Skadden

2019-20 Supreme Court Update

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The U.S. Supreme Court's 2019-20 term is receiving substantial attention for cases involving signature initiatives of President Donald Trump's administration. But the Court also maintains an extensive docket directly relevant to the business community, including important disputes concerning workplace discrimination, challenges to agency enforcement, copyright law and stock-drop litigation.

Discrimination in the Workplace

In one of the most anticipated decisions this term, the Supreme Court will decide whether discriminating against an individual for being gay, lesbian, bisexual or transgender violates Title VII of the Civil Rights Act, which prohibits discrimination "because of sex."

Counsel for gay, lesbian and bisexual employees argue that, as the *en banc* U.S. Court of Appeals for the Second Circuit held in *Zarda v. Altitude Express*, firing someone for being attracted to a person of the same sex is a decision motivated, at least in part, by sex. By contrast, in *Bostock v. Clayton County, Georgia*, the U.S. Court of Appeals for Eleventh Circuit adopted the employers' position that Congress did not intend to include sexual orientation within the meaning of "sex" when it passed the Civil Rights Act in 1964. The U.S. Court of Appeals for the Sixth Circuit grappled with the statute's application to transgender employees in *EEOC v. R.G. & G.R. Harris Funeral Homes*, finding in favor of the employee.

Based on oral arguments, which took place on October 8, 2019, the cases remain too close to call. The Court's decision could materially affect employers in states that do not already outlaw workplace discrimination based on LGBTQ status.

Challenges to Agency Enforcement: Separation of Powers

Following the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB) to regulate consumer financial products and services, and structured it as an "independent bureau" headed by a single director, who can be removed by the president only for cause. In *Seila Law LLC v. CFPB*, the Supreme Court will consider whether this structure violates the separation of powers, and, if so, whether the statutory provision limiting the president's removal power can be severed without invalidating the provisions establishing the CFPB.

The petitioner, a California law firm that provides "debt-relief services," received a civil investigative demand from the CFPB requesting documents about its business structure and practices. It asked the CFPB to set aside the demand because a panel of the U.S. Court of Appeals for the District of Columbia Circuit had held (in an opinion authored by then-Judge Brett Kavanaugh) that the CFPB's structure was an unconstitutional impediment to the president's power. The *en banc* D.C. Circuit ultimately reversed the panel's holding, concluding — as later did the U.S. Court of Appeals for the Ninth Circuit in the instant case — that the CFPB's structure did not violate the separation of powers.

Both the petitioner and the Trump administration argued that the Supreme Court should grant *certiorari* and that the CFPB's structure (established by statute during the Obama administration) is unconstitutional — they disagree only on the severability question. This unusual alignment prompted the Court to appoint counsel to defend the Ninth Circuit's judgment.

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Whether the CFPB's structure violates the separation of powers likely will depend on the Court's willingness to distinguish a single-director independent agency from independent agencies headed by tenure-protected boards or multimember commissions (for example, the Securities and Exchange Commission or the Federal Trade Commission), whose constitutionality has appeared settled since the New Deal. As for severability, the Court will analyze whether Congress expressed a preference for a CFPB with a director who is removable at will over no CFPB at all. Oral argument is scheduled for March 3, 2020.

Securities Law: Disgorgement

The SEC may seek only three types of remedies in civil actions to enforce federal securities laws: injunctive relief, equitable relief and civil monetary penalties. For decades, courts have accepted the SEC's authority to seek disgorgement of ill-gotten gains as a form of "equitable relief." That authority came into question in 2017 when the Supreme Court unanimously held in *Kokesh v. SEC* that disgorgement claims are subject to a five-year statute of limitations because disgorgement represents a penalty, not a remedial sanction. The Court explicitly declined to decide whether the SEC may seek disgorgement in enforcement actions at all. The question is now before the Court in *Liu v. SEC*. (See "SEC Enters Election Year Focused on Key Initiatives.")

Petitioners contend that the SEC lacks authority to seek disgorgement because, unlike equitable relief, which aims to restore the status quo and compensate victims, disgorgement seeks to punish violators and deter future violations. The SEC argues, among other things, that disgorgement can qualify as an equitable remedy even though it also might be considered a penalty in some contexts.

The Supreme Court's decision could significantly limit the funds the SEC may seek in future enforcement actions and affect its position in settlement negotiations. Oral argument is scheduled for March 3, 2020.

Copyright Law

Java is one of the world's most popular programming languages. To aid developers in creating programs, Java released a library of shortcuts to implement functions with fewer lines of code. Google wanted to tap into developers' familiarity with Java's shortcuts when it created its mobile platform and included some of those shortcuts in its new implementing code. This term, the Court will consider whether shortcuts that function to access other lines of code are copyrightable and, if so, whether Google's actions qualified as fair use. In two opinions, the U.S. Court of Appeals for the Federal Circuit decided against Google, holding that the shortcuts were subject to copyright law and that the fair use doctrine did not apply.

