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**Bilski v. Kappos (08-964)**

Appealed from the U.S. Court of Appeals for the Federal Circuit (Oct. 30, 2008)
Oral argument: Nov. 9, 2009

In 1997, the U.S. Patent and Trademark Office denied Bernard Bilski’s patent application for a method of hedging risk in commodities trading. The Federal Circuit affirmed, holding that a process must be tied to a particular machine or transform an article into a different state to be patentable. The Supreme Court will consider the scope of the “machine-or-transformation” test for patentability. This case will have implications for the validity of current “process patents” as well as the availability of future patent protection for business methods.

**Background**

According to 35 U.S.C. § 101, “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor.” This provision is a subject-matter restriction, barring patent protection for fundamental principles such as abstract ideas, laws of nature, and natural phenomena. *Diamond v. Diehr*, 450 U.S. 175, 185 (1981). In 1997, Bernard Bilski and Rand Warsaw (Bilski) filed a patent application claiming a method of hedging financial risk associated with fluctuations in price of commodities over time. This risk-hedging method involves making agreements with both the consumers and suppliers of a commodity so as to balance risk positions. The Federal Circuit provided an illustration of the method:

For example, coal power plants ... purchase coal to produce electricity and are averse to the risk of a spike in demand for coal since such a spike would increase the price and their costs. Conversely, coal mining companies ... are averse to the risk of a sudden drop in demand for coal since such a drop would reduce their sales and depress prices. The claimed method envisions an intermediary ... that sells coal to the power plants at a fixed price, thus isolating the power plants from the possibility of a spike in demand. ... The same provider buys coal from mining companies at a second fixed price, thereby isolating the mining companies from the possibility that a drop in demand would lower prices below that fixed price.


The examiner rejected the application, and Bilski’s subsequent appeal to the Board of Patent Appeals and Interferences failed. Bilski then appealed to the Federal Circuit. Sitting en banc, the court affirmed, holding that Bilski’s hedging method did not meet the machine-or-transformation test, which provides that a process is eligible for a patent if “(1) it is tied to a particular machine or apparatus; or (2) it transforms a particular article into a different state or thing.” The Supreme Court granted certiorari to decide whether Bilski’s method is eligible for a patent and whether the machine-or-transformation test is the exclusive standard for determining the patent eligibility of processes.

**Potential Impacts**

The Supreme Court will explore to what extent intangible business methods constitute patentable subject matter. This decision may have dramatic effects across a variety of industries. More than 60 amicus briefs have been filed from corporations and groups such as IBM, Yahoo, Microsoft, Google, Palm, Bloomberg, and the American Bar Association.

In support of Bilski, biotechnology companies have expressed concern that the machine-or-transformation test threatens important diagnostic patents, such as tests for HIV/AIDS, cancer, and other illnesses. For example, Caris Diagnostics argues that venture capitalists, “the lifeblood of biotechnology companies,” will reduce their investments if the method or product does not have strong patent protection. Novartis Corp. maintains that medical diagnostic process claims are distinct from business method claims and that, if the Court affirms that Bilski’s hedging method is not eligible for a patent, it should reserve judgment on diagnostic process claims for a later case.

High-technology companies also support Bilski. IBM’s amicus brief, for example, supports patent protection for software inventions that make technological contributions, noting that patents encourage innovation. The Franklin Pierce Law Center argues that strong protection of software patents has led to U.S. dominance in the software field—seven of the 10 largest software companies are based in the United States and the top five software patent holders are U.S. companies. Several entrepreneurial software companies worry that denying software patent protection will make it too difficult for small businesses to compete with larger established companies.

Conversely, the Foundation for a Free Information Infrastructure expresses concern that some software patents will stifle innovation. Because software systems consist of thousands of individual algorithms, exclusive patents over algorithms might eventually make it impossible to develop software without infringing patents. The Free Software Foundation argues that software patents are unnecessary, pointing out that, in 1987, Microsoft had only one
contends that requiring processes to pass “any new and useful process” as signifying something related to industry or technology. Kappos argues that process does not include human activity that is not tied to technology. According to Kappos, Bilski’s hedging method fails outside the purview of §101, because the process relates solely to human conduct. Moreover, Kappos maintains that the method is an abstract idea, which the Court has never recognized as eligible for a patent.

