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Corporate Attys Want More High Court Action After Slow Term

By **Jeff Zalesin**

Law360, New York (June 29, 2015, 2:55 PM ET) -- With the U.S. Supreme Court closing the curtain Monday on a term that brought landmark decisions on same-sex marriage, health insurance subsidies and lethal injections, court watchers focused on corporate transactions and capital markets are feeling a little left out.

Despite its Omnicare decision in March, a mixed blessing for securities issuers adopting a middle-ground position on liability for executives' opinions, the high court stayed mostly silent this year on key questions for attorneys handling stock offerings, mergers, board shake-ups and lawsuits resulting from such corporate actions, experts told Law360.

"This term is not going to be remembered as a big business-case term," said Michael Celio, a securities attorney at Keker & Van Nest LLP.

The Supreme Court's jurisdiction over corporate law is mostly limited to securities lawsuits, since other disputes over transactions tend to be governed by state law.

But lawyers practicing in the corporate field say they would welcome more guidance from the nation's highest court, and they have a few suggestions for issues the justices might want to tackle in the next few years in addition to theories about why it hasn't been more prolific.

Here, experts tell Law360 what has kept the justices away from business cases and the issues they'd like to see taken up in the future.

Interesting Cases Turned Away

Whatever the cause of this year's shortage of corporate and securities decisions, it can't be explained wholly by a lack of demand for Supreme Court review from litigants in those areas. The justices denied petitions for certiorari in numerous securities suits, including some closely watched disputes.

In October, for example, the court declined to review a Ninth Circuit ruling that allowed a former Harbinger Corp. director to expand his suit alleging he was misled into voting for the software company's merger with Peregrine Systems Inc. by adding a claim under Section 11 of the Securities Act of 1933, the section that makes securities issuers liable for false statements or omissions in registration statements.

Ross A. Albert, a corporate lawyer at Morris Manning & Martin LLP, said he was surprised to see the court turn that case away, particularly after the solicitor general recommended granting review and affirming the Ninth Circuit. Perhaps the justices would have heard the case, Albert said, if they were more inclined to reverse the appeals court's ruling.

"The Supreme Court is more likely to take a case when the result is going to be a reversal rather than an affirmance," he said.

Celio said that the court passed up an opportunity to consider an important issue in March, when it **refused to review** a decision finding Stiefel Laboratories Inc. responsible for failing to update a shareholder with news of merger talks.

While the facts of that case might have made it unattractive to the court, Celio said, the denial of certiorari leaves in place a sparse patchwork of case law on companies' duty to update past statements that investors may still be relying on.

"There's some guidance at the circuit level, but it's a little bit scattered here and there," Celio said of the duty-to-update case law. "It has the very paradoxical effect of discouraging disclosure."

Halliburton, Omnicare Suck Up All the Oxygen

Aside from its decision in Omnicare Inc. et al. v. Laborers District Council Construction Industry Pension Fund, which found executives could be held responsible under Section 11 for opinions rendered misleading by omitted facts, the Supreme Court was relatively mum on securities and corporate issues this term.

That scarcity of securities rulings is hardly unprecedented. Joshua Yount, a securities lawyer at Mayer Brown LLP, estimated that the court has generally limited itself to one or two securities cases per term in the last few years.

The rate of securities cases has not always been that slow, but Yount said the drop-off followed a bump in Supreme Court attention to securities that came the wake of the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act, federal statutes enacted in 1990s.

"I think it's slowed down a bit in terms of the urgency to answer some of the questions raised by those laws," he said.

Yet another limiting factor is that many securities suit settle and those adjudicated on the merits often are not appealed all the way to the Supreme Court, he said. It's also possible, he added, that the high court's attention has been diverted by more politically charged cases.

Richard Booth, a business law professor at Villanova University, said the Supreme Court may have avoided taking too many securities cases this term in part to give lower courts time to process **last term's decision** in Halliburton Co. v. Erica P. John Fund Inc.

In Halliburton, the high court upheld its own 1988 ruling in Basic Inc. v. Levinson, which established the fraud-on-the-market presumption of reliance, but said defendants can rebut the presumption before the class certification stage by showing their alleged misstatements didn't actually impact the price of their stock.

"It's probably very sensible for the court to give the lower court some time to think about what it all means," Booth said of Halliburton's aftermath.

What Attorneys Want Next

When the Supreme Court does return to corporate law, experts said, it is likely to start with insider trading. That area of white collar criminal law was set ablaze by the Second Circuit's December decision in U.S. v. Newman, which made it harder to prosecute tippees who are one or more layers removed from sources of confidential information on which they allegedly traded.

In June, the Supreme Court gave U.S. Attorney Preet Bharara an extra month to decide whether to petition for review of the decision.

"That's the gay marriage case of our little world," Celio said. "They've almost got to take it."

Booth and Albert agreed that some appeal asking whether the Newman decision was correct, if not Newman itself, is likely to land on the high court's docket soon.

Yount, meanwhile, said there are some key questions pertaining to securities class actions he would like to see the high court address.

"One would be a little more guidance on what showing would be necessary to establish an efficient market for the presumption of reliance in securities class actions," he said.

Another important question, he added, is whether a corporation can be found to have scienter in a securities fraud case if no individual officer had the requisite state of mind, but two or more officers had separate knowledge that together might constitute scienter.

Yount said that Supreme Court guidance on securities law is needed to control litigation driven by the plaintiffs bar, including what he called "blackmail" suits. It would be wrong, he said, for the Supreme Court to use its overall reduced caseload as an excuse to shortchange securities cases.

"That doesn't strike me as a compelling reason to give less attention to an area of the law that has such influence on the day-to-day workings of the economy," he said.

--Editing by Katherine Rautenberg.
