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# Bank Counsel Roundtable
# Banks at the U.S. Supreme Court

**Eric Sherman, Christina Carroll, and Nick Bullard**

**July 26, 2022**



## Housekeeping

Today's program is 60 minutes.

**Materials & Attendance Form**
Are available for download from Dorsey's reminder email sent from Events@Dorsey.com.

**Q&A**
We will not have time for Q&A, attendees may contact the speakers directly or reach out to your trusted Dorsey contact. Speaker contact information is included in the materials.

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# Look Back at the Court's 2021-22 Term

- **Decline of merits decisions**
  - 2021 term: only 58 signed opinions in argued cases
  - Prior two terms: also only 50-60 signed opinions
  - Lowest number of merits decisions since the Civil War
- **Decline of unanimity**
  - Only 29% of cases were decided unanimously
  - Lowest rate of unanimity over the last two decades
  - Average rate of unanimity was 43% over the last 12 terms

## Look Back at the Court's 2021-22 Term (cont.)

- **Roberts and Kavanaugh as the "swing" justices**
  - Roberts and Kavanaugh were in the majority in 95% of the decisions
  - They were each in dissent in only three cases this term
- **Sotomayor in dissent**
  - Justice Sotomayor was in the majority just 58% of decisions, the lowest of any justice



## Look Forward to the Court's 2022-23 Term

- **Pace of cert. grants remains slow**
  - The Court has granted review in 31 cases so far
- **A retirement and a new justice**
  - Justice Breyer retired
  - Justice Ketanji Brown Jackson was sworn in on June 30, 2022
    - Dissents in her vote as a justice
    - Recused herself from some cases (e.g., Harvard admissions case)

## Follow up from Last Term

### *Morgan v. Sundance, Inc.*

- In general, waiver is characterized by the intentional relinquishment or abandonment of a known right.
- Does the Federal Arbitration Act allow courts to tip the scales in favor of arbitration by requiring a party opposing arbitration also to show prejudice?
- Eighth Circuit said yes by a 2-1 panel vote; circuits split 9-2 in favor of requiring a showing of prejudice.



## Follow up from Last Term

### *Morgan v. Sundance, Inc.* (cont.)

- FLSA collective action brought by fast-food worker against franchisee challenging denial of overtime pay.
- Employment agreement contained mandatory arbitration clause.
- Franchisee litigated for eight months, bringing a motion to dismiss, filing an answer (not raising the arbitration clause), and engaging in mediation.
- Franchisee moves to stay and compel arbitration.
- District court denies finding prejudice, but Eighth Circuit reverses.

## Follow up from Last Term

### *Morgan v. Sundance, Inc.* (cont.)

- Held (9-0): Federal courts may not create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's policy favoring arbitration. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.
- On remand, Eighth Circuit to determine whether franchisee knowingly relinquished its right to arbitrate by acting inconsistently with its exercise, or to apply a different (but established) procedural framework (such as forfeiture).



## Follow up from Last Term

### *Viking River Cruises, Inc. v. Moriana*

- The Court has previously upheld arbitration agreements requiring bilateral proceedings in both the class-action and FLSA collective-action contexts.
- Can a state private attorney general statute that permits a plaintiff to assert employment law violations affecting other employees defeat an agreement requiring individual arbitration?
- California Court of Appeal held the arbitration clause unenforceable.

## Follow up from Last Term

***Viking River Cruises, Inc. v. Moriana* (cont.)**

- The California Labor Code Private Attorneys General Act (PAGA) allows an employee to sue for civil penalties for violation of many of the code's provisions.
- Actionable violations include those affecting other current or former employees.
- Treated like a type of *qui tam* action.
- $100 per initial violation per employee per pay period, $200 for subsequent violations per employee per pay period.
- Employees keep 25 percent.



## Follow up from Last Term

***Viking River Cruises, Inc. v. Moriana* (cont.)**

- Employment agreement barred arbitration of any class, collective, or representative PAGA action.
- Employee sued claiming employer failed to deliver her final wages within 72 hours.
- Employee joined a number of other code violations affecting other employees, concerning minimum wage, overtime, meal and rest breaks, timing of pay and pay statements.
- Employer motion to compel arbitration denied and ruling affirmed.

## Follow up from Last Term

***Viking River Cruises, Inc. v. Moriana* (cont.)**

- Held (8-1): PAGA violates the FAA to the extent it conditions enforceability of an agreement to arbitrate individual PAGA claims upon the plaintiff's ability to join violations that did not affect the plaintiff.
- The rule "unduly circumscribes the freedom of parties to determine the issues subject to arbitration and the rules by which they will arbitrate."
- "[S]tate law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate."



## Follow up from Last Term

***Viking River Cruises, Inc. v. Moriana* (cont.)**

What next?

