

US Supreme Court 2020 Term Preview

Skadden

12 / 22 / 20

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The first months of the Supreme Court's 2020 term have had an aura of fatigue: a nation gripped by the COVID-19 pandemic, a court adjusting to a new colleague and an unusually light caseload (to be argued by telephone). Despite all this, the Court will address a number of issues important to businesses, including bankruptcy, administrative law, personal jurisdiction and liability under the Alien Tort Statute. Perhaps the most elucidating aspect of this term will be the window it gives into how Justice Amy Coney Barrett will affect the direction of the Court.

The previous term ended with 53 signed opinions, the lowest number in over 100 years, and with Chief Justice John G. Roberts, Jr. emerging as the clear "anchor" vote, holding the majority in 97% of the Court's cases and sometimes siding with his more liberal colleagues. The 2020 term is on pace to generate a similarly low number of signed opinions, but Chief Justice Roberts' ability to command a majority may wane with the addition of Justice Barrett. While we will not get the benefit of Justice Barrett's views on the handful of cases that were argued prior to her confirmation (unless the Court ends up with a 4-4 divide), we will gain some insight into her views on many key areas of the law, including agency deference, criminal law, voting rights and statutory interpretation. And because oral arguments remain telephonic — a format in which each justice generally speaks more — we may get a better preview of her views than is typical. By the end of the term, we will also have a picture of how her voting aligns with other justices. To be sure, one term — especially a term with a relatively light docket — is not going to paint a complete picture. But it will shed at least some light as we consider issues that are likely in the pipeline over the coming months and years.

The broad assumption is that Justice Barrett will vote in favor of business. Although her record on the U.S. Court of Appeals for the Seventh Circuit generally supports that prediction, it is not all that probative for a few reasons. For starters, it provides limited information given her relatively short tenure — three years — on the bench. And the Seventh Circuit's docket is different from the Supreme Court's in critical ways: Circuit courts do not have discretion over the cases they hear and thus face a different mix of issues. For example, regional circuits tend to hear a relatively higher proportion of criminal and immigration matters than the Supreme Court but very few administrative law cases, which constitute an important portion of the Supreme Court's docket. On top of that, circuit court judges are constrained by precedent in a way that the justices are not.

While it seems safe to assume that Justice Barrett will vote more in line with the Court's conservatives than her predecessor, Justice Ruth Bader Ginsburg, it is worth noting that the conservative justices often disagree with one another, especially in business matters that may not implicate conventionally ideological legal issues. During the 2018 term, for example, Justice Brett M. Kavanaugh agreed with Justice Neil M. Gorsuch in the judgment just as often as he agreed with Justices Stephen G. Breyer and Elena Kagan — which is to say, not often. In fact, Justices Kavanaugh and Gorsuch "vote[d] together the least frequently of any two justices in their first terms together appointed by the same president going back to President Kennedy," even less frequently than Justices David H. Souter and Clarence Thomas, who "ended up on opposite ideological poles of the Court," according to the blog *Empirical SCOTUS*. Justice Kavanaugh's and Justice Gorsuch's rate of agreement did increase in the 2019 term (from 70% to 88%), but perhaps that just underscores the limited insight one can glean from a single term.

Ultimately, this term will provide just an initial look into Justice Barrett's jurisprudence and influence on the Court. Only after studying her opinions over a period of time will we get a deeper sense of her views and how she is likely to vote in a given case. And

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although Justice Barrett will not participate in all of this term's cases, we will have an opportunity to see her views on a number of diverse legal issues, including the ones discussed below.

Facebook, Inc. v. Duguid

In *Facebook, Inc. v. Duguid*, the Court will consider the breadth of the Telephone Consumer Protection Act's (TCPA) prohibition on robocalls. The plaintiff in this case claimed that Facebook violated the TCPA by using an autodialer to send him text messages alerting him to a potential problem with his account. The U.S. Court of Appeals for the Ninth Circuit construed the TCPA to ban not just calls made by specialized devices that dial randomly but also calls made by any device that can store and dial numbers — in other words, virtually any modern phone. That broad definition imposes a burden on businesses, which risk litigation — and \$500-\$1,500 per violation — every time they try to deliver essential, desired and often time-sensitive communications. We already know what Justice Barrett thinks about this question: Earlier this year, she wrote the Seventh Circuit's opinion in *Gadelhak v. AT&T*, forcefully rejecting the Ninth Circuit's sweeping construction and holding that the TCPA applies only to devices that use a random or sequential number generator. At oral argument on December 8, 2020, several justices picked up on *Gadelhak*'s textual analysis and its concern that the plaintiffs' reading of the TCPA would make every ordinary smartphone an illegal autodialer.

