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"Fighting to protect the right to jury trial and an independent judiciary for all Americans."

BAD INHERITANCE:

A LOOK AT BUSH'S CIVIL JUSTICE LEGACY THROUGH THE SUPREME COURT'S CURRENT TERM

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INTRODUCTION

On January 5, 2009, a federal judge in Minnesota dismissed over 1,000 cases brought by patients with defective heart devices implanted in their chests.[1] While acknowledging that some patients were injured, the judge lamented that these patients no longer had a remedy as a result of the 2008 Supreme Court ruling in *Riegel v. Medtronic,* which wiped out litigation surrounding these defective medical devices.

On January 9, 2009, in one of its first acts, the new U.S. House of Representatives passed the Lilly Ledbetter Fair Pay Act,[2] a bill that would fix damage done by the Supreme Court in another case, the 2007 decision *Ledbetter v. Goodyear.* In that case, the Court harshly re-wrote civil rights laws by radically limiting the time Ledbetter's wage discrimination suit could be filed.[3]

As in *Riegel*, the *Ledbetter* Court's decision eviscerated fundamental legal rights that had been in place for many years. Also, as in *Riegel*, lower courts around the country have begun using the *Ledbetter* decision to broadly dismiss cases.[4] And also like *Riegel*, the Court left it to Congress to set things right.

All indications are that the Senate will soon join the House and pass legislation to repair the damage done by the *Ledbetter* decision, and President Obama will sign it into law.[5] Fixing *Riegel* will take a bit more time, although Congress has indicated its desire to do so.[6] And it remains to be seen how much additional damage to the civil justice system the Court will do this term, which Congress may or may not have the power, time or political will to fix given the other monumental problems facing the country.

If one asks the average person, they would probably say that U.S. Supreme Court rulings usually have little relevance to their everyday lives. For example, most people assume that our laws, history and democratic traditions are strong enough to ensure that if they were hurt by reckless or corporate misconduct, their right to go to court to remedy that injury would never be taken away by the U.S. Supreme Court. They would be wrong.

Under the leadership of Chief Justice John Roberts, the Supreme Court has signaled a troubling tendency to follow a Bush administration-inspired revolution in laws governing litigation against corporate America. In many instances, the Court's activism has gone unnoticed because the cases seem, at first glance, not to be the watershed cases that generate so much media and popular scrutiny. However, these cases and their underlying effects on the civil justice system will affect average citizens immensely. By undermining people's ability to sue manufacturers of dangerous products, or the ability to punish corporate wrongdoing through monetary penalties, or even the ability of citizens to hold their government officials accountable to the public, the average citizen could be left in a dangerous position by Supreme Court rulings. And the immunity given to corporate miscreants will lead to a more dangerous environment for all Americans.

Because of these ramifications, a closer look is needed at recent and upcoming Supreme Court cases that deal with the civil justice system and what it could mean for consumers. We examine the following issues: preemption, punitive damages, judicial recusal, mandatory binding arbitration, environmental lawsuits and financial regulation.

PREEMPTION - IMMUNITY FROM LAWSUITS

Front and center this term is the alarming trend toward preemption of state liability laws - providing total immunity to companies that may produce dangerous or defective consumer products.

Preemption is not a new issue, but Supreme Court rulings in recent years have twisted this legal principle beyond anything ever envisioned by Congress or even by conservatives on earlier courts. Under our system of government, federal laws and state laws typically co-exist without any problem. States traditionally have enacted laws to protect the health and safety of their citizens, and this use of state police power is firmly part of our history and tradition and enshrined in the 10th Amendment to the U.S. Constitution.[7] Sometimes, however, Congress decides to exclusively regulate in an area and does not want states also regulating. It is perfectly understandable, for example, that 50 states should not each separately regulate the operation of nuclear reactors. If a state were to pass a law regulating that field, there would be a conflict between the federal and state laws. In that case, the Supremacy Clause in the U.S. Constitution applies, which says that in such cases, the federal law is "supreme" and overrides, or "preempts" the state law.[8]

Congress is the only branch of government with the authority to preempt state law, and sometimes it does so clearly. This is "express preemption." More often it is not so clear. In these cases, a court must interpret ambiguous language or even Congress' intent. For many years, the Court always presumed that Congress did *not* intend to preempt state law, supporting the authority of states to develop laws to protect their own citizens. However, this "presumption" against preemption has not been mentioned, and even blatantly ignored, in some recent court decisions.

