SULLIVAN & CROMWELL LLP

SUPREME COURT BUSINESS REVIEW

October Term 2014

Contents

Page

Administrative Law

- *Mach Mining, LLC* v. *EEOC* 1
- *Michigan* v. *EPA* 2
- *Perez* v. *Mortgage Bankers Association* 3
- *Whitman* v. *United States* 4

Civil Procedure

- *Dart Cherokee Basin Operating Co.* v. *Owens* 5
- *Gelboim* v. *Bank of America* 6

Civil Rights

- *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.* 7

Labor and Employment

- *EEOC* v. *Abercrombie & Fitch Stores, Inc.* 8
- *Integrity Staffing Solutions, Inc.* v. *Busk* 9
- *Young* v. *United Parcel Service* 10

Patents

- *Commil USA, LLC* v. *Cisco Systems, Inc.*.....11
- *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*.....12

Preemption

- *Oneok, Inc.* v. *Learjet, Inc.* 13

Securities Litigation

- *Omnicare, Inc.* v. *Laborers District Council Construction Industry Pension Fund*.....14

Statutes of Limitations

- *Kellogg Brown & Root Services* v. *U.S. ex rel. Carter*.....15
- *Jesinoski* v. *Countrywide Home Loans, Inc.* 16
- *Tibble* v. *Edison International* 17

Taxation

- *Comptroller* v. *Wynne*.....18

Mach Mining, LLC v. EEOC

Administrative Law – Judicial Review of Agency Action

In *Mach Mining*, the Supreme Court considered whether and to what extent courts may review the Equal Employment Opportunity Commission's attempt to conciliate an employment discrimination charge, as required by Title VII of the Civil Rights Act, before the agency may bring suit against the employer. The Court unanimously held that, like other prerequisites to suit under Title VII, courts may review whether the EEOC has satisfied the attempted conciliation requirement before allowing a suit to go forward.

As for the scope of that judicial review, the Court rejected the arguments put forth by both the government and Mach Mining. The Court rejected reliance merely on the EEOC's "say-so that it complied with the law," but it also declined to accept Mach Mining's argument that courts should engage in robust review for a showing of good-faith bargaining akin to the review under the National Labor Relations Act. The Court held that reviewing courts must ensure that the statutory requirements have been satisfied: the agency informed the employer of the nature of the specific discrimination alleged and employees involved, and it attempted to engage the employer in a discussion to allow the employer to remedy the alleged discrimination informally. A sworn affidavit from the EEOC stating that it has fulfilled these obligations will normally suffice, but courts must conduct necessary factfinding when the employer presents concrete evidence suggesting otherwise.

The EEOC will now be required to establish a record of attempted conciliation in each case, but it will have some leeway in how it engages in conciliation efforts in each particular case. Employers should challenge any failure by the EEOC to provide sufficient information about the specific discriminatory practices alleged and the employees involved.

No. 13-1019

Opinion Date: 4/29/15

Vote: 9–0

Author: Kagan, J.

Lower Court: Seventh Circuit

Employers notified of an employment discrimination charge should insist that the EEOC provide them with detailed information regarding the alleged discriminatory practices and affected employees. Employers should also insist that the EEOC engage in a conciliation effort.

Michigan v. EPA

Administrative Law – Consideration of Costs of Regulation

In *Michigan* v. *EPA*, the Supreme Court held that in determining whether it is "appropriate and necessary" to regulate power plant emissions, the Environmental Protection Agency is required to consider the costs that would be imposed by such regulation (rather than merely accounting for costs in the subsequent setting of emissions standards).

The Court held that the EPA had unreasonably interpreted the statutory term "appropriate" to "not allow for the consideration of costs" when deciding whether to regulate power plants. The Court noted that the word "appropriate" is a broad term suggesting consideration of all relevant factors, and that agencies "have long treated cost as a centrally relevant factor when deciding whether to regulate." A formal cost-benefit analysis was not necessarily required, the Court explained; it would be up to the agency to decide how to account for cost considerations.

The Court's decision affirms the centrality of cost considerations to agency decision-making under broadly worded statutes. But because agencies have flexibility in considering how they will account for cost, it is not clear how the obligation to consider costs will affect the regulatory process or outcomes. Regulated entities will need to consider challenging not simply whether agencies have taken account of cost, but whether they have done so in an appropriate way.

No. 14-46

Opinion Date: 6/29/15

Vote: 5–4

Author: Scalia, J.

