

U.S. Supreme Court Docket, October 2016 Term — Antitrust & Trade Regulation Cases

Granted Petitions	Docket No.	Subject	Status, Deadlines	Questions Presented
Visa Inc. v. Stoumbos Granted 6/28/16	15-962 (1/27/16)	Antitrust	Respondent Brief (3/30/16) Petitioner Reply Brief (4/11/16) Petitioner Brief (9/1/16) Attorneys: Anthony J. Franze (Arnold & Porter LLP) for Petitioners. Steve W. Berman (Hagens Berman Sobol Shapiro LLP) for Respondents. Supreme Court Docket	Whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as the Court of Appeals held below, or are insufficient, as the Third, Fourth, and Ninth Circuits have held. D.C. Circuit decision (8/4/15)
Visa Inc. v. Osborn Granted 6/28/16	15-961 (1/27/16)	Antitrust	Respondent Brief (3/30/16) Petitioner Reply Brief (4/11/16) Petitioner Brief (9/1/16) Attorneys: Boris Bershteyn (Skadden Arps Slate Meagher & Flom LLP) for Petitioners. Steve W. Berman (Hagens Berman Sobol Shapiro LLP) for Respondents. Supreme Court Docket	Whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as the Court of Appeals held below, or are insufficient, as the Third, Fourth, and Ninth Circuits have held. D.C. Circuit decision (8/4/15)

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Edstrom v. Anheuser-Busch InBev SA/NV	16-270 (8/30/16)	Antitrust	Response due 10/3/16 Respondent Waiver Attorneys: Joseph M. Alioto (Alioto Law Firm) for Petitioners. M. Miller Baker (McDermott Will & Emery LLP) for Constellation Brands, Inc. Craig Sunshine (Skadden, Arps, Slate, Meager & Flom, LLP) for Anheuser-Busch InBev SA/NV. Supreme Court Docket	Whether §7 of the Clayton Act, 15 U.S.C. §18, which prohibits acquisitions that may “substantially...lessen competition, or to tend to create a monopoly” and the standards announced by this Court in <i>U.S. v. Falstaff Brewing Corp.</i>, 410 U.S. 526 (1973) require separate analysis of a transaction’s elimination of an actual and potential competitor exercising present beneficial competitive influence on the market? Whether §7 of the Clayton Act requires an increase in concentration in order to state a claim and avoid dismissal under Fed. R. Civ. P. 12(b)(6)? Ninth Circuit decision (4/4/16)
Archangel Diamond Corp. Liquidating Trust v. Lukoil	16-151 (7/28/16)	RICO	Response due 10/3/16 Attorneys: Bruce S. Marks (Marks & Sokolov, LLC) for Petitioner. Douglas B. Tumminello (Lewis Roca LLP) for OAO Lukoil. Supreme Court Docket	Absent extraordinary circumstances, should federal courts deny <i>forum non conveniens</i> dismissal of an American resident plaintiff’s RICO claims in order to fulfill Congress’ policy that RICO plaintiffs be incentivized through treble damages and attorney fees to act as private attorney generals to remedy serious national problems for which public prosecutorial resources are inadequate? Tenth Circuit decision (2/9/16)
Farmer v. D&O Contractors, Inc.	16-94 (7/18/16)	RICO	Response due 9/21/16	Whether this Court’s adoption in 1987 by analogy to the antitrust four-year period for

			Attorneys: G. Robert Blakey for Petitioner. M. Patrick McDowell (Brunini) for D & O Contractors, Inc. Supreme Court Docket	the statute of limitations for RICO inferentially carried with it a one-year extension from the termination of the government's investigation. Whether "due diligence" under equitable tolling includes delay in filing occasioned while a civil RICO plaintiff waits for the government to provide the admissible evidence required for a successful filing of a civil RICO claim for relief. Whether the standard for "due diligence" should, not be, in this Petition, as it is, "reasonable," that is, negligence, but rather at least "recklessness," that is, conscious avoiding a known duty of care, and, in particular, by also taking into consideration the injury or prejudice, if any, occasioned by the delay. Whether under the different equitable circumstances of this case, the Fifth Circuit's denial of equitable tolling by inflexible adherence to existing case law for lack of "diligence" in filing the RICO claims and lack of "extraordinary circumstances" preventing the filing of the RICO claims is in conflict with this Court's recognition that "equitable principles of tolling" may be employed by the courts to address equitable circumstances that do not fit the basic rules under present case law. Fifth Circuit decision (2/18/16)
Bridgeview Health Center, Ltd. v. Clark	16-91 (7/18/16)	Privacy	Response due 8/19/16 Respondent Waiver Attorneys: David M. Oppenheim (Bock, Hatch, Lewis &	Does the Telephone Consumer Protection Act, 47 U.S.C. § 227, and its regulations as they existed prior to August 1, 2006, which hold that the party "on whose behalf" an

