Supreme Court: A Term-End Review

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Editor's note: This article has been updated to reflect Supreme Court decisions through June 29, 2015.

As the U.S. Supreme Court's 2014-15 term concluded, the Court resolved several cases with potentially wide-reaching implications for a range of important policy and business issues. On June 25, 2015, the Court handed the Obama administration a major victory by upholding its implementation of the Affordable Care Act (ACA). On June 26, 2015, the Court ruled in a landmark decision that the Fourteenth Amendment requires states to license same-sex marriages and recognize same-sex marriages lawfully performed in other states.[1] And, over the course of the last sixth months, the Court also resolved a number of notable disputes in such areas as separation of powers, administrative law, federal litigation procedure, antitrust law and securities law. Summarized below are some of the cases that may interest our clients.

Affordable Care Act

The Supreme Court ruled in an opinion authored by Chief Justice Roberts and supported by five other justices that the Obama administration correctly interpreted the ACA by providing tax credits to individuals purchasing health insurance in all states, whether those states have their own insurance exchanges or rely on exchanges facilitated by the federal government. A bipartisan majority of the Court — which had once again found itself at the center of a politically charged dispute over the ACA — has endorsed the Obama administration's implementation of one of its most significant legislative initiatives.

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 U.S. Court of Appeals for the Fourth Circuit but succeeded before a panel of the U.S. Court of Appeals for 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 in September 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*, in November 2014. The plaintiffs in *King* are residents of Virginia (a state served by a federally facilitated exchange, HealthCare.gov), who argued 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. On June 25, 2015, the Supreme Court affirmed the Fourth Circuit's rejection of the plaintiffs' challenge.

Separation of Powers

In a year when Congress and President Barack Obama are engaged in critical foreign policy disputes — including over negotiations with Iran and approval of major trade pacts — the Court has handed down an important decision on the balance of congressional and executive powers in foreign relations. In *Zivotofsky v. Kerry* (decided on June 8, 2015), a majority of six justices struck down Section 214(d) of the Foreign Relations Authorization Act of 2003, which directed the State Department to honor requests to

[1] Skadden filed *amicus curiae* briefs in both the ACA and marriage equality cases.

designate "Israel" as the place of birth on the passport of a U.S. citizen born in Jerusalem. The State Department, by contrast, has maintained a practice of listing "Jerusalem" rather than "Israel" as the place of birth in passports and certain other documents of U.S. citizens born in Jerusalem, owing to the contested sovereignty over that city. Affirming the decision of the District of Columbia Circuit, the Supreme Court held that the power to recognize foreign states resides in the president alone, and therefore invalidated Section 214(d) for infringing on that power. The dissent, authored by Chief Justice John Roberts, focused on Congress' own extensive foreign relations authorities and emphasized that "[n]ever before has [the Supreme] Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs." The split Court foreshadows more disagreements ahead: By focusing narrowly on the recognition power and shunning broad pronouncements about the exclusivity of the president's authority to conduct diplomatic relations, the majority left for another day the resolution of other disputes between Congress and the White House over supremacy in foreign affairs.

The Court used narrow grounds to resolve another separation-of-powers dispute, *Department of Transportation v. Association of American Railroads* (decided on March 9, 2015). The case concerned 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 Amtrak, which it deemed to be a private entity. The Supreme Court disagreed, ruling that — for purposes of developing the standards — Amtrak is a governmental entity, not a private one. In reaching that conclusion, the Court paid little heed to the statutory provision specifying that Amtrak "shall be operated and managed as a for profit corporation" and "is not a department, agency, or instrumentality of the United States Government." The Court reasoned, instead, that "the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status." But the Court's designation of Amtrak as a governmental entity itself raises a host of questions, including about the method of appointing certain Amtrak officials. Rather than tackle these questions at present, the Court remanded the case to allow the District of Columbia Circuit to address them in the first instance.

Administrative Law

The Supreme Court continues to scrutinize recent regulatory activity by the Environmental Protection Agency (EPA). In the 2013-14 term, it considered the EPA's authority to regulate greenhouse gases and its approach to controlling air pollution that crossed borders between states. This term, the Court took up *Michigan v. EPA*, a challenge to the EPA's rules limiting 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 a 5-4 decision issued on the final day of the term, the Court ruled that the EPA impermissibly construed the Clean Air Act by refusing to consider costs before initiating its program to regulate smokestack emissions from power plants. The majority held that the EPA needed to take cost into consideration before deciding whether regulation was "appropriate and necessary," and that the EPA could not defer that analysis to those later regulatory stages that determine the controls to impose on any given facility. 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 have imposed annual costs of $9.6 billion and produce annual monetized benefits between $37 billion and $90 billion, mostly as the result of improved health. With this ruling, the Court also has given momentum to regulated entities that favor more robust cost-benefit analysis before the initiation of the regulatory process.

