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BAD NEWS FOR DISGRUNTLED MINORITY SHAREHOLDERS

'Standing' issues decide cases involving corporation, trash authority

By JEFFREY J. WHITE

In 2009, the Connecticut Supreme Court decided a wide range of cases that will have a lasting impact on the business community, issuing decisions in the hot-button areas of shareholder derivative suits, class actions and unfair trade practices law.

One central theme was "standing" or (for some unfortunate litigants) the lack thereof. In addition, the Supreme Court prevented a party from assigning an unfair trade practices claim to two plaintiffs that tried to circumvent the exclusivity bar of the workers' compensation laws. Finally, the court clarified existing precedent on the qualified privilege defense for intracorporate communication regarding employment decisions.

Standing

In *May v. Coffey*, 291 Conn. 106 (2009), the Supreme Court revisited the question of whether shareholders can sue in their individual capacity for alleged corporate malfeasance instead of filing a derivative action on behalf of the company. The plaintiffs, who were minority shareholders in a closely held company, sued the majority shareholders because the defendants allegedly set a public offering for shares at an unreasonably low price and as a result, diluted the plaintiffs' percentage of ownership in the company. The plaintiffs also alleged that the defendants breached their fiduciary duty to the plaintiffs and had been unjustly enriched.

The trial court dismissed both counts for lack of standing because the complaint alleged injuries caused to the company, not the individual shareholders. Accordingly, the trial court held that the plaintiffs must seek redress through a shareholder derivative lawsuit.

On appeal, the plaintiff's central claim was that the company was not injured as a whole due to the fact that the majority shareholders suffered no injury. As a result of the unreasonably low offering price, the defendants were able to participate in the stock offering, and thus, benefited from the transaction.

The Supreme Court rejected this contention as it held that the critical question was not whether the majority shareholders could offset the injury to their existing shares by participating in the public offering, but rather, whether all existing shares were diluted by the offering. Because the injury suffered by the plaintiffs was derivative of the harm suffered by all shareholders at the company, the Supreme Court determined that the plaintiffs' claims were properly dismissed.

The Supreme Court also addressed the question of standing with respect to the awarding of attorney's fees and expenses in class actions in *Town of New Hartford v. Connecticut Resources Recovery Authority et. al.*, 291 Conn. 511 (2009) (one of the four CRRA decisions issued on the same date in 2009). After losing at the trial level, the named defendant objected to the plaintiffs' request for attorney's fees of approximately $8.9 million (or 23.5 percent of the total monetary benefit obtained) as being unreasonable. The municipality plaintiffs all supported the distribution of attorney's fees. The Supreme Court, relying on out-of-state precedent, held that the defendant had no standing to object to an award of attorney's fees from a common fund in a class action lawsuit because the distribution had no impact on the amount paid by the defendant.

CUTPA Claims

In *Stearns & Wheeler LLC v. Kowalsky Brothers Inc.*, 289 Conn. 1 (2008), the Supreme Court held that an assignment of a CUTPA claim that provided an avenue for the estates of two deceased workers to sue the defendant-employer was not enforceable because it would violate the public policy set forth in the workers' compensation exclusivity provision.

In reaching its decision, the court noted that CUTPA is silent as to whether an action brought pursuant to that statute can be assigned. Furthermore, the court noted that its case law regarding the assignment of tort and contract claims was not overly helpful as CUTPA claims did not fall within either precise category.

As a result, the court analyzed the question as a matter of first impression and ultimately held that to allow the estates to recover from the defendant-employer would effectively circumvent the workers' compensation exclusiv-

Jeffrey J. White is an associate in the Hartford office of Robinson & Cole LLP. He is a member of the firm's Appellate Practice Team.

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ity provision. Notably, however, the court did not reach the issue of whether CUPTA claims are generally assignable although it did note that the two state supreme courts that have held that such claims are not assignable have expressed legitimate concerns.

Intra-Corporate Communications

In *Gambardella v. Apple Health Care Inc.*, 291 Conn. 620 (2009), the Supreme Court clarified ambiguity in its prior decisions on the standards to be applied when a party asserts the qualified privilege of intracorporate communications in order to protect itself from a defamation lawsuit. *Gambardella* involved a lawsuit brought by an employee who claimed that, in connection with her termination, her former employer and supervisor falsely accused her of stealing a nursing home patient's property. Making matters worse, other employees at the nursing home learned of the allegations. As a result, the plaintiff brought an action for defamation.

Following a bench trial, the trial court held the defendants liable for defamation after it concluded that the plaintiff had established that the former patient had willingly given her the property and that the defendants published false allegations of theft to third parties. In issuing this decision, the trial court rejected the defendants' defense that the communications to third parties were protected by the qualified privilege for intra-corporate communications.

The central issue in the appeal was whether the trial court applied the correct standard when analyzing whether the qualified privilege had been defeated. The defendants argued that a showing of "actual malice" is required, *i.e.*, the publication of a statement with knowledge of the statement's falsity or reckless disregard for its truth.

In contrast, the plaintiff argued that in addition to a showing of "actual malice," a plaintiff may also establish "malice in fact," which centers on whether the false statement was published with bad faith or an improper motive.

Although the Supreme Court acknowledged that some dicta in its previous decisions could be interpreted as imposing the "actual malice" standard only, it noted that for more than 100 years the court has concluded that the qualified privilege is lost in employment decisions upon a showing of either "actual malice" or "malice in fact." After clarifying this precedent, the court ruled that there was sufficient evidence to support the trial court's finding of actual malice. According, the judgment was affirmed. ■