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Saved by the Supreme Court: Rescuing Corporate America

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Saved by the Supreme Court: Rescuing Corporate America

Alan B. Morrison*

There may be a recession still underway, and millions of Americans are without jobs or working for far less than they used to be paid, but Corporate America is doing just fine. It has record profits, and even with the recent downturn, stocks have rebounded very nicely from their low point in 2009. And collectively, American corporations are sitting on trillions of dollars in cash. They are well-armed with high paid lobbyists, their political committees are revved up and ready to go for 2012, and the Supreme Court has freed them from the law that forbade them from using their own money to fund independent political ads so that they can elect their favorites and defeat those who might try to pass laws that make life more difficult for them. In short, Corporate America is the perfect picture of a “have” in the world of “haves” and “have nots.”

One reason that profits have increased for Corporate America is that the Supreme Court has been a major ally. Since the late 1980s, on almost every occasion where big corporations have had a case of major significance in the High Court, the Court has ruled in their favor. In most cases, the companies had not lost a legislative battle or gone to the Court to protect a right that had been swept aside. With few exceptions, they never asked anyone else to fix a problem, but preferred to let the Court help them out, as it was more than willing to do. The Court has come to their rescue on a wide range of both procedural and substantive issues, with a number of these cases coming in the Court’s most recent term.

To be sure, the Court does not always side with Big Business, as evidenced by the failure of the Chamber of Commerce to persuade the Court that the Arizona law imposing more serious punishments on those who hire illegal immigrants than does federal law is not preempted by the federal statute.¹ And in another preemption case this past term, *Williamson v. Mazda Motors*, the Court permitted an injured passenger to sue a car manufacturer under state law over an alleged defect that was not subject to any direct federal standard.² In the overall scheme, these cases and others that went against a corporate party seem to be of only modest importance, because they applied to relatively few situations, rather than making a broad rule that is unfavorable to similarly situated defendants. They do at least demonstrate that the High Court does not *always* rule as Corporate America would like. Rather, my point is that, in the cases that really count, you can bet on Big Business winning in the Supreme Court.

Many people who see “Supreme Court” and “Corporate America” in the same sentence immediately think of the 2010 decision in *Citizens United v. FEC*, in which the Court used the First Amendment to strike down the long standing federal law that prohibited corporations from using their own money to make independent expenditures -- mainly in the form of political ads --

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¹ Chamber of Commerce v. Whiting, 131 S.Ct. 1968, 1973 (2011).

² 131 S.Ct. 1131, 1134 (2011).

in connection with federal elections.³ Because there are also “dozens of [similar] state laws,”⁴ the ruling loosened millions of dollars to be used to affect elections ranging from the president and governors, to members of Congress and state legislatures, to Attorneys General and District Attorneys, and, more perniciously, to the 39 states that elect judges at one level or another. It is not clear how many corporations will take advantage of this newly found right, or whether its use will be limited to some companies or some elections. What is clear, however, are certain facts surrounding the ruling that highlight how aggressively the Court has been in rescuing corporations, even when they do not ask the Court for that help.

First, *Citizens United* was not a case in which the Court was backed into a corner and had to decide whether corporations could make unlimited independent expenditures. As Justice Stevens’ dissent points out, there were three statutory grounds on which the Court could have ruled for the plaintiff.⁵ Moreover, in the trial court, the plaintiff had abandoned the broad claim that the Court eventually upheld, and as a result there was no proper record on which to decide the case.⁶ Indeed, in order to reach that issue, the Court set the case for re-argument and ordered the parties to brief whether the ban on independent expenditures by for-profit corporations violated the First Amendment.⁷ Finally, because the actual plaintiff was a non-profit corporation, the only way that the for-profit aspect was in the case was because the plaintiff accepted very small amounts of money from for-profit companies, and some of that money *might* have been used to support the expenditure found to violate federal law.⁸ Since the plaintiff was not a for-profit corporation, the Court could sensibly have said that it would await a case in which such a plaintiff brought the issue to the Court. Perhaps even more significant, in the most recent battle in Congress over campaign finance laws, no one ever proposed that the ban on corporate independent expenditures be lifted or modified, and several business groups actually supported the extension of the 1974 law to close certain loopholes as they related to corporate involvement in federal elections. Even assuming that there was a reasonable First Amendment case to be made on this question, the Court’s eagerness to reach out in a singularly inappropriate case for deciding the question demonstrates that the majority had made up its mind as to how it would rule and was simply looking for any vehicle by which to announce its preferred outcome.⁹

Citizens United was a decision that immediately hit home to the average American, but most of the Court’s pro-business rulings are much less known and less obviously pro-business, which is just what you would like if you were a corporate CEO or general counsel. For convenience, I have grouped them under two main headings below, “The More Technical the Better” and “Seemingly Small Changes That Really Matter.” Within the first, I discuss changes

³ 130 S.Ct. 876, 913 (2010).

