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Cases to Watch in the 2014-15 Supreme Court Term

The Supreme Court will begin its new term on Monday, October 6, 2014. Although the Court has not yet accepted for review any headline-grabbing cases of the type we've seen in recent years in such areas as campaign finance, greenhouse gas regulation and the Affordable Care Act, its docket already includes potentially significant cases addressing separation of powers, administrative law, federal litigation procedure, antitrust law and securities law. Below are some of the cases that may be of interest to our clients.

Separation of Powers

Having significantly limited the president's authority to circumvent the congressional confirmation process through recess appointments in its last term, the U.S. Supreme Court will hear notable separation of powers cases again this term, albeit from more obscure corners of the federal government.

In *Department of Transportation v. Association of American Railroads* (to be argued on December 1, 2014), the Court will dust off nondelegation doctrine — a constitutional limitation on Congress' authority to delegate its powers — which the Court has not used to invalidate any statute since the New Deal. The case concerns a 2008 statute requiring the Federal Railroad Administration (FRA) and Amtrak to "jointly … develop" standards that would help enforce a dispatching preference that Amtrak's passenger trains enjoy over other rail services. (Under the statute, disagreements between Amtrak and the FRA about these standards would be resolved through binding arbitration.) The District of Columbia Circuit held that this statutory scheme unconstitutionally delegated legislative power to a private entity — namely, Amtrak. The outcome of the Supreme Court case could turn on narrow grounds, such as whether Amtrak's unusual governance structure renders it a public or private entity for purposes of the nondelegation doctrine. But the Court's decision also could sweep far broader by addressing, for example, the limits of public-private collaboration in federal regulation and governance.

Another case this term will explore the respective roles of legislative and executive branches in foreign affairs — an issue of frequent dispute between Congress and the White House but rarely touched by courts. The State Department has maintained a practice of listing "Jerusalem" — rather than "Israel" — as the place of birth in passports and certain other documents of United States citizens born in Jerusalem, in recognition of contested sovereignty over that city. But in 2002, Congress enacted a statute directing the State Department to honor those citizens' (or their legal guardians') requests to record Israel as their place of birth. President George W. Bush objected to the statute in a signing statement, asserting that the statute impermissibly interfered with the president's constitutional authority to conduct foreign affairs, and declined to enforce the statute. The District of Columbia Circuit recently agreed with the executive branch and held the statute unconstitutional. The Supreme Court will review that decision in *Zivotofsky v. Kerry* (to be argued on November 3, 2014). A broad ruling could expand or curtail the ability of Congress to influence through legislation a wide range of foreign diplomacy, including negotiations over trade and other economic affairs.

If you have any questions regarding the matters discussed in this memorandum, please contact ***Boris Bershteyn*** *at 212.735.3834, boris.bershteyn@skadden.com or call your regular Skadden contact.*

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Administrative Law

The Court's review of regulations and other administrative agency actions frequently yields decisions that narrowly address a particular agency's jurisdiction or statutory scheme. Even when those decisions have great policy significance — as in the last term's opinions limiting the Environmental Protection Agency's authority to control greenhouse gases — they rarely affect every sphere of rulemaking. This term, however, the Court will address a procedural question in *Perez v. Mortgage Bankers Association* and *Nickols v. Mortgage Bankers Association* (to be argued on December 1, 2014) with potential implications across all areas of regulatory activity.

When an agency promulgates a new regulation or amends an old one, the Administrative Procedure Act requires the agency to provide the public notice and solicit the public's comments — an undertaking that can demand substantial time and resources. The same notice-and-comment procedure generally is not required when an agency interprets its own existing regulation. Courts of Appeals disagree, however, about the process an agency must follow before it can significantly revise its interpretation of its regulation. The Supreme Court will review the District of Columbia Circuit's ruling that a revision of this kind requires notice and comment.

