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Some Observations on the Impact of Justice Scalia's Death on Pending Business Cases

Justice Antonin Scalia's recent passing leaves the United States Supreme Court with eight active members. The timetable for the nomination and confirmation of his successor is unknown and currently the subject of a political dispute and intensive media coverage. There has been extensive reporting on the potential impact of Justice Scalia's death on major cases involving social issues, but less discussion of the potential impact of his death on business cases. In at least one recent case, however, a corporate defendant cited the uncertainty following Justice Scalia's death in connection with a decision to settle. Speculation about what the Supreme Court might do in a particular case is inherently unreliable (and perhaps even more so in business cases than in cases involving social issues or criminal law). We thought it would be useful, however, to identify business cases of potential interest to our business clients and offer some analysis of potential impact.

The Relevant Procedure

In any case that has been argued but not decided, Justice Scalia's vote in the Court's pre-opinion conference is void. If Justice Scalia was a member of a five-justice majority, then the Court may either: (a) affirm the lower court ruling by an equally divided Court, without opinion, creating no national precedent; or (b) direct that the case be reargued when a new justice is in place. Any opinions already assigned to Justice Scalia will be reassigned. As for cases scheduled to be argued after Justice Scalia's death, some may be set for reargument in the 2016 or 2017 Terms.

The Potential Impact of Justice Scalia's Absence and the Current Status of the Court

Historic voting patterns, over all types of cases, show that the remaining active justices tend to vote in two groups. Chief Justice John G. Roberts, Jr., and Justices Clarence Thomas and Samuel Alito, Jr. vote together often. Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan also tend to vote together. Justice Kennedy, now Senior Associate Justice, votes with the Chief Justice and Justices Thomas and Alito marginally more often than with Justices Ginsburg, Breyer, Sotomayor and Kagan. But such patterns are not necessarily valid predictors of how the justices may vote in specific business cases concerning diverse legal issues. We provide below thoughts regarding the potential impact of Justice Scalia's death, and the Court's current status, on some major pending business cases of interest, in various key legal areas.

Insider Trading: *Salman v. United States*

- In *Salman v. United States*, the Court will consider "[w]hether the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC* requires proof of 'an exchange that is objective, consequential,

and represents at least a potential gain of a pecuniary or similarly valuable nature' as the Second Circuit held in *United States v. Newman*—or whether it is enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case."

- Justice Scalia could have been a vote in favor of the *Newman* approach. In a short opinion regarding the Court's denial of certiorari in *Whitman v. United States*, an insider trading case, Justice Scalia (joined by Justice Thomas) noted that "[a] court owes no deference to the prosecution's interpretation of a criminal law," and that "[t]he rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants." Furthermore, one study has observed that, in securities cases, Justice Scalia voted for a pro-management outcome more than half the time.[1] He backed Justice Thomas's opinion concurring in the judgment in *Halliburton Co. v. Erica P. John Fund, Inc*., in which Justice Thomas advocated overruling the Court's seminal opinion in *Basic v. Levinson*.
- Without Justice Scalia's influence, there may not be a sufficient number of justices that will approach the government's position with skepticism given historical voting patterns. It seems relatively likely that the Supreme Court will affirm the conviction based on tipping between brothers (as close family members), but whether a majority of the Court would go further to address other types of relationships is uncertain.

Class Actions: *Tyson Foods, Inc. v. Bouaphakeo*; *Spokeo, Inc. v. Robin*; *Microsoft Corp. v. Baker*

- Three cases currently pending before the Court—*Tyson Foods, Inc. v. Bouaphakeo*; *Spokeo, Inc. v. Robin*; and *Microsoft Corp. v. Baker*—have been viewed as raising significant class action procedural issues. Justice Scalia previously wrote for a five-justice majority in *Wal-Mart Stores*, *Inc. v. Dukes*; *Comcast Corp. v. Behrend*; and *American Express Co. v. Italian Colors Restaurant*, three cases that are regarded as restricting federal court class actions. It is not clear, however, to what extent any of the three currently pending cases will be decided based on class action-specific jurisprudence.
- *Tyson Foods, Inc. v. Bouaphakeo* is a case commenced by hourly workers who won class certification in the district court for wage/hour claims arising out of Tyson's alleged underpayment for time spent donning and doffing protective equipment and walking to work sites. Tyson argued that the class had been improperly certified based on the sort of statistical approach disapproved by *Wal-Mart* and *Comcast*. During the November 2015 oral argument, however, questioning by Justices Sotamayor, Kagan, Kennedy and Breyer indicated that they did not see the case as controlled by class action rules and procedures. Chief Justice Roberts and Justice Alito appeared to disagree. While drawing conclusions from oral argument is ordinarily unreliable, it appears that there may be a majority for deciding *Tyson* outside the reach of *Wal-Mart* and *Comcast*, so that Justice Scalia's absence from the Court may not impact the outcome of this case.
  - On a related note, on February 26, Dow Chemical announced that it has entered into a settlement agreement to resolve the In re *Urethanes Class Action* litigation—agreeing to pay the plaintiff class $835 million, conditioned on (in addition to the approval of the class settlement) the Supreme Court agreeing to hold in abeyance Dow's certiorari petition, which currently is being held by the Court, pending a decision in *Tyson Foods*, which has a common class

