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WHAT'S INSIDE

SEALED DOCUMENTS

AT&T sits out Al Jazeera's appeal of confidentiality ruling

AT&T's pay television unit has told Delaware's high court it's sitting out Al Jazeera's appeal of an order to let the news media see the records in their legal battle over AT&T's refusal to carry the Qatar-based broadcaster's U.S. cable news arm.

Al Jazeera America LLC v. AT&T Services Inc., No. 562, 2013, response to appellant's opening brief filed (Del. Jan. 6, 2014).

Al Jazeera filed an opening brief Dec. 20 in support of its appeal of that Chancery Court order to unseal the news network's breach-of-contract complaint against AT&T. According to Al Jazeera, if the order stands, companies will increasingly litigate in other courts rather than "suffer serious economic loss … in order to enforce their contractual rights in Delaware."

But AT&T, which had also opposed the unsealing of the suit in the Chancery Court, nevertheless said in a response brief filed Jan. 6 with the state Supreme Court that it "takes no position with respect to Al Jazeera's appeal."

As in most courts, litigants are provisionally allowed to file documents in the Chancery Court under seal without first getting a ruling from

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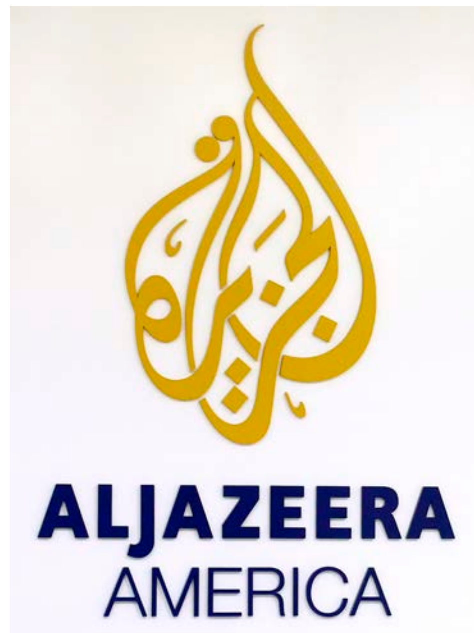

REUTERS/Brendan McDermid

COMMENTARY

How the CFPB's supervisory and enforcement functions work together

Allyson B. Baker, a partner of Venable LLP, uses insight gained while she was a lead enforcement attorney with the Consumer Financial Protection Bureau to examine a recent speech by a CFPB deputy director for clues as to how the agency might prioritize its deployment of supervisory resources in the coming year.

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How the CFPB's supervisory and enforcement functions work together

By Allyson B. Baker, Esq.
Venable LLP

In an Oct. 9 speech to the Federal Deposit Insurance Corp.'s Advisory Committee on Economic Inclusion, Steve Antonakes, the deputy director of the Consumer Financial Protection Bureau and also the associate director of its Supervision, Enforcement and Fair Lending Unit, discussed the CFPB's supervisory and enforcement tools.

Antonakes noted that the CFPB has "the opportunity to oversee consumer financial products and services across charters and business models," and that for this reason, "charter or license type is becoming less relevant in determining how we [the CFPB] will prioritize and schedule our examinations and investigations." Instead, as Antonakes explained, the CFPB has "begun to implement a prioritization framework that allocates our examination, investigation and fair-lending resources across product types."

In a rare public assessment of CFPB supervision priorities, Antonakes then outlined the "qualitative and quantitative factors" used to determine — in part, at least — supervision priorities.

"These factors include," he said, "the size of a product market; a regulated entity's market share in that product market; the potential for consumer harm related to a particular product market; and field and market intelligence that encompasses a range of issues including, but not limited to, the quality of a regulated entity's management, the existence of other regulatory actions, default rates, and consumer complaints."

A USEFUL LIST

This list provides useful guidance to banks and non-banks subject to the CFPB's supervision authority and, if nothing else, offers at least a tentative roadmap of how the agency might prioritize its deployment of supervisory resources. In addition, this guidance gives some insight into the CFPB's interest in crafting policies that concern a particular market or industry, regardless of whether that market or industry's participants are comprised of banks, non-banks or both.

Antonakes also stressed that although the offices of supervision and enforcement operate under the same unit umbrella, the CFPB's Office of Enforcement has "tools" that operate independently from the agency's supervisory function. He noted that instead of relying on information gathered through the CFPB's examination process, the Office of Enforcement can rely on information it gathers through its investigative function, as well as information gathered from "listening to and analyzing consumer complaints, industry whistle-blower tips, and information from government agencies, industry, and consumer groups."

Antonakes further described some of the ways in which the Office of Enforcement acts independently. He also discussed an unusual aspect of the CFPB's enforcement jurisdiction — that the agency can seek the same remedies in either district court or in the CFPB's administrative forum. The availability of the same remedies in either forum means that the CFPB's decision to bring a case in one forum instead of another forum is not driven by the availability of certain remedies but by other circumstances specific to a case.