While *Perez* and *Nickols* arise from interpretations of particular overtime rules by the Department of Labor, their outcome could have much broader reach. After all, the Administrative Procedure Act governs a wide spectrum of rules, from pollution controls to securities to telecommunications. The notice-and-comment process serves as the principal formal colloquy between administrative agencies and members of the public, including the regulated community. It also contributes to the record upon which an agency must base its final rules and defend those rules in the courts. A decision in the government's favor in *Perez* and *Nickols* could encourage agencies to avoid the time and expense of notice-and-comment rulemaking by making policy through interpretation of existing regulations.

Procedural Aspects of Federal Litigation

The Supreme Court frequently resolves disputes about procedures of federal litigation, and this term is no exception. It will address, for example, the circumstances in which a plaintiff can immediately appeal the dismissal of a single action within a group of consolidated actions. The dispute before the Court arose from private actions alleging manipulation of the London Interbank Offered Rate (LIBOR), a number of which — including an antitrust case brought by the petitioners — had been consolidated in the U.S. District Court for the Southern District of New York. The District Court dismissed many of the LIBOR claims, including all of the petitioners' claims, but allowed certain claims in other consolidated cases to proceed. The petitioners appealed to the Second Circuit, which dismissed the appeal *sua sponte* for lack of appellate jurisdiction, because the District Court had not disposed of all claims in the consolidated actions. The Supreme Court will review that decision in *Gelboim v. Bank of America Corporation* (to be argued on December 9, 2014). The outcome may affect the resolution of complex business disputes, such as antitrust or products liability actions, which often involve multiple cases consolidated for pretrial purposes. If the Supreme Court disagrees with the Second Circuit, those disputes may more frequently reach appellate courts in a piecemeal, rather than consolidated, fashion.

Another dispute on the Court's docket will address the burden on a defendant seeking to remove a case from state to federal court. In the underlying case, the Tenth Circuit let stand a district court order remanding a class action back to state court because the defendant's notice of removal did not include evidence that the amount in controversy exceeded $5 million — a prerequisite for removal under the Class Action Fairness Act (CAFA). In *Dart Cherokee Basin Operating Company, LLC v. Owens* (to be argued on October 7, 2014), the defendant is asking the Court to hold that the notice could simply

allege the amount in controversy; then, once the plaintiff denies the allegation, the defendant would adduce evidence to support it. The resolution of *Dart Cherokee* should provide valuable guidance to defendants seeking to take advantage of CAFA, a 2005 statute that expanded federal jurisdiction over class actions in an effort to curb forum shopping by plaintiffs.

Other Business Cases

The Supreme Court will address the scope of the state-action doctrine — an exception from the antitrust laws that allows states to substitute certain regulatory schemes for free-market competition. The question before the Court concerns the circumstances in which that doctrine protects a state regulatory agency composed primarily of market participants. Asserting that such agencies (like other private parties performing acts authorized by a state) become immune from antitrust laws only when actively supervised by the state, the Federal Trade Commission enjoined certain actions by the board that regulates North Carolina's dental practices, which is composed mostly of practicing dentists. The board argued that it need not be subject to the state's active supervision to qualify for the state-action exception to antitrust laws. The Fourth Circuit disagreed, and the Supreme Court will review its decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* (to be argued on October 14, 2014). Should the Court broadly extend antitrust immunity, it would raise the specter of self-interested market participants using state powers to foreclose competition. Yet a limited immunity could make it more difficult for states to attract practitioners to serve on regulatory boards. Although the two cases hail from distinct areas of law, the policy questions implicated by *Board of Dental Examiners* echo those of the *Association of American Railroads* (discussed above).

In the area of securities law, the Court will address the scope of Section 11 of the Securities Act of 1933, which allows "any person acquiring" a security to sue the issuer, its directors, its underwriters and others if "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). The Court must decide whether a plaintiff who brings a Section 11 suit about a statement of opinion in a registration statement, alleging that the opinion is objectively wrong, must also allege that the opinion was not subjectively held. The Sixth Circuit concluded that objective falsehood was sufficient — a decision the Supreme Court will review in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* (to be argued November 3, 2014). If upheld, the Sixth Circuit's approach could suggest that Section 11 imposes strict liability for objectively untrue statements of opinion and therefore open the door to more private Section 11 lawsuits.