Detainees being held by the U.S. military at Guantanamo Bay, Cuba, brought these cases challenging the meaning and constitutionality of the Military Commissions Act of 2006. The act amended the federal habeas statute to provide that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

Sprint/United Management Co. v. Mendelsohn

This case involves a dispute regarding “me, too” evidence. “Me, too” evidence refers to plaintiffs proffering testimony from other employees who allege discrimination by other supervisors of the same corporate employer. In this case, a discharged employee who was suing for age discrimination under the Age Discrimination in Employment Act sought to introduce evidence of other alleged acts of discrimination committed against ADEA-covered workers by other supervisory personnel.
<table>
<thead>
<tr>
<th>Date</th>
<th>Case Name</th>
<th>Date</th>
<th>Case Name</th>
<th>Date</th>
<th>Case Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>NOVEMBER 26</td>
<td>LaRue v. DeWolff</td>
<td>NOVEMBER 27</td>
<td>Knight v. Commissioner</td>
<td>NOVEMBER 28</td>
<td>Rowe v. New Hampshire Motor Transport Association</td>
</tr>
<tr>
<td>NOVEMBER 27</td>
<td>New Jersey v. Delaware</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DECEMBER 3</td>
<td>Sprint/United Management Co. v. Mendelsohn</td>
<td>DECEMBER 4</td>
<td>Riegel v. Medtronic, Inc.</td>
<td>DECEMBER 5</td>
<td>Boumediene v. Bush and Al Odah v. United States</td>
</tr>
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Contents

CRIMINAL PROCEDURE
Snyder v. Louisiana — page 103

EMPLOYMENT LAW
Sprint/United Management Co. v. Mendelsohn — page 134

ENEMY COMBATANTS
Boumediene v. Bush and
Al Odah v. United States — page 126

ERISA
LaRue v. DeWolff, Boberg & Associates, Inc. — page 122

INTERSTATE BOUNDARIES
New Jersey v. Delaware — page 118

MEDICAL DEVICES
Riegel v. Medtronic, Inc. — page 113

MOTOR CARRIERS
Rowe v. New Hampshire Motor Transport Association — page 110

TAXATION
Knight v. Commissioner — page 100

ALPHABETICAL INDEX — page 138
SUBJECT INDEX — page 140
GLOSSARY — page 142

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Should investment advice fees incurred by trusts be fully deductible or only partially deductible? Many nontrust investors pay for investment advice. How is their situation different from that of trust investors? Should trusts be more encouraged than individuals to seek investment advice, or less? There is a conflict in the circuits, and the United States Department of the Treasury has raised the ante by proposing a regulation.

Say I want to invest my own money in stocks and bonds. Would it be prudent of me to pay for some advice? Probably. If I don’t get any advice and I lose all my money, will I be unhappy? Sure. But can anyone sue me? No—it was my money, and I blew it.

Say I’m a trustee, and I want to invest trust assets in stocks and bonds. Would it be prudent of me to pay for some advice? You bet. If I don’t get any advice and I lose all the money, will I be unhappy? Sure. Can anyone else sue me? You bet. The beneficiaries can sue, and probably will.

Of course it’s a good idea for me to get some help when I invest my own assets. But it is a much better idea to get some help when I invest someone else’s assets. In fact, it may be downright necessary. If I pay for expert advice in investing trust assets and the trust loses anyway, I still may be sued. But at least I can say that it wasn’t my fault.

The difference is that in the first instance, it’s my money and that in the second, it’s other people’s money. Does that difference make the cost of the advice only partially deductible in the first case, but fully deductible in the second? That’s what this case is about.

**ISSUE**

Are investment-management advice fees incurred by a trust costs “which would not have been incurred if the property were not held in such trust” within the meaning of Internal Revenue Code § 67(e)?

**FACTS**

The William L. Rudkin Testamentary trust (the Trust) was established in 1967 and funded with proceeds from the sale of Pepperidge Farm to the Campbell Soup Company. In 2000, when the Trust assets ranged in value between $2.2 million and $3.4 million, the trustee paid some $22,000 to Warfield Associates, Inc. for investment-management advice. In its tax return, the Trust deducted these fees in full. After audit, the Commissioner of Internal Revenue only allowed the deduction to the extent that the fees exceeded 2 percent of the trust assets.

**Case at a Glance**

**I SSUE**

Are investment-management advice fees incurred by a trust costs “which would not have been incurred if the property were not held in such trust” within the meaning of Internal Revenue Code § 67(e)?

**FACTS**

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cent of the Trust’s adjusted gross income. As a result, there was a tax deficiency of $4,448.

The Tax Court unanimously upheld the commissioner, and the Second Circuit affirmed. The Supreme Court granted certiorari due to a conflict in the circuits. This summer, Treasury promulgated a proposed regulation that, of course, took the position of the government in this case.

CASE ANALYSIS
Congress has enacted many thresholds under tax deduction provisions. For example, medical expenses are deductible only to the extent that they exceed 7.5 percent of adjusted gross income. The threshold, or floor, effectively makes the deduction available to far fewer taxpayers, thus simplifying the Code and minimizing potential abuse.

Section 67 is a similar provision, placing a 2 percent of adjusted gross income floor on a host of “miscellaneous itemized deductions.” One of those deductions is investment advice. However, § 67(e) provides that the 2 percent floor need not be subtracted from “costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate.”

Both sides agree that the exception to the 2 percent floor in § 67(e) has two requirements:

1) the cost must be paid in connection with the administration of an estate or trust; and
2) the cost must be one which “would not have been incurred if the property were not held by such trust or estate.”

All agree that the first requirement was met in this case. The dispute concerns the second.

In similar cases, the Sixth Circuit held for the trusts—that the second requirement was met. The Federal, Fourth, and Second Circuits have held for the commissioner. However, the Federal and Fourth Circuits so held because these investment advice fees were “customarily” or “commonly” incurred by individuals, while the Second Circuit so held because the fees “could” have been incurred by individuals.

The petitioner in this case is the trustee who argues that the second requirement establishes a causation test—that the expenses are fully deductible only if they were caused by the fact that the property was held in trust. That fact, in this case, meant that the trustee had fiduciary obligations to the beneficiaries. Moreover, the trustee was subject to Connecticut’s version of the Uniform Prudent Investor Act, an act that has been adopted in 44 states. Failure to invest trust assets properly would have subjected the trustees to liability. Even though individuals may well have incurred similar expenses, they had no comparable obligations or potential liabilities. Therefore, only the trustee’s expenses could have been caused by the trust’s status. Thus, according to the trustee, the expenses should have been fully deductible.

Moreover, the petitioner argues that trust assets are not always invested the same way that individual assets are invested. For example, under modern portfolio theory, individuals should invest to maximize “total return,” regardless of whether that return emphasizes current income or future growth. Trustees, however, must often balance current income and future growth, since the current income would benefit one class of trust beneficiaries, while the future growth would benefit a different class. Therefore, since trust assets are not invested the way individual assets are, the deductibility of their expenses should be different as well.

The respondent-commissioner argues that there are only three linguistically permissible interpretations of the second requirement. The first would require an individualized assessment to determine whether these individuals owning these assets would not have paid for investment advice if the assets had not been held in trust. Neither side will argue for this individualized, unworkable rule. That leaves two permissible interpretations.

The first remaining interpretation is that the costs definitely would not have been incurred if there had been no trust. Pursuant to this interpretation, only those expenses that are “unique” to trusts are fully deductible. This interpretation, respondent argues, would be easier to administer. The second remaining interpretation is that only those expenses that individuals would not customarily or commonly incur can be fully deductible.

The respondent argues that, under either of the two remaining interpretations, the commissioner wins. As to the first interpretation, investment advice fees are not unique to trusts. Therefore, they cannot be fully deductible. As to the second interpretation, individuals do commonly incur investment advice fees. Therefore, they cannot be fully deductible.

Both sides would prefer to think that the statute is clear on its face. If the statute is clear, it should be unnecessary to refer to legislative history. However, in case the statute is not found sufficiently clear, both sides also argue with commendable caution that legislative history supports their interpretation.

Both sides agree that respondent-commissioner argued that Congress enacted § 67(c) to address certain abuses of “pass-through entities.” Both sides agree that the second

(Continued on Page 102)
The prong of § 67(e) was enacted to prevent the restrictions of § 67(c) from going too far. However, petitioner of course claims that this legislative history proves that Congress wanted these investment advice fees to be fully deductible, while respondent argues that it doesn’t.

To make matters worse, in July of this year, the secretary of the Treasury issued a proposed regulation on § 67(e). The proposed regulation takes the position that only those costs that are “unique” to the estate or trust will satisfy the exception, and that costs are “unique” only if an individual could not have incurred them. Note that this “uniqueness” requirement coincides with the first of the respondent’s two remaining interpretations. Further, the proposed regulation specifies that, if the estate or trust pays a “bundled fee” to the trustee, which fee includes standard annual trustee fees (clearly subject to the exception) and investment advice fees (perhaps not subject to the exception), then these fees must be unbundled, and analyzed separately.

SIGNIFICANCE

In the United States, it is estimated that over $1 trillion in assets are held in trusts and estates. These assets generated over $85 billion in gross income in 2005, reported on almost four million tax returns. Billions of dollars are spent by these trusts and estates for investment advice. In fact, investment advice fees constitute the largest expenditure by these entities.

If investment advisor fees were less than fully deductible to the trust, then fewer trustees would incur this expense. Of course, all of us would hope that trustees will invest trust assets carefully, and that trust beneficiaries will be fully protected. Therefore, all else being equal, trustees should be encouraged to get help when making investment decisions.

However, there still would be strong incentives for trustees to get help, even if the help were not fully tax deductible. Trustees will still be well advised to be careful, lest they be sued for breaching their fiduciary obligations. Moreover, most trustees are subject to some version of the Uniform Prudent Investor Act. Additionally, in most states, including Connecticut, the activities of trustees are monitored by the state, with requirements for regular accounting and reporting to the authorities. But are these protections enough?

Many large corporate trustees such as banks have investment expertise in-house. They charge one fee to the trusts, which bundles the trust administration and investment advice services. If the Court holds that trust investment advice fees are fully deductible, then bundling is irrelevant. However, if the Court holds that trust investment advice fees are not fully deductible, then bundling might be a problem.

Imagine a large trust, which can afford to hire a large, corporate trustee. The trust pays one large annual fee, to compensate the trustee for both trust administration and investment advice services. The trust argues that the entire annual fee is one that “would not have been incurred if the property were not held by such trust or estate.” Therefore, it argues, the fee is fully deductible.

Now imagine a small trust—too small to afford hiring a corporate trustee. The individual trustee, probably a family relative of the trust settler, does the administrative work herself. However, she pays an outside expert for investment advice. Would this investment advice fee be only partially deductible? If so, then the larger trusts, which can afford the bundled services of the large, corporate trustees, will have an unfair advantage. However, if the position of the proposed Treasury regulation is upheld, then such fees will be unbundled, and all trusts, and all trustees, will be in the same boat.

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Tax Section of the Florida Bar (Angela C. Vigil (305) 789-8900)
Did the Louisiana Supreme Court Properly Analyze the State’s Use of Peremptory Challenges Under *Miller-El v. Dretke*?

by Alan Raphael

Did the Louisiana Supreme Court properly analyze the state’s use of peremptory challenges under *Miller-El v. Dretke*?

**Issue**

Did the Louisiana Supreme Court misapply U.S. Supreme Court precedent for evaluating a murder defendant’s claims that the prosecutor’s use of peremptory challenges to remove African Americans from the jury that tried and sentenced him to death reflected intentional racial discrimination?

**Facts**

Early in the morning of August 16, 1995, Allen Snyder attacked his estranged wife Mary and her married friend Howard Wilson with a knife as Mary and Wilson returned from a date. Wilson died; Mary survived. Allen and Mary had experienced marital difficulties during their eight-year marriage. Each had been unfaithful, and Allen had physically abused his wife, causing her to move with her children to her mother’s house. The couple had discussed reconciliation, but Mary had rejected Allen’s request that they meet.

After the attack on Mary and Wilson, Allen Snyder barricaded himself inside his home and called the police, indicating that he was suicidal. The police responding to the call found him curled up in a

(Continued on Page 104)
fetal position, mumbling “they’re coming to get me” over and over. The Jefferson Parish (county) prosecutor James Williams charged Allen Snyder with first-degree murder and sought the death penalty because his actions had endangered the lives of more than one person.

Snyder’s trial occurred less than a year after the acquittal in California of former football player and celebrity O.J. Simpson for the murder of his wife and her male friend. Like Simpson, Snyder had been said to be depressed, suicidal, and unwilling to accept the breakup of his marriage. Nationally, the Simpson case attracted a great deal of attention and demonstrated a racially polarized popular response, with African Americans overwhelmingly favoring his acquittal and most whites believing he should have been convicted of the murders. In the Snyder case, the prosecutor more than once publicly compared Snyder to Simpson and vowed to obtain Snyder’s conviction. The defense moved to bar the prosecutor from making any reference to the Simpson trial and from comparing the two trials in remarks to the press. After Williams promised the court that he would make no such reference, either in court or to the press, the judge denied the defense motions.

Although the county was about 20 percent black, only nine of the 85 prospective jurors called in the Snyder trial (10.6 percent) were African American. Four of the black potential jurors were dismissed “for cause” and the prosecutor removed the remaining five by peremptory challenges, leaving an all-white jury to try Snyder and determine his punishment if convicted. As is normal practice in criminal trials, the potential jurors, whom the judge removed for cause, were dismissed either on the motion of a party or

on the judge’s own initiative (sua sponte) based on the potential jurors’ responses to the jury questionnaire, their demeanor, and their answers to the questions asked by counsel during the voir dire.

After the dismissals for cause, the remaining jurors were submitted in panels of 13 to the prosecutor and then to the defense counsel to give them an opportunity to exercise their peremptory challenges. Each side in this case had 12 peremptory challenges as allowed by Louisiana law and each used them all. Not only were counsel allowed to exercise peremptory challenges when the panel was first presented to them, but they also were allowed to remove jurors who had previously been accepted. This practice is known as a backstrike.

Peremptory challenges have existed in all United States jurisdictions since the founding of the country, and before that were a standard practice in English jurisprudence.

Historically, peremptory challenges were used to eliminate from juries persons whom a party believed would not be impartial, and for any reason, without being required to explain or justify their use. Since Batson v. Kentucky, 476 U.S. 79 (1986), however, the Supreme Court has modified the nature of peremptory challenges by barring their use for intentional racial or gender discrimination in the selection of jurors. Over the course of more than a dozen decisions, the Court has developed the method for applying the three-part “Batson test” when a peremptory strike is challenged on racial discrimination grounds.

Under the Batson line of cases, an equal protection violation under the Fourteenth Amendment is proven if the objecting party can show that any peremptory challenge was employed in a racially (or sexually) discriminatory manner. First the defendant has to show a prima facie case of discriminatory jury selection as indicated by the “totality of the relevant facts” surrounding the use of the challenges. If this burden is not met, no explanation is required for the use of the peremptories and the equal protection objection is denied. If the objector meets this burden, then the burden shifts to the party using the challenges to provide a race-neutral explanation for removing the jurors. Those explanations must be “clear and reasonably specific,” rather than mere denials of intent to discriminate. As long as the explanation is race- or gender-neutral, the burden then shifts back to the objector, who bears the burden of convincing the judge that the challenges were intentionally used to discriminate.

In this case, the trial judge never found that the defendant had made a prima facie case of racial discrimination in the use of peremptory challenges. He nevertheless proceeded to the second step of Batson and required the prosecutor to explain his peremptory challenges. This was an incorrect action by the judge because the prosecutor is not obligated to explain the use of peremptory challenges unless a prima facie case of discrimination has been shown. When this error is made, however, appellate courts act as if a finding of prima facie case had been made and proceed with the other steps of the Batson analysis.

The prosecutor then met his burden at the second stage of the Batson analysis by providing nonracial reasons for his peremptory challenges. The question in this appeal is whether the Louisiana Supreme Court was correct in ruling that the defendant failed to meet his burden at the third stage of Batson by fail-
One prospective juror was Jeffrey Brooks, a 26-year-old African American college student. At the beginning of his voir dire, Brooks expressed a concern that serving on a jury might interfere with his student teaching requirement of observing classes taught by another instructor. Court staff contacted Brooks’s college dean, who stated that the jury service would not be a problem in light of the short time the trial was expected to take. The trial judge informed Brooks of the dean’s statement. He responded, “Okay.” No further questions were asked about whether Brooks remained worried about missing the class observations for a few days, nor did he express any continuing concern. When asked a question about the death penalty, Brooks responded that he could impose it; as to another topic, he said he “would listen” to evidence of insanity. Both of these would be issues in the trial of Snyder. Asked about the verdict he would return if guilt was proven beyond a reasonable doubt, he replied, “Guilty.” In answer to other questions, Brooks stated that he was “very weak on her ability to consider the imposition of the death penalty” and “very positive” about a life sentence. The trial court denied the defense motion, stating only, “All right. I’m going to go ahead and allow the challenge.”

After questioning the fourth panel of prospective jurors, the prosecutor used peremptory challenges against two more African Americans, Jeffrey Brooks, who had earlier been accepted for the jury, and Loretta Walker. Defense counsel made Batson objections to both of these strikes. As to Brooks, the prosecutor stated that he looked “very nervous” when questioned and might favor a conviction on a lesser charge to speed up the trial so that he could return to his classes. Defense counsel did not dispute that Brooks appeared nervous, stating that “As far as him looking nervous, hell, everybody out here looks nervous. I’m nervous.” He disputed the other reason given by the prosecutor for challenging Brooks, pointing out that the college dean’s assurance that missing classes would not cause any problem negated any concern that the prospective juror would try to rush the trial in order to return to class. The trial court overruled the defense motion without explanation.

Loretta Walker, another African American struck from the jury by the prosecution’s use of a peremptory challenge, initially said she could not impose the death penalty. When questioned further, she indicated that she could vote for the death penalty if the defendant had done some bad acts, such as killing or molesting a child. According to the prosecutor, he removed Walker because she was unwilling to impose the death penalty except in limited circumstances not present in the case before the court. The judge denied defense counsel’s Batson challenge to her removal from the jury.

After presentation of the evidence, the jury found Allen Snyder guilty of first-degree murder. During the sentencing phase of the trial that followed the determination of guilt, the prosecutor argued that Snyder’s appearing suicidal after the killing “made me think of another case, the most famous murder case in ... recorded history, that all of you are aware of.” The defense objected and argument at the bench ensued about the propriety of Williams’s reference to the Simpson case. The court rejected the defense objections without explanation and Williams resumed his argument as follows:

The most famous murder case, and all of you have heard about it, happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco, and kept the police off of him, and you know what, he got away with it. Ladies and gentlemen, is it outside the realm of possibility that that was what that man was thinking when he

(Continued on Page 106)
called in and claimed that he was going to kill himself?

In support of its motion for a new trial, the defense argued that the prosecutor was able to obtain a death sentence only by ensuring the jury was all white and then by making a racially inflammatory reference to the Simpson trial. The court denied the motion and held there was no Batson violation because “the Court believes that the D.A. explained sufficient race-neutral reasons for his challenges.”

Affirming the conviction and sentence over two dissents, the Louisiana Supreme Court found the reasons given by the prosecutor for the peremptory challenges to be “plausible, supported by the record and race-neutral.” State v. Snyder, 750 So.3d 832, 842 (La. 1999). Two dissenting justices contended that the prosecutor’s mention of the Simpson case after promising not to refer to it showed his racially discriminatory purpose, either as an independent due process violation or in relation to his exercise of the peremptory challenges.

The U.S. Supreme Court vacated the Supreme Court of Louisiana’s judgment and remanded the case back to that court for reconsideration in light of Miller-El v. Dretke, 545 U.S. 231 (2005) (Miller II), in which the U.S. Supreme Court described in great detail the proper procedure to apply in evaluating a Batson claim. Upon remand, the Supreme Court of Louisiana affirmed the conviction and sentence, this time by a 4-3 margin. Louisiana v. Snyder, 942 So. 2d 484, 500 (La. 2006).

The Supreme Court of Louisiana considered the Batson arguments only as to two jurors, Jeffrey Brooks and Elaine Scott. Because the defense made no objection when the prosecutor struck Gregory Scott and Thomas Hawkins, Jr., from the panel, the court viewed any claim that they were removed in violation of Batson to be waived. The challenge removing Loretta Walker from the jury was not argued by Snyder’s counsel, presumably because Walker’s voir dire answers indicated her hesitation at imposing the death penalty.

The majority of the Louisiana court found no racial discrimination in the backstrike of Brooks after comparing his answers on voir dire to those of white jurors not challenged. It also found no racial discrimination in the prosecutor’s reference to the Simpson trial, and it noted that the prosecutor never mentioned the race of either Simpson or Snyder. In two separate dissents, however, justices of the Louisiana Supreme Court asserted that proper application of Miller II led to the conclusion that the prosecutor had engaged in intentional racial discrimination in his use of one or more peremptory challenges. In the dissenters’ view, the prosecutor had violated Batson, and Snyder’s conviction therefore must be reversed.

The U.S. Supreme Court granted a writ of certiorari to review the decision of the Louisiana Supreme Court. Snyder v. Louisiana, 127 S. Ct. 3004 (2007).

CASE ANALYSIS
The United States Supreme Court vacated the initial decision of the Supreme Court of Louisiana affirming Snyder’s conviction and sentence and directed the state court to review Snyder’s Batson claims in light of the U.S. Supreme Court decision in Miller-El v. Dretke, 545 U.S. 231 (2005) (Miller II), which found a Batson violation after the Texas courts and lower federal courts had failed to do so.

Miller II involved a claim brought under the habeas corpus statute, 28 U.S.C. sec. 2254, by a Texas criminal defendant sentenced to death upon conviction for murder. The defendant claimed that the prosecutor in his case had improperly used peremptory challenges to remove prospective African American jurors from the jury that decided his fate. Although much of the Court’s decision related to the standards to be applied in habeas cases as opposed to direct criminal appeals, the decision sets out procedures applicable to the evaluation of Batson challenges in both direct appellate and habeas corpus contexts.

The Supreme Court’s Miller II opinion begins by indicating that criminal trials with juries selected in a racially discriminatory manner harm the defendant, injure the persons removed from the jury and the groups to which they belong, and damage society in general. The Miller II Court recognized that the Batson requirement that a reviewing court consider “all relevant circumstances” to determine if there was an improper racial motivation for use of peremptory challenges could include not just matters relating to the jury selection in the defendant’s trial, but also to matters beyond the case itself. Both in direct criminal appeals and in habeas cases, the reviewing court is required to give deference to the findings of fact of the state court. Quoting from an earlier Supreme Court ruling in this case, Miller-El v. Cockrell (Miller I), 537 U.S. 322 (2003), the Court noted that this standard is demanding but “does not by definition preclude relief.”

One factor present in Miller II was the numerical disparity by race in the prosecutor’s use of peremptory challenges. Of the 108-person venire panel for the trial, there were 20 black members. Only one actual-
ly served on the jury. Nine were excused for cause or by agreement; the prosecution struck ten peremptorily, using almost all of its peremptories to strike African-Americans. According to the Supreme Court in Miller I, “Happenstance is unlikely to produce this disparity.”

More important according to the Miller II Court were the comparisons between the black venire members who were struck and the white panel members who were allowed to serve: “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson’s third step.” For example, in that case the Court discussed the challenge to venire member Billy Jean Fields, a black man who expressed what the Court characterized as “unwavering support for the death penalty.” Nevertheless, the prosecutor’s proffered reason for challenging Fields was “with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated ….”

The defense objected that this reason misconstrued Field’s voir dire testimony. At that point, the prosecutor offered a new reason: that Fields had a brother who had been convicted of drug offenses. The Supreme Court reviewed the voir dire and concluded that Fields in fact had expressed unwavering support for capital punishment and indicated that “[U]nless he [the prosecutor] had an ulterior reason for keeping Fields off the jury ... we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.”

Further, none of the white and Latino venire persons who clearly expressed the view that the death penalty was inappropriate for persons who could be rehabilitated was subject to any further questions about their views and all were allowed to serve on the jury. Regarding the fact that the potential juror’s brother had been convicted of offenses, the Court noted that that explanation for striking the potential juror was not even given until after the prosecutor’s first explanation about the death penalty was challenged, that the voir dire further indicated that the juror was not close to his brother, and that the state had failed to engage in any meaningful questioning about the subject. These facts led the Court to conclude that “There is no good reason to doubt that the State’s afterthought about Field’s brother was anything but makeweight.”

Several other factors also led the Supreme Court to find a Batson violation in Miller II. The Court specifically noted the prosecutor’s “shuffling” of the venire panel. Under Texas practice, either party could have the jury cards shuffled to change the order in which panel members were reached for questioning; by making such requests when African Americans were about to be reached for questioning, the prosecutor increased the possibility that those venire members would end up at the end of the pack of cards and thus escape being called for questioning at all.

The Court noted other suspect “patterns of practice” during the jury selection, concluding that prosecutor’s “enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race.” Finally, the Miller II Court noted the appearance of the general policy of the Dallas County District Attorney’s Office to exclude black venire members from juries at the time Miller-El’s jury was selected, a practice described in a manual from the 1960s that was still used in the prosecutor’s office at the time of Miller-El’s trial in the mid-1980s, before Batson was decided.

Snyder’s brief argues that the totality of the circumstances in the jury selection in his trial should lead the Supreme Court to reverse his conviction because of a Batson violation. He contends that the racial disparity in the use of peremptories by the prosecutors in his case was similar to and perhaps even more compelling evidence than the evidence of racial discrimination in Miller-El’s case. In Snyder’s case, no blacks were left on the jury panel after the exercise of challenges for cause and peremptory strikes, while one African American remained in Miller-El’s jury. As to the two jurors Snyder claims were struck for racial reasons, Elaine Scott and Jeffrey Brooks, his brief argues that the reasons given by the prosecutor for their removal were not credible but instead were pretextual, contradicted by the record of the voir dire, and a reflection of inadequate questioning by the prosecutor.

The explanation that the prosecution feared potential juror Brooks would want to agree to a compromise verdict to shorten the trial so that he could get back to his student teaching class was refuted by the dean’s statement that his absence was not a problem in light of the short trial time expected, Brooks’s satisfaction with that explanation, and the lack of anything in the record to indicate that he had a continuing concern with serving on the jury. Further, the fact that Brooks was initially found acceptable by the prosecutor but later subject to a backstrike supported the

(Continued on Page 108)
inference that he was struck for a racially impermissible motive and was a move similar to the prosecution’s use of the jury shuffle in Miller-El’s trial. The trial judge did not state that Brooks appeared nervous and Snyder denies that anything in the record supports the prosecutor’s claim that he was; the brief simply ignores defense trial counsel’s seeming concession on this point when counsel indicated that he and everybody else in the court was nervous.

As to potential juror Elaine Scott, Snyder argues that the reasons given by the prosecutor for challenging her—that she was weak in her willingness to impose the death penalty and that she strongly favored a sentence of life imprisonment—was not supported by the record of her voir dire. The prosecutor failed to inquire further about his purported concerns that led him to strike Brooks and Scott, although obviously he had that opportunity.

In addition, Snyder asks the Court to consider as evidence of racially discriminatory intent the three other African Americans who were removed from the jury by peremptory challenges. Snyder is barred from directly challenging the exclusion of two of those potential jurors because no timely Batson challenge was made, and he does not contest the removal of the third. Nevertheless, Snyder points out, Miller II requires a court considering a Batson challenge to look at the “totality of the circumstances” surrounding the trial. Likewise, Snyder’s brief asserts that the Court should consider as evidence of discriminatory intent the fact that the prosecutor had made references out of court comparing this case with the racially charged O.J. Simpson case, and that he also went on to make an in-court reference to the Simpson trial after several promises not to do so.

**SIGNIFICANCE**

Because the Supreme Court never gives reasons for agreeing to hear or declining to hear a case on its discretionary docket, it is often difficult to know why at least four of the justices voted to grant certiorari in a case. Obviously the outcome of this case is important for Snyder, because an affirmance of his conviction will lead to his execution. Perhaps the Court will use this case to clarify or to change the Miller II test under Batson. However, the Court is generally reluctant to reconsider a recent decision unless it has been shown that the decision is unworkable in practice, which does not appear to be true in this case. Miller II was decided by a 6-3 vote; even after the retirement of Justice O’Connor, five of the justices who were in the majority in that case are still on the Court. Accordingly, this is not an instance in which a recent change in the Court membership may portend a change in the law.

The dissenting Supreme Court justices in Miller II did not question the test used by the majority, but instead objected to its application to the facts presented in the case, in light of the deference that must be given to trial court factual findings and to state court judgments when challenged in a federal habeas proceeding. The fact that the U.S. Supreme Court vacated the initial decision of the Supreme Court of Louisiana and remanded this case to the Louisiana court to decide in light of Miller II does not indicate any opinion it might have on the merits of the case but is simply an indication that the U.S. Supreme Court has announced or clarified the tests to be used, which may not have been applied by the Louisiana courts prior to the federal decision being made.

Two of the justices in the Miller II majority, Justices Souter and Breyer, have suggested that the Court should reconsider whether Batson is effective in eliminating racial discrimination in the use of peremptories, and have suggested that eliminating peremptory challenges altogether might be the only way of stopping prosecutors from using them to discriminate by race or gender. See Rice v. Collins, 546 U.S. 333 (2006) (concurring opinion). However, there is no indication that those sentiments are shared by other justices. In addition, the question for which the Supreme Court granted review is a narrower one—whether the Louisiana Supreme Court misapplied Miller II—so it is unlikely that the Court would consider a much broader challenge to the Batson remedy now.

It is possible that the Court might narrow Miller II’s rule by distinguishing its facts as presenting a particularly strong case for finding racial discrimination. The Court could note the much greater number of peremptories used against African Americans in Miller-El’s case, the unusual proof of an actual stated policy in the Miller-El prosecutor’s office for removing blacks from juries, and the specific facts the Miller-El Court majority found to show that the reasons offered for the strikes were not credible.

Deference is given to trial court factual findings on appeal. The trial court judge who ruled against Snyder’s Batson claim was physically present in the courtroom and observed the proceedings, thus being able to observe matters not available to a reviewing court. None of the reasons given by the trial court for denying the Batson motions related to the demeanor of those potential jurors, but Louisiana may argue that the trial judge must have made observations about the
demeanor of the potential jurors during *voir dire* that supported his ruling that there were no *Batson* violations. If the Supreme Court were to accept such an argument, it would become more difficult to prevail on a *Batson* argument on appeal once it is initially rejected by the trial court.

Because this case is on direct appeal, the discussion of the standards imposed by the federal law regarding habeas corpus review in *Miller II* is not relevant to the issues in Snyder’s case, but any decision narrowing the scope of review of *Batson* rulings announced in *Miller II* would affect both direct appeals and habeas cases as well.

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When the Package Contains Tobacco, Should the Rules Change?

by Robert M. Jarvis

The Internet has made buying goods and services quick and easy, allowing consumers to compare the offerings of sellers from around the world. But the development of e-commerce has cut into government revenues, as taxes often are not collected or not remitted. At the same time, the anonymity of the web has given minors a new avenue to try to acquire contraband substances. All of these issues are at play in this case, which arises from Maine’s attempt to police electronic tobacco sales.

ISSUE
Do the preemption clauses of the Federal Aviation Administration Authorization Act of 1994 apply to the delivery of tobacco products?

FACTS
In response to the growing popularity of internet tobacco sales, in June 2003 the State of Maine enacted the Tobacco Delivery Law (TDL), 22 M.R.S.A. §§ 1551 and 1555-C & -D.

The statute has two aims: ensuring that tobacco products do not reach minors, and seeing that adults who order such goods pay the applicable taxes. To achieve its goals, the TDL requires motor carriers to: (1) determine if a package contains tobacco; (2) accept such a package only from a licensed retailer; and, (3) release it only to a person who, through appropriate identification, proves he or she is old enough to buy tobacco.

Worried that the TDL’s requirements would hurt their members by increasing costs, slowing delivery times, and opening the door to expanded liability, in October 2003, three truckers’ groups—the New Hampshire Motor Transport Association, Massachusetts Motor Transport Association, Inc., and Vermont Truck and Bus Association, Inc.—filed a federal lawsuit claiming that the law was in conflict with the Federal Aviation Administration Authorization Act of 1994 (FAAAA). In particular, they cited the FAAAA’s two preemption clauses, which prohibit states from enacting or enforcing laws relating to the “price, route

In February 2004, Judge D. Brock Hornby of the United States District Court for the District of Maine denied the truckers’ motion for immediate summary judgment. See New Hampshire Motor Transport Association v. Rowe, 301 F. Supp. 2d 38 (D. Me. 2004). In his decision, Judge Hornby explained that while the TDL might be problematic in practice, it was not invalid as written: “At this stage of the proceedings, the truckers have asserted a facial preemption argument (determined by reading only the words of the Maine statute), not an as-applied challenge (determined by examining the actual effect of the law) ... . I conclude that [the TDL is] not facially preempted by the FAAAA.” Id. at 40 n.2 & 46.

In an attempt to short circuit the “as applied” inquiry, in April 2004, Maine Attorney General G. Steven Rowe claimed that the associations lacked standing because the law did not affect them but only their members. In June 2004, Judge Hornby rejected this argument, concluding that the associations were proper plaintiffs. See New Hampshire Motor Transport Association v. Rowe, 324 F. Supp. 2d 231 (D. Me. 2004).

In May 2005, with the record now more fully developed, Judge Hornby issued his third opinion. In a lengthy decision, he found that the TDL was preempted by the FAAAA because of the actual impact it was having on carriers. See New Hampshire Motor Transport Association v. Rowe, 377 F. Supp. 2d 197 (D. Me. 2005). In particular, he wrote: “Whatever one might think of the social benefits or costs of delivering tobacco products, the effects of [the TDL] are the types of effects that the FAAAA forbids.” Id. at 219.

In July 2005, Maine appealed Judge Hornby’s decision to the United States Court of Appeals for the First Circuit. By the time the case was ready for oral argument, amicus briefs supporting its position had been submitted by the attorneys general of twenty-five states. Nevertheless, in May 2006, a unanimous panel consisting of Chief Judge Michael Boudin, Senior Judge Norman H. Stahl, and Circuit Judge Jeffrey R. Howard affirmed Judge Hornby: “To the extent that Maine’s Tobacco Delivery Law requires (or has the effect of requiring) carriers to implement state-mandated procedures in the processing and delivery of packages, it is preempted by the FAAAA.” New Hampshire Motor Transport Association v. Rowe, 448 F.3d 66, 82 (1st Cir. 2006). In so holding, Judge Howard relied heavily on his earlier opinion in United Parcel Service, Inc. v. Flores-Galarza, 385 F.3d 9 (1st Cir. 2004). In that case, he had determined that the FAAAA prohibited Puerto Rico from requiring UPS to verify that the necessary excise taxes had been paid on the packages it was delivering in the commonwealth.

In August 2006, Maine filed a petition for a writ of certiorari with the United States Supreme Court. In January 2007, the Court solicited the views of the United States. In May 2007, the federal government recommended that review be denied, but in June 2007, the justices agreed to hear Maine’s appeal. See Rowe v. New Hampshire Motor Transport Association, 127 S. Ct. 3037 (2007).

**Case Analysis**

In Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), the Court, interpreting the Airline Deregulation Act of 1978 (ADA), the FAAAA’s predecessor, held that the State of Texas, using guidelines devised by the National Association of Attorneys General (NAAG), could not punish what it considered to be deceptive advertising on the part of TWA. Writing for the 5-3 majority (Justice Souter recused himself), Justice Scalia observed: “[I]t is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares.” Id. at 388. In a dissenting opinion, Justice Stevens (joined by Chief Justice Rehnquist and Justice Blackmun), chided the majority for its broad reading of the preemption clause and insisted that if the NAAG guidelines were allowed to function, their effect would be minor.

Three years later, the Court returned to the subject in American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995). In another 5-3 decision (this time Justice Scalia sat out) involving the ADA, the Court, per Justice Ginsburg, held that members of AA’s frequent flyer program could not use the Illinois consumer protection statute to sue the airline in tort after it changed its award policies, although they could sue in contract to the extent that AA had reneged on any express promises. Justice Stevens dissented, essentially for the same reasons as in Morales. Justice O’Connor, joined by Justice Thomas, also dissented, believing that neither of the plaintiffs’ claims were justiciable (a view Justice Ginsburg derisively labeled the “ ‘all is pre-empted’ position”).

Rowe gives the Court an opportunity to further develop the meaning of preemption in the transportation context, but with a twist. While Morales and Wolens involved economic regulation, Rowe presents a health and welfare issue (the TDL also has an economic side, of course, given that one of its goals is

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(Continued on Page 112)
enhanced tax collection, but this aspect of the statute is not really in play). It is this difference that Maine and its amici are relying on, arguing as they do that Congress never intended preemption to be the all-consuming proposition that Justices O'Connor and Thomas made it out to be in Wolens. And, as it happens, there is a line in Justice Scalia's opinion in Morales that suggests that economic motives and health and welfare motives should be judged differently: “In concluding that the NAAG fare advertising guidelines are pre-empted, we do not, as Texas contends, set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines.” 504 U.S. at 390.

For their part, the truckers and their supporters rely on the unequivocal wording of the FAAAA's preemption clauses, which, of course, carried the day in the lower courts. They also note that Maine’s regulations are having a significant impact (unlike the NAAG guidelines that Justice Stevens deemed innocuous in Morales), as Judge Hornby recounted in his third opinion: “The Maine statute here deals with the delivery of packages and, in its application to UPS, affects delivery on an express or time-guaranteed basis. UPS has a national and international distribution system that relies heavily on uniform procedures for picking up, documenting, processing, handling and delivering packages. The record establishes that to comply with the Maine statute, UPS must use delivery practices for Maine packages that vary from its nationally and internationally uniform procedures. This lack of uniformity affects the price of UPS’s services and interferes with the orderly flow of packages by jeopardizing the speed, reliability and efficiency of delivery.” 377 F. Supp. 2d at 209 (footnotes omitted).

The truckers are further bolstered by Granholm v. Heald, 544 U.S. 460 (2005). In that case, the Court, by a 5-4 vote, struck down Michigan and New York’s restrictions on internet wine sales. Near the end of his majority opinion, Justice Kennedy brushed aside the very arguments Maine now is making: “The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary ….

Another commentator has summed up the importance of this case by writing: “The State of Maine argued before [the district court and the First Circuit] that the FAAAA was intended to preempt only economic regulation, and not regulation based on the state’s police powers. This argument has a certain force, but also offers the potential for a drastic narrowing of FAAAA preemption, since state police powers are virtually boundless. Maine’s argument also stresses that case law on FAAAA preemption is based on cases involving preemption under the Employee Retirement Income Security Act (ERISA), and that the scope of ERISA preemption has since narrowed. The First Circuit found this argument unpersuasive, but perhaps the Supreme Court will feel differently. Its treatment of this issue, at any rate, is likely to shed light on the Roberts Court’s general views on statutory construction and state-federal relations.” Glenn Harlan Reynolds, Looking Ahead: October Term 2007, 2007 Cato Sup. Ct. Rev. 335, 347 (emphasis in original).

With respect, it seems doubtful that Rowe will do all that Professor Reynolds thinks it will. Given the existence of Morales and Wolens, it would be surprising if the Court felt that it could break new ground. Moreover, the language used by the FAAAA’s preemption clauses affords little, if any, wiggle room. Indeed, sensing that the justices will be reluctant to put the requested gloss on the statute, one observer already has called on Congress to amend the FAAAA by adding an express health and welfare exception. See Nathaniel Bryans, Case Note, 59 Me. L. Rev. 481 (2007).

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Federal law governing medical devices contains an express preemption clause barring state "requirements" that are "different from or in addition to" requirements established by the Food and Drug Administration. Previously, the Supreme Court narrowly found no preemption for medical devices cleared as "substantially equivalent" to already marketed devices. That decision distinguished devices subject to full premarket approval. This case will determine the existence and scope of express preemption of product liability claims involving PMA devices.

In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Supreme Court considered express preemption of product liability suits by § 360k(a) of the Medical Device Amendments (MDA) to the Food, Drug & Cosmetic Act (FDCA). The product at issue in that case was a medical device cleared by the FDA for marketing as "substantially equivalent" to a previously marketed device—so-called § 510(k) notification. The court splintered in *Lohr*, producing three opinions, none joined by more than four justices. By a 5-4 majority, the Court held that § 510(k) notification was insufficiently specific to generate preemptive federal requirements within the scope of § 360k(a). In coming to this conclusion, the *Lohr* court explicitly distinguished another form of FDA device approval, so-called Pre-Market Approval (PMA), as being significantly more "rigorous" because it directly considered safety and effectiveness and as a result took much more of the agency's time.

The *Lohr* decision did not decide whether manufacturers of PMA devices could invoke federal preemption, but over the intervening decade most federal and state courts held that the PMA process was sufficiently specific to support preemption under *Lohr*. A significant minority, however, held that the PMA process, like § 510(k) notification, was not sufficiently device specific because it applied equally to an entire category of devices, rather than uniquely to a particular device. The *Riegel* case is expected to resolve this split of authority and perhaps revisit more broadly the question of express preemption of state common-law tort claims.

**ISSUE**

Does the express preemption provision of the Medical Device Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k(a), preempt state-law claims seeking damages for injuries caused by med-

Federal law governing medical devices contains an express preemption clause barring state "requirements" that are "different from or in addition to" requirements established by the Food and Drug Administration. Previously, the Supreme Court narrowly found no preemption for medical devices cleared as "substantially equivalent" to already marketed devices. That decision distinguished devices subject to full premarket approval. This case will determine the existence and scope of express preemption of product liability claims involving PMA devices.
tical devices that received premarket approval from the Food and Drug Administration?

**FACTS**

Medtronic, Inc. is probably the largest manufacturer of PMA medical devices in the nation, if not the world. Among the many prescription devices it makes is the Evergreen balloon catheter (EBC), which is used to treat patients with coronary disease. The EBC is used during angioplasty, a surgical procedure, to unclog diseased coronary arteries. It is inserted into the artery, moved to where the clog is located, and inflated like a balloon. Pressure from the inflated EBC squeezes the clog against the arterial wall, reopening the vessel. When the procedure is complete, the EBC is deflated and removed.

The EBC is an innovative device. There was no “substantially equivalent” prior device. Thus the EBC had to undergo premarket approval, the FDA’s most rigorous approval process, and the agency had to determine whether the device was safe and effective for its intended use. This occurred on August 30, 1994, after several years of FDA consideration of Medtronic’s application. Two PMA supplements altering the EBC’s labeling were submitted and later approved, in 1995 and 1996. Because the EBC was essentially a balloon, Medtronic’s FDA-approved labeling warned doctors not to overinflated the device, and contraindicated its use on certain types of hard, calcified obstructions.

On May 10, 1996, Charles Riegel underwent an angioplasty in which the EBC was used on an obstruction in his right coronary artery. According to Riegel’s medical records, this artery was “diffusely diseased” and “heavily calcified.” Thus, Riegel’s surgeon used the EBC for a contraindicated purpose. The surgeon also inflated the EBC to a pressure of ten atmospheres, which exceeded the EBC’s “rated burst pressure” of eight atmospheres. The EBC burst, causing severe injuries to Riegel that required intubation, advanced life support, and emergency coronary bypass surgery. He survived, but alleges “severe and permanent personal injuries and disabilities.”

Riegel and his wife timely filed a product liability complaint against Medtronic in the U.S. District Court for the Northern District of New York, alleging state-law claims for negligent design, testing, inspection, manufacture, distribution, labeling, marketing, and sale concerning the EBC, as well as strict liability, breach of express and implied warranty. Medtronic sought summary judgment on grounds of express preemption under the MDA. The district court granted Medtronic’s motion on March 14, 2002, as to all claims except negligent manufacturing and express warranty. Discovery failed to substantiate the remaining claims. After final judgment was entered, Riegel appealed the preemption ruling to the U.S. Court of Appeals for the Second Circuit, which affirmed 2-1. Riegel v. Medtronic, Inc., 451 F.3d 104 (2d Cir. 2006). Riegel sought certiorari from the Supreme Court, which was granted on June 25, 2007.

**CASE ANALYSIS**

Plaintiffs-petitioners contend that the Second Circuit—as well as the majority of other circuits to address the express preemption issue in the context of PMA devices (the Third, Fifth, Sixth, Seventh, Eighth, and Ninth)—erred in finding that the PMA process generated preemptive requirements that barred common-law tort suits. Petitioners argue, first, that § 360k(a) should be construed narrowly. They assert language of the preemption clause does not logically include state-law damages claims within its preemptive scope at all. This is evident, petitioners claim, because when Congress enacted the MDA, the legislative history did not mention preemption of common-law damages claims. Because such preemption would be controversial, such legislative silence, petitioners argue, cannot provide the requisite intent to preempt.

In support of their proffered construction, petitioners offer two other provisions in the MDA as indicative of lack of congressional preemptive intent. The first of these is the section of the express preemption clause, § 360k(b), which provides for FDA preemption exemption for particular state “requirements.” Petitioners argue that the exemption procedures cannot workably apply to damages claims. Petitioners also rely upon § 360h(d), concerning the “Effect on Other Liability” of FDA recall orders. This section, petitioners assert, demonstrates that Congress provided for continued state-law litigation of claims against device manufacturers. Preemption, petitioners argue, contradicts these other sections of the MDA and should be rejected.

Petitioners also rely upon a presumption against preemption. Any express preemption of historic state police powers, they claim, requires a “clear and manifest” statement of congressional intent that is absent from § 360k(a). Petitioners also point to the device industry’s failure to argue preemption for quite some time after the adoption of the MDA in 1976.

Petitioners also rely upon Lohr, despite the distinction Lohr drew between § 510(k) notification and PMA. They point out that Lohr, like Riegel, involved tort liability allegedly arising from the use of a defective class III medical device. According
to petitioners, *Lohr* held that for the MDA to preempt any state-law claim, that claim must relate to a device-specific federal requirement. Further, the state legal requirement must have been created “with respect to” medical devices specifically. Petitioners find neither of these prerequisites satisfied by the PMA process. That process, they contend, does not impose device-specific design or labeling requirements. Conversely, petitioners argue that damages verdicts and common-law tort duties do not represent device-specific state-law requirements because they extend to all products, not just medical devices.

In addition, petitioners assert that their claims are “substantially identical” to the requirements that the FDA imposed upon the EBC. Because the tort duties petitioners advance are “equivalent” to the federal standards applicable to the device, those tort duties should not be preempted.

Finally, petitioners argue that the effect of PMA preemption upon state-law tort remedies would not be as “limited” as the Court of Appeals surmised. Instead, petitioners contend, PMA devices are the “riskiest” type of device, and thus injure many more patients than their relatively small numbers might suggest. Petitioners therefore argue that, instead of being “quite limited,” the effect of applying preemption to damages claims for injuries caused by PMA devices would be broad. That effect would be particularly profound, petitioners claim, on those persons injured by PMA devices because federal law provides no alternative remedy.

Defendant-respondent Medtronic responds, first, by arguing that preemption is appropriate because petitioners’ state claims would impose “requirements” “with respect to” the design, manufacturing, and labeling of the EBC that are “different from” and in “addition to” the FDA’s device-specific federal requirements established by FDA premarket approval. Respondent argues that, under the express terms of § 360k(a), those claims are preempted.

Respondent asserts that the PMA process imposes device-specific federal requirements on medical devices. In contrast to the abbreviated § 510(k) notification process at issue in *Lohr*, respondent contends the much more rigorous PMA procedure requires substantive evaluation of a device’s safety and effectiveness.

This is because, respondent argues, the FDA grants PMA approval only if the device is “safe and effective” according to MDA standards that require the devices to be designed, manufactured, and labeled in accordance with the specifications set forth in the corresponding PMA application. According to respondent’s interpretation of the regulations, a manufacturer is prohibited from changing the design, manufacturing, or labeling of a PMA device in a manner that could impact its safety or effectiveness. Thus, respondent contends, the design, manufacturing, and labeling specifications contained in the PMA application become device-specific requirements imposed by the FDA when the FDA approves the application and mandates that the device conform to the Agency’s conditions of approval. This, they argue, is what happened when the FDA approved the EBC’s PMA application.

*Lohr* fully supports PMA preemption, respondent argues. In *Lohr*, the manufacturing and labeling requirements applicable to the § 510(k)-cleared device were entirely generic—the manufacturing and labeling regulations applicable to all medical devices. Respondent contrasts the requirements imposed in that case with the PMA requirements imposed on the EBC, describing those as going far beyond generic and encompassing the device-specific manufacturing, design, and labeling requirements set forth in the FDA-approved PMA application and incorporated by the FDA’s approval letter.

Respondent argues, as well, that the FDA regulation (21 C.F.R. § 808.1) governing preemption does not indicate that preemption is limited solely to FDA regulations. Rather, both § 360k(a) and the FDA’s interpretive regulation extend preemption beyond “specific counterpart regulations” to other kinds of “specific requirements,” such as those generated by the PMA approval of an individual device. All of these “requirements,” whether in the form of regulations, approvals, or other FDA action, give rise to preemption under respondent’s view of the FDA’s regulatory scheme.

Respondent argues in addition that state tort claims impose specific state-law “requirements” on the PMA devices such as the EBC. This result was affirmed, respondent contends, by a majority of the Court in *Lohr* and in the Court’s other tort preemption precedent. Respondent cites several holdings in which the Court held that state common-law claims constitute “requirements” within the meaning of similar statutory language. E.g., *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality). In light of these cases, respondent argues that any argument that state common-law claims cannot be preempted under § 360k(a) is foreclosed by prior precedent.

(Continued on Page 116)
Respondent goes on to argue that nothing in the language or legislative history of the MDA warrants any more limited reading of the term “requirement,” as used specifically in § 360k(a). To the contrary, respondent claims, § 360k(a) uses “requirement” in its broadest sense, since that section refers to “any requirement” established by a state. That contrasts, respondent asserts, to the more limited context in which the term is used elsewhere in the MDA.

Petitioners are incorrect, respondent contends, to resort to the legislative history of the MDA in an attempt to displace the unambiguous meaning of “any requirement.” Respondent also disputes petitioners’ assertion that it is “unprecedented” that Congress would preempt state-law claims without providing an alternate federal remedy. Respondent provides examples where this type of preemption took place because it was essential to some important federal objective, chiefly promoting the public health by means of comprehensive federal regulation.

Respondent also meets petitioners’ arguments about device-specific state “requirements” with a discussion of Justice Breyer’s concurrence in Lohr, in which Breyer assertedly recognized that there is no difference for preemption purposes between a medical device requirement imposed by state regulation and one imposed by state common law. While common-law tort duties are expressed in general terms, respondent argues that they become device specific when a jury is empowered to decide whether a particular liability theory applies to a state design, manufacturing, and labeling requirement with which the device did not comply. In that way, respondent argues, a verdict for petitioners would have the same practical effect as a state regulation mandating design, manufacture, or labeling standards that differ from those approved by the FDA with respect to the EBC. For that reason, respondent argues, both types of state-imposed standards are equally preempted by § 360k(a).

Respondent responds to petitioners’ “substantially identical requirements” argument, first, with a waiver argument: that petitioners never argued that theory in the lower courts. Should the Court nevertheless entertain the position that only state requirements “parallel” the FDA’s requirements are involved, respondent argues that petitioners are still wrong because a state-law product liability claim necessarily rests on the premise that a device, designed, manufactured, and labeled in conformity with its PMA specifications, is somehow defective under state law. Such a finding of defect, respondent posits, would be directly at odds with applicable PMA requirements and could not possibly “parallel” them.

Next, the respondent argues that preemption of petitioners’ state-law claims furthers the policy and objectives of the MDA. Respondent asserts that Congress extended FDA regulation to medical devices in order to promote the public health by ensuring that safe and effective devices would be widely available. To achieve that objective, respondent contends, Congress intended that the FDA would maintain a careful balance between twin goals of safety and technological innovation. Preemption of state-law claims involving FDA-approved design, manufacturing techniques, and labeling is essential, respondent believes, to achieving these congres- sionally set public-health objectives. Absent preemption, medical device manufacturers would allegedly be subject to overlapping and often irreconcilable state and federal regulatory requirements. Such wide-spread conflict, respondent argues, would on one hand significantly complicate the process of introducing new medical devices. On the other hand, without preemption, respondent asserts, lay juries would be free to second-guess expert FDA regulatory determinations regarding the safety and effectiveness of PMA-approved devices. This is why, respondent argues, the Second Circuit decided that it supports preemption.

Lastly, respondent points out that the universe of petitioners left without a common-law remedy by preemption in the context of PMA medical devices is relatively small. This is because, respondent states, the vast majority—over 99 percent—of medical devices reach the market through the § 510(k) notification process, which the Court held in Lohr did not preempt state-law claims. Even with respect to PMA-approved devices, there are still viable remedies for breach-of-express-warranty and negligent manufacturing, which respondent concedes are not “different from” or “in addition to” mandatory federal requirements for PMA-approved devices. According to the respondent, the petitioners were afforded full discovery and could not establish a viable, unpreempted state-law claim.

**Significance**

The outcome of this case is extremely significant for the most technologically sophisticated medical device companies, such as Medtronic, which are heavily invested in cutting-edge devices that do not qualify for the easier and cheaper § 510(k) notification means of approval. For the vast majority of medical devices that come to market under the § 510(k) process, however, it is unlikely that Riegel
will change the legal landscape in any relevant respect.

A decision in favor of preemption would have considerable significance going forward with respect to other PMA products. For example, a decision unambiguously requiring broad preemption of the claims at issue in *Riegel* would likely have prevented any significant mass tort from arising out of the problems some manufacturers (including Medtronic) encountered with implantable defibrillators. A relative reduction in the product liability burden for the most sophisticated products could, in the long run, cause more risk capital to flow into the development of this type of medical device, possibly to the detriment of similar research in prescription drugs, assuming no decrease in the litigation burden faced by drug manufacturers.

There are a number of issues being argued that could have much broader implications. Chief among these is the petitioners’ contention that, by their nature, state common-law tort claims are incapable of being state “requirements” subject to express federal preemption. This is the same “positive enactments” argument that petitioners have lost since *Cipollone*. While it is unlikely that the Court would reverse itself on this issue, if that were to happen, then the viability of express preemption under a variety of other statutes, such as the Cigarette Labeling Act, FIFRA (insecticides), and even ERISA could be undermined.

On a more general level, *Riegel* will be of interest as an indicator of whether there is likely to be any greater unanimity in the Roberts Court on preemption issues involving common-law torts. *Lohr*, in particular, was a badly fractured decision in which most of the major issues were decided 5-4 with no majority opinion. Other major preemption cases, such as *Bates* and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), have been decided by similarly narrow votes. At the moment, that appears doubtful, as the changes in personnel that have occurred since *Lohr* have involved replacing justices who tended to look favorably upon preemption (Rehnquist, O’Connor) with other justices (Roberts, Alito) whom many speculate will share similar views.

Finally, *certiorari* was granted in *Riegel* despite an amicus brief filed by the Solicitor General recommending against that action. The Solicitor General can be expected to maintain the same substantive position in the brief that the government will be filing on the merits. In light of the recent problems that have wracked the Justice Department, *Riegel* might well be a test of how much credibility the legal positions taken by the Bush Administration remains with the Court.

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- Consumers Union of United States, Inc. (Lisa Emily Heinzerling (202) 662-9115)

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- Chamber of Commerce of the United States of America (Alan Untereiner (202) 775-4500)
- CropLife America et al. (Lawrence S. Ebner (202) 496-7500)
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Royal grants made during the colonial period fixed a portion of the subaqueous border in the Delaware River between Delaware and New Jersey at the low-water mark on the eastern, New Jersey, side of the river. Over New Jersey’s objection, Delaware is seeking to regulate a liquid natural-gas terminal proposed for construction on riparian lands in New Jersey. The piers and unloading facilities for transferring the gas between ships and this planned New Jersey terminal would extend beyond the low-water mark into Delaware’s territory.

The zeal with which the several states guard their respective claims of sovereignty arises from a unique blend of governance imperatives and pride. When the sovereignty of one state is exercised in a manner that reaches into affairs that a sister state claims to be within her sole authority, there is usually a prompt joining of the issue by the state that feels its sovereignty is being impinged. Many of these cases involve disputed state boundaries, and these tend to be more frequent when the disputed boundaries are demarked by rivers, which typically have a degree of dynamism as to their precise location and also a special utility in terms of transportation and commerce.

The case now before the Supreme Court falls in that general milieu and is made more pointed by arising in one of the relatively few settings in which the state boundary is not defined as the middle of the river, but is located at the low-water mark on one side or the other. For the state whose border is drawn at the low water mark on its side to effectively use the river for transport and commerce, facilities built on its shores must extend their piers into the river beyond the low-water mark, implicating the sovereign interest of their neighbor. Disputes such as these are usually resolved by negotiation, but when that fails, Article III of the Constitution grants original jurisdiction to the United States Supreme Court.

This interstate border and sovereignty dispute between the states of Delaware and New Jersey over the Delaware River has been through a number of iterations. There has twice before been litigation in the Supreme Court, and a negotiated agreement solemnized and made effective in a 1905 interstate compact ratified by Congress. That history, while providing the principal building blocks for the legal analysis of the present dispute, also adds to its legal complexity. The past decisions are responsible for leaving the
ambiguities (which might better be classified as deliberately vague compromises) that the current litigation seeks to resolve.

**Issues**

When the state line is the low-water mark on the New Jersey side of the Delaware River, does the Compact of 1905 or any other law authorize New Jersey to exercise regulatory jurisdiction over aspects of a New Jersey riparian activity that extends beyond the low-water mark into the river on the Delaware side of the state boundary? (The Special Master recommended the answer is in the affirmative. Neither state took exception to that recommended ruling.)

When the state line is the low-water mark on the New Jersey side of the Delaware River, does the Compact of 1905 or any other law authorize Delaware to exercise regulatory jurisdiction over aspects of a New Jersey riparian activity that extends beyond the low-water mark into the river on the Delaware side of the state boundary? (The Special Master recommended the answer is in the affirmative. New Jersey took exception to that recommended ruling.)

Assuming that the answer to the second issue is in the affirmative, does the Compact of 1905 or any other law require that Delaware refrain from exercising that authority, or give deference to determinations made by New Jersey in relation to the portion of the activity taking place on the Delaware side of the boundary? (The Special Master did not expressly answer this question, but it can fairly be implied that the Special Master answered it in the negative. New Jersey took exception to that position.)

**Facts**

The southernmost segment of the Delaware River forms the border between New Jersey and Delaware. It is a relatively short border, roughly 40 miles in length, with Delaware on the west bank and the southern tip of New Jersey on the east bank. The two states have sparred over the precise location of that boundary and the regulatory authority over activities in that stretch of the Delaware River for at least 135 years. The dispute was rekindled in this case by Delaware's refusal to permit construction of a liquid natural-gas terminal in New Jersey along the upstream end of that river segment. The crux of the dispute relates to the claimed authority of Delaware to regulate concurrently with New Jersey those aspects of the facility that will extend into the river beyond the low-water mark on the New Jersey side.

The pertinent facts underlying the dispute in this case predate the founding of the United States as a nation. Grants from the English crown created the geopolitical landscape of the colonies, and those divisions, both geographic and political, have largely continued unchanged through the period when the colonies declared independence. The two states' borders remained unaltered by either the Articles of Confederation or the U.S. Constitution. In this instance, for example, a 1682 deed of feoffment from the Duke of York granting land to William Penn was the key piece of evidence that led to a ruling by the U.S. Supreme Court that the boundary between Delaware and New Jersey in the upstream half of the state border is located at the low-water mark on the eastern shore (i.e., the New Jersey side of the river). See, *New Jersey v. Delaware II*, 291 U.S. 361 (1934). As a practical matter, recognition of that particular dividing line placed the entire navigable portion of that stretch of the river within the boundary of Delaware.

In most cases, when a river forms a state boundary, the dividing line between the states is, in layman's terms, the "middle" of the river. On occasion, when disputes on such rivers have arisen, states have invoked the Supreme Court's original jurisdiction to resolve their disagreement. The legal term for the precise river boundary line is the "live thalweg," which means the middle of the main navigable channel that is used for the transportation of goods. *Louisiana v. Mississippi*, 466 U.S. 96 (1984). Whether viewed in lay terms or more technically, placing the dividing line in the middle of the river or at the line of transportation provided the "riparian" landowners who own land adjacent to the river and the citizens of both states with access to the navigable channel of the river entirely within the boundaries of their own states. When, as in this case, the interstate boundary is at the low-water mark, riparian projects on that shore may need to extend beyond the state line to accomplish their purposes, whether for transportation, or for water intake or discharge. When those projects do extend beyond the state border, the second state might seek to regulate it even though it is situated largely in the first state. See, *Virginia v. Maryland*, 540 U.S. 56 (2003). This is a recipe for conflict.

The prior legal conflict between New Jersey and Delaware along their border began as a fisheries regulation dispute. Beginning in 1871, Delaware sought to impose a license fee (85 for Delaware residents, 820 for all others) on all who fished in the Delaware portion of the river, which Delaware claimed extended to the low-water mark on the New Jersey shore. In 1872, Delaware authorities actively enforced the regulation by arresting at gunpoint some New Jersey residents fishing in navigable waters on the New

*(Continued on Page 120)*
Jersey side of the river's midline who had not paid Delaware's license fee. After a heated exchange of letters of the respective governors, the states spent five years in futile negotiations that attempted to reach an agreement on fisheries regulation. At that point, in 1877, New Jersey filed the very first “original jurisdiction” action in the U.S. Supreme Court seeking a declaration that the boundary was the “middle” of the river, and it sought and obtained a preliminary injunction that forbade Delaware from enforcing its fishing laws against any New Jersey resident until the Supreme Court dissolved the injunction.

