

BUSINESS AND THE SUPREME COURT



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EXECUTIVE SUMMARY

During the past few months—in connection with both the Presidential election and speculation about Supreme Court vacancies over the next year or two—there has been much attention to the work of the U.S. Supreme Court. Issues of “social” import—abortion, gay marriage, and civil rights—tend to dominate the public discourse. Yet, there are a large number of cases the Court hears each term that affect, either directly or indirectly, the business community. Cases involving issues of copyright protection, preemption, employment discrimination, tort liability, and environmental regulations all have a bearing on the marketplace. Indeed, in any given term, the Court typically hears more of these types of cases than it does cases of broader “social” interest.

In the past two terms, the Court has decided cases involving due process limits on punitive damage awards, copyright infringement, preemption of state tort law, employment discrimination, and violations of international law and the extraterritorial reach of U.S. law. This term the Court will address age discrimination in employment, liability for environmental cleanup costs, and state restrictions on the interstate shipment of wine.

There have been a number of recent circuit court rulings that may find their way to the Court in the next several terms. These rulings involve bankruptcy filings in asbestos cases, the constitutionality of business tax credits granted by states, and the preemptive effect of federal food and drug law on personal injury cases. Moreover, if class action reform passes through Congress, and the Supreme Court faces more of these cases because of removal from the state courts, the Court will play an even more substantial role in the tort and civil justice arenas.

This paper surveys business-related cases recently and currently before the Court, to give a flavor of the sorts of issues the Court often grapples with, and focuses on three recent circuit court decisions that may appear before the Court in a future term.

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Introduction

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I. Business Cases Recently Before the Court

The most important case for business interests in the 2002-2003 term was *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which dealt with the constitutionality of punitive damages awards. By a vote of 6 to 3, the Court vacated a \$145 million punitive damages award from Utah that was 145 times the amount of compensatory damages in the

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case. The Court held that punitive damages were impermissibly awarded in this case “to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country” and violated due process. *Id.* at 420. Justices Scalia, Thomas, and Ginsberg dissented. Scalia and Thomas reasoned that the Due Process Clause did not provide substantive protection against the size of punitive damage awards, *id.* at 429-430, while Ginsberg stated that, “this Court has no warrant to reform state law governing awards of punitive damages.” *Id.* at 438.

In the 2002-2003 term, the Court also issued a number of rulings in copyright cases, including *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (where the Court unanimously held that a trademark owner had to show “actual dilution” of its famous mark rather than merely “likely” dilution to prevail under the Federal Trademark Dilution Act), and *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (where the Court unanimously held¹ that unaccredited copying of a work with an expired copyright did not violate the Lanham Act). From these decisions, it appears that the Court will hold trademark and copyright holders to a strict standard of proof in claims involving trademark dilution or copyright violations. In *Moseley*, the Court required objective proof of actual injury to the economic value of the mark, and in *Dastar*, the Court held that, “[t]he words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers.” *Dastar*, 529 U.S. at 33

Also in the 2002-2003 term, the Court heard a number of cases involving preemption challenges brought by businesses, which were sustained in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) (holding that a provision of California's Holocaust Victim Insurance Relief Act (HVIRA) requiring any insurer that did business in California and that sold insurance policies in Europe which were in effect during Holocaust-era to disclose certain information about those policies to the California Insurance Commissioner or risk losing its license, impermissibly interfered with the President's conduct of foreign affairs, and was preempted on that basis)² and *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003) (holding unanimously that an order of the Louisiana Public Service Commission that prohibited the utility from including extended reserve shutdown units as available to affiliates and that entitled customers to credit for overpayment of equalization payments was barred by federal preemption)³, and were rejected in *Pharmaceutical Research & Manufacturing of America v. Walsh*, 538 U.S. 644 (2003) (holding that Maine's prescription drug rebate program, under which enrollees could purchase prescription drugs from participating Maine pharmacies at discounted price, with the discount reimbursed out of rebate payments collected from participating drug manufacturers, and under which any drug manufactured by a nonparticipating manufacturer could not be dispensed to a Medicaid beneficiary without the prior approval of State Medicaid administrator, did not impose a disparate burden on out-of-state manufacturers in violation of Commerce Clause)⁴, *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (holding that boating accident tort claims were not preempted by the Federal Boat Safety Act)⁵, and *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (holding unanimously that the "Any Willing Provider" (AWP) provisions of Kentucky Health Care Reform Act, which prohibited health benefit plans from discriminating against providers willing to meet terms and conditions for plan participation, or against chiroprac-

tors, were laws regulating insurance, and thus saved from preemption by the Employee Retirement Income Security Act (ERISA)).⁶

