

## BUSINESS LAWS IN FLUX

### Bilski, 'Sarbox' and Black: A 2010 U.S. Supreme Court case review

The year 2010 is shaping up to be a decisive one for business-related law, with at least three landmark cases pending before the U.S. Supreme Court — regarding patents, Sarbanes-Oxley and corporate fraud. Business owners need to become aware of the legal issues involved and their possible implications.

#### Intellectual property: **Bilski v. Kappos**

On Nov. 9, 2009, the court heard arguments on the biggest open question in patent law: Do abstract ideas deserve legal protection? The plaintiffs, Bernard Bilski and Rand Warsaw, created a mathematical process that allowed energy companies to calculate a fixed monthly charge for homeowners based upon usage patterns. In the process, they revolutionized the way that utility companies hedged financial risk. In 1997, they applied for a patent for this "invention." The patent and trademark office rejected the application, stating that it fell outside the current definition of a patentable process. Specifically, the process was neither tied to a machine, nor did it transform an article into a different state or thing.

Bilski asserts that patentable inventions and processes should be broadly defined to allow for new technological innovations. The U.S. Patent and Trademark Office, on the other hand, asserts that a mathematical calculation to hedge risk is too abstract to warrant patent protection. While most patent pundits predict that the justices will invalidate the specific patent at issue, very few are willing to speculate on what, if anything, the justices will opine as a new patent eligibility test.

What should you do in light of this case? Sit down with your patent attorney before rushing to file any method patents. Ensure that patent protection will be both available and economically viable, post-Bilski.



#### EMPLOYMENT LAW

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Explore other means of protecting these ideas, either as an alternative or as an addition to the current patent laws.

#### 'Sarbox': **Free Enterprise Fund v. Public Company Accounting Oversight Board**

After Enron, Congress passed the Sarbanes-Oxley Act in 2002 to crack down on fraudulent accounting practices. The act, which created stricter financial reporting rules for public companies and established the Public Company Accounting Oversight Board to regulate auditors, is up for debate again.

Beckstead and Watts, a small auditing firm, claims that the board — which is appointed and overseen by the Securities and Exchange Commission — is unconstitutional, possessing too much power without imposing enough accountability. They argue that only the president of the United States has the power to oversee such an executive-level body.

If the Supreme Court finds the SEC's board unconstitutional, the decision could theoretically invalidate the entire Sarbanes regulatory system. It would then be up to Congress to build a new oversight system that would not interfere with the president's authority — and such a move would require companies to learn a new set of accounting regulations.

There's not much you can do in anticipation of the decision, but you — and your accountant — should keep an eye peeled

for the ruling and inevitable changes to the accounting regulatory schemes.

#### Fraud: **Black, et al. v. United States**

When federal prosecutors go after Madoff-style criminal fraud cases, they often rely on an obscure element in the wire and mail fraud statutes making it illegal to "deprive another of the intangible right of honest services." This verbiage has been used to successfully prosecute, as one court put it, "something close to bribery," but not actual bribery. On the other hand, this legalese has been criticized as too broad to give fair notice of what is prohibited. In theory, the phrase allows for a conviction even if an executive's dishonesty causes no economic harm to a company or its shareholders.

In the Black case, the Supreme Court will determine whether the "honest services" clause should be invalidated. If the court decides the language is too vague, it could invalidate the convictions of other corporate fraud cases. And yes, we can expect "me too" applications from Madoff, Skilling and others. A more likely outcome? The court will provide a definition for "honest services," then send the case back to the lower court for a new trial in light of the new definition. If that happens, expect Congress to move to amend the law, making it more detailed and clear.

By the end of 2010, it is hoped that the Supreme Court will bring certainty and clarity to these open questions. The Supreme Court should at least shine some light into the murk, providing better guidance to businesses and their advisers.

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