In addition, the Court recently began to preempt not just state laws that directly regulate corporate conduct (e.g., safety design rules that car manufacturers must follow) but also a state's own general tort laws – the only means injured people have to be compensated if a company violates these safety rules. Providing a tort remedy, which is one of the most traditional of state functions, is plainly not equivalent to a state "regulating." Tort remedies are invoked only to give citizens a remedy for an actual injury, not to prevent some predicted harm. Indeed, the Court has always accorded special deference to state tort laws and protected them from federal preemption.[9] However, the Court has now found preemption of state tort laws where such tort laws have co-existed with federal laws for years without problem, even where there is a complete absence of evidence that this is what Congress intended, and sometimes in violation of the Court's own precedent.[10]

In the 1983 case *Silkwood v. Kerr-McGee*, conservative Justice William Rehnquist joined the Court in upholding a $10.5 million punitive damages award by a local Oklahoma jury for the lethal contamination of a nuclear plant worker, even though the field - nuclear energy - was heavily regulated by the federal government.[11] The Court stressed the distinction between state regulatory law and state tort law, stating that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[12]

Now, in a very radical turn of events, the Court is preempting state tort law.[13] In fact, the Court has gone so far as to ignore a clear statement by Congress not to preempt state tort law,[14] instead looking toward statements that are written by federal agencies (not Congress), to find intent to preempt state liability laws.[15]

The Court first departed from its precedent in a 1992 ruling in *Cippolone v. Ligget Group*, a tobacco case.[16] In that case, a divided Court found that Congress expressly preempted certain lawsuits challenging health warnings on tobacco products in the Public Health Cigarette Smoking Act of 1969. In its analysis, the Court abandoned the difference between state regulation and state tort law, deciding that when Congress preempted state "requirements or prohibitions," it also meant state tort law.[17] Even so, the *Cippolone* Court cautioned that preemption should be read narrowly and there should be a presumption against it.[18]

However, in a 2000 decision, *Geier v. Honda Motor Co*., the Court turned preemption analysis on its head.[19] Here, the Court went so far as to find preemption of state liability laws based on the opinion of Department of Transportation agency officials who wanted to preempt tort law, in spite of Congress' explicit statement in the auto-safety law that tort liability should not be preempted.[20]

After these two radical forays toward preempting state tort law, the Court appeared to swing back to its traditional approach and its distinctions between state regulatory law and state tort law when deciding which laws, if any, were preempted.[21] However, last term saw the Roberts Court revisit and embrace preemption of state tort law once again.

The case was *Riegel v. Medtronics*, concerning the FDA's regulation of certain medical devices – those that require premarket approval under the Medical Device Amendments of 1976.[22] The Court decided to preempt tort claims brought under this act if those devices later injure a patient.[23] The Court found "express preemption by Congress" even though the statute said nothing about liability laws whatsoever and state tort laws had co-existed with this federal law for years. The *Riegel* opinion dropped the traditional distinction between state regulation and state tort law. Most tellingly, in *Riegel,* the Court also seemed to have abandoned the "presumption against preemption." Preemption scholars have called this decision "the most serious blow to consumers." [24]

Key members of Congress said the Court went too far in *Riegel*. Senator Ted Kennedy (D-MA), chairman of the Senate Committee on Health, Education, Labor & Pensions Committee, said, "This decision ignores both congressional intent and 30 years of experience in which FDA regulation and tort liability played complementary roles in protecting consumers from device risks."[25]

According to Representative Henry Waxman (D-CA), now Chairman of the House Energy and Commerce Committee, "The *Riegel* decision protects the financial interests of medical device companies at the expense of patients harmed by FDA approved devices. If manufacturers face no liability, all the financial incentives will point them in the wrong direction: away from ensuring the safety of their medical devices. We must act quickly to address this dangerous situation."[26] Although legislation was introduced in the 110th Congress, no action was taken.[27] Consumer advocates expect legislation to be reintroduced.

This term the Court heard two more preemption cases, but so far, the results are confusing. The *Altria* case, the first case heard this term, revolved around a claim of deceptive advertising against the makers of "light" cigarettes.[28] The Supreme Court was asked to decide whether language in the Federal Cigarette Labeling and Advertising Act of 1965 trumps state laws against false advertising. In a narrow decision, the Court found that the federal law does not preempt Maine's law and consumers still should be able to bring lawsuits against the tobacco industry for false marketing their cigarettes as "light" or "low-tar" when in fact they are not.[29] After *Riegel*, many consumer advocates were happy to see the Court revive its "presumption against preemption" language last seen in the mid-1990s. *Altria* was a test case of sorts for a larger group of cases brought by state Attorneys General on this issue.[30] Presumably the roughly 40 other cases with similar claims may now proceed in state courts around the country.