The crux of Bilski’s argument is that an intangible process claim, such as a business method for hedging risks, is eligible for patent protection, because the Court has recognized patent protection for practical applications of “otherwise unpatentable principles” like mathematical formulas and natural processes. Bilski draws a distinction between a “practical application,” which he argues is patentable, and an abstract principle, which he acknowledges is not. In Bilski’s view, a principle is practically applied and eligible for a patent if “it is applied (1) to a new and useful result; (2) in a particular apparatus or structure; or (3) in a particular art or process.”

Kappos rejects the practical application test because of its unlimited application to a range of innovations that have never been considered eligible for patent protection in U.S. history. Kappos notes that this test fails to embody the spirit of invention that §101 was supposed to protect, because virtually any human activity could fall within the scope of the test as long as the invention produced some useful result.

Bilski bolsters his position by pointing to an infringement defense provision that Congress enacted in 35 U.S.C. §273, which recognizes a “prior user” defense to claims of infringement against business methods. Pointing to the legislative history of §273, Bilski suggests that Congress purposely “defined business methods broadly enough to encompass [a] method of hedging consumption risk.” Therefore, Bilski argues, because the defense applies to financial business methods, it must be the case that business methods may be eligible for a patent even if they do not satisfy the machine-or-transformation test.

Kappos responds that §273 does not reflect the congressional intent to extend the protection that §101 provides to business methods consisting solely of human activity. Kappos asserts that §273 was a reaction to a Federal Circuit holding that recognized that a process is not ineligible for a patent merely because it relates to business activities. Thus, the infringement defense recognized in §273 has no bearing on whether Bilski’s business methods are, in fact, eligible for a patent under 35 U.S.C. §101. Kappos stresses that §273 does not even address the criteria for patent-eligible subject matter in §101.

Is the Machine-or-Transformation Test Dispositive?

Bilski argues that passing the machine-or-transformation test is sufficient, but not necessary, for determining whether a process is eligible for patent protection. Bilski asserts that the Federal Circuit’s holding—that transformation must be “the clue” to the patentability of processes not involving a machine—misinterprets the Supreme Court’s statements in Gottschalk v. Benson, 409 U.S. 63 (1972) and in Diamond v. Diehr, 450 U.S. 175 (1981). Bilski points out that, even though the Supreme Court has recognized that the machine-or-transformation test demonstrates eligibility, the Court specifically “declined to hold that a process must be tied to a machine or transform articles in order to be patentable” in both Benson and Parker v. Flook, 437 U.S. 584 (1978). Bilski further urges that the fact that Diehr mentioned the transformation test dispositive.

Legal Arguments


The parties to this case argue over the scope of patentable subject matter covered by 35 U.S.C. §101. Bilski asserts that the machine-or-transformation test applied by the Federal Circuit has no basis in §101 and conflicts with Supreme Court precedent. Bilski argues the plain language of §101 encompasses “any new and useful process” and that there is no statutory basis for protecting some subcategories of processes but not others. Further, Bilski contends that requiring processes to meet the machine-or-transformation test conflicts not only with congressional intent but also with the Court’s broad and flexible framework for determining patent eligibility. To back up this argument, Bilski points to Diamond v. Chakrabarty, which noted, “Congress plainly contemplated that the patent laws would be given wide scope.” 477 U.S. 503, 308 (1980).

Respondent David Kappos, undersecretary of commerce for intellectual property and director of the U.S. Patent and Trademark Office, argues that Bilski’s method for hedging risk is not eligible for a patent, because the Court has identified the term “process” as signifying something related to industry or technology. Kappos argues that process does not include human activity that is not tied to technology. According to Kappos, Bilski’s hedging method falls outside the purview of §101, because the process relates solely to human conduct. Moreover, Kappos maintains that the method is an abstract idea, which the Court has never recognized as eligible for a patent.

The crux of Bilski’s argument is that an intangible process claim, such as a business method for hedging risks, is eligible for patent protection, because the Court has recognized patent protection for practical applications of “otherwise unpatentable principles” like mathematical formulas and natural processes. Bilski draws a distinction between a “practical application,” which he argues is patentable, and an abstract principle, which he acknowledges is not. In Bilski’s view, a principle is practically applied and eligible for a patent if “it is applied (1) to a new and useful result; (2) in a particular apparatus or structure; or (3) in a particular art or process.”