The Court almost always hears at least one employment discrimination case per term, and 2002-2003 was no exception. During that term, the Court disappointed employer interests by unanimously holding in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003)⁷ that a Title VII plaintiff need not provide direct evidence of discrimination in order to receive a mixed-motive jury instruction. In *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004)⁸, the Court rejected a "reverse" discrimination claim under the Age Discrimination in Employment Act (ADEA) and held that "[t]he text, structure, purpose and history of the ADEA, along with its relationship to other federal statutes . . . show[] that the statute does not mean to stop an employer from favoring an older employee over a younger one." *Id.* at 1248-49. Employers feared that a contrary result would have created great havoc, especially with regard to many benefit plans (including early retirement programs). *Jones v RR. Donnelley & Sons, Co.*, 124 S. Ct. 1836 (2004)⁹ involved consolidated suits in which current and former African-American employees sued their employer for race discrimination under § 1981, rather than Title VII, as is typically done. The question before the Court was what statute of limitations period applied to the actions. The Court unanimously held that a § 1981 cause of action is governed by the federal "catch-all" four-year statute of limitations if the claim was made possible by a post-1990 enactment, and the employees' hostile work environment, wrongful termination, and failure-to-transfer claims were governed by the federal "catch-all" limitations period. This case is significant for employers and businesses because the advantages of bringing race claims under Section 1981 (four years to file a claim, no exhaustion requirement before the EEOC, and no damages cap as there is under Title VII) will likely result in more cases being filed under this statute.

In one non-employment related case with an impact on businesses decided in the 2003-2004 term,

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the Court limited the scope of the Alien Tort Statute in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004)¹⁰ by holding that the statute granted federal courts jurisdiction to hear a “very limited” set of federal common law causes of action for violations of international law. *Id.* at 2754. The decision suggests that ATS plaintiffs alleging violations of all but the most well established international norms might well have difficulty surviving motions to dismiss in the future. However, companies active in the global marketplace will need to remain alert to the risk of ATS litigation, and Justice Scalia, who concurred in part and concurred in the judgment and filed an opinion, did not view the Court’s pronouncement as decisive because he disagreed with the Court’s “reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms . . . the judicial lawmaking role it invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.” *Id.* at 2769-70.

F. Hoffman-Laroche, Ltd. v. Empagran S. A., 124 S. Ct. 2359 (2004)¹¹ was an important decision regarding the extraterritorial reach of the U.S. antitrust laws to foreign conduct. The case was an antitrust class action brought on behalf of foreign and domestic purchasers of vitamins, alleging an international price-fixing conspiracy by manufacturers and distribu-

tors. The Court held that where the price-fixing conduct significantly and adversely affected customers both outside and within United States, but the adverse foreign effect was independent of any adverse domestic effect, the Foreign Trade Antitrust Improvements Act (FTAIA) domestic injury exception did not apply, and thus, neither did Sherman Act, to claims based solely on foreign effect.

II. Significant Cases in the 2004-2005 Term

As with previous terms, the Court this term is poised to decide a number of cases that will impact businesses both directly and indirectly. On the employment discrimination front, the Court this term is deciding whether disparate impact claims will be allowed under the Age Discrimination in Employment Act (ADEA) in *Smith v. City of Jackson*, (Docket No. 03-1160). For years, the courts of appeals have been divided over whether plaintiffs suing under the ADEA can pursue disparate impact claims. The Court has come close to deciding this issue twice already—once in 1993 (where the Court mentioned, but did not decide, the controversy) and again in 2002, when the Court agreed to review *Adams v. Florida Power Corp.*, but then dismissed the writ of certiorari as “improvidently granted.” 535 U.S. 228 (2002).

