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### **STANDARD FIRE INSURANCE CO. v. KNOWLES**

*Appealed from the U.S. Court of Appeals for the Eighth Circuit*

**Oral argument: Jan. 7, 2013**

#### **Questions Presented**

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act (CAFA) of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the \$5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds \$5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

#### **Issue**

Whether a named plaintiff in a class action lawsuit can defeat a defendant's attempt to remove the action to federal court by stipulating for the named plaintiff and absent potential class members that the class will not seek damages above the \$5 million threshold for federal jurisdiction, even where the defendant establishes that the amount in controversy exceeds \$5 million?

#### **Facts**

In April 2011, Greg Knowles filed a class action in the circuit court of Miller County, Arkansas, against the Standard Fire Insurance Company (Standard Fire). Knowles claimed that Standard Fire breached its homeowners insurance policy by failing to pay for a retention fee known as "general contractors' overhead and profit (GCOP)." Knowles alleged that he and potentially thousands of others across Arkansas were not fully reimbursed by Standard Fire for the GCOP fee.

In May 2011, Standard Fire removed the case to federal district court. Standard Fire argued that removal was proper under the "CAFA", which gives a federal district court jurisdiction over a class action if there is diversity of citizenship and the total amount in controversy exceeds \$5 million. Knowles asked the court to remand the case back to state court because in his original complaint Knowles had stipulated that he would not seek more than \$5 million in damages for the proposed class.

In December 2011, the district court sent the case back to state court. The court concluded that Standard Fire satisfied its burden, by showing through a preponderance of the evidence, that the amount in controversy exceeded \$5 million. However, the court further found that Knowles satisfied his burden of proving to a legal certainty that his claim fell below the \$5 million CAFA threshold. The court explained that a stipulation of the amount in controversy can defeat removal if it is clear, legally binding, and made in good faith.

The U.S. Court of Appeals for the Eighth Circuit denied Standard Fire's petition to appeal. On Aug. 31, 2012, the U.S. Supreme Court granted certiorari to determine whether, in a class action, a named plaintiff's stipulation that he will not seek more than \$5 million is binding on the absent class members.

#### **Discussion**

Here, the Supreme Court will decide whether a named plaintiff in a class action can defeat a defendant's attempt to remove the case to federal court, by stipulating that the amount in controversy is less than the \$5 million threshold required by the CAFA to give a federal court jurisdiction over a class action. Standard Fire argues that CAFA was meant to expand federal courts' jurisdiction over class actions, and that allowing Knowles' stipulation to defeat

removal would unfairly bind absent class members. Knowles claims that Congress did not intend for cases like this to be in federal court, and that absent class members are not adversely affected by a stipulation.

#### **Abusive Class Action Litigation**

Standard Fire claims that CAFA was meant to curb abusive class action in state courts by expanding federal courts' jurisdiction over class actions. Before CAFA, Standard Fire asserts that plaintiffs' lawyers targeted state courts such as Miller County, Arkansas, known to be hostile to out-of-state defendants. Various states claim that such "magnet courts" were known for easily granting class certification and "rubber-stamping" settlements. The states contend that class certification is important because it often allows a plaintiff to aggregate the class claims and create leverage to coerce a defendant into settlement.

The Arkansas Trial Lawyers Association (ATLA) claims that Standard Fire distorts the image of the Miller County Circuit Court by merely relying on unsubstantiated news articles and anecdotes. Knowles contends that state courts are free to follow their own procedural rules as long as they satisfy due process requirements. Knowles claims that the Arkansas' "certify now, decertify later" approach is fair because it allows courts to certify classes earlier, but also permits splitting and decertifying later if individualized issues arise. Knowles also argues that his is not the type of case that Congress intended to be in federal court.

#### **Protecting the Rights of Class Members**

Standard Fire argues that allowing Knowles' stipulation to defeat removal would unfairly impact the rights of absent class members. Standard Fire asserts that before a class action can bind absent class members, (1) a court must certify the proposed class, (2) absent class members

must have notice of the litigation, and (3) a court must determine that the named plaintiff adequately represents their best interests. The Center for Class Action Fairness (CCAF) notes that before CAFA, Congress recognized that class actions often harmed absent class members because lawyers would receive large fees and class members would receive minimal awards.

