Skadden

2017-18 Supreme Court Update

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In the 2017-18 term, the U.S. Supreme Court will decide a number of potentially significant disputes relevant to businesses, including those involving constitutional protections, class actions and other corporate liability issues.

Constitutional Issues

The Legality of Sports Gambling

A precept of constitutional law is that the federal government cannot "commandeer," or coerce, the states to take regulatory action that the 10th Amendment would otherwise reserve to them. In a pair of consolidated gambling cases — *New Jersey Thoroughbred Horsemen's Association, Inc. v. National Collegiate Athletic Association* and *Christie v. National Collegiate Athletic Association* — the Supreme Court will consider New Jersey's argument that the Professional and Amateur Sports Protection Act (PASPA) violates the anti-commandeering doctrine. PASPA prohibited states from authorizing betting on amateur or professional sports — effectively creating a nationwide ban on sports gambling — but exempted four states (New Jersey not among them) that already permitted such activity. It also exempted New Jersey's casinos, provided the state establish a regulatory scheme for sports gambling within one year of PASPA's enactment.

New Jersey sat idle for nearly 20 years, until voters approved a ballot measure in 2011 to legalize sports gambling. The National Collegiate Athletic Association and the four major professional sports leagues sued, citing the state's failure to take advantage of the one-year grace period and PASPA's prohibition on any sports gambling outside the four previously exempted states. New Jersey argued that PASPA impermissibly commandeered the states by prohibiting them from legalizing sports gambling. The U.S. Court of Appeals for the Third Circuit, sitting *en banc*, sided with the leagues, as had the district court below. A victory for New Jersey at the Supreme Court would pave the way for sports gambling in the Garden State and in others that follow its lead. It could also call into question other federal limitations on state activities on "commandeering" grounds. The case was argued on December 4, 2017.

Warrantless Search and Seizure

In Fourth Amendment cases decided in the 1970s, the Supreme Court held that, when one voluntarily shares information with a third party, law enforcement can obtain that information from the third party without obtaining a warrant — even if "the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed" (*United States v. Miller*, 1976). But the ease and ubiquity of data sharing and collection in the era of computers and smartphones have raised questions about the practicability of this so-called "third-party doctrine." Justice Sonia Sotomayor, for example, argued in a 2012 concurring opinion in *United States v. Jones* that the third-party doctrine is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."

The Court will have an opportunity to reconsider the doctrine in *Carpenter v. United States*, which involves a decidedly digital-age investigative tool: cellphone records. The question presented in *Carpenter* is whether the Fourth Amendment permits the warrantless search and seizure of cellphone records revealing a user's location and movements over the course of 127 days. The case was argued on November 29, 2017, and

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the outcome will be closely watched by law enforcement, defense lawyers and privacy advocates.

The Future of *Inter Partes* Review

The rise of "patent trolls" — who file and receive patents for claims that are obvious, found in nature or "prior art," only to use those patents as an offensive weapon against alleged "infringers" in the hope of securing multiple, quick settlements — prompted Congress to create a more efficient adjudicatory process outside traditional patent litigation. The America Invents Act, signed into law by President Barack Obama in 2011, established *inter partes* review (IPR) as a way to efficiently challenge and invalidate patents, including those owned by patent trolls. IPR proceedings are conducted by the Patent Trial and Appeal Board, an administrative arm of the U.S. Patent and Trademark Office, rather than by a court or judicial body. In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, the Supreme Court will consider whether IPR proceedings satisfy constitutional requirements, including the right to a jury trial. The case was argued on November 27, 2017, after business interests weighed in as *amici* on both sides of the case.

ALJs and the Appointments Clause

The Supreme Court will consider, in *Lucia v. SEC*, whether the appointments clause of the Constitution requires administrative law judges (ALJs) within the Securities and Exchange Commission (SEC) to be appointed by the entire commission, which had not been the practice until just weeks ago. In 2012, the SEC charged Raymond Lucia with violating the Investment Advisers Act and certain SEC rules. After a formal administrative hearing before one of the agency's ALJs, Lucia was barred from working as an investment adviser for life and received other severe penalties. The question in *Lucia* is whether the SEC's ALJs are mere employees (as the federal government has maintained through years of litigation) or "officers of the United States" within the meaning of the appointments clause (as the federal government conceded in a dramatic about-face in November 2017). If the ALJ in Lucia's case was an officer, then the ALJ was likely appointed in an unconstitutional manner. A decision in Lucia's favor could have ramifications well beyond the SEC, as ALJ proceedings take place in a range of federal agencies.

Partisan Gerrymandering

In a case with the potential to reshape American politics, the Supreme Court will consider, in *Gill v. Whitford*, challenges to partisan gerrymandering. When the issue came before the Court in 2004, Justice Anthony Kennedy — then, as now, the pivotal vote on the issue — called for workable standards "for measuring the burden a gerrymander imposes on representational rights." The appellees in *Gill* — who in the three-judge district court below successfully challenged the 2011 redistricting plan drawn by the Republican-controlled legislature in Wisconsin — contend that they have now developed the necessary standards. At oral argument on October 3, 2017, the Court seemed likely to once more divide along ideological lines, with Justice Kennedy again holding the decisive vote. Adding another twist to this issue, the Court recently agreed to hear one more partisan gerrymandering case, *Benisek v. Lamone*. Whereas *Gill* presents a statewide challenge to a Republican-drawn map, *Benisek* concerns a single congressional district drawn by the Democrat-controlled Maryland Legislature. Finally, the Supreme Court will also decide a pair of consolidated redistricting cases from Texas alleging racial, rather than partisan, gerrymandering.

