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Key Supreme Court Cases From the 2019-20 Term and a Look Ahead to the 2020-21 Term

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On September 23, 2020, a panel of Skadden attorneys hosted a webinar entitled "Key Supreme Court Cases From the 2019-20 Term and a Look Ahead to the 2020-21 Term." Panelists **Julie Bédard**, **Boris Bershteyn**, **Jocelyn E. Strauber** and **Jonathan Marcus** discussed cases recently resolved by, or still pending before, the U.S. Supreme Court concerning separation of powers, employment discrimination, government enforcement remedies, securities law, arbitration, and the Alien Tort Statute and Affordable Care Act. (The discussion was held prior to the appointment of Justice Amy Coney Barrett.)

Separation of Powers

Mr. Bershteyn, a partner in Skadden's Complex Litigation and Trials and Antitrust/Competition Groups and former law clerk to Justice David Souter, began the conversation with a discussion of the Court's decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), in which a 5-4 majority held that having the Consumer Financial Protection Bureau (CFPB) be led by a single individual removable only for cause violates the separation of powers.

Mr. Bershteyn, who previously served as general counsel of the Office of Management and Budget (OMB) and acting administrator of the Office of Information and Regulatory Affairs, explained that *Seila Law* changed the landscape regarding Congress' ability to restrict the circumstances when the president can remove heads of federal agencies. Beginning with *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court has upheld Congress' ability to afford tenure protections to such agency heads as the commissioners of the Federal Trade Commission and certain employees deemed "inferior" officers, such as independent counsel. At issue in *Seila Law* was whether the statutory provision establishing the CFPB's single director, who serves for a five-year term and is removable only for cause, violated the separation of powers. In holding that it did, the Court characterized its prior cases upholding removal restrictions as exceptions — and, as Mr. Bershteyn explained, effectively the only exceptions — to the principle that "[t]he President's removal power is the rule." Because the CFPB's structure did not fit within those exceptions and was (according to the Court's majority) in some respects an "innovation with no foothold in history or tradition," the Court held the structure unconstitutional.

Mr. Bershteyn explained that *Seila Law* can be seen as an extension of the Roberts Court's skepticism toward removal limits and hypothesized that the Court may be moving toward overruling *Humphrey's Executor*. If that were to happen, one potentially profound implication may be that "independent agencies," which traditionally have not been subject to inter-agency review of regulatory actions from the likes of the OMB, may find themselves no longer so insulated.

Previewing the 2020-21 term, Mr. Bershteyn noted that the Court has agreed to hear a challenge to the structure of the Federal Housing Finance Agency (FHFA), which is in some respects similar to the CFPB's single-director structure, in *Collins v. Mnuchin*, No. 19-422 (consolidated with *Mnuchin v. Collins*, No. 19-563). Although we are likely to see arguments similar to those in Seila Law, one area for potential controversy may include a complicated set of financial transfers related to the FHFA's establishment.

Employment Discrimination

Mr. Bershteyn next discussed *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), in which the Court held that Title VII of the Civil Rights Act of 1964 makes it unlawful to fire an individual for being homosexual or a transgender person. A circuit split had arisen prior to *Bostock* as to whether Title VII, which makes it unlawful to discriminate against an individual because of "sex," prohibited the discrimination of an individual based on their sexual identity. In a 6-3 opinion authored by Justice Neil Gorsuch, the Court held that it did, reasoning that it is "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Mr. Bershteyn explained that, while Justice Gorsuch's majority opinion places a strong emphasis on the express terms of the statute, Justices Samuel Alito, Clarence Thomas and Brett Kavanaugh in dissent place greater value on the meaning the statute was understood to have when it was enacted.

Asked whether *Bostock* signaled further developments in the area of employment discrimination on the basis of sex, Mr. Bershteyn said that he saw *Bostock* as a discrete, but potentially important, development in antidiscrimination law. He noted that the opinion may have already caused some reverberations, noting that the U.S. Court of Appeals for the Tenth Circuit cited *Bostock* in a recent opinion recognizing hybrid "sex plus age" discrimination claims under Title VII.

Federal Fraud Charges

Jocelyn E. Strauber, a partner in Skadden's Government Enforcement and White Collar Crime Group and former law clerk to Chief Justice William Rehnquist, discussed *Kelly v. United States*, 140 S. Ct. 1565 (2020), in which the Court unanimously reversed the convictions of two defendants under federal fraud statutes involved in the "Bridgegate" scandal.