Knowles responds that absent class members' rights are not adversely affected when a court considers an amount-in-controversy stipulation to determine a jurisdictional fact. Knowles claims that such jurisdictional determinations are not merit decisions. Moreover, Knowles argues that he could not have "diminished" the rights of absent class members because class counsel cannot make decisions that bind absent class members until after class certification.

### Analysis

Under the CAFA, a class action defendant may remove a suit from state to federal court when specific requirements are met, including when the amount in controversy exceeds \$5 million. Here, Standard Fire argues that the class action filed by Knowles should be removable to federal court because the class claims exceed the \$5 million threshold under CAFA when the claims are aggregated. Knowles counters that the class action must continue in state court because he, as the named plaintiff, determines the content of the class complaint at the pleading stage, including the amount of the class aggregated claims.

### Competing Textual and Legislative Interpretations of CAFA

Standard Fire asserts that when the U.S. District Court for the Western District of Arkansas remanded the class action to state court, it did so against the textual meaning of CAFA. Standard Fire points to the plain language of CAFA, arguing that § 1332(d) provides a method to calculating the amount in controversy through aggregating the class members' claims. Under Standard Fire's interpretation of CAFA, a "claim" refers not to the amount actually sought in recovery by an individual class member, but instead to each member's total right to recovery based on the case-specific facts and allegations. Standard Fire asserts that the district court established the controlling and irrefutable fact that the aggregated class claims meet the \$5 million CAFA threshold, which can-

not be evaded by any means, including Knowles's stipulation.

In response, Knowles contends that the district court's remand was proper because it acknowledges the well-established rule that a plaintiff is "master" of his complaint, meaning that he may avoid removal to federal court by seeking to recover less than the jurisdictional amount. Knowles points out that one such way to avoid removal is by entering into a stipulation to ensure that the amount in controversy does not reach the \$5 million threshold. In contrast to Standard Fire's reading of "claims" as maximum potential recovery for an individual class member, Knowles defines them as values determined by the class definition and allegations made in the plaintiff's complaint.

Standard Fire further alleges that remanding the class action contradicts the legislative purpose of CAFA. According to Standard Fire, Congress enacted CAFA to expand the circumstances in which class actions may be litigated in federal court. Knowles rebuts Standard Fire's argument, asserting instead that allowing removal to federal court would undermine CAFA's purpose by placing costly, time-intensive burdens on courts seeking to determine amount-in-controversy calculations. Knowles asserts that if courts cannot rely on complaints and stipulations to determine the amount in controversy, they must undergo preliminary fact-specific inquiries that contravene CAFA's intention to simplify questions of federal diversity jurisdiction.

### Enforceability of Stipulation

Standard Fire argues that fundamental principles of class action and due process prevent Knowles from using the stipulation to evade removal under CAFA. Standard Fire cites *Smith v. Bayer Corp.* to support its assertion that prior to certification of a class action, proposed class members cannot be bound because they have not had the opportunity to assert their individual interests or access adequate representation in the litigation. Standard Fire asserts because Knowles lacks authority over other potential class members, he cannot diminish or limit their individual claims against Standard Fire.

In contrast, Knowles upholds the enforceability of the stipulation. As a preliminary issue, Knowles notes that Congress

expressly supported the courts' consideration of jurisdictional stipulations, acknowledging their use in class representatives' complaints as a means to avoid federal diversity jurisdiction. Moreover, Knowles asserts that the stipulation does not offend due process or class action principles because the amount-in-controversy issue to which the stipulation applies is a preliminary decision about jurisdiction, rather than a decision on the merits of the case.

Knowles concedes that even if the Supreme Court accepts Standard Fire's calculation of the amount in controversy, which the district court found to exceed \$5 million, the stipulation is enforceable to the extent that it limits attorneys' fees and keeps the amount in controversy below the \$5 million CAFA threshold for federal jurisdiction. Knowles asserts that if the stipulation were to limit the percentage recovery for class action counsel, there would be no harm to individual class members, but the amount in controversy would still remain below the CAFA threshold.

In response, Standard Fire criticizes Knowles for introducing this new challenge to Standard Fire's calculation of amount in controversy. According to Standard Fire, Knowles never argued in the district court for an alternative method of calculation, nor did Knowles challenge the district court's factual finding in the court of appeals or in opposition to Standard Fire's petition for certiorari.