Kappos rejects the practical application test because of its unlimited application to a range of innovations that have never been considered eligible for patent protection in U.S. history. Kappos notes that this test fails to embody the spirit of invention that §101 was supposed to protect, because virtually any human activity could fall within the scope of the test as long as the invention produced some useful result.

Bilski bolsters his position by pointing to an infringement defense provision that Congress enacted in 35 U.S.C. §273, which recognizes a “prior user” defense to claims of infringement against business methods. Pointing to the legislative history of §273, Bilski suggests that Congress purposely “defined business methods broadly enough to encompass [a] method of hedging consumption risk.” Therefore, Bilski argues, because the defense applies to financial business methods, it must be the case that business methods may be eligible for a patent even if they do not satisfy the machine-or-transformation test.

Kappos responds that §273 does not reflect the congressional intent to extend the protection that §101 provides to business methods consisting solely of human activity. Kappos asserts that §273 was a reaction to a Federal Circuit holding that recognized that a process is not ineligible for a patent merely because it relates to business activities. Thus, the infringement defense recognized in §273 has no bearing on whether Bilski’s business methods are, in fact, eligible for a patent under 35 U.S.C. §101. Kappos stresses that §273 does not even address the criteria for patent-eligible subject matter in §101.

**Is the Machine-or-Transformation Test Dispositive?**

Bilski argues that passing the machine-or-transformation test is sufficient, but not necessary, for determining whether a process is eligible for patent protection. Bilski asserts that the Federal Circuit’s holding—that transformation must be “the clue” to the patentability of processes not involving a machine—misinterprets the Supreme Court’s statements in Gottschalk v. Benson, 409 U.S. 63 (1972) and in Diamond v. Diehr, 450 U.S. 175 (1981). Bilski points out that, even though the Supreme Court has recognized that the machine-or-transformation test demonstrates eligibility, the Court specifically “declined to hold that a process must be tied to a machine or transform articles in order to be patentable” in both Benson and Parker v. Flook, 437 U.S. 584 (1978). Bilski further urges that the fact that Diehr mentioned the transformation test dispositive.
test was merely an example of a process that could satisfy § 101, not that satisfaction of the machine-or-transformation test was necessary for determining the eligibility of a patent. Kappos argues that the machine-or-transformation test is the operative test for determining patent eligibility because, in Diehr—the Supreme Court’s most recent case involving a patent for a process—the Court restated Benson’s language that “[t]ransformation and reduction of article ‘to a different state or thing’ is the clue to the patentability of a process claim,” without reaffirming Benson’s caveat that the test was not necessarily dispositive. 450 U.S. at 184 (quoting Benson, 409 U.S. at 70). Kappos also finds support from the Court’s earlier precedents that consistently relied on the machine-or-transformation test to determine eligibility for processes.

**Conclusion**

The Supreme Court’s decision in this case will help define the extent of subject matter that is eligible for patent protection. The Court’s decision could have an impact on the validity of many existing patents as well as the patentability of future inventions and processes. Full text is available at topics.law.cornell.edu/supct/cert/08-964. TFL

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**Hertz Corporation v. Melinda Friend et al. (08-1107)**


Federal district courts have the power to exercise diversity jurisdiction over any civil claim for at least $75,000 arising between citizens of different states. 28 U.S.C. § 1332(a)(1). For purposes of diversity jurisdiction, a corporation is a citizen of “any State by which it has been incorporated and of the State where it has its principal place of business.” 28 U.S.C. § 1332(c)(1). Whenever a party is sued in state court, that party may remove the suit to federal court, provided that the federal court would otherwise have jurisdiction. See 28 U.S.C. § 1441(a). Thus, when a resident plaintiff sues a foreign defendant in the plaintiff’s home state, that defendant can remove the suit to a federal court exercising diversity jurisdiction. When the suit involves a class action, as long as any member of the plaintiff class is a citizen of a different state than the defendant, the action is generally removable. See 28 U.S.C. § 1453(b). However, when a large corporation does business in a number of states, determining its “principal place of business” often presents courts with a challenge.

