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Securities Law Alert

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***– Benchmark Litigation* 2016**

Supreme Court: Hears Oral Arguments on Whether (1) *American Pipe* Tolling Applies to Section 13's Three-Year Statute of Repose; and (2) SEC Actions Seeking Civil Disgorgement Are Subject to Section 2462's Five-Year Statute of Limitations

During Justice Gorsuch's first two days on the Court, the Supreme Court heard oral arguments on two significant securities law cases: *California Public Employees' Retirement System v. ANZ Securities* (No. 16-373) (*CalPERS*), in which the Court is considering whether *American Pipe* tolling[1] applies to the three-year statute of repose set forth in Section 13 of the Securities Act of 1933; and *Kokesh v. SEC* (No. 16-529), in which the Court is weighing the question of whether SEC actions for civil disgorgement are subject to the five-year limitations period set forth in 28 U.S.C. § 2462.

Justices Question What Constitutes an "Action" within the Meaning of Section 13's Statute of Repose

On April 17, 2017, the Court heard oral arguments in *CalPERS* on the question of whether the filing of a class action tolls Section 13's statute of repose as to all asserted members of the class pursuant to the *American Pipe* doctrine.[2] Section 13 of the Securities Act provides in relevant part that "[i]n no event shall any … action be brought" under Sections 11 or 12(a) of the Securities

1. Under the *American Pipe* tolling doctrine, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

2. Please click here to read our prior discussion of the circuit split on this issue.

Act more than three years after the offering or sale of the security.

At issue in the case before the Court is the timeliness of an individual opt-out suit brought after the expiration of Section 13's three-year statute of repose. During oral argument, Petitioner contended that the suit was timely because the original class action had been filed within the three-year period, and the filing of the class action tolled its claims pursuant to the *American Pipe* doctrine.

Justice Kennedy suggested that Petitioner's argument appeared to be "an attack on statutes of repose generally." He expressed the view that "[i]f you have a statute of repose, everybody will have to sue within [a specified number of] years. That's exactly the point of the statute … [and] the whole reason they passed it." Justice Breyer similarly noted that the Court has previously "made a big distinction" between statutes of repose and statutes of limitations, and, among other things, held that "you cannot toll" statutes of repose.

Petitioner argued that the operative word in Section 13 is "action." In Petitioner's view, the *American Pipe* doctrine holds that "the class action complaint commences the action on behalf of each unnamed class member, and in the wording of Section 13, it brings the action on behalf of every unnamed class member."

Justice Gorsuch questioned Petitioner's approach on textual grounds. He stated, "when I see the word 'action,' I think of lawsuit, traditionally, and 'claim' as the claims within the lawsuit." He observed that, "the laws often distinguish between actions and claims," and "[t]he securities laws do, routinely." Justice Gorsuch asked why the Court should not simply "follow the plain language and the traditional understanding of the term 'action'?" He noted, "Congress could have use[d] [the word] 'claims,'" and that the case before it concerned "the same claims" "but … a different action."

Justice Alito similarly pressed Petitioner to explain "the definition of action" in Section 13. He expressed skepticism with respect to Petitioner's contention that the word "action" encompasses the claims of every unnamed class member and asked Petitioner, "you think Congress had all of this in mind … but it thought it was also clear it didn't need to spell it out." Petitioner responded that, "what [Congress] had in mind was letting the other side know that the claim had been asserted against it, and that the class action does."

Respondent argued that Section 13 sets forth a statute of repose after which no new lawsuits may be filed. Justice Sotomayor pressed Respondent to explain why the term "action" would not encompass the claims of unnamed class members who subsequently brought a separate suit. She explained that, under Respondent's theory, "action means new complaint, new complaint number, … [e]ven though it's asking for the same relief … [b]y the same party." Justice Breyer similarly stated that the "action" in question here "was brought when [the original named plaintiffs] filed the class action." He explained, "this is the same action. It is not a different action."

