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FEDERALISM AND BUSINESS DECISIONS IN THE OCTOBER 2005 TERM

*Carter G. Phillips**

The Supreme Court's October 2005 Term was largely a bust in the business and federalism area, as the Court's decisions seemed to avoid many of the big issues. Yet, there are three relatively important business-related decisions that I would like to discuss.

I. RETALIATION UNDER TITLE VII: BURLINGTON NORTHERN & SANTA FE RAILWAY CO. v. WHITE

The first case I think is necessary to discuss is *Burlington Northern & Santa Fe Railway Co. v. White*.¹ I was counsel for Burlington Northern. *Burlington Northern* was a retaliation case that provided a significant victory for employees. The question Burlington Northern presented to the Supreme Court was the issue of whether or not § 704² of the retaliation provision should be read in *pari materia* with § 703,³ which is the core antidiscrimination provision of Title VII.⁴

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¹ 126 S. Ct. 2405 (2006).

² Title VII, 42 U.S.C. § 2000e-3 (2000).

³ *Id.* § 2000e-2.

⁴ *Id.* §§ 2000e et. seq.

The case arose in the context of a straightforward situation of gender discrimination alleged by the plaintiff, White (“employee”). Subsequent to those claims, two actions were taken against the employee that ultimately became the basis for the retaliation claim. First, the employee was removed from forklift duties and was assigned as an ordinary laborer on the yard. The employee’s claim was that this was an inferior job, and therefore, she was being victimized by that particular change. Second, the employee was suspended without pay. According to the employer, the suspension was a consequence of insubordination in the field. The employer investigated the alleged insubordination, and the employee was subsequently reinstated with full back pay. The issue for the Court was whether those changes in her employment situation were sufficient to trigger a claim for retaliation under Title VII.

At the time we filed the certiorari petition, there were at least four basic standards that were available that had been followed by different courts or had been advocated by the parties.⁵ The employee’s initial argument was that because the language of § 704 states “any retaliation,” meaning that any action subjectively viewed as retaliatory, if, in fact, it was taken subsequent to some kind of discrimination claim having been raised, would be sufficient to go forward as a retaliation claim under § 704. The next, most favorable position for employees was the argument as to whether or not the actions taken would affect a reasonable person and make him or her less willing to either testify or bring a claim of discrimination. That

⁵ See *Burlington Northern*, 126 S. Ct. at 2410-11 (discussing the circuit split over the

was a position that had been adopted largely by the Ninth Circuit.⁶ It was also a position approved by the Seventh Circuit and the D.C. Circuit.⁷ The third position was whether or not the allegedly retaliatory act constituted a materially adverse action; that is, when looking at the nature of the conduct, was it action that affected the employment relationship, generally speaking, in an economic sense. This approach is derived from the test that the Court uses for harassment claims under § 703.⁸ The final argument was whether or not the allegedly retaliatory act was a final action by the employer, which was the approach adopted by the Fifth Circuit.⁹ Interestingly enough, the Justice Department, in filing its brief, actually abandoned the position that had been previously adopted by the Equal Employment Opportunity Commission (“EEOC”), which was that any action taken that would cause an employee to be less likely to file a claim, should be sufficient to serve as a predicate for retaliation.

As counsel for Burlington Northern, I thought that even if we did not win on the specific facts of the case, the likelihood was pretty

scope of acts considered to be retaliatory).

⁶ See *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (adopting the interpretation of the Equal Employment Opportunity Commission, which provided that retaliation exists when the action taken is reasonably likely to deter the charging party from engaging in a protected activity); see also *Burlington Northern*, 126 S. Ct. at 2410-11.

⁷ See *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211, 1218 (D.C. Cir. 2006).

⁸ *Burlington Northern*, 126 S. Ct. at 2410 (explaining that the Sixth Circuit requires that a plaintiff demonstrate the existence of an adverse employment action, which exists when a material adverse alteration in the terms of the employee’s employment occurs).

