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Supreme Court Justice Neil Gorsuch and securities litigation

Friend or Foe?

By Alla Zayenchik

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After a hotly contested, year-long battle for Justice Scalia's seat, Neil Gorsuch has been sworn in as the 113th Supreme Court Justice over Democrats' filibuster. While the dispute concerning who would occupy the vacant seat has come to a close, many questions remain concerning the impact of Justice Gorsuch's confirmation on the nation's securities laws.

Early in his career, Gorsuch was critical of securities enforcement actions. Advocating for more limited damages in securities fraud class actions, Gorsuch authored an amicus brief on behalf of the United States Chamber of Commerce in the 2005 *Dura Pharmaceuticals v. Broudo* case. Also in 2005, he co-wrote a decidedly anti-enforcement article in his personal capacity for *The Legal Times*, stating: "The problem is that securities fraud litigation imposes an enormous toll on the economy, affecting virtually every public corporation in America at one time or another and costing businesses billions of dollars in settlements every year."

As a judge on the Tenth Circuit Court of Appeals starting in 2006, Gorsuch rarely had the opportunity to rule on class action securities cases. One of his notable securities laws decisions was *MHC Mutual Conversion v. Sandler O'Neill & Partners*, in which Gorsuch, writing for the court, addressed Section 11 liability for issuers making false or misleading statements.

In that case, the court declined to impose Section 11 liability against officers of Bancorp predicated on their 2009 statements concerning mortgage-backed securities in the bank's portfolio in connection with a secondary stock offering to raise $90 million. Bancorp announced that it expected the market for its securities to rebound soon. However, fifteen months after the offering, the company had to recognize $69 million in losses. In rejecting plaintiffs' claims, Judge Gorsuch largely focused on a limited view of liability that would make damages available only "when the speaker doesn't sincerely hold the opinion he expresses at the time he expresses it." He explained that "[i]n 2008, no doubt

there were those who genuinely thought the market for mortgage-backed securities would soon rebound. Events have disproved…these opinions, but that hardly means the opinions were anything other than honestly offered—true opinions at the time made."

However, Judge Gorsuch's ruling was not so constrained as to limit liability to opinions that are not sincerely held. Judge Gorsuch wrote that liability may lie for opinions that are given without a reasonable basis — i.e., not just opinions that the speaker does not believe — but that the plaintiffs in the *MHC Mutual Conversion* case had not alleged enough to win under that theory either. Judge Gorsuch also supported investors' rights by adding that securities issuers cannot insulate themselves from liability by adding "we believe" or "it is our opinion" before statements of fact, as "issuers cannot avoid liability by liberally sprinkling prefatory labels throughout a prospectus or simply tacking them onto everything they say." One year later, in the 2015 *Omnicare* decision, the Supreme Court endorsed the broader scope of liability and agreed that not all statements preceded by prefatory labels like "we believe" are "opinions."

While Justice Gorsuch has expressed skepticism about private enforcement of the securities laws in the past, it is not entirely clear how he will approach securities matters on the high court. During his Senate confirmation hearings, he vowed that personal views and policy preferences would not impact his decisions, as his primary goal would be to remain faithful to the text of the law. As he told Congress, a judge "who likes every outcome he reaches is very likely a bad judge."

Justice Neil Gorsuch

An early test for Justice Gorsuch will be the *ANZ Securities* case discussed in this issue of *The Advocate* (see page 15), which involves the textual interpretation of the Securities Act's statute of repose. The Supreme Court heard argument in *ANZ Securities* on April 17, Justice Gorsuch's first day on the Court's bench. Justice Gorsuch appeared inclined to side with the defendants' position in the case and to hold that even when the claims of an aggrieved investor are already being prosecuted by a class representative in a pending class action, investors must take action to preserve their individual claims if they might want to pursue them outside of the class action context. Echoing the judicial reasoning of the late Justice Scalia, Justice Gorsuch noted that he does not "like the policy consequences" of such a holding, but that it might be required under the relevant statute's "plain language."

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