

# Tulsa Law Review

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Volume 35

Number 3 *Practitioner's Guide to the 1998-1999* Volume 35 | Number 3  
*Supreme Court Term*

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Spring 2000

## Business As Usual in a Dollar Democracy: A Review of Business-Related Cases in the 1998-1999 Supreme Court Term

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### Recommended Citation

Barbara K. Bucholtz, *Business As Usual in a Dollar Democracy: A Review of Business-Related Cases in the 1998-1999 Supreme Court Term*, 35 *Tulsa L. J.* 485 (2000).

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# BUSINESS AS USUAL IN A “DOLLAR DEMOCRACY”\*: A REVIEW OF BUSINESS-RELATED CASES IN THE 1998-1999 SUPREME COURT TERM

Barbara K. Bucholtz<sup>†</sup>

## I. INTRODUCTION

With respect to business-related cases, the 1998-1999 term of the Supreme Court provided little in the way of surprises. That view may appear counter-intuitive, given the Court's headline-grabbing rulings on ADA discrimination<sup>1</sup> and on federalism.<sup>2</sup> However, the groundwork for those high-profile decisions was laid in the Court's recent precedent.<sup>3</sup> Thus, the big news of these cases is essentially old news. This Court continues to be pre-eminently a Rehnquist Court: conservative,

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\*. The concept of a “dollar democracy” is taken from Ferdinand Lundberg, *AMERICA'S SIXTY FAMILIES* (New York: The Vanguard Press, 1937), *quoted in* T.H. WATKINS, *RIGHTEOUS PILGRIM: THE LIFE AND TIMES OF HAROLD ICKES* 628 (1990). It is meant to suggest a societal dichotomy, endemic to the United States, in which the egalitarian precepts of democracy are countervailed by the hegemonic influences of capitalism. In the words of Lundberg, a “modern industrial oligarchy . . . dominates the United States, functioning discreetly under a *de jure* democratic form of government behind which a *de facto* government, . . . plutocratic in its lineaments, has gradually taken form since the Civil War. . . . It is the government of money in a dollar democracy.” *Id.* (Many thanks to Professor Gary Allison for calling my attention to Watkins' excellent book. This article highlights some of the major cases and trends in last term's decisions. A complete list of the 1998-1999 business related cases is provided at Appendices A and B which follow this article).

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1. American with Disabilities Act 42 U.S.C. §121 et. seq., construed this term in: *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S. Ct. 1597 (1999); *Murphy v. United Parcel Serv. Inc.*, 527 U.S. 516, 119 S. Ct. 2133 (1999); *Sutton v. United Airlines*, 527 U.S. 471, 119 S. Ct. 2139 (1999); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391 (1998).

2. For a discussion of the term's ADA cases, *see infra* notes 19-49 and accompanying text. *See Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999) and its companion case, *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 919 F. Supp. 756 (D.N.J. 1996). For a discussion of the term's federalism cases *see infra* notes 201-20 and accompanying text.

3. For example, the Court signaled its states' rights proclivities at least as early as 1992. *See New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992). *See also Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996); *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). For a discussion of the precursors to this term's federalism cases, *see infra* notes 201-09 and accompanying text.

to be sure, and with the exception of the federalism cases, generally cohesive and constrained.<sup>4</sup>

The Rehnquist template can be seen statistically by its consistent ability to achieve a 40% or greater unanimity of result in decisions since 1991.<sup>5</sup> In the 1998-1999 term, that percentage was 44%.<sup>6</sup> More significantly, the Rehnquist Court profile is evident in the doctrinal result reached and the analytical approach taken in the overwhelming majority of business-related opinions last term. A panoramic view of the business cases on the docket reveals a characteristically "Rehnquistian" Court: maintaining a moderately pro-business position on substantive issues and with the exception of the federalism cases<sup>7</sup> exhibiting a clear preference for reaching results by skillful use of technical statutory construction and interpretation of precedent. Of the big news cases covering employment discrimination and federalism, the employment discrimination cases were, on balance, good news for the business community, while the federalism cases and the other cases that implicate business interests cut both ways for the business community.

## II. EMPLOYMENT CASES

Viewing the term's most important business-related cases from the perspective of various business interests, it is apparent that employment issues dominated the docket numerically. Of the seventy-five cases decided last term, thirty-seven were business-related, and of that number, almost one-third, twelve, involved employment issues.

### A. ADA Decisions

Of the employment cases, the most well-publicized decisions were indisputably the disability cases. In last term's three most highly publicized disability

4. For an excellent commentary on the development of an image of a restraintist Court by the cases it selects, see Professor Douglas Kmiec's remarks following the 1997-1998 term, which was perhaps its most technocratic: What better way to manifest a narrower, more constrained role for the judiciary than to select cases inscrutable to the general public? . . . In a way, it's saying if you really think this is the least dangerous branch of government, then it should play its role with a decidedly lower profile than the selected branches, and so it will confine itself to clarifying difficulties in statutory enactments . . .

Quoted in Marcia Coyle, *Ok, Let's All Go to the Right*, NAT'L L. J., Aug. 10, 1998, at B7. (in reference to selecting cases that call for that kind of ostensibly technical resolution). See also my remarks, following the 1995-1996 term, that to some extent the profile of a distinctly Rehnquist Court has been developed by its case selection, and that, "In the long run, a retrospective of the business-related cases the Court chose to reject may be the best mechanism for . . . [evaluating it]." 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 (1997).

5. See NAT'L L.J., Aug. 16, 1999, at B14. The *Journal* reports that the percentages of unanimity and unanimity of result with concurrence in reasoning since 1991 are: 1992-1993 term 43%; 1993-1994 term: 40%; 1994-1995 term: 44%; 1995-1996 term: 48%; 1996-1997 term: 43%; 1997-1998 term: 48%; 1998-1999 term: 44%. The most notable exception to this "Rehnquistian Consensus" was the mere plurality garnered for the federalism cases.

6. See *id.*

7. The notions of dual sovereignty and states' rights that inform the Court's emerging federalism doctrine rest on more theoretical underpinnings. See *infra* notes 209-19 and accompanying text.

decisions, the Court made it clear that its 1997-1998 decisions with regard to sexual harassment in the workplace did not signal a wholesale adoption of the liberal agenda with regard to employment discrimination.<sup>8</sup> A more accurate portrait of the Court's position on employment discrimination can be drawn by viewing its 1997-1998 workplace sexual harassment cases in tandem with its 1998-1999 workplace disability cases. Taken together these cases evince an affinity for the status quo. They neither express nor intimate any inclination to reverse or to expand existing precedent.

Recall that during the 1997-1998 term, the Court in *Oncale v. Sundowner Offshore Services*<sup>9</sup> held that Title VII protections extend to same-sex sexual harassment in the workplace.<sup>10</sup> In *Farragher v. City of Boca Raton*<sup>11</sup> and in *Burlington Indus. Inc. v. Ellerth*<sup>12</sup> the Court clarified the standards applicable to employer vicarious liability in sexual harassment cases.<sup>13</sup> In *Oubre v. Energy Operations, Inc.*,<sup>14</sup> the Court declared that a signed release did not foreclose an employee's age discrimination claims against her employer.<sup>15</sup> Finally, in the *Bragdon v. Abbott*<sup>16</sup> case, the Court held that an employer who tested positive for HIV was protected by the Americans With Disabilities Act (ADA).<sup>17</sup> These 1997-1998 cases seemed to give employers a clear signal that the Rehnquist Court did not intend to roll back the liberal approach of its more liberal predecessors to workplace discrimination. To that extent, the Rehnquist's conservative Court proved itself to be only moderately pro-business.

