U.S. Supreme Court Docket, October 2017 Term — Antitrust & Trade Regulation Cases

Granted Opinions	Docket No.	Subject	Status, Deadlines	Holding
State of Ohio v. American Express Company	16-1454 (6/2/17)	Antitrust	Petition Granted 10/16/17 Response due 7/6/17, extended 8/21/17 Brief in Opposition: United States; American Express Company Select Amicus Briefs: Ahold U.S.A., Inc., John M. Connor, Discover Financial Services, Retail Litigation Center, Inc., Former federal antitrust officials, Southwest Airlines Co., and United States Public Interest Research Group Education Fund, Inc. Attorneys: Eric E. Murphy, State Solicitor of Ohio Supreme Court Docket	Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of credit card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions? Second Circuit decision (1/5/17)
Pending Petitions	**Docket No.**	**Subject**	**Status, Deadlines**	**Questions Presented**
Miranda v. Selig	17-453	Antitrust	Response due 10/26/17 Attorneys: Samuel Kornhauser and David Truong (Law Offices of Samuel Kornhauser) and Brian David and Samuel	Whether the decision in *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*, 259 U.S. 200

Last updated: 10/16/2017

			David (Law Office of Samuel David) for Sergio Miranda. Supreme Court Docket	(1922) at its progeny should be reversed? Whether the Commissioner of Baseball and the Major League Clubs' admitted conspiracy to fix, at uniform, below market levels, the salaries they pay minor league baseball players, violates federal antitrust laws? Whether the Curt Flood Act, 15 U.S.C. 26b is unconstitutional on its face or as applied and/or vague by purportedly denying equal protection for antitrust violations of the Sherman Act to minor league baseball players but affording those antitrust protections to major league players? Ninth Circuit decision (6/26/17)
Ferrellgas Partners, L.P. v. Morgan-Larson, LLC	17-441	Antitrust	Response due 10/23/17 Attorneys: Gregory George Garre, Mellissa Arbus Sherry, Benjamin W. Snyder, Daniel M. Wall, Niall E. Lynch, Aaron T. Chiu (Latham & Watkins LLP); Craig S. O'Dear, Catesby A. Major, and Tracy R. Hancock (Bryan Cave, LLP-KCMO) for Ferrellgas Partners, L.P. and Ferrellgas, L.P. Donald B. Verrilli, Jr., Benjamin J. Horwich, and Joshua S. Meltzer (Munger, Tolles & Olson LLP); Jay N. Varon, Elizabeth A.N. Haas, and Kate E. Gehl (Foley & Lardner LLP); Brandon J.B. Boulware and Jeremy Suhr (German May PC) for AmeriGas, Inc., AmeriGas Propane, Inc., AmeriGas Propane, L.P., and UGI Corporation Supreme Court Docket	Whether, or in what circumstances, a plaintiff adequately pleads a "continuing violation" of the antitrust laws, sufficient to satisfy the statute of limitations, by alleging continuing sales during the limitations period when the alleged price-fixing conspiracy was formed outside the limitations period? Eight Circuit decision (6/23/17)

SolarCity Corp. v. Salt River Project Agricultural Improvement and Power District	17-368 (9/7/17)	Antitrust	Response due 10/11/17 Attorneys: Molly S. Boast, Christopher E. Babbitt, Daniel S. Volchok, David Gringer, Daniel Winik, and Christopher T. Casamassima (WILMER CUTLER PICKERING HALE AND DORR LLP) for SolarCity Corp. Supreme Court Docket	Whether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine? Ninth Circuit decision (6/12/17)
Bais Yaakov of Spring Valley v. Anda, Inc.	17-351 (9/5/17)	Advertising	Response due 10/10/17 Response waived 9/14/17 Attorneys: Aytan Y. Bellin (Bellin & Associates LLC), Roger Furman (Law Offices of Ramin Azadegan), Glenn L. Hara (Anderson + Wanca), and David M. Oppenheim (Bock, Hatch, Lewis & Oppenheim, LLC) for Bais Yaakov of Spring Valley. Supreme Court Docket	Where Congress confers broad authority on an agency to administer a statute, and the statute is silent regarding the subject matter of a particular agency rule, does that silence mean that Congress has "spoken," pursuant to *Chevron* step one, against the agency's issuing such a rule, as the D.C. Circuit panel majority held in this case? Or, as the First, Second, Sixth, Ninth, and Federal Circuits have held, does a broad grant of authority to an agency, coupled with silence on the subject matter of a particular agency rule, mean that the rule satisfies *Chevron* step one, and the court must proceed to *Chevron* step two? May a court use *expressio unius* reasoning, as the D.C. Circuit panel majority did in this case, to infer that Congress's silence about a particular subject in a statute means that Congress has "spoken," pursuant to *Chevron* step one, to forbid an agency from issuing regulations on that subject? Or, is a court precluded from using *expressio unius* reasoning in the administrative context, as the Sixth, Seventh, Eighth, and Tenth Circuits