Lower Court: D.C. Circuit

Regulated entities should consider challenging whether agencies with broad statutory mandates have considered the costs of complying with regulations or have considered those costs in an appropriate way.

Perez v. Mortgage Bankers Association

Administrative Law – Notice and Comment

Perez addressed the D.C. Circuit's longstanding *Paralyzed Veterans* doctrine, which required federal agencies to follow notice-and-comment procedures when significantly changing interpretive rules. The Supreme Court held that the *Paralyzed Veterans* rule is inconsistent with the text of the Administrative Procedure Act, which exempts the issuance and modification of interpretive rules from notice-and-comment requirements.

The Court suggested, however, that a changed interpretation should be subject to searching review by courts, especially when regulated entities have relied extensively on the prior interpretation. As a result, an agency will need to provide a more substantial justification for a new interpretive rule that unsettles serious reliance interests or that is based on factual findings contrary to previous findings. The Court also noted that agencies may not be able to apply a new interpretive rule retroactively to past conduct.

Justices Scalia, Thomas, and Alito each wrote separately to question whether courts should defer to agencies' interpretations of their own regulations.

In the wake of *Perez*, companies and individuals should raise and preserve retroactivity defenses when facing agency enforcement actions based on changed interpretations. Regulated entities also should preserve arguments that agencies' interpretive rules are not entitled to any deference by courts.

No. 13-1041

Opinion Date: 3/9/15

Vote: 9-0

Author: Sotomayor, J.

Lower Court: D.C. Circuit

Perez *makes it procedurally easier for agencies to modify their interpretations of existing regulations.*

Parties should consider challenging whether new interpretive rules may be applied to past conduct and whether they are entitled to judicial deference.

Whitman v. United States

Administrative Law – Statutory Interpretation

In *Whitman*, the Supreme Court declined to review a criminal conviction for insider trading under Section 10(b) of the Securities Exchange Act of 1934. In affirming the conviction, the Second Circuit deferred to the Securities and Exchange Commission's interpretation of what Section 10(b) prohibits.

Justice Scalia issued a statement respecting the denial of certiorari, joined by Justice Thomas, expressing serious doubt that courts should defer to agencies' interpretations of laws that contemplate criminal enforcement. Justice Scalia observed that deference to agency interpretation in the criminal context is both inconsistent with the rule of lenity and ultimately contrary to "the principle that only the legislature may define crimes and fix punishments." Although Justice Scalia agreed that Whitman's petition was not an appropriate vehicle, he expressed interest in considering this question in a future case.

Although their statement carries no precedential value, Justice Scalia and Justice Thomas have led major shifts in criminal law jurisprudence in the past and have now openly signaled their interest in this issue. Accordingly, when faced with an agency interpretation of an ambiguous statute that potentially carries criminal penalties, companies and individuals should consider raising this issue in legal presentations to regulators and prosecutors, even in the civil enforcement context. Parties should also take care to preserve the issue for appellate review in cases in which the government relies upon agency interpretation of an ambiguous statute that may have criminal implications.

No. 14-29

Opinion Date: 11/10/14

Vote: n/a

Author: Scalia, J. (statement respecting denial of certiorari)

Lower Court: Second Circuit

Even in the civil enforcement context, parties should make and preserve challenges to agency interpretations of ambiguous statutes that carry potential criminal penalties.

Dart Cherokee Basin Operating Co. v. Owens

Civil Procedure – Removal to Federal Court

A defendant may remove a class action based on state law from state to federal court if, among other requirements, the amount in controversy exceeds $5 million. If the class complaint does not expressly allege the amount of damages sought, what must a defendant include in its notice of removal to demonstrate that the statutory amount-in-controversy requirement is satisfied?

In *Dart Cherokee*, the Supreme Court held that such a defendant need only include a plausible allegation in its notice of removal that the amount in controversy exceeds the jurisdictional threshold. The removal statute, the Court reasoned, requires only a "short and plain statement of the grounds for removal," language designed to track the general federal pleading standards for a plaintiff attempting to establish federal diversity jurisdiction in the first instance. The Court therefore rejected the Tenth Circuit's rule requiring defendants to include evidence in support of their amount-in-controversy allegation in a notice of removal. A defendant need only adduce evidence if the plaintiff later contests the amount-in-controversy allegation in the notice of removal.

In a short but significant aside, the Court clarified that there is no presumption against removal under the Class Action Fairness Act of 2005, thus rejecting the view of some lower courts that such a presumption exists. The Court emphasized the Act's "strong preference" that large interstate class actions be heard in federal court.

