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Taking Care of Business: A Review of Business-Related Cases in the 1995-1996 Supreme Court Term

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I. INTRODUCTION

Last term, the Supreme Court considered approximately forty cases1 which are most likely to impact the business community. Viewed through the prism of these cases, the term reveals a pragmatic,2 centrist court, a moderately pro-business Court. In that regard, the Court appears to be in harmony with the electorate, because one of the defining characteristics of this fall's elections was that while the Republicans failed to win the Presidency and failed to achieve the overwhelming majority they sought in Congress, "corporate America" did manage to "defeat . . . a host of state ballot initiatives that were intended to circumscribe . . . [business activity] . . . ."3

In California, for example, voters defeated Proposition 211 which was designed to facilitate shareholder access to the courts, and thereby dilute the effect of recent federal legislation which makes shareholder class action fraud claims under federal securities laws more difficult to maintain.4

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1. The cases are identified in Appendix A (a chart which is designed to give the reader some sense of the contours that shape the current Court's jurisprudence as it relates to the business community) and Appendix B (a list of the cases and their citations). These appendices follow this article.

2. This is not to suggest, however, that there were no skirmishes over dogmas and doctrine. See, for example, Justice Scalia's dissents in BMW v. Gore, 116 S. Ct. 1589 (1996), and Gasperini v. Center for the Humanities, 116 S. Ct. 2211 (1996).


4. See id. The article points out that had supporters of Proposition 211 been successful, the Proposition
In Florida, the Save Our Everglades coalition's penny-a-pound sugar tax proposal was defeated. The tax would have funded the restoration of the Everglades. The coalition asserted that fertilizer run-off from agribusiness sugar cane fields was destroying the Everglade ecosystem.

Voters in Colorado, Missouri, and Montana turned down referenda to raise the state minimum wage. Similarly, California voters rejected proposals to curtail the ability of Health Maintenance Organizations ("H.M.O.s") to give physicians financial incentives for instituting cost saving measures, including non-treatment and the withholding of information about treatment not covered by the H.M.O. plan.

Thus, as we were reminded several times during the Burger Court Conference this past October, Supreme Court decisions are not only doctrinal, they are also contextual. That is to say, they arise in the context of, and in some way reflect, the socio-political and economic milieu in which they come down.

And so to say, as most commentators do, that the most recent term of the Supreme Court was basically favorable to business interests must, to some extent, reflect a basically pro-business mindset in society. To put it another way, if last term's Supreme Court decisions and this fall's elections are any measure, we have become a nation of moderate Republicans.

The cases which impacted business interests covered a broad spectrum of substantive issues last term and some of these issues have sequels in the current term. It will be instructive to see how the Court deals with these sequels. For example, last term the Court in *BMW v. Gore* dealt with the issue of whether a punitive damages award was so large that it violated due process. In the new term, launched October 7, the Court returned to the issue of punitive damage

would have counteracted the stringent federal requirements designed to deter "strike suits" because major public corporations have California shareholders. See id. Thus, application of California law as to these shareholders would inure to the benefit of shareholders in all jurisdictions. The article notes that supporters of Proposition 211 asserted that its defeat was attributable to the amount of money corporate opponents spent proselytizing against it. See id. Other commentators have remarked that the extent of its defeat, by a margin of 74 percent to 26 percent, suggests that genuine voter sentiment, more than an advertising blitz, accounted for the defeat.

5. See id. 6. See id. This defeat was also credited to the amount of advertising money the sugar producers spent in a campaign to defeat the tax proposal. The proposal lost by a much closer margin than California's Proposition 211 (54 percent to 46 percent). See id. The narrow margin lends credibility to the coalition's argument that "Big Sugar's" war chest for a negative campaign defeated the proposal, especially in light of the fact that Florida voters approved a pro-Environmental amendment to their constitution for the protection of the Everglades. The Florida electorate approved the amendment-which directs the legislature to require "those who cause water pollution' within the Everglades [to be] 'primarily responsible for paying the costs of abatement of that pollution"' by a vote of 68 percent to 32 percent. Harvey Wasserman, *Burnt Sugar (Environmental Issues in Florida)*, THE NATION, Dec. 9, 1996, at 6. The anomaly may be attributable to "Big Sugar's" judgment that the tax would be a more formidable burden on business than the amendment. Wasserman suggests that judgment was in error. See id.

7. See Passell, supra note 3. 8. See id. The article concludes by quoting Lester Brickman of Cardoza Law School, "when business gets its act together . . . it can win." Id.

9. A Symposium on the Burger Court was held at The University of Tulsa under the auspices of the T.U. Law School on October 1-3, 1996. The Symposium was entitled "The Burger Court: Counter-Revolution or Confirmation?"

awards to consider whether punitive damage awards are taxable. Because the Court found that they are, juries may be tempted to award higher punitives to take the “tax bite” into account.

Another case from last term which has its sequel in the current docket, concerns the telecommunications industry. Last term, the Court in Denver Area Education Telecommunications Consortium v. FCC addressed issues relative to the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992. The Act contains provisions which regulate, among other things, “patently offensive” material on cable television. This term the Court will revisit a case it previously heard to consider the constitutionality of the “must-carry” rules under that same 1992 Act.

