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Merck & Co. Inc. v. Reynolds (08-905)

Appealed from the U.S. Court of Appeals for the Third Circuit (Sept. 9, 2008)
Oral argument: Nov. 30, 2009

Under 28 U.S.C. § 1658, claims of "fraud, deceit, manipulation or contrivance" concerning the Securities Exchange Act of 1934 can be made either "[two] years after the discovery of the facts constituting the violation" or "[five] years after such violation," whichever is earlier. The appellate courts are in general agreement that the two-year period of limitations begins when the plaintiff had, or should have had, knowledge of the facts constituting the violation. What is at issue in this case is whether in a § 10(b) action under the Securities Exchange Act, the two-year limitation begins to run when the plaintiff has obtained evidence that the defendant acted with the intent to defraud, or simply when the plaintiff obtained general knowledge of facts pointing to potential fraud. The respondents, Reynolds et al., filed their first complaint alleging securities fraud under § 10(b) of the Securities Exchange Act against the petitioner, Merck & Co. Inc., in connection with its anti-inflammatory drug Vioxx, on Nov. 3, 2003. *In re Merck & Co. Inc. Securities, Derivative and ERISA Litigation*, 543 F.3d 150, 160 (3d Cir. 2008).

On May 9, 1999, the Food and Drug Administration (FDA) approved Vioxx, which shares the anti-inflammatory properties of drugs like ibuprofen and naproxen but does not carry the risk of gastrointestinal damage associated with those drugs. Press releases and public statements issued by Merck emphasized the drug's safety and its commercial prospects.

Beginning in 1999, Merck initiated the Vioxx Gastrointestinal Outcomes Research (VIGOR) study, which compared Vioxx to naproxen. On March 27, 2000, the company publicized the results of its research, which showed that Vioxx users had a higher incidence of heart attacks than users of naproxen. The results could be explained in one of two ways: either Vioxx increased the risk of heart attacks, or, as Merck hypothesized, naproxen decreased the risk of heart attack (referred to as the "naproxen hypothesis").

In February 2001, the FDA held a hearing at which the uncertainty of the VIGOR results regarding increased risk of heart attacks was discussed. After the hearing, most securities analysts still forecast large future profits for Vioxx. In August 2001, the *Journal of the American Medical Association* published the results of Vioxx clinical trials, noting that the use of drugs such as Vioxx might increase the risk of heart attack. Most securities analysts interpreted the article as simply a reiteration of what was already known about Vioxx.

On Sept. 21, 2001, the FDA issued a warning letter accusing Merck of downplaying the potential risks of Vioxx and holding out the naproxen hypothesis as something more than an unproven explanation of the VIGOR study. Subsequently, Merck's stock price fell but quickly recovered, and securities analysts remained enthusiastic about the future of Vioxx.

In October 2003, the *Wall Street Journal* published an article describing a study linking the use of Vioxx with an increased risk of heart attack. During this time, Merck's stock lost significant value amid concerns about the safety of Vioxx. On Sept. 30, 2004, Merck voluntarily withdrew Vioxx from the market.

On Nov. 3, 2003, Reynolds and other class members brought suit in the District of New Jersey, alleging that the petitioner had violated the securities laws by misrepresenting the safety risks and commercial viability of Vioxx. *See In re Merck*, 543 F.3d at 160. Merck moved to dismiss the case on the ground that the two-year limitations period had already run, and the court granted the motion. The Third Circuit reversed the district court, holding that Reynolds did not have sufficient knowledge of the facts constituting the claim on or before Nov. 3, 2001, and that their claim could proceed. *See id.* at 172. The U.S. Supreme Court granted certiorari to determine if Reynolds' claim is time-barred. This case turns on whether Reynolds knew—or should have known—of the facts constituting Merck's alleged violation of the securities laws more than two years before filing the complaint.

Fairness to Plaintiffs and Defendants

At the heart of this case is the need to strike a proper balance between ensuring that plaintiffs with meritorious securities fraud claims can bring suit and providing defendants with a certain and predictable time frame after which claims cannot be brought. Merck argues that allowing the period of limitations to run only when a plaintiff claiming potential securities fraud has knowledge of scienter will result in unfairness to the defendants by allowing the plaintiffs to increase the settlement value of meritless claims. The Chamber of Commerce agrees, arguing that a scienter requirement would allow plaintiffs to wait to file a complaint until the stock of the target company has dropped significantly, thereby increasing the losses that the plaintiffs may claim as damages.