Defendants seeking to remove cases from state to federal court need only include in the notice of removal plausible allegations that the jurisdictional amount in controversy is exceeded. They should be prepared to respond with evidence, however, if removal is contested. In CAFA cases, defendants seeking removal may now face a lower bar in jurisdictions where courts had previously applied a presumption against removal.

No. 13-719

Opinion Date: 12/15/14

Vote: 5–4

Author: Ginsburg, J.

Lower Court: Tenth Circuit

Dart Cherokee *may make it easier for defendants to remove cases from state court to federal court, especially in large class actions. The Court rejected a presumption against removal and emphasized the "strong preference" of the Class Action Fairness Act for large class actions to be heard in federal court.*

Gelboim v. Bank of America*

Civil Procedure – Appealability in Multidistrict Litigation

In *Gelboim*, the Supreme Court considered what should happen when, in the course of consolidated pretrial proceedings in a multidistrict litigation (MDL), the court issues an order disposing of claims in one case but not others. Is the plaintiff whose claims have been dismissed entitled to take an immediate appeal, even though other plaintiffs remain before the MDL court and the consolidated pretrial proceedings remain ongoing?

The Supreme Court said yes. In the Court's view, cases consolidated for MDL pretrial proceedings normally retain their separate identities, unless the parties have elected to file a single master complaint and consolidated answer. An order disposing of one of those cases is therefore an appealable final decision. That rule, the Court stressed, provides litigants with certainty on when they should appeal and keeps them from having to wait for the disposition of many other cases.

The Court noted that, under its approach, plaintiffs with the weakest cases might be the first dismissed and thus positioned to take early appeals that could affect other plaintiffs with stronger cases. But the Court emphasized that the MDL court may enter partial judgment under Federal Rule of Civil Procedure 54(b) and thus allow other plaintiffs to join in an appeal. The MDL court also could delay entering any judgments at all and thereby forestall early appeals.

Finally, the Court's decision is notable for what it does not do. Virtually all of the federal courts of appeals have held that when cases are *fully* consolidated in an MDL (and not merely consolidated for pretrial proceedings), an order disposing of one of the cases is not appealable. The Court did not address that question, and thus defendants can continue to argue that appealability is different for full consolidation than for pretrial consolidation.

*S&C served as counsel for respondents in this case.

No. 13-1174

Opinion Date: 1/21/15

Vote: 9–0

Author: Ginsburg, J.

Lower Court: Second Circuit

When cases are consolidated for pretrial proceedings in an MDL, a plaintiff whose case is dismissed may take an immediate appeal.

Defendants can argue, however, that the same rule does not apply when cases have been consolidated for all purposes in an MDL.

Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.

Civil Rights – Disparate-Impact Claims

In *Texas Department of Housing & Community Affairs*, the Supreme Court considered whether the Fair Housing Act (FHA) permits challenges to housing policies or practices that, though not discriminatory on their face or in their intent, disparately impact minorities.

The Court held that, by making it unlawful to "otherwise make unavailable" a dwelling on the basis of a protected characteristic, the Act demonstrates a statutory purpose to allow disparate-impact claims. Viewed in light of that purpose, amendments to the Act, and the Court's previous decisions interpreting other anti-discrimination laws, the Court concluded that the Act's "results-oriented language" authorizes disparate-impact claims.

The Court made clear, however, that disparate-impact claims are subject to important limits. The FHA requires only the removal of "artificial, arbitrary, and unnecessary barriers" that disparately impact minorities. Thus, courts must allow housing authorities and developers to show that their challenged policies serve valid interests, and courts should not reject a valid business justification absent an available alternative that would not result in the discriminatory impact but would still serve the defendant's legitimate needs. Moreover, any remedial order must be focused on eliminating the arbitrary practice and designing additional measures to eliminate any disparities through race-neutral means.

The Court did not address whether disparate-impact claims are cognizable under differently worded anti-discrimination laws, such as the Equal Credit Opportunity Act (ECOA). In recent years, federal regulators have relied on a disparate-impact theory in enforcing the ECOA, but the ECOA does not contain "results-oriented" language comparable to the statutory phrase "otherwise make unavailable."

No. 13-1371

Opinion Date: 6/25/15

Vote: 5–4

Author: Kennedy, J.