			Oppenheim LLC) for Petitioner. Vincent A. Lavieri (Gardiner Koch Weisberg & Wrona) for Respondent. Supreme Court Docket	unsolicited facsimile advertisement is sent is directly liable under the statute and the regulations <i>sub silentio</i> import common law agency requirements? Seventh Circuit decision (3/21/16)
Trudeau v. U.S.	16-37 (7/6/16)	Consumer Protection	Response due 9/26/16 Attorneys: Steffen N. Johnson (Winston & Strawn LLP) for Kevin M. Trudeau. Ian Heath Gershengorn for U.S. Department of Justice. Supreme Court Docket	Whether a violation of 18 U.S.C. § 401 should be classified as a Class A felony under 18 U.S.C. § 3559 (as the First and Fourth Circuits hold), similarly to the closest analogous offense (as the Sixth, Seventh, and Ninth Circuits hold), or <i>sui generis</i> based on the penalty actually imposed by the court (as the Third, Fifth, and Eleventh Circuits hold). Whether the willfulness <i>mens rea</i> of criminal contempt requires the government to prove that the defendant's wrongful conduct was knowing (as the Fifth, Seventh, and D.C. Circuits hold), reckless (as the Fifth, Seventh, and D.C. Circuits hold), or negligent (as the Eighth and Ninth Circuits hold). Seventh Circuit decision (2/5/16)
Sergeants Benevolent Association Health and Welfare Fund v. Sanofi-Aventis U.S. LLP	15-1525 (6/17/16))	RICO	Respondent Brief (8/18/16) Attorneys: Matthew W.H. Wessler (Gupta Wessler PLLC) for Petitioners. William N. Withrow Jr. (Troutman Sanders LLP) for Respondents. Supreme Court Docket	Where purchasers allege that a manufacturer misrepresented a drug's safety to prescribing doctors to increase sales, does the presence of the doctors break the causal chain—for purposes of RICO causation—between the misrepresentations and the purchasers' economic injuries? Second Circuit decision (11/13/15)