The Council of Institutional Investors argues that, if the period of limitations begins when a plaintiff has only general knowledge of a potential fraud, the plaintiff would be dis-

PREVIEWS *continued on page 72*

advantaged because there would be less time available to investigate potential claims that are often highly complex and difficult to detect. The National Association of Shareholder and Consumer Attorneys (NASCAT) argues that, because the Private Securities Litigation Reform Act requires plaintiffs who claim securities fraud to plead facts with particularity, the period of limitations should not run until a potential plaintiff has at least some evidence of scienter so that the plaintiff can gather enough information to survive motions to dismiss.

Protection of the Economy and Capital Markets

NASCAT emphasizes the important role that private securities litigation plays in combating securities fraud. The association contends that private securities actions fill in the enforcement gaps that exist because of the Securities and Exchange Commission's limited resources and its inability to detect and prosecute all violations of federal securities law.

On the other hand, the Washington Legal Foundation argues that investors would be harmed by the scienter requirement, because it would enable plaintiffs to bring stale claims, which are more costly to defend, and that investors will eventually bear the burden of these increased costs through reduced profits. The Securities Industry and Financial Markets Association argues that the increased litigation risks posed by the scienter requirement harm the U.S. economy in general by raising the cost of access to U.S. capital markets, which will, in turn, make foreign capital markets a more attractive option for investors.

Legal Arguments

The Discovery Rule and Inquiry Notice

Reynolds sued Merck for alleged violations of § 10(b) of the Securities Exchange Act of 1934. Under 28 U.S.C. 1658(b), Congress incorporated into § 10(b) a two-year limitations period that is triggered upon "discovery of the facts constituting the violation." Both Merck and Reynolds agree that triggering the two-year limitations period in § 1658(b) does not require *actual* "discovery of the facts constituting the violation." Rather, the limitations period can be triggered upon *constructive* discovery—that is, the point at which a plaintiff should reasonably know of the facts constituting the violation, irrespective of the plaintiff's actual awareness of the facts. Furthermore, both Merck and Reynolds recognize that the constructive discovery rule also incorporates the doctrine of "inquiry notice," which essentially means that once a plaintiff, either actually or constructively, becomes aware of facts that suggest wrongdoing, a duty arises to inquire further in order to determine whether or not a valid claim exists. However, the parties disagree as to the nature and sufficiency of facts that effectively trigger the limitations period, particularly with regard to scienter or intent.

Does a Plaintiff Need to Possess Evidence of Scienter Before the Limitations Period is Triggered?

In its decision, the Third Circuit stated that "whether the plaintiffs, in the exercise of reasonable diligence, should have known of the basis for their claims depends upon whether they had sufficient information of possible wrongdoing to place them on inquiry notice or to excite storm warnings of culpable activity [scienter]." *In re Merck*, 543 F.3d at 164 (quoting *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n. 15 (3d Cir. 2006)) (internal quotations and citations omitted). Merck argues, however, that a plaintiff may receive "storm warnings" that are sufficient to trigger the limitations period even without actually possessing information that bears on each element of an offense, including the element of scienter. Merck draws analogies to Supreme Court precedent dealing with the contours of the discovery rule in other contexts. For example, Merck asserts that in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), the Supreme Court recognized that a plaintiff bringing an action under the Fair Credit Reporting Act could be on inquiry notice after having been denied credit, even without possessing "information that a credit agency had made improper disclosures."

Conversely, Reynolds argues that the "facts constituting the violation" must bear on each individual *element* of the underlying violation, noting that "§ 10(b) is violated when a defendant has (1) made a misrepresentation (2) that is material, (3) with scienter, (4) in connection with the purchase or sale of securities." Reynolds points out that Supreme Court precedent acknowledges that scienter is an essential element of a § 10 (b) violation. Therefore, Reynolds argues, the two-year limitations period under § 1658(b) cannot be triggered until an investor possesses, actually or constructively, information bearing on scienter. Reynolds claims that, before Nov. 6, 2001, Merck investors possessed neither actual nor constructive knowledge of any information bearing on scienter.

