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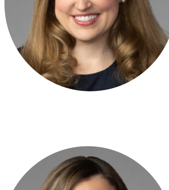
In this article, Freeborn Litigator Partner, Jeffrey M. Cross, analyzes and discusses the United States Supreme Court's ruling in *Viking River Cruises, Inc. v. Moriana*, slip op. No. 20-1573, 2022 U.S. LEXIS 2940, 142 S. Ct. 1906 (June 15, 2022), which held that California's ruling that a categorical waiver in an arbitration provision of a California Labor Code Private Attorneys General Act representative action was void.



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On June 30, Illinois Governor J.B. Pritzker signed the CROWN Act, a new law prohibiting employers from discriminating against employees because of race-based hairstyles and hair textures.

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Supreme Court Bypasses Opportunity to Clarify Patent Eligibility under 35 U.S.C. § 101

Aishwarya Totad, Attorney and Troy D. Smith, Partner

Patent law in the United States is far from straightforward. For an invention to be protected with a patent, the invention must be subject matter eligible, novel, useful, and non-obvious. The first criteria, subject matter eligibility, is often the cause for much uncertainty in the patent community. In two landmark decisions, *Mayo* and *Alice*, the Supreme Court has established a two-step framework to analyze patent subject matter eligibility. This framework, however, has not removed the uncertainty in the patent eligibility analysis, as evidenced by the pleadings in the American Axle case. After the Federal Circuit affirmed the district court's ruling that the patent was invalid as being just a simple application of a natural law, American Axle filed a combined petition for panel rehearing and rehearing en banc. The Federal Circuit, in a 6-6 split, denied the petition, leading to American Axle filing a petition for a writ of certiorari to the Supreme Court asking for clarification on the test to determine patentable subject matter.

Powerhouse Points

- The Supreme Court declined to clarify its two-step framework to analyze patent subject matter eligibility.
- Despite the established framework, its application by courts continues to result uncertainty as what subject matter is eligible for patent protection, especially with respect to the application of law of nature.
- The Section 101 analysis could benefit from clarification by the Supreme Court and, without it, further litigation will ensue regarding whether certain inventions are patent-eligible subject matter.

Section 101 of the Patent Act defines the four statutory categories of patent-eligible subject matter as any new and useful (i) process, (ii) machine, (iii) manufacture, or (iv) composition of matter, or any new and useful improvement thereof. In contrast, inventions that are directed to laws of nature, abstract ideas (for example, mathematical equations or formulae), and natural phenomena are not eligible for patentability. In *Diamond v. Diehr,* the Supreme Court said that while an abstract idea is not patentable, the application of a law of nature or mathematical formula to a known structure or process may be patentable. It is here where the issue lies with the *American Axle* case. American Axle brought a patent infringement lawsuit against Neapco Holdings for a method of manufacturing driveline propeller shafts containing a liner designed to attenuate two modes of vibration simultaneously. The district court granted summary judgment of patent ineligibility under Section 101, which was then affirmed by the Federal Circuit.

The question in this case was if American Axle's invention was ineligible for patent protection as being a simple application of Hooke's Law. The en banc request was denied with a 6-6 split of the Federal Circuit. Half of the Federal Circuit found that the claim contains "no further identification of specific means of achieving" specific results beyond simply claiming Hooke's Law. The other half of the Federal Circuit reasoned that the claims do more than simply reciting a law of nature and included elements necessary to produce the desired effect of reducing the vibrations. This latter point implicates *Diehr,* where the Supreme Court held that "when a claim containing a mathematical formula implements or applies that formula in a structure or process which when considered as a whole, is performing a function which the patent laws were designed to protect then the claim satisfies the requirements of 101." The question that then arises is if this holding should have been applied to the American Axle patent such that the patent would have survived.

American Axle's petition for writ of certiorari asked the Supreme Court to clarify: (1) the appropriate standard for determining whether a patent claim is directed to a patent ineligible concept, and (2) if patent eligibility was a question of law for the court based on the scope of the claims or a question of fact for the jury based on the state of art at the time of the patent. The Solicitor General filed an amicus brief laying out the unpredictability of the current patent subject matter eligibility standard and urged the Court to answer at least the first question presented in American Axle's petition.

