Sullivan & Cromwell LLP

Supreme Court Business Review

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Contents

Microsoft Corp. v. *Baker*

Class Actions – Appealing Class Certification Decisions

No. 15-457

Opinion Date: 6/12/17

Vote: 8–0

Author: Ginsburg, J.

Lower Court: Ninth Circuit

In *Microsoft*, the Supreme Court considered the permissibility of a strategy that individual plaintiffs have employed to obtain appellate review of orders denying class certification. As a general rule, 28 U.S.C. § 1291 authorizes the federal courts of appeals to review only "final decisions" of the district courts. Because a denial of class certification does not end the case, such an order is not considered "final," and plaintiffs typically must either wait until after final judgment on their individual claims to appeal the denial or persuade the court of appeals to review the denial order pursuant to its discretionary authority under Federal Rule of Civil Procedure 23(f).

After Microsoft*, plaintiffs seeking appellate review of orders denying class certification must either litigate their individual claims to final judgment or obtain interlocutory Rule 23(f) review at the discretion of the court of appeals.*

In this case, after the Ninth Circuit denied review under Rule 23(f), the plaintiffs voluntarily dismissed their individual claims and then appealed from that dismissal. Although the plaintiffs challenged *only* the district court's order striking their class-action allegations, they argued that the Ninth Circuit could review that order because the *voluntary dismissal* was a "final decision" under Section 1291.

The Court held that this voluntary-dismissal tactic does not satisfy the requirements of Section 1291. The Court reasoned that the tactic "subverts the final-judgment rule," "invites protracted litigation and piecemeal appeals," and "undercuts Rule 23(f)'s discretionary regime" by allowing plaintiffs to force an immediate appeal under Section 1291 while affording no discretion to the court of appeals and no comparable power to defendants.

By eliminating one method to obtain immediate appellate review of denials of class certification, *Microsoft* may result in fewer appeals of class-certification denials and increased settlement pressure on individual plaintiffs who are not permitted to represent classes.

Henson v. *Santander Consumer USA Inc.*

Fair Debt Collection Practices Act – Debt Collectors

The Fair Debt Collection Practices Act (FDCPA) authorizes hefty fines and private class action lawsuits in response to abusive or unfair practices by individuals or entities who collect on consumer debts. One of the FDCPA's statutory definitions provides that a "debt collector" is someone who "regularly collects or attempts to collect . . . debts owed or due . . . another." Although this definition plainly excludes a loan originator (who does not try to collect a debt owed *another*) and includes a third-party collection agent hired to collect another entity's defaulted debt, *Henson* presented the question whether an entity that *purchases* debt and *then* attempts to collect on that debt qualifies as a debt collector under the FDCPA.

The Supreme Court held that such an entity is *not* a "debt collector" because, at the time it tries to collect on the debt, the debt is "owed or due" to itself, not "another." The Court found that the plain text of the FDCPA compels this conclusion and declined to reach a contrary result by speculating about what Congress would have intended had it foreseen the modern market for defaulted debt when it drafted the relevant definition.

No. 16-349

Opinion Date: 6/12/17

Vote: 9–0

Author: Gorsuch, J.

Lower Court: Fourth Circuit

Someone who purchases a debt and then tries to collect on it is not a "debt collector" under one of the definitions of that term in the Fair Debt Collection Practices Act.

*** S&C filed an *amicus* brief in support of respondent on behalf of The Clearing House Association L.L.C., the American Bankers Association, and the Consumer Bankers Association.**

Bank of America Corp. v. *City of Miami*

Fair Housing Act – Cause of Action and Proximate Causation

In *Bank of America*, the Supreme Court considered two questions concerning the Fair Housing Act's scope: what kinds of injuries plaintiffs may sue to redress, and the connection plaintiffs must show between their claimed injuries and the alleged discriminatory conduct.

