

***MAYER, BROWN, ROWE & MAW'S
SUPREME COURT DOCKET REPORT
OCTOBER TERM, 2002 – NUMBER 6***

Today the Supreme Court granted certiorari in nine cases of potential interest to the business community, two of which have been consolidated. Except where the Court has expedited the briefing schedule as indicated below, amicus briefs in support of the petitioners are due on Monday, February 24, 2003, and amicus briefs in support of the respondents are due on Wednesday, March 26, 2003. Any questions about these cases should be directed to Miriam Nemetz (202-263-3253) or Robert Bronston (202-263-3244) in our Washington office.

1. Insurance — State Regulation — Foreign Affairs Doctrine — Due Process — Commerce Clause. The California legislature enacted the Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (“HVIRA”), to require insurers licensed to do business in California to provide records regarding each insurance policy issued by any European corporate relative and in effect in Europe between 1920 and 1945. Failure to produce the information results in automatic license suspension. The HVIRA is part of a legislative scheme to encourage and facilitate litigation over Holocaust-era insurance claims in California courts. The United States government has vigorously opposed the HVIRA (and substantially similar legislation enacted in other states) as an interference with U.S. foreign policy on Holocaust-era insurance claims.

The American Insurance Association and several insurers and reinsurers brought suit in federal court against the California Insurance Commissioner to challenge the constitutionality of the HVIRA. They prevailed in the district court, but the Ninth Circuit reversed, concluding that the HVIRA is constitutional. Today, the Supreme Court granted certiorari in *American Insurance Association v. Low*, No. 02-722, to decide three questions: (1) whether the HVIRA violates the foreign affairs doctrine of *Zschernig v. Miller*, 389 U.S. 429 (1968); (2) whether the HVIRA exceeds California’s legislative jurisdiction under the Due Process Clause; and (3) whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, insulates the HVIRA from review under the Foreign Commerce Clause.

In challenging the HVIRA, the petitioners prevailed in the district court on a motion for a preliminary injunction. The district court held that the HVIRA was likely to be facially unconstitutional because it (1) intrudes on the federal government’s exclusive authority over the Nation’s foreign affairs and (2) violates the Foreign Commerce Clause by “potentially prevent[ing] the federal government from speaking with one voice in its expectations of foreign insurance companies” and impermissibly “meddl[ing] in foreign commerce outside its borders.” 2000 WL 777978 (E.D. Cal. 2000). The Ninth Circuit disagreed with the district court’s legal analysis, concluding as a matter of law that the HVIRA does not violate the foreign affairs doctrine and that the McCarran-Ferguson Act shields the HVIRA from Commerce Clause scrutiny. 240 F.3d 739 (2001). The court of appeals rejected arguments by the United States,

Germany, and Switzerland as *amici* that the HVIRA undermines U.S. foreign relations and extensive international agreements to resolve Holocaust-era insurance claims exclusively through the procedures of the International Commission on Holocaust Era Insurance Claims.

Although the Ninth Circuit disagreed with the district court’s legal analysis, the court of appeals left the preliminary injunction in place to allow the district court to consider the petitioners’ arguments that the HVIRA violates the Due Process Clause. On remand, the district court held that the HVIRA does not exceed California’s legislative jurisdiction under the Due Process Clause, but does violate due process by mandating license suspension for insurers without a hearing on the merits. 186 F. Supp. 2d 1099 (E.D. Cal. 2001). The Ninth Circuit sustained the district court’s legislative jurisdiction holding, but reversed the due process ruling in favor of petitioners. 296 F.3d 832 (2002). In sustaining the State’s legislative jurisdiction, the court of appeals held that the HVIRA passes constitutional muster because it is a reporting statute that does not regulate the substance of out-of-state transactions. *Id.* at 840-844.