Finally, in emphasizing the independence of the CFPB's enforcement function, Antonakes reminded his audience that the agency has independent litigating authority, meaning that it can bring cases in its own name in district court, without referring a case to the Justice Department for prosecution.

INDEPENDENT BUT TEAMING UP

The Dodd-Frank Act and the CFPB's rules of investigation provide for a agency enforcement function that is robust and independent. But notwithstanding this independence and Antonakes' description of the CFPB's specific enforcement "tools" that are not dependent on its supervision authority, it would be wrong to assume that

Courtesy of CFPB

> CFPB Deputy Director Steve Antonakes said the agency has "begun to implement a prioritization framework that allocates our examination, investigation and fair-lending resources across product types."

Allyson Baker, a partner in the Washington office of **Venable LLP**, is a trial attorney and was, until recently, an enforcement attorney with the Consumer Financial Protection Bureau, where she served as lead counsel on one of the first enforcement actions that also resulted in the largest agency settlement to date.

the offices of supervision and enforcement are not interconnected in their work. It seems likely that the two offices will be working increasingly closely together.

In a rare public assessment of the Consumer Financial Protection Bureau's supervision priorities, Deputy Director Steve Antonakes outlined the "qualitative and quantitative factors" used to determine supervision priorities.

Indeed, on Oct. 8, one day before Antonakes' speech, the CFPB announced two enforcement actions that had derived from its examination of a mortgage broker and of a bank's mortgage lending operations. *In the Matter of Washington Federal*, File No. 2013-CFPB-0005l *In the Matter of Mortgage Masters*, File No. 2013-CFPB-0006. The two enforcement actions allege violations of the Home Mortgage Disclosure Act, which requires lending institutions to report and disclose certain loan information. The consent orders in each of these matters allege "violations of law and deficiencies in the applicable compliance systems with respect to [each] respondent's compliance with the HMDA."

Both of these actions, as noted in each order, derive from the CFPB's authority to examine an entity's implementation of "processes for managing compliance with the federal consumer financial laws" and to identify "violations of law and deficiencies in the applicable compliance systems." Thus, the predicate facts giving rise to these enforcement actions derive largely, if not exclusively, from the CFPB's examination of Washington Federal and Mortgage Masters.

PREDICTIONS FOR 2014

These two actions are a powerful reminder that the CFPB's Office of Supervision has already prioritized mortgage market participants. These actions also are an important reminder that although the Office of Enforcement has tools that operate independently from the CFPB's supervisory function, the offices of enforcement and supervision also work closely together. Any bank or non-bank that is the subject of a CFPB examination should be cognizant that although each office acts through independent functions, both also operate in an interconnected environment that shares priorities and information. WJ

AT&T

CONTINUED FROM PAGE 1

the judge. But when news organizations intervened to request an order to unseal the documents in the Al Jazeera litigation, Vice Chancellor Sam Glasscock III granted most of that petition. *Al Jazeera Am. LLC v. AT&T Servs.*, No. 8823, 2013 WL 5614284 (Del. Ch. Oct. 14, 2013).

The suit says AT&T dropped Al Jazeera America from its U-verse TV service in January 2013 after Al Jazeera bought Current TV, a network formerly owned by ex-Vice President Al Gore.

Both AT&T and Al Jazeera agreed the case must remain sealed because of sensitive business information about the broadcast contract terms.

The parties had only begun to litigate the crux of the suit when it was side-tracked by objections from various news organizations that even the public version of the complaint was so heavily redacted the public could not grasp what the litigation was about.

Al Jazeera and AT&T then teamed up to oppose the media's petition to unseal the complaint.

But Vice Chancellor Glasscock on Oct. 14 said the companies had failed to show that they would be seriously damaged if the public learned most of the lawsuit's details.

He said in the ruling that the public has the right to be informed of the circumstances under which a Middle Eastern journalistic enterprise can be denied entry into the American broadcast market by a provider with 48 million viewers.

If the ruling stands, "future contracting parties will avoid selecting Delaware as a dispute resolution forum," Al Jazeera said.

If information could be kept secret simply because its revelation might embarrass or disadvantage the parties, the public's right to know about litigation in the nation's premiere business court would be seriously compromised, the judge said.

He ordered the filing of a mostly unredacted version of the sealed complaint.

Al Jazeera filed an emergency interlocutory appeal, which effectively stayed the order, with the result that there is still little information about the specifics of a lawsuit filed in August.

In its opening brief to the state high court, Al Jazeera said Vice Chancellor Glasscock made a serious error of law when he too narrowly interpreted the scope of the Chancery Court rule that allows documents to be sealed if they contain "sensitive financial business or personal information."

The brief said the judge had "acknowledged that the parties had shown that in the business in which they operate, confidentiality of contract terms is paramount, and the disclosure of those terms would cause both parties significant economic harm," yet he failed to rule accordingly.

