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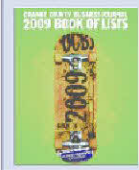
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Broadcom Appeal Scenarios: Go Away, or Go Before 9th Circuit

By SARAH TOLKOFF
ORANGE COUNTY BUSINESS JOURNAL STAFF

WEEKLY EDITION
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Some legal observers are betting federal prosecutors will drop their appeals in the Broadcom Corp. stock options cases, which proved to be the biggest local legal story of 2009.

But should the U.S. Attorney's Office in Santa Ana go ahead, how things might shake out before the Court of Appeals for the 9th Circuit in San Francisco is anyone's guess.

Earlier this month, federal prosecutors filed a notice of appeal in two Broadcom cases. The move is the first step toward getting approval from Washington, D.C., to move ahead with an appeal.

The prosecutors are seeking to overturn the dismissal of charges last month against Broadcom cofounders Henry Samuelli and Henry "Nick" Nicholas.

In a set of stunning moves, U.S. District Judge Cormac Carney in Santa Ana threw out charges against the cofounders as well as former financial chief Bill Ruehle because of a court finding of prosecutor misconduct and a lack of evidence that the executives violated securities laws.

The move decimated the government's case against the former executives and Samuelli, who was reinstated as a Broadcom executive last month.

The judge also threw out a Securities and Exchange Commission lawsuit against them.



His dismissals prompted prosecutors earlier this month to drop drug charges against Nicholas that came about from their probe of options at Broadcom.

After a series of staggering losses, some think a notice of appeal is a formality that will end up going nowhere.

"It would not surprise me if the Department of Justice just decides that it's time to put this behind it," said Lawrence Rosenthal, a professor at Chapman University School of Law in Orange.

Some see a withdrawal as more likely now that the government has called it quits in the drug case against Nicholas, who was charged with distributing drugs to business associates and customers.

An appeal could open old wounds and place a spotlight on prosecutors in the cases.

Assistant U.S. Attorney Andrew Stolper and his team are accused of leaking stories to the media, intimidating defendants, improperly dealing with a defense attorney and threatening to make Nicholas' young son testify against him.

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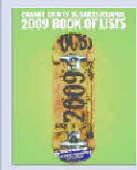
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A big hurdle for the government: If the dismissals are overturned and charges are reinstated, the cases would go straight back to Carney's courtroom.



One lawyer familiar with the situation said there's little chance prosecutors could get the cases shifted to another judge.

Prosecutors now are believed to be assembling a detailed memorandum for an appeal for review by the Office of the Solicitor General in Washington.

It's then up to the solicitor general—Elena Kagan, a former Harvard Law School professor—to make a recommendation on whether to send the case to a federal appeals court, in this case the fickle 9th Circuit.

The court, made up of 29 judges, is the biggest of the country's 13 appellate courts.

A randomly selected panel of three 9th Circuit judges would be appointed to review the cases. They'd likely hear arguments from both sides and decide to reverse Carney's rulings or let them ride.

If the 9th Circuit opted to reverse the rulings, federal charges against Nicholas and Samueli would be reinstated and trials would be set in Santa Ana.

Liberal Leaning

The 9th Circuit has a reputation as a liberal-leaning group of judges, but what that means for Nicholas and Samueli is unclear.

"It's the least predictable of all of the federal circuits, and that's really a function of its size," Chapman's Rosenthal said. "It's luck of the draw."

There's a chance more liberal judges could side with Broadcom's investors in reversing the dismissals.

"If the 9th Circuit wanted to protect the individual investor, you'd think they would want to somehow recognize the wrongdoing on the part of the executives," said Michael C. Carroll, a corporate and securities lawyer in Irvine. "We have a situation where the government has to stand its ground to make a very important point—that the backdating of stock options will not be tolerated."

In early 2007, Broadcom restated several years of financial results to reflect \$2.2 billion in charges for misdated stock options, the highest restatement bill of any company involved in the options issue.

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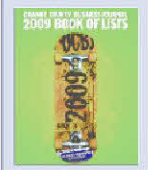
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On the other hand, liberal-leaning judges might side with Carney in what he saw as aggressive government overreaching in the cases.



Or they could find that Carney was the one who overreached.

"Ordinarily in a case like this, appellate courts would view Carney's orders with great skepticism," Rosenthal said. "Carney's rulings were very unorthodox. From where the Department of Justice sits, he may have overstepped his own authority in this criminal case."

Amends Broadcom has made by posting charges to past results and settling shareholder lawsuits could be a factor in dropping the appeal, according to Carroll.

Broadcom, which makes chips for computers, cell phones and other consumer electronics, "has paid its dues," he said.

"I think Broadcom has already paid the price," Carroll said. "The company's reputation was clouded by all of these events. I think there was some damage done."

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