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Inside the Courts

An Update From Skadden Securities Litigators

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U.S. SUPREME COURT

Statutes of Limitations

Credit Suisse Sec. (USA) LLC v. Simmonds, No. 10-1261 (U.S. Mar. 26, 2012)

Click here to view the opinion.

Supreme Court Rejects Ninth Circuit's Tolling Rule for Section 16(b) Claims

The U.S. Supreme Court unanimously held that the statute of limitations governing the recovery of "short-swing" profits from corporate insiders under Section 16(b) of the Securities Exchange Act can begin to run regardless of whether the insiders filed a public disclosure of their transactions under Section 16(a). Section 16(b) gives corporations and their beneficial owners a private cause of action against insiders owning more than 10 percent of any one class of security. The provision imposes strict liability on the insiders for any profits realized from the purchase-and-sale or sale-and-purchase of the corporation's securities within any six-month period. Suits must be brought, under Section 16(b), within "two years after the date such profit was realized." Section 16(a) contains the disclosure requirement, mandating that insiders governed by Section 16 report changes in their ownership interests publicly.

In 2007, plaintiff Vanessa Simmonds filed 55 Section 16(b) complaints against the underwriters of several IPOs that occurred in the 1990s and 2000s. The district court dismissed the 24 complaints at issue as time-barred by the two-year limitations period. The Ninth Circuit reversed under its 1981 decision in *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981), which held that the limitations period is tolled until the Section 16(a) disclosure occurs, regardless of whether the plaintiff has actual or constructive knowledge of her claim, because the underwriter defendants had never filed any Section 16(a) disclosures.

A unanimous opinion authored by Justice Antonin Scalia reversed the Ninth Circuit's bright-line rule. The Court noted that the Securities Exchange Act's plain text provides that the period for recovering short-swing profits commences on the "date such profit was realized." 15 U.S.C. § 78p(b). If Congress intended the limitations period to be tied to the disclosure requirement under Section 16(a), it could have easily so provided. The Court also rejected the notion that equitable tolling should invariably delay accrual until disclosure regardless of the plaintiff's knowledge of her claim. Such a rule would discourage diligence in plaintiffs and unfairly subject defendants to perpetual potential exposure, especially defendants who had a good faith belief that a 16(a) disclosure was not required of them, such as the underwriter defendants at issue.

The Court was evenly split 4-4 regarding whether Section 16(b) provided a statute of repose rather than a limitations period.

AUDITOR LIABILITY

In re Lehman Bros. Sec. & ERISA Litig., No. 09 MD 2017 (LAK) (S.D.N.Y. Mar. 22, 2012)

Click here to view the opinion.

S.D.N.Y. Remands Case Related to Lehman Brothers Collapse to State Court

Judge Lewis A. Kaplan of the U.S. District Court for the Southern District of New York remanded to state court Martin Act claims filed by the New York Attorney General against Ernst & Young in connection with its role in the Lehman Brothers collapse because the court lacked federal jurisdiction. Ernst & Young argued that the attorney general's allegation that the auditor had not conducted its reviews in accordance with PCAOB standards arose under federal law because determining what PCAOB standards require is a question of federal law. Although the determination of PCAOB standards was a federal question, the court ruled that such a determination was not necessary to resolve the case because New York could get all of the relief it sought without a finding that Ernst & Young violated the PCAOB's standards. Thus, the action did not arise under federal law.

CLASS ACTIONS

Appointment of Lead Plaintiff and Counsel

In re Diamond Foods, Inc., Sec. Litig., No. C 11-05386 WHA (N.D. Cal. Mar. 20, 2012)

Click here to view the opinion.

California Federal Court Appoints Lead Plaintiff and Orders Due Diligence Conducted on Selection of Class Counsel

Judge William Alsup of the U.S. District Court for the Northern District of California appointed Mississippi Public Employees' Retirement System (Mississippi PERS) as lead plaintiff in a securities class action lawsuit against defendants Diamond Foods, Inc. and its board chair, president and CEO Michael J. Mendes and CFO Steven M. Neil. Initially, six securities class actions were filed in the Northern District and were consolidated into *In re Diamond Foods, Inc., Securities Litigation*. Two institutional investors, Mississippi PERS and New England Carpenters, both moved for appointment as lead plaintiff. The court appointed Mississippi PERS as lead plaintiff because it suffered the greater loss and had the greater financial interest in the litigation. The court rejected New England Carpenters' argument that the Private Securities Litigation Reform Act's professional plaintiff bar prevented Mississippi PERS from serving as lead plaintiff, noting that the bar likely did not apply to institutional investors. Even if it did apply, the court held that it had discretion to lift the bar. Lifting the bar is appropriate here because the purpose of the statute would be served by appointing Mississippi PERS, the plaintiff with the greatest financial interest, as lead plaintiff, the court said.

Having appointed Mississippi PERS lead plaintiff, the court ordered it to conduct due diligence in selecting class counsel and, in doing so, stated that it should interview appropriate candidates. Further, the court noted that the motion for appointment of class counsel should include declarations from the lead plaintiff explaining the diligence undertaken and why the counsel selected was favored over other candidates. The declarations should be filed under seal, but served on defense counsel, the court said.

Class Action Fairness Act

Rolwing v. Nestle Holdings, Inc., No. 11-3445 (8th Cir. Feb. 2, 2012)

Click here to view the opinion.

Eighth Circuit Holds Plaintiffs Are Bound by Damages Representations Made to Limit Amount in Controversy Under CAFA

The U.S. Court of Appeals for the Eighth Circuit affirmed a decision remanding a putative class action to Missouri state court where the complaint included allegations and stipulations that attempted to limit the matter in controversy to below $5 million in order to avoid removal to federal court under the Class Action Fairness Act of 2005 (CAFA). The case is significant because the appellate court's holding places the plaintiffs in a Catch-22: They may avoid removal to federal court by pleading a lower amount of damages, but then are for the remainder of the case limited to that maximum recovery.

In the suit, which arose out of a merger between Nestle and Ralston Purina Company, a shareholder of the latter contended that payments to Ralston Purina shareholders for their shares were made six days late; therefore, under a Missouri statute regarding interest rates, Nestle owed more than $13 million to shareholders. The complaint, however, included a prayer for relief requesting a judgment not to exceed $4,999,999, and further stated that "[p]laintiff and the class do not seek — and will not accept — any recovery of damages (in the form of statutory interest) and any other relief, in total, in excess of $4,999,999." Nestle removed the case to federal court, asserting that the case clearly comprehended the possibility of damages in excess of $5 million, and thus fell within the jurisdiction of CAFA. The district court granted the plaintiff's motion to remand the action to state court, finding his stipulations as to the requested relief binding.

