Litigation
Getting Down to Business: Early Observations on The Roberts Court's Business Cases

*By Allyson N. Ho**

In a review of what would prove the last term of the Rehnquist Court, Judge Richard Posner argued that "the more that constitutional law dominates the Court's docket," the more politicized the Court will become, as "the more that appointments to the Court focus on the candidate's likely position in constitutional cases rather than on competence in business law and other statutory fields."[1] Of course, "constitutional law" and "business law" are not mutually exclusive. And even "business law" or "statutory" cases can generate political controversy. But as other commentators have noted, the Supreme Court's business docket under Chief Justice John Roberts has been marked not only by greater consensus among the justices, but also by interesting lineups that cut across "political" or "ideological" lines.[2]

Of the thirty business cases decided in the October 2006 Term,[3] twenty-two were decided unanimously, or with only one or two dissenting votes. That trend continued in the October 2007 Term, with several of the most significant business cases decided by wide margins. Among the fifteen cases in which the U.S. Chamber of Commerce participated, for example, twelve were decided by margins of 7 to 2 or higher and five were unanimous. Two preemption cases were decided by margins of 8 to 1 and 7 to 2.[4] Two closely watched arbitration cases were decided 6 to 3 and 8 to 1.[5] And the Court decided a pair of employment discrimination cases dealing with retaliation claims by margins of 7 to 2 and 6 to 3.[6]

Not only does the Roberts Court's business docket produce greater consensus among the justices, but it also challenges conventional notions of individual justices as "conservative" or "liberal." For example, Justice Ginsburg authored a majority opinion favoring business and federal preemption,[7] while Justice Alito authored an opinion for the Court against business and in favor of an employment discrimination plaintiff.[8] Justice Thomas was the lone dissenter in one of the arbitration cases, reiterating his view that the Federal Arbitration Act does not apply in state-court proceedings,[9] while Justice Souter wrote for the Court in the blockbuster—and more closely divided—Exxon Valdez punitive damages case, in which a five-justice majority ordered a $2 billion reduction in a punitive damages award against Exxon that resulted from the 1989 Exxon Valdez oil spill.[10]

As the Exxon case shows, the Roberts Court's business docket is not all sweetness and light. In the October 2007 Term, for example, the Court deadlocked 4-4 in a high-profile preemption case.[11] And in a case hailed as the most important securities case in decades, the Court narrowly rejected by a 5-3 vote the so-called "scheme liability" theory, which would have permitted a company's accountants, banks, and vendors to be held liable as primary violators for securities fraud.[12] Indeed, the *Stoneridge* decision is notable as one of the few business cases that divided the Court along conventionally ideological lines. But it is the exception that proves the rule.

These are just early data points for the Roberts Court, to be sure. Nonetheless, it seems likely that the Court will continue to devote a significant portion of its docket to business cases,[13] and that those cases will continue, on the whole, to elicit greater consensus among the justices. In particular, there is every reason to expect that the Court's business decisions will continue to be animated by practical concerns about the costs and unpredictability of civil litigation—concerns that cut across ideological lines and defy conventional notions of individual justices as "conservative" or "liberal."

Punitive Damages

Over the last decade, the Supreme Court has issued a series of closely divided rulings establishing significant new constitutional rights for corporate defendants hit with large punitive damage awards. It began with the 1996 decision in *BMW v. Gore*[14] and continued in *State Farm v. Campbell*.[15] Justices Scalia and Thomas sharply dissented from these decisions, expressing no greater enthusiasm for developing innovative rights under the Due Process Clause for corporate defendants than for other litigants.[16] Justice Ginsburg also dissented in these cases.[17] In the 2006 Term, when the Court returned to the issue in *Philip Morris USA v. Williams*, all eyes were on Chief Justice Roberts and Justice Alito to see if they might join Justices Scalia, Thomas, and Ginsburg, and "flip" the Court on the issue of punitive damages.