The Ninth Circuit’s legislative jurisdiction holding conflicts directly with the Eleventh Circuit’s decision in *Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (2001), in which the court held that Florida’s Holocaust Victims Insurance Act, which is virtually identical to the HVIRA, exceeds the due process limits on the State’s legislative jurisdiction because the statute imposes significant burdens and requirements on foreign insurers regarding transactions that occurred in foreign jurisdictions with foreign insureds.

This case has important implications for all insurers and any business that has foreign affiliates. Mayer, Brown, Rowe & Maw is counsel of record for the petitioners.

2. Arbitration — FAA Preemption — Use of State Law Procedures to Allow Class-Wide Arbitration. The Supreme Court granted certiorari in *Green Tree Financial Corp. v. Bazzle*, No. 02-634, to decide whether the Federal Arbitration Act (“FAA”) prohibits a court from ordering class-wide arbitration under state law when the arbitration agreement does not expressly provide a class action remedy.

The Bazzles signed a retail installment sales contract with Green Tree Financial Corp. to finance home improvements. The agreement included a mandatory arbitration provision that did not provide for a class action remedy. The Bazzles filed a class action against Green Tree in South Carolina state court, contending that Green Tree had violated the state’s consumer protection laws. Plaintiffs sought class certification, and Green Tree sought an order compelling arbitration. The court granted the plaintiffs’ motion for class certification and, applying state law permitting class-wide arbitration, ordered that the class claims be arbitrated. The case proceeded to arbitration, resulting in a \$27 million judgment. Green Tree appealed, arguing that the trial court and the arbitrator violated the terms of the FAA when they imposed class-wide arbitration in the absence of an express contractual provision permitting it.

The South Carolina Supreme Court upheld the award. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (2002). The court held that “class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in

prejudice.” *Id.* at 360. The court rejected the Seventh Circuit’s reasoning that Section 4 of the FAA, which mandates arbitration “in accordance with the terms of the agreement,” precludes class-wide arbitration where the arbitration agreement is silent on the matter. See *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995). Instead, the South Carolina Supreme Court adopted the approach of several California state courts, which have held that state laws that allow class-wide arbitration further rather than defeat the FAA’s goal of enforcing agreements to arbitrate and therefore are not preempted by the FAA. See, e.g., *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998).

This case has important ramifications for the business community. As noted in an amicus brief filed by the American Bankers Association, the lower courts’ divergent views of the role of state law in the construction and enforcement of arbitration agreements have made it difficult for parties to draft nationwide arbitration agreements that will be enforced in a uniform manner. The Supreme Court’s decision also could affect the many state-law challenges to the enforceability of arbitration agreements that are ongoing in state and federal courts.

3. Trade Regulation — Unfair Practices — First Amendment — Commercial Speech.

The Supreme Court granted certiorari in *Nike, Inc. v. Kasky*, No. 02-575, to determine whether a corporation that participates in a public debate regarding its business practices may be subject to liability for factual inaccuracies on the ground that its statements are “commercial speech” because they may influence consumers’ purchasing decisions.

Petitioner Nike, Inc. is a multinational athletic apparel and equipment manufacturer whose labor practices have been scrutinized as part of the public debate regarding “globalization.” Responding to claims that it was operating sweatshops in third-world countries, Nike took out “editorial advertisements,” issued press releases, wrote letters to the editor and op-ed pieces in newspapers around the country, and sent letters to the officers of major national universities. Nike conveyed in these communications that it treats workers in its contract facilities fairly and that its investments produce substantial economic and political benefits. Respondent Marc Kasky, a California resident ostensibly acting on behalf of the general public as a “private attorney general,” sued Nike and several of its employees who had spoken about globalization on Nike’s behalf, alleging that their statements were false or amounted to misrepresentations in violation of California’s unfair trade practice and false advertising law. Kasky conceded that the statements at issue would be immune from state regulation if considered to be non-commercial speech, but contended that they constituted commercial speech because they were also intended to reach and influence actual and potential purchasers of Nike’s products.

