THE MONITOR

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Got Wine?
The U.S Supreme Court Wants To Ensure That You Do!

Americans love their wine! In fact, wine sales have nearly doubled on a per capita basis between 1977 (the year after the famous "Judgment of Paris" where two California wines defeated two French wines in a blind tasting sending shockwaves through the World of Wine) and 2016, from 290 gallons of wine-based alcohol sales per capita to 440 gallons.

The likelihood of that trend continuing increased over the summer when the U.S. Supreme Court, in a 7-2 decision in *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019) struck down a Tennessee law requiring a two-year residency requirement for anyone seeking an initial license to operate a liquor store in Tennessee. This decision opens the doors for big-box retailers, such as Total Wine, a national chain of high-end liquor superstores, to enter markets that were previously closed to them (or at least very difficult to gain entry). The ruling is considered to be a win for consumers.

This decision is the first ruling out of the high court affecting the wine industry since its 2005 decision in *Granholm v. Heald*, where the U.S. Supreme Court held, in a 5-4 decision, that laws in New York and Michigan that allowed in-state wineries to ship directly to consumers, but prohibited out-of-state wineries from doing the same, were unconstitutional. 544 U.S. 460 (2005). While *Granholm* was a landmark decision in the wine industry (today most states allow some form of out-of-state winery direct shipping by producers of wine), the case did not address retailers such as Total Wine. Since *Granholm* was decided in 2005, numerous battles have been waged in state legislatures and courtrooms

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around the country concerning *retailer direct shipping*. Indeed, at the core of the petitioner's main arguments in *Tennessee Wine* was a claim that *Granholm* applied only to producers and products, not retailers.

Tennessee Wine finally ended this ambiguity, with Justice Alito, writing for majority, declaring that "*Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary, the court stated that the clause prohibits state discrimination against 'all out-of-state economic interests'" *including retailers*. *Tennessee Wine*, 139 S. Ct. at 2471.

Justice Gorsuch dissented, noting that "States may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms" which he added states have been doing for 150 years, specifically noting that the Tennessee law had been in place for 80 years. *Id*. at 2477.

So, what is the practical impact of *Tennessee Wine* and what does it mean to you, the consumer? Prior to *Tennessee Wine*, 40 states restricted out-of-state wine retailers from shipping directly to consumers. In the wake of the U.S. Supreme Court's ruling, the wine will now flow into all 50 states as more big-box competitors take advantage of the ruling and begin moving into states, like Tennessee, that had similar restrictions on retailers. This will probably force some smaller, local stores out of business as big-box retailers move in with lower prices and usually more product choices for consumers.

Benjamin Franklin once proclaimed that wine is "proof that God loves us, and loves to see us happy." So, apparently, does the U.S. Supreme Court. Cheers!

Federal Corporate Fiduciary Duties

When making corporate decisions, officers and directors must satisfy their fiduciary obligations to the corporation and its stockholders. States generally impose fiduciary duties on officers and directors of corporations incorporated in the state in fulfilling their managerial responsibilities. For example, directors of Delaware corporations must protect the interests of the corporation and effectively serve as "trustees" for the stockholders with respect to the interests of the stockholders in the corporation. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

But what, if any, fiduciary duties are imposed on officers and directors of corporations by virtue of federal law? Some courts have held that federal statutes, including the Securities Exchange Act of 1934, impose additional fiduciary duties on officers and directors of publicly traded corporations. For example, in McClure v. Borne Chem. Co., 292 F.2d 824, 834 (3d Cir. 1961), cert. denied, Borne Chem. Co. v. McClure, 368 U.S. 939, 82 S. Ct. 382, 7 L. Ed. 2d 339 (1961), Judge Biggs stated:

> In the present case we are construing two sections of the Securities Exchange Act of 1934. That Act deals with the protection of investors, primarily stockholders. It creates many managerial duties and liabilities unknown to the common law. *It expresses federal interest in management-stockholder relationships which heretofore had been almost exclusively the concern of the states. Section 10(b) imposes broad fiduciary duties on management vis-a-*

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vis the corporation and its individual stockholders. As implemented by Rule 10b-5 and Section 29(b), Section 10(b) providesstockholders with a potent weapon for enforcement of many fiduciary duties. It can be said fairly that the Exchange Act, of which Sections 10(b) and 29(b) are parts, constitutes far reaching federal substantive corporation law. (Emphasis added).