### Conclusion

The Supreme Court will determine whether under the CAFA representative plaintiffs may bind potential class members and avoid defendants' attempts to remove the actions to federal court when the representatives stipulate that they will not seek more than \$5 million in damages. Standard Fire advocates against the stipulation, arguing that it misinterprets CAFA and unconstitutionally binds potential class members without giving them an opportunity to assert their individual interests. In contrast, Knowles seeks to uphold the stipulation under a conflicting reading of CAFA that emphasizes principles of administrative efficiency and letting a plaintiff be the "master" of his complaint. ☉

*Written by Alexandra Cowen and Chan-woo Park. Edited by Brandon Bodnar.*

## KOONTZ v. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Appealed from the Florida Supreme Court  
Oral argument: Jan. 15, 2013

### Questions Presented

Whether the government can be held liable for taking when it refuses to issue a land use permit on the sole basis that the permit applicant did not accede a permit condition that if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1997) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use?

### Issues

Whether the constitutional standards set out in *Nollan* and *Dolan* apply so that the government can be held liable for an improper taking when the government refuses to issue a land use permit on the sole basis that the permit applicant did not accede to a condition to dedicate money, services, labor, or any other type of personal property to a public use.

### Facts

In 1972, Koontz, the petitioner, purchased a vacant lot. Shortly thereafter, the Florida Legislature enacted the Water Resources Act (WRA) of 1972 and, in 1985, the Warren S. Henderson Wetlands Protection Act (WHWPA). These acts gave each water management district jurisdiction to control the use of private property containing wetlands and uplands suitable for fish and wildlife habitat. Because of these acts, all but 1.4 acres of Koontz's property became a riparian habitat protection zone (RHPZ), which lies within the jurisdiction of St. Johns River Water Management District (St. Johns), the respondent.

In 1994, Koontz applied for a permit to develop 3.7 acres of this property. After investigating the property, a staffer for St. Johns agreed to recommend that Koontz's permit be approved subject to contingencies. Koontz refused to perform the off-site mitigation or to reduce his development

from 3.7 acres to 1 acre. Because of Koontz's denial, St. Johns denied Koontz's permit request. Koontz brought a lawsuit against St. Johns claiming that St. Johns improperly exacted his property. The trial court applied the constitutional standards enunciated by the U.S. Supreme Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* and concluded that St. Johns had effected an improper taking of Koontz's property.

St. Johns appealed to the U.S. District Court of Appeal for the Fifth Circuit. The court affirmed the judgment from the trial court awarding compensation to Koontz. Subsequently, St. Johns appealed to the Florida Supreme Court, which reversed the lower court's decision.

### Discussion

This decision has the potential to drastically modify takings jurisprudence with regard to exactions. In order to prevent government corruption, Koontz argues that the *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* standards should extend to cases such as this, involving the government's refusal to issue a land use permit because the applicant did not accede to a condition that affected non-real property interests. On the other hand, St. Johns argues that the *Nollan* and *Dolan* standards should not apply in these situations because local governments are best able to make these regulatory decisions.

### Corruption

Hillcrest Property, LLP, another Floridian property owner, argues that exaction practices are particularly susceptible to corruption because they promote the government's monopoly power to extract or extort concessions from developers and landowners who have no choice in the matter. The Institute for Justice and the Cato Institute support this proposition by offering examples of how non-real property exactions are abused without judicial review, including local governments using exactions to finance municipal pet projects. The amici briefs in support of Koontz argue that extending *Nollan* and *Dolan* standards to non-real property exactions would prevent government abuse because it would allow the government to demand non-real property exactions where doing so "makes sense."

The National Governors Association et

al. (NGA) argues that the local governments, not the courts, are in the best position to assess the costs and harms of a specific development to their community. The NGA contends that property owners and developers play a large role in the political process, which prevents local officials from abusing their power. St. Johns points out that landowners and developers have other legal protections from corruption such as due process and equal protection claims; thus, expanding *Nollan* and *Dolan* standards to non-real property exactions is not necessary.

### Effect on the Permitting Process

St. Johns argues that extending the *Nollan* and *Dolan* standards to this case and similar cases would cause considerable damage to the flexible process by which landowners and local governments negotiate permit conditions. The NGA explains that even if the government would not deny permits outright, any negotiations between the government and landowners would be one sided and would consist of the government remaining silent until the landowner made an offer that the officials believed was acceptable.

On the other hand, the Land Use Institute (LUI) provides empirical studies to show that government agencies are capable of incorporating land use rules into their decision-making processes, and that the rules actually improve the process. The studies show that the *Nollan* and *Dolan* standards nudged many governments into more systematic, comprehensive, and creative planning and decision-making.

