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Inside the Courts

An Update From Skadden Securities Litigators

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UNITED STATES SUPREME COURT

Amgen Inc. v. Conn. Ret. Plans & Trust Funds, No. 11-1085 (2012)

Click here to view the Ninth Circuit opinion.

Supreme Court Conducts Oral Argument to Address Securities Fraud Class Action Circuit Split

The U.S. Supreme Court heard oral argument on November 5, 2012, concerning whether a securities fraud plaintiff alleging fraud on the market must establish materiality in order to obtain class certification. The U.S. Court of Appeals for the Ninth Circuit, in *Connecticut Retirement Plans and Trust Funds v. Amgen Inc.*, 660 F.3d 1170 (9th Cir. 2011), had held that such a plaintiff need not establish the materiality of an alleged fraudulent statement in order to obtain class certification. Rather, according to the Ninth Circuit's ruling, it is enough to show that the security in question was traded in an efficient market and that the alleged fraudulent statement became public. In so holding, the Ninth Circuit joined the U.S. Courts of Appeals for the Third and Seventh Circuits, but deepened a split with the U.S. Courts of Appeals for the First, Second and Fifth Circuits on the issue.

Plaintiffs asked the Court to affirm the Ninth Circuit's ruling, arguing that determining materiality can wait until a class is certified. Plaintiffs asserted that the materiality determination bears on the merits of the case, and not class certification, and that materiality presents a common question about whether or not the statements create liability. On the other hand, Amgen Inc. argued that materiality is an essential predicate of the fraud-on-the-market theory because "a market price will reflect a statement if and only if the statement is material." Thus, plaintiffs must establish that a defendant's alleged misstatements are material in order to obtain class certification because, without the presumption of reliance provided by the fraud-on-the-market theory, individual issues regarding reliance predominate, preventing class certification.

A decision is anticipated by the end of June 2013.

ANNUAL STOCKHOLDER MEETINGS

Rich v. Fuqi Int'l, Inc., C.A. No. 5653-VCG (Del. Ch. Nov. 5, 2012)

Click here to view the opinion.

Court of Chancery Denies Company Request to Continue to Suspend Annual Stockholder Meeting

Vice Chancellor Sam Glasscock III of the Court of Chancery denied Fuqi International, Inc.'s motion for partial final judgment and a motion to certify the decision for interlocutory appeal in connection with its request to continue to suspend its annual stockholder meeting until Fuqi could provide audited financial statements to stockholders. Fuqi had not held an annual meeting for more than three years and argued that it was caught between Delaware's annual meeting requirement and SEC Regulations 14A and 14C, which require publicly traded companies to distribute certain materials, including an annual report and audited financial results in advance of annual meetings. Fuqi further argued that previous Delaware Court of Chancery case law, specifically *Newcastle Partners v. Vesta Insurance Group, Inc.*, 887 A.2d 975 (Del. Ch. 2005), did not govern the facts of this case because the SEC had subsequently promulgated a new rule governing the exemption requests from Rules 14A and 14C. The court rejected Fuqi's argument and held that "[t]he SEC release does not change a company's substantive obligations under federal securities law. Neither does it affect the principles and goals of SEC proxy rules, which are still to protect the stockholder franchise and provide accurate information to stockholders." The court continued, "Fuqi's position here is that the company has been managed in such a way that it cannot comply with the proxy rules, and therefore it should not be subject to *any* oversight by stockholders by way of an annual meeting. Such a position stands the purpose of corporate and securities law on its head. It cannot

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be the case that managers of a corporation can entirely avoid the annual meeting requirement by 'dickering with the auditors and the SEC over financial statements.' On the contrary; a stockholder's right to a meeting is especially strong when financial management is so questionable as to delay the provision of audited financial statements for three full years." The court also pointed to instances where Fuqi made tactical decisions not to pursue exemptions from the relevant proxy rules, in part based on informal communications with the SEC that indicated the request would likely be denied, and that such a denial could negatively affect the outcome of the ongoing SEC investigation.

The court held that "because Fuqi has created the very predicament it now finds itself in, and because Fuqi has now deprived stockholders of their right to an annual meeting for over three years, the interests of justice weigh heavily in favor of holding the annual meeting as scheduled."

AUCTION RATE SECURITIES

Anschutz Corp. v. Merrill Lynch & Co., Inc., No. 11-1305-cv (2d Cir. Aug. 16, 2012)

Click here to view the opinion.

Second Circuit Affirms Dismissal of Claims That Merrill Lynch Allegedly Failed to Disclose That It Supported Auctions of ARS

The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of claims that Merrill Lynch violated Section 10(b) of the Securities Exchange Act by allegedly failing to disclose that it supported auctions of auction rate securities (ARS). The court ruled that the plaintiff failed to distinguish its claims from *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120 (2d Cir. 2011), which affirmed the dismissal of similar claims against Merrill Lynch because the support bidding was disclosed pursuant to a settlement with the SEC. First, the plaintiff's allegations that Merrill Lynch participated in 100 percent of the auctions it underwrote was not a distinguishing factor, because the *Wilson* court had already determined that even if Merrill Lynch participated in all such auctions, its disclosure that it "may routinely" place support bids constituted adequate disclosure. Second, the plaintiff's "generalized" allegations that Merrill Lynch's support bidding created an appearance of liquidity in the ARS market were no different than the allegations in *Wilson*. Third, even though the plaintiff purchased its ARS before Merrill Lynch posted its disclosure (unlike in *Wilson)*, that purchase occurred after the SEC order, putting the plaintiff on notice that Merrill Lynch might place support bids to prevent auction failure, and the plaintiff held its ARS for more than a year after Merrill Lynch's disclosure, even though it had the option to sell the ARS at issue.

AUDITOR LIABILITY

Gould v. Winstar Commc'ns, Inc., No. 10-4028-cv(L), 10-4280-cv(CON) (2d Cir. July 19, 2012)

Click here to view the opinion.

Second Circuit Vacates Summary Judgment Ruling to Auditor on Claims It Made Misrepresentations in Audit Opinion for Subsequently Bankrupt Company

The U.S. Court of Appeals for the Second Circuit vacated a grant of summary judgment to an auditor on claims that the auditor violated Sections 10(b) and 18 of the Securities Exchange Act by allegedly making misrepresentations in an audit letter attached to the 10-K of a company that subsequently went bankrupt. The court reasoned that there was material evidence showing that the auditor knew of and advised against deceptive accounting schemes, but eventually issued an unqualified opinion, which, the court held, was sufficient to establish a factual dispute as to scienter. In addition, although the auditor had done substantial work in conducting the audit, a jury could still find the audit was so deficient as to be reckless. Further, an analyst's testimony that she regularly reviewed accountant reports when recommending stocks to the plaintiffs was sufficient to create a material issue of fact regarding the plaintiffs' reliance on the audit letter, even though the analyst could not specifically remember reviewing the letter. Finally, deposition testimony by the plaintiffs' expert that press releases announcing potential fraud at the bankrupt company lowered the company's stock price was sufficient to create a factual dispute regarding causation, even though the cancellation of the company's credit facility and a credit downgrade also may have caused the company's stock price to decline.

Underland v. Alter,
No. 10-3621
(E.D. Pa. July 16, 2012)

Click here to view the opinion.

Pennsylvania Federal Court Upholds Claims That Auditor Certified Registration Statements That Contained Material Misstatements and Omissions

Judge Cynthia M. Rufe of the U.S. District Court for the Eastern District of Pennsylvania upheld claims that an auditor certified registration statements for Advanta, a now-bankrupt credit card issuer, that allegedly contained material misstatements and omissions in violation of Section 11 of the Securities Act. The plaintiffs adequately alleged that Advanta did not incorporate past and present adverse credit trends when determining its loan loss reserves, in violation of GAAP. Therefore, when (as alleged) the auditor approved the registration statements that contained purportedly misleading statements concerning Advanta's compliance with GAAP, the auditor allegedly violated Section 11's requirement that the auditor verify that Advanta had used accurate data and considered all relevant internal and external factors and risks.

CLASS ACTIONS

Class Action Fairness Act

Frederick v. Hartford Underwriters Ins. Co.,
No. 12-1161
(10th Cir. June 28, 2012)

Click here to view the opinion.

Tenth Circuit Joins Majority of Courts in Existing Circuit Split as to The Burden for Establishing the Amount in Controversy for CAFA Removal

The U.S. Court of Appeals for the Tenth Circuit joined the U.S. Courts of Appeals for the First, Second, Fourth, Sixth, Seventh, Eighth and Eleventh Circuits in adopting the preponderance standard to establish the amount in controversy for defendants seeking removal under CAFA. This holding deepens an existing circuit split between these courts and the U.S. Courts of Appeals for the Third and Ninth Circuits, which hold that the party seeking removal under CAFA must prove with "legal certainty" that the amount in controversy exceeds $5 million.

