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Supreme Court Roundup

A Trio of Upcoming Cases May Impact Institutional Investors

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Cyan Inc. v. Beaver County Employees Retirement Fund

The *Cyan* case concerns whether state courts can hear class action lawsuits that allege only claims under the federal Securities Act of 1933. The Securities Act is an important tool for investors, as it imposes strict liability on securities issuers for material misstatements and omissions in registration statements. The ability to bring these cases in state courts is significant to investors because, among other reasons, state courts can be more receptive to such cases. For example, studies show that California courts dismiss approximately six percent of Securities Act cases, while federal courts have a higher dismissal rate of approximately thirty-two percent.

The Supreme Court is taking the *Cyan* case because courts have split as to whether a federal law, the Securities Litigation Uniform Standards Act ("SLUSA"), prevents Securities Act cases from being heard in state court. Basing their arguments on the plain reading of the statute's text, the *Cyan* plaintiffs contend that Securities Act cases are clearly permitted to proceed in state courts. Defendants, on the other hand, argue that SLUSA prohibits states from hearing Securities Act claims because the goal of SLUSA was to reestablish federal courts as the preferred venue for large class actions involving nationally traded securities. The Supreme Court heard oral argument on November 28, 2017 and is expected to issue an opinion in the coming months.

China Agritech v. Resh

The Supreme Court is reviewing a significant case for investors regarding the timeliness of class actions, *China Agritech v. Resh*. This case regards the situation where a plaintiff investor brings a class action, the court denies class certification for reasons that may be curable, and a different plaintiff investor then brings essentially the same class action to try again for class certification on a better court record. In *China Agritech*, two prior cases were brought within the "statute of limitations," i.e., within the statutory time period for bringing such claims, but the classes were not certified, and the parties disputed whether a subsequent, third case was timely. The question was whether the filing of the initial claims had stopped the clock on the statutory time period, or "tolled" the statute of limitations, for the later case. In an earlier case, *American Pipe*, the Supreme Court dealt with a similar situation where the court had denied class certification and an investor, who was a member of the plaintiff class, brought a subsequent individual claim. There, the Court found that the initial claim

had tolled the statute of limitations as to the individual claim, but there remained an open question as to *American Pipe's* applicability to subsequent class actions.

The Ninth Circuit appellate court in *China Agritech* held, based on the *American Pipe* precedent, that the second class action case was timely because the statute of limitations had been tolled during the pendency of the first class action. In so finding, the Ninth Circuit noted that this rule would create "no unfair surprise to defendants" because, due to the prior suit, they had already been alerted to the substantive claims and the identity of plaintiffs. The Court also noted that the rule would also reduce the incentive to file duplicative, protective class actions because a class member who fears that class certification will be denied will be incentivized to wait until the success or failure of the first class action is determined. Other federal appellate courts disagree, however, and hold that the statute of limitations is not tolled in this way.

A ruling for the *China Agritech* plaintiffs would protect investors who choose to passively participate in a class action, then determine that there are reasons they could win class certification in a different case. In other words, if class certification is denied in the first case because the plaintiff makes a technical error in their motion or does a poor job of presenting the evidence to the court, why shouldn't all class members be allowed to do things the right way and file a similar action that can achieve class certification? The Supreme Court is expected to decide such issues before the end of its term in June 2018.

Raymond James Lucia Companies Inc. v. Securities and Exchange Commission

The Supreme Court recently agreed to resolve a circuit split between the D.C. Circuit and the Tenth Circuit regarding whether the current hiring process for SEC administrative law judges ("ALJs") violates the Appointments Clause of the Constitution. The Appointments Clause empowers the president to appoint certain public officials with the "advice and consent" of the Senate. The question is whether SEC administrative law judges are "inferior officers" subject to the requirements of the Constitution's Appointments Clause. Inferior officers are government officers who must be appointed through advice and consent of Senate, by the President, by the courts, or by the head of the relevant government agency. Many ALJs, however, are currently hired through a simpler process through government agencies' internal personnel offices. Thus, if the ALJs are deemed to be "inferior officers," many sitting ALJs would have been hired in violation of the Constitution. Appellate courts are split on this issue, and the Supreme Court has chosen to decide it.

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Notably, the US government's position on the issue has changed. Until recently, the government argued that SEC ALJs were merely employees and did not need to be appointed pursuant to the Appointments Clause. Now, the Solicitor General views the SEC ALJs as inferior officers. Accordingly, the SEC has moved ahead on ratifying, or reappointing pursuant to the Appointments Clause, its ALJs, so as to resolve concerns about proceedings overseen by those judges.

Even though the employment of the SEC's ALJs may now comply with the Appointments Clause, a Supreme Court ruling on this issue could still have widespread impact. A finding by the Supreme Court that ALJs are officers would have significant implications both for the SEC and for other federal agencies that use similar procedures for hiring, such as the Federal Reserve, the Consumer Financial Protection Bureau, and the Federal Mine Safety Commission. Such agencies may need to reappoint numerous ALJs pursuant to the Appointments Clause, and those reappointments may face difficulties depending on the political climate. Perhaps most importantly, past decisions by ALJs deemed to be inferior officers who were not properly appointed could be called into question, upending settled law in a variety of federal agencies.