Finally, an important Commercial Speech case last term was 44 Liquormart v. Rhode Island, a case that questioned the parameters of the Central Hudson “special care” test for infringements on commercial speech. This term the Court returns to the Central Hudson test in another commercial speech case to consider whether compelled speech should be analyzed under the same test as suppressed speech. Thus, a number of business-related cases involve continuing sagas which transcend the boundaries of specific Court terms and will eventually yield more evidence of trends and patterns in cases that have a substantial impact on business interests.

11. See O'Gilvie v. United States, 117 S. Ct. 452 (1996). In this case, plaintiffs challenged taxes assessed against a $10 million punitive damage award. O'Gilvie died of toxic shock syndrome. See id. at 454. The gravamen of the case was a claim of wrongful-death against International Playtex, Inc. See id. The issue before the Court was whether punitives are excludable from gross income under Section 104(a)(2) of the Internal Revenue Code because they are received “on account of” personal injuries. See id. The government argued that only compensatory damages are within the purview of that Section. See, Marcia Coyle, High Court Business Cases May Cost Companies More, NAT'L L.J., Oct. 7, 1996, at B-1. The court, by a 6 to 3 vote, agreed. See O'Gilvie, 117 S. Ct. at 454.

13. See id. at 2380.
14. See Turner Broad. v. FCC, 114 S. Ct. 2445 (1994) (holding that the “must carry” rules are subject to intermediate scrutiny and it remanded to a 3-judge district court panel for consideration of the nature of the government’s interest in “must-carry” requirements). The Court described intermediate level scrutiny as imposing upon the government the burden of showing that “must-carry” does not infringe upon First Amendment rights “substantially more than necessary to further important governmental interests.” Id. at 2469-70.
17. See Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367 (9th Cir. 1995), cert. granted, Glickman v. Wileman Bros. & Elliott, Inc., 116 S. Ct. 1875 (1996) (No. 95-1184). At issue in Wileman is the 1937 Agricultural Marketing Agreement Act which, inter alia, assesses a fee on fruit handlers (those who produce and market fruit) to cover an annual advertising budget. See Wileman, 58 F.3d at 1372. The Ninth Circuit applied Central Hudson’s three-pronged test for suppression of commercial speech and found that the assessment (deemed “compelled speech”) did not pass Constitutional muster. See id. at 1379-80. The government argued that the Circuit’s reliance on Central Hudson is misplaced in cases of compelled (as opposed to suppressed) speech. See id. at 1377-78. It argued that the proper test for the constitutionality of compelled speech is found in Keller v. State Bar of Cal., 496 U.S. 1 (1990). Keller held that the state bar association at issue was more analogous to the labor union in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), than to a government agency: therefore, mandatory dues can be used to finance activities “necessarily or reasonably incurred for the purpose of regulating the legal profession . . .” Keller, 496 U.S. at 14. By contrast, government agencies may tax and, otherwise, assess fees even against those who disagree with the purpose for which the funds are raised. See, e.g., United States v. Lee, 455 U.S. 252, 259 (1982).
Viewed separately, even a single term is revelatory of the Court's view of private sector issues. This paper considers a random sample of business-related issues the Court heard last term: issues pertaining to compensatory and punitive damages; pre-emption and the Commerce Clause, ERISA (Employee Retirement Income Security Act); Anti-trust, Labor and Employment. It reaches the conclusion that the term could quite accurately be characterized as moderately pro-business. However, it is important to notice that this posture is evidenced not only by the decisions the Court reached in particular cases but also by the particular cases the Court chose to consider. That is to say, that while a close reading of the forty business-related cases creates a clear impression of a moderate, pragmatic and centrist Court, a Court that is developing a distinctive consensus on business sector issues, the question remains the extent to which this moderation is attributable to a deliberate selection of "easier" cases—cases that do not exacerbate pre-existing ideological splits in the Court—rather than to the resolution of the issues it actually considered. Was this moderate, apparently, centrist visage pre-ordained by the docket? In the long run, a retrospective of the business-related cases the Court chose to reject may be the best mechanism for making this evaluation.

II. DAMAGE AWARDS

Last term, perhaps the case with the highest profile was BMW v. Gore. In Gore, the Court, for the first time, struck down a punitive damages award, holding that it was grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment.

Plaintiff Gore bought a new BMW from an authorized dealer but he subsequently discovered that it had been repainted by the manufacturer to cover salt water damage the car suffered in transatlantic shipment. BMW acknowledged that it had a policy of not advising its dealers or customers of pre-delivery damage when the cost of repair did not exceed 3 percent of the car's retail price.

Gore alleged this practice violated Alabama's fraud statute because the failure to disclose amounted to suppression of a material fact. The jury agreed and awarded Gore $4,000 in compensatory damages (the amount by which it calculated the value of the car to be reduced) and $4 million in

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18. By way of example, in labor law cases the Court was almost entirely pro-union. See infra notes 110 through 139 and accompanying text. However, as will be discussed below the issues in most of those cases were only marginally doctrinal and did not trigger ideological disputes of broad national interest or significance.