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 resolved in *Perez v. Mortgage Bankers Association* and *Nickols v. Mortgage Bankers Association* (decided on March 9, 2015) 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 (APA) requires it to provide notice to the public 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 merely interprets its own existing regulation. Courts of Appeals had disagreed, however, about the process an agency must follow before it can significantly revise its interpretation of its regulation. In *Perez* and *Nickols*, the Supreme Court resolved the dispute and held that the APA does not require notice-and-comment procedures for revisions of this kind.

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 APA 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. By ruling in the government's favor in *Perez* and *Nickols*, the Court arguably encouraged federal agencies to avoid the time and expense of notice-and-comment rulemaking by making policy through evolving interpretations of existing regulations. Yet, the decision is not uniformly good news for federal agencies, as several justices signaled in separate opinions that they will take a hard look in future cases at other procedural advantages those agencies enjoy — including the deference the agencies receive from the courts when those agencies construe their own rules.

Procedural Aspects of Federal Litigation

The Supreme Court frequently resolves disputes about procedures of federal litigation, and this term is no exception. For example, in *Dart Cherokee Basin Operating Company, LLC v. Owens* (decided on December 15, 2014), 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 U.S. Court of Appeals for 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 the justices in *Dart Cherokee* split 5-4, the dispute among them 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 addressed the legal reasoning of the district court but merely 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 discretionary 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 that early juncture the discretionary nature of the Tenth Circuit's ruling. Doing so 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 assist and influence the Court's deliberations, even when it is directed to a procedural issue.

Separately, the Supreme Court has ruled that a plaintiff can immediately appeal the dismissal of a single action within a group of federal cases consolidated for pretrial proceedings. That issue 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 U.S. District Court for the Southern District of New York. The district court dismissed many of the LIBOR-related claims, including all of the petitioners' claims, but allowed certain claims in other consolidated cases to proceed. The petitioners appealed to the U.S. Court of Appeals for 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 Cases of Interest

Continuing its trend of expanding whistleblower protections, the Court in *Department of Homeland Security v. MacLean* (decided

on January 21, 2015) held that a federal air marshal who publicly disclosed that the Transportation Security Administration (TSA) had decided to cut costs by removing air marshals from certain long-distance flights is entitled to protection under the federal whistleblower statute because his disclosure does not fall within the statute's exception for disclosures "specifically prohibited by law." The disclosure was prohibited by a TSA regulation, not by a statute, and the Court held this regulatory prohibition insufficient to satisfy the exception. It reasoned that Congress used only the word "law" and not the phrase "law, rule, or regulation," which it had used elsewhere. This expansion of whistleblower protections builds upon decisions announced in the 2013-14 term: *Lawson v. FMR*, which extended the Sarbanes-Oxley Act's whistleblower protection to employees of a public company's private contractors and subcontractors, and *Lane v. Franks*, which protected public employees from retaliation for truthful testimony before a federal grand jury outside their ordinary job responsibilities. This line of recent decisions hints at the Court's willingness to enforce protections for broader classes of whistleblowers under the various federal statutory schemes.

The Supreme Court also narrowed 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 concerned 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 (FTC) enjoined certain actions by a board that regulates North Carolina's dental practices and is composed mostly of practicing dentists. In *North Carolina Board of Dental Examiners v. Federal Trade Commission* (decided on February 25, 2015), the Supreme Court agreed with the FTC, holding that — where a controlling share of a state regulatory board's members are active participants in the profession being regulated — the state must actively supervise the board before it can avail itself of antitrust immunity. The Court reasoned that, without oversight from a sovereign actor, the board's members suffer from dual loyalties, posing intolerable risk of anticompetitive self-regulation. The decision may, at least on the margin, affect participation of professionals in state regulatory entities.

In a March 24, 2015, opinion, the Supreme Court held in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* that an issuer may be held liable under Section 11 of the Securities Act of 1933 for statements of opinion made in a registration statement if the issuer failed to hold the belief professed or failed to disclose material facts about the basis for the opinion that rendered the statement misleading. (See "Omnicare Decision Clarifies Pleading Standard for Section 11 Claims Based on Statements of Opinion.")

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Portions of this article were published in "2014-15 Supreme Court Highlights," January 2015. For previously covered cases, this article includes updates and supplemental material.