Lower Court: Fifth Circuit

The Fair Housing Act permits disparate-impact claims in limited circumstances. The Court did not rule on other anti-discrimination laws, such as the Equal Credit Opportunity Act, that lack similar "results-oriented" statutory language.

EEOC v. Abercrombie & Fitch Stores, Inc.

Labor and Employment – Religious Accommodation

In *Abercrombie*, the Supreme Court considered whether an employer must have actual knowledge of an applicant's or employee's need for a religious accommodation in order for an adverse employment action to be unlawful under Title VII of the Civil Rights Act of 1964.

Title VII protects job applicants and employees from adverse employment actions taken because of their religious practices unless the employer shows it cannot accommodate the religious practice without undue hardship to its business. The Court held that an employer violates Title VII if the applicant or employee's religious practice is a motivating factor in the adverse employment action, even if the employer only suspects (but does not know) that the applicant or employee's practice is a religious one, and even if the adverse action was taken pursuant to a neutral policy unrelated to religion.

The Court did not resolve whether an employer must at least suspect that the practice in question has a religious component to violate Title VII. In cases where employers were unaware that a particular practice was religious in nature, employers may still argue that they have not discriminated "because of" a religious practice for purposes of Title VII, though plaintiffs and the Equal Employment Opportunity Commission may argue that employers should have surmised that the practice was religious.

Employers should consider asking, as a standard part of their intake procedures, whether an applicant may need a religious accommodation in order to perform the job and, if so, what that accommodation would be. Asking that question only of those who appear to need a religious accommodation could subject employers to criticism for inquiring about applicants' religion. Employers may also want to review the materials available to applicants to ensure that the employer's EEO policy includes accommodation of religious practices.

No. 14-86

Opinion Date: 6/1/15

Vote: 8–1

Author: Scalia, J.

Lower Court: Tenth Circuit

After Abercrombie, *employers should consider asking all applicants whether they may need a religious accommodation to perform the job.*

Integrity Staffing Solutions, Inc. v. Busk

Labor and Employment – Fair Labor Standards Act

In *Integrity Staffing*, the Supreme Court considered whether time spent by warehouse workers waiting for and undergoing mandatory security screenings before leaving the workplace is compensable under the Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act of 1947.

Time spent on activities that are merely "preliminary" or "postliminary" to the principal activities an employee is hired to perform is not compensable under the Portal-to-Portal Act. The Court unanimously concluded that the time waiting for and undergoing post-shift security screenings is not compensable, because it is merely "postliminary" to the activities the warehouse workers are employed to perform. The security screenings are not themselves the workers' "principal activities": the workers are employed to retrieve products from warehouse shelves and package them for delivery, not to undergo screenings. Nor are the screenings "integral and indispensable" to the employees' duties: undergoing a security screening is not an intrinsic element of retrieving and packaging warehouse products.

The Court's decision provides additional clarity and predictability in this area by rejecting other tests for determining whether time is compensable. For example, it rejected the Ninth Circuit's focus on whether an activity is required by the employer as a basis for determining whether it is compensable. The Court also held that a test considering whether the activity is for the benefit of the employer is overbroad, and that it is irrelevant to the FLSA inquiry whether the employer could reduce the time spent on any preliminary or postliminary activity.

No. 13-433

Opinion Date: 12/8/14

Vote: 9–0

Author: Thomas, J.

Lower Court: Ninth Circuit

Employers must compensate non-exempt employees only for time spent on activities that are integral and indispensable to the work that the employees are hired to perform.

Young v. United Parcel Service

Labor and Employment – Pregnancy Discrimination Act

In *Young*, the Supreme Court addressed the meaning of the Pregnancy Discrimination Act, which requires employers to treat pregnant women the same as "other persons not [pregnant] but similar in their ability or inability to work."

The Court rejected the interpretations put forward by all of the litigants. It disagreed with Young and the federal government that whenever an employer grants an accommodation to anyone, it must grant the same accommodation to pregnant employees. In the process, the Court declined to defer to the EEOC's interpretation. But the Court also disagreed with UPS's rule that an employer may grant an accommodation to some employees but deny it to pregnant women, so long as the employer has a facially neutral reason unrelated to pregnancy.

The Court opted for a middle-ground approach under its familiar *McDonnell Douglas* burden-shifting framework: a pregnant employee may establish a *prima facie* case of disparate treatment by showing that her employer did not accommodate her but did accommodate others similar in their ability or inability to work. The burden then shifts to the employer to offer a nondiscriminatory reason for the distinction. Finally, the burden shifts back to the plaintiff to show that the employer's reason is pretextual with evidence that "the employer's policies impose a significant burden on pregnant workers" and "the employer's [proffered] reasons are not sufficiently strong to justify the burden."