				have ruled-in intercircuit conflict with the D.C. Circuit panel? United States Court of Appeals for the District of Columbia Circuit decision (3/31/17)
Tobinick v. Novella	17-344 (9/1/17)	Advertising	Response due 10/6/17 Attorneys: Cullin A. O'Brien (Cullin A. O'Brien Law, P.A.) for Edward Lewis Tobinick, MD d/b/a Institute of Neurological Recovery, INR PLLC, d/b/a/ Institute of Neurological Recovery Supreme Court Docket	When a defendant is sued for both common law defamation and business disparagement under the Lanham Act, does the application of state civil court anti-SLAPP procedure irreconcilably conflict with Federal Rule of Civil Procedure 56? Is commercial competition a necessary element of whether business disparagement is actionable "commercial advertising or promotion" under the Lanham Act in light of this Court's definitive holding that commercial competition is not a requirement for standing to sue under the *Lanham Act in Lexmark Int'l v. Static Control Components*, 134 S.Ct. 1377 (2014)? In a Federal Rule of Civil Procedure 56 summary judgment analysis of whether business disparagement is actionable "commercial speech" under the Lanham Act, is a court required to consider the "full context" of how the defendant is disseminating the disparagement, including the defendant's secondary and for-profit uses of the disparagement? Eleventh Circuit decision (2/15/17)

Bona Fide Conglomerate, Inc. v. SourceAmerica	17-283 (8/23/17)	Antitrust	Response due 9/22/17 Responses waived: 8/31/17, 9/1/17, 9/5/17, 9/6/17, and 9/8/17 Attorneys: John H. L'Estrange, Jr. (Wright, L'Estrange & Ergastolo) for Bona Fide Conglomerate, Inc. Supreme Court Docket	If a Sherman Act §1 complaint does allege parallel conduct, must the complaint still allege a specific time, place and person involved in the alleged conspiracy? Whether a Sherman Act §1 complaint that alleges direct evidence of conspiracy must still allege a specific time, place and person involved in the alleged conspiracy? 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? Ninth Circuit decision (5/22/17)
Apple Inc. v. Robert Pepper, et al	17-204 (8/2/17)	Antitrust	Response due 9/6/17 Brief in opposition Robert Pepper, et al 9/6/17 Reply brief Apple Inc. 9/20/17 Attorneys: Daniel M. Wall (Latham & Watkins LLP) for Apple Inc. Supreme Court Docket	Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense? Ninth Circuit decision (1/12/17)
HannStar Display Corporation v. Sony Electronics, Inc.	16-1457 (5/31/17)	Antitrust	Response due 7/6/17, extended 9/27/17 Respondent Waiver Brief in Opposition 9/27/17	Does state privilege law govern a state law claim for which state law supplies the rule of decision, where the claim is in federal court on the basis of diversity jurisdiction and no federal question claim is present?

			Attorneys: James G. Kreissman, Harrison J. Frahn IV, and Elizabeth H. White (Simpson Thacher & Bartlett LLP) for HannStar Display Corporation Supreme Court Docket	Ninth Circuit decision (9/1/16)
Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.	16-1220 (4/3/17)	Antitrust	Respondent Brief 6/5/17 Petitioner Reply Brief 6/13/17 Attorneys: William A. Isaacson (Boies Schiller Flexner LLP) for Animal Science Products, Inc. Supreme Court Docket	Whether the Second Circuit, in conflict with the decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. § 1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits. Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit). Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury. Second Circuit decision (9/20/16)
Denied Petitions	**Docket No.**	**Subject**	**Status, Deadlines**	**Questions Presented**
Power Ventures,	16-1105	Advertising	Petition denied 10/10/17	Whether an online company given consent by