- Arbitrate the individual PAGA claim and dismiss the representative PAGA claims
- PAGA preempted to the extent it barred the parties from agreeing to arbitrate the individual claim
- Once the individual claim Is booted from court, plaintiff lacks standing under PAGA to assert the representative claims

## Follow up from Last Term

### *Badgerow v. Walters*

- The FAA does not contain a grant of subject matter jurisdiction to federal courts.
- A federal court has subject matter jurisdiction over a petition to compel arbitration if, save for the agreement to arbitrate, it would have subject matter jurisdiction over the underlying controversy.
- Does that "look-through approach" apply to a petition to confirm or vacate an arbitration award?



## Follow up from Last Term

### *Badgerow v. Walters* (cont.)

- Held (8-1): "Look-through" analysis does not apply to petitions to confirm or vacate arbitration awards
- The "look-through" rule is based upon statutory language peculiar to FAA Section 4
  - "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration *may petition any United States district court which, save for such agreement, would have jurisdiction under title 28*, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties…"

## Follow up from Last Term

- ***West Virginia v. EPA***
  - The court struck down a centerpiece of the Obama administration's climate policy: the EPA's Clean Power Plan, rules governing fossil-fuel-fired electric generators.
  - The Court formally recognized the "major questions doctrine."
  - "[A]dministrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance."



## Follow up from Last Term

- ***West Virginia v. EPA* (cont.)**
  - Potentially major impact going forward.
  - Examples: SEC's Climate Disclosure Rule and regulation of cryptocurrency.

## This Term: *Bittner v. United States*

- **Background**
  - 5th Circuit, EDTX
  - Amici: US Chamber of Commerce, Am. CollegeTax Counsel, Ctr. Taxpayer Rights
  - Petitioner
    - Romania-born, USA 9 years (naturalized), Romania 20 years post-1990, file while abroad
    - Amended 5 reports late (one per year) 2007-2011, 25+ accounts, aggregate $10M+
- **Bank Secrecy Act, 31 U.S.C. § 5311**
  - "Report of Foreign Bank and Financial Accounts" (FBAR). *Id.* at § 5314.
  - June 30 deadline for year prior
  - FBAR filed by person with control of a foreign account over $10,000
- **Question Presented: One "violation" per form or per account?**
  - Non-willful violation = $10,000 max fine



## This Term: *Bittner v. United States*

- **Posture / Arguments**
  - EDTX said per form; 5th Cir. reversed
  - Circuit split
    - 9th Cir. (CA) says per form = $50,000 fine
    - 5th Cir. (TX) says per account = $2.72M fine for 272 violations
    - IRS says both
  - Arguments focus on the duty
    - 9th Cir. / EDTX: Regulations require one, annual FBAR (one "form") vs.
    - 5th Cir.: Regulations to disclose existence of foreign accounts (per account)
- **Notable Takeaways**
  - Average FBAR more than 10 accounts, 900,000 FBARs, 9.5M accounts
  - 40M+ foreign-born USA residents
  - Ongoing issue → counsel your clients, disclose foreign accounts

## This Term: *Mallory v. Norfolk Southern Railway Co.*

**Background**

- Mallory, a Virginia resident, sued Norfolk Southern, a Virginia railway corporation based in Virginia, under FELA in Pennsylvania state court alleging on-the-job exposure to carcinogens in Ohio and Virginia.
- Norfolk Southern moves to dismiss for lack of personal jurisdiction. Mallory responds that, under a Pennsylvania statute, Norfolk Southern consented to general personal jurisdiction by registering to do business in Pennsylvania.
- Trial court grants motion, and two levels of Pennsylvania appeals courts affirm.



## This Term: *Mallory v. Norfolk S. Rwy. Co.* (cont.)

**Analysis below:**

- Under *Goodyear* and *Daimler*, a state statutory scheme violates Fourteenth Amendment due process if it allows for general jurisdiction over foreign corporations absent affiliations within the state that are so continuous and systematic as to render the foreign corporation essentially at home there
- A foreign corporation's registration to do business under such a scheme is coerced and not voluntary

## This Term: *Mallory v. Norfolk S. Rwy. Co.* (cont.)

**Petitioner's arguments:**

- State statutes requiring consent to jurisdiction were upheld before and after the enactment of the Fourteenth Amendment
- *International Shoe* and its progeny represent an expansion of jurisdiction over nonconsenting corporations based on their contacts with the forum state. They did not invalidate jurisdiction by consent.
- Requiring corporations to give up a waivable procedural right does not violate due process.

**Norfolk's brief due August 26; argument scheduled for October 11**



## This Term: MoneyGram cases

- **Background**
  - Dispute between States over unclaimed/uncashed checks issued by MoneyGram Payments Systems.
  - MoneyGram returns unclaimed checks to Delaware, where it is headquartered.
  - 30 states argue that the checks should go to the states where they were purchased.
  - Delaware filed case directly in the Supreme Court to resolve the question.
  - Special Master recommends judgment against Delaware.

