

Securities Law

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Justices May Bypass Clarity in Nvidia's Pleading Test Request

By Martina Barash

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Documents

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- Internal documents, expert reports at issue in crypto sales row
 - Rare securities case at top court may not yield more clarity

Nvidia Corp.'s quest for a new rule from the US Supreme Court about how investors must plead securities suits didn't strike the chord it intended at oral argument this week.

Some justices viewed the company's appeal as crumbling into a request for a ruling on the facts, according to lawyers who listened to the Nov. 13 argument. "There was a fair amount of hand-wringing about whether they should have even accepted this appeal," said Stephen Warren of Holland & Knight LLP.

The chip maker sought to defeat a revived stock-drop suit over its alleged reliance on the volatile cryptocurrency mining market, rather than gaming, for sales of its graphic cards. Nvidia challenged two aspects of the investors' complaint under the requirement to plead "with particularity" under the Private Securities Litigation Reform Act: references to internal company documents without descriptions of their contents, and the use of an expert report.

It remains to be seen whether the Supreme Court gives the the litigants get a bright-line rule, clarifications, a ruling on the facts that reaffirms previous opinions, or even a rejection of the appeal as "improvidently granted." The last of these options is unlikely, according to Warren. "But I don't expect them to make new law," he said. "I think it'll rather be an affirmance of their previous positions."

"The Supreme Court doesn't take a lot of securities cases," said Adam Goldberg of Pillsbury Winthrop Shaw Pittman LLP. It's helpful for practitioners to get guidance on the laws in this area, he said. And lawyers who represent companies are "always looking for clarity on what a heightened pleading standard might look like," he said.

'Problematic Ask'

After judges in the lower courts came to different conclusions on dismissal, it seemed that Nvidia and its CEO, Jensen Huang, “were asking the Supreme Court to weigh in on who had gotten the facts right, who had correctly given credence to the facts that were alleged,” Goldberg said. “And that seemed like a problematic ask that was unlikely to lead to a new rule.”

“There seemed to be agreement—across a number of justices who don’t always agree—that this perhaps wasn’t the right vehicle to make clarifications to the PSLRA, if clarifications were needed,” Goldberg said.

The pleading standard calls for lower courts to weigh the allegations holistically, said Lauren Ormsbee of Labaton Keller Sucharow LLP. “And by definition, that type of review is not hospitable to a bright line rule,” she said.

Several justices expressed concern that Nvidia’s legal position had shifted from its petition for review and briefs, attorneys Jack Yoskowitz and Molly Rao of Seward & Kissell LLP said in an email.

The company’s counsel, Neal Katyal of Hogan Lovells US LLP, was “repeatedly grilled on whether Nvidia was retreating” from its request for new legal rules on the use of internal company documents and expert reports in pleadings, they said.

The justices primarily discussed whether the investors’ reference to internal Nvidia sales documents, which they didn’t have in their possession, could support their allegations that Huang knew about the proportion of crypto-mining revenue.

“The Justices expressed their usual reluctance to delve into the specific facts of the case and tell the lower court that they simply got it wrong,” Susan Hurd of Alston & Bird LLP said in an email. Katyal “explained that this was not a case where the Ninth Circuit articulated the right standard and just misapplied it to the facts,” she said. Instead, the company’s “position is that the Ninth Circuit articulated a looser standard than other circuits on when internal report allegations are sufficient at the motion to dismiss stage and that it would be highly problematic to let that standard stand.”

Opinion as Fact

“I was surprised how light the discussion was on the expert opinion issue,” Hurd said. No one expressed “righteous indignation,” she said. “I don’t see how an expert’s opinion is ever a ‘fact’ that can be considered on a motion to dismiss for purposes of assessing compliance with the heightened pleading standards,” she said. “I just expected more fist banging on table than we got on that subject.”

Holland & Knight’s Warren said Katyal conceded he wasn’t asking for a bright-line rule that plaintiffs can never have an expert report as part of their complaint, allowing that it can be used to supplement personal knowledge allegations.

“Once the justices had that clarification, it didn’t seem that anyone was really concerned about it,” Warren said.

If the high court allows the expert analysis, the role of such a report at the pleading stage in securities fraud suits might become less rare, according to one attorney.

"It is very unusual—I have never seen a complaint in a securities class action that relied on an expert report," said Goldberg. "Part of the reason for that is that experts are expensive."

"Is this going to start a trend, or is this a unique situation?" he said. "I do suspect you'll see more."

Goldberg addressed an outcome where the court disagrees with Nvidia but still wants to rule on the merits. "I think the court is likely to say that the existing, heightened standard under the PSLRA is clear, and it's up to the trial court to determine whether a plaintiff has pled with sufficient specificity what was false and what the defendant knew about it," he said. "My guess is that's the likely direction they will go here."

The case is NVIDIA Corp. v. E. Ohman J:or Fonder AB, U.S., No. 23-970, oral argument 11/13/24.

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