In the words of the Supreme Court, that lawsuit, *Original No. 1*, “slumbered for many years.” Eventually, the two states negotiated the Compact of 1905, which sufficiently addressed the fishery issue so that New Jersey agreed to withdraw its bill of complaint and the case was dismissed without prejudice. *New Jersey v. Delaware I*, 205 U.S. 550 (1907). The Compact, unfortunately, did not really tackle the hard questions such as the location of the border and, although it sought it, did not actually produce uniform parallel fisheries regulation. Thus, in 1929, New Jersey was granted leave to file a new bill of complaint, this time with the express purpose of settling the border. In *New Jersey v. Delaware II*, the Court fixed the boundary as described above—on the low-water mark on the New Jersey side, above a point described by a 12-mile radius circle drawn from New Castle, Delaware, and in the middle of the river below that point.

Turning the clock ahead another 70 years, not only was there no longer any possible debate about the location of the boundary, but so far as is evident in the record of the current case, there was no significant acrimony between the states despite some ongoing posturing. New Jersey continued to claim Delaware had only limited jurisdiction over New Jersey shore-based developments that extended into Delaware waters. It based its arguments on certain language in the 1905 Compact and on a more general theory of “riparian jurisdiction.” Delaware, ignoring those objections, enacted laws and regulations that by their terms were in force everywhere in Delaware, including those parts of the river where the interstate boundary was now established as the low-water mark on the New Jersey side of the river. The détente lasted until 2005, when Delaware denied permits that were needed for the construction of a proposed liquefied natural gas (LNG) plant to be constructed by Crown Landing, LLC, a subsidiary of British Petroleum. Under the plans, an unloading platform and transfer facilities would be located on the Delaware side of the boundary line. The main facilities, including three 150,000-cubic-meter storage tanks, would be built on the New Jersey side of the border. Additionally, preparing ship channels around the platform would require dredging 1.24 million cubic yards of subaqueous soils located on roughly 29 acres of riverbed on the Delaware side of the boundary.

After it became clear that Delaware would not alter its position and its administrative rulings denying the permits became final, the political sparring became heated. New Jersey threatened to withdraw its pension funds from Delaware banks and Delaware legislators proposed legislation to authorize the National Guard to defend its borders from encroachment. One New Jersey legislator looked into the seaworthiness of the decommissioned battleship *New Jersey*, docked as a museum in Camden, New Jersey, in the event that it might be needed to repel an armed invasion from Delaware.

As the Special Master later put it, “Despite—or perhaps because of—these diverse responses to the current dispute, the States have been unable to break their impasse.”

On July 28, 2005, New Jersey brought this suit in the Supreme Court by invoking its seldom-used “original jurisdiction” pursuant to which the Court functions as a trial court. As is typical in such cases, the Court appointed a Special Master to take evidence and make recommendations for resolving the litigation. And so a third iteration of *New Jersey v. Delaware* is again before the Supreme Court as New Jersey now objects to the Special Master’s recommendations and Delaware defends them.

**Case Analysis**

At one level, the legal world of interstate disputes tends to be populated by uniquely fact-intensive disputes. First, each boundary dispute has its own unique history. Secondly, when they exist at all, interstate compacts often require interpretation of their terms, terms that can be as opaque as the political disputes they seek to resolve are sensitive. At another level, those same interstate disputes can be legally very simple, for once the boundary is settled there is a fairly clear body of law that describes the attributes of sovereignty that a state may exercise within its boundaries. Similarly, once a compact or similar congressional determination has been interpreted, applying the law is relatively straightforward business.

In this case, New Jersey previously lost the boundary dispute, so it is absolutely clear that the project as planned extends into Delaware. Correspondingly, unless some legal basis for claiming exclusion from
the ordinary operation of Delaware law can be found in the 1905 Compact or some other source, the Crown Landing LNG project is subject to Delaware laws that are being applied within Delaware’s territory. In this case, therefore, New Jersey is laboring to find a basis for excluding from regulation a project that extends into another state’s territory. This is not unprecedented. The Court recently ruled in a case that arose on the Potomac River that a compact and an act of Congress provided a reasonable basis for excluding a Virginia shore-based water intake from regulation by Maryland even though the intake would be on the Maryland side of the interstate border.

As noted previously, the 1905 Compact was intended to settle disputed fishery issues in the river. The Preamble to the Compact, however, had a broader theme that indicated an intent to address “jurisdiction,” raising the possibility that it does address the sorts of regulatory authority issues at the heart of the instant dispute. The key language of the relevant provisions is found in Articles VII and VIII of the Compact. Article VII provides: “Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.” Article VIII provides: “Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.”

In making its case, New Jersey points to the Article VII concept of “riparian jurisdiction” existing on its “side” of the river and argues that this provision of the Compact was intended to govern cases such as this one and to exclude regulation by Delaware. Contrastingly, Delaware emphasizes Article VIII, contending that territorial rights are among the things that are “unaffected” by the Compact. The parties make these and related arguments quite elaborately. The documentary record before the Special Master is available on a website maintained by the Special Master, Ralph Lancaster, at http://www.pierceatwood.com/custompagedisplay.asp?Show=2 The Special Master has filed a report, available on that site, that in essence recommends that the Court rule the states have concurrent regulatory jurisdiction over the Delaware portions of New Jersey riparian activities that have elements that cross over into Delaware territory.

**SIGNIFICANCE**

This case has minimal precedential significance because it will turn on an interpretation of legal enactments that are unique to the upper half of the state border between New Jersey and Delaware. It has practical significance in regard to the harmonious relations between those two states and the ability of New Jersey to control, without Delaware’s concurrence, some aspects of New Jersey riparian activities in that stream stretch on the Delaware River.

Economically, for New Jersey, the stakes are fairly high. This LNG facility is sizeable and represents many millions of dollars, if not a few billions of dollars, in construction spending and thereafter a job stream and economic activity that will benefit New Jersey. To claim a greater impact than that, such as an impact on national energy security, tends to ignore the market realities of the situation. If there is a sufficient market demand for LNG, this terminal will be built somewhere, but that somewhere may not be in New Jersey on this part of the Delaware River.

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ERISA

Does ERISA Permit Participants in Defined Contribution Retirement Plans to Obtain Individualized Relief for Losses Caused by a Fiduciary Breach?

by Michael J. Collins

In this case, the Court will determine whether the Employee Retirement Income Security Act of 1974 permits a participant in a defined contribution retirement plan who experienced investment losses due to the employer’s alleged failure to follow his investment instructions is entitled to relief under ERISA.

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FACTS

James LaRue was a participant in the “401(k)” plan maintained by his employer, DeWolff, Boberg & Associates, Inc. Like most 401(k) plans, the plan permitted employees to direct how to invest their plan accounts from among a menu of mutual funds.

In his lawsuit against DeWolff, LaRue claimed that his 401(k) plan account balance was depleted by approximately $150,000 because DeWolff twice failed to follow his investment instructions to transfer assets allocated to his account between mutual funds. LaRue did not allege that either DeWolff or the plan itself misrepresented any fact or that his investment instructions were intentionally ignored.

Neither the district court nor the Fourth Circuit has addressed whether DeWolff actually breached any duties to LaRue. Rather, both the district court and the Fourth Circuit held that the relief sought by LaRue—recovery of losses he may have incurred as a result of the

ISSUES

The Court will resolve two issues. First, does ERISA permit a participant in a defined contribution retirement plan to bring an action to recover losses to his individual plan account that were caused by a fiduciary breach? Second, does “make-whole” relief for losses directly caused by a fiduciary breach in these circumstances constitute a claim for equitable relief cognizable under ERISA?

LA RUE v. DEWOLFF, BOBERG & ASSOCIATES, INC.
DOCKET NO. 06-856

ARGUMENT DATE: NOVEMBER 26, 2007
FROM: THE FOURTH CIRCUIT
CASE ANALYSIS

The clear trend in the past 15–20 years has been a move away from “defined benefit” retirement plans to “defined contribution” plans (such as 401(k) plans). This trend has occurred for a number of reasons, including increasingly complex tax rules applicable to defined benefit plans, employers becoming less willing to assume the risks of funding the benefits under defined benefit plans, and the trend toward a more mobile workforce (defined contribution plans generally make more sense than defined benefit plans for short-service employees).

Under a defined benefit plan, an employee’s benefits are determined pursuant to a specified formula. The employee does not have an interest in any specific assets held in the trust that holds the plan’s assets. Rather, the employer is required to contribute sufficient funds to pay all promised benefits. Thus, the employer generally bears the entire risk of investment performance, and if investments perform below expectations, the employer generally is required to contribute additional funds to the plan.

Defined contribution plans are very different from defined benefit plans. Under a typical defined contribution plan, both the employee and the employer contribute amounts to the plan’s trust, and those assets are allocated to an individual account in the employee’s name. A “401(k)” plan simply means that the employee is permitted to contribute to the plan using pre-tax dollars. Under most defined contribution plans, the employee selects how to invest his or her account from among a specified menu of mutual funds or other investments. If the investments perform well, the employee’s account increases in value and more funds are available for the employee’s retirement. Conversely, the employee assumes the risk of poor investment performance as well.

ERISA’s rules apply to employee benefit plans sponsored by private employers, including defined contribution plans such as the one at issue in LaRue. Among other things, ERISA imposes duties on plan “fiduciaries,” those persons who are responsible for plan administration or who have control over plan assets. Section 404 of ERISA (29 U.S.C. § 1104), which is derived from the common law of trusts, generally requires fiduciaries to act prudently, for the exclusive purpose of providing benefits to employees covered by the plan, and in accordance with plan documents.

In turn, § 409 of ERISA (29 U.S.C. § 1109) provides that if a fiduciary breaches its duties, it is personally responsible to make good to the plan any losses to the plan resulting from the breach, and to restore to the plan any profits the fiduciary made through use of assets of the plan. In addition, a breaching fiduciary is “subject to such other equitable or remedial relief as the court may deem appropriate.”

Finally, even if there is a fiduciary breach, the requested remedy must be enforced through a lawsuit brought under § 502 of ERISA (29 U.S.C. § 1132). Two provisions of § 502 are at issue in this case. First, § 502(a)(2) provides that a plan participant or beneficiary, the Secretary of Labor or another fiduciary may bring suit to, inter alia, obtain appropriate equitable relief to redress violations of ERISA. The issue raised by LaRue is whether the recovery of individualized losses due to a fiduciary breach constitutes equitable relief within the meaning of § 502(a)(3).

With respect to the first issue, most courts that have considered the issue have held that § 502(a)(2) does not permit a participant in a defined contribution plan to obtain individualized relief. Rather, when only one participant is impacted by a breach, most courts have concluded that the terms of § 409 of ERISA do not provide a remedy because the plan itself is not being made whole, but rather a single person is.

LaRue argues that this interpretation of §§ 409 and 502(a)(2) of ERISA is mistaken. Because the assets of 401(k) and other defined contribution plans are, by definition, allocated to individual accounts, any loss to the plan necessarily results in a loss to one or more individual accounts. However, this does not change the fact that the plan itself—of which the individual account is a part—suffered a loss as a result of the fiduciary breach. Thus, LaRue argues that § 409 should be read to provide that the losses resulting from a fiduciary breach are first restored to the plan as a whole, and then can be allocated to affected individual accounts.

DeWolff counters that the majority interpretation of § 409 is correct. It argues that a holding in favor of LaRue would effectively amend § 409 to require a fiduciary to make good “any losses incurred by an

(Continued on Page 124)
individual participant in the plan” irrespective of whether the plan itself, or any other participant, has suffered any losses. There is no indication that Congress intended for § 409 to cover an individual claim for lost profits when that loss has no impact on any other plan participant or the plan itself. In other words, § 409 of ERISA does not extend to individualized losses because any recovery benefits solely the affected employee and not the plan itself.

The second issue raised by the case, the meaning of “equitable relief” in § 502(a)(3) of ERISA, has been much litigated. The U.S. Supreme Court has addressed the issue three times in recent years, in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), *Great-West Insurance v. Knudson*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atl. Med. Servs.*, Inc., 126 S. Ct. 1869 (2006). Under those cases, relief qualifies as equitable for purposes of § 502(a)(3) only if both (1) the basis for the plaintiff’s claim is equitable, and (2) the remedy sought by the plaintiff was typically available in premerger courts of equity (i.e., before equity and “law” courts were merged) under the circumstances at issue in the case. Under this test, in no event do money damages qualify as equitable relief.

Relying heavily on arguments made by Professor John Langbein in a 2002 *Columbia Law Review* article critical of *Great-West*, LaRue argues that the requested relief qualifies as equitable under the standard developed by the Court. In particular, the historical remedy of “surcharge” was regularly awarded by equity courts for breaches of trust, and the restoration of specific monetary losses to LaRue’s 401(k) plan account is analogous to that remedy. Although this may superficially resemble a remedy of money damages, surcharge is “distinctly equi-

table in nature.” Thus, even if the Court concludes that no remedy is available under § 502(a)(2) of ERISA due to the “plan-wide remedy” issue, LaRue is entitled to recover his losses due to the alleged fiduciary breach pursuant to § 502(a)(3).

DeWolff responds that, at base, the recovery of investment losses is nothing more than traditional monetary relief. DeWolff argues that although LaRue may attempt to give an equitable label to the claim, in reality LaRue is attempting to obtain a money damages remedy that is unavailable under § 502(a)(3). Even if an equity court at the time of the divided bench may have been authorized to award monetary relief, that does not transform the nature of that relief to an equitable remedy. DeWolff also challenges LaRue’s historical analysis, claiming that there is scant historical evidence underlying LaRue’s assertion that surcharge was typically available where, as here, there were no out-of-pocket losses (but, rather, just a decline in the value of investments). Finally, DeWolff argues that accepting LaRue’s argument would be inconsistent with several ERISA preemption cases in which the Court held that state-law claims for certain remedies were preempted “precisely because they seek remedies not available” under § 502 of ERISA.

**SIGNIFICANCE**

The Court typically hears at least one ERISA case per term. Most of these cases in recent years have involved either the scope of ERISA preemption or, as here, the interpretation of ERISA’s remedy provisions. In light of the ever-increasing prevalence of 401(k) and other defined contribution plans, this is one of the most important ERISA cases taken up by the Court in recent years.

Section 502 of ERISA has long been controversial. The provision is critically important because of ERISA’s broad preemption rules. Under § 514 of ERISA (29 U.S.C. § 1144), any law that “relates to” an ERISA-covered employee benefit plan is preempted by ERISA. This preemption rule means that any state laws that attempt to impose liability relating to an ERISA-covered plan are preempted. Thus, if ERISA itself does not provide a remedy, a plaintiff will not be able to obtain any recovery even if the plaintiff has suffered losses as a result of alleged misconduct.

In this case, whether DeWolff breached its ERISA fiduciary duties is not at issue. In fact, that issue has not been addressed by the lower courts, and the courts may ultimately conclude that there was no breach. Rather, the lower courts dismissed LaRue’s lawsuit on the basis that, even if there was a fiduciary breach, ERISA does not provide a remedy. Thus, the ultimate issue in this case is whether ERISA provides individual participants in defined contribution retirement plans with any remedy in the event of fiduciary breaches that do not have plan-wide consequences.

