply divided Court found it to be consistent with the Act.¹⁵⁸

The Court considered the jurisdictional reach of the Labor Management

147. *See id.*

148. *See id.* at 552.

149. *Eastern Enter. v. Apfel*, 118 S. Ct. 2131, 2146 (1998).

150. *See id.*

151. *See id.* at 2149.

152. *See id.* at 2150.

153. *Id.* at 2153.

154. *See Air Line Pilots Ass'n. v. Miller*, 118 S. Ct. 1761, 1769 (1998).

155. *See id.* at 1767.

156. *See Allentown Mack Sales and Serv., v. NLRB*, 118 S. Ct. 818, 823-24 (1998).

157. *See id.* at 820.

158. *See id.* at 826.

Relations Act (LMRA), in *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. United Auto. Implement Workers of America, Local 787*.¹⁵⁹ Justice Scalia authored the opinion of the Court ruling that by its terms, § 187(a) of the LMRA gave courts subject-matter jurisdiction over “[s]uits for violation of contracts. . . .”¹⁶⁰ But the plain meaning of that statute does not extend to confer jurisdiction over suits alleging fraudulent inducement to contract.¹⁶¹ The Court also refused to consider the Declaratory Judgment Act, as well as whether there was an alternate source of jurisdiction, because the facts before it did not give rise to a case or controversy on the voidability of the contract.¹⁶²

VI. DEBTOR-CREDITOR

In construing the Bankruptcy Code, specifically 11 U.S.C. § 523(a)(6), a unanimous Court held in *Kawaauhua v. Geiger*, that that section only excepts from discharge, debts “for willful and malicious injury.”¹⁶³ Reading the words according to their plain and ordinary meaning and refusing to interpret the statute in a way that would render any provision superfluous, the Court found that Kawaauhua’s medical malpractice award against Dr. Geiger was dischargeable because the award was for negligent or reckless misconduct, not the intentional misconduct characterized by the terms “willful and malicious.”¹⁶⁴ Thus, it could not be saved by the exception in § 523(a)(6).¹⁶⁵

Cohen v. De La Cruz required the Court to interpret another provision of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A).¹⁶⁶ That section excepts from bankruptcy discharge “any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation or actual fraud.”¹⁶⁷ The debtor filed for Chapter 7 after a New Jersey Rent Control administrator ordered him to reimburse his tenants for charges assessed against them in excess of rent control limits.¹⁶⁸ The tenants argued that, pursuant to § 523(a)(2)(A), Bankrupt’s reimbursement order was not dischargeable in bankruptcy nor were treble damages, attorney fees and costs assessed under the New Jersey Consumer Fraud Act, because his overcharges constituted actual fraud.¹⁶⁹ The debtor conceded that the “debt” referred to in § 523(a)(2)(A) covered the reimbursement obligation but he argued it did not cover the treble damages or litigation expenses

159. See *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. United Auto. Implement Workers of Am. Local 787*, 118 S. Ct. 1626 (1998).

160. See *id.* at 1629.

161. See *id.*

162. See *id.* at 1631.

163. *Kawaauhua v. Geiger*, 118 S. Ct. 974 (1998).

164. See *id.* at 978.

165. See *id.*

166. See *Cohen v. De La Cruz*, 118 S. Ct. 1212, 1214 (1998).

167. *Id.*

168. See *id.* at 1215.

169. See *id.*

because they were not debts "obtained by . . . fraud."¹⁷⁰ The Court, however, found Bankrupt's construction of the term "debt for" in conflict with its usage in other provisions of the Code.¹⁷¹ These provisions make it clear that "debt for" means "debt arising from" or "debt on account of" and, therefore, includes an award of treble damages for fraud.¹⁷²

