2015-16 Supreme Court Update

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In its current term, the U.S. Supreme Court is once again poised to address a range of disputes relevant to businesses. These include significant constitutional issues, class action practice and other procedural matters, and emerging questions concerning cross-border litigation.

Constitutional Powers and Limits

First Amendment and Union Dues

In one of the term's most watched cases, the Court will consider — or perhaps reconsider — First Amendment questions with potentially significant effects on operations of public sector unions. Nearly 40 years ago, in *Abood v. Detroit Board of Education*, the Supreme 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 and non-union members. But the First Amendment protects non-union members from being forced to pay "non-chargeable fees" that support other union activities.

In California, the public school teachers union requires that non-union teachers opt out each year from paying nonchargeable fees. In *Friedrichs v. California Teachers Association*, argued on January 11, 2016, the Supreme Court will decide (1) whether to overrule *Abood* and (2) whether requiring non-union teachers to opt out of paying the "non-chargeable" fee — rather than requiring the union to affirmatively obtain consent — violates nonmembers' First Amendment right to be free from compelled speech. *Amicus* briefs filed with the Court largely split along ideological lines, with states divided on both sides of the case and the federal government arguing on the side of the teachers union.

Affirmative Action

The Supreme Court also will revisit a familiar affirmative action dispute — Abigail Fisher's challenge to the constitutionality of public university admissions policies in *Fisher v. University of Texas at Austin*, which was argued on December 9, 2015. Fisher, who is white, argues that Texas' flagship public university violated the 14th Amendment's Equal Protection Clause in considering her race when it denied her application for undergraduate admission. *Insights* covered *Fisher* in 2012, when the Supreme Court remanded the case to the U.S. Court of Appeals for the Fifth Circuit with instructions to apply "strict scrutiny" to the affirmative action program. This demanding standard requires the government to prove that its method of promoting diversity in higher education was narrowly tailored to serve a compelling state interest. Applying it to Fisher's case, the Fifth Circuit upheld the program, and the case has once again found its way onto the Supreme Court's docket. Various educational, academic and business organizations have filed *amicus* briefs supporting the university's position, including one on behalf of such *Fortune* 100 companies as American Express, Apple, Deloitte, PepsiCo, Pfizer and Walmart, in

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which the companies argue that affirmative action enables them to "hire highly trained employees of all races, religions, cultures, and economic backgrounds."

Separation of Powers

The Supreme Court also will consider whether separation of powers permits the enactment of a statute directing the outcome in a single pending case. The case arose after the victims of several terrorist acts sued Iran's central bank, Bank Markazi, unsuccessfully seeking to attach nearly $2 billion of bonds in which the bank held an ownership interest. Congress responded by passing the Iran Threat Reduction and Syria Human Rights Act of 2012, which provides for the execution or attachment of "the financial assets that are identified in and the subject of proceedings in" the victims' litigation. The question in *Bank Markazi v. Peterson*, argued on January 13, 2016, is whether Congress overstepped its authority by dictating what assets the plaintiffs could attach in a particular case. As business disputes, including those involving major financial institutions, continue to draw political and judicial scrutiny, *Bank Markazi* could help clarify the limits of Congress' power to affect outcomes of discrete adjudications.

Federal Civil Procedure and Class Actions

Standing

Congressional influence on the work of the judiciary also may be clarified in *Spokeo, Inc. v. Robins*. The case was argued on November 2, 2015, and considers whether Congress may by statute confer Article III standing upon a plaintiff who suffers no concrete harm. The plaintiff alleged that Spokeo, which gathers public data about individuals for credit reports, published inaccurate information about him in violation of the Fair Credit Reporting Act. The district court held that the plaintiff lacked Article III standing in the absence of actual harm, but the U.S. Court of Appeals for the Ninth Circuit reversed. As *amicus* briefs filed by the U.S. Chamber of Commerce and certain technology companies argue, availability of Article III standing without actual harm could open federal courts to class actions on a scale previously unseen. Ultimately, the Court may bypass the question: At oral argument, some justices appeared open to the narrower course of finding that the plaintiff suffered actual harm from Spokeo's alleged misconduct.