The plaintiff filed a putative class action suit against the defendant in state court seeking "a total award for compensatory and punitive damages [that] does not exceed $4,999,999.99." The defendant removed the case to federal court, arguing that based on the size of the class and the temporal period at issue, the plaintiff sought at least $2,960,988 in compensatory damages, plus punitive damages equal to compensatory damages, which made the total amount in controversy at least $5,921,996. Acknowledging that there was a split among circuits as to the defendant's burden to show potential damages over the jurisdictional amount when seeking removal under CAFA, the district court found that the plaintiff's complaint was a binding limitation on damages and the amount in controversy thus did not exceed $5 million. The district court remanded the case to state court for lack of jurisdiction. The Tenth Circuit reversed and remanded, holding that a defendant seeking to remove under CAFA must show that the amount in controversy exceeds $5 million by a preponderance of the evidence. In so holding, the Tenth Circuit ensured that defendants seeking removal face the same burden regardless of whether they are invoking simple diversity jurisdiction or CAFA jurisdiction. The Tenth Circuit further clarified that a plaintiff's attempt to limit damages in the complaint is not dispositive when determining the amount in controversy. A defendant "is entitled to present his own estimate of the amount at stake ... [and] [t]he preponderance of the evidence standard must be applied to all damages counted toward the total amount in controversy, including punitive damages."

Class Certification

In re St. Jude Med., Inc. Sec. Litig., No. 10-cv-00851 (D. Minn. Oct. 25, 2012)

Click here to view the opinion.

Minnesota Federal Court Grants Class Certification in Securities Fraud Lawsuit

Judge Susan Richard Nelson of the U.S. District Court for the District of Minnesota granted certification of a stockholder class in a securities class action brought pursuant to Sections 10(b) and 20(a) of the Securities Exchange Act. Shareholders claimed that St. Jude Medical and its officers caused the company's stock to trade at artificially inflated rates by allegedly disseminating false and misleading statements and allegedly concealing material adverse facts. The delay in disclosing negative facts about the company's outlook, including a slowdown in the demand for medical devices, allegedly gave insiders a chance to sell $16 million worth of stock before disclosing the drop in sales. The court noted that, because the lead plaintiff and class members purchase stock on an efficient market, they are presumed to have relied on St. Jude's alleged misrepresentations and omissions.

In re IndyMac Mortgage-Backed Sec. Litig., No. 09 Civ. 4583 (LAK) (S.D.N.Y. Aug. 17, 2012)

Click here to view the opinion.

S.D.N.Y. Certifies Class of Certificate Holders in Case Relating to IndyMac's Underwriting Standards for MBS Offerings

Judge Lewis A. Kaplan of the U.S. District Court for the Southern District of New York certified a class of certificate holders who alleged that IndyMac and certain underwriters violated Sections 11 and 12(a)(2) of the Securities Act by allegedly making misleading statements regarding IndyMac's underwriting standards in the offering documents for 10 mortgage-backed securities offerings. The class had more than 700 members, and so Rule 23(a)'s numerosity requirement was satisfied, even though two of the offerings had fewer than 40 investors. The commonality, typicality and adequacy requirements of Rule 23(a) also were satisfied because the class's claims were based on allegedly misleading offering documents and so were subject to common proof, even though the lead plaintiff may have received unique information through its investment adviser, and were therefore potentially subject to unique defenses. Rule 23(b)'s predominance requirement also was satisfied because there was no showing that any member had notice of the alleged misstatements; any unique defenses were unique to an underwriter-defendant, not a plaintiff; and the underwriting guidelines for the mortgages underlying the different certificates, although not identical, were substantially similar. Finally, the court determined that a class action was superior to other means because there were no other individual actions, and smaller investors would not have an incentive to bring claims absent a class action. The fact that certain prospective members were foreign carried little weight because the defendants did not identify any entities' home countries that would not give preclusive effect to the action.

Individual Claims

McCrary v. Stifel, Nicolaus & Co. Inc., No. 11-1213 (8th Cir. Aug. 6, 2012)

Click here to view the opinion.

Eighth Circuit Reverses Dismissal of Individual Claims for Mismanagement of Investment Accounts Where Class Claims Deemed Insufficient

The U.S. Court of Appeals for the Eighth Circuit affirmed in part and reversed in part the dismissal of claims against Stifel, Nicolaus & Co. Inc. for the alleged mismanagement of client investment accounts, holding that individual claims may not be automatically dismissed when class claims are deemed insufficient. The plaintiff individual investors filed suit against the firm and two of its brokers on behalf of a putative class of investors, alleging violations of Sections 10(b) of the Securities Exchange Act. The plaintiffs alleged that their investment accounts sustained a diminution of value as a result of one broker's misconduct and fraudulent behavior, including "churning," unauthorized trading and excessive commission fees. The defendants moved to dismiss the complaint for failure to state a claim, and the U.S. District Court for the Eastern District of Missouri concluded that the plaintiffs' allegations failed to

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satisfy the requirements for class certification and dismissed the complaint with prejudice, finding it unnecessary to determine whether the complaint met the heightened pleading requirements of the PSLRA.

On appeal, the Eighth Circuit concluded that the district court properly had dismissed the class claims, as the plaintiffs' allegations were too individualized to satisfy the uniformity requirements of Rule 23(b)(3). Specifically, one plaintiff alleged that the trading activities were excessive in light of his age, and the other that they were excessive in light of his desire to pay for his son's college education. Notwithstanding the affirmance of the denial of class certification, the Eighth Circuit held that the district court improperly dismissed the plaintiffs' individual securities fraud claims without undertaking an analysis of the claims under the PSLRA. Although defendants had argued that the complaint did not include individual claims, the Eighth Circuit determined that it did, even if they were "inartfully drafted," because the complaint alleged that the claims were brought by the individuals "and other class members" and contained damages calculations for the individual plaintiffs. The Eighth Circuit affirmed in part, reversed in part and remanded the individual claims for the district court's reconsideration.

DEMAND FUTILITY

Lambrecht v. O'Neal; *Sollins v. O'Neal*, Nos. 11-1285; 11-1589 (2d Cir. Dec. 4, 2012)

Click here to view the summary order.

Second Circuit Affirms Dismissal of Double-Derivative Claims Against BofA's Directors Concerning Merrill Lynch's Subprime Activities

In a summary order, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of double-derivative claims against Bank of America's directors concerning the subprime activities of Merrill Lynch prior to its acquisition by Bank of America because the shareholder-plaintiff could not show demand futility. The shareholder's allegations that Bank of America became "complicit" in Merrill Lynch's premerger conduct were properly directed against Bank of America, and could not be used to circumvent the demand requirement. Further, Bank of America's directors were protected from personal liability for Merrill Lynch's premerger conduct by an exculpatory provision in Bank of America's articles of incorporation. In addition, although Bank of America's directors may have faced a substantial likelihood of liability under Section 14(a) of the Securities Exchange Act for their failure to timely disclose bonuses paid to Merrill Lynch's executives — and so were potentially unable to impartially assess claims against *Bank of America's* officers and directors — Bank of America could bring an action against *Merrill Lynch's* executives without "substantially undermining" the defenses of Bank of America's directors. Thus, those directors' potential liability was too attenuated to excuse the demand requirement. The court also affirmed the dismissal of a separate shareholder action because the board delegated the decision to an audit committee, and the committee made a business judgment that the suit was not in Bank of America's best interests.

Swanson v. Weil, No. 11-cv-02142-WYD-KLM (D. Colo. Sept. 26, 2012)

Click here to view the opinion.

Colorado Federal Court Dismisses Derivative Lawsuit Against Janus Capital Group And Its Executive Officers, Finding Plaintiff Failed to Show Exception to Demand Futility

The U.S. District Court for the District of Colorado dismissed a derivative lawsuit against Janus Capital Group Inc.'s executive officers, holding that the plaintiff failed to meet his burden under *Aronson* to show demand futility. The plaintiff alleged that certain officers and directors breached their fiduciary duties, violated Section 14(a) of the Securities Exchange Act, and were unjustly enriched in connection with the award of unjustifiably high compensation in 2010. The court addressed both prongs of *Aronson*, finding the plaintiff failed to plead sufficiently particularized facts to establish a reasonable doubt concerning director disinterestedness or independence and that the plaintiff could not show that the purportedly high compensation was not the product of a valid exercise of business judgment. The court found that a declining stock price was not sufficient to show inappropriate levels of compensation. The court also rejected

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the proposition that mere shareholder disagreement with the challenged transaction was sufficient to rebut the presumption of business judgment. Accordingly, the court granted Janus and individual defendants' motions to dismiss.

In re HP Derivative Litig., No. 5:10-cv-3608 EJD (N.D. Cal. Sept. 25, 2012)

Click here to view the opinion

Northern District of California Dismisses Derivative Lawsuit Against Hewlett Packard, Its Former CEO Mark Hurd and Members of Its Board

Judge Edward J. Davila of the U.S. District Court for the Northern District of California dismissed the plaintiffs' derivative lawsuit against Hewlett Packard (HP), HP's former CEO Mark Hurd and members of HP's board of directors because the plaintiffs failed to meet their burden under both the *Aronson* and the *Rales* tests to prove demand futility. The plaintiffs alleged that Hurd and the members of HP's board of directors committed waste or otherwise breached their duties to HP by approving Hurd's August 6, 2010, separation agreement, valued at approximately $53 million. In dismissing the plaintiffs' claims, the court made two key determinations: first, that HP received valuable consideration from Hurd in the form of both a release of claims against HP and extended confidentiality, noncompete and nonsolicitation covenants; and second, that the benefits and cash payment made to Hurd, valued at approximately $53 million, were not excessive. The court further concluded that the plaintiffs failed to plead facts showing the materiality of the alleged misrepresentation in HP's 2010 proxy statement — that Hurd's employment agreement was still valid — or a connection between the alleged misrepresentation and any harm. The court allowed the plaintiffs leave to amend.