Plaintiff Melinda Friend and a group of other employees of Hertz Corp. in California filed a class action suit against Hertz in California state court, alleging that Hertz had violated California’s wage and hour laws. Hertz sought to remove the suit to the U.S. District Court for the Northern District of California under 28 U.S.C. § 1453(b). Hertz argued the district court had diversity jurisdiction because Hertz was a Delaware corporation with corporate headquarters in New Jersey. However, Hertz also conceded that it employs more people in and derives more revenue from California than any other state. The district court, applying the Ninth Circuit’s “place of operations” test from Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495 (9th Cir. 2001), concluded that the plurality of Hertz’s business activities occurs in California and therefore denied the removal petition and remanded the case to California state court.

The Ninth Circuit affirmed, holding that the district court had correctly applied Tosco when it reasoned that Hertz’s principal place of business was California. Melinda Friend et al. v. Hertz Corporation, 297 Fed. App’x. 690 (9th Cir. 2008). Because it was possible to conclude that a “substantial predominance” of Hertz’s business takes place in California under Tosco’s place of operations test, the Ninth Circuit refused to apply Tosco’s backup “nerve center” test, under which a court would look to the state where most of a corporation’s executive and administrative functions take place. Id. The Ninth Circuit rejected Hertz’s argument that the court should apply a “per capita” approach and consider the comparative populations of states in which Hertz operates in order to determine the extent of its activities in any particular state. Finally, the Ninth Circuit concluded that Hertz was “not in jeopardy of being mistreated in California courts.” The Supreme Court granted certiorari on June 8, 2009, to resolve the issue of how to interpret a corporation’s principal place of business for diversity purposes.

**Policies of Simplicity and Fairness**

Hertz argues that, under 28 U.S.C. § 1332(c)(1), a corporation’s principal place of business is the physical location of its headquarters. Using the “headquarters test,” Hertz argues that, in addition to Delaware, the state where Hertz is incorporated, it is a citizen of New Jersey, where its headquarters are located. Friend counters that § 1332(c)(1) requires a “business realities test,” under which a court considers the actual reach of a corporation’s activities and argues that Hertz must be a citizen of California. In reaching a decision, the Court will weigh competing public policy interests supporting the interests of multistate businesses, on the one hand, and plaintiffs’ interests in having a venue in state court, on the other.

The issue in this case is reflected in the split among circuit courts. The Seventh Circuit applies a bright-line nerve center test, which looks to the physical location of a corporation’s headquarters to determine its citizenship. See Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1223 (7th Cir. 1991). The Ninth Circuit applies the nerve center test only if no individual state contains a substantial predominance of the corporation’s operations. See Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 500 (9th Cir. 2001). Other circuits fall in the middle, either applying a hybrid that weighs a variety of factors or choosing discretionally between the tests on a case-by-case basis. See e.g., Diaz-Rodriguez v. Pep Boys Corp., 410 F.3d 56 (1st Cir. 2005); Long v. Silver, 248 F.3d 309 (4th Cir. 2001); J.A. Olson Co. v. City of Winona, 818 F.2d 401 (5th Cir.

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Hertz argues that the headquarters test should control, because it is clear and simple to administer. Hertz explains that corporations must report their principal office to the U.S. Department of State and the Securities and Exchange Commission. Thus, determining a corporation’s headquarters could be as easy as going online to access the SEC’s Web site and reading its public annual reports that contain the address of companies’ principal executive offices. Furthermore, Hertz claims that a corporation’s headquarters tend to be “fixed and permanent.” In contrast, Hertz asserts, a business realities test “makes a corporation’s citizenship depend on the fluctuations of the market in a State at any given time.” Advocates for business, including the Chamber of Commerce, agree that the headquarters (that is, the nerve center) test is clear and predictable. The Chamber of Commerce claims that it is unrealistic to assume that a corporation would change the location of its headquarters simply to avoid particular state courts, because so many other factors weigh in a corporation’s decision to locate its headquarters in a particular place.

Conversely, Friend contends that the headquarters test is not so simple. Friend asserts that a corporation’s headquarters might be in multiple locations, such as where the CEO’s office is, where the board of directors meets, and where the corporation maintains its official records. Friend disputes that corporations’ headquarters tend to remain in a fixed and permanent location, because corporations often relocate their headquarters for the purpose of obtaining the benefits of another state’s tax or corporation laws. Whatever uncertainty a business realities test may cause, Friend contends the question pales in comparison with the instability of a headquarters test, because it is easier to relocate a company’s official headquarters than it is to move the locus of a company’s actual day-to-day operations.

