Skadden

2018-19 Supreme Court Update

Contributing Partner

Boris Bershteyn / New York

Law Clerks

Lekë Badivuku / New York

Leonardo Villalobos / New York

Much of the attention on the U.S. Supreme Court in the 2018-19 term has concerned its composition or its handling of cases involving some of the signature initiatives of President Donald Trump's administration. Less noticed is the Court's extensive docket of potentially significant disputes relevant to businesses, including those involving administrative law, the First Amendment, antitrust, securities, arbitration and class actions.

Administrative Law

The doctrine of so-called *Auer* deference may, in the words of Justice Clarence Thomas, finally draw its last gasp. On December 10, 2018, the Supreme Court granted *certiorari* in *Kisor v. Wilkie* to determine whether courts should continue to defer to an agency's interpretation of its own regulations when they are ambiguous. For over 70 years, Supreme Court precedent has directed courts to do just so, adding an important weapon to federal agencies' legal arsenal. But several members of the current court — Chief Justice John Roberts and Justices Samuel Alito, Neil Gorsuch and Thomas — have over the years called the doctrine into question. In *Kisor*, which involves an interpretation by the Department of Veterans Affairs of its own regulation, the Supreme Court will finally resolve the uncertainty regarding the doctrine's viability. The U.S. Chamber of Commerce has argued in an *amicus* brief that *Auer* deference heightens regulatory uncertainty and harms business interests.

Trademarks and First Amendment

In its 2017 decision in *Matal v. Tam*, the Court held that a provision of the Lanham Act prohibiting trademarks that "disparage" persons, institutions or beliefs violated the First Amendment. Now, the Court will consider whether a similar provision within the Lanham Act — one prohibiting "scandalous" or "immoral" trademarks — also violates the First Amendment. The case is *Iancu v. Brunetti*, where the respondent is attempting to register the mark "FUCT" in connection with his clothing line.

The respondent argues that the "scandalous" clause at issue here should be treated no differently than the "disparagement" clause in *Tam* — both are unconstitutional restrictions on speech. The U.S. Court of Appeals for the Federal Circuit found in his favor, but the government is defending the law by arguing that the decision in *Tam* does not apply because no rationale for striking down the "disparagement" clause garnered the assent of a majority of the court. And, in any event, the court in *Tam* said that the "disparagement" clause discriminates based on viewpoint, whereas — according to the government — the "scandalous" clause at issue here does not. The Supreme Court granted *certiorari* on January 4, 2019.

The decision will either narrow or expand *Tam*'s holding and perhaps establish a clear rule regarding how the First Amendment interacts with trademark law.

Antitrust Standing

In 1977, the Supreme Court held in *Illinois Brick Co. v. Illinois* that only direct purchasers of a product can seek remedies for federal antitrust violations. This term, the Court will assess this doctrine's applicability in a digital marketplace in *Apple v. Pepper* — a dispute involving Apple and iPhone users who make purchases from Apple's App Store.

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Four Times Square
New York, NY 10036
212.735.3000

iPhone users allege that Apple has created a "monopoly app store" that overcharges for iPhone apps. They argue that they have standing as direct purchasers because they buy the apps directly from Apple's App Store, and Apple itself receives the payment. Apple, however, argues that iPhone users are indirect purchasers because app prices are set by third-party app developers, thus breaking the causal chain between Apple's actions and consumers' damages. The district court sided with Apple, but the U.S. Court of Appeals for the Ninth Circuit reversed.

At oral arguments presented to the Supreme Court, several justices questioned Apple's characterization of app developers as middlemen between itself and iPhone users, with Justice Elena Kagan saying, "I mean, I pick up my iPhone. I go to Apple's App Store. I pay Apple directly with the credit card information that I've supplied to Apple. From my perspective, I've just engaged in a one-step transaction with Apple."

The justices questioned counsel for iPhone users about coherence of their theories of damages or monopolization. And Justice Gorsuch asked why the users did not seek a more comprehensive revision of *Illinois Brick* — a doctrine that has been expressly rejected by many states' antitrust laws. Indeed, a bipartisan group of 31 states filed an *amicus* brief arguing that *Illinois Brick* was wrongly decided or no longer relevant in the modern economy.

Should the Supreme Court side with iPhone users, online distribution platforms may face increasing antitrust exposure. No matter what happens, the decision will shed light on *Illinois Brick*'s applicability in today's markets.

Federal Securities Laws

Federal Merger Litigation

Shareholder litigation concerning the adequacy of disclosures made in connection with a merger or acquisition has increasingly been brought through an implied cause of action under Section 14(e) of the Securities Exchange Act. On January 4, 2019, the Court granted certiorari in *Emulex Corp. v. Varjabedian* to consider whether a defendant violates Section 14(e) only if shareholders can prove that the defendant intended to make a material misstatement or omission — or (as the Ninth Circuit has held) if the defendant was merely negligent. As *amicus* in support of *certiorari*, the Securities Industry and Financial Markets Association argued that a lower standard of liability would invite litigation against the financial institutions that advise on a merger or acquisition. Another *amicus*, the U.S. Chamber of Commerce, asked the court to go further and decide that Section 14(e) does not provide for a private cause of action in the first place — a question the court has never addressed.