The Court's decision could have broad implications for the software industry. Java's shortcuts are part of an application-program interface that allow for the interoperability of programs across multiple platforms, and, as *amicus* Red Hat, Inc. contends, "[v]irtually all software and consumer product developers depend on interoperability." Indeed, *amici* R Street Institute and Public Knowledge contend that "nearly every technical standard in use" for the interoperation of programs across platforms "includes one or more software interfaces that must be implemented in the same way that Google implemented the Java interface in the present case." Therefore, the Court's resolution of the software copyright issues will be of interest to the broader business community. Oral argument remains to be scheduled.

International Arbitration

In *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, the Supreme Court will consider whether a party can compel arbitration by enforcing an arbitration agreement it did not sign. In this case, an arbitration agreement existed between a buyer (Outokumpu) and a seller. When the buyer sued the seller's subcontractor (GE Energy), the subcontractor moved to compel arbitration under the arbitration agreement.

Extensive case law, rooted in contract principles, addresses the enforcement of agreements by and against nonsignatories. Some of that case law involves the doctrine of equitable estoppel, which prevents parties from relying on contractual terms as the basis for a suit while simultaneously denying the applicability of other terms in the same contract. The Supreme Court has applied this doctrine to domestic arbitration agreements under the Federal Arbitration Act (FAA). Here, the question is whether the doctrine also applies to international arbitration agreements under the New York Convention, even though the convention, unlike the FAA, defines agreements as those "signed by the parties."

Outokumpu argued that, under a plain reading of the New York Convention, GE Energy could not compel arbitration because it did not sign the arbitration agreement. The Eleventh Circuit agreed. GE Energy sought the Supreme Court's review, arguing that, because equitable estoppel does not conflict with the terms of the convention, the doctrine should apply to international arbitration agreements.

The Court's decision should be closely watched by businesses engaged in cross-border commercial transactions in which nonsignatories affect performance of a contract. Oral argument is scheduled for January 21, 2020.

ERISA Stock-Drop Suits

The interaction between the federal securities laws and the Employee Retirement Income Security Act of 1974 (ERISA) will remain an open question — at least this term. In *Fifth Third Bancorp v. Dudenhoffer*, the Supreme Court held that, in cases where plaintiffs allege that an employee stock ownership plan (ESOP) fiduciary violated ERISA for failing to disclose that the company's stock was overvalued, courts must determine whether a prudent fiduciary could not have concluded that disclosure would do more harm than good and that the disclosure would have been consistent with federal securities law.

In *Retirement Plans Committee of IBM v. Jander*, the Supreme Court was poised to consider whether the *Dudenhoffer* standard could be satisfied by plaintiffs' generalized allegations that disclosure of the artificial inflation is inevitable and that the earlier the disclosure, the less the harm. In a three-page *per curiam* opinion, however, the Court vacated the judgment and remanded the case to the Second Circuit because petitioners and the federal government had focused on the consistency between the securities laws and ERISA, arguments the Second Circuit never had the chance to address. (See "Securities Class Action Filings Continue Record Pace.") The Court, however, left open the possibility it may hear the case once the Second Circuit decides the issue. Some of the justices hinted at their views in short concurrences, with Justices Ruth Bader Ginsburg and Elena Kagan inclined toward the plaintiffs' position and Justice Neil Gorsuch toward the fiduciary's.

Administrative Law and Immigration

In another case of intense public interest, *Department of Homeland Security v. Regents of the University of California*, the Court will consider the fate of the Deferred Action for Childhood Arrivals (DACA) program. Established in 2012 by the Obama administration, DACA gives undocumented immigrants brought to the United States as children the opportunity to postpone deportation and receive work permits. The Trump administration rescinded the program in 2017, calling it "an unconstitutional exercise of authority by the Executive Branch." Litigation ensued, with plaintiffs arguing that DACA's rescission was arbitrary and violated the Administrative Procedure Act (APA).

The Trump administration contends that the rescission was adequately justified and that, in any event, the rescission is not reviewable by courts because it involves a matter "committed to agency discretion by law." Courts around the country weighed in, with most siding against the Trump administration. The Supreme Court is now poised to determine both the rescission's reviewability and its legality under the APA. Oral argument occurred on November 12, 2019. Justices Elena Kagan, Stephen Breyer, Ruth Bader Ginsburg and Sonia Sotomayor were critical of the government's justifications for winding down DACA. The other justices appeared more accepting of the government's rationale, although Chief Justice John Roberts and Justices Neil Gorsuch and Brett Kavanaugh each questioned whether the administration adequately explained the reliance interests involved.

Defense Preclusion in Serial Litigation

If a defendant raises a defense and chooses not to pursue it, is raising that same defense barred in a later proceeding between the same parties over a different claim? In August 2018, the Second Circuit held that district courts have the discretion to bar the defense in appropriate circumstances — a decision in tension with those of the Ninth, Eleventh and Federal Circuits.

In *Lucky Brand Dungarees v. Marcel Fashion Group*, the Supreme Court will take up the principles of claim and issue preclusion for defendants in serial litigation with another party — not an uncommon occurrence, particularly in the intellectual property space. As a leading treatise notes, lower courts "have had difficulty in articulating the rules of defendant preclusion," reflecting "deeper problems in defining the proper scope of preclusion." At oral argument on January 13, 2020, several Justices questioned whether the Court's precedent sent conflicting signals on this issue.