

The ball's in their court

The big bench gets down to business

By GREGORY ZELLER

Awaiting the nine justices of the U.S. Supreme Court, who suited up for their new term Monday, are debates on everything from federal sentencing guidelines to Guantanamo detainees to the proper administering of capital punishment.

Heavy stuff – but the next nine months also carry particular importance for corporate America, with several cases pending that could change the way business works.



Bob Gagliano

A Supreme Court decision on investors' rights hinges on the interpretation of a 1994 ruling, according to Certilman Balin partner Thomas McNamara.

The court will engage critical discussions over employment discrimination, Equal Employment Opportunity statutes and who, exactly, is responsible for Enron-level fraud. And when they're done, investors, employees and corporations may have a new set of stars to steer by.

Out of the box

First up is Tuesday's hearing on the corporate liability case *Stoneridge Investment Partners v. Scientific-Atlanta*, a showdown over investors' ability to sue "secondary actors" – such as accounting and law firms – for assisting corporate misdeeds like the Enron debacle.

The case revolves around Scientific-Atlanta, a maker of set-top boxes for cable and satellite television services. The Georgia-based Cisco subsidiary allegedly jacked up its prices when selling boxes to

Charter Communications of St. Louis, Mo., then paid back Charter with exorbitant ad rates – revenue the cable television, Internet and communications services provider reportedly used to inflate profits.

Investors sued both companies, but Scientific-Atlanta – citing a 1994 Supreme Court ruling – said it couldn't be sued for securities fraud, because it didn't directly deceive anyone.

How the Supremes revisit *Central Bank v. First Interstate Bank* will be key here, according to Thomas McNamara, partner in charge of litigation at Certilman Balin Adler & Hyman in East Meadow. Back in '94, the court determined no liability under securities laws for secondary players who abet a securities violation.

"Liability rested with the primary actors," McNamara said, "and you could

not hold a third party liable for assisting somebody else in violating security laws."

In *Stoneridge*, however, the plaintiffs argue that "this is a case of primary liability," he added, and that Scientific-Atlanta was involved in creating false business records by issuing inflated invoices, knowing Charter would report them as income.

About 30 outside entities have filed amicus briefs – support statements filed by non-parties to the case – on *Stoneridge*, attention normally reserved for controversial social issues like abortion. McNamara said it was unusual to see so many amicus briefs in a corporate case, though not surprising.

"It's an issue that has a lot of interest," he said, but he's not predicting any earth-shattering outcomes: The 8th Circuit's decision to follow the precedent set by *Central Bank*, essentially shielding

Scientific-Atlanta from liability, will likely stand.

"I would be very surprised if that decision is not affirmed," he said. "Extending liabilities to third parties would really have a chilling effect. An attorney or an accountant may not want to do work with a company in financial straits."

Only eight justices will decide *Stoneridge*; Justice Stephen Breyer, with no reason given, has recused himself. Previously, Chief Justice John Roberts recused himself from the case, but later decided to hear it.

The eight-person bench opens an interesting possibility, *McNamara* noted, since a 4-4 deadlock would revert the matter to the lower court. "The decision of the 8th Circuit would stand," he said.

Discrimination debate

A pair of employment cases, meanwhile, will define new parameters for discrimination claims.

In *Sprint/United Management Co. v. Mendelsohn*, the justices will determine whether the testimony of non-parties must be admitted in discrimination cases, even if it alleges discrimination not involving the plaintiff.

In a nutshell: An employee claims age discrimination after being fired and calls as a witness a fellow employee who claims the same, but cites a different supervisor.

That's pretty much the case in *Sprint/United*. The plaintiff claimed she was terminated because of her age, a violation of the Age Discrimination in Employment Act, and attempted to prove that five other employees over the age of 40 were also fired under dubious circumstances. The 10th Circuit ruled it didn't matter if the other firings were done by supervisors not named by the plaintiff, but other circuit courts cited the Federal Rules of Civil Procedure, which hold that relevant evidence may be excluded if its "probative value" is outweighed by unfair prejudices or other factors that could mislead a jury.

Attorney Michael Ciaffa of Meyer, Suozzi, English & Klein in Garden City said allowing "me too" testimony would "encourage lawsuits and make them more expensive and complicated to defend."

"To avoid liability, businesses will need to pay closer attention to patterns that might suggest discrimination," Ciaffa said.