In *Philip Morris*, the company had been hit with a $79.5 million punitive damage award by an Oregon jury in favor of the spouse of a deceased smoker. Philip Morris presented two arguments under the federal Due Process Clause. First, it argued that the $79.5 million award reflected a nearly 100:1 ratio between punitive and compensatory damages and was therefore unconstitutionally excessive under the *BMW v. Gore* and *State Farm* framework. Second, Philip Morris argued that the trial judge erred in failing to instruct the jury not to consider harm to non-parties—namely, millions of other Oregon smokers—in determining the size of the punitive damage award. In a 5-4 opinion authored by Justice Breyer—and joined by the Chief Justice and Justice Alito, along with Justices Kennedy and Souter—the Court accepted the second claim, and remanded on that basis alone; it did not rule on the first claim.[18] Justices Stevens, Scalia, Thomas, and Ginsburg dissented.

The *Philip Morris* decision may suggest a new trend in punitive damages jurisprudence—one in which the Court focuses more on establishing procedural protections against

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arbitrary punitive damage awards *before* they are imposed, such as through jury instructions and other procedural devices, and less on imposing substantive limitations on the size of jury verdicts after the fact.

The Court's most recent punitive damages decision, *Exxon Shipping Company v. Baker*, involved the legality of punitive damages under federal maritime law, not the federal Due Process Clause.[19] In its review of a $2.5 billion punitive damages award resulting from the Exxon Valdez oil spill in 1989, the Court considered three issues: (1) whether a ship owner may be liable for punitive damages without acquiescence in the actions causing harm; (2) whether punitive damages have been barred implicitly by federal statutory law making no provision for them; and (3) whether the award of $2.5 billion in that case is greater than maritime law should allow in the circumstances. With Justice Alito not participating, the Court was equally divided on the first question of derivative liability. As to the second question, the Court held unanimously that the silence of the Clean Water Act on the issue did not bar an award of punitive damages in addition to compensatory damages for economic loss. Finally, as a matter of federal maritime common law, the Court held 5 to 3 in an opinion authored by Justice Souter that the $2.5 billion punitive damages award was excessive and set an upper limit on such awards of a 1:1 punitive-to-compensatory damages ratio.

Writing for the majority, Justice Souter focused on the "stark unpredictability" of punitive damages awards that, in turn, suggest an intolerable unfairness within the civil justice system.[20] Seeking to address that unfairness, the Court tied punitive damages to compensatory damages using a concrete ratio—settling on a 1:1 rule after surveying various state provisions and common law rules. In reaching that conclusion, the Court emphasized that the compensatory damages in the *Exxon* case were already quite high, and that the defendant was more reckless than acting "primarily by a desire for gain."

Because two of the five votes in the *Exxon* majority came from Justices Scalia and Thomas, who do not interpret the Constitution to impose any limitations on state-law punitive damages awards, the Court's 1:1 ratio appears unlikely to gain traction as a matter of constitutional law. Only time will tell whether Justice Souter's *Exxon* opinion will provide broader guidance outside the relatively narrow context of federal maritime law on punitive damages awards more generally, but the comprehensiveness of the opinion may well lend itself to wider application—particularly in light of the Court's recognition of "the implication of unfairness that an eccentrically high punitive damages award causes."

Dormant Commerce Clause, Federal Preemption

As the punitive damages cases demonstrate, although some critics contend that the Court's voting patterns tend to fall uncomfortably along political or partisan lines, business appellate lawyers know better. Businesses often challenge state regulations either under the dormant Commerce Clause or as a matter of federal preemption—just as they challenge large punitive damage awards under the federal Due Process Clause. But when they do so, their lawyers do not primarily cite Justices Thomas and Scalia, because those justices in fact regularly vote against business in such cases. It is also worth noting that, in the areas of dormant Commerce Clause and federal preemption, Justice Alito seems to be charting a distinct course. He is voting for the dormant Commerce Clause, and for federal preemption—and, at times, against the new Chief Justice and Justices Scalia and Thomas.

In *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,[21] petitioners challenged a New York law that all local trash must be processed at a local government facility, claiming that the rule restricts the free movement of items in interstate commerce and therefore violates the dormant Commerce Clause. The Chief Justice authored a plurality opinion upholding the law and expressing some skepticism about the dormant Commerce Clause, while Justices Thomas and Scalia authored concurring opinions reiterating their longstanding and outright hostility to the doctrine.[22] In contrast, Justice Alito dissented—and thereby demonstrated his willingness to use the dormant Commerce Clause to invalidate state regulations of interstate commerce.[23] Similarly, in *Department of Revenue of Kentucky v. Davis*,[24] Justice Alito (along with Justice Kennedy) parted company from the Chief Justice, Justice Thomas, and Justice Scalia in dissenting from the Court's decision that state tax schemes that tax income earned by out-of-state, but not in-state, bondholders do not violate the Dormant Commerce Clause.

