

Ohio Legal Battles To Watch In 2024

By Ryan Harroff

Law360 (January 1, 2024, 8:02 AM EST) -- The new year in Ohio will ring in more developments in claims over the Norfolk Southern train derailment in East Palestine and a fight by FirstEnergy investors to keep class certification, with both matters having already spawned a cavalcade of complaints.

Another battle is being fought by an Ohio Supreme Court justice seeking to undo a state law requiring her to be listed as a Democrat on general election ballots, marking a rare instance of such a high-ranking judicial official being a plaintiff while on the bench.

Here are three Buckeye State cases to watch in 2024.

FirstEnergy Investor Class Fights to Maintain Certification

The Sixth Circuit will hear arguments from embattled Ohio power company FirstEnergy and its investors over whether those investors can pursue their claims arising from the firm's role in a massive state corruption scandal as a certified class.

FirstEnergy investors have been fighting for a payout from the major drop in the company's stock price after it was revealed the energy firm worked with former Ohio House Speaker Larry Householder in the state's largest corruption scandal ever in order to get a \$1.3 billion tax-funded bailout of its nuclear energy program. The company has admitted to its role in the scheme and agreed to pay a \$230 million fine to the government, but it has continued to fight investors' claims arising from the scandal.

Corporate compliance attorney Mark Chutkow of Dykema Gossett PLLC told Law360 that FirstEnergy's bid to decertify the investor class would, if granted, allow them to "divide and conquer" the claims for civil liability flowing from the company's admitted role in the bribery scheme with Householder. Chutkow said that looking at the situation on a surface level, he believed the class could get decertified.

"It's fairly unusual to get an interlocutory appeal on a class action like this over certification," Chutkow said. "The Sixth Circuit is obviously taking very seriously the arguments that FirstEnergy is making here in terms of whether the plaintiffs adequately represent the class and whether there's a commonality in their damages of the individual class members."

Robbins Geller was appointed class counsel when the Southern District of Ohio certified the investors, and it is that certification order that FirstEnergy will ask the Sixth Circuit to undo next year.

In a separate case also brought by investors, this one a derivative shareholder suit, FirstEnergy has agreed to pay a \$180 million settlement but the court held up that deal because of a parallel case brought by yet another investor claiming he should have been involved in the settlement talks. The complex twisting and untwisting of different investors' claims will no doubt be part of the company's argument as it asserts that they cannot possibly be certified without an error of law.

The case is In re: FirstEnergy Corp., case number 23-0303, in the U.S. Court of Appeals for the Sixth Circuit.

Norfolk Southern Faces a Barrage of Train Derailment Suits

Ever since a train carrying toxic chemicals derailed and partially exploded in February in East Palestine, a town near the border between Ohio and Pennsylvania, lawsuits have been piling up from all sorts of parties including affected residents, government officials and Norfolk Southern's investors.

Coming in to 2024, dozens of proposed class actions are still pending resolution as individuals and businesses surrounding the site of the derailment and subsequent intentional chemical burn that Norfolk Southern caused seek damages, medical monitoring and other relief. Attorneys across multiple disciplines have been loaded up on cases arising from the situation, and those not directly involved in the litigation are paying close attention, too.

Michael Miguel, a principal insurance recovery attorney at McKool Smith, told Law360 that litigation is just getting started in terms of contamination and environmental damages. Miguel said both the government and Norfolk Southern are going to have to spend substantial time figuring out the total impact of the derailment, adding that what has already been put before the courts and what judges will hear next year is likely "the tip of the iceberg."

"[The contamination] doesn't all show up the next day in a creek," Miguel said. "You know, it migrates through the subsurface environment and can come in contact with a lot of things that impact property, groundwater and that sort of thing. There's no way they're going to be completely quantified and known by the end of 2024, for sure."

Also on Norfolk Southern's plate will be the ongoing government investigations and scrutiny from elected officials including both of Ohio's senators, who called for a state of emergency declaration for the East Palestine area in September.

The company's shareholders are also going after Norfolk Southern over the substantial dip in its stock price that followed the derailment as public outcry over its safety practices spooked investors. Labaton Sucharow was named lead counsel for a class of investors in September and is leading the charge on that front.

The consolidated case is In Re: East Palestine Train Derailment, case number 4:23-cv-00242, in the U.S. District Court for the Northern District of Ohio. The investor case is In Re Norfolk Southern Corporation Bond/Note Securities Litigation, case number 1:23-cv-04068, in the U.S. District Court for the Southern District of New York.

Ohio Supreme Court Justice Battles Partisan Ballot Rule

Ohio legal experts have a lot on their plate already for the year, and one of its most powerful attorneys

is challenging a state law designating candidates for appellate judge positions as partisans. Ohio Supreme Court Justice Jennifer Brunner does not want to have the word "Democrat" next to her name when she runs for reelection next time.

Justice Brunner filed her complaint in November, arguing that she lost her campaign for the Ohio Supreme Court's top seat to her colleague Chief Justice Sharon L. Kennedy in part because she for the first time had to be listed alongside her party affiliation but was forbidden from engaging in certain political actions that other "partisan" candidates are permitted to do in Ohio, such as attending rallies.

The crux of Justice Brunner's claims is that appellate judge candidates are unfairly held to limitations that only apply to judges which prevent them from, as an example, clarifying their disagreements with a given political party in public. As a result, Justice Brunner said she and other appellate judge candidates are deprived due process in a way that municipal judges, county judges and partisan candidates for other positions are not.

Brett Krantz, the chairman of global law firm network Meritas and a partner at Cleveland firm Kohnman Jackson & Krantz, told Law360 that Justice Brunner will have a hard time trying to get the partisan label rule overturned. Krantz said that having read the complaint, he does not see the due process or equal protection violation that the justice is alleging.

"I think she has a little bit better argument on the free speech side than on the due process or equal protection side," Krantz said. "I'm not a constitutional scholar, but I think any time you're a judge, and you're going and saying, 'This violates my constitutional rights to give less information to the voters,' I think that's an uphill battle."

Krantz also noted that both Democrat and Republican organizations already distribute lists of their preferred judicial candidates to voters and said that putting a party affiliation on the ballot itself is not the only way the public can get an impression of a judge's political leanings.

Justice Brunner's attorney and husband Rick Brunner told Law360 in November that part of the issue is what incorrect impressions voters could have of a judicial candidate based on their party affiliation, even if that candidate does not agree with their party on every matter. Krantz said that while voters might make assumptions about how a judge feels on a given issue because of general party trends, that does not necessarily rise to the level of a constitutional problem.

"If you make the assumption that voting for judges is the appropriate thing to do, I don't think you should take knowledge away from voters," Krantz said.

The case is Brunner v. LaRose et al., case number 4:23-cv-02180, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Keith Goldberg, Clark Mindock and Hailey Konnath. Editing by John C. Davenport.