Ford Motor Company v. Bandemer and Ford Motor Company v. Montana Eighth Judicial District Court

In the consolidated cases *Ford Motor Company v. Bandemer* and *Ford Motor Company v. Montana Eighth Judicial District Court*, the Court will decide how to apply traditional limits on where a defendant can be sued in an increasingly mobile economy. The Due Process Clause prohibits a state from exercising specific jurisdiction over a defendant unless the defendant has purposefully availed itself of sufficient minimum contacts with the state, and the plaintiff's claims arise out of or relate to those contacts. In the *Ford* cases, the plaintiffs sued for injuries stemming from car accidents they had in each forum state. While Ford did not manufacture or sell those exact cars in the forum states, the plaintiffs argued that personal jurisdiction was proper because Ford manufactured and sold other cars in the forum states. At oral argument in October 2020, the Court appeared to be struggling with how to apply its decades-old precedent to the modern marketplace. Several justices seemed hesitant to block the lawsuits. At the same time, they expressed concern about maintaining coherent limits on personal jurisdiction. The Court's resolution of these cases could have significant ramifications for businesses and could open the door to increased forum-shopping by strategic plaintiffs.

City of Chicago v. Fulton

In *City of Chicago v. Fulton*, the Court will address the obligations of creditors who passively retain property belonging to bankrupt estates. *Fulton* focuses on the intersection of two provisions of the Bankruptcy Code: Section 362(a)(3), which prohibits “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate”; and Section 542(a), which exempts an entity in possession, custody or control of property from delivering it to the trustee if it “is of inconsequential value or benefit to the estate.” The question in this case is how to apply these potentially competing provisions to Chicago's refusal to return impounded cars after their owners filed for bankruptcy relief. The Seventh Circuit held that Chicago was required to return the impounded cars, and that its refusal to do so would give the city an unfair advantage over other creditors. The Supreme Court's decision ultimately will turn on whether the passive activity of keeping an impounded car on a lot constitutes an “act.” The breadth of the Court's construction could affect many creditors' obligations going forward.

Van Buren v. United States

In *Van Buren v. United States*, the Court will consider what it means to “exceed authorized access” to a computer system under Section 1030(a)(2) of the Computer Fraud and Abuse Act (CFAA). This case arises from a police officer's search of a license plate record database. Although the officer was authorized to use the database for law enforcement purposes, he used it for personal research (at the request of an FBI informant who agreed to pay him for the information). When he was caught, he was charged with computer fraud and convicted. The defendant petitioned the Court for review to consider how the CFAA applies when an individual is authorized to obtain information from a computer for some purposes but not others. Many businesses restrict access to their websites, computers or internet connectivity to certain uses and purposes. The defendant argues that under the lower court's construction of the CFAA, using a work computer to check the weather for an upcoming vacation or to monitor the score of a game could be a federal crime whenever an employer's computer use policy prohibits using the computer for nonwork activity. And because the CFAA also has a civil cause of action, the Court's resolution of this case is of interest to businesses, which are involved regularly as plaintiffs and defendants in civil CFAA actions.

Administrative Law Cases

The Court's docket this term also includes several administrative law questions. In *Federal Communications Commission v. Prometheus Radio Management* and *National Association of Broadcasters v. Prometheus Radio Project*, for example, the Court

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will consider the validity of Federal Communications Commission orders relaxing the agency's cross-ownership restrictions to accommodate changed market conditions. And in *Wolf v. Innovation Law Lab*, the Court will consider whether the Department of Homeland Security's Migrant Protection Protocols policy is a lawful implementation of the agency's statutory authority and whether it is exempt from the Administrative Procedure Act's notice-and-comment rulemaking requirements. The Court's resolution of these cases will shed light on how the current justices approach challenges to agency action, which will shortly confront the incoming Biden administration.

It will be particularly important to see how Justice Barrett's vote affects the Court's jurisprudence in this area. While the modern conservative approach tends to favor judicial scrutiny of agency action, many conservatives — including Justice Antonin Scalia and Judge Laurence H. Silberman of the U.S. Court of Appeals

for the District of Columbia Circuit, the two jurists for whom Justice Barrett clerked — favored deference to agencies of the elected executive branch over deference to unelected judges.

Should we end up with a divided government, we can expect President-Elect Joe Biden to rely on executive orders and agency action to accomplish his policy objectives, which will precipitate an increased focus on challenges to such measures. Meanwhile, the COVID-19 pandemic will continue to spark litigation in all areas of the law, from class actions to bankruptcy to labor and employment. Many of the Court's cases this term, and Justice Barrett's role in shifting the balance of power, will affect the emerging legal issues discussed here. The diverse docket means we will have at least some insight into Justice Barrett's views on several key legal doctrines, and the glimpse we get from the Court's decisions this term will be helpful as we look ahead.