‘Deflategate’ Lawyer Heads to High Court in Securities Case

By Antoinette Gartrell

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- Appellate attorney Andrew Tulumello plans to tell U.S. Supreme Court Nov. 6 Second Circuit made mistake in disclosure dispute
- District court dismissed suit, but appeals court reversed
- If high court upholds Second Circuit, impact will be “huge,” Tulumello says

Andrew Tulumello
Partner

Andrew Tulumello will try to convince the Supreme Court in November that a federal appeals court got it wrong when it ruled an SEC disclosure provision gives investors a private right of action for securities fraud.

The case is one of several securities-related disputes that the high court has agreed to decide during its October 2017 term.

Tulumello, co-partner in charge of Gibson, Dunn & Crutcher’s D.C. office, is probably best known—at least by sports fans—for unsuccessfully appealing Patriot’s quarterback Tom Brady’s four-game NFL suspension before the U.S. Court of Appeals for the Second Circuit for deliberately under-inflating footballs.

Among appellate litigators, however, Tulumello has developed a reputation for racking up an impressive string of victories, including earlier this year in a high court upset in his client’s favor in a Federal Employers’ Liability Act case.

At around the same time, Tulumello won summary judgment for PepsiCo’s Frito-Lay subsidiary in a $450 million product mislabeling case.

Tulumello is “a supremely talented commercial litigator who can do it all—trial court, appellate court, and now the Supreme Court,” Gibson Dunn appellate litigator, Mark Perry, told Bloomberg BNA. He’s “the man to call in a high-stakes, high-pressure dispute—he has great judgment, sound common sense, and a winning way.”

Tulumello will argue to the high court Nov. 6 that investors can’t sue for securities fraud based on an omission from the management narrative required by Item 303 of the 1934 Securities Exchange Act. The narrative, also known as the Management’s Discussion and Analysis provision of a corporate annual report, requires companies to disclose known trends and uncertainties that could affect their business.

Investors alleged that Tulumello’s client Leidos Inc., formerly known as SAIC,

artificially inflated its stock price by disclosing some trends and uncertainties without disclosing that it had been implicated in a fraudulent billing scheme related to New York's "City Time" project. The district court dismissed the suit, but the Second Circuit reversed. It said Item 303 imposes an "affirmative duty to disclose" that can serve as the basis for a securities fraud claim under Section 10(b), the statute's general antifraud proscription.

`Key Mistake'

Tulumello told Bloomberg BNA the Second Circuit made a "key mistake" in reversing the lower court and said he's hopeful that the high court will see things his way this time around. Upholding the Second Circuit's decision would have a "huge" impact, Tulumello said. If the justices "leave the status quo as it is, we'll just be where we have always been." However, if the Second Circuit's reasoning prevails, "you could take a perfectly truthful disclosure that's completely silent on something and make that the basis of liability," he said.

Under the Second Circuit's rationale, "[a]nything you don't say can get you in trouble. Known trends and uncertainties captures virtually everything that a company is doing at any point in time every single day," Tulumello said. "What the Second Circuit said was that a company somehow has to take information that is premature and not concrete and decide if it's a trend. In order to not disclose it, you have to be able to affirmatively say that it's not reasonably possible to come to fruition. You can hardly say that about anything," he said.

Allowing securities fraud claims to be based on Item 303 would "completely undermine the whole goal of the provision, which was a narrative discussion from management's perspective about how it looks at the business. If the Supreme Court were to say that omissions are actionable, it's going to be very hard for anyone to put the horse back in the barn," Tulumello said. "Layering on more Section 10(b) liability is just going to lead to more boilerplate and less meaningful disclosure."

The November argument will be Tulumello's second appearance before the justices. Tulumello argued in April on behalf of BNSF Railway Inc. in a suit by two of the company's injured workers. In June, the high court sided with Tulumello in holding that the Federal Employers' Liability Act, a federal law that allows railroad workers to sue their employers for injuries that occur on the job, didn't allow the workers to sue the company in Montana, since neither worker lived in Montana or was injured there.

Although the Second Circuit wasn't persuaded in *Leidos*, Tulumello said this time, there will be some "major differences" in his argument. A three-judge appeals court panel may feel obligated to follow an earlier panel's reasoning. At the Supreme Court, however, "it's really about first principles and talking to the justices about their cases. So we're working with a narrower set of cases and talking about first principles of the law as opposed to what other circuits said," Tulumello said.

Proper Preparation

Tulumello said the best way to get ready for an oral argument is to participate in "as many moot courts as you can sanely tolerate." "The ones that are the most brutal and really thicken your skin are the internal moots, where your skeptical colleagues are pretending to be justices. Those are big learning experiences and much harder than the actual argument because it's just a withering rundown of questions and probing of weakness that just makes you better," he said.

Typically, the moots are timed, Tulumello said, but instead of stopping at 30 minutes, which would be your limit in the court, "we go for as long as people have questions. Everyone shoots all their ammunition at you and it's only when their guns are totally empty and you have nothing left to say that you sit down and recap."

Tulumello also plans to do a mix of external moots at the U.S. Chamber of Commerce and his alma mater Harvard Law School. "Law professors just have a very

different take than practitioners, so it's really interesting to get the academic perspective."

Sports Law

As a litigator, Tulumello isn't limited to business disputes. He also co-chairs the firm's Sports Law Practice Group.

Tulumello said his advocacy for the sports industry began several years ago when he received a "cold call" from the NFL Players Association asking if he were willing to write an amicus brief for the Supreme Court. "I honestly thought it was a joke," he said.

From there, Tulumello went on to help represent the players during the 2010-2011 lockout and became part of the trial and appellate teams on the Tom Brady case.

Since several other Gibson Dunn partners were also doing work for various sports clients, they realized that creating a practice group would be beneficial in order to "keep tabs on developments and share information," Tulumello said.

Although Tulumello maintains a full appellate schedule, he still finds time to give back to young associates at the firm. "Drew Tulumello is an outstanding lawyer, manager, colleague and leader in our firm. He is a great teacher and mentor; our young lawyers love working with and learning from him," his partner Theodore "Ted" Olson told Bloomberg BNA.