



## **DPCC Special Report:**

### **A Weakened Supreme Court Hurts Small Businesses**

*We need a Supreme Court operating at full strength so that small businesses have clear guidance about their rights and responsibilities. But Republicans are threatening to put politics first by listening to the most extreme, right wing voices and leaving a vacancy on the Supreme Court open for over a year.*

*With only eight justices, the Court could deadlock on critical issues that impact small businesses, creating uncertainty and giving Americans in different parts of the country different rights and responsibilities. Such a split has already occurred on an important question involving whether borrowers can be required to have their spouses guarantee their loans. When a deadlock occurs, important, national issues remain undecided until the Court is able to rehear the case or another case raising the same issue comes before it. That uncertainty is harmful for all Americans—and especially for small businesses, which need certainty and predictability to operate. It's time for Senate Republicans to put the Constitution above politics and do their job by holding a hearing and a vote on Chief Judge Merrick Garland's nomination to the Supreme Court.*

*The following report highlights some of the ways that unprecedented Republican obstruction weakens the Court and could create confusion for small businesses.*

#### **1. Unsettled Law About Borrowers' Obligations**

**The Issue:** Can borrowers be required to have their spouses guarantee their loans?

**The Background:** On March 22, the Supreme Court deadlocked 4-4 on the question of whether two women could be required to guarantee loans given to their husbands.<sup>1</sup> Valerie Hawkins and Janice Patterson argued that the bank's demand for payment was discriminatory under the Equal Credit Opportunity Act (ECOA), which has long been understood to prohibit banks from requiring individuals to guarantee their spouses' loans when they have no connection to the loan other than their marriage and an applicant is otherwise creditworthy.

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<sup>1</sup> Hawkins & Patterson v. Community Bank, No. 14-520, [3/22/16](#).

The Supreme Court's 4-4 split in *Hawkins & Patterson v. Community Bank* means that small business borrowers across the country now face unsettled law on whether banks can require their spouses to guarantee their loans. Banks in some parts of the country may now require borrowers to seek their spouse's guarantee, business owners in some parts of the country may now need their spouse's agreement to serve as a guarantor before they can seek a loan, and spouses in some parts of the country may now have their personal financial security forcibly tied up in the success or failure of their spouse's loan.

The law of the Eighth Circuit, where the *Hawkins* case arose, is inconsistent with law in the Seventh Circuit, creating different rules in different parts of the country and uncertainty for borrowers who may not know which law applies to them, and whether that law will soon be overturned.

The *Hawkins* case illustrates that a deadlocked Supreme Court matters. It undermines certainty and uniformity in our nation's laws.

## **2. Unclear Standards for Damages in Patent Cases**

**The Issue:** What are the appropriate standards for finding willful infringement of a patent and therefore awarding treble damages?

**The Background:** Under the Patent Act, lower courts "may increase ... damages up to three times the amount found or assessed."<sup>2</sup> The U.S. Court of Appeals for the Federal Circuit has interpreted the Patent Act to require a finding of "willful" patent infringement before such enhanced damages may be awarded, and set forth a specific test for identifying willfulness.

*Stryker Corp. v. Zimmer* concerns a suit brought by Stryker, a leading medical device and equipment manufacturer, against a competitor, Zimmer, Inc., alleging patent infringement. A lower federal court sided with Stryker and tripled Stryker's \$70 million damage award.<sup>3</sup> The U.S. Court of Appeals for the Federal Circuit reversed, finding that, because Zimmer had not willfully infringed the patents at issue under the Federal Circuit's test for willfulness, Stryker was not entitled to the lower court's enhanced damages award.<sup>4</sup> Stryker's case is now on appeal to the Supreme Court.

Individual judges on the U.S. Court of Appeals for the Federal Circuit disagree about what showing is needed to establish willful infringement and therefore enhanced damages. A resolution in *Stryker Corp. v. Zimmer* would clarify this disagreement and provide guidance to federal courts about the appropriate standards for granting enhanced damages in a patent infringement suit. Without clarification, enhanced damages, a powerful tool in allegations of infringement, will be left in limbo.

Intellectual property is the lifeblood of many small businesses; at the same time, threats of costly litigation can obliterate an otherwise healthy small business. Clarity about how intellectual property infringement will be litigated is essential for innovative small businesses to thrive.

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<sup>2</sup> 35 U.S.C. § 284.

<sup>3</sup> *Stryker Corp. v. Zimmer, Inc., et al.*, 782 F.3d 649 (Fed. Cir. 2015)

<sup>4</sup> *Stryker Corp. v. Zimmer, Inc., et al.*, 782 F.3d 649 (Fed. Cir. 2015)

### 3. Confusion About Whether Service Advisors Are Exempt from Overtime Requirements

**The Issue:** Are service advisors at a car dealership exempt from federal overtime-pay requirements?

**The Background:** The Federal Labor Standards Act (FLSA) requires employers to compensate employees that work more than forty hours a week “at a rate not less than one and one-half times the regular rate at which he is employed.”<sup>5</sup> However, FLSA also exempts “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” from its overtime requirements.<sup>6</sup>

*Encino Motorcars, LLC v. Navarro* concerns current and former “service advisors” at a car dealership, asking whether they are exempt from the FLSA’s overtime requirements because of the exception in the law. The lower federal court sided with Encino Motorcars, concluding that “a service advisor is a ‘salesman ... engaged in ... servicing automobiles’ and is thus exempt from [federal] overtime[-pay] requirements.”<sup>7</sup> The Court of Appeals for the Ninth Circuit reversed, deferring “to a Department of Labor interpretive regulation stating that service advisors are not exempt [from federal overtime-pay requirements] because they do not *personally* service automobiles.”<sup>8</sup> Encino Motorcars has asked the Supreme Court to review the Ninth Circuit’s decision.

A resolution in *Encino Motorcars, LLC v. Navarro* would provide guidance to federal courts regarding whether service advisors in the car sales industry are exempt from federal overtime-pay requirements. Without one, there will be uncertainty for the nation’s 18,000 car dealerships, which currently employ more than 45,000 service advisors.<sup>9</sup> Clarity about whether some car dealerships’ employees are eligible for overtime-pay will help car dealerships better understand and prepare for the cost of potential overtime-pay.

### Conclusion

These are just some of the critical issues that the United States Supreme Court may confront in the near future that could impact small businesses.

It is time for the U.S. Senate to do its job by fully and fairly considering the nomination of Chief Judge Merrick Garland to the United States Supreme Court. Deliberately blocking any nomination to the Court until next year will undermine the Court’s essential role as the nation’s final arbiter of law for not only the current Supreme Court term but also the next term, which begins in October. The American people deserve to have a fully functioning federal government. Under our Constitution, that includes a Supreme Court which can serve as the final arbiter of law.

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<sup>5</sup> 29 U.S.C. §207.

<sup>6</sup> 29 U.S.C. §213(b)(10)(A).

<sup>7</sup> *Navarro v. Mercedes Benz of Encino*, 2013 U.S. Dist. LEXIS 188961 (C.D. Cal. Jan. 25, 2013).

<sup>8</sup> *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267 (9<sup>th</sup> Cir. 2015).

<sup>9</sup> Petition for Certiorari, *Encino Motorcars LLC v. Navarro*, [9/30/15](#).