CASE COMMENTARIES

CONSTITUTIONAL LAW

As applied to closely-held corporations, federal regulations requiring employers to provide employees with free access to contraceptives violates the Religious Freedom Restoration Act. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

By Zachery Fullerton

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), the U.S. Supreme Court granted certiorari to address whether federal regulations requiring employers to provide certain contraceptives to employees violated the Religious Freedom Restoration Act ("RFRA") in the context of closely-held, for-profit organizations with sincere anti-contraceptive religious beliefs.

The Patient Protection and Affordable Care Act of 2010 ("ACA") requires nonexempt employers to provide group health insurance that furnishes preventative care for women, including contraceptives. As part of this coverage, the Health Resources and Services Administration ("HRSA"), the federal agency responsible for implementing the ACA, decided that *all* Food and Drug Administration ("FDA") approved contraceptive methods must be provided by nonexempt employers under the ACA, including post-fertilization contraceptives. In response to this directive, several corporations filed lawsuits seeking to enjoin application of the ACA's contraceptive mandate. In *Burwell v. Hobby Lobby*, the Supreme Court granted certiorari to reconcile conflicting rulings on this issue that were arising in the circuit courts.

Norman and Elizabeth Hahn first brought suit under the auspices of Conestoga Wood Specialties, a closely-held, for-profit corporation under the sole ownership of the Hahn family. The Hahn family ran their business in such a way that it did not conflict with their religious beliefs or moral values, as evidenced by Conestoga's mission statement and vision. Specifically, the Hahn family believed that "human life begins at conception" and they felt that post-conception contraceptives were equivalent to the "termination of human life." *Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS*, 724 F.3d 377, 390 (3d Cir. 2013). To that end, the Hahn family believed that the ACA's contraceptive mandate – specifically the contraceptives that inhibit an already fertilized egg from progressing – was a restriction of their rights as outlined in RFRA. Consequently, the family sued for an injunction which was ultimately denied on appeal to the United States Court of Appeals for the Third Circuit, where the court held that "for-profit, secular corporations cannot engage in religious exercises" within the purview of RFRA.

Almost concurrently, David and Barbara Green brought suit under the auspices of two closely-held, for-profit corporations by the names of Hobby Lobby and Mardel. Similar to the Hahn family, the Green family retained exclusive control of both companies and ran them in accordance with their religious beliefs, as evidenced by the companies' statements of purpose. The Greens also sought an injunction to challenge the contraceptive mandate of the ACA and similarly took issue with the post-fertilization contraceptives. However, unlike the Third Circuit's ruling, the United States Court of Appeals for the Tenth Circuit held that the two for-profit businesses were "persons" within the purview of RFRA and thus could bring suit under that law. *See Hobby Lobby Stores, Inc.*, *v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). The Tenth Circuit went on to conclude that the contraceptive mandate imposed by the ACA substantially interfered with the free exercise of religion by the for-profit businesses. As the defendant "had failed to show a compelling interest in enforcing the mandate and, in the alternative . . . had failed to prove that enforcement of the mandate was the least restrictive means of furthering the Government's asserted interests," the court reversed the district court's ruling and remanded the case for further consideration.

The Religious Freedom Restoration Act prohibits the Government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless the Government] demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Applying this legal standard in the *Hobby Lobby* case, the Supreme Court broke the RFRA analysis into three distinct issues, examined each separately, and reached the conclusion that the contraceptive mandate of the ACA violated RFRA as it applies to closely-held, for-profit organizations with sincerely held religious beliefs.

First, the Supreme Court analyzed whether RFRA protections apply to the three corporations at all. As RFRA applies to a person's exercise of religion, the Court needed to determine whether the corporations were people and if they could in fact exercise religion. In interpreting the language of the statute, the Court turned to the Dictionary Act wherein "the word 'person' . . . include[s] corporations, companies, firms . . . as well as individuals." 1 U.S.C. § 1. Based on this rule and no congressional intent to the contrary, the Court concluded that the three corporations were indeed "people" within the meaning of RFRA. As for the exercise of religion, the Court reasoned that a corporate form alone does not preclude the exercise of religion, because the Government itself conceded that nonprofit organizations are protected under RFRA. Moreover, the profit-making objective of these corporations does not preclude the exercise of religion because corporate law dictates that corporations can have a vast array of objectives (including religious aims), as many do. As a tertiary argument, the Government pointed out that the difficulty in determining the religious beliefs of large publicly-traded companies must imply that Congress did not want RFRA to apply to for-profit corporations. The Court determined that they did not need to speak to RFRA's applicability to large publicly-traded companies, as all of the corporations in the case at hand were closely-held, leaving this issue somewhat unanswered.

After establishing that the corporations had standing under RFRA, the Supreme Court analyzed the issue of whether the contraceptive mandate substantially burdened the corporations' exercise of religion. In line with the penalties ascribed by the ACA, corporations are taxed $100 per day for each individual affected by the lack of a company-provided health plan that covers the contraceptives at issue. According to the Court, these penalties could amount to $475 million per year for Hobby Lobby, $33 million per year for Conestoga, and $15 million for Mardel. The Court concluded that these sums were undoubtedly substantial. Additionally, the Court discussed the connection between what the corporations were required to provide under the ACA and what they found morally wrong. The government argued that the connection was too attenuated. However, the Court found this argument untenable, as judging the reasonableness of a religious belief is well beyond the Court's reach.