⁴ *Id.* at 969 (Stevens, J., dissenting).

⁵ *Id.* at 936-38.

⁶ *Id.* at 931-32.

⁷ *Id.* at 932.

⁸ *Id.* at 937.

⁹ This past June, the Court struck down Arizona’s limited public financing system that had been in effect for a dozen years and that gave participating candidates additional funding when their opponents and those who made independent expenditures to support an opponent gave above the amount that the participating candidate was allowed to spend. *See* *Ariz. Free Enter. Club’s Freedom Pac v. Bennett*, 131 S. Ct. 2806 (2011). Systems like Arizona’s were seen as one way to counteract the impact of *Citizens United*, and thus this decision can also be characterized as pro-corporate.

that are often thought of as procedural, but have very significant real world consequences. Included in that part is the long-running and highly successful effort by the Court to sweep a large portion of the civil court docket into arbitration, the forum of choice for corporations when sued by individuals. Within the “Small Changes” portion, I will discuss the Court’s rulings seriously cutting back on punitive damages, the limitations imposed when shareholders try to sue wrongdoers other than the company that issued their stock, and the various ways in which the Court has made drug companies less subject to suit.

I. The More Technical the Better

A. “Clarifying” the Rules of Procedure

As Congressman John Dingell said when he was chair of the House Energy Committee,

Most people think of the procedure as just being kind of amorphous, and you don’t have to worry much about it. The procedure is exquisitely important.... I’ll let you write the substance of a statute, and you let me write the procedure, and I’ll screw you every time.¹⁰

No one understands this better than the Supreme Court as it has tightened a number of procedural rules in the past two decades that have made litigation life much better for defendants, which mostly translates into better for corporations.

First there was the decision in *Daubert v. Merrell Pharmaceuticals, Inc.*,¹¹ in which the Court “clarified” the standard in the Federal Rules of Evidence for deciding whether to accept testimony of an expert witness. The Court had several options as to how to interpret the existing rule, and while it did not choose the most restrictive, the choice it did make, as construed by it and the lower courts, has made it considerably more difficult for a party to qualify an expert witness for trial. In doing so, Justice Blackmun pronounced a new test, not found in the text of the rule or elsewhere.

In theory, this should have been a neutral change since the rule applies to both sides’ witnesses. But that is not the impact for two reasons: plaintiffs often have the obligation to provide expert testimony as part of their basic case, and unless they can find a qualified expert, the defense does not have to worry about getting their own. In addition, the defendant, usually a corporation, is generally much better funded and has people on its payroll that the company can use as experts. That may or may not have been the intention of the Justices in the majority, but that is its real world impact. There is a debate about how harmful the change is to plaintiffs, but there is not much debate that the new interpretation hurts plaintiffs more than it hurts defendants.

¹⁰ Craig Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1141 (2004) (citing *Regulatory Reform Act: Hearing Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 312 (1983)).

¹¹ 509 U.S. 579 (1993).

Unlike legislation, which must be passed by both chambers of Congress and signed by the president, changes in the Federal Rules of Evidence and Procedure do not have to run that gauntlet. Instead, there is a committee structure in place to consider all changes in the Federal Rules and make recommendations to the Supreme Court. In that process, the appropriate committee -- composed of federal judges, law professors, and practitioners from both the plaintiff and defense side -- takes a systematic look at an area of the rules, obtains needed empirical and other research, considers alternative proposals, seeks input from all segments of the Bar on a specific proposal, makes a recommendation with a detailed explanation of what it did and why, and then forwards it up the line until it eventually reaches the Supreme Court. But in *Daubert*, the Court short-circuited that far more open and democratic process and created, in effect, its own original rule, which is considerably different from the common understanding of the pre-existing rule of evidence. The problem is not only that *Daubert* is too favorable to defendants -- which it is -- but that the Court saw a problem and decided to "solve" it on its own, with only amicus briefs to inform it of additional considerations. And even the amici had no opportunity to comment on the Court's standard, which it created on its own and announced only in its opinion.

The next significant, and probably even more blatant end-run on the rules process, occurred in the Court's decisions in *Bell Atlantic Corp. v. Twombly*,¹² and *Ashcroft v. Iqbal*,¹³ both of which decided that greater specificity was required in pleadings than had been previously required. In theory, the change applies to pleadings by defendants as well as plaintiffs, but in practice the impact of the change falls almost entirely on the plaintiff who now must satisfy a heavier burden to avoid dismissal. The requirement is especially harsh where only the defendant has access to the information needed to satisfy the higher burden and will not make it available unless a court proceeding requires it to be produced. The defendant in *Twombly* was a large telephone company, while the defendants being sued by *Iqbal* in his civil rights case were the Attorney General and the Director of the FBI. The significance of *Iqbal* is that it removed any doubt that the pleading standard announced in *Twombly* was in any way limited to the facts of that case, which involved a massive class action under the federal antitrust laws, where wide-ranging discovery was sought, and where the plaintiff had arguably pled only a theory that was not viable under existing law. *Iqbal*, by contrast, involved an individual action, claiming a routine constitutional violation, in which the lower courts had already carefully circumscribed discovery, yet the Court extended *Twombly* to cover this case as well.

Again, while there is a debate about how much more burdensome the new pleading standard is, almost no one claims that there is not a new standard and that it surely imposes *some* additional burden on plaintiffs in *some* cases and that at least *some* plaintiffs will not get their day in court as a result of the new interpretation of the existing rule. Indeed, the *Twombly* Court overruled part of a major Supreme Court opinion regarding the pleading standard that had been universally cited as the leading authority in this area.¹⁴ I do not argue here that the outcome is wrong -- although I think it is harmful and unjust -- but make the more basic point that the Court concluded that there was a problem with the existing pleading standard and decided that it need

¹² 550 U.S. 544 (2007).

¹³ 129 S. Ct. 1937 (2009).

¹⁴ 550 U.S. at 561-63 (overruling *Conley v. Gibson*, 355 U.S. 41 (1957)).

not involve the rules committee in solving the problem, but that it could do so on its own. The main beneficiary, not surprisingly, is Corporate America, as was clear from the outcome in *Twombly*, which overturned the lower court's refusal to dismiss the case.

This term's decision in *Wal-Mart Stores, Inc. v. Dukes*,¹⁵ dealt a serious blow to all class actions, but a particularly harmful one to employment discrimination cases. It did so by greatly ratcheting up the requirements for showing a common question required for class certification, and then upset the widely held understanding that back pay in employment discrimination cases could be routinely awarded if the court found a violation of Title VII and ordered the defendant to end its discriminatory practices.

The plaintiffs in *Wal-Mart* had succeeded in certifying an unusually large class of women who, they alleged, were systematically underpaid by *Wal-Mart* and given far fewer promotions than their comparable male counterparts. Their claim, which was backed up by detailed statistical analyses, was that, although the company had a written anti-discrimination policy,¹⁶ it had a contrary corporate culture of male domination and preferences that was absorbed by the local managers who were given wide discretion in matters of pay and promotion and regularly acted to the disadvantage of female employees.¹⁷ After extensive discovery and a lengthy hearing, the district judge found the allegations credible and supported by substantial proof.¹⁸ He then certified a nationwide class for purposes of determining liability and awarding back pay for loss of wages and promotion for what could be as many as one million women, a ruling that was largely affirmed by a closely divided Ninth Circuit *en banc*.¹⁹

That the Supreme Court overturned class certification was not a surprise to many, given the strong anti-litigation bias the Court had shown in the other cases discussed in this Issue Brief. In addition, there were certain aspects of the claim that made it seem counter-intuitive: how could Wal-Mart be charged with discrimination when the relevant decisions were made by local managers in approximately 3400 stores, with no central control over who was paid how much or who was selected for promotion, even if found to produce statistically significantly adverse treatment for women? What is surprising is that the five Justice majority did so by ruling that the requirement of a common question, which had always been assumed not to place a heavy burden on the plaintiffs, was now a major hurdle to certification where the challenge was to unwritten rules or practices that harmed the plaintiffs and could only be proven by circumstantial evidence. In many class actions, employment or otherwise, there will be a written rule or practice that harms the plaintiff class, such as strength requirements for firefighters or IQ tests for maintenance workers, whose application is undisputed, and the principal issue is whether the requirement offends Title VII. But given the increasing sophistication of companies in avoiding blatant Title VII violations, we are likely to see more *Wal-Mart* type situations, in which the policy is unstated, but the harm is real, and the plaintiffs will be kept out of court, at least if the case is brought on a company-wide basis.

¹⁵ 131 S. Ct. 2541 (2011).

¹⁶ *Id.* at 2553.

¹⁷ *Id.* at 2547-49.

¹⁸ *Id.* at 2549.

¹⁹ *Id.*

Undoubtedly, the size of the plaintiff class, the fact that the class included some women who had eventually been promoted, and some who were not underpaid, also troubled the Court. It may be that *Wal-Mart* will, in the end, only stand for the proposition that some classes of great size, seeking relief under some theories of liability, cannot be certified under Rule 23. It also remains possible that smaller classes, based on a single store, state, or region, could be certified, using national statistics and applying them locally. At the very least, this part of the ruling will provide enormous ammunition for defense counsel in all class actions. Moreover, given the Court's emphasis on what plaintiffs have to prove, and not merely allege, at the class certification stage, it will require plaintiffs to take extensive and costly pre-certification discovery, but with the increased likelihood that the class will not be certified and that plaintiffs, which means their lawyers, will lose their investment. Or they may just decide not to bring the case at all, which does not seem to bother the *Wal-Mart* majority in the slightest.

The other part of *Wal-Mart* was in many respects more surprising because it was unanimous in rejecting the effort to use Rule 23(b)(2) – which is easier to satisfy than is Rule 23(b)(3) – to bring in claims for back pay, in addition to the primary relief of ordering the defendant to cease violating Title VII. Although the Court rejected *Wal-Mart*'s argument that monetary relief can never be awarded under Rule 23(b)(2), it said that it could not be awarded in this case, but did not explain in what other kinds of cases it would be appropriate. What is most disturbing to employment lawyers who represent plaintiffs is that, ever since Title VII was enacted, it has been the uniform understanding and practice that monetary relief in the form of back pay was available after an injunction had been granted so that the plaintiffs would be made whole, and so that defendants would have proper incentives to conform their conduct to the law.

To be sure, the Court was troubled that class members who wished to bring their monetary claims on their own could not opt-out of this part of the case, although no one had asked these plaintiffs to afford such an opportunity. In addition, plaintiffs had proposed using a formula for deciding who would receive back pay and in what amounts, and the Court was insistent that the defendant had a right to question the use of the formula in at least some cases. And it surely did not help the class that the formula would have been applied on a nationwide basis to several hundred thousand women who might be eligible for back pay. But those were not the stated grounds for the broad ruling denying back pay under Rule 23(b)(2).

It remains to be seen how damaging the back pay aspects of *Wal-Mart* will be in other cases. It may be that granting an opt-out, which is unlikely to be utilized unless a class member has an unusually large claim, and allowing a defendant to show why a generally applicable formula is not appropriate for at least some class members, will solve the problem for most classes. But it also may be that, in the end, no monetary relief will be available under Rule 23(b)(2) and that the requirements of Rule 23(b)(3), particularly that the common questions predominate over the individual questions, may make class certification for monetary relief in employment cases impossible under the Rule as written. At the very least, defendants in employment class actions, and probably in at least some other kinds of class litigation, will argue that *Wal-Mart* precludes class-wide monetary relief except under Rule 23(b)(3), which will increase their bargaining position over both class certification and settlement on the merits.

Another procedural ruling that greatly favors defendants was *J. McIntyre Machinery, Ltd., v. Nicaastro*.²⁰ The Court there held that the plaintiff, who was injured on the job by a three-ton scrap metal stripper, could not sue the British manufacturer in state court in New Jersey where the plaintiff was injured by the allegedly defective machine.²¹ It found that the Due Process Clause of the Constitution precluded the state from entertaining that lawsuit because the company had never done business in New Jersey, but had instead used an Ohio distributor to sell its products in the United States.²² Where, one might ask the majority, could the plaintiff have sued in the United States? What about Ohio where the distributor was located or Las Vegas where the company regularly sent representatives to tout its products and where the plaintiff's employer had first learned of the McIntyre machine that it later purchased? Would the holding have been different if the manufacturer were in Oregon, and everything else were the same? The Justices did not say.

The concurring opinion by Justice Breyer, joined by Justice Alito, seemed to focus on the lack of proof by the plaintiffs of a necessary connection with New Jersey, as well as a concern about hand-crafted products of an artisan ending up in some distant part of the country, and a lawsuit being brought there, as well as the effect that a favorable ruling for plaintiffs would have on claims arising out of conduct on the Internet.²³ Most first semester law students would have no trouble distinguishing the artisan case from the three ton scrap machine, but the concurrence did not see it that way. As for the Internet, the Court could have done what it often does in such situations: add a footnote saying that Internet cases are different and are not controlled by this decision.

Taking a very mechanical view of the Due Process Clause, and showing a heightened focus on the role of sovereignty, the plurality suggested that, because the sovereignty of the United States is not limited, plaintiff might be able to sue in federal court, possibly even in New Jersey.²⁴ If the Due Process Clause is supposed to protect defendants from being sued in distant forums, why is New Jersey federal court appropriate, but a state court across the street is not? Similarly, assuming that the defendant could be sued in Ohio, where it shipped the machines for further distribution, or even in Nevada where it regularly went to promote its business, how are they significantly *more* convenient than New Jersey? And if Due Process is about reasonable expectations, does anyone really suppose that the manufacturer had any special concern about *where* in the US it might be sued, once it told its distributor to sell as many machines as possible, with no geographic limitations whatsoever?

