Skadden

The Supreme Court's Business Docket for the October 2018 Term

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On September 26, 2018, Skadden hosted a webinar titled "US Supreme Court October 2018 Term." Topics included some of the key business-related cases on the Supreme Court's docket, including cases addressing antitrust, foreign sovereign immunity, products liability, class actions, arbitration, intellectual property, preemption and securities litigation. All former Supreme Court law clerks, the speakers were Skadden partners **Boris Bershteyn**, **Steve Kwok**, **Cliff Sloan** and **Jocelyn Strauber**.

Antitrust

Mr. Bershteyn, a partner in Skadden's Complex Litigation and Trials Group and former law clerk to Justice David H. Souter, kicked off the webinar with a discussion of *Apple Inc. v. Pepper*, a case with implications for antitrust defenses and e-commerce platforms.

Mr. Bershteyn, whose practice focuses on antitrust litigation, explained that standing requirements play an important role in antitrust cases because federal courts are reluctant to undertake complex inquiries into allocation of damages among layers of indirect purchasers. The seminal case on this issue, *Illinois Brick*, held that only direct purchasers of a product have standing to bring claims for damages under federal antitrust law. Modern products and markets, however, pose novel questions in applying traditional antitrust principles, including who is purchasing from whom. *Apple* involves plaintiff iPhone users who claimed that Apple monopolized the market for iPhone app distribution and charged an allegedly excessive 30 percent commission on app prices. In response, Apple argued that because app developers are the ones paying the commission, app purchasers cannot sue for antitrust damages. The district court agreed and dismissed the case for lack of direct purchaser standing. The U.S. Court of Appeals for the Ninth Circuit reversed, however, reasoning that Apple is a distributor of apps to iPhone users, who are purchasers from Apple and therefore have standing.

The Court will now decide which approach is correct. Mr. Bershteyn noted that this case could be decided narrowly on its facts, could have broader implications for antitrust liability for online distribution platforms, or perhaps could even result in a wholesale reform of indirect purchaser standing.

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Key Takeaways

Foreign Sovereign Immunities Act

Mr. Bershteyn went on to discuss two cases on the Supreme Court's docket related to the Foreign Sovereign Immunities Act (FSIA), another area of law with significant threshold litigation issues.

In *Jam v. International Finance Corporation*, the Court will consider when international organizations are immune from suit in U.S. courts. Mr. Bershteyn began with a historical perspective of a related doctrine — the immunity given to foreign sovereigns. This doctrine has evolved from the near absolute immunity afforded prior to the 1950s towards a more "restrictive" theory of foreign sovereign immunity that was ultimately reflected in the FSIA in 1976. With respect to international organizations, however, the International Organizations Immunities Act of 1945 provides that international organizations "shall enjoy the same immunity from suit ... as is enjoyed by foreign governments." This language poses a question: Does this statute grant international organizations the same type of immunity (*i.e.*, absolute) enjoyed by foreign sovereigns in 1945, or does it grant international organizations the type enjoyed at the time of the lawsuit (*i.e.*, the more restrictive theory of today)?

Mr. Bershteyn predicted that this case could prove important for both international organizations and those who seek to hold them liable. The decision could narrow the instances when U.S. courts can serve as a forum for resolving disputes without a substantial domestic nexus, an issue with analogues across fields of law from human rights to securities.

The second FSIA case, *Republic of Sudan v. Harrison*, involves a more technical question about effecting service of process on a foreign sovereign. Among the permitted statutory means, service may be accomplished by "sending a copy of the summons and complaint ... to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The question raised here is whether this mailing can be made through the embassy of the foreign state in the U.S. or whether it must be mailed to the ministry in the foreign county itself. Although the Court's decision will likely turn on the precise text of the FSIA, it could be revealing of how the newly composed Court will handle statutory interpretation disputes.

Products Liability and Class Actions

Mr. Kwok, a partner in Skadden's Government Enforcement and White Collar Crime Group and former law clerk to Justice Anthony M. Kennedy, discussed several cases on the docket related to products liability and class actions.

The first case, *Air & Liquid Systems Corporation v. DeVries*, raises a question about the element of causation in torts cases, and specifically whether liability can attach to a defendant when the plaintiff's injury is not caused by the defendant's own product, but instead by a third party's product that is typically used in conjunction with the defendant's product, such as the tires on a car. In this case, the plaintiffs are relatives of a sailor who died from lung cancer, allegedly from exposure to asbestos onboard Navy ships. While the defendants manufactured the equipment used on the Navy ships, the asbestos usually used with this equipment for insulation was supplied by others and would have been replaced numerous times before the decedent began his Navy service. Hence, it was undisputed that the equipment itself did not cause, and could not have caused, the injury. Nonetheless, instead of applying the usual causation test, the U.S. Court of Appeals for the Third Circuit applied a multipart "foreseeability" test, asking whether the defendant equipment manufacturers knew or should have foreseen that their products would be used with cancer-causing asbestos.

