ALFA International
The Global Legal Network
Celebrating 40 Years

THE SUPREME COURT TERM IN REVIEW FOR BUSINESSES: A DISCUSSION OF THIS PAST YEAR'S DECISIONS AND THEIR PRACTICAL IMPACTS

JULY 8, 2020

PRESENTERS

Joseph G. Fortner, Jr.
Halloran & Sage LLP
Hartford, CT
E: fortner@halloransage.com
T: 860.297.4609

Kandice K. Hull
McNees Wallace & Nurick LLC
Harrisburg, PA
E: khull@mcneeslaw.com
T: 717.237.5452

Renee Lieux
McNees Wallace & Nurick LLC
Harrisburg, PA
E: rlieux@mcneeslaw.com
T: 717.237.5284

ERISA CASES

THOLE *V.* U.S. BANK N.A. NO. 17-1712 (JUNE 1, 2020)

- James Thole and Sherry Smith retired participants in U.S. Bank’s defined benefit retirement plan
- They have been paid all of their monthly pension benefits
- Filed a $750 million punitive class action under ERISA alleging a breach of the duty of loyalty and prudence by investing the plan’s assets poorly

THOLE *V.* U.S. BANK N.A.

- The Court held they lacked Article III standing because "win or lose, they would still receive the exact same monthly benefits they are already entitled to receive."
- The Court reasoned that
  - they possessed no equitable or property interest in the plan;
  - they cannot assert injuries to the plan where they have not suffered an injury;
  - Article III standing requires a concrete injury; and
  - Defined benefit plans are regulated so the plaintiffs' contention that meaningful regulation of plan fiduciaries is only possible if they may sue for misconduct is without merit

RETIREMENT PLANS COMMITTEE OF IBM *V.* JANDER

18-1165 (JANUARY 14, 2020)

- Larry Jander was a participant in IBM's ESOP
- In 2014, IBM sold a microelectronics business and took a $4.7 billion loss
- Jander criticized the retirement committee as they continued to purchase IBM stock despite knowing of an undisclosed $700 million dollar loss on the microelectronics business

RETIREMENT PLANS COMMITTEE OF IBM *V.* JANDER

18-1165 (JANUARY 14, 2020)

- *Fifth Third Bancorp v. Dudenhoeffer* standard- to state a claim for breach of the duty of prudence on the basis of inside information, the plaintiff must allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it

RETIREMENT PLANS COMMITTEE OF IBM *V.* JANDER

18-1165 (JANUARY 14, 2020)

- Remanded the case back to the Second Circuit to determine whether to consider the views of the SEC on the standard to allege a breach of fiduciary duty based upon insider information and whether ERISA imposes a duty to act on insider information

INTEL CORPORATION INVESTMENT POLICY COMMITTEE ET AL. V. SULYMA

NO. 18-1116 (FEBRUARY 26, 2020)

- ERISA requires participants with “actual knowledge” to file suit within three (3) years of gaining that knowledge
- Sulyma filed an action against Intel alleging they had made imprudent investment decisions more than 3 years after Intel had disclosed investment decisions to him
- Although he visited the website numerous times, he did not recall reading the documents which contained the investment disclosures

INTEL CORPORATION INVESTMENT POLICY COMMITTEE ET AL. V. SULYMA

NO. 18-1116 (FEBRUARY 26, 2020)

- The Court held a participant does not have “actual knowledge” of disclosures he receives if he does not read them or recall reading them

PUTNAM INVESTMENTS LLC V. BROTHERSTON

18-896 (JANUARY 13, 2020)

- Circuits are split on whether the plaintiff bears the burden of providing losses to a plan as a result of a breach of fiduciary duty or a defendant bears the burden of disproving losses resulted from a breach
- Supreme Court denied cert