Material Misstatement Liability

In 2011, the Court held that only the "maker" of a fraudulent statement is primarily liable under SEC Rule 10b-5(b). Persons who prepare the statement and do not retain the ultimate authority on whether and how to communicate it are, at best, secondarily liable. This term, in *Lorenzo v. SEC*, the Supreme Court will consider whether the preparer, even if not primarily liable for a Rule 10b-5(b) violation, can be held primarily liable for the same conduct under the fraudulent scheme provisions of the securities laws. The Court's opinion will be of interest to the business community for its guidance on fraudulent scheme liability in general and its overlap with false statement liability. (See "Securities Class Action Filings Show No Signs of Abating.")

Arbitration

The Court took an opportunity early in the term to resolve two issues concerning the scope of arbitrable disputes under the Federal Arbitration Act (FAA). Although both cases were decided unanimously, one decision generally favored arbitration and the other did not.

Delegation Provisions

Courts generally decide gateway questions about arbitrability, such as whether an arbitration agreement covers a particular controversy. Parties can agree, however, to have arbitrators decide these questions by including a delegation provision. In one of the term's first decisions, the Supreme Court unanimously held in *Henry Schein, Inc. v. Archer & White Sales, Inc.* that when parties contractually delegate the arbitrability question to arbitrators, courts must respect that decision, even when one party contends that the argument for arbitration is "wholly groundless." Issuing his first opinion for the Court, Justice Brett Kavanaugh wrote that the "wholly groundless" exception is inconsistent with the FAA's text and "confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability." The decision reinforces the long-standing principle that arbitration is a matter of contract and reassures contractual parties that courts will be hesitant to override provisions of arbitration agreements.

Class Arbitration

Does an arbitration agreement authorize class arbitration if it includes commonly used, broad language such as "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings"? In *Lamps Plus, Inc. v. Varela*, the Supreme Court will consider the standard a court should apply in determining whether an arbitration agreement authorizes class arbitration and whether the FAA constrains state law interpretation of the issue.

The Supreme Court's opinion may give the business community greater clarity about the contractual language it should use to address class arbitration. But, as so often happens before the Court, procedural hurdles may interfere. At oral argument on October 29, 2018, some of the justices indicated that jurisdictional questions may lead the Court to avoid reaching the class arbitration issue. (See "Significant Rulings Expected for Ongoing Mass Tort, Consumer Class Action Issues.")

Exemption for Independent Contractors

The FAA does not apply to "contracts of employment" for any "class of workers engaged in foreign or interstate commerce." On January 15, 2019, the Supreme Court unanimously decided in *New Prime Inc. v. Oliveira* that this exemption (found in Section 1 of the FAA) applies to independent contractors working in transportation industries.

Dominic Oliveira, a truck driver who signed an agreement designating him as an independent contractor, argued that he could not be compelled to arbitrate because the "contracts of employment" exemption encompasses independent contractors. New Prime, an interstate trucking company, argued for a narrow reading of "contracts of employment" that included only employer-employee relationships. The U.S. Court of Appeals for the First Circuit sided with Oliveira, and the Supreme Court affirmed.

In his opinion for the Court, Justice Gorsuch endorsed the broad reading of the exemption, holding that "contracts of employment" refers to any agreement to perform work. He reasoned that the statute, construed against the background of its enactment in 1925, evinced no intent to distinguish between independent contractors and traditional employees in the exemption.

Some of the *amici* in support of Oliveira had asserted that employers in transportation industries might deliberately classify their workers as independent contractors to avoid the exemption and compel arbitration when disputes arise. But the Court's decision means that the exemption's applicability will not depend on whether a relationship is structured as an "employer-employee" relationship or an "independent contractor" relationship.

Class Actions

Cy Pres Settlements

In *Frank v. Gaos*, the Court will address the permissibility of "*cy pres* only" settlements under the Rule 23(e)(2) of the Federal Rules of Civil Procedure, which states a court can approve a class action settlement only if it is "fair, reasonable, and adequate." Does a settlement that distributes none of the proceeds to class members, but rather allocates them among organizations related to the subject matter of the case, meet this standard? Proponents argue that such settlements can be more efficient than minimal monetary awards to class members, and that nothing in the text or history of Rule 23 bars them. The Ninth Circuit agreed, but certain class members contend before the Court that awards to class members were feasible and that class counsel should not have incentives to divert settlement funds toward causes of their choosing. The case was argued on October 31, 2018, with the justices expressing skepticism of *cy pres* settlements and also questioning whether the plaintiffs have standing to begin with. Should the Court reach the merits, it could affect the distribution — and perhaps the likelihood and amount — of certain class action settlements.

Equitable Exceptions

On November 27, 2018, the Court heard arguments for another class action case — *Nutraceutical Corp. v. Lambert* — concerning the timeliness of a plaintiff's petition for permission to appeal an order decertifying the class. Rule 23(f) of the Federal Rules of Civil Procedure establishes a 14-day deadline for such petitions, and the plaintiff missed that deadline by several months. Yet the Ninth Circuit applied an equitable exception and accepted the petition because the plaintiff's counsel told the trial court (before the deadline) that he intended to seek reconsideration.

The case may boil down to a distinction between jurisdictional rules and nonjurisdictional claim-processing rules. Whereas the former require strict compliance, the latter are generally subject to equitable exceptions — unless expressly made mandatory. The Court's decision will affect how diligently the parties must seek review of class certification decisions.

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