2014-15 Supreme Court Highlights

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Approaching the midpoint of its 2014-15 term, the Supreme Court has added to its docket several cases with potentially wide-reaching implications for a range of important policy and business issues. The Court accepted for review a dispute about the interpretation of the Affordable Care Act (ACA), the outcome of which may significantly affect the statute's implementation. It will also decide whether states must license same-sex marriages and recognize same-sex marriages lawfully performed in other states. Other notable cases before the Court address separation of powers, administrative law, federal litigation procedure, antitrust law and securities law. Summarized below are some of the cases of interest to our clients.

Affordable Care Act

The Supreme Court is once again at the center of a politically charged dispute over the ACA — and the success of the statute's implementation could be at stake. Critical to the ACA's design are subsidies, in the form of tax credits, that help millions of individuals purchase health insurance. The statute makes these tax credits available in connection with insurance purchased through an exchange — which is a type of health coverage marketplace — "established by the State." In a majority of states, however, the exchange is facilitated by the federal government rather than state-run. The Internal Revenue Service has promulgated rules making the tax credits available in connection with purchases on either type of exchange. Challenges to that regulation — based principally on the argument that the plain language of the ACA limits tax credits to purchases on state-run exchanges — were rebuffed by a panel of the Fourth Circuit but succeeded before a panel of the District of Columbia Circuit. The D.C. Circuit appeared to redress this circuit split — and thus make Supreme Court review unnecessary — when it decided on September 4, 2014, to take up the issue *en banc* and vacate its panel decision. But the Supreme Court nonetheless granted *certiorari* in the Fourth Circuit case, *King v. Burwell*, on November 7, 2014. The plaintiffs in *King* are residents of Virginia (a state served by a federally facilitated exchange, HealthCare.gov), who argue that, without tax credits, they would be unable to afford health coverage and therefore would be exempt from the ACA's individual mandate to purchase health insurance. The argument in the case will be heard on March 4, 2015.

Separation of Powers

During its last term, the Supreme Court significantly limited the president's authority to circumvent the congressional confirmation process through recess appointments. It 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* (argued on December 8, 2014), the Court may dust off the 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 law requiring the Federal Railroad Administration (FRA) and Amtrak "jointly" to "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 Supreme Court's decision 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 also could charter a broader course 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 one 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 it. 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* (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.

Administrative Law

The Supreme Court continues to scrutinize recent regulatory activity by the Environmental Protection Agency (EPA). Last term, it considered the EPA's authority to control greenhouse gases and its approach to controlling air pollution that crossed borders between states. Now, the Court has taken up a challenge to the EPA's rules controlling emissions of hazardous air pollutants — in large part, mercury — from power plants. As with many controversial regulatory policy issues, this dispute focuses on compliance costs. In particular, the Court will examine whether the EPA permissibly construed the Clean Air Act by considering costs in setting the level of emission controls on power plants, but not in deciding whether to regulate power plants in the first place. The District of Columbia Circuit upheld the EPA's approach, and the Supreme Court will review that decision in *Michigan v. EPA*, *Utility Air Regulatory Group v. EPA* and *National Mining Association v. EPA*. The economic significance of the EPA's rule can hardly be overstated: According to the agency's projections, the rule's requirements (when implemented fully in 2016) would impose annual costs of $9.6 billion and produce annual monetized benefits between $37 billion and $90 billion.

The Court's review of regulations and other administrative actions frequently yields decisions that narrowly address a particular agency's jurisdiction or statutory scheme. But even when

those decisions have great policy significance — as in the mercury cases described above — they rarely affect every sphere of rulemaking. This term, however, the Court will address in Perez v. *Mortgage Bankers Association* and *Nickols v. Mortgage Bankers Association* (argued on December 1, 2014) a procedural question 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 it to provide notice to the public and solicit the public's comments — an undertaking that can require 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 a regulatory 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 therefore 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. In one of the term's first decisions, *Dart Cherokee Basin Operating Company, LLC v. Owens*, the Court placed a low pleading burden on a defendant seeking to remove a case from state to federal court. It held that the defendant's notice of removal needs to include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold — and need not contain evidentiary submissions on that issue. 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), a 2005 statute that expanded federal jurisdiction over class actions in an effort to curb forum shopping by plaintiffs. The Supreme Court vacated the Tenth Circuit's judgment, disagreeing with the district court's reasoning and siding with defendants that seek to take advantage of CAFA removal jurisdiction.