DIRECTORS AND DIRECTORS' DUTIES

Caremark Liability

South v. Baker, C.A. No. 7294-VCL (Del. Ch. Sept. 25, 2012)

Click here to view the opinion.

Court of Chancery Dismisses Derivative Shareholder Claims to Recover Damages Company Allegedly Suffered as a Result of Mine Safety Violations

Vice Chancellor J. Travis Laster of the Delaware Court of Chancery granted a motion to dismiss claims brought derivatively by shareholders of Hecla Mining Company to recover damages the company allegedly suffered as a result of mine safety violations and resulting federal securities actions. The plaintiffs asserted that the directors were liable for failure of oversight, or so-called *Caremark* liability. Seven derivative lawsuits in three different jurisdictions were pending relating to the same alleged safety violations. The defendants moved to dismiss the complaint pursuant to Rule 23.1, arguing that the plaintiffs failed to establish that pre-suit demand on the board of directors would have been futile.

The court found that the plaintiffs failed to state an oversight claim under *Caremark*. The court found that the plaintiffs' reference to a report and press release by the U.S. Mine Safety and Health Administration did not support a reasonable inference that the board consciously decided to violate positive law or support a reasonable inference of intentional inaction. The court also found that the safety incidents at a Hecla mine did not amount to "red flags" sufficient to put the board on notice of safety issues, and that the complaint failed to make sufficient allegations from which it could infer a systematic failure of the board to exercise oversight.

Because the complaint lacked particularized facts supporting a reasonable inference that a majority of the board faced a substantial risk of liability, the court found that the plaintiffs' suit was subject to dismissal under Rule 23.1. Taking into account the plaintiffs' failure to demand a books-and-records inspection prior to filing suit, the court dismissed the complaint with prejudice and without leave to amend as to the named plaintiff. The court reminded that "[b]ecause a plaintiff asserting a *Caremark* claim must plead facts sufficient to establish board involvement in conscious wrongdoing, our Supreme Court has admonished stockholders repeatedly to use

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Section 220 of the General Corporation Law, 8 *Del. C.* § 220, to obtain books and records and investigate their claims before filing suit." Thus, the court held that "[a] plaintiff who hurries to file a *Caremark* claim after the announcement of a corporate trauma behaves contrary to the interests of the corporation but consistent with the desires of the filing law firm to gain control of (or a role in) the litigation. The natural and logical inference from this recurring scenario is that the plaintiff is serving the interests of the law firm, rather than those of the corporation on whose behalf the plaintiff ostensibly seeks to litigate." Because the plaintiffs failed to rebut the presumption that they were not adequate representatives of the corporation — a presumption such a scenario creates — the court dismissed the suit with prejudice as to the named plaintiff.

Mergers and Acquisitions

Ams. Mining Corp. v. Theriault, Nos. 29 and 30, 2012 (Del. Aug. 27, 2012)

Click here to view the opinion.

Delaware Supreme Court Affirms Post-Trial Decision and Final Judgment Awarding More Than $2 Billion in Damages in Southern Peru Copper Litigation

The Delaware Supreme Court, sitting en banc, affirmed the Delaware Court of Chancery's post-trial decision and final judgment awarding more than $2 billion in damages (including interest) and $304 million in attorneys' fees in *In re Southern Peru Copper Corp. Shareholder Derivative Litigation*, C.A. No. 961-CS (Del. Ch. Oct. 14, 2011, revised Dec. 20, 2011). In *Southern Peru*, the Court of Chancery held that a subsidiary of Southern Peru's controlling shareholder and its affiliate directors breached their fiduciary duties of loyalty to Southern Peru and its minority stockholders by causing Southern Peru to acquire the controller's 99.15 percent interest in a Mexican mining company, Minera Mexico, S.A. de C.V., for an unfair price. The Court of Chancery found that the trial evidence established that the controlling shareholder extracted an unfair deal due to an ineffective special committee.

The defendants raised five issues on appeal, and the Delaware Supreme Court held that all were without merit. First, the court found that the Court of Chancery properly exercised its discretion when it excluded the testimony of a key defense witness. The court held that the defendants' assertion that they were unfairly prejudiced was undermined by the record because they had previously acknowledged that they may decide not to have a live witness at the trial. Moreover, the Court of Chancery's finding that an "eleventh-hour" witness would be unfair to the plaintiff was supported by the record and the product of a logical deductive reasoning process. Second, the court held the Court of Chancery did not commit an error by failing to allocate the burden of proof for the entire fairness standard before the trial began because the record supported the Court of Chancery's finding that the evidence of unfairness was so overwhelming that the question of whose burden it was at trial was irrelevant to the outcome. However, the Delaware Supreme Court recognized that, if possible, the party who bears the burden of proof should be determined before the trial begins.

Third, the Delaware Supreme Court affirmed the Court of Chancery's judgment that the merger consideration was unfair, holding that the Court of Chancery's factual findings were supported by the record and its conclusions were the product of an orderly and logical deductive reasoning process. Fourth, the Delaware Supreme Court held that the record reflected that the Court of Chancery properly exercised its broad historic discretionary powers when awarding damages based on the difference between what was paid and the value of what was received. Lastly, the Delaware Supreme Court affirmed the plaintiffs' attorneys fees and rejected the defendants' arguments that the Court of Chancery gave undue weight to the first *Sugarland* factor, *i.e.*, the result achieved. On the issue of attorneys' fees, Justice Carolyn Berger dissented because "the trial court did not apply *Sugarland*, it applied its own world views on incentives, bankers' compensation, and envy." Justice Berger further explained that the analysis "focused on the perceived need to incentivize plaintiffs' lawyers to take cases to trial" and was not based on *Sugarland*.

In re Synthes, Inc. S'holder Litig., C.A. No. 6452 (Del. Ch. Aug. 17, 2012)

Click here to view the opinion.

Delaware Court of Chancery Dismisses Minority Shareholder Claims Related to Merger of Synthes and Johnson & Johnson

Chancellor Leo E. Strine Jr. of the Delaware Court of Chancery dismissed a minority shareholder plaintiffs' claims alleging breach of fiduciary duty arising out of the merger between Synthes, Inc. and Johnson & Johnson. The plaintiff stockholders argued that they stated a claim for breach of fiduciary duty because Synthes' controlling stockholder refused to consider an acquisition offer that would have cashed out all of the minority stockholders, but would have required the controlling stockholder to remain as an investor in the company. Instead, the controlling stockholder worked with the other directors of Synthes and, after affording a consortium of private equity buyers a chance to make an all-cash, all-shares offer, ultimately accepted a bid made by Johnson & Johnson for 65 percent stock and 35 percent cash, and consummated a merger on those terms. Importantly, the controlling stockholder received the same treatment in the merger as the other stockholders. As the court explained it, "although the controller was allowed by our law to seek a premium for his own controlling position, he did not and instead allowed the minority to share ratably in the control premium paid by J & J." As a result, the court found that the controlling stockholder did not have "any conflict with the minority that justifies the imposition of the entire fairness standard. The controlling stockholder had more incentive than anyone to maximize the sale price of the company, and Delaware does not require a controlling stockholder to penalize itself and accept less than the minority, in order to afford the minority better terms. Rather, pro rata treatment remains a form of safe harbor under our law."

In addition to refusing to apply entire fairness review, the court rejected the argument that the case was governed by *Revlon*, "because it is an 'end stage' transaction in which Synthes' shareholders will only own 7% of the surviving entity." The court reminded that "the settled authority of [the Delaware] Supreme Court in *In re Santa Fe Pacific Corp. Shareholder Litigation* ... held that a merger transaction involving nearly equivalent consideration of 33% cash and 67% stock did not trigger *Revlon* review when there was no basis to infer that the stock portion of that consideration was stock in a controlled company." Finally, the court remarked that when plaintiffs rely heavily on a proxy statement for their allegations, the court cannot, "draw inferences in their favor that contradict that document, unless they *plead* non-conclusory facts contradicting it. Playing games with virtual ellipses is not a way to plead non-conclusory facts."

In re Answers Corp. S'holders Litig., C.A. No. 6170-VCN (Del. Ch. July 19, 2012)

Click here to view the opinion

Click here to view the opinion denying reargument.

Court of Chancery Declines Request for Reargument of Opinion Denying the Defendants' Motion to Dismiss Claims Related to the Merger of Answers and AFCV

Vice Chancellor John W. Noble of the Court of Chancery denied the defendants' motions for reargument of the court's April 11, 2012, memorandum opinion (the April Opinion) that denied, in part, the defendants' motion to dismiss claims for breaches of fiduciary duty and aiding and abetting those breaches in connection with a merger between Answers Corporation and AFCV Holdings.

In the April Opinion, the court held that the "Complaint adequately plead[ed] that the Board breached its duty of loyalty by conducting a flawed sales process," despite the fact that a majority of the board was independent and disinterested as alleged. First, the court held that the plaintiffs alleged sufficient facts that three board members — Answer chairman and CEO Robert S. Rosenschein and two representatives of Redpoint, a 30 percent shareholder — were interested in the transaction. The court noted that although company managers are not typically interested simply because they will maintain their positions post-transaction, "here, the Complaint alleges that Rosenschein would lose his job unless he completed a change of control transaction." Further, the court stated that the complaint adequately alleged that the Redpoint representatives were interested because they sought to sell the company to achieve liquidity for Redpoint, which was a unique benefit. As for the remaining board members, the court held that the complaint adequately alleged bad faith because the board members

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purportedly knew that the three directors wanted to end the sales process quickly so that they could enter into a merger agreement before the market price rose above the offer price, but they nevertheless agreed to expedite the sales process.