Justice Kagan questioned Respondent's position that "there's only one view of the word 'action.'" She stated, "[l]et's just suppose that 'action' is a word that sometimes it's used one way, and sometimes it's used another way, and we should look a little bit as to the practical consequences" of the definition. Justices Kagan, Breyer, and Ginsburg suggested that defining the term "action" as a lawsuit would result in the filing of motions to intervene in every class action. Justice Kagan stated, "this is a rule that's kind of guaranteed to create make-work for district courts." She observed that such a rule would "be essentially irrelevant for large investors," but it could cause "small investors to lose their claims" since they might not have "the faintest idea" of the need to file a timely motion to intervene to preserve their claims.

The Court is expected to issue a decision in *CalPERS* later this term.

Justices Probe Whether Civil Disgorgement Is a Penalty or Forfeiture for Purposes of Section 2462

On April 18, 2017, the Court heard oral arguments in *Kokesh* on the question of whether civil disgorgement is a "fine, penalty, or forfeiture" governed by a five-year statute of limitations under 28 U.S.C § 2462 or is remedial in nature and therefore not subject to any statute of limitations. [3]

The oral argument focused on each party's claims that disgorgement is or is not a "penalty" or "forfeiture" under § 2462. Petitioner argued that the Court should apply the ordinary definition of "forfeiture." According to Petitioner, a forfeiture is "an order requiring turnover of money or property to the government as a result of wrongdoing," encompassing civil disgorgement. Petitioner also contended that remedies containing both remedial and punitive elements should be considered penalties. In Petitioner's view, the purpose of disgorgement is to impose consequences on a defendant as a result of wrongdoing and, therefore, to punish the defendant. Additionally, Petitioner argued that disgorgement is not categorically remedial or compensatory because disgorged funds are not distributed to victims except at the discretion of the government.

The U.S. government, however, urged the Court to construe each word of § 2462 narrowly and to find that civil disgorgement is neither a "penalty" nor a "forfeiture." The government argued that disgorgement is not a penalty because it is intended only to remedy unjust enrichment and put a defendant back where he or she would have been had he or she committed no wrongdoing. According to the government, penalties and forfeitures may require a person to give up something to which he or she is rightfully entitled, but disgorgement only deprives a person of money to which he or she never had any rightful entitlement. The government also argued in response to Petitioner that discretion over distribution of disgorged funds actually lies with courts, not the government. According to the government, a court ultimately decides whether to require disgorgement and how to distribute disgorged funds, though the SEC may make a recommendation.

During oral argument, the Justices asked many questions and posed several hypotheticals to test the parties' definitions of "penalty" and "forfeiture" and to better understand the actual use and implications of civil disgorgement. For example, Justice Sotomayor posed a hypothetical to Petitioner in which she committed a crime but gave half of the proceeds to Justice Breyer, asking whether it would be a penalty to require her to disgorge the full amount. Justice Kennedy posed a similar hypothetical involving a person who misappropriated $100,000 and gave $90,000 to a co-conspirator. Justice Kennedy then asked whether the government could recover a total of $190,000 from the co-conspirators and whether that could be called disgorgement. Justice Breyer asked the government to list characteristics of disgorgement shared by neither fines nor forfeitures. He also likened the government's argument to claiming that a houseboat should not be subject to a tax imposed by a city on both houses and boats. Chief Justice Roberts asked either party to tell him in what percentage of civil disgorgement cases the funds were actually distributed to victims.

Chief Justice Roberts, Justice Alito, and Justice Kennedy asked both parties multiple times about a lack of Congressional authorization for civil disgorgement. Chief Justice Roberts and Justice Alito also asked the parties to explain what time limits would apply to disgorgement and where they would come from, if § 2462 does not apply. Chief Justice Roberts quoted former Chief Justice John Marshall to say that it is "utterly repugnant" to our laws to have a penalty remedy without a time limit.

3. Please click here to read our prior discussion of the circuit split on this issue.

Justice Gorsuch questioned both parties repeatedly about comparisons between criminal law and the case at hand. He suggested that criminal forfeiture is considered punitive, even though forfeited funds are sometimes distributed to victims just as with civil disgorgement. He also asked both parties whether the difference between criminal and civil remedies is simply their label.