Nike moved to dismiss the suit as barred by the First Amendment. The California Superior Court agreed with Nike’s position, dismissing the case, and the California Court of Appeal unanimously affirmed. 93 Cal. Rptr. 2d 854 (2000). The California Supreme Court granted review and reversed by a 4-3 vote. 45 P.3d 243 (2002). The majority defined commercial speech “subject[] to laws aimed at preventing false advertising or other forms of commercial deception” as statements (1) made by persons “engaged in commerce,” (2) to an audience of “actual or potential buyers or customers of the speaker’s goods or services,” (3) in

the form of “representations of fact about the business operations, products, or services of the speaker * * *, made for the purposes of promoting sales of, or other commercial transactions in, the speaker’s products or services.” *Id.* at 256. Applying this three-part test, the court concluded that Nike’s statements were commercial speech subject to California’s unfair trade practice and false advertising law because “Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations.” *Id.* at 259. According to the court, the fact that petitioners’ speech occurred in the context of a debate on an issue of public importance did not render it political rather than commercial because “[s]peech is commercial in its content if it is likely to influence consumers in their commercial decisions” and “[f]or a significant segment of the buying public, labor practices do matter in making consumer choices.” *Id.* at 262. The court accordingly remanded the case for a determination of “whether any false representations were made.” *Id.* at 247.

This case is of obvious interest to all businesses. If the California Supreme Court’s decision is sustained, then a business whose practices are publicly criticized will be forced to choose between remaining silent and allowing the allegations to go unanswered, and speaking up and thereby risking litigation based on contentions that its statements were false or misleading.

4. Fair Labor Standards Act — Removal. The Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (“FLSA”), which establishes minimum standards for wages and overtime entitlement, provides that an action for a violation of the statute “may be maintained * * * in any Federal or State court of competent jurisdiction.” 29 U.S.C. § 216(b). The Supreme Court granted certiorari in *Breuer v. Jim’s Concrete of Brevard*, No. 02-337, to determine whether a claim under the FLSA brought in state court may be removed by the defendant to federal court.

Petitioner Phillip T. Breuer filed a claim under the FLSA against Respondent Jim’s Concrete of Brevard in Florida state court. Jim’s Concrete removed the case to the United States District Court for the Middle District of Florida, and Breuer moved to remand. The district court denied Breuer’s motion for remand, but certified that decision for interlocutory review.

The Eleventh Circuit affirmed the order denying remand. 292 F.3d 1308 (2002). The court noted the tension between the FLSA’s provision that a cause of action “may be maintained” in state court, and the language of the removal statute providing that an action over which a federal district court has original jurisdiction may be removed unless “otherwise expressly provided by Act of Congress.” 28 U.S.C. § 1441(a). Adopting the reasoning of the First Circuit’s opinion in *Cosme Nieves v. Deshler*, 786 F.2d 445 (1986), however, the court concluded that the FLSA’s language was not “an express statutory provision against removal” (292 F.3d at 1309) and hence determined that the removal was proper.

The court acknowledged that the Eighth Circuit reached a contrary result in *Johnson v. Butler Brothers*, 162 F.2d 87 (1947), but observed that a “great majority” of “district courts across the country” had permitted removal. *Id.* at 1309.

This case is important to all businesses subject to litigation under the FLSA.

The Court has expedited the briefing schedule in this case. Accordingly, amicus briefs in support of the petitioner are due on Friday, February 14, 2003, and amicus briefs in support of the respondent are due on Monday, March 10, 2003.