Merck counters that, when an investor knows, or reasonably should know, of a material misstatement—in this case, Merck's representations about Vioxx—he or she should at least *suspect* that the defendant did so with scienter. Merck points out that in cases claiming securities fraud, scienter is often proven through inferences stemming from other information, including the misstatement itself. Merck argues that the Third Circuit's rule is therefore unworkable, because an investor may never possess information that bears directly on scienter and thus will never trigger the limitations period, effectively crippling the discovery rule and inquiry notice.

Reynolds concedes that, in some circumstances, the misstatement itself could reasonably give rise to a suspicion of fraud or deceit, but that this is not always the case. However, Reynolds points to the facts of the case at issue, arguing that the circumstances surrounding Merck's misstatements to the public that Vioxx was not harmful did not in themselves indicate that Merck *intended* to deceive. Reynolds also argues that the plaintiff must possess the *ability* to discover facts pertaining to scienter before the plaintiff can be charged with being on inquiry notice and triggering the limitations period. Reynolds contends that Merck's standard has no support in case law and that it would require plaintiffs to inquire into information relating to scienter that may be impossible to discover.

What Duty Does Inquiry Notice Imply?

Both parties advance arguments relating to a plaintiff's duty to inquire. Primarily, Merck argues for a categorical approach that would require the running of the statute of limitations from the date an investor is on inquiry notice. Thus, once a plaintiff receives storm warnings of possible wrongdoing, a plaintiff is on inquiry notice and the statute of limitations begins to run. Alternatively, Merck argues that, upon inquiry notice, the statute of limitations should be suspended only if a plaintiff conducts a "reasonably diligent investigation." Merck argues that Reynolds never claimed to have engaged in any such investigation, and, therefore, the claim is time barred.

Reynolds responds by arguing that a plaintiff must have the means of discovering the potential fraud before a duty to inquire can arise. Reynolds argues that it is unfair to trigger the limitations period because a plaintiff failed to engage in an inquiry that objectively could not have led to discovery of fraud. Because regular investors in Merck could not have had access to information before Nov. 6, 2001, that could have led to discovery of scienter, Reynolds concludes that the statute of limitations does not bar the filing of his suit.

Conclusion

The outcome of this case has potentially far-reaching effects. If the Court decides that the limitations period is only triggered once a plaintiff is aware of information bearing on scienter, there is a concern that plaintiffs will "sit on their rights" to increase the settlement value of potentially meritless claims. However, should the Court decide that general awareness of potential fraud is sufficient to trigger the limitations period, plaintiffs may be unable to discover facts quickly enough to file a complaint that can withstand a motion to dismiss. Full text is available at topics.law.cornell.edu/supct/cert/08-905. **TFL**

Prepared by Kevin Jackson and Eric Johnson. Edited by Joe Rancour.

United Student Aid Funds v. Espinosa (08-1134)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Dec. 10, 2008)
Oral argument: Dec. 1, 2009

Francisco Espinosa filed for Chapter 13 bankruptcy, and his reorganization plan proposed that he would repay $13,250 in student loans to United Student Aid Funds. Although United Student Aid Funds claimed that it was owed an additional $4,582.15, the U.S. Bankruptcy Court for the District of Arizona confirmed Espinosa's plan as proposed. United Student Aid Funds subsequently intercepted Espinosa's income tax refunds, claiming that Espinosa had improperly discharged his student loans, because Espinosa had not initiated a statutorily required adversary proceeding to determine whether repayment of the student loans would constitute an "undue hardship." The Supreme Court's decision in this case will affect how student loans and other debts are collected after an individual declares bankruptcy and the overall relationship between debtors and creditors in the United States.

Background

A person declaring bankruptcy must file a plan outlining, among other things, which debts will be discharged. 11 U.S.C. § 1321–22. Once a court approves and confirms the plan and orders the discharge of the debts that will not be repaid, all matters are presumed to be settled according to the confirmed plan. 11 U.S.C. § 1327. However, student loans are generally considered nondischargeable, unless paying them would cause undue hardship for the debtor. 11 U.S.C. § 523(a)(8); 11 U.S.C. § 1328(a)(2). In order to discharge a student loan, a special adversary proceeding generally needs to take place. *See* Fed. R. Bankr. P. 7001(6). However, the courts are split as to whether a bankruptcy court's order granting discharge of student loans loses its finality when no adversary proceeding has taken place to determine the issue of undue hardship. *See Espinosa v. United Student Aid Funds Inc.*, 553 F.3d 1193, 1198 (9th Cir. 2008).