A federal preemption case from the same Term reveals a similar pattern. In *Watters v. Wachovia Bank*,[25] the Court upheld by a 5-3 vote (with Justice Thomas not participating) a controversial 2001 federal regulation preempting state regulation of national banks. In doing so, the majority effectively undermined the ability of state governments to regulate predatory mortgage lending practices, to take one example. The Chief Justice and Justice Scalia dissented, however, joining the opinion of Justice Stevens.[26] Once again, Justice Alito departed from them, and joined Justice Ginsburg's majority opinion instead.

If *Watters* exemplifies the unconventional lineups produced by business cases, then *Riegel v. Medtronic* illustrates the occasionally surprising consensus they can create. In an opinion authored by Justice Scalia—one of the dissenters in *Watters*—the Court held 8-1 that federal law preempts state-law products liability claims challenging the design and labeling of medical devices that the federal Food and Drug Administration has found to be safe and effective.[27] In reaching that conclusion, Justice Scalia's opinion emphasized that federal preemption is, if anything, even more appropriate where state tort suits are concerned than state statutes or regulations, because they would presumably reflect at least some type of cost-benefit analysis, whereas juries only see harm without any corresponding benefit[28]—again, a reflection of the Court's ongoing concern about the vagaries of civil litigation. Interestingly enough, the lone dissent in *Riegel* was authored by Justice Ginsburg, who wrote for the Court in favor of preemption in the *Watters* case decided the previous Term.

In *Rowe v. New Hampshire Motor Transport Association*, the Supreme Court ruled unanimously that state-law regulation of tobacco shipments was preempted by the Federal Aviation Authorization Act's preemption of laws "related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1).[29] The Court simply followed its earlier precedent broadly construing the statute's preemption provision, and concluded that not even the good intentions of state regulators—here, in attempting to combat underage smoking—can justify ignoring the plain command of the language chosen by Congress.[30]

Antitrust, Class Actions

The Roberts Court has decided a remarkable number of antitrust cases thus far, with October Term 2006 as the most active on that front since October Term 1992. There is also a common theme to this recent flurry of activity. During the October 2005 and 2006 Terms, the Court rejected the claims of antitrust plaintiffs by a combined 46-5 vote. Moreover, of the five dissenting votes, two came from Justice Thomas—arguably the Court's most "conservative" justice—while three came from Justices Stevens and Ginsburg—arguably the Court's most "liberal." That leaves a broad consensus in the middle of the Court generally hostile to broad antitrust liability—informed by skepticism about the ability of courts to distinguish anti-competitive from pro-competitive conduct and by concern about the serious consequences for litigants and markets alike when courts fail to do so.[31]

In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, for example, the Court unanimously reversed the Ninth Circuit on a predatory bidding claim.[32] The Court had previously expressed its skepticism of predatory pricing claims in its 1993 decision in *Brooke Group v. Brown & Williamson*.[33] *Brooke Group* established a two-part test that plaintiffs must meet in order to state a claim of predatory pricing. In *Weyerhaeuser*, the Court applied the same two-part test to predation on the buy side of the market.

In *Credit Suisse First Boston v. Billing*,[34] the Court rejected an antitrust class action against ten leading investment banks for administering certain initial public offerings for technology companies with the blessing of the Securities and Exchange Commission. In an opinion authored by Justice Breyer, the Court granted implied antitrust immunity and recognized the need to allow federal officials to regulate the stock market without fear that their efforts will be undermined by litigation.[35]

In particular, Justice Breyer expressed concern that in the absence of immunity, "antitrust plaintiffs may bring lawsuits throughout the nation in dozens of different courts with different nonexpert judges and different nonexpert juries."[36] "In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible," Justice Breyer explained, "it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate similar fact patterns consistently."[37] In the majority's view, such uncertainty is unacceptable not only from a rule of law standpoint, but also because of the chilling effect it would have on "a wide range... conduct that the securities law encourages."[38]

