More pro-corporate rulings by US Supreme Court

John Andrews
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Amid intense media focus on decisions gutting the Voting Rights Act, maintaining affirmative action and protecting gay marriage, the *Wall Street Journal* ran a front-page story Monday entitled "Supreme Court Comes to Defense of Business." The article praised the court's 2012-2013 term, the eighth under Chief Justice John Roberts, for consistently upholding the positions of the Chamber of Commerce.

"The Supreme Court strengthened the hand of business," wrote the *Journal*, by "making it easier for companies to defend themselves from the kinds of big lawsuits that have bedeviled them for decades."

The article focused on several rulings earlier this year that decimated class-action lawsuits, the judicial mechanism allowing lawyers to aggregate small claims arising from illegal business practices into bigger claims that are economically feasible to litigate. The newspaper quoted one prominent Supreme Court specialist, Deepak Gupta, calling the term "a near bloodbath for class-action plaintiffs' lawyers."

Also earlier this term, the Supreme Court ruled that current US residents cannot sue Shell Oil for human rights violations that took place in Nigeria, despite the clear language of the Alien Tort Statute that allows for federal court jurisdiction. (See: "Supreme Court bars US lawsuits against overseas human rights abuses")

On Monday and Tuesday, the four-justice extreme right-wing bloc, joined by the conservative "swing" associate justice Anthony M. Kennedy, handed the Chamber of Commerce four more victories—a particularly heartless products-liability decision giving pharmaceutical companies broad immunity from suits based on injuries caused by their defective medications, two employment rulings that raise steep barriers for workers who sue because of workplace harassment and retaliation, and a land-use decision exposing local governments to money damages when they seek to impose conditions on commercial landowners in exchange for building permits.

Each case was decided 5-4, with the majority decision authored by reactionary Associate Justice Samuel A. Alito, whom Senate Democrats allowed to replace the somewhat more moderate Sandra Day O'Connor in 2006. In each case, the four moderate associate justices, Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, dissented.

Mutual Pharmaceutical Company v. Bartlett overturned a $21 million jury verdict in favor of Karen Bartlett, who took a generic form of the anti-inflammatory drug sulindac, as prescribed by her doctor, for shoulder pain. The medication triggered acute toxic epidermal necrolysis, resulting in about two-thirds of her skin disintegrating, leaving her body essentially one open wound. She spent months in a medically induced coma, underwent 12 eye surgeries, endured two serious episodes of septic shock, and was tube-fed for a year. The disease left her disfigured, disabled and almost completely blind.

At trial, Bartlett's lawyers demonstrated that sulindac had proven much more risky than other anti-inflammatory medications, such as aspirin and Tylenol, without any corresponding benefit. The jury found that the product was dangerously defective, and the appellate court affirmed.

Alito ruled that the manufacturer of a generic drug cannot be sued because the original formula and warnings had once been approved by the Food and Drug Administration (FDA), effectively giving broad immunity to manufacturers of generic pharmaceuticals and denying those harmed by their defective products any compensation.

Alito wrote that "the dreadful injuries from which products liabilities cases arise often engender passionate responses… but sympathy… does not relieve us of the responsibility of following the law." This is utter nonsense.

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If the law simply dictated the Supreme Court's ruling, then how could the trial judge, the three appellate judges who affirmed the judgment, and the four dissenting Supreme Court justices—not to mention the citizen jurors who heard all the evidence, deliberated and voted in favor of Ms. Bartlett—have all been so wrong?

Koontz v. St. Johns River Water Management District restricts the ability of local governments to manage social resources. The owner of a 15-acre parcel of Florida wetlands applied for a development permit. The local agency made several alternative proposals for the development to go forward if the owner preserved wetlands on other portions of his property or helped maintain wetlands nearby. No permit was ever issued.

The landowner sued, claiming that the government's demands were excessive and would have constituted a "taking" of his property for which the Fifth Amendment requires just compensation. Alito agreed, even though no transaction ever took place.

Most striking were the Supreme Court majority's attacks on the right of workers to defend themselves from discrimination, harassment and retaliation in the workplace.

In *Vance v. Ball State University*, a food service worker claimed a supervisor harassed her at work because of race. Two 1998 Supreme Court decisions held that under Title VII of the Civil Rights Act of 1964, employers are responsible for discriminatory actions by their "supervisors." In contrast, the same conduct by co-workers violates Title VII only if the worker complains about harassment and the employer fails to take the appropriate action to stop it.

Like many federal regulatory schemes, Title VII is interpreted and administered by a commission established under an Act of Congress—the Equal Employment Opportunity Commission (EEOC). Since the Supreme Court upheld supervisory liability 15 years ago, the EEOC—like most dictionaries—has defined "supervisor" to mean an employee with authority to direct another's work. Generally, courts follow the federal regulatory commission's interpretation of a federal law.

This Supreme Court is different, however. Again employing result-oriented reasoning, Alito restricted "supervisors" to employees with the authority "to take tangible employment actions… such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

The new, restrictive rule effectively eliminates supervisory liability claims against large businesses, which separate hiring and firing from the line supervision where most employment harassment occurs.

In the other employment case, *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court took a jury verdict away from a medical doctor who proved he was denied employment in retaliation for his complaints about being discriminated against because of his Middle-Eastern origin. Alito wrote, for the majority, that proving an illegal motive is not enough. Workers must show that no action would have been taken against them "but for" their employers' desire to retaliate.

So-called "mixed-motive" scenarios are common in employment discrimination and retaliation claims. The employers charged with wrongdoing invariably cite multiple reasons to justify their actions.

The previous rule, supported by the EEOC and general legal principles, was that so long as illegal retaliation was a substantial motivating factor for the employment decision, Title VII is violated. Now, under the more restrictive standard announced by Alito, plaintiffs must also eliminate all the other motives and establish that the adverse action would not have been taken "but for" the retaliatory motive.

Ginsburg, joined by the other three moderates, blasted both employment rulings, reading her dissents from the bench, while Alito visibly grinned and shook his head, a severe departure from Supreme Court decorum.

Ginsburg labeled the majority's rulings "blind to the realities of the workplace," saying that as a result, Title VII "has shifted in a decidedly employer-friendly direction" that "will leave many harassment victims without an effective remedy" and will "undermine Title VII's capacity to prevent workplace harassment."

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