Although decisions announced at the beginning of a term typically reflect unanimous or lopsided votes, the justices in *Dart Cherokee* split five to four. The dispute among them, however, had less to do with whether the district court properly remanded the case than

whether the Supreme Court should have addressed that question at all. After the Supreme Court accepted *Dart Cherokee* for review, an *amicus* brief drew its attention to a procedural twist: The Tenth Circuit never expressly ruled on the legal reasoning of the district court — it only made a discretionary decision not to review the district court's remand order. For the four dissenting justices, this procedural complication became dispositive; they would have dismissed the defendant's *certiorari* petition in *Dart Cherokee* without deciding its merits. But the majority disagreed and held that the Tenth Circuit's refusal to review the district court's remand decision "was infected by legal error" that the district court committed.

The disagreement among the justices highlights two important lessons for Supreme Court practice: First, a party opposing a *certiorari* petition must meticulously identify any procedural oddities that might make the petition a poor vehicle for addressing the legal question the petition asks the Court to resolve. The *Dart Cherokee* plaintiff might have benefited from highlighting at an early juncture the discretionary nature of the Tenth Circuit's ruling. That might have deterred the Supreme Court (including members of the majority who ultimately sided with the defendant) from granting *certiorari* in the first place. Second, a well-targeted *amicus* brief can continue to assist and influence the Court's deliberations.

The Court also has ruled that a plaintiff can immediately appeal the dismissal of a single action within a group of federal cases consolidated for pretrial proceedings. The dispute before the Court arose from private lawsuits alleging manipulation of the London InterBank Offered Rate (LIBOR), an important reference point for determining interest rates for financial instruments. The Judicial Panel on Multidistrict Litigation consolidated a number of these actions — including an antitrust case brought by the petitioners — for pretrial proceedings in the District Court for the Southern District of New York. The district court dismissed many of the LIBOR-related claims, including all of the petitioners' antitrust claims, but allowed certain claims in other consolidated cases to proceed. The petitioners appealed to the Second Circuit, which dismissed their appeal on its own initiative for lack of appellate jurisdiction, because the district court had not disposed of all claims in the consolidated actions. On January 21, 2015, the Supreme Court unanimously reversed the Second Circuit's judgment, holding that the district court's dismissal of the petitioners' claims effectively removed the petitioners from the consolidated proceedings and triggered their right to appeal. This outcome may have the effect of expediting appellate review in complex business disputes, such as antitrust or products liability actions, which often involve multiple cases consolidated for pretrial purposes. And the Supreme Court's decision clears the way for the Second Circuit's consideration of the LIBOR dispute's merits, with possible implications for a number of other pending cases alleging manipulation of various financial benchmarks.

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* (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 draw on practitioners for service on regulatory bodies. The policy questions implicated by *Board of Dental Examiners* echo those of the *Association of American Railroads* (discussed above), albeit in distinct areas of law.

Finally, in the area of securities law, the Court will address the scope of Section 11 of the Securities Act of 1933, in a case that addresses statements of opinion in a registration statement. (See "Securities Litigation Developments Largely Expected to Shift From Supreme Court to District and Circuit Courts in 2015.") If the Supreme Court upholds the Sixth Circuit's decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* (argued November 3, 2014), the ruling 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.

Portions of this article were published in "Cases to Watch in the 2014-15 Supreme Court Term," October 2014. For previously covered cases, this article includes updates and supplemental material.