In the opinion denying reargument, the court rejected the defendants' contention that disinterested directors can only act in bad faith when they are aware of a self-dealing action by a person owing a fiduciary duty and they act to further that self-dealing action. The court stated that the Delaware Supreme Court opinion *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. 2009), reaffirmed that disinterested directors act in bad faith "if they knowingly and completely fail[] to undertake their responsibilities ... ." The court held that the complaint adequately alleged that the disinterested board members expected that Answers' stock price was going to rise above AFCV's offer and, based on that expectation, they agreed to speed up the sales process. The court appeared to give weight to the allegation that the board's financial advisor had identified the risk that "time is not a friend to this deal with continued out performance and a looming q4 earnings call." The court noted that these are "unique facts" that supported an inference that the disinterested directors "knowingly and completely failed to undertake" their duty in the change-of-control context to seek the highest value reasonably available for Answers' shareholders.

DODD-FRANK ACT

James L. Turkle Trust v. Wells Fargo & Co., No. C 11-6494 CW (N.D. Cal. July 2, 2012)

Click here to view the opinion.

Northern District of California Finds Dodd-Frank Enactment Constitutes a Capital Treatment Event Under a Trust Agreement for Trust-Preferred Securities

Chief Judge Claudia Wilken of the U.S. District Court for the Northern District of California dismissed a plaintiff's allegations of breach of contract and breach of the covenant of good faith and fair dealing, holding that a capital treatment event occurred under a trust agreement with the enactment of the Dodd-Frank Act. The plaintiff was a holder of the defendant's Capital Trust X securities, trust-preferred securities issued on November 21, 2007. The trust agreement gave the defendant the right to redeem all or part of the outstanding Capital Trust X securities at any time on or after December 15, 2012. The trust agreement also gave the defendant the right to redeem all, but not some, of the Capital Trust X securities for their face value, plus interest, prior to December 15, 2012, upon the occurrence of a capital treatment event.

On July 21, 2012, President Obama signed into law the Dodd-Frank Act, which disallowed the treatment of trust-preferred securities as Tier 1 capital. Bank holding companies with trust-preferred securities were required to phase in the new requirements under the act from January 1, 2013, through January 1, 2016. Thus, the phase-in period for the new requirements would begin after the December 15, 2012, optional redemption date for the plaintiff's Capital Trust X securities. On September 1, 2011, the defendant announced that because a capital treatment event occurred with the passage of the Dodd-Frank Act, the defendant would redeem all of its Capital Trust X securities on October 3, 2011; it did so on October 3, 2011, as announced. The plaintiff, on behalf of itself and a class of all holders of Capital Trust X securities, brought an action charging the defendant with breach of contract and breach of the implied covenant of good faith and fair dealing for redeeming the securities before the optional redemption date of December 15, 2012. The court determined that, even though the optional redemption date would occur before the start of the phase-in period for the Dodd-Frank Act on January 1, 2013, and thus would not affect the defendant's ability to treat any of the Capital Trust X securities as Tier I capital until after the optional redemption date had passed, the defendant's determination that the enactment of the Dodd-Frank Act constituted a capital treatment event was nonetheless reasonable and thus proper.

ECONOMIC LOSS

Acticon AG v. China N.E. Petroleum Holdings, Ltd., No. 11-4544-cv (2d Cir. Aug. 1, 2012)

Click here to view the opinion.

Second Circuit Determines That Share Price Rebound After an Alleged Fraud Does Not Negate an Inference That the Plaintiff Has Suffered an Economic Loss

The U.S. Court of Appeals for the Second Circuit reversed the district court and upheld claims that an energy company violated Section 10(b) of the Securities Exchange Act by allegedly misleading investors about its reported earnings, reserves and internal controls. Although the company's share price dropped after it allegedly disclosed the misrepresentations and omissions, it later rebounded, and the plaintiff could have sold its holdings and avoided a loss on certain days. The court held that a price rebound after an alleged fraud, without more, does not negate an inference that the plaintiff has suffered an economic loss. It reasoned that if the price of a stock is artificially inflated when the plaintiff purchases the stock, the plaintiff is still harmed if the stock rises for unrelated reasons after the fraud is disclosed. Because the company did not show whether the fraud represented the market's reaction to the alleged disclosures or unrelated gains, the plaintiffs adequately alleged an economic loss.

ERISA

Dudenhoefer v. Fifth Third Bancorp, No. 11-3012 (6th Cir. Sept. 5, 2012)

Click here to view the opinion.

Sixth Circuit Reverses Dismissal of ERISA Class Action Against Subprime Lender

The U.S. Court of Appeals for the Sixth Circuit reversed a decision dismissing a putative class action against Fifth Third Bancorp, holding that the plaintiffs adequately alleged that the company's retirement plan fiduciaries violated ERISA by continuing to invest in company stock while the stock was plummeting in value due to Fifth Third's status as a subprime lender. The plaintiffs, participants in and contributors to the company retirement plan, filed a putative class action alleging that Fifth Third and plan fiduciaries violated ERISA by continuing to invest in and hold Fifth Third stock between 2007 and 2009, when the stock lost 74 percent of its value as a result of the company's subprime exposure. The complaint further alleged the defendants failed to provide plan participants with accurate and complete information about the company and investments in company stock. The defendants moved to dismiss, and the district court granted the motion for failure to state a plausible claim, finding that the defendants were entitled to the "so-called *Kuper* or *Moench* presumption" that their decision to remain invested in company stock was reasonable. The court held that the plaintiffs failed to overcome this presumption.

On appeal, the Sixth Circuit reversed, noting that recent precedent established that it was not appropriate to apply at the motion-to-dismiss stage a presumption that investing in company stock was reasonable. *See Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 592 (6th Cir. 2012) (citing *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995)). The court instead applied the requirements of notice pleading under Fed. R. Civ. P. 8 and determined that the complaint plausibly alleged that plan fiduciaries had breached their duties to the plan. Specifically, the plaintiffs alleged that, by the start of the class period, the defendants had knowledge of the risks of subprime practices, and that these warnings should have led the defendants to investigate whether Fifth Third stock still was a prudent investment, given the company's own exposure to subprime lending. The court further noted that the defendants had incorporated the bank's SEC filings, which allegedly failed to disclose the company's financial risks, into plan documents, and that this constituted a fiduciary communication. The Sixth Circuit reversed and remanded the case for further proceedings in the district court. The opinion reflected a departure from the decisions of other federal courts of appeal, including the U.S. Courts of Appeal for the Second and Third Circuits, which had applied the *Moench* presumption at the pleading stage. *See, e.g.*, *In re Citigroup ERISA Litigation*, 662 F.3d 128, 139 (2d Cir. 2011); *Edgar v. Avaya*, 503 F.3d 340, 349 (3d Cir. 2007).

FOREIGN CORPORATIONS

Sec. & Exch. Comm'n v. Tourre, No. 10 Civ. 3229 (KBF) (S.D.N.Y. Nov. 19, 2012)

Click here to view the opinion.

S.D.N.Y. Denies SEC Motion to Reinstate Claim Against Goldman Sachs Vice President In Connection With Foreign Entity's Purchase of Collateralized Debt Obligation

Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York denied an SEC motion to reinstate a previously dismissed claim that a former vice president at Goldman Sachs violated Section 10(b) of the Securities Exchange Act in connection with a foreign entity's purchase of a collateralized debt obligation. The SEC argued that the claim should be reinstated after the U.S. Court of Appeals for the Second Circuit held in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), that a transaction's domestic transfer of title is sufficient to survive a motion to dismiss based on *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). The SEC asserted that the claim survived because the CDO's title was transferred from a trustee to Goldman Sachs — but not to the allegedly defrauded investor — in the United States. However, the court determined that the domestic transaction must be the alleged fraudulent transaction in order for a claim to survive under *Morrison*. Because the vice president's alleged fraud was purportedly committed in connection with the transfer of securities to a foreign investor outside the U.S. — not to Goldman Sachs — the SEC's claim was correctly dismissed under *Morrison*.

FORWARD-LOOKING STATEMENTS

Rabbani v. DryShips Inc., No. 4:12-cv-00130 RWS (E.D. Mo. Nov. 6, 2012)

Click here to view the opinion.

Missouri Federal Court Dismisses Purported Class Action Against Shipping Company Premised on Forward-Looking Statements

Judge Rodney W. Sippel of the U.S. District Court for the Eastern District of Missouri dismissed a purported class action against DryShips, Inc. by investors claiming that the shipping company violated Section 10(b) of the Securities Exchange Act by allegedly making false and misleading statements or omissions about a planned spin-off of a subsidiary and its ability to comply with existing loan covenants and general financial condition.