Having held that the penalties for defying the ACA mandates would be a substantial burden on the corporations' religious beliefs, the Court finally turned to the issue of whether the mandate is both "(1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental issue." 42 U.S.C. § 2000bb-1. As for the first prong of this test, the Court concluded that they need not adjudicate the issue and simply assumed that the interest is compelling. However, the Court did adjudicate on the second prong of the test. According to the Court, the HSRA "has already established an accommodation for nonprofit organizations with religious objections." As established by the ACA, these organizations can self-certify their opposition to the contraceptive services and have the organization's insurer "[e]xpressly exclude contraceptive coverage from the group health insurance coverage . . ." *Burwell*, 134 S. Ct. at 2782. The Court held that this is a much less restrictive means of furthering the governmental interest, and thus, the Government failed in proving the second prong of the test.

Although the majority opinion of the Supreme Court attempted to limit this decision to closely-held corporations and to the religious beliefs highlighted by the corporations in question, it certainly seems possible that the case will open the ACA to a flood of RFRA-based attacks. This is primarily due to the Court's split decision and the majority's lack of comment on RFRA's applicability to large publicly-traded corporations. Indeed, in a dissenting opinion by Justice Ginsburg, she argued that corporations "can [now] opt out of any law . . . they judge incompatible with their sincerely held religious beliefs." *Id.* at 2787 (Ginsburg, dissenting). While this seems to be a bit of an overstatement, it is likely that lower courts will begin to face waves of RFRA-based claims and that judges will continue to grapple with the law until either Congress speaks or the Supreme Court judicially creates a more definitive standard.

CONTRACTS

Under Tennessee law, filing a proof of loss with an insurance provider is sufficient to trigger the beginning of a contractually agreed upon immunity period, regardless of whether the loss has been ascertained. *Meyers v. Farmers Aid Ass'n,* No. E2013-02585-COA-R9-CV, 2014 Tenn. App. LEXIS 793 (E.D. Dec. 9, 2014).

By Samuel Chitrit

In *Meyers v. Farmers Aid Ass'n*, the Tennessee Court of Appeals addressed whether the filing of a proof of loss with an insurance provider is sufficient to trigger the beginning of a contractually agreed upon immunity period, regardless of whether the loss has been ascertained.

On October 11, 2010, Lloyd L. Meyers ("Mr. Meyers") purchased a homeowner's insurance policy from Farmers Aid Association of Loudon County, Tennessee ("FAA"). On September 14, 2011, Mr. Meyers's insured property was destroyed by a fire and Mr. Meyers notified FAA of the loss. FAA acknowledged the loss in a letter to Mr. Meyers dated that same day. Approximately one month later, Mr. Meyers submitted his sworn proof of loss to FAA, who did not respond nor take any action in regard to Mr. Meyer's claim.

On March 12, 2013, eighteen months after the proof of loss was filed, Mr. Meyers filed suit against FAA in the Circuit Court of Loudon County. In addition to compensatory damages, Mr. Meyers's complaint sought bad faith damages and punitive damages under the Tennessee Consumer Protection Act. Later, FAA filed a motion for summary judgment asserting that Mr. Meyers's suit was barred by the policy's limitations period of 1 year. The following provisions of the policy at hand are at issue in this case:

> **When Loss Payable:** The amount of the loss for which the Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.
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> . . . .
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> **Suit:** No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

At trial, the Circuit Court of Loudon County found that FAA's inaction after the proof of loss was filed tolled the contractual limitations period. Thus, the trial court held that Mr. Meyers's suit was not time-barred and denied FAA's motion for summary judgment.

On October 3, 2013, FAA filed a motion for interlocutory review. The Tennessee Court of Appeals granted the interlocutory appeal on April 16, 2014.

In Tennessee, an agreed limitations period is valid and enforceable. The contractual limitations period begins to run upon accrual of the cause of action. Insurance policies requiring a claim to be brought within so many days after a property loss, but which protect the insurer from suit until after a settlement of loss period, grant an insurer a period of immunity in which the insured may not file suit ("settlement period" or "immunity period").

Suit must be brought after the cause of action accrues. The cause of action will begin to accrue once the immunity period has expired, rather than on the date of the insured's actual loss. However, denying an insured's claim during the settlement period will waive the immunity period. Thus, the cause of action will begin to accrue upon the denial of the insured's claim/waiver, and the insurer can no longer use the immunity period as a bar to suit. If the insured's claim is not denied within the settlement period, the cause of action will begin to accrue upon expiration of the settlement period.

On appeal, the Tennessee Court of Appeals held that the trial court erred as a matter of law when it denied FAA's motion for summary judgment. The court found that, under the terms of the insurance policy, the settlement period began to run when Mr. Meyers filed his sworn proof of loss with FAA. Since FAA never denied Mr. Meyers's claim, his cause of action accrued when the sixty-day immunity period expired on January 14, 2012. Therefore, the one-year contractual limitations period within which Mr. Meyers was permitted to file suit expired on January 14, 2013. Mr. Meyers filed suit on March 12, 2013, almost two months after the limitations period expired.

Under Tennessee law, the settlement period begins to run when the proof of loss is filed, not when an insurer ascertains the loss. The insured are given two options: (1) wait until the insurer waives the immunity period by denying the claim; or (2) file a proof of loss, forcing the insurer to make a decision within the settlement period. If the insurer fails to make a determination within the settlement period, the insured has a right to sue. To hold otherwise and would in turn allow an insurer to indefinitely sit on a claim without taking any further action.

