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The Supreme Court:

Lessons From This Term's Decisions and Issues On The Horizon

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A More Liberal Court?

- Or "Justice Kennedy's Court"?
- Six closely-divided cases decided on last three days of the Term – Justice Kennedy is only Member of the Court in the majority in all of them
- Division among the Court's more conservative Justices continued
  - Chief Justice Roberts, Justice Kennedy most frequently joined with more liberal Justices to form majorities in divided cases
  - Justices Thomas and Scalia less frequently
- Commentators' views of Court highly dependent on case selection
  - Next Term could be "much more conservative" because of cases already granted

Key Takeaways From This Term

- 22 cases pitted a business on one side against an individual or government on the other
- Businesses won 12 of those cases – a far lower proportion than in prior Terms
  - 2013: 15 wins, 7 losses
  - 2012: 16 wins, 9 losses
  - 2011: 18 wins, 3 losses
- Businesses lost some of the most important cases this Term – *e.g.*, the employment-discrimination and Fair Housing Act decisions
- Although *number* of cases was roughly the same as in prior years, the *scope* was narrower
- Biggest business win: *King v. Burwell*

Affordable Care Act

- Bottom line: Obamacare will continue as implemented by Obama Administration
  - Tax Credits will be available nationwide, regardless of whether the health insurance exchange is operated by the State or by the federal government
- 6-3 ruling and Chief Justice Roberts' strong explanation of law's structure puts the law on a firmer footing
- Shift in statutory interpretation away from "hyper-textualism" toward a more holistic assessment of statutory text, structure, and "legislative plan"
- Less tolerance for litigation campaigns to obstruct actions of the political branches?
- ACA still faces other lawsuits, but none with "death threat" potential

Fair Housing Act / Disparate Impact

- Two types of discrimination claims:
  - Disparate treatment – intentional discrimination
  - Disparate impact – facially neutral practice that has a "disproportionately adverse effect on minorities" and that is not justified by a legitimate rationale or serves interest that could be served as effectively through alternate means
- Holding: disparate impact claims available under the Fair Housing Act
- Important guidance regarding proof of disparate impact:
  - Statistical disparities alone are not sufficient
  - Plaintiff must prove "robust" causal link between challenged policy and statistical disparity
  - Policies are unlawful only if they are "artificial, arbitrary, and unnecessary barriers"; proof of a "valid interest" provides a defense
  - Remedial orders should be race-neutral absent extraordinary circumstances

Religious Accommodation

- *EEOC v. Abercrombie & Fitch*
  - Teenage girl applied for a job with Abercrombie and was rejected because she wore a head scarf
  - Is there Title VII liability where the employee does not tell the employer that she needs the accommodation for religious reasons?
  - No; a plaintiff can prevail simply by showing that the need for an accommodation was a motivating factor in the adverse employment decision
  - Court avoided the question whether there can be liability if the employer is unaware of the purpose of the accommodation: "That issue is not presented in this case, since Abercrombie knew – or at least suspected – that the scarf was worn for religious reasons."
  - But suggests that some degree of knowledge is necessary: "It is arguable that the motive requirement . . . is not met unless the employer at least suspects that the practice in question is a religious practice"

Pregnancy Discrimination

- *Young v. UPS*
  - Pregnancy Discrimination Act: Pregnant employees "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work"
  - Plaintiff can make a prima-facie case of disparate treatment through either direct evidence of discrimination or application of McDonnell-Douglas framework: She is in the protected class; she sought and did not receive an accommodation; and the employer did accommodate others who were "similar in their ability or inability to work"
  - Burden then shifts to defendant to "articulate some legitimate non-discriminatory reasons" for the employment decision
  - Plaintiff can then prove that defendant's reasons are pretextual; policies burden pregnant women and can support an inference of intentional discrimination
  - Court declined to "grant pregnant workers an unconditional most-favored-nation status"

Fair Labor Standards Act

- *Integrity Staffing Solutions v. Busk*
  - Under FLSA and Portal-to-Portal Act, employers need not compensate an employee for "preliminary" and "postliminary" activities that are not "integral and indispensable" to his or her "principal activity"
  - Court holds that warehouse workers are not entitled to be paid for 25 minutes each day spent waiting for and engaging in anti-theft security screenings
  - The workers weren't hired to undergo security screenings; they were hired to retrieve products from shelves and package them for shipment
  - Ninth Circuit erred by focusing on whether the security screenings were required, instead of whether they were integral to the employees' jobs
  - An activity is "integral and indispensable" only if the employee must do it in order to perform his job
  - Ruling is consistent with Court's other recent common-sense FLSA decisions (e.g. *Sandifer* case from last Term)