First, the FHA allows any "aggrieved person" who "claims to have been injured by a discriminatory housing practice" to sue for damages, but plaintiffs must show that their claimed injuries arguably fall within the "zone of interests" that the FHA protects to have a cause of action. Miami asserted economic injuries: that allegedly "predatory" lending to minority customers, which supposedly resulted in disproportionate foreclosures and vacancies in certain neighborhoods, forced Miami to spend more on municipal services to, and reduced the property tax revenues from, those areas. The Court concluded that Miami's claimed injuries arguably fall within the FHA's zone of interests and that Miami is thus an "aggrieved person" entitled to sue.

Second, the Court held that, in order to meet the FHA's proximate-cause requirement, it was not enough for Miami to show that its injuries foreseeably flowed from the alleged discriminatory practices. Drawing from proximate-cause principles in tort, antitrust, and RICO cases, the Court held that FHA plaintiffs must show a "direct relation" between their injury and the discriminatory practice, which will generally only include injuries within the "first step" of the chain of causation.

Bank of America authorizes cities to bring certain FHA claims to redress financial injuries, including against financial institutions, but makes clear that FHA plaintiffs must prove a direct link between their injuries and the allegedly discriminatory conduct in order to prevail.

*** S&C filed an *amicus* brief in support of petitioners on behalf of the U.S. Chamber of Commerce and the Property Casualty Insurers Association.**

No. 15-1111

Opinion Date: 5/1/17

Vote: 5–3

Author: Breyer, J.

Lower Court: Eleventh Circuit

Cities alleging lost revenue and higher costs from discriminatory housing practices have a cause of action under the Fair Housing Act.

Defendants in these suits will have a defense that the causal chain between their conduct and those injuries is too attenuated to establish proximate causation.

State Farm Fire & Casualty Co. v. *Rigsby*

False Claims Act – Violation of Sealing Requirement

The False Claims Act (FCA) permits private parties, known as "relators," to bring suit against persons who make fraudulent claims for payment to the federal government and to receive a portion of the ultimate damages award. The FCA imposes a number of requirements on such *qui tam* suits, including a requirement that the relator's complaint not be filed on the public docket and "remain under seal for at least 60 days." 31 U.S.C. § 3730(b)(2).

In *State Farm*, the Supreme Court considered the appropriate consequence for a relator's failure to abide by the seal requirement. The Court rejected the argument that the FCA mandated dismissal as a sanction for violation of the seal requirement. Referring to other provisions of the FCA that expressly require dismissal for failure to comply with certain conditions, the Court reasoned that Congress knew how to expressly mandate dismissal for violation of the seal requirement if it had intended to do so. The Court further stated that automatic dismissal for violation of the seal requirement would contravene the FCA's purpose by "depriving" the government of the assistance of private parties in ferreting out false claims.

The Court declined to set forth the factors that a district court should consider when determining the appropriate sanction for a violation of the seal requirement, but left that determination to "the sound discretion of the district court." Accordingly, defendants may still argue that dismissal is warranted based on the circumstances of a particular case.

*** S&C served as co-counsel for the petitioner in this case.**

No. 15-513

Opinion Date: 12/6/16

Vote: 8–0

Author: Kennedy, J.

Lower Court: Fifth Circuit

A violation of the False Claims Act's sealing requirement does not automatically require dismissal of a relator's suit, though defendants may argue that such a sanction is justified in the case of egregious and intentional violations.

Expressions Hair Design v. *Schneiderman*

First Amendment – Restrictions on Communicating Prices

In *Expressions Hair Design*, the Supreme Court considered whether N.Y. Gen. Bus. Law § 518, which prohibits merchants from "impos[ing] a surcharge" on credit card transactions, regulates speech and is therefore subject to First Amendment scrutiny. The merchants asserted that they wished to display their prices as one sticker price ("$10"), plus an additional fee charged to credit card transactions ("with a $.30 surcharge for credit card users"), but that Section 518 prevented them from communicating their prices in that manner. The Second Circuit held that Section 518 prohibited such a pricing scheme and concluded that the law regulated prices, not speech, and thus was not subject to First Amendment scrutiny.