The Court’s decision in *LaRue* may substantially impact ERISA “stock drop” cases, of which dozens have been filed in recent years (e.g., the *Enron* and *Worldcom* cases). In those cases, plaintiffs have alleged that losses they experienced as a result of their 401(k) plan’s investment in their employer’s stock are recoverable under ERISA. Most of these suits have been “tag-alongs” to securities lawsuits involving the same basic allegations. Although there has been no final judgment in favor of a plaintiff in any of these ERISA “stock drop” cases, billions of dollars of settlements have been entered into with respect to these
cases that have survived motions to dismiss. If the Court rules in favor of DeWolff in this case, defendants in the stock drop cases may be less likely to settle, since they may be able to obtain dismissal of the stock drop cases at an early stage on the basis that no remedy is available under ERISA.

In conclusion, LaRue is an important ERISA case, with implications that go beyond the particular facts of the case. The Court’s holding in LaRue will impact the viability of ERISA claims in many circumstances involving defined contribution retirement plans.

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ENEMY COMBATANTS

Does the Military Commissions Act of 2006 Violate the Suspension Clause?
by Vikram Amar and Whitney Clark

PREVIEW of United States Supreme Court Cases, pages 126–133. © 2007 American Bar Association.

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ISSUES
Do aliens who are detained by the United States government as enemy combatants at Guantanamo Bay, Cuba, have any right to challenge the legality of their confinement via a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination?

If aliens detained at Guantanamo Bay do have such rights, does the Military Commissions Act of 2006 violate the Suspension Clause of Article I, Section 9, of the United States Constitution?

FACTS
In the wake of 9/11, Congress authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided” the attacks of that day or “harbored such organizations or persons.” Pursuant to this authorization,

President Bush employed military forces in various foreign countries. In connection with these military actions, the United States has seized many “hostile persons” and detained a small percentage of them whom the United States considers “enemy combatants.” Many of these combatants are currently being held at the U.S. Naval Base at Guantanamo Bay, Cuba; there are approximately 340 detainees there now, all of whom are foreign nationals who were captured abroad.

Habeas corpus petitions have been filed on behalf of numerous Guantanamo Bay detainees. In Rasul v. Bush, 542 U.S. 466 (2004), the Supreme Court held that district courts had statutory jurisdiction under 28 U.S.C. § 2241 to consider these habeas petitions. The Rasul Court remanded to the district court for consideration of the merits of petitioners’ claims in the first instance.

Boumediene v. Bush
AND
Al Odah v. United States
DOCKET NOS. 06-1195 AND 06-1196

ARGUMENT DATE:
DECEMBER 5, 2007
FROM: DISTRICT OF COLUMBIA CIRCUIT
In these consolidated appeals, groups of foreign nationals held at Guantanamo similarly filed habeas petitions alleging violations of the Constitution, treaties, statutes, regulations, common law, and the law of nations. Some detainees also raised nonhabeas claims under the federal question statute, and the Alien Tort Act. In the Boumediene cases (which consist of two cases involving seven detainees), the district court granted the government’s motion to dismiss the cases in their entirety. These detainees appealed. In the Al Odah cases, which consist of 11 cases involving 56 detainees, the district judge denied the government’s motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment’s Due Process Clause and the Third Geneva Convention, but dismissed all other claims. In those cases the government appealed and the detainees cross-appealed.

While these appeals were pending, Congress enacted the Detainee Treatment Act (DTA). The DTA amended the federal habeas corpus statute to provide that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” The MCA also eliminates federal court jurisdiction—except to challenge a final CSRT decision that an alien is properly detained as an enemy combatant or to challenge a final criminal conviction issued by military commissions—over “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of such an alien. The MCA further provides that these amendments “shall take effect on the date of the enactment of this Act,” and that they “shall apply to all cases, without exception, pending on or after the date of enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”

The D.C. Circuit subsequently dismissed these consolidated appeals for lack of jurisdiction—concluding that the MCA applies to these cases and eliminates federal court jurisdiction over the petitions. The court of appeals held that the MCA is consistent with the Suspension Clause of the U.S. Constitution, which provides that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The Supreme Court has stated this clause “protects the writ of habeas corpus ‘as it existed in 1789’”—when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus.

The D.C. Circuit concluded “the history of the writ in England prior to the founding” shows that “habeas corpus would not have been available in 1789 to aliens without presence or property in the United States.” The court also and more generally held that, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights protected under the Suspension Clause. The present case before the Supreme Court involves the meaning and constitutionality of the MCA.

**Case Analysis**

Counsel for the Guantanamo Bay petitioners first contend that, in accordance with well-settled rules of statutory construction, the jurisdiction-stripping provisions of the MCA do not apply to habeas cases such as theirs that were pending at the time of the enactment. The petitioners maintain that Congress has not articulated the “specific and unambiguous statutory directive” that the Supreme Court held in Hamdan and INS v. St. Cyr, 533 U.S. 289 (2001), is required to affect a repeal of habeas. The petitioners argue that §7(a) of the MCA purports to strip jurisdiction over two distinct categories of cases—(1) “an application for a writ of habeas corpus” filed by or on behalf of certain aliens, and (2) “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of such an alien.” Section 7(b), which sets out the effective date of §7(a), provides only that §7(a) applies to pending cases that are in the second category. The MCA does

(Continued on Page 128)
not provide—much less contain an "unmistakably clear statement" as required by the Supreme Court's decision in *Hamdan*—that § 7(a) repeals jurisdiction for habeas cases pending on the date of enactment. Arguing that the MCA probably would be deemed an unconstitutional withdrawal of jurisdiction, the petitioners suggest that the Supreme Court use every possible resource of construction to avoid the conclusion that Congress had such intent.

The solicitor general contends that the MCA validly divests the district court of jurisdiction over all habeas corpus petitions filed on behalf of aliens held at Guantanamo Bay as enemy combatants, and substituted a review scheme that permits such detainees to challenge their enemy combatant status only in a petition to the District of Columbia Circuit Court. In the solicitor general's view, the court of appeals correctly rejected the contention made by some of the detainees that the MCA does not apply to pending cases. Section 7(a) amends 28 U.S.C. § 2241 (the federal habeas statute) to eliminate jurisdiction over any petition for a writ of habeas corpus filed by an alien detained as an enemy combatant. And § 7(b) provides that § 7(a) "shall take effect on the date of the enactment of this Act" and "shall apply to all cases, without exception, pending on or after the date of enactment of this Act." The court of appeals observed that the statute "could not be clearer" in its application to all cases, without exception.

Petitioners begin their substantive attack on the MCA, should it apply to them, by pointing out that they would be entitled to the common-law writ of habeas if they were being held in a state or territory of the United States. Petitioners argue that because the United States has "complete jurisdiction and control" over Guantanamo, and because the essence of the writ of habeas corpus is to protect an individual, whether citizen or nonenemy alien, against arbitrary executive detention, the writ, as it existed in 1789 is available to individuals in the petitioners' position.

According to the petitioners, the Supreme Court made clear in *Rasul* that recognizing the right of "persons detained at the [Guantanamo] base" to challenge their detention on habeas was "consistent with the historical reach of the writ of habeas corpus." The petitioners argue this conclusion was not mere dictum: it was necessary support for the Supreme Court's determination that the district court had jurisdiction under the habeas statute to hear claims by aliens held at Guantanamo. Relying heavily on *Rasul*, the petitioners argue that because Guantanamo Bay is within the "territorial jurisdiction" of the United States, the common-law writ of habeas extends to foreign nationals held there: As Justice Kennedy said in his concurring opinion in *Rasul*, "Guantanamo Bay is in every practical respect a United States territory," and "belongs to the United States" extending the "implied protection" of the United States to it. The scope of the writ at common law, argue petitioners, depended not on "formal notions of territorial sovereignty," but on practical questions of jurisdiction and control. Regardless of whether Guantanamo is U.S. sovereign territory, the *Rasul* Court recognized that it is within the "complete jurisdiction and control" of the United States, to the exclusion of any other sovereign.

The petitioners contend that the writ as it existed in 1789 applied in places that were not considered sovereign territory. In *King v. Oxerton*, 82 Eng. Rep. 1173 (K.B. 1668), and *King v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669), for example, the writ was held to run to the Island of Jersey, which was not sovereign English territory. Even before Great Britain in 1813 asserted sovereignty over certain territories in India, the justices of Great Britain's Supreme Court in *Rex v. Mitter* issued writs of habeas corpus to review detention of Indian nationals. According to the petitioners, *Rasul* supports the contention that the thrust of the historical cases is "that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised ... by the Crown.'"

The petitioners further argue that in any event, the United States exercises all of the incidents of sovereignty—plenary authority of the state to make its law applicable in the territory; plenary authority of the state to subject persons within the territory to the processes of its courts; and plenary jurisdiction to punish noncompliance with its laws or regulations—in Guantanamo Bay. And under its indefinite lease with Cuba, the United States may exercise these incidents of sovereignty in perpetuity. The United States exercises all of these powers; Cuba exercises none.

The petitioners also cite *Rasul* for the proposition that the Guantanamo detainees have fundamental due process rights that habeas can vindicate—indefinite detention without access to counsel and without being charged with any wrongdoing unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." The petitioners distinguish their situation from the Supreme Court precedent on which the solicitor general relies, claiming...
those cases denied constitutional rights to aliens outside the United States based on implicit concern of conflict between the Constitution and foreign law. The petitioners claim that recognition of fundamental due process rights for Guantanamo detainees would not conflict with or disrupt the legal systems of any foreign country. But failure to recognize them would leave Guantanamo Bay a legal black hole—a land without law. The petitioners further claim that Johnson v. Eisentrager, 339 U.S. 763 (1950), the primary Supreme Court case that the solicitor general relies on, is inapposite because of the significant differences between the Guantanamo detainees and the German prisoners in Eisentrager. The Germans were enemy aliens tried and convicted by military commissions, captured outside United States territory, and held outside the United States as prisoners of war. In stark contrast, the Guantanamo Bay detainees are not nationals of countries at war with the United States; they deny any wrongdoing; they have never even had access to any tribunal, much less been charged and convicted of wrongdoing; and they are imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Finally, the petitioners argue that even if the Guantanamo Bay detainees do not possess any fundamental rights, they can invoke the Suspension Clause because it enforces a structural, judicial limit on the power of Congress. The court of appeals, relying on Eisentrager, held the Suspension Clause didn’t apply to Guantanamo detainees because, “the Constitution does not confer rights on aliens without property or presence within the United States.” But, argue the petitioners, unlike the Fourth and Fifth amendments of the Constitution, which secure individual rights of “the people” or “persons,” the Suspension Clause secures a judicial remedy for unjustified Executive detention. They contend the Suspension Clause is an essential element of separation of powers, protecting the power of the judiciary to inquire into the lawful basis of Executive detention, and precluding Congress from removing that power except in accordance with the terms of the Clause. No rights are required to challenge a statute that exceeds such a structural limitation on the powers of Congress.

In response, the solicitor general asserts the D.C. Circuit correctly held that aliens held outside the sovereign territory of the United States are not entitled to any of the protections of our Constitution, including those guaranteed by the Suspension Clause, and that there is no basis to upset that long-standing constitutional rule here. The solicitor general argues that even if the detainees could assert rights under the Suspension Clause, they are not entitled to any additional process beyond what the MCA provides because habeas corpus would not have been available to them in 1789.

The text and history of the Suspension Clause, contends the solicitor general, demonstrate that it does not confer rights on enemy combatants seized by our military and held abroad. The solicitor general notes that both of the exigencies for which the Constitution permits suspension of the writ of habeas corpus—rebellion and invasion—pertain to wartime conditions within the United States. And he contends that the fact that the Suspension Clause does not speak to the application of the writ in the context of military operations abroad is powerful evidence that the protection afforded by the Suspension Clause does not extend to overseas detentions of aliens in the first place. It would be absurd, argues the solicitor general, for Congress to have the power to suspend the writ within the United States, but to lack any such authority, regardless of exigency, as to military operations on foreign soil. The solicitor general argues that the founders expected that the Congress and President, together, would determine the appropriate process for individuals detained overseas during military operations, unfettered by the strictures of the Suspension Clause.

The solicitor general further contends that Johnson v. Eisentrager compels the conclusion that the petitioners lack any rights under the Suspension Clause. It is undisputed that petitioners are aliens who have no voluntary connections to the United States and who were seized abroad. In addition, petitioners have at all times been detained outside the United States, and are currently being held at Guantanamo Bay, Cuba, an area that is not a sovereign territory of the United States. Nothing in Rasul, argues the solicitor general, upsets these settled principles. In Rasul, the Court addressed only the question whether the then-existing habeas statute applied to Guantanamo Bay. In answering that statutory question, the Court considered the extent of the “jurisdiction and control” that the United States exercises there. But, claims the solicitor general, whatever relevance those concepts have for judging the jurisdictional scope of the habeas statute, “jurisdiction and control” did not define the substantive reach of the common-law writ. At common law, formal sovereignty was the touchstone, and the King, not the courts, decided whether to extend formal sovereignty to territory over which Britain exercised jurisdiction.

(Continued on Page 130)
and control. The solicitor general cites numerous Supreme Court precedents to support his contention that our own law is in accord with that common-law tradition, and notes that both political branches have recognized Cuba’s ultimate sovereignty over Guantanamo Bay.

Even in contexts to which the Suspension Clause is fully applicable, the Supreme Court held in Swain v. Pressly that Congress may withdraw habeas jurisdiction if it provides an “adequate and effective” alternative remedy. Assuming they win on their argument that the Suspension Clause and the habeas writ protects them, petitioners go on to argue that the MCA is constitutionally inadequate. In particular, they reject the idea that the MCA and DTA provide an adequate substitute for habeas. Only twice has the Court recognized a procedure to be an adequate substitute for federal habeas. The petitioners argue that in both cases—Swain v. Pressley, 430 U.S. 372 (1977), and United States v. Hayman, 342 U.S. 205 (1952)—Congress had crafted new procedures that were virtually identical to the displaced statutory habeas. It is well settled, claim the petitioners, that the Suspension Clause prohibits the substitution of any process that fails to provide the core procedures and remedies available under the preexisting habeas regime. The petitioners contend that the review of CSRT determinations under the DTA does not meet this standard. At a minimum, argue the petitioners, the common-law writ requires an opportunity to present evidence demonstrating the unlawfulness of detention; a neutral and plenary review of all the evidence; a court empowered to order release; speedy resolution of claims; and full representation by counsel.

In the MCA, claim the petitioners, Congress deliberately created a limited and narrow remedy that has none of the hallmarks of habeas. Under the MCA, the sole judicial recourse of a Guantanamo detainee is review under the DTA which does not authorize the D.C. Circuit to review the lawfulness of the detention itself. DTA review is also limited to the information reasonably available to the government. A detainee can’t present additional evidence in a DTA proceeding that might exculpate him or impeach the government’s evidence. CSRT regulations direct the tribunal to presume that government’s evidence is “genuine and accurate,” but the detainee can’t rebut that presumption, or otherwise counter the government’s evidence, because much of it is classified. The DTA denies detainee the assistance of counsel. The CSRT panelists are not neutral, independent decision makers, but are subject to command influence and reversal by superior officers in the chain of command. The CSRT is permitted to rely on evidence obtained by torture or coercion (which Due Process forbids). Finally, the DTA doesn’t authorize the remedy that is at the heart of habeas—the detainee’s release. The petitioners contend that they are entitled to a searching judicial review that permits them to challenge both the factual basis for their detention and their designation as enemy combatants.