19. Many commentators have been frustrated by the Court's refusal to hear cases involving important business-related issues. See, e.g., remarks by Roy Englert, a practicing attorney, in Coyle, supra note 11.


21. See id. at 1598.

22. See id. at 1592 n.1.

23. See id. at 1593.

24. See id.
The trial court expressly held that the punitive award was not so excessive as to violate due process and the Alabama Supreme Court agreed. But it reduced the award to $2 million because it believed that the jury had improperly calculated the damages by multiplying the compensatory award by similar sales of BMW's in all states, not just in Alabama. The Supreme Court reversed and remanded.

Justice Stevens delivered the opinion in which Justices O'Connor, Kennedy and Souter joined and Justice Breyer concurred. Justices O'Connor and Souter joined in the concurrence. Justice Thomas joined Justice Scalia's dissent; the Chief Justice joined Justice Ginsberg's dissent.

Justice Stevens began by asserting that “the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a “grossly excessive” punishment on a tortfeasor.” And he set out three guideposts by which to measure excessiveness. The first guidepost is the extent of the state’s reasonable and legitimate interests in protecting its own consumers. Justice Stevens found that the award exceeded Alabama’s legitimate interest in protecting its citizens from deceptive trade practices and he concluded that, for the following reasons, BMW could not have reasonably anticipated a penalty of this magnitude for its conduct. The harm inflicted on Alabama consumers was purely economic: the repainting itself did not affect the car’s performance, its safety features or even its appearance. BMW’s conduct evinced no reckless disregard for Alabama consumers’ safety nor did its conduct involve fraudulent misrepresentations. Thus, the extent of the state’s legitimate interest in protecting citizens from this kind of harm was minimal, compared to the size of the exemplary damages imposed.

The second guidepost of excessiveness is the ratio between plaintiff’s compensatory damages and the amount of the punitive award. Here, the $2 million in punitives was 500 times the amount of Gore’s actual harm. And while the Court refused to draw a bright line of mathematical certainty, it found that a ratio of 500 to 1, under these facts, was clearly excessive.

The third guidepost for excessiveness requires a court to compare this award with civil or criminal sanctions that could be imposed in the jurisdiction for comparable misconduct. The comparable sanction in Alabama is a fine of

25. See id. at 1593-94.
26. See id. at 1594.
27. See id. at 1595.
28. See id. at 1592.
29. See id.
30. See id.
31. See id. at 1592 (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993)).
32. See Gore, 116 S. Ct. at 1598. Justice Stevens described the first guidepost as “the degree of reprehensibility of the non-disclosure.” Id.
33. See id. at 1599.
34. See id. at 1596.
35. See id at 1598-1601.
36. See id. at 1601.
37. See id. at 1601-03.
$2,000—dramatically lower than the $2 million award in this case.\textsuperscript{38} Justice Stevens concluded that the award met none of the three guidelines.\textsuperscript{39}

Justice Scalia took a predictably textualist approach, dissenting on the grounds that the Constitution does not make the size of a punitive award in state court a cognizable issue.\textsuperscript{40} All the Fourteenth Amendment guarantees, said Scalia, is a process by which a defendant may contest the award in state court.\textsuperscript{41} He argued that the Court’s decision goes beyond the purview of that procedural guarantee and confers a substantive due process right on defendants.\textsuperscript{42}

Justice Ginsberg took a more pragmatic approach. She dissented on the basis that the opinion unnecessarily invades state law territory, in light of the recent trend among state legislatures to provide statutory caps on punitive damages.\textsuperscript{43} And she cited title 23, section 9.1(B)-(D) of the Oklahoma Statutes as an example.\textsuperscript{44}

One could argue that Ginsberg’s point is well taken: for the reason she advanced, the case is practically \textit{sui generis}. It won’t have a significant impact on state jury awards because of the trend toward legislative caps.\textsuperscript{45} Nevertheless, \textit{Gore} was a decision that gave the business community comfort.

As did the other case on damages last term-this one concerning compensatory damages awards: \textit{Gasperini v. Center for the Humanities}.\textsuperscript{46} Gasperini, a journalist and photographer, loaned 300 original slide transparencies to the Center and the Center lost them.\textsuperscript{47} Gasperini filed suit in federal district court in New York invoking diversity jurisdiction.\textsuperscript{48} The jury awarded Gasperini $1500 per slide for a total of $450,000 in compensatory damages.\textsuperscript{49} The Center moved for a new trial, asserting that under New York law the award was excessive in that it “deviated materially” from what would be considered reasonable compensation.\textsuperscript{50} The federal district court denied the Center’s motion without comment.\textsuperscript{51} And the Second Circuit reversed on the grounds that the
district court's denial was "an abuse of discretion" because, under section 5501(c) the award was clearly excessive.53

When the matter reached the Supreme Court, the issue was whether there was an irreconcilable conflict between a federal appellate court's application of the New York cap (on the one hand) and the 7th Amendment stricture that federal courts not re-examine facts tried by a jury (on the other hand).54 Justice Ginsberg delivered the opinion of the Court. Justice Scalia filed a dissent in which Justices Thomas and Rehnquist joined.55

The initial inquiry for the Court was whether a federal district court—sitting in diversity—must apply the New York law. That issue devolves to the question of whether the New York law (which directs appellate courts to order new trials when jury verdicts are excessive), is "substantive" or "procedural" under the Erie doctrine.56 Recall that, according to Erie, federal courts sitting in diversity apply state substantive law and federal procedural law and that, according to Erie and its progeny, "substantive" is generally described as "outcome determinative."57 The Supreme Court applied the test and found that the New York law was, indeed, substantive; therefore federal courts were bound by it.

