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ALERT

U.S. Can Be Sued For Negligent Inspections

The Supreme Court announced its decision yesterday in *United States v. Olson*, U.S., No. 04-759, 74 U.S.L.W. 4007, holding that the United States can be sued under the Federal Tort Claims Act for negligent inspections by the Mine Safety and Health Administration (MSHA) to the same extent as a private party in similar circumstances could be sued in state court. The reversal of the U.S. Court of Appeals for the Ninth Circuit ends a line of cases restricting such lawsuits and is expected to create agency pressure for more aggressive whistleblower investigations and enforcement. The Supreme Court's decision appears to be applicable to any federal agency conducting inspections and/or whistleblower investigations (e.g. OSHA, FRA, FAA) under a variety of laws ranging from environment to health and safety to financial disclosure and beyond.

The Olson case arose from a claim alleging that MSHA did not respond properly to safety complaints, thereby contributing to injuries and a fatality. The underlying enforcement case against the company was successfully defended by Patton Boggs Partner Mark N. Savit and Of Counsel Willa Perlmutter. In that matter, an extensive criminal investigation ended without a prosecution and the civil penalty case was settled with exculpatory language preventing its use against the company in a tort claim. Given that Savit's representation resulted in a complete win for the company, the plaintiffs pursued a claim against the government. They now have the opportunity to persuade the U.S. District Court in Arizona that they would have the right under Arizona law to take that claim to trial.

In responding to the Court's decision, Savit said: "The decision provides pro-enforcement agency personnel with a reason to urge aggressive responses to whistleblower complaints, even if the claim has no merit. It also provides additional incentives for employers to train facility management on proper complaint and investigation responses."

In addition to defending investigations and enforcement actions, and coordinating the defense with civil liability risk reduction, Savit and the Patton Boggs risk reduction group train hundreds of management personnel each year on how to respond to government investigations. They also provide advice about risk management programs and audit those programs. For further information contact Mark N. Savit at 303.830.1776 or Henry Chajet at 202.457.6511.

Important Note: This alert does not constitute legal advice and counsel should be consulted regarding specific factual situations which will determine the compliance advice applicable to any particular question regarding the subject matter. If you would like additional information or advice and counsel on training, compliance or audits, please let us know.

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