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The Eighth Circuit, on appeal, first held that Nestle had established that the actual amount in controversy exceeded $5 million, and thus, "for a remand to be justified, Rolwing must show that it is legally certain that recovery in this case cannot exceed $5 million." The court then held that the plaintiff had met this burden because his stipulations limiting the recovery sought in the action were enforceable under Missouri's doctrine of judicial estoppel. The court stated that, "by defeating removal through asserting the position that he will not accept more than $4,999,999 in damages on behalf of the class he is seeking to represent, Rolwing is estopped from later accepting damages that exceed that amount."

Class Certification

N.J. Carpenters Health Fund v. RALI Series 2006-QO1 Tr., No. 11-1683-cv (2d Cir. Apr. 30, 2012)

Click here to view the opinion.

Second Circuit Affirms Denial of Class Certification in MBS Suit

In a summary order on a Federal Rule of Civil Procedure 23(f) appeal, the U.S. Court of Appeals for the Second Circuit affirmed the denial of class certification under Rule 23(b)(3) in two mortgage-backed securities (MBS) suits alleging violations of Sections 11 and 12 of the Securities Act, because individual questions of each investor's knowledge of the alleged misrepresentations or omissions would predominate. A plaintiff cannot assert claims for violation of Section 11 based on alleged misrepresentations or omissions if the plaintiff had actual knowledge of the untruth or omission. Because the plaintiffs' proposed class was not limited to a specific purchase date, the defendant's evidence that information regarding mortgage-backed securities was publicly available — which could be circumstantial evidence of individual purchaser knowledge — would change depending on the date of purchase. Thus, without the benefit of discovery from absent class members, the district court's determination that the issue of knowledge would require individual proceedings was not a reversible error. (Acknowledging the fact that courts have both granted and denied class certification motions in many MBS suits, the panel also noted that "both grants and denials of class certification in MBS litigation may fall within the range of a district court's discretion.") Further, because Section 12 claims are derivative of Section 11 claims, class certification also was properly denied as to those claims.

City of Farmington Hills Emps. Ret. Sys. v. Wells Fargo Bank, N.A., No. 10-4372 (D. Minn. Mar. 27, 2012)

Click here to view the opinion.

Minnesota Federal Court Certifies Class Action Claiming Wells Fargo Breached Terms of Securities Investment Contracts

Judge Donovan Frank of the U.S. District Court for the District of Minnesota certified a class of more than 100 institutional investors that participated in a securities lending program offered through Wells Fargo Bank, N.A. As part of the program, investors signed securities lending agreements that permitted the bank to lend the investors' securities to third-party borrowers in return for cash collateral. Well Fargo would then invest that collateral and share a percentage of the revenues with the original investors. According to the investors, Wells Fargo failed to ensure that the collateral funds were invested in safe, short-term investments as required by the lending agreements. The investors brought suit against the bank on a number of theories — breach of fiduciary duty, breach of contract and violation of consumer fraud statutes — and sought class certification for their claims.

The court certified the class because the similarities among the securities lending agreements signed by the class members supported treatment of the case as a class action. The court rejected Well Fargo's argument that the class did not meet the typicality requirement for certification under Rule 23 because class members signed different agreements, participated in different investment pools and withdrew from the program at different times. Because they pursued the same legal theories and would likely use the same generalized evidence regarding Well's Fargo's conduct, the class members met the typicality requirement, the court reasoned. In analyzing the predominance requirement under Rule 23, the court also noted that all class

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members received the same statements regarding the safety and liquidity of the investment portfolio as part of the securities loan agreement. Although the court noted that some consumer fraud claims are not suitable for class certification due to issues of individual reliance, it concluded that common questions predominated because the consumer fraud claims could be established on a classwide basis through the use of generalized evidence and each member of the putative class signed a securities loan agreement containing the alleged misrepresentation.

In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig., Nos. 09 Civ. 832 (MGC), 09 MD 2072 (MGC) (S.D.N.Y. Mar. 27, 2012)

Click here to view the opinion.

S.D.N.Y. Denies Class Certification, Determining That the Plaintiff's Expert's Testimony Was Unreliable

Judge Miriam Goldman Cedarbaum of the U.S. District Court for the Southern District of New York denied class certification on claims that Freddie Mac's former CEO and former CFO violated Section 10(b) of the Securities Exchange Act because the plaintiff did not show that the market for Freddie Mac's Series Z preferred shares was efficient. The plaintiff presented two event studies, and Freddie Mac presented expert testimony refuting those studies' conclusion that the Series Z shares were sold in an efficient market. After an evidentiary hearing, the court determined that the plaintiff's expert's testimony was unreliable because his event studies and testimony were flawed and inconsistent. The plaintiff's expert changed the dates he considered relevant news dates in preparing his two event studies and changed them again while testifying, and he did not control for dates where the Series Z share price produced an abnormal return that was in the "wrong" direction given the news (*e.g.*, the share price gained more than expected even though the news was negative). The expert's study also showed that the Series Z share price only responded to material news 28 percent of the time, which was insufficient to show a cause-and-effect relationship between unexpected news and changes in share price. Therefore, the plaintiff did not establish that the market for the Series Z shares was efficient. Consequently, the plaintiff was not entitled to a presumption of reliance, and the proposed class did not satisfy Rule 23(b)(3)'s predominance requirement.

Pub. Emps.' Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc., No. 09 CV 1110 (HB) (S.D.N.Y. Feb. 2, 2012)

Click here to view the opinion.

S.D.N.Y. Certifies Class Action Related to a Securitized Mortgage Offering

Judge Harold Baer Jr. of the U.S. District Court for the Southern District of New York certified a class of plaintiffs alleging that Goldman Sachs did not conduct adequate diligence on an offering of securitized mortgages in violation of Sections 11 and 12(a)(2) of the Securities Act. Although certain tranches of the securities had been purchased by only a few putative class members, the court found no reason to assume the differences between tranches would create interclass conflict, and so it did not count the classes separately. The court also determined that inquiries regarding individual investor knowledge would not predominate. The court distinguished its previous holding in *N.J. Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160 (S.D.N.Y. 2011), because the defendant did not show that specific investors knew of the defendant's alleged misconduct. Individualized statute of limitations issues also did not predominate because the defendant only cited general public knowledge that was available to all class members.

In re SLM Corp. Sec. Litig., No. 08 Civ. 1029 (WHP) (S.D.N.Y. Jan. 24, 2012)

Click here to view the opinion.