That answer gives rise to the next question: does application of the New York law run afoul of the Seventh Amendment command that precludes federal judicial review of jury findings other than "according to the rules of the common law."58 Or, put another way, is there a constitutionally acceptable path between the Scylla59 of the New York law and the Charybdis60 of the Seventh Amendment? Justice Ginsberg found that there was: by permitting federal appellate courts to apply the New York law under an abuse-of-discretion standard—focusing on the trial court's exercise of its discretion rather than on the jury's conduct in making the award.61

Justice Scalia again dissented on textualist grounds: he declared that the Court's decision nullifies a core component of the Bill of Rights: Seventh Amendment protection against re-examination of jury awards.62 The Chief Jus-

53. See id.
54. See id. at 2222.
55. See id. at 2214.
57. See Gasperini, 116 S. Ct. at 2219-20 (1996). See also Guaranty Trust v. York, 326 U.S. 99 (1945) (concluding that "outcome determinative" requires a showing that the law have a significant effect on the result of the litigation). But see, Hanna v. Plumer, 380 U.S. 460, 468 (1965) (holding that the test is not to be mechanically applied).
58. See Gasperini, 116 S. Ct. at 2220-22.
60. A whirlpool off the coast of Sicily personified in Greek myth as a female monster. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, supra note 59, at 228.
61. See Gasperini, 116 S. Ct. at 2223-25.
62. See id. at 2229-30 (Scalia, J. dissenting).
TULSA LAW JOURNAL

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Last term saw the Court reaching decisions which had the effect of imposing limits on both compensatory and punitive damages awards. Thus, in Gore and in Gasperini the position taken by the Court should be considered to give solace to the business community.

I. PRE-EMPTION AND THE COMMERCE CLAUSE

The business community did not fare quite so well in pre-emption and Commerce Clause cases. Barnett Bank v. Nelson is emblematic of an interesting metamorphosis in the law: court and agency-driven incremental breaking down of barriers previously erected by U.S. law to segregate certain types of business activity—in this case, the commercial banking industry and the insurance business. The dissolution of these barriers is, in large part, a response to our economy's global competition with foreign companies that do not operate under similar legal constraints.

In Barnett Bank the legal constraint was a Florida law that prohibited national banks with affiliates in small towns from acting as insurance agents in those towns. A unanimous Court found that the Florida statute was preempted by a federal statute which expressly permitted national banks to engage in small town insurance business. And because the federal statute expressly covered the insurance business, the Court held that the Florida statute was not saved from pre-emption by the McCarran-Ferguson Act. The Court noted that McCarran-Ferguson decrees that federal statutes do not pre-empt state law regulating insurance unless the federal statute specifically relates to the business of insurance, as this federal statute did. Barnett Bank represents a win for the banking business and a loss for the insurance business.

The Supreme Court also found that a federal statute requiring arbitration clauses in contracts to be treated with parity in relation to other contract provisions pre-empted a Montana statute that treated arbitration clauses differently (requiring that they be printed in bold letters, among other things.).

63. See id. at 2225-30 (Stevens, J., dissenting).
64. 116 S. Ct. 1103 (1996).
65. For a recent discussion of the ramifications of Barnett Bank, see Marianne Levelle, Comptroller Expands Bank Powers, NAT'L L.J., Dec. 9, 1996, B-1 (noting that in the absence of a Congressional imprimatur, blessing the entry of banks into previously forbidden territory (like the insurance and securities investment businesses) the same result has been achieved through reinterpretation of existing law by agency and judicial fiat). For a more thorough discussion of this issue, see Mark J. Roe, Some Differences in Corporate Structure in Germany, Japan and the United States, 102 YALE L.J. 1927 (1993).
66. See FLA. STAT. ANN. § 626.988(2) (West 1996).
69. See Barnett Bank, 116 S. Ct. at 1110.
72. See id; see also, Doctor's Assoc. v. Casarotto, 116 S. Ct. 1652, 1655 (1996) (involving a dispute over the arbitration clause in a standard form Subway Sandwich Shop franchise agreement).
Federal law also pre-empted state law in a credit card case. In *Smiley v. Citibank*, the petitioner, a resident of California, held credit cards with a national bank located in South Dakota. South Dakota law permitted banks to charge late fees on credit card payments; but California law did not. The Court first interpreted the National Bank Act of 1864 to permit national banks to charge late fees by characterizing them as permissible "interest" on loans. The Court then went on to hold that the 1864 Act pre-empted California law. *Smiley* represents another win for the banking industry.