The Court has also agreed to hear *Cooper Industries, Inc. v. Aviall Services, Inc.* (Docket No. 02-1192) from the Fifth Circuit, which involves a dispute over environmental cleanup costs incurred at four aircraft engine maintenance facilities in Texas. A successor property owner, Aviall Services Inc., is seeking to recover an equitable share of its clean-up costs from the property’s prior owner, Cooper Industries, Inc. The parties disagree as to whether Aviall can use the Superfund for this purpose even though it cleaned up its property voluntarily, after consultations with Texas state officials, without first litigating the issue with the United States Environmental Protection Agency.

This term the Court also deals with the question whether Michigan may restrict the ability of out-of-state wineries to direct-ship wine within in three cases:

Granholm et al. v. Heald et al. (Docket No. 03-1116) and *Michigan Beer & Wine Wholesalers Ass'n v. Heald et al.* (Docket No. 03-1120) and *Swedenburg v. Kelly* (Docket No. 03-1274), each from the Sixth Circuit. Here the Court will have to balance limitations against interstate economic discrimination placed on states by Article One's Commerce Clause and the state regulatory powers extended in Section 2 of the Twenty-First Amendment.



III. What The Future Holds

There are a number of recent circuit decisions that may make their way to the Supreme Court in the next few terms, all of which implicate business interests.

A. An Asbestos Ruling from the Third Circuit

The scope of asbestos-related litigation and its impact on a wide variety of businesses cannot be underestimated. Asbestos litigation is the longest running mass tort in U.S. history.¹² Asbestos litigation could ultimately cost companies as much as \$275 billion, an amount that exceeds all estimates for the cost of the Superfund clean up sites combined, Hurricane Andrew, or the September 11 terrorist attacks. Asbestos defendants span the wide range of American business; more than 6,000 entities have been named as defendants in

an asbestos personal injury claim.¹³ A total of \$54 billion has already been spent on asbestos litigation, and about 65% of compensation has gone to nonmalignant claims.¹⁴ The litigation has spread far beyond the asbestos and building products industries; the list of defendants now ranges across 75 out of 83 different types of industries in the U.S.¹⁵ As one asbestos litigator put it bluntly, “they’re 8,000 companies that have the problem and each of those have four sister companies and so we’re now talking about the entire economy and unless you guys all want to go out of business, you have to look at these companies, because everybody is related to somebody that has the A word connected with them because everybody has got the problem.”¹⁶

In recent years, a large percentage of asbestos-related suits have been brought by the presently unimpaired. The tort system has proven largely unable to cope with the influx of unimpaired plaintiffs, with the result that the claims of plaintiffs who have been seriously injured are often lost in the shuffle and that damages awarded for similar claims can vary wildly. Moreover, attempts to craft class-action solutions to the asbestos litigation crisis outside of bankruptcy have failed.¹⁷ As a result, in 1994, Congress enacted § 524(g) of the Bankruptcy Code, which contains special provisions relating only to bankruptcies involving asbestos liability. These provisions were intended to be a grant of express authority to the bankruptcy courts to enter supplemental injunctions that would channel all current and future asbestos claims—including claims against certain third parties that the plan proponent might designate—to a special trust funded by the debtor. In these “prepackaged” bankruptcies the company and claimant agree on a settlement plan before a Chapter 11 filing is made. The strategy lumps all claims into a subsidiary, which is then put into bankruptcy protection, and creates a fund to pay current and future claims.¹⁸

However, these “prepackaged” bankruptcies may not be easy to come by for many companies. The Third Circuit recently rejected a proposed \$1.2 billion asbestos-liability settlement plan for a U.S. unit of ABB, Ltd, a potential setback for other companies that

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also are hoping to put asbestos-related problems behind them by filing for bankruptcy court protection. The Third Circuit sided with the plaintiffs—ailing claimants or people who have been exposed and could develop health problems—and faulted the structure of the proposed settlement on two counts.¹⁹ The court ruled the plan unfairly extended protection from liability to two ABB units that weren't in bankruptcy—ABB Lummus Global and Basic, Inc.²⁰ The court also ruled that the plan wrongly favored current claimants, including those who had already received payments, over future claimants, and held that the class of unimpaired plaintiffs did have standing to challenge Plan confirmation.²¹

This is one of the first cases to address this section of the bankruptcy code, and the ruling could lead other companies to modify their proposed asbestos settlements. If other courts differ from the Third Circuit in their interpretation of the code provision, the Supreme Court may ultimately have to interpret provision of the bankruptcy code, which could impact thousands of business in this country.