Antonacci v. Chicago	15-1524 (6/17/16)	RICO	Response due 7/18/16 Respondent Waiver Attorneys: Louis B. Antonacci (Antonacci Law PLLC), <i>pro se</i>. Suzanne M. Loose, Office of the Corporation of the City of Chicago, for City of Chicago. Supreme Court Docket	Whether this Court’s ruling in <i>Bell v. Hood</i>, 327 U.S. 678 (1946) prohibits the dismissal of Petitioner’s well-pleaded RICO claims (18 U.S.C. §§ 1961 <i>et seq.</i>) for lack of subject matter jurisdiction. Whether dozens of alleged acts of extortion, mail fraud, and wire fraud, perpetrated over a two-year period by lawyers, state court judges, and court reporters, sufficiently alleges a “pattern” of racketeering activity under RICO, when the criminal enterprise has undue influence over the state courts and attorney admission process and thus presents a clear threat of continued racketeering activity. Whether a plaintiff may file an amended complaint, pursuant to FRCP 59(e), after a district court has already dismissed the complaint and entered judgment thereon. Whether a district court may <i>sua sponte</i> dismiss a case for lack of diversity jurisdiction, and enter judgment thereon, without allowing any jurisdictional discovery, because the plaintiff used the word “resident” rather than “citizen” when describing the particular citizenship of the parties. Whether a district court may <i>sua sponte</i> dismiss a case for lack of diversity jurisdiction, and enter judgment thereon, without allowing any jurisdictional discovery, despite the plaintiff’s allegation that there is complete diversity of “citizenship” between the plaintiff and the defendants. Whether the unsupported affidavit of alleged Seyfarth Shaw LLP partner Joseph Damato, submitted with the brief of appellee, may destroy diversity jurisdiction
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				and, if so, whether Seyfarth may properly be dismissed as a dispensable party, pursuant to this court's holding in <i>Newman-Green Inc. v. Alfonzo-Larrain</i>, 490 U.S. 826 (1989). Seventh Circuit decision (3/18/16)
JSW Steel (USA), Inc. v. MM Steel, L.P.	15-1492 (6/9/16)	Antitrust	Response due 9/26/16 Attorneys: Neal Kumar Katyal (Hogan Lovells US LLP) for JSW Steel (USA), Inc. Reagan W. Simpson (Yetter Coleman, LLP) for MM Steel, L.P. Supreme Court Docket	Whether, under the Sherman Act, a vertical restraint that would otherwise be subject to the rule of reason can be condemned as <i>per se</i> unlawful just because it was entered upon to facilitate a horizontal conspiracy. Whether it is permissible to infer that a manufacturer knowingly joined an antitrust conspiracy based solely on evidence that the manufacturer terminated a distributor in response to or following complaints and threats by other distributors. Fifth Circuit decision (11/25/16)
National Collegiate Athletic Association v. O'Bannon	15-1388 (5/13/16)	Antitrust	Respondent Brief (7/1/16) Petitioner Reply Brief (7/19/16) Attorneys: Seth P. Waxman (Wilmer Cutler Pickering Hale and Dorr LLP) for Petitioner. Jonathan S. Massey (Massey & Gail, LLP) for Respondents. Supreme Court Docket	Whether the Ninth Circuit erred in holding that NCAA rules defining "the eligibility of participants" in NCAA-sponsored athletic contests, <i>NCAA v. Board of Regents of Univ. of Okla.</i>, 468 U.S. 85, 117 (1984), violated the Sherman Act. Whether the First Amendment protects a speaker against a state-law right-of-publicity claim based on the realistic portrayal of a person in an expressive work (here, a student-athlete in a college-sports videogame). Ninth Circuit decision (9/30/15)

Husqvarna Professional Products, Inc. v. New Hampshire	15-1218 (3/25/16)	Franchising & Distribution	Respondent Brief (6/20/16) Petitioner Reply Brief (7/5/16) Attorneys: Thomas J. Collin (Thompson Hine LLP) for Petitioner. Laura E. B. Lombardi, Attorney General's Office, for New Hampshire. Supreme Court Docket	Whether a court deciding a Contract Clause case may use "rational speculation" review to uphold retroactive application of a law substantially impairing private contracts based on legislative findings that are contradicted by undisputed evidence. Whether a court deciding an Equal Protection case may rely upon legislative findings to hold that a classification has a rational basis when the findings are contradicted by undisputed evidence. Whether a statute requiring disputes between a manufacturer and its dealers to be submitted to a state administrative agency for adjudication violates the Supremacy Clause as to disputes subject to arbitration under the manufacturer's dealer contracts. New Hampshire Supreme Court decision (12/29/15)
Deere & Co. v. New Hampshire	15-1213 (3/28/16)	Franchising & Distribution	Respondent Brief (6/20/16) Petitioner Reply Brief (7/1/16) Attorneys: Catherine E. Stetson (Hogan Lovells US LLP) for Petitioners. Gregory A. Holmes (Holmes Law Offices, PLLC) for Frost Farm Service, Inc. Laura E. B. Lombardi, Attorney General's Office, for New Hampshire. Peter J. McNamara for New Hampshire Automobile Dealers Association. Supreme Court Docket	Whether the Contract Clause prohibited the New Hampshire legislature from retroactively voiding petitioners' private contracts, in the name of "leveling the playing field" between the parties to those contracts. New Hampshire Supreme Court decision (12/29/15)
O'Bannon v. National Collegiate	15-1167 (3/14/16)	Antitrust	Respondent Brief (5/13/16) Petitioner Reply Brief (5/26/16)	Whether, in determining an appropriate remedy for a violation of Section 1 of the Sherman Act under the "Rule of Reason," a