In this case, the Tennessee Court of Appeals first noted that it was undisputed that the language contained in the insurance policy required action by both parties before the settlement period began: Mr. Meyers would have to submit a proof of loss, and FAA would have to ascertain the loss within sixty days. The court noted that construing the policy "to allow. [FAA] to create a contract whereby it may remain immune from suit by its own inaction (after receipt of the proof of loss) would constitute an absurd result." The record shows that after Mr. Meyers filed his proof of loss with FAA, the parties did not communicate again until Mr. Meyers filed suit almost eighteen months later. The court found that, even though FAA's inaction was unsatisfactory, it was ultimately Mr. Meyers's responsibility to follow-up with FAA after he submitted his proof of loss, and to take action to protect his rights within the proper time allotted for by the contract. In order to avoid enforcing a contract that would require action by both parties before the settlement period would begin, the Tennessee Court of Appeals held that Mr. Meyers's cause of action accrued sixty days after he filed his proof of loss. As such, the trial court's order denying summary judgment was reversed and summary judgment was granted in favor of FAA.

In light of this decision, transactional attorneys should be aware that an insurance policy's contracted for settlement/immunity period will begin as soon as the insured files a proof of loss. Policies which require an insurer to ascertain the loss before the settlement period begins will not be upheld in court, because such a provision could allow an insurer to sit indefinitely on a claim without taking action. Furthermore, the contracted for immunity period will be waived if an insured's claim is denied, thus opening the insurer up to suit. Finally, transactional attorneys should make certain to contract for a reasonable settlement period, such that an insured's claim can be properly ascertained before the period of immunity expires.

EMPLOYMENT LAW

Under Tennessee law, evidence of an employer's knowledge of his or her employee's engagement in a protected activity in support of a claim under the Tennessee Human Rights Act can be inferred by the factfinder through direct or circumstantial evidence. *Ferguson v. Middle Tenn. State Univ.*, No. M2012-00890-SC-R11-CV, 2014 Tenn. LEXIS 898; 2014 WL 5463941 (Tenn. Oct. 29, 2014).

By Rachael Henry

Under the Civil Rights Act of 1964 ("Title VII") and the Tennessee Human Rights Act ("THRA"), employers and their agents are prohibited from retaliating against employees who engage in protected activities, such as filing an employment discrimination lawsuit. In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Supreme Court acknowledged that Title VII was established to discourage employers from taking actions that could deter employees from filing discriminatory complaints against that employer. Later, in *Allen v. McPhee*, 240 S.W.3d 803 (Tenn. 2007), the Tennessee Supreme Court acknowledged that the anti-retaliation provisions of the THRA were intended to serve the same purpose as those provisions of Title VII. In *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006), the Supreme Court stated that such retaliatory actions by employers can take many forms. Further, in *Ford v. Gen. Motors Corp.*, 305 F.3d 545 (6th Cir. 2002) the court held that an increase in an employee's workload was sufficient evidence to allow the jury to determine that there was a violation of Title VII. In *Ferguson v. Middle Tenn. State Univ.*, the Tennessee Supreme Court addressed whether, under a THRA claim, an employer's knowledge of her employee's engagement in a protected activity can be inferred from direct or circumstantial evidence.

In *Ferguson v. Middle Tenn. State Univ.*, Jim Ferguson ("Ferguson"), a Japanese-American, brought a claim against his employer, Middle Tennessee State University ("MTSU"), claiming retaliatory discrimination in violation of Title VII and THRA. In 1997, Ferguson began working for the Housing Department at MTSU under the supervision of Dana Byrd ("Byrd"). While the parties initially had a good working relationship, it began to decline over time. Ferguson suspected that the deterioration in their relationship was the result of Byrd learning about Ferguson's Japanese-American heritage.

In 1998, Ferguson had surgery that called for medical restrictions of his work. However, Byrd assigned work to Ferguson that exceeded his restrictions and told him that he should "perform the work or go home." In desperate need of the income, Ferguson continued to work under Byrd. In 1999, Ferguson complained to the Human Resources Department about the excessive workload and provided a copy of the doctor's medical restrictions. Subsequently, Ferguson's work requirements decreased for a period of time. However, Byrd soon had Ferguson lifting heavy equipment, again exceeding his medical restrictions.

In 2002, Ferguson injured his shoulder and his back while at work. Ferguson was once again given medical restrictions, which he provided to Byrd. Nevertheless, Byrd had Ferguson perform tasks outside of his restrictions. Ferguson's condition worsened, and he was forced to have back surgery and was out of work until March 2003. In late 2002, Ferguson filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), claiming discrimination on the basis of race and national origin, and alleged that he was subjected to a hostile workplace. In March 2003, ten days after his return to work from back surgery, Ferguson filed an employment discrimination lawsuit against MTSU, alleging violations of the Americans with Disabilities Act, Title VII, the THRA, and the Tennessee Handicap Act.

Just four days after MTSU was served with the complaint, Byrd ordered Ferguson to perform tasks that were clearly outside of his medical restrictions. In June 2003, Ferguson sustained a brain injury at work, forcing him to take time off. When he returned five days later, he received numerous work orders, many of them requiring him to work beyond his medical restrictions. Ferguson's medical conditions continued to decline, and he left MTSU in December 2003. By April 2004, Ferguson filed a second suit against MTSU, alleging unlawful retaliation under Title VII and THRA. The complaint was consolidated with the discrimination complaint that he had previously filed in March of 2003, and was later amended in 2008 to add a claim of malicious harassment. Ferguson and MTSU finally went to trial in November 2011.