However, at first blush, three blockbuster discrimination cases this term appear to send a very different message. On June 22, 1999 the Court issued three opinions which precluded expansion of ADA language and precedent to cover several types of disabilities.<sup>18</sup> In *Sutton v. United Airlines, Inc.*,<sup>19</sup> the Court held that the statutory standard for ADA protection: that the employee show a "physical or mental impairment ... substantially limit[ing] one or more of the major life activities,"<sup>20</sup> be read to include any devices or medication that ameliorate the debilitating effects of the impairment.<sup>21</sup> Therefore, myopia that can be corrected with prescription glasses is not an ADA-covered impairment.<sup>22</sup> Thus, the fact that an employer in *Sutton* rejected a myopic individual did not state a justiciable claim

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8. See *Sutton v. United Airlines Inc.*, 527 U.S. 471, 119 S. Ct. 2139 (1999); *Albertson's Inc., v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 119 S. Ct. 2133 (1999).

9. 523 U.S. 75, 118 S. Ct. 998, 1001 (1998).

10. See generally *id.*

11. 524 U.S. 775, 118 S. Ct. 2275 (1998).

12. 524 U.S. 742, 118 S. Ct. 2257 (1998).

13. See *Farragher*, 524 U.S. 775; see also *Burlington*, 524 U.S. 742.

14. 522 U.S. 422, 118 S. Ct. 838 (1998).

15. See *id.* at 840.

16. 524 U.S. 624, 118 S. Ct. 2196 (1998).

17. See *id.* at 2206-07.

18. See *Sutton*, 119 S. Ct. 2139 (1999); *Albertson's Inc.*, 119 S. Ct. 2162 (1999); *Murphy*, 119 S. Ct. 2133 (1999).

19. 119 S. Ct. 2139 (1999).

20. 42 U.S.C. § 12102(2)(A) (1994).

21. See *Sutton*, 119 S. Ct. at 2146-49.

22. See *id.*

because “the ADA allows employers to prefer some physical attributes over others and to establish physical criteria . . .” as job qualifications.<sup>23</sup>

In *Albertsons Inc., v. Kirkingburg*,<sup>24</sup> the Court extended its reasoning in *Sutton* and decided that individuals whose impairments do not, in fact, significantly limit their capacities because they can in some way compensate for the impairments, are also not *per se* covered by the Act.<sup>25</sup> In *Albertsons*, Kirkingburg’s visual impairment in one eye was compensated by his ability to see with his other eye.<sup>26</sup> His impairment did not preclude him from performing the major life activity of seeing; he simply performed it differently.<sup>27</sup> Monocular vision alone, then, will not qualify an individual for ADA protection.<sup>28</sup>

In order to qualify, a claimant must also show the extent to which the impairment significantly restricts major life activities.<sup>29</sup> Furthermore, the Court extended its position in *Sutton* with regard to an employer’s right to establish job qualification preferences. The Court declared that an employer who adopts a federal standard (in this case, a vision standard)<sup>30</sup> as a job qualification is not obligated to adopt any waiver programs available under the standard as well.<sup>31</sup>

The third case in this ADA triad, *Murphy v. United Parcel Service, Inc.*,<sup>32</sup> again extended the Court’s reasoning in *Sutton* and announced that the ADA was unavailable to disabled individuals unless they could show that their impairment disqualified them from a broad range of jobs, not simply a particular job.<sup>33</sup> Thus, an individual with high blood pressure who could not meet the specific job qualifications for a mechanic at UPS (because that job required him to meet standards for driving commercial vehicles) was not covered by the Act. “At most,” said the Court, “petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires . . . [him to drive] . . . a specific type of vehicle used on a highway in interstate commerce.”<sup>34</sup>

Three cases in last term’s docket, then, refused to extend the reach of ADA protections to milder, less egregious impairments. These cases were,

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23. *Id.* at 2150-52.

24. 119 S. Ct. 2162 (1999).

25. *See id.* at 2169-70.

26. *See id.* at 2169.

27. *See id.*

28. *See id.*

29. *See id.*

30. Department of Transportation’s Motor Carrier Safety Regulations, 49 CFR § 391.41(b)(10) (1998), *cited in Albertson’s*, 119 S. Ct. at 2169-72.

31. *See Albertson’s*, 119 S. Ct. at 2172. The waiver program at issue was deemed by the Court not a modification of the visual standards but as an experiment to test the efficacy of the standards. *See id.* at 2174.

32. 119 S. Ct. 2133 (1999).

33. *See id.* at 2133.

34. *Id.* at 2138-39.

understandably, greeted by the business community with some relief.<sup>35</sup> The remaining ADA cases on the Court's docket, however, were not so reassuring.

For instance, in *Wright v. Universal Maritime*,<sup>36</sup> the Court overruled the famously conservative Fourth Circuit<sup>37</sup> and held that a general arbitration clause in a collective bargaining agreement (CBA) did not require an employee to arbitrate his ADA claim nor did it preclude him from bringing suit under it.<sup>38</sup> Also, in *Cleveland v. Policy Management Systems Corp.*,<sup>39</sup> the Court permitted an ADA petitioner to explain the inconsistency between her assertion of total disability, in claiming eligibility for Social Security benefits, and her apparently conflicting statement in her ADA petition that her disability could be reasonably accommodated.<sup>40</sup>

Hence, the widely-publicized ADA cases were not an unqualified "win" for the business community.<sup>41</sup> Three cases favored business interests, while two ADA cases protected employee interests. A similar dichotomy of results can be seen in the remaining employment cases.

### B. Civil Rights Statutes

The Court decided three employment cases under the Civil Rights Statutes which were not entirely good news for business interests. The most far-reaching of those cases was a Title VII case, *Kolstad v. American Dental Association*.<sup>42</sup> At issue in *Kolstad* were the provisions of the 1992 Act which amended the Civil Rights Act of 1964 and, for the first time, made punitive damages available in a Title VII case.<sup>43</sup> The Court held that for a punitive damage award something more than proof of intentional discrimination by the employer must be shown, but it declined to

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35. Steven Bokart, general counsel for the United States Chamber of Commerce opined, "The great fear [in ADA cases] was a dramatic expansion in lawsuits, with a lot of people without clearly defined disabilities clearly empowered to seek legal relief .... That was very, very scary for employers." Robin Toner & Leslie Kaufman, *Ruling Upsets Advocates for the Disabled*, N.Y. TIMES, June 24, 1999 at A22. A partner with the law firm that represents United Parcel, a party-defendant in one of the cases (*Murphy*) echoed that sentiment: "It provides a greater certainty for business people .... And it allows everyone to bring the focus back to the truly disabled." *Id.* On the other hand, the decisions were deeply troubling to the disabled community and some of the drafters and supporters of the ADA. This same article reports that Prof. Chai Feldblum of Georgetown Law School commented, "Where it leaves the ADA is with a huge gaping hole right at its heart." *Id.* And Christopher Bell, former counsel for the EEOC (Equal Employment Opportunity Commission) cautions, "Employers need to be careful not to leap to the conclusion that anyone taking medication is no longer covered .... This raises the bar for disability coverage, but it really only means that truly disabled people can make a claim." *Id.*

36. 119 S. Ct. 391 (1998).