Justice Kennedy suggested that although both parties argued in favor of a categorical rule applying to all civil disgorgement claims, the Court might do best to eschew such a broad rule and instead give guidance as to when civil disgorgement is a penalty and when it is not.

The Court is expected to issue a decision in *Kokesh* later this term.

First Circuit: Alleging Defendants' Knowledge of Undisclosed Facts Is Insufficient to Plead Scienter; Plaintiffs Must Also Allege Defendants Knew or Should Have Known the Omissions Would Mislead Investors

On April 7, 2017, the First Circuit held that defendants' alleged knowledge of undisclosed facts is not sufficient, standing alone, to raise an inference of scienter. *Brennan v. Zafgen*, 853 F.3d 606 (1st Cir. 2017) (Stahl, J.). Rather, plaintiffs must also allege that defendants "knew or should have known that their failure to disclose those facts risked misleading investors."

The case before the First Circuit concerned allegations that a biopharmaceutical company and its CEO failed to disclose two "superficial" adverse events that occurred during clinical trials for the company's only drug-in-development. Defendants did, however, disclose two "serious" adverse events.

The First Circuit acknowledged defendants' alleged "awareness of some connection" between the drug and the adverse events based on news and scientific articles. However, the court found defendants' alleged knowledge insufficient to support an inference that "defendants deliberately or recklessly risked misleading investors by not disclosing the two superficial adverse … events." The First Circuit found defendants' "disclosures both before and during the class period weaken[ed] the complaint's scienter showing." The court underscored that "defendants disclosed to investors the two serious adverse [ ] events, and noted on several occasions that the company was not going to disclose all adverse events as they occurred."

The First Circuit also found the "marginal" materiality of the adverse events in question weighed against an inference of scienter. The court emphasized that in *Matrixx Initiatives v. Siracusano,* 563 U.S. 27 (2011),[4] the Supreme Court held that "the mere existence of reports of adverse events—which says nothing in and of itself about whether the drug is causing the adverse events—will not satisfy" the materiality standard. *Id.* (quoting *Matrixx*, 563 U.S. 27). Here, the court found it "unlikely that a reasonable investor … would have viewed the two superficial adverse … events, at the time they occurred, as having significantly altered the information available to them."

4. Please click here to read our prior discussion of the *Matrixx* decision.

Fourth and Sixth Circuits: ERISA Fiduciaries May Rely on the Market Price of a Publicly-Traded Stock as an Assessment of the Stock's Riskiness

In two recent decisions, the Fourth and Sixth Circuits both applied the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014),[5] to hold that an ERISA fiduciary may rely on the market price of a publicly-traded stock as an assessment of the stock's riskiness. The Fourth Circuit held that a prudent fiduciary may consider public information concerning a stock's riskiness when determining whether to divest. *Tatum v. RJR Pension Investment Committee*, 2017 WL 1531578 (4th Cir. 2017) (Motz, J.). The Sixth Circuit ruled that a fiduciary's failure to investigate the accuracy of a publicly-traded company's stock price is not a "special circumstance" within the meaning of the *Fifth Third* decision. *Saumer v. Cliffs Natural Resources*, 853 F.3d 855 (6th Cir. 2017) (Cook, J.).

Fourth Circuit: A Prudent Fiduciary May Consider Public Information Concerning a Stock's Riskiness When Determining Whether to Divest

On April 28, 2017, the Fourth Circuit held that "in an efficient market, a fiduciary can rely on the market price to reflect the public information about risk of loss, even if, in the beneficiaries' view, the market valuation is not properly accounting for the true risk of loss." *Tatum*, 2017 WL 1531578. The court further found that ERISA does not require "a more compelling reason for divestment decisions than for investment decisions."

