

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

Pending Petitions	Docket No.	Subject	Status, Deadlines	Questions Presented
<a href="#">Miranda v. Selig</a>	14-453	Antitrust	<p>Response due 10/26/17</p> <p>Attorneys: Samuel Kornhauser and David Truong (Law Offices of Samuel Kornhauser) and Brian David and Samuel David (Law Office of Samuel David) for Sergio Miranda.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>Whether the decision in <i>Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs</i>, 259 U.S. 200 (1922) at its progeny should be reversed?</p> <p>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?</p> <p>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?</p> <p>Ninth Circuit <a href="#">decision</a> (6/26/17)</p>
<a href="#">Ferrellgas Partners, L.P. v. Morgan-</a>	17-441	Antitrust	<p>Response due 10/23/17</p> <p>Attorneys: Gregory George Garre, Mellissa Arbus Sherry,</p>	<p>Whether, or in what circumstances, a plaintiff adequately pleads a "continuing violation" of the antitrust laws, sufficient to satisfy the</p>

<a href="#">Larson, LLC</a>			<p>Benjamin W. Snyder, Daniel M. Wall, Niall E. Lynch, Aaron T. Chiu (Latham &amp; 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 &amp; Olson LLP); Jay N. Varon, Elizabeth A.N. Haas, and Kate E. Gehl (Foley &amp; 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</p> <p><a href="#">Supreme Court Docket</a></p>	<p>statute of limitations, by alleging continuing sales during the limitations period when the alleged price-fixing conspiracy was formed outside the limitations period?</p> <p>Eight Circuit <a href="#">decision</a> (6/23/17)</p>
<a href="#">SolarCity Corp. v. Salt River Project Agricultural Improvement and Power District</a>	17-368 (9/7/17)	Antitrust	<p>Response due 10/11/17</p> <p>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.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>Whether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine?</p> <p>Ninth Circuit <a href="#">decision</a> (6/12/17)</p>
<a href="#">Bais Yaakov of Spring Valley v. Anda, Inc.</a>	17-351 (9/5/17)	Advertising	<p>Response due 10/10/17</p> <p>Attorneys: Aytan Y. Bellin (Bellin &amp; Associates LLC), Roger Furman (Law Offices of Ramin Azadegan), Glenn L. Hara (Anderson + Wanca), and David M. Oppenheim (Bock, Hatch, Lewis &amp; Oppenheim, LLC) for Bais Yaakov of Spring Valley.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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 <i>Chevron</i> 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 <i>Chevron</i> step one,</p>

				<p>and the court must proceed to <i>Chevron</i> step two?</p> <p>May a court use <i>expressio unius</i> 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 <i>Chevron</i> step one, to forbid an agency from issuing regulations on that subject? Or, is a court precluded from using <i>expressio unius</i> reasoning in the administrative context, as the Sixth, Seventh, Eighth, and Tenth Circuits have ruled-in intercircuit conflict with the D.C. Circuit panel?</p> <p>United States Court of Appeals for the District of Columbia Circuit <a href="#">decision</a> (3/31/17)</p>
<a href="#">Tobinick v. Novella</a>	17-344 (9/1/17)	Advertising	<p>Response due 10/6/17</p> <p>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</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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?</p> <p>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 <i>Lanham Act in Lexmark Int'l v. Static Control Components</i>, 134 S.Ct. 1377 (2014)?</p> <p>In a Federal Rule of Civil Procedure 56</p>

				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 <a href="#">decision</a> (2/15/17)
<a href="#">Bona Fide Conglomerate, Inc. v. SourceAmerica</a>	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.  <a href="#">Supreme Court Docket</a>	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 <a href="#">decision</a> (5/22/17)
<a href="#">Muslim American Society Freedom Foundation v. District of Columbia</a>	17-274  (8/22/17)	Advertising	Response due 9/21/17  Response waived 9/11/17  Attorneys: Paul W. Hughes (Mayer Brown LLP) for Muslim American Society Freedom Foundation.	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 <a href="#">decision</a> (1/24/17)