The court dismissed the purported class action because the plaintiffs did not sufficiently allege an actionable misrepresentation or omission or scienter. The court emphasized that the "PSLRA's falsity pleading requires particularity and cannot be satisfied by alleging th[at] defendants made statements 'and then showing in hindsight that the statement is false.'" Although DryShips planned to add new ships to its fleet, the company called off plans to do so amid the global economic crisis that reduced shipping demand. As these statements only became false in hindsight, they were not actionable. Similarly, the plaintiffs provided no facts contemporaneous to the statement that DryShips was not at risk of breaching loan covenants that would show the statement was knowingly false at the time. The plaintiffs failed to show how the shipping company's debt or penalties for contractual breach placed DryShips in danger of default on its loan payments at the time of statement in 2008, or that DryShips could have predicted the depth or length of the coming recession. And, finally, the court concluded that the plaintiffs failed to state a claim as to the statement that DryShips was in "strong financial condition" because such statements are "quintessential puffery." The court also noted that "[t]he inference of scienter arising from plaintiffs' pleadings is far from compelling. ... [A] much more likely inference exists: [The CEO of DryShips], like many in 2008, could not know how bad the recession would be and made an overly optimistic forecast."

The court also dismissed claims by plaintiffs who purchased DryShips' common stock in two at-the-market offerings. The subclass alleged that DryShips and the underwriters violated Sections 11, 12 and 15 of the Securities Act by making false or misleading statements and

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omissions about plans to spin-off a DryShips subsidiary. The court, however, dismissed these claims because the statements were forward-looking and accompanied by sufficient cautionary language to invoke both the "bespeaks caution" doctrine and the PSLRA's safe harbor provision.

Rochester Laborers Pension Fund v. Monsanto Co., No. 4:10CV1380 CDP (E.D. Mo. Aug. 1, 2012)

Click here to view the opinion.

Court Dismisses Class Action Against Monsanto Where Forward-Looking Statements Were Accompanied by Specific Warning About Volatility of Business

Judge Catherine Perry of the U.S. District Court for the Eastern District of Missouri dismissed a putative class action alleging that Monsanto Company had violated Sections 10(b) and 20(a) of the Securities Exchange Act by allegedly concealing, among other things, a declining demand for its herbicide Roundup. The plaintiffs claimed that Monsanto failed to disclose that competition from Chinese producers of a generic glyphosate herbicide would force Monsanto to reduce the price of Roundup, which had been previously increased due to a glyphosate supply shortage. Monsanto moved to dismiss the complaint on the ground that the challenged statements either were not actionable or were protected by the safe harbor provision of the Private Securities Litigation Reform Act.

The court granted Monsanto's motion to dismiss the complaint because almost all of the statements were forward-looking statements. Moreover, the court stressed that Monsanto repeatedly warned investors of the very risks that the plaintiffs alleged Monsanto failed disclose. Specifically, Monsanto warned that "increasing competition from agricultural biotechnology firms and from major agrichemical, seed and food companies," "continued competition for our Roundup herbicides," and "[Monsanto's] ability to match our production to the level of product demanded by farmers or our licensed customers has a significant effect on our sales, costs, and growth potential." The court explained that these were not generic, boilerplate descriptions of risk but rather specific warnings about the volatility of the glyphosate business, the competition faced by Roundup, and issues with supply and demand affecting sales. Because the forward-looking statements were accompanied by meaningful cautionary statements, the statements were protected by the PSLRA safe harbor provision.

INSIDER TRADING

Donoghue v. Bulldog Investors Gen. P'ship, No. 11-1708-cv (2d Cir. Oct. 1, 2012)

Click here to view the opinion.

Second Circuit Affirms Judgment Requiring Disgorgement of Profits From Hedge Fund's Short-Swing Trading

The U.S. Court of Appeals for the Second Circuit affirmed a judgment requiring the disgorgement of profits from a hedge fund's short-swing trading under Section 16(b) of the Securities Exchange Act. The court held that Section 16(b) created a fiduciary duty among 10 percent beneficial owners to avoid short-swing trades. Breach of this duty constituted an injury-in-fact that satisfied Article III, and so the plaintiff had constitutional standing to bring her claim, even though the plaintiff could not show harm to the company that issued the securities.

Sec. & Exch. Comm'n v. Obus, No. 10-4749-cv (2d Cir. Sept. 6, 2012)

Click here to view the opinion.

Second Circuit Vacates Summary Judgment In Favor of Three Defendants in Insider Trading Case

The U.S. Court of Appeals for the Second Circuit vacated summary judgment in favor of three individual defendants on claims that the defendants violated Section 10(b) of the Securities Exchange Act by allegedly committing insider trading. The SEC alleged that an employee of GE acquired knowledge of a pending acquisition and relayed that information to a friend at a hedge fund, who in turn told a supervisor who traded on the information. The SEC presented testimony that the GE employee had a conversation with the friend concerning the target shortly after

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learning confidential information, and that the friend immediately told his supervisor. The SEC also presented testimony that the supervisor stated that he had been "tipped off" by GE. The district court erred by relying on GE's internal investigation, which concluded that there was no violation, because GE's investigation was not "indisputably reliable," and GE did not have access to outside sources, some of whom gave evidence that contradicted the investigation's conclusions. The SEC also presented competent evidence that the friend knew, based on his experience in a hedge fund and his knowledge of the GE employee's position, that the information he allegedly received was confidential. With regard to the friend's supervisor, testimony that he stated that he had been tipped off and that the friend told him that the GE employee could be fired for disclosing the information was sufficient to show the supervisor's knowledge that the information was confidential.

INVESTMENT COMPANY ACT

Sivolella v. AXA Equitable Life Ins. Co., No. 11-4194 (PGS) (D.N.J. Sept. 25, 2012)

Click here to view the opinion.

New Jersey Federal Court Upholds Claims Concerning Investment Adviser's Allegedly Excessive Management Fees

Judge Peter G. Sheridan of the U.S. District Court for the District of New Jersey upheld claims that an investment adviser violated Section 36(b) of the Investment Company Act by allegedly charging excessive management fees. (The investment adviser did not dispute in its motion to dismiss that it had violated Section 36(b).) The investment adviser argued that the plaintiff was not the legal owner of the securities at issue (because she was not the "record owner") and so she did not have statutory standing because she was not a "security holder." However, the court determined that the plaintiff had an economic stake in the transactions because she paid the challenged fees, bore the risk of poor investment performance and had the right to instruct the funds holding the actual shares how to vote those shares. Thus, the plaintiff was a "security holder" under Section 36(b), which must be broadly construed to protect investors.

LOSS CAUSATION

Bach v. Amedisys, No. 10-395-BAJ-CN (M.D. La. June 28, 2012)

Click here to view the opinion.

Louisiana Federal Court Dismisses Securities Fraud Claim for Failure to Plead Loss Causation Where Purported Corrective Disclosures Were Rejected

Chief Judge Brian Jackson of the U.S. District Court for the Middle District of Louisiana granted home health care provider Amedisys Inc.'s motion to dismiss a consolidated class action alleging that the company and several executives violated Section 10(b) of the Securities Exchange Act by allegedly improperly obtaining Medicare reimbursements that materially inflated the company's reported revenues and earnings. The complaint asserted that Amedisys certified patients for medically unnecessary treatments and pressured or intimidated nurses and therapists into providing unnecessary treatment visits in order to trigger higher fees. The plaintiffs alleged that fraudulently obtained Medicare reimbursements, which represented roughly 90 percent of the company's reimbursements for services, inflated Amedisys' reported earnings.

To establish loss causation, the plaintiffs relied on purported corrective disclosures that occurred through: (1) media reports speculating about potential Medicare fraud, (2) resignations of executives, (3) a *Wall Street Journal* article featuring statistical analysis of information already available to the market and statements from a nurse who alleged over-treatment of patients, (4) the announcement of government investigations, and (5) the second-quarter earnings statement attributing poor performance to decreased certifications for treatment from clinicians fearful of regulatory scrutiny and investigations.

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The court rejected each of these purported corrective disclosures because none revealed actual evidence of fraud. The court explained that "[o]nce again, the court must distinguish between actual corrective disclosures of fraud, and events which ... a reasonable investor may view ... as indicators of risk because they reveal the potential existence of future corrective information." Because the news reports, earnings statements and government announcements did not reveal any fraud or misrepresentations by Amedisys or its executives, the court concluded that these were not corrective disclosures and the plaintiffs therefore failed to plead loss causation.

MATERIALITY

In re Boston Scientific Corp. Sec. Litig.,
No. 11-2250
(1st Cir. July 12, 2012)

Click here to view the opinion.

First Circuit Affirms Dismissal of Claims That Medical Device Manufacturer Failed to Disclose Material Information About Its Sales Force

The U.S. Court of Appeals for the First Circuit affirmed the dismissal of claims that a medical device manufacturer violated Section 10(b) of the Securities Exchange Act by allegedly failing to disclose material information about its sales force. The manufacturer made statements concerning the size and effectiveness of its sales force, without disclosing that it was conducting an internal investigation of certain sales representatives, 10 of whom were eventually fired. The internal audit was not material before it was completed — only a small number of employees were being investigated, and it was not clear that the manufacturer would fire any of the investigated employees. The manufacturer's failure to disclose that it fired 10 employees when disclosing risk factors was also not material, because those fired employees represented less than 1 percent of the manufacturer's sales force, and their later defection to a competitor was not foreseeable. Further, the plaintiffs did not adequately plead scienter, because they did not allege facts showing that the manufacturer knew it was withholding material information, even if the employees' defection to a competitor was "marginally material." In addition, the alleged impact on the manufacturer's finances was too small to support a strong inference of scienter.

MORTGAGE-BACKED SECURITIES

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.,
No. 11-2762-cv
(2d Cir. Sept. 6, 2012)

Click here to view the opinion.