### Analysis

The unconstitutional conditions doctrine instructs that when the government has the power to grant or deny permits, it cannot condition approval on waiver of constitutional rights. In the realm of land use exactions, two cases embody this doctrine: *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. In *Nollan*, the Supreme Court held that the government could condition the granting of a permit if the condition passes the "essential nexus" test; that is, the condition imposed must advance the same government interest as the prohibition of the use. In *Dolan*, the Supreme Court elaborated and developed the rough proportionality test, requiring the government to provide an individualized

determination that the condition imposed is related and proportional to the impact of the proposed development project.

### ***Nollan and Dolan Application to Attempted Exactions or Final Exactions***

Koontz argues that the need to safeguard against the imposition of unconstitutional conditions is especially pronounced in the land use permit context. This, argues Koontz, arises from the fact that an unconstitutional permit exaction violates, not one, but two constitutional rights: the right to make reasonable use of one's land, and the right to be compensated for the exacted property. It makes no difference what type of property is at issue or the timing of the exaction: the logic and purpose of the unconstitutional conditions doctrine and the holding of *Nollan* and *Dolan* is to prevent the State from using the permit process as a plan to extortion.

St. Johns argues that Koontz does not seek to invalidate a land use exaction, but rather that Koontz seeks just compensation for a taking of his property. Furthermore, St. Johns argues that although the timing of the exaction may or may not be relevant when the landowner seeks to invalidate an unconstitutional condition, timing does matter when the landowner seeks compensation. Under *Nollan* and *Dolan*, argues St. Johns, a landowner cannot seek compensation for an exaction that was never imposed. St. Johns argues that because Koontz never dedicated any property to St. Johns and he never spent any money on improvements or off-site mitigation, St. Johns cannot owe Koontz compensation for property that he never lost.

### ***Would a Condition that the Applicant Conduct a Monetary Payment Work as a Taking?***

Koontz argues that the *Nollan/Dolan* restrictions should apply to all exactions demanded by the government in the permit process, regardless of the type of property demanded and the timing of the demand. Koontz argues that these restrictions do not prohibit the State from demanding property in exchange for the issuing of a permit. Rather, they impose restrictions on the State's exaction power. To apply the *Nollan/Dolan* restrictions exclusively to real-estate exactions, argues Koontz, is to allow the government unlimited potential for abuse of landowners undergoing the permit process.

Koontz also asserts that the Takings Clause protects private property in general, not just interests in land or other real property. Nothing in *Nollan* and *Dolan*, argues Koontz, implies that the "essential nexus" and "rough proportionality" tests apply only to land dedications. According to Koontz, the essential question is whether the State can do indirectly, through the permit process, what they cannot do directly outside the permit process.

St. Johns argues that even if it had required Koontz to spend money to offset the negative impact of his development on the wetlands, this condition would not have amounted to a taking. St. Johns relies on *Eastern Enterprises* for this proposition. In *Eastern Enterprises*, the Court considered whether a federal statute that imposed retroactive liability on a coal company to fund lifetime benefits for its retirees constituted a taking. There, argues St. Johns, a majority of Justices decided that the Just Compensation Clause of the Fifth Amendment does not apply to a requirement to spend fungible money.

Furthermore, St. Johns contends that monetary liability is not like a physical occupation because money is fungible. St. Johns argues that if a general financial liability is to be construed as a taking, then any fee for services that must be paid in advance, such as a filing fee, would also be considered a taking.

Koontz believes that applying *Nollan* and *Dolan* to all exactions of property serves the principles driving those decisions. Those decisions were driven by the desire to insulate the private property owner from having to bear the burdens that should, in all fairness and justice, be borne by the public as a whole. Koontz argues that there is no real distinction between real property and money; indeed, money may pose an even greater risk of abuse given its fungible nature.

St. Johns insists that expanded application of the *Nollan/Dolan* tests to the expenditure of fungible money would expose a broad range of fees, such as application and usage fees, to heightened scrutiny.

