D&O, EPL Insurers Smell Trouble After High Court Rulings

March 25, 2011

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NU Online News Service, March. 25, 12:26 p.m. EDT

Management liability insurers may smell trouble ahead in the wake of two U.S. Supreme Court rulings delivered on Tuesday—one increasing securities litigation potential and the other easing the process of bringing certain types of employment cases.

In the securities case, Matrixx Initiatives, Inc., et al. v. Siracusano, the court unanimously upheld a Ninth Circuit decision finding that investors appropriately pled a case against Matrixx alleging they were misled.

At issue was the question of whether Matrixx, the maker of Zicam Cold Remedy, has withheld reports of a possible link between the product's use and anosmia—loss of smell.
The Supreme Court said the adverse effects reported did not have to be "statistically significant" in number.

"The question is whether a reasonable investor would have viewed the non-disclosed information as having significantly altered the 'total mix' of information made available," Justice Sonia Sotomayor writes, citing the "total mix" requirement for materiality in a prior case (Basic Inc. v. Levinson, 1988).

"Something more than the mere existence of adverse event reports is needed to satisfy that standard, but that something more is not limited to statistical significance and can come from the source, content, and context of the reports."

She notes that Matrixx received reports from medical experts and researchers that plausibly indicated a reliable causal link between Zicam and anosmia.

"Consumers likely would have viewed Zicam's risk as substantially outweighing its benefit," she writes, concluding that reasonable investors might also alter their views with such information.

In the employment case, Kasten v. Saint-Gobain Performance Plastics Corp., the court held in a 6-2 ruling that an employee could bring a lawsuit alleging an employer illegally retaliated against him with a negative employment action—in this case dismissal—even though the complaint about a wage-and-hour law violation was oral rather than written.

The court considered the anti-retaliation provision of the Fair Labor Standards Act. The provision forbids employers "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint" alleging an FLSA violation.

In the underlying case, Kasten had complained about the illegal placement of time clocks at the plastics company where he worked. In particular, he told his shift supervisor, the human resources manager and others that the location of the clocks—between the area where workers put on and took off work-related protective gear and the area where they carried out their assigned tasks—meant they were not receiving credit for the time they spent donning and doffing this gear, which would be a violation of the FLSA.

"Several functional considerations indicate that Congress intended the anti-retaliation provision to cover oral, as well as written, complaints," writes Justice Stephen Breyer for the majority.
The Act's anti-retaliation provision makes the enforcement scheme effective by preventing "fear of economic retaliation from inducing workers 'quietly to accept substandard conditions,'" he writes, quoting from a 1996 case (Mitchell v. Robert DeMario Jewelry, Inc.).

"Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly the illiterate, less educated, or overworked workers who were most in need of the Act's help at the time of passage," he writes.

"Limiting the provision's scope to written complaints could prevent Government agencies from using hotlines, interviews, and other oral methods to receive complaints."