The Supreme Court may decide whether there are circumstances that warrant creating an exception to the causation requirement in products liability cases. Because the facts of this case involve the specific context of maritime law, the Court could rule quite narrowly, but it also could rule broadly, which may impact products liability cases in other contexts.

Turning to class actions, Mr. Kwok discussed *Frank v. Gaos*, which involves the question of whether a court can approve a class action settlement when the settlement proceeds will not go directly to class members, as is the usual course, but instead to charitable or academic institutions. This is called a *cy pres*-only class action settlement, which means the settlement funds are designated for the "next best" class of beneficiaries for the indirect benefit of the class in cases where the administrative cost of compensating the class members directly is prohibitive. In this case, the parties argued that, where the injury is widely dispersed and it is impractical to distribute proceeds to class members,

the money should instead go to public interest organizations that focus on the issues of internet privacy at the heart of the litigation. Objectors argued that this type of settlement is not appropriate because, among other things, class certification is inappropriate to begin with if there is no practicable way for the court to redress the putative class members' injuries, and a *cy pres*-only settlement incentivizes plaintiffs' counsel to maximize fees over benefit to the class. Mr. Kwok mentioned that the ruling in this case may significantly alter the incentive structure facing plaintiffs' counsel contemplating bringing similar class actions.

Finally, in *Nutraceutical Corporation v. Lambert*, the Court will address a technical procedural issue related to the deadline for appealing a class certification decision. The issue in this case is whether the 14-day deadline for appealing denial of a class certification motion, set out in Federal Rule of Civil Procedure 23(f), is a nonjurisdictional claim-processing rule, which may be subject to equitable tolling, or whether it is a jurisdictional rule that cannot be waived even for good cause. Petitioners argue that there is a split among seven courts of appeals on this issue. This case is expected to shed light on Rule 23(f)'s deadline requirements, and potentially other similar provisions in the Federal Rules as well, to provide clearer guidance to practitioners.

Arbitration

Mr. Sloan, a partner in Skadden's Litigation Group and former law clerk to Justice John Paul Stevens, discussed three arbitration cases on the docket. He noted that arbitration has been an area of intense activity for the Supreme Court in recent years, with the Court expressing a strong pro-arbitration policy and frequently invalidating obstacles to arbitration.

The first case, *Lamps Plus, Inc. v. Varela*, involves the standard that must be satisfied to authorize classwide arbitration. The Supreme Court has emphasized the fundamental differences between bilateral and classwide arbitration — and cautioned against easily inferring consent to the latter — in cases such as *AT&T Mobility LLC v. Concepcion* and *Epic Systems Corp. v. Lewis*.

In this case, the plaintiff filed a class action against the defendant for claims related to an alleged data breach of the personal information of the defendant's employees. The defendant moved to compel arbitration pursuant to an arbitration agreement, which did not expressly mention class proceedings. The U.S. Court of Appeals for the Ninth Circuit concluded that the arbitration contract was ambiguous about the scope of arbitration; that ambiguity should be resolved against the defendant employer, as drafter of the agreement; and that classwide arbitration could proceed. The issue therefore involves the standard that must be satisfied to authorize classwide arbitration, and the Court's decision may impact the availability of classwide arbitration in cases where the parties have not expressly addressed class proceedings in their agreement.

The next case, *Henry Schein, Inc. v. Archer & White Sales, Inc*., involves the threshold question of who decides arbitrability — the arbitrator or the court. This is sometimes known as a "gateway" issue in arbitration.

The Supreme Court previously has held that, if the parties' agreement to have the arbitrator decide arbitrability is clear, the issue must go to the arbitrator. Some courts, however, have developed an exception in which the issue of arbitrability does not have to go to the arbitrator if the court finds that the claim of arbitrability is "wholly groundless." Here, the underlying suit was brought on antitrust grounds, seeking damages and general injunctive relief. Defendants moved to compel arbitration pursuant to an arbitration agreement that provided that any disputes would be decided by arbitration, except requests for injunctions and intellectual property disputes. The U.S. Court of Appeals for the Fifth Circuit concluded that the "wholly groundless" exception applies where the agreement excludes certain types of disputes. This case tees up the validity of the "wholly groundless" exception and the gateway question of allocating authority between arbitrators and the courts.

Finally, *New Prime Inc. v. Oliveira*, concerns another "gateway" issue — whether the court or the arbitrator should decide if a statutory exemption to the Federal Arbitration Act (FAA) applies. In this case, the statutory exemption at issue involves employment contracts of transportation workers and its application to independent contractor relationships. The U.S. Court of Appeals for the First Circuit held that the court, not the arbitrator, must decide whether the FAA exemption applies. In addition, the court held that transportation worker agreements that establish or purport to establish independent contractor relationships are "contracts of employment" within the meaning of the exemption. Mr. Sloan noted that this case also presents important questions about the allocation of authority between courts and arbitrators, in this case in charting the statutory boundaries of the FAA.

