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New Court Term Hints at Views on Regulating Business

By ADAM LIPTAK

WASHINGTON — The new Supreme Court term that begins Monday will be dominated by cases concerning corporations, compensation and the financial markets that could signal the justices’ attitude toward regulatory constraints at a time of extraordinary government intervention in the economy.

The justices’ decisions will be closely watched at a time when, constitutional scholars say, Obama administration initiatives are generating fundamental questions about the structure and limits of government power that will, in short order, reach the court.

“There will be major ways in which these interventions will produce legal and constitutional issues,” said Michael W. McConnell, a former federal appeals court judge who is now director of the Stanford Constitutional Law Center.

The term will provide important hints, said Richard H. Pildes, a law professor at New York University, to “how much the worst economic crisis since the Depression is going to shape the court’s general stance toward markets and economic regulation.”

Professor Pildes pointed to two cases in particular, one concerning the constitutionality of a regulatory board created in the wake of the Enron accounting scandal, the other about what role the courts should play in setting the compensation of advisers to mutual funds.

The decisions in those cases, he said, are likely to signal whether the court has become “more receptive to regulatory constraints on the market” in the wake of the financial crisis.

The new term comes at a time of rapid change at the court. While the Rehnquist court welcomed no new justices in its final 11 years, ending with Chief Justice William H. Rehnquist’s death in 2005, there have already been three versions of the Roberts court in its first four years. And there may be more changes come summer, if talk of the retirement of Justice John Paul Stevens turns out to be correct.

The court’s newest addition, Justice Sonia Sotomayor, arrived in August, replacing Justice David H. Souter. While most Supreme Court specialists expect her to vote much as Justice Souter did, there are at least two areas in which she may veer away from his approach.

One is criminal law. The other is corporate law, a field in which the expertise she gained on the federal appeals court in New York, with its heavy business docket, will play a major role.

The Obama administration, meanwhile, took office in the middle of the last term and its lawyers made only
minor adjustments in pending cases. They will be freer to chart their own course now. One result, Professor McConnell said, will be an inevitable clash, one echoing confrontations with other ambitious presidents, including Franklin D. Roosevelt and Ronald Reagan.

“Every time in American history when you see a consequential administration,” he said, “you see a heightened tension between it and the court.”

By the time the justices left for their summer break in June, a majority of the cases they had agreed to hear — 24 of 45 — concerned business issues, according to a tally by the National Chamber Litigation Center of the United States Chamber of Commerce. The corresponding numbers last year were 16 of 42.

The nature of the cases has changed, too. In recent terms, the business docket was studded with cases about employment discrimination, federal pre-emption of injury suits and the environment. With the exception of a single employment case, all of those categories are missing.

In their stead, important questions about bankruptcy, corporate compensation, patents, antitrust and government oversight of the financial system will confront the justices.

Free Enterprise Fund v. Public Company Accounting Oversight Board, No. 08-861, for instance, concerns an issue that has engaged the court since the New Deal: at what point does the lack of presidential control over independent agencies violate separation-of-powers principles?

The case arose from the last big financial crisis, the accounting scandals at Enron, Worldcom and other companies. In response, in the Sarbanes-Oxley Act of 2002, Congress created an independent board to oversee accounting firms. The board’s members are appointed and may be removed for cause by the Securities and Exchange Commission, itself an independent agency, meaning the accounting board is doubly insulated from both political pressure and presidential oversight.

The Supreme Court’s ruling in the case, said Professor Pildes, who submitted a brief supporting the board to the appeals court, could affect “how much flexibility Congress will have to design new administrative structures to avoid future financial crises.”

In Jones v. Harris Associates, No. 08-586, the Supreme Court will decide what role the courts should play in regulating the compensation paid to investment advisers for mutual funds. In affirming dismissal of the case, a unanimous three-judge panel of the United States Court of Appeals for the Seventh Circuit, in Chicago, said the issue was a variation on the much-discussed question of whether the markets could be trusted to set executive compensation.

“Publicly traded corporations use the same basic procedures as mutual funds,” Chief Judge Frank H. Easterbrook wrote for the panel. Though he dissented from the full court’s decision not to rehear the case, Judge Richard A. Posner agreed that “executive compensation in large, publicly traded firms often is excessive because of the feeble incentives of boards of directors to police compensation.”

A case re-argued in September and technically part of last year’s docket, Citizens United v. Federal Election Commission, No. 08-205, is another example of the court’s more intensive focus on the limits of government regulation of businesses. The question in the case, which centers on the documentary “Hillary: The Movie,” is...
whether the government may ban political speech by corporations that concerns candidates during campaign season.

Another case about free speech rights, Milavetz, Gallop & Milavetz v. United States, No. 08-1119, arises from a 2005 federal law that appears to bar lawyers from advising their clients to take on more debt if they are considering bankruptcy, a practice that can be abusive. But there are perfectly lawful reasons to take on such debt, like refinancing a mortgage to pay down credit card debt. The Justice Department is urging the court to narrow the law.

The case that has most transfixed the business community is Bilski v. Doll, No. 08-964, a patent dispute that addresses the consequential question of whether intangible business methods may be patented. A federal appeals court last year rejected Bernard L. Bilski’s attempt to patent a method of hedging risks in commodities trading, ruling that only processes tied to a particular machine or capable of transforming an object into something different can be patented.

A broad ruling could affect many aspects of the economy, notably computer software.

“Bilski seems to have the makings of a landmark decision in patent law,” said Pamela Harris, executive director of the Supreme Court Institute at Georgetown University.