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In a season of political surprises, the eight-member U.S. Supreme Court has stirred no controversy with its decisions so far this term. The handful of opinions the Court released in the fall were unanimous and, for the most part, favorable to the federal government. But potentially significant decisions remain on the docket, possibly awaiting the addition of the ninth justice.

Insider Trading. In *Salman v. United States*, a unanimous Supreme Court affirmed the U.S. Court of Appeals for the Ninth Circuit's broad interpretation of insider trading liability, abrogating (at least in part) a contrary, high-profile decision by the U.S. Court of Appeals for the Second Circuit. At issue in *Salman* was whether an insider "tipper" breaches a fiduciary duty — by disclosing confidential corporate information for personal benefit — when the disclosure is a gift to a trading relative or friend. In a significant setback for the government in 2014, the Second Circuit in *United States v. Newman* narrowed the circumstances when such a personal benefit can be inferred: It required "proof of a meaningfully close personal relationship" between tipper and tippee "that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." But in *Salman*, the Ninth Circuit disagreed with the Second Circuit and did not require similar proof of potential gain. Instead, it relied on the Supreme Court's 1983 decision in *Dirks v. SEC*, which stated, without qualification, that the tipper receives a sufficient personal benefit by making "a gift of confidential information to a trading relative or friend." In an opinion by Justice Samuel A. Alito Jr., the Supreme Court agreed with the Ninth Circuit that *Dirks* "easily resolves" the issue: "In such situations, the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds" to the relative or friend.

Sealing False Claims Act Complaints. In *State Farm Fire and Casualty Co. v. United States ex rel. Rigsby*, the Court addressed the proper remedy for violations of a statutory requirement that certain complaints under the False Claims Act be sealed. When a private party known as a "relator" brings a False Claims Act complaint, the pleading must "be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." This sealing requirement was breached in *State Farm* through disclosures to media outlets and legislators. But does the violation necessarily require the complaint to be dismissed? In a unanimous opinion by Justice Anthony M. Kennedy, the Court ruled that it does not. Applying standard statutory interpretation tools, the Court held that Congress did not intend dismissal to be the sole remedy. Legislative history also indicated that the sealing requirement "was meant to allay the Government's concern that" the complaint "would alert defendants to a pending federal criminal investigation." Accordingly, the Court reasoned, "it would make little sense to adopt a rigid interpretation" that, through automatic dismissal, "prejudices the Government by depriving it of needed assistance from private parties."

Fraud on Financial Institutions. In *Shaw v. United States*, a unanimous Supreme Court had no trouble concluding that an individual who steals from a bank account can be convicted of defrauding the bank. Federal law makes it a crime to "knowingly execut[e] a scheme ... to defraud a financial institution." The defendant, who diverted funds from a bank customer's account, argued that he did not thereby defraud the bank itself, which suffered no pecuniary loss. In an opinion by Justice Stephen G. Breyer, the Court disagreed. It reasoned that the bank had a cognizable property interest in its customer's account and that conviction does not require proof that the bank suffered financial loss.

2016-17 Supreme Court Update

Design Patents. Writing another chapter in the litigation between two mobile phone giants, the Supreme Court concluded in *Samsung Electronics Co. v. Apple Inc.* that, when it comes to infringements on design patents, damages may be computed from profits on a component of a consumer product rather than the whole product. The Patent Act provides that a person who manufactures or sells “any article of manufacture to which [a patented] design or colorable imitation has been applied shall be liable to the owner to the extent of his total profit.” After a jury found that Samsung’s smartphones violated Apple’s design patents related to the device’s face or screen, Apple was awarded as damages the entire profit Samsung made from the sales of infringing smartphones. The U.S. Court of Appeals for the Federal Circuit affirmed this aspect of the damages award, reasoning that the entire device sold to consumers — not its component, such as the screen or face — must be an “article of manufacture” under the statute. In a unanimous opinion by Justice Sonia Sotomayor, the Supreme Court reversed, holding that “the term ‘article of manufacture’ is broad enough to encompass both a product sold to a consumer as well as a component of that product.” But the Court did not fully resolve the dispute, sending the case back to the Federal Circuit for a determination whether, in the context of the Apple-Samsung dispute, the relevant “article of manufacture” was the smartphone itself or a particular smartphone component.

Controversies on the Horizon. Still undecided are a number of more controversial cases, including about whether a city has standing to bring claims under the Fair Housing Act (*Bank of America Corp. v. City of Miami*); whether a state law banning surcharges for the use of a credit card unconstitutionally restricts speech (*Expressions Hair Design v. Schneiderman*); whether agreements to resolve employer-employee disputes through individual arbitration, rather than collective or class proceedings, are enforceable (*Epic Systems v. Lewis*); and whether excluding churches from a state aid program for nonprofits violates the Free Exercise and Equal Protection clauses (*Trinity Lutheran Church of Columbia, Inc. v. Pauley*). In addition, in a case arising from disputes over the use of school bathrooms by transgender students, the Court may revisit foundational administrative law doctrines on deference accorded to federal agencies’ conclusions (*Gloucester County School Board v. G.G.*). Whether that case will be heard at all may depend on positions yet to be taken by the Trump administration, whose actions — most importantly, the nomination to fill the vacancy left by Justice Antonin Scalia’s death last year — may be the most significant developments of the Supreme Court’s term.