

Litigation

Nov. 8, 2024, 9:47 AM EST

# Meta Case Leads Justices to Ponder Further Role for SEC on Risks

By Martina Barash

## Documents

 [Docket](#)

- 
- Raft of scenarios highlights court's concerns, attorneys say
  - Government lawyer says rules already cover situation here

US Supreme Court justices showed an interest in returning to the SEC the job of refining companies' risk disclosure requirements during oral argument Nov. 7 in a Meta Platforms Inc. securities fraud case.

The justices repeatedly wondered what kind of guideline they could craft as they confronted a wide range of hypothetical scenarios, including factory fires caused either by wiring problems or by "space junk" falling from the sky.

The high court appeared to be struggling with its options, according to attorneys who listened to the argument. "The court could issue a ruling—with a suggestion to the SEC that it issue a rule," said Michael Canty of Labaton Keller Sucharow LLP.

The investors' multibillion-dollar proposed class action focuses on a data-harvesting scandal involving political consulting firm Cambridge Analytica. The investors allege their stock in the company, then called Facebook, took two significant hits in the wake of that scandal.

The investors sued over 2016 Securities and Exchange Commission filings made by Facebook, including under Item 105, which calls for the disclosure of material factors that make an investment or offering "speculative or risky."

They claimed Facebook's risk disclosures—that data breaches and improper disclosure of user data "could harm" its reputation and negatively impact the business—were misleading because they presented the risks as hypothetical, even though company leaders allegedly knew Cambridge Analytica had accessed user data.

### Regulations 'Someday'?

The case's own unusual facts, presenting challenging questions about how past events affect future risk, gave the justices pause.

"Why can't the SEC just write a reg?" Justice Brett M. Kavanaugh asked Kevin Barber, assistant to the Solicitor General. Barber argued for the SEC in support of the investors.

"The SEC could always be clearer in this regard, and maybe it could someday, but I don't think the SEC feels that it hasn't already written the regs," Barber said.

Among the situations animating the justices were factory fires that eliminated or halved production capacity, from potentially recurring causes or something falling from the sky; road flooding and steps that become slippery in the rain; and neighborhood burglaries leading to rising insurance costs.

"It was like the war of the hypotheticals," said Susan Hurd of Alston & Bird LLP, who represents corporations and executives.

"You got the sense that they were concerned about how to articulate a standard that wouldn't cause problems, that wouldn't be burdensome for companies to comply with, that wouldn't be so subjective that you get a bunch of different interpretations of the standard," she said. "And I think that's why you saw some of the justices say, 'Hey, SEC, can't you solve this problem?'"

### Rulemaking and Other Options

"It remains to be seen whether the SEC takes up rulemaking," said Canty. Under the new administration, the SEC is likely to have less of an appetite for regulation and for private litigation. "Private litigation is more efficient and better able to ferret out fraud," said Canty, who represents shareholders and participated in a brief for institutional investors supporting the Facebook plaintiffs.

Justice Amy Coney Barrett suggested the justices don't want a bright-line rule, Canty said, pointing to her question, "Where do you draw the line?"

Fact-intensive inquiries are best for district courts to handle, he said. "If the Supreme Court gives guidance, it will be helpful to district courts," he said.

"They're really struggling with the fact that they granted cert in a case that presents an important issue, but the facts of the case are unusual," Hurd said. Because of the difficulties in creating a standard that can be applied in other cases without unintended consequences, "they invited the SEC to take the problem off their hands by drafting regulations that would resolve the issue," she said.

But according to Barber, who argued for the government, those regulations are already in place. He disagreed "that Item 105 just doesn't ever require disclosure of past events, because what it requires disclosure of is material factors that render investment in the company risky or speculative," he said. "And that can readily encompass past events, present conditions, and potential future events."

The case is Facebook, Inc. v. Amalgamated Bank, U.S., No. 23-980, argued 11/6/24.

---

To contact the reporter on this story: Martina Barash in Washington at [mbarash@bloomberglaw.com](mailto:mbarash@bloomberglaw.com)

To contact the editors responsible for this story: Andrew Harris at [aharris@bloomberglaw.com](mailto:aharris@bloomberglaw.com); Carmen Castro-Pagán at [ccastro-pagan@bloomberglaw.com](mailto:ccastro-pagan@bloomberglaw.com)

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved