

U.S. Supreme Court

## Trump's SCOTUS Picks Not Seen as Investor Friendly

### BNA Snapshot

- President Trump slated to announce SCOTUS nominee Jan. 31
- Nominee not likely to have “investor friendly” perspective, attorney says
- Sampling of securities law rulings



By Antoinette Gartrell

Decisions by President Donald Trump's top U.S. Supreme Court contenders, all federal appeals court judges, suggest they don't have an “investor friendly” perspective on the use of private remedies.

Based on Trump's campaign comments, one would expect him to select judges who take a narrow view of federal regulatory schemes, including the antifraud provisions of the federal securities laws, Washington attorney Daniel Sommers of Cohen Milstein Sellers & Toll PLLC

told Bloomberg BNA.

All three candidates—Judge Thomas Hardiman of the U.S. Court of Appeals for the Third Circuit, Judge Neil Gorsuch of the Tenth Circuit and Judge William Pryor of the Eleventh Circuit—probably would strictly construe shareholder securities suits, Virginia Lawyer Dallas Hammer of Zuckerman Law told Bloomberg BNA. That would spell good news for issuers, broker-dealers, and investment advisers sued for securities fraud and bad news for shareholder-plaintiffs, he said.

According to Hammer, Gorsuch could have the most lasting effect on securities law because he is one of the most vociferous opponents of Chevron deference. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the high court concluded that if congressional intent isn't clear on an issue, the courts must defer to the agency's reasonable interpretation of a statute it administers. If Gorsuch's views on administrative law gain traction on the court, it could fundamentally change the way securities laws have been enforced for the past three decades, Hammer said.

No matter whom Trump nominates, there's likely to be further refinement of class certification requirements and the boundaries of the securities laws, Jacob Zamansky of Zamansky LLC, New York, told Bloomberg BNA. The nominee will strictly follow established precedent, he said.

New York attorney Matthew Farley of Drinker Biddle & Reath LLP doesn't see much of a difference between the three frontrunners. “Everyone is more happy with the court that strictly follows the text of the constitution and statutes,” Farley, who represents industry clients, told Bloomberg BNA. The nominee will fit the general profile of the late Justice Antonin Scalia, James Commons of McDermott Will & Emery LLP, Washington, told Bloomberg BNA.

Trump is slated to announce his pick late Jan. 31.

The following is a sampling of how the three judges have ruled in securities cases.

### Neil Gorsuch

Gorsuch has served on the Tenth Circuit since 2006. In 2015, he ruled that the SEC didn't abuse its discretion in upholding Financial Industry Regulatory Authority sanctions against a Salt Lake City penny stock brokerage and head trader for aiding

an unregistered pump and dump scheme (ACAP Fin. Inc. v. SEC, No. 13-9592, 10th Cir., 4/3/15).

A few years earlier, Gorsuch ruled that a communications company wasn't obligated to advance legal expenses its former chief executive incurred defending securities fraud charges (Flood v. ClearOne Comm. Inc., No. 09-4017, 10<sup>th</sup> Cir., 8/30/10).

Gorsuch also cleared the way for a third conspiracy trial of two former investment bankers over their alleged roles in a looting scheme (United States v. Wittig, 10th Cir., No. 08-3220, 8/10/09).

### **Thomas Hardiman**

Hardiman has served on the Third Circuit since 2007 after being elevated from the U.S. District Court for the Western District of Pennsylvania.

In 2016, Hardiman cut off ex-major league baseball player Jaret Wright's chances to revive claims he lost millions of dollars because of risky unsuitable trades SunTrust Bank made on his behalf (Wright v. SunTrust Bank, Inc., 3d Cir., No. 15-1365, 2/8/16). Hardiman wrote that Wright's claims weren't subject to arbitration because they arose out of his agreement with two other advisory firms, which didn't contain an arbitration clause, and not out of his agreement with SunTrust.

In a separate case, Hardiman allowed two founders of a metal components business to dodge securities fraud liability for allegedly pocketing millions in corporate funds funneled through a sham corporate sales entity they formed, ultimately reducing the value of the shares the plaintiffs sold back to the corporation (Gallup v. Clarion Sintered Metals Inc., 3d Cir., No. 11-4004, 7/26/12). Any remedy for the shareholders must be based on state law rather than the federal securities statutes, Hardiman said in an unpublished opinion.

### **William Pryor**

Pryor is an Alabama native who has sat on the Atlanta-based Eleventh Circuit since 2003.

Pryor affirmed a jury verdict for Stiefel Labs and its former chief executive officer on charges they committed securities fraud by buying back the former chief financial officer's stock at an artificially low price ahead of the company's merger (Fried v. Stiefel Labs Inc., 11th Cir., No. 14-14790, 3/1/16).

He also ruled that the former Miami budget director wasn't immune from an SEC enforcement action for fraud (SEC v. Boudreaux, 11th Cir., No. 14-10363, 9/5/14).

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