5. Dormant Commerce Clause — Congressional Exemptions — Milk Pricing And Pooling. Since it struck down part of the New York Milk Control Act in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Supreme Court regularly has developed its dormant commerce clause jurisprudence through cases involving state regulation of the milk industry. Continuing in that tradition, the Court granted certiorari in and consolidated *Hillside Dairy, Inc. v. Lyons*, No. 01-950, and *Ponderosa Dairy v. Lyons*, No. 01-1018. The two petitions, which seek review of the same Ninth Circuit decision, present three general questions: first, whether Congress clearly exempted California’s interstate regulation of the dairy industry from the effects of the dormant Commerce Clause; second, whether courts can resort to the legislative history of a statute to find such a clear exemption; and third, whether the Privileges and Immunities Clause can invalidate a statute that does not expressly mention out-of-state residency or citizenship.

California has administered its own milk industry regulations for nearly a century. Since 1967, those regulations have provided that in-state milk producers (*i.e.*, dairy farms) would be paid using a system of quotas and pooled revenue designed to stabilize the price of raw milk. When a California milk processor bought raw milk from an out-of-state producer, however, the processor was in effect allowed to make direct payments to that producer, thereby avoiding payments to the in-state revenue pool. Responding to complaints from members of the state’s dairy industry, California altered its treatment of out-of-state milk producers in 1997. Under these amended regulations, California milk processors were no longer permitted to pay out-of-state producers without contributing to the in-state revenue pool. Several out-of-state producers filed suit in federal district court, contending that California’s new system unconstitutionally impaired interstate commerce, deprived them of certain privileges and immunities available to California milk producers, and violated their right to due process of law. The district court granted California’s motion to dismiss the producers’ privileges and immunities and due process claims, and subsequently entered summary judgment in California’s favor as to the Commerce Clause claim.

The Ninth Circuit affirmed. *Ponderosa Dairy v. Lyons*, 259 F.3d 1148 (2001). In the court’s view, Section 144 of the Federal Agriculture Improvement and Reform Act of 1996 exempted California’s pooling laws from the strictures of the Commerce Clause. Section 144 provides that

[n]othing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding: (1) the percentage of milk solids or solids not fat in fluid milk products * * * ; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fats.

Relying on a previous Ninth Circuit case, *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (1998), and the legislative history of Section 144, the court held that this statutory language protected not only California’s regulations dealing with milk solids, but also the “interrelated and mutually interdependent” pricing and pooling regulations, including the 1997 amendments. *Id.* at 1153-1154.

In *Maine v. Taylor*, 477 U.S. 131, 139 (1986), the Supreme Court held that “[a]n exemption from the effects of the negative Commerce Clause requires “a clear expression of approval from Congress.” In rejecting the petitioner’s Commerce Clause claim, the Ninth Circuit concluded that the necessary clear expression “may be gleaned both from the language of the relevant statute and from the legislative history.” *Shamrock*, 146 F.3d at 1180. The Ninth Circuit further concluded that the district court properly dismissed the plaintiffs’ privileges and immunities claim, because California’s amended regulations “are based on the location where the milk is produced” and “do not, on their face, create classifications based on any individual’s residency or citizenship.” *Id.* at 1156.

This case is directly relevant to dairy farmers in California and its neighboring states. Because the Court will articulate the standard for determining the existence and scope of statutory exemptions for the dormant Commerce Clause, the case is potentially relevant to any company engaging in interstate commerce in a state that tends to favor home-grown businesses.

6. *Employment Retirement Income Security Act — Applicability of the “Treating Physician Rule”*. The Supreme Court granted certiorari in *Black & Decker Disability Plan v. Nord*, No. 02-469, to determine whether an ERISA plan administrator’s determination of disability is subject to the “treating physician” rule and, therefore, *de novo* review is appropriate where an administrator operating under an apparent conflict of interest rejects the conclusions of an employee’s treating physician without providing specific, legitimate reasons for doing so that are based on substantial evidence in the record.