The Court's opinion does not explain what constitutes a significant burden on pregnant workers or what reasons could be strong enough to justify such a burden. In the face of that uncertainty and to forestall potential litigation, employers may decide to offer pregnant women the same accommodations that are afforded to temporarily injured employees. The 2008 amendments to the Americans with Disabilities Act also may require such accommodations for pregnant women, meaning that *Young* may ultimately have little practical effect.

No. 12-1226

Opinion Date: 3/25/15

Vote: 6–3

Author: Breyer, J.

Lower Court: Fourth Circuit

Employers may wish to ensure that any accommodations they afford to temporarily injured employees are also offered to pregnant women.

Commil USA, LLC v. Cisco Systems, Inc.

Patents – Scienter Requirement for Induced Infringement

In *Commil*, the Supreme Court considered whether a good-faith belief that a patent is invalid is a defense to induced infringement of that patent under 35 U.S.C. § 271(b).

The Court first clarified that, under *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011), a claim of induced infringement requires showing that the accused infringer knew not only of the patent at issue, but also that the acts it induced infringed that patent. Thus, a defendant may escape liability by showing that it reasonably read the patent's claims differently from the patent holder.

The Court then held that a defendant may *not* escape liability by showing that it had a good-faith belief that the patent was invalid. The Court reasoned that, by making a defendant liable if it "actively induces infringement of a patent," Section 271(b) ties a defendant's knowledge to the infringement, not to the patent's validity. Noting that infringement and validity are "separate issues" that give rise to different defenses under the Patent Act, the Court held that allowing an accused infringer to defend itself by asserting that it believed the patent was invalid would conflate those issues. Moreover, the Court held that allowing an accused infringer to defend itself by showing a good-faith belief in the invalidity of the patent would weaken the presumption of patent validity and allow a defendant to escape liability based on a lesser burden than would be necessary to show patent invalidity.

Recognizing that its decision might enhance the rights of patent holders seeking to "use patents . . . primarily for obtaining licensing fees" at the expense of accused infringers, the Court emphasized the responsibility of district courts to discourage frivolous patent suits through attorney sanctions or attorney's fee awards.

No. 13-896

Opinion Date: 5/26/15

Vote: 6–2

Author: Kennedy, J.

Lower Court: Federal Circuit

A good-faith belief that a patent is invalid is not a defense to an induced infringement claim; accused infringers must prove a patent's invalidity by clear and convincing evidence.

Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.

Patents – Appellate Review of Claim Construction

In *Teva*, the Supreme Court addressed the standard of review that the Federal Circuit should apply to district courts' resolution of factual matters during patent claim construction.

The Court held that such factual determinations should be reviewed for clear error, not *de novo* as the Federal Circuit had held. Although the ultimate construction of the patent claim is a legal conclusion that the appellate court reviews *de novo*, the Court explained, the court must accept the district court's resolution of a factual dispute unless it finds that the district court made a clear error. The Court based its decision on Federal Rule of Civil Procedure 52(a)(6), which requires a clear-error standard of review for all "[f]indings of fact," without making any exception for factual findings made in the course of claim construction.

Before *Teva*, litigants typically did not focus on the fact/law distinction in claim construction because all aspects of claim construction were reviewed *de novo* on appeal. Indeed, because of the availability of full *de novo* review and the Federal Circuit's willingness to set aside district courts' claim construction determinations, many parties viewed claim construction merely as a non-dispositive first step in litigation. That approach encouraged appeals and reduced settlement at the district court level. This decision may reduce the number of appeals and increase the likelihood of settlement following district court claim construction, particularly in cases that turn on disputes about expert or other extrinsic evidence.

No. 13-854

Opinion Date: 1/20/15

Vote: 7–2

Author: Breyer, J.

Lower Court: Federal Circuit

Teva *increases the importance of the district court claim construction process to the extent it involves factual disputes. Parties may now be more likely to settle after adverse claim construction findings, rather than appealing to the Federal Circuit.*

Oneok, Inc. v. Learjet, Inc.

Preemption – Natural Gas Act

In *Oneok*, the Supreme Court considered whether the Natural Gas Act implicitly preempts suits under state antitrust law that allege price manipulation affecting both wholesale and retail natural gas prices.

