Ten-Minute Read: The U.S. Supreme Court's 2022 Business Cases

Every year the United States Supreme Court decides important cases that impact companies that do business in the United States. What follows is a bottom-line summary of what business leaders in the United States and abroad need to know about the Supreme Court's 2022 business decisions. It can be read in about ten minutes.

John Bash is a partner in the Austin and Washington, D.C. offices of Quinn Emanuel Urquhart & Sullivan, LLP. He formerly served in the U.S. Department of Justice as an Assistant to the Solicitor General, during which time he argued ten cases in the U.S. Supreme Court, and as the United States Attorney for the Western District of Texas.

I. The basics of the U.S. Supreme Court

In a typical Supreme Court term, which begins in October, the Supreme Court decides 60 to 70 cases. The cases are argued every month between October and April. All opinions are usually issued by the last day of June, at which point the nine Justices take a summer recess.

The Supreme Court has the power to choose which cases to take. It generally elects to hear cases raising legal issues that have produced disagreement among lower courts or that have particular national or international importance. Many of the Court's cases are not directly relevant to business and finance; they focus instead on areas like criminal law, immigration law, and federal Indian law. But each year the Court decides a set of cases raising critically important issues for corporations, start-ups, small businesses, and investment funds.

II. The end of regulatory deference on "major questions"

The headline development for business this year was the Court's recognition of a new legal doctrine that may well enable businesses to limit the power of federal regulators across a range of areas—from climate change to financial markets to consumer safety to telecommunications.

On the last day before the summer recess, the Court ruled by a vote of 6-3 that the Obama Administration's "Clean Power Plan" exceeded the authority of the Environmental Protection Agency. (*West Virginia v. Environmental Protection Agency*, No. 20-1530) The decision was less important for what it did—the Clean Power Plan had never taken effect, the Trump Administration had repealed it, and the Biden EPA is currently working on a replacement plan—than for what it portends for future regulatory efforts to solve major national problems.

In the Clean Power Plan, the EPA had attempted to shift electricity generation from higher-emissions sources, like coal plants, to lower- or zero-emissions sources, like natural gas and wind. But under U.S. law, agencies cannot take regulatory action unless some statute enacted by Congress authorizes the action. The EPA had cited a provision of the federal Clean Air Act that had historically been used more narrowly—only to require individual power plants and other polluters to adopt the most feasible pollution-reduction techniques, not to change the overall mix of generation resources feeding the Nation's electricity grids.

The Court held that the EPA could not mandate so fundamental a change in national energy policy under the Clean Air Act provision. Critically, the Court discerned in earlier precedents a principle called the

"major questions doctrine." That doctrine, the Court said, addresses the "recurring problem" of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." Under the major questions doctrine, agencies may not take action that has "vast economic and political significance" without "clear congressional authorization."

That represents something of a sea change in regulatory law. Far from requiring "clear congressional authorization," courts have traditionally given agencies the benefit of the doubt in the interpretation of the technical statutes that they administer—whether they address environmental degradation, financial regulation, the pharmaceutical industry, or any other area within a given agency's bailiwick. But the "major questions doctrine" reflects almost the opposite approach: When a new regulation has "vast economic and political significance," statutes like the Clean Air Act will be read narrowly to constrict agency power.

The EPA case was not the only decision in which the Supreme Court relied on that approach. In January a divided 6-3 Court granted a stay that suspended a Biden Administration rule requiring large employers to ensure that all of their workers were either vaccinated against COVID-19 or tested weekly. (*National Federation of Independent Business v. OSHA*, No. 21A244) As with the EPA case, the Court found it unlikely that Congress intended to empower the Occupational Safety and Health Administration, an agency that focuses on workplace safety, to issue a "broad public health regulation" for 84 million Americans.

What does this mean for business in the United States going forward? We are entering a new phase of American law where traditional deference to regulators gives way to scrutiny and skepticism. Federal agencies should expect legal headwinds when they claim the power to enact fundamental changes to the economy or society—although it is uncertain how "significant" a regulatory policy must be to warrant greater scrutiny. For example, the Court rejected a "major questions" challenge to the authority of the Centers for Disease Control to mandate COVID-19 vaccination for healthcare workers (see discussion of *Biden v. Missouri* below).