S.D.N.Y. Certifies Class Against Sallie Mae Related to Purchases of Private Student Loans

Judge William H. Pauley III of the U.S. District Court for the Southern District of New York certified a class against Sallie Mae on claims that it purportedly violated Section 10(b) of the Securities Exchange Act by making allegedly fraudulent statements regarding its purchases of private student loans. Although the plaintiffs' expert did not offer an opinion on the materiality of the alleged misrepresentations and omissions, the court ruled that the plaintiffs satisfied the predominance requirement with respect to materiality based on Sallie Mae's own statements regarding the private student loans. The court also rejected Sallie Mae's argument

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that a deal with private equity investors — which contained a fixed strike price — made the alleged misrepresentations and omissions immaterial because Sallie Mae could not show that negative disclosure would not have affected the deal's terms. In addition, the lead plaintiff's options trading did not make it atypical and inadequate, and the lead plaintiff's amendments to its certification (about its trading in Sallie Mae stock) did not impact the litigation or prejudice Sallie Mae.

CONFIDENTIAL WITNESSES

In re Am. Int'l Grp., Inc. 2008 Sec. Litig., No. 08 Civ. 4772 (LTS) (DF) (S.D.N.Y. Mar. 6, 2012)

Click here to view the opinion.

S.D.N.Y. Orders Plaintiffs to Reveal the Identities of Confidential Witnesses

In a securities fraud action, Magistrate Judge Debra Freeman of the U.S. District Court for the Southern District of New York ordered the plaintiffs to reveal the identities of confidential witnesses upon which the plaintiffs had relied in successfully opposing the defendants' motion to dismiss. Relying on *In re Bear Stearns Cos., Inc. Securities, Derivative, and ERISA Litigation*, 08 MDL No. 1963 (RWS), 2012 WL 259326 (S.D.N.Y. Jan. 27, 2012) (but recognizing that the law is not uniform), the court concluded that the witnesses' identities were not work product. But, even if they were, the defendants would face a significant hardship without the disclosure, overcoming the potential work-product protection. In addition, the confidentiality order entered in the action could address any specific confidentiality concerns of the witnesses.

DIRECTORS AND DIRECTORS' DUTIES

Derivative Litigation

Steinhardt v. Howard-Anderson, C.A. No. 5878-VCL (Del. Ch. Jan. 6, 2012)

Click here to view the opinion.

Court of Chancery Sanctions Lead Plaintiff for Trading on Information Obtained Through the Litigation

Vice Chancellor J. Travis Laster of the Delaware Court of Chancery issued an opinion sanctioning a lead plaintiff in a stockholder class action for trading on information obtained through the litigation, in violation of a confidentiality order. The court disqualified the lead plaintiff and required him to self-report the matter to the SEC, disclose the improper trading in future applications for lead plaintiff and disgorge more than $530,000 in profits. The plaintiffs included professional investor Michael Steinhardt and a former Steinhardt associate, Herb Chen, who were significant (19 percent) stockholders of Occam Networks, Inc. prior to its acquisition by Calix, Inc. The plaintiffs sought to enjoin the merger, and the parties engaged in expedited discovery. The court entered a standard confidentiality order requiring that confidential discovery material be used solely for purposes of the litigation and also barring trading in securities on the basis of confidential information. After a short injunction pending additional disclosures and the deposition of an investment banker, the merger was approved by stockholders and consummated.

After the injunction hearing, the defendants served discovery requests seeking information about the plaintiffs' trading activities. The discovery established that Steinhardt began short-selling Calix stock in the course of the litigation even though he was receiving regular detailed written and oral reports from Chen about the progress of the litigation. The discovery also established that Chen knew that Steinhardt was short-selling and warned him not to, but nevertheless continued to provide him information about the litigation. The court explained that Chen also had mistakenly sold a limited amount of Occam stock to make a margin call. The court found that Steinhardt had violated his fiduciary duty as a class representative, stating that it "is unacceptable for a plaintiff-fiduciary to trade on the basis of non-public information obtained through litigation." However, the court held that "it would be inequitable to sanction

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Chen" because of the "small size" and inadvertent nature of his trades. The court was "more troubled by Chen's decision to continue providing Steinhardt with written and oral updates on the litigation despite knowing that Steinhardt was shorting Calix ... ," but because Chen proved to be a highly motivated and effective representative plaintiff, the court concluded that his conduct did not warrant an additional sanction.

Mergers and Acquisitions

In re Celera Corp. S'holder Litig., C.A. No. 6304-VCP (Del. Ch. Mar. 23, 2012)

Click here to view the opinion.

Court of Chancery Approves Settlement for Therapeutic Benefits of Two-Step Merger

Vice Chancellor Donald F. Parsons of the Delaware Court of Chancery overruled an objection and approved the settlement of litigation challenging a two-step merger transaction. The lead plaintiff, New Orleans Employees' Retirement System (NOERS), a stockholder of Celera, accused various defendants, including the Celera board members, of breaching their fiduciary duties in connection with the deal. During briefing on a motion for a preliminary injunction, the parties entered into a memorandum of understanding (MOU) that contemplated a settlement for therapeutic benefits but no increase in the merger price. Thereafter, the tender offer succeeded, Quest exercised a top-up option and the merger closed.

Celera's largest shareholder (BVF) objected to the settlement. The court rejected, among other arguments, arguments from objector BVF concerning the defense of acquiescence, typicality and adequacy under Rule 23(a). BVF argued that NOERS was subject to the unique defense of acquiescence, and could not adequately represent it through confirmatory discovery and settlement. The court disagreed, reasoning that, if new information in confirmatory discovery had caused NOERS to rescind the MOU (and it had not), NOERS could not have been "fully informed" when it sold its shares as required for an acquiescence defense. Calling NOERS's decision to sell its shares "careless and cavalier," the court found NOERS to satisfy the adequacy of representation requirements of Rule 23, albeit barely. The court stated that, as a prophylactic measure, it "may well employ a more bright line test in the future," and reject as inadequate lead plaintiffs who sell prior to settlement.