37. See, e.g., Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1.

38. 119 S. Ct. at 394-97. Notably, this case did not require the Court to address the discrepancies between *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991) because the validity of a union-negotiated waiver of an employee's right to bring his/her claim to a federal forum was not raised in *Wright* where there was no waiver. See *Wright*, 119 S. Ct. at 394-95.

39. 526 U.S. 795, 119 S. Ct. 1597 (1999).

40. See *id.* at 1602-04.

41. For a more comprehensive analysis of these ADA cases, see, Vicki J. Limas, 35 TULSA L. J. (2000).

42. 527 U.S. 526, 119 S. Ct. 2118 (1999).

43. See *id.* at 2124.

require that the employee prove egregious conduct independent of the employer's state of mind. The terms "malice and reckless indifference"<sup>44</sup> in the 1991 Act refer to the employer's state of mind and proof of the employer's awareness that it might be acting in violation of federal law is a sufficiently egregious state of mind to satisfy those terms.<sup>45</sup>

However, the Court pointedly added that the egregious state of mind, like the discriminatory act of a co-worker supervisor or manager must be imputed to the employer.<sup>46</sup> Further, although common law agency principles are generally available to impute co-worker and managerial malice to the employer,<sup>47</sup> those principles would be modified to provide an employer a defense premised on its "good faith efforts to enforce an antidiscrimination policy."<sup>48</sup> *Kolstad* cuts both ways, giving employees more latitude in proving punitives while giving employers who implement Title VII programs a safe harbor.<sup>49</sup>

In another civil rights case, *Haddle v. Garrison*,<sup>50</sup> the Court expanded the protections of the Civil Rights Conspiracy Statute<sup>51</sup> to reach an at-will employee.<sup>52</sup> In so doing, it explained that even though the at-will employee had no Constitutionally protected property interest in his employment, his claim of wrongful intimidation under §1985(2) was not foreclosed. "[T]he fact that employment at-will is not 'property' for purposes of the Due Process Clause . . . does not mean that loss of at-will employment may not 'injur[e] [petitioner] in his person or property' for purposes of § 1985(2)."<sup>53</sup>

The at-will employee in *Haddle* claimed that he was terminated from his at-will employment in retaliation for responding to a grand jury subpoena and agreeing to testify against his employer in a Medicare fraud prosecution.<sup>54</sup> The Court held his claim was cognizable under §1985, the Civil Rights Conspiracy Statute.<sup>55</sup> Nevertheless, while the Chief Justice - writing for a unanimous Court - did cite

44. *See id.*

45. *See id.* at 2124-26.

46. *See id.* at 2126

47. *See* *Kolstad*, 119 S. Ct. at 2127-29.

48. *See id.* at 2130

49. In one respect, at least, this case may prove more important in employment discrimination law than the previously cited triad of ADA cases because it paints with a brush covering a broader segment of discrimination cases. Critical to the availability of these cases is the potential to prove and receive punitive damages since an award of only compensatory damages often makes these cases financially unviable. Another interesting aspect of the case is that it is one of seven cases brought by, or against, nonprofit mutual benefit associations. *See e.g.* *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 119 S. Ct. 292 (1998); *California Dental Assoc. v. F.T.C.*, 526 U.S. 756, 119 S. Ct. 1604 (1999); *Greater New Orleans Broad. Assoc. v. United States*, 527 U.S. 173, 119 S. Ct. 1923 (1999); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721 (1999); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 119 S. Ct. 1402 (1999); and *Nat'l Collegiate Athletic Assoc. v. Smith*, 525 U.S. 459, 119 S. Ct. 924 (1999). Whether or not the presence of seven nonprofit associations as parties on a single Supreme Court docket is a record, it is certainly indicative of the more proactive role currently played by non-profits in the economy and in society-at-large.

50. 525 U.S. 121, 119 S. Ct. 489 (1998).

51. 42 U.S.C. § 1985(2) (1994).

52. *See* *Haddle*, 119 S. Ct. at 492.

53. *See id.* at 489, 492.

54. *See id.* at 490.

55. *See id.* at 492.

traditional tort law claims of third party interference with at-will employment relationships as authority for the holding,<sup>56</sup> the decision was obviously driven by public policy considerations supporting the integrity of the judicial system. The decision is probably, therefore, *sui generis* and not a clarion call for an expansion of at-will employee rights.

Employee property interests did not fare so well in the third civil rights employment case. In *American Manufacturers Mutual Insurance Co. v. Sullivan*,<sup>57</sup> employees challenged workers compensation state law procedures under § 1983.<sup>58</sup> Pennsylvania's worker compensation law required employers subject to the Act to pay all "reasonable" and "necessary" medical treatment costs of a valid claim, but it also created a review procedure under which a consortium of private health care providers could evaluate the reasonableness and necessity of the treatment sought.<sup>59</sup> Employees claimed that once their workers compensation claims were deemed valid, the costs associated with the claims amounted to property rights.<sup>60</sup> The review procedure deprived them of a property right to treatment and that act of deprivation was committed under color of state law.<sup>61</sup> In essence, the employees sought to extend the reach of Justice Brennan's holding in *Goldberg v. Kelly*,<sup>62</sup> which identified a Constitutionally-mandated right to pre-deprivation notice and hearing in federal welfare assistance cases, to the workers compensation arena.<sup>63</sup>

The Court distinguished the workers compensation procedures on two grounds and held that the withholding of workers compensation awards pending review did not create a § 1983 *Goldberg*-type claim.<sup>64</sup> Section 1983 requires that claimants prove they were "deprived of a right secured by the Constitution or laws of the United States and that the alleged deprivation was committed under color of state law."<sup>65</sup> The Court declared the facts in *Sullivan* met neither element of the section.<sup>66</sup> First, the Court ruled that the review board was not acting under color of state law even though the alleged deprivation was caused by a procedure " 'created by the State.' "<sup>67</sup> The reviewing board consisted of private sector health care providers that could not be considered "state actors" simply because the review procedure was created by the State.<sup>68</sup>

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56. *See id.*

57. 526 U.S. 40, 119 S. Ct. 977 (1999).

58. 42 U.S.C. § 1983 (1994).

59. *See Sullivan*, 119 S. Ct. at 982.

60. *See id.* at 984-85.

61. *See id.*

62. 397 U.S. 254 (1970).

63. *See Sullivan*, 119 S. Ct. at 982.

64. *See id.* at 987-90.

65. *See id.* at 985.

66. *See Sullivan*, 119 S. Ct. at 986 (1999) (Stevens, J., concurring in part and dissenting in part).

67. *Id.* at 985. (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Rehnquist applied the two-pronged test for "under color of state law" requiring plaintiff to show "both an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible' and that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" (emphasis added)).

68. *See Sullivan*, 119 S. Ct. at 985.