⁹ *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). “[O]ur court has stated that Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions. Ultimate employment decisions include acts such as hiring, granting leave, discharging, promoting, and compensating.” *Id.* (quotations and citations omitted); see also *Burlington Northern*, 126 S. Ct. at 2410.

good that the Court would adopt the standard that the Solicitor General had advocated. This standard was a materially adverse action position—that there was something in the nature of harm to her employment situation that would justify going forward under Title VII. The Supreme Court, however, in an eight-to-one decision, (nine-zero on the outcome but eight-to-one on the theory of the case), adopted a much more favorable position to the employee, which was much closer to the position the EEOC had initially put forward in its guidelines.¹⁰ The Court basically said that you look at it from the perspective of the employee.¹¹

The Court did say that the employee's position must be an objectively reasonable position.¹² Although, even in that regard, the Court's opinion seems to suggest that you have to consider the individual circumstances when deciding if something is objectively reasonable.¹³ In the instant case, the suspension occurred during the holiday season and the employee had children. Thus, when considering the specific facts of this particular case, the suspension, even with ultimate back pay, created an objectively reasonable injury

¹⁰ *Burlington Northern*, 126 S. Ct. at 2415. The Supreme Court determined that a complaining employee must show “that a reasonable employee would have found the challenged action materially adverse” *Id.* (citation omitted); *see also* EEOC COMPLIANCE MANUAL § 8, at 13 (1998). Similar to the Supreme Court's reasonable employee standard, the Equal Employment Opportunity Commission found that “[t]he statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.” *Id.*

¹¹ *Burlington Northern*, 126 S. Ct. at 2417 (“Whether a particular [act by the employer] is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.”) (quotations and citation omitted).

¹² *Id.*

¹³ *Id.*

that might cause an individual to regard the suspension as retaliatory. Therefore, the suspension was actionable under the statute. Justice Alito wrote a separate concurrence in which he would have adopted the position taken by the Solicitor General wholesale.¹⁴

The *Burlington Northern* decision is a relatively significant case because it provides a very basic approach to going forward beyond summary judgment with most retaliation claims. It is important to put the holding in context. Retaliation claims do not require the individual plaintiff to be a member of a protected class. Retaliation claims protect activity. Therefore, any white male who complains about racial, gender or other discrimination is fully protected against retaliation under those circumstances. The Court was very clear that the scope of the § 704 protection is broader than that of § 703, which means it is not simply an action taken with respect to your terms and conditions of employment—it protects beyond the employment relationship.¹⁵ For example, if somebody slashes your tires in the parking lot as a consequence of some complaint you made, it would be actionable under § 704, where arguably it would not be actionable under § 703.

The Court adopted an approach to retaliation that is very unlikely to lead to a lot of summary judgment dispositions in these cases. Essentially, you have a situation where some kind of action took place, such as a discrimination complaint, followed by some action by the employer vis-à-vis the employee that is regarded as an

¹⁴ *Id.* at 2418 (Alito, J., concurring).

¹⁵ *Id.* at 2412 (majority opinion) (finding that no limiting words appear in the anti-retaliation provision).

adverse action. There will be relatively few summary judgment dispositions because whether the consequences of what the employer did would have deterred a reasonable person under the circumstances from either filing a complaint or otherwise testifying in a discrimination case, will almost always be a jury question.

The Court, in an earlier case last Term, *Jackson v. Birmingham Board of Education*,¹⁶ took an expansive view of retaliation claims under Title IX,¹⁷ which presaged the Court's approach in *Burlington Northern*. The Court concluded that Congress, in § 704, meant to expand the protection for retaliation beyond the scope of basic discrimination claims.¹⁸ If Congress wants to change it, that is fine, but the Court is not going to interpret the statute more narrowly under the circumstances.¹⁹

The value of *Burlington Northern* as precedent is also worth noting. Lower courts in future civil rights cases will certainly be guided by the specific civil rights statutes (many other federal statutes prohibit retaliation) at issue in those cases in defining retaliation under those statutes. The Court did rely on The National Labor Relations Act²⁰ and its definition of retaliation in forming its judgment about how to read § 704 in *Burlington Northern*.²¹ Thus, it

¹⁶ 544 U.S. 167 (2005).