The settlement provided class members with the following therapeutic benefits: (i) a reduction in a termination fee from $23.45 million (or 3.5 percent of transaction size, described by the court as "the high end of the generally acceptable range") to $15.6 million (or 2.3 percent of transaction size); (ii) modification of a no-solicitation provision to potentially invite competing offers from potential bidders subject to a "Don't-Ask-Don't-Waive" standstill agreement; (iii) extension of the tender offer for seven days; and (iv) supplemental disclosures concerning the process leading to the deal and Celera's banker analysis. The court held that these "therapeutic deal changes may represent the maximum relief that Plaintiffs could have obtained." In particular, the court noted that "Plaintiffs may have been able to show that the combined potency of the Don't-Ask-Don't-Waive Standstills and the No Solicitation Provision was problematic." The court indicated that, in isolation, these provisions arguably foster legitimate objectives, but taken together, they are "more problematic" because the "Don't-Ask-Don't-Waive Standstills block at least a handful of once-interested parties from informing the Board of their willingness to bid (including indirectly by asking a third party, such as an investment bank, to do so on their behalf), and the No Solicitation Provision blocks the Board from inquiring further into those parties' interest. Thus, Plaintiffs have at least a colorable argument that these constraints collectively operate to ensure an informational vacuum. Moreover, the increased risk that the Board would outright lack adequate information arguably emasculates whatever protections the No Solicitation Provision's fiduciary out otherwise could have provided. Once resigned to a measure of willful blindness, the Board would lack the information to determine whether continued compliance with the Merger Agreement would violate its fiduciary duty to consider superior offers. Contracting into such a state conceivably could constitute a breach of fiduciary duty." The court approved the settlement and awarded $1.35 million in attorneys' fees for the therapeutic benefits.

In re Delphi Fin. Grp. S'holder Litig., C.A. No. 7144-VCG (Del. Ch. Mar. 6, 2012)

Click here to view the opinion.

Court of Chancery Declines to Enjoin Sale Despite Likelihood of Demonstrating That Founder Violated Duties to Stockholders

Vice Chancellor Sam Glasscock III of the Delaware Court of Chancery declined to enjoin the proposed sale of Delphi Financial Group, Inc. to Tokio Marine Holdings, Inc. (TMH), despite finding that the plaintiffs demonstrated a likelihood of success on the merits with respect to their allegations against Delphi's founder and controlling stockholder, Robert Rosenkranz. Although Rosenkranz retained less than 13 percent of all outstanding shares, he maintained control of Delphi because of his ownership of high-vote Class B stock. However, a charter provision, which was in force at Delphi's initial public offering, directed that, upon the sale of the company or sale of control, each Class B share would be converted to Class A; therefore, Rosenkranz was unable to transfer his controlling position. The court stated, "This concession to the Class A stockholders resulted, presumably, in a higher purchase price for Class A stock than would have been the case without the provision." The Delphi board set up a committee of directors to negotiate a differential for the Class B stock with Rosenkranz. However, Rosenkranz continued to negotiate with TMS on behalf of Delphi. The court found that "on the present record ... the Plaintiffs bought Delphi's stock with the understanding that the Charter structured the corporation in such a way that denied Rosenkranz a control premium." Therefore, the court held, "Plaintiffs are reasonably likely to be able to demonstrate at trial that in negotiating for disparate consideration and only agreeing to support the merger if he received it, Rosenkranz violated duties to the stockholders." However, because the deal represented a large premium, damages were available and no other potential purchaser had emerged, the balance of equities did not favor an injunction over letting stockholders exercise their franchise.

In re El Paso Corp. S'holder Litig., C.A. No. 6949-CS (Del. Ch. Feb. 29, 2012)

Click here to view the opinion.

Court of Chancery Declines to Enjoin Sale Despite Likelihood of Proving That Merger Was 'Tainted by Disloyalty'

Chancellor Leo E. Strine Jr. of the Delaware Court of Chancery declined to enjoin the proposed sale of El Paso Corporation to Kinder Morgan despite finding that the plaintiffs had established a likelihood of success on the merits that the merger was "tainted by disloyalty."

The court examined "troubling" undisclosed conflicts of interest on the part of El Paso's CEO and key negotiator and its financial advisor. According to the court, El Paso's CEO, who "undertook sole responsibility for negotiating" the deal, was tasked with getting the highest price for the company in the merger, but failed to disclose his intent to work with other El Paso executives to bid for one of the company's businesses after the merger with Kinder Morgan was consummated. The court also explained that El Paso's financial advisor owned 19 percent of Kinder Morgan (a $4 billion investment) and controlled two Kinder Morgan board seats. Although this conflict was disclosed, the court found the financial advisor's "Chinese wall" and other efforts to address those conflicts were inadequate. In addition, the lead banker on the deal failed to disclose that he owned an approximate $340,000 interest in Kinder Morgan stock. The court concluded that the "record ... persuades me that the plaintiffs have a reasonable likelihood of success in proving that the Merger was tainted by disloyalty." However, the court ultimately denied the motion for a preliminary injunction because El Paso stockholders could turn down the deal if they did not like the price, and because no rival bid existed. Nevertheless, the court left open the possibility of a post-merger money damages case, noting that "plaintiffs have a probability of showing that more faithful, unconflicted parties could have secured a better price from Kinder Morgan."

In re Micromet, Inc. S'holder Litig., C.A. No. 7197-VCP (Del. Ch. Feb. 29, 2012)

Click here to view the opinion.

Court of Chancery Denies Attempt to Enjoin Amgen's Acquisition of Micromet

Vice Chancellor Donald F. Parsons of the Delaware Court of Chancery denied the shareholder plaintiffs' attempt to enjoin an all-cash negotiated tender offer for all the shares of Micromet, a biopharmaceutical company.

The court held that *Revlon* duties only attached when the Micromet board "resolved to enter into serious merger negotiations with Amgen and instructed [the financial advisor] to conduct a market check of other potential acquirors." The court stated that, once *Revlon* attached, "the Board decided to undertake a market check to test the adequacy of Amgen's offer and see if it could obtain a higher price from another potential acquiror." The court rejected the plaintiffs' challenge to the scope of this premerger market check and found it was "adequate and consistent with the Board's well-informed understanding of the industry and Micromet's needs." The court also held that, for similar reasons, "Micromet's decision to eschew contacting any private equity buyers also seems reasonable." Likewise, the plaintiffs' attack on the premerger market check as "unreasonably short" failed. The court rejected the notion that providing the other potential suitors with a "week-long diligence" period improperly tipped the bidding process in Amgen's favor. As for the post-signing market check, the court held that the combination of the no-shop, matching rights, information rights and change of recommendation provisions in the merger agreement did not restrict the board from timely exercising its fiduciary duties in the event those provisions were triggered.

The court also rejected the plaintiffs' disclosure claims. First, the court held that Micromet was not required to disclose the basis and criteria for the selection of the probability of success rates for certain clinical trial drugs that were supplied to Goldman for its financial analysis. Second, the court held that there was no need to disclose fees paid by Micromet to Goldman over the past two years or Goldman's interest in Amgen stock. Third, the court rejected a claim that a more detailed disclosure about net operating loss-related projections was needed, saying such detail was "a level of granular disclosure" not required by Delaware law. Fourth, the court held that Goldman's "Sum of the Parts" analysis did not need to be disclosed as it was not relied on by Goldman in providing its fairness opinion. Lastly, the court rejected claims that "upside case" projections not relied upon by Goldman needed to be disclosed.