If the ruling stands, "future contracting parties will avoid selecting Delaware as a dispute resolution forum," Al Jazeera warned in the heavily redacted brief. WJ

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Defendant: Kenneth J. Nachbar and Shannon E. German, Morris, Nichols, Arsht & Tunnell, Wilmington

Related Court Document:

Al Jazeera's opening brief: 2013 WL 6844704

Courts divide on corruption statute as 1st Circuit limits 18 U.S.C. § 666 to bribes

By Joseph F. Savage Jr., Esq., and Brian Kelly, Esq.
Goodwin Procter LLP

The 1st U.S. Circuit Court of Appeals has held — contrary to the 2nd, 7th and 8th circuits — that 18 U.S.C. § 666 is solely a bribery statute and does not criminalize gratuities to state and local officials.[1] For companies whose employees regularly interact with public officials, resolving the scope of this statute could prove important. If this often-used law is limited to bribes, routine business socializing with public officials — such as by sharing meals, attending ball games and the like — may be less likely to be scrutinized by federal prosecutors.

On the other hand, if the statute is interpreted to ban only bribes, then companies will be unable to resolve statutory charges by characterizing an allegedly unlawful payment as a relatively minor "gratuity." In addition, the lack of a gratuity option may cause prosecutors to treat more minor transactions as bribes. And — at least for the moment — certain conduct that is unlawful in New York or Chicago, for example, cannot be prosecuted in Boston or Providence. This circumstance complicates compliance.

While the U.S. Supreme Court has generally described the distinction between a bribe and a gratuity, the convoluted legislative history of federal anti-corruption statutes makes divining congressional intent regarding Section 666 difficult. In *United States v. Sun-Diamond Growers of California*, the court explained that the "distinguishing feature of each [the bribery and gratuity] crime is its intent element."[2] It also noted that bribery necessitates a *quid pro quo* — "a specific intent to give or receive something of value *in exchange* for an official act" — whereas a gratuity is merely remuneration for "some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken."

The convoluted legislative history of federal anti-corruption statutes makes divining congressional intent regarding Section 666 difficult.

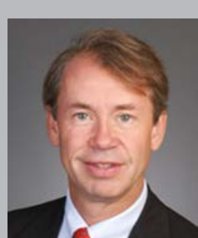
In *Sun-Diamond* and many cases before it, the Supreme Court concluded that when Congress enacted 18 U.S.C. § 201 in 1962 it deliberately made bribes and gratuities to federal public officials separate crimes. Subsection 201(b) outlawed giving, taking or promising anything of value to any public official "with the intent to influence" any official act. With its emphasis on inducement of corrupt activity, Section 201(b) is the statute's bribery provision. In contrast, subsection 201(c) outlawed giving, taking or promising anything of value "for or because of" any official act. This subsection emphasizes mere connectedness to corrupt activity; it is the statute's gratuity provision.

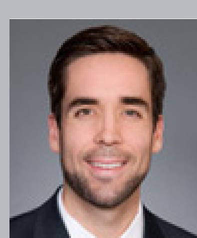
Section 201's bifurcated structure kept the distinction between bribes and gratuities uncontroversial. In 1984, Congress sought to extend federal anti-corruption prohibitions to certain state and local public officials working for entities that receive federal funding (and to private individuals who provided improper benefits to them).[3]

Newly enacted Section 666 prohibited the exchange of or offer to exchange anything of value to or by a state/local official "for or because of" government-related conduct.[4] Congress mimicked the "for or because of" language of Section 201(c)'s gratuity provision, but it omitted the "with the intent to influence" language in Section 201(b)'s bribery provision. Thus, it appeared that Congress had enacted a statute that prohibited gratuities but not bribes.

Two years later, Congress attempted to remedy this drafting oversight.[5] But instead of creating distinct bribery and gratuity subsections as it did with Section 201, Congress retained Section 666's original, single-provision format. As rewritten, Section 666(a) banned the exchange of or offer to exchange anything of value to or by a state/local official "with the intent to influence or reward" government-related conduct.[6] Courts were then left to decide whether Congress had *added* a bribery prohibition or *replaced* the gratuity prohibition with a bribery ban.

Three federal appeals courts have concluded that the amended Section 666(a) imposes both bribery and gratuity liability. In *United States v. Ganim*, the 2nd Circuit held that Section 666(a)'s omission of the phrase "for





Joseph F. Savage Jr. (L) is a partner in the Boston office of **Goodwin Procter LLP** and is a former federal prosecutor. He concentrates his practice on white-collar criminal defense, governmental investigations work and complex civil litigation. Savage is a contributing editor to Westlaw Journal White-Collar Crime and serves as chairman of the New England Innocence Project. **Brian Kelly** (R) also works in the Goodwin Procter's Boston office, where he is a litigation associate.