Therefore, the withholding of medical treatment compensation pending review did not operate under color of state law.<sup>69</sup> Second, the employees had no vested property right in the medical treatment until the treatment was deemed “reasonable” and “necessary” by the Board.<sup>70</sup> Only at that point did the Pennsylvania statute at issue create an entitlement to the treatment.<sup>71</sup> Thus, *Sullivan* can be seen as a victory for the business community, but overall, this term’s civil rights cases cut both ways.<sup>72</sup>

### C. ERISA

Two Employee Retirement Income Security Act of 1974 (ERISA)<sup>73</sup> cases were decided last term. In *Hughes Aircraft Co. v Jacobson*,<sup>74</sup> a unanimous Court applied textbook rules of statutory construction to find in favor of an employer and against its retired employees.<sup>75</sup> The plain meaning of the applicable sections of ERISA<sup>76</sup> made it abundantly clear, said the Court, that the employer did not violate ERISA when it amended its retirement plan to provide for early retirement and to eliminate mandatory employee contributions.<sup>77</sup> Pursuant to the Act, retirees whose contributions had been mandatory under the previous plan had no vested property interest in the current plan’s unsegregated assets.<sup>78</sup> Furthermore, the retirees were protected by the employer’s obligation to pay the specified amount to which each retiree was entitled.<sup>79</sup> A unanimous Court in *UNUM Life Insurance Co. of America v. Ward*,<sup>80</sup> however, found the ERISA provisions applicable to the facts in that case somewhat opaque, thus requiring the Court to place the disputed language of the statute in the factual context to which it would be applied.<sup>81</sup> The *UNUM* Court considered the statutory provision which saves from ERISA preemption any state law that “regulates insurance,”<sup>82</sup> and, placing the statutory language in the context of the untimely claim for disability benefits at issue in *UNUM*, found that California’s “notice-prejudice” rule regulates insurance.<sup>83</sup> Hence, it was saved from ERISA preemption.<sup>84</sup> Consequently, the employee’s untimely claim was saved from

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69. *See id.* at 989.

70. *See id.* at 990.

71. *See id.*

72. *See, e.g., City of Monterey, v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1998) (raising eminent domain issues and holding that whether the City denied all economically viable use of developer’s property when it rejected developer’s proposal five times, and whether the city’s rejection substantially advanced a legitimate public purpose were properly jury questions. The case did not advance the development of Takings jurisprudence significantly).

73. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144 (1999).

74. 525 U.S. 432, 119 S. Ct. 755 (1999).

75. *See id.*

76. *See id.* at 762.

77. *See generally id.*

78. *See id.*

79. *See id.* at 764.

80. 526 U.S. 358, 119 S. Ct. 1380 (1999).

81. *See generally id.*

82. *Id.* at 1386 (quoting § 514 (b)(2)(A), 29 U.S.C. § 1144 (b)(2)(A) (1994)).

83. *See UNUM*, 119 S. Ct. at 1385.

84. *See id.* at 1385, 1387-91.

preclusion because the California law required the insurer to show that the employee's belated notice of claim caused it actual prejudice.<sup>85</sup>

A related issue, however, did implicate ERISA's preemption clause<sup>86</sup> and was not "saved."<sup>87</sup> ERISA's preemption clause states in relevant part that ERISA "shall supercede .... state laws to the extent that those laws 'related to any employee benefit plan.'"<sup>88</sup> At issue was a California agency rule<sup>89</sup> which provided that "'the employer is the agent of the insurer in performing the duties of administering group insurance policies."<sup>90</sup> The Court found that the rule related to an employee benefit plan because it affected its administration.<sup>91</sup> The California rule was, therefore, preempted by ERISA.<sup>92</sup> Last term's ERISA cases, then, were quintessentially "Rehnquistian:" delivering a mixed bag of results to the business community by using traditional rules of statutory construction.

#### D. Health Law

The contiguous field of health law yielded even less favorable results for business interests. The most important health law case last term was *Humana, Inc. v. Forsyth*.<sup>93</sup> In *Humana*, a unanimous Court held that RICO's<sup>94</sup> treble damage award could be assessed against insurers in a successful fraud case.<sup>95</sup> This concession was premised upon its analysis of the McCarran-Ferguson Act<sup>96</sup> which provides in pertinent part that "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."<sup>97</sup>

RICO does not relate to the business of insurance. But neither does it "invalidate, impair or supercede" Nevada's insurance regulation laws.<sup>98</sup> Since Nevada law "permits recovery of compensatory and punitive damages," RICO's treble damage award is "in harmony with the state's regulation."<sup>99</sup> In *Your Home Visiting Nurse Services, Inc. v. Shalala*,<sup>100</sup> the Court deferred to the agency's

85. See *id.* at 1386.

86. 29 U.S.C. § 1144(a).

87. See UNUM, 119 S. Ct. at 1385.

88. See *id.* at 1384 (quoting § 514(a), 29 U.S.C. § 1444(a) (1994)).

89. See UNUM, 119 S. Ct. at 1391.

90. *Id.* (quoting *Elfstrom v. New York Life Ins. Co.*, 432 P.2d. 731, 737 (Cal. 1967) (en banc) (establishing "Elfstrom rule").

91. See UNUM, 119 S. Ct. at 1392.

92. See *id.* at 1391.

93. 525 U.S. 299, 119 S. Ct. 710 (1999).

94. Racketeer Influenced and Corrupt Organizations Act (RICO) of 1978, 18 U.S.C. § 1961 (1994 & Supp. IV 1998).

95. See *Humana*, 119 S. Ct. at 719.

96. 15 U.S.C. § 1012(b) (1994).

97. See *Humana*, 119 S. Ct. at 715 (quoting 15 U.S.C. § 1012(b) (1994)).

98. *Humana*, 119 S. Ct. at 715.

99. See *id.* at 714.

100. 525 U.S. 429, 119 S. Ct. 930 (1999).

interpretation of the Medicare Act<sup>101</sup> in its regulations promulgated under the Act,<sup>102</sup> finding that the reviewing board lacked jurisdiction to review an intermediate level refusal to reopen the reimbursement determination at issue.<sup>103</sup> The Court's deference was premised on its finding that the agency's interpretation was reasonable<sup>104</sup> and on the Court's straightforward reading of the applicable section of the Medicare Act. The Court opined "judicial review under the federal-question statute ... is precluded by 42 U.S.C. §405(h) [which is] applicable to the Medicare Act by operation of §1395ii ...."<sup>105</sup>

The third health law case last term required an interpretation of the Emergency Medical Treatment and Active Labor Act.<sup>106</sup> In a per curiam decision, the Court ruled in *Roberts v. Galen of Virginia*<sup>107</sup> that a guardian's lawsuit on behalf of his patient-ward alleging the patient's transfer from defendant hospital was premature, stated a cognizable claim under the Act.<sup>108</sup> The Court reasoned the allegations were cognizable because the relevant sections of the Act,<sup>109</sup> which required that hospitals stabilize emergency patients before transferring them to other facilities, did not require proof of the hospital's improper motive in failing to provide the requisite emergency care.<sup>110</sup> The failure to stabilize and the transfer were sufficient to give rise to a claim.<sup>111</sup> Three up and three out. Health care providers lost all three health law cases this term, with each case decided pursuant to traditional canons of statutory construction.

#### *E. Native American And Energy Resource Law*

Business interests fared substantially better in energy-related cases involving Native American tribes. A divided Court in *Amoco Production Co. v. Southern Ute Indian Tribe*,<sup>112</sup> applied the "plain meaning" of the term "coal," as it was understood at the time the Coal Lands Acts of 1909 and 1910<sup>113</sup> were passed and found that Congress reserved only the hard rock coal under the Acts.<sup>114</sup> Thus, when Congress subsequently conveyed the surface and other mineral rights, its reservation of coal rights did not include the coal bed methane gas imbedded in the coal.<sup>115</sup> The Court stated that in the early 20<sup>th</sup> Century, methane gas "was considered a dangerous waste product which escaped from coal;"<sup>116</sup> its value as an energy source was not

101. 42 U.S.C. § 1935 (1994).