DODD-FRANK ACT

Jacobs Eng'g Grp., Inc. Consol. S'holder Derivative Litig., No. BC454543 (Cal. Super. Ct. Mar. 6, 2012)

Click here to view the opinion.

California Superior Court Sustains Demurrer With Prejudice

Judge Kenneth R. Freeman of the California Superior Court for the County of Los Angeles sustained the defendants' demurrer without leave to amend in a suit alleging that Jacobs Engineering Group, Inc. overpaid its senior management. The plaintiffs brought suit against Jacobs, certain senior officers and its compensation consultant. The court held that the plaintiffs failed to show (i) demand futility; (ii) the disinterestedness of a majority of the board of directors; and (iii) that the compensation plan was not the exercise of valid business judgment. The court rejected the plaintiffs' argument that the directors were interested because they approved the compensation plan after a majority of the shareholders rejected the plan. Expressly rejecting the plaintiffs' reliance on the Dodd-Frank Act, the court stated that the shareholder vote is "advisory only" and held that "[m]erely ignoring a non-binding vote of the shareholders and approving an increase in executive compensation is decidedly not a breach of fiduciary duty, by itself, under Dodd-Frank." Similarly, because the shareholder vote is advisory only, the court rejected the plaintiffs' argument that the board violated the business judgment rule by approving the plan. Finally, the court noted that even if the plaintiffs had alleged demand futility, they did not allege facts sufficient to support a claim. The court also sustained the individual defendants' demurrers without leave to amend.

EXPERT WITNESSES

Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Bos., No. 02-12146-NMG (D. Mass. Jan. 13, 2012)

Click here to view the opinion.

Massachusetts Federal Court Precludes Expert Report and *Sua Sponte* Grants Summary Judgment

In a securities fraud class action, Judge Nathaniel M. Gorton of the U.S. District Court for the District of Massachusetts precluded on *Daubert* grounds an expert report that formed the basis of the plaintiffs' fraud-on-the-market claims and *sua sponte* granted summary judgment for Credit Suisse. The plaintiffs' expert presented an event study that purportedly measured the impact of the defendants' allegedly fraudulent statements and omissions on AOL's stock price; however, that event study was unreliable because the plaintiffs' expert (i) "cherry-picked" days with volatile trading, (ii) made too frequent use of dummy variables, (iii) attributed changes in AOL's stock price to factors that had already been disclosed to the market, and (iv) failed to isolate the effects of potentially confounding news regarding AOL. Because the expert's event study and testimony were the plaintiffs' only evidence of loss causation and were not reliable, the plaintiffs could not show a genuine issue of fact on loss causation. Consequently, the court *sua sponte* granted summary judgment in favor of Credit Suisse.

FOREIGN CORPORATIONS

Absolute Activist Value Master Fund Ltd. v. Ficeto, No. 11-0221-cv (2d Cir. Mar. 1, 2012)

Click here to view the opinion.

Second Circuit Holds That Foreign Funds' Claims Failed Under *Morrison,* But Leaves Room for Amended Complaint

The U.S. Court of Appeals for the Second Circuit held that the plaintiff foreign funds did not show that their purchases and sales of unlisted securities through PIPE transactions were domestic transactions under *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), because the plaintiffs did not adequately allege that irrevocable liability was incurred or that title was transferred within the United States. The foreign funds purchased and sold securities issued by U.S. companies brokered through a U.S. broker-dealer. The court initially determined that, pursuant to *Morrison*, Section 10(b) of the Securities Exchange Act would apply to the funds' transactions only if either (i) one of the parties to the securities transaction incurred irrevocable liability within the U.S. to take or deliver the security, or (ii) title to the securities was transferred within the United States. Because the plaintiffs failed to adequately allege the existence of either of these conditions, their claims failed under *Morrison*. However, the plaintiffs were entitled to amend their complaint because it had been drafted prior to the *Morrison* decision and amendment would not clearly be futile.

In re Vivendi Universal, S.A., Sec. Litig., No. 02 Civ. 5571 (RJH) (S.D.N.Y. Jan. 27, 2012)

Click here to view the opinion.

S.D.N.Y. Dismisses Claims Relating to Vivendi's Ordinary Shares

Judge Richard J. Holwell of the U.S. District Court for the Southern District of New York dismissed claims alleging violations of Section 10(b) of the Securities Exchange Act and Sections 11 and 12(a)(2) of the Securities Act under *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). Vivendi's ordinary shares did not trade on an American exchange, and so, applying *Morrison*, the court dismissed the plaintiffs' Section 10(b) claims relating to Vivendi's ordinary shares. The court also determined that *Morrison* applied to the plaintiffs' Section 11 and 12(a)(2) claims because its underlying logic applied to the Securities Act claims, and dismissed those claims.

FORWARD-LOOKING STATEMENTS

In re Smith & Wesson Holding Corp. Sec. Litig., No. 11-1436 (1st Cir. Feb. 17, 2012)

Click here to view the opinion.

First Circuit Affirms Summary Judgment in Case Involving 'Aggressive Discounting'

The U.S. Court of Appeals for the First Circuit affirmed summary judgment in favor of Smith & Wesson on claims that it violated Section 10(b) of the Securities Exchange Act by allegedly making misleading statements in its quarterly forecasts. The plaintiffs alleged that Smith & Wesson's aggressive discounting front-loaded its sales figures, making those figures, on which its forecasts relied, materially misleading. But the plaintiffs did not show that Smith & Wesson's discounting during the class period was materially different from its discounting in previous years. In addition, the plaintiffs failed to plead scienter, because Smith & Wesson's purported misstatements and omissions were not so clearly improper as to create an inference of recklessness.

INSIDER TRADING CLAIMS

Huppe v. WPCS Int'l Inc., No. 08-4463-cv (2d Cir. Jan. 20, 2012)

Click here to view the opinion.

Second Circuit Determines That a Beneficial Owner's Acquisition of Securities Directly From an Issuer Was a 'Purchase' Under Section 16(b)

Affirming the district court, the U.S. Court of Appeals for the Second Circuit determined that a beneficial owner's acquisition of securities directly from an issuer — at the issuer's request and with the board's approval — was a "purchase" under Section 16(b) of the Securities Exchange Act. The defendants — two limited partnerships — purchased a large quantity of securities directly from the issuer, with the approval of the issuer's board. At the time of purchase, the defendants owned more than 10 percent of the issuer's securities, and had traded in the issuer's securities in the prior six months. The court determined that trades by 10 percent holders were potentially susceptible to the speculative abuse of inside information, even when directly negotiated with the issuer and approved by the issuer's board, and so did not fall within any exceptions to Section 16(b)'s ban on short-swing trading by insiders. In addition, although the limited partnerships' agreements had delegated decision-making to their general partners' agents, the limited partnerships were still "beneficial owners" under Section 16(b).