or because of" was inconsequential because it had "been replaced with language that is to the same effect — namely that the payment must be made to 'influence or reward' the official conduct."[7] The 8th Circuit agreed in *United States v. Zimmermann*, concluding that Section 666(a) "prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action."[8] The court paused only to note that a bribe requires a *quid pro quo* arrangement while a gratuity does not. In *United States v. Anderson*, the 7th Circuit looked to Sections 2C1.1 and 2C1.2 of the U.S. sentencing guidelines, which respectively define bribe and gratuity offenses, and treated those guidelines' express applicability to Section 666(a) as conclusive evidence of the statute's criminalization of both.[9]

THE 1ST CIRCUIT BREAKS RANK

The 1st Circuit considered the scope of Section 666(a) after Juan Bravo Fernandez and Hector Martinez were convicted in 2012 of bribery under the statute. Both men received four-year prison sentences.[10]

Fernandez, the president of a Puerto Rican private security firm, urged the Puerto Rican Senate to pass certain security-related legislation. Martinez, then a Puerto Rican senator and the chairman of the Senate's Public Safety Committee, submitted Fernandez's favored bill for consideration in the Senate, presided over a hearing on Fernandez's bill (at which Fernandez testified), and then issued a committee report in May 2005 supporting Fernandez's bill. Soon after, Fernandez booked first-class airline tickets to Las Vegas for himself and Martinez. Fernandez and Martinez then traveled together to Las Vegas, where Fernandez paid for many of the senator's personal expenses. Upon return to Puerto Rico, Martinez called for an immediate vote on Fernandez's bill and voted in favor of it.

At trial, the court instructed the jury:

> [A] defendant is not required to have accepted or received a thing of value before the business, transaction, or series of transactions. Rather, the government may prove that defendant Martinez solicited, demanded, accepted, or agreed to accept the thing of value before, *after*, or at the same time as the business, transaction, or series of transactions. Therefore, the government does not need to prove that defendant Martinez solicited, demanded, accepted or agreed to accept the trip to Las Vegas *before* defendant Martinez performed any official act or series of acts.[11]

The 1st Circuit vacated the convictions, concluding that the trial court erred when it instructed the jury that it could find the defendants guilty under Section 666(a) solely on a theory of gratuity liability.[12]

The 1st Circuit reasoned that Section 666(a)'s key language — the exchanging of or offering to exchange anything of value to or by state/local officials "with the intent to influence or reward" government-official conduct — incorporated only Section 201(b)'s bribery provision. The court explained that the "intent to influence" and the "intent to reward" clauses of Section 666(a) simply refer to two different types of *quid pro quo* bribery and do not create a separate gratuity offense.[13] "Influence" bribes pertain to situations in which a payment is made to a public official in order to induce him to engage in official conduct. "Reward" bribes pertain to situations in which a promise of payment is made before the public official's conduct is undertaken and payment is delivered only after the official complies with the payer's request. The 1st Circuit emphasized that, in either case, the offer is made before the illicit conduct occurs.

> Three federal appeals courts have concluded that the amended Section 666(a) imposes both bribery and gratuity liability.

The 1st Circuit also noted that Section 666's legislative history demonstrated congressional intent to proscribe only bribery. In the House reports preceding passage of Section 666, the term "gratuity" was wholly absent, while "bribe" was mentioned with great frequency and emphasis.[14] The court stressed that Congress' amendment of Section 666 just two years after its enactment was meant to cleanly sever the statute's textual connection to Section 201's "for or because of" gratuity provision.

Finally, the 1st Circuit concluded that Congress did not intend for Section 666(a) to proscribe gratuities because the statute's maximum penalty of 10 years in prison comports more closely with Section 201(b)'s 15-year maximum penalty for bribery than Section 201(c)'s two-year maximum penalty for gratuities.[15]

FORECASTING A RESOLUTION

Should the Supreme Court choose to resolve the differing views of Section 666(a), it will have to address the tension between many recent cases that have narrowly construed statutes criminalizing white-collar behavior and the more expansive reading of Section 666(a) adopted by the 2nd, 7th and 8th circuits.

The tendency to narrowly construe white-collar criminal statutes is well engrained. More than two decades ago, in *McCormick v. United States*, the Supreme Court reversed a conviction and held that an explicit *quid pro quo* is necessary for a Hobbs Act extortion conviction in the context of campaign contributions.[16] In 1999, the court held in *Sun-Diamond* that Section 201 applies only when something is given for an official act — and does not prohibit payments motivated by the recipients' official status.[17]

The court also narrowly construed 18 U.S.C. § 1346 — the "honest services" mail fraud statute — in a triumvirate of 2010 cases including *Skilling v. United States*.[18] The justices there unanimously agreed to apply the statute to "bribes and kickbacks" but refused to read it to "proscribe a wider range of offensive conduct" due to "the due process concerns underlying the vagueness doctrine."[19]

Most recently, in its 2013 *Sekhar v. United States* decision, the Supreme Court concluded that compelling a person to recommend that his employer approve an investment cannot constitute extortion under the Hobbs Act.[20] It reasoned that an investment recommendation is not a form of property that is capable of being "obtained." The court's narrow construction of white-collar statutes is part of a broader chorus, which has warned that numerous broadly worded criminal statutes have spawned over-criminalization and a risk of converting average citizens into unknowing felons.[21]