Second Circuit Vacates Ruling That Purported Lead Plaintiff Lacked Standing to Assert Claims on Behalf of Purchasers of Certificates Issued in 17 Separate Offerings

The U.S. Court of Appeals for the Second Circuit vacated a ruling that a purported lead plaintiff lacked standing to assert claims under Sections 11 and 12(a)(2) of the Securities Act on behalf of purchasers of certificates issued in 17 separate offerings. That plaintiff purchased securities from two trusts backed by securitized loans, but it brought suit on behalf of investors who had purchased certificates in 15 other trusts using the same shelf registration statements but different supplements. The court held that a plaintiff has class standing if (1) the defendant's alleged conduct has personally injured the plaintiff and (2) the defendant's conduct implicates the "same set of concerns" as the conduct that allegedly injured other purported class members. The court held that the plaintiff had standing to represent all investors in trusts backed by loans with the same originators as those of the two trusts the plaintiff had invested in, because those investments raised a similar set of concerns. But the plaintiff did not have standing with respect to trusts with different originators, because the plaintiff's claims were based on the originators' alleged failure to follow their underwriting guidelines, and whether an originator deviated from its underwriting guidelines required underwriter-specific proof, even if the alleged misrepresentations were identical. In addition, although the market for the certificates was illiquid and the plaintiff had received all scheduled payments for its certificates, the plaintiff still adequately alleged a loss in the form of a credit risk that was allegedly higher than the risk represented in the offering documents.

Fed. Hous. Fin. Agency v. Deutsche Bank AG, No. 11 Civ. 6192 (DLC) (S.D.N.Y. Nov. 12, 2012)

Click here to view the opinion.

S.D.N.Y. Upholds Claims Brought by the Federal Housing Finance Agency on Behalf of Fannie Mae and Freddie Mac Against Deutsche Bank Concerning MBS Sales

Judge Denise Cote of the U.S. District Court for the Southern District of New York upheld claims, brought by the Federal Housing Finance Agency on behalf of Fannie Mae and Freddie Mac, that Deutsche Bank violated Sections 11 and 12(a)(2) of the Securities Act in connection with sales of mortgage-backed securities. The court found that the agency adequately alleged reliance because Fannie Mae and Freddie Mac purportedly relied upon term sheets and free-writing prospectuses that contained the challenged data, even though the complaint was based on prospectus supplements — which incorporated that data — issued after Fannie Mae and Freddie Mac had acquired the MBS at issue. In addition, the court found that disclaimers in the term sheets and free-writing prospectuses stating that the materials were "preliminary" were not disclaimers of reliability where Deutsche Bank allegedly used those materials to market and sell the securities at issue.

Fed. Hous. Fin. Agency v. JPMorgan Chase & Co., No. 11 Civ. 6188 (DLC) (S.D.N.Y. Nov. 5, 2012)

Click here to view the opinion.

S.D.N.Y. Upholds Claims Brought by the Federal Housing Finance Agency on Behalf of Fannie Mae and Freddie Mac Against JPMorgan Concerning MBS Sales

Judge Denise Cote of the U.S. District Court for the Southern District of New York upheld claims, brought by the Federal Housing Finance Agency on behalf of Fannie Mae and Freddie Mac, that JPMorgan violated Sections 11 and 12(a)(2) of the Securities Act in connection with sales of mortgage-backed securities. The agency alleged that JPMorgan did not follow its underwriting guidelines, as shown by (1) the results of private and government investigations, (2) the collapse in the MBS's credit ratings, (3) the fact that more than 60 percent of the loans intended to be the safest in the securitizations were allegedly in default, and (4) a forensic review of loan files from three securitizations allegedly showing that JPMorgan did not comply with its underwriting guidelines for the majority of loans examined.

The court found that although the private and government investigations alone were "insufficiently tethered" to the securities at issue to support the agency's claims, they provided a basis for JPMorgan's alleged "systemic failure" in packaging the MBS, while the MBS's subsequent loan performance and ratings downgrades linked the individual securities to the alleged misrepresentations. Further, the court found that allegations concerning the MBS's loan performance and ratings downgrades were not improperly alleging fraud by hindsight, because the complaint adequately alleged that they evidenced defects that were present in the securities at the time of sale, but not disclosed to investors. In addition, the court held that although the agency's forensic review covered only three out of 127 securitizations, no such review was necessary to satisfy Rule 9(b)'s pleading requirements.

In re Morgan Stanley Mortg. Pass-Through Certificates Litig., No. 09 Civ. 2137 (LTS) (MHD) (S.D.N.Y. July 16, 2012)

Click here to view the opinion.

S.D.N.Y. Upholds Claims That Morgan Stanley Made Misstatements And Omissions in Connection With the Sale of Mortgage-Backed Securities

Judge Laura Taylor Swain of the U.S. District Court for the Southern District of New York upheld claims that Morgan Stanley violated Sections 11 and 12(a)(2) of the Securities Act by allegedly making misstatements and omissions in connection with the sale of mortgage-backed securities. The court determined that the claims were not barred by the Securities Act's one-year limitations period because the plaintiffs could not have adequately pled their Securities Act claims before the one-year statutory period had run; the news reports cited by Morgan Stanley did not specifically relate to the securities at issue; and the securities at issue remained investment grade until after the applicable period. A reasonably diligent investor would therefore have been unlikely to discover a probable claim more than one year before the plaintiffs brought the claims at issue.

PSLRA DISCOVERY STAY

Union Cent. Life Ins. Co. v. Ally Fin., Inc., No. 11 Civ. 2890 (GBD) (JCF) (S.D.N.Y. Aug. 17, 2012)

Click here to view the opinion.

S.D.N.Y. Denies Plaintiffs' Motion to Commence Discovery on State Law Claims While a Motion to Dismiss Is Pending

In an action alleging violations of the Securities Exchange Act and state common law claims, Magistrate Judge James C. Francis IV of the U.S. District Court for the Southern District of New York denied the plaintiffs' motion to commence discovery with respect to their state law claims against certain defendants while a motion to dismiss was pending. Although the plaintiffs sought discovery only from the defendants against whom they had not asserted federal securities claims, the court ruled that under the plain language of the PSLRA, the stay applies to federal securities *actions*, not individual claims as the plaintiffs asserted. The court distinguished *Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162 (S.D.N.Y. 2001), which held that the PSLRA stay did not apply to state law claims that did not mirror federal securities claims, because the state law claims at issue were "closely intertwined" with the plaintiffs' federal securities claims. In addition, maintaining a broad stay was appropriate because coordination among the defendants was particularly important for claims concerning mortgage-backed securities, such as those at issue.

SCIENTER

Fried v. Lehman Bros. Real Estate Assocs. III, L.P., No. 11-1774 (2d Cir. Dec. 20, 2012)

Click here to view the opinion.

Second Circuit Affirms Dismissal of Claims Against Affiliates of Lehman Bros. Related to the Sale of Limited Partnerships in Real Estate Investment Partnerships

In a summary order, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of claims that the defendants (affiliates of Lehman Bros.) violated Section 10(b) of the Securities Exchange Act by allegedly making misrepresentations and omissions in connection with the sale of limited partnerships in four real estate investment partnerships. Lehman's disclosure in a Form 8-K that it suffered a $300 million loss in "real estate held for sale" for the period before the plaintiffs committed to buy the limited partnerships did not give rise to a strong inference that the defendants knew that there had been a loss in the particular properties bound for the investment partnerships at issue. In contrast, internal Lehman documents demonstrate that the defendants believed that the value of the properties bound for the investment partnerships had increased in value at that point. Similarly, the complaint did not allege that an internal pre-sale presentation to Lehman's CEO recommending reducing Lehman's own real estate balance sheet recommended doing so by marking down the value of the holdings (as opposed to disposing of some of them), and even if it did, there were no allegations that the recommendation referred to the properties bound for the partnerships.

KB Partners I, LP v. Barbier, No. A-11-CA-1034-SS (W.D. Tex. Nov. 20, 2012)

Click here to view the opinion.

Western District of Texas Refuses to Dismiss Investors' Suit Alleging Concealed Information About Pain Drug

Judge Sam Sparks of the U.S. District Court for the Western District of Texas upheld claims that Pain Therapeutics, Inc. and certain executives violated Section 10(b) of the Securities Exchange Act by allegedly misleading investors about the prospects of FDA approval for pain-killer Remoxy by purportedly concealing information. (The court had dismissed the plaintiff's earlier complaint for failure to adequately plead scienter as required by the PSLRA.)

The court ruled that the plaintiff's amended complaint adequately set forth information alleging that Pain Therapeutics' executives concealed damaging information about Remoxy. The court noted that in the amended complaint the plaintiff added factual allegations detailing the regular

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updates that the company's executives received about ongoing testing of the drug, as well as allegations about frequent conversations and meetings between Pain Therapeutics and its business partner, which had assumed responsibility for the regulatory approval of the drug. The court further noted that allegations that the individual defendants were kept informed about the specific testing challenges faced by Remoxy, and that they discussed their awareness of ongoing testing of the drug at investor conferences, further supported an inference that the defendants had acted with scienter.

Ross v. Career Educ. Corp., No. 12 C 276 (N.D. Ill. Oct. 30, 2012)

Click here to view the opinion.

