WILMERHALE

Securities: Certiorari Petitions Granted

MARCH 13, 2013

WilmerHale compiles lists of certiorari petitions that raise securities-law issues. This page contains a consolidated list of all granted petitions, organized in reverse chronological order by date of certiorari petition.

Proskauer Rose LLP v. Troice, et al., No 12-88 (vide 12-79, 12-86)

Questions Presented:

1. Does the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1), prohibit private class actions based on state law only where the alleged purchase or sale of a covered security is "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud?
2. Does SLUSA preclude a class action in which the defendant is sued for aiding and abetting fraud, but a non-party, rather than the defendant, made the only alleged misrepresentation in connection with a covered securities transaction?

Cert petition filed 7/18/12, conference 9/24/12, CVSG 10/1/12, conference 1/11/13, conference 1/18/13, cert granted limited to question 1 and case consolidated with 12-86 and 12-79.

Amgen Inc. v. Conn. Retirement Plans and Trust Funds, No. 11-1085

Questions Presented:

1. Whether, in a misrepresentation case under SEC Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory.
2. Whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.

Cert petition filed 3/1/12, conference 6/7/12, cert granted 6/11/12, argued 11/5/12, affirmed 2/27/13.

CA9 Opinion
CA9 Oral Argument

Merit Stage Briefs: (Parties)
Brief of petitioners Amgen Inc., et al.
Brief of respondent Connecticut Retirement Plans and Trust Funds
Reply of petitioners Amgen Inc., et al.

Merit Stage Briefs (Amici)
Brief amici curiae of Law Professors
Brief amici curiae of Washington Legal Foundation, et al.
Brief amici curiae of Chamber of Commerce of the United States of America, et al.
Brief amici curiae of Former SEC Commissioners, et al.
Brief amicus curiae of Securities Industry and Financial Markets Association
Brief amicus curiae of the United States
Brief of National Association of Shareholder and Consumer Attorneys
Brief amicus curiae of Public Justice, P.C.
Brief amici curiae of Civil Procedure and Securities Law Professors
Brief amicus curiae of AARP
Brief amici curiae of New York City Pension Funds, et al.
Brief amicus curiae of Public Citizen, Inc.
Brief amici curiae of Financial Economists
Brief amici curiae of California Public Employees' Retirement System, et al.

Supreme Court Oral Argument
Supreme Court Opinion

Gabelli, et al. v. SEC, No. 11-1274

Question Presented:

Section 2462 of Title 28 of the United States Code provides that "except as otherwise provided by Act of Congress" any penalty action brought by the government must be "commenced within five years from the date when the claims first accrued." (emphasis added). This Court has explained that "[i]n common parlance a right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954).

Where Congress has not enacted a separate controlling provision, does the government's claim first accrue for purposes of applying the five-year limitations period under 28 U.S.C. § 2462 when the government can first bring an action for a penalty?

Cert petition filed 4/20/12, conference 9/24/12, cert granted 9/25/12, argued 1/8/13, reversed and remanded 2/27/13.

CA2 Opinion
CA2 Oral Argument unavailable

Merit Stage Briefs: (Parties)
Brief of petitioners Marc J. Gabelli and Bruce Alpert filed

Brief of respondent Securities and Exchange Commission filed
Reply brief of petitioners Marc J. Gabelli and Bruce Alpert filed

Merit Stage Briefs: (Amicus)
Brief amicus curiae of Association of the Bar of the City of New York
Brief amicus curiae of American Bankers Association
Brief amici curiae of Securities Industry and Financial Markets Association, et al.
Brief amicus curiae of Cato Institute
Brief amicus curiae of DRI - The Voice of the Defense Bar
Brief amicus curiae of National Association of Criminal Defense Lawyers
Brief amicus curiae of Occupy the SEC

Supreme Court Oral Argument
Supreme Court Opinion

Willis of Colorado Inc., et al. v. Troice, et al., No. 12-86 (vide 12-79, 12-88)

Questions Presented:

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") precludes state law class actions that allege a misrepresentation or omission "in connection with" the purchase or sale of a covered security. 15 U.S.C. § 78bb(f)(1). The complaints at issue in this case plainly included such alleged misrepresentations. The district court, applying Eleventh Circuit precedent, recognized as much and dismissed the complaints. However, the Fifth Circuit disagreed and, purporting to apply the Ninth Circuit's test, found the fact that the complaints included alleged misrepresentations in connection with a covered security insufficient to invoke SLUSA because the complaints also included other misrepresentations that were not made "in connection with" a covered securities transaction. In doing so, the Fifth Circuit acknowledged that it was departing from the holding of the Eleventh Circuit and several other circuits.

The question presented is whether a covered state law class action complaint that unquestionably alleges "a" misrepresentation "in connection with" the purchase or sale of a SLUSA-covered security nonetheless can escape the application of SLUSA by including other allegations that are farther removed from a covered securities transaction.

Cert petition filed 7/18/12, petition granted 1/18/13, vided 12-88.

Erica P. John Fund, fka Archdiocese of Milwaukee Supporting Fund, Inc., v. Halliburton Co., et al, No. 09-1403

Questions Presented:

1. Whether the Fifth Circuit correctly held, in direct conflict with the Second Circuit and district courts in seven other circuits and in conflict with the principles of *Basic v. Levinson*, 485 U.S. 224 (1988), that plaintiffs in securities fraud actions must satisfy not only the requirements set forth in Basic to trigger a rebuttable presumption of fraud on the market,

but must also establish loss causation at class certification by a preponderance of admissible evidence without merits discovery?