In *Wyeth v. Levine*, Diana Levine, a guitarist, lost her arm due to gangrene caused by use of the anti-nausea drug Phenargan.[31] Levine won a $7.4 million jury verdict (later reduced to $6.7 million) in the lower courts for her claim that the pharmaceutical giant Wyeth failed to warn of this particular side effect. Wyeth knew that injecting the drug intravenously could cause gangrene and encouraged other methods of delivery on its physician insert. However, the warnings did not prohibit intravenous delivery of the drug. Levine argued that the warnings should have been stronger to prevent her loss of limb. Wyeth argued, in the lower courts and Supreme Court, that because they complied with the FDA's warning requirements, this lawsuit should be preempted.[32]

The preemption argument advocated by business groups and the Bush Administration in the *Wyeth* case relies heavily on a preamble to a regulation passed by the FDA in 2006.[33] The FDA itself drafts the preambles, not Congress, so whether Congress intended this type of power grab by an agency is an important issue.[34] The Bush Administration and business groups have intervened in numerous federal court cases over the past 2+ years with friend-of-the-court briefs supporting their position that this preamble be held to carry enough weight to preempt state tort law claims.[35] Since Congress has made no statements indicating preemption in these types of cases, the *Wyeth* case rests on a court finding that preemption is "implied" by Congress. Implied preemption means that Congress, by regulating prescription drug labels, intended (without making clear) to preempt – i.e. prevent all access to the courts by anyone injured by drug company recklessness.

It is hard to overstate the potential ramifications of such a wide interpretation of preemption. Under the pharmaceutical companies' theory, as long as the FDA approves a drug warning label, they are completely immune from any liability for deaths and injuries caused by the drug. This is true regardless of whether the dangerous side effect was known to the drug company and not shared with the FDA, or if the side effect is something that only becomes apparent in long-term clinical use (as opposed to the short-term studies required for FDA approval). These are not far-fetched scenarios. Numerous case studies have shown that such information problems plague prescription drugs and often with deadly consequences.[36] It is clear that preemption in these cases does not benefit the American public, instead its purpose is to shield the pharmaceutical industry from any liability and, consequently, accountability for the drugs it brings to market.

Moreover, the FDA's troubled history illustrates that this agency is incapable of ensuring the safety of drugs and devices. For this reason, many career scientists at the FDA oppose preemption and a recent report from the House Committee of Oversight and Reform reveals their long-standing opposition to the Bush White House's blatant political insertion of language into regulations claiming preemption.[37] According to this report, "the documents received by the Committee call into question whether FDA has acted in the best interests of public health. The agency's actions have undoubtedly helped shield drug manufacturers from liability. According to the agency's own experts, however, they have done so at the cost of delaying the dissemination of important safety information to the public."[38]

According to the *New England Journal of Medicine*, "[d]rug and device companies have chosen an inauspicious moment to attack the right of patients to seek redress. A series of pivotal reports on patient safety from the Institute of Medicine, as well as numerous articles in scholarly journals, has put the issue of patient safety in the national spotlight. Although frivolous lawsuits should not be condoned, product-liability litigation has unquestionably helped to remove unsafe products from the market and to prevent others from entering it. Through the process of legal discovery, litigation may also uncover information about drug toxicity that would otherwise not be known. Preemption will thus result in drugs and devices that are less safe and will thereby undermine a national effort to improve patient safety."[39]

Another signal the Court recently sent in this quickly changing and highly politicized area of preemption was its decision not to review a nuclear waste disposal case, *E.I. Dupont v. Stanton*.[40] The question in that case was whether those injured by the disposal of nuclear waste near the Hanford reactor in Washington State were preempted from suing for their injuries.[41] The Supreme Court decided to let the lower court's decision that they were not preempted stand, an apparent nod back to the traditional approach put forth in *Silkwood*. The Court also decided not to hear another preemption case from California, *Albertson's v. Kanter*.[42] In that case, the California State Supreme Court ruled that consumers are not preempted from suing over misleading labeling on salmon packages.[43]

The Court's vacillation in this area is compounded by an organized push for preemption by corporate America, with the assistance of the Bush Administration. The Bush appointments of Justices John Roberts and Samuel Alito coincided with that administration's renewed interest in a more radical attempt to preempt state tort law by federal agencies. The frequency of these cases in recent terms, combined with the coordinated attack led by the Bush Administration to preempt legal claims through agency regulations that may be difficult to reverse, forecasts a looming threat to the civil justice system. In fact, some recent analyses have concluded that using preemption to immunize corporations from any civil liability for dangerous and defective products will go down as one of the Bush Administration's greatest legacies.[44]

PUNITIVE DAMAGES

As discussed above, tort law plays a vital role in compensating victims of deceptive and dangerous consumer goods. Two types of damages can be awarded in tort cases – compensatory damages, which compensate for injuries, and punitive damages. Punitive damages are only awarded in cases of egregiously bad conduct and are meant to punish the wrongdoer or deter future misconduct.