Northern District of Illinois Refuses to Dismiss Securities Fraud Claims Related to For-Profit Education Company's Alleged Falsification of Job Placement Rates

Judge Matthew Kennelly of the U.S. District Court for the Northern District of Illinois denied in part and granted in part a motion to dismiss claims that Career Education Corp. (CEC) and certain executives violated Section 10(b) of the Securities Exchange Act by making allegedly false statements about the for-profit education company's student placement rates, regulatory compliance and accreditation status. The complaint asserted that CEC and certain of its executives allegedly failed to disclose the company's improper practices related to determination of students' post-education job placement rates between 2009 and 2011. CEC had disclosed irregularities related to its student placement rates in 2007, and subsequently had replaced its CEO and initiated an internal investigation.

The court held that the plaintiffs pleaded facts adequate to support their allegations, including by providing specific descriptions of the confidential witnesses who were the sources of the allegations, and thus met the PSLRA's particularity requirements. The court further determined that the alleged representations were material because the disclosure of CEC's actual student placement rate would have "significantly altered the mix of information available to investors." Moreover, given that CEC made the allegedly false statements about its placement rates shortly after a change in management, the statements reasonably could have been understood by an investor to convey that CEC had remedied past problems. The court granted the motion to dismiss only as to CEC's CFO, finding that the plaintiffs had alleged insufficient facts to permit a reasonable inference of scienter by stating only that the executive "knew" about all material aspects of CEC's operations and approved CEC's SEC filings.

In re Fed. Nat'l Mortg. Ass'n Sec., Derivative & "ERISA" Litig., No. 04-1639 (RJL) (D.D.C. Oct. 16, 2012)

Click here to view the opinion.

D.C. Federal Court Dismisses Claims Relating to Allegedly False Statements Made by Fannie Mae's Former CFO

Judge Richard J. Leon of the U.S. District Court for the District of Columbia granted summary judgment in favor of Fannie Mae's former CFO, dismissing claims that he violated Section 10(b) of the Securities Act by making allegedly false statements about Fannie Mae's accounting, risk management and internal controls, because the plaintiffs did not demonstrate a compelling inference of scienter. The court found that the CFO's reliance on internal and external accounting experts was evidence of good faith and cut against an inference of scienter. With regard to Fannie Mae's allegedly weak internal controls, the court held that an email in which the CFO stated that questions from the chairman of the internal audit committee must be sent to another senior officer did not have any connection to accounting fraud, and so did not evidence scienter, and the plaintiffs did not present any additional evidence showing that the CFO knew that Fannie Mae had weak internal controls. The court held that the plaintiffs also did not present evidence that the CFO knew that Fannie Mae was not in compliance with certain GAAP provisions; the plaintiffs either failed to show that the CFO had seen documents allegedly showing that Fannie Mae was not complying with GAAP or those documents did not state that Fannie Mae was not in compliance. Similarly, the plaintiffs did not show that the CFO had seen documents that allegedly showed that Fannie Mae was hiding its accounting practices from its auditor and the

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SEC. Further, the reports of regulators that the plaintiffs relied on were developed after the fact, and did not specifically state what the CFO allegedly knew or disregarded. The plaintiffs also failed to show that the CFO had a motive to commit fraud, because the fact that his compensation was tied to Fannie Mae's share price was not evidence of scienter as a matter of law, and the CFO increased his holdings of Fannie Mae's securities by 20 percent during the class period.

SEC ENFORCEMENT

Sec. & Exch. Comm'n v. Apuzzo, No. 11-696-cv (2d Cir. Aug. 8, 2012)

Click here to view the opinion.

Second Circuit Holds That SEC Not Required to Plead That CFO's Conduct Was a Proximate Cause of Primary Securities Violation

The U.S. Court of Appeals for the Second Circuit, reversing the district court, upheld the SEC's claims that the former CFO of a manufacturer violated Section 20(e) of the Securities Exchange Act by allegedly aiding and abetting a customer's allegedly fraudulent scheme to prematurely recognize revenue. The court held that the SEC was not required to plead that the CFO's conduct was a proximate cause of the primary securities violation, because enforcement actions — unlike private actions — do not require the SEC to prove causation. Rather, the SEC was only required to plead that the CFO participated in the fraudulent venture and sought to "make it succeed." Because the SEC adequately alleged that the CFO participated in transactions that he knew were designed to inflate the customer's gains, its complaint stated a claim for aiding and abetting a securities violation.

Sec. & Exch. Comm'n v. Espuelas, No. 06 Civ. 2435 (PAE) (S.D.N.Y. Oct. 26, 2012)

Click here to view the opinion.

S.D.N.Y. Grants Summary Judgment in Favor of Executive Vice President Charged With Aiding and Abetting Securities Violations

Judge Paul A. Engelmayer of the U.S. District Court for the Southern District of New York granted summary judgment in favor of the former executive vice president of an Internet media company on charges that she aided and abetted the company's alleged violations of Sections 13(a) and 13(b)(2)(A) of the Securities Exchange Act. Although the SEC established a genuine issue of fact as to the company's primary liability, it did not proffer evidence that the defendant knew that the transactions at issue were contingent and therefore improperly recognized as revenue. The executive's participation in discussions regarding revenue generation was not evidence that she knew the structure of the specific transactions. Similarly, the executive's receipt of revenue information did not show she knew about the specific transactions at issue. In addition, a witness' testimony that the individual defendant knew of the allegedly contingent nature of the transactions was not admissible, because the SEC did not establish a basis to support the witness' knowledge, and the witness also testified that he could not remember if the individual defendant had ever said that the transactions were contingent.

SECURITIES ACT CLAIMS

United States v. Bailey,
No. 11-50132
(9th Cir. Aug. 27, 2012)

Click here to view the opinion.

Ninth Circuit Holds That Prior Complaint in a Separate Suit Is Not Appropriate Evidence to Prove Willfulness for Securities Fraud Violations Under SEC Rule S-8

Richard A. Bailey was criminally charged for issuing unregistered stock in order to raise capital for his company, and for his and the company's personal benefit, in violation of Rule S-8 — the SEC rule that requires the distribution of unregistered stock to be in exchange for bona fide services. Prior to trial, the prosecution sought permission to admit into evidence a 2003 SEC civil complaint filed against Bailey for distributing unregistered stock to raise capital for his company, rather than in exchange for bona fide services. The prosecution argued the 2003 SEC complaint would show that Bailey knew that the alleged conduct was unlawful and that he was required to comply with Rule S-8. And although Bailey settled the civil action with no admission of liability, the district court allowed the prosecution to introduce the 2003 SEC complaint into evidence. A jury convicted Bailey of two counts of securities fraud and Bailey appealed, arguing his conviction was prejudiced by the improper admission of the 2003 SEC complaint. The U.S. Court of Appeals for the Ninth Circuit vacated the conviction and remanded for a new trial, holding that a mere accusation of prior conduct does not tend to prove Bailey committed the act for which he was on trial. "[S]tating the obvious," the Ninth Circuit reasoned, "a complaint is merely an accusation of conduct and not, of course, proof that the conduct alleged occurred." In holding the 2003 SEC complaint was improperly admitted, the Ninth Circuit further commented that even if the prosecution's use of the complaint was narrowly offered to prove Bailey knew it was illegal to issue unregistered stock to raise capital for his company, the complaint would not establish knowledge because "[a]ll a complaint establishes is knowledge of what a plaintiff claims. It does not establish the truth of either the facts asserted in the complaint, or of the law asserted in the complaint."

*Ho v.
Duoyuan Global Water, Inc.*,
*No. 10-CV-7233 (GBD)
(S.D.N.Y. Aug. 24, 2012)*

Click here to view the opinion.

S.D.N.Y. Upholds Claims That China-Based Manufacturer Made False And Misleading Statements in Connection With Its IPO and a Secondary Offering

Judge George B. Daniels of the U.S. District Court for the Southern District of New York upheld claims that a China-based manufacturer violated Section 11 of the Securities Act by allegedly making false and misleading statements in connection with its IPO and a secondary offering. Although the plaintiffs could not trace their claims to the secondary offering, they had standing to assert their Section 11 claims because they held shares traceable to the IPO. In addition, the plaintiffs' claims were not barred by the statute of limitations because the registration documents, which were audited by an outside auditor, would not have put investors on notice that the manufacturer had misstated its financial figures, and the warning statements in the offering documents were too general to put investors on inquiry notice as a matter of law. Further, the plaintiffs' allegations that the manufacturer reported losses for two subsidiaries to a Chinese regulator but reported significant profits for those same subsidiaries to the SEC were sufficient to support claims that the manufacturer allegedly made misleading statements concerning its financials and its compliance with GAAP. The plaintiffs' allegations that the manufacturer overstated how many employees and distributors it had, however, did not sufficiently allege misstatements, because the plaintiffs relied on reports and statements from 2011, which could not show that statements made from 2006-09 were false.

Lenartz v. Am. Superconductor Corp., No. 11-10582-WGY (D. Mass. July 26, 2012)

Click here to view the opinion.

Massachusetts Federal Court Upholds Claims That Securities Underwriters Failed to Adequately Investigate Statements Made in a Registration Statement

Judge William G. Young of the U.S. District Court for the District of Massachusetts upheld claims that the underwriters of a wind turbine manufacturer's securities offering violated Sections 11 and 12(a)(2) of the Securities Act by allegedly failing to adequately investigate statements made in a registration statement. The court determined that the Securities Act claims did not sound in fraud because the plaintiffs separated the allegations supporting their negligence claims from those supporting claims sounding in fraud and, further, based their Securities Act claims on separate duties for different classes of defendants. Consequently, those Securities Act claims were not subject to Rule 9(b)'s heightened pleading standards, even though the plaintiffs used terms such as "materially misleading" and "knew or negligently ignored," because the plaintiffs' allegations did not evidence the deception necessary to a fraud claim. Thus, because the Securities Act claims were not subject to Rule 9(b)'s heightened pleading standards, the fact that the securities issuer had restated financials that it had incorporated into its registration statement was sufficient to state a claim under Sections 11 and 12(a)(2).