The Fourth Circuit rejected plaintiffs' claim that "a hypothetical prudent fiduciary is not *justified* in divesting a stock based on public information about risk." The court explained that in *Fifth Third*, the Supreme Court "merely held that a fiduciary is *not required* to divest a high-priced stock based on public information that shows a risk of price decrease." In the case before it, the Fourth Circuit found the district court correctly held that "a prudent fiduciary would have" considered the "risk of loss … reflected in the low stock price" of the stocks at issue when determining whether to divest.

Significantly, the Fourth Circuit deemed meritless plaintiffs' argument that "a hypothetical prudent fiduciary would have concluded that [the stock at issue] was undervalued and that some unknown event would occur to increase its value unexpectedly or to cease its precipitous decline." The court found that ERISA "does not demand such an impossible feat." The court stated that "[h]aving a standard in which the fiduciary is held liable regardless of whether an outcome is foreseeable is akin to having no standard at all."

Sixth Circuit: Failure to Investigate the Accuracy of a Publicly-Traded Company's Stock Price Is Not a "Special Circumstance" within the Meaning of *Fifth Third*

On April 7, 2017, the Sixth Circuit held that *Fifth Third* foreclosed the argument that a stock's "risk profile exceeded the reasonable bounds for a retirement option." *Saumer*, 853 F.3d 855. The Sixth Circuit explained that *Fifth Third* "plainly holds that a fiduciary may rely on market price as an unbiased assessment of a security's value," including its riskiness.

The Sixth Circuit further held that "a fiduciary's failure to independently verify the accuracy of the market's pricing" does not constitute a "'special circumstance' rendering [the fiduciary's] reliance on the market price imprudent" under *Fifth Third*. The court found "that even if the special-circumstances exception encompasses more than market inefficiency, it doesn't include a fiduciary's failure to independently verify the accuracy of the market's pricing."

The Sixth Circuit explained that the *Fifth Third* Court "reasoned that an investor's inquiry into a publicly traded company is unlikely to reveal the company's 'true' value, much less the future course of its stock price." Because ERISA fiduciaries have "little hope of outperforming the market … based solely on their analysis of publicly available information," the *Fifth Third* Court held ERISA fiduciaries may "as a general matter,

5. Please click here to read our prior discussion of the *Fifth Third* decision.

prudently rely on the market price." *Id.* (quoting *Fifth Third*, 134 S. Ct. 2459).

Fifth Circuit: A Subsequent Disclosure Can Negate an Inference of Scienter If Plaintiffs Do Not Allege a "Particular Reason to Lie" That "Vanished" by the Time of the Disclosure

On April 21, 2017, the Fifth Circuit held that a disclosure made two months after an alleged misstatement by an oil and gas company's CFO negated any inference of scienter because plaintiffs did not allege a "particular reason to lie" that "would have vanished" two months later. *Neiman v. Bulmahn*, 2017 WL 1423321 (5th Cir. 2017) (Higginson, J.).

The Fifth Circuit also found plaintiffs failed to raise a strong inference of scienter based on the CFO's alleged access to internal corporate reports containing contrary information, or the CFO's position within the company. In addition, the court held plaintiffs failed to state a claim as to alleged misstatements concerning the company's liquidity.

Plaintiffs Must Plead a Time-Sensitive Reason for an Alleged Misstatement If Defendants Disclose the Truth Shortly Thereafter

Plaintiffs contended that the company's CFO misrepresented production at one of the company's oil wells ("Well #4") in September 2011. The Fifth Circuit found the company's disclosure of the "true production of Well #4 in November 2011, just two months after [the CFO's] statements, belie[d] an inference of scienter." The court reasoned that "[i]t would have made little sense for [the CFO] to lie about Well #4's production in September only for [the company's president] to disclose the true production in November," particularly since plaintiffs failed to allege any timing motive. For example, plaintiffs did "not allege that [the CFO] inflated [Well #4's] production numbers in September in order to facilitate an important business opportunity that was no longer salient in November."