INTELLECTUAL PROPERTY CASES

2019 TERM INTELLECTUAL PROPERTY DECISIONS

- Patents: Two decisions
  - *Peter v. Nantkwest, Inc. (*Sotomayor, Dec. 11, 2019)
  - *Thryv, Inc. v. Click-to-Call Tech.* (Ginsburg, April 20, 2020)
- Copyrights: Two decisions
  - *Allen v. Cooper* (Kagan, March 23, 2020)
  - *Georgia v. Public.Resource.Org* (Roberts, April 27, 2020)
- Trademarks: Three decisions
  - *Romag Fasteners, Inc. v. Fossil, Inc. (*Gorsuch, April 23, 2020)
  - *Lucky Brand Dungarees v. Marcel Fashions Grp* (Sotomayor, May 14, 2020)
  - *U.S. Patent & Trademark Office v. Booking.com* (Ginsburg, June 30, 2020)

2019 TERM IP CASES: PATENTS

- *Thryv, Inc. v. Click-to-Call Technologies* (140 S.Ct. 1367)
  - Starting in 2012, the America Invents Act allowed Inter Partes Reviews, trial proceedings before Patent Trial & Appeal Board for limited review of the patentability of issued patents
    - Sections 102 (novelty) and 103 (nonobviousness) bases only, and only on the basis of prior art existing in patents or printed publications
    - Heard by Board
  - Only proceeds if Board agrees to institute review (§ 314)
    - Time-barred if request made more than a year after an infringement suit is filed against party seeking review (§ 315(b))
    - Decision whether to institute IPR is "final and nonappealable." (§ 314(d))

2019 TERM IP CASES: PATENTS

- *Thryv, Inc. v. Click-to-Call Technologies* (140 S.Ct. 1367)
  - Thryv sought IPR regarding Click-to-Call's patent relating to anonymous telephone calls
    - C-to-C claimed IPR untimely, based on 2001 infringement suit which was voluntarily dismissed without prejudice
    - Board rejected timeliness argument, and allowed IPR to proceed
      - Concluded that dismissal without prejudice does not trigger § 315(b) one-year time limit
      - Result was 13 claims cancelled
  - Click-to-call appealed, claiming the IPR was untimely

2019 TERM IP CASES: PATENTS

- *Thryv, Inc. v. Click-to-Call Technologies* (140 S.Ct. 1367)
  - Court had held that § 314(d) barred judicial review of the Board's institution decisions where the grounds for the challenge were closely tied to the application and interpretation of statutes related to the decision
    - *Cuozzo Speed Technologies v. Lee*, 136 S.Ct. 2131 (2016)
  - Federal Circuit had ruled in another case that notwithstanding § 314(d), timeliness determinations were appealable
    - Concluded that timeliness decisions are not "closely related" to a § 314(a) likelihood-of-success determination

2019 TERM IP CASES: PATENTS

- *Thryv, Inc. v. Click-to-Call Technologies* (140 S.Ct. 1367)
  - Citing *Cuozzo's* language that § 314(d) bars review of matters "closely tied to the application and interpretation of statutes related to" the institution decision, the Court here held that a timeliness challenge "easily meets that measurement."
    - The time limitation under § 315(b) is "integral" to the institution decision
    - To allow an appeal on this basis would waste resources, including by unwinding the agency's merits decision
    - And it would "save bad patent claims."

ALFA International
The Global Legal Network
Celebrating 40 Years

2019 TERM IP CASES: PATENTS

- *Thryv, Inc. v. Click-to-Call Technologies* (140 S.Ct. 1367)
  - Result: the ability to appeal the Board's determinations regarding the commencement of an IPR is clearly limited
  - Justice Gorsuch, in dissent, chastises the Majority for "defy[ing] the plain language of [the] statute," and going further down the road of handing judicial powers to executive agency officials
- Do not expect that a court will vacate the Board's decisions about whether to proceed with an IPR