Although they are rare, punitive damages (sometimes called "exemplary damages") have critical social and financial importance lying not in their frequency, but in the "signals" such awards send to other potential wrongdoers.[45] As the industry-backed Rand Institute for Civil Justice put it, "Punitive damages are designed to punish a defendant for grossly inappropriate actions and, in so doing, to deter future such actions by signaling that their consequences can be severe."[46] Indeed, history is replete with examples where the imposition or threat of punitive damages has resulted in dangerous products and services being taken off the market, and ensuring that similar products and services are never put on the market.[47]

Not surprisingly, corporations and their insurers have been at the forefront of attacks on punitive damages over the years. These business interests seek to drastically limit punitive damages through "caps" and other means.

Last term the Court addressed punitive damages and signaled a direction that both threatens consumer's rights and foreshadows more punitive damages litigation in the future. The case, *Exxon Shipping v. Baker*, the remaining leg of the lawsuit generated from the worst oil spill in history when the Exxon Valdez ran aground in Alaska in 1989, was itself decided under maritime common law.[48] This means that although the Court reduced the punitive damages in that case to the exact amount of money given to the victim to compensate for his injuries (compensatory damages), it should have very little effect on cases *not* brought under this obscure maritime law.[49]

In fact, in the same decision, the Court cited studies suggesting good reason for judicial restraint and allowing juries to do their job, specifically that:

> [D]iscretion to award punitive damages has not mass-produced runaway awards, and although some studies show the dollar amounts of punitive-damages awards growing over time, even in real terms, by most accounts the median ration of punitive to compensatory awards has remained less than 1:1. Nor do the data substantiate a marked increase in the percentage of cases with punitive awards over the past several decades. The figures thus show an overall restraint and suggest that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter.[50]

Even so, in the *Exxon* opinion, Justice Souter mentioned in a footnote that limiting punitive damage awards to equal the compensatory award amount might be a good idea, in all cases.[51] And indeed, lower courts are starting to pick up on that. For example, the 3rd Circuit recently cited the *Exxon* decision to support its reduction of a punitive damage award in a *non-maritime case*.[52] The 3rd Circuit applied a 1:1 ratio of punitive to compensatory damages in an insurance bad faith case, drastically reducing the punitive damage award determined by the jury, even though the court agreed that the defendants' behavior was "outrageous."[53]

The Court re-visited a punitive damage award this term in the tobacco case *Philip Morris v. Williams*.[54] The Supreme Court had twice reviewed aspects of the damages award in this large tobacco case and both times sent the case back to the Oregon state court for further consideration. In 2007, the Court sent the case back to the Oregon state court with instructions to reevaluate the $80 million punitive damage award against Philip Morris, arising out of the tobacco industry's well-documented deceptive advertising practices.[55] The Oregon court then reinstated the entire punitive damage award, focusing on a state law.[56]

This third appearance on the Supreme Court docket was limited to the question of whether the Oregon state court erred by refusing to revisit the punitive award issue. However, during the oral argument Justice Roberts seemed ready to revisit the larger question of whether there is a constitutional limit to a punitive damage award amount and, if so, what is that limit.[57] Although that question was not briefed or argued in this case, Roberts' questioning signals that at least some members of the Court may feel that it is time for the Court to interfere once again with the power and authority of local juries and issue an definitive ruling for an extreme limit on punitive damages for corporate misconduct.

JUSTICE FOR SALE

A quieter, yet immensely important, issue percolating both within the Court itself and now on its docket, is determining when a judge's financial dealings cross a line into a court's ability to remain impartial. The Supreme Court justices have confronted this themselves, sometimes to the point of not being able to hear a case because they could not establish a quorum due to multiple recusals.[58] Recusal is a process by which a judge is disqualified, or disqualifies him/herself, from hearing a case due to a possible conflict of interest.

This term the Court will decide a West Virginia case that examines at what point a judge's financial conflicts impede justice. The case, *Caperton v. A.T. Massey Coal Co.*, asks whether the Constitution requires a state Supreme Court justice to remove himself from a case where a great majority of his campaign money came from the defendant company.[59] Justice Brent D. Benjamin of the West Virginia Supreme Court received more than $3 million from Don Blankenship, owner of the powerful coal company Massey Energy.[60] Despite such financial ties, Justice Benjamin repeatedly refused to recuse himself from cases involving Massey Energy and twice formed the majority vote to overturn a $50 million verdict against the coal company for fraud against other mining companies.[61]

Theodore B. Olson, former Solicitor General of the United States and staunch conservative, argued, "[t]he improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge. We certainly believe that, in this case, acting Chief Justice Benjamin crossed that line."[62]