At trial, the jury found in favor of MTSU on the discrimination and the malicious harassment claims, but found in favor of Ferguson on the claim of retaliation. In December 2011, MTSU filed a motion for a new trial and/or a remittitur, arguing that Ferguson had failed to show that Byrd had knowledge of Ferguson's engagement in a protected activity, and therefore did not retaliate under Title VII or THRA. The trial court denied the motion, stating there was sufficient evidence to support the jury's verdict.

MTSU appealed, and the Tennessee Court of Appeals held that it was "undisputed" that some people on MTSU's staff knew about the Ferguson's lawsuit. However, the appellate court found that general knowledge of Ferguson's lawsuit by MTSU's administration was *not* sufficient to satisfy the knowledge requirement under a retaliation claim. Therefore, the court of appeals held that Ferguson had not presented "material evidence" to support the jury's verdict that Byrd had knowledge of the lawsuit before taking adverse action against him.

Ferguson appealed to the Tennessee Supreme Court, asking the court to find that he had presented sufficient material evidence of Byrd's knowledge of the lawsuit before retaliating against him, thus supporting the jury's verdict. In its analysis, the court looked to the Tennessee Supreme Court's decision in *Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18 (Tenn. 2011), which found that in order to succeed under a THRA claim, the employee must prove that (1) the employee engaged in a protected activity, (2) the employer had knowledge of the employee's engagement in that protected activity, (3) the employer thereafter took a materially adverse action against that employee, and (4) there is a causal connection between the employee's protected activity and the adverse action taken by the employer. Citing *Mulhall v. Ashcroft*, 287 F.3d 543 (6th Cir. 2002), the court agreed that the knowledge requirement could be satisfied by direct or circumstantial evidence. Further, the court noted that the jury could use both common sense and their own experience in evaluating factual questions. Thus, the court found that the *Ferguson* jury was free to evaluate the direct and circumstantial evidence provided by the witnesses' testimonies in order to find an inference that Byrd knew about Ferguson's discrimination lawsuits before increasing his workload.

Further, the Tennessee Supreme Court stated that determining a witness's credibility in order to make such an inference was under the sole province of the jury. The jury alone had the power to believe or disbelieve Byrd's testimony in light of the other contradicting testimonies. Because the jury could have reasonably found that Byrd's testimony denying her knowledge of Ferguson's discriminatory claims was not credible, the jury could have inferred Byrd's knowledge of the protected activity, thus supporting a THRA violation. Noting that a civil jury finding can be set aside only if there is a lack of sufficient material evidence to support the verdict, the court held that it could not overturn the jury's verdict.

In light of the *Ferguson* decision, attorneys should take extra caution when arguing a THRA claim. Because satisfying the knowledge requirement can be inferred from direct or circumstantial evidence, contradicting testimonies can be devastating to an employer in a THRA case. The *Ferguson* decision lowered the threshold required to satisfy the knowledge element of a THRA claim by clarifying that direct evidence of the employer's knowledge is not required, but instead can be inferred from the circumstantial evidence. Thus, attorneys should be careful in arguing similar claims, because an argument relying solely on lack of direct evidence of the employer's knowledge about his or her employee's protected activity will likely fail. In order to avoid issues like those addressed in *Ferguson*, practicing attorneys should keep in mind that the factfinder in a THRA case can infer that the employer knew of his or her employee's engagement in a protected activity, and that direct evidence is not necessary to satisfy this knowledge requirement.

INTELLECTUAL PROPERTY

Under Tennessee law, the Tennessee Uniform Trade Secrets Act preempts conflicting civil claims when such claims are dependent on "whether the defendant is found to have 'misappropriated' a 'trade secret' as those terms are defined" in the Act. *Ram Tool & Supply Co. v. HD Supply Const. Supply, Ltd.*, No. M2013-02264-COA-R3CV, 2014 WL 4102418, 2014 Tenn. App. LEXIS 500 (Tenn. Ct. App. Aug. 19, 2014).

By Lindsay Johnson

The Tennessee Uniform Trade Secret Act ("TUTSA" or the "Act"), codified at Tennessee Code Annotated § 47-25-1701 *et seq*., created a statutory cause of action for the misappropriation of a trade secret. Under TUTSA, a claim for misappropriation of a trade secret will stand where information that: (1) "derives independent economic value from not generally being known" and for which reasonable efforts have been taken to maintain its secrecy; (2) learned by the defendant "while in a position of trust and confidence" to the plaintiff; is (3) used (4) to the plaintiff's detriment. Following TUTSA's enactment in 2000, civil claims that are "based upon misappropriation of a trade secret" are now preempted by TUTSA and governed by the law of that Act. However, before *Ram Tool & Supply Co. v. HD Supply Construction Supply, Ltd*, "[t]he scope of TUTSA's preemption provision" had yet to be considered by a Tennessee court of general jurisdiction. The Tennessee Court of Appeals addressed this seminal issue in determining whether a "breach of fiduciary duty/loyalty claim and derivative claims of aiding/abetting and conspiracy" are preempted by the Tennessee Uniform Trade Secrets Act.