By way of response, the solicitor general argues first that the Court should decline to rule on the adequacy of the DTA at this time, but should instead require petitioners to exhaust their available DTA remedies. The solicitor general contends the Supreme Court should not attempt to evaluate the adequacy of the DTA until the D.C. Circuit has had an opportunity to construe the statute and provide the Supreme Court with a concrete setting to examine the operation of the DTA. In any event, the solicitor general argues, Congress has afforded petitioners a constitutionally adequate substitute for challenging their detention. Importantly, notes the solicitor general, the yardstick for judging the adequacy of the DTA alternative would be the limited and deferential role of habeas in the context of wartime detentions. The solicitor general claims that Congress’s chosen system of providing aliens detained at Guantanamo Bay as enemy combatants administrative hearings before a military tribunal, subject to judicial review in the D.C. Circuit, builds additional protections upon those that are available even to conventional prisoners of war under the Geneva Convention. And it was designed to track the requirements for due process sufficient for American citizens in Hamdi v. Rumsfeld, 542 U.S. 507 (2004). The solicitor general asserts that the laws that establish that system—the MCA and the DTA—reflect precisely the kind of consultation between the President and Congress that “strengthens the Nation’s ability to determine—through democratic means—how best” to confront national security threats during an ongoing military conflict while preserving individual liberties. According to the solicitor general, the Defense Department established the CSRT procedures using as a baseline the procedures described by the Hamdi plurality—procedures the plurality deemed adequate under the Due Process Clause and described as “already” existing in Army Regulation 190-8.

Finally, the petitioners argue that their detention is unlawful. No act of Congress, they say, authorizes indefinite military detention based on the government’s expansive definition of “enemy combatant.” In Hamdi, the government claimed the power to imprison “enemy combatants,” a category that was limited to persons who were “part of or supporting forces hostile to the United
States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” The Court found that the Authorization for Use of Military Force (AUMF) authorized military detention of persons falling within this “limited category” because detention of enemy combatants (so defined) was “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”

Nine days after Hamdi was announced, the deputy secretary of defense promulgated a far broader definition of “enemy combatant”—to include anyone who is “part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.” This new definition does not appear in any act of Congress. It is not limited to people who have actually engaged in armed conflict against the United States—it includes citizens of friendly nations whose conduct does not approach any definition of “combat” or whose alleged support for al Qaeda is unintentional. The Boumediene petitioners’ own case demonstrates the extreme breadth of the government’s new definition. They were not in or near any zone of armed conflict; they were not armed; the civilian police in Bosnia took them into custody from their homes; and they were subject to a three-month investigation that concluded that there was insufficient evidence even to detain them further, let alone prosecute them. The government’s position that petitioners are nonetheless detainable indefinitely as “enemy combatants” oversteps any plausible reading of Hamdi.

Petitioners also argue that the AUMF is conditioned on a nexus to the September 11 attacks. The AUMF’s authorization of force is expressly limited to nations, organizations, or persons “associated with the September 11, 2001, terrorist attacks.” Indeed, the President first requested broader authority to use force against persons unconnected with September 11 “to deter and preempt any future acts of terrorism and aggression against the United States,” but Congress refused. The district court misinterpreted the AUMF to authorize the use of force against “those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks. That reading, which the government does not defend, cannot be reconciled with the AUMF’s text or Congress’s deliberate decision not to authorize force against targets unconnected with the September 11 attacks.

Because the AUMF contains no express authorization for detention, the petitioners contend any such authority must be inferred from Congress’s authorization to use “necessary and appropriate force.” The AUMF’s implied authorization to detain, however, does not extend to persons who could not properly be subjected to military force (including the imposition of detention) under the long-understood laws of war. As Hamdi reflects, the power to detain “combatants” inferred from the AUMF’s authorization of “force” goes no further than the situations in which the laws of war themselves authorize military “force” (including military detention). Under the laws of war, individuals who are not affiliated with the armed forces of an enemy state are not “combatants,” but “civilians.” The laws of war permit the use of military force against civilians, but only and for such time as they “take a direct part in hostilities.” This is not a case involving “enemy aliens” because petitioners are not citizens of a nation at war with the United States. The government has never asserted that petitioners themselves “planned, authorized, committed, or aided” the September 11 attacks or “harbored” those who did. Therefore, petitioners’ indefinite detention is unlawful.

The solicitor general contends that the CSRT definition of “enemy combatant” reflects a reasonable implementation of the President’s responsibility to “determine” the object of the use of force authorized by the AUMF. The solicitor general says Hamdi—in which the Supreme Court validated the constitutionality of the detention of an individual who had “associated with” the Taliban but had no direct connection to September 11—forecloses the petitioners’ argument that the AUMF requires a specific nexus between each petitioner and the September 11 attacks. The solicitor general also argues that neither the language of the AUMF, nor the laws of war support the petitioners’ contention that the AUMF imposes territorial limits on the battlefield and precludes the detention of persons found in friendly nations. The AUMF imposes no geographic limits on the President’s authority to use force, and nothing in the law of armed conflict prevents a party to a conflict from taking custody of and capturing enemy combatants captured on the territory of a cooperating state.

(Continued on Page 132)
Finally, the solicitor general argues, the President’s constitutional authority as the commander in chief independently justifies petitioners’ detention even apart from the AUMF. The President in this instance is acting pursuant to his own long-recognized authority and congressional authorization, and that, as the Court famously stated in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), is when “his authority is at its maximum.”

In response to petitioners’ contention that their detention violates the Fifth Amendment, the solicitor general largely reiterates that as aliens captured and held outside the sovereign territory of the United States, under Eisentrager and its progeny, petitioners have no due process or other constitutional rights. The solicitor general also reiterates his contention that nothing in Rasul upset the constitutional holding of Eisentrager. He argues that to construe the single footnote in Rasul, which states: “petitioners’ allegations ... unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States,’ ” as implicitly overruling the substantive Fifth Amendment holding of Eisentrager, thereby jettisoning decades of settled law in a single ambiguous sentence (and in an opinion that went to lengths to avoid overruling the statutory holding of Eisentrager while still finding it outdated), would be implausible to the extreme.

**Significance**

It is technically possible that the Court would be implausible to the extreme. The Court also could resolve the case in very broad terms by invalidating the MCA and ruling on the merits of the detainees’ constitutional claims. It is unlikely that the Court will resolve these cases at either extreme. The MCA was drafted largely in response to the Court’s Hamdan decision, and appears to express a clear congressional intent to apply the law to all habeas cases (and other detention-related claims) of Guantanamo Bay detainees without exception. And it would be unusual for the Court to pass on the merits of the detainees’ claims without the benefit of full lower court rulings on the merits.

Prior “War on Terror” cases also support the notion that the Court is unlikely to hand down a broad ruling. The Court’s decisions in Hamdi, Rasul, and Hamdan suggest that it is interested in engaging in a process with the political branches to address the complex and novel issues surrounding these disputes. It is possible, as the petitioners suggest, that the Court (or at least part of it) did tip its hand on the detainees’ substantive constitutional right to habeas in Rasul—suggesting that Guantanamo Bay is essentially equivalent to sovereign territory of the United States and that therefore aliens detained there are entitled to some constitutional protections. But the opinions in the present cases will likely address these constitutional issues more fully, and in a manner that facilitates a continued dialogue between the Court and the political branches.

These cases do arguably differ from prior War on Terror cases in one important respect: in crafting the MCA, the President and Congress participated in a more thorough and involved coordinated policy-making process in which both political branches aired issues pretty fully. In contrast, the DTA (and certainly the AUMF) was worked out quickly and did not involve nearly as much interaction and care between the political branches. Given that the President and Congress have essentially “pooled” their respective constitutional powers, any separation of powers issue is confined to the Court’s perspective of its own constitutional role in these matters, vis-à-vis, the political branches.

Finally, the Court’s decision is likely to have ramifications beyond any future doctrinal complications that may result—both in the United States and abroad. The Court’s ruling will probably come down in June or July of next year—right in the middle of the presidential campaign. As the War on Terror is obviously a critical issue in the eyes of voters, what candidates say about the Court’s ruling may have significant election implications. Many commentators also contend that the Court’s ruling may have implications on the United States’s ability to continue to promote the rule of law globally.

As the ABA’s amicus brief argues, habeas is the cornerstone of the rule of law, which has no force against a government that can arrest and detain at will without judicial review. Numerous amici note that it will be difficult for the United States to assert that developing countries should follow the rule of law if our government can create an area where it isn’t recognized. According to the petitioners and their amici, the world will be watching to see if our nation’s highest Court will revive the United States’ commitment to its own constitutional values and serve as an important global example.
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Is “Me, Too” Evidence Relevant and Admissible to Prove Illegal Bias in Age Discrimination Cases?

by Rhonda Reaves

This case involves a dispute regarding “me, too” evidence. “Me, too” evidence refers to plaintiffs proffering testimony from other employees who allege discrimination by other supervisors of the same corporate employer. In this case, a discharged employee who was suing for age discrimination under the Age Discrimination in Employment Act (ADEA) sought to introduce evidence of other alleged acts of discrimination committed against ADEA covered workers by other supervisory personnel.

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ISSUE

Must a district court in a disparate treatment case admit “me, too” evidence—testimony by nonparty employees alleging discrimination at the hands of other supervisory personnel who played no role in the adverse employment decision challenged by the plaintiff?

FACTS

The plaintiff, Ellen Mendelsohn, 51, worked as a midlevel manager at Sprint/United Management Company (Sprint) for 16 years. On November 22, 2002, Mendelsohn, who was at that time the oldest manager in her unit, was laid off as part of a reduction in force (RIF) at Sprint's headquarters campus in Overland Park, Missouri (Overland Park). The Overland Park RIF was part of a general Sprint downsizing. From October 2001 through March 2003, between 14,000 and 15,000 employees were let go company-wide. In 2003, Mendelsohn sued Sprint in federal court, alleging that she was laid off because of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA).

In support of her allegations, Mendelsohn intended to introduce at trial evidence of five former Sprint employees who were laid off at or around the time of Mendelsohn’s termination. According to Mendelsohn, these former employees were prepared to testify that they, too, believed they were laid off because of their age and that there was a pervasive atmosphere of age discrimination at Sprint.

Before trial, Sprint moved to exclude, among other things, any evidence of Sprint's alleged discriminatory treatment of other employees. The district court granted the motion, forbidding Mendelsohn from offering any evidence that Sprint had a “pattern and practice, culture or history of age discrimination.” Instead, the district court ruled that only persons “similarly situated” to Mendelsohn would be permitted to testify about alleged discrimination at Sprint. The district court defined “similarly situated employees” as those who were laid off by Mendelsohn’s own supervisor in close temporal proximity to Mendelsohn’s

Sprint/United Management Co. v. Mendelsohn
Docket No. 06-1221

ARGUMENT DATE: DECEMBER 3, 2007
FROM: THE TENTH CIRCUIT
termination. Because none of Mendelsohn's five proffered witnesses were supervised by Mendelsohn's supervisor, their testimony was excluded. Following an eight-day trial, the jury returned a verdict for Sprint, finding that Sprint did not discriminate against Mendelsohn based on age. Mendelsohn appealed. A panel of the Tenth Circuit reversed in a 2-1 decision. The majority held that the district court erred in excluding, in toto, the testimony of the five ex-employees. Sprint appealed to the U.S. Supreme Court. The Court granted certiorari to resolve a conflict in the courts about the proper role of “me, too” evidence in such cases.

**Case Analysis**

In this case the district court excluded evidence of five witnesses for the plaintiff who would have testified to other incidents of alleged discrimination by the employer. Generally, a district court's evidentiary ruling is entitled to deference and will only be reversed if the district court made a clear error. The Tenth Circuit found that the district court committed such an error in this case.

The ADEA makes it unlawful “to discharge any individual ... because of such individual's age.” 29 U.S.C. § 623(a)(1). The plaintiff must show that the employer intentionally discriminated against her. (These types of intentional discrimination cases are referred to as disparate treatment cases.)

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the Supreme Court established a three-part burden-shifting regime to prove discriminatory intent. The plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for its action. If the employer makes such a showing, the burden shifts back to the plaintiff to prove pretext, meaning that the employer's stated reason is not the true reason and the true reason was illegal discrimination.

The type of evidence that can be admitted as proof of pretext is at issue in this case. In *McDonnell Douglas v. Green*, the Supreme Court described evidence of pretext broadly to include, among other things, the employer's general policy and practice with respect to minority hiring. Since *McDonnell Douglas*, courts have struggled to define what constitutes relevant evidence of pretext in discrimination cases consistent with federal rules of evidence. The Federal Rules of Evidence govern what evidence is to be admitted at trial. Federal Rule 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Federal Rule of Evidence 403 permits courts to exclude otherwise relevant evidence if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” This means that relevant evidence may be excluded when it would cause undue delay and waste trial time, when it would create a risk of confusing the issues or misleading the jury, or when the evidence would cause unfair prejudice. In discrimination cases, courts look to the Federal Rules of Evidence to determine what evidence of pretext is relevant and admissible to prove intentional discrimination.

Some courts have interpreted Rules 401 and 403 to exclude so-called “me, too” evidence in discrimination cases. “Me, too” evidence is evidence of alleged discriminatory acts taken against “similarly situated” workers. In a Tenth Circuit case, *Aramburu v. The Boeing Co.*, 112 F.3d 1398 (1997), for example, plaintiff Aramburu alleged, among other things, that he was subjected to disparate discipline because of his Mexican ancestry. Aramburu sought to introduce evidence that nonminority employees who committed similar work infractions were treated differently than he was (i.e., they were not discharged). The Tenth Circuit limited Aramburu to evidence of “similarly situated employees.” It defined “similarly situated employees” as “those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.” The Tenth Circuit concluded that the testimony Aramburu offered did not meet the test of “similarly situated employees.”

Sprint seeks to extend *Aramburu*’s definition of similarly situated employee to the Mendelsohn case. According to Sprint, since the five witnesses Mendelsohn sought did not work under the same supervisor as Mendelsohn, that such evidence was properly excluded by the district court. The Tenth Circuit rejected Sprint’s argument and limited *Aramburu* to cases involving allegations of discriminatory discipline.

In this appeal, Sprint seeks to have the Supreme Court reverse the Tenth Circuit’s decision. Sprint makes two basic arguments: (1) that the disputed evidence was properly excluded as irrelevant under Federal Rule of Evidence 401, and (2) even if the evidence was relevant, it was nevertheless properly excluded under Federal Rule of Evidence 403. Sprint argues that the excluded tes-

(Continued on Page 136)
timony was irrelevant to determine whether Mendelsohn was discrimi-

nated against. According to Sprint, in these types of intentional dis-

crimination cases, the focus is on the biases of the decisionmaker. In this

case, the decisionmakers were Mendelsohn’s supervisors—either her

immediate supervisor Jim Fee or Fee’s immediate supervisor, Paul

Reddick. Sprint further argues that testimony by other witnesses who

did not share Mendelsohn’s supervi-

sor was irrelevant to determine bias

against Mendelsohn.

Sprint next argues that even if the evidence was relevant, it was never-

theless properly excluded. Sprint argues that the testimony of the five

additional witnesses would have caused undue delay and wasted trial

time. Sprint further argues that if admitted, the evidence would have

caused undue prejudice to Sprint. More specifically, the admission of the testi-

mony would have created jury sympathy for Mendelsohn and animosity towards

Sprint.