In 1988, Francisco Espinosa borrowed $13,250 in student loans through the Federal Family Education Loan Program, which grants federally guaranteed loans, and proposed to repay $13,250 when he filed for Chapter 13 bankruptcy in 1992. *See Espinosa*, 553 F.3d at 1197. After receiving notification about Espinosa's bankruptcy petition, United Student Aid Funds filed a proof of claim for the $13,250 in loans and for an additional $4,582.15 in interest. However, the bankruptcy court confirmed Espinosa's proposed amount of $13,250. Espinosa's bankruptcy trustee subsequently notified United Student Aid Funds that the amount specified in the plan differed from the amount it had claimed and that United Student Aid Funds had 30 days to object to the plan. The organization did not object, and Espinosa paid off all obligations required by the plan. Following completion of the repayment plan in 1997, the bankruptcy court granted Espinosa a discharge of all remaining debts that were not included in the repayment plan.

When United Student Aid Funds began intercepting Espinosa's income tax refunds three years later, Espinosa petitioned the bankruptcy court to hold the organization in contempt for violating the bankruptcy court's grant of discharge. United Student Aid Funds countered that Espinosa had failed to properly discharge his student loans, claiming that student loans are not dischargeable unless the debtor proves in an adversary proceeding that repayment of the student loans would be an "undue hardship," and claimed that Espinosa had failed to initiate such a proceeding.

The bankruptcy court rejected the organization's argument and required it to stop intercepting Espinosa's in-

PREVIEWS *continued on page 74*

come tax refunds. The bankruptcy court also did not allow United Student Aid Funds to appeal Espinosa's repayment plan, stating that the creditor should have objected to the plan before it was confirmed. The U.S. District Court of Arizona reversed the ruling, indicating that the due process rights of United Student Aid Funds had been violated because Espinosa had not initiated an adversary proceeding by serving the organization with a complaint and a summons before discharging his student loans. On appeal, the Ninth Circuit reversed the district court, holding that Espinosa had properly discharged his student loans in his repayment plan and that United Student Aid Funds' due process interests had been protected because the organization had been notified of the plan and had the opportunity to object. *Espinosa*, 553 F.3d at 1205.

Implications

United Student Aid Funds argues that Espinosa should not be able to discharge his student loan by declaring in his Chapter 13 repayment plans that he will not fully repay the loans. Espinosa contends that United Student Aid Funds should not be able to claim repayment after he already provided the organization with notice and an opportunity to object to his repayment plan. The Supreme Court's decision in this case will affect how debtors are able to discharge student loan debts in bankruptcy actions and is of particular significance during economic times, during which graduates of vocational programs, colleges, and professional schools face the prospect of having to repay student loans in a challenging job market.

A decision for United Student Aid Funds may hamper the functionality of America's bankruptcy system. The National Association of Chapter Thirteen Trustees (NACTT) claims that United Student Aid Funds' arguments challenge the finality of Chapter 13 plans that have been confirmed by a bankruptcy court. According to the NACTT, the finality of confirmed Chapter 13 plans is necessary to ensure the efficiency and effectiveness of the bankruptcy process, because the process brings to the table all the various creditors' interests and ultimately binds both the debtor and all the creditors to a compromise on how the debts should be settled. The NACTT argues that creditors simply would not participate in bankruptcy proceedings if the confirmed Chapter 13 plan could be changed after it is confirmed.

Conversely, United Student Aid Funds argues that allowing a debt to be discharged by merely declaring the debt in a Chapter 13 repayment plan would needlessly increase the costs incurred by federal student loan programs. United Student Aid Funds fears that a decision in favor of Espinosa would allow debtors to routinely attempt to discharge nondischargeable debts in repayment plans, forcing creditors to scrutinize every plan and endure "an enormous expenditure of resources." The Educational Credit Management Corporation, the primary Chapter 13 bankruptcy processor of the Federal Family Education Loan Program, claims that it receives about 3,600 Chapter 13 bankruptcy plans each month, all of which would require additional scrutiny and review if federal loans were subject to discharge by declaration. United Student Aid Funds also argues that a ruling for Espinosa would open the door to discharging other types of debts that Congress has designated as nondischargeable, such as taxes and child support payments. United Student Aid Funds points out that loan creditors may have the resources to protect their interests, but less sophisticated creditors—such as divorced spouses who are owed child support payments—do not, and a decision for Espinosa could make it more difficult for these individuals to recover the debts they are owed.