Fidelity Financial Services v. Fink involved another dispute over the interpretation of a Bankruptcy Code provision.¹⁷³ Under Code § 547(c)(3)(B), a bankruptcy "trustee may not avoid a security interest for a loan used to acquire the encumbered property if . . . the security interest is 'perfected on or before 20 days after the debtor receives possession of the property.'"¹⁷⁴ In *Fink*, a secured creditor mailed its application to perfect, under Missouri law, twenty-one days after bankrupt took possession of the encumbered property. The secured creditor argued that because Missouri law permits lien perfection to relate back to the date of the transaction if creditor perfects in thirty days, his compliance with Missouri law constituted perfection under the Code.¹⁷⁵ The Supreme Court affirmed the lower court's ruling that Missouri law's relation-back provision could not expand the meaning of the terms of the federal Code at § 547(c)(3)(B): "perfected on or before 20 days after the debtor receives possession of such property."¹⁷⁶ The creditor's interpretation of the text was not supported by a straight forward reading of the text, consideration of related provisions, or legislative history.¹⁷⁷

VII. EXPORT LAW

In a short but important decision, the Court, in *United States v. United Shoe Corporation*, struck down the Harbor Maintenance Tax's applicability to exports.¹⁷⁸ The Export Clause of the Constitution precludes the imposition of a tax on exports: "No Tax or Duty shall be laid on Articles exported from any State."¹⁷⁹ The Supreme Court has previously held, however, that a charge may be assessed against exports as long as it is merely a "user fee" compensating the government for providing services and facilities.¹⁸⁰ The Harbor Maintenance Tax imposed a charge calculated as 0.125 percent of an export's value.¹⁸¹ Because the tax was calculated on an *ad valorem* basis rather than on the value of government services rendered in connection with export, the charge resembled an impermissible tax, not a user fee.¹⁸² Applying

170. *Id.* at 1216-17.

171. *See id.* at 1217.

172. *See* *Cohen v. De La Cruz*, 118 S. Ct. 1212, 1217 (1998).

173. *See* *Fidelity Fin. Serv., Inc., v. Fink*, 118 S. Ct. 651 (1998).

174. *Id.*

175. *See id.* at 653-54.

176. *Id.* at 652, 656.

177. *See id.* at 655-56.

178. *See* *United States v. United States Shoe Corp.*, 118 S. Ct. 1290 (1998).

179. U.S. CONST. art. I, § 9, cl. 5.

180. *See* *United Shoe Corp.*, 118 S. Ct. at 1292.

181. *See* 26 U.S.C.A. § 4461(a) (West 1998).

182. *Id.*

the test for a user fee fashioned in *Pace v. Burgess*,¹⁸³ that an acceptable charge must correlate with the value of government services rendered in connection with export, the Court found that the HMT violated the Export Clause.¹⁸⁴

VIII. ANTI-TRUST

In another short but important decision the Court overruled its longstanding precedent, *Albrecht v. Herald Co.*,¹⁸⁵ which held that vertical maximum price fixing was a per se violation of antitrust law.¹⁸⁶ In *State Oil Company v. Khan*, lessees of a gas station and convenience store owned by State Oil fell into receivership.¹⁸⁷ The lessees argued that their business failure was caused by State Oil's imposition of a vertical maximum price on gasoline charged at lessee's pumps.¹⁸⁸ Under the terms of the lease, while lessees were free to set their own prices for customers, if the prices were higher than State Oil's suggested retail price, the overage must be paid to State Oil.¹⁸⁹ State Oil sold the gasoline to lessees at the suggested retail price less a profit margin of 3.25 cents per gallon.¹⁹⁰ Lessees alleged this arrangement not only insured business failure but also violated § 1 of the Sherman Act.¹⁹¹ The Seventh Circuit reversed the District Court's summary judgement in favor of State Oil on the basis that *Albrecht* held that vertical price fixing was a per se antitrust violation.¹⁹² The Supreme Court reversed and overruled *Albrecht*.¹⁹³

The analysis developed by the Court in *Khan* began with express terms of § 1 of the Sherman Act which provides: "[e]very contract, combination . . . , or conspiracy, in restraint of trade is illegal."¹⁹⁴ The Court has traditionally interpreted § 1 to preclude only unreasonable restraints in spite of the section's plain meaning.¹⁹⁵ Based upon that interpretation, the Court has historically analyzed most anti-trust claims under a fact-driven inquiry which requires the Court to ascertain whether the practice at issue imposes an unreasonable restraint on competition.¹⁹⁶ It has reserved per se rules for the types of restraints it perceives as having "predictable and pernicious anti-competitive effect and . . . limited potential for pro-competitive benefit"¹⁹⁷ The Court in *Albrecht* found vertical maximum price-fixing the type of restraint that called for a per se rule, not necessarily because it always had an anti-competitive effect but because it allowed price fixers to discriminate against their

183. 92 U.S. 372 (1876).

