Securities Regulation & Law Report™

May 26, 2014

Class Actions

Legal Expert: Watch Out for Dicta In Supreme Court's Halliburton Ruling

By Yin Wilczek

May 21 — As the U.S. Supreme Court is poised to deliver its decision in *Halliburton Co. v. Erica P. John Fund Inc.*, legal experts on a May 21 panel suggested that the court is unlikely to wreak dramatic changes on securities fraud class actions.

There will probably "be not a lot of change" for such litigation, said Thomas Goldstein, a partner at Goldstein & Russell PC, Washington, and co-founder and publisher of the SCOTUSblog website.

Goldstein—whose firm co-authored an amicus brief in support of the respondent Erica P. John Fund in the case—also suggested that dicta will be the "most consequential" result from the case. "The author of the opinion will be as important as the judgment" itself, Goldstein said, adding that should the opinion reflect broad concerns about class actions, district courts will take that as a signal to start tightening up on private securities litigation.

Goldstein spoke with other attorneys on a Supreme Court panel organized by the D.C. Bar.

Decision Soon

The Supreme Court is expected in the next month to issue a decision in *Halliburton*, a would-be class action involving the company's alleged misstatements between June 1999 and December 2001 about its financial condition. Commentators have suggested that the decision could result in the overturning of *Basic Inc. v. Levinson*, a 25-year-old decision that established the fraud-on-the market class-wide presumption of reliance.

The high court heard oral argument in the case in March (46 SRLR 431, 3/10/14).

On the D.C. Bar panel, Mark Perry, a Washington-based partner at Gibson Dunn & Crutcher LLP, agreed that the Supreme Court's "appetite for throwing out *Basic* didn't seem to be there," based on the questions the justices asked during the oral argument. Similarly, Bradley Bondi, a Washington-based partner at Cadwalader, Wickersham & Taft LLP, said, "I don't see" the court doing "anything radical" to *Basic*.

Speaking from the perspective of the plaintiffs' bar, Daniel Sommers, a partner at Cohen Milstein Sellers & Toll PLLC in Washington, told the panel that "anything short of throwing out *Basic* is a win" for investors.

Interest in Securities Litigation

In other remarks, the panel noted that the high court, over the last 10 years and during Chief Justice John Roberts's leadership, is taking an unprecedented interest in private securities litigation. The court under Roberts seems to have a "grand vision" of "regularizing" securities cases, Perry said.

Members of the court also are "really engaged" in securities issues, Bondi said. "They're asking the right questions and taking the right cases up," he added. "It's an exciting time to be a securities litigator."

However, Goldstein suggested that a majority of the court "thinks there is too much" civil litigation, viewing it as "burdensome" and "extortionist." Accordingly, there is "almost always" some coalition amongst its members that can be formed in a case to restrict securities litigation, he said.

Looking ahead, Sommers suggested that the issue of damage calculation in securities class actions is "somewhere on the horizon" for the court. "I would not be surprised if the issue percolates up to the Supreme Court" sometime in the future, he

said.

Perry, pointing to the proliferation of litigation around mortgage-backed securities, predicted that “some question” on the topic will reach the court going forward.

To contact the reporter on this story: Yin Wilczek in Washington at ywilczek@bna.com

To contact the editor responsible for this story: Phyllis Diamond at pdiamond@bna.com