EEOC Conciliation

- *Mach Mining, LLC v. EEOC*
  - Before EEOC sues an employer to challenge unlawful employment practice, it must negotiate with the employer
  - Lower courts were divided as to whether and to what extent a court may review EEOC's conciliation efforts
  - Court (9-0, per Kagan, J.): Title VII permits limited administrative review:
    - Notice of violation and employee injuries
    - Opportunity to remedy the allegedly discriminatory practice
  - Standard will be satisfied, in most cases, with an affidavit from an agency official

Employment – Up Next

- *Green v. Donahoe*
  - Before filing a Title VII discrimination action, an employee must exhaust administrative remedies
  - The complaining employee must initiate the administrative proceeding within a specified time period:
    - 180-300 days (private sector)
    - 45 days (federal employees)
  - Question: For a constructive discharge claim, what act starts the review period?
    - Date of resignation
    - Date of last discriminatory act

Retiree Medical Benefits

- *M & G Polymers USA v. Tackett*
  - Employers with union labor forces negotiate Collective Bargaining Agreements that specify details of benefit plans
  - CBAs may offer—and historically have offered—certain benefits for retired employees
  - Under Sixth Circuit's *Yard-Man* presumption, benefits for retirees in CBA are presumed to vest for life absent contrary indications
  - Court (9-0, per Thomas, J.): No *Yard-Man* inference. Ordinary rules of contract interpretation apply to CBA.
  - Apparent dispute as to what contract rules do:
    - Thomas, J.: Retiree benefits generally aren't vested
    - Ginsburg, J., concurring: Reasons to believe the benefits have vested

Duties of ERISA Fiduciaries

- *Tibble v. Edison Int'l*
  - In a 401(k) plan, fiduciaries select the menu of investment options, subject to a duty of prudence
  - Fiduciaries may be sued for imprudent acts or omissions within six years
  - Ninth Circuit opinion could be read to say that once an investment has been in the lineup for more than six years, it can no longer be challenged
  - Court (9-0, per Breyer, J.): To figure out when the limitations period starts, look at the claim
  - Under trust law, fiduciaries have a duty to monitor the trust
  - To the extent plaintiffs allege a duty to monitor, the clock starts from the alleged monitoring failure
  - No guidance on scope of duty to monitor

ERISA – Up Next

- *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*
  - Sometimes, ERISA plans pay too much
  - Section 502(a)(3) authorizes a fiduciary to pursue "equitable relief"
  - Question: Can a fiduciary recoup overpayments if the proceeds are no longer an identifiable fund
- *Gobeille v. Liberty Mutual*
  - Self-funded health plans are governed by ERISA
  - ERISA preempts "any and all State laws insofar as they . . . relate to any employee benefit plan"
  - Vermont requires self-funded plans to report claims data to statewide database
  - Question: Is Vermont's health-care information database law preempted by ERISA as relates to self-funded plans?

Patents

- Less of a blockbuster year than last year – three decisions
- Again, Federal Circuit decisions reversed by Supreme Court
- *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*: standard for appellate review of claim construction rulings
  - Court holds that factual findings regarding *extrinsic evidence* underlying a claim construction ruling are subject to clear-error review.
  - Claim construction determination based on *intrinsic* evidence ("the patent claims and specifications, along with the patent's prosecution history")is subject to *de novo* review
  - Not clear that Supreme Court's ruling will alter outcome of many claim construction appeals

Patents

- *Commil USA, LLC v. Cisco Systems, Inc.*: whether a defendant's good-faith belief that a patent is invalid is a defense to a claim of inducing infringement of that patent
  - Court holds it is not.
  - Settled that plaintiff must prove that defendant knew of the patent and knew that the induced acts were infringing
  - Allowing defense of good-faith belief of invalidity would undermine the presumption of patent validity and circumvent the requirement that a defendant must show by clear and convincing evidence that a patent is invalid
- *Kimble v. Marvel Entertainment, LLC*: Court declines to overturn precedent invalidating patent royalty agreements extending beyond patent term
  - Court notes that 'work-arounds' remain available