On June 30, 2022, the Supreme Court denied American Axle's petition without explanation, bypassing the opportunity to clarify the Section 101 analysis. ■

Aishwarya Totad is an Associate in the Litigation Practice Group and a member of the Intellectual Property Team. A recent graduate of the University of Connecticut School of Law, she has a background in engineering and judicial policy.

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Meet the Newest Litigation Practice Group Members

Sean J. Quinn, Chicago

Sean is a Partner in the Litigation Practice Group and a member of the Intellectual Property Group. He focuses his practice on helping businesses protect their intellectual property and resolving complex commercial disputes. Sean manages intellectual property litigations involving trademark, trade dress, copyright, trade secret, and unfair competition claims. He also manages complex commercial litigations involving contractual matters, fraud, employment, and shareholder disputes.

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Bill is a member of the Litigation Practice Group. He focuses his practice on complex commercial litigation, including representation of publicly traded corporations in contract disputes, consumer fraud, and class actions. Bill has experience drafting substantive pleadings and dispositive motions, refining large-scale discovery, and preparing for trial.

Nicholas Vittori, Chicago

Nick is an Associate in the Litigation Practice Group and a member of the Complex Commercial Litigation Team. His litigation background covers areas involving breach of contract, fraud and other business torts, breach of fiduciary duty, white collar criminal defense and professional malpractice. He has experience drafting substantive motions and pleadings, developing case strategy, engaging in large scale discovery, taking depositions, and preparing for trial.

Recent Developments in Arbitration: The Supreme Court's Viking River Cruises Decision

Jeffery M. Cross, Partner

Over the years, the Supreme Court has been quite active in the area of arbitration. This past Term the Court issued five decisions involving arbitration.

Of these five decisions, the one decision that seems to reflect most clearly the Court's approach to arbitration is *Viking River Cruises, Inc. v. Moriana*, slip op. No. 20-1573, 2022 U.S. LEXIS 2940, 142 S. Ct. 1906 (June 15, 2022). *Viking* involved the California Labor Code Private Attorneys General Act known as "PAGA." In reaching its decision, the Court fleshed out its prior holdings regarding arbitration and "representative actions," such as class actions. These prior holdings include the blockbuster decision *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), that held that a party cannot be forced by state statute to arbitrate a dispute as a class action unless the party clearly agreed to do so. The Court's reasoning in *Viking* clarifies its thinking as to class arbitrations.

The California Labor and Workforce Development Agency had authority to bring enforcement actions against employers for a variety of violations of the labor code. However, the California legislature concluded that the Agency did not have the resources to meet the legislature's goal of full compliance. Consequently, the legislature authorized aggrieved employees to bring private enforcement actions. The California courts, however, held that the cause of action belonged to the State and the aggrieved employee was acting only as the "agent" or "proxy" of the State. The State remained the real party in interest. If there was a recovery, the State received 75 percent of any fine, and the remaining 25 percent was distributed among the injured employees.

The California courts also interpreted PAGA as permitting claim joinder. Under this interpretation, an aggrieved employee with standing to sue an employer could add all of the claims for other employees that the State could bring.

- The Supreme Court held that nothing in its precedent or in the FAA established a rule mandating enforcement of a waiver in an arbitration provision waiving claims on behalf of an absent principal.
- Class-action waivers in arbitration provisions cannot be declared void by state laws or state court interpretations.
- The Supreme Court drew a line between class arbitrations and representative arbitrations between a single agent representing a single principal against a single defendant covering claims made by the single agent.

The Respondent employee joined Viking River Cruises as a sales representative. Her employment agreement contained an arbitration provision that provided that any arbitration could not be brought as a class action, a collective action, or a representative action under PAGA. The lower courts held that the waiver of the PAGA representative action was void as against state policy. Viking argued in the Supreme Court that the state court's holding deviated from the traditional bilateral arbitration between two individual entities and therefore was in violation of § 2 of the FAA under the Court's precedents such as *Concepcion*.

