

Recent Supreme Court Decisions of Relevance - FATCA

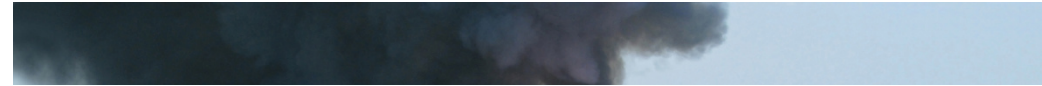
Dr. Deborah Sturman

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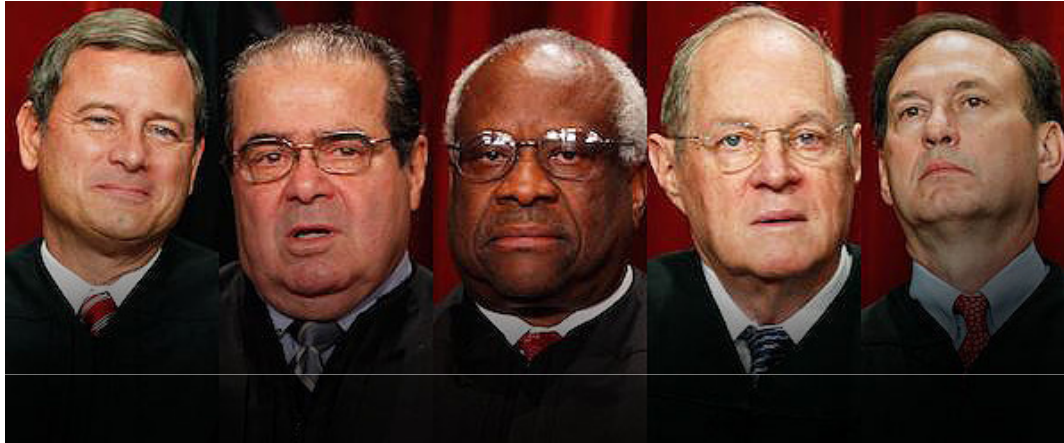
Halliburton



Halliburton

- Stock price drop resulting from restatement or other announcement correcting a previous statement is evidence of securities fraud
- Left intact Basic v. Levenson, a 1988 case holding that the investing public's reliance is a common factor, permitting class actions, allowing a class to plead that the defendant company had committed "fraud on the market"

Halliburton



- Conservative Supreme Court could have eliminated securities class actions. They did not.



UBS



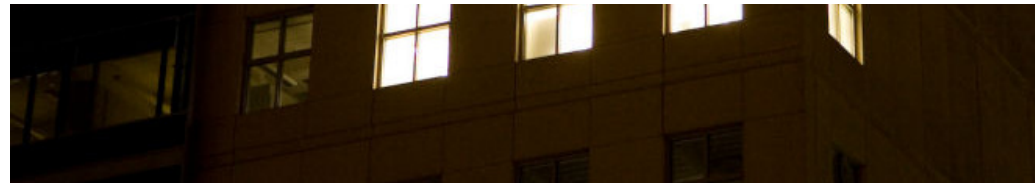
UBS

- The Court held that Morrison excludes not just suits based on shares sold on foreign exchanges but also multiply listed companies, namely those listed, on foreign and US exchanges if the company is located abroad





Amgen



Amgen

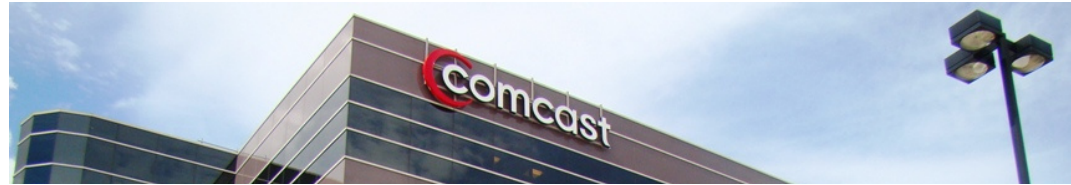
- Defendants attempted to create a hurdle for class certification by requiring plaintiffs to prove that false or misleading statements underlying the suit were “material” before certifying a class.



Amgen

- The court rejected that request because although materiality must be proven, it was premature to require the class to do so at the class certification stage. That is before discovery is completed and would in effect create an objective and thus unfair standard.





Comcast



Comcast

- The Court held that a more rigorous analysis than previously required regarding differences between class members' interests was justified.
- If such differences were found the class action vehicle would be precluded.
- Although an antitrust case, this theory might be applied to securities class actions.

Comcast

- The result: Defendants will bring in expert witnesses trying to show that there is no predominant plaintiff.





FATCA



FATCA

- US citizens must tax their worldwide income. US tax authorities thus created FATCA, “Foreign Account Tax Compliance Act.”
- FATCA is designed to force foreign banks to disclose their US investors’ assets.
- FATCA requires banks to withhold 30% of all income earned by US citizens in “Foreign Financial Institutions,” which are very broadly defined.

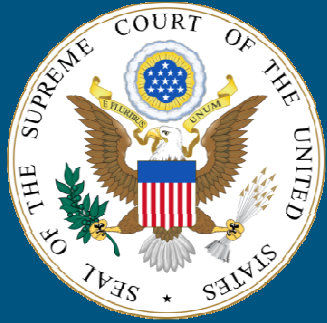
FATCA

- To avoid FATCA reporting requirements, financial institutions can enter into agreements with the IRS. Alternatively, a foreign government can agree to collect the data and transmit it to US authorities. Germany, Italy, Spain, the UK and Switzerland have so agreed.