Legal Arguments

Is a Specialized Adversary Proceeding Required?

United Student Aid Funds argues that student loan debt cannot be discharged without proving hardship in a specialized adversary proceeding. The organization claims that the plain language of the relevant bankruptcy statutes, such as § 1328(a), make it clear that Congress intended student loans to be presumptively nondischargeable and points to *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004), in which the Supreme Court indicated that student loans are "presumptively nondischargeable" unless they would inflict undue hardship on the debtor. United Student Aid Funds also stresses that the rule that student loans are presumptively nondischargeable is self-executing, meaning that a student loan cannot be discharged unless the debtor first successfully establishes undue hardship in an adversarial proceeding. According to United Student Aid Funds, it is immaterial that the creditor did not object to the repayment plan, because the student loans could not be legally discharged without Espinosa first demonstrating undue hardship in an adversarial proceeding.

On the other hand, Espinosa claims that the relevant statutes indicate on their face that, if the court confirms a discharge, then student loans become dischargeable. Espinosa adds that the order confirming his plan is valid and final even if it contains legal errors, because it has passed direct review. As such, Espinosa claims that all issues associated with the order, regardless of whether or not the parties addressed them, are considered res judicata—meaning that they are settled and can neither be raised nor decided again in court.

United Student Aid Funds argues that a lack of adversary proceedings to establish undue hardship voids a court order that discharges student loans. In this respect, the organization argues that a plan to discharge a nondischargeable debt would violate the bankruptcy provisions of the U.S. Code, and therefore no court may issue an order confirming such a plan. *See* 11 U.S.C. § 1325. Pointing to *United States ex rel. Wilson v. Walker*, 109 U.S. 258 (1883), United Student Aid Funds maintains that it has been well established that court decisions made without the necessary authority or in contravention of the law are simply void and not subject to res judicata and further cites *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353–54 (1920), in which the Court stated that "[i]f [courts] act beyond [their] authority, and certainly in contravention of it, their judgments and orders are regarded as nullities."

Espinosa distinguishes his own case from the Supreme Court precedent that United Student Aid Funds cites. According to Espinosa, the the judgment in the *Walker* case was void because the Court had no jurisdiction over the matter at issue. Espinosa points out that, in the present case, the bankruptcy court had jurisdiction over the student loans at issue and argues that Supreme Court jurisprudence shows that only in very rare circumstances—when a court significantly departs from its granted authority—can a judgment be considered void. Espinosa cites *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2206 n.6 (2009), in which the Supreme Court indicated that a judgment could be found nonbinding in particularly extreme circumstances, such as when the court lacked subject-matter jurisdiction.

Moreover, Espinosa argues that, if the creditor fails to object to the discharge before the bankruptcy court confirms the repayment plan, the creditor is bound by the court's decision and has waived all of its objections. Espinosa does not believe that a self-executing provision making student loans generally nondischargeable is sufficient to make a confirmed payment plan nonbinding when a creditor had an opportunity to object to the plan.

Due Process Arguments

United Student Aid Funds believes that a notice typical of adversary proceedings is necessary to satisfy due process requirements to inform a creditor that a debtor is attempting to discharge student loan debts. Specifically, the creditor insists that, unlike a general notice in bankruptcy proceedings, a heightened notice—including serving a summons—is required when discharging a student loan. United Student Aid Funds stresses that Espinosa mailed his plan to its post office box, providing only minimal notice, which failed to meet the due process requirements of notice and an opportunity to be heard that "Congress prescribed to be due" to student loan creditors.

Espinosa counters that this case does not involve questions of due process, because United Student Aid Funds received actual notice and knew when and how it could object to the repayment plan. Instead, Espinosa claims this case is a waiver case, because actual notice spoils claims of any kind of violation of due process. Espinosa also rejects the claim made by United Student Aid Funds that it was entitled to a particular kind of formal notice.

Conclusion

A decision for United Student Aid Funds could hamper the reliability and effectiveness of the U.S. bankruptcy system, because decisions made by bankruptcy courts might lose finality. A decision in favor of Espinosa, however, could increase the cost of student loan programs and make some nondischargeable debts dischargeable by declaration. The Court's decision in this case is important in light of the current economy—both the ability of graduates to meet student loan obligations and the ability of debtors to pay other types of nondischargeable debts, such as taxes and child support obligations, are of particular concern when unemployment is high. Full text is available at topics.law.cornell.edu/supct/cert/08-1134. **TFL**

Prepared by Joanna Chen and Oliver Reimers. Edited by Katie Worthington.