¹⁷ Title IX, 20 U.S.C. § 1681 (2000) provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." See also *Jackson*, 544 U.S. at 174.

¹⁸ See *Jackson*, 544 U.S. at 180 (finding that Congress' intent to provide citizens protection would be difficult to achieve without effective protection against retaliation).

¹⁹ See *id.* at 175 (finding that Congress should not limit the definition of retaliation as it did in § 704 of Title VII because the statutes are vastly different).

²⁰ National Labor Relations Act, 29 U.S.C. § 158 (2000).

²¹ *Burlington Northern*, 126 S. Ct. at 2414.

is not at all inconsistent with the Court's approach to think that future parties would look at the various retaliation provisions. Although, obviously, to the extent that there are differences in the language, it may cut the other way. It may be that Congress meant for other statutes to be narrower. There are a couple of statutes that I know are specifically narrower than § 704 in some ways.²² I think that those statements probably did not help Burlington Northern's arguments in the *Burlington Northern* case.

In terms of retaliatory motive, retaliatory acts do not have to be limited to the terms of employment. The classic illustration came out of the D.C. Circuit, in *Rochon v. Gonzales*,²³ where an FBI agent was threatened. Under ordinary circumstances, the FBI would provide a family with specific protections in the face of a threat. The FBI agent claimed that the FBI did not protect his family because they were retaliating against him. Candidly, the scope of § 704 probably goes to the limits of the imagination of plaintiffs' lawyers, which in my experience is pretty expansive. It obviously does not affect the motive issue, which remains the same, but even in that context, I do not think motive is all that hard to get past summary judgment, because what you get is just a sequential analysis. You file a complaint where you filed some kind of a letter complaining about certain conduct, and then, subsequently, something happened to you which you thought was adverse.

Interestingly, in *Burlington Northern*, the employee who had

²² See *id.* at 2414 (discussing the National Labor Relations Act in comparison to § 704).

²³ *Rochon*, 438 F.3d 1211.

been on the forklift before the plaintiff was put on the forklift, complained bitterly that he wanted off the forklift because it was a dead-end job—it does not go anywhere within the yard. All the other jobs may lead to advancement opportunities within the yard and a job on the forklift essentially indicates that the employee has no place to go. If he had the wherewithal to complain about Ms. White and her plight, then if he had not been taken off of the forklift, he could have complained about that under § 704, arguing he was being retaliated against by being forced to work on a forklift.

As to whether or not it is retaliatory, you can say you are going to focus on it as a motive issue, but in reality that issue is a difficult one, arguably a gamble because the jury decides. Ordinarily, this is not the end of the world, but here you are talking about claims for emotional injuries, which under common law would require fairly outrageous conduct.²⁴ However, you do not need outrageous conduct in this situation; all you need is something that somebody feels bruised about and a subjective reason that person feels that way.²⁵ Plus, the individual has a punitive damages claim.²⁶

The effect of this is not insubstantial, which I suppose in some ways leads me to suspect that maybe Congress could revisit the standards. Essentially, the opinion seems to articulate that courts should not be granting summary judgment in § 704 cases because

²⁴ See generally Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982).

²⁵ *Burlington Northern*, 126 S. Ct. at 2415 (finding that a plaintiff must show the action would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” (quoting *Rochon*, 438 F.3d at 1219)).

²⁶ *Id.* at 2417.

retaliation does not mean the same thing as discrimination.²⁷ I do think that employers will have a more difficult time obtaining summary judgment going forward.

II. § 283 OF THE PATENT ACT: *EBAY V. MERCExchange, LLC*

The second case worth discussing, a somewhat happier case for me, is *eBay v. MercExchange, LLC*.²⁸ In this case, I represented eBay and eBay prevailed. *eBay* was an interesting dispute, and it comes up in the context of the BlackBerry controversy. The issue was whether, if a plaintiff can prove that a patent is valid and has been infringed, the plaintiff is entitled to a permanent injunction at the end of that proceeding.²⁹ The statute, § 283 of the Patent Act,³⁰ is actually pretty explicit (at least from this advocate's perspective), because it provides that a district court may issue an injunction and do so on the basis of traditional equitable principles.³¹ That sounds like a grant of discretionary authority for the district court to decide whether or not to grant an injunction.