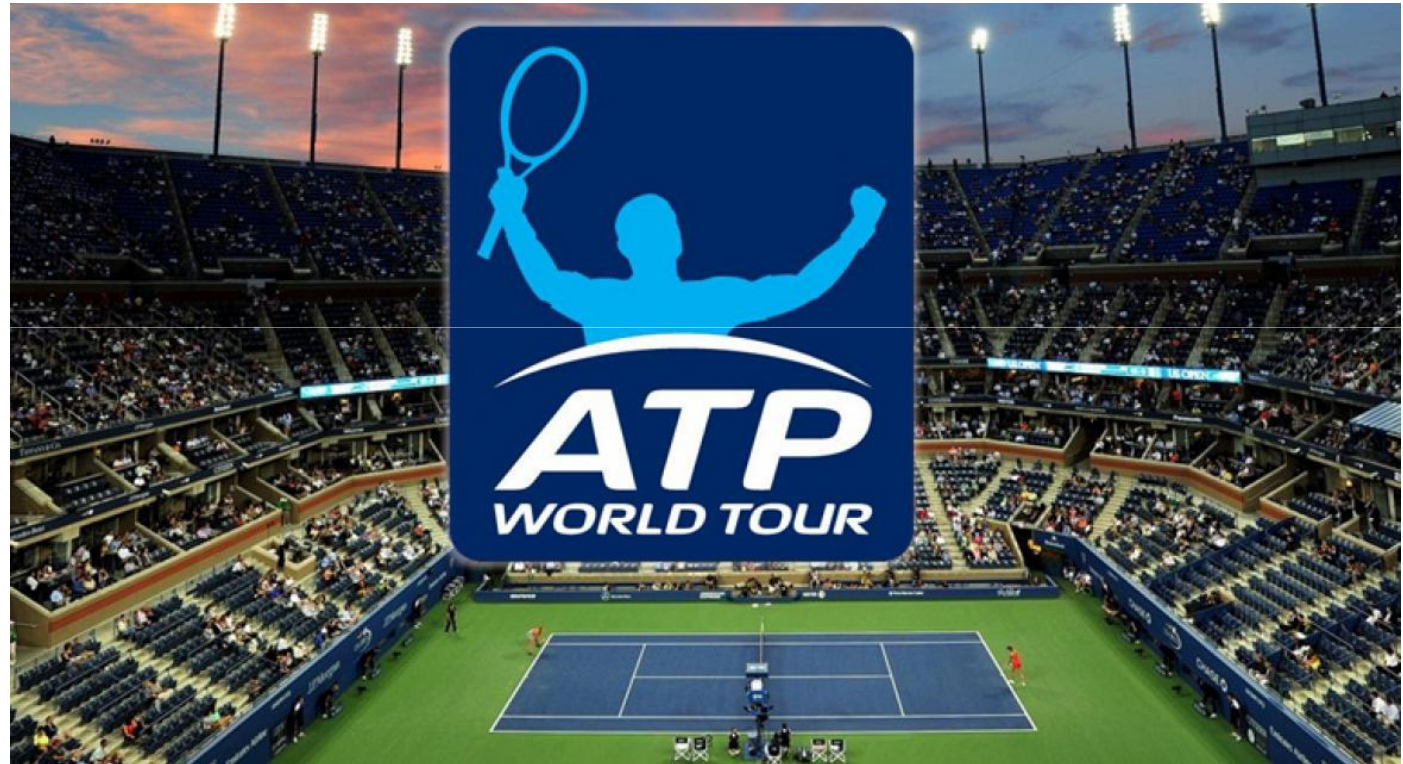


Implications of FATCA

- **FATCA implicates an enormous array of institutions. Hedge funds, private equity funds and others who do not have US clients must also comply since they do business with banks that must be compliant.**
- **Many FFIs will opt out of trading in US securities due to the FATCA burden. Swiss banks already have.**

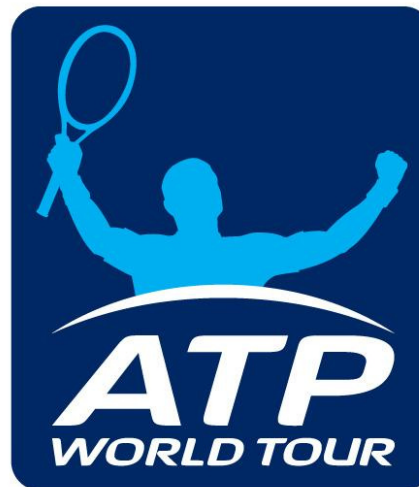


ATP v DTB



ATP

- The Delaware Supreme Court held that a company's bylaws can shift litigation costs to an unsuccessful plaintiff in intra-corporate litigation.
- Relates only to Delaware cases, is narrow, and unlikely to remain the law.



ATP

- Since the ATP decision, at least three public companies incorporated in Delaware – Echo Therapeutics, Inc., Hemispherx Biopharma, Inc., and The LGL Group, Inc. – have adopted one-way fee-shifting bylaws.
- The Council of Institutional Investors and the Delaware Corporation Law Council have proposed a legislative amendment that would prohibit Delaware corporations from adopting fee-shifting bylaws.





Discussion



Deborah Sturman

Sturman LLC



- Represents European institutional investors in securities actions, provides Legal Portfolio Management services, and represents European plaintiffs in complex, international litigation.
- Sturman was the initiator of the first class actions in U.S. courts on behalf of victims of WWII slave labour, representing the class in In re Holocaust Victim Assets Litigation and leading to recoveries of approximately \$7 billion.
- Sturman has been profiled in the Wall Street Journal, the Financial Times, Manager Magazin and Handelsblatt, and was named runner-up Lawyer of the Year by the National Law Journal.
- As a legal commentator, Sturman regularly appears in the German, Dutch, French, Swiss and Belgian media.
- She is fluent in German and Dutch/Flemish and conversant in French and Italian.

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