Kenneth Nord was employed as a Material Planner for Kwikset Corporation, a subsidiary of Black & Decker Corporation, and was enrolled in the Black & Decker Disability Plan (“Plan”). The Plan Administrator had delegated his responsibilities to review disability claims to Metropolitan Life Insurance Company (“MetLife”). In March 1997, Nord was experiencing hip and lower back pain and his treating physician, Dr. Hartman, concluded that Nord suffered from a mild degenerative disc disease. Upon Dr. Hartman’s recommendation, Nord stopped working and submitted a claim for disability benefits. Three orthopedic doctors subsequently confirmed Dr. Hartman’s diagnosis and Black & Decker’s human resources representative concluded that Nord’s physical limitations prevented him from performing the requirements of his job.

In February 1998, MetLife informed Nord that his claim had been denied. Nord requested a review and, as part of that process, he was referred to Dr. Mitri for an independent evaluation of his medical claims. Based on Dr. Mitri’s conclusion that Nord could perform his job, MetLife recommended that Nord’s claim be denied. The Administrator followed that recommendation.

Nord sued, claiming that the denial of his disability benefits violated ERISA. The district court granted summary judgment to Black & Decker after concluding that the Administrator did not abuse his discretion in denying Nord’s claim. In doing so, the court rejected Nord’s contention that the Administrator’s decision to deny benefits should be reviewed *de novo* because Black & Decker funds and administers the Plan and, therefore, the Administrator had a conflict of interest when he denied Nord’s benefits.

The Ninth Circuit reversed. 296 F.3d 823 (2002). The court of appeals explained that its review for abuse of discretion is “less deferential” where, as in this case, the Administrator is operating under an apparent conflict of interest by funding and administering the Plan. *Id.* at 828. The court concluded that the Administrator’s decision to reject the opinion of Nord’s treating physicians without providing “specific, legitimate reasons” based on “substantial evidence in the record” demonstrated an actual conflict of interest. *Id.* at 831. Consequently, the court reviewed the Administrator’s decision *de novo* and reversed because it concluded that Dr. Mitri’s opinion could not overcome the other evidence demonstrating that Nord was disabled. *Id.* at 832.

This case is of special interest to any organization administering an ERISA disability plan.

7. Lanham Act — Reverse Passing Off — Consumer Confusion and Damages. The Lanham Act prohibits false designations only if they are “likely to cause confusion or to cause mistake, or to deceive as to * * * the origin of the goods.” 15 U.S.C. § 1125(a)(1)(A). Prohibited forms of false designation include “passing off,” in which the defendant sells its goods under the name or trademark of another, and “reverse passing off,” in which a defendant sells a good as its own after removing the name or trademark of another. The Lanham Act permits a damages award of any profits earned from the infringement, and the award may be enhanced as long as the enhancement constitutes “compensation and not a penalty.” 15 U.S.C. § 1117(a). The Supreme Court granted certiorari in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, No. 02-428, to determine (1) whether a reverse passing off claim requires proof of consumer confusion, and (2) whether the Lanham Act permits an enhanced damages award solely to deter future infringement.

In 1948, Doubleday published *Crusade in Europe*, a collection of General Dwight Eisenhower’s memoirs. That same year it granted the television rights to Twentieth Century Fox Television Productions, Inc. (“Fox”) to produce a television series based on the book. In 1988, Fox sublicensed its rights to New Line, which distributed a videocassette series that incorporated much of the Fox series. Both works were entitled *Crusade in Europe*. Dastar Corporation (“Dastar”) obtained a copy of the 1940s television series, made slight modifications to it, and then released it for sale under the title *Campaigns in Europe*. The Dastar video credits listed only the Dastar staff and producers contributing to the video; they did not include Fox or New Line. Fox and New Line sued Dastar under Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1), alleging that Dastar unlawfully distributed copied videos without giving credit to the original material.

The district court granted summary judgment against Dastar, awarding \$783,000 in damages, an amount equal to Dastar's profits from its videos. The court doubled the award pursuant to 15 U.S.C. § 1117(a), determining that an enhancement was necessary to deter future infringement by Dastar. The resulting award exceeded Dastar's entire gross revenue from its videos.