The leading pre-emption case last term was *Medtronic*. In *Medtronic* the Court found that federal law did not pre-empt state law remedies for negligence. The federal law at issue was the 1976 Medical Device Amendments to the Food, Drug and Cosmetic Act of 1938. The 1976 Act required pre-market approval of new medical devices but it grandfathered in devices already on the market and new devices that were "substantially equivalent" to devices already on the market.

Only a limited FDA review of "substantially equivalent" devices was required. It was pursuant to this expedited review process that the pacemaker at issue in this case reached the market and, eventually, the injured plaintiff. Plaintiff sued under traditional state tort theories. The Court was asked to consider whether this expedited process pre-empted the state law remedies for negligent design and manufacturer and for failure to warn. By a 5-4 decision, the Court held that it did not.

The plurality noted that under traditional pre-emption analysis, state remedies grounded in police power regulation enjoy a presumption against pre-emption. These remedies are not pre-empted unless Congress manifests its intent to pre-empt. And while the Medical Device Act did have a pre-emption provision, the plurality decided that the pre-emptive language in the Act precluded only state regulation, not necessarily state remedies. In this context, given the fact that the common law remedies in no way interfered with the federal scheme, the plurality found that the common law remedies were not pre-empted.

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74. See S.D. CODIFIED LAWS §§ 54-3-1, 54-3-1.1 (Michie 1990).
75. See *Smiley*, 116 S. Ct. at 1732.
77. See *Smiley*, 116 S. Ct. at 1732-35 (the Court deferred to the interpretation of the Comptroller of the Currency that "interest" for purposes of § 85 includes late payment fees).
78. See id. at 1735.
80. See id. at 2257.
81. See id. at 2245.
82. See id. at 2246.
83. See id. at 2248.
84. See id. at 2245.
85. See id.
86. See id. at 2245, 2250.
87. See id. at 2251-58.
88. See id. at 2258.
This case could be viewed as a loss for business—and surely it was for the manufacturer of the pacemaker in this case. On the other hand, this case was distinctive, involving as it did a unique statute which gave the FDA only limited review of these medical devices—a statute which did not establish federal design requirements except for the "substantially equivalent" standard. It is a case which may be inapplicable to most other cases raising pre-emption issues. Medtronic failed to establish clear guidelines for when federal regulations will pre-empt traditional state remedies for tortious conduct.

Undoubtedly, the issue will continue to be debated on a case specific basis. One aspect of the case that will give the plaintiff's bar pause is the express statement by five justices that common law remedies can be pre-empted, just as state regulations can, and that implied pre-emption can exist along with, and in addition to, express pre-emption. Consequently, in terms of patterns and trends, Medtronic is not an anti-business decision.

Finally, under this category of cases, the Court struck down a state law pursuant to the Commerce Clause. In Fulton v. Faulkner, a unanimous Court applied the dormant Commerce Clause, which forecloses the ability of states to institute economic protectionism by way of legislation. The Court struck down a North Carolina intangibles tax levied on the fair market value of corporate stock owned by North Carolina residents. The Court struck down the tax because the tax exempted the stock of corporations that did all of their business in North Carolina. North Carolina was unable to justify this facially protectionist law. Justice Souter, writing for a unanimous Court, found this protectionist policy impermissible under the Commerce Clause. Fulton represents a loss for local business, but a win for interstate business. Thus, the cases in this category were a mixed bag for business.

IV. ERISA

The Court analyzed three ERISA cases last term and in two of them employers were able to avoid liability to employee-beneficiaries.

In Lockheed Corp. v. Spink, a reinstated employee argued that Lockheed's early retirement plan amounted to a "prohibited transaction" because the employer had an inherent self-interest in conditioning early retirement benefits on the employee's release of any claims he may have had against the employer. The Court found that Lockheed was merely a plan sponsor, not a
plan fiduciary and that its quid pro quo offer to retirees was not impermissible under ERISA.\textsuperscript{99}

The Court also found that the 1986 Omnibus Budget Reconciliation Act which amended ERISA to prohibit age discrimination in qualified plans was made expressly prospective by its language.\textsuperscript{100}

Similarly, in \textit{Peacock v. Thomas},\textsuperscript{101} a controlling shareholder of a judgment proof corporation avoided personal liability for the corporation’s breach of its fiduciary duties.\textsuperscript{102} The Court found the shareholder was not a plan fiduciary and it stated there is no independent cause of action under ERISA for piercing the corporate veil in order to reach him under an alter ego theory.\textsuperscript{103}

