

NEWS SECTION

U.S. Court of Appeals for the Second Circuit

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Lattanzio v. Deloitte & Touche,
2007 U.S. App. LEXIS 2061 (2nd Cir. Jan. 31, 2007).

In a class action suit, a group of Warnaco stock purchasers brought action alleging that Deloitte, Warnaco's outside consultant, concealed the risk of Warnaco's collapse by making misstatements about Warnaco's financial condition. The plaintiffs class was composed of shareholders whose stock holdings lost value when Warnaco filed for bankruptcy.

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American Federation for State, County, and Municipal Employees v. American International Group, 462 F.3d 121 (2d Cir. 2006).

The American Federation for State, County, and Municipal Employees ("AFSCME"), through its pension plan, held nearly 27,000 shares of American International Group ("AIG") stock. In December of 2004, AFSCME submitted to AIG a shareholder proposal that would amend AIG's bylaws to require AIG to publish the names of shareholder nominated candidates for director positions in addition to the board of directors' nominated candidates. AFSCME brought suit to compel AIG to include the statement as to shareholder nominated candidates for the Board.

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The Second Circuit reversed the District Court on the issue as to whether a shareholder proposal requiring a company to include certain shareholder-nominated candidates for the board of directors on the corporate ballot can be excluded from the corporate proxy materials on the basis that the proposal "relates to an election" under Securities Exchange Act Rule 14a-8(i)(8). Reviewing the SEC's two interpretations of Rule 14a-8(i)(8) the court selected the SEC's earlier interpretation, reasoning that where the agency interpretation of an ambiguous statute has shifted, the interpretation made at the time of the implementation of the statute should control.

Morris v. Schroder Capital Management,
2007 U.S. App. LEXIS 1495
(2nd Cir. Jan. 11, 2007).

Paul M. Morris, as a vice president of Schroder Capital Management, received a deferred compensation plan containing forfeiture provisions that would trigger if he voluntarily quit during the plan's three year vesting period and sought

employment with a competitor. Morris argued that he did not voluntarily quit but rather that he was constructively discharged. The district court held that because Morris had failed to state a claim of constructive discharge, the covenant not to compete was valid pursuant to New York's employee choice doctrine, which permits enforcement of restrictive covenants without regard to a covenant's reasonableness.

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The Second Circuit affirmed the District Court's dismissal, holding that Morris was not constructively discharged for he failed to prove that the working conditions at his previous place of employment were so difficult or unpleasant that he felt compelled to resign. Under the employee choice doctrine, an employer conditions post-employment benefits on the acceptance of restrictive covenants. Where the employee was terminated involuntarily and without cause, the court must determine whether the forfeiture was reasonable. In making their decision, the Second Circuit adopted the constructive discharge test from federal employment discrimination law for the purposes of the employee choice doctrine.

U.S. Court of Appeals for the Fourth Circuit

Retail Industry Leaders Ass' v. Fielder, 2007 WL 102157 (4th Cir. Jan. 17, 2007).

The Retail Industry Leader's Association, of which Wal-Mart Stores, Inc. is a member, brought suit against the Maryland Secretary of Labor to declare that the Fair Share Health Care Fund Act was preempted by ERISA and to enjoin the Act's enforcement. The Maryland General Assembly enacted the Fair Share Health Care Fund in 2006, which required employers with 10,000 or more Maryland employees to spend at least 8% of their total payrolls on employees' health insurance costs or pay

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The United States District Court of Maryland entered summary judgment declaring that the Act was preempted by ERISA and therefore not enforceable. On appeal the Fourth Circuit held that a trade association, whose members were major retail companies, had "associational standing" to challenge the Fair Share Health Care Fund Act even though they had suffered no injury. The court, affirming the lower court's decision, went on to explain that since the Act conflicted with ERISA's goal of permitting uniform nationwide administration of health care plans that it was preempted by ERISA and therefore not enforceable.

National City Bank of IN v. Turnbaugh, 463 F.3d 325 (4th Cir. 2006).

The Maryland Commissioner of Financial Regulation, acting pursuant to Maryland law, attempted to exercise visitatorial powers and to limit prepayment penalties on adjustable rate mortgage ("ARM") loans originated by operating subsidiaries of a national bank. The Office of the Comptroller of Currency had issued regulations that state laws apply to national banks operat-

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ing subsidiaries to the same extent that those laws apply to the parental national bank. In light of this regulation the bank and its operating subsidiaries brought action against the Commissioner for declaratory and injunctive relief. The District Court for the District of Maryland entered summary judgment in favor of the bank and its subsidiaries.

The court went on to explain that if state law applied to operating subsidiaries to a greater extent than it applied to their parent national banks, it would frustrate national banks’ right to conduct the business of banking through operating subsidiaries.

The Commissioner appealed to the Fourth Circuit which affirmed the lower court’s decision. The court went on to explain that if state law applied to operating subsidiaries to a greater extent than it applied to their parent national banks, it would frustrate national banks’ right to conduct the business of banking through operating subsidiaries.