The threat to an independent judiciary has been ramped up in recent years due in part to astronomical sums spent on judicial campaigns, primarily by business groups. For example, a 2005 report from Center for Justice & Democracy entitled "Chamber of Horrors" documents how the U.S. Chamber of Commerce:

> [H]as joined the growing movement by conservative, corporate think-tanks and foundations to influence the judiciary and what should be the non-politicized

> election of judges. Despite fundamental constitutional concerns, corporate front groups like the Chamber's Institute for Legal Reform (ILR) have broadened their efforts to strong-arm judges into voting their way and tried to defeat judges who don't. Part of the motivation stems from the fact that in some states, businesses that had succeeded in ensuring very weak consumer protection laws and regulations were being held accountable for wrongdoing by judges and juries who were meting out justice through verdicts and judgments. Another major reason is that state courts, such as [former] Ohio's Supreme Court, have been striking down so-called "tort reforms" as a violation of constitutional rights – trial by jury, separation of power, access to a remedy and equal protection.[63]

According to a report by the Brennan Center for Justice, "over 70% of Americans believe that campaign contributions have at least some influence on judges' decisions in the courtroom. Only 5% of those surveyed believe that campaign contributions have no influence. These suspicions may be corroding the public's faith in the judiciary. According to the 2001 poll, only 33% of those surveyed believe that the 'justice system in the U.S. works equally for all citizens,' while 62% believe that '[t]here are two systems of justice in the U.S. – one for the rich and powerful and one for everyone else.'"[64]

This important case might encourage the U.S. Supreme Court to lay down some guidelines as to when a judge must remove himself from a case. According to the Brennan Center for Justice in their friend-of-the-court brief to the Supreme Court, "The sole interested source of money, the enormous sums, and the timing of the expenditures in this case constitute an egregious example of a national trend—brazen attempts to purchase influence in pending cases. Ted Olson and the petitioners are squarely on the mark—this case is far beneath the floor of the most basic notions of due process."[65]

MANDATORY BINDING ARBITRATION

Congress passed the Federal Arbitration Act (FAA) in 1925 as a means for voluntary dispute resolution between business parties.[66] In arbitration, judges and juries do not decide disputes. Instead, the two parties hire an independent arbitrator who is not a judge and is not bound by any court rules. Nor is an arbitrator required to issue a written decision, or even adhere to previous decisions.

As many consumers now know, mandatory binding arbitration clauses (i.e., required with no right to appeal to court), which eviscerate the right to jury trial, are become standard business practice in credit card and real estate contracts, applications for bank loans and leasing cars, employment contracts and even health insurance policies.

While the Federal Arbitration Act was originally enacted to help businesses resolve their own disputes, some courts have used it as a legal basis to approve the broad use of arbitration clauses in these consumer contracts, even though the manner by which a consumer is forced to give up his or her right to jury trial can hardly be considered voluntary or consensual.[67] Such mandatory arbitration clauses are often stuck in the fine print of an agreement for employment or an acceptance of terms of credit or some other such necessary economic service. Consumers or small businesses that refuse to submit to mandatory binding arbitration may be unable to get credit cards, insurance, health care or jobs.

The arbitration process itself is also very unfair to the consumer. Because arbitration can be as costly as litigation and does not afford the accountability and fairness procedures that a court would, the consumer is at a distinct disadvantage in a mandatory arbitration dispute. Studies have also shown that arbitration tends to favor corporations over consumers (for one thing, corporations tend to be repeat players in arbitration and the arbitrator depends on such parties for continued work). According to a study of California arbitration cases handled by a major arbitration firm (NAF) over a four-year period, the consumer lost 95 per cent of the time.[68] This same study also revealed that "companies track how arbitrators rule and do not choose arbitrators who do not rule in their favor. One NAF arbitrator, a Harvard law professor, was blackballed after she was awarded $48,000 to a consumer in a case in which a credit card company filed a claim against the consumer. After the same credit card company had her removed from other pending cases, she resigned, citing NAF's apparent systematic bias in favor financial services industry."[69]

Recently, Congress drafted amendments to the Federal Arbitration Act that would restrict use of arbitration and define it as a limited and voluntary alternative to the court system, but not a mandatory alternative.[70] According to the new legislation, "[a] series of United States Supreme Court decisions have changed the meaning of the [Federal Arbitration] Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or a jury, and instead submit their claims to binding arbitration."[71] In the meantime, the Court has agreed to hear three cases this term that could continue to restructure the role of arbitration in business disputes.

The most watched arbitration case this term, *14 Penn Plaza LLC v. Pyett*, involves three nightwatchmen who believe they were discriminated against due to their age.[72] The men filed grievances. Their collective bargaining agreement provided for mandatory arbitration over all disputes, including statutory civil rights claims like discrimination. The union chose not to pursue the discrimination claims in arbitration and the men eventually sued under those claims in federal court. The 2nd Circuit upheld their right to sue, finding that a collective bargaining contract that demands arbitration of individual statutory rights claims is unenforceable. In other words, certain statutory civil rights claims may not be bargained away.

