SUPREME COURT OF VIRGINIA

Tanner v. State Corporation Commission, 266 Va. 170

580 S.E.2d 850 (2003) · No. Record Nos. 020938, 020939, 020940 · Decided June 6, 2003

SUMMARY

The Supreme Court of Virginia, on rehearing, reconsidered portions of its earlier decision concerning whether accounts receivable agreements and promissory notes were securities subject to Virginia registration requirements. The court reaffirmed its ruling that the accounts receivable agreements were not investment contracts, but modified its treatment of notes issued under Rule 504 of Regulation D, holding that Rule 504 was promulgated under section 3(b) of the Securities Act and that such securities were not federally preempted covered securities. The case was reaffirmed as modified and remanded for reconsideration of penalties.

CASE DETAILS

COURT	Supreme Court of Virginia
WRITING FOR THE COURT	Senior Justice Roscoe B. Stephenson, Jr.; Chief Justice Hassell; Justice Lacy; Justice Koontz; Justice Kinser; Justice Lemons; Senior Justice Carrico; Senior Justice Stephenson
JURISDICTION	Virginia
DECIDED	June 6, 2003
DOCKET	Record Nos. 020938, 020939, 020940
DISPOSITION	other
PROCEDURAL POSTURE	Rehearing of consolidated appeals from judgments of the State Corporation Commission concerning violations of the Virginia Securities Act.
STANDARD OF REVIEW	The court reviewed the Commission's legal conclusions de novo, construing the applicable statutes, rules, and federal securities-law provisions. The court considered only the record presented on appeal.
PRECEDENTIAL VALUE	Published and precedential Supreme Court of Virginia opinion
PARTIES	David R. Tanner, James C. Perry, Brian W. Kreider v. State Corporation Commission

TOPICS

administrative law · judicial review of agency action · statutory interpretation · appellate procedure · commercial litigation

PRACTICE AREAS

administrative law · securities regulation · statutory interpretation · appellate procedure · commercial litigation

QUESTIONS PRESENTED

1. Whether the court's prior determination that the Accounts Receivable Purchase and Sales Agreements were not securities resulted from a mistake of fact concerning the evidence in the record.
2. Whether Rule 504 of Regulation D was issued under § 4(2) or § 3(b) of the Securities Act of 1933.
3. Whether securities issued pursuant to Rule 504 are covered securities under § 18(b)(4) of the Securities Act and therefore exempt from registration under Virginia law.

HOLDINGS

1. The court reaffirmed its prior holding that the Agreements were not investment contracts, and therefore were not securities subject to the Virginia Securities Act's registration requirements. The court rejected the Commission's attempt to rely on a letter that was not part of the appellate record.
2. Rule 504 of Regulation D was issued under § 3(b) of the Securities Act of 1933, not § 4(2).
3. Securities issued pursuant to Rule 504, which was promulgated under § 3(b), are not covered securities under § 18(b)(4) of the Securities Act. They therefore are not preempted from state registration requirements and must be registered under Code § 13.1-507.

KEY QUOTATIONS

> *“Upon rehearing, as with original appeals, we consider and make decisions based upon the record that has been brought to us.”* (266 Va. at 172, 580 S.E.2d at 852)

> *“In other words, securities issued under § 3(b) are not "covered securities" and, therefore, must be registered under Code § 13.1-507.”* (266 Va. at 172-173, 580 S.E.2d at 852-853)

FACTUAL BACKGROUND

The appellants sold instruments called Accounts Receivable Purchase and Sales Agreements issued by Kennsington Holding Corporation. In the original decision, the court held that the Agreements were not investment contracts under the Howey test because purchasers acquired accounts receivable and had rights relating to their collection. The case also involved promissory notes issued pursuant to Rule 504 of Regulation D, and the question whether those notes were exempt from registration under the Virginia Securities Act.

PROCEDURAL HISTORY

In the original consolidated appeals, the Supreme Court of Virginia affirmed in part and reversed in part the Commission's judgments and remanded for further consideration of penalties. The Commission petitioned for rehearing under Code § 8.01-675.2 and Rule 5:39. The court granted rehearing as to Parts V and VI, reaffirmed Part V, and modified Part VI.

DISPOSITION

other

REMAND INSTRUCTIONS

Part VI of the original opinion was modified to reflect that Rule 504 was issued under § 3(b), that the notes were not covered securities, and that they were subject to registration under Code § 13.1-507. The remainder of the original opinion was reaffirmed; the Commission was to reconsider penalties on remand.

CASES CITED

- Tanner v. State Corporation Commission, 265 Va. 148, 574 S.E.2d 525 (2003)
- Securities and Exchange Commission v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946)