Plaintiffs' lawyers are upset with this decision for several reasons. First, it will give defendants in many product liability cases another issue to raise, causing additional expense and delay, which always favors defendants. Second, some courts may follow *McIntyre* and force plaintiffs to sue in an inconvenient location, increasing their costs, or not suing at all if they can only sue in England or perhaps Nevada. Third, the ruling is another judicial weight on the scales of justice in favor of defendants, even if very few cases end up being dismissed for Due Process

²⁰ 131 S. Ct. 2780 (2011).

²¹ *Id.* at 2785.

²² *Id.* at 2791.

²³ *Id.* at 2791-94.

²⁴ *Id.* at 2790.

reasons. Looking at *McIntyre* as part of a larger pattern makes it more understandable as another decision that makes litigation more difficult for plaintiffs to maintain and easier for corporations to defeat.

Another 2011 decision falling in the procedural category is the below-the-radar ruling in *Schindler Elevator Corp v. United States ex rel Kirk*.²⁵ In this False Claims Act case, the plaintiff, a former employee of defendant, alleged that defendant had filed false reports with the government about its compliance with certain statutes designed to give veterans certain preferences in employment when working for government contractors. Prior to filing suit, plaintiff had used the Freedom of Information Act (FOIA) to obtain copies of certain filings by defendant, as well as agency statements that no responsive records were found for some periods. Under the False Claims Act, individuals can sue on behalf of the government to recover money owed the government, but the basis of such suits cannot be “reports” issued by the government. The theory for that exception is that, if the government already has the information, it alone should decide whether to sue the alleged wrongdoer.

In *Schindler*, the Court held that responses to FOIA requests, regardless of their contents, were “reports” and thus information provided under FOIA could not be the basis of the suit,²⁶ even where the government – the beneficiary of the exception – argued that the statute should not apply to routine responses to FOIA requests.²⁷ The result is that some significant number of False Claims Act cases will be dismissed for using FOIA to gather facts, or will be dismissed under *Iqbal* for not having facts that could only be obtained under FOIA. Once again, by a seemingly modest ruling that “simply interprets” what Congress wrote, it will be much harder to sue companies for falsifying information provided to the government by those doing business with it.

B. It’s Just a Change in Forum

Over the past two decades the Court has decided a number of cases interpreting the Federal Arbitration Act (FAA).²⁸ In virtually every one, it has ruled in favor of sending the case to arbitration or allowing the arbitrator to decide important legal or factual questions. Its constant refrain, over the vehement opposition of the individuals who want their day in court and not before an arbitrator, is that arbitration does not alter anyone’s legal rights, but simply involves a change in forum.²⁹

There are a number of reasons why most people do not see arbitration as just another forum. In our public courts, judges and juries are free, but the parties have to pay for arbitrators.

²⁵ 131 S. Ct. 1885 (2011).

²⁶ *Id.* at 1889.

²⁷ Brief for United States as Amicus Curiae Supporting Respondent, *Schindler Elevator Corp. v. United States ex rel Kirk*, 601 F.3d 94 (2d Cir. 2010) (No. 09-1678-cv), 2011 WL 246073.

²⁸ 9 U.S.C. §§ 1 *et seq.* (2006).

²⁹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

Discovery – the ability to gather vital information from the other side – is generally limited or not available at all in arbitration. Arbitrators often come with an industry background and are chosen for repeat business because they have ruled “reasonably” in the past, unlike jurors who come from the pool of individuals more closely resembling consumers and workers, or judges who are elected or appointed as state officials. All of those differences and more, such as guaranteed secrecy, are why companies love arbitration, and why consumers, workers, and lawyers who represent them generally want to stay as far away from arbitration as possible. Besides, if arbitration were such a good deal for plaintiffs, then they would chose to arbitrate once the dispute arose, and the “agreement” to arbitrate would not have to be forced on them in their contracts. To see what a stretch the Court has made to enable corporations to require arbitration whenever they choose, a little background on the FAA is useful.