Alleging Access to Internal Reports Containing Contrary Information Is Insufficient, Standing Alone, to Raise a Strong Inference of Scienter

The Fifth Circuit rejected plaintiffs' attempt to plead scienter based on confidential witness allegations that well production "reports were made available" to the CFO. The court explained that in order "for allegations concerning internal corporate reports alone to support a strong inference of scienter (1) the complaint must have corroborating details regarding the contents of allegedly contrary reports, their authors and recipients, and (2) the corporate reports [must] be connected to the speaking executive in a persuasive way." Here, plaintiffs alleged that the CFO "received weekly emails containing production reports" but did not "directly allege" that the CFO actually "read the relevant section of the reports before he made" the misstatements at issue.

The Fifth Circuit found "[t]he specifics of this case make the inference that the [CFO] actually looked at Well #4's data tenuous" because the information was contained in a weekly "productivity report listing both company-wide metrics and individual well data." The court explained that "[f]or [the CFO] to determine that Well #4's productivity had fallen, he would have had to open not only the email … containing the productivity report, but also open the productivity report, parse through data for [the company's] other hundred or so wells, find the data for Well #4, and then notice that the data differed from his August statements in a material way." Since there were no allegations that the CFO "was alerted to the Well #4 data in some way," the Fifth Circuit determined that "inferring [the CFO] took those steps is less plausible than inferring that

he would not have read specific entries in the emailed reports."

An Executive's Position Within the Company Does Not Support an Inference of Scienter Absent "Special Circumstances"

The Fifth Circuit explained that in the absence of "special circumstances," plaintiffs may not allege scienter by asserting "that defendants must have been aware of [a] misstatement based on their positions within the company." The court found that none of the considerations that "might tip the scales in favor of an inference of scienter" pursuant to the "special circumstances" exception applied here.

First, the Fifth Circuit found it unlikely that "corporate executives would be familiar with the intricacies of day to day operations" given the size of the company (sixty employees).

Second, the court acknowledged that Well #4 was "projected to produce 22.5% of [the company's] total output," but stated that its "jurisprudence requires more" to find that an asset was "critical to the company's continued vitality." The Fifth Circuit noted that it has previously held the "special circumstances" exception inapplicable to "statements concerning an asset that comprised 22% of the respective company's total portfolio." *Id.* (citing *Owens v. Jastrow*, 789 F.3d 529 (5th Cir. 2015)).

Finally, the Fifth Circuit determined that Well #4's true production would not necessarily have been "readily apparent" to the CFO, nor were the CFO's statements "internally inconsistent" with representations by other company executives.

Ninth Circuit: *Omnicare*'s Pleading Standards for Opinion-Based Section 11 Claims Apply to Claims Alleging Misstatements of Opinion Under Section 10(b) and Rule 10b-5

On May 5, 2017, the Ninth Circuit held that the pleading standards for alleging a Section 11 claim based on a misstatement of opinion set forth in *Omnicare v. Laborers Dist. Council Const. Industry Pension Fund*, 135 S. Ct. 1318 (2015),[6] apply to opinion-based claims brought under Section 10(b) and Rule 10b-5. *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Technology*, 2017 WL 1753276 (9th Cir. 2017) (Smith, Jr., J.).

The Ninth Circuit explained that "*Omnicare* establishes three different standards for pleading falsity of opinion statements." First, if plaintiffs assert that the opinion constitutes a "material misrepresentation," then *Omnicare* requires plaintiffs to "allege both that 'the speaker did not hold the belief she professed' and that the belief is objectively untrue." *Id.* (quoting *Omnicare*, 135 S. Ct. 1318). Second, if plaintiffs contend that "a statement of fact contained within an opinion statement is materially misleading," then plaintiffs "must allege that 'the supporting fact [the speaker] supplied [is] untrue.'" *Id.* (quoting *Omnicare*, 135 S. Ct. 1318). Third, if plaintiffs claim that a statement of opinion is misleading under "a theory of omission," then plaintiffs "must allege 'facts going to the basis for the issuer's opinion … whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.'" *Id.* (quoting *Omnicare*, 135 S. Ct. 1318).