2019 TERM IP CASES: PATENTS

- *Peter v. Nantkwest* (140 S.Ct. 365)
  - Arose from patent applicant's action against PTO after PTAB affirmed rejection of its application
  - Rather than appeal to Federal Circuit, civil action filed against PTO in Eastern District of Virginia (35 U.S.C. § 145)
    - Under this option, statute provides that "all the expenses of the proceedings shall be paid by the applicant."
  - After summary judgment granted to PTO, agency sought reimbursement of expenses, including salaries of agency attorneys and paralegals

2019 TERM IP CASES: PATENTS

- *Peter v. Nantkwest* (140 S.Ct. 365)
  - Court's analysis emphasized that under "American Rule," each party pays its own attorneys fees, absent statute or contract
  - Agency's claim for attorney fee shifting under § 145 would be a "radical departure" from longstanding principles
    - "Expenses of the proceeding" not commonly understood to include attorney's fees when section enacted
    - Use of term "Expenses" alone does not authorize attorney's fees award
    - Because Congress did not authorize fee shifting, not allowed here

ALFA International
The Global Legal Network
Celebrating 40 Years

2019 TERM IP CASES: COPYRIGHTS

- *Georgia v. Public.Resource.Org, Inc.* (140 S.Ct. 1498)
  - Georgia Code Revision Commission issues State's official code – the Official Code of Georgia Annotated
    - Includes statutory text, as well as non-binding annotations
      - Judicial opinion summaries
      - State Attorney General Opinion summaries
      - Lists of related law articles
    - Assembled by the Commission; funded by Legislature
  - Produced and published by Matthew Bender
    - Lexis drafts annotations for approval by Commission
    - Agreement vests copyrights in State

2019 TERM IP CASES: COPYRIGHTS

- *Georgia v. Public.Resource.Org, Inc.* (140 S.Ct. 1498)
  - Public.Resource.Org posted OCGA online and distributed copies
  - Commission sued for copyright infringement
  - PRO counterclaimed for declaration that OCGA is within public domain
  - Trial court held annotations were copyrightable
  - 11^{th} Circuit reversed

2019 TERM IP CASES: COPYRIGHTS

- *Georgia v. Public.Resource.Org, Inc.* (140 S.Ct. 1498)
  - Supreme Court began by discussing the “government edicts doctrine,” under which neither a court’s opinion nor the reporter of same can assert a copyright in the opinion, decision, syllabus, or headnote
    - The doctrine was limited to extent reporter created explanatory materials without authority to speak with the force of law
  - Thus, the critical point is: neither judges, nor legislators, can be “authors” of the law, including any explanatory or procedural materials which they create in their duties

2019 TERM IP CASES: COPYRIGHTS

- *Georgia v. Public.Resource.Org, Inc.* (140 S.Ct. 1498)
  - ”Author” of these annotations is the Commission
  - It functions as an arm of the Legislature
  - It does so as part of its official duties
  - Georgia’s claim that the annotations do not fall within the Government Edicts Doctrine is not compelling, as the practical significance of their inclusion in the OCGA is that they have an authoritative element
  - To permit a copyright claim for the annotations would allow states to hide non-binding judicial and legislative work product, including dissents, behind a pay wall

2019 TERM IP CASES: COPYRIGHTS

- *Georgia v. Public.Resource.Org, Inc.* (140 S.Ct. 1498)
  - Georgia's Copyright claim is rejected
  - Thus
    - "Non-binding, explanatory legal materials are not copyrightable," whether
      - Created by judges; or
      - Created a legislative body vested with authority to make law
    - But, independent explanatory materials that do not have indicia that they have the government imprimatur can be

2019 TERM IP CASES: COPYRIGHTS

- *Allen v. Cooper* (140 S.Ct. 994)
  - Suit by videographer against North Carolina for its online publication of videos and photographs taken of shipwreck off North Carolina coast
  - Trial court held that state sovereign immunity was abrogated under 1990 Copyright Remedy Clarification Act, and that this was permissible under Section 5 of the 14th Amendment
  - Fourth Circuit reversed