Ms. Strauber, who previously served as co-chief of the U.S. Attorney's Office for the Southern District of New York's Terrorism & International Narcotics Unit, explained how *Kelly* circumscribed the reach of federal fraud statutes to exclude schemes that only incidentally involve the taking of property. Petitioners were two individuals involved in the reallocation of lanes over the George Washington Bridge to create traffic jams in Fort Lee, New Jersey, under the guise of a traffic study. In fact, the relocation of lanes was a response to Fort Lee's mayor's refusal to endorse the reelection of then Gov. Chris Christie. Both defendants were convicted under the federal wire fraud statute, which prohibits deceptive schemes to deprive victims of money or property, and the federal-program fraud statute, which bars "obtain[ing] by fraud" the "property" of a federally funded program or entity. Petitioners were convicted on the theory that they had taken property by seeking to take control of the physical bridge lanes through reallocation and by causing the Port Authority of New York and New Jersey to incur the costs of the traffic study. At issue in *Kelly* was whether this conduct was a violation of the federal fraud statutes. In a unanimous opinion authored by Justice Elena Kagan, the Court held that the conduct did not violate those statutes because the "principal object" of defendants' scheme was not to obtain property. The Court determined that the reallocation of lanes was not a taking of property but rather an exercise of regulatory authority, and on the basis of *Cleveland v. United States*, 531 U.S. 12 (2000), the Court held that causing a regulator to exercise regulatory power is not a taking of property. And although the use of employee labor to conduct the traffic study did constitute property, Justice Kagan explained that such a taking of property was merely incidental to the scheme, and not its primary purpose, and thus insufficient.

Ms. Strauber viewed the overall approach taken in *Kelly* as consistent with the Court's prior holdings narrowing the scope of the federal fraud statutes, particularly in the realm of public corruption prosecutions. She explained that the import of *Kelly* is that a scheme to defraud others, which involves even a foreseen taking of property, is insufficient if the taking of property was not a primary purpose of the scheme. Asked what implications *Kelly* might have on fraud cases more generally, Ms. Strauber indicated that the imposition of a "primary purpose" requirement under the federal fraud statutes may heighten the government's burden of proof going forward and that it may even affect financial fraud cases involving the "right to control" theory. Ms. Strauber explained that courts have held that depriving a person access to information to make discretionary economic decisions can qualify as a taking of property. Although the *Kelly* Court did not address the issue, the imposition of the "primary purpose" requirement may create an opportunity to further narrow the definition of property by excluding the right to control, which is currently at issue in *United States v. Gatto* and related prosecutions involving the alleged bribery of student-athletes to attend particular universities.

Key Takeaways

Government Enforcement Remedies

Jonathan Marcus, of counsel in our Appellate Litigation; Derivatives; Financial Institutions Regulation and Enforcement Group and former assistant to the U.S. Solicitor General, discussed *Liu v. SEC*, 140 S. Ct. 1936 (2020), which upheld the ability of the Securities and Exchange Commission (SEC) to seek disgorgement of a wrongdoer's net unlawful profits when those profits are awarded to victims.

To combat securities fraud, the SEC is authorized to seek "equitable relief" in civil proceedings, which excludes sanctions that are punitive in nature. At the same time, the SEC has historically sought disgorgement of a person's ill-gotten gains from acts violating the securities laws, which Mr. Marcus noted was understood to have been a permissible use of its power. In 2017, however, the Supreme Court held in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) that, for purposes of the applicable statute of limitations, disgorgement constituted a penalty. That holding cast doubt on the SEC's continued ability to seek disgorgement as a form of "equitable relief." In *Liu*, the Court resolved that doubt in favor of the Commission, holding that the SEC's ability to seek equitable relief includes disgorgement, up to an extent. As Mr. Marcus explained, the Court cabined the remedy by requiring that, for disgorgement to be equitable, the award amount must be limited to the net unlawful profits of the wrongdoer. The Court also strongly suggested that those profits should be returned to the victim investors as opposed to being deposited in the Treasury. Mr. Marcus, who previously served as general counsel to the Commodity Futures Trading Commission, considered Liu to be an important win for the SEC but noted that the limitations the Court imposed on the remedy could hamstring to some degree the SEC's efforts to obtain disgorgement going forward.