Deferring to the Second Circuit's interpretation of Section 518, the Supreme Court concluded that the law does regulate speech. Because Section 518 "tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer," the Court reasoned, it is not a pure price regulation. Instead, the law prevents sellers from communicating their prices in a particular way. In other words, under the Second Circuit's interpretation, the merchants may post the sticker price as $10.30 for credit card transactions, but they may not post the sticker price as $10 plus an additional $.30 fee for credit cards. Because Section 518's prohibition was triggered by the way the merchants *communicated* their prices rather than the prices themselves, the Court determined that the law should receive First Amendment scrutiny, and remanded the case so the Second Circuit could apply that scrutiny in the first instance.

Expressions Hair Design may open up a wider range of regulations to First Amendment scrutiny if businesses can show that the laws' applications somehow depend on the manner in which information is communicated.

No. 15-1391

Opinion Date: 3/29/17

Vote: 8–0

Author: Roberts, C.J.

Lower Court: Second Circuit

Laws restricting how merchants communicate prices—as opposed to how merchants set those prices—are speech regulations subject to First Amendment scrutiny.

Impression Products, Inc. v. *Lexmark International, Inc.*

Intellectual Property – Patent Exhaustion Doctrine

In *Impression Products*, the Supreme Court overturned two longstanding limitations on the scope of the patent exhaustion doctrine—*i.e.*, the rule that a patent holder who sells its product can no longer control that item through the patent laws.

First, the Court held that a patentee may not claim infringement for a patented product after an authorized sale of that product even if the purchaser's resale right is restricted. The Court reasoned that the limited monopoly right conveyed by a patent is extinguished by an authorized sale of a product, which conveys a "bundle of rights" including the common-law right to freely use or sell a purchased item. Thus, although a restriction on purchaser resale may be enforceable as a matter of contract law, it cannot be enforced through a patent infringement suit. A patentee *may* impose restrictions on a *licensee* of a product, because a license is not a sale of the patented product and necessarily contemplates restrictions on its use.

Second, the Court rejected the Federal Circuit's holding that a patentee does not exhaust its patent rights by selling the product outside the United States. Consistent with its holding in the copyright context, the Court explained that the location of a sale does not alter the common-law background principle that restrictions on the subsequent sale or reuse of a product are unenforceable.

By overturning two longstanding patent exhaustion limitations previously recognized by the Federal Circuit, *Impression Products* may require companies to adjust their approaches when seeking to protect their interests in a patented item that they wish to sell.

No. 15-1189

Opinion Date: 5/30/17

Vote: 8–0

Author: Roberts, C.J.

Lower Court: Federal Circuit

A patent holder seeking to impose restrictions on the further use or resale of its product must do so through contract law remedies or by licensing the product rather than selling it.

The limitations imposed by the patent exhaustion doctrine apply equally to sales in the United States and abroad.

Life Technologies Corp. v. *Promega Corp.*

Intellectual Property – Supply of Components Abroad

Section 271(f)(1) of the Patent Act imposes liability upon a person who supplies from the United States "all or a substantial portion of the components of a patented invention" for combination outside the United States in a way that would infringe the patent if such combination occurred domestically. In *Life Technologies*, the Supreme Court considered whether supplying a single component of a multicompetent invention for manufacturing abroad may be considered "substantial" and thus trigger infringement liability under this provision.

The Court unanimously concluded that the term "substantial" is best construed in the quantitative sense, rather than permitting a qualitative assessment of a single component's importance to the overall invention. Under that interpretation, the Court held, a single component will never constitute a "substantial portion" of a multicomponent invention, and thus supplying a single component can never be sufficient to trigger liability under Section 271(f)(1).

Life Technologies sets a bright-line rule that the only relevant factor in determining infringement liability under Section 271(f)(1) is the quantity of components supplied for combination abroad, and that one component is not enough to infringe. But the opinion leaves other questions unanswered, such as precisely how many components are necessary to constitute a "substantial portion," or how a court should identify a "component" of a patented invention in the first place. Parties should expect these issues to be the focus of future litigation under this provision.

No. 14-1538

Opinion Date: 2/22/17

Vote: 7–0

Author: Sotomayor, J.

Lower Court: Federal Circuit

Supplying a single component of a multicomponent invention for combination abroad cannot give rise to infringement liability under Section 271(f)(1) of the Patent Act.