An advocate for workers’ rights, the Legal Aid Society’s Employment Law Center, stresses that it is more efficient to allow California courts to adjudicate claims involving California plaintiffs and companies conducting a significant amount of their business in California, because California’s courts are larger and better equipped to handle these claims than the federal courts are. Generally, Legal Aid contends, litigating workers’ rights claims under state law in federal court requires workers to travel greater distances and to produce witnesses at greater expense, creating an undue burden on the plaintiffs.

In addition, Friend argues that Congress rejected a simple bright-line test in consideration of other concerns, such as fairness, when it passed 28 U.S.C. § 1332(c)(1). Friend asserts that Congress believed it to be “fair” for a corporation to be accountable in the courts of the state where it conducts most of its business. Friend maintains that a rule that looks only at the location of a corporation’s headquarters would defeat the purpose behind the statute, because the headquarters can be far from the actual operations of the company’s business. Friend asserts that “diversity jurisdiction was not designed to allow a major California employer such as Hertz to profit from California’s large economy and then ... avoid the jurisdiction of California’s courts.”

Hertz concedes that Congress intended to prevent corporations from having unfettered access to federal courts. But, Hertz adds, Congress intended for corporations doing business in many states to have access to federal courts in order to protect the corporation from the local bias that might exist in state courts. The Chamber of Commerce echoes this concern, claiming that removal may avoid locally elected judges’ perceived bias against out-of-state corporations. Hertz emphasizes that removal protects it against forum shopping by plaintiffs’ attorneys for state courts that are the “most lax” in applying class action rules. Hertz also points out that Congress recently amended § 1332 as part of the Class Action Fairness Act to broaden the ability of corporations to gain access to federal courts using diversity jurisdiction.

Statutory Interpretation

This case hinges on the interpretation of the term “principal place of business.” Hertz’s citizenship determines whether the case belongs in state or federal court. Hertz argues that the Ninth Circuit’s interpretation of § 1332(c)(1) is incorrect, because the word “place” within the statutory phrase “the State where it has its principal place of business” refers to a single physical location within a state. The corporation argues that, if Congress intended to make corporations citizens of the states where the sum total of their operations is the greatest, the statute would have read “the state that is the corporation’s principal place of business,” clearly equating a state with the principal place of business. Hertz reasons that, in using the phrase “the State where it has its principal place of business,” Congress intended that “place” refer not to a state as a whole but to the physical location of a business within some state. Hertz argues that a court should consider the location of a corporation’s headquarters to be its principal place of business, because the headquarters is truly principal in that it is the company’s single most important, influential, and authoritative location.

Also relying on grammatical interpretation, Friend argues that if Congress had meant to refer to the corporation’s headquarters by using the term “principal place of business,” the statute would clearly say “headquarters.” Because the statute does not refer to “headquarters” in this context, Friend asserts that the Court should infer that Congress had not intended that “principal place of business” definitively refer to a company’s “headquarters.” Friend cites the statutory construction axiom that, “when it can be demonstrated that Congress knew how to say something simply and directly, a strong inference arises when Congress chooses to use other language.” Friend argues that the language that Congress chose indicates that Congress had intended for courts to determine a corporation’s
“principal place of business” using a fact-sensitive approach that compares a corporation’s different places of business. Friend asserts that statutory construction favors a fact-sensitive business realities test because, “[b]y its own terms, [the phrase ‘principal place’ requires a comparison between two or more places.”

Conclusion
This case presents the Court with the opportunity to further clarify the process by which to determine the location of a corporation’s principal place of business, which will, in turn, determine corporate citizenship for the purposes of diversity jurisdiction. Full text is available at topics.law.cornell.edu/supct/cert/08-1107.

Prepared by Matthew Benner and Tom Kurland. Edited by Lucienne Pierre and Joe Rancour.