"Although *Omnicare* concerned Section 11 claims," the Ninth Circuit determined that "the Supreme Court's reasoning is equally applicable to Section 10(b) and Rule 10b-5 claims." The Ninth Circuit explained that "[t]he Supreme Court's definition of opinion statements and differentiation of them from factual statements was specific to Section 11 only to the extent that Section 11 imposes

6. Please click here to read our prior discussion of the *Omnicare* decision.

liability for 'untrue statement[s] of … *fact*.'" *Id.* (quoting *Omnicare*, 135 S. Ct. 1318). The court noted that "[t]he only other circuit to have considered *Omnicare*'s effect on the falsity pleading standard for Section 10(b) claims based on opinion statements has held that the reasoning of *Omnicare* applies." *Id.* (citing *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016)).[7] The Ninth Circuit stated that it was "likewise so persuaded," and held "that the three standards for pleading falsity under *Omnicare* also apply to Section 10(b) and Rule 10b-5 claims."

In so holding, the Ninth Circuit determined that *Omnicare* overruled its prior decision in *Reese v. Malone*, 747 F.3d 557 (9th Cir. 2014)[8] to the extent that *Reese* permitted plaintiffs to allege the falsity of a statement of opinion by pleading that the speaker had "no reasonable basis for the belief" expressed. *Id.* (quoting *Reese*, 747 F.3d 557). The Ninth Circuit stated that under *Omnicare,* "pleading falsity by alleging that 'there is no reasonable basis for the belief' is permissible only under an omissions theory of liability." To assert an omission-based claim, a plaintiff must "'call into question the issuer's basis for offering the opinion" by alleging "facts about the inquiry the [issuer] did or did not conduct or the knowledge it did or did not have.'" *Id.* (quoting *Omnicare*, 135 S. Ct. 1318). The Ninth Circuit found *Reese*'s "no reasonable basis for the belief" standard "clearly irreconcilable" with *Omnicare*.

Judge Kleinfeld issued a concurring opinion expressing his view that *Omnicare*'s clear irreconcilability with *Reese* is "debatable" because "[S]ection 10(b) and [S]ection 11 are materially different."

7. Please click here to read our prior discussion of the *Sanofi* decision.

8. Please click here to read our prior discussion of the *Reese* decision.

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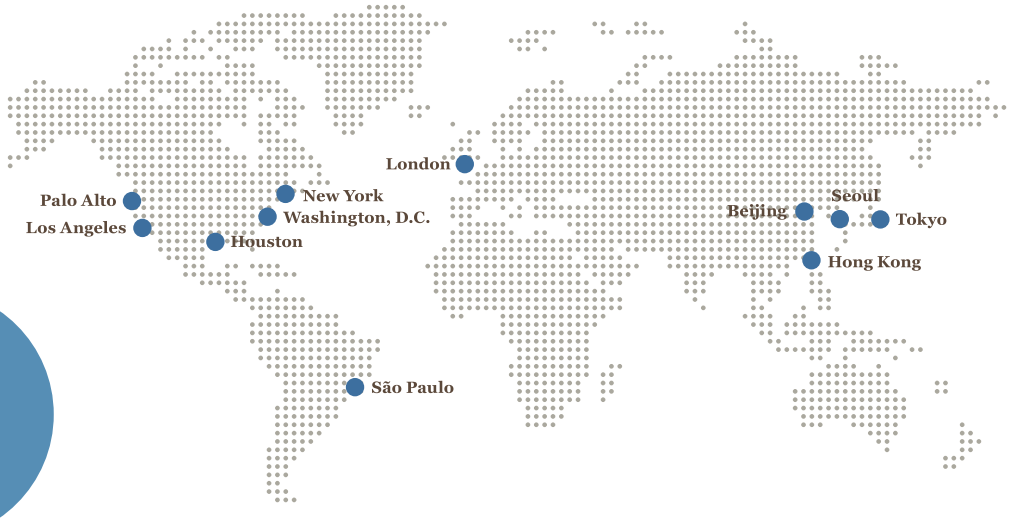

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