Notwithstanding § 283, the Federal Circuit had, for at least 15 years (some would say for the entirety of its 25 years in existence), not applied the traditional four-part test that I suspect all of you are

²⁷ *Id.* at 2416.

²⁸ 126 S. Ct. 1837 (2006).

²⁹ *Id.* at 1839.

³⁰ 35 U.S.C. § 283 (2000).

³¹ *Id.* Section 283 of the Patent Act states: "The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." *Id.*

reasonably familiar with.³² Instead of looking at the four-factor test, the Federal Circuit basically compressed the issue down to a simple question of whether or not there would be an overriding public interest in denying an injunction in a particular case.³³ The Federal Circuit never actually denied a permanent injunction, but it hypothesized that there may be a product that is so important to the public health that it could not be prohibited from the market, and the circuit held out the possibility that injunctive relief might not be appropriate in that narrow circumstance.³⁴

eBay involved a dispute over a business method patent having to do with how you connect buyers and sellers on the internet within the eBay site. This is not the auction part of eBay, but the actual sales part of eBay. The patent consists of fairly convoluted arrangements which involve an attempt to guarantee trusted sources, so that the people who are making purchases on eBay using credit cards will feel comfortable doing so. The patent was designed to promote that particular objective. eBay, obviously, took the position that it devised this method separate from anyone else, and indeed, the district court found that eBay never relied on anything MercExchange had done in devising eBay's own methods, but the jury nevertheless found that it had infringed.³⁵ The jury made that

³² *eBay*, 126 S. Ct. at 1839. The four factors are irreparable injury, inadequacy of remedies available at law, a balance of hardships, and the public interest. *Id.*; see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

³³ See *MercExchange, LLC v. eBay, Inc. (MercExchange II)*, 401 F.3d 1323, 1339 (Fed. Cir. 2005). The court applied the "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances." *Id.*

³⁴ Transcript of Oral Argument at 34, *eBay*, 126 S. Ct. 1837 (No. 05-130).

³⁵ *MercExchange, LLC v. eBay, Inc. (MercExchange I)*, 275 F. Supp. 2d 695, 698, 719-20 (E.D. Va. 2003).

finding—the validity had already been determined—so the only question was whether or not a permanent injunction should be issued.³⁶

The district court found that there was no need for a permanent injunction in this context because MercExchange was not in the business of actually trying to make sales through the internet but was simply in the business of licensing.³⁷ If all you really want is to have a license that you can get money for, then money damages ought to be a perfectly complete remedy under the circumstances. Under the traditional standards of whether or not there is an adequate remedy at law, the district judge said there was an adequate remedy.³⁸ The district court also opined that it didn't have much faith and confidence in business-method patents as a particular approach because it would result in unending litigation between the two parties.³⁹ The court refused to grant an injunction because MercExchange would be in every other day claiming there had been contempt.⁴⁰ Furthermore, the district court was reasonably confident that eBay would probably be able to work around the MercExchange patents going forward—as it had committed to do.⁴¹ eBay made some fundamental changes, and therefore, the court denied the injunction—a courageous decision given that it was unsupported by

³⁶ *Id.* at 698, 710-11.

³⁷ *Id.* at 713-16.

³⁸ *Id.* at 713.

³⁹ *See id.* at 713-14 (agreeing with the defendant that the public interest would not be served by an injunction due to “growing concern over the issuance of business-method patents” and predicting “contempt hearing after contempt hearing” if an injunction was issued).

⁴⁰ *MercExchange I*, 275 F. Supp. 2d at 714-15.