The Act grants the Federal Energy Regulatory Commission authority over matters relating to wholesale prices, but allows states to regulate retail sales of natural gas. The interstate pipelines argued that because the suit challenged behavior that affected matters solely within the Commission's authority—wholesale natural gas prices—the Act preempted the entire suit under field preemption principles.

The Court disagreed, concluding that state regulation of anti-competitive behavior affecting retail prices was not in the field of matters preempted by the Act, even though the same behavior also affected wholesale prices regulated by the Commission. The Court emphasized the Act's purpose of preserving state regulatory authority over certain areas of the natural gas industry, including the retail prices that were the target of the antitrust suit. The general applicability of state antitrust law further reinforced that the state's exercise of regulatory power was not impermissibly directed at federally controlled wholesale prices.

Although allowing for the possibility of conflict preemption (which had not been argued by the parties), this decision adds uncertainty to the applicability of field preemption of state laws that only partially overlap with an exclusive federal domain. The Court appears reluctant to find field preemption of generally applicable state laws, at least in areas in which Congress has shown its intent to preserve state regulatory authority, even though the same challenged behavior might also impact areas of exclusive federal jurisdiction.

No. 13-271

Opinion Date: 4/21/15

Vote: 7–2

Author: Breyer, J.

Lower Court: Ninth Circuit

Oneok *adds some uncertainty to the scope of field preemption by permitting suits under generally applicable state laws, even when those suits challenge conduct that also affects areas of exclusive federal jurisdiction.*

Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund

Securities Litigation – Registration Statements

In *Omnicare*, the Supreme Court clarified when opinions in registration statements can be actionable under Section 11 of the Securities Act of 1933.

Section 11 requires that a registration statement not "contain[] an untrue statement of a material fact" or "omit[] to state a material fact . . . necessary to make the statements therein not misleading." In *Omnicare*, the Court considered what plaintiffs need to plead under each of those phrases with respect to statements of opinion. The Court's guidance is significant in light of the importance of pleading standards and motions to dismiss in securities litigation.

The Court held, consistent with a majority of the federal courts of appeals, that a pure statement of opinion offered in a Section 11 filing is "an untrue statement of material fact" only if the plaintiff can plead (and ultimately prove) that the issuer did not actually hold the stated belief. At the same time, the Court held that the omission of certain material facts can render even a pure statement of opinion actionably misleading under Section 11. But the Court emphasized that pleading an omissions claim will be difficult because a plaintiff must identify specific, material facts whose omission makes the opinion statement misleading to a reasonable person reading the statement fairly and in context.

The Court's decision should curtail Section 11 litigation over honestly held opinions that turn out to be wrong, but it may cause the plaintiffs' bar to bring claims that issuers have not accompanied their opinions with sufficient material facts underlying those opinions. To ward off the risk of such lawsuits, issuers should consider supplementing their disclosure documents with information about the bases of their opinions that could be material to a reasonable investor.

No. 13-435

Opinion Date: 3/24/15

Vote: 9–0

Author: Kagan, J.

Lower Court: Sixth Circuit

To ward off the risk of Section 11 lawsuits, issuers should consider supplementing their disclosure documents with information about the bases of their opinions that could be material to a reasonable investor.

Kellogg Brown & Root Services v. U.S. ex rel. Carter

Statutes of Limitations – False Claims Act

KBR clarifies two important legal issues relevant to *qui tam* suits under the False Claims Act (FCA). First, the Court held that the Wartime Suspension of Limitations Act, which tolls "any statute of limitations applicable to any offense" that involves "fraud or attempted fraud against the United States" during times of armed conflict, applies only in criminal proceedings. Accordingly, that statute does not extend the FCA's standard statute of limitations in a civil *qui tam* suit.

Second, the Court held that the FCA's "first-to-file" bar does not preclude claims that are related to previously filed claims in another suit that have been dismissed. The first-to-file provision bars a *qui tam* action when a related action is "pending," and the Court concluded that, based on that term's natural meaning, a claim that has previously been dismissed is no longer "pending." The Court acknowledged potential practical problems with this interpretation, such as the effect on settlement incentives for a defendant who may be sued again as soon as the prior-filed action is resolved. But the Court expressly declined to decide whether such a defendant would be protected from any such subsequent suit under the doctrine of claim preclusion.

Companies now have certainty when opposing civil whistleblower suits that the statute of limitations will not be extended (perhaps indefinitely) during times of armed conflict. Although *KBR* may lead to increased follow-on suits after *qui tam* actions are dismissed or resolved, defendants should argue that such claims are barred by claim-preclusion principles.