The Ninth Circuit affirmed the Lanham Act judgment in an unpublished opinion. 2002 WL 649087 (Apr. 19, 2002). It rejected Dastar's argument that the plaintiffs were required to prove that Dastar's video had resulted in consumer confusion, holding that "bodily appropriation," or the unauthorized copying or use of substantially the entire work, "subsumes the less demanding consumer confusion standard." *Id.* at *1 (internal quotes omitted). Turning to the damages issue, the court affirmed the district court's doubling of the award under 15 U.S.C. § 1117(a), finding the deterrence of future infringing conduct "a permissible ground [for enhancement] under the Lanham Act." 2002 WL 649087, at *2.

The circuits are split on both issues presented in the case. The Ninth Circuit has long applied a "bodily appropriation" test in reverse passing off cases, which obviates the need for proof of consumer confusion. See, e.g., *Cleary v. News Corp.*, 30 F.3d 1255 (1994). By contrast, several other circuits have adopted a multi-factor test to determine whether there is a likelihood of consumer confusion. See, e.g., *Murray Hill Publ'ns, Inc. v. ABC Communications, Inc.*, 264 F.3d 622 (6th Cir. 2001); *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305 (11th Cir. 2001); *Batiste v. Island Records, Inc.*, 179 F.3d 217 (5th Cir. 1999). The Second Circuit applies a third test, requiring that the plaintiff prove a "substantial similarity" between the original and copied work. See *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775 (1994). The circuits are also split over whether deterrence is a valid ground for enhancement under the Lanham Act. The Ninth Circuit's holding that a doubled profit award for deterrence purposes did not constitute a penalty under the Lanham Act conflicts with the view expressed by other courts of appeals. See, e.g., *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 969 (D.C. Cir. 1990) (deterrence by itself will not justify an enhanced award); *Jurgens v. McKasy*, 927 F.2d 1552, 1564 (Fed. Cir. 1991) (same).

This case is of great significance to the business community. The Court will clarify both the role of consumer confusion in reverse passing off cases and the permissible justifications for enhancement of a damages award under the Lanham Act. The case is of particular interest to the media and entertainment industries as they must consider how to credit a modified work without being subject to allegations of reverse passing off.

The Court has expedited the briefing in this case. Accordingly, amicus briefs in support of the petitioner are due on Friday, February 14, 2003, and amicus briefs in support of the respondents are due on Monday, March 10, 2003.

8. *Employment Discrimination — Mixed-Motive Cases — Direct Evidence Requirement.* Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, provides that an "unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any

employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m). An employer may limit the remedies available in such a mixed-motive discrimination case by demonstrating that it “would have taken the same action in the absence of the impermissible motivating factor.” 42 U.S.C. § 2000e-5(g)(2)(B). The Supreme Court granted certiorari in *Costa v. Desert Palace, Inc.*, No. 02-679, to decide: (1) whether a plaintiff must prove by direct evidence that discrimination was a motivating factor in the adverse employment decision in order to trigger the mixed-motive analysis, and (2) what constitutes direct evidence sufficient to trigger the analysis.

Catherina Costa was employed by Caesars Palace Hotel & Casino as a warehouse worker from 1987 to 1994, when she was terminated for disciplinary infractions. Costa filed suit under Title VII, alleging that she was subject to different treatment than her male co-workers in the application of disciplinary standards and allowance of overtime. At trial, Costa proceeded on a mixed-motive theory. The jury returned a verdict in her favor, awarding her back pay and compensatory and punitive damages.