Securities

- *Omnicare v. Laborers Dist. Council*
  - Section 11 of the 1933 Act imposes liability for untrue statements or omissions of material fact
  - Is an issuer liable for statements of opinion if they turn out to be wrong? Only in limited circumstances: Statements of opinion are actionable as "untrue statements of material fact" only if the plaintiff can prove that the defendant didn't hold the belief expressed
  - **But** there is liability under § 11's omissions clause if issuer "omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion"; the plaintiff must identify "particular [and material] facts going to the basis for the issuer's opinion – facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have – whose omission makes the opinion statement at issue misleading"
  - Scalia (rejecting this part of the opinion): The language on omissions "invites roundabout attacks upon expressions of opinion" because a plaintiff "can always charge that . . . the investigation was not 'objectively adequate'"

Antitrust – State Action Doctrine

- *N.C. State Bd. of Dental Examiners v. FTC*
  - State Action Doctrine exempts certain conduct from antitrust laws
    - *Municipalities*: Actions reflect state policy
    - *Private Parties*: Actions undertaken pursuant to state policy that are supervised by the State
  - Some licensing boards are state entities but are selected and staffed by private parties
  - Court (6-3, per Kennedy, J.): Nonsovereign actors controlled by active market participants must satisfy the standard for private parties.
  - Without state supervision, there is too great a risk that active market participants will pursue their private interests in restraining trade

Federal Regulation

- Increased skepticism about federal regulation and authority of administrative agencies
- Court holds in *Horne v. Dep't of Agriculture* that the government's raisin price support program violates the Takings Clause
  - Raisin growers required to surrender a portion of crop each year; government then disposes of them off-market (gives to schools, sells abroad, etc.) and returns any amounts in excess of expenses
  - Court holds seizure of personal property is a taking and could not be justified as a condition of permitting interstate sales of raisins. "Just compensation" based on fair market value of raisins; any benefits of program irrelevant.

Federal Regulation

- Marked lack of deference to federal agencies
- *Michigan v. EPA*: Overturns EPA's conclusion regarding relevance of costs to regulatory decision
  - EPA directed to study of hazards to public health from power-plant emissions and regulate "if [it] finds such regulation is appropriate and necessary after considering the results of the study"
  - No *Chevron* deference: "No regulation is 'appropriate' if it does significantly more harm than good." Unlike other sections of the Act, relevant provision did not limit EPA to considering only specifically enumerated, non-cost factors
- *King v. Burwell*: Court held that *Chevron* did not apply because issue too significant to assume Congress delegated decision to IRS
- *Perez v. Mortgage Bankers Ass'n*: Court holds that notice-and-comment not needed to reverse informal guidance, BUT three concurring opinions casting doubt on deference to informal agency interpretations of statutes and regulations

Class Actions: Next Term

- *Spokeo, Inc. v. Robins*: Can Congress confer standing on plaintiffs by creating a private right of action for a bare statutory violation?
  - Fair Credit Reporting Act imposes obligations on "consumer reporting agencies" with respect to the consumer information they transmit
  - Plaintiff filed a putative class action alleging that Spokeo—a people-search engine—is a consumer reporting agency and that it violates FCRA. Sought statutory damages for alleged violations
  - Ninth Circuit upheld standing based on allegation of statutory violation; refused to require a showing of traditional Article III injury-in-fact
  - This ruling makes it much easier for plaintiffs to assert class actions – in many cases seeking hundreds of millions or billions in damages. And the same issue arises under more than a dozen federal statutes
  - Spokeo argues that traditional concrete injury-in-fact is required, "injury in law" is not sufficient

Class Actions: Next Term

- *Tyson Foods v. Bouaphakeo*
  - First case to address standards for class certification in three Terms (the last one was *Comcast* in the 2012 Term)
  - *Wal-Mart v. Dukes* (2011): To satisfy Rule 23's requirements of predominance and commonality, plaintiffs must demonstrate that class members "have suffered the same injury," such that their claims "depend upon a common contention" that is "capable of classwide resolution"; no "trials by formula"
  - In *Tyson*, the plaintiffs are hourly workers at a pork-processing facility; they allege that Tyson did not properly compensate them for time spent donning and doffing protective gear and walking to and from their work stations
  - Court will address two questions
    - Can plaintiffs gloss over individualized issues by using statistical techniques that presume that all class members are identical?
    - Can a class be certified if it includes hundreds of non-injured individuals who have no legal right to damages?