### **Conclusion**

The Supreme Court's ruling in this case will decide whether the constitutional standard set out in *Nollan* and *Dolan* apply so that the government can be held liable for an improper taking when the government

refuses to issue a land use permit on the sole basis that the permit applicant did not accede to a condition to dedicate money, services, labor, or any other type of personal property to a public use. If the Court adopts Koontz's position, the standards will apply to cases where the government refused to issue a land use permit and to cases involving non-real property exactions. If the Court adopts St. Johns' position, the standards will not apply to this case or similar cases but will continue to apply to cases where the government actually took real property from the landowner. ☺

*Written by Ali Paradis and Alfonso Dulcey. Edited by Brooks Kaufman.*

## **ALLEYNE v. UNITED STATES (11-9335)**

*Appealed from the U.S. Court of Appeals for the Fourth Circuit*

**Oral argument: Jan. 14, 2013**

A jury found Allen Alleyne guilty of robbery under a federal statute, but the jury did not find him guilty of brandishing a weapon during the robbery. A federal criminal statute provides that a judge can raise the mandatory minimum sentence for robbery with a finding that it was more likely than not that the defendant brandished a firearm. Thus, a judge's finding can raise the mandatory minimum prison sentence even when a jury was unable to come to that same conclusion beyond a reasonable doubt. The U.S. Supreme Court allowed such findings from judges in *Harris v. United States*. Now, the court will reconsider that position or have the opportunity to further clarify how much sentencing discretion can be given to judges under federal statutes. Full text is available at [www.law.cornell.edu/supct/cert/11-9335](http://www.law.cornell.edu/supct/cert/11-9335). ☺

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## **BOYER v. LOUISIANA (11-9953)**

*Appealed from the Louisiana Third Circuit Court of Appeal*

**Oral argument: Jan. 14, 2013**

The state of Louisiana indicted Jonathan Edward Boyer for the murder of Bradlee Marsh in 2002, but the case did not proceed to trial until 2009. The trial resulted

in Boyer's conviction, and a state appellate court affirmed. Boyer now argues before the U.S. Supreme Court that Louisiana violated his Sixth Amendment right to a speedy trial. Specifically, Boyer alleges that five years of delay were caused entirely by Louisiana's failure to fund his appointed, capitol-certified counsel and that this funding failure should be weighed against the state. Louisiana counters that Boyer has no constitutional right to capitol-certified counsel and that Boyer, not the state, is responsible for the delay. In resolving the question presented, the Supreme Court will determine whether a state's failure to fund appointed, specially qualified counsel for an indigent capital defendant should be weighed against the state for speedy trial purposes. The decision may substantially affect indigent defendants' constitutional rights as well as state procedures for providing indigent capital defense. Full text is available at [www.law.cornell.edu/supct/cert/11-9953](http://www.law.cornell.edu/supct/cert/11-9953). ©

*Written by Thomas Santoro and Stephen Wirth. Edited by Judah Druck.*

### **CITY OF ARLINGTON, TEXAS ET AL. v. FEDERAL COMMUNICATIONS COMMISSION ET AL. (11-1545) AND CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL V. FEDERAL COMMUNICATIONS COMMISSION (11-1547)**

*Appealed from the U.S. Court of Appeals for the Fifth Circuit*

**Oral argument: Jan. 16, 2013 (11-1545)**

Although the Communications Act requires a local government to respond within a reasonable time period to requests for building these facilities, the law does not specify what exactly is a reasonable time period. In 2008, the Federal Communications Commission (FCC) set time frames on zoning authorities for processing requests to build wireless facilities. The Petitioner cities of Arlington, Texas, and New Orleans, Louisiana, challenged the FCC's time frames by arguing that the FCC overstepped its power under the Communications Act. When the U.S. Court of Appeals for the Fifth Circuit concluded that the FCC acted within its power, Arlington and New Orleans challenged that the Fifth Circuit improperly

submitted its own judgment to that of the FCC on the question of the FCC's scope of authority. Arguing to uphold the decision of the Fifth Circuit, Respondent FCC contends that Congress intended to empower the FCC to interpret the Communications Act in all its provisions. Differing from the FCC, Respondent Celco (a partnership of four corporations) argues that although Congress did not empower the FCC to determine the limits of its own authority, the Fifth Circuit was right to defer to the FCC on these time frames in particular. Full text is available at [www.law.cornell.edu/supct/cert/11-1545](http://www.law.cornell.edu/supct/cert/11-1545). ©