Beard v. Kindler (08-992)
Appealed from the U.S. Court of Appeals for the Third Circuit (Sept. 3, 2008)
Oral argument: Nov. 2, 2009

Joseph Kindler was convicted of murder and sentenced to death in a Pennsylvania court. While Kindler’s post-conviction motions were pending, he escaped and remained at large for years. On the basis of a fugitive forfeiture rule, the court decided that Kindler had waived his rights to make these motions when he fled. After Kindler was returned to prison, he moved to re-instate his motions. The Pennsylvania courts refused and Kindler subsequently petitioned for habeas relief, which the district court granted and the Third Circuit affirmed. The Supreme Court will decide if a federal court may grant a habeas petition when the state’s highest court declared that Kindler had forfeited his relief claims when he fled. Full text is available at topics.law.cornell.edu/supct/cert/08-992.

Prepared by Joanna Chen and Mian Wang. Edited by Katie Worthington.

Graham v. Florida (08-7412);
Sullivan v. Florida (08-7621)
Appealed from the Florida First District Court of Appeal (Graham v. Florida, April 10, 2008; Sullivan v. Florida, June 17, 2008)
Oral argument: Nov. 9, 2009

Terrance Jamal Graham committed an armed burglary when he was 16 years old. Joe Harris Sullivan committed sexual battery when he was 13 years old. Both men are currently serving life sentences in Florida with no possibility of parole. Graham and Sullivan each argue that sentencing a juvenile to life in prison without the possibility of parole violates the Eighth Amendment’s ban on cruel and unusual punishment. Florida counters that such sentences are not constitutionally barred and reflect a state’s legislative response to the growing problem of juvenile crime. In these cases, the Supreme Court will determine whether juveniles may be sentenced to life imprisonment without the possibility of parole for committing non-homicide offenses. Full text is available at topics.law.cornell.edu/supct/cert/08-7621.


Hemi Group LLC v. City of New York (08-969)
Appealed from the U.S. Court of Appeals for the Second Circuit (Sept. 2, 2008)
Oral argument: Nov. 3, 2009

The state and city of New York have enacted laws requiring the taxation of cigarettes sold or used within their boundaries. The city of New York sued a group of Internet retailers under the Racketeer Influenced and Corrupt Organizations Act (RICO). The city claimed that the retailers had violated federal and state laws by selling cigarettes to New York residents without charging a tax on tobacco products, constituting both consumer fraud and tax evasion. The District Court for the Southern District of New York dismissed the city’s claims, holding that the city did not plead that the retailers were an “enterprise” as defined by RICO. The Second Circuit vacated this judgment. The Supreme Court’s decision in this case will affect Internet sites’ ability to sell tobacco products at a discounted price, and will refine the application of RICO in civil suits. Full text is available at topics.law.cornell.edu/supct/cert/08-969.

Prepared by Kevin Jackson and Eric Johnson. Edited by Joe Rancour.

Jones et al. v. Harris Associates LP (08-586)
Appealed from the U.S. Court of Appeals for the Seventh Circuit (Aug. 8, 2008)
Oral argument: Nov. 2, 2009

In 2004, Jerry Jones sued Harris Associates LP under § 36(b) of the Investment Company Act for breaching its fiduciary duty by receiving “excessive” fees for rendering advice about mutual funds of which Jones was a shareholder. Harris Associates created the mutual funds in question, but the funds’ boards of trustees approved Harris’ fees. Jones’ case was defeated on summary judgment in the Northern District of Illinois. The district court applied the standard adopted by the Second Circuit in Gartenberg v. Merrill Lynch Asset Management Inc. to analyze the advising fees and found that the fees could have been the product of a normal arms-length negotiation. The Seventh Circuit affirmed the decision but rejected the Gartenberg standard, adopting, instead, a more lenient standard that allows court interference in fee arrangements only when there is evidence that the adviser failed to disclose relevant information or misled the board during fee negotiations. The Supreme Court’s decision will define the contours of a mutual fund adviser’s fiduciary duty with regard to compensation. Full text is available at topics.law.cornell.edu/supct/cert/08-586.