For businesses, the "major questions doctrine" will be a powerful new tool to challenge undesirable regulations. But it will also foster uncertainty about whether new regulatory action will survive legal challenge, and it may ultimately be invoked to challenge significant de-regulatory or pro-competitive policies as well.

III. Some modest new obstacles to federal arbitration

The Federal Arbitration Act was enacted by Congress and signed by President Coolidge nearly a century ago. The statute guarantees that agreements to resolve disputes outside of court through private arbitration will be enforceable; empowers federal courts to compel arbitration where required by contract; and establishes a mechanism to enforce or challenge monetary awards granted by arbitrators.

Given the popularity of arbitration as an efficient way to resolve business disputes, the Federal Arbitration Act continues to generate a host of legal questions that have divided lower courts. The Supreme Court resolved a number of those questions this year. Notably, although the Supreme Court has traditionally been seen as pro-arbitration, all but one of the five arbitration decisions this year disfavored federal arbitration in various (if modest) ways, and did so by lopsided votes:

- **Waiver:** Plaintiffs sometimes argue that a defendant waived the right to arbitrate a dispute by conducting months or even years of litigation in court before demanding arbitration. The Court unanimously held that to block arbitration on that basis, a plaintiff need not show that it was harmed by the defendant's delay, at least as a matter of federal law. (*Morgan v. Sundance, Inc.*, No. 21-328)

- **Discovery for foreign arbitrations:** A federal statute allows parties to conduct discovery in the United States—obtain documents and take depositions—for use in a court case in another country. The Court

unanimously held, however, that the statute cannot be used in connection with a private arbitration. (*ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401)

- **Exempt transportation employees:** The Federal Arbitration Act has an exemption for employment contracts with "workers engaged in foreign or interstate commerce"—meaning that arbitration clauses in such contracts are not enforceable under federal law and the employees thus can sue in court. In a case involving airline employees who load cargo onto airplanes, the Court held unanimously that the exemption applies to any workers who are directly involved in the transportation of cargo across State or national boundaries, even if the workers do not themselves cross boundaries in the course of their work. (*Southwest Airlines Co. v. Saxon* No. 21-309)

- **Arbitrating representative claims:** A California statute allows an employee to sue his or her employer on behalf of the state for violations of California labor law and to recover civil penalties for all employees who were harmed. The Court held by a vote of 8-1, however, that an employer may agree with each employee to arbitrate only violations harming that employee, not violations harming other employees, and thus held that federal law preempts the California statute as to contractual waivers of representative claims. (*Viking River Cruises, Inc. v. Moriana*, No. 20-1573)

- **Enforcement in federal court:** Despite the Federal Arbitration Act's provisions allowing parties to vacate or confirm an arbitral award in federal court, the Court held by a vote of 8-1 that in many cases, federal court is unavailable for this purpose and parties are limited to suit in state court instead—even if the underlying dispute between the parties raises questions of federal law. Federal court is available only if the request to enforce or challenge the award itself satisfies the normal requirements for a federal case—for example, if the parties hail from different States and the amount of the award exceeds $75,000. (*Badgerow v. Walters*, No. 20-1143)

IV. Economically consequential decisions on federal healthcare programs

The Medicare and Medicaid programs—which cover the elderly and the economically disadvantaged, respectively—provide health coverage for 36% of Americans and account for close to 40% of national health spending. They have increasingly generated difficult legal questions that have drawn the attention of the Supreme Court. Given the vast economic importance of the programs, especially for any business in the healthcare industry, even legal issues that are quite technical can be enormously consequential.

- **Drug cost reimbursement for hospitals:** Under the 2003 Medicare prescription drug benefit, known as Medicare Part D, the Department of Health and Human Services must use the same rate to reimburse all hospitals for drugs, unless it conducts a cost survey for a given year (which it virtually never does). But in 2018 and 2019, HHS announced that it would reimburse hospitals that serve low-income or rural populations at a lower rate than other hospitals—costing those hospitals $1.6 billion. The Court held, unanimously, that the Department had exceeded its powers under the law. That ruling will likely generate significant additional revenue for the covered hospitals—but at a cost to the federal budget. Notably, the Court read the statute narrowly but declined to overrule the so-called "*Chevron* doctrine" of deference to agency interpretations of their own mandates, as many businesses had advocated in this case. (*American Hospital Association v. Becerra*, No. 20-1114)