*Written by Belinda Liu and Sarah O'Laughlin. Edited by Charlotte Davis.*

### **DELIA v. E.M.A. (12-98), MO.2310**

*Appealed from the U.S. Court of Appeals for the Fourth Circuit*

**Oral argument: Jan. 8, 2013**

E.M.A., a minor, suffered catastrophic injuries during her birth due to the physician's negligence during delivery. As part of its Medicaid program, North Carolina paid for E.M.A.'s medical expenses upon her mother's agreement to reimburse the Medicaid program for any recovery gained from a third party to cover E.M.A.'s medical expenses. When E.M.A. settled her claim against the physician for a fraction of her medical costs, North Carolina attached a lien. In this case, the U.S. Supreme Court will decide whether a North Carolina law that allows the North Carolina Department of Health and Human Services (DHHS) to assert a lien against a Medicaid recipient's recovery from a third party violates the "no-lien" provision of the Medicaid Act. DHHS argues that the North Carolina statute is consistent with the Medicaid Act's no-lien provision because it operates as an advanced agreement. E.M.A. responds that the statute violates the Medicaid Act because it allows DHHS to recover a proportion of the settlement that is greater than her medical expenses. Full text is available at [www.law.cornell.edu/supct/cert/12-98](http://www.law.cornell.edu/supct/cert/12-98). ©

*Written by Cristina Quinones-Betancourt and Nathan Taylor. Edited by Brooks Kaufman.*

### **DESCAMPS v. UNITED STATES (11-9540)**

*Appealed from the U.S. Court of Appeals for the Ninth Circuit*

**Oral argument: Jan. 7, 2013**

Matthew Descamps was sentenced to 262 months in prison after the U.S. Court of Appeals for the Ninth Circuit found that he had committed his third violent felony, in violation of the Armed Career Criminal Act (ACCA). The contested violent felony was a 1978 conviction for burglary of a California grocery store. Under the California burglary statute, one can be convicted of a burglary without an explicit finding that entry into the premises was itself unlawful. The element of unlawful entry is required under the generic burglary statute described in the ACCA. The Ninth Circuit found the "unlawful entry" element was satisfied by the plea bargain, thus subjecting Descamps to the mandatory 15-year minimum prison sentence required under the ACCA. How the U.S. Supreme Court decides this case will determine how sentencing courts use factual assertions surrounding a prior conviction in situations where a violent crime as defined under the ACCA contains elements absent from the crime for which the defendant was convicted. Full text is available at [www.law.cornell.edu/supct/cert/11-9540](http://www.law.cornell.edu/supct/cert/11-9540). ©

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### **GABELLI v. SEC (11-1274)**

*Appealed from the U.S. Court of Appeals for the Second Circuit*

**Oral argument: Jan. 8, 2013**

"Time zone arbitrage" is an investment practice that takes advantage of the time difference between markets in the United States and abroad but that may harm international institutional investors. In its initial action against defendants, Marc J. Gabelli and Bruce Alpert (collectively, Gabelli), the SEC argued that Gabelli committed securities fraud by allowing time zone arbitrage while simultaneously representing to the directors and investors of the mutual fund that it would not be tolerated. The U.S. Court of Appeals for the Second Circuit held that the period for the statute of limitations did not begin running until the Securities and Exchange Commission (SEC) discov-

ered the alleged misconduct. The defendants now appeal, arguing that potential targets of government enforcement actions should not have to live under the constant threat of penalty for conduct long since passed. The SEC counters that wrongdoers should not benefit by virtue of their conduct being more difficult to uncover. The U.S. Supreme Court's resolution of this case will have long lasting implications on the government's efforts to regulate the securities market. Full text is available at [www.law.cornell.edu/supct/cert/11-1274](http://www.law.cornell.edu/supct/cert/11-1274). ©

*Written by Zachary Glantz and Jonathan Goddard. Edited by Judah Druck.*

### **JERRY W. GUNN ET AL., v. VERNON F. MINTON (11-1118)**

*Appealed from the The Supreme Court of Texas*

**Oral argument: Jan. 16, 2013**

Vernon F. Minton (Minton) leased software that he had developed to the National Association of Securities Dealers, Inc. (NASD) and NASDAQ Stock Market, Inc. (NASDAQ), and was granted a patent for the software. Subsequently, Minton filed a patent infringement lawsuit against NASD and NASDAQ, but the trial court dismissed the lawsuit due to a rule that invalidates patents that apply to inventions sold more than a year prior to the application date of the patent. Minton then filed a legal malpractice lawsuit against his attorneys, Petitioner Jerry W. Gunn et al., who represented Minton in the patent infringement case. The issue in this case concerns whether the federal courts should have exclusive jurisdiction over legal malpractice claims that arise from patent litigation. Gunn argues that significant state interests and congressional intent require that the case be heard in state court. Minton claims, however, that the federal issue is substantial and that based on the federal interests and congressional intent, this case should be decided in federal court. Full text is available at [www.law.cornell.edu/supct/cert/11-1118](http://www.law.cornell.edu/supct/cert/11-1118). ©