Another arbitration case on the docket this term touches on both arbitration and preemption. The case, *Vaden v. Discover*, arose out of Discover credit card's suit against Betty Vaden for nonpayment of her credit card fees.[73] Discover is attempting to force arbitration of Vaden's state law claims against them. Such a result would leave the consumer, Betty Vaden, without her day in court to challenge credit card fees she argues are both unfair and manipulative. This case is an example of these arbitration clauses being inserted into addendums to credit card contracts and mailed separately after the card has been in use.

Finally, the Court recently agreed to hear a third arbitration case, *Arthur Andersen LLP, et al., v. Carlisle*.[74] The question at issue is whether, under the Federal Arbitration Act, federal circuit courts may stop a lawsuit against a party while a related arbitration is pending between other parties. In other words, Arthur Andersen is being sued by a company that relied on its, along with another company's, fraudulent tax advice. The two other companies had an arbitration agreement between themselves, and Arthur Andersen is asking to halt their own lawsuit until the outcome of the arbitration is decided, apparently because they feel that the arbitration will impact their own case. Essentially this extends the arbitration agreement to parties who were not originally contemplated and in effect gives a larger reach to the arbitration decision than was originally intended.

What these cases signify, in a larger sense, is the Court's interest in defining the role of arbitration in contractual disputes. Given the Court's tendency over the past decade to expand the role of arbitration, many feel that these cases will continue to weaken the consumer's access to courts to resolve disputes and result in a more dangerous and unfair business climate for the consumer.

ENVIRONMENTAL SUITS

The Court has agreed to hear five environmental suits this term and at least three of these cases encompass access to justice and business issues. John Echeverria, director of Georgetown University Law Center's Environmental Law & Policy Institute, noted that environmental groups won in the lower courts in all the cases and he voiced pessimism about the justices' rulings.[75] "The Supreme Court increasingly has become the place where environmental laws go to die, and the coming term doesn't look like it's going to be any more positive for the environment," he said.[76]

From a business perspective, the most interesting environmental lawsuit before the Court is *Entergy Corp. v. EPA*. *Entergy* asks whether the Environmental Protection Agency is authorized to weigh costs and benefits in deciding which systems to use at a water-cooling plant or is the EPA required to use the most advanced technology available.[77] This is a central issue to business, as the argument against increased environmental standards has always been that the higher standards cost too much and hurt the companies' profits.

From an access to justice perspective, however, two lesser-discussed cases raise important issues. In *Summers v. Earth Island Institute*, environmental watchdog groups challenged a Forest Service regulation that was instituted without the proper notice and comment period, procedures that allow interested citizens to have a voice in environmental matters.[78] The lower courts upheld the right of the watchdog groups to challenge the regulation itself because of these deficiencies.

Industry groups are arguing in this case that the environmental watchdog groups do not have the right to challenge administrative regulations if the regulation itself does not injure the public interest group in any tangible way, a group of legal theories known as justiciability, standing and ripeness. Ultimately the Court's decision in this case will have concrete repercussions as to how much say citizens and other public interest groups have in protecting the public by challenging environmental regulations, both when those regulations are being written and later in legal challenges. According to Mark Levy, a Supreme Court litigator and close watcher of the Court, the *Summers* case is especially important to watch because "[i]t fits in with the Roberts Court's jurisprudential approach and its restriction on the role of the courts."[79]

Another case, *Burlington Northern v. U.S.,* arises under the environmental statute, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and confronts the issue of joint and several liability.[80] Joint and several liability is a centuries-old fairness rule that prevents an injured victim from shouldering the costs of misconduct by allowing an injured party to recover fully from any one party that was substantially at fault (even if that party was not the sole faulty party). Business groups have been fighting against joint and several liability in tort cases for years.

This term the Supreme Court is asked to decide whether CERCLA, a statute that provides for clean-up and remediation of toxic sites, supports joint and several liability.[81] In this case, the toxic site at issue was formed from leaks of a Shell Oil product that was shipped by Burlington National and leaked while in shipment.[82] The 9th Circuit found Burlington Northern and Shell Oil entirely responsible for clean-up of the toxic leaks. Business groups are arguing that each responsible party should only be liable for the damage that they caused (in this case, the lower court had found Burlington Northern nine per cent responsible and Shell Oil six per cent responsible).[83] Such a system of "apportionate liability" would leave the taxpayer – instead of wrongdoers - funding the remainder of the clean-up.