Samsung Electronics Co. v. *Apple Inc.*

Intellectual Property – Design Patent Infringement Damages

No. 15-777

Opinion Date: 12/6/16

Vote: 8–0

Author: Sotomayor, J.

Lower Court: Federal Circuit

In *Samsung*, the Supreme Court overruled the Federal Circuit's interpretation of the term "article of manufacture" in Section 289 of the Patent Act. That provision allows a patent holder to recover the total profit an infringer makes from manufacturing or selling "any article of manufacture to which [a patented] design or colorable imitation has been applied"—*i.e.*, the total profit an infringer makes from infringing a design patent. For multicomponent products, the Federal Circuit had interpreted the term "article of manufacture" to always mean the end product ultimately sold to consumers, not any individual component of that product. Under that interpretation, a patent holder was always entitled to the infringer's total profit earned from the end product, not just a component of that product—in this case, the profits from sales of the entire smartphone, not just the profits attributable to its infringing face or icon design.

For purposes of determining design patent infringement damages under Section 289 of the Patent Act, the "article of manufacture" is not necessarily the end product sold to consumers, but may instead be a component of that product.

The Court unanimously rejected the Federal Circuit's interpretation, holding that the term "article of manufacture" encompasses both the end product and the components of that product. "An article of manufacture," the Court reasoned, "is simply a thing made by hand or machine." As a result, depending on the "article of manufacture" to which the infringed design has been applied, an infringer may be on the hook for its profits from either the end product or a single component.

The Court did not provide guidance for how courts should identify the relevant "article of manufacture," and that will be the critical question in future litigation over the amount of damages design patent holders may recover from an infringer. But by rejecting the Federal Circuit's narrow reading of "article of manufacture," the Court has potentially reduced design patent infringers' liability in at least some cases.

Sandoz Inc. v. *Amgen Inc.*

Intellectual Property – Biologics Price Competition and Innovation Act

In *Sandoz*, the Supreme Court clarified two important aspects of the Biologics Price Competition and Innovation Act, which creates an abbreviated process for FDA approval of "biosimilar" drugs—*i.e.*, biologic products claiming to be highly similar to an already approved biologic product—and facilitates litigation of relevant patents before a biosimilar is marketed.

First, Section 262(*l*)(2)(A) of the Act requires a biosimilar applicant to provide its application and manufacturing information to the manufacturer of the corresponding biologic within 20 days of receiving notice that the FDA has accepted the application for review. The Court held that an injunction is not available under federal law for the manufacturer to compel compliance with Section 262(*l*)(2)(A); the exclusive federal remedy is a declaratory judgment action for patent infringement. The Court did not decide, however, what state-law remedies might be available or whether any such remedies would be preempted by the Act.

Second, Section 262(*l*)(8)(A) of the Act requires a biosimilar applicant to provide notice to the manufacturer of the corresponding biologic "not later than 180 days before the date of the first commercial marketing" of the biosimilar. The Court held, based on the plain text and context of Section 262(*l*)(8)(A), that applicants need not wait for FDA approval to provide such notice.

Sandoz should promote early resolution of patent disputes for biosimilars, so that marketing may begin immediately after FDA approval. *Sandoz* also assures biosimilar applicants that they may not be compelled as a matter of federal law to disclose their application and manufacturing information, although a decision not to do so carries the risk of substantial loss of control and certainty over the patent litigation process.

No. 15-1039

Opinion Date: 6/12/17

Vote: 9–0

Author: Thomas, J.

Lower Court: Federal Circuit

Biosimilar applicants may provide notice of commercial marketing before FDA approval, thus promoting earlier resolution of patent disputes relating to the product.

The only federal remedy available to manufacturers for a biosimilar applicant's failure to timely disclose its application and manufacturing information is a declaratory judgment action.

SCA Hygiene Products v. *First Quality Baby Products*

Intellectual Property – Laches Defense

No. 15-927

Opinion Date: 3/21/17

Vote: 7–1

Author: Alito, J.