The Second Circuit recently cited McClure when reversing the dismissal of a minority shareholder's insider trading claims against insiders that allegedly purchased a company's stock by making a tender offer through a shell corporation without disclosing any information about the company's financial state. *Steginsky v. Xcelera Inc*., 741 F.3d 365, 367, 371 (2d Cir. 2014).

In doing so, the Second Circuit held that "the duty of corporate insiders to either

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Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
Infosys Limited (NYSE: INFY)	Dec. 13, 2019
iRobot Corporation (NASDAQ: IRBT)	Dec. 23, 2019
Pareteum Corporation (NASDAQ: TEUM)	Dec. 23, 2019
Zendesk, Inc. (NYSE: ZEN)	Dec. 23, 2019
Zynerba Pharmaceuticals, Inc. (NASDAQ: ZYNE)	Dec. 23, 2019
PG&E Corporation (NYSE: PCG)	Dec. 24, 2019
Uniti Group Inc. (NASDAQ: UNIT)	Dec. 30, 2019
Twitter, Inc. (NYSE: TWTR)	Dec. 30, 2019
Sealed Air Corporation (NYSE: SEE)	Jan. 2, 2020
Resideo Technologies, Inc. (NASDAQ: REZI)	Jan. 7, 2020
Yunji Inc. (NASDAQ: YJ)	Jan. 13, 2020
Armstrong Flooring, Inc. (NYSE: AFI)	Jan. 14, 2020
Wanda Sports Group Company Limited (NASDAQ: WSG)	Jan. 17, 2020
Grubhub Inc. (NYSE: GRUB)	Jan. 20, 2020
Aurora Cannabis Inc. (NYSE: ACB)	Jan. 20, 2020
Canopy Growth Corporation (NYSE: CGC)	Jan. 21, 2020
Energy Transfer LP (NYSE: ET)	Jan. 21, 2020
Prudential Financial, Inc. (NYSE: PRU)	Jan. 27, 2020
HEXO Corp. (NYSE: HEXO)	Jan. 27, 2020
Merit Medical Systems, Inc. (NASDAQ: MMSI)	Feb. 3, 2020

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disclose material nonpublic information or abstain from trading is defined by federal common law." Id. (citing In re Cady, Roberts & Co., 40 S.E.C. 907, 910 (1961) ("[T]he securities acts may be said to have generated a wholly new and far-reaching body of Federal corporation law.")). The Second Circuit reasoned that "looking to idiosyncratic differences in state law would thwart the goal of promoting national uniformity in securities markets." Xcelera, 741 F.3d at 371.

Both stockholders and management of corporations should therefore be cognizant of the fiduciary duties imposed on management by federal law. Please feel free to contact our offices if you have any questions or concerns regarding those duties.

SEC Disgorgement Faces High Court Challenge

Recently, the U.S. Supreme Court agreed to review the Securities and Exchange Commission's ("SEC") authority to obtain disgorgement. The case is titled *Charles C. Liu, et al. v. Securities and Exchange Commission*, CN 18-1501 ("*Liu*"). The issue is whether the SEC may seek and obtain disgorgement from a court as "equitable relief" for a securities law violation even though the Supreme Court previously determined that such disgorgement is a penalty.

Specifically, the *Liu* case involves an appeal by a couple that was ordered to disgorge approximately $27 million for defrauding Chinese investors who believed their investments were being used for a proton therapy cancer treatment center. The investors were part of the U.S. Immigrant Investor Program, referred to as the EB-5 program, which provides U.S. visas to foreigners who invest at least $1 million in a commercial enterprise that creates at least 10 full-time jobs for Americans.