The Supreme Court disagreed. The Court held that nothing in its precedent or in the FAA established a rule mandating enforcement of a waiver in an arbitration provision waiving claims on behalf of an absent principal. The Court noted that there are myriad examples of non-class representative actions in which a single agent litigates on behalf of a single principal. These include shareholder derivative suits, wrongful death actions, trustee actions, and suits on behalf of infants or incompetent persons. Instead, the Court emphasized that it had held that class-action waivers in arbitration provisions could not be declared void by state laws or state court interpretations. The Court noted that the change from bilateral arbitration between individual entities to class arbitration was such a fundamental departure from the arbitration norm that it would not be forced on a party to an arbitration provision by state law or state court action. Only if the parties clearly agreed to class arbitration would it be permitted.

To understand the Court's holding in *Viking,* it is valuable to examine the Court's *Concepcion* decision. Class arbitration, of course, involves absent parties. The inclusion of such absent parties requires the addition of various procedures and formalities to protect such absent parties. Indeed, without such procedures and formalities, absent parties may not be bound. Such procedures include a determination whether the named parties are representative of the absent class and whether the claims of the named parties are typical of the class. In addition, the arbitration must provide absent class members with notice and an opportunity to opt-out.

Perhaps most importantly, the Court noted that class arbitration increases the risks on the defendant without many of the protections afforded the parties in class litigation. For example, in class litigation, the parties are entitled to discovery which in many cases can be extensive because of the amount at stake. In addition, the decision of the trial court in class litigation can be appealed. Indeed, the decision to certify the class is subject to interlocutory appeal.

In traditional bilateral arbitration, the parties give up some of the procedural rigor as well as appellate review to realize the benefits of arbitration. These include lower costs and greater efficiency. Often in arbitration discovery is truncated or streamlined. Furthermore, appeal under § 10 of the FAA is limited. Vacatur of an arbitration award is limited to very narrow grounds such as bias of the arbitrator or that the arbitrator refused to consider material evidence.

The Court noted that defendants in an arbitration are generally willing to accept the cost of errors in an arbitration because the impact is limited and the benefits of speed and efficiency outweigh such a limited cost. However, with class arbitration, this balance is dramatically upended. For the foregoing reasons, the Court in C*oncepcion* made it clear that the parties must clearly agree to class arbitration. A state statute or state court decision declaring a waiver of class arbitration void would violate the FAA.

The Court, however, rejected Viking's definition of bilateral arbitration as too narrow. The Court held that nothing in its precedent suggested that, in enacting the FAA, Congress intended to require states to abrogate their agency law to mandate that representative actions involving a single agent and a single principal could not be arbitrated. The Supreme Court thus upheld California's ruling that a categorical waiver in an arbitration provision of a PAGA representative action was void.

Notwithstanding the foregoing, the Court did find aspects of a PAGA action as interpreted by the California courts to be in conflict with the FAA. This was the claim joinder aspect. The Court held that a corollary to its rule that arbitration is a matter of consent is that a party can be compelled to arbitrate only those issues that it has agreed to arbitrate. A state law that would mandate a party to arbitrate claims of multiple employees would expand the scope of arbitration beyond what a party had agreed to.

This Supreme Court has clearly been an activist court when it comes to arbitration. This Term has been no exception. The *Viking* decision provides important insights into the Court's thinking as to representative arbitration, drawing a line between class arbitrations and representative arbitrations between a single agent representing a single principal against a single defendant covering claims made by the single agent. ■

Jeff Cross is a Partner in the Litigation Practice Group and a member of the Antitrust and Complex Litigation Team. Jeff has over 40 years of trial experience representing a variety of corporations and business throughout the country on antitrust and complex commercial litigation. He is also an arbitrator on the American Arbitration Association's Commercial Panel and a Fellow of the Chartered Institute of Arbitrators.

Freeborn Attorneys and Practices Earn High Marks in Chambers USA 2022 Rankings

We congratulate the following members of the Litigation Practice Group on being ranked in the Chambers USA 2022 Guide:
Tina M. Bird (Construction); James J. Boland (Insurance: Dispute Resolution: Reinsurance); Thomas F. Bush (Insurance: Dispute Resolution: Reinsurance); Philip L. Comella (Environment: Litigation); Jeffery M. Cross (Antitrust); Mark R. Goodman (Insurance: Transactional & Regulatory); Joseph T. McCullough IV (Insurance: Dispute Resolution: Reinsurance); and Ann M. Zwick (Environment: Litigation).