2019 TERM IP CASES: COPYRIGHTS

- *Allen v. Cooper* (140 S.Ct. 994)
  - Court's analysis begins with the prohibition against suits against nonconsenting states
  - Exception where
    - Congress has enacted unequivocal statutory language abrogating immunity; AND
    - A Constitutional provision allows Congress to so act

2019 TERM IP CASES: COPYRIGHTS

- *Allen v. Cooper* (140 S.Ct. 994)
  - Court here found that Congress had, in fact, used "clear language" to abrogate the States' immunity rom copyright infringement suits
  - Case thus turned on whether it was authorized to do so under any Constitutional provisions
  - Court held: it was not, rejecting the following arguments:

2019 TERM IP CASES: COPYRIGHTS

- *Allen v. Cooper* (140 S.Ct. 994)
  - Intellectual Property Clause, Art. I, § 8, cl. 8.
    - Congress has the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."
    - Based in significant part upon *stare decisis*, Court held that its prior *Seminole Tribe of Fla. v. Florida* and *Florida Prepaid* decisions precluded Congress from using its Article I powers to circumvent the limits which sovereign immunity places upon Federal jurisdiction

2019 TERM IP CASES: COPYRIGHTS

- *Allen v. Cooper* (140 S.Ct. 994)
  - 14th Amendment, Section 5
    - Authority exists only where there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."
    - Merely negligent acts of infringement do not fall within the Fourteenth Amendment's due process deprivation clause
      - Infringement must be intentional (or at least reckless)
    - And if State offers an adequate remedy for infringement, this satisfies the requirements of "due process."

2019 TERM IP CASES: COPYRIGHTS

- *Allen v. Cooper* (140 S.Ct. 994)
  - 14th Amendment, Section 5
    - Prior analysis under Patent Remedy Act in *Florida Prepaid* is "critical."
      - Statutory abrogation of immunity in Act was out of proportion to the problem which Congress found required addressing; most infringements were the result of mistakes or misunderstandings
      - Here, Congress found no evidence that states were intentionally infringing copyrights and allowing to no remedies
      - Thus, abrogation under the 14th Amendment not valid
  - Court left open that Congress could pass a valid Copyright state immunity abrogation statute in the future

2019 TERM IP CASES: TRADEMARKS

- *Romag Fasteners, Inc. v. Fossil, Inc.* 140 S. Ct. 1492
  - After Fossil agreed to use Romag fasteners in Fossil's products, Romag discovered Chinese factories were using counterfeit Romag fasteners
    - Fossil had been doing very little to guard against practice
  - When Romag sued, jury found Fossil acted "in callous disregard" of Romag's rights, but rejected the willfulness claim
  - Romag sought disgorgement of profits
    - Denied as Second Circuit law required proof the violation was willful
  - Court took case to resolve Circuit splits

2019 TERM IP CASES: TRADEMARKS

- *Romag Fasteners, Inc. v. Fossil, Inc.* 140 S. Ct. 1492
  - Case focused on 35 U.S.C. § 1117 (a), which provides that a Plaintiff "shall be entitled" to recover defendant's profits, its damages, and costs of the action when it is established that the violation of a registrant's rights in the mark:
    - Is in violation of § 1125(a) (false or misleading use of marks)
    - Is in violation of § 1125(d) (cyberpiracy)
    - Is a willful violation of § 1125(c) (dilution)
  - Fossil argued that the willfulness requirement applied to § 1125(a), because statute provides award is "subject to the principles of equity."