B. Circuit Split in Tort Law Preemption Cases

As seen in prior terms, preemption is an issue of particular interest to business that receives frequent review by the Court. On July 20, 2004, the Third Circuit Court of Appeals joined five other circuits in finding that personal injury suits are improper for medical devices approved by the Food and Drug Administration (FDA) through its Pre-Market Approval (PMA) procedures. In *Horn v. Thoratec Corporation*, 376 F.3d 163 (3d Cir. 2004), the plaintiff (the deceased patient's executrix) brought a product liability suit against a heart pump manufacturer alleging defective design and manufacture and failure to warn of alleged defects. A divided Court of Appeals panel held that the plaintiff's claims were preempted by Section 360k(a) of the Medical Device Amendments (MDA) to the Food, Drug and Cosmetic Act. The Third Circuit specifically joined the Sixth and Eleventh Circuits in finding that a state claim attacking the safety of a medical device is preempted if (1) the FDA has established specific federal requirements that are applicable to that particular device, and (2) the state claim is different from, or in addition to, the specific federal requirements.²²

The plaintiff relied primarily on *Medtronic v. Lohr*, 518 U.S. 470 (1996), where the Supreme Court held that the FDA's approval of a pacemaker did not result in preemption of the plaintiff *Lohr's* state claims.²³ The Third Circuit distinguished *Lohr* by stating that the heart pump in the case before it (the HeartMate) received FDA approval through the rigorous § 360e(c) PMA process, not through the 510(k) "substantial equivalence" process that was at issue in *Lohr*. The Third Circuit also concluded that the plaintiff's claims would impose requirements on the defendant that would differ or add to the requirements imposed by the FDA, and thus, if the plaintiff's claims were successful, they might require the defendant to alter its product design and warnings, amounting to requirements different from, or in addition to, the federal requirements imposed by the FDA.²⁴



The Eleventh Circuit differs from its sister circuits on this preemption issue. In *Goodling v. Medtronic, Inc.*, 167 F.3d 1367 (11th Cir. 1999), the 11th Circuit ruled that § 360k(a) does not preempt common law claims involving PMA-approved devices. The Third Circuit's ruling is good news to the medical device industry. Ultimately, however, the Supreme Court may revisit MDA pre-emption, and the current split among the circuits only heightens this prospect.

C. Constitutionality of Business Tax Credits

A panel of the 6th Circuit issued a decision on October 19, 2004 that has wide-reaching implications for how states entice businesses to open shop (or keep shop open) inside their boundaries. For decades, policymakers and state legislatures have been developing schemes to lure businesses to their states, keep the ones they have, and create more jobs, and nationwide, these subsidies and tax breaks have reached an estimated annual value of nearly \$50 billion.²⁵ *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004) involved a challenge to local property tax abatements and investment tax credits granted to DaimlerChrysler to induce it to remain in Toledo, Ohio. The Sixth Circuit held that while the property tax abatement did

not violate the Commerce Clause, and the abatements and the credits did not violate Ohio's equal protection clause, the investment tax credits did violate the Commerce Clause.