Mendelsohn, on the other hand, argues that the disputed evidence was relevant and admissible. Mendelsohn argues that the disputed evidence was relevant to establish whether Sprint had a “culture of discrimination.” A culture of discrimination is relevant, Mendelsohn argues, because it tends to explain why a particular supervisor might have engaged in discrimination. According to Mendelsohn, Sprint’s work culture played a critical role in shaping the conduct and attitudes of officials and workers alike and is a telling indicator of Sprint’s discrimi-

nary environment. As Mendelsohn describes: “fellow supervisors typi-

cally have for years worked under the same leadership, been guided by

and interpreted the same memos, e-

-mails, speeches and comments from the same managers, had access to

the same computer files, attended the same or similar meetings, and

talked in overlapping circles at the same lunches or around the same

water coolers.” Therefore,

Mendelsohn argues, discriminatory

remarks and action by other super-

visors against other older workers

bear directly on Mendelsohn’s claim

that Sprint’s proffered reason for

her layoff (a general business down-

turn) was merely a pretext for age discrimination, especially when the specific methods used to choose the excluded witnesses for layoff were similar to the allegedly discriminatory manner in which Mendelsohn had been selected for layoff. According to Mendelsohn, evidence of a pattern or practice of discrimination informs whether an individual was the victim of intentional discrimination and is therefore rele-

vant to her claims.

Second, Mendelsohn refutes Sprint’s claim that the disputed evidence was properly excluded under Rule 403. Mendelsohn argues that the testimony of the five disputed witn-

esses would not have cause inordi-

nate delays in the trial nor would the testimony have confused the

jury. Finally, Mendelsohn disputes that any prejudice would have resulted from the admission of the disputed testimony. Alternatively, any possible confusion or prejudice could have been overcome with an appropriate instruction to the jury from the court.

SIGNIFICANCE

Rarely in employment discrimination cases does the decisionmaker admit to discrimination. In most cases the plaintiff asks the factfinder to infer a decisionmaker’s discriminatory intent from proof of collateral facts, such as the treatment of similarly situated employees. This “me, too” evidence can be powerful circumstantial evidence of an intent to discriminate. Plaintiffs offer testi-

mony from others who believe they were discriminated against to show an atmosphere or culture of discipli-

nism. If admitted, this evidence allows plaintiff to argue to the factfinder that “where there is smoke there is fire.” “Me, too” evidence can also be highly prejudicial to employers. The employers in this situation argue that unproven allega-

tions of discrimination by others who are not similarly situated to the plaintiff are irrelevant to the case at hand and were only offered to “muddy the waters” with the jury.

This case could provide guidance to lower courts on the proper evalu-

ation of “me, too” evidence. Four cir-

uits have held “me, too” evidence wholly irrelevant. Five circuits have held that “me, too” evidence may be excluded under Federal Rule of Evidence 403. The outcome of this case can have a substantial effect on future discrimination cases. A ruling that such “me, too” evidence is irrelevant would seriously limit the type of evidence plaintiffs can offer as proof of discriminatory intent and hamper legitimate discrimination claims. A ruling that courts must admit such “me, too” evidence potentially expands the scope of discrimination trials, but it may be that such expansion is consistent with the intent of McDonnell Douglas.
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**Alphabetical Index**

**Ali v. Federal Bureau of Prisons et al.** — 52

**Board of Education of the City School District of the City of New York v. Tom F. ex rel. Gilbert F.** — 8

**Boumediene v. Bush and Al Odah v. United States** — 126

**CSX Transportation, Inc. v. Georgia State Board of Equalization** — 64

**Danforth v. Minnesota** — 60

**Department of Revenue v. Davis and Davis** — 67

**Federal Express Corporation v. Holowecski et al.** — 56

**Gall v. United States and Kimbrough v. United States** — 24

**Hall Street Associates, L.L.C. v. Mattel, Inc.** — 81

**John R. Sand & Gravel Company v. United States** — 76

**Klein & Co. Futures, Inc. v. Board of Trade of the City of New York, et al.** — 90

**Knight v. Commissioner** — 100

**LaRue v. DeWolff, Boberg & Associates, Inc.** — 122

**Logan v. United States of America** — 86

**Medellín v. Texas** — 13

**New Jersey v. Delaware** — 118

**New York State Board of Elections et al. v. Torres et al.** — 34

**Riegel v. Medtronic, Inc.** — 113

**Rowe v. New Hampshire Motor Transport Association** — 110
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Snyder v. Louisiana</td>
<td>103</td>
</tr>
<tr>
<td>Sprint/United Management Co. v. Mendelsohn</td>
<td>134</td>
</tr>
<tr>
<td>Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc. et al.</td>
<td>38</td>
</tr>
<tr>
<td>United States v. Santos et al.</td>
<td>29</td>
</tr>
<tr>
<td>United States v. Williams</td>
<td>72</td>
</tr>
<tr>
<td>Watson v. United States</td>
<td>4</td>
</tr>
</tbody>
</table>
Subject Index

Arbitration
Hall Street Associates, L.L.C. v. Mattel, Inc. — 81

Commodities Trading
Klein & Co. Futures, Inc. v. Board of Trade of the City of New York, et al. — 90

Criminal Law
United States v. Santos et al. — 29
Watson v. United States — 4

Criminal Procedure
Danforth v. Minnesota — 60
Snyder v. Louisiana — 103

Employment Law
Federal Express Corporation v. Holowecki et al. — 56
Sprint/United Management Co. v. Mendelsohn — 134

Enemy Combatants
Boumediene v. Bush and Al Odah v. United States — 126

ERISA
LaRue v. DeWolff, Boberg & Associates, Inc. — 122

Federal Courts
John R. Sand & Gravel Company v. United States — 76

First Amendment
New York State Board of Elections et al. v. Torres et al. — 34
United States v. Williams — 72

International Law
Medellin v. Texas — 13

Interstate Boundaries
New Jersey v. Delaware — 118

Medical Devices
Riegel v. Medtronic, Inc. — 113

Motor Carriers
Rowe v. New Hampshire Motor Transport Association — 110

Prisoners’ Rights
Ali v. Federal Bureau of Prisons et al. — 52
**Securities Law**
*Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc. et al.* — 38

**Sentencing**
*Gall v. United States and Kimbrough v. United States* — 24
*Logan v. United States of America* — 86

**Special Education**
*Board of Education of the City School District of the City of New York v. Tom F. ex rel. Gilbert F.* — 8

**Taxation**
*CSX Transportation, Inc. v. Georgia State Board of Equalization* — 64
*Department of Revenue v. Davis and Davis* — 67
*Knight v. Commissioner* — 100
Burdens/standards of proof — As a general matter, the party in a lawsuit asserting a claim or defense has the burden of presenting evidence that establishes the claim or defense. This is known as the burden of proof.

There are three burdens of proof. From the least to the most demanding, they are the preponderance-of-the-evidence burden of proof; the clear-and-convincing burden of proof; and the beyond-a-reasonable-doubt burden of proof. The first two burdens can apply in either criminal or civil cases, while the third applies only in criminal cases and then only to the prosecution.

There are no ready definitions for these burdens. There are, however, working definitions. Under the preponderance standard, the party with the burden of proof is required to come forward with credible evidence establishing that a claim or defense is more likely true than not. Under the clear-and-convincing standard, the party with the burden of proof is expected to present evidence establishing that the claim or defense is quite likely true. Under the beyond-a-reasonable-doubt standard, the prosecution must present such evidence of the defendant’s guilt that a reasonable person would not hesitate to find the defendant guilty. See Victor v. Nebraska, 114 S. Ct. 1239 (1994).

Class action lawsuit — As a general rule, a class action lawsuit is one in which one or several named individuals sue for themselves and others believed to have sustained injuries or losses similar to those sustained by the named plaintiffs, but who, at the time the case is filed, are unknown both as to their identities and their actual numbers. In order for a plaintiff’s lawsuit to be given class action status, the named plaintiff must show that (1) the class is so large as to make it impracticable to specify each and every plaintiff by name, (2) there exist questions of law or fact common to all members of the plaintiff class, (3) the claims of the named plaintiffs are representative of the claims of the unnamed plaintiffs, and (4) the named plaintiffs can fairly and adequately represent the interests of the entire plaintiff class. (Note: Less common is the class action lawsuit in which the class is composed of named and unnamed defendants or in which both the plaintiff’s and the defendant’s side of the case constitute a class.)

Collateral review (see also habeas corpus) — Collateral review is the criminal law’s fail-safe mechanism. It is intended to ensure that a conviction and sentence satisfy the requirements imposed by law, constitutional and statutory. As its name suggests, collateral review looks at a convicted defendant’s trial and in some cases the sentencing proceeding; it is not, however, a second trial. As a general rule, collateral review is limited to issues of law.

To be eligible for collateral review, the petitioning party must be in custody at the time the process begins. Typically but not necessarily, custody means imprisonment. For those convicted of state-law crimes, collateral review is available under state law and federal law, the latter in the form of a petition for a writ of habeas corpus. As a general rule, state-law petitioners must exhaust all avenues of collateral review under state law before filing a federal habeas corpus petition. For federal-law petitioners, federal habeas corpus review is available after certain post-conviction avenues such as a motion to vacate a conviction or sentence have been exhausted.

For both state-law and federal-law petitioners, federal habeas corpus review begins in a trial-level court but, in the collateral-review context, the trial court functions as a reviewing court. However, if the federal habeas corpus petitioner is unsuccessful in habeas court, he or she is permitted, within limiting procedural rules, to seek further review of the habeas court’s decision in the appropriate intermediate federal appeals court and, if unsuccessful there, in the Supreme Court.

Damages — In law, damages means money given to a party whose legal interests have been injured. While there are several types of damages that can be given to an injured party, two of the most prominent types are compensatory damages and punitive damages. An award of compensatory damages is a sum of money intended to make the injured party whole, insofar as this is possible. An award of punitive damages is intended to punish the wrongdoer in order to deter future wrongdoing. Usually, punitive damages go to the injured party and are over and above any award of compensatory damages. However, in some states, a portion of any punitive damages award goes to the state treasury.

Direct review — In American criminal law, a defendant is tried once, but the trial itself can be reviewed many times by many appellate courts. One channel of review is called direct review because it is initiated by a first appeal as a matter of statutory right. Direct review also is wide-ranging review because the convicted defendant is permitted to raise all procedurally proper issues regarding the trial court’s disposition of his or her case — including issues of law, issues of fact, and issues concerning the trial judge’s use of discretion.

If the first appeal is resolved against the convicted defendant, appellate rules permit the defendant to seek discretionary review by still higher courts, generally by the highest court of the convicting state and then by the United States Supreme Court. (In federal criminal cases, the convicted defendant’s initial appeal as a matter of right is to a circuit court of appeals and then as a matter of discretion to the Supreme Court.) If these courts...
decline to hear the defendant's case or hear the case but decide against the defendant, or if the defendant defaults on his or her right to seek discretionary review, the direct review process ends and it is said that the defendant's conviction and sentence are final. At this point, the only avenue of relief from a conviction or sentence — retrial, resentencing, or outright release — is collateral review, defined above.

**Discovery** — Discovery is a pretrial device in which each party to a lawsuit seeks information from the other party as well as from non-parties believed to have knowledge relevant to the issues in the case. The plaintiff seeks information through discovery to make his or her case; the defendant seeks information to support any defenses that may be available.

**Diversity** — This term is used whenever a federal court has jurisdiction over a case that does not involve a question of federal law. While there are several types of diversity jurisdiction, the most common type has two requirements: (1) the plaintiff and the defendant are residents of different states; (2) the dollar amount of the dispute between the parties is at least $75,000, exclusive of interest and costs.

**En banc** — The term literally means “full bench.” Cases in the federal circuit courts of appeals are typically heard and decided by panels of three judges who are drawn from all the judges in that circuit. In rare instances, the court may subsequently agree to have the case reargued, this time in front of more or all of the judges from that circuit.

**Habeas corpus** — Under the federal habeas corpus statute, 28 U.S.C. § 2254 (1994), a person held in state/local custody who believes that his or her custody violates federal law — typically, the Constitution — may challenge that custody by filing a petition for a writ (i.e., an order) of habeas corpus in federal district court. If the petitioner wins, he or she must be released or retried, at the option of the prosecuting authority.

**Per curiam opinion** — This term literally means “the opinion of the court,” the Supreme Court or any appellate court. Because the opinion is the court’s opinion, there is no indication of which justice/judge wrote it.

**Plurality opinion** — This term denotes an opinion of the United States Supreme Court in which there is no majority opinion; that is, fewer than a bare majority of five justices were able to agree on the legal basis for the Court’s action in affirming, reversing, or vacating a lower court decision.

In some cases, the Court’s opinion can be a **partial plurality opinion**. A partial plurality opinion is one in which at least one part of the opinion represents the views of four or fewer Justices. For an example of a partial plurality opinion, see **Hubbard v. United States**, 115 S. Ct. 1754 (1995) (Parts IV and V, a plurality of three Justices; Parts I, II, III, and VI, a majority of six Justices).

**Preemption** — Under the Supremacy Clause, U.S. Const. art. VI, § 2, federal law — whether based on the Constitution, a statute, or a treaty — takes precedence over state or local law on the same matter. In other words, if federal law addresses a matter, either expressly or by implication, it trumps and renders unenforceable any state or local law on the matter.

**Qualified immunity** — Qualified immunity is a defense that can be raised by a government employee whenever there is uncertainty about the lawfulness or unlawfulness of certain actions taken by the employee, actions claimed by the plaintiff to be unlawful. A government employee can avoid a trial under this defense if the employee can show that, at the time of the complained-of action, he or she could not have known that it violated the law.

**Strict scrutiny** — Strict scrutiny is a searching level of judicial review applied to governmental actions — federal, state, and local — challenged as unconstitutional. Strict scrutiny requires the governmental actor to show that it had a compelling reason to take the challenged action and that the action taken goes no further than necessary — is narrowly tailored — to advance the cited compelling reason.

**Summary judgment** — This is the name of a procedural device available to either party to a civil lawsuit that enables one or the other party to win without a trial. A party seeking summary judgment is entitled to a judgment in its favor if there is no genuine dispute about the pertinent facts, and, based on those undisputed facts, the law compels a judgment for the party who has asked for a favorable ruling.
Contributing Editors

<table>
<thead>
<tr>
<th>Alternative Dispute Resolution/Special Education</th>
<th>Constitutional Law</th>
<th>First Amendment</th>
<th>Labor Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jay E. Grenig</td>
<td>Thomas E. Baker</td>
<td>David Hudson</td>
<td>Barbara J. Fick</td>
</tr>
<tr>
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<td>Florida International University</td>
<td>First Amendment Center</td>
<td>Notre Dame Law School</td>
</tr>
<tr>
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<td>Pepperdine University</td>
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<td>School of Law</td>
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<td>Fourth Amendment</td>
<td>John Hussbaumer</td>
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<tr>
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<td>Fordham University</td>
<td>Thomas M. Cooley Law School</td>
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<tr>
<td>Civil Procedure/Federal Courts</td>
<td>Criminal Procedure</td>
<td>Health Law</td>
<td></td>
</tr>
<tr>
<td>Linda Mullenix</td>
<td>Alan Raphael</td>
<td>Elliott B. Pollack</td>
<td></td>
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<td>Loyola University Chicago</td>
<td>Pullman &amp; Comley, LLC</td>
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<td>Immigration Law</td>
<td></td>
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<td>Washburn University</td>
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<td>(312) 427-2737 (ext. 382)</td>
<td></td>
</tr>
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<td>Commercial Law</td>
<td>Death Penalty</td>
<td>Indian Rights</td>
<td></td>
</tr>
<tr>
<td>Ralph C. Anzivno</td>
<td>Kathy Swedlow</td>
<td>Nell Jessup Newton</td>
<td></td>
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<td>Thomas M. Cooley Law School</td>
<td>UC Hastings College of the Law</td>
<td></td>
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<td>San Francisco, CA</td>
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</tbody>
</table>

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