2019 TERM IP CASES: TRADEMARKS

- *Romag Fasteners, Inc. v. Fossil, Inc.* 140 S. Ct. 1492
  - Court held that while willfulness is required for disgorgement in a dilution claim under § 1125(c), Plaintiff had shown a violation of §1125(a)
  - Lanham Act has a variety of triggers based upon state of mind
  - “Principles of equity” neither lead to the conclusion that Congress intended a “state of mind” requirement for disgorgement under § 1125(a), nor does language of Lanham Act lead to conclusion that Congress intended equity to limit the availability of a profits remedy

2019 TERM IP CASES: TRADEMARKS

- *Romag Fasteners, Inc. v. Fossil, Inc.* 140 S. Ct. 1492
  - Historic trademark law does not clearly address the need for proof of willfulness for profits disgorgement
  - And, while willfulness is "a highly important consideration in determining whether an award of profits is appropriate," it is not an inflexible precondition to such recovery
  - Thus, held that willfulness is *not* a precondition to such an award for infringement claims based upon false or misleading use of the mark

2019 TERM IP CASES: TRADEMARKS

- *USPTO v. Booking.Com B.V*, 2020 WL 3518365
  - Owner of website used to book hotel accommodations (booking.com) challenged TTAB refusal to register website address as trademark
  - Registration refused on grounds that "booking.com" was generic
    - Consumers would understand "booking.com" to refer to an online reservation service
      - Thus generic, or at least descriptive without secondary meaning
  - PTO urged a nearly *per se* rule: when a generic term is combined with a generic top-level domain name (such as ".com"), the resulting combination is generic

2019 TERM IP CASES: TRADEMARKS

- *USPTO v. Booking.Com B.V*, 2020 WL 3518365
  - Case focused on distinctiveness
  - Only distinctive marks may be registered
    - Spectrum
      - Generic
      - Descriptive
      - Suggestive
      - Arbitrary;
      - Fanciful.
    - Generic marks, and descriptive marks without secondary meaning, not eligible for registration

2019 TERM IP CASES: TRADEMARKS

- *USPTO v. Booking.Com B.V,* 2020 WL 3518365
  - Court clarified:
    - "Generic" refers to a class of goods or services
    - For compound marks, distinctiveness inquiry is based upon the term's meaning as a whole, not by looking at parts in isolation
    - Relevant meaning is what it means to consumers
  - Thus, whether a mark is "generic" turns on the significance of the mark *as a whole* to consumers

2019 TERM IP CASES: TRADEMARKS

- *USPTO v. Booking.Com B.V,* 2020 WL 3518365
  - Ultimate question: Do consumers think the term “booking.com” refers to a type of service?
    - As evidence reflected they did not not, the term is not generic
  - Majority rejected PTO’s proposed rule that generic term combined with generic top-level domain name (“generic.com”) is itself generic
    - PTO’s past practice has allowed such registrations
    - Distinguished prior cases rejecting registrations where “Company” was added to a generic term
    - The addition of a domain name can, in fact, convey to consumers a source-identifying characteristic: a website

ALFA International
The Global Legal Network
Celebrating 40 Years

2019 TERM IP CASES: TRADEMARKS

- *USPTO v. Booking.Com B.V*, 2020 WL 3518365
  - Court made clear: it is not adopting a rule that adding a TLD automatically makes "generic.com" terms nongeneric
    - Instead, proof of consumer perception remains the hallmark
  - Rejected concerns that allowing "booking.com" to be registered would block the adoption of similar domain names
    - The Court and the applicant agreed "booking.com" is a weak mark
    - Thus, close variants are unlikely to infringe
  - Thus, affirmed appellate judgment regarding eligibility

2019 TERM IP CASES: TRADEMARKS

- *USPTO v. Booking.Com B.V,* 2020 WL 3518365
- Take aways:
  - On a narrow view: domain names which include terms that may seem to be generic or descriptive may be registrable if there is proof of secondary meaning
    - Look to see whether consumers use the domain name generically
  - On a broader view: reflects the importance of proof of secondary meaning when seeking to register weak marks

2019 TERM IP CASES: TRADEMARKS

- *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.* (140 S. Ct. 1589)
  - Continuation of two decades of trademark litigation between "Lucky Brand" and "Get Lucky" jeans
    - Round One: Settlement (2003)
    - Round Two: Trial, with injunction against Lucky Brand copying Marcel's "Get Lucky" mark, and damages (2005)