A panel of the Ninth Circuit reversed. 268 F.3d 882 (2001). Relying on Justice O’Connor’s concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), the panel held that in a mixed-motive case the plaintiff must advance “direct and substantial evidence of discriminatory animus.” 268 F.3d at 889. The Ninth Circuit reheard the case en banc, vacated the panel decision, and affirmed the liability judgment in Costa’s favor by a 7-4 vote. 299 F.3d 838 (2002). The en banc majority ruled that the 1991 amendments to Title VII had overruled *Price Waterhouse* and abrogated the direct evidence requirement. *Id.* at 850-851. It reasoned that the language of the 1991 amendments “requires proof of only ‘a motivating factor’ and does not set out any special proof burdens,” concluding that “Congress did not impose a special or heightened evidentiary burden on the plaintiff in a Title VII case in which discriminatory animus may have constituted one of two or more reasons for the employer’s challenged action.” *Id.* at 851. The panel also opined that the direct evidence requirement had created “chaos” among the circuits as to how to apply it. *Id.* at 852-853.

Judge Gould dissented, joined by Judges Kozinski, Fernandez and Kleinfeld. The dissenters concluded that “[t]he 1991 amendments to Title VII did not modify the Supreme Court’s prior holding on the need for direct evidence,” because “the statutory amendments are silent as to that subject.” 299 F.3d at 866. The dissenters also observed that the more lenient mixed-motive test — which shifts the burden of proof to the defendant once the plaintiff has produced evidence of discriminatory motive — is a departure from the well-established framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in which the burden of persuasion always remains with the plaintiff. 299 F.3d at 866. Failing to impose a heightened evidentiary standard for the mixed-motive analysis, the dissenters opined, would effectively vitiate the *McDonnell Douglas* framework. *Id.*

The en banc Ninth Circuit’s holding that direct evidence of discriminatory animus is not required to trigger the mixed-motive test conflicts with the conclusions of virtually every other circuit. See, e.g., *Jackson v. Harvard Univ.*, 900 F.2d 464 (1st Cir. 1990); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d

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Cir. 1995); *Fuller v. Phipps*, 67 F.3d 1127 (4th Cir. 1995); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858 (5th Cir. 1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343 (7th Cir. 1997); *Schleiniger v. Des Moines Water Works*, 8 F.3d 1541 (8th Cir. 1993); *Heim v. Utah*, 8 F.3d 1541 (10th Cir. 1993); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990).

Because any employment discrimination claim can be presented as a mixed-motive case, this case is of substantial importance to every business subject to Title VII.

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On January 13, 2003, the Supreme Court requested the views of the Solicitor General in the following cases of interest to the business community:

South Florida Water Management District v. Miccosukee Tribe of Indians, No. 02-626: The questions presented are (1) whether the state water management agency's pumping of water for flood management, which adds nothing to the water being pumped, constitutes an "addition" of pollutants "from" a point source and thus triggers the need for an NPDES permit under the Clean Water Act; and (2) whether the court below should have deferred to the long-held federal and state agency position that the state water management agency's pumping does not constitute an "addition" of pollutants that requires an NPDES permit. Mayer, Brown, Rowe & Maw is co-counsel for the petitioner.

Intel Corp. v. Advanced Micro Devices, Inc., No. 02-572: The questions presented are (1) whether 28 U.S.C. § 1782, which authorizes federal district court discovery for use in a proceeding in a foreign or international tribunal, authorizes a federal district court to provide a private person with discovery that the foreign jurisdiction itself does not authorize; (2) whether Section 1782 allows civil discovery by a private person when no proceeding before a foreign tribunal is pending or imminent; and (3) whether Section 1782 extends discovery rights in the United States to private non-litigants.

Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd., No. 02-649: The questions presented are (1) whether, to satisfy the Sherman Act's restraint of trade requirement, plaintiffs who prove a mixed U.S.-foreign price-fixing cartel that is "substantially foreign" must prove that the cartel had a "substantial effect on U.S. commerce," or whether it is enough for the plaintiffs to show that cartel members or their agents made non-minimal sales in the U.S. or engaged in other implementing acts here; and (2) whether the existence of "substantial effects" is subject to jury determination when multi-million dollar U.S. sales by the defendant of the relevant product are undisputed.

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