## This Term: MoneyGram cases (cont.)

- **Key Issue**
  - Whether the unclaimed or uncashed checks are "money orders" or "similar written instruments" under the federal Disposition of Abandoned Money Orders and Traveler's Checks Act.
- **American Bankers Association's amicus brief**
  - Urges "clear rules" to minimize banks' "penalties, administrative burdens, and potential liability."
- **Set for argument on October 3, 2022**



## CLE Code for Attendees in States that Require a Code

***(Tip: The CLE code is different than the event code assigned by states)***

# Petitions Before the Supreme Court

- **Turkiye Halk Bankasi A.S. v. United States**
  - **Foreign Sovereign Immunities Act: immune except for commercial activity, civil**
    - **Activity within USA, connected with USA, outside of but effect within USA**
  - **Background**
    - **Halkbank, majority owned by Turkey = foreign state under FSIA**
    - **Scheme to divert funds to circumvent sanctions against Iran**
    - **Prosecuted 3 bank executives; bank argued immunity**
    - **SNDY / 2d Cir.: no immunity for criminal acts + commercial activity exception**
  - **Issue: Can the USA indict and sentence a foreign sovereign?**
    - **2d, 10th, D.C. Cirs. = yes, 18 U.S.C. 3231 ("all offenses against the USA")**
    - **6th Cir. = no**
    - **FSIA flip (only act granting jurisdiction, civil vs. only immunizes for civil acts)**
    - **RICO implications, foreign policy**



# Petitions Before the Supreme Court

- **NSO Group Technologies Limited v. WhatsApp Inc.**
  - **FSIA vs. common law**
    - **FSIA: foreign *states,* not individuals**
    - **Common law immunity for foreign individuals, private agents ("conduct-based")**
    - ***Samantar v. Yousuf*: if no FSIA, then common law**
  - **Background**
    - **NSO: Israeli company, tech to combat terrorism, crimes against children, "Pegasus"**
    - **WhatsApp notification killed investigation into Islamic State terrorist planning attack**
    - **WhatsApp sued under Computer Fraud and Abuse Act and other laws**
    - **NDCA: NSO is gov't agent but no immunity because judgment wouldn't bind gov't**
    - **9th Cir.: no immunity if not FSIA "foreign state" – FSIA displaces common law**
  - **Issue: Can a private entity seek common-law sovereign immunity?**
    - **4th, D.C. Cirs. = yes vs. 9th Cir. = no, FSIA applies to entities**
    - **Foreign policy / reciprocity**

## Petitions Before the Supreme Court

- ***Kinney v. HSBC Bank USA, N.A.***
  - Kinney, a Chapter 13 debtor, defaulted under bankruptcy plan by failing to make monthly mortgage payments.
  - Bank moved to dismiss the case due to the material default.
  - Kinney then submitted the missing payments after her plan had ended.
  - The bankruptcy court concluded Kinney was not eligible for a discharge because she did not submit all required payments within the plan's term.



## Petitions Before the Supreme Court

- ***Kinney v. HSBC Bank USA, N.A.*** **(cont.)**
  - Issue: Whether a Chapter 13 debtor may obtain a discharge if she defaults but then makes up missed payments after the plan period.
  - The Court invited the Solicitor General to file a brief.

## Petitions Before the Supreme Court

- ***Buffington v. McDonough***
  - Concerns the Department of Veterans Affairs' interpretation of a veteran benefit statute.
  - The Federal Circuit deferred to the VA's interpretation, relying on the *Chevron* doctrine.
  - Issue: "Whether Chevron should be overruled."
  - Many amici have filed briefs, urging an overruling of *Chevron*.

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# Thank You for Attending

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## Questions

**If you have questions, you are welcome to follow-up directly with the presenters or call on your trusted Dorsey contact.**

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Eric regularly appears before federal and state courts and arbitration panels nationwide. Most of his clients operate in the banking and financial services sector. Eric handles defense of consumer class actions, litigation of corporate trust matters, trust and estate litigation, and other complex disputes.



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Christina has represented clients across a number of industries—such as investment banking, marketing and advertising firms, religious organizations, healthcare, wedding and photography, oil and gas, construction, commercial brokerage, hospitality—and across a number of matters—including breach of fiduciary duty, breach of trust, fraud, breach of contract, discrimination, eviction, embezzlement, bill of review, theft of trade secrets, defamation, jury retaliation, civil conspiracy, and negligence.

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Nick's practice focuses on three primary areas: (1) employee benefit and ERISA litigation, (2) healthcare-related litigation, and (3) appellate matters. In his ERISA practice, Nick represents plan fiduciaries, employers, insurers, and service providers on the full range of ERISA issues. In his healthcare practice, Nick provides comprehensive representation to hospitals and health systems, managed care organizations, pharmacy benefits managers, and health care technology companies. He also maintains a robust appellate practice.

Nick first developed a passion for appellate litigation when he clerked for Judge James B. Loken of the U.S. Court of the Appeals for the Eighth Circuit. Relying on that experience, Nick has helped with appeals before the Supreme Court of the United States, federal appellate courts, and state appellate courts.

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