By contrast, in \textit{Varity v. Howe},\textsuperscript{104} the Court did find an actionable breach of fiduciary duty under ERISA and the facts in \textit{Varity} make it abundantly clear why the Court reached that conclusion. In \textit{Varity}, the employer-company was a fiduciary, operating and administering its own plan.\textsuperscript{105} When it saw that several of its divisions were failing financially, it devised a scheme to dodge a number of financial obligation bullets. First, it transferred all of the failing divisions into one newly created shell corporation.\textsuperscript{106} Then it persuaded the employers of those divisions to switch their employer from those existing divisions to the new shell, thereby releasing the employer from obligations under pre-existing plans.\textsuperscript{107} And it did so by fraudulently misrepresenting the financial prospects of the new shell which were, in fact, nil.\textsuperscript{108} The Court held the conduct violated § 404(a) of ERISA, misconduct which is actionable under § 502(a)(3).\textsuperscript{109}

V. Anti-Trust, Labor and Employment

In other employment cases, business lost to the unions fairly consistently. The only win for business in this arena was against the pro-football players’ union in an anti-trust case: \textit{Brown v. Pro Football, Inc.}\textsuperscript{110}

In 1987, following the expiration of their collective bargaining agreement, the NFL and the Players Association initiated contract negotiations.\textsuperscript{111} One of the terms under discussion was a proposal by the clubs which would permit them to pay their rookie squads an across-the-board $1,000 per week per rookie.\textsuperscript{112} The players argued rookies should have the same right to negotiate their

\textsuperscript{99} See id. at 1789-92.
\textsuperscript{100} See id. at 1792-93.
\textsuperscript{101} 116 S. Ct. 862 (1996).
\textsuperscript{102} See id. at 865.
\textsuperscript{103} See id. at 869.
\textsuperscript{104} 116 S. Ct. 1065 (1996).
\textsuperscript{105} See id. at 1067-69.
\textsuperscript{106} See id. at 1068.
\textsuperscript{107} See id. at 1068-69.
\textsuperscript{108} See id.
\textsuperscript{109} See id. at 1074.
\textsuperscript{110} 116 S. Ct. 2116 (1996).
\textsuperscript{111} See id. at 2119.
\textsuperscript{112} See id.
individual salaries that other players had. Negotiations reached an impasse because of this issue, whereupon the clubs implemented their plan unilaterally. The players argued that this concerted action was in restraint of trade, and an anti-trust violation. The Court found that the clubs were exempt from anti-trust liability, in this instance, because their actions were instituted only after an impasse in good faith collective bargaining occurred and they were implementing their "last best good faith wage offer." Simply put, the Court invoked the labor law exemption to anti-trust law. In a vigorous dissent, Justice Stevens argued this application of the labor law exemption was misplaced, inappropriate and an invitation to employers to stonewall and, then, having brought collective bargaining to impasse, to engage in concerted action, no matter how offensive the action might be to anti-trust policy or how tenuous its claim to good faith bargaining.

In other labor cases, however, the unions fared much better. In *Holly Farms Corp. v. NLRB* for example, the Court was asked to characterize the status of workers who provide bridging services between independent contractors and the corporations they serve: were these workers covered by the National Labor Relations Act ("NLRA") or not? Holly Farms is a vertically integrated poultry producer and subsidiary of Tyson Foods. Holly Farms processes the poultry for market but it outsources the actual raising of the poultry to independent contractor farms. The question for the Court was whether the workers who catch the chickens (after they have been raised by the farmers) and the workers who deliver them to Holly Farms’ processing plant are “employees” of Holly Farms (who pays their wages). The Court had to decide whether the workers were covered by the NLRA as “employees” or excluded from NLRA coverage as “agricultural laborers” (because their actual work—catching chickens—is done “on the farm”). A divided Court found that because these two groups of workers did not perform agricultural tasks they were covered by the NLRA. Therefore, they were part of the collective bargaining unit of the processing plant.

*NLRB v. Town & Country Electric, Inc.* was another pro-Union case that also extended the term “employee” under the Act: this time to cover employees who were simultaneously being paid by the union organizers and by the

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113. See id.
114. See id.
115. See id. at 2123-26.
116. See id. at 2128-35 (Stevens, J., dissenting).
118. See id. at 1399-1400.
119. See id. at 1400.
120. See id.
121. See id. at 1406.
122. See id.
company as electricians. The Court, in effect, said a man can serve two masters.

United Food & Commercial Workers Union v. Brown Group, Inc. was another pro-union case. Here, the Court conferred standing on the Union to sue on behalf of its membership under the federal Worker Adjustment and Retraining Notification Act (WARN). The company argued that the Union could not meet the third prong of the modern standing test for associations. The third prong of that test, as enunciated in Hunt v. Washington State Apple Commission, states that the relief requested must not require the participation of individual members. Because in United Food the proof of damages was discrete to each member, members’ participation in fashioning the remedy was required. The Supreme Court found that the third prong of the Hunt test was not constitutionally mandated but was merely included for reasons of prudence and judicial efficiency; therefore it could and should be abrogated in this case.

The Court was sympathetic to the union’s position in Auciello Iron Works, Inc. v. NLRB as well. A unanimous Court found that an employer engaged in an unfair labor practice under the NLRA when it refused to sign the contract it had proposed to the Union and the Union had already accepted. The employer argued that its refusal to sign its own contract was premised on its doubts that the Union had majority support. The Court found that once an employer offers a new contract, with notice of the facts that give rise to its doubts, this defense comes too late.