Employers Need to Prepare for Illinois Crown Act

Erin McAdams Franzblau, Partner and Jennifer M. Huelskamp, Partner

Earlier this year, the U.S. House passed the CROWN Act, which would prohibit employment discrimination against employees and applicants based on hairstyles traditionally associated with one's race. The CROWN Act stands for "Creating a Respectful and Open World for Natural Hair" Act and is now with the U.S. Senate for a vote, although its future is uncertain. Several states have also already implemented their own versions of the CROWN Act and, here in, Illinois a similar law is in the works.

An amendment to the Illinois Human Rights Act was passed January 1, 2022, which created a quasi-CROWN Act as it relates to schools. Senate Bill 817 prohibits schools from issuing policies on hairstyles historically associated with race or ethnicity. Specifically, it prevents school boards, local school councils, charter schools, and elementary and secondary schools from creating hairstyle-based dress code requirements. The bill also requires the Illinois State Board of Education (ISBE) to provide schools with educational resource materials to teach about protective hairstyles.

As it relates to Illinois employers, on April 9, 2022, the Illinois Senate passed House Amendment 1 to SB 3616, joining the Illinois House in unanimously passing legislation referred to as the Illinois CROWN Act. Governor J.B. Pritzker then signed the bill into law on June 30, 2022, creating a new definition of "race" under the Illinois Human Rights Act (IHRA). The new definition now includes "traits associated with race, including, but not limited to, hair texture and protective hairstyles such as braids, locks, and twists."

Illinois joins 13 other states with similar CROWN laws, including California, Colorado, Connecticut, Delaware, Maryland, Nebraska, Nevada, New Mexico, New Jersey, New York, Oregon, Virginia, and Washington. As such, Illinois employers should be aware of the CROWN Act at the state level now and review applicable policies and procedures with legal counsel in order to ensure that they are in line with the requirements of this new law. ■

Powerhouse Points

Illinois Employers Should:

- Review dress code policies and procedures with legal counsel to ensure they comply with the new Illinois law;
- Consider whether they have a nondiscriminatory reason (such as a bona fide occupational qualification) to impose a certain grooming or dress-code requirement; and
- Train managers accordingly.

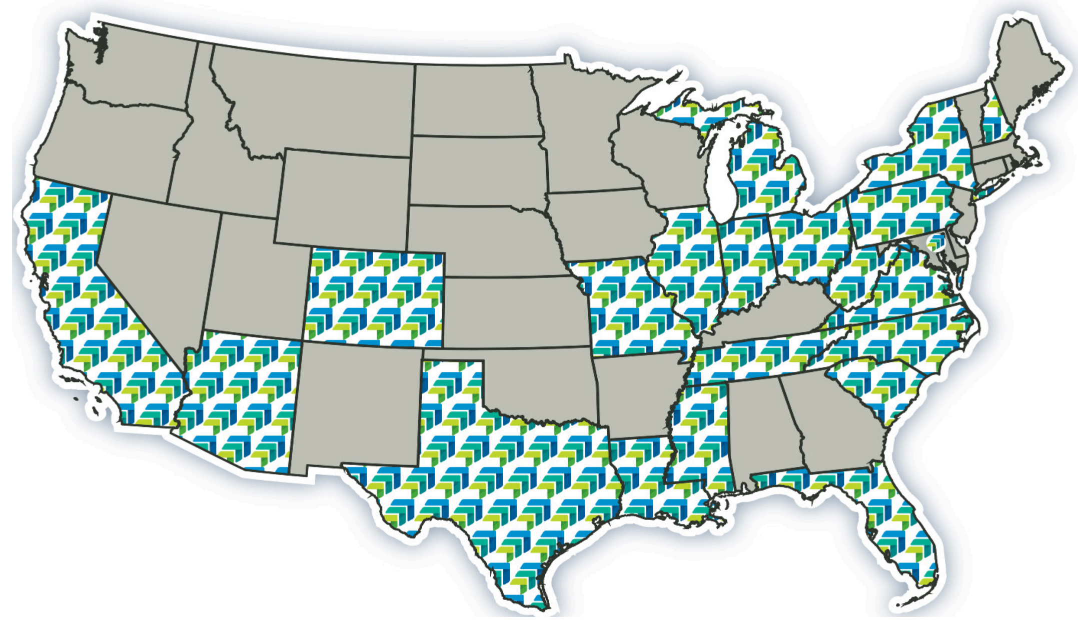
Erin McAdams Franzblau is a Partner in the Litigation Practice Group, with a focus on helping companies navigate employment laws. Erin litigates employment matters, counsels employers on nearly every sub-specialty of employment law, and acts as employment counsel for M&A transactions. She also serves as the firm's Associate General Counsel for Employment Matters and as Chair of the firm's Women's Leadership Council.