102. 42 C.F.R. § 405.1885 (1998).

103. *See generally* Your Home, 119 S. Ct. 930.

104. *See id.* at 934.

105. *See id.*

106. The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395 dd (1994 & Supp. III 1997).

107. 525 U.S. 249, 119 S. Ct. 685 (1999) (per curiam).

108. *See generally id.*

109. 42 U.S.C. §§ 1395 dd(b)-(d) (1994 & Supp. III 1997).

110. *See generally* Roberts, 119 S. Ct. 685.

111. *See id.* at 686.

112. 526 U.S. 865, 119 S. Ct. 1719 (1999) (Ginsburg, J., dissenting).

113. *Id.* at 1727 (citing Coal Lands Acts of 1909 and 1910, 30 U.S.C. §§ 81, 83-85 (1994)).

114. *See generally* Amoco Production Co., 119 S. Ct. at 1719.

115. *See id.*

116. *See id.* at 1725.

recognized. Some of the surface lands and mineral rights conveyed under the 1909 and 1910 Acts were formerly Southern Ute reservation lands.<sup>117</sup> The federal government eventually returned its reserved rights in those lands to the Ute tribe.<sup>118</sup>

Thereafter, energy companies entered into leases with owners of the surface and residual mineral interests to extract the coal bed methane gas from the coal.<sup>119</sup> It was the ownership of this energy resource that was at issue in the instant case. The tribe claimed that it owned the gas as a part of its interest in the coal.<sup>120</sup> The Court held that Congress did not intend to reserve the gas which it believed in 1909-1910 to be valueless; hence no interest in the gas devolved to the tribe when the hard rock coal interest was returned to the Utes.<sup>121</sup>

In the other energy resource case involving a Native American tribe, the Court also found in favor of the energy industry and against the tribe. In *El Paso Natural Gas Co. v. Neztosie*,<sup>122</sup> a unanimous Court refused to apply the doctrine of tribal court exhaustion to a case involving injuries allegedly caused by exposure to radioactive materials.<sup>123</sup> The materials were in open pit uranium mines located on the Navajo Nation Reservation.<sup>124</sup> Injured tribal members filed suit in tribal court. The uranium mining companies sought to enjoin the tribal litigation and to try the case in federal district court.<sup>125</sup> The companies argued that a 1988 amendment to the Price-Anderson Act<sup>126</sup> granted federal district courts original jurisdiction in all cases implicating the Act.<sup>127</sup> The Court agreed, holding that Price-Anderson's "unusual pre-emption provision" precludes consideration of the exhaustion doctrine because it expresses Congress' "unmistakable preference for a federal forum . . . both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal [here, from tribal court] is contested."<sup>128</sup> Statutory construction worked in favor of the energy industry in those two cases.

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117. *See id.*

118. *See id.*

119. *See id.*

120. *See Amoco Production Co.*, at 1722-23.

121. *See id.* at 1727. Notably, Justice Ginsburg challenged the Court's reading of legislative intent in the case stating that Congressional intent with regard to dominion of the methane gas, which was formerly considered to be waste product of coal, was at least ambiguous and she "would therefore apply the canon that ambiguities in land grants are construed in favor of the sovereign". . . a construction which would preserve the government's and, therefore, the tribe's interest in it. *Id.*

122. 526 U.S. 473, 119 S. Ct. 1430 (1999).

123. *See id.*

124. *See id.*

125. *See id.*

126. Atomic Energy Act of 1954, 42 U.S.C. § 2011, as amended by Price-Anderson Act, 42 U.S.C. § 2210 (n)-(o) (1994 & Supp. III 1997) (citing 42 U.S.C. § 2014 (w) (the Act limits liability and provides insurance coverage for claims against federal licenses for injuries resulting from "a nuclear incident")).

127. *See El Paso Nat. Gas Co.*, 119 S. Ct. at 1437 (citing 42 U.S.C. § 2014 (hh) (1994)).

128. *El Paso Nat. Gas Co.*, 119 S. Ct. at 1437.

### F. Debtor-Creditor

In the two debtor-creditor cases this term, creditors won one and lost one. A divided Court in *Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership*<sup>129</sup> invoked the absolute priority rule<sup>130</sup> against equity security holders in a debtor association and refused to allow them exclusive rights to equity securities in the new entity created by a proposed reorganization plan.<sup>131</sup> The Court reasoned that the plan did not give a dissenting senior class of creditors the opportunity either to become equity holders in the new entity or to propose an alternative plan.<sup>132</sup> In so ruling, the Court relied on language in the applicable section of the Bankruptcy Code which bars junior interests (here, the equity holders) from receiving property in the new entity "on account of" the junior interests.<sup>133</sup> The Court interpreted "on account of" to mean "because of" and thereby sustained the bank-creditor's objection to the "cramdown" reorganization plan.<sup>134</sup> Creditors prevailed with this interpretation of the Bankruptcy Code but lost an attempt to obtain injunctive relief against prejudgment debtors in the other debtor-creditor case, *Grupo Mexicano de De Sarollo, S.A. v. Alliance Bond Fund, Inc.*<sup>135</sup>

In *Alliance*, investment fund creditors purchased unsecured notes from a Mexican holding company involved in toll road construction under the auspices of the Mexican government.<sup>136</sup> A downturn in the Mexican economy had the ripple effect of putting the Mexican company in an insolvent position.<sup>137</sup> Fearing dissipation of the debtor's remaining assets, the note-holder-creditors accelerated the principal and filed suit for judgment on the notes and for a preliminary injunction blocking any transfer of the debtor's remaining assets during the

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129. 526 U.S. 434, 119 S. Ct. 1411 (1999).

130. The absolute priority rule in bankruptcy cases is a judge made rule that predated the Bankruptcy Code and interpreted its predecessor, the Bankruptcy Act, to require reorganization plans to be "fair and equitable" to creditors. Recognizing the dominant position of management in developing a reorganization plan, the Courts developed the "absolute priority rule, which stated that fairness and equity required that 'the creditors ... be paid before stockholders could retain [equity interests] for any purpose whatever.'" *Id.* at 1416 (quoting *Northern Pac. R. Co. v. Boyd*, 228 U.S. 482, 500 (1913)). In the instant case, former partners (equity security holders) of the bankrupt devised the Plan which excluded senior interest holders (creditors) from owning interests in the reorganized debtor. The bank, as creditor, opposed and blocked confirmation of the Plan. Consequently, the debtor invoked § 1129(b) of the Bankruptcy Code which is known as the "cramdown" process which would permit approval of the plan over dissent if, *inter alia*, the plan was found to be "fair and equitable" with respect to each dissenting class of impaired unsecured claims. § 1129(b)(c). *Id.* at 1415. The bank's mortgage could not be completely satisfied by the bankrupt's assets. *Id.* at 1415. The remaining deficiency qualified it as a dissenting class of impaired unsecured claims, thus triggering the "fair and equitable" requirement of § 1129(b)(2)(B)(ii) which was characterized in the legislative history of the Code as a "partial codification of the absolute priority rule." *Id.* at 1419.