- **Disproportionate share payments:** Hospitals that serve a high percentage of low-income patients receive "disproportionate share hospital" payments from Medicare and Medicaid. Those payments are calculated based on a formula set out in the Medicare statute—a formula that one Justice called "mind-numbingly complex." In 2004, HHS reinterpreted key language in the formula to reduce the amount of the payments. In a sharply divided 5-4 opinion, the Court held that HHS's new interpretation was correct. The result will

likely be reduced funding of hospitals that serve low-income populations. (*Becerra v. Empire Health Foundation*, No. 20-1312)

- **COVID-19 vaccine mandate:** The Court let take effect a Biden Administration rule requiring healthcare providers that receive Medicare or Medicaid funding to ensure that their employees are vaccinated against COVID-19. The Court concluded that HHS has broad statutory authority to protect the health and safety of patients who receive medical care from such providers. (*Biden v. Missouri*, No. 21A240)

- **Disability discrimination by healthcare providers:** Two federal statutes, including the Affordable Care Act signed by President Obama in 2010, allow individuals to sue healthcare providers that receive Medicare or Medicaid funding for discrimination on the basis of disability. The Court held by a vote of 6-3 that in such lawsuits, plaintiffs may not recover noneconomic damages for emotional distress. Coupled with an earlier decision that barred punitive damages, the decision promises to reduce the number of lawsuits filed and the realistic settlement ranges for such claims, because in many cases there are little or no monetary damages. (*Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219)

V. New risks for companies that offer defined-contribution plans

A 1974 federal law called the Employee Retirement Income Security Act governs retirement plans and healthcare benefits offered by U.S. employers. Given the widespread adoption of such plans by U.S. companies, it is no surprise that the Supreme Court has confronted dozens of cases raising questions under various provisions of ERISA, including one this Term.

- **Defined-contribution plans:** Many companies offer their employees defined-contribution retirement plans that include an array of investment options. The Court held, unanimously, that even if some of those options are clearly reasonable choices, the company can be liable under ERISA for plan mismanagement if the plan also includes unreasonable investment options—for example, investments with excessive fees. (*Hughes v. Northwestern University*, No. 19-1401)

VI. A quiet term for intellectual property

This was an unusually quiet year for intellectual property, which is typically an important area of the Supreme Court's docket. The Court decided no patent cases this year, despite the considerable confusion among U.S. courts about several key patent issues, especially the question of what kinds of inventions can be patented. Nevertheless, the Court did decide a copyright case that will make it easier for artists, authors, and other creatives to secure copyright protection.

- **Copyright registration:** Content creators often submit applications to register copyrights to the U.S. Copyright Office without a lawyer. Under a special safe harbor provision, if it is later discovered that the registration contained an error, a copyright is still valid so long as the applicant did not know about the error. The Court held, by a vote of 6-3, that even if the error reflects a misunderstanding of the law of copyright—as opposed to a factual error about the copyrighted work—that safe harbor applies. The ruling will provide some additional protection to content creators who register a copyright without the advice of a lawyer. (*Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, No. 20-915)

VII. Two notable technical decisions

Finally, the Court issued two technical decisions that may be relevant to companies facing certain situations.

- **Bankruptcy fees:** A 2017 federal law imposed an increase in the quarterly fees that companies in Chapter 11 bankruptcy pay to the government, but for historical reasons the law exempted parties in Alabama or North Carolina bankruptcy proceedings. The Court unanimously held that the law violated the U.S. Constitution's requirement that bankruptcy laws be "uniform," which does not permit arbitrary regional exemptions. (*Siegel v. Fitzgerald*, No. 21-441)

- **Suits against foreign government entities**: In certain circumstances, a federal law overrides the immunity from lawsuits enjoyed by foreign nations (including some foreign state-owned business enterprises). In those cases, a court must decide whether the law of a U.S. state or the law of a foreign country applies to the dispute. The Court held by a unanimous vote that to answer that question, a court must use the same legal analysis that would apply to a private party faced with a similar lawsuit. (*Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 20-1566)

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

John Bash
Email: johnbash@quinnemanuel.com
Phone: 202-316-5159

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