			<a href="#">Supreme Court Docket</a>	
<a href="#">Apple Inc. v. Robert Pepper, et al</a>	17-204 (8/2/17)	Antitrust	<p>Response due 9/6/17</p> <p>Brief in opposition Robert Pepper, et al 9/6/17</p> <p>Reply brief Apple Inc. 9/20/17</p> <p>Attorneys: Daniel M. Wall (Latham &amp; Watkins LLP) for Apple Inc.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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?</p> <p>Ninth Circuit <a href="#">decision</a> (1/12/17)</p>
<a href="#">Feldman v. American Dawn, Inc.</a>	17-172 (7/31/17)	Antitrust	<p>Response due 9/1/17</p> <p>Brief in opposition 9/1/17</p> <p>Reply brief 9/19/17</p> <p>Attorneys: James Brandon Lieber (Lieber Hammer Huber &amp; Paul, P.C.) for Andrew Feldman.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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?</p> <p>Eleventh Circuit <a href="#">decision</a> (3/3/17)</p>
<a href="#">Corcel Corporation, Inc. v. Ferguson Enterprises, Inc.</a>	17-47 (7/5/17)	RICO	<p>Response due 8/7/17, extended 9/6/17</p> <p>Brief in opposition Ferguson Enterprises, Inc. 9/6/17</p> <p>Attorneys: Ricardo Corona (Corona Law Firm, P.A.) for Corcel Corporation, Inc.</p>	<p>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 <i>Rotella v. Wood</i>, 528 U.S. 549, 556</p>

			<a href="#">Supreme Court Docket</a>	<p>(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 <i>Zenith Radio Corp. v. Hazeltine Research Inc.</i>, 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.</p> <p>Eleventh Circuit <a href="#">decision</a> (1/30/17)</p>
<a href="#">HannStar Display Corporation v. Sony Electronics, Inc.</a>	16-1457 (5/31/17)	Antitrust	<p>Response due 7/6/17, extended 9/27/17</p> <p>Respondent Waiver</p> <p>Attorneys: James G. Kreissman, Harrison J. Frahn IV, and Elizabeth H. White (Simpson Thacher &amp; Bartlett LLP) for HannStar Display Corporation</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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?</p> <p>Ninth Circuit <a href="#">decision</a> (9/1/16)</p>
<a href="#">State of Ohio v. American Express Company</a>	16-1454 (6/2/17)	Antitrust	<p>Response due 7/6/17, extended 8/21/17</p> <p>Brief in Opposition: <a href="#">United States; American Express</a></p>	<p>Under the “rule of reason,” did the Government’s showing that Amex’s anti-steering provisions stifled price competition</p>

			<p><a href="#">Company</a></p> <p>Select Amicus Briefs: <a href="#">Ahold U.S.A., Inc.</a>, <a href="#">John M. Connor</a>, <a href="#">Discover Financial Services</a>, <a href="#">Retail Litigation Center, Inc.</a>, <a href="#">Former federal antitrust officials</a>, <a href="#">Southwest Airlines Co.</a>, and <a href="#">United States Public Interest Research Group Education Fund, Inc.</a></p> <p>Attorneys: Eric E. Murphy, State Solicitor of Ohio</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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?</p> <p>Second Circuit <a href="#">decision</a> (1/5/17)</p>
<p><a href="#">American National University of Kentucky, Inc. v. Commonwealth of Kentucky</a></p>	<p>16-1372 (5/9/17)</p>	<p>State Unfair Trade Practices</p>	<p>Response due 6/15/17</p> <p>Brief in opposition 8/30/17</p> <p>Reply brief 9/8/17</p> <p>Attorneys: Mark T. Hurst (Stoll Keenon Ogden PLLC) for American National University of Kentucky, Inc.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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 <i>Goodyear Tire &amp; Rubber Co. v. Haeger</i>, 581 U.S. __, 197 L.Ed. 2d 585 (2017), and <i>Nelson</i>, which the courts below did not have occasion to consider?</p> <p>Ky. App. <a href="#">decision</a> (8/12/16)</p>
<p><a href="#">Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.</a></p>	<p>16-1220 (4/3/17)</p>	<p>Antitrust</p>	<p>Respondent Brief 6/5/17</p> <p>Petitioner Reply Brief 6/13/17</p> <p>Attorneys: William A. Isaacson (Boies Schiller Flexner LLP) for Animal Science Products, Inc.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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</p>

				<p>“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.</p> <p>Second Circuit <a href="#">decision</a> (9/20/16)</p>
<a href="#">Power Ventures, Inc. v. Facebook, Inc.</a>	16-1105 (3/9/17)	Advertising	<p>Response due 4/12/17</p> <p>Brief in Opposition: Facebook, Inc.</p> <p>Reply Brief: Power Ventures, Inc.</p> <p>Amicus Brief: Cato Institute</p> <p>Attorneys: Thomas Lee (Hughes Hubbard &amp; Reed LLP) for Power Ventures, Inc.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>Whether an online company given consent by 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.</p> <p>Ninth Circuit <a href="#">decision</a> (12/9/16)</p>
<b>Denied Petitions</b>	<b>Docket No.</b>	<b>Subject</b>	<b>Status, Deadlines</b>	<b>Questions Presented</b>
<a href="#">Evergreen Partnering Group, Inc. v. Pactiv Corporation.</a>	16-1148 (3/17/17)	Antitrust	<p>Petition denied 10/2/17</p> <p>Response due 4/21/17</p> <p>Response Requested 5/16/17</p>	<p>Whether Kodak’s Rule 56 standard or the more stringent “tends to exclude the possibility of independent action” standard articulated in <i>Matsushita</i> applies where the alleged conduct, unlike in <i>Matsushita</i>, is not</p>