Class Actions: Next Term

- *Campbell-Ewald Co. v. Gomez*
  - *Genesis Healthcare v. Symczyk* (2013): A defendant can moot an FLSA collective action by claim by making a Rule 68 offer of judgment to the named plaintiff in the full amount that she seeks
  - In *Campbell-Ewald*, the Court will determine whether a defendant can moot a putative Rule 23 class action by making an offer of judgment to the named plaintiff prior to certification of a class
    - Are the named plaintiff's individual claims moot?
    - If so, does that moot the entire putative class action?
  - Secondary issue: Whether a government contractor may invoke derivative sovereign immunity outside the context of damage caused by public works projects

Arbitration

- No cases decided this Term
- Next Term: *DIRECTV, Inc. v. Imburgia*
- Arbitration provision states:
  - "[i]f … the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section [i.e., the arbitration clause] … is unenforceable."
- Such agreements ***were*** unenforceable under California law ***until*** the Supreme Court's decision in *AT&T Mobility v. Concepcion*
- California appellate court construed the contractual provision to refer to California law alone, without considering the preemptive effect of federal law; Ninth Circuit reached the opposite conclusion
- Important question about ability of state courts to invalidate arbitration agreements by creating new contract interpretation principles

Bankruptcy

- *Wellness Int'l v. Sharif*
  - *Stern v. Marshall* (2011): Unless a state-law counterclaim is resolved in the course of ruling on a creditor's proof of claim, Article I bankruptcy courts lack authority to issue a final decision.
  - Question: What if the parties consent?
  - Court (6-3, per Sotomayor, J.): Parties can consent to bankruptcy court jurisdiction. It does not threaten the separation of powers
  - Roberts, C.J., dissenting: Bankruptcy jurisdiction threatens the institutional integrity of the Judicial Branch

Bankruptcy

- *Baker Botts v. ASARCO*
  - Attorneys that are paid directly from the bankruptcy estate must file fee petitions
  - Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered"
  - Question: Are fees for litigating fees recoverable?
  - Court (6-3, per Thomas, J.): American Rule disfavors fee shifting. Attorney pursuit of own fees is not "service rendered"
  - Breyer, J., dissenting: Not a "service rendered," but pursuit of fees is "reasonable compensation" for "services rendered"

Bankruptcy

- *Bank of America v. Caulkett*
  - Bankruptcy Code voids liens that are not "secured claim"
  - Question: Is underwater second lien a "secured claim"?
  - Court: Yes, applying *Dewsnup*, despite statutory text
- *Harris v. Viegelahn*
  - Debtors may convert from Chapter 13 to Chapter 7
  - Question: Who gets undisbursed wages after conversion?
  - Court: Postpetition earnings belong to the debtor under Chapter 7, so the creditors have no claim

Bankruptcy

- *Bullard v. Blue Hills Bank*
  - Litigants may appeal final judgments and decrees
  - Question: Is denial of plan confirmation a final order?
  - Court: No. That's an intermediate step of a single proceeding

Marriage

- Landmark decision, but note sharp divisions among the Justices
- Majority relies on liberty ***and*** equality principles
- Expansive view of Court's role in defining the "liberty" protected by the Constitution
  - Original intent of Framers was not to bind Court to meaning of "liberty" at Constitution's adoption, but to allow Court to apply broad principles based on subsequent developments
- Next: addressing the interaction between religion and same-sex marriage
  - Religious objections of government employees
  - Religious objections of private businesses
  - Possible application of federal anti-discrimination principles to religion-affiliated institutions

Energy Regulation

- *FERC v. Electric Power Supply*
  EnerNOC, Inc. v. Electric Power Supply
  - FERC has authority to regulate wholesale energy markets
  - FERC has no authority to regulate retail sales to consumers
  - In Order 745, FERC tried indirectly to regulate demand response programs in retail market by regulations of wholesale market
  - D.C. Circuit: That's *ultra vires* and arbitrary, too, because the dissenting Commissioner had good arguments

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Questions?

Please email Erica Weber at eweber@mayerbrown.com

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