184. See *United Shoe Corp.*, 118 S. Ct. at 1296.

185. 390 U.S. 145 (1968).

186. See *id.* at 151.

187. See *State Oil Co. v. Kahn*, 118 S. Ct. 275, 278 (1997).

188. See *id.*

189. See *id.*

190. See *id.*

191. See *id.* at 278.

192. See *id.* at 279.

193. See *State Oil Co. v. Kahn*, 118 S. Ct. 275, 278, 285 (1997).

194. *Id.* at 278 (quoting 15 U.S.C. § 1).

195. See *id.* at 279.

196. See *id.*

197. See *id.*

dealers and interposed the "perhaps erroneous judgement of a seller for the forces of the competitive market."¹⁹⁸ However, subsequent case law diminished the strength of that argument.

In *Continental T.V., Inc. v. GTE Sylvania Inc.*,¹⁹⁹ the Court overruled *United States v. Arnold, Schwinn & Co.*,²⁰⁰ and its per se ban on vertical non-price restraint.²⁰¹ The Court opined that a per se ban must be "based upon demonstrable economic effect rather than, as in Schwinn, upon formalistic line drawing."²⁰² This decision left *Albrecht's* rationale in a precarious posture.

Based upon a growing dissatisfaction with per se bans generally, and the *Albrecht* ban in particular, the *Khan* Court reassessed *Albrecht's* rationale and found it thin, resting on theoretical propositions rather than demonstrable economic realities.²⁰³ Thus, in spite of the venerable doctrine of stare decisis, the Court decided to overrule *Albrecht* in the interest of "adapting to changed circumstances and the lessons of accumulated experience."²⁰⁴ While the overruling of precedent is a rare event, *Khan's* decision should be seen not as a radical departure from existing law but as an update of a clearly outmoded approach in antitrust jurisprudence.

IX. CONCLUSION²⁰⁵

As has been the case for the past several terms, the Rehnquist Court can be rated as centrist and moderately pro-business²⁰⁶—pro-business in the sense that it meets the expectations of the business community with regard to settled aspects of the law.²⁰⁷ But its pro-business posture is clearly moderated, not only in the arena of employment discrimination and sexual harassment, but also in uncertain areas of the law where a pro-business decision could not be supported by the Court's preferred analytical posture of rigorous textual analysis.²⁰⁸

The latter point suggests the predominant characteristics of last term's pro-business decisions. With very few exceptions, the business cases exhibited, if not a tour de force of statutory construction, then certainly a consistent preference for judicial restraint. That, of course would be a fitting stance for a reputedly conservative Court. But is this judicial reticence wholly to be explained by jurisprudential convictions? As I have suggested in an earlier article,²⁰⁹ there is

198. *Id.* at 280 (quoting *Albrecht*, 390 U.S. at 152).

199. 433 U.S. 36 (1977).

200. 388 U.S. 365 (1967).

201. *See State Oil Co.*, 118 S. Ct. at 281.

202. *See id.*

203. *See id.* at 282.

204. *Id.* at 284.

205. A list of this term's business-related cases and their citations, Appendix A, and a topical chart of those cases, Appendix B, follow this article.

206. *See Bucholtz, Taking Care of Business, supra* note 10.

207. *See, e.g., United States v. Bestfoods*, 118 S. Ct. 1876 (1998), discussed *supra* Part III.

208. *See, e.g., Quality King Distrib. v. L'Anza Research Int'l Ins.*, 118 S. Ct. 1125 (1998), discussed *supra* Part IV.

