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Supreme Court Nominee Has Taken Skeptical View of Private Securities Fraud Litigation, Agency Deference

On January 31, 2017, President Donald J. Trump announced his nominee for the Supreme Court seat vacated by the death of Justice Antonin Scalia nearly a year ago: Judge Neil Gorsuch of the United States Court of Appeals for the Tenth Circuit. Judge Gorsuch has a limited record in private securities litigation cases during his tenure on the Tenth Circuit, but his writing and litigation activity prior to joining the bench give some insight into his views on key issues affecting securities litigants.

Judge Gorsuch was nominated to the Tenth Circuit by President George W. Bush in 2006 and was confirmed by voice vote in the Senate, after an uneventful confirmation process. Before ascending to the federal bench, Judge Gorsuch worked for a year as the Principal Deputy Associate Attorney General of the Department of Justice in the administration of George W. Bush. Prior to that, he spent ten years as a partner at Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, where he principally represented corporate clients. Judge Gorsuch clerked for Justices Byron R. White and Anthony M. Kennedy and, if confirmed, would be the first former law clerk to sit on the Supreme Court alongside his former boss.

On the bench, Judge Gorsuch has written only one opinion in a private securities litigation case. *See MHC Mutual Conversion Fund, L.P.* v. *Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109 (10th Cir. 2014). It is noteworthy that the ruling, on a significant topic in securities litigation, evinces a distinct undercurrent of skepticism toward the expansive application of federal securities laws, and was ultimately embraced by the United States Supreme Court.

In *MHC Mutual*, Judge Gorsuch addressed the question of what a plaintiff must plead to establish liability, under Section 11 of the Securities Act of 1933, for statements of opinion. He wrote, for a unanimous panel, that "a plaintiff must show *both* that the defendant expressed an opinion that wasn't his real opinion (sometimes called 'subjective disbelief') *and* that the opinion didn't prove out in the end (sometimes called 'objective falsity')." *Id.* at 1113. A circuit split developed on this issue, and his opinion presaged the Supreme Court's eventual interpretation of the statute. One year later, the Supreme Court adopted the same standard, holding that Section 11 does not provide the basis for a cause of action for an issuer's "statement of opinion that is ultimately found incorrect," if "the speaker actually holds the stated belief." *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1325-26 (2015).

Notably, Judge Gorsuch has a record of commentary on and involvement in securities litigation while in private practice. For instance, in 2005, Judge Gorsuch co-authored a working paper for the Washington

Legal Foundation entitled *Settlements in Securities Fraud Class Actions: Improving Investor Protection*.[1] In that paper, Judge Gorsuch observed that "economic incentives unique to securities litigation encourage class action lawyers to bring meritless claims and prompt corporate defendants to pay dearly to settle such claims. These same incentives operate to encourage significant attorneys' fee awards even in cases where class members receive little meaningful compensation."[2]

Judge Gorsuch, in that same working paper, made a number of suggestions to reform private securities litigation, including applying a more rigorous loss causation standard, establishing plaintiff fee award funds that are separate from any recovery to the plaintiff class, increasing use of the lodestar method to determine fee awards, adopting competitive bidding processes for class counsel, and other similar market-oriented measures. The reforms Judge Gorsuch proposed largely focused on shifting the incentives affecting class counsel, and scrutiny of their awards, in an attempt to render it less attractive to the plaintiffs' bar to assert claims of dubious merit.

Prior to his judicial service, Judge Gorsuch also wrote an amicus brief for the United States Chamber of Commerce in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005). In *Dura*, the Court reaffirmed the loss causation element of a securities fraud claim under the Private Securities Litigation Reform Act of 1995. The amicus brief that Judge Gorsuch authored on behalf of the Chamber advocated a heightened loss causation requirement, focusing in particular on the cost to U.S. businesses "due to pressures unique to American securities litigation," because of which "businesses are typically forced to settle even meritless suits." Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioners, *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336 (2005) (No. 03-932), 2004 WL 2069560, at *2. The brief described the loss causation requirement as a "key safeguard against such suits." *Id.* at *3.

It also is worth noting that during his tenure on the Tenth Circuit, Judge Gorsuch has advocated positions on administrative law issues that might be a preview of his views on SEC enforcement and litigation. In particular, Judge Gorsuch has advocated replacing the judicial deference to agency determinations of "ambiguous" statutory provisions, the administrative law doctrine known as "*Chevron* deference." *See Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

In *Gutierrez-Brizuela*, writing for a unanimous panel, Judge Gorsuch found that, although an agency can effectively overrule judicial interpretations of the agency's governing statutes through its delegated legislative authority, the agency's new rule could not be retroactively applied. *Id.* at 1148. The issue in *Gutierrez-Brizuela* was narrow: whether the Bureau of Immigration Affairs ("BIA") could apply a

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1 Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, Washington Legal Foundation Critical Legal Issues Working Paper Series No. 128 (Apr. 2005), *available at* http://www.wlf.org/upload/0405WPGorsuch.pdf.

2 *Id.* at 2.

particular policy that interpreted an ambiguous statute contrary to an earlier Tenth Circuit opinion, when the events in issue occurred *after* the Tenth Circuit's ruling but before the BIA formalized its policy (or, put differently, when the only law on the books was the Tenth Circuit's opinion). *Id.* at 1143-44. The Tenth Circuit held that this was one of the rare instances in which the court was not required to afford *Chevron* deference to the BIA rule. *Id.* at 1148.

Judge Gorsuch also authored a concurring opinion to his own majority opinion, in which he expressed his criticism of the *Chevron* doctrine, specifically, the "huge amounts of core judicial and legislative power" it permits executive agencies to "swallow." *Id.* at 1149 (Gorsuch, J., concurring). Judge Gorsuch wrote that the "administrative state" that has resulted from *Chevron* deference runs contrary to the principle of separation of powers. *Id.* at 1155.

In Judge Gorsuch's view, *de novo* judicial review of agency rulemaking should replace *Chevron* deference. *Id.* at 1158. As described by Judge Gorsuch, such a rule would limit the power of federal agencies—including, presumably, the SEC—to interpret the statutes they are charged with administering. *See id.* at 1153-54. If adopted, this approach would likely result in increased judicial supervision of the administrative agencies.

In sum, although Judge Gorsuch's record on securities litigation and enforcement is relatively limited, it suggests an inclination for limited private rights of action under the federal statutes, and increased judicial review of agency action.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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