

The Supreme Court - May 20, 2019

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The Supreme Court of the United States issued three decisions this morning:

Mission Product Holdings, Inc. v. Tempnology, LLC, No. 17-1657: In this bankruptcy-related case, Tempnology, LLC entered into an agreement with Mission Product Holdings, Inc., giving Mission a license to use Tempnology's Coolcore trademarks. Three years later, Tempnology filed a petition for Chapter 11 bankruptcy and sought to "reject" its licensing agreement under 11 U.S.C. §365(a) of the Bankruptcy Code. That section of the code enables a debtor to "reject any executory contract," and specifically provides that such a rejection "constitutes a breach of contract." The Bankruptcy Court, in approving the rejection, also held that this rejection revoked Mission's right to use the trademarks. The Bankruptcy Appellate Panel reversed, finding Mission could continue to use the trademarks. The First Circuit, in turn reversed that decision, reinstating the Bankruptcy Court's termination of Mission's license. Today the Court reversed, holding that a rejection under Section 365 has the same effect as a breach of the contract outside bankruptcy; it breaches the contract but does not rescind it, and thus all the rights that would ordinarily survive a contract breach, including the trademark rights here, remain in place. The opinion was authored by Justice Kagan, with Justice Sotomayor filing a concurring opinion, and Justice Gorsuch dissenting.

The Court's decision is available [here](#).

Herrera v. Wyoming, No. 17-532: Petitioner Clayvin Herrera is a member of the Crow Tribe who was hunting a group of elk and pursued them past the boundary of the Crow Reservation in Montana into the Bighorn National Forest in Wyoming. Herrera was convicted by the State of Wyoming for taking elk off-season and without a state hunting license, over his objections that he had a protected right to hunt under the 1868 Treaty between the Crow Tribe and the United States. In that 1868 Treaty, the United States promised that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists . . . on the borders of the hunting districts." Wyoming's appellate court likewise rejected Herrera's

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argument, following the Supreme Court's 1896 decision in *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Race Horse*, the Court had concluded Wyoming's admission to the United States extinguished a different treaty with the same language – reasoning later repudiated by the Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The Wyoming appellate court also alternatively concluded that the Tenth Circuit's prior decision holding that the 1868 Treaty's hunting rights expired when Wyoming became a State in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), had issue-preclusive effect against Herrera as a member of the Crow Tribe, which was a party to that suit. The Court today vacated and remanded, following *Mille Lacs* in holding that the hunting rights under the 1868 Treaty did not expire when Wyoming became a State; finding that the Tenth Circuit's decision was not of preclusive effect; and further holding that Bighorn National Forest did not become categorically "occupied" within the meaning of the Treaty when the national forest was created. Justice Sotomayor authored the majority opinion, joined by Justices Ginsburg, Breyer, Kagan, and Gorsuch. The other four justices dissented.

The Court's decision is available [here](#).

Merck Sharp & Dohme Corp. v. Albrecht, No. 17-290: In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Supreme Court held that "clear evidence" that the Food and Drug Administration ("FDA") would not have approved a change to a drug's label pre-empts a state law claim that a drug manufacturer failed to warn consumers of risks associated with the drug. Here, separate actions were brought by more than 500 individuals who took Merck's drug Fosamax, a drug that treats and prevents osteoporosis, but also may increase the risk of "atypical femoral fractures" – a type of fracture affecting the thigh bone. When the FDA first approved Fosamax in 1995, the label did not warn of atypical femoral fractures, but as stronger evidence developed, the FDA ordered Merck to include a warning on its label in 2011. The plaintiffs here brought state law failure to warn claims related to atypical femoral fractures they suffered between 1999 and 2010. Merck argued the claim was pre-empted, specifically pointing to the FDA's rejection of Merck's attempt in 2008 to include a more general warning regarding the risk of "stress fractures." The District Court found the claim pre-empted, but the Third Circuit vacated and remanded. Today, the Court in turn vacated and remanded, holding that this pre-emption issue is for a judge to decide, rather than a jury, and that the "clear evidence" standard in *Wyeth* requires evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning. Justice Breyer issued the majority opinion, joined by Justices Thomas, Ginsburg, Sotomayor, Kagan, and Gorsuch. Justice Alito, Chief Justice Roberts, and Justice Kavanaugh concurred in the judgment.

The Court's decision is available [here](#).

Today, the Supreme Court granted certiorari in the following case:

Ritzen Group, Inc. v. Jackson Masonry, LLC, No. 18-938: Whether an order denying a motion for relief from the automatic stay in a bankruptcy proceeding is a final order

appealable under 28 U.S.C. §158(a)(1).