Previewing the 2020-21 term, Mr. Marcus noted that the Court has agreed to hear a similar challenge to the ability of the Federal Trade Commission (FTC) to seek monetary relief under its power to seek injunctions, in *FTC v. Credit Bureau Center, LLC*, No. 19-825 (consolidated with *AMG Capital Management LLC v. FTC*, No. 19-508). There, the Court will consider whether the FTC can seek an order requiring defendants in civil proceedings to compensate consumers for unfair or deceptive trading practices. In the proceedings below, the U.S. Court of Appeals for the Seventh Circuit held that the FTC cannot, creating a circuit split with seven other circuit courts. Mr. Marcus explained that the Court will have to consider how its precedent that broadly interprets the available scope of relief can be reconciled with its more recent jurisprudence focusing on the plain language of the statute. The resolution of the tension between these competing precedents will determine whether the FTC's authorization to seek injunctions permits seeking backward-looking compensation for injured consumers.

Securities Law

Mr. Marcus then went on to discuss the Court's *per curiam* dismissal and remand in Retirement Plans Committee of *IBM v. Jander*, 140 S. Ct. 592 (2020), regarding the intersection of the securities laws and the Employee Retirement Income Security Act (ERISA). Mr. Marcus noted that despite the Court not reaching a decision in the matter, its *per curiam* opinion and concurrences address important issues. Employee stock retirement plans allow employees to invest in their company's stock. Because the fiduciaries of these plans are typically corporate employees, they sometimes acquire inside information about the company that would counsel them to take certain actions, such as disclosing the inside information or refraining from buying further company stock. In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), the Court held that, to allege that fiduciaries of an employment stock ownership plan violated ERISA by not acting on inside information, a plaintiff must plausibly allege an alternative action that (1) the fiduciaries could have taken that would have been consistent with the securities laws and (2) a prudent fiduciary would not have viewed as more likely to harm the fund than to help it.

Jander was poised to deal with the second prong of *Dudenhoeffer*, namely whether plaintiffs could make generalized allegations of harm from a failure to disclose inside information to satisfy the more-harm-than-good standard, but instead evolved into a reconsideration of *Dudenhoeffer*'s place within the framework of the securities laws. In their briefing on the merits, the fiduciaries argued that ERISA could not impose a duty on them to act on inside information. The government, presenting the views of the SEC and Department of Labor, argued that the duty to act on inside information was very narrow and would only arise where the securities laws would mandate disclosure. Because these arguments were not presented in the lower courts, the Supreme Court remanded the action to the U.S. Court of Appeals for the Second Circuit. In a concurrence, Justice Kagan wrote that these new arguments were inconsistent with the Court's holding in *Dudenhoeffer* that presupposed there *is* a duty to act on inside information in certain circumstances. Justice Gorsuch, separately concurring, expressed his view that a fiduciaries who learn information in their capacity as corporate officers can never have a duty to disclose under ERISA. Asked about how to interpret the Court's remand, Mr. Marcus said he believed that the Court's decision signals that it is receptive to reconsidering aspects of *Dudenhoeffer*.

Key Takeaways

Arbitration

Julie Bédard, head of Skadden's International Litigation and Arbitration Group for the Americas and former law clerk on the Supreme Court of Canada, discussed three cases relating to arbitration.

Having previewed *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637 (2020), in last year's presentation, Ms. Bédard said she was glad to report that the Court had reached what the international arbitration community generally views to be the "correct" decision. In *GE Energy*, a buyer and seller entered into an arbitration agreement regarding the purchase of cold rolling mills for a steel plant in which GE Energy Power Conversion France SAS (GE Energy) was expressly listed as a potential subcontractor of the seller. After GE Energy became a subcontractor, the cold rolling mills failed, leading to a lawsuit by the buyer against GE Energy. GE Energy moved to compel arbitration of the lawsuit, arguing that it had standing to enforce the arbitration agreement even though it was not a signatory to the agreement. At issue was whether the New York Convention, an international treaty governing the recognition and enforcement of international arbitration awards that defines agreements as those "signed by the parties," precluded the application of traditional principles of state law doctrines, such as the doctrines of equitable estoppel, assumption of agreement and incorporation by reference. In a unanimous opinion authored by Justice Thomas, the Court held that it did not, finding that the New York Convention was enacted in the U.S. with the assumption that existing state laws and domestic equitable estoppel doctrines would not be displaced.