Prepared by Sarah Chon and Frederick Wu. Edited by Lara Haddad.
Kucana v. Holder (08-911)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (July 7, 2008)
Oral argument: Nov. 10, 2009

A gron Kucana, an Albanian immigrant, missed his immigration hearing and was ordered to be deported. The Board of Immigration Appeals denied Kucana’s motion to re-open his case. Kucana appealed the decision to the Seventh Circuit Court of Appeals, which ruled that the board’s decision was not subject to judicial review. In relevant part, 8 U.S.C. § 1252(a)(2)(B)(ii) specifies that certain matters subject to the U.S. attorney general’s discretion are not subject to judicial review. The dispute in this case centers on the scope and proper interpretation of the statute—in particular, on whether it allows judicial review of decisions made by the attorney general not to re-open cases. The outcome of this case will determine the ability of immigrants to challenge denials of their motions to re-open their cases through the regular judicial process. Full text is available at topics.law.cornell.edu/supct/cert/08-911.

Prepared by Oliver Reimers and Rebecca Vernon. Edited by Joe Rancour.

NRG Power Marketing v. Maine Pub. Utilities et al. (08-674)

Appealed from the U.S. Court of Appeals for the D.C. Circuit (March 28, 2008)
Oral argument: Nov. 3, 2009

The Federal Energy Regulatory Commission (FERC) declared that future challenges to contract rates in New England’s energy market will be evaluated under Mobile-Sierra’s public interest standard, which presumes that freely negotiated rates are “just and reasonable” as long as there is no serious threat to the public interest. The petitioner in this case, NRG Power Marketing, supports FERC’s use of the public interest standard. The respondents, Maine Public Utilities Commission et al. contend that the use of the public interest standard deprives noncontracting third-party challengers of their statutory right to evaluation under a more scrutinizing just and reasonable standard. The D.C. Circuit held that the just and reasonable standard is the appropriate standard of review when noncontracting third parties initiate challenges. The Court’s decision in this case may have an impact on the stability of the electrical energy market and therefore will influence future investments and ultimately the industry’s ability to supply New England with adequate electricity. Full text is available at topics.law.cornell.edu/supct/cert/08-674.

Prepared by Kate Hajjar and Barbara Bispham. Edited by Katie Worthington.

Pottawattamie County, IA v. McGhee (08-1065)

Appealed from the U.S. Court of Appeals for the Eighth Circuit (Nov. 21, 2008)
Oral argument: Nov. 4, 2009

In 2005, Curtis W. McGhee and Terry J. Harrington, both convicted of murder in 1978, sued Pottawattamie County, Iowa, and former county attorneys under 42 U.S.C. § 1983, alleging that the prosecutors had coerced false testimony from witnesses and then introduced that testimony in their murder trials. The prosecutors argued that they were immune from the lawsuit under the doctrine of absolute immunity, but both the district court and the Eighth Circuit disagreed. The Supreme Court’s decision will determine the extent to which prosecutors are immune from liability for their misconduct before the trial begins. Full text is available at topics.law.cornell.edu/supct/cert/08-1065.

Prepared by Will Rosenzweig and Daniel Shatz. Edited by Lucienne Pierre.

Schwab v. Reilly (08-538)

Appealed from the U.S. Court of Appeals for the Third Circuit (July 21, 2008)
Oral argument: Nov. 3, 2009

In 2005, Nadejda Reilly filed a Chapter 7 bankruptcy petition. Reilly listed her business property as an exemption, demonstrating her intent to retain the entire property by declaring the amount of the property’s exemption to be equal to her estimation of the asset’s value. The bankruptcy trustee assigned to the case, William Schwab, did not object to Reilly’s exemption but later determined that the business property had a higher value than Reilly’s estimation and sought to sell the property as a way to recoup the difference. Reilly argued that Schwab’s failure to object within the 30-day statutory period rendered the property exempt. Schwab countered that Reilly’s exemption was limited to the specific amount claimed and did not serve to fully exempt the property from distribution. Schwab also argued that the deadline for filing an objection applied only to the type of property claimed as exempt, not to its value. The Supreme Court’s decision will determine whether a debtor in a Chapter 7 bankruptcy proceeding can successfully claim a full exemption in an asset by declaring that the exemption value equals the asset’s value as well as whether the 30-day objection period applies. Full text is available at topics.law.cornell.edu/supct/cert/08-538.