No. 12-1497

Opinion Date: 5/26/15

Vote: 9–0

Author: Alito, J.

Lower Court: Fourth Circuit

This decision may encourage follow-on suits after a related claim has been dismissed or resolved. Companies should raise a claim-preclusion defense against such suits.

Jesinoski v. Countrywide Home Loans, Inc.

Statutes of Limitations – Truth in Lending Act

In *Jesinoski*, the Supreme Court considered whether a borrower seeking to rescind a loan based on a claim that the lender's disclosures were insufficient must file suit within the three-year statutory period, or instead must merely notify the lender of her intent to rescind within that period.

The Truth in Lending Act grants borrowers an unconditional right to rescind a loan if the borrower notifies the lender of her intent to rescind within three days of the transaction. After that initial three days, the borrower may only rescind if the lender failed to satisfy the Act's disclosure requirements, but that conditional right exists only for three years after the loan is made. In this case, the Court held that a borrower need only notify her lender that she intends to rescind the loan within that three-year period; she need not file suit before those three years elapse.

The Court made clear that timely notification alone is sufficient even if the lender disputes the borrower's assertion that its disclosures were inadequate. Such a lender may argue that its disclosures were adequate under the Act either in response to a rescission suit filed by a borrower or by filing suit itself to challenge a borrower's notification of rescission.

No. 13-684

Opinion Date: 1/13/15

Vote: 9–0

Author: Scalia, J.

Lower Court: Eighth Circuit

To effect a timely rescission of a loan under the Truth in Lending Act, a borrower need only notify the lender of her intent to rescind within the three-year statutory period, even if the lender believes it complied with the Act's disclosure requirements.

Tibble v. Edison International

Statutes of Limitations – ERISA

In *Tibble*, the Supreme Court considered whether the six-year statute of limitations for claims against Employee Retirement Income Security Act plan fiduciaries runs from the date of the initial investment decision or from some later date based on an alleged failure to monitor plan investments.

Drawing from trust law, the Court held that ERISA plan fiduciaries (like trustees) have a continuing duty to monitor plan investments and remove imprudent investments. In a suit alleging breach of that fiduciary duty to monitor, the Court ruled that the six-year statute of limitations begins to run from the date of the breach of the duty to monitor investments, not from the date of the initial investment decision.

The Court did not address the precise contours of the continuing duty to monitor investments or specify when the duty to remove a particular investment might arise. While the Ninth Circuit had suggested that the duty would arise only after a material change in circumstances sufficient to trigger a full due diligence review of the investments, the Court rejected that bright-line test and stated that a plan fiduciary must discharge his responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use.

This decision opens the door to litigation over how often ERISA fiduciaries must review investments and how quickly they must remove imprudent investments. ERISA plaintiffs will more often claim a breach of the continuing duty to monitor investments in addition to claiming a breach of fiduciary duty at the time of the initial investment decision. If plaintiffs plausibly allege a failure adequately to monitor investments, the entire period after selection of investments is potentially open to suit.

No. 13-550

Opinion Date: 5/18/15

Vote: 9–0

Author: Breyer, J.

Lower Court: Ninth Circuit

ERISA plan fiduciaries should periodically review investment decisions, including investment options under 401(k) plans, as the failure to modify plan offerings may be the basis for suit long after the initial investment decisions were made.

Comptroller v. Wynne

Taxation – Dormant Commerce Clause

In *Wynne*, the Supreme Court considered whether one feature of Maryland's state income tax scheme, which taxes income earned by its residents in other states without giving a credit for taxes paid on that income to those states, violates the dormant Commerce Clause by discriminating against interstate commerce.

The Court concluded that the Maryland tax scheme did violate the Clause. It reached this conclusion by applying the "internal consistency" test, which asks whether interstate and intrastate commerce would be treated equally if every state applied the same challenged tax scheme. Because the Maryland tax structure would result in double taxation of all income earned outside the taxpayer's state of residence—taxed once by the resident state, and once by the state where the income was earned—Maryland's scheme failed this test, and thus discriminated against interstate commerce. Maryland could remedy the violation by, for example, offering credits to its residents for taxes they pay to other states where they earn income, or by not collecting taxes on nonresidents' income earned in Maryland.

