Securities: Certiorari Petitions Pending

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

Rabalais v. Leon, No. 12-1005

Question Presented:

Is sports performance an excluded commodity under the Commodity Exchange Act?

Cert petition filed 2/13/1, waiver of respondent Leon filed 2/26/13.

SEC v. Bartek, et al., No. 12-1000

Question Presented:

The Securities and Exchange Commission (SEC or Commission) brought this action against respondents for alleged violations of the securities laws arising from a scheme to falsify a company's financial statements. As relevant here, the Commission sought civil monetary penalties, as well as injunctions that would prohibit respondents from committing future violations and from serving as officers or directors of publicly traded companies. The court of appeals held that all of those claims for relief were barred by the five-year limitations period in 28 U.S.C. 2462.

The questions presented are as follows:

1. Whether, with respect to the SEC's claims for civil monetary penalties, the limitations period in Section 2462 began to run before the Commission discovered, or reasonably could have discovered, respondents' alleged fraudulent scheme.
2. Whether the SEC's remaining claims, which request injunctions against future violations and against further service as officers or directors, seek a “civil fine, penalty, or forfeiture” and thus are subject to the limitations period in Section 2462.

Cert petition filed 2/13/13.

Bulldog Investors General Partnership v. Donoghue, et al., No. 12-818

Question Presented:

In 2011, the Court granted a Petition for Writ of Certiorari in *First Am. Fin. Corp v. Edwards*.,131 S. Ct. 3022 (2011) ("*First American*") to decide whether a federal statute's grant of a private cause of action for its violation is, by itself, sufficient to give an uninjured private plaintiff constitutional standing to sue in federal court. First American was briefed and argued, but not decided, because the Court dismissed the writ. 132 S. Ct. 2536 (2012).

The Second Circuit Court of Appeals considered the Supreme Court's dismissal of the writ in *First American* in reaching the decision appealed here.

The questions presented in this case are:

1. Did the Second Circuit err by holding that the Respondents had Article III, § 2 standing to prosecute this action in federal court under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), in the absence of any allegation that the Petitioner's statutory violation injured any Respondent?
2. Did the Second Circuit err by holding that § 16(b) creates a "fiduciary duty," (found nowhere in the statute) which is owed by every 10% stockholder of a public company and whose breach is always an "injury-in-fact" to the company?

Cert petition filed 1/2/13, waiver of respondent Donoghue files 1/22/13, conference 3/15/13.

Tonga Partners, L.P., et al. v. Analytical Surveys, Inc., No. 12-829

Question Presented:

1. Can a court limit the availability of the "debt previously contracted" exception to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), such that the exception would apply only to debts that have already matured, despite the lack of any such requirement or other qualification appearing in the text of the statute?
2. Does the "debt previously contracted" exception to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), apply when a company defaults under the terms of a convertible note - thus owing a debt to the note holder - and the holder of that note accepts a new convertible note from the company instead of demanding acceleration and payment of the prior note, which demand would likely have forced the company into bankruptcy?

Cert petition filed 2/13/1, waiver of respondent Leon filed 2/26/13.

Goldman, Sachs & Co., et al. v. NECA-IBEW Health & Welfare Fund, No. 12-528

Question Presented:

Under the federal securities laws, only a person who has purchased or acquired a security may assert claims alleging that the registration statement or prospectus for that security contained false

information. See 15 U.S.C. §§ 77k, 77l(a)(2). A person who has not transacted in a security lacks standing to bring suit asserting such claims. The fact "'[t]hat a suit may be a class action … adds nothing to the question of standing."' Lewis v. Casey, 518 U.S. 343, 357 (1996) (citation omitted). The question presented is:

1. Whether the Second Circuit erred in concluding, in direct conflict with a decision from the First Circuit on the same issue, that a representative plaintiff has standing to assert on behalf of absent class members claims for relief that the representative plaintiff lacks standing to assert on its own behalf.

Cert petition filed 10/26/12, response requested 12/6/12, conference 3/15/13.

Roe, et al. v. United States, et al., No. 12-112

Questions Presented:

1. Respondent Doe pled guilty to racketeering for defrauding investors out of $40,000,000, but as his case was blanket sealed, entirely hidden, the District Court didn't sentence him to restitution, though by law such order was mandatory, and didn't notify his victims, also mandatory. This Court has held that a court acts illegally when it fails to follow mandatory sentencing laws. Does a sealing order justify a court's refusal to sentence or otherwise act according to law?
2. The courts know respondent takes advantage of his sealed case, concealing his conviction from investors and partners in spite of a duty to disclose. Victims of this fraud, including petitioner's clients, have lost up to $500,000,000. Does a court violate the law when it emboldens crime by maintaining seals?
3. Doe's case is not unique; the Eleventh Circuit prohibits sealed dockets, but Second Circuit courts, in conflict, indiscriminately blanket seal entire cases, operating a covert dual justice system, accountable to no one, without public notice, hearing, or evidentiary support. Does this violate the constitution?
4. Petitioner learned this from case documents he received from a whistleblower. They reveal official misconduct, yet he was enjoined from telling anyone, even Congress, based on an alleged 12-year-old blanket sealing order no one has seen, to which he is a stranger. The Third and Sixth Circuits, in conflict, hold this unconstitutional. Does a court violate the First Amendment by extending a sealing order into a prior restraint *contra mundum*, enjoining without due process one who lawfully and privately receives a copy of a sealed document from disseminating it?

Cert petition filed under seal with redacted copies for public record 7/13/12, response requested 9/20/12, conference 3/22/13.

Lawson, et al. v. FMR LLC, et al., No. 12-3

Question Presented:

Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, forbids a publicly traded company, a mutual fund, or "any … contractor [or] subcontractor … of such company [to] … discriminate against

an employee in the terms and conditions of employment because of" certain protected activity. (Emphasis added). The First Circuit held that under section 1514A such contractors and subcontractors, if privately-held, may retaliate against their own employees, and are prohibited only from retaliating against employees of the public companies with which they work.

The question presented is:

Is an employee of a privately-held contractor or subcontractor of a public company protected from retaliation by section 1514A?

Cert petition filed 6/28/12, conference 9/24/12, conference 10/5/12, CVSG 10/9/12.

Chadbourne & Parke LLP v. Troice, et al., No. 12-79

The Securities Litigation Uniform Standards Act ("SLUSA") precludes most state-law class actions involving "a misrepresentation" made "in connection with the purchase or sale of a covered security."15 U.S.C. § 78bb(f)(1)(A). The circuits, however, are divided over the standard for determining whether an alleged misrepresentation is sufficiently related to the purchase or sale of a covered security to satisfy the "in connection with" requirement. The Fifth Circuit in this case adopted the Ninth Circuit standard and held that the complaint here was not precluded by SLUSA, expressly rejecting conflicting Second, Sixth, and Eleventh Circuit standards for construing the "in connection with" requirement, all of which would result in SLUSA preclusion here.

Additionally, and also in conflict with several other circuits, the Fifth Circuit held that SLUSA does not preclude actions alleging aiding and abetting of fraud in connection with SLUSA-covered security transactions when the aiders and abettors themselves did not make any representations concerning a SLUSA-covered security.

The questions presented are:

1. Whether SLUSA precludes a state-law class action alleging a scheme of fraud that involves misrepresentations about transactions in SLUSA-covered securities.
2. Whether SLUSA precludes class actions asserting that defendants aided and abetted SLUSA-covered securities fraud when the defendants themselves did not make misrepresentations about the purchase or sale of SLUSA-covered securities.

Cert petition filed 7/18/12, conference 9/24/12.