Despite this significant track record and an accompanying philosophical impulse to narrowly construe white-collar statutes, Justice Antonin Scalia — who along with Justice Clarence Thomas serves as the court's premiere advocate for narrow textualism in criminal cases — stated in a 2009 denial of *certiorari* that Section 666(a) "[prohibits] *bribes and gratuities* against public officials"[22] Justice Scalia observed that Section 666(a)'s "clear rules against certain types of corrupt behavior" do not suffer from the "freestanding, open-ended" phrasing of provisions like Section 1346.[23]

Furthermore, even when the court has scaled back anti-corruption statutes, as it did in *Sun-Diamond*, it has used the word "reward" as part of the definition of "gratuity" under Section 201(c).[24] Finally, the Supreme Court may refuse to believe that Congress unequivocally intended for Section 666(a) to permit gratuities collected by state and local officials while simultaneously criminalizing their receipt by federal officials in Section 201

In any event, until the circuit split is resolved, those who have business dealings with state and local officials cannot know for sure which day-to-day conduct falls within the prohibition of the federal statute that most explicitly addresses state and local corruption. WJ

NOTES

1 *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).

2 526 U.S. 398, 404-05 (1999).

3 *See Salinas v. United States*, 522 U.S. 52, 58 (1997).

4 18 U.S.C. § 666(c) (1984).

5 H.R. Rep. No. 99-797, at 16 (1986).

6 18 U.S.C. § 666(a)(1)(B), (a)(2) (2012).

7 510 F.3d 134, 150 (2d Cir. 2007) (citations omitted).

8 509 F.3d 920, 927 (8th Cir. 2007).

9 517 F.3d 953, 961-62 (7th Cir. 2008).

10 *United States v. Martinez-Maldonado*, 792 F. Supp. 2d 197 (D.P.R. 2011); *United States v. Bravo-Fernandez*, 828 F. Supp. 2d 441 (D.P.R. 2011). The defendants' sentences were also based on convictions for conspiracy to travel in interstate commerce in aid of racketeering.

11 *United States v. Fernandez*, 722 F.3d 1, 17 (1st Cir. 2013) (emphasis in original).

12 *Id*. at 27.

13 *Id*. at 23.

14 *Id*. at 21.

15 *Id*. at 24.

16 500 U.S. 257, 273-74 (1991).

17 *United States v. Sun-Diamond*, 526 U.S. 398, 406 (1999) ("[T]he government's alternative reading … would criminalize, for example, token gifts to the president based on his official position and not linked to any identifiable act.").

18 561 U.S. 358 (2010); *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010); *Black v. United States*, 130 S. Ct. 2963 (2010).

19 *Skilling*, 561 U.S. at 393.

20 133 S. Ct. 2720, 2725-26 (2013).

21 *See* Justin Weitz, *The Devil is in the Details: 18 U.S.C. § 666 After Skilling v. United States*, 14 N.Y.U. J. Legis. & Pub. Pol'y 805 (2011); Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* In the Name of Justice, 43, 44 (Timothy Lynch ed., 2009).

22 *Sorich v. United States*, No. 08–410, *cert. denied* (U.S. 2009), 129 S. Ct. 1308, 1311 (Scalia, J., dissenting from denial of *certiorari*) (emphasis added).

23 *Id*.

24 *Sun-Diamond*, 526 U.S. at 405.

Delaware high court says CEO's delay waived right to contest his removal

Allegro Development Corp.'s ex-CEO waited too long to challenge the procedure the board used to remove him from the risk management software firm, so it doesn't matter whether the surprise ouster was "void" or only "voidable," Delaware's high court has decided.

Klaassen v. Allegro Development Corp. et al., No. 583, 2013, 2013 WL 6798468 (Del. Dec. 20, 2013).

In a brief order issued Dec. 20 after oral argument of Eldon Klaassen's appeal, the *en banc* Delaware Supreme Court unanimously affirmed the dismissal of his contest-for-control suit, finding that by negotiating at length for reinstatement, he had effectively conceded the validity of his removal.

The justices said they would issue an opinion later setting forth their reasoning. But since the decision turned on Klaassen's failure to timely challenge his ouster, it is unlikely the high court will address the issue of whether the removal was "void" or "voidable," as some legal scholars had hoped.

The ruling all but concludes Klaassen's challenge to an Oct. 11 Chancery Court opinion in which Vice Chancellor J. Travis Laster found that the board's Nov. 1, 2012, removal action was only "voidable," meaning susceptible to a court challenge, rather than automatically "void," or invalid on its face. *Klaassen v. Allegro Dev. Corp. et al.,* No. 8626, 2013 WL 5739680 (Del. Ch. Oct. 11, 2013).

The former CEO said that by failing to void the board's actions, the state Supreme Court would signal to other board members that they can act "with stealth and deception to engineer critical corporate actions."