Similar concerns animated the majority opinion in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[39] which held that resale price agreements should be evaluated under the rule of reason to determine whether there is a violation of Section 1 of the Sherman Act—expressly overruling the 96-year-old rule of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[40] which provided that resale price maintenance agreements were per se unlawful. In overruling *Dr. Miles*, the Court made clear its concern that rigid per se rules might block competitive practices—noting that "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[41] At the same time, the Court recognized that such agreements may have "anticompetitive effects" that should "not be ignored or underestimated."[42] But the Court nevertheless concluded that such anticompetitive effects could be appropriately addressed under the rule of reason, when applied in "a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[43]

The risk of allowing plaintiffs to capture pro-competitve behavior by casting too wide a net in their pleadings also animated the Court's decision in *Bell Atlantic v. Twombly*, which involved allegations that the "Baby Bell" telephone companies had conspired in violation of Section 1 of the Sherman Act.[44] In an opinion authored by Justice Souter, the Court reiterated that mere parallel conduct between competitors is not enough to state a Section 1 claim of conspiracy.[45] In *Twombly*, the Baby Bells could have easily engaged in the alleged conduct unilaterally and in their own self-interest. So it was not enough for the plaintiffs merely to allege the existence of an agreement. They were also required to allege facts about the agreement, sufficient to make it plausible, and not merely conceivable, that they could be entitled to relief.[46]

By rejecting the inadequately pled complaint in *Twombly*, the majority also demonstrated its concern with the high risks of expensive discovery and in terrorem settlements. The Court recognized that antitrust discovery, in particular, can be ruinously expensive—so much so that it can lead companies to settle even frivolous suits rather than incur such costs, which frequently amount to millions of dollars.[47] By requiring plaintiffs to plead facts that support a plausible theory of liability, frivolous antitrust claims can be defeated at the pleading stage, thereby avoiding the cost and expense of discovery and reducing the incentives for extortionate settlements—which are particularly great in the class-action context.[48] In *Twombly*, for example, the putative class included hundreds of millions of telephone consumers over a long period of time, so the potential liability was massive.[49]

In a decision animated by concern about the growing cost of discovery in antitrust cases, the Court reasoned that "only by taking care to require allegations that reach the level suggesting conspiracy... can [we] hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence."[50] Otherwise, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings" because "[j]udges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."[51]

That same concern about the potentially enormous costs of discovery and its role in leveraging in terrorem settlements similarly animated the Court's decision in *Stoneridge*, hailed as the biggest securities case in a generation.[52] The issue in *Stoneridge* was whether shareholders of companies that commit securities fraud should be able to sue investment banks, accounting firms, lawyers, and other third parties that allegedly participated in the fraud, even if those entities never made fraudulent statements. That concept of expanding liability to third parties is commonly referred to as "scheme liability." The concept of scheme liability, in turn, was a response to the Supreme Court's holding in an earlier case, *Central Bank v. First International Bank*,[53] which rejected secondary liability for aiding and abetting in private securities litigation. Under a scheme liability theory, plaintiffs' lawyers argued that law firms, accounting firms, and banks could be held liable as primary violators under the securities laws.

In one of the few business decisions that has divided the Roberts Court along conventional ideological lines, the Supreme Court rejected that analysis in a 5-3 opinion (with Justice Breyer not participating), holding that such claims were properly dismissed because the investors did no rely on anything the third-party suppliers said or did when they decided to purchase the securities.[54] In an opinion authored by Justice Kennedy, the Court took very seriously the practical consequences of embracing the plaintiffs' approach to the securities laws. In prior cases interpreting the securities laws, the Court had already acknowledged the "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."[55] The *Stoneridge* Court observed that adopting the plaintiffs' approach would expose a new broader class of defendants to those risks, which could in turn increase the cost of doing business to protect against these threats.[56] "Overseas companies with no other exposure to this country's securities laws might also be deterred from doing business here."[57] Further, if broader potential liability made it more costly to be a publicly traded company in this country, securities offerings could shift away from domestic capital markets.[58]

The potential significance of *Stoneridge* is perhaps best exemplified by the sheer number of amicus or "friend of the court" briefs filed by various individuals and entities interested in the outcome of the case. All told, more than 100 separate individuals and entities filed briefs, with the Bush Administration, sixteen former Securities and Exchange Commission chairmen, commissioners, and officials, The New York Stock Exchange and NASDAQ, the American Bankers Association, the American Institute of Certified Public Accountants, and the U.S. Chamber of Commerce weighing in with briefs opposing scheme liability, while the Regents of the University of California, thirty-two states, and various state retirement systems filed briefs supporting the class-action plaintiffs.