Black v. United States (08–876)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (June 25, 2008)
Oral argument: Dec. 8, 2009

The United States convicted Conrad Black, John Boultbee, and Mark Kipnis of mail and wire fraud under 18 U.S.C. § 1341. The Seventh Circuit affirmed the convictions, rejecting arguments that the trial judge had erred when he failed to instruct the jury that a violation of 18 U.S.C. § 1346 requires contemplation of economic harm to the party to whom one owes "honest services." The Seventh Circuit further held that objection to the prosecution's request for a special verdict constituted a waiver of the right to challenge the trial judge's instruction in light of the fact that a special verdict would have clarified whether the trial judge's instruction regarding fraud related to providing honest services was the basis for the convictions. The Supreme Court's decision will determine the limits of the honest services provision and the means by which to preserve instructional error. Full text is available at topics.law.cornell.edu/supct/cert/08-876. **TFL**

Prepared by Will Rosenzweig and Daniel Shatz. Edited by Lucienne Pierre.

Florida v. Powell (08-1175)

Appealed from the Supreme Court of Florida (Sept. 29, 2008)
Oral argument: Dec. 7, 2009

Kevin Powell was arrested on suspicion of illegally owning a firearm and, after allegedly waiving his rights to counsel under *Miranda v. Arizona*, confessed during questioning. On appeal, Powell's conviction was overturned on the ground that the warnings read to Powell had failed to inform him adequately of his right to have an attorney present during questioning. The Florida Supreme Court affirmed the appellate court's decision, holding that a suspect must be expressly advised of his or her right to have an attorney present while being questioned. The U.S. Supreme Court's decision will clarify *Miranda*'s requirements regarding advising a suspect of his or her right to counsel during questioning. Full text is available at topics.law.cornell.edu/supct/cert/08-1175. **TFL**

Prepared by Sarah Chon and Frederick Wu. Edited by Lara Haddad.

PREVIEWS *continued on page 76*

Free Enterprise Fund v. Public Co. Oversight Bd. (08-861)

Appealed from the U.S. Court of Appeals for the D.C. Circuit (Aug. 22, 2008)
Oral argument: Dec. 7, 2009

In 2002, Congress passed the Sarbanes-Oxley Act in reaction to the perceived failures of the self-regulatory system for accounting procedures that led to the Enron and WorldCom scandals. The act established the Public Company Accounting Oversight Board to supervise the audit of public companies. Although the board is under the authority of the Securities and Exchange Commission, its members are not subject to direct removal or appointment by the President, and the board retains the power to set and raise its own budget. The Supreme Court will determine whether Congress' establishment of the board is an unconstitutional violation of separation of power principles and whether the board's structure violates the Appointments Clause. Full text is available at topics.law.cornell.edu/supct/cert/08-861. **TFL**

Prepared by Lilian Balasanian and Tamilia Chiu.

Graham County Soil v. United States (08-304)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (June 9, 2008)
Oral argument: Nov. 30, 2009

The United States ex rel. Karen Wilson brought a qui tam action against two counties in North Carolina—Graham and Cherokee Counties—for allegedly filing fraudulent reimbursement claims with the federal government. The counties argue that, under the False Claims Act, no court has jurisdiction over Wilson's suit, because North Carolina had previously publicly disclosed the information on which Wilson relies in her suit. Wilson counters that the False Claims Act's ban on public disclosure refers only to federal reports, audits, and investigations. The Supreme Court will decide whether, under the False Claims Act, a publicly disclosed state audit and investigation may preclude jurisdiction over a qui tam action. Full text is available at topics.law.cornell.edu/supct/cert/08-304. **TFL**

Prepared by Samuel Farina-Henry and Kelly Vaughan. Edited by Lauren Jones.