131. *See* *Bank of America*, 119 S. Ct. at 1419.

132. *See id.*

133. *Id.* at 1420-24.

134. *See* note 130, *supra*.

135. 527 U.S. 308, 119 S. Ct. 1961 (1999).

136. *See id.* at 1963.

137. *See id.* at 1964-65.

pendency of the action.<sup>138</sup> Subsequently, the note-holder creditors prevailed on the merits of the case and the preliminary injunction was converted to a permanent injunction.<sup>139</sup>

On writ of certiorari from the Second Circuit, the Supreme Court, by a plurality, declared that the preliminary injunction was premature.<sup>140</sup> District courts historically have not had the equitable power to impose a preliminary injunction prior to a judgment on the debt.<sup>141</sup> The Court rejected creditors' argument that the final result in the case established the debt, converted the preliminary injunction into a permanent injunction and thereby rendered the issue moot.<sup>142</sup> The Court did concede that, "[g]enerally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction."<sup>143</sup> But where, as here, the trial court had no authority to issue the preliminary injunction, "the final injunction does not establish the substantive validity of the preliminary one."<sup>144</sup>

The authority of district courts to enjoin conduct preliminarily under Rule 65 has been consistently constrained by "traditional principles of equity jurisdiction."<sup>145</sup> In the instant context, the well-established rule is that "a judgment establishing a debt is necessary before a court of equity will interfere with the debtor's use of his property."<sup>146</sup> Invoking general principles of judicial restraint, the Court refused to extend the district court's equitable powers in this context.<sup>147</sup> In so ruling, it declined to adopt the dissent's invocation of broader principles of equity in recognition of the untenable "Catch-22" position the decision presented to creditors. The Court opined, "[w]hen there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a better position than we both to perceive them and to design the appropriate remedy."<sup>148</sup>

### G. Patent Law

The Court rendered an important patent law decision of broad application last term, when it was asked to determine what standard of review the Federal Circuit must use in reviewing finding of facts issued by the Patent and Trademark Office ("PTO").<sup>149</sup> Over the objection of three dissenters, the Court found that the applicable standard of review was delineated in § 706 of the Administrative Procedure Act (APA).<sup>150</sup> Section 706 establishes that "a reviewing court shall . .

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138. *See id.* at 1964.

139. *See id.* at 1964.

140. *See Grupo*, 119 S. Ct. at 1975.

141. *See id.* at 1974.

142. *See id.* at 1965.

143. *Id.* at 1966.

144. *Id.*

145. *Id.* at 1968 (*quoting* 11A CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 2941 (2d ed. 1995)).

146. *Grupo*, 119 S. Ct. at 1969 (1999).

147. *See id.*

148. *Id.* at 1969.

149. *Dickinson v. Zurko*, 527 U.S. 150, 119 S. Ct. 1816 (1999)

150. Administrative Procedure Act, 5 U.S.C. § 551.

. (2) . . . set aside agency findings . . . found to be (A) arbitrary, capricious, . . . an abuse of discretion or . . . (E) unsupported by substantial evidence . . . on the record.”<sup>151</sup> The Court’s decision dilutes the Federal Circuit’s authority to review PTO findings. It expressly rejected the Circuit’s argument that APA’s § 559 “clearly erroneous standard” is the applicable rule.<sup>152</sup> That section permits an exception to § 706 and states that the APA does “not limit or repeal additional requirements recognized by law.”<sup>153</sup> In sum, the decision enhances the deference the Circuit must show PTO findings.

In *Pfaff v. Wells Electronic, Inc.*,<sup>154</sup> the other patent case last term, a patentee marketed commercial quantities of his computer chip socket for over a year before applying for its patent.<sup>155</sup> He subsequently sought protection of his patent from a competitor’s infringement.<sup>156</sup> A unanimous Court gave a close reading to § 102 of the Patent Act<sup>157</sup> and found that his pre-patent sales ran afoul of § 102’s on-sale bar, thereby rendering his patent invalid.<sup>158</sup>

#### H. Taxation

An important state franchise tax case was decided last term. In *South Central Bell Telephone Co. v. Alabama*,<sup>159</sup> a unanimous result was reached striking down Alabama’s franchise tax regime.<sup>160</sup> The statute taxed Alabama corporations at the rate of 1% of the par value of the corporation’s stock.<sup>161</sup> Yet, it imposed a tax of 0.3% of actual capital employed in Alabama on foreign corporations domesticated and doing business in Alabama.<sup>162</sup> The discrepancy in tax rates discriminated against foreign corporations in derogation of interstate commerce, said the Court. Therefore, the tax scheme violated the Commerce Clause.<sup>163</sup>

The Court rejected Alabama’s Eleventh Amendment argument that federal court jurisdiction does not “extend to any suit” brought against a state by citizens of another state.<sup>164</sup> The Court cited its own recent precedent on the issue to the effect that where, as here, the state court “takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case.”<sup>165</sup>

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151. Section 706 (*quoted in Dickinson*, 119 S. Ct. at 1818).

152. *See Dickinson*, 119 S. Ct. at 1824.

153. *Id.* at 1819.

154. 525 U.S. 55, 119 S. Ct. 304 (1999).

155. *See id.* at 307-08.

156. *See id.* at 304.

157. Patent Act, 35 U.S.C. § 102(g).

158. *Pfaff*, 119 S. Ct. at 312.

159. 526 U.S. 160, 119 S. Ct. 1180 (1999).

160. *See id.* at 1186.

161. *See id.* at 1182.

162. *See id.*

163. *See id.* at 1185.

164. *Id.* at 1184.

165. *South Central Bell*, at 1184 (*quoting* *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, Dept. of Bus. Regulation of Florida, 496 U.S. 18, 30 (1990)). The Court also recently held in *Fulton v. Faulkner*, 516 U.S. 325 (1996), that North Carolina’s intangibles tax system which discriminated against foreign Corporations violated the dormant Commerce Clause. *See* Barbara K. Bucholtz, *Taking Care of Business*, *supra* note 4, at 458.

The Court rejected Alabama's suggestion that it overrule this recent precedent.<sup>166</sup>

### I. Civil Practice

Several interesting civil practice cases implicating business interests appeared on the Court's 1998-1999 docket. In *Kumho Tire Co. Ltd. v. Carmichael*,<sup>167</sup> the Court revisited its *Daubert*<sup>168</sup> expert witness rule. In *Daubert* the Court held that expert scientific testimony is admissible only if it is "both relevant and reliable,"<sup>169</sup> and it assigned a "gatekeeper" role to the trial court to make that determination.<sup>170</sup> In *Kumho Tire* the Court, over one dissent, extended the *Daubert* rule to the testimony of other experts who are not scientists.<sup>171</sup>

The expert testimony at issue in *Kumho Tire* was that of an engineer with expertise in determining the causes of tire failure.<sup>172</sup> The trial court rejected the engineer's methodology and excluded his testimony on the grounds of unreliability, pursuant to Rule 702, Fed. R. Evid.<sup>173</sup> In so doing, it applied *Daubert's* reliability factors including: 1) theory verification; 2) peer review or publication of the theory; 3) percentage of error; and 4) acceptance in the relevant community of experts.<sup>174</sup>

The Court first determined that Rule 702 applies to the reliability of all evidence; likewise *Daubert* extends to all expert testimony.<sup>175</sup> The Court, however, declined either to limit or to expand the number of factors a court might consider in applying *Daubert*, concluding that, "[t]oo much depends upon the particular circumstances of the particular case at issue."<sup>176</sup> Commentators agree that the case will impact the use of dueling experts in product liability cases.<sup>177</sup> Whether the decision is favorable to business interests depends, of course, on whose ox - or expert - is being gored.