ALFA International
The Global Legal Network
Celebrating 40 Years

2019 TERM IP CASES: TRADEMARKS

- *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.* (140 S. Ct. 1589)
  - Continuation of two decades of trademark litigation between "Lucky Brand" and "Get Lucky" jeans.
    - Round Three: Marcel sued for continued infringement of its marks, relying not on use of "Get Lucky," but on other allegedly infringing uses
    - District Court granted Lucky Brand's motion to dismiss based on the release from 2003
    - Second Circuit vacated dismissal, holding that "defense preclusion" barred Lucky Brand from raising this previously unlitigated defense which should have been raised earlier

ALFA International
The Global Legal Network
Celebrating 40 Years

2019 TERM IP CASES: TRADEMARKS

- *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.* (140 S. Ct. 1589)
  - Decision goes beyond trademark law: Court addressed whether the concept of "defense preclusion" is a valid application of *res judicata*
  - Second Circuit had reasoned that a defendant should be preluded from raising an unlitigated defense which should have been raised earlier, where (a) previous action involved adjudication on merits; (b) previous action involved the same parties; (c) defense was either asserted or could have been asserted; (d) district court, in its discretion, concludes preclusion of the defense appropriate

2019 TERM IP CASES: TRADEMARKS

- *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.* (140 S. Ct. 1589)
  - Court began by noting that "defense preclusion" comprises two distinct doctrines: issue preclusion and claim preclusion
  - Where issue preclusion does not apply, a defense can be barred only if the causes of action share a common nucleus of operative facts
  - These two lawsuits may have been part of the continuation of this jeans war, but they were grounded on different conduct, marks, and times

2019 TERM IP CASES: TRADEMARKS

- *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.* (140 S. Ct. 1589)
  - Marks:
    - 2005 Action: Marcel alleged infringement of "Get Lucky" mark
    - 2011 Action: no claim of use of "Get Lucky" phrase – instead, based upon claim that use of "Lucky" in Lucky Brand's marks infringed
  - Time: Conduct cited in 2011 Action all post-2005 Action
  - Differences are esp. important where enforceability of mark and likelihood of confusion turn on extrinsic facts which change over time
  - Thus, no preclusion of defenses

POP UP QUESTION

- Which Justice is Known For Asking Very Few Questions During Oral Arguments?
  A. Alito
  B. Ginsburg
  C. Thomas
  D. Breyer

OTHER CASES OF INTEREST

GE ENERGY POWER CONVERSION FRANCE SAS V. OUTOKUMPU STAINLESS USA LLC

- Outokumpu operates a steel plant in Alabama. In November 2007, while Outokumpu’s plant was under construction, the company’s predecessor, ThyssenKrupp, entered into three contracts with F.L. Industries (“Fives”) to provide three “cold rolling mills.” Each of the contracts contains an arbitration clause that requires arbitration take place in Dusseldorf, Germany, and that the forum apply the substantive law of Germany
- The contracts define the parties as Outokumpu and Fives and their subcontractors; appended to the contracts is a list of subcontractors, including petitioner GE Energy

GE ENERGY POWER CONVERSION FRANCE SAS V. OUTOKUMPU STAINLESS USA LLC

- GE Energy was a subcontractor of Fives
- Outokumpu filed a lawsuit against GE Energy in Alabama state court in 2016, when the part that GE Energy supplied to the mills failed; GE Energy removed to federal court and moved to dismiss and compel arbitration
- The district court compelled arbitration but the 11th Circuit reversed because GE Energy was not a signatory to the contracts mandating arbitration

GE ENERGY POWER CONVERSION FRANCE SAS V. OUTOKUMPU STAINLESS USA LLC

- Question
  - Does the Convention on the Recognition and Enforcement of Foreign Arbitral Awards permit a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel?
- Conclusion
  - The Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. Justice Clarence Thomas authored the opinion for a unanimous Court