Inc. v. Facebook, Inc.	(3/9/17)		Response due 4/12/17 Brief in Opposition: Facebook, Inc. Reply Brief: Power Ventures, Inc. Amicus Brief: Cato Institute Attorneys: Thomas Lee (Hughes Hubbard & Reed LLP) for Power Ventures, Inc. Supreme Court Docket	users of an online social networking service to access data shared or stored by the users on the service, but is prohibited access by the service, "intentionally accesses a computer without authorization . . . and thereby obtains information from [a] protected computer" in violation of 18 U.S.C. §1030(a)(2)(c) of the Computer Fraud and Abuse Act of 1986. Ninth Circuit decision (12/9/16)
Evergreen Partnering Group, Inc. v. Pactiv Corporation.	16-1148 (3/17/17)	Antitrust	Petition denied 10/2/17 Response due 4/21/17 Response Requested 5/16/17 Brief in Opposition: Pactiv Corporation Reply Brief: Evergreen Partnering Group, Inc. Select Amicus Briefs: Law Professors and Antitrust/Industrial Organization Scholars Attorneys: Richard Wolfram for Evergreen Partnering Group, Inc. Supreme Court Docket	Whether Kodak's Rule 56 standard or the more stringent "tends to exclude the possibility of independent action" standard articulated in *Matsushita* applies where the alleged conduct, unlike in *Matsushita*, is not inherently procompetitive and is not economically or otherwise irrational. Did the court of appeals in this case improvidently apply the heightened "tends to exclude" test to Petitioner's concerted refusal to deal claim, in circumstances in which it was not warranted, and thus erroneously deny the plaintiff its right to have its case heard by the trier of fact? First Circuit decision (8/3/16)
ConAgra Brands, Inc. v. Briseño, et al.	16-1221 (4/10/17)	Advertising	Petition denied 10/10/17 Attorneys: Shay Dvoretzky (Jones Day) for Conagra Brands, Inc. Samuel Issacharoff for Robert Briseño. Anton Metlitsky (O'Melveny &Meyers, LLP) for The Chamber of Commerce	Whether Federal Rule of Civil Procedure 23 permits a district court to certify a damages class where there is no reliable, administratively feasible method for identifying the members of the class?

			of the United States of America, et al. Andrew J. Pincus (Mayer Brown LLP) for The National Association of Manufacturers. Richard A. Samp (Washington Legal Foundation) for Washington Legal Foundation. Charles Christian Sipos (Perkins Coie, LLP) for The Grocery Manufacturers Association. Supreme Court Docket	Ninth Circuit decision (1/5/17)
SolidFX, LLC v. Jeppsen Sanderson, Inc.	16-1303 (4/25/17)	Antitrust	Petition denied 10/2/17 Response due 5/30/17 Respondent Waiver Attorneys: Kenzo Kawanabe (Davis Graham & Stubbs LLP) for SolidFX, LLC. Supreme Court Docket	Whether a monopolist who asserts ownership of a valid intellectual property right has absolute immunity from antitrust liability, even where the monopolist has conceded that its intellectual property did not relate to its anticompetitive conduct? Tenth Circuit decision (10/31/16)
American National University of Kentucky, Inc. v. Commonwealth of Kentucky	16-1372 (5/9/17)	State Unfair Trade Practices	Petition denied 10/10/17 Response due 6/15/17 Brief in opposition 8/30/17 Reply brief 9/8/17 Attorneys: Mark T. Hurst (Stoll Keenon Ogden PLLC) for American National University of Kentucky, Inc. Supreme Court Docket	Whether the Due Process Clause prohibits the delegation of fact-finding to an adverse party on an issue that is decisive of a deprivation of property? Whether this matter should be vacated and remanded in light of the Court's recent due-process holdings in *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. _, 197 L.Ed. 2d 585 (2017), and *Nelson*, which the courts below did not have occasion to consider? Ky. App. decision (8/12/16)
Alban v. Nippon	16-1415	Antitrust	Petition denied 10/2/17	Whether—in direct conflict with this Court's decisions and the decisions of other federal