SECURITIES FRAUD PLEADING STANDARDS

Boca Raton Firefighters & Police Pension Fund v. Bahash, No. 12-1776-cv (2d Cir. Dec. 20, 2012)

Click here to view the opinion.

Second Circuit Affirms Dismissal of Claims Related to Integrity of S&P's Credit-Rating Services

In a summary order, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of claims that McGraw-Hill and two of its officers violated Section 10(b) of the Securities Exchange Act by allegedly making misrepresentations about the integrity of its Standard & Poor's subsidiary's credit-rating services. The challenged statements — for example, that S&P's code of practices and procedures underscored McGraw-Hill's dedication to transparency and independent decision-making — were held to be non-actionable puffery because those statements were too generic and indefinite to give rise to a claim under Section 10(b). Further, the allegations about scienter did not satisfy the PSLRA's heightened pleading standards because they did not identify any facts demonstrating a strong inference of scienter when the challenged statements were made. In addition, the court recognized that the complaint did not plead scienter because it "relies upon an assumption that McGraw-Hill executives were prescient, understanding not only the weakness of the services they were offering but also the imminent detrimental effect that those weaknesses would have on the company's stock price once the financial markets collapsed."

In re Rigel Pharm., Inc., No. 10-17619 (9th Cir. Sept. 6, 2012)

Click here to view the opinion.

Ninth Circuit Holds That Disagreement Over Statistical Methodology and Study Design Are Insufficient to Allege a Materially False Statement for Securities Fraud Allegations

In reviewing an issue that neither the U.S. Supreme Court nor the U.S. Court of Appeals for the Ninth Circuit had addressed previously, the Ninth Circuit held that statements concerning statistical results of a clinical trial may not be considered false or misleading under Rule 10b-5 simply because the statistical methodology that produced those results was not the best or most acceptable methodology.

The plaintiff, individually and on behalf of all other persons who purchased or acquired Rigel Pharmaceuticals, Inc.'s common stock between December 13, 2007, and February 3, 2009, and persons who purchased Rigel stock issued in connection with its February 2008 stock offering, brought various securities fraud actions against Rigel and certain individual defendants. The plaintiff alleged Rigel and the individual defendants made various false statements concerning the results of a clinical drug trial. Specifically, the plaintiff alleged that on December 13, 2007,

(continued on next page)

Rigel issued a press release and held conference calls with various doctors concerning its clinical study for R788, then subsequently reported additional information about the clinical trial that was "more academic and detailed" than the December 13, 2007, statements and contained "much more extensive, detailed, and scientific information." The plaintiff thus alleged that Rigel and the various individuals made material false statements during the December 13, 2007, press release and conference calls because they should have used the more academic and detailed statistical methodology when presenting findings on December 13, 2007.

The district court granted the defendants' motion to dismiss and the Ninth Circuit affirmed. The Ninth Circuit explained that the plaintiff did not allege that the defendants inaccurately reported the results of their statistical methodology or that the defendants had chosen or changed their statistical methodology after seeing the raw data from the clinical trial, but the plaintiff instead alleged that the defendants should have used a different statistical methodology altogether. Thus, the plaintiff's allegations were not about false statements at all. The Ninth Circuit held that the fact that the plaintiff disagreed with the methodology for summarizing the data did not make the summaries false or misleading. The Ninth Circuit further concluded that "securities laws do not require that companies report information only from optimal studies, even assuming that scientists could agree on what is optimal, and that companies reporting information from imperfect studies are not required to disclose alternative methods for interpreting the data."

SECURITIES INVESTOR PROTECTION ACT

Sec. & Exch. Comm'n v. Sec. Investor Prot. Corp., No. 11-mc-678 (RLW) (D.D.C. July 3, 2012)

Click here to view the opinion.

D.C. Federal Court Denies SEC's Request to Compel the SIPC to File a Protective Decree on Behalf of Investors Defrauded by Robert Allen Stanford's Ponzi Scheme

Judge Robert L. Wilkins of the U.S. District Court for the District of Columbia denied the SEC's application to compel the Securities Investor Protection Corporation (SIPC) to file a protective decree on behalf of investors defrauded by Robert Allen Stanford's Ponzi scheme. Analogizing to Section 21(e) of the Securities Exchange Act, which allows the SEC to seek an order "commanding" a person or entity to comply with the Securities Exchange Act, the court initially determined that the SEC must prove by a preponderance of the evidence that the SIPC had refused to protect the customers of an SIPC member in order to obtain an order. The court determined that the defrauded investors were not "customers" of the Stanford Group Company, an SIPC member, because the Stanford Group Company never physically possessed any of the defrauded investors' funds, and investors are only considered customers if they entrust funds to an SIPC member. Thus, the defrauded investors could not meet the statutory definition of "customers," and so were not entitled to the SIPC's protection.

SETTLEMENTS

In re Am. Int'l Grp., Inc. Sec. Litig., No. 10-4401-cv (2d Cir. Aug. 13, 2012)

Click here to view the opinion.

Second Circuit Holds That Failure to Establish Fraud-on-the-Market Presumption Is Not Sufficient to Deny Certification of a Settlement Class

In a securities fraud action, the U.S. Court of Appeals for the Second Circuit vacated the denial of a motion to certify a settlement class. The district court had ruled that because the proposed settlement class was not entitled to a fraud-on-the-market presumption, it could not satisfy Rule 23(b)(3)'s predominance requirement, and so it could not be certified. The Second Circuit, however, held that a failure to establish the fraud-on-the-market presumption is not sufficient to deny the certification of a settlement class because a settlement class will never go to trial, and so the trial management issues of proving individual reliance will not arise.

SLUSA PRECLUSION

Stichting Pensioenfonds ABP v. Merck & Co., Inc., No. 05-5060 (SRC) (D.N.J. Aug. 1, 2012)

Click here to view the opinion.

New Jersey Federal Court Determines That SLUSA Applies to Claim Filed by Individual Investor

In an opinion designated "Not For Publication," Judge Stanley R. Chesler of the U.S. District Court for the District of New Jersey dismissed state common law fraud, conspiracy and misrepresentation claims against Merck because those claims were precluded by the Securities Litigation Uniform Standards Act (SLUSA). SLUSA preclusion applies to class actions or to actions in a single court that "proceed as a single action for any purpose," and even though an individual investor filed the claim at issue, that claim was one of a group of actions — including a class action — that involved allegations of securities fraud against Merck concerning the health profile of its drug Vioxx. The plaintiff had previously agreed to coordinate its case — including the timing of its filings, conforming its complaint with respect to certain overlapping claims and conducting discovery — with those other cases. The plaintiff had also agreed to be bound by a single consolidated ruling concerning a prior motion to dismiss. Thus, the court determined that SLUSA applied to the plaintiff's action, and that SLUSA preclusion barred its state common law claims based on the same conduct. '

WHISTLEBLOWER PROTECTION

Ott v. Fred Alger Mgmt., Inc., No. 11 Civ. 4418 (LAP) (S.D.N.Y. Sept. 27, 2012)

Click here to view the opinion.

S.D.N.Y. Upholds Claims That Investment Adviser Violated Dodd-Frank Whistleblower Protection Provisions

Chief Judge Loretta A. Preska of the U.S. District Court for the Southern District of New York upheld claims that an investment adviser violated the whistleblower protection provisions of the Dodd-Frank Act by unfairly compensating and then firing an employee who reported an allegedly unlawful trading policy to the SEC. Even though she did not report any new information to the SEC after the Dodd-Frank Act was enacted, the employee adequately alleged that her conduct was protected because the anti-retaliation provision does not limit protected disclosures to "original information." The employee also plausibly alleged a reasonable belief that the policy violated the securities laws where her employer may have breached a duty to its client, a co-worker allegedly described the policy as "sabotage," and the SEC referred the matter to its Division of Enforcement. In addition, the employee's allegations that her bonus was reduced and that she was subsequently fired because of her contact with the SEC were sufficient to allege an adverse employment action.

Kramer v. Trans-Lux Corp., No. 3:11cv1424 (SRU) (D. Conn. Sept. 25, 2012)

Click here to view the opinion.

Connecticut Federal Court Upholds Claims That Corporation Violated Dodd-Frank Whistleblower Protection Provisions

Judge Stefan R. Underhill of the U.S. District Court for the District of Connecticut upheld claims that a corporation violated the whistleblower protection provisions of the Dodd-Frank Act by firing an employee allegedly for informing the corporation's board and the SEC that his supervisors were violating the corporation's pension plan. Although the employee had not reported the information using an SEC-identified communications channel, he was entitled to protection because the SEC's regulation that applies the Dodd-Frank Act's retaliation provision to those who provide information in a manner other than those required by the SEC was not unreasonable or foreclosed by the act's language. In addition, even if the company did not actually violate the SEC's regulations, the employee was entitled to protection because he adequately alleged that he "reasonably believed" that the company had committed an SEC filing violation, and the retaliation provision does not require an actual violation.

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