In the *Liu* case, Defendants Liu and Wang argued that disgorgement is being used as a penalty in their case because the district court ordered them to surrender even more money than they made from their fraudulent scheme. The defendants further argued that the SEC's "sole legal argument" is that disgorgement is authorized as an

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as an equitable remedy: "[b]ut this Court held, in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), 'that SEC disgorgement constitutes a penalty' and cannot be considered an equitable remedy… the SEC's legal claim rests on the wholly unsupported proposition that the exact same remedy that the Court concluded was a penalty for purposes of the SEC's statute of limitations is not a penalty for purposes of the SEC's remedial authority."

In *Kokesh*, the High Court reasoned that disgorged funds at times have been dispersed to the U.S. Treasury instead of investors; the disgorgement remedy is intended to prevent future wrongdoing as opposed to compensating victims. Also, in *Kokesh*, the justices declined to take a position on whether courts possess authority to order disgorgement in SEC enforcement proceedings.

An adverse ruling by the Supreme Court in *Liu* will likely impact SEC enforcement, at least in the short term. For example, the SEC could seek higher fines in place of disgorgement or even bring more claims in administrative proceedings, as opposed to in federal courts.

The SEC's Recent Proxy Guidance Could Provide Leverage to Challenge a Proxy Advisor's Recommendation

Recently, the Securities and Exchange Commission ("SEC") issued new guidance on proxy voting which has been characterized as an attempt to hold proxy advisors more accountable to public company stockholders. Proxy advisors, such as Institutional Shareholder Services Inc. and Glass Lewis & Co., advise stockholders on how to vote in corporate elections and key topics ranging from executive pay to proposed mergers and acquisitions. In the past, public companies have suggested that proxy advisors have too much influence over corporate governance because they lack regulatory oversight. Defenders of proxy advisors maintain that these firms help hold issuers accountable to public company stockholders.

The SEC's guidance was intended to clarify that voting advice provided by proxy advisors is generally considered a solicitation under federal proxy rules, and thus anti-fraud rules apply. As a result, the SEC maintains that these solicitations are prohibited from including false or misleading material information. In its guidance, the SEC recommends certain practices proxy advisors can utilize to avoid violating the regulations. These include explaining the methods used to produce advice, revealing third-party sources which the proxy advisor relied upon in generating the advice, and disclosing any conflicts of interest.

Stockholder voting on proxy contests and mergers and acquisitions are of critical importance to investors. In these types of votes, stockholders are being asked to participate, alongside the board of directors, in corporate decision making at the highest level and therefore require stockholders to be just as informed as the board. It is too early to know for certain, but of particular interest for those following the market and company proxies, time will tell whether the SEC's guidance will ultimately empower public companies to challenge or improperly influence proxy advisors when making recommendations on corporate governance issues.

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JF JOHNSON FISTEL

Johnson Fistel was founded on the following five core values: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients — their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.

Locations

California Office

655 West Broadway, Suite 1400
San Diego, California 92101
T: 619.230.0063
F: 619.255.1856

Georgia Office

40 Powder Springs Street
Marietta, Georgia 30064
T: 470.632.6000
F: 770.200.3101

New York Office

1700 Broadway, 41st Floor
New York, NY 10019
T: 212.292.5690
F: 212.292.5680

Contact Us:
ContactUs@JohnsonFistel.com

Visit Us:
http://www.JohnsonFistel.com

Partners


Frank J. Johnson


Michael I. Fistel, Jr.

Associates & Counsel


Brett M. Middleton


Mary Ellen Conner


Tiffany Johnson


Richard A. Nervig


Kristen L. O'Connor


Chase M. Stern


Adam J. Sunstrom


Phong L. Tran

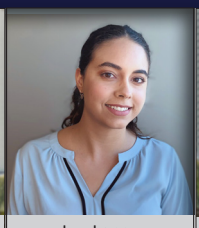

Ralph M. Stone


William W. Stone

Staff


Ashley Lane


Serena Lee


Luz Lopez


Matthew T. Ostman


Estevan Vasquez