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SECURITIES

Coffey v. Dean Witter Reynolds, Inc., 891 F.2d 261

Author: Judge Logan

Dissent: Judge Baldock (dissenting in part)

Plaintiff, Coffey, appealed from the district court's order compelling arbitration of her claim brought under section 10(b) of the Securities Exchange Act of 1934 and from the subsequent confirmation of an arbitral award in favor of defendants, Dean Witter Reynolds ("Dean Witter") and Hines, a Dean Witter account executive. Coffey contended that there was no agreement between the parties to arbitrate and that, even if such an arbitration agreement existed, it was modified by SEC Rule 15c2-2, 17 C.F.R. § 240.15c2-2, *rescinded*, 52 Fed. Reg. 39,216.

The Tenth Circuit concluded that an arbitration agreement existed between the parties by virtue of a customer's agreement signed in conjunction with an earlier account of Coffey's deemed to be applicable to all subsequent accounts between Coffey and Dean Witter. SEC Rule 15c2-2 made agreements to arbitrate future disputes between a broker or dealer and a public customer illegal. This rule was rescinded after the instant case was filed. The court, however, did not apply the rescission retroactively. Rather, it held that Coffey was entitled to litigate rather than arbitrate her claim because Rule 15c2-2 was in effect at the time she instituted the instant litigation. The case was reversed and remanded.

Grubb v. Federal Deposit Insurance Corp., 868 F.2d 1151

Author: Judge Bright, sitting by designation

Defendant, Federal Deposit Insurance Company ("FDIC"), successor-in-interest to First National Bank and Trust Company of Oklahoma City ("First National"), appealed the district court's decision in favor of plaintiff, Grubb. Grubb's complaint alleged fraud in violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission, as well as Oklahoma state law. Among the issues on appeal were whether Grubb acted recklessly so as to render erroneous the jury's award, and whether the alleged misrepresentations by First National caused Grubb's consequential damages.

The Tenth Circuit affirmed in part and reversed in part. The court ordered a new trial on damages unless Grubb agreed to a remittitur. The court found that a reasonable jury could conclude that Grubb affirmatively established reliance; however, undisputed evidence showed that Grubb failed to prove causation between First National's initial misrepresentations and his later decision to invest.

Holloway v. Peat, Marwick, Mitchell & Co., 879 F.2d 772

Author: Judge Tacha

Defendants, Republic Bancorporation, Inc. ("RBI"), a nonbank holding company, and its nonbank subsidiaries, Republic Trust & Savings ("RTS"), and Republic Financial Corporation ("RFC"), filed for bankruptcy after issuing thrift certificates and passbook savings certificates to plaintiffs, Holloway and others. Holloway appealed the district court's summary judgment arguing that it lacked subject matter jurisdiction. Holloway reasoned that RTS's certificates were not securities within the meaning of the federal securities laws.

The Tenth Circuit first applied the commercial/investment test, which favors economic reality over form and errs in favor of protecting investors. The court found that Congress intended the securities acts to protect investors, such as Holloway, who are seeking a passive return from instruments issued to raise capital for general financing of RTS. The court concluded that the certificates issued were "notes" or "evidence of indebtedness", notwithstanding their demand character, and thus were investment, rather than commercial, instruments. Contrary to the district court's holding, the supremacy clause does not permit state regulation to preempt the protection afforded by federal law.

Moreover, the court agreed with the district court's finding that prior to becoming a nonbank holding company, RBI and its subsidiaries were covered by Federal Reserve Board ("FRB") regulations. FRB regulations protect depositors through federal deposit insurance but not with the required protection which would exclude them from also being covered by securities act protection. The court reversed the district court and found that the instruments issued by RTS were securities protected by the antifraud provisions of the federal securities laws. The court affirmed the district court's decision which found RFC's certificates to be covered by the antifraud provisions of the federal securities laws. The court reversed the summary judgment in favor of Holloway and remanded to the district court.

Maritan v. Birmingham Properties, 875 F.2d 1451

Author: Judge Anderson

Plaintiff, Maritan, appealed from an adverse summary judgment dismissing his action under the federal securities laws, and pendent state law claims, against defendant Birmingham Properties. Maritan claimed that his investment in a limited partnership, formed to construct and sell homes, constituted an "investment contract" under the federal securities laws and as such was entitled to the protections of the Securities Act of 1933.

Referring to the three-prong test used in *S.E.C. v. Howey*, 328 U.S. 293 (1946), to distinguish an investment contract from other commercial dealings, the district court found that Maritan's role could not be considered passive considering his access to critical information about

the venture, his power to hold title to property under the agreement and his active involvement in the project which gave him control over the ultimate expectation of profits. Accordingly, the district court entered summary judgment in favor of Birmingham Properties.

On appeal, the Tenth Circuit affirmed the judgment, finding that Maritan's investor's interest in the partnership was not an "investment contract" under the federal securities laws given his active involvement in the project.

MidAmerica Federal Savings and Loan Association v. Shearson/American Express, Inc., 886 F.2d 1249

Author: Judge Tacha

On appeal, defendant, Shearson/American Express, Inc. ("Shearson"), alleged that the district court erred in denying motions for directed verdict, judgment notwithstanding the verdict, various jury instructions, failing to order a new trial, and denying compelled arbitration.

The Tenth Circuit affirmed. The motion for summary judgment arose from the claim that where an oral omission induced the purchase of securities, knowledge of the information by a latter written communication should be imputed to the purchaser. The Tenth Circuit disagreed, stating that both section 408(a)(2) of the Oklahoma Securities Act and section 12(2) of the federal Securities Act of 1933 make it clear that plaintiff need show only lack of knowledge of an omission in order to prevail. Section 12(2) on its face makes actionable misleading omissions from either oral communications or written prospectuses, and there is no requirement of justifiable reliance by the purchaser.

The Tenth Circuit also held there was sufficient evidence to support the jury's conclusion that a fiduciary relationship existed, that Shearson took unfair advantage of that relationship in the breach of fiduciary duties, that Shearson's actions showed an intent to waive its right to arbitration, and that the district court's instructions were sufficient.