2. Whether the Fifth Circuit improperly considered the merits of the underlying litigation, in violation of both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and Federal Rule of Civil Procedure 23, when it held that a plaintiff must establish loss causation to invoke the fraud-on-the-market presumption even though reliance and loss causation are separate and distinct elements of security fraud actions and even though proof of loss causation is common to all class members?

Cert. petition filed 5/13/10.

Conference 9/27/10; CVSG 10/4/10; cert. petition granted 1/7/11; argument 4/25/11; vacated and remanded 6/6/11.

Opinion Below

Matrixx Initiatives., et al., v. James Siracusano and NECA-IBEW Pension Fund, No. 09-1156

Question Presented:

> Whether a plaintiff can state a claim under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 based on a pharmaceutical company's nondisclosure of adverse event reports even though the reports are not alleged to be statistically significant?

Cert. petition filed 3/23/10.

Conference 4/23/10; response requested 4/14/10; response requested 4/14/10; opposition filed 5/13/10; **cert. petition granted 6/14/10**; argued 1/10/11; affirmed 3/22/11.

Opinion Below

WilmerHale filed a brief in support of petitioner on behalf of the Pharmaceutical Research and Manufacturers of America, et al.

Janus Capital Group. and Janus Capital Management LLC, v. First Derivative Traders, No. 09-525

Questions Presented:

1. Whether the Fourth Circuit erred in concluding—in direct conflict with decisions of the Fifth, Sixth, and Eighth Circuits—that a service provider can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" another company's misstatements?
2. Whether the Fourth Circuit erred in concluding—in direct conflict with decisions of the Second, Tenth, and Eleventh Circuits—that a service provider can be held primarily liable in

a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider?

Cert. petition filed 10/30/09.

Opposition filed 12/2/09; CVSG 1/11/10; conference of 6/24/10; **cert. petition granted 6/28/10**; argued 12/7/10; reversed 6/13/11.

Opinion Below

Ameriprise Financial v. Gallus, No. 09-163

Questions Presented:

1. Whether the Eighth Circuit properly held that liability for breach of an adviser's "fiduciary duty with respect to the receipt of compensation" may be premised on the ostensible inadequacy of the adviser's disclosures to independent directors notwithstanding any impact on the "fee itself," despite the holdings of other courts that a violation of Section 36(b) may be predicated only upon a fee that is so excessive it could not have resulted from arm's-length bargaining?
2. Whether Section 36(b)(3)'s limitation that "[n]o award of damages shall be recoverable for any period prior to one year before the action was instituted" restricts recovery to damages accruing during the one year prior to the filing of the complaint?

Cert. petition filed 8/6/09.

Opposition filed 11/9/09; conference of 12/11/09; conference 4/2/10; **cert. petition granted 4/5/10**;judgment VACATED and case REMANDED for further consideration in light of *Jones v. Harris Associates L.P.,* 559 U.S.___(2010).

Robert Morrison, et al. v. National Australia Bank, Ltd., et al., No. 08-1191

Questions Presented:

1. Whether the antifraud provisions of the United States securities laws extend to transnational frauds where: (a) the foreign-based parent company conducted substantial business in the United States, its American Depository Receipts were traded on the New York Stock Exchange and its financial statements were filed with the Securities Exchange Commission ("SEC"); and (b) the claims arose from a massive accounting fraud perpetrated by American citizens at the parent company's Florida-based subsidiary?
2. Whether this Court, which has never addressed the issue of whether subject matter jurisdiction may extend to claims involving transnational securities fraud, should set forth a policy to resolve the three-way conflict among the circuits (i.e., District of Columbia Circuit versus the Second, Fifth and Seventh Circuits versus the Third, Eighth and Ninth Circuits)?
3. Whether the Second Circuit should have adopted the SEC's proposed standard for determining the proper exercise of subject matter jurisdiction in transnational securities fraud cases, as set forth in the SEC's amicus brief submitted at the request of the Second

Circuit, and whether the Second Circuit should have adopted the SEC's finding that subject matter jurisdiction exists here due to the “material and substantial conduct in furtherance of” the securities fraud that occurred in the United States?

Cert. petition filed on 3/23/09.

Opposition filed 5/1/09; CVSG 6/1/09; **cert. petition granted 11/24/09.** Oral argument heard 3/24/10.

Trainer Wortham v. Betz, No. 07-1489

Questions presented:

1. Did the Court of Appeals err in concluding that the statute of limitations begins to run not from the moment the plaintiff is on inquiry notice that there may have been a misrepresentation (as some circuits have held), and not from the subsequent point at which a reasonable investigation would have revealed that she had a possible fraud claim (as other circuits have held), but only from the point at which she receives evidence that the investment advisor intended to defraud her?
2. Did the Courts of Appeals err in holding that an investor who is on inquiry notice that she has a basis for a fraud claim, and is, therefore, obliged to make a reasonable inquiry, may reasonably end her investigation just because the suspected defrauders have made assurances that contradict known facts?

Cert. petition filed 5/27/08.

CVSG 10/6/08; U.S. Brief filed 4/22/09 (recommending denial of certiorari); conference 5/21/09; conference 4/30/10; **cert petition granted 5/3/10.** Judgment VACATED and case REMANDED for further consideration in light of *Merck & Co. v. Reynolds,* 559 U.S.___(2010).