209. *Bucholtz, Taking Care of Business, supra* note 10.

sufficient evidence in the type of business case the Court selects for review, as well as its textual analysis, to make the argument that the Court has a very real preoccupation with forming and maintaining a stabilizing consensus. That, in turn, would suggest that the ultimate concern of the current Court is to protect the strength of the Court qua institution, avoiding both cases and interpretative postures that widen ideological fault lines in the Court and in society. If that is so, then court-watchers looking for the drama of policy-driven analysis and path breaking constitutional theory will have to wait for another day.

APPENDIX A

List of Cases

Antitrust

1. State Oil Co. v. Khan, 118 S. Ct. 275 (1997).

Intellectual Property

1. Quality King Distrib. v. L'Anza Research Int'l, Inc., 118 S. Ct. 1125 (1998).
2. Feltner v. Columbia Pictures Television, Inc., 118 S. Ct. 1279 (1998).

Environmental Law

1. United States v. Bestfoods, 118 S. Ct. 1876 (1998).
2. Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998).

Employment—Sexual Harassment

1. Oncale v. Sundowner Offshore Serv., 118 S. Ct. 998 (1998).
2. Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).
3. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998).

Employment—Other

1. Oubre v. Entergy Operations, Inc., 118 S. Ct. 838 (1998).
2. Airline Pilots Assoc. v. Miller, 118 S. Ct. 1761 (1998).
3. Allentown Mack Sales and Serv. v. NLRB, 118 S. Ct. 818 (1998).
4. Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. United Auto. Implement Workers of Am. Local 787, 118 S. Ct. 1626 (1998).
5. Bragdon v. Abbott, 118 S. Ct. 2196 (1998).

Benefits

1. Eastern Enter. v. Apfel, 118 S. Ct. 213 (1998).
2. Bay Area Laundry v. Ferbar Corp, 118 S. Ct. 542 (1997).
3. Geissal v. Moore Med. Corp., 118 S. Ct. 1869 (1998).

Taxation

1. Atlantic Mutual Ins. Co. v. Comm'r of Internal Revenue, 118 S. Ct. 1413 (1998).
2. United States v. United States Shoe Corp., 118 S. Ct. 1290 (1998).

Debtor/Creditor

1. Fidelity Fin. Serv., Inc. v. Fink, 118 S. Ct. 651 (1998).
2. Cohen v. De La Cruz, 118 S. Ct. 1212 (1998).
3. Kawauhau v. Geiger, 118 S. Ct. 974 (1998).

Communications

1. AT&T v. Central Office Tel., 118 S. Ct. 1956 (1998).

Native American

1. Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc., 118 S. Ct. 1700 (1998).

Trusts and Estates

1. United States v. Estates of Romani, 118 S. Ct. 1478 (1998).

Civil Practice

1. General Electric Co. v. Joiner, 118 S. Ct. 512 (1997).
2. Baker v. General Motors Corp., 118 S. Ct. 657 (1998).
3. Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 118 S. Ct. 956 (1998).

Other - Forfeiture and Excessive Fines

1. United States v. Bajakajian, 118 S. Ct. 2028 (1998).

Appendix B
1997-1998 Term
Supreme Court Cases
Impacting the Business Community

Field/Rule of Law-Cases	Author	Business Interest Involved	Competing Interest Involved	Synopsis of Holding/Issue
I. Antitrust <i>Khan</i>	O'Connor	gasoline supplier	operator of gas station	Vertical maximum price caps are not a per se violation of the Sherman Act.
II. Intellectual Property <i>Quality King</i>	Stevens	domestic copyright holders	foreign purchaser/importer	<i>Quality King</i> : domestic copyright holder has no right to prohibit importation of purchased products under first sales doctrine.
<i>Fettner</i>	Thomas	copyright holder	unauthorized broadcaster of copyrighted programs	<i>Fettner</i> : 7th Amendment grants right to Jury assessment of infringement damages even though Copyright Act is silent.
III. Env't. Law <i>Bestfoods</i>	Souter	parent corporation of chemical company	federal government	<i>Bestfoods</i> : parent is liable for clean up of industrial waste of a subsidiary under CERCLA only if (1) its corporate veil is pierced or (2) it was involved in the operations of the polluting facility.
<i>Steel</i>	Scalia	manufacturer	env't. protection group	<i>Steel</i> : respondent lacked standing under Art. III to sue manufacturer for failure to file timely reports.
IV. Employment: Sexual Harassment <i>Oncale</i>	Scalia	employer	employee	<i>Oncale</i> : sex discrimination consisting of same sex harassment is actionable under Title VII.
<i>Faragher</i>	Souter	employer	employee	<i>Faragher</i> : employers are vicariously liable for sexual harassment of employees under title VII. Subject to an affirmative defense.
<i>Ellerth</i>	Kennedy	employer	employee	<i>Ellerth</i> : where employee suffered no adverse job consequences from actionable sexual harassment, employer may raise an affirmative defense to damages.