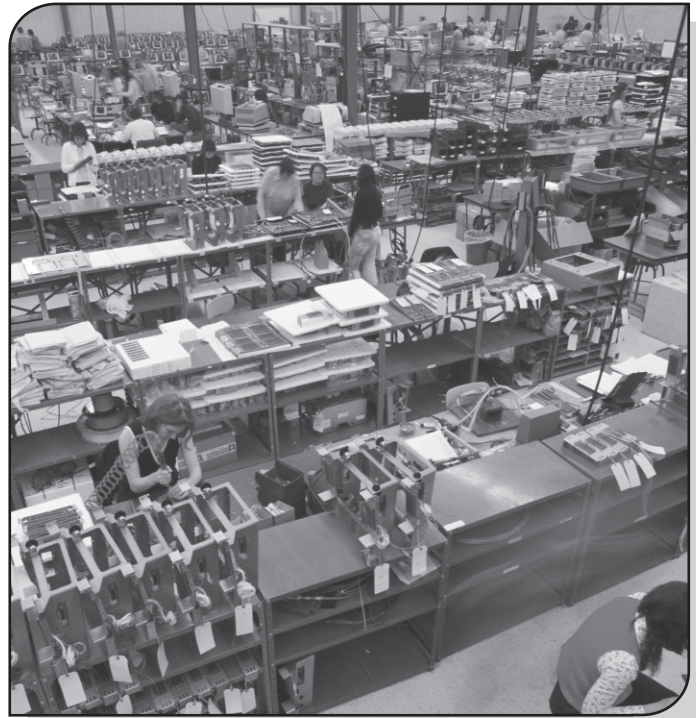
In 1998, DaimlerChrysler entered into an agreement with the City of Toledo to construct a new vehicle-assembly plant near the company's existing facility in exchange for various tax incentives.²⁶ The total value of the tax incentives, which included both investment tax credits and personal property tax exemptions, totaled approximately \$280 million.²⁷ Plaintiffs argued that these incentives discriminated against interstate commerce by granting preferential treatment to in-state investment and activity, and thus violated the Commerce Clause of the U.S. Constitution and the Equal Protection Clause of the Ohio Constitution.²⁸ The district court held that neither incentive violated the Commerce Clause.²⁹ The Sixth Circuit panel began its opinion with the principle that, "[I]n general, a challenge credit or exemption will fail Commerce Clause scrutiny if it discriminates on its face or if, on the basis of a sensitive, case by case analysis of purposes and effects, the provisions will in its practical operation work discrimination against interstate commerce by providing a direct commercial advantage to local business."³⁰

Relying on such cases as *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (where the Court held unconstitutional amendments to New York's securities transfer tax that aimed to offset the competitive advantage that the transfer tax otherwise created for out-of-state exchanges that did not tax transfers), *Maryland v. Louisiana*, 451 U.S. 725 (1981) (where the Court held that a Louisiana statute that imposed a first-use tax on natural gas extracted from the continental shelf in an amount equivalent to the severance tax imposed on natural gas extracted in Louisiana unquestionably discriminated against interstate commerce in favor of local interests), and *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984) (where the Court invalidated a New York franchise tax that gave corporations an income tax credit based on the portion

of their exports shipped from New York), the panel held that Ohio's investment tax credit could not be upheld under the Commerce Clause of the United States Constitution because the economic effect of the tax credit was to encourage further investment in-state at the expense of development in other states and that the result hindered free trade among the states.³¹

In contrast, the Court upheld the personal property tax exemption because "the conditions imposed on the receipt of the Ohio property tax exemption are minor collateral requirements and are directly linked to the use of the exempted personal property. The authorizing statute requires only an investment in new or existing property within an enterprise zone and maintenance of employees. The statute does not impose specific monetary requirements, require the creation of new jobs, or encourage a beneficiary to engage in an additional form of commerce independent of the newly acquired property. As a consequence, the conditions placed on eligibility for the exemption do not independently burden interstate commerce."³² The Court also rejected plaintiff's equal protection challenge, by first finding that the tax credit and the exemption provision classify on the basis of locality, a classification that is not inherently suspect (and thus they need only satisfy rational basis review), and then holding that "[t]he purpose of the Ohio statutes—to encourage industrial development and economic stimulation of the state's economically troubled areas—clearly has a reasonable nexus to the tax provisions."³³

If the decision stands, it could have a far-reaching impact on the four states under the court's jurisdiction—Ohio, Kentucky, Tennessee and Michigan—as well as other states with similar tax credit programs. Economists have argued that such targeted incentives are unnecessary for economic growth and unfair to those who do not receive them.³⁴ An appeal to the full 6th Circuit on this far-reaching issue is probably inevitable, and a petition to the Supreme Court may not be far behind.