Lower Court: Federal Circuit

The equitable defense of laches allows a defendant to obtain dismissal of a suit that a plaintiff unreasonably and prejudicially delays in bringing. In *SCA Hygiene*, the Supreme Court held that laches cannot bar a damages claim in a patent infringement suit that the plaintiff brings within the six-year statute of limitations provided in the Patent Act, 35 U.S.C. § 286.

The Court explained that this determination followed directly from its 2014 decision in *Petrella* v. *Metro-Goldwyn-Mayer, Inc.* that laches is not a basis to dismiss a copyright infringement claim for damages brought within the Copyright Act's three-year limitations period. In both contexts, Congress had expressly enacted a rule governing the timeliness of claims, and there was no equitable "gap" for the doctrine of laches to fill.

After SCA Hygiene, *laches is no longer a defense to a patent infringement suit seeking damages for infringement occurring within the Patent Act's six-year statute of limitations.*

The decision in *SCA Hygiene* makes it easier for a patentee to put an infringer on notice and then (if the infringer refuses to take a license or cease infringement) wait before bringing suit, perhaps until the infringer makes profits. Entities concerned about infringement litigation long after the time of infringement may choose to seek a declaratory judgment in district court or *inter partes* review in the U.S. Patent & Trademark Office.

Other defenses may still be available to accused infringers to counter unfair conduct and delay by patent holders. For instance, the Court specified that the defense of equitable estoppel may still operate to bar particularly unscrupulous claims, such as those brought by patent holders who induce infringement, only to later bring suit.

TC Heartland LLC v. *Kraft Foods Group Brands LLC*

Intellectual Property – Venue Requirement for Patent Litigation

No. 16-341

Opinion Date: 5/22/17

Vote: 8–0

Author: Thomas, J.

Lower Court: Federal Circuit

In *TC Heartland,* the Supreme Court considered the Federal Circuit's longstanding venue rule that a domestic corporate defendant may be sued for patent infringement in any judicial district in which that defendant is subject to personal jurisdiction with respect to that suit. This expansive venue rule, based on the Federal Circuit's determination that Congress's amendment of the general venue statute, 28 U.S.C. § 1391, also applied to expand the patent-specific venue statute in 28 U.S.C. § 1400(b), permitted the development of several districts popular with patent infringement plaintiffs, such as the Eastern District of Texas and the Eastern District of Virginia.

The Court unanimously reversed the Federal Circuit's rule. Noting that it had previously interpreted the patent venue statute's reference to "the judicial district where the defendant resides" to mean only the defendant's state of incorporation, the Court held that Congress's amendment of the *general* venue statute did not alter that interpretation of Section 1400(b). Accordingly, the Court held that a domestic corporate defendant "resides" only in its state of incorporation for purposes of patent venue.

Importantly, the Court had no occasion in this case to consider the second half of the patent venue statute, which provides that a defendant may be sued in any district "where the defendant has committed acts of infringement and has a regular and established place of business." Parties can be expected to dispute the proper interpretation of that provision in future litigation where plaintiffs seek to sue corporate defendants outside their states of incorporation. The Court also did not resolve how its interpretation of the venue provision applies to a foreign corporation, which is not incorporated in *any* U.S. judicial district.

Overturning 30 years of patent venue law, TC Heartland *holds that a domestic corporation may only be sued in its state of incorporation or where it has a "regular and established place of business."*

Popular districts for patent plaintiffs in Texas and Virginia can expect to see a large decline in their patent litigation dockets.

McLane Co. v. *EEOC*

Labor and Employment – Appellate Review of EEOC Subpoenas

No. 15-1248

Opinion Date: 4/3/17

Vote: 7–1

Author: Sotomayor, J

Lower Court: Ninth Circuit

The Equal Employment Opportunity Commission (EEOC) enjoys broad statutory subpoena power in aid of its authority to enforce the employment discrimination prohibition of Title VII of the Civil Rights Act of 1964. If an employer refuses to comply with a subpoena, the EEOC may seek to enforce it in district court. Under prior Supreme Court precedent, so long as the EEOC's charge of discrimination is proper and the material requested is relevant, the district court should enforce the subpoena unless the employer shows that it is too indefinite, has been issued for illegitimate purposes, or is unduly burdensome.

