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U.S. Supreme Court

Justices' Securities Docket Could Reflect Class-Action Focus

BNA Snapshot

- Supreme Court asked to decide state/federal nature of dispute between investors, banks
- High court already to tackle jurisdictional, whistle-blower cases next term

By Antoinette Gartrell

Did Bank of America and JPMorgan Chase breach their state-law fiduciary and contractual obligations to mutual fund clients by not telling them about certain beneficial fee arrangements?

The U.S. Supreme Court, which has signaled a strong interest in class securities litigation, could resolve the question during its coming term (*Holtz v. JPMorgan Bank N.A.*, U.S., No. 16-1536, petition filed 6/22/17; *Goldberg v. Bank of America N.A.*, U.S., No. 16-1541, petition filed6/21/17).

Investors have asked the Supreme Court to review two January decisions by the U.S. Court of Appeals for the Seventh Circuit that said that the state law claims should have been alleged as federal securities law violations for failure to disclose material information. JPMorgan's brief is due July 24, Bank of America must respond by Aug. 23.

The issue is important in light of a 1998 statute, the *Securities Litigation Uniform Standards Act* (SLUSA), intended to force compliance with heightened federal securities-fraud pleading requirements. SLUSA calls for federal preemption—removal followed by dismissal—of state law class actions alleging "misrepresentations in connection with the purchase or sale of a covered security." SLUSA preemption is a major issue for investors, for whom state courts generally are friendlier venues than federal district courts.

The prospect of the high court taking up the cases depends on two things: the court's "appetite for deciding two distinct aspects of SLUSA in a term and how satisfied the justices are with the Seventh Circuit's disposition" of the cases, securities lawyer James Goldfarb of Murphy & McGonigle, New York, told Bloomberg BNA. The court seems to be of the view that if the controversy involves a covered security, which both cases do, Congress's intent with SLUSA was to preclude class actions outside the federal securities laws, he said.

Jurisdictional Questions

The justices already have agreed to review a SLUSA dispute between a pension fund and Cyan Inc., a high-technology concern that allegedly made material misrepresentations in securities offerings (*Cyan Inc. v. Beaver Cty. Emp. Ret. Fund*, U. S., No. 15-1439, petition granted6/27/17). Cyan moved to dismiss the pension fund's complaint, which alleged only 1933 Securities Act violations, saying it should have been filed in federal court. A California trial court, however, denied Cyan's dismissal motion, an intermediate appeals court affirmed, and the California Supreme Court declined to review the decisions.

New York lawyer Serena P. Hallowell of Labaton Sucharow, predicted that the investors will prevail before the high court as well. She told Bloomberg BNA that just because SLUSA provided for state law claims to be precluded in federal court, it doesn't mean lawmakers intended that Securities Act claims receive the same treatment. "If anything, an analysis of Congress' silence says the opposite," Hallowell, who brings securities fraud cases on behalf of institutional investors, said.

Whistle-Blower Protections

Next term, the high court also will take up a dispute over whether a corporate whistle-blower who didn't take his concerns to the Securities and Exchange Commission is covered by Dodd-Frank Act anti-retaliation provisions (*Digital Realty Trust, Inc. v. Somers*, U.S., No. 16-1276, petition granted6/26/17). The U.S. Courts of Appeal for the Ninth and Second Circuits have said so-called reporting out isn't required, but the Fifth Circuit has held otherwise.

A decision requiring reporting to the commission could hurt all key stakeholders—whistle-blowers, companies, and the SEC—New York lawyer Jordan A. Thomas of Labaton Sucharow told Bloomberg BNA.

First, he said, "[i]t would force sophisticated whistle-blowers to report to the SEC first and bypass internal reporting. This hurts responsible organizations because they'll be deprived of the ability to address problems internally."

Second, it would leave the commission "between a rock and a hard place," because historically, the first line of defense has been robust compliance programs, Thomas, who chairs Labaton's whistle-blower practice, said.

Third, the SEC whistle-blower program was designed to encourage internal reporting and provides an incentive to do so, Thomas said. "If there's no remedy for retaliation, it will send whistle-blowers into harm's way."

The justices' willingness to address whistle-blower issues could spell good news for a former Microsemi Corp. employee who claimed unsuccessfully she was fired for complaining that the semiconductor corporation violated affirmative action requirements (*Rocheleau v. Microsemi Corp.*, U.S., No. 16-1520, petition filed5/22/17). In that case, the Ninth Circuit affirmed that plaintiff Ramona Rocheleau didn't show she engaged in protected activity. In a May 22 petition, Rocheleau asked the justices to resolve a circuit split over what constitutes a reasonable belief of unlawful conduct sufficient to invoke Dodd-Frank Act whistle-blower protections. Microsemi's response is due July 21.

No matter how the justices come down on these important issues, there's an expectation of more clarity, Washington lawyer Mark A. Perry of Gibson, Dunn & Crutcher LLP, told Bloomberg BNA. It will be clear who can bring suit as a whistle-blower and where suits under the '33 Act can be brought, he said.

Former SEC enforcement lawyer Stephen Crimmins of Murphy & McGonigle, New York and Washington, agreed. He said the Supreme Court will likely continue to pursue a "no-drama approach" that avoids an expansive reading of the securities laws next term.

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