In re Official Committee Of Unsecured For Dornier Aviation (North America), Inc.,
453 F.3d 225 (4th Cir. 2006).

A Chapter 11 debtor’s parent corporation filed claim, asserting that the debtor owed it approximately \$146 million. Unsecured creditors committee objected to the treatment of these sums as debt arguing that claim should be either recharacterized as equity or equitably subordinated. The United States Bankruptcy Court for the Eastern District of Virginia recharacterized the parent’s sale of spare parts to debtor as an equity contribution rather than a debt.

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The parent corporation appealed to the Fourth Circuit contending that the bankruptcy court’s decision to recharacterize the claim as an equity contribution violated the principle that a bankruptcy court may not use its equitable powers “to alter the

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substantive rights of the parties.” The court affirmed and held that recharacterization is within the statutory powers afforded a bankruptcy court. The court explained that the Bankruptcy Code establishes a system in which contributions to capital receive a lower priority than loans because “the essential nature of a capital interest is a fund contributed to meet the obligations of a business and which is to be repaid only after all other obligations have been satisfied.”

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U.S. Court of Appeals for the Ninth Circuit

Educ. Credit Mgmt. Corp. v. Mason, 464 F.3d 878 (9th Cir. 2006).

A debtor was granted a partial “undue hardship” discharge of his approximately \$100,000 in student loan debt by the United States Bankruptcy Court for the District of Idaho. The debtor, who had a philosophy degree from Boise State and a law degree from Gonzaga, owed over \$200,000 in unsecured, non-priority claims, at the time of his bankruptcy filing. The majority of his debt was for student loan debts and the debtor sought discharge of these obligations pursuant to 11 U.S.C. § 523(a)(8).

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The student loan creditor appealed the decision to a Bankruptcy Appellate Panel which affirmed the court’s decision. The lender appealed to the Ninth Circuit which reversed the lower court and held that the debtor failed to make a “good faith effort” to repay his student loan debt, and thus, the debt did not fall within undue hardship exception to discharge.

The court, in reaching the decision to reverse, concluded that the debtor had “significant free time,” and had inadequately searched for full-time employment, or at least a second part-time job. The court also noted that the debtor, who had made only one attempt to pass the Idaho bar exam, should have taken greater efforts to re-negotiate his debt.

Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc., 457 F.3d 1062 (9th Cir. 2006).

Volkswagen of America, Inc. brought suit against Au-Tomotive Gold, Inc. claiming that the Lanham Act prevents a maker of automobile accessories from selling, without a license or other authorization, products bearing exact replicas of the trademarks of these famous car companies. The United States District Court for the District of Arizona entered judgment in favor of the key chain maker, and the automobile manufacturers appealed.

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and license plate covers sold by the alleged infringer, and thus the marks were entitled to trademark protection. The court also held that the unauthorized use of manufacturers’ trademarks was likely to cause consumer confusion, as required to support trademark infringement claims.





commercial sign ordinance, which generally prohibited portable signs. The city subsequently removed the action to the United States District Court. The court granted summary judgment for the owner, and the city then appealed.

The owner of Blazing Bagels sought to continue the use of a hired employee wearing a portable sign and brought a state-court action asserting a § 1983 First Amendment challenge to the city’s commercial sign ordinance, which generally prohibited portable signs.

On appeal, the Ninth Circuit held that the ordinance lacked a “reasonable fit” between the city’s legitimate interests in traffic safety and aesthetics and restriction imposed to achieve those goals. The court reasoned: “Ubiquitous real estate signs, which can turn an inviting sidewalk into an obstacle course challenging even the most dextrous hurdler, are an even greater threat to vehicular and pedestrian safety and community aesthetics than the presence of a single employee holding an innocuous sign that reads: ‘Fresh Bagels-Now Open.’” The court continued by noting that “the City has protected outdoor signage displayed by the powerful real estate industry from an Ordinance that unfairly restricts the First Amendment rights of, among others, a lone bagel shop owner.”

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The court was emphatic in its dismissal of arguments put forth by the key-chain manufacturer which relied on the doctrine of aesthetic functionality: “Auto Gold’s incorporation of Volkswagen and Audi marks in its key chains and license plates appears to be nothing more than naked appropriation of the marks. The doctrine of aesthetic functionality does not provide a defense against actions to enforce the trademarks against such poaching.”

**Ballen v. City of Redmond,
466 F.3d 736 (9th Cir. 2006).**

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Upcoming Cases at the Supreme Court of the United States

Tellabs v. Makor Issues & Rights (06-484)

Early in the year 2000, the CEO of Tellabs, Inc. twice stated that its' best product, the Titan 5500, was still maintaining its growth rate even though it was ten years old. Yet on April 6, 2000, Tellabs reduced its first quarter revenue due to a fall off in orders for the Titan 5500. Investors allege that the CEO of Tellabs was aware of this when he made his statements and subsequently brought a securities fraud suit against Tellabs, its CEO and a number of Tellabs employees.