Although the Court limited its ruling to the particular features of Maryland's tax scheme, its decision calls into question any state or local tax scheme that does not provide a credit to residents for taxes paid to other jurisdictions where they earn income. Moreover, by making clear that dormant Commerce Clause limitations apply to personal income taxes to the same extent as corporate income taxes, the Court's decision protects other forms of entities from double taxation even if taxes are passed through to individuals.

No. 13-485

Opinion Date: 5/18/15

Vote: 5–4

Author: Alito, J.

Lower Court: Md. Court of Appeals

Wynne *limits states' ability to enact policies that result in multiple taxation of income earned by their residents in other jurisdictions, whether those taxes are imposed on corporate entities or passed through to individuals.*

S&C's Supreme Court and Appellate Practice

Sullivan & Cromwell has one of the premier appellate practices in the country, as *The National Law Journal* recently recognized in naming the practice to its 2014 Appellate Hot List. S&C lawyers have achieved success for the Firm's clients in cases before the U.S. Supreme Court, federal courts of appeals and administrative agencies, state supreme and appellate courts, and numerous international tribunals. In the past six years alone, S&C lawyers have argued 10 times in the Supreme Court and dozens of times in other federal and state appellate courts. This past Term, S&C lawyers were counsel of record for the respondents in *Gelboim* v. *Bank of America*, as well as counsel for numerous *amici curiae*. S&C's appellate practice draws on the experience of 17 former U.S. Supreme Court clerks and more than 130 clerks to judges on all 13 federal courts of appeals and many state courts and international tribunals.

S&C lawyers' appellate experience has spanned the Firm's practice areas, including:

- antitrust
- banking
- bankruptcy
- corporate and securities
- criminal procedure
- environmental
- false claims
- intellectual property
- labor and employment
- products liability
- tax law

Clients turn to S&C for their high-stakes appeals because of the Firm's extensive appellate expertise and its deep understanding of their industries, issues and concerns. What sets S&C's appellate practice apart is that its lawyers have handled virtually every phase of civil and criminal litigation on behalf of clients. Because of that broad experience, they are able to work collaboratively with trial teams to frame arguments persuasively at any level.

Please feel free to contact any member of the Firm's appellate practice with any questions about the Supreme Court or other appellate matters.

New York
Telephone: +1 212 558 4000
Facsimile: +1 212 558 3588
125 Broad Street
New York, NY 10004-2498
U.S.A.

Washington, D.C.
Telephone: +1 202 956 7500
Facsimile: +1 202 293 6330
1701 New York Avenue, N.W.
Washington, DC 20006-5215
U.S.A.

Los Angeles
Telephone: +1 310 712 6600
Facsimile: +1 310 712 8800
1888 Century Park East
Los Angeles, CA 90067-1725
U.S.A.

Palo Alto
Telephone: +1 650 461 5600
Facsimile: +1 650 461 5700
1870 Embarcadero Road
Palo Alto, CA 94303-3308
U.S.A.

Beijing
Telephone: +86 10 5923 5900
Facsimile: +86 10 5923 5950
Suite 501
China World Trade Center Tower 1
No. 1, Jianguo Menwai Avenue
Beijing 100004
P.R. China

Hong Kong
Telephone: +852 2826 8688
Facsimile: +852 2522 2280
28th Floor, Nine Queen's Road
Central
Hong Kong

Tokyo
Telephone: +81 3 3213 6140
Facsimile: +81 3 3213 6470
Otemachi First Square East Tower
16F
5-1, Otemachi 1-chome
Chiyoda-ku, Tokyo 100-0004
Japan

London
Telephone: +44 20 7959 8900
Facsimile: +44 20 7959 8950
1 New Fetter Lane
London EC4A 1AN
England

Paris
Telephone: +33 1 7304 1000
Facsimile: +33 1 7304 1010
24, rue Jean Goujon
75008 Paris
France

Frankfurt
Telephone: +49 69 4272 5200
Facsimile: +49 69 4272 5210
Neue Mainzer Strasse 52
60311 Frankfurt am Main
Germany

Brussels Conference Facility
Telephone: +32 2 789 5055
7 Rue Joseph II, 1st Floor
1000 Brussels
Belgium

Melbourne
Telephone: +61 3 9635 1500
Facsimile: +61 3 9654 2422
101 Collins Street
Melbourne, Victoria 3000
Australia

Sydney
Telephone: +61 2 8227 6700
Facsimile: +61 2 8227 6750
Level 27, The Chifley Tower
2 Chifley Square
Sydney, New South Wales 2000
Australia