

***MAYER, BROWN, ROWE & MAW LLP'S***  
***SUPREME COURT DOCKET REPORT***  
**MAY 15, 2006**

Today the Supreme Court granted certiorari in two cases of interest to the business community. Absent extensions, which are likely, amicus briefs in support of the petitioners will be due on June 29, 2006, and amicus briefs in support of the respondents will be due on August 3, 2006. Any questions about these cases should be directed to David Gossett (202-263-3384) in our Washington, D.C. office.

***1. Federal Employers' Liability Act—Contributory Negligence Standard.*** The Federal Employers' Liability Act (FELA) establishes an exclusive remedial scheme for compensating railroad workers who suffer workplace injuries. Section 1 of FELA makes railroad employers liable to their employees for workplace injuries that "result in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Section 3 of FELA, in abrogation of the common law, provides that an employee's contributory negligence will not bar recovery but that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The Supreme Court today granted certiorari in *Norfolk Southern Ry. Co. v. Sorrell*, No. 05-746, to decide whether an employee's contributory negligence is governed by the same causation standard as governs a railroad's negligence.

In the per curiam decision below, reported at 170 S.W.3d 35, the Missouri Court of Appeals affirmed a judgment against the petitioner railroad in a FELA action brought by an employee injured in a workplace accident. The judgment was based on a jury verdict that was returned after the jury had been instructed, pursuant to state practice, to apply one causation standard to the railroad's negligence and a different, more restrictive standard to the employee's contributory negligence. The Missouri Court of Appeals decision, although consistent with *Missouri-Kansas Texas R.R. v. Shelton*, 383 S.W.2d 842 (Tex. Civ. App. 1964), arguably conflicts with *St. Louis S.W. Ry. Co. v. Dickerson*, 470 U.S. 409 (1985) (per curiam), in which the Supreme Court held that federal law governs the jury instructions in a FELA action, and with decisions of the Third, Fifth, and Sixth Circuits and the Oregon Supreme Court, all of which have held that the same standard of causation applies to both the railroad's negligence and the employee's contributory negligence. See *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3d Cir. 1995); *Page v. St. Louis S.W. Ry.*, 349 F.2d 820 (5th Cir. 1965); *Ganotis v. New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965); *Caplinger v. Northern Pac. Terminal*, 418 P.2d 34 (Or. 1966).

The issue being reviewed by the Supreme Court is of considerable significance to railroads, both because of its direct import and because of its broader implications. Most immediately, the Court's decision will determine whether an employee's contributory negligence will be judged by a different standard than an employer's negligence. If the decision below is affirmed, railroads will face greater financial liability for workplace accidents than if the decision is reversed. More generally, the Court's decision could offer guidance on the proper interpretation of

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FELA, which some observers believe has been misinterpreted by state courts to the detriment of the railroads.

**2. Clean Air Act—EPA Definition of Emission “Increases”—Jurisdiction.** Section 307(b) of the Clean Air Act (CAA), provides that the D.C. Circuit has exclusive jurisdiction over any challenge to a nationally applicable regulation under the Act, and that such challenges may not be brought in an enforcement action. The CAA defines a “modification” for purposes of both the New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) programs as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such a source[.]” 42 U.S.C. § 7411(a), 7949(2). Despite the identical statutory language, the NSPS regulations measure emissions increases on an hourly basis while the PSD regulations, as interpreted by the EPA, measure emissions increases on an annual basis. Compare 40 C.F.R. § 60.14(a) & (b) with 40 C.F.R. § 51.1666(b). In either case, “modified” facilities are subject to certain restrictions, including permitting requirements. As demonstrated by this case, the difference in how emissions are measured—hourly versus annually—can be significant.

The Supreme Court granted certiorari in *United States v. Duke Energy Corp.*, No. 05-848, to address (1) whether the Clean Air Act regulations, as put at issue here, are subject to the exclusive jurisdiction of the D.C. Circuit; and, (2) whether the Clean Air Act’s definition of “modification” renders unlawful the EPA’s longstanding regulatory test defining PSD emissions increases by reference to annual emissions.