Conclusion

From the large number of business-related cases the Supreme Court hears each term, to the variety of business-related cases in the circuits that may come before the Court on review in the near future, the Court is clearly an important institution in terms of its impact on the marketplace. While most of the public may be concerned about the Court will rule on so-called "hot button" social issues that may come before the justices in the future, businesses should clearly be watching what the future of the Court holds and how the justices may vote on the many business-related cases that come before them.

ENDNOTES

- 1 Justice Breyer did not take part in the decision.
- 2 Justice Ginsberg wrote a dissenting opinion, which Justices Stevens, Scalia, and Thomas joined.
- 3 Justice Thomas delivered the opinion of the Court.
- 4 Justice Breyer concurred in part and concurred in the judgment and filed an opinion; Justice Scalia concurred in the judgment and filed an opinion; Justice Thomas concurred in the judgment and filed an opinion; and Justice O'Connor concurred in part and dissented in part and filed an opinion, in which Chief Justice Rehnquist and Justice Kennedy joined.
- 5 Justice Stevens delivered the opinion of the Court.
- 6 Justice Scalia delivered the opinion of the Court.
- 7 Justice Thomas delivered the opinion of the Court.
- 8 Justice Souter delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, Ginsburg and Breyer joined. Justice Scalia filed a dissenting opinion. Justice Thomas also filed a dissenting opinion, in which Justice Kennedy joined.
- 9 Justice Stevens delivered the unanimous opinion of the Court.
- 10 Justice Souter authored the opinion. Justice Scalia concurred in part and concurred in the judgment and filed an opinion, in which Chief Justice Rehnquist and Justice Thomas joined. Justice Ginsburg concurred in part and concurred in the judgment and filed an opinion, in which Justice Breyer joined. Justice Breyer concurred in part and concurred in the judgment and filed an opinion.
- 11 Justice Breyer authored the opinion. Justice Scalia filed an opinion concurring in judgment in which Justice Thomas joined. Justice O'Connor did not participate.
- 12 Stephen J. Carroll, Deborah Hensley, Allan Abrahamse, et al., *Asbestos Litigation Costs and Compensation: An Interim Report*, THE INSTITUTE FOR CIVIL JUSTICE DOCUMENTED BRIEFING, August, 2002, at 2.
- 13 Laura A. Foggan, *Bankruptcy Perils*, legal times, February 17, 2003.
- 14 Carroll, *supra* note 12, at 3.
- 15 *Id.*
- 16 John Aldock Speech at Mealy's Conference, April 15, 2003.
- 17 See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (overturning certification, in "limited fund" class action, of mandatory settlement class including all persons exposed to asbestos by the defendant; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (overturning certification under Rule 23(b)(3) of opt-out class including "exposure-only" plaintiffs).
- 18 Russell Gold and Goran Mijuk, *ABB Fails to Get Court Approval for Asbestos Plan*, WALL STREET JOURNAL, December 3, 2004 at A3.
- 19 *In Re: Combustion Engineering, Inc.*, 2004 WL 2743565 (3d Cir. Dec. 2, 2004).
- 20 *Id.* at *2.
- 21 *Id.* at *3.
- 22 *Horn v. Thoratec Corp.*, 376 F.3d 163, 165 (3d Cir. 2004).
- 23 *Horn*, 376 F.3d at 167.
- 24 *Id.* at 176.
- 25 Michael LaFaive and Jeffrey Weeden, *Are Targeted Incentives Constitutional?* (2004) at <http://www.mackinac.org/article.asp?ID=6681>.
- 26 *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 741 (6th Cir. 2004).
- 27 *Cuno*, 386 F.3d at 741.
- 28 *Id.*
- 29 *Id.* at 742.
- 30 *Id.* at 742 (internal citations omitted).
- 31 *Id.* at 744-45.
- 32 *Id.* at 747.
- 33 *Id.* at 748 and 749.
- 34 LaFaive and Weeden, *supra* note 25.