Klaassen unsuccessfully argued that because the meetings at which the board decided to remove him were secret and thus illegal, the ouster was void. Had the justices agreed, Klaassen would not have had to offer any further evidence that his ouster was improper.

The vice chancellor also held that Klaassen waited too long to go to court while he and the directors battled over a proposed sale of the company.

In his appeal brief, Klaassen argued that because the board had excluded him from the meetings at which the directors decided to remove him and drew up paperwork to that effect, the action was void.

In an answering appellate brief, his opponents on the board countered that the vice chancellor decided correctly when he found that the evidence clearly favors them. The only witness in support of Klaassen's position was Klaassen, the appellees said.

Since Klaassen's suit focused on a matter of equity — his alleged right to his position — it was subject to equitable defenses such as laches, a delay in filing suit that amounts to acquiescence, the answering brief said.

In his reply brief, Klaassen said that by failing to void the board's actions, the state Supreme Court would signal to other board members that they can act "with stealth and deception to engineer critical corporate actions."

Moreover, the brief said, the Chancery Court's decision to accept the laches defense represented "an unwarranted extension of Delaware law."

After the high court issues its final opinion, Klaassen could request a rehearing before the full court or seek review by the U.S. Supreme Court.

But because the full Delaware Supreme Court has already decided Klaassen's case unanimously, his odds are long either way. WJ

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Defendants: Peter J. Walsh Jr. and Ryan T. Costa, Potter Anderson & Corroon, Wilmington; Van H. Beckwith, Jonathan R. Mureen and Jordan H. Flournoy, Baker Botts LLP, Dallas

Related Court Documents:
Order: 2013 WL 6798468
Answering brief: 2013 WL 6709992
Reply brief: 2013 WL 6709994

See Document Section A (P. 21) for the answering brief and Document Section B (P. 35) for the reply.

Subsidiary's investors get too little in $2.6 billion KKR stock swap, suits say

A half-dozen shareholder suits are asking Delaware's Chancery Court to halt private equity giant Kohlberg Kravis Roberts & Co.'s "opportunistic" $2.6 billion stock-swap purchase of a subsidiary that purportedly shortchanges stockholders of the distressed-assets investment firm.

Corwin v. KKR Financial Holdings LLC et al., No. 9237, complaint filed (Del. Ch. Jan. 8, 2014).

A complaint filed by shareholder Robert Corwin on Jan. 8, mirrors five other Delaware suits accusing KKR Financial Holdings LLC's directors of rubber-stamping parent KKR's stock-swap offer that values the subsidiary at $12.79 per share or 0.051 of a KKR share.

The other suits, which make essentially the same charges and seek the same relief, were filed by Michael Reiffman, the Pompano Beach Police & Firefighters Retirement System, Sam and Tova Wietschner, Gary Bushey, and Robert Parsons. They were filed between Dec. 27 and Jan. 9 by four law firms.

Corwin's suit says that although the parent company's offer is technically a little higher than KKR Financial's current stock value, that's only because of a temporary dip due to the company's lower-than-expected 2013 third-quarter financial report, but the firm's fiscal future is bright.

Nevertheless, the directors disloyally accepted the parent's opportunistic offer even though it pays a scant premium, rather than wait for an expected market rebound that would have been a greater benefit to investors, the Corwin suit says.

Corwin's suit and the other five separate shareholder actions all claim that because of the unique and complex nature of KKR Financial's portfolio of investment assets (mostly "stressed" or "distressed" companies and bonds), no competing bidders will emerge with a higher bid.

According to the Chancery Court docket, at press time, no move had been made to consolidate the suits.

> The suit says that although the offer is higher than KKR Financial's current stock value, that's only because of a temporary dip due to the company's lower-than-expected 2013 third-quarter financial report.

In a joint Dec. 16 announcement of the merger to KKR Financial shareholders on the company's website, the heads of both companies said the merger is a big win for all stockholders.

In that message, Henry Kravis and George Roberts, co-chairs and co-CEOs of KKR & Co., said that "through this transaction, we are acquiring a business with a fully invested, complementary portfolio of assets while increasing the scale and diversity of KKR's balance sheet."

They said the stock swap gives KKR Financial shareholders a 27 percent premium over the current stock price.

In the same website announcement, KKR Financial board chairman Paul Hazen said, "This transaction offers KFN shareholders a substantial premium for that business, with an implied value in excess of the company's trading price over the last five years, while enhancing holders' liquidity."

Hazen promised in the announcement that "KFN common shareholders will gain access to the performance of the entire KKR platform."

The suits claim the KKR Financial directors breached their duty to get the best price for the company in the event of a sale and the parent company aided and abetted that breach. The complaints ask the court to enjoin or rescind the merger.

The suits also ask the court to hold the defendants individually liable for any economic damage the deal may have for KKR Financial and its shareholders. WJ

Attorneys:

Plaintiffs (Corwin and PBPFRS): Stuart M. Grant, Michael J. Barry, Nathan A. Cook and Bernard C. Devieux, Grant & Eisenhofer, Wilmington, Del.