Complete Relief and Mootness

In another case affecting the scope of class actions in federal courts, the Court in *Campbell-Ewald Company v. Gomez*, argued on October 15, 2015, will decide whether a plaintiff's claims become moot when a defendant offers to provide complete relief — including when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23 and receives the offer of complete relief before the class is certified. As in *Spokeo*, the dispute in *Campbell-Ewald* asks the Court to define the contours of "cases" and "controversies" susceptible to judicial resolution under Article III. The case could help class action defendants manage litigation by strategically offering relief to class representatives prior to class certification.

Class Certification

The Court is taking up another dispute with potentially broad implications for federal class actions in *Tyson Foods, Inc. v. Bouaphakeo*, argued on November 10, 2015. The case, which involves alleged violations of the Fair Labor Standards Act (FLSA), calls into question reliance on the use of statistical averages in calculating liability and damages in class litigation, as well as inclusion of arguably uninjured members in a class. The U.S. Chamber of Commerce, the Business Roundtable and the National Association of Manufacturers, among others, filed *amicus* briefs arguing that doing so ignored the individual harm requirements of Article III standing. Should their view prevail, class action plaintiffs could face significant additional hurdles in certifying classes. But the oral argument did not suggest that this outcome is likely, as the justices appeared less interested in broad class certification issues than questions particular to the FLSA.

Federal Jurisdiction and Securities Claims

The lone securities case so far this term, *Merrill Lynch, Pierce, Fenner & Smith v. Manning*, argued on December 1, 2015, asks whether the Securities Exchange Act of 1934 confers exclusive jurisdiction on federal courts for state law claims predicated on violations of the Exchange Act or its implementing regulations. The defendants argued that the plaintiffs' state law claims can be removed to federal court because the alleged wrongdoing is predicated on a violation of an Exchange Act regulation governing short-selling. The plaintiffs, in turn, argued that their state law claims are separable from Exchange Act regulation. As the Securities Industry and Financial Markets Association contended in an *amicus* brief, a ruling for the plaintiffs could open a path for keeping securities litigation in state courts, thereby avoiding the requirements of such federal procedural statutes as the Private Securities Litigation Reform Act.

Cross-Boundary Disputes

Foreign Sovereign Immunities Act

Mirroring the trends in complex civil litigation, cross-boundary disputes are taking center stage at the Supreme Court. In one of this term's first decisions, on December 1, 2015, the Court

clarified how the commercial activity exception to foreign sovereign immunity applies to events that span the world. In *OBB Personenverkehr AG v. Sachs*, a California resident purchased a Eurail pass online from a Maine travel agent and subsequently suffered severe injuries while boarding a train in Innsbruck, Austria. She sued the Austrian railway, which invoked immunity from suit under the Foreign Sovereign Immunities Act (FSIA). The plaintiff, in turn, relied on an exception from immunity for suits "based upon a commercial activity carried on in the United States by the foreign state." The Court unanimously held that immunity applied and the "commercial activity" exception did not, because the connection to the United States was too ancillary. The decision could have implications beyond FSIA, as the problem of distinguishing between domestic and foreign activity is commonplace in modern litigation.

RICO and Extraterritoriality

Finally, the Court will again address the extraterritorial application of U.S. laws — a subject it confronted several years ago with respect to federal securities laws in *Morrison v. Australia National Bank Ltd.* This time, the statute at issue is the Racketeer Influenced and Corrupt Organization Act (RICO). In *RJR Nabisco v. The European Community*, the European Community (now the European Union) and its member states alleged that Nabisco directed a global money-laundering scheme by selling cigarettes wholesale to international drug dealers. The U.S. Court of Appeals for the Second Circuit held that RICO can apply extraterritorially, at least to the extent that the relevant predicate offenses necessarily occur abroad. The Supreme Court will consider whether this conclusion is consistent with the presumption against extraterritoriality set forth in *Morrison*.