MERGERS AND ACQUISITIONS

In re Novell, Inc. S'holder Litig., No. 10-12076-RWZ (D. Mass. Feb. 10, 2012)

Click here to view the opinion.

Massachusetts Federal Court Stays Claims Pending Outcome of Related Action in Delaware Court of Chancery

Judge Rya W. Zobel of the U.S. District Court for the District of Massachusetts stayed claims that certain former directors of Novell violated Section 14(a) of the Securities Exchange Act in connection with the company's merger with Attachmate pending the outcome of a related action in the Delaware Court of Chancery. Although federal courts have exclusive jurisdiction over Section 14(a) claims, the claims in the Chancery Court were parallel because they involved the same facts and standards. Consequently, the court determined that a stay was appropriate under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), because (i) the stay would avoid piecemeal litigation, and the state court would apply the same standards to the same facts and potentially provide a predicate for collateral estoppel to the Section 14(a) claims; and (ii) the parties had already engaged in significant discovery in the state action.

PONZI SCHEMES

Lawrence v. Bank of Am., N.A., No. 11-12401 (11th Cir. Jan. 11, 2012)

Click here to view the opinion.

Eleventh Circuit Court of Appeals Affirms Dismissal With Prejudice

In an unpublished opinion, the U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal with prejudice of a putative class action against Bank of America. Plaintiffs alleged that Bank of America had aided and abetted an individual Bank of America customer, Beau Diamond, in operating a Ponzi scheme by ignoring unusual account activity in his accounts with the bank. The Complaint alleged three causes of action against Bank of America: (i) common law fraud, (ii) conversion and (iii) breach of fiduciary duty. All three causes of action were based on Bank of America's alleged knowing support and facilitation of Diamond's Ponzi scheme. The court held that the plaintiffs' complaint did not raise a plausible inference that Bank of America had knowledge of the Ponzi scheme. The court noted that "[a]lthough Plaintiffs alleged the transactions were atypical and therefore Bank of America should have known of the Ponzi scheme, such allegations are insufficient under Florida law to trigger liability. Florida law does not require banking institutions to investigate transactions." The court also affirmed the denial of leave to amend because the plaintiffs' proposed new allegations were insufficient to state a claim; therefore, amendment would be futile.

Belmont v. MB Inv. Partners, Inc., No. 09-4951 (E.D. Pa. Jan. 5, 2012)

Click here to view the opinion.

Pennsylvania Federal Court Rules Fund Not Liable for Employee's Ponzi Scheme

Judge Berle Schiller of the U.S. District Court for the Eastern District of Pennsylvania granted summary judgment to an investment management fund on claims that it allegedly violated Section 20(a) of the Securities Exchange Act in connection with a Ponzi scheme perpetrated by the fund's former employee. The plaintiffs alleged that the fund furthered the employee's scheme by failing to create a "culture of compliance." However, the court determined that the plaintiffs presented no evidence that the fund actively participated in the fraud, and the fund's mere failure to discover the fraud was insufficient to establish control person liability. In addition, the fund was not liable under the doctrine of respondeat superior because the former employee had not been acting on the fund's behalf in running the Ponzi scheme through a separate entity.

SCIENTER

Rahman v. Kid Brands, Inc., No. 11-1624 (JLL) (D.N.J. Mar. 8, 2012)

Click here to view the opinion.

N.J. Federal Court Dismisses 10(b) Claims Against Kid Brands

Judge Jose L. Linares of the U.S. District Court for the District of New Jersey dismissed claims that Kid Brands violated Section 10(b) of the Securities Exchange Act in connection with purported violations of anti-dumping laws by Kid Brands' subsidiaries because the plaintiff did not adequately plead scienter. The plaintiff could not rely on its confidential witnesses because he did not adequately describe their jobs, the information the witnesses received or how they accessed that information. Because the plaintiff had relied only on allegations from the confidential witnesses to allege individual scienter, without the confidential witnesses, the plaintiff did not sufficiently plead scienter as to any individual defendants. The plaintiff also failed to plead corporate scienter (which the court assumed, *arguendo*, applied in the Third Circuit) because he did not allege the pervasiveness of the violations at Kid Brands' subsidiaries.

Warchol v. Green Mountain Coffee Roasters, Inc., No. 2:10-cv-227 (D. Vt. Jan. 27, 2012)

Click here to view the opinion.

Vermont Federal Court Dismisses 10(b) Claims Against Green Mountain Coffee

Judge William K. Sessions III of the U.S. District Court for the District of Vermont dismissed claims that a coffee company violated Section 10(b) of the Securities Exchange Act because the plaintiffs did not adequately plead scienter. First, the plaintiffs' confidential witnesses' tes-

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timony failed to create an inference of scienter because they could not testify to whether the company's officers knew of the allegedly improper accounting. Second, none of the company's officers who allegedly fraudulently inflated the company's stock sold the company's stock during the class period. Third, neither of the deals the company signed during the class period created an inference of fraud because they closed after the company's alleged corrective disclosures.

SEC ENFORCEMENT

Sec. & Exch. Comm'n v. Citigroup Global Mkts. Inc., No. 11-5227-cv (L) (2d Cir. Mar. 15, 2012)

Click here to view the opinion.

Second Circuit Grants Stay in SEC-Citigroup Settlement Proceedings

The U.S. Court of Appeals for the Second Circuit granted a stay of proceedings in the district court pending its review of the district court's rejection of a settlement agreement between the SEC and Citigroup. Both the SEC and Citigroup appealed the decision, and the court determined that their appeal was likely to succeed. First, the court determined that the district court did not appear to give proper deference to the SEC's policy decisions, instead substituting the district court's policy judgment. The policy decisions of an administrative agency are entitled to the courts' deference. Second, it was unlikely that the district court had the discretion to overrule a private party's determination of what constituted that party's best interests. Third, the district court likely did not have discretion to reject a settlement unless liability was admitted or conclusively determined. The court also determined that the stay was necessary to prevent irreparable harm, because the district court's decision had essentially precluded the possibility of a new settlement. In addition, the court deferred to the SEC's judgment that a stay would be in the public interest.

Sec. & Exch. Comm'n v. Weintraub, No. 11-21549-CIV (S.D. Fla. Dec. 30, 2011)

Click here to view the opinion.