Plaintiff (Parsons): Ryan M. Ernst and Daniel P. Murray, O'Kelly Ernst & Bielli, Wilmington

Plaintiff (Wietschner): Blake A. Bennett and Gregory F. Fischer, Cooch & Taylor, Wilmington

Plaintiffs (Bushey and Reiffman): Seth D. Rigrodsky, Brian D. Long and Gina M. Serra, Rigrodsky & Long, Wilmington

Related Court Documents:

Bushey complaint: 2014 WL 72166
Corwin complaint: 2014 WL 72200
Wietschner complaint: 2014 WL 64178
PBPFRS complaint: 2013 WL 6846498

Burden of proof too high in Hershey suit over child labor, fund says

A Delaware state court master who recommended dismissing a pension fund's records-inspection suit against Hershey Co. is imposing an "impossible" burden of proof by requiring it to show that Hershey knowingly buys cocoa produced with illegal child labor, according to newly filed court papers.

Louisiana Municipal Police Employees' Retirement System v. Hershey Co., No. 7996, brief in exception to master's final report filed (Del. Ch. Dec. 16, 2013).

Hershey shareholder the Louisiana Municipal Police Employees' Retirement System filed a Chancery Court brief Dec. 16 opposing the master's report in a last-ditch effort to save its records-inspection action, which seeks to confirm suspicions that the Hershey board has routinely looked the other way when buying cocoa from child-abusing West African farms.

LeGrow's final report follows a preliminary report issued Aug. 16 in which she found that the action did not offer "credible evidence" of wrongdoing, as Delaware law requires. Hershey is a Delaware corporation.

Without evidence that the Hershey directors knew of specific cocoa purchases that implicated child labor, LMPERS has no basis to pursue its records request, she wrote in the preliminary report.

LMPERS filed an exception Aug. 21, asking LeGrow to reconsider the draft report's conclusions and hear arguments before submitting her final recommendations.

No one has accused Hershey of any crime; the question is actually whether the board knew it was putting the company in a precarious position, the shareholder says.

LMPERS needs access to the candy maker's books to prove its allegations, the brief says.

Shareholders like LMPERS often use books-and-records suits to gather ammunition for a later breach-of-duty action against a corporation's board of directors.

But Abigail LeGrow, one of the masters who help speed up litigation by serving as fact finders under Chancery Court judges, said in her Nov. 8 final report that she found no "reasonably conceivable set of circumstances" in which the municipal pension fund's suit could link the board to the abuse. *La. Mun. Police Employees' Ret. Sys. v. Hershey Co.*, No. 7996, *master's final report filed* (Del. Ch. Nov. 8, 2013).

Without that link, LMPERS cannot show it has more than mere suspicion to go on in accusing Hershey's directors of breaching their duty to the company by exposing it to liability in connection with an international child-labor-abuse scandal, she said.

But the fund's arguments failed to sway LeGrow, whose final report likened LMPERS' reasoning to guilt by association.

Since the Chancery Court usually endorses the recommendations of a master's final report, LMPERS' shareholder action, which has generated headlines about corporate social responsibility and the ethics of cocoa production, will likely die in its infancy.

After LeGrow issued her final report, LMPERS followed with its exceptions brief, arguing that she held the pension fund to an unreasonably high standard of proof.

No one has accused Hershey of any crime, the brief notes. The question is actually whether the board knew it was putting the company in a precarious position, according to LMPERS.

Hershey has admitted there is "widespread illegal conduct in areas where the company acquires significant amounts of the key ingredient of its products," the brief says, and that should be enough to survive dismissal at the pleading stage. WJ

REUTERS/Thierry Gouegnon

A Hershey Co. shareholder filed a brief Dec. 16 opposing a special master's report in a last-ditch effort to save its records-inspection action, which seeks to confirm suspicions that the Hershey board looks the other way when buying cocoa from child-abusing West African farms. Here, a man carts bags of cocoa beans at a warehouse in Agboville, near the Ivory Coast.

Attorneys:

Plaintiff: Jay W. Eisenhofer, Michael J. Barry and Justin K. Victor, Grant & Eisenhofer, Wilmington, Del.

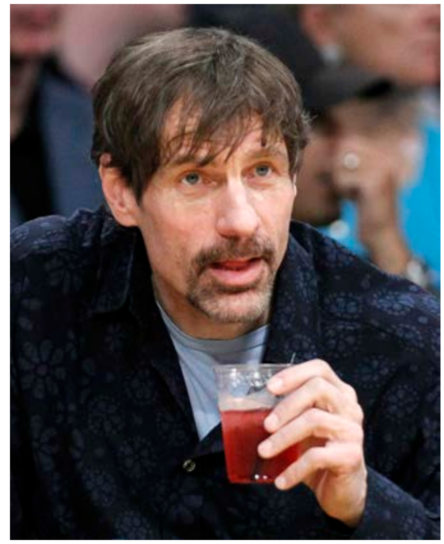
Defendants: Srinivas Raju and Robert L. Burns, Richards, Layton & Finger, Wilmington

Related Court Document:

Brief in exception to master's report: 2013 WL 6711118

Broadcom's $118 million insurance pact was ambiguous, Delaware high court says

Delaware's high court has given three ex-Broadcom Corp. top officers a green light to sue the telecom chipmaker's insurers for allegedly using the criminal charges they faced as a pretext to exclude them from a $118 million shareholder suit pact.