In 2010, HD Construction Supply, Ltd., d/b/a White Cap Construction Supply ("White Cap") moved into the Nashville market to compete with Ram Tool & Supply Co., Inc. ("Ram Tool") in the commercial construction supply industry. At that time, Ram Tool's Nashville location generated annual revenues of approximately $15 million, while White Cap did not have a business presence in the area. White Cap undertook to build its Nashville client-base by recruiting key employees away from Ram Tool. White Cap carried out this plan using the services of its recruiter, Robert Maples ("Maples"), in conjunction with Ram Tool employee Tim Pruitt ("Pruitt"). Pruitt, a profitable salesman for Ram Tool, became involved with White Cap when Maple promised him the branch manager position for White Cap's new Nashville location when it opened in early 2011. Subsequently, between July 2010 and December 30, 2010, while he remained employed by Ram Tool, Pruitt assisted White Cap and Maples in secretly hiring four key sales account managers away from Ram Tool. During this time Pruitt was the "primary point-of-contact" between White Cap and the targeted Ram Tool employees. Also during this time, Pruitt assisted Maples and White Cap in obtaining confidential information concerning Ram Tool business operations, including customer lists, commission schedules, employee productivity schedules, and inventory requirements.

On March 30, 2011, Ram Tool filed a complaint in the Davidson County Chancery Court against Maples, Pruitt, and the four recruited sales managers. The complaint was later amended to include White Cap as a defendant, and the four recruited sales managers were dismissed from the claim. Ultimately, after the complaint was amended three times in the Tennessee Chancery Court, the case was transferred to the Tennessee Circuit Court, where Ram Tool's fourth amended complaint alleged, among other things, that Pruitt breached his fiduciary duty of loyalty owed to Ram Tool, that Maples and White Cap aided and abetted that breach, and that Pruitt, Maples, and White Cap participated in a civil conspiracy to unlawfully recruit from Ram Tool. Ram Tool filed a motion for partial summary judgment vis-à-vis the above stated claims. The defendants "filed motions for summary judgment alleging that all remaining claims…were based upon misappropriation of trade secrets and/or proprietary or confidential information, and therefore, were preempted by TUTSA." The Tennessee Circuit Court, relying on *Hauck Manufacturing Company v. Astec Industries, Inc.*, 375 F. Supp. 2d 649 (E.D. Tenn. 2004), granted the defendant's motion for summary judgment. The court "found that Ram Tool's claims were preempted by TUTSA" because "the underlying facts and allegations…demonstrate that the plaintiff's common law claims depend on proof that the trade secret, proprietary and/or confidential information—all of which are synonymous under Tennessee case law—was acquired, disclosed, and/or was used by the defendants." However, the circuit court indicated that if TUTSA does not in fact preempt the breach of fiduciary duty and its derivative claims under Tennessee law, then summary judgment would be inappropriate in the immediate case because the relevant claims implicate genuine issues of material fact. It is on this ground that the plaintiff appealed.

On appeal, the Tennessee Court of Appeals considered the applicable scope of the TUTSA preemption provision as a threshold issue in determining "whether Ram Tool's breach of fiduciary duty/loyalty claim is preempted" by TUTSA. This issue of first impression turned on the meaning of "based upon," because TUTSA does not "preempt, among other things, '[o]ther civil remedies that are not *based upon* misappropriation of a trade secret.'" Tenn. Code Ann. §47-25-1708(b)(2) (emphasis added). While seminal in Tennessee, the question of scope has been considered by several other Uniform Act jurisdictions. Courts to consider this issue seem to agree that for "non-UTSA claims to survive [preemption]," they must assert "something more" than a bald restatement of the facts establishing the misappropriation of trade secrets. *Hauck*, 375 F. Supp. 2d at 655. The extent to which "something more" is required varies based upon whether the state adopted a narrow or broad interpretation of "based upon."

Noting that the *Hauck* preemption test "provides a workable standard for applying TUTSA's preemption provision while furthering TUTSA's stated goals of providing a uniform standard of liability and avoiding duplicative recovery," the *Ram Tool* court adopted the "same proof" test as articulated in *Hauck*. Specifically, under the "same proof" test, "a claim will be preempted when it necessarily rises or falls based on whether the defendant is found to have 'misappropriated' a 'trade secret' as those terms are defined in the UTSA." This broad interpretation means that "if proof of a non-UTSA claim would also simultaneously establish a claim for misappropriation of trade secrets, it is preempted irrespective of whatever surplus elements or proof were necessary to establish it."

Applying the "same proof" standard in a de novo review as to "whether the trial court erred in granting summary judgment on [Ram Tool's] breach of fiduciary duty/loyalty claim and its derivative claims..." the court found that TUTSA preempted the claims to the extent that they were based upon the misappropriation of trade secrets. However, "insofar as the [the claims] are not grounded in the misappropriation of trade secrets, [they] are not preempted by TUTSA." It is interesting and important to note that, because this case was filed in Tennessee prior to July 1, 2011, the court applied the now defunct *Hannan* summary judgment analysis in place of the modern statutory rule embodied in Tennessee Code Annotated § 20-16-101. Under the *Hannan* standard, summary judgment was improperly granted in part because the defendant (movant) failed to carry its burden to show that Ram Tool "cannot prove its breach of fiduciary duty/loyalty claim absent reliance upon trade secrets [at trial]." The case was remanded for further proceedings in this regard. Had the current statutory summary judgment rule applied alongside the broad preemption, summary judgment would have been proper, as it was clear at the time of the motion that the pleadings exclusively "rel[ied] upon misappropriation of a trade secret as the factual basis for its …breach of fiduciary duty/loyalty claim."