Athletic Association			Attorneys: Jonathan S. Massey (Massey & Gail, LLP) for Edward C. O'Bannon, Jr. Seth P. Waxman (Wilmer Cutler Pickering Hale and Dorr LLP) for Respondent. Supreme Court Docket	court may treat the restraint itself—here, the agreement among the NCAA and its members prohibiting college athlete compensation, or what the NCAA calls “amateurism”—as a legitimate procompetitive effect. Whether, after finding a violation of Section 1 of the Sherman Act under the Rule of Reason, a court is restricted to awarding relief that the plaintiff proves is “virtually as effective” as the restraint in serving its alleged purposes, “without significantly increased cost.” Ninth Circuit decision (9/30/15)
Gourley v. Google, Inc.	15-1141 (3/10/16)	Privacy	Respondent Brief (8/11/16) Petitioner Reply Brief (8/31/16) Attorneys: Edward D. Robertson Jr. (Bartimus, Frickleton and Robertson, PC) for Petitioners. Edward P. Boyle (Venable, LLP) for Vibrant Media, Inc. Douglas H. Meal (Ropes & Gray, LLP) for WPP PLC. Anthony J. Weibell (Wilson, Sonsini, Goodrich & Rosati, P.C.) for Google, Inc. Supreme Court Docket	Whether third-parties who access Internet cookies without authorization and thereby acquire the content of Internet communications between Internet users and websites are immune from Wiretap Act liability as actual parties to communications between Internet users and those websites. Whether the Stored Communications Act protects data detailing an Internet user’s web browsing history stored within a web browser provider’s files that are accessible by an Internet user’s web-browser provider and contained on the personal computing device of the user. Third Circuit decision (12/21/15)
Peake v. U.S.	15-1134 (3/9/16)	Antitrust	Respondent Brief(8/19/16) Petitioner Reply Brief (9/1/16) Attorneys: David Oscar Markus (Markus/Moss PLLC) for	Whether the First Circuit erred in determining that Puerto Rico is a State for purposes of the Sherman Act. Whether the First Circuit erred in applying a

			Petitioner. Donald B. Verrilli Jr., U.S. Department of Justice. Supreme Court Docket	“preponderates heavily against the verdict” standard rather than an “effect on the jury” standard in its harmless error analysis, thereby ignoring the prejudicial effect of the prosecution’s repeated improper argument and questioning that followed the prosecution’s assurances to the trial court that such arguments would not be made. First Circuit decision (10/14/15)
SmithKline Beecham Corp. v. King Drug Company of Florence, Inc.	15-1055 (2/19/16)	Antitrust	Respondent Brief (5/2/16) Petitioner Reply Brief (5/16/16) Solicitor General Invitation (6/6/16) Attorneys: Jay P. Lefkowitz (Kirkland & Ellis LLP) for SmithKline Beecham Corp. Bruce E. Gerstein (Garwin Gerstein & Fisher, LLP) for King Drug Company of Florence, Inc. Supreme Court Docket	Whether the Third Circuit’s sweeping holding that a patentee’s grant of an exclusive license must undergo antitrust scrutiny by courts and juries—even though such a license is specifically permitted under the patent laws—is inconsistent with this Court’s decision in <i>Actavis</i> and decades of this Court’s earlier precedents. Third Circuit decision (6/26/15)
The Dow Chemical Co. v. Industrial Polymers, Inc.	14-1091 (3/9/15)	Antitrust	Held in abeyance (3/7/16) Respondent Brief (5/11/15) Petitioner Reply Brief (5/22/15) Select Amicus Briefs: DRI—The Voice of the Defense Bar Attorneys: Carter G. Phillips (Sidley Austin LLP) for Petitioner. Cory L. Andrews for the Washington Legal Foundation. Paul D. Clement (Bancroft PLLC) for Industrial Polymers, Inc.	Whether, in certifying a class under Federal Rule of Civil Procedure 23(b)(3), courts may presume class-wide injury from an alleged price-fixing agreement, even when prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges. Whether a class may be certified or a class-wide damages judgment affirmed where plaintiffs’ common “proof” of damages is a model that (a) does not purport to determine the actual damages of most class members, but instead applies an “average” overcharge

			Supreme Court Docket	estimated from a sample of transactions of very different purchasers, or (b) assumes that defendants engaged in multiple antitrust violations, even though plaintiffs attempted to prove only one violation at trial. Tenth Circuit decision (9/29/14)
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