The Court's decision in *Stoneridge* in no way prevents the Securities and Exchange Commission from using its enforcement authority to bring actions against third parties such as the *Stoneridge* defendants. What *Stoneridge* does prevent is an *expansion* of liability in a class-action system notorious for huge transaction costs. As in *Exxon* and *Twombly*, the Court's decision in *Stoneridge* appears "not so much pro-business as it is massively skeptical of civil litigation," as Kenneth Starr has characterized the Supreme Court generally.[59]

Arbitration

In October Term 2007, the Court decided two arbitration cases by wide margins, further reflecting broad consensus among the Justices. In *Preston v. Ferrer*, the Court held 8 to 1 that, when parties agree to arbitrate all issues arising under a contract, the Federal Arbitration Act (FAA) preempts a state law that vests primary jurisdiction in a state administrative agency.[60] In reaching that conclusion, the Court merely followed its precedents recognizing the FAA's preemptive force generally, and found no basis for adopting a different rule where state administrative (as opposed to judicial) proceedings are concerned.

In *Hall Street Associates v. Mattel, Inc.*, the Court held 6 to 3 that the FAA's statutory grounds for vacating arbitral awards cannot be expanded by private contract.[61] Although the Court acknowledged the competing policy arguments presented by the parties for their respective positions, it found the statutory text dispositive and thus left the policy considerations to Congress. The arbitration cases, like the business cases generally, thus reflect not only broad consensus among the Justices, but also deference to Congress's choices in weighing competing concerns and making policy judgments.

Employment Discrimination

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, the Court held in a 5 to 4 decision that the statutory 180-day deadline for filing a discrimination lawsuit cannot be stretched to allow employees to sue for a salary discrepancy today that arose from sex or race discrimination that occurred years ago.[62] Handed down at the close of the October 2006 Term, the *Ledbetter* case generated considerable controversy and led some to deride the Roberts Court as "pro business" at the expense of workers.

But in October Term 2007, the Supreme Court overwhelmingly ruled in favor of workers, and against companies, in a series of cases involving employee rights. As Patricia Millett—who served in the Office of the Solicitor General under both the Clinton and Bush administrations—recently testified before the Senate Judiciary Committee, those decisions "provide an important counter-balance to any claim that the Roberts Court is somehow innately hostile to employees or supportive of business at the expense of workers."[63]

For example, before the Court were a pair of cases involving whether two federal antidiscrimination laws—42 U.S.C. § 1981 and the Age Discrimination in Employment Act (ADEA)—contained an implied right of action for retaliation against employees who allege discrimination. The Court ruled in favor of the employee plaintiffs in both cases, holding that persons who are fired for complaining about age and race bias are protected under federal law. The first case, *Gomez-Perez v. Potter*,[64] involved a postal worker alleging that the U.S. Postal Service had illegally retaliated against her after she sued for age discrimination. The 6 to 3 decision, authored by Justice Alito, allows her lawsuit to continue. The second case, *CBOCS West v. Humphries*,[65] involved a supervisor at a Cracker Barrel restaurant who alleges he was fired after complaining about race discrimination. The Court held 7 to 2, in a decision by Justice

Breyer, that the lawsuit could proceed under Section 1981.

In *Meacham v. Knolls Atomic Power Laboratory*,[66] the Court held in an opinion authored by Justice Souter that an employer defending a disparate impact claim under the ADEA bears the burdens of both production and persuasion in showing that the employment decision was based on "reasonable factors other than age." Hailed as an important victory for age discrimination plaintiffs, *Meacham* was decided by a 7 to 1 vote, with Justice Breyer not participating.