*Written by Z. Lu and Sherry Jarons. Edited by Brooks Kaufman.*

### **LEVIN v. UNITED STATES (11-1351)**

*Appealed from the U.S. Court of Appeals for the Ninth Circuit*

**Oral argument: Jan. 15, 2013**

Steven A. Levin sued his military doctor and the United States for medical malpractice and medical battery for a procedure performed at the U.S. Naval Hospital in Guam. The United States substituted itself for the military doctor and claimed that they had sovereign immunity which barred the claim under the Gonzalez Act. Levin argues that the Gonzalez Act only removes liability from armed services medical personnel and does not create an immunity that would remove any possibility for recovery in medical battery suits against armed forces medical personnel. The United States contends that no waiver of sovereign immunity exists unless a statute's explicit language creates a waiver. Furthermore, the United States argues that to find an implied waiver of sovereign immunity in the Gonzalez Act would overturn the U.S. Supreme Court's long-standing precedent regarding waivers of sovereign immunity and create questions about when sovereign immunity is waived. Full text is available at [www.law.cornell.edu/supct/cert/11-1351](http://www.law.cornell.edu/supct/cert/11-1351). ©

*Written by Dean Caruwana and Claire Holton-Basaldua. Edited by Brandon Bodnar.*

### **MARACICH v. SPEARS (12-25)**

*Appealed from the U.S. Court of Appeals for the Fourth Circuit*

**Oral argument: Jan. 9, 2013**

In 2006, several individuals who had bought cars contacted a group of lawyers in South Carolina, claiming various car dealerships overcharged them. To investigate this claim, the lawyers requested from the state department of motor vehicles the disclosure of the personal information of thousands of people who had bought from dealerships in Spartanburg County. The U.S. Court of Appeals for the Fourth Circuit found that the litigation exception of the Driver's Privacy Protection Act (DPPA) allowed the lawyers to engage in mass solicitation using the information. Petitioner Maracich argues that the DPPA provision requiring the consent of individuals to disclose their personal information imposes a consent requirement

onto requests to solicit potential clients for the purpose of litigation. In contrast, Respondent Spears argues that the DPPA exception for litigation waives the consent requirement in this instance. The outcome of this case may help determine how far lawyers can go to obtain personal information and how far Congress can go to reach into an area traditionally regulated by the states. Full text is available at [www.law.cornell.edu/supct/cert/12-25](http://www.law.cornell.edu/supct/cert/12-25). ©

*Written by Dillon Horne and Matthew Soares. Edited by Charlotte Davis.*

### **MISSOURI v. MCNEELY**

*Appealed from the Missouri Supreme Court*

**Oral argument: Jan. 9, 2013 (11-1425)**

Tyler G. McNeely was arrested for drunk driving on October 3, 2010. After McNeely refused a breathalyzer and blood tests, Officer Mark Winder, acting without a warrant, directed hospital personnel to remove blood from McNeely. McNeely asserts that this action violated his Fourth Amendment right to be free from unreasonable searches and seizures. The state of Missouri responds that Winder's action was constitutional because it fell into the "exigent circumstances" exception to the Fourth Amendment's warrant requirement because the blood evidence was likely to be destroyed during the time it would take to obtain a warrant. McNeely also argues that bodily integrity is the core of the Fourth Amendment, that warrantless blood draws are unnecessary because other states have required warrants for blood draws and have not encountered difficulties enforcing driving under the influence (DUI) laws, and that judges and prosecutors overwhelmingly support warrants for blood draws. Missouri responds that blood testing is the best method of obtaining probative, relevant evidence of drunk driving, that blood draws typically involve little risk and pain, and that because alcohol naturally dissipates in a person's bloodstream, evidence of drunk driving is continually destroyed. Full text is available at [www.law.cornell.edu/supct/cert/11-1425](http://www.law.cornell.edu/supct/cert/11-1425). ©

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