Environmental law is a major area for the joint and several liability debate, because many times it is impossible to find exactly who is responsible for pollution.[84] For this reason, CERCLA was envisioned as a "strict liability" statute.[85] In other words, if a site is contaminated, the owner of the site is responsible for clean-up even if they themselves did not cause the contamination. If the Supreme Court apportions liability rather than finding joint and several liability, this will weaken the public policy nature of CERCLA and undermine its goal of cleaning up toxic land. Such a ruling would also have ramifications in future tort lawsuits.

AN AREA TO WATCH - FINANCIAL REGULATION

As has become all too clear over the past few months, years of immunity in the financial world have led to disastrous results.[86] Many believe the subprime mortgage crisis could have been avoided had prior Administrations and Congress not immunized from liability those Wall Street firms that pressured lenders to make risky loans with abusive terms.[87]

Although it is obviously too early for cases stemming from the most recent meltdown to have their day in the Court, we can look to two recent cases for some indication of the Court's reluctance to impose pro-consumer protections and other accountability measures on business.

In 2007, the Supreme Court combined the trend toward preemption with the trend toward deregulation and unaccountability in the financial world in a case between the federal Office of the Comptroller of the Currency and regulators in Michigan. In that case, *Waters v. Wachovia Bank* (2007), Wachovia acquired a mortgage business that had been regulated by the state of Michigan.[88] Wachovia, wanting full control over its now wholly-owned subsidiary mortgage business, sued, arguing that "states are not at liberty to obstruct, impair, or condition the exercise of national bank powers, including those powers exercised through an operating subsidiary."[89]

The Supreme Court agreed. The effect of this decision, however, means that bank-owned mortgage lenders are no longer subject to the more rigorous state licensing and consumer protections laws in the mortgage provider arena. In dissent, Justice John Paul Stevens lamented that it was "especially troubling that the court so blithely preempt[ed] Michigan laws designed to protect consumers."[90]

In a related issue, the Court recently decided to hear a case asking whether state Attorneys General may investigate if minorities were charged higher mortgage rates by national banks.[91] Lower federal courts had held that only the federal Office of the Comptroller of the Currency could investigate national banks. New York Attorney General Cuomo heads this lawsuit and is joined by every other state.[92]

The case of *Stoneridge Investment Partners v. Scientific-Atlanta, Inc., et al*, decided last term, turns on a specific provision in a financial regulation.[93] But the main issue here was whether a shareholder, injured by both a company's misstatements of the health of the market and the coordinated actions of banking institutions complicit in the overall fraudulent scheme on the shareholders, may sue the banking institutions involved. The Court, to the dismay of shareholders and consumer advocates, held that they could not sue these banking institutions because, even though complicit in the fraudulent scheme, the banks hadn't made material misrepresentations to the shareholders.[94]

When the *Stoneridge* case was beginning its court review back in 2002, a coalition of 27 state attorneys general wrote a friend of the court brief in support of liability:

> The view that those crafty enough to benefit from participating in a securities fraud while carefully avoiding the public attribution of a false statement to them can escape liability directly conflicts with both the broad language and purposes of the antifraud provisions. Indeed one could argue that it is precisely with respect to such a scheme that the anti-fraud provisions are needed the most.[95]

The Court's opinion in *Stoneridge* was a direct blow to American investors, essentially immunizing banks, accountants, law firms, and other institutions that may intentionally commit fraud in order to deceive the investing public. This seriously compromises the integrity of American markets and denies American investors the opportunity to seek recovery from those who orchestrated the fraud. Given the recent events on Wall Street, such immunity portends disastrous results.[96] The signal sent by the Court in *Stoneridge* will surely be tested in future terms given the latest financial crisis and its basis in immunity for financial institutions engaged in buying and selling mortgage-backed securities.[97]

CONCLUSION

The 2008 Term, and perhaps the *Wyeth* case most specifically, could solidify this Court's approach toward consumer lawsuits, judicial independence, and the role of juries in the civil justice system in the years to come. Although seemingly narrow issues face this Court this term, the implications will resonate. Whether the courts can provide some accountability for business decisions, whether the civil justice system can continue to provide an incentive for manufacturers to make safe products, whether business will be granted a "get out of jail free" card for their dangerous and sometimes fatal negligence, whether juries will be able to punish reprehensible corporate behavior, whether judges can be bought, and whether citizens can challenge certain types of regulations – these are the fundamental issues at stake this term.