GE ENERGY POWER CONVERSION FRANCE SAS V. OUTOKUMPU STAINLESS USA LLC

- The Federal Arbitration Act (FAA) does not "alter background principles" of state law, including doctrines like equitable estoppel, which authorizes contract enforcement by a nonsignatory
- The Court then considered whether state-law equitable estoppel doctrine permitted under the FAA conflicts with the Convention, concluding that it does not. Most importantly, the text of the Convention is silent as to whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel; this silence is dispositive of the matter

RITZEN GROUP, INC. V.. JACKSON MASONRY, LLC

- Ritzen Group contracted to buy property from Jackson Masonry, but the sale was never completed. Ritzen claims that Jackson breached the contract by providing erroneous documentation about the property just before the deadline, while Jackson claims Ritzen breached by failing to secure funding by the deadline
- Ritzen sued Jackson for breach of contract in state court, and just before trial, Jackson filed for bankruptcy, triggering an automatic stay. Ritzen filed a motion to lift the stay, which the bankruptcy court denied, and Ritzen did not appeal. Instead, Ritzen brought a claim against the bankruptcy estate. The bankruptcy court ruled for Jackson, finding that Ritzen, not Jackson, breached the contract

RITZEN GROUP, INC. V.. JACKSON MASONRY, LLC

- Ritzen filed two appeals in the district court. The first appeal arose from the bankruptcy court's order denying relief from the automatic stay (which Ritzen did not appeal at the time). The second appeal arose from the bankruptcy court's determination that Ritzen, not Jackson, breached the contract. The district court ruled against Ritzen on both appeals; the first appeal was untimely filed, and the second one failed on the merits. The 6th circuit affirmed

RITZEN GROUP, INC. V.. JACKSON MASONRY, LLC

- Question
  - Is an order denying a motion for relief from the automatic stay in bankruptcy proceeding a final order under 28 U.S.C. § 158(a)(1)?
- Conclusion
  - A bankruptcy court's order unreservedly denying relief from the automatic stay constitutes a final, immediately appealable order under 28 U.S.C. § 158(a). Justice Ruth Bader Ginsburg authored the majority opinion on behalf of the unanimous Court

RITZEN GROUP, INC. V.. JACKSON MASONRY, LLC

- Bankruptcy court orders are final only when they definitively dispose of discrete disputes within the bankruptcy case
- Applying that reasoning to the facts of this case, the Court found that a bankruptcy court's order unreservedly granting or denying relief from a bankruptcy's automatic stay conclusively resolves a discrete dispute and thus qualifies as an independent "proceeding" within the meaning of §158(a)

LIU V. SEC

- Charles Liu operated securities fund. However, Liu misappropriated millions of dollars that had been invested in the fund, in violation of Section 17(a) of the Securities Act of 1933, which prohibits the making of false statements in the context of a securities offering
- The district court ordered Liu to “disgorge” (pay back) $26 million, the amount investors had paid into the fund, and the U.S. Court of Appeals for the Ninth Circuit affirmed. In petitioning the Supreme Court’s review, Liu argued that the SEC lacked the authority to obtain disgorgement

LIU V. SEC

- Question
  - May the Securities and Exchange Commission seek and obtain disgorgement from a court as “equitable relief” for a securities law violation, even though the Court has determined that such disgorgement is a penalty?
- Conclusion
  - In a Securities and Exchange Commission enforcement action, a disgorgement award that does not exceed a wrongdoer’s net profits and is awarded for victims is equitable relief permissible under 15 U.S.C. § 78u(d)(5). Justice Sonia Sotomayor authored the opinion on behalf of the 8-1 majority of the Court

LIU V. SEC

- To determine whether disgorgement was an available remedy, the Court first looked to traditional equitable remedies, noting that courts have long used equitable remedies (albeit by different names) to prevent parties from unjustly gaining profit from wrongdoing. Though disgorgement was not, by that name, a traditional equitable remedy, it serves the same essential purpose and works in the same way and thus is available as a remedy