			<p>Brief in Opposition: <a href="#">Pactiv Corporation</a></p> <p>Reply Brief: <a href="#">Evergreen Partnering Group, Inc.</a></p> <p>Select Amicus Briefs: <a href="#">Law Professors and Antitrust/Industrial Organization Scholars</a></p> <p>Attorneys: Richard Wolfram for Evergreen Partnering Group, Inc.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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?</p> <p>First Circuit <a href="#">decision</a> (8/3/16)</p>
<a href="#">SolidFX, LLC v. Jeppsen Sanderson, Inc.</a>	16-1303 (4/25/17)	Antitrust	<p>Petition denied 10/2/17</p> <p>Response due 5/30/17</p> <p>Respondent Waiver</p> <p>Attorneys: Kenzo Kawanabe (Davis Graham &amp; Stubbs LLP) for SolidFX, LLC.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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?</p> <p>Tenth Circuit <a href="#">decision</a> (10/31/16)</p>
<a href="#">Alban v. Nippon Yusen Kabushiki Kaisha</a>	16-1415 (5/23/17)	Antitrust	<p>Petition denied 10/2/17</p> <p>Response due 6/26/17</p> <p>Respondent Waiver</p> <p>Attorneys: Warren T. Burns (Burns Charest LLP) for Jill M. Alban</p> <p><a href="#">Supreme Court Docket</a></p>	<p>Whether—in direct conflict with this Court’s decisions and the decisions of other federal 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</p>

				<p>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 <i>Pacific Merchant Shipping Association v. Aubrey</i>, 918 F. 2d 1409 (9th Cir. 1990).</p> <p>Third Circuit <a href="#">decision</a> (1/18/17)</p>
<p><a href="#">Suture Express, Inc. v. Owens &amp; Minor Distribution, Inc.</a></p>	<p>16-1487 (6/9/17)</p>	<p>Antitrust</p>	<p>Petition denied 10/2/17</p> <p>Response due 7/13/17, extended 8/14/17</p> <p>Brief in Opposition: <a href="#">Owens &amp; Minor Distribution, Inc.</a></p> <p>Attorneys: Sanford I. Weisburst (Quinn Emanuel Urquhart &amp; Sullivan, LLP) for Suture Express, Inc.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>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.</p> <p>Tenth Circuit <a href="#">decision</a> (3/14/17)</p>
<p><a href="#">Ogden v. Wells Fargo Bank, N.A.</a></p>	<p>17-137 (4/18/17)</p>	<p>RICO</p>	<p>Petition denied 10/2/17</p> <p>Response due 8/28/17</p> <p>Respondent Waiver</p> <p>Attorneys: Thomas Ogden (The Law Offices of Thomas Ogden, P.C.) for Millie Ogden.</p>	<p>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 <i>Anza</i> and <i>Hemi</i> dissents are confusing everyone? <i>RJR Reynolds, Inc. v. E.U.</i>, held a predicate act's foreign reach defines RICO's</p>

			<a href="#">Supreme Court Docket</a>	extraterritoriality. Proximate cause, however, is analyzed on whom 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 <i>RJR Reynolds'</i> rationale of determining extraterritoriality by measuring from inside the enterprise, out, also control proximate cause analysis?  Ninth Circuit <a href="#">decision</a> (1/3/17)
<a href="#">Top Flite Financial Inc. v. Bridging Communities, Inc.</a>	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.  <a href="#">Supreme Court Docket</a>	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

				<p>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?</p> <p>Sixth Circuit <a href="#">decision</a> (12/15/16)</p>
<a href="#">S.G.E. Management, LLC v. Torres</a>	16-1309 (5/2/17)	RICO	<p>Petition denied 10/2/17</p> <p>Respondent Brief 7/27/17</p> <p>Attorneys: James C. Ho (Gibson, Dunn &amp; Crutcher LLP) for S.G.E. Management, LLC.</p> <p><a href="#">Supreme Court Docket</a></p>	<p>Must a RICO fraud plaintiff prove reliance, in order to establish causation—as this Court held in <i>Bridge v. Phoenix Bond &amp; Indemnity Co.</i>, 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</p>

				<p>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?</p> <p>Fifth Circuit <a href="#">decision</a> (9/30/16)</p>
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