A removal and remand case of some import came before the Court last term. In *Ruhrgas A.G. v. Marathon Oil Co.*,<sup>178</sup> subsidiaries of Marathon Oil entered a sales agreement with Ruhrgas A.G. for gas produced by the subsidiaries in the North Sea.<sup>179</sup> The agreement contained a dispute resolution clause providing for

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166. In another state taxation case, *Arizona Department of Revenue v. Blaze Construction Co.*, 526 U.S. 32, 119 S. Ct. 957 (1999), a unanimous Court held that a non-Indian federal contractor had no tax unity from income it received under its contract with the Bureau of Indian Affairs, Department of the Interior (BIA) to construct and repair roads on Indian reservations. Only the federal government itself or an instrumentality closely tied to it enjoys such immunity. *Id.* at 959-61.

167. 526 U.S. 137, 119 S. Ct. 1167 (1999).

168. *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

169. *Id.* at 2799.

170. *Kumho*, 119 S. Ct. at 1171.

171. *See id.*

172. *See id.*

173. Fed. R. Evid. 702.

174. *Kumho*, 119 S. Ct. at 1173.

175. *See id.* at 1174.

176. *Id.* at 1175.

177. Marcia Coyle, *Kumho Tire Clarifies Use of Daubert*, NAT'L L.J., April 5, 1999 at B1.

178. 526 U.S. 574, 119 S. Ct. 1563 (1999).

179. *See id.* at 1567.



arbitration in Sweden.<sup>180</sup> However, when a dispute arose, Marathon, and others, sued in Texas state court alleging fraud, breach of fiduciary duty and related state law claims. Ruhrgas removed the case to federal court where it moved to dismiss for want of personal jurisdiction.<sup>181</sup> Marathon moved to remand arguing lack of federal subject-matter jurisdiction.<sup>182</sup> The district court found that Ruhrgas had insufficient contacts with Texas to meet its long-arm statute requirements and it dismissed the case on personal jurisdiction grounds.

The Supreme Court affirmed the trial court and, thereby, clarified its recent holding in *Steel Co. v. Citizens for a Better Environment*.<sup>183</sup> During its 1997-1998 term, the Court in *Steel* held that Article III constraints generally dictate that a court must first find that it has subject-matter jurisdiction before it addresses the merits of a case.<sup>184</sup> However, *Ruhrgas* involved the pre-trial issue of personal jurisdiction. The Court declared that, “[a]lthough the character of the two jurisdictional bedrocks unquestionably differs, the distinctions do not mean that subject-matter jurisdiction is ever and always the more ‘fundamental.’ Personal jurisdiction, too, is an essential element of district court jurisdiction ....”<sup>185</sup> Furthermore, *Steel’s* “jurisdiction ‘before the merits’ principle does not dictate the sequencing of jurisdictional issues.”<sup>186</sup> Therefore, where the resolution of the personal jurisdiction issue is straight-forward and clear (as it was in *Ruhrgas*), while the subject-matter issue is complex and nuanced (as it was in *Ruhrgas*), the district court does not abuse its discretion in resolving the jurisdictional question on the basis of personal jurisdiction.<sup>187</sup>

In another removal and remand case, a divided Court held that a faxed file-stamped copy of the complaint was not proper notice for purposes of determining the thirty day removal period under 28 U.S.C. § 1446(b).<sup>188</sup> The language of § 1446(b) specifies removal notice “through service or otherwise, of a copy of the complaint.” A certified copy, but not a faxed copy satisfies § 1446(b).<sup>189</sup>

### J. Antitrust

An important antitrust case was considered by the Court last term. *Nynex Corp. v. Discon, Inc.*<sup>190</sup> continues a discernable trend in Supreme Court antitrust jurisprudence to limit the reach of *per se* violations of the Sherman Act. Just two terms ago, the Court in *State Oil Co. v. Khan*<sup>191</sup> overruled precedent and held that

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180. *See id.* at 1565.

181. *See id.*

182. *See id.*

183. 523 U.S. 83, 118 S. Ct. 1003 (1998).

184. *See generally id.*

185. *Ruhrgas*, 119 S. Ct. at 1565.

186. *Id.* at 1566.

187. *Id.*

188. *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 119 S. Ct. 1322 (1999).

189. *Id.* at 1323-25.

190. 525 U.S. 128, 119 S. Ct. 493 (1998).

191. 522 U.S. 3, 118 S. Ct. 275 (1997).

vertical maximum price caps are not *per se* violations of the Sherman Act.<sup>192</sup> The Court justified its decision on the grounds that *per se* bans are increasingly disfavored because they rest on theoretical constructs rather than on demonstrable evidence of impermissible trade restraint.<sup>193</sup>

In keeping with the *Khan* approach, a unanimous *Nynex* Court held that the *per se* rule in group boycott cases is limited to horizontal agreements.<sup>194</sup> *Nynex*, however, concerned a single competitor and a vertical agreement. In *Nynex*, a supplier of telephone equipment removal services (Discon) filed an antitrust claim against a subsidiary of Nynex which had previously purchased Discon's services but had switched to another supplier, Discon's competitor.<sup>195</sup> Discon alleged that the switch was made in order to harm Discon and that the competitor charged higher rates than Discon.<sup>196</sup> Discon argued the evidence showed the switch offered no price advantage for the Nynex subsidiary and was obviously anti-competitive.<sup>197</sup>

The Court found the facts did not state a case for a *per se* ban. To be entitled to a *per se* ban in this context, Discon would have to prove harm "not just to a single competitor, but to the competitive process itself."<sup>198</sup> Further, to apply the *per se* ban under these facts "would subject cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique" to *per se* antitrust liability and treble damages, thereby curtailing the business community's freedom to change suppliers even though no damage to the trade has been found."<sup>199</sup> Indeed, "[t]he freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage."<sup>200</sup> *Nynex* is a decision that is entirely consistent with and further develops recent antitrust doctrine.

On the whole, then, last term's business-related decisions reinforce the profile of the Rehnquist Court whose moderately pro-business decisions are reached primarily by a strong consensus and predominantly by a close reading of precedent and applications of technical rules of statutory construction. Finally, there were last term's federalism cases. To what extent do these cases break the mold and to what extent can we forecast their impact on business interests?

### K. Federalism Cases

Undoubtedly, this term's highly divisive federalism cases will distinguish it. At one level, these cases do signal a departure from previous terms in which there was abundant evidence that the Court was making a conscious effort in its choice of

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192. See generally *id.*

193. For a more complete analysis of *Khan*, see Barbara K. Bucholtz, "Sticking to Business": A Review of Business-Related Cases in the 1997-1998 Supreme Court Term, 34 TULSA L.J. 207, 225-26 (1999).

194. *Nynex*, 119 S. Ct. at 498.

195. See *id.* at 496.

196. See *id.*

197. See *id.*

198. *Id.* at 498.

199. *Id.*

200. *Nynex*, 119 S. Ct. at 499.

cases and in its technical approach to case resolution to avoid wedge issues or flash points that might widen pre-existing ideological dichotomies in the Court and in society.