⁴¹ *Id.* at 714.

any Federal Circuit case law.⁴²

The Federal Circuit blew a hole in the district court's decision, concluding that none of those considerations were legitimate.⁴³ The Federal Circuit stated that whatever else eBay may do to serve the public interest it "is not the type of important public need that justifies the unusual step of denying injunctive relief."⁴⁴ The client might question that, but we did not fight that particular fight. So the Federal Circuit said, absent that, there was no basis for denying injunctive relief in this case, and remanded the case to the district court.⁴⁵ We asked the Court to hear the case.

eBay had approximately seven briefs that were filed in support of the petition arguing there were tremendous problems with permitting the issuance of these kinds of the injunctions. The briefs made a metaphoric reference to "trolls" as individuals who do not in fact make any inventions or provide any inventive genius to anything, but rather sit and look through the patents that have been issued looking for opportunities to grab a patent. Then, such "trolls" would try to use it against a particular manufacturer or other provider of services and try to extort a certain amount of money. I am sure the people who represent those individuals would have a somewhat different characterization of that conduct. In any event, that was part

⁴² *Id.* at 722; *eBay*, 126 S. Ct. at 1840. The Supreme Court stated that the district court did not apply "traditional equitable principles in deciding respondent's motion for a permanent injunction." *Id.*

⁴³ *MercExchange II*, 401 F.3d at 1339 ("[T]he district court did not provide any persuasive reason to believe this case is sufficiently exceptional to justify the denial of a permanent injunction.").

⁴⁴ *Id.*

⁴⁵ *Id.* at 1339-40.

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of the problem because of the existence of “trolls” who only want injunctive relief because they think that an injunction will tremendously leverage any kind of a negotiation. Hence, this was part of the reason why eBay urged the Court to grant the case.

The Court did grant it, and it reversed nine to zero.⁴⁶ The Court did not take a very controversial position because § 283 says what it means, which is that you are supposed to avoid judicial equitable considerations in deciding whether injunctive relief should be issued and that the Federal Circuit had adopted a standard fundamentally at odds with the four-factor test.⁴⁷ In doing that, the Supreme Court also said the district court probably erred in relying on serious doubts about the business method patent as a legitimate patent.⁴⁸ Therefore, as the Court noted, this matter ought to go back to the district court for an evaluation of the four-factor test and a decision as to whether or not an injunction should be issued.⁴⁹

From my client’s perspective, being sent back to the district court was a significant advantage, because my fear was that if it went right back to the Federal Circuit, the Federal Circuit would try to re-enter essentially the same decision it had issued before. Arguably, if the case had been remanded to the Federal Circuit, it might have found that all four of the four-factor bases were satisfied and we

⁴⁶ *eBay*, 126 S. Ct. at 1839,1841.

⁴⁷ *Id.* at 1839 (“[The] Patent Act expressly provides that injunctions ‘may’ issue ‘in accordance with the principles of equity’ ” and Congress has not indicated such a departure as interrupted by the Federal Circuit (citing 35 U.S.C. § 283 (2000))).

⁴⁸ *Id.* at 1840.

⁴⁹ *Id.* (“Neither the District Court nor the Court of Appeals below fairly applied these traditional equitable principles” and although the district court did cite to the four-factor test, it adopted a categorical principle resulting in an analysis that “cannot be squared with the principles of equity adopted by Congress.”).

would have lost. From that perspective, it was a very good decision for eBay.

The Court's opinion is extremely narrow. There is a fundamental difference between one set of four Justices who were in one concurrence and another set of three other Justices who joined a separate concurrence. Justice Kennedy, who was the Justice who raised the issue with respect to "trolls" during the oral argument asked me, "[i]s the troll the scary thing under the bridge, or is it a fishing technique?"⁵⁰ I said, "[f]or my clients, it's been the scary thing under the bridge"⁵¹ It was an interesting exchange, if nothing else. What seemed to worry Justice Kennedy and some other Justices, which was not really in *eBay* but is a significant part of the problem here is: what happens when you take a very small part of a manufacturing process and subject it to a patent claim and you cannot use that part—must the entire manufacturing process come to a screeching halt?⁵² That is the situation when "trolls" hit the jackpot; they find that embedded patent and they can take maximum advantage of it. It was clear that Justice Kennedy, speaking for four Justices, was very concerned about that problem going forward and thought district courts in particular should focus very much on that particular situation.⁵³ Chief Justice Roberts, writing for two other

⁵⁰ Transcript of Oral Argument, *supra* note 34, at 26.