Shady Grove Orthopedic Associates PA v. Allstate Insurance Company (08-1008)

Appealed from the U.S. Court of Appeals for the Second Circuit (Nov. 19, 2008)
Oral argument: Nov. 2, 2009

Shady Grove Orthopedic Associates filed a class action lawsuit in federal court, arguing that Allstate Insurance Company violated New York law by failing to pay statutorily required interest to policyholders. The district court dismissed the case on the grounds that New York law prevented a class action lawsuit in this context, and the Second Circuit affirmed. The Supreme Court will address the application of state law in federal court under the Erie Doctrine—particularly, whether New York class action law applies in federal...
court and whether it conflicts with Rule 25 of the Federal Rules of Civil Procedure. Full text is available at topics.law.cornell.edu/supct/cert/08-1008. TFL

Prepared by Jessica Lynn and Chris Maier. Edited by Joe Rancour.

Wood v. Allen (08-9156)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Sept. 16, 2008)

Oral argument: Nov. 4, 2009

In 1994, Holly Wood was convicted of murder for shooting his ex-girlfriend in the head. The judge imposed the death penalty, as recommended by the jury. Wood claims that, during sentencing, he did not receive effective assistance of counsel as guaranteed by the Sixth Amendment, because defense counsel had failed to investigate his mental disabilities fully and to present evidence of these disabilities at trial. According to Wood, the state court’s rejection of this argument was an unreasonable application of federal law. He also argues that the Eleventh Circuit’s standard of review in habeas corpus proceedings abdicates the court’s judicial review function under the Antiterrorism and Effective Death Penalty Act of 1996. The state of Alabama counters that the Eleventh Circuit properly deferred to the reasonable determinations of the state courts as required by the 1996 act. This decision will examine the appropriate level of deference due to state court factual determinations during federal habeas proceedings. Full text is available at topics.law.cornell.edu/supct/cert/08-9156. TFL

Prepared by Rob Trichinelli and Kevin Sbolette. Edited by James McConnell.

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Winmill of Idaho, Tena Campbell of Utah, and William F. Downes of Wyoming—allowed an unfettered hour-long session of “ask the judges,” which resulted in developing or refining a process to review just how much discovery a particular case really mandates.

An interesting aspect of all of the presentations during the conference was the contrast in the differing impressions and solutions different judges and lawyers had on similar issues. It was apparent that different judges approach and solve these problems in different ways. All attendees went away with a slightly different view on various solutions to the problems that had been discussed. The conference made it very clear that practitioners would be well-advised to consult the local rules frequently.

The multidistrict composition of the Annual Idaho, Utah, and Wyoming Tri-State FBA Conference is made up of the jurists and lawyers who work in the forefront of today’s federal litigation, the result of which provides an unbeat-able gathering for federal lawyers.

ELEVENTH CIRCUIT

Tampa Bay

The Tampa Bay Chapter recently hosted a reception honoring the judiciary of the Middle District of Florida. The event was held at the Renaissance Vi-

Tampa Bay, Florida. The judges attending the event were noy in St. Petersburg and was attended by more than 115 attorneys and judges. The judges attending the event were from all five divisions within the Middle District of Florida, which stretches across 350 miles from the Georgia border on the northeast to south of Naples on Florida’s southwest coast. TFL

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of agency internal guidance and standards regarding whether the information a program is seeking for a grant program application requires a Paperwork Reduction Act review, followed by agency review of socioeconomic policies. For more information on the Federal Grants Committee, please contact Jana Gagner at jana.gagner@nist.gov.

Indian Law Section

On Nov. 13, 2009, the Indian Law Section, in conjunction with the National Native American Bar Association and the Native American Bar Association of Washington, D.C., sponsored the 11th Annual Washington, D.C., Indian Law Conference. It was a great honor to have the meeting held at the National Museum of the American Indian—a site of tremendous significance to the issues covered during the conference. The day-long conference included the following panels: “Federal Court Update”; “Ethics: Inter-Tribal Investment and Co-Ownership: Who Is Your Client”; “Beyond Land-into-Trust: Creative Land Ownership Options for Tribes”; “Civil and Regulatory Jurisdiction Fix”; and “Tribal Bankruptcy? Options During Difficult Economic Times.” The luncheon keynote speaker was Hilary Tompkins, solicitor at the U.S. Department of the Interior. TFL

Sections and Divisions is compiled by Adrienne Woolley, FBA manager of sections and divisions. Send your section or division information and photos to awoolley@fedbar.org or Sections and Divisions, Federal Bar Association, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201.

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