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Justices' Analysis of Securities Law Surprises in *Slack v. Pirani*

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On April 17, the U.S. Supreme Court heard argument in *Slack Technologies v. Pirani* to resolve whether Sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to show they bought registered securities under the registration statement they claim is misleading. The justices surprised court watchers in argument by focusing on a difference between two statutes that practitioners have treated the same for decades.

The case concerns Slack's 2019 direct listing of securities and purported misstatements in the accompanying registration statement. Slack moved to dismiss the complaint because plaintiff didn't plead that he purchased securities registered pursuant to the challenged registration statement as opposed to unregistered securities that were allowed to be sold simultaneously. The lower court denied Slack's motion to dismiss, and a divided Ninth Circuit affirmed.

Despite textual differences between the two statutes, for decades courts and parties have generally treated those sections similarly, including the standing requirement that plaintiffs must have purchased shares issued under an alleged misleading registration statement. Historically, Section 11 applied to the registration statement, and Section 12(a)(2) to the accompanying prospectus and related oral statements.

However, the justices surprisingly focused on the differences between the two statutes, asking questions primarily about Section 12(a)(2).

Justice Elena Kagan articulated "four key differences between the two sections," including that Section 12(a)(2) "refers to sales not only by means of a prospectus but also by means or oral communication, which would suggest we're outside the world of registration" and "creates liabilities for sellers who had absolutely nothing to do with the registration statement, so the class of people who might be liable is very different and is not connected to the registration statement."

Relevant to *Slack*, the justices' questions suggested that Section 12(a)(2) might attach liability for both registered and unregistered securities sold at the time of Slack's direct listing.

Perhaps more importantly, the justices suggested (particularly Kagan, Sonia Sotomayor, and Ketanji Brown Jackson) that Section 12(a)(2) is broader in scope than Section 11 because it may apply outside the registration context. If adopted, that holding could seriously impact federal securities litigation going forward.

Presently, plaintiffs typically bring Section 12(a)(2) actions based on a prospectus or oral statement made in connection with a public offering, registration of securities, or direct listing. But the justices' suggested reading could broaden Section 12(a)(2) to cover conduct that is typically challenged under Section 10(b) of the Securities Exchange Act of 1934.

In particular, if the court detaches Section 12(a)(2) from a prospectus, it may mean a company or individual is exposed to liability for "oral statements" made in connection with an "offer[] or s[ale] [of] a security," much like Section 10(b) exposes them to liability for statements made "in connection with the purchase or sale of any security." This is meaningful because while Section 10(b) requires a plaintiff to show scienter, Section 12(b)(2) is strict liability.

During these discussions, Justice Brett Kavanaugh noted the relative dearth of Section 12 jurisprudence, observing that "[t]here's not a lot of law out there on the Section 12 issue." He expressed "concern[] about deciding [Section 12] without the SEC here, without more law out there, [and] without knowing more about the Section 12 issue."

With these comments, Kavanaugh, and potentially Justices Neil Gorsuch and Amy Coney Barrett, noted a desire to decide the Section 11 tracing question (i.e., whether plaintiff needs to trace their securities to those registered pursuant to the registration statement) and remand the Section 12(a)(2) question.

While the argument mainly focused on the treatment of registered and unregistered securities, there was a brief discussion of Section 12's privity requirement that limits Section 12 defendants to statutory sellers. The court previously held that a statutory seller is a person who directly sells to plaintiff or solicits the sale at least in part by a desire to serve their own financial interests or those of the securities owner.

The potential holding in *Slack* regarding Section 12's scope could work in tandem with recent Ninth and Eleventh Circuit opinions that have broadened the conduct that might make someone a statutory seller. The net effect would likely lead to increased litigation under Section 12(a)(2).

Of further note, Justice Clarence Thomas asked each party about the basis of the judge-made tracing requirement for both statutes, given that the text makes no reference to "tracing." Thomas may look to scale back tracing or force plaintiffs to plead and prove in another manner that they acquired securities issued under the misleading registration statement, assuming the court holds that is what "such security" means in Section 11.

While the court seems inclined to say something about Section 12(a)(2), it is not clear whether that will take form in the court's holding or will be included as dicta. A narrow holding on Section 11's tracing requirement and a remand for the lower court to further consider the scope of Section 12(a)(2) is certainly possible in *Slack*.

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