[1] John C. Coates, *Securities Litigation in the Roberts Court*: *An Early Assessment*, 57 Ariz. L. Rev. 1 (2015).

action issue. Dow stated that it "continues to believe strongly in its legal position as expressed in its petition" but that "[g]rowing political uncertainties due to recent events within the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class action suits have changed Dow's risk assessment of the situation."

- In *Spokeo*, *Inc. v. Robin*, the plaintiff-respondent commenced a class action based on the Fair Credit Reporting Act because Spokeo allegedly published a false credit report about him on the Internet. Spokeo argued that the plaintiff had suffered no injury and consequently lacked standing. Justice Scalia has emphasized the importance of standing—in, for example, *Lujan v. Defenders of Wildlife*, for which he wrote the majority opinion noting that standing requires a concrete and particularized, actual or imminent invasion of a legally protected interest. At oral argument in *Spokeo*, Chief Justice Roberts and Justices Scalia and Alito appeared to accept Spokeo's argument that the plaintiff lacked standing, indicating (with Justice Thomas as a likely fourth vote) a consensus, while Justices Ginsburg, Sotamayor, Breyer and Kagan appeared to be more inclined to agree with the plaintiff. Justice Kennedy thus appears pivotal to a majority, but with Justice Scalia's absence, the Court could easily be evenly divided.
- The Ninth Circuit ruled in *Microsoft Corp. v. Baker* that it had appellate jurisdiction to review an order striking class action allegations after the named plaintiffs voluntarily dismissed their claims with prejudice. Microsoft has argued that the circuits are divided about whether federal appellate courts have jurisdiction in such cases, which it characterizes as inconsistent with the Court's 1978 ruling in *Coopers & Lybrand v. Livesay*. In *Coopers & Lybrand*, the Court ruled that orders denying class certification are not appealable as final orders pursuant to 28 U.S.C. § 1291. It is difficult to predict how the justices will line up in this case once it is briefed and argued. Assuming that the justices typically referred to as "conservative" are more likely to favor strict statutory limits on appellate jurisdiction, and that the justices typically referred to as "liberal" will not, this case could see an equally divided Court in Justice Scalia's absence.

Patents: *Cuozzo Speed Technologies, LLC v. Lee* and *Halo Electronics, Inc. v. Pulse Electronics*

- The Court's docket also includes two potentially important patent cases, *Cuozzo Speed Technologies*, *LLC v. Lee* and *Halo Electronics*, *Inc. v. Pulse Electronics*. Cuozzo involves the inter partes review process whereby the Patent Trial and Appeal Board of the US Patent and Trademark Office reviews the validity of a previously awarded patent being challenged by a third party. The US Court of Appeals for the Federal Circuit held that it lacked authority to review the Board's decision and that the Board may give claims their "broadest reasonable interpretation" rather than their plain and ordinary meaning. *Halo*, consolidated with *Stryker Corp. v. Zimmer*, *Inc*., involves determining what constitutes willful infringement of a patent for the purposes of enhancing patent infringement damages. We believe that Justice Scalia's absence is unlikely to make a difference in the outcome, given that the majority of recent intellectual property cases heard by the Supreme Court have been decided by a unanimous or near unanimous court.

RICO: *RJR Nabisco v. European Community*

- The Court will review the Second Circuit's decision in *RJR Nabisco v. European Community* to determine whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act ("RICO") applies extraterritorially. Justice Scalia's absence is unlikely to affect the outcome of the case, given the Supreme

Court's unanimous rulings in both *Morrison v. National Australian Bank* and *Kiobel v. Royal Dutch Petroleum Co*., which broadened the presumption against extraterritoriality and found, respectively, that Section 10(b) of the Exchange Act and the Alien Tort Statute did not apply extraterritorially.

Jurisdiction as to Securities Exchange Act: *Merrill Lynch, Pierce, Fenner & Smith, Inc. et al. v. Manning*

- In December 2015, the Court heard argument in *Merrill Lynch, Pierce*, *Fenner & Smith*, *Inc. et al. v. Manning* and was poised to resolve the circuit split whether § 27 of the Securities Exchange Act of 1934 provides exclusive federal jurisdiction over cases conceptually enforcing duties under the Exchange Act when claims are pleaded in state courts solely based on state laws. At oral argument, the justices seemed skeptical of the position that the Exchange Act precludes litigation of state law claims in state court, even if the allegedly unlawful conduct also would be actionable under the Exchange Act. Justice Scalia expressed concern that the petitioner's approach would impose "quite an onerous task" on federal judges to "sift through the complaint to see if any of the claimed causes of action under State law mirror a cause of action that happens to exist under Federal law, without even the hint that they mention the Federal statute." The questions and comments of Chief Justice Roberts and Justices Sotomayor and Ginsburg indicate that Justice Scalia's death may not affect the outcome and that a majority may be coalescing behind allowing such claims to proceed in state court.

Bankruptcy: *Husky International Electronics, Inc. v. Ritz*

- In *Husky International Electronics, Inc. v. Ritz*, the Court will address whether the "actual fraud" bar to discharge under Bankruptcy Code § 523(a)(2)(A) applies only when the debtor has made a false representation, or whether it also applies when the debtor has deliberately obtained money through a fraudulent-transfer scheme that was actually intended to cheat a creditor.
- There is no recent Supreme Court jurisprudence on this issue, but older cases suggest that bankruptcy decisions dealing with fraud tend to be close to unanimous and protective of the creditor.
- In light of relevant precedent, it does not appear that Justice Scalia's absence will affect the result. The cases relied on by the parties in their certiorari briefs were all decided by a unanimous Court or wide majorities:
  - *Cohen v. de la Cruz*, 523 U.S. 213 (1998) (unanimous holding that "§ 523(a)(2)(A) prevents the discharge of all liability arising from fraud, and that an award of treble damages therefore falls within the scope of the exception").
  - *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (unanimous holding that "a medical malpractice judgment attributable to negligent or reckless conduct does not fall within the § 523(a)(6) exception, the debt is dischargeable in bankruptcy").
  - *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015) (unanimous holding that a "debtor who converts to Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee").
  - *Field v. Mans*, 516 U.S. 59 (1995). In this case, the debtor had written letters to petitioners on which they relied in continuing to extend credit to a corporation controlled by the debtor. The case turned on whether the creditors needed to show they reasonably relied on the fraudulent letters or if the standard of justifiable reliance applied. Justice Souter, writing for seven members of the Court, determined that the standard is justifiable reliance. Justices Scalia and Breyer dissented.

Employment: *Green v. Brennan*

- The issue in *Green v. Brennan* is whether, under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as the Tenth Circuit held in this case (and two other circuits have held as well).
  - A review of recent Supreme Court jurisprudence suggests that, in the voting patterns for constructive discharge claims, Justices Scalia, Alito, Thomas, Kennedy and Chief Justice Roberts tend to issue decisions in favor of the employer. For example, in *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), those Justices and Chief Justice Roberts held that each paycheck received by Ledbetter did not constitute a discrete discriminatory act for the Title VII time limit, even if affected by prior discrimination.
  - However, Justice Thomas wrote the majority opinion in *Nat'l R.R. Passenger Corp. v. Morgan*, in which the Court held that a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180- or 300-day period, but that a charge alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period.
  - Comments and questions from the justices at oral argument do not give any clear indication of the potential result, although Chief Justice Roberts and Justices Sotamayor, Ginsburg, Breyer, Kagan and Kennedy seemed to suggest some support for the idea that a claim for constructive discharge cannot run from the last discriminatory act because the claim is not complete until the plaintiff quits. There may be a consensus to reverse the Tenth Circuit, such that Justice Scalia's absence will not affect the outcome.

Diversity Jurisdiction: *Americold Realty Trust v. ConAgra Foods*

- In *Americold Realty Trust v. ConAgra Foods*, the Court will review a Tenth Circuit decision, regarding whether, for diversity jurisdiction purposes, the citizenship of a real estate investment trust is based on the citizenship of the trustees, the trust beneficiaries or some combination of both. The Court's holding could be of particular import to numerous cases in which pension plans are plaintiffs.
  - In *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) (5-4 with Scalia writing for the majority), the Court ruled that the citizenship of a limited partnership for purposes of diversity jurisdiction is based on the citizenship of the limited partners. The court "reject[ed] the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members."
  - The justices' questions at oral argument suggest that most of the justices seem disinclined to accept Americold's argument that the citizenship of the trustees controls, and to favor adoption of a *Carden*-like rule.

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