Respondent Duke Energy modernized its coal-fired generating units in a way that allowed the plants to operate more hours each day and more days each year. Although the plants’ hourly emissions did not increase, the EPA, applying the PSD regulations as it interpreted them, initiated an enforcement action contending that Duke Energy’s modernization program constituted a “modification,” and thus required a permit, because the plants’ enhanced utilization rate would result in an increase in annual emissions. In response, Duke Energy argued that the EPA had misinterpreted the CAA and its own regulations, and that the emissions resulting from the company’s modernization program were properly measured on an hourly rather than annual basis.

In the decision below, reported at 411 F.3d 539, the Fourth Circuit held that EPA had misinterpreted the CAA and that the emissions resulting from Duke Energy’s modernization program should, consistent with the NSPS regulations, be measured on an hourly basis. The court noted in passing that it had jurisdiction to decide the dispute, notwithstanding the jurisdictional and procedural limitations established by Section 307(b), because it was merely choosing between alternative interpretations of the PSD regulations rather than invalidating them outright. Petitioners, environmentalists who intervened below, vehemently dispute that characterization, and the Supreme Court will now decide whether it is accurate.

Just nine days after the Fourth Circuit’s decision, which prevented the EPA from interpreting the PSD regulations to require the measurement of emissions on an actual, annual basis,

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the D.C. Circuit, in *New York v. Environmental Protection Agency*, 413 F.3d 3 (D.C. Cir. 2005), concluded that the PSD provisions compel an “actual emissions” test for PSD modifications.

The Court’s decision in this case will be of great interest to the energy industry and all power producers subject to the Clean Air Act. This case will affect the venue for bringing an action challenging the Clean Air Act and may affect the cost of modifying power plants subject to the Act.

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Today and on April 24, 2006, the Supreme Court invited the Solicitor General to file briefs expressing the views of the United States in the following cases of interest to the business community:

*Microsoft Corp. v. AT&T Corp.*, No. 05-1056. The question presented is whether computer software code is the kind of tangible creation that can be treated under patent law as a protectable “component[] of a patented invention” within the meaning of 35 U.S.C. § 271(f)(1).

*Apotex Inc. v. Pfizer Inc.*, No. 05-1006. The question presented is whether a suit brought by a generic drug manufacturer seeking a declaratory judgment that a generic equivalent will not infringe a patent held by the brand-name manufacturer states a justiciable controversy when the failure to secure a court judgment prohibits the federal government from approving the generic equivalent and the prospect of patent liability purportedly deters the generic manufacturer from entering the marketplace.

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Starting this week, you may see a few changes in the Docket Report:

- Barring unforeseen circumstances, we now aim to send out the Docket Report on the *same day* that the Court grants certiorari in a case, rather than within two days thereafter. This should make the docket report even more timely, and thus, we hope, even more useful to our readers.
- In the past, we have summarized cases in which the Court has granted review, but have not addressed the Court’s eventual decisions in these cases. Starting today, we plan to begin issuing brief notifications of new Supreme Court *decisions* of interest to the business community. These notifications, which we hope to issue within a few hours of the Court’s decision, will contain only a very brief analysis of any decision—but will, we hope, alert our readers to issues of concern to them. These notifications will be sent via email to all email subscribers to the Docket Report.
- In order to provide information in a more timely manner, and in conjunction with the previous two changes, we plan to discontinue hardcopy distribution of the

## *Supreme Court Docket Report*

Docket Report as of the end of this Term—July 2006. After that time, the Docket Report will be distributed *only via email*. If you have not yet converted to an email subscription and provided us with your email address, please contact Claudia Hannigan at 202-263-3089 or [SupremeCourtDocket@mayerbrownrowe.com](mailto:SupremeCourtDocket@mayerbrownrowe.com) to update our records.

- We are always eager to receive feedback on the Docket Report. Any comments about the Docket Report, or about these new changes, should be addressed to David Gossett at 202-263-3384 or [dgossett@mayerbrownrowe.com](mailto:dgossett@mayerbrownrowe.com).

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