Despite the potential for opening a litigious Pandora's Box, the attorney predicted a "narrow majority will give cautious approval to introduction of 'me too' evidence" in limited cases.

"An amicus brief submitted by the federal government advocates this middle ground," Ciaffa noted.

In *Federal Express Corp. v. Holowecki*, the high bench will review a lower court's ruling that the submission of an "intake questionnaire" to the Equal Employment Opportunity Commission constitutes "filing a charge" against an employer. Ciaffa noted that recent Supreme Court decisions are "fairly rigid in applying statutory requirements," and citing more potential for rampant litigation and litigation costs, he predicted a defeat for the plaintiff.

"Filing an intake questionnaire is not the same as filing a charge," he said.

However the court rules, each case is likely to be nip-and-tuck – several of Ciaffa's "narrow majorities." Last term, fully one-third of the Supreme Court's decisions came by the slimmest possible margin, 5-4.

Kimberly Atkins of sister paper *Lawyers USA* contributed to this story. For a complete list of cases pending before the Supreme Court this term, visit the "certiorari granted" page at www.lawyers-usaonline.com.

Bench Strength

And now, your starting nine for the 2007 term of the Supreme Court of the United States.

A hearty mix of youth and experience, with an untested chief justice and one associate justice beginning his first full term, the High Court will tackle several mind- and liberty-bending challenges this season. Issues range from capital punishment to immigration to discrimination, and several pending cases could chart a new course for Corporate America.

Here, then, is a look inside the robes of your 2007 Supremes:



Chief Justice John G. Roberts Jr.
Born: January 27, 1955, Buffalo, N.Y.
Career Highlights: Clerked for SCOTUS Justice William Rehnquist; associate counsel to President Ronald Reagan; former justice, U.S. Court of Appeals
Nominated by: President George W. Bush
Joined SCOTUS: Sept. 29, 2005



Associate Justice John Paul Stevens
Born: April 20, 1920, Chicago, Ill.
Career Highlights: U.S. Navy veteran; former justice, U.S. Court of Appeals
Nominated by: President Gerald Ford
Joined SCOTUS: Dec. 19, 1975



Associate Justice Antonin Scalia
Born: March 11, 1936, Trenton, N.J.
Career Highlights: Former law professor at Georgetown and Stanford University; former justice, U.S. Court of Appeals
Nominated by: President Ronald Reagan
Joined SCOTUS: Sept. 26, 1986



Associate Justice Anthony M. Kennedy
Born: July 23, 1936, Sacramento, Calif.
Career Highlights: Former law professor at the University of the Pacific; former justice, U.S. Court of Appeals
Nominated by: President Ronald Reagan
Joined SCOTUS: Feb. 18, 1988



Associate Justice David Hackett Souter
Born: Sept. 17, 1939, Melrose, Mass.
Career Highlights: Former New Hampshire attorney general; former justice, U.S. Court of Appeals
Nominated by: President George H.W. Bush
Joined SCOTUS: Oct. 9, 1990



Associate Justice Clarence Thomas
Born: June 23, 1948, Pin Point, Georgia
Career Highlights: Former assistant attorney general of Missouri; former civil rights secretary, U.S. Department of Education; former justice, U.S. Court of Appeals
Nominated by: President George H.W. Bush
Joined SCOTUS: Oct. 23, 1991



Associate Justice Ruth Bader Ginsburg
Born: March 15, 1933, Brooklyn, N.Y.
Career Highlights: Former law professor at Rutgers University and Columbia; former general counsel, ACLU; former justice, U.S. Court of Appeals
Nominated by: President Bill Clinton
Joined SCOTUS: Aug. 10, 1993



Associate Justice Stephen G. Breyer
Born: Aug. 15, 1938, San Francisco, Calif.
Career Highlights: Assistant special prosecutor of the Watergate Special Prosecution Force; former chief judge, U.S. Court of Appeals
Nominated by: President Bill Clinton
Joined SCOTUS: Aug. 3, 1994



Associate Justice Samuel Anthony Alito Jr.
Born: April 1, 1950, Trenton, N.J.
Career Highlights: Former assistant U.S. attorney (N.J.); former deputy assistant attorney general, U.S. Department of Justice; former justice, U.S. Court of Appeals
Nominated by: President George W. Bush
Joined SCOTUS: Jan. 31, 2006