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Supreme Court

As the U.S. Supreme Court's October 2016 Term winds down, Skadden's Boris Bershteyn offers insight into some of the opinions already handed down. The topics include insider trading, fraud on financial institutions and design patents. While these opinions stirred little controversy, Bershteyn suggests more controversial rulings may be on the horizon.

U.S. Supreme Court's 2016 Term: Some Highlights of What It's Done So Far

BY BORIS BERSHTEYN

In a season of political surprises and amidst the confirmation of a new Justice, the U.S. Supreme Court has stirred little controversy with its decisions so far this term. With the customary June end to the term approaching and all the oral arguments delivered, many of the Court's opinions—especially those of note to the business community—have been unanimous. Some highlights:

Boris Bershteyn, a partner in Skadden's New York office, litigates complex matters before appellate courts (including the U.S. Supreme Court) and trial courts. He also advises clients on regulatory and enforcement actions by government agencies and related internal investigations.

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 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 breach could occur: 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

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followed by a gift of the proceeds'' to the relative or friend.

Fair Housing Act Claims by Municipalities

In another closely watched business case, *Bank of America Corp. v. Miami*, the Court addressed whether and when a city can bring a claim under the Fair Housing Act.

The FHA prohibits racial discrimination in real estate transactions. On that basis, the City of Miami sued two banks for allegedly issuing riskier mortgages on less favorable terms to minority customers than to similarly situated white ones. According to the City, these practices reduced its property tax revenues and caused it to spend more on municipal services.

The Court divided 5 to 3 in holding that, under the circumstances, the FHA granted the city standing as a ''person aggrieved'' by the banks' alleged practices. The majority opinion by Justice Stephen G. Breyer viewed this result as preordained by precedent, including a decision from the late 1970s allowing a village to bring an FHA suit against real estate brokerage firms engaged in racial steering.

Justice Clarence Thomas's dissent would read the same precedent much more narrowly—particularly in light of more parsimonious treatment of standing in the Court's recent decisions.

The banks did score a partial victory, however. The Court ruled that the City cannot plead that the banks' allegedly discriminatory practices proximately caused its injuries (lost property-tax revenue and increased municipal spending) merely because the injuries were foreseeable consequences of the banks' practices. More direct allegations of causation are necessary, and the Court remanded the case back to lower courts to determine precisely what these must be.

Federal Vacancies

As the dawn of a new Presidential Administration reminds us, personnel oftentimes is policy. The Supreme Court, meanwhile, experienced its own brush with arcane questions of federal personnel appointments: In *National Labor Relations Board v. SW General*, it addressed the circumstances when a nominee awaiting Senate confirmation can fulfill, on an acting basis, the duties of the office for which he is nominated.

The choice of acting officials is circumscribed by the provisions of the Federal Vacancies Reform Act of 1998, a statute that combines technical subject matter with inscrutable drafting. Parsing through that statute's clauses, a 6-2 majority held (in an opinion by Chief Justice John Roberts) that a senior employee of the National Labor Relations Board nominated to be the agency's general counsel could not serve as the acting general counsel while his nomination awaited Senate confirmation.

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.

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

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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 a pair posing important constitutional questions: whether a bar on federal government approval of disparaging trademarks violates the Free Speech Clause (*Lee v. Tam*); 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*).