NOTES

[1] Janet Moore, "Judge dismisses lawsuits in Medtronic heart device case," *Minneapolis Star Tribune*, January 6, 2009.
[2] The Lilly Ledbetter Fair Pay Act, H.R. 11, 111th Cong. (2009).
[3] *Ledbetter v. Goodyear*, 550 U.S. 618 (2007).
[4] Robert Pear, "Justices' Ruling in Discrimination Case May Draw Quick Action by Obama," *New York Times*, Jan. 4, 2009.
[5] *Id*.
[6] The Medical Device Safety Act of 2008, H.R. 6381, 110th Cong. (2008).
[7] The 10th Amendment states: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. Const. Amend. X.
[8] The Supremacy Clause states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the laws or constitution of any state to the contrary notwithstanding. U.S. Const. Art. VI, cl. 2.
[9] *Silkwood v. Kerr-McGee*, 464 U.S. 238, 251 (1984)("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.")
[10] *Geier v. Honda Motor Co*., 529 U.S. 861 (2000).
[11] *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).
[12] *Id.* at 251.
[13] *Cipollone v. Liggett Group*, 505 U.S. 504 (1992); *Geier v. Honda Motor Co*., 529 U.S. 861 (2000); *Riegel v. Medtronic,* 128 S.Ct. 999 (2008).
[14] *Geier v. Honda Motor Co*., 529 U.S. 861 (2000).
[15] *Id.*
[16] *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).
[17] *Id.*
[18] *Id.*
[19] *Geier v. Honda Motor Co., 529 U.S. 861 (2000).*
[20] *Id.*
[21] *Sprietsma v. Mercury Marine, a Div. Of Brunswick Corp*., 537 U.S. 51 (2002); *Bates v. Dow Agrosciences LLC,* 544 U.S. 431 (2005).
[22] *Riegel v. Medtronic,* 128 S.Ct. 999 (2008).
[23] *Id*.
[24] David Vladeck, "Safety Last," *The Nation*, October 16, 2008.
[25] Senator Edward Kennedy's Office Press Release, "HEALTH LEADERS IN CONGRESS INTRODUCE LEGISLATION REVERSING SUPREME COURT'S MEDICAL DEVICE DECISION," June 26, 2008.
[26] Congressman Frank Pallone's Office Press Release, "HEALTH LEADERS IN CONGRESS INTRODUCE LEGISLATION REVERSING SUPREME COURT'S MEDICAL DEVICE DECISION," June 26, 2008.
[27] The Medical Device Safety Act of 2008, H.R. 6381, 110th Cong. (2008).
[28] *Altria Group, Inc. v. Good*, 129 S.Ct. 538 (2008).
[29] *Id.*
[30] "Altria Ruling Ignites Legal Moves," *Wall Street Journal*, Dec. 22, 2008.
[31] *Wyeth v. Levine*, *cert. granted* 128 S.Ct. 1118 (2008)
[32] Anthony Sebock and Benjamin Zipursky, "The Upcoming Supreme Court case of Wyeth v. Levine and the Preemption Temptation," Findlaw.com, Sept. 23, 2008.
[33] 71 Fed. Reg. 3934-3935.

[34] Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DePaul L. Rev. 227 (2007).

[35] Senator Chris Dodd's Office Press release, "Dodd, Kennedy, Waxman, Dingell, Brown Call on Administration to Stop FDA Provision Undercutting State Laws That Protect Patients," Feb. 23, 2006.

[36] See, e.g., "The Bitterest Pill: How Drug Companies Fail to Protect Women and How Lawsuits Save Their Lives," Center for Justice & Democracy, 2008.

[37] U.S. House of Representatives, Committee on Oversight and Governmental Reform, Majority Staff report, "FDA Career Staff Objected to Agency Preemption Policies," October 2008.

[38] *Id*. at 4.

[39] Gregory D. Curfman, M.D., Stephen Morrissey, Ph.D., and Jeffrey M. Drazen, M.D., "Why Doctors Should Worry About Preemption," *New England Journal of Medicine*, July 3rd, 2008.

[40] Mark H. Anderson & Brent Kendall, "U.S. Supreme Court Rejects Dupont-GE Appeal in Radiation Case," *Dow Jones Newswire*, Dec. 15, 2008.

[41] *In Re: Hanford Nuclear Reservation Litigation*, 534 F.3d 986 (9th Cir. 2008).

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[43] *In Re: Farm Raised Salmon Cases*, 175 P.3d 1170 (Cal. 2008).

[44] American Association of Justice, "Get Out of Jail Free: A Historical Perspective of How the Bush Administration Helps Corporations Escape Accountability," October 15, 2008.

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[51] *Id.* at 2634, fn. 28

[52] *Jurinko v. Medical Protective Co*., 2008 U.S. App. LEXIS 26263 (Dec. 24, 2008).

[53] *Id.*

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[61] *Id.*

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[78] *Summers, et al. v. Earth Island Institute, et al,* 490 F.3d 687, *cert. granted* (January 18, 2008) (No. 07-463).

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[80] *Burlington Northern v. U.S*, 502 F.3d 781, *cert. granted* (October 1, 2008)(No. 07-1601)

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