The FAA was enacted against a background of courts refusing to enforce agreements by businesses to submit their disputes to arbitration. Under the FAA those agreements were made enforceable, and the federal courts were given the power to assure compliance with the law. That basic approach is not the source of the present controversy. What is controversial has been the vast extension of enforcing pre-dispute arbitration agreements between businesses, to situations in which the other party is consumer or an employee, where the corporation has all the bargaining power, and the arbitration clause is included if the person wants the product being sold or the job being offered. But to the Supreme Court, this change in context is beside the point, and all contracts include an arbitration clause are strictly enforced. This is not the place for a full recounting of the path to arbitral supremacy, but a few examples of how the reach of the FAA has been expanded will illustrate the enormous gift that the Court has bestowed on Corporate America, which is able to insert mandatory arbitration clauses in all manner of contracts with no realistic way for consumers or employees to object.

In 1925, the scope of Congress’s Commerce Clause power, which is the basis of the FAA, was understood to be quite limited, yet the Court has applied the Act to an extent that would have been unthinkable when it was passed, although quite routine today. When a homeowner sued an exterminator for failure to honor a contract to handle a pesticide problem, the Court upheld a mandatory arbitration clause since the pesticides and materials used to repair the house came from outside the state, and hence there was “a contract evidencing a transaction involving commerce” as required for the FAA to apply.³⁰ Similarly, when employees of Circuit City sued their employer, the Court by a 5-4 vote construed the exclusion for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” not to apply to them, and so they were subject to the mandatory arbitration of the Act.³¹ As the dissent pointed out, Congress expressly excluded from it the only workers that satisfied the existing law on what Congress could constitutionally cover under the Commerce Clause.³² The result is that employees, who could not constitutionally have been subject to the FAA at the time it was written, are now covered by it because, according to the majority, Congress drafted the exclusion too narrowly!

³⁰ *Allied-Bruce Terminex Companies, Inc., v. Dobson*, 513 U.S. 265, 268 (1995).

³¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

³² *Id.* at 133-35 (Souter, J., dissenting).

As noted, the FAA was written to deal with businesses refusing to abide by agreements with other businesses to employ arbitration to resolve their disputes. As the *Terminex* and *Circuit City* cases illustrate, the Court construes the FAA to reach ordinary consumer contracts as well as employment contracts. Furthermore, it has allowed companies to insist on arbitration of claims based on federal and state statutes designed to protect consumers and employees, and not just contract disputes.³³ And it has ruled that a collective bargaining agreement can include a requirement that all claims of union members against the employer, including both contractual and statutory, must go to arbitration and not to court, even though the member has no choice on whether to sign the agreement and hence surely did not consent to have her claims arbitrated.³⁴

This year, in *AT&T Mobility LLC. v. Conception*, the most far-reaching of the Court's arbitration rulings, again by a 5-4 vote, it allowed a company to include in its standard form contract a waiver of the right to sue or participate in any class action, based on the contract, or on any state or federal law.³⁵ *AT&T* was a perfect case for a class action because the company had sold consumers a cell phone package, which included a two year service contract, in which the phone was "free." The customer was nonetheless billed \$30, the amount that the State of California imputed as a sales tax. Either the company was within its rights in advertising its phone as free, or it was not, and the answer should have been the same for everyone – a perfect case for a class action, even under *Wal-Mart*. The company had a program that was designed to make the arbitration route look attractive to an individual, but arbitration would help the millions of people who bought cell phones from AT&T only if everyone pursued their individual \$30 claims in arbitration, which of course they would not do. The bottom line is that every company will insist in their contracts with their employees and customers that all disputes must be arbitrated and that no class actions will be allowed. That, in turn, means that lawyers will decline to take most of these cases. More than any other decisions, the Court's rulings under the FAA have re-shaped the litigation landscape for Corporate America and have made it much less likely that consumer or employees can prevail and that wrongdoing can be deterred or remedied.

Despite the fact the five Justices who comprise the majority in FAA cases generally consider themselves to be originalists, their approach to statutory interpretation is decidedly modern. If they had been true to their asserted belief that courts should read statutes as they were written by the Congress that enacted them, the majority should have said something like this in deciding these cases: "The FAA was written to enforce business to business agreements to arbitrate. It contained an exception for all employees that Congress could constitutionally have covered in 1925. It was passed before this Court greatly expanded the reach of the Commerce Clause, before most of the consumer and investor protection laws were enacted, and before Title VII and other federal and state anti-discrimination laws became law. We shall construe the law to be limited to the circumstances that led to its passage and to its scope as the Congress that enacted would have understood its reach. We leave to Congress the decision as to whether to extend it beyond its origins and, if so, in what respects. We are fully confident that the corporate parties that are asking us to apply it to circumstances unimaginable by the Congress of 1925 will

³³ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

³⁴ *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

³⁵ 131 S. Ct. 1740 (2011).

be more than able to protect their interests when proposals to expand the FAA are debated there.” But it did not.