In *Sprint/United Management Co. v. Mendelsohn*,[67] the Court addressed the admissibility of so-called "me, too" evidence regarding claims of discrimination by nonparties and unanimously held that such evidence cannot automatically be excluded, but "requires a fact-intensive, context-specific inquiry" to determine its admissibility. And in *Federal Express Corp. v. Holowecki*,[68] the Court held 7-2 that an age discrimination suit could go forward even though the employee plaintiffs filed their complaint with the EEOC on the wrong form.

These employment cases are "notable," as Patricia Millett has pointed out, "not only for their consistently employee-favorable outcomes, but more importantly for (i) the respect they demonstrate for Congress's leadership role in making the difficult yet critically important policy choices and balances that inhere in the regulation of workplace relationships, and (ii) the broad consensus on the Court in these cases."[69]

CONCLUSION

The broad consensus among the Justices reflected in the Supreme Court's business cases cannot be explained or understood merely by labeling the Roberts Court as "pro business." Indeed, last Term the Court issued a higher percentage of decisions favoring criminal defendants than companies, yet no one would accuse the Court of being "soft on crime."[70] Rather, the remarkable consensus among the Justices on the business cases appears to reflect, at least in part, shared concerns about the civil justice system that cut across ideological lines and defy conventional notions of individual justices as "conservative" or "liberal."

Endnotes

1 Richard A. Posner, *The Supreme Court, 2004 Term:Foreword: A Political Court*, 119 Harv. L. Rev. 31, 67 (2005). *See also The Roberts Court Gets Down To Business: The Business Cases*, 34 Pepp. L. Rev. 599, 601 (2007); Kenneth W. Starr, *The Roberts Court & The Business Cases*, 35 Pepp. L. Rev. 541 (2008).

2 *See*, *e.g.*, Michael S. Greve, *Does the Court Mean Business?*, Federalist Outlook No. 26, Am. Enterprise Inst. for Pub. Pol'y Res. (Sept. 2007); Peter B. Rutledge, *Looking Ahead: October Term 2006*, 2006 Cato Sup. Ct. Rev. 361.

3 The designation of cases that implicate "business" interests is necessarily imprecise. With that caveat, I have adopted the metric employed by the U.S. Chamber of Commerce in assessing cases that raise issues important to companies.

4 Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008); Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008).

5 Hall Street Associates, Inc. v. Mattel, Inc., 128 S. Ct. 1396 (2008); Preston v. Ferrer, 128 S. Ct. 978 (2008).

6 CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008); Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008).

7 127 S. Ct. 1559 (2007).

8 CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008).

9 Preston v. Ferrer, 128 S. Ct. 978 (2008).

10 Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

11 Warner-Lambert Co. v. Kent, 128 S. Ct. 1168 (2008) (mem.).

12 Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008).

13 According to the U.S. Chamber of Commerce, about 40 percent of the Court's docket during the October 2007 Term dealt with cases important to companies, which is similar to the prior term and up from 31 percent two years ago. *See* David G. Savage, *High court is good for business*, L.A. Times at A-1 (June 21, 2007) (available online at http://articles.latimes.com/2007/jun/21/nation/na-scotus21).

14 517 U.S. 559 (1996).

15 538 U.S. 408 (2003).

16 *See e.g.*, *Gore*, 517 U.S. at 598 (Scalia, J., dissenting); *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting);

17 *See*, *e.g.*, *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting).

18 *See* Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. (2007).

19 *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008). Exxon sought review of the punitive damages award under both federal maritime common law and the Due Process Clause, but the Supreme Court granted review only on the federal maritime law question.

20 *Id.* (quoting BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 626 (1994) (per curiam)).

21 127 S. Ct. 1786 (2007).

22 *Id.* at 1798 (Scalia, J., concurring in part); *id.* at 1799 (Thomas, J., concurring in the judgment).

23 *Id.* at 1803 (Alito, J., dissenting).

24 128 S. Ct. 1801 (2008).

25 127 S. Ct. 1559 (2007).

26 *Id.* at 1578 (Stevens, J. dissenting, joined by Roberts, C.J., and Scalia, J.).

27 Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008).

28 *Id.* at 1008.

29 128 S. Ct. 989 (2008).