The *Ram Tool* decision clarifies the TUTSA preemption in Tennessee in two important respects. First, and perhaps most significant, the adoption of the "same proof" test produces a concrete and consistent rule furthering the overarching intent of TUTSA—a uniform act precluding duplicative recovery. Federal and state courts sitting in Tennessee will now all apply the "same proof test," effecting dual benefits of reduced forum shopping and enhanced predictability. Second, *Ram Tool* develops the TUTSA jurisprudence by clarifying the scope of the preemption clause, and incorporating clear and well-illustrated case law to Tennessee law via *Hauck*. It is now clear that under the "same proof" test, "[i]f a proven claim, whether in whole or part, constitutes misappropriation of a trade secret, it is that and that alone."

PROPERTY

Under Tennessee law, article I, section 21 of the Tennessee Constitution encompasses regulatory takings to the same extent as the Takings Clause of the United States Constitution. *Phillips v. Montgomery Cnty.*, 442 S.W.3d 233 (Tenn. 2014).

By Brady Cody

Federal regulatory takings are recognized under the Takings Clause of the Fifth Amendment to the United States Constitution (the "Takings Clause"). Additionally, a majority of states have laws, set out in similar constitutional provisions or statutes, that recognize a claim for regulatory taking. In those jurisdictions, when the law goes so far as to permit a regulatory taking of an individual's property, the government is required to provide just compensation to the property owner. In *Phillips v. Montgomery Cnty.*, the Tennessee Supreme Court addressed whether Tennessee would follow suit, examining whether article I, section 21 of the Tennessee Constitution encompasses regulatory takings.

In *Phillips*, Mack and Leann Phillips (the "Property Owners") filed a claim against the Clarksville Montgomery County Regional Planning Commission (the "Planning Commission") and Montgomery County, Tennessee (the "County"). The Property Owners owned 15.62 acres of property and submitted a preliminary subdivision plat to the Planning Commission pursuant to county zoning requirements. Although no member of the public opposed the Property Owners' plat during a subsequent public hearing, the Planning Commission nonetheless denied the plat, citing two reasons. First, all proposed subdivisions of land were required to conform to the overall comprehensive plan of the Planning Commission. Second, the Planning Commission was prohibited from approving a subdivision of land if an agency investigation determined that the proposed development is not in the public's best interest.

Following the denial, the Property Owners filed a claim against both the Planning Commission and Montgomery County. The claim asserted that the Planning Commission denied the plat simply because the land fell within the path of a potential future extension of a state highway, which at that point had no current plans to begin construction or condemnation. The Property Owners argued that the rejection of the plat was a regulatory taking under article I, section 21 of the Tennessee Constitution, based upon its plain language and its similarity to the United States Constitution. At trial, the County submitted a motion to dismiss, arguing that Tennessee courts had not previously recognized regulatory takings under the Tennessee Constitution, which the trial court denied. On interlocutory appeal, the Tennessee Court of Appeals partially reversed, agreeing with the County that the regulatory takings claim should be dismissed because article I, section 21 of the Tennessee Constitution had not previously been construed as encompassing regulatory takings. However, the court of appeals also found that the Property Owners' complaint contained a sufficient claim for inverse condemnation.

On appeal by the Property Owners, the Tennessee Supreme Court held that article I, section 21 of the Tennessee Constitution encompasses regulatory takings to the same extent as the Takings Clause. Prior to addressing regulatory takings under the Tennessee Constitution, the court first looked towards federal jurisprudence, which, under the Takings Clause, requires the United States government to pay just compensation for any property subject to a regulatory taking. Under the federal framework, the court found that a regulatory taking generally takes place in one of three circumstances. The first circumstance involves the government acting in a manner that requires a property owner to suffer a permanent physical invasion of their property, regardless of the level of invasion that occurs. The second circumstance is labeled a total regulatory taking, where an action by the government totally strips the property owner from any economic beneficial use of their property. The third circumstance consists of all claims that fall outside the scope of the first two categories. Under the federal framework, this third circumstance is assessed under two primary factors: the economic impact of the regulation on the property owner and the level in which the regulation has interfered with "distinct investment-based expectations." Additionally, a third, less-frequently used factor is that of the character of the governmental action at issue.

After establishing the treatment of regulatory takings under federal jurisprudence and the Takings Clause, the Tennessee Supreme Court examined whether other states have followed suit and allowed such takings under their individual state laws. The court listed forty-six states that have determined that regulatory takings are encompassed within their state constitution or within a state statute that is similar to the Takings Clause. Additionally, the court recognized that a majority of those states use the federal framework developed by the United States Supreme Court to adjudicate a regulatory takings claim. In its analysis, the court referenced only a single example of a state, Alabama, that had expressly declined to recognize regulatory takings under its state constitution.

Having examined both the United States Constitution and other states that had been faced with similar quandaries, the Tennessee Supreme Court determined that Tennessee would similarly recognize regulatory takings under article I, section 21 of the Tennessee Constitution. First, the court discussed the similarity between the text of the Takings Clause, which states "nor shall private property be taken for public use, without just compensation," and article I, section 21 of the Tennessee Constitution, which provides "[t]hat no man's particular services shall be demanded, or property taken, or applied to public use ... without just compensation being made therefor." The court found that the absence of variations between the two texts suggested that there was no real reason to interpret the Tennessee text any differently than that of the Takings Clause. The court made clear that, without a sufficient ground for doing so, it would not interpret a Tennessee constitutional provision differently than a similar federal constitutional provision. Additionally, the court concluded that the statutes that enacted article I, section 21 of the Tennessee Constitution, including regulation of eminent domain, the prohibition of government takings of private property for private purposes, and the requirement of just compensation when private property is taken for public purposes, appear to strongly protect private property rights. Thus, there was no suggestion that the Tennessee text should be treated as any less restrictive than the text of the Takings Clause.