II. Seemingly Small Changes in Substantive Law Really Do Matter

One of Corporate America’s first substantive targets was punitive damages, which are generally available under state law. Rarely awarded in practice, because they require that the defendant engage in truly outrageous conduct, and often over-turned or significantly reduced on appeal, they are nonetheless greatly despised by all manner of defendants. As defendants see it, punitive damages might be very large in any given case, and they always represent a direct rebuke to a company that claims it is behaving ethically, even if its conduct injured the plaintiff. Corporations also claim that the potential for juries to reach outrageous results causes them to settle cases that should have been fought, or to pay too much for those that should be settled. But instead of going to state legislatures, where their lobbyists would surely have protected their interests, they went to the Supreme Court and asked it to bail them out.

For a period of time, the Court turned down their pleas, finding generally that the portion of the Constitution cited did not apply to punitive damages.³⁶ The Court was rightly concerned that, if there was a constitutional basis to challenge punitive damages awards, the Court would be flooded with cases and that it would be very hard to draw lines between permissive and excessive punitive damages on any principled basis. Eventually, the corporate onslaught wore down the Court, and in a case in which the Alabama courts had upheld a \$2 million punitive damages verdict when a dealer lied to a customer about whether the car had been in a wreck and the damage painted over, the Court ruled that this verdict was too high.³⁷ To reach that conclusion, the Court had to rely on the long discredited theory of substantive due process from the *Lochner* era, under which the Court substituted its judgment in matters of economics for those of the states and Congress. Recognizing that it had a problem in deciding which punitive awards were excessive, it began to impose so-called “procedural safeguards” on state courts.³⁸ When that did not solve the problem, it prohibited states from taking into account similar conduct outside its borders, and it imposed guidelines for an appropriate ratio of actual damages to punitive damages, with the outside figure of 9 to 1.³⁹ Finally, when a federal maritime case involving the infamous Exxon-Valdez oil spill came to the Court, it was able to exercise its traditional common law powers and held that anything beyond one to one would generally be excessive in that context.⁴⁰

³⁶ See *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (Eighth Amendment inapplicable to punitive damages); see also *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (Due Process satisfied by award in this case).

³⁷ See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

³⁸ *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (requiring state courts to apply *de novo* standard of review in punitive damages cases).

³⁹ See *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). By contrast, the same majority, in the same term, rejected a claim that a sentence of 25 years in prison, with no chance of parole, for stealing three golf clubs, was not excessive under the Eighth Amendment in *Ewing v. California*, 538 U.S. 11 (2003); see also Alan B. Morrison, *Your Money or Your Life*, LEGAL TIMES, May 19, 2003.

⁴⁰ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). Unlike most of the cases discussed in this Issue Brief, the punitive damages rulings do not conform to the normal ideological lines on both sides. Thus, Justices Scalia and

Again, this is an area where the Court should have said, “Take your complaints to the state legislatures or even Congress.” The states have shown considerable willingness to tackle “tort reform” especially in the medical malpractice area, and they should at least have been asked to fix the perceived problem legislatively. Moreover, it is much easier for a legislature to draw lines and balance the relevant interests, than it is for courts, especially the Supreme Court whose only tool is the Due Process Clause of the Constitution. But since the Court made up its mind to “do something” about punitive damages, it used the only means it had to achieve the desired end.⁴¹

Interpreting the federal securities laws to protect alleged wrongdoers is another area where the Court has increasingly, although not uniformly, favored Corporate America, as three sets of cases illustrate. In some cases, the plaintiffs claim that not only is the company issuing the stock alleged to have engaged in fraud, but so have others such as joint venturers and underwriters who might be liable as aiders and abettors, and who may, unlike the company, still have assets. When several of those cases reached the Court, it narrowly construed the law to preclude secondary liability for the others, although they could be liable if plaintiffs made the unlikely showing that they had actually relied on the not-generally-public statements of these other participants.⁴² Just last term in *Janus Capital Group Inc. v. First Derivative Traders*,⁴³ the Court held that owners of a mutual fund could not sue the related company that supplied misleading information to the company in which the plaintiffs had invested, because their company, which had no assets, had actually “issued” the false information, and only the company that issued the stock could be sued. The result was that the alleged wrongdoer was able to avoid liability and the plaintiffs had no one from whom they could recover, even if they proved that there was fraud.

Finally, in *Morrison v. National Australia Bank Ltd.*,⁴⁴ the plaintiffs alleged that a Florida subsidiary of the Australian company in which they bought stock had provided false information to the parent, which had caused plaintiffs to lose money. The Court said that, even though the alleged fraud was committed in the United States, our courts could not entertain lawsuits brought by our citizens, involving stock issued and traded overseas, and that the SEC was also prohibited from suing the alleged wrongdoer.⁴⁵ In the securities fraud area, the Court’s rulings have been somewhat more favorable to plaintiffs than in others, so that it could not be said that the results

Thomas have refused to apply substantive due process to state court judgments, although they did support the limits in *Exxon*. On the other side, Justice Souter wrote *Exxon*, and he and Justices Stevens and Breyer generally went along with imposing various limits on punitive damages.

⁴¹ By contrast, federal antitrust law is an area that Congress has largely delegated to the courts. Thus, when the Supreme Court made it harder to prove antitrust violations by overturning long-standing precedent that treated certain conduct as a per se violation, and instead made it subject to rule of reason analysis, *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)), it could not properly be charged with usurping the legislative or rulemaking functions, although those decisions were a significant help to corporate defendants charged with antitrust violations by consumers or competitors.

⁴² See *Stoneridge Investment Partners, Inc. v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

⁴³ 131 S. Ct. 2296 (2011).

⁴⁴ 130 S. Ct. 2869 (2010).

⁴⁵ *Id.* at 2882-86, 2888.

have been entirely pro-corporate, but the trend is generally favorable for defendants and their insurers, especially in the cases that really matter.

Drug companies have also done quite well in the Court, with some notable exceptions where the issue has been preemption. While the plaintiff in *Wyeth v. Levine*,⁴⁶ defeated a defense of preemption where the jury found that the company had failed to provide adequate warnings for the drug that seriously injured the plaintiff, claimants in these cases must still establish the factual basis for their case on the merits. On the other hand, in *PLIVA, Inc. v. Mensing*,⁴⁷ the Court ruled that the maker of a generic drug had no obligation to notify the FDA when it had knowledge that the warning labels that were proposed by the original manufacturer and approved by the FDA understated a serious risk from the product. Because generic manufacturers cannot unilaterally change the label, and have no duty to ask the FDA to do so, they cannot, said the 5-4 majority, be sued no matter what they know of the risks that caused a plaintiff's injuries. That ruling is a wholesale "get out of jail free card" for the generic drug industry, and an especially harmful one for patients now that generics represent 75% of the drugs sold in this country.⁴⁸

In the Medicaid law, Congress required drug companies to provide entities that serve Medicaid patients with drugs priced at the lowest price they charge any customer, with certain limited exceptions. Congress gave the Department of Health & Human Services (HHS) the duty to enforce the law, but not the staff or money to carry out that function. Several counties decided to try to sue to recover damages for what they believed to be violations of this law, but the Supreme Court held that only HHS could seek such a remedy, even though the states and localities suing were paying much of the cost of these overcharges.⁴⁹

The final drug case handed down this term was *Sorrell v. IMS Health, Inc.*,⁵⁰ a challenge to a Vermont law that effectively prohibited drug companies from paying pharmacies to give them doctor, but not patient, specific information on what a doctor was prescribing so that their sale force could tailor their pitch to the habits of each doctor. The majority (5-4) treated the law as a form of censorship and found the interest of the doctors in not being subjected to that kind of scrutiny insufficient to sustain the law.⁵¹ The result is that policy of Vermont and two other states to shield doctors from what they concluded was inappropriate promotion of drugs has been invalidated.

III. Conclusion

Corporate America has not won every case in the Supreme Court in the past two decades, but it has prevailed in most of the important ones. By important I mean a decision that either wins the case outright for this defendant or erects a major barrier to the plaintiff proceeding, whereas most plaintiff wins enable them to preserve a verdict won at trial or avoid an early

⁴⁶ 555 U.S. 555 (2009).

⁴⁷ 131 S. Ct. 2567 (2011).

⁴⁸ *Id.* at 2583.

⁴⁹ *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342 (2011).

⁵⁰ 131 S. Ct. 2653 (2011).

⁵¹ *Id.* at 2659.

defeat. In addition, many of the favorable decisions for defendant companies are broadly applicable, making those victories even more significant. Indeed, I can think of no truly significant case in the last decade that Corporate America has lost.

In reaching those results, the Court has come to the rescue of Corporate America when other branches of the federal or state government were available and better suited to the job, but had not even been asked, let alone had they turned the companies down. The Court proceeds boldly when caution seems the wiser course, and it is apparently quite unconcerned with the victims of corporate abuse or with allowing alleged wrongdoing to go unremedied. Its distaste for lawsuits by consumers and employees that seek to recover money damages is evident, and its desire to slow down the use of the courts rarely checked. Whatever else the Court may do in other areas, there is little doubt what will happen when the stakes are high and Corporate America is in the Supreme Court.