⁵¹ *Id.*

⁵² *See id.* at 15-17, 55.

⁵³ *eBay*, 126 S. Ct. at 1842 (Kennedy, Stevens, Souter, & Breyer, JJ., concurring). Justice Kennedy explained that:

When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not

Justices, said that the history of patent law is, you have a property right, the property right has been invaded, you are entitled to an injunction—that's history.⁵⁴ History is a pretty good source in thinking about the world in general, and therefore, my view is that even though you have to apply the four-factor test, I would expect that 99.9 percent of cases would lead to a permanent injunction. He did not quite say it that way, but the first part is almost a verbatim statement of what the Chief Justice said. Justice Thomas wrote the opinion for the Court. Justice Alito joined that opinion and didn't join either of the other two concurring opinions.

So, what we are left with is a movement in that we know that § 283 means what it says. What we do not know is whether or not district courts are going to have broad or narrow discretion to decide how to proceed from this case forward. I think it is quite likely we will in fact get another *eBay* type case somewhere down the road. I hope for eBay's sake it is not an *eBay* case. Specifically, it is interesting to note that there have been two decisions that I am aware of that were reported post *eBay*, and in both of those cases the district courts denied permanent injunctive relief.⁵⁵ For those who predicted that *eBay* would be a complete non-event, that is clearly not a particularly apt statement. I think in both of those cases they were

serve the public interest.

Id.

⁵⁴ *Id.* at 1841.

⁵⁵ See *Merck & Co. v. Mediplan Health Consulting*, 434 F. Supp. 2d 257, 265 (S.D.N.Y. 2006) (holding that injunctive relief for patent infringement could not be granted after the patent's expiration); *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 444 (E.D. Tex. 2006) (denying patentee a permanent injunction for failure to demonstrate the potential to suffer irreparable harm without a permanent injunction).

not the kind of pharmaceutical cases where injunctive relief will be routinely granted. Both are situations that involved fairly small claims, small patents, as part of a much broader manufacturing process, which I do think is the situation that disturbed four members of the Court in *eBay*. My guess is that the average district judge will at least have some concerns. But *eBay* is clearly not the final word on any of this issue; it is only a fascinating first stop.

III. RICO DECISIONS

A. *Anza v. Ideal Steel Supply Corp.*

The last case I would like to discuss is the RICO⁵⁶ case, *Anza v. Ideal Steel Supply Corp.*⁵⁷ The Court actually had two RICO cases of note.⁵⁸ In the first case, which was my case, the Court completely avoided the larger issue. In *Anza*, however, the Court decided an issue that is quite important under RICO. The Court adopted a proximate cause requirement or direct injury requirement, (which I think is the same thing), in applying RICO.⁵⁹

In *Anza*, the defendants, National Steel Supply, Inc. and its owners, Joseph and Vincent Anza (“National Steel”), were accused of defrauding the State of New York by not collecting sales tax and

⁵⁶ RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO) 18 U.S.C. § 1962 (2000) (prohibiting certain conduct associated with a pattern of racketeering activity); *see id.* § 1964(c) (providing a civil cause of action for those injured by reason of a violation of the statute).

⁵⁷ 126 S. Ct. 1991 (2006).

⁵⁸ *See id.*; *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016 (2006) (remanded to the Eleventh Circuit for consideration in light of the decision in *Anza*, 126 S. Ct. 1991).

⁵⁹ *See Anza*, 126 S. Ct. at 1998 (stipulating a proximate-cause requirement in RICO claims, which is satisfied when an alleged violation of the statute is the direct cause of

taking the sales tax savings, reducing the prices that it charged for steel products, and thereby effectively competing against the plaintiff, Ideal Steel (“Ideal Steel”). Therefore, National Steel was allegedly taking business away from Ideal Steel. Consequently, the claim was that National Steel engaged in mail and wire fraud by not paying taxes to the State of New York and, in that process, Ideal Steel was directly injured because National Steel was allowed to unfairly compete against Ideal Steel. I think they would argue that there were reasonably identifiable damages in that case.