Milavetz, Gallop & Milavetz v. United States (08-1119); United States v. Milavetz, Gallop & Milavetz (08-1225)

Appealed from the U.S. Court of Appeals for the Eighth Circuit (Sept. 4, 2008)
Oral argument: Dec. 1, 2009

This case concerns the constitutionality of three Bankruptcy Code provisions that are applicable to debt relief agencies: 11 U.S.C. §§ 526(a), 528(a)(4), and 528(b)(2)(B). Minnesota law firm Milavetz, Gallop & Milavetz P.A. claims that it is exempt from the provisions, arguing that an attorney is not a "debt relief agency." Furthermore, the law firm claims that 11 U.S.C. § 526(a), which prevents a debt relief agency from counseling a client to incur additional debt in contemplation of bankruptcy, is an unconstitutionally overbroad restriction of free speech. Finally, Milavetz argues that 11 U.S.C. §§ 528(a)(4) and 528(b)(2)(B), which require a debt relief agency to make certain disclosures in its advertisements, violate the First Amendment. The United States argues that the statutes apply to attorneys and that they are constitutional restrictions on speech. This case's outcome may affect bankruptcy laws, disclosure laws, and the legal advice that a lawyer may provide a client. Full text is available at topics.law.cornell.edu/supct/cert/08-1119. **TFL**

Prepared by Michelle Lynn and Chris Maier. Edited by Lucienne Pierre.

Stolt-Nielsen S.A. v. AnimalFeeds International (08-1198)

Appealed from the U.S. Court of Appeals for the Second Circuit (Nov. 4, 2008)
Oral argument: Dec. 9, 2009

AnimalFeeds filed a class action lawsuit against four major parcel tanker transportation companies, including Stolt-Nielsen, alleging antitrust violations. As required by a written contact between the parties, the case was referred to an arbitration panel. The contract, however, is silent as to whether class arbitrations are permissible. Stolt-Nielsen argues that the silence in the agreement means that class arbitration is not permitted, whereas AnimalFeeds claims that the decision should be left to the arbitrators. The arbitrators decided to allow class arbitration, but the district court refused to do so. The Second Circuit reversed the district court. The Supreme Court's decision will place an economic burden on the losing side and may affect decisions that international businesses make on whether or not to select a forum in the United States. Full text is available at topics.law.cornell.edu/supct/cert/08-1198. **TFL**

Prepared by Catherine Suh and Andrew Kaplan. Edited by James McConnell.

Stop the Beach Renourishment v. Florida Dept. of Envt'l Protection (08-1151)

Appealed from the Florida Supreme Court (Sept. 29, 2008)
Oral argument: Dec. 2, 2009

In order to combat beach erosion, the Florida state legislature passed the Beach and Shore Preservation Act, which authorized local municipalities to restore the coastline by adding sand, creating a temporary buffer against erosion. Stop the Beach Renourishment Inc. (SBR) claims that Florida Department of Environmental Protection et al. misused the statute in order to unconstitutionally appropriate private beaches for public use without just compensation. SBR alleges that the Florida Supreme Court violated the due process and takings clauses of the Beach and Shore Preservation Act by suddenly and unpredictably changing state's substantive law to deprive SBR of its private property without compensation. SBR asks the Court to explicitly articulate a doctrine of "judicial takings" in order to address the problem of redefining property rights out of existence by state judiciaries so that states can avoid compensating property owners. The Florida Department of Environmental Protection contends that, even if there were a situation in which a doctrine of judicial takings should be imposed, this is not one of them, because the Florida Supreme Court properly followed common law precedent. Full text is available at topics.law.cornell.edu/supct/cert/08-1151. **TFL**

Prepared by Rob Trichinelli and Kevin Sholette. Edited by James McConnell.

Weyhrauch v. United States (08-1196)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Aug. 4, 2008)
Oral argument: Dec. 8, 2009

Bruce Weyhrauch, a member of the Alaska House of Representatives, was charged with mail fraud related to provision of honest services for intending to devise a scheme to deprive the state of Alaska of its intangible right to his honest services in violation of 18 U.S.C. § 1346. The United States asserts that Weyhrauch should have disclosed his attempts to procure future employment from an oil company before voting for legislation that would benefit that company. Weyhrauch claims that he cannot be convicted of honest services fraud, because Alaska requires the disclosure of only actual conflicts of interest, not possible ones. The United States believes that a violation of § 1346 does not require a concurrent violation of state law in order to convict Weyhrauch of honest services fraud. The Supreme Court's decision in this case will determine whether § 1346 mandates the creation of a federal common law extending the federal government's authority over criminal matters that states usually handle. Full text is available at topics.law.cornell.edu/supct/cert/08-1196. **TFL**

Prepared by Barbara Bispham and Kate Hajjar. Edited by Katie Worthington.