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Key Takeaways

Intellectual Property

Mr. Sloan went on to discuss two intellectual property cases on the docket.

In *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, the Court will consider a case concerning basic questions about a copyright holder's right to sue for infringement. A copyright holder cannot sue for infringement under the Copyright Act unless the holder has registered its copyright or its copyright application has been denied. The question here is what it means to register the copyright — is it merely filing an application with the U.S. Copyright Office, or does it require the Copyright Office to have taken some action by approving or rejecting the application? The U.S. Court of Appeals for the Eleventh Circuit held that "registration" for the purposes of the Copyright Act does not occur until the Copyright Office takes action on the application. The U.S. Court of Appeals for the Tenth Circuit takes a similar approach, while the U.S. Courts of Appeals for the Fifth and Ninth Circuits require only that the formalities of the application be satisfied.

This issue has substantial practical consequences for when copyright holders can go to court and file a claim. If approval by the Copyright Office (which can take approximately eight months or longer) is required, copyright owners may need to file applications immediately, so that they will be in a position to litigate infringement claims if necessary.

In the second intellectual property case, *Helsinn Healthcare S.A. v. Teva Pharmaceuticals*, the Court will consider the scope of the "on sale" bar to patent infringement claims. This rule prevents patent infringement claims if the invention was "on sale, or otherwise available to the public" more than one year before the effective filing date of the claimed invention. In this case, the invention was on sale, but the details of the invention were confidential and not public. Helsinn, the patent holder, maintains that for the "on sale bar" to apply, in addition to being on sale, the invention must have been made public and that the Leahy-Smith America Invents Act of 2011 (AIA), which amended the patent laws, compels that conclusion. Mr. Sloan emphasized that the Court has been deciding numerous patent cases in recent years and, in this case, it is poised to decide an important limitation in patent disputes and to interpret the impact of the relatively new AIA on the patent statutes.

Preemption

Ms. Strauber, a partner in Skadden's Government Enforcement and White Collar Crime Group and former law clerk to Justice William H. Rehnquist, first discussed *Virginia Uranium, Inc. v. Warren*. At issue is whether the federal Atomic Energy Act (AEA or Act) preempts Virginia's ban on conventional uranium mining.

Petitioners are owners of Virginia land containing large uranium deposits, who challenge the state's ban on conventional uranium mining on federal preemption grounds. While the AEA gives the federal government exclusive authority to occupy the field of radiological safety concerns regarding the activities that the AEA regulates, the Act does not regulate conventional uranium mining. Respondents, Virginia officials, claim that because the banned activity falls outside the AEA, the AEA does not pre-empt the ban, and that no inquiry into the ban's purpose is required. Petitioners claim that while the ban on its face does not reach the regulated activity, the state has conceded that its purpose was to regulate the safety of activities that are within the AEA's reach and therefore that the state ban is preempted. In a 2-1 decision, the U.S. Court of Appeals for the Fourth Circuit found no preemption.

The outcome here will turn on the Court's interpretation and application of its prior decisions concerning the AEA's preemptive effect, and in particular whether a state statute's purpose must be considered when the state statute regulates an activity not covered by the federal statute.

Securities Fraud

Ms. Strauber concluded the webinar with a discussion of *Lorenzo v. SEC*, which involves the question of whether a misstatement claim that does not meet the elements set forth in the Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, can be repackaged and pursued as a fraudulent scheme claim. The petitioner Lorenzo was the director of investment banking at a registered broker-dealer and, at his boss' direction, sent emails containing false and misleading statements to prospective investors in a startup's debenture offering. The U.S. Court of Appeals for the D.C. Circuit, in a 2-1 decision, applied *Janus Capital* and found that Lorenzo did not violate the false statement provision of Rule 10b-5(b) because he did not "make" the false statements, but he did violate the fraudulent scheme provisions of Rule

10b-5 (Rule 10b-5(a) and(c)) by sending the emails knowing the statements they contained were false. Notably, then-Judge Kavanaugh dissented from the majority decision and reasoned that the defendant could not be found liable on a scheme liability theory if he could not be found primarily liable as the maker of the statement.

The U.S. Courts of Appeals for the Second, Eighth and Ninth Circuits have held that fraudulent scheme liability must be based on more than false statements. The U.S. Court of Appeals for the Eleventh Circuit, like the D.C. Circuit here, has held that a person who is not a maker of the false statements can nonetheless violate the fraudulent scheme provisions based on his or her role in disseminating those false statements.

The Court's ruling here will turn on its application of *Janus Capital*, and could impact the distinction between primary and secondary liability for violators of securities laws as well as the definition of a "maker" of a statement. Ms. Strauber noted that *Janus Capital* was a 5-4 decision, with former Justice Kennedy in the majority. In *Lorenzo*, the other justices may vote along similar lines, raising the possibility of a 4-4 split in the likely event that Justice Kavanaugh recuses himself, which would leave the D.C. Circuit's holding below intact.