The district court dismissed the claim on the basis that there is a reliance requirement and there was no reliance by National Steel on any of the fraudulent actions because the victim of the fraud was the State of New York.⁶⁰ The Court of Appeals reversed that holding and said the reliance requirement is not a requirement under RICO in the context of mail and wire fraud, and that was the issue that actually went to the Supreme Court.⁶¹ On the face of it, you would have thought the Court was going to write an opinion on reliance and whether reliance is necessary for a fraud action under RICO. Instead, what the Court did was much broader and, in many ways, much more important, at least for RICO litigants. The Court said, no, we are going to look at this case as a direct injury case and decide whether

plaintiff's injuries).

⁶⁰ See *Ideal Steel Supply Corp. v. Anza*, 254 F. Supp. 2d 464, 469 (S.D.N.Y. 2003) (holding that the plaintiff could not demonstrate reliance on the defendants' alleged fraudulent New York State tax claims).

⁶¹ See *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004) (holding that the plaintiff had standing to pursue a civil RICO cause of action, because the complaint alleged facts sufficient to show a loss of business proximately caused by the defendants' racketeering activity).

this is a *Holmes*⁶² issue and whether or not this states a claim to a sufficiently direct injury to justify going past the motion to dismiss stage.⁶³ The Court's decision was striking, because it dismissed a complaint at the pleading stage in a RICO case on the basis that the claim was too remote—the theory being that the State of New York was the real injured party.⁶⁴ Hence, the State of New York was perfectly capable of defending its own interest through a RICO action or otherwise and *Ideal Steel*, in this particular case, is at least one step removed.⁶⁵

The significance of this in terms of the development of the law under RICO is that obviously there has been a fair amount of hostility in a lot of camps as to RICO's scope. It has moved way beyond the organized crime focus that it had originally, and a lot of legitimate businesses, including those in this case, are fighting over these issues. The Court had been looking for vehicles to cut back on RICO, but it did not have a great deal of success because the language of the statute is so broad.⁶⁶ Regardless, even if you have

⁶² *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269, 275 (1992) (holding that in order to maintain a civil RICO claim, a plaintiff is required to show more than factual causation—there must be a direct link between the injury asserted and the alleged violation of the RICO Act).

⁶³ *Anza*, 126 S. Ct. at 1994 (applying the *Holmes* precedent to find that the plaintiff's alleged injury in the form of lost sales was not directly related to the defendants' alleged pattern of defrauding the New York State tax authority).

⁶⁴ *See id.* at 1998 (explaining that the State of New York could adjudicate its own claim against the defendants; there is no need to expand RICO to include a civil cause of action for parties injured indirectly).

⁶⁵ *Id.* (reasoning that if the plaintiffs were allowed to proceed with the claim, the indirect relationship between the injury and the alleged violation would make any damage calculations speculative, whereas New York State could pursue its claim for lost tax revenue in a straightforward manner and the damages could easily be calculated).

⁶⁶ RICO, 18 U.S.C. § 1964(c) states:

Any person injured in his business or property by reason of a violation of

conservative business instincts, there are contending influences that at least some members of the Court have to deal with: primarily, the plain meaning of statutes. The plain meaning leads you to a specific conclusion, even if it is not the conclusion you feel most comfortable with. There are numerous decisions under RICO in which the Court has adopted a pretty sweeping view of that statute, because that is the way the language reads.⁶⁷

Here, by contrast, the Court talks about how it had already decided the most dramatic question with respect to injury, because it already decided that not every injury was going to be included—it could not be a derivative injury.⁶⁸ That is what it said in *Holmes*.⁶⁹ In *Holmes*, the plaintiff was a step removed from the party who was directly injured.⁷⁰ The Court in *Anza* had gotten past the plain language issue and now was in a world where it had to decide the best way to deal with this issue as a matter of proximate cause.⁷¹ In

section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

⁶⁷ See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (stating that RICO is to be given a broad interpretation in accordance with Congress' expansive language and because of "its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes' " (quoting *U.S. v. Turkette*, 452 U.S. 576 (1981))).