LIU V. SEC

- Next, the Court considered what limitations on disgorgement should exist. First, the effect should be only to return the defendant’s wrongful gains to those harmed by the defendant’s wrongdoing. Second, the remedy must be limited to the profits obtained by each individual defendant. Third, the remedy must be limited to the “net” profits, considering both receipts and expenses

ROTKISKE V. KLEMM

- Rotkiske accumulated credit card debt between 2003 and 2005, which his bank referred to Klemm & Associates for collection. Klemm filed a collections lawsuit against Rotkiske. In January 2009, unbeknownst to Rotkiske, someone at that address accepted service on his behalf, and Klemm obtained a default judgment against him. Rotkiske only discovered the judgment when he applied for a mortgage in September 2014

ALFA International
The Global Legal Network
Celebrating 40 Years

ROTKISKE V. KLEMM

- Rotkiske filed an action against Klemm alleging that its actions violate FDCPA. Klemm moved to dismiss the claim as time-barred. The FDCPA provides that any action under the Act must be brought “within one year from the date on which the violation occurs.” Rotkiske argued that the statute incorporates a “discovery rule,” which “delays the beginning of a limitations period until the plaintiff knew or should have known of his injury.” The district court rejected this argument, finding that under a plain reading of the statute, the limitations period begins at the time of injury. The 3rd Circuit affirmed

ROTKISKE V. KLEMM

- Question
  - Does the statute of limitations under the Fair Debt Collection Practices Act begin when the violation is discovered or when the violation occurred?
- Conclusion
  - The statute of limitations in § 1692k(d) of the Fair Debt Collection Practices Act begins to run when the alleged FDCPA violation occurs, not when it is discovered. Justice Clarence Thomas delivered the opinion of the 8-1 majority affirming the judgment below

ROTKISKE V.. KLEMM

- The Court first looked at the statutory language of the FDCPA, finding that the plain meaning of the statute of limitations unambiguously refers to the date of the alleged violation. The Court rejected Rotkiske’s argument that the statute incorporates a “discovery rule” that would delay the beginning of the limitations period until the plaintiff knew or should have known of his injury, finding the “atextual judicial supplementation...particularly inappropriate.”

ACKNOWLEDGEMENT

- Summaries borrowed in part from:

www.oyez.org

ALFA International
The Global Legal Network
Celebrating 40 Years

THANK YOU! IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT ONE OF THE PRESENTERS

Joseph G. Fortner, Jr.
Halloran & Sage LLP
Hartford, CT
E: fortner@halloransage.com
T: 860.297.4609

Kandice K. Hull
McNees Wallace & Nurick LLC
Harrisburg, PA
E: khull@mcneeslaw.com
T: 717.237.5452

Renee Lieux
McNees Wallace & Nurick LLC
Harrisburg, PA
E: rlieux@mcneeslaw.com
T: 717.237.5284

CLE & POST-WEBINAR SURVEY

- CLE:
  - ALFA INTERNATIONAL IS AN APPROVED PROVIDER OF CLE IN CALIFORNIA AND ILLINOIS. If you need credit in another state, you should consult with that state's CLE board for details on how to apply for approval. ALFAI provides a CLE package that answers questions you will likely be asked when applying and also gives direction as to what we believe is needed to apply in each state.
  - **NEW SERVICE:** Some state CLE boards require verification of participation in webinars. To satisfy that requirement, ALFAI will now prompt participants to answer questions and/or provide a verification code, as we did in this webinar. **If this is required in your state:**
    - Please note these items on the Certificate of Completion you will receive after the webinar.
    - Keep a copy of the certificate for auditing purposes.
  - If you encounter any difficulties in obtaining CLE credit in your state, please contact:
    - **Taylor Doherty**
      tdoherty@alfainternational.com
- POST-WEBINAR SURVEY
  - You will be prompted to complete a **Post-Webinar Survey** after exiting this webinar. Your feedback will help ALFA International continue to provide quality programming to our members and clients.

ALFA International
The Global Legal Network
Celebrating 40 Years