Finally, in O’Connor v. Consolidated Coin Caterers, Inc., a unanimous Court said that under the Age Discrimination in Employment Act, the fact that a plaintiff, allegedly terminated on the basis of age, is replaced by a person who is also in the protected class will not defeat his claim. The pivotal fact and proper focus of the inquiry is not the age of his replacement, but whether he was, indeed, terminated because of his age.

124. See id. at 457.
125. See id. at 456 (emphasis in original).
128. See United Food, 116 S. Ct. at 1536.
129. See id. at 343. The Court stated the three prongs of the test as follows: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.
130. See id. at 1760-61.
131. See United Food, 116 S. Ct. at 1536.
133. See id. at 1760-61.
134. See id. at 1760.
135. See id. at 1760.
138. See O’Connor 116 S. Ct. at 1310.
139. See id.
VI. CONCLUSION

In sum, as these union and employee cases attest, while last term was a pro-business term overall, it was only moderately pro-business. A final thought: should the holdings of last term’s cases be the sole litmus test of the current Court’s disposition towards business related cases? As noted above, several of these cases are virtually *sui generis*,140 while others resolve issues that impact only small segments of society.141 Perhaps the better questions might be: what business-related cases did the Court decline to hear and why? Answers to those questions might lead to a deeper understanding of the Rehnquist Court’s mindset at mid-decade.