In *McLane*, the Supreme Court addressed whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena *de novo*—*i.e.*, as though the court of appeals were deciding the issue in the first instance—or merely for an abuse of discretion—giving deference to the district court's assessment.

The Court held that abuse of discretion is the appropriate standard of appellate review. First, the Court reasoned, courts of appeals generally have reviewed district courts' decisions regarding subpoena enforcement for abuse of discretion in other contexts, and all but one did so with respect to EEOC subpoenas. Second, the Court observed that district courts are better suited to making the fact-specific determinations underlying the decision to enforce an EEOC subpoena, such as whether the evidence sought is relevant and whether the subpoena is unduly burdensome.

The impact of *McLane* is limited by the fact that the Ninth Circuit had been the only court of appeals to apply *de novo* review in this context. Parties in every circuit will now face a heavy burden in seeking to overturn a district court's determination as to whether an EEOC subpoena should be enforced or quashed.

To persuade an appellate court to overturn a district court's decision to enforce or quash an EEOC subpoena, parties typically will need to show that the district court abused its discretion by committing an error of law in its analysis.

BNSF Railway Co. v. *Tyrrell*

Personal Jurisdiction – Limits on General Jurisdiction

In *Tyrrell*, the Supreme Court reversed Montana's assertion of general personal jurisdiction over a railroad, incorporated in Delaware with its principal place of business in Texas, in an action brought by non-Montana residents seeking to recover for injuries suffered outside of Montana.

First, the Court concluded that Section 56 of the Federal Employers' Liability Act (FELA) does not confer personal jurisdiction on federal or state courts. The Court explained that the first sentence of that provision, which states that "an action may be brought in a district court . . . in which the defendant shall be doing business," is a venue provision, not a provision for the exercise of personal jurisdiction (which Congress typically accomplishes by authorizing service of process). The Court further explained that the second relevant sentence of Section 56, which states that the "jurisdiction of" the federal courts under FELA "shall be concurrent with that" of state courts, confers *subject matter* jurisdiction, not personal jurisdiction.

Second, the Court held that Montana could not exercise general jurisdiction over the railroad under a rule purporting to authorize Montana courts to exercise jurisdiction over all "persons found" in the State. The Court explained that allowing all-purpose jurisdiction over the railroad on the basis of that rule would violate the due process constraints explained most recently in *Daimler AG* v. *Bauman*, which held that a corporate entity is subject to general jurisdiction only in such states where it is essentially "at home." That test applies, the Court confirmed, to "all state-court assertions of general jurisdiction over nonresident defendants; that constraint does not vary with the type of claim asserted or business enterprise sued."

No. 16-405

Opinion Date: 5/30/17

Vote: 8–1

Author: Ginsburg, J.

Lower Court: Mont. Sup. Ct.

Section 56 of the Federal Employers' Liability Act does not itself provide for personal jurisdiction in any particular judicial district.

Tyrrell *confirms that the rule that corporate entities may be subject to general jurisdiction only in those States where they are "at home" does not vary with the type of claim asserted.*

Bristol-Myers Squibb Co. v. *Superior Court of California*

Personal Jurisdiction – Limits on Specific Jurisdiction

No. 16-466

Opinion Date: 6/19/17

Vote: 8–1

Author: Alito, J.

Lower Court: Cal. Sup. Ct.

In *Bristol-Myers Squibb*, the Supreme Court clarified the requirements of due process when a State seeks to exercise specific jurisdiction over a nonresident defendant sued by a nonresident plaintiff. The case involved consolidated actions brought in California by both resident and nonresident plaintiffs to recover for injuries allegedly caused by a drug manufactured by Bristol-Myers Squibb (BMS), which is incorporated in Delaware and headquartered in New York. The nonresident plaintiffs did not allege that they purchased, took, were injured by, or were treated for the drug in California; they instead relied on BMS's nationwide marketing of the drug and a number of other unrelated contacts BMS had with California, such as laboratories and state advocacy offices.