Jennifer Huelskamp is a Partner in the Employment and Litigation Practice Groups with a practice focused on employment litigation and counseling. She has significant experience representing clients in state and federal courts and in proceedings before government agencies, including the Equal Employment Opportunity Commission, the Illinois Department of Labor, and the Illinois Department of Human Rights. Jennifer also routinely practices in the general commercial litigation space.

21 Freeborn Litigators Recognized in the 29th edition of The Best Lawyers in America©

We congratulate the following members of the Litigation Practice Group on being included:
Jessica Kirkwood Alley, Theodore I. Brenner, Philip L. Comella, Jeffery M. Cross, David C. Gustman, Lawrence P. Ingram, Michael J. Kelly, Melissa B. Murphy, Steven D. Pearson, Jason P. Stearns, Robert A. Stines, Alexander S. Vesselinovitch, Matthew T. Connelly, Ian J. Dankelman, Christina L. Flatau, Sarah A. Gottlieb, Amanda S. Keller, David M. Knapp, Jennifer M. Huelskamp, Hoyt L. Prindle III, Andrew A. Wooden

RECENT LITIGATION BY STATE



HIGHLIGHTED WINS

- Secured a favorable settlement for an incarcerated pro bono client in a civil rights action involving a claim of wrongful termination of in-facility employment. Near the case's conclusion, the magistrate judge presiding over the case stated, on record, of Freeborn's attorneys: "The quality of the representation provided by plaintiff's counsel, who were appointed by the court, was exceptional."

- A team of Freeborn attorneys, in partnership with the National Immigrant Justice Center, prevailed on behalf of a pro bono client in an asylum trial against the government's robust efforts to deport our client back to Cameroon. The client fled Cameroon after the military arrested and tortured her because of her political identity, and for participating in a peaceful protest against the marginalization and unjust treatment of Southern Cameroon. Even after she fled, the military continues to search for and threaten her, so she cannot return for fear she will be imprisoned or murdered. The client was recently granted protection in the U.S.

- Secured summary judgment on behalf of closely held corporation in contentious breach of fiduciary duty claim.

- Obtained reversal of an unfavorable decision on appeal, resulting in case going back to trial court for decision on trial regarding avoidance of fraudulent transfers under Pennsylvania state law.

- Successfully prevailed on motion to dismiss a breach of contract claim with prejudice on behalf of client North Carolina company. Plaintiff claimed that under its business brokerage agreement, it was entitled to a commission when defendant client completed an internal company restructuring. The court found that while the transaction at issue may have qualified as a commission triggering transaction, plaintiff's claim was defeated by defendant's evidence and dismissal was warranted with prejudice because plaintiff failed to comply with Supreme Court Rule 191(b). Plaintiff's motion to reconsider was denied. (*Circuit Court of Cook County, Illinois*)

- Successfully dismissed 7-count complaint containing claims of breach of fiduciary duty, conspiracy, and violations of the Illinois Securities law, as well as defeated a motion for reconsideration of the dismissed claims, in a lawsuit involving members of a local start-up company. (*Circuit Court of Cook County*)

ABOUT FREEBORN'S LITIGATION POWERHOUSE®

With more than 90 litigators, Freeborn's Litigation Practice Group brings both bench strength and deep experience to each client matter. Known as a Litigation Powerhouse®, we are 'litigators first' and our philosophy is to prepare cases to be tried. Even when settlement is appropriate, we believe our trial-ready approach provides the best ultimate outcome.

Each of our litigators are trained, first and foremost, to understand our client's business and their goals for litigation. Within the context of their goals, our focus is obtaining the best result possible for their business. Our success is based on knowledge of the process and our ability to efficiently organize and prepare our cases. Whether the litigation requires a single lawyer or a team of 20, we are trial-ready lawyers, equipped to provide client-focused results.

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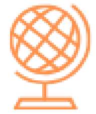

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