# APPENDIX A
## 1995-1996 TERM
### SUPREME COURT CASES
#### IMPACTING THE BUSINESS COMMUNITY

<table>
<thead>
<tr>
<th>Field/Rule of Law</th>
<th>Case</th>
<th>Author</th>
<th>Unanimous?</th>
<th>Favorable to Business?</th>
<th>Kind of Business Interest (in case)</th>
<th>Competing Interest in this case was:</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Punitive and Compensatory Damages</td>
<td><em>Gore</em></td>
<td>Stevens</td>
<td>No</td>
<td>Yes</td>
<td>Car dealer</td>
<td>Consumer (economic interest)</td>
</tr>
<tr>
<td></td>
<td><em>Gasperini</em></td>
<td>Ginsberg</td>
<td>No</td>
<td>Yes</td>
<td>Photography</td>
<td>Tortfeasor</td>
</tr>
<tr>
<td>II. Commercial Speech; First Amendment Telecommunications</td>
<td><em>Umbehr</em></td>
<td>O'Connor</td>
<td>No</td>
<td>Yes</td>
<td>Trash hauling, independent contractors</td>
<td>Government as employer</td>
</tr>
<tr>
<td></td>
<td><em>Denver Area</em></td>
<td>Breyer</td>
<td>No</td>
<td>Yes</td>
<td>Cable operators</td>
<td>Federal regulations to protect children from pornography</td>
</tr>
<tr>
<td></td>
<td><em>44 Liquormart</em></td>
<td>Stevens</td>
<td>No</td>
<td>Yes</td>
<td>Retail advertisers</td>
<td>State regulations to promote temperance</td>
</tr>
<tr>
<td></td>
<td><em>O'Hare Truck, Serv.</em></td>
<td>Kennedy</td>
<td>No</td>
<td>Yes</td>
<td>Towing service, independent contractors</td>
<td>Government as employer</td>
</tr>
<tr>
<td>III. Pre-emption; Commerce Clause</td>
<td><em>Barnett Bank</em></td>
<td>Breyer</td>
<td>Yes</td>
<td>N/A</td>
<td>Bank</td>
<td>State law; insurance agencies</td>
</tr>
<tr>
<td></td>
<td><em>Casarotto</em></td>
<td>Ginsberg</td>
<td>No</td>
<td>N/A</td>
<td>Franchise</td>
<td>State law</td>
</tr>
<tr>
<td></td>
<td><em>Medtronic</em></td>
<td>Stevens</td>
<td>No</td>
<td>No</td>
<td>Manufacturer</td>
<td>Consumers</td>
</tr>
<tr>
<td></td>
<td><em>Smiley</em></td>
<td>Scalia</td>
<td>Yes</td>
<td>Yes</td>
<td>Bank</td>
<td>Credit card holder</td>
</tr>
<tr>
<td></td>
<td><em>Fulton</em></td>
<td>Souter</td>
<td>Yes</td>
<td>Yes</td>
<td>Out of state corp.</td>
<td>State treasury; in-state corps.</td>
</tr>
<tr>
<td>IV. ERISA</td>
<td><em>Spink</em></td>
<td>Thomas</td>
<td>No</td>
<td>Yes</td>
<td>Employer as plan sponsor</td>
<td>Beneficiaries</td>
</tr>
<tr>
<td></td>
<td><em>Peacock</em></td>
<td>Thomas</td>
<td>No</td>
<td>Yes</td>
<td>Employer as plan sponsor</td>
<td>Beneficiaries</td>
</tr>
<tr>
<td></td>
<td><em>Varity Corp.</em></td>
<td>Breyer</td>
<td>Yes</td>
<td>N/A</td>
<td>Employer as plan fiduciary</td>
<td>Beneficiaries</td>
</tr>
<tr>
<td>Section</td>
<td>Case</td>
<td>Justice</td>
<td>Vote</td>
<td>Description</td>
<td>Counterparty</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>------</td>
<td>---------</td>
<td>------</td>
<td>-------------</td>
<td>--------------</td>
<td></td>
</tr>
<tr>
<td>V. Bankruptcy</td>
<td><em>Strumpf</em></td>
<td>Scalia</td>
<td>yes</td>
<td>creditor-bank</td>
<td>bankrupt</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Mans</em></td>
<td>Souter</td>
<td>no</td>
<td>creditor</td>
<td>bankrupt</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Things Remembered</em></td>
<td>Thomas</td>
<td>yes</td>
<td>commercial lessee</td>
<td>commercial lessor</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Noland</em></td>
<td>Souter</td>
<td>yes</td>
<td>ch.11 debtor corp.</td>
<td>IRS</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>CF&amp;I Fabricators</em></td>
<td>Souter</td>
<td>no</td>
<td>ch.11 debtor corp.</td>
<td>IRS</td>
<td></td>
</tr>
<tr>
<td>VI. Intellectual Property</td>
<td><em>Westview Instruments</em></td>
<td>Souter</td>
<td>yes</td>
<td>patent on dry cleaning systems</td>
<td>competitor's system</td>
<td></td>
</tr>
<tr>
<td>VII. Government Contracts</td>
<td><em>Hercules Inc.</em></td>
<td>Rehnquist</td>
<td>no</td>
<td>chemical manufacturing</td>
<td>federal government</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Winstar</em></td>
<td>Souter</td>
<td>no</td>
<td>investors</td>
<td>federal government</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>O'Hare Truck</em></td>
<td>Kennedy</td>
<td>no</td>
<td>towing serv.</td>
<td>government as employer</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Umehr</em></td>
<td>O'Connor</td>
<td>yes</td>
<td>trash hauler</td>
<td>government as employer</td>
<td></td>
</tr>
<tr>
<td>VIII. Antitrust</td>
<td><em>Brown</em></td>
<td>Breyer</td>
<td>yes</td>
<td>professional football</td>
<td>players' union</td>
<td></td>
</tr>
<tr>
<td>IX. Labor, employment</td>
<td><em>Holly Farms</em></td>
<td>Ginsberg</td>
<td>no</td>
<td>Poultry industry</td>
<td>unions</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Town &amp; Country Elec.</em></td>
<td>Breyer</td>
<td>yes</td>
<td>electric</td>
<td>unions</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>United Food &amp; Commercial Workers</em></td>
<td>Souter</td>
<td>yes</td>
<td>food industry</td>
<td>unions</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Anciello Ironworks</em></td>
<td>Souter</td>
<td>yes</td>
<td>manufacturing</td>
<td>unions</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Consolidated Coin</em></td>
<td>Scalia</td>
<td>yes</td>
<td>n/a</td>
<td>employee</td>
<td></td>
</tr>
<tr>
<td>X. Jurisdiction: Procedure &amp; Class Action</td>
<td><em>Epstein</em></td>
<td>Thomas</td>
<td>no</td>
<td>takeover bidder and board</td>
<td>target shareholders</td>
<td></td>
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<tr>
<td></td>
<td><em>Quackenbush</em></td>
<td>O'Connor</td>
<td>yes</td>
<td>insurance</td>
<td>reinsurer</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Things Remembered</em></td>
<td>Thomas</td>
<td>yes</td>
<td>commercial lessee</td>
<td>commercial lessor</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Henderson</em></td>
<td>Ginsberg</td>
<td>yes</td>
<td>n/a</td>
<td>federal government</td>
<td></td>
</tr>
<tr>
<td>XI. Maritime; Admiralty; and Aviation</td>
<td><em>Sofec</em></td>
<td>Thomas</td>
<td>yes</td>
<td>oil tanker</td>
<td>manufacturers of moorings</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Henderson</em></td>
<td>Ginsberg</td>
<td>yes</td>
<td>n/a</td>
<td>federal government</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Yamaha Motor</em></td>
<td>Ginsberg</td>
<td>yes</td>
<td>manufacturer</td>
<td>injured consumer</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Korean Airlines</em></td>
<td>Scalia</td>
<td>yes</td>
<td>airline</td>
<td>passenger and his heirs</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX B
List of Cases

Punitive and Compensatory damages

Commercial Speech; First Amendment; and Telecommunications

Pre-emption; Commerce Clause

Employee Retirement Income Security Act (ERISA)

Bankruptcy
Intellectual Property

Government Contracts
3. O'Hare Truck, supra.
4. Umbehr, supra.

Antitrust

Labor; Employment

Jurisdiction; Procedure; and Class Actions
3. Things Remembered, supra.

Maritime; Admiralty; and Aviation
2. Henderson, supra.

Railroads

Environment

Banking
2. Smiley, supra.

Taxation
4. Reorganized CF & I Fabricators, supra.
5. Fulton v. Faulkner, supra.