Florida Federal Court Grants SEC's Motion for Summary Judgment

Judge Paul C. Huck of the U.S. District Court for the Southern District of Florida granted the SEC's motion for summary judgment, finding defendant Allen E. Weintraub violated Sections 10(b) and 14(e) of the Securities Exchange Act and Rules 10b-5 and 14e-8 promulgated thereunder. Defendant Weintraub, the sole owner, officer, director and employee of Sterling Global, an inactive Florida corporation, emailed two written tender offer letters to various board members, officers and public relations representatives of Eastman Kodak Company and AMR Corporation. Weintraub also emailed the tender offer letters to numerous media outlets. The letters offered to purchase shares of the companies' stock at substantial premiums. Weintraub later represented to the media that his AMR offer had the backing of "several large [financial] institutions." However, Weintraub never obtained a letter of credit or other written financing agreement and had been declined by several banks. The tender offer letters also failed to disclose several aspects of Weintraub's background, including that Weintraub (i) pleaded guilty to two felony counts of organized fraud and one count of felony money laundering; (ii) was on probation when he submitted the tender offer letters; (iii) was permanently enjoined from acting as an officer or director of any public company as a result of previous violations of federal securities law; (iv) had yet to satisfy a $1,050,000 judgment entered against him by the court for previous violations of federal securities law and (v) filed for bankruptcy in 2007. The tender offer letters also failed to disclose that Sterling Global was administratively dissolved in 2010 for failing to file its annual report.

Against this background, the court held that there was no genuine dispute as to any material fact regarding the liability of Weintraub for violating antifraud provisions of federal securities laws. With respect to Section 10(b) liability, the court found that Weintraub made numerous

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false and misleading statements regarding his ability and intent to consummate the deals, his personal background and his representations to media outlets. The Court found the statements were material, noting that "[n]ews of a tender offer is generally considered material" and "[c]ourts have repeatedly found the failure to disclose bankruptcies and court orders — such as those entered against Mr. Weintraub — to be material admissions in securities fraud enforcement actions." Further, the statements were made "in connection with the purchase or sale of a security" because they were "disseminated to the public in a medium upon which a reasonable investor would rely, and that they were material when disseminated." Finally, scienter was demonstrated by Weintraub's creation of documents he knew were false — as the facts contained therein were within his personal knowledge.

The court also held that Weintraub violated Section 14(e), the Securities Exchange Act's broad antifraud prohibition for tender offers, noting "[t]he SEC has provided notice that 'communications that are made at any time will be subject to the antifraud provisions of Rule 10b-5 under the Exchange Act, as well as to the antifraud provisions of Rule 14a-9 and Section 14(e) if a transaction involves ... proxy or tender offer rules respectively." Here, Weintraub's tender offer letters and related communications were pre-commencement communications that fall under Rule 14e-8. With liability established, the court ordered that the case proceed to trial only on the issue of remedies.

SECURITIES ACT CLAIMS

Washtenaw Cnty. Emps.' Ret. Sys. v. Princeton Review, Inc., No. 11-11359-RGS (D. Mass. Mar. 6, 2012)

Click here to view the opinion.

Massachusetts Federal Court Dismisses Claims Against *Princeton Review*

Judge Richard G. Stearns of the U.S. District Court for the District of Massachusetts dismissed with prejudice claims that the *Princeton Review* and its officers and directors violated Sections 11 and 12(a)(2) of the Securities Act in connection with a securities offering. Although the defendants did not disclose advanced booking information, they had no duty to disclose forecasts, and the plaintiffs did not allege any incomplete or misleading disclosure in the offering documents that would have created such a duty. In addition, because the defendants adequately disclosed the risk factors that led to a decline in the *Princeton Review*'s share price, those factors could not form the basis of a material misrepresentation.

Arfa v. Mecox Lane Ltd., No. 10 Civ. 9053 (S.D.N.Y. Mar. 1, 2012)

Click here to view the opinion.

S.D.N.Y. Dismisses Section 11 Claims Against Online Retailer

Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York dismissed claims that a Chinese online retailer and its underwriters violated Section 11 of the Securities Act because the offering documents for the retailer's IPO allegedly contained false and misleading statements about the retailer's plans for opening physical stores and its growth and margins. The court initially determined that Rule 9(b)'s heightened pleading standards did not apply because the plaintiffs did not allege that the defendants acted with scienter, and so the claims did not sound in fraud. However, the offering documents adequately disclosed that the retailer closed some physical stores in 2010, and that the retailer relied heavily on online sales for revenue and growth. The offering documents also disclosed declines in gross margins and increases in expenses. In addition, the plaintiffs did not present evidence regarding the retailer's advertising strategy or its internal controls that contradicted statements in the offering documents.

SECURITIES FRAUD PLEADING STANDARDS

Capital Mgmt. Select Fund Ltd. v. Bennett, No. 08-6166-cv(L) (2d Cir. Jan. 10, 2012)

Click here to view the opinion.

Second Circuit Affirms Dismissal of 10(b) Claims Against Investment Company

The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of claims that an investment company violated Section 10(b) of the Securities Exchange Act because the plaintiffs could not show that their agreements with the investment company were misleading. The plaintiffs alleged that the investment company violated its agreements with the plaintiffs when it used plaintiffs' securities as collateral for additional borrowing, even when those securities were not deemed collateral. But the plaintiffs relied only on the agreements' language to show material misrepresentations, and a reasonable reading of that language allowed the investment company to reuse plaintiffs' securities as collateral. In addition, the investment company did not impliedly represent that it would follow certain state and federal securities laws that limit such use of plaintiffs' securities, because the investment company disclosed that it was not a U.S.-regulated company.

Sec. Police & Fire Prof'ls of Am. Ret. Fund v. Pfizer, Inc., No. 10-cv-3105 (SDW) (MCA) (D.N.J. Feb. 10, 2012)

Click here to view the opinion.

N.J. Federal Court Dismisses 10(b) Claims Against Pfizer

Judge Susan D. Wigenton of the U.S. District Court for the District of New Jersey dismissed claims that Pfizer, as successor-in-interest to Wyeth, violated Section 10(b) of the Securities Exchange Act by allegedly making material misstatements and omissions regarding the results of "Phase II" testing of a drug. Although Wyeth had initially stated that it would not move to Phase III testing of the drug unless Phase II results were "spectacular," the cautionary language in Wyeth's announcement that it was beginning Phase III testing cured any alleged misstatement because it disclosed that no conclusions could be drawn from the Phase II study at that time. In addition, Wyeth did not have a duty to disclose certain specific results of the Phase II study.

SECURITIES INVESTOR PROTECTION ACT (SIPA)

Sec. & Exch. Comm'n v. Sec. Investor Prot. Corp., No. 11-mc-678 (RLW) (D.D.C. Feb. 9, 2012)

Click here to view the opinion.

