Supreme Court to address jurisdiction, liability, privilege in cases affecting businesses

By Shay Dvoretzky, Esq., and Emily Kennedy, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

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The 2022 Supreme Court Term is off to a slow start. The Court finished the calendar year without issuing any opinions in argued cases, something that hasn't happened in over a century. The pace of cert grants — which was already on the decline — is also at a record low. While the Court recently has averaged close to 60 grants by early January, the 2022 Term has only 51 cases on the docket so far.

This sleepy beginning does mean that the second half of the Term will be all the more eventful. Over the next six months, the Court will issue decisions on significant matters including affirmative action in college admissions, state legislatures' control over elections, and the intersection of free speech and anti-discrimination laws. The Court will also decide a number of important issues affecting businesses, including where they can be sued, what they can be held liable for, and how they communicate with their attorneys.

Mallory v. Norfolk Southern Railway Co. could have major ramifications for where companies may be sued. The 14th Amendment's due process clause limits courts' jurisdiction over defendants. If the forum state doesn't have general personal jurisdiction over a defendant (for companies, that's the place of incorporation or principal place of business), then it must have specific personal jurisdiction — the company must have engaged in activities that gave rise to the lawsuits. A defendant may also consent to jurisdiction, and *Mallory* tests the limits of what constitutes consent.

Pennsylvania law provides that every company registering to do business there consents to general jurisdiction within the state. Relying on that implied-consent statute, Mallory — a former Norfolk Southern employee — sued the Virginia-based railroad in Pennsylvania for alleged exposure to carcinogens from his work for the company in Virginia and Ohio. Norfolk Southern argued that there was no personal jurisdiction, and that Pennsylvania's implied-consent statute violates due process. The Pennsylvania Supreme Court agreed, and the U.S. Supreme Court granted cert.

The parties' arguments in this case pit historical understandings of personal jurisdiction against modern realities of a mobile economy. Emphasizing the history of consent-by-registration laws, Mallory urges the Justices to uphold Pennsylvania's statute as consistent with the original understanding of the 14th Amendment. Norfolk Southern argues that consent-by-registration laws were a solution to a problem that is now obsolete thanks to the framework the Court developed in its 1945 decision, *International Shoe Co. v. Washington*, which allows businesses to be sued based on their business activities in a state, regardless of their consent.

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The questions at November's oral argument suggested that the Justices' views of *Mallory* may be divided and ideologically scrambled. Chief Justice John Roberts and Justice Elena Kagan appeared sympathetic to Norfolk Southern's argument that *International Shoe* displaced earlier cases upholding consent-by-registration laws. But Justice Ketanji Brown Jackson suggested that both avenues for personal jurisdiction can coexist, and Justices Sonia Sotomayor and Neil Gorsuch questioned whether Norfolk Southern's consent was actually coerced on these facts.

Meanwhile, Justices Samuel Alito and Brett Kavanaugh expressed concern about the potential practical ramifications of Mallory's position, which could shift the jurisdictional landscape by subjecting companies to suit anywhere they do business.

However the Court ultimately rules, *Mallory* is likely to have significant ramifications for businesses and where they may be sued.

While *Mallory* is about a state's power to hale defendants into its courts, the Court will also consider questions about a state's ability to regulate conduct in *other* states.

National Pork Producers Council v. Ross involves a constitutional challenge to California's Proposition 12, a ballot initiative that requires farms to meet certain criteria before their pork can be sold in the state.

Farmers and pork producers claim that the law violates the dormant commerce clause — the theory that states cannot interfere with Congress' constitutionally conferred power over interstate commerce. Because California imports more than 99% of its pork, Proposition 12's challengers claim that the law unconstitutionally discriminates against interstate commerce by "transform[ing] the pork industry nationwide."

But Proposition 12's defenders say the alleged impact is overstated. They claim that Proposition 12 is no different than many laws states routinely pass regulating quality and safety standards. Allowing this challenge to proceed, they argue, would dramatically expand the scope of the dormant commerce clause in ways that undermine states' sovereignty.

On Jan. 9, the Court will hear argument in In re Grand Jury, *a case about the scope of the attorney-client privilege for multipurpose communications containing a mix of legal and business advice.*

The Justices wrestled at oral argument about where to draw the line in allowing states to impose policy preferences on the rest of the country. For more than two hours, they peppered advocates with hypotheticals about state laws ranging from bans on fruit picked by undocumented workers, or goods made by vaccinated employees, to requirements that firewood be treated with certain pesticides. And if some states enact competing laws — such as one requiring that goods be made by unionized workers and another prohibiting the use of unionized labor in manufacturing — businesses would be forced to choose between markets for selling their product. That, several Justices feared, would permit the sort of "economic Balkanization" that the commerce clause was intended to prevent.