Ms. Bédard also discussed the Supreme Court's denial of *certiorari* in *Monster Energy Co. v. City Beverages, LLC*, No. 19-1333. Section 10 of the Federal Arbitration Act allows for the vacation of an arbitration award where there was "evident partiality" by the arbitrators. The Ninth Circuit Court of Appeals vacated an award where a JAMS arbitrator failed to disclose that he held an ownership interest in JAMS and Monster Energy frequently arbitrated disputes before JAMS (97 arbitrations over a five-year period), holding that these facts "created a reasonable impression of bias." Ms. Bédard explained that the system of arbitration depends on transparency, and that the petition presented an important question regarding the need for disclosure, but the facts at issue were unique in that arbitrators generally do not own interests in arbitral institutions. Asked what the Court may consider the next important issue in arbitration, Ms. Bédard commented that the Court may be inclined to consider the applicability of Section 1782 of Title 28 of the United States Code, which authorizes federal courts to compel discovery in aid of legal proceedings in other countries, to foreign commercial arbitrations.

Previewing the 2020-21 term, Ms. Bédard noted that the Court has agreed to once again hear *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963, an action that will appear in its second iteration before the Court. In a 2019 decision arising from the same proceedings, the Court held that when a contract delegates the question of arbitrability to an arbitrator, a court may not override that delegation, even if the court thinks that the arbitrability claim is "wholly groundless." At issue this time around is whether an arbitration clause that delegates the issue of arbitrability to an arbitration tribunal, but contains a carve-out for actions for injunctive relief, also delegates the issue of arbitrability to the carved-out action to the tribunal. After the U.S. Court of Appeals for the Fifth Circuit held that it did not, the Court agreed to hear the issue.

Alien Tort Statute

Previewing the 2020-21 term, Ms. Strauber noted that the Court will hear a challenge to the application of the Alien Tort Statute in *Nestlé USA v. Doe I*, No. 19-416 (consolidated with *Cargill, Inc. v. Doe I*, No. 19-453). The Alien Tort Statute gives federal courts original jurisdiction of civil actions by noncitizens for torts that violate the law of nations. The Court has limited the application of the statute in prior cases, finding that the statute does not apply extraterritorially and that foreign corporations are not subject to liability. Plaintiffs in *Nestlé USA* allege that they were victims of child labor law violations in cocoa farms in West Africa and that defendants, U.S. corporations, aided and abetted those violations. At issue before the Court is whether domestic corporations can be liable under the statute and, if so, whether alleged oversight of foreign conduct by domestic corporations, acting in the U.S., overcomes the bar against extraterritorial application of the statute. Ms. Strauber noted that a majority of the justices have strong views against extraterritoriality in this context and pointed out that the Court has never sided with plaintiffs in an action involving the Alien Tort Statute. With respect to the statute's application to domestic corporations, some justices may be open to that possibility based on their prior rulings; others appear unlikely to favor any interpretation that expands the statute's reach.

Affordable Care Act

Mr. Bershteyn noted that the validity of the Affordable Care Act (ACA) is once again before the Court this term. The ACA requires individuals to maintain health insurance coverage or make a shared responsibility payment. In 2012, the Court addressed the constitutionality of this "individual mandate" and, in a somewhat surprising twist, upheld the mandate based on Congress' taxing power (rather than the Commerce Clause), because the penalty for noncompliance occurred through a taxing mechanism. In 2017, however, Congress enacted legislation setting the shared responsibility payment to zero. In *California v. Texas*, No. 19-840 (consolidated with *Texas v. California*, No. 19-1019), the Court will consider whether the individual mandate, as amended by the new legislation, continues to be a valid exercise of Congress' taxing power, even if Congress derives no revenues from the mandate, and if not, whether the mandate is severable from the remainder of the ACA. Mr. Bershteyn emphasized the policy significance of the issues presented. The ACA permeates the way health care is delivered and funded; if the Court were to hold the mandate unconstitutional and nonseverable, its decision could have significant ramifications for the U.S. health care system already strained by the pandemic.