D.C. Federal Court Rules on SIPC's Role in Stanford Proceedings

Judge Robert L. Wilkins of the U.S. District Court for the District of Columbia granted the SEC's motion for an order to show cause and ordered SIPC to show why it should not be required to file an application for a protective decree in Texas federal court. That application, if granted, would force Stanford's fund into bankruptcy proceedings and entitle the fund's customers to compensation from the SIPC. The SIPC argued that SIPA requires the SEC to file a formal complaint, and that the matter should proceed as a normal civil action. But the court determined that the language and purpose of the statute required only a summary hearing. The court also rejected the SEC's argument that its determination that the SIPC should file the application for a protective decree was not reviewable.

SLUSA

Appert v. Morgan Stanley Dean Witter, Inc., No. 11-1095 (7th Cir. Mar. 8, 2012)

Click here to view the opinion.

Seventh Circuit Affirms Dismissal of Action Alleging That Brokerage Overcharged for Postage and Handling Fees

The U.S. Court of Appeals for the Seventh Circuit upheld the dismissal of an action for breach of fiduciary duty and unjust enrichment associated with brokerage fees that allegedly bore no relation to actual costs. Appert filed an action in state court alleging that Morgan Stanley

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charged its customers a fee for handling, postage and insurance (HPI) that bore no relationship and was grossly disproportionate to its actual transaction costs. Morgan Stanley removed the action to federal court, asserting jurisdiction pursuant to the Class Action Fairness Act of 2005 (CAFA) or alternatively, the Securities Litigation Uniform Standards Act (SLUSA), and moved for dismissal. The district court granted Morgan Stanley's motion, but allowed plaintiff to file an amended complaint. After the plaintiff amended her complaint, Morgan Stanley again moved to dismiss, arguing that SLUSA barred the plaintiff's suit, or alternatively, that the plaintiff failed to state a claim. The district court again dismissed the action.

On appeal, the Seventh Circuit affirmed dismissal of the action, finding that the federal court had jurisdiction and that the plaintiff failed to state a claim. The court first concluded that SLUSA did not apply, because any alleged misrepresentation that stated that the HPI fee was tied to actual costs was not "material" to investors' decisions to buy or sell securities. The court further concluded that the defendant instead established federal jurisdiction pursuant to CAFA, and that the plaintiff did not establish that the action fell within CAFA's securities exception. Finally, the court affirmed dismissal of the action for failure to state a claim, agreeing that the contract did not suggest that the HPI fee represented Morgan Stanley's actual costs, that it was not reasonable to read this into the agreement, and that Morgan Stanley had no implied duty to charge a fee that was reasonably proportionate to actual costs where it notified customers in advance of its charges and customers were free to decide whether to continue to do business with the firm.

STATUTES OF LIMITATIONS

In re Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571 (SAS) (S.D.N.Y. Mar. 20, 2012)

Click here to view the opinion.

S.D.N.Y. Determines 10(b) Claims Against Former Vivendi CFO Not Time-Barred

Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York determined that claims asserting violations of Section 10(b) of the Securities Exchange Act against Vivendi's former CFO were not time-barred. The plaintiffs originally had been part of a proposed class in 2002, but they filed a new complaint after being excluded from the class. That new complaint was governed by the two-year statute of limitations, which had been extended from one year after the filing of the original complaint. Although the plaintiffs filed their new complaint more than two years after the order dismissing them from the initial class action, the court determined that the filing of a Rule 23(f) petition seeking interlocutory review of a class certification decision tolled the statute of limitations while the petition was pending. Because the plaintiffs filed their new complaint within two years of the decision denying interlocutory appeal, their action was timely.

SUCCESSOR OBLIGOR CLAUSES

In re BankAtlantic Bancorp Inc. Litig., C.A. No. 7068-VCL (Del. Ch. Feb. 27, 2012)

Click here to view the opinion.

Chancery Court Enjoins BankAtlantic Sale to BB&T

Vice Chancellor J. Travis Laster of the Delaware Court of Chancery, permanently enjoined BankAtlantic Bancorp, Inc. (Bancorp), a company which holds 100 percent equity in BankAtlantic, a federal savings bank, from selling BankAtlantic to BB&T Corporation. To attract bidders, the deal was structured as a "good bank/bad bank" transaction where the performing assets were separated from the nonperforming assets. Pursuant to the merger agreement, the performing assets were to be sold to BB&T Company and Bancorp was to retain the nonperforming assets as consideration. If the transaction were consummated, Bancorp no longer would have been a federally regulated bank holding company. The plaintiffs filed suit alleging

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the transaction violated debt covenants that prohibited Bancorp from selling "all or substantially all" of its assets where the acquirer had not assumed the debt. The court held that, under New York law, the transaction constituted substantially all of Bancorp's assets and the ensuing default would cause irreparable harm to plaintiffs.

The court began its analysis by stating that New York law considers both quantitative and qualitative factors when determining whether a transaction conveys "substantially all" of a company's assets for purposes of a successor obligor provision. The court held that "[f]rom a quantitative standpoint, Bancorp is selling 85-90% of its assets in the Sale Transaction." The court reached this percentage by comparing the value of Bancorp's total assets with the value of BankAtlantic as listed in the most recent Form 10-K and 10-Q. Further, the court stated that "[i]t is difficult to imagine a transaction that would have a greater qualitative impact on Bancorp" because it would leave Bancorp with "no brand, no banking franchise, no deposit base, no branches, eight current employees, and a portfolio of criticized assets." The court held that "[t]aken as a whole, the evidence at trial establishe[d] that the Sale Transaction will constitute a transfer of substantially all of Bancorp's assets. Because BB&T is not assuming the Debt Securities, the Sale Transaction will breach the Successor Obligor Provision." The court therefore permanently enjoined the transaction.

WHISTLEBLOWER PROTECTION

Lawson v. FMR LLC,
No. 10-2240
(1st Cir. Feb. 3, 2012)

Click here to view the opinion.

First Circuit Holds SOX Whistleblower Provision Limited to Public Company Employees

The U.S. Court of Appeals for the First Circuit held that employees of a nonpublic company that are working as contractors to a public company are not protected by the whistleblower provision of Section 806 of the Sarbanes-Oxley Act, affirming the dismissal of those claims on a motion to dismiss. The plaintiffs, former employees of nonpublic investment advisers to public companies, alleged that their former employers had retaliated against them for raising concerns about possible securities violations at the public companies that their former employers advised. However, based on the express language of Section 806 and the act's legislative history, the court determined that Congress intended for the whistleblower protections to apply only to those employees of public companies and invited it to amend the statutory provisions if broader applications were intended.

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