Finally, in response to the County's assertion that the Tennessee Supreme Court had not previously interpreted article I, section 21 as encompassing regulatory takings, the court acknowledged that its previous decisions recognized only physical occupation and nuisance-type takings. However, the court opined that simply because it had not previously had an occasion to decide whether article I, section 21 encompassed regulatory takings did not mean that it should not do so, and the court labeled its previous holdings on the issue of regulatory takings as both narrow and dated. The court determined that article I, section 21 of the Tennessee Constitution encompassed regulatory takings, citing a combination of the similarities between the Tennessee text and the Takings Clause, the lack of any indication that it should viewed differently, and a widespread adoption of the federal viewpoint by other state courts. As such, the Tennessee Supreme Court partially reversed the decision of the court of appeals, denying the County's motion to dismiss the regulatory taking claim, and remanded the case to the trial court for further proceedings.

In light of the *Phillips* decision, transactional attorneys should be aware that the Tennessee Supreme Court has expressly authorized a claim for regulatory taking under article I, section 21 of the Tennessee Constitution. Prior to this decision, a federal claim was the only available option for a regulatory taking claim. As such, state and local regulations in Tennessee may now provide the basis for a regulatory taking claim in the same manner as federal law. From this, it can be surmised that a regulatory taking claim should be brought under one or more of the three-circumstance test provided by the United States Supreme Court. Because the *Phillips* decision relies heavily on federal jurisprudence and does not offer its own independent test, a transactional attorney should look toward the already established federal framework for guidance in regulatory takings cases proceeding under state law.

SECURITIES

Investors can recover damages in a private securities fraud action only if they prove that they *relied* on the defendant corporation's misrepresentation in deciding to buy or sell a stock, and if the case is a class action, generally, this reliance does not need to be proven in order to certify a class under Fed. R. of Civ. P. 23(b)(3), but is instead presumed. However, the reliance presumption can be rebutted at the class certification stage if the defendant corporation offers evidence to prove that the misstatement did not actually have an effect on the price of the stock at the time that the plaintiffs decided to buy or sell it. *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 2014 U.S. LEXIS 4305, 134 S. Ct. 2398.

By Matthew Johnson

Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78j(b) (2012), and Securities and Exchange Commission *Rule 10b-5*, 17 C.F.R. § 240.10b-5 (2015), prohibit corporations from making any public, material misstatement in connection with the purchase or sale of any security. Material omissions are also actionable, but only if those omissions make the stated facts misleading. When a corporation does make a material misstatement or omission, investors can recover damages in a private securities fraud action only if the investors prove that they *relied* on the defendant corporation's misrepresentation in deciding to buy or sell the corporation's stock, assuming reliance is not already presumed.

In *Basic Inc. v. Levinson*, the United States Supreme Court ruled that reliance is presumed when the subject securities trade in an efficient market at a price that reflects all public, material information–including material misstatements. *Basic Inc. v. Levinson*, 485 U.S. 224, [ ] (1988). The *Basic* holding relieves a plaintiff investor of the obligation to prove actual reliance on a corporation's misrepresentation in a private securities fraud action. Most recently, in *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), the United States Supreme Court addressed whether *Basic's* reliance presumption should be overruled, and if not, whether a defendant corporation nonetheless should be allowed to rebut the reliance presumption in a class-action lawsuit at the class certification stage by showing a lack of price impact, one of the classic defenses to rebut a *Rule 10b-5* claim on the merits.

Erica P. John Fund (EPJ) was the lead plaintiff in a class action against Halliburton Company, and argued that Halliburton and its executives made certain misrepresentations relating to Halliburton's potential liability in an earlier asbestos litigation and its expected revenue in an attempt to inflate the price of Halliburton's stock. EPJ alleged that these misrepresentations were a violation of *Section 10(b)* and *Rule 10b-5*. To recover damages for violations of *Rule 10b-5*, a private plaintiff must prove "(1) a material misrepresentation or omission (or other manipulation or deception) by the defendant; (2) scienter; (3) a connection between the defendant's misrepresentation or omission (or other manipulation or deception) and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Amagen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2011). *Basic* allows reliance to be presumed where transactions occur in a fully informed efficient market. *Basic Inc. v. Levinson*, 485 U.S. 224, [ ] (1988). However, a defendant may rebut the reliance presumption by showing among other things, lack of "price impact." An absence of price impact would sever the connection between the misrepresentation and the purchase or sale of a security, thereby serving as a defense against a *Rule 10b-5* claim.

Price impact was not at the forefront of EPJ's first suit (*Halliburton I*). When EPJ moved to certify a class of all of Halliburton's common stock investors in *Halliburton I*, the District Court for the Northern District of Texas found that the proposed class indeed satisfied all of the threshold requirements of *Fed. R. of Civ. P. 23(b)(3)*, but EPJ's claim did not fulfill the "loss causation" requirement. Loss causation is the causal connection between the defendants' alleged misrepresentation and the plaintiff's economic losses. Fifth Circuit precedent required securities fraud plaintiffs to demonstrate loss causation as an additional threshold requirement special to private securities fraud actions at the class certification stage in order to invoke *Basic's* presumption that the plaintiff investor relied on the defendant's misrepresentation. Thus, the district court held that EPJ could not certify the class to continue the suit since it did not demonstrate loss causation or a connection between the plaintiffs' losses and Halliburton's alleged misrepresentations required to invoke *Basic's* reliance presumption. The Fifth Circuit affirmed.