30 As noted *supra*, the Court evenly divided on the question whether state laws pertaining to fraud in the approval of drugs by the FDA are preempted—and thus left standing a ruling against preemption by the Vermont Supreme Court. Warner-Lambert Co. v. Kent, 128 S. Ct. 1168 (2008) (mem.).

31 As Justice Breyer has explained, "the threat of antitrust mistakes... means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law encourages." Credit Suisse Sec. (USA), LLC v. Billing, 127 S. Ct. 2383, 2396 (2007).

32 549 U.S. 312, 127 S. Ct. 1069 (2007).

33 509 U.S. 209 (1993).

34 127 S. Ct. 2383 (2007).

35 *Id.* at 2395.

36 *Id.*

37 *Id.*

38 *Id.* at 2396.

39 127 S. Ct. 2705 (2007).

40 220 U.S. 373 (1911).

41 *Id.*

42 *Id.*

43 *Id.*

44 127 S. Ct. 1955 (2007).

45 *Id.* at 1961.

46 *Id.* at 1065-66.

47 *Id.* at 1967.

48 *Id.*

49 *Id.* at 1962 (respondents "represent a putative class consisting of all subscribers of local telephone and/or high speed internet services... from February 8, 1996 to present" (internal quotation marks and citation omitted).

50 *Id.* at 1967.

51 When the Court first announced its decision in *Twombly*, there was wide speculation that it may herald a brave new world in which all plaintiffs must plead with greater specificity. But the Court appeared to throw cold water on that theory just a few weeks later in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam). In *Erickson*, which reversed the dismissal of a pro-se prisoner's section 1983 claim, the Court cited *Twombly* for the proposition that complaints need not allege specific facts, so long as they provide fair notice to the defendant of the nature of the claim and the grounds on which it is based. *Id.* at 2198.

52 Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008).

53 511 U.S. 164 (1994).

54 *Id*. at 761, 766.

55 *Id.* at 772 (citing Blue Chip Stamps v. Manor Drug Stores, 431 U.S. 723, 740-41 (1975)). Although she dissented in *Stoneridge*, Justice Ginsburg has recently warned that "[p]rivate securities fraud actions... if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007*).* Indeed, the Roberts Court has acted to rein in securities litigation generally. For example, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), a unanimous Court held that the statutory bar against class actions alleging misrepresentation "in connection with the purchase or sale" of securities also barred class actions alleging fraud in connection with an investor's "holding" of securities.

56 *Stoneridge*, 128 S. Ct. at 772.

57 *Id.*

58 *Id.*

59 *See* Starr, *The Roberts Court & The Business Cases*, 35 Pepp. L. Rev. at 541. For an opposing view, *see* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. Times Magazine (Mar. 16, 2008) (available online at http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html). *See also* Eric Posner, *Is the Supreme Court Biased in Favor of Business?*, Slate: Convictions (Mar. 17, 2008) (available online at http://www.slate.com/blogs/blogs/convictions/archive/2008/03/17/is-the-supreme-court-biased-in-favor-of-business.aspx) (critiquing Rosen's argument that the Supreme Court is increasingly "pro-business").

60 128 S. Ct. 978 (2008).

61 128 S. Ct. 1396 (2008).

62 127 S. Ct. 2162 (2007).

63 *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, 110th Cong. 7-28 (2008) (statement of Patricia Ann Millett) (available at http://judiciary.senate.gov/testimony.cfm?id=3485&wit_id=7314). In Millett's view, "the Supreme Court's decisionmaking in business cases reflects broad consensus—a consensus that crosses traditional liberal/conservative lines—on deference to the laws that Congress writes and the policy judgments that the statutory text and Congress's actions and inaction reflect." *Id.*

64 128 S. Ct. 1931 (2008).

65 *Id*. at 1951.

66 *Id*. at 2395.

67 *Id*. at 1140.

68 *Id*. at 1147.

69 *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, 110th Cong. 7-28 (2008) (statement of Patricia Ann Millett) (*available at* http://judiciary.senate.gov/testimony.cfm?id=3485&wit_id=7314).

70 *See Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, 110th Cong. 7-28 (2008) (statement of Patricia Ann Millett) (*available at* http://judiciary.senate.gov/testimony.cfm?id=3485&wit_id=7314).