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Supreme Court is whether, and to what extent, a court must consider or weigh competing inferences in determining whether a complaint asserting a claim of securities fraud has alleged facts sufficient to establish a "strong inference" that the defendant acted with scienter, as required under the PSLRA. The 7th Circuit held that when determining whether a "strong inference" has been pled, the court should not consider competing inferences of an innocent state of mind. Six other circuits currently allow inferences to play a significant role.

United States v. Atlantic Research Corp. (06-562)

From 1981 to 1986 Atlantic retrofitted rocket motors for the United States at its Camden, Arkansas facility. Atlantic voluntarily cleaned up the contamination, incurring the costs of the clean up. Afterwards it sought to recover a portion of these costs from the United States based on the Comprehensive Environmental Response, Compensation, and Liability Act ("CER-

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CLA”) §§ 107(a) and 113(f) on the theory that the United States was partly responsible.

The question presented to the Supreme Court is whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under CERCLA, but that does not satisfy the requirements for bringing an action for contribution under § 113(f) of CERCLA, may bring an action against another potentially responsible party under § 107(a). The Eighth Circuit held that when a private party voluntarily cleans up contamination they may be held liable for, thus barring it from contribution under § 113, they may pursue an action for direct recovery or contribution under § 107, against another liable party. Presently there is a three to one circuit split on this issue, with the Second, Seventh, and Eighth Circuits holding that § 107(a) allows pre-enforcement contribution.

Safeco v. Burr (06-84) and GEICO v. Edo (06-100)

The Fair Credit Reporting Act (“FCRA”) requires those that use consumer credit information to notify a consumer when they have been treated adversely because of their credit score. Customers of both Safeco and GEICO Insurance claim that they received adverse treatment because of their credit scores, but failed to receive notification from the respective companies they did business with.

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Under FCRA, if a company negligently failed to send an adverse-action notice, the consumer could recover actual damages. However, if the company willfully failed to send the notice, the consumer could recover statutory damages and punitive damages. The Supreme Court combined argument of the two cases for each case shares the central question as to what constitutes willfulness on the part of the company. Presently there is a split between the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits as to what is the requisite mens rea for a willful violation of the FCRA.

Supreme Court of the United States

eBay Inc. v. MercExchange, L.L.C., 126 S.Ct. 1837 [2006].

MercExchange, L.L.C., held a business method patent for an electronic marketplace very similar to that which eBay and half.com use to conduct business online. In a patent infringement suit, a jury found MercExchange’s patent valid and found

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that damages were appropriate. However, District Court denied MercExchange’s motion for permanent injunctive relief. The Federal Circuit reversed, applying a “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”

The Supreme Court vacated and remanded, finding that the traditional four-factor test applied by courts of equity when considering whether to award permanent injunctive relief applies to disputes under the Patent Act. Delivering the unanimous opinion of the Court, Justice Thomas reasoned that nothing in the Patent Act implied that the courts should depart from the long tradition of applying equitable principles.

Philip Morris USA v. Williams,
127 S.Ct. 1057 (2007).

In an Oregon negligence and deceit lawsuit, a jury found that Jesse Williams’ death was caused by smoking and that Philip Morris had knowingly and falsely led him to believe that smoking was safe. On the charge of deceit, the Estate of Williams was awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages. The trial court later reduced the award, but the Oregon Court of Appeals restored it.

Delivering the 5-4 opinion of the Court, Justice Breyer reasoned, in part, that the Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injuries inflicted on strangers to the litigation when the Defendant had no opportunity to defend against such a charge.

The Supreme Court vacated and remanded, finding that a punitive damages award based in part on a jury’s desire to punish the defendant for harming nonparties amounted to the taking of property without due process. Delivering the 5–4 opinion of the Court, Justice Breyer reasoned, in part, that the Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injuries inflicted on strangers to the litigation when the Defendant had no opportunity to defend against such a charge.



Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 126 S.Ct. 1503 (2006).

Dabit filed a private securities fraud class action in federal court, invoking diversity jurisdiction to advance his state-law claims, that his former employer fraudulently caused him, other brokers, and their clients to keep their overvalued securities. The District Court dismissed his complaint, on the basis that the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) prohibits class actions based on state law alleging the misrepresentation of a material fact in connection with the sale of a security. The Second Circuit ruled that brokers were fraudulently induced to refrain or delay from selling, as opposed to not selling, and thus fell outside of SLUSA.

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The Supreme Court vacated and remanded, holding that the history and purpose of SLUSA’s pre-emption provision included kind of claim Dabit alleged. Delivering the 8-0 opinion of the Court (with Alito taking no part), Justice Stevens reasoned that due to the federal interest in protecting the integrity and efficiency of the national securities market, Congress to adopted legislation to prevent the perceived abuses of class actions. To prevent class actions shifting from circumventing this intent by taking their class actions to state court, Congress enacted SLUSA. **BLB**