The Court held that California could not exercise specific jurisdiction over the nonresident plaintiffs' actions against BMS. The Court rejected the California Supreme Court's "sliding scale" analysis, whereby the more contacts a nonresident defendant has with the State, the less direct a connection the nonresident plaintiffs were required to show between their claim and the defendant's forum contacts. The Court made clear that the critical element of establishing specific jurisdiction is the connection between the defendant's contacts with the forum and the plaintiffs' claims. The Court found no support in its case law for relaxing that requirement based on a defendant's *other* contacts with the forum that are unrelated to the controversy.

Finally, the Court rejected the plaintiffs' effort to premise jurisdiction on BMS's decision to contract with a California company to distribute the drug nationally, noting that the requirements to establish jurisdiction must be met as to *each* defendant, and the mere act of contracting with a third-party company for nationwide distribution of a product is insufficient to establish jurisdiction.

Bristol-Myers Squibb *will likely reduce the prevalence of aggregated lawsuits brought by out-of-state plaintiffs in states other than the defendant's state of incorporation and principal place of business.*

CalPERS v. *ANZ Securities*

Securities Fraud – Statute of Repose

No. 16-373

Opinion Date: 6/26/17

Vote: 5–4

Author: Kennedy, J.

Lower Court: Second Circuit

The Securities Act sets two time restrictions that govern lawsuits alleging misstatements or omissions in securities registration statements: a statute of limitations providing that the plaintiff must bring suit within a year of discovering the misrepresentation or omission, and a statute of repose providing that "in no event" may such a suit be brought more than three years after the offering of the security. The question in *CalPERS* was whether so-called "*American Pipe* tolling," under which the filing of a putative class action tolls the statute of limitations for all members of the putative class, applies to extend the Securities Act's three-year statute of repose for putative class members who later opt out of the class.

In a 5-4 decision, the Supreme Court held that *American Pipe* tolling does *not* toll the Securities Act's prohibition on claims brought more than three years after a security offering. The Court explained that the tolling principle adopted in *American Pipe* is a judge-made rule grounded in considerations of equity and fairness. Such equitable tolling rules form the common-law background against which Congress enacts statutes of *limitations*, the Court reasoned, but a statute of *repose* reflects a legislative judgment that a defendant should be categorically protected from liability after a certain amount of time has passed since an alleged violation. Such statutes leave no room for courts to modify time limits out of equitable concerns.

After *CalPERS*, investors who are unnamed members of a putative class and wish to protect their right to later bring individual claims must take action to do so—by moving to intervene as a class representative or filing a separate action, for example—before the three-year statute of repose expires. The decision should allow defendants to better assess their potential exposure to individual actions beyond the risks faced from the putative class action.

The Securities Act's three-year statute of repose is not tolled by the filing of a putative class action. As a result, unnamed members of a putative class must take action to press their own claims before the three-year period expires if they wish to protect their ability to pursue such individual claims.

Kokesh v. *SEC*

Securities Fraud – Limitations Period for SEC Disgorgement

In *Kokesh*, the Supreme Court held that a five-year statute of limitations applies when the Securities and Exchange Commission (SEC) seeks disgorgement in enforcement actions. Under 28 U.S.C. § 2462, a five-year statute of limitations applies to any government "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." In a unanimous opinion, the Court concluded that SEC disgorgement—a remedy requiring a defendant to give up ill-gotten gains attributable to his violations of the securities laws—operates as a "penalty," because the remedy is imposed for claims based on public laws rather than private disputes, is imposed for punitive purposes, and is not exclusively used to compensate individuals harmed by the defendant's conduct. Accordingly, SEC disgorgement is subject to the five-year limitations period in Section 2462, and the SEC may seek disgorgement only of those gains obtained through violations occurring within the five-year limitations period.

More broadly, *Kokesh* may limit the SEC's ability to bring enforcement actions or negotiate settlements for claims falling outside the five-year limitations period. Although the Court's holding was limited to SEC enforcement actions, Section 2462 applies to many agencies and contexts, and the Court's reasoning may thus apply equally to enforcement actions brought by other agencies, such as the Commodity Futures Trading Commission.