Yusen Kabushiki Kaisha	(5/23/17)		Response due 6/26/17 Respondent Waiver Attorneys: Warren T. Burns (Burns Charest LLP) for Jill M. Alban Supreme Court Docket	courts of appeals—the Third Circuit's decision failed to apply the appropriate standards of deference to (a) the opinion of the Commission and the United States that the Shipping Act does not preempt state antitrust claims when defendants have not filed their agreement with the Commission, and/or (b) to the factual and/or regulatory or policy considerations that undergrid that preemption determination. Whether the Third Circuit improperly refused to apply a presumption against preemption of state laws of general applicability under the Shipping Act, in conflict with this Court's decisions and the decision of the Ninth Circuit in *Pacific Merchant Shipping Association v. Aubrey*, 918 F. 2d 1409 (9th Cir. 1990). Third Circuit decision (1/18/17)
Suture Express, Inc. v. Owens & Minor Distribution, Inc.	16-1487 (6/9/17)	Antitrust	Petition denied 10/2/17 Response due 7/13/17, extended 8/14/17 Brief in Opposition: Owens & Minor Distribution, Inc. Attorneys: Sanford I. Weisburst (Quinn Emanuel Urquhart & Sullivan, LLP) for Suture Express, Inc. Supreme Court Docket	Whether, on a rule-of-reason tying claim, evidence that the tie increased prices or reduced quality in the tied market obviates the need for further inquiry into tying market power, or at a minimum reduces the amount of evidence from the tying market needed to establish tying market power. Whether antitrust injury may be found where an appreciable number of buyers, even if not all buyers, of the tied product suffered harm. Tenth Circuit decision (3/14/17)

Ogden v. Wells Fargo Bank, N.A.	17-137 (4/18/17)	RICO	Petition denied 10/2/17 Response due 8/28/17 Respondent Waiver Attorneys: Thomas Ogden (The Law Offices of Thomas Odgen, P.C.) for Millie Ogden. Supreme Court Docket	The circuits are split if RICO proximate cause is based on directness, foreseeability or some combination. As the "directness" test is draconian it is decimating RICO's evolution. Can RICO proximate cause be clarified as the *Anza* and *Hemi* dissents are confusing everyone? *RJR Reynolds, Inc. v. E.U.,* held a predicate act's foreign reach defines RICO's extraterritoriality. Proximate cause, however, is analyzed on whim as it is not clear where the measurement is to start from (i.e., the enterprise's edge or from a component predicate act). Does *RJR Reynolds'* rationale of determining extraterritoriality by measuring from inside the enterprise, out, also control proximate cause analysis? Ninth Circuit decision (1/3/17)
Top Flite Financial Inc. v. Bridging Communities, Inc.	16-1336 (5/3/17)	Privacy	Petition denied 10/2/17 Response due 6/5/17 Conference 9/25/17 Attorneys: C. Thomas Ludden (Lipson Neilson Cole Seltzer & Garin, P.C.) for Top Flite Financial Inc. Supreme Court Docket	Respondents Bridging Communities, Inc. and Gamble Plumbing & Heating, Inc. had the burden of showing that a class should be certified under Federal Rule of Civil Procedure 23(b)(3). To meet this burden, Respondents had to show that questions whose answers would be resolved in common as to the entire class would predominate over questions that would need to be answered on an individualized, party-by-party, basis. After discovery was completed, Respondents did not introduce any evidence showing that the material issue of whether non-party InfoUSA had obtained consent from each proposed class member

				would be answered through common evidence. Did the failure of Respondents, as the moving party, to introduce any evidence on this issue justify denial of the motion for class certification? The Sixth Circuit held that the District Court was speculating in denying class certification because there was no evidence showing that the issue of whether InfoUSA had obtained consent to send facsimiles would be answered on a common or individualized basis. Did this decision impermissibly shift the burden of proof on the motion for class certification from Respondents to Petitioner? Petitioner offered evidence that there was a significant question regarding the standing of the potential class members that would need to be answered on an individualized basis. Respondents did not offer any evidence to rebut this showing. Did the Sixth Circuit err by nonetheless finding that common issues predominated over this individualized issue? The decision on a motion for class certification is reviewed on an abuse of discretion standard. Did the Sixth Circuit appropriately defer the decision by the District Court or did the Sixth Circuit instead substitute its own judgment for that of the District Court in what amounted to a de novo review of the decision on this motion? Sixth Circuit decision (12/15/16)
S.G.E. Management, LLC	16-1309 (5/2/17)	RICO	Petition denied 10/2/17 Respondent Brief 7/27/17	Must a RICO fraud plaintiff prove reliance, in order to establish causation—as this Court held in *Bridge v. Phoenix Bond & Indemnity*

