Bloomberg Law

Class Action Litigation Report®

VOL. 18, NO. 23 DECEMBER 8, 2017

Securities

Justices Parse 'Gibberish' in Securities Statute

BY PERRY COOPER

Members of the U.S. Supreme Court appeared stumped Nov. 28 over the meaning of a securities statute's jurisdictional provisions, which Justice Samuel A. Alito Jr. called ''just gibberish.''

''What are we supposed to do with this?'' Alito asked.

He proposed throwing out the provisions altogether, but other justices seemed to favor the position of securities class action plaintiffs who want to bring federal claims under the 1933 Securities Act in state court (*Cyan Inc. v. Beaver Cty. Emp. Ret. Fund*, U.S., No. 15-1439, *argued* 11/28/17).

Investors generally view state courts as friendlier venues for securities class actions. Companies argue keeping all securities litigation in federal court helps maintain uniformity.

Tough One for Conservatives It's always hard to tell where the justices stand after oral argument, Washington securities lawyer Daniel Sommers told Bloomberg Law. But here, ''the challenge is heightened because the justices were having a difficult time parsing through the statutory language at play in this case,'' Sommers, of plaintiffs' firm Cohen Milstein Sellers & Toll PLLC, said.

The statute at issue in the suit is Securities Act Section 77(v)(a) as amended by the Securities Litigation Uniform Standards Act. SLUSA was enacted in 1998 in a bid to prevent class securities fraud plaintiffs from bypassing stringent federal pleading requirements by framing their claims as state law violations.

Sommers said that the statute's unclear wording, and self-referencing provisions, created problems for the more conservative justices. They ''are being forced into the uncomfortable exercise of looking to legislative intent and legislative history in order to determine the proper outcome.''

He said justices Sonia Sotomayor and Elena Kagan appeared the most supportive of the investor's interpretation of the statute. Sommers attended the argument but isn't involved in the case.

A defense attorney also present at argument agreed the case was a difficult one for the justices.

''It's hard to tell how the Justices may be leaning based on the arguments,'' Anna Erickson White of Morrison & Foerster LLP in San Francisco told Bloomberg Law. ''They all seemed to struggle with a clean statutory interpretation; in fact, 'gibberish' was used to describe the statute at least three times.''

But she said the court could rule for the company. ''The question may come down to legislative intent, on which a few justices seemed to be leaning petitioners' way,'' she said.

Concurrent Jurisdiction? Cyan Inc., a communications company, was sued by a pension fund for allegedly making material misstatements in securities offering documents. The suit was filed in California state court but alleged only federal claims under the '33 Act, which generally governs the securities registration and offering process.

Cyan argued the complaint should have been filed in federal district court. The investors said state courts share concurrent jurisdiction with federal courts over '33 Act claims.

The government argued a middle position between those of the parties. State courts have jurisdiction over '33 Act claims, but Cyan could have removed this case to federal court, Allon Kedem, asssistant to Solicitor General Noel Francisco, argued as an amicus curiae.

Obtuse Language If Congress intended to take away state court jurisdiction over these claims, it ''chose a rather obtuse way'' of doing it, Justice Ruth Bader Ginsburg said.

Neal K. Katyal of Hogan Lovells LLP in Washington, arguing for Cyan, agreed the language is hard to decipher. ''This body could have written a much better statute than our friends across the street,'' he said. But he argued Cyan's approach is ''the best way of understanding the text.''

All the readings of the provisions are ''a stretch,'' Alito said. ''Is there a certain point at which we say this means nothing, we can't figure out what it means, and, therefore, it has no effect, it means nothing?''

Thomas C. Goldstein of Goldstein & Russell P.C. in Bethesda, Md., arguing for the investors, said if Congress wanted to take away the long-standing jurisdiction of state courts over '33 Act claims, it needed to do so with clearer language.

The Supreme Court has said ''that if Congress is going to change this kind of law significantly, you don't find elephants in mouse holes.''

Policy Arguments A few public policy arguments found their way into the statutory interpretation discussion, too.

Sotomayor asked, ''What difference does it make who adjudicates the claim if both courts are going to be bound by federal law?''

 ISSN 1529-0115

Katyal said Congress built a ''super safe house'' and locked the front door against federal court abuse of federal claims, then locked the side doors to prevent abuse of state law claims. ''But they didn't build even a door to deal with the problem of all of this being repleaded now in state courts,'' he said.

Securities suits under the '33 Act are a huge problem for companies on the ground, Katyal said. He pointed to online retailer Alibaba's amicus brief, which says 50 percent of '33 Act claims involving initial public offerings have parallel federal and state court litigation.

Goldstein said Congress was only concerned about state courts adjudicating cases involving mixed '33 Act and 1934 Securities Exchange Act claims. Pure '33 Act claims are fine in state court, he said.

To contact the reporter on this story: Perry Cooper in Washington at pcooper@bloomberglaw.com

To contact the editor responsible for this story: Steven Patrick at spatrick@bloomberglaw.com

Transcript at http://src.bna.com/uxP

  CLASS ISSN 1529-0115