V. Employment: Other <i>Oubre</i>	Kennedy	employer	employee	<i>Oubre</i> : General release signed by employee did not bar her ADEA claim.
<i>Allentown Mack Sales</i>	Scalia	employer	union	<i>Allentown Mack Sales</i> : employer must have good faith reasonable doubt of union support to poll employees.
<i>Textron Locoming</i>	Scalia	employer	union	<i>Textron Locoming</i> : claim of fraudulent inducement not cognizable under LMRA.
VI. Benefits <i>Eastern Enterprises</i>	O'Connor	former coal company	coal industry retirees	<i>Eastern Enterprises</i> : Coal Industry Retiree Health Benefits Act's retroactive effect was unconstitutional.
<i>Bay Area Laundry</i>	Ginsburg	employer	multi-employer pension fund	<i>Bay Area Laundry</i> : Six-year statute of limitations was triggered when employer missed payment.
<i>Geissal</i>	Souter	employer	terminated employee	<i>Geissal</i> : COBRA covered qualified employee.
VII. Taxation <i>Atlantic Mutual</i>	Scalia	PC insurers	Treasury Dept.	<i>Atlantic Mutual</i> : Treasury's interpretation of one-time foreigners for PC insurers under 86 Tax Act upheld.
<i>United States Shoe</i>	Ginsburg	exporters	federal government	<i>United States Shoe</i> : export fee was unconstitutional tax.
VIII. Commercial <i>Owen Federal Bank</i>	Souter	bank mortgagee	mortgagors	Rescission defense unavailable after three years.
IX. Debtor/ Creditor <i>Fidelity Fin.</i>	Souter	Secured creditor	Bankruptcy Trustee of Debtor's estate	<i>Fidelity Fin.</i> : Secured creditor must perfect within 20 days to preserve preferences.
<i>De la Cruz</i>	O'Connor	Chapter 7 debtor	Judgment creditors	<i>De la Cruz</i> : Judgment and costs for fraud are not discharged in bankruptcy.
<i>Kawachuhau</i>	Ginsburg	Chapter 7 debtor	Judgment creditors	<i>Kawachuhau</i> : Judgments re: negligence/recklessness discharged.
X. Communications <i>Central Office</i>	Scalia	common carrier	reseller of long distance services	State law claims for breach of K preempted by filed rate doctrine under ICA.

XI. Native American <i>Kiowa Tribe</i>	Kennedy	creditor	Native American tribe	Sovereign immunity extends to contractual relationships.
XII. Trusts & Estates <i>Estate of Romani</i>	Stevens	judgment creditor	federal government	Federal government must record its tax lien to maintain its preference.
XIII. Banking <i>National Credit Union</i>	Thomas	banks	credit unions	Credit Union membership pool must share a common bond of association.
XIV. Civil Practice <i>Joiner</i>	Rehnquist	n/a	n/a	<i>Joiner</i> : Abuse of discretion standard for review of trial rulings on admission of expert witness testimony.
<i>Baker</i>	Ginsburg	n/a	n/a	<i>Baker</i> : Full faith and credit not offended by admissibility of evidence discrepancies in different jurisdictions.
<i>Lexecon</i>	Souter	n/a	n/a	<i>Lexecon</i> : 28 U.S. C. § 1407(a) does not confer jurisdiction on pre-trial panels for purposes of multi-district litigation.
XV. Other <i>Bajakajian</i>	Thomas	n/a	n/a	Penalty excessive in violation of 8th Amendment.