Free Speech and Public Union Dues

For the second time in three terms, the Supreme Court will consider whether the First Amendment restricts the collection of mandatory union dues from nonmembers. Nearly 40 years ago, in *Abood v. Detroit Board of Education*, the Court rejected a First Amendment challenge to "agency shop" arrangements, which allow public sector unions to collect mandatory fees from nonmembers. Those "fair share" fees are meant to offset the costs of contract negotiation or administration that, in principle, benefit both union members and other employees. (Nonmembers cannot be forced to pay "non-chargeable fees" that support other union activities, like lobbying.) The question before the Court in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* is whether to overrule *Abood* and hold that requiring nonmembers to pay any mandatory fees violates the First Amendment.

Notably, the Court was poised to answer this very question in the 2015-16 term, but Justice Antonin Scalia's death after the Court heard oral argument in *Friedrichs v. California Teachers Association* left the Court equally divided. Two years later, Justice Neil Gorsuch has taken Justice Scalia's seat and could deliver the fifth vote needed to overrule *Abood* and ban fair share fees.

Class Actions

The Securities Act and State Court Jurisdiction

Cyan, Inc. v. Beaver County Employees Retirement Fund presents a thorny issue of statutory interpretation left unsettled in the wake of two statutes designed to limit securities class actions. In 1995, the Private Securities Litigation Reform Act heightened the federal pleading requirements for securities fraud and made it more difficult for those actions to survive motions to dismiss. In response, litigation migrated to state courts, and Congress responded by passing the Securities Litigation Uniform Standards Act (SLUSA) in 1998. Among other provisions, SLUSA prohibited state courts from exercising jurisdiction over certain

"covered" class actions — the precise scope of which is at issue in *Cyan*. The Court heard oral argument on November 28, 2017, with several justices noting the difficulty of parsing SLUSA's language.

Statutes of Limitation for Successive Class Actions

The Court recently agreed to hear another securities lawsuit, *China Agritech, Inc. v. Resh*, this time with implications for class actions generally. (See "Securities Class Action Filings Reach Record High.") The dispute concerns the tolling of statutes of limitations for successive class actions. In its 1974 decision in *American Pipe & Construction Co. v. Utah*, the Court held that the filing of a class action tolls the statute of limitations for members of the putative class. But appellate courts disagree whether the tolling benefits subsequent class actions or only subsequent individual claims. In an *amicus* brief urging the Supreme Court to hear the case, the U.S. Chamber of Commerce argued that the former approach would prompt perpetual litigation in the form of "stacked" class actions — and suggested that *American Pipe* itself may be ripe for reconsideration.

Corporate Liability

Corporate Liability Under the Alien Tort Statute

Whether corporations can be liable under the Alien Tort Statute (ATS), also known as the Alien Tort Claims Act, is the subject of *Jesner v. Arab Bank, PLC*. The ATS, enacted as part of the Judiciary Act, confers jurisdiction on federal district courts to hear a civil action by "an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Supreme Court has gradually limited the scope of the ATS — most recently in 2013 by closing the door on so-called "foreign-cubed" cases involving foreign acts, plaintiffs and defendants. *Jesner* asks whether, irrespective of extraterritoriality issues, a corporation (rather than a natural person) can ever be liable under the ATS. In *Jesner*, individuals and families of individuals killed in terrorist attacks overseas brought suit in the U.S. District Court for the Eastern District of New York against Arab Bank, a multinational financial institution headquartered in Amman, Jordan. The plaintiffs allege that the bank — which has a branch in New York — is liable under the ATS for those terrorist acts because it "provided a range of financial services to terrorists and terrorist front groups posing as charities." Although a majority of the justices appeared skeptical of ATS corporate liability at oral argument on October 11, 2017, the Court could issue a narrow opinion focusing on Arab Bank's limited U.S. connection.

Protections for Non-SEC Whistleblowers

In *Digital Realty Trust, Inc. v. Somers*, the Court will consider corporate liability under a far more modern statute — the Dodd-Frank Act, enacted in the wake of the 2008 financial crisis. The Dodd-Frank Act prohibits retaliation by employers against a whistleblower (defined as someone who reports misconduct to the SEC) in a number of contexts, including when the whistleblower makes "disclosures that are required or protected under" several other laws. Some of these laws, however, protect disclosures beyond those to the SEC. How does the definition of whistleblower apply under those circumstances? If the Court — which heard argument on November 28, 2017 — finds the statute ambiguous, it might defer to the SEC's interpretation, which does not require disclosure to the SEC for whistleblower protection.

Employment Agreement Arbitration Clauses

A trio of consolidated cases could have significant implications for arbitration clauses in employment agreements. *Epic Systems Corp. v. Lewis*, *National Labor Relations Board v. Murphy Oil USA, Inc.* and *Ernst & Young LLP v. Morris* address a tension between two landmark statutes: the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA). The Supreme Court has previously held that arbitration agreements are presumptively enforceable under the FAA. The NLRA, meanwhile, protects the right of employees to engage in "concerted" action — such as class action litigation. The Court will consider whether employee arbitration agreements mandating that disputes with employers be resolved individually and through arbitration, effectively waiving employees' right to join a class action lawsuit, are valid notwithstanding the NLRA's protections. Oral argument took place on October 2, 2017.