Time will tell whether the Court ultimately tackles these broader questions or resolves the case on narrower grounds by remanding to the lower courts for further factual development about whether Proposition 12 will in fact wreak nationwide havoc on the pork industry — a question the lower courts didn't consider because they dismissed the challengers' claim at the pleading stage.

In addition to questions about states regulating conduct in each other's territory, the Court is facing questions about how broadly the United States can regulate conduct abroad.

In *Abitron Austria GmbH v. Hetronic International, Inc.*, the Court will consider whether the Lanham Act, which protects U.S. trademarks from infringement, applies to purely foreign sales.

Following a dispute over trademarks for radio remote controls used to operate heavy machinery, a jury awarded Hetronic International $90 million in damages for Lanham Act violations by Abitron Austria GmbH — even though only 3% of Abitron's worldwide sales had a substantial effect on U.S. commerce. The 10th U.S. Circuit Court of Appeals affirmed the award, holding that the Lanham Act applies to Abitron's foreign sales because those sales ultimately affected Hetronic's cash flow in the United States.

Abitron sought certiorari, asking the Supreme Court to consider how the Lanham Act applies to foreign conduct.

U.S. law generally applies only domestically, unless Congress clearly says otherwise. When there is no such clear statement, courts often have to determine whether a given application of a law is domestic or extraterritorial. A law's application is domestic, and thus permissible, if the conduct relevant to the statute's core focus — Congress' chief concern in passing the statute — occurred in the United States.

The question in *Abitron* is how that framework applies to the Lanham Act. Abitron claims that the Lanham Act applies only domestically and only when U.S. consumers are confused — not, as in this case, when the confusion takes place abroad. Hetronic claims that the Lanham Act applies extraterritorially and encompasses foreign infringement that has a substantial domestic effect. The Court agreed to weigh in and will hear oral argument on March 1.

The Court's ultimate decision will have an obvious impact on the scope of potential liability businesses may face under the Lanham Act for foreign sales. The 10th Circuit's test sweeps in substantial foreign conduct that could exponentially increase damages awards.

This case may have further implications, as well, by impacting the Court's broader framework for assessing extraterritoriality — potentially creating a ripple effect across other laws that implicate business activity abroad.

As businesses anticipate the implications of these and other key questions before the Court, many will be eager to talk with counsel. But another case on the Court's docket may affect those communications: On Jan. 9, the Court will hear argument in *In re Grand Jury*, a case about the scope of the attorney-client privilege for multipurpose communications containing a mix of legal and business advice.

This case arises from the Department of Justice's criminal investigation of an unnamed law firm's client. In response to a grand jury subpoena, the law firm produced more than 20,000 pages but withheld communications providing legal advice about the client's taxes. The 9th U.S. Circuit Court of Appeals affirmed a federal district court's contempt order, holding that the attorney-client privilege protects multipurpose communications only if the primary purpose of the communication was to provide legal advice.

The 9th Circuit's decision implicates a three-way split about the scope of the attorney-client privilege. Three other circuits — the 2nd, 5th, and 6th — similarly restrict the privilege to communications whose primary purpose was legal advice. The 7th U.S. Circuit Court of Appeals goes farther, at least in the tax context, holding that the attorney-client privilege doesn't protect any multipurpose communications about tax advice.

But in a 2014 decision by then-Judge Kavanaugh, the District of Columbia U.S. Circuit Court of Appeals took a broader approach that extends the privilege when providing legal advice was a significant purpose behind the communication.

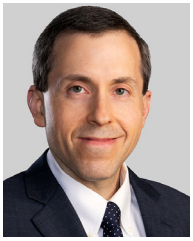
Along with the unnamed law firm, a diverse array of amici urge the Court to adopt the D.C. Circuit's test. A more restrictive test, they say, is out of touch with modern business realities and legal practice, and will hamper attorneys' communications with their clients because most communications have multiple purposes. The United States claims that the D.C. Circuit's test is too permissive and would facilitate overly aggressive shielding of information.

While the Court may limit its decision to the tax context, it could also tackle the scope of the attorney-client privilege more broadly. And either way, its decision is likely to impact how lawyers communicate with their corporate clients and whether they must isolate legal advice from other business discussions.

Whatever the outcome in these and other cases, one thing seems likely: Over the coming months, the 2022 Term's decisions will give businesses a lot to discuss with their lawyers.

Shay Dvoretzky and Emily Kennedy are regular, joint contributing columnists on the U.S. Supreme Court for Reuters Legal News and Westlaw Today.

About the authors



Shay Dvoretzky (L), a partner in **Skadden, Arps, Slate, Meagher & Flom**'s Washington, D.C., office, is the head of the firm's Supreme Court and appellate litigation group. He represents clients in appellate matters in the U.S. Supreme Court, federal courts of appeals and state appellate courts. He can be reached at shay.dvoretzky@skadden.com. **Emily Kennedy** (R) is firm counsel in the Supreme Court and appellate litigation group in the firm's Washington, D.C., office. She can be reached at emily.kennedy@skadden.com.

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