⁶⁸ See *Anza*, 126 S. Ct. at 1998 ("There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.").

⁶⁹ *Holmes*, 503 U.S. at 268-69, 274 (holding that a plaintiff must show both "but for" causation and proximate cause to recover under the RICO statute).

⁷⁰ *Id.* at 271.

⁷¹ *Anza*, 126 S. Ct. at 1997-98.

that context, the Court held that the plaintiff's claim was too remote.⁷² It is interesting because the Court recognized that there was no possibility of double recovery here.⁷³ Ordinarily, one of the two prongs for deciding whether or not a claim is too indirect or too remote is whether there is a risk of double recovery.⁷⁴ If you go back to the direct injury cases out of the RICO laws, it is the double recovery that demands the Court's attention.⁷⁵ In *Anza*, the Court said it would be very difficult to try to figure out what portion of the plaintiff's injury is allocable to this particular fraud, as opposed to any of a thousand other market factors that may influence someone's ability to compete or the prices somebody might charge in the marketplace.⁷⁶ Who knew whether the money was being used to reduce prices—maybe the money was just being used to line the pockets of the defendant's executives and the prices were exactly what they would have been otherwise?⁷⁷ The Court went through a whole string of these analyses in that context and concluded this was too indirect.⁷⁸

⁷² *Id.*

⁷³ *Id.* at 1997-98.

⁷⁴ *See, e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465, 473-76 (1982) (explaining that some matters regarding apportionment of damages to direct and indirect victims simply cannot be resolved at a trial, and thus any recovery must be barred to protect against double recovery).

⁷⁵ *See, e.g., Holmes*, 503 U.S. at 269 (citing *Blue Shield*, 457 U.S. at 473-75) (citations omitted).

⁷⁶ *Anza*, 126 S. Ct. at 1997-98 (“[Ideal Steel’s] lost sales could have resulted from factors other than [National Steel’s] alleged acts of fraud. Businesses lose and gain customers for many reasons . . .”).

⁷⁷ *Cf. id.* at 1997 (“[T]he additional cash could go anywhere from asset acquisition to research and development to dividend payouts.”).

⁷⁸ *Id.* at 1997-98 (explaining that when the connection between injury and injurious conduct is too attenuated, recovery must be barred).

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B. Mohawk Industries, Inc. v. Williams

I will take two more seconds to talk about a related case. There was another case, *Mohawk Industries, Inc. v. Williams*,⁷⁹ which posed a much narrower issue, which is whether corporations can be association-in-fact enterprises within the meaning of the statute. As an example, the whole predicate for the federal government's claims against the tobacco industry is that each of these corporations got together and formed an enterprise apart from each of the individual corporations that was an "enterprise in fact." Well, if you read the statute, the language of the statute seems to indicate that the only enterprises in fact that are permissible are those that are comprised of individuals. This was designed to get at gangs of individuals, and therefore, groupings of corporations or other entities that are not limited to individuals are not actionable under the statute.

The Court dismissed the writ of certiorari on that particular issue and then vacated and remanded on the basis of *Anza*.⁸⁰ *Mohawk Industries* involved a set of claims by employees who alleged that the employer was hiring a substantial number of illegal aliens and was thereby paying lower labor costs for all of the non-alien employees. In that sense, it looks a lot like the kind of indirect injury the Court criticized in *Anza*. So the Court sent the case back to the Court of Appeals to review that issue.⁸¹ I think the Court will decide the question as to whether RICO allows an enterprise in fact

⁷⁹ *Mohawk*, 126 S. Ct. 2016.

⁸⁰ *Id.*

⁸¹ *Id.*

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that is not controlled solely by a group of individuals. It is one thing if you have an individual who controls a corporation or a corporation that controls another corporation. The question is whether you can have corporations and individuals interact and create a separate enterprise that would be the predicate for a claim under RICO. That issue is an open one, and based on oral argument, it seemed to me there were potentially six Justices who had serious doubts whether that kind of a cause of action can go forward.

And those are the most recent Supreme Court decisions in the area of federalism and business interests.