Certainly, a consensus-building and technocratic demeanor would seem to be appropriate for a conservative Court because that demeanor accords with this Court's avowed precept that the Third Branch should be the weakest Branch. In politically contentious times it would also seem to be a wise approach because, in fact, the judiciary is the weakest branch: least able to withstand the brunt of protracted ideological conflict.

On the other hand, it has been no secret that states' rights occupy a pre-eminent position on the Chief Justice's agenda. In that sense, the federalism cases are no surprise but simply add to a growing body of dual sovereignty cases under his watch.

The Rehnquist Court's first foray into dual sovereignty issues occurred in 1992. In *New York v. United States*,<sup>201</sup> the Court held that the federal law-level Radioactive Waste Policy Amendments Act of 1985 unconstitutionally coerced states into administering a federal program. Four years later, the Court in *Seminole Tribe v. Florida*<sup>202</sup> held that Congress lacked authority under the Commerce Clause to abrogate a state's Eleventh Amendment immunity from private suits in federal courts.<sup>203</sup> Building on the reasoning in those two cases, the Court in 1997, in the case of *Printz v. United States*,<sup>204</sup> held that interim background checking procedures imposed on state law enforcement officers by the Brady Act<sup>205</sup> constituted an unconstitutional exercise of federal power over state officials which was not authorized either by the Necessary and Proper Clause or by the Commerce Clause.<sup>206</sup> And that same year, in *City of Boerne v. Flores*,<sup>207</sup> the Court held that the Religious Freedom Restoration Act exceeded Congressional power under § 5 of the Fourteenth Amendment.<sup>208</sup>

With these precedents as prologue, a deeply-divided Court last term extended the reasoning of *Seminole Tribe* to *Alden v. Maine*<sup>209</sup> and ruled that Congress had no power to authorize private suits against states in state courts. A provision in the Fair Labor Standards Act which purported to authorize these suits was, therefore, unconstitutional.<sup>210</sup>

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201. 505 U.S. 144, 112 S. Ct. 2408 (1992).

202. 517 U.S. 44, 117 S. Ct. 2157 (1996).

203. See generally *id.*

204. 521 U.S. 898, 117 S. Ct. 2365 (1997).

205. Brady Handgun Violence Prevention Act, 18 U.S.C. § 922 (Specifically, see § 922(s)(1)(A)(i)(III, IV), (s)(2)).

206. See generally *Printz*, 117 S. Ct. 2365.

207. 521 U.S. 507, 117 S. Ct. 2157 (1997).

208. See generally *id.*

209. 527 U.S. 706, 119 S. Ct. 2240 (1999).

210. See generally *id.*

By the same plurality,<sup>211</sup> the Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>212</sup> struck down a provision in the Trademark Remedy Clarification Act holding that Congress impermissibly attempted to abrogate a state's sovereign immunity by subjecting states to lawsuits brought pursuant to § 43 of the Lanham Act and alleging false and misleading advertising by the state.<sup>213</sup> Florida's otherwise lawful activity in marketing its prepaid college tuition program, declared the Court, could not be constitutionally challenged by competing business interests under the Lanham Act.<sup>214</sup> The federal government's sole power to authorize private suits against a state arises from its power to enforce the Fourteenth Amendment.<sup>215</sup> The competing business interest, in this case a bank, did not qualify for Fourteenth Amendment protection because there is simply no constitutionally-protected property right to market share. The activity of doing business is not property at all.<sup>216</sup> And, outside the parameter of Fourteenth Amendment rights, only a state's express waiver of its immunity will authorize these suits.<sup>217</sup>

In the instant case, the Court rejected the bank's constructive waiver argument: that Florida constructively waived its sovereign immunity under the applicable law when it entered interstate commerce with its marketing plan after Congress passed the Trademark Act which purported to authorize the type of private suit at issue in this case.<sup>218</sup> The state sovereignty trump does not necessarily inure to the benefit of the business community: *College Savings Bank* is not good news for business interests.

On the other hand, recall that the Court's emerging states' immunity dogma was moderated to some extent by last term's franchise tax case, *South Central Bell*, where the Court, on Commerce Clause grounds, struck down a state franchise tax system challenged by a private litigant in state court. There, a unanimous Court rejected the State's Eleventh Amendment argument. The Court said that once the state court agrees to consider and rule in a case implicating a federal issue, the State cannot raise the Eleventh Amendment as a bar to review by the Supreme Court.<sup>219</sup>

Next term, the Court has agreed to hear a business-related dual sovereignty case with an interesting spin: are Massachusetts "Burma Laws" - which require state agencies to boycott private companies doing business in Myanmar (formerly

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211. The vote in both *Alden v. Maine* and in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* was 5 to 4. In *Alden*, Justice Kennedy authored the opinion in which Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas joined. Justice Souter wrote the dissent in which Justice Stevens, Breyer and Ginsburg joined. Justice Scalia authored the opinion in *College Savings Bank* in which the Chief Justice and Justices O'Connor, Kennedy and Thomas joined. Both Justices Stevens and Breyer authored dissents. Breyer's dissent was joined by Justices Stevens, Souter and Ginsberg.

212. 527 U.S. 666, 119 S. Ct. 2219 (1999).

213. See generally *id.*

214. See *id.* at 2222.

215. See *id.* at 2223.

216. See *id.* at 2223-25.

217. See *id.* at 2222, 2226.

218. See *College Savings Bank*; 119 S. Ct. 2219, 2225-31. (1999).

219. See *supra* text accompanying notes 159-66.

Burma) - an impermissible intrusion into the federal realm of foreign policy?<sup>220</sup> After next term we will undoubtedly know more about how business interests will fare under the Court's evolving federalism jurisprudence. But the evidence to date invites the prediction that federalism issues, in so far as they are business-related, will prove a mixed blessing for the business community.

### III. CONCLUSION

The headline-grabbing cases involving employment discrimination and federalism issues appeared to be a wake-up call and a harbinger of a more insistent conservatism. In fact, from a business perspective, it was a business as usual "Rehnquistian" term: moderately pro-business but willing to subjugate business interests in order to retain, if not expand, liberal precedent on employment discrimination issues (on the one hand) and to discount business interests when those interests run afoul of the Court's states' rights agenda (on the other hand).

One final puzzle remains: how far is the conservative wing of the Court willing to go in advancing its states' rights "retro-lution" even at the risk of exacerbating pre-existing ideological fault lines in the Court and in society? Undoubtedly, the answer to that questions lies in the results of the next Presidential election and in the next President's opportunity to make appointments to the High Court.

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220. *Natsios v. National Foreign Trade Council*, No. 99-474, 120 S. Ct. 525 (1999). Other dual sovereignty cases on the current docket include *U.S. v. Morrison*, No. 99-5, 120 S. Ct. 605 (1999) and *Brzonkala v. Morrison*, No. 99-29, 120 S. Ct. 605 (1999) (both involving challenges to the federal Violence Against Women Act); *Mitchell v. Helms*, No. 98-1648, 119 S. Ct. 2336 (1999) and *Sante Fe Indep. Sch. Dist. v. Doe*, No. 99-62, 120 S. Ct. 494 (1999) (both involving separation of church and state issues). See generally Marcia Coyle, *Justices' Docket Heats Up*, NAT'L L.J., Dec. 20, 1999, at A1.