v. Torres			Attorneys: James C. Ho (Gibson, Dunn & Crutcher LLP) for S.G.E. Management, LLC. Supreme Court Docket	*Co.*, 553 U.S. 639 (2008), and as the Second, Ninth, Tenth, and Eleventh Circuits have since reaffirmed? Or is reliance no longer required—as the Fourth Circuit and now the Fifth Circuit have held? To certify a RICO fraud class action, must the plaintiff show that reliance is a common issue because virtually all class members would have relied—as the Second, Ninth, and Tenth Circuits have all held? Or is it sufficient to show merely that it "follows logically" that some class members would have relied—as the Fifth Circuit has now held? Fifth Circuit decision (9/30/16)
Corcel Corporation, Inc. v. Ferguson Enterprises, Inc.	17-47 (7/5/17)	RICO	Petition denied 10/10/17 Response due 8/7/17, extended 9/6/17 Brief in opposition Ferguson Enterprises, Inc. 9/6/17 Attorneys: Ricardo Corona (Corona Law Firm, P.A.) for Corcel Corporation, Inc. Supreme Court Docket	Whether, in applying the four-year statute of limitations in this civil RICO case, it was error for the district court and Eleventh Circuit Court of Appeals to adopt and apply a version of the separate accrual rule that effectively disregards *Rotella v. Wood*, 528 U.S. 549, 556 (2000) and instead dates the accrual of this RICO cause of action from the date of the discovery that the fraudulent scheme succeeded rather than from the date of discovery of injury to plaintiff. Whether, in applying the four-year statute of limitations in this civil RICO case, it was error for the district court and the Eleventh Circuit Court of Appeals to adopt and apply a version of the separate accrual rule that effectively disregards *Zenith Radio Corp. v. Hazeltine Research Inc.,* 401 U.S. 321, 339 (1971), and

				implicitly rejects the principle of that case than where the fact of future damages is speculative or their amount and nature unprovable no cause of action accrues with respect to such future damages until the date they are actually suffered. Eleventh Circuit decision (1/30/17)
Feldman v. American Dawn, Inc.	17-172 (7/31/17)	Antitrust	Petition denied 10/10/17 Response due 9/1/17 Brief in opposition 9/1/17 Reply brief 9/19/17 Attorneys: James Brandon Lieber (Lieber Hammer Huber & Paul, P.C.) for Andrew Feldman. Supreme Court Docket	Does an employee who loses his job as a result of an antitrust conspiracy have standing to pursue an antitrust claim arising from the violation? Is the loss of employment an antitrust injury? Eleventh Circuit decision (3/3/17)
Dunlap v. Cottman Transmissions Systems, LLC, et al.	17-237 (8/9/17)	Franchising & Distribution	Petition denied 10/10/17 Attorneys: James M. Dunlap, pro se. James C. Rubinger for Cottman Transmissions Systems, LLC, et al. Supreme Court Docket	Whether the de novo decision of the Fourth Circuit Court of Appeals is contrary to Rule 56 Subdivision (e) of the Federal Rules of Civil Procedure in that the court did not consider and incorporate the decisions of the Virginia Supreme Court and the Fourth Circuit Court of Appeals that were previously rendered in this case and fails to recognize that this is the defendants' second attempt to gain an advantage by introducing an affirmative defense that was available at the time the

				case was initiated and was waived by the failure to introduce it in 2010 and that the current decision is in conflict with decisions rendered in the Second and Eight Circuits? Whether the settlement agreement reached in 2007 has been inappropriately expanded in conflict with the laws of Pennsylvania? Fourth Circuit decision (5/11/17) Fourth Circuit decision (6/24/14)
Muslim American Society Freedom Foundation v. District of Columbia	17-274 (8/22/17)	Advertising	Petition denied 10/10/17 Response due 9/21/17 Response waived 9/11/17 Attorneys: Paul W. Hughes (Mayer Brown LLP) for Muslim American Society Freedom Foundation. Supreme Court Docket	Whether the District's event-related sign ordinance, which lacks any objective criteria defining what renders a sign "related to" an event, is unconstitutionally vague. D.C. Circuit decision (1/24/17)