However, the United States Supreme Court granted certiorari and vacated the decision, overruling the Fifth Circuit precedent that required securities fraud plaintiffs to demonstrate loss causation at the class certification stage in order to invoke the *Basic* reliance presumption. The Court stated that "loss causation" is a causation requirement and thus "addresses a different matter from whether an investor relied on a misrepresentation […] ." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 S. Ct. 2179 (2011). Thus, evidence for loss causation is more appropriately brought up at the trial stage, not the class certification stage. The Court remanded the case.

The crusade continued. On remand, in *Halliburton II*, Halliburton argued once again that class certification was inappropriate because the evidence it had introduced earlier to disprove "loss causation" also demonstrated an absence of "price impact," rebutting the presumption of reliance. Halliburton argued that evidence of a lack of price impact should be allowed to be introduced at the class certification stage to rebut *Basic's* reliance presumption. The district court declined to consider Halliburton's argument, holding that the *Basic* reliance presumption still applied, thus certifying EPJ's class under *Fed. R. of Civ. P. 23(b)(3).* The Fifth Circuit affirmed. The United States Supreme Court once again granted certiorari to determine whether *Basic's* reliance rule should be overruled or modified, and if not, whether a defendant corporation nonetheless should be allowed to rebut the reliance presumption in a class-action lawsuit at the class certification stage by showing a lack of price impact.

In *Halliburton II*, the United States Supreme Court considered Halliburton's arguments that (1) securities fraud plaintiffs should not be granted a presumption of reliance, and (2) even if plaintiffs are granted a presumption of reliance, defendants should be allowed to rebut that presumption at the class certification stage with direct evidence of the lack of impact that the misrepresentation had on the price of the stock at the time in question.

Halliburton's primary argument for overruling *Basic's* presumption of reliance is that the decision rested on a chain of theories; the heart of that chain was the "efficient capital markets hypothesis" (EMH). The EMH asserts that current financial markets are informationally efficient. For EMH to be true, one has to assume that all investors perceive all available information in precisely the same manner. The "fraud on the market theory" (FOMT), which rests on the assumption of an efficient market, holds that the price of stock traded in an efficient market reflects all public material information—including material misstatements. The reliance requirement presumed in a private misstatements or omissions action under *Rule 10b-5* rests on the FOMT. Since the EMH is the base that holds the reliance requirement in place, Halliburton specifically attacked the EMH in its defense. Halliburton's contention with EMH was that even to assume an informationally efficient market is a bold, conclusory assumption; the consequence of that assumption is that an investor can fulfill the reliance element by simply presuming that a misstatement affected its stock price.

Although questioning the premise of the EMH was a logical defense on Halliburton's behalf, the Supreme Court rejected this argument, stating that Halliburton focused too much on the current debate among economists as to whether or not the EMH is a reliable theory. The Court declared that the presumption of reliance was not based on any particular economic theory or model, but instead based on how "market professionals generally consider most publicly announced statements." *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988). The Court also said that Halliburton focused too much on the *degree* to which the market price of a company's stock reflects public information about the company. The Court replied to this argument by stating that exactly *how* efficiently a market reflects public information is not the point; the fact that the "price [of a stock] may be inaccurate does not detract from the fact that false statements affect it, and cause loss, which is all that *Basic* requires." *Schleicher v. Wendt*, 618 F.3d 679, 685 (2010). Additionally, the Court stated that the *Basic* reliance presumption did "not rest on a 'binary' view of market efficiency," as Halliburton had argued. Thus, the Court held, the *Basic* Court rested its presumption of reliance on the EMH with the knowledge that a market does not have to be a Boolean concept of completely efficient or completely inefficient to presume that a false statement affected the price of a stock in said market.

Although the Supreme Court did not sway from the presumed reliance element, the Court agreed with Halliburton's second contention that the plaintiffs' presumption of reliance should be able to be rebutted by demonstrating the absence of price impact in the class certification stage. While the issue of price impact should not predominate the issue of class certification under *Fed. R. of Civ. P. 23(b)(3)*, the Court explained:

> [Price impact is] an essential precondition for any Rule 10b–5 class action. While *Basic* allows plaintiffs to establish that precondition indirectly [through presumption of reliance], it does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply.

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2415-16 (2014). The Court reasoned that since any indirect evidence of price impact would be before the court during the class certification stage in any event, direct evidence should also be allowed in order to afford the defendant an opportunity to defeat the *Basic* reliance presumption. The Court stated, " […] we see no reason to artificially limit the inquiry at the certification stage to indirect evidence of price impact. Defendants may seek to defeat the *Basic* presumption at that stage through direct as well as indirect price impact evidence." *Id.* at 2417. The Court eventually molded that idea into its holding; in order to "maintain the consistency of the presumption with the class certification requirements of Federal Rule of Civil Procedure 23, defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Id.*

The *Halliburton II* holding is more of a clarification of law rather than new law, because the Court essentially reaffirmed the holding in *Basic*; plaintiffs are given the advantage of a presumption of reliance just as before. The highlight of the case is that securities and transactional attorneys should be aware that defendants now may rebut the presumption of reliance at the class certification stage of a *Section 10(b)/Rule 10b-5* class action by showing lack of price impact. Corporate defendants might want to try their luck with Congress in the future if they want any additional meaningful change in securities law reform, because the Court looks like it will stick with its current reasoning in allowing a presumption of reliance for the foreseeable future.