Notably, *Kokesh* explicitly left open two more fundamental questions: whether disgorgement is available at all as a remedy in SEC enforcement actions, and if so, whether courts have been appropriately applying disgorgement principles in such actions. Defendants may thus wish to challenge the propriety of the disgorgement remedy in future SEC enforcement actions.

No. 16-529

Opinion Date: 6/5/17

Vote: 9–0

Author: Sotomayor, J.

Lower Court: Tenth Circuit

The SEC may seek disgorgement only of those gains earned by a defendant within the five years preceding the filings of the SEC's enforcement action.

Kokesh*'s reasoning likely extends to similar enforcement actions brought by other agencies.*

Salman v. *United States*

Securities Fraud – Insider-Trading Liability

No. 15-628

Opinion Date: 12/6/16

Vote: 8–0

Author: Alito, J.

Lower Court: Ninth Circuit

Salman addressed the scope of criminal insider-trading liability for "tippees." The securities laws prohibit those who acquire material, nonpublic information subject to a duty of trust and confidence from secretly trading on that information. These individuals also may not "tip" such information to others for trading in violation of their fiduciary duties. A tippee acquires the tipper's duty to abstain from trading if the tippee knows the information was disclosed in breach of the tipper's duty, and thus can be liable for securities fraud to the same extent as the tipper. In its prior decision in *Dirks* v. *SEC*, the Supreme Court held that a tipper breaches his duty by disclosing the information for a personal benefit—*i.e.*, by receiving "something of value" in exchange for the inside information.

In *Salman*, the Court clarified that a jury may infer such a personal benefit to the tipper where the tipper merely *gifts* the information to a relative or friend, without receiving any pecuniary benefit in return. The Court reasoned that gifting inside information to a relative or friend is effectively equivalent to the tipper trading on the information himself and then gifting the cash proceeds to the relative or friend—a scenario that all agreed would amount to a breach of the tipper's duty.

Salman resolves uncertainty surrounding insider-trading liability that was introduced by the Second Circuit's 2014 ruling in *United States* v. *Newman*, which held that, for a tippee to be liable, the tipper must receive a benefit of a pecuniary or similarly valuable nature. Yet *Salman* left unanswered other questions about the reach of insider-trading liability, such as who counts as a "relative or friend," or what may constitute a sufficient showing of a nonpecuniary personal benefit to the tipper where the tippee is *not* a relative or friend.

Salman *makes clear that merely gifting inside information to a friend or relative, without any expected pecuniary benefit in return, may count as a sufficient "personal benefit" to establish insider trading liability for both the tipper and the tippee.*

Town of Chester v. *Laroe Estates, Inc.*

Standing Doctrine – Requirements for Intervenors

In *Town of Chester*, the Supreme Court considered whether litigants must have Article III standing to intervene as of right. Federal Rule of Civil Procedure 24(a)(2) allows a person to intervene in a lawsuit when he has an interest in the subject of the action that may be impaired if the case is adjudicated in his absence. Although it is well established that a *plaintiff* must demonstrate a concrete injury that is fairly traceable to the defendant's conduct and is likely to be redressed by a favorable decision, the Supreme Court had never decided whether intervenors of right must do the same.

The parties agreed that intervenors of right must show that they have Article III standing if they seek relief that is different from the relief sought by the plaintiff(s). The Supreme Court unanimously agreed with that principle and did not go further, but instead remanded for the lower courts to decide whether the intervenor in this case sought different relief from the original plaintiff.

The Court did not address other questions briefed by the parties, such as the appropriate juncture in the litigation at which a court should assess an intervenor of right's standing, or whether the requirements of Rule 24(a)(2) and Article III standing essentially overlap.

As a practical matter, intervenors seeking damages will often be required to establish their own Article III standing, unless intervenors and plaintiffs seek to recover the same identifiable pool of funds. Importantly, *Town of Chester* is silent on whether an intervenor of right seeking the same relief as the plaintiff needs to show his own standing, so a standing argument is still available to defendants facing claims from proposed intervenors of right.

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Author: Alito, J.

Lower Court: Second Circuit

If an intervenor of right seeks relief that differs from that requested by a plaintiff in the case, that intervenor must demonstrate Article III standing in order to be permitted to intervene.

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