REUTERS/Danny Moloshok

Broadcom co-founder and former CEO Henry Nicholas, shown here in 2011, and two other Broadcom officers are suing insurers that barred them from a 2009 settlement of all securities fraud and breach-of-duty charges shareholders filed over allegedly backdated stock option awards.

Nicholas et al. v. National Union Fire Insurance Co. et al., No. 209, 2013, 2013 WL 6795187 (Del. Dec. 20, 2013).

The Delaware Supreme Court revived the bad-faith claims ex-CEO Dr. Henry F. Nicholas III and two other officers brought against insurers that barred them from a 2009 settlement of all securities fraud and breach-of-duty charges investors filed over allegedly backdated stock option awards.

A state Superior Court judge last year dismissed the officers' suit after finding that the 2011 agreement the insurers made with Broadcom to fund the shareholder settlement unambiguously excluded the top executives' claim for being left outside the coverage umbrella. *Nicholas v. Nat'l Union Fire Ins. Co.*, 2013 WL 1143514 (Del. Super. Ct. Mar. 19, 2013).

But on appeal, the high court said the 2011 agreement could be interpreted to exclude additional coverage claims — but not necessarily the bad-faith damages claim the ex-officers brought against the insurers.

The underlying litigation was brought in federal court in California by shareholders who claimed Broadcom's board of directors wrongly rewarded executives with big discounts on stock options through backdating, the practice of improperly dialing back the award date to a time when the stock was considerably cheaper.

When Broadcom later recorded the true value of those options it had to take a $2.6 billion write-down, diminishing the value of the company and its stock, investors said.

Some shareholder suits alleged the directors breached their duty of loyalty and supervision, while other lawsuits said company officials violated federal securities laws by disseminating false and incomplete information to shareholders and regulatory agencies.

> The justices said the agreement could be interpreted to exclude additional coverage claims — but not necessarily the bad-faith damages claim the ex-officers brought.

Broadcom and the flock of insurers that wrote myriad layers of D&O policies that were part of its $210 million in coverage agreed to settle most of the shareholder charges.

Excluded were those allegations that involved Nicholas, co-founder Henry Samueli and ex-CFO William J. Ruehle, who faced criminal proceedings related to the stock options.

Many insurance policies and company charters bar indemnification of officers and directors who are found to have been dishonest or disloyal.

When the three officers challenged the 2011 insurance agreement in the Superior Court, the judge dismissed the complaint, finding that it sought to "undermine" the pact. But in their state Supreme Court appeal, the executives said the agreement could be read to permit damage claims.

Justice Randy J. Holland, writing for the high court panel, agreed that the fact that the suit in effect challenges the insurers' failure to cover the three officers may not make it a forbidden coverage action. Damages actions for bad faith may be allowed under the pact, he said.

The high court remanded the case so that discovery and testimony could be conducted to determine what the parties' intent was in the 2011 agreement and whether they planned to bar any suit that challenged the coverage of the pact. WJ

Attorneys:

Appellants: Jennifer C. Wasson and Michael B. Rush, Potter, Anderson & Corroon, Wilmington, Del.; Scott D. Gilbert and Miriam M. Smolen, Gilbert LLP, Washington

Appellee (National Union Insurance Co.): Edward M. McNally and Patricia A. Winston, Morris James LLP, Wilmington; Robert Novack, Bressler, Amery & Ross, Florham Park, N.J.

Related Court Document

Opinion: 2013 WL 6795187

Outspoken Strine nominated to lead Delaware Supreme Court

(Reuters) – Leo Strine, the outspoken chief judge of Delaware's nationally important business court, has been nominated to lead the state's Supreme Court, Gov. Jack Markell said Jan. 8.

The move, if confirmed, would take Chancellor Strine's outsize persona away from the day-to-day rough-and-tumble of adjudicating corporate cases and put him in the more staid world of the state Supreme Court.

A majority of U.S. publicly traded companies incorporate in Delaware, in part so they can be governed by its well-established law and courts.

The Supreme Court is the final arbiter of the state's laws, including its corporate law.

Until now, Strine, 49, has been the chancellor or head of the business court, the Court of Chancery, where individual judges decide cases without a jury.

He has earned wide respect for meaty, 100-page legal opinions that defy easy labels as friendly to companies or shareholders.

But some lawyers have grumbled about a domineering style, and he frequently raises eyebrows with courtroom digressions beyond the law that have occasionally gotten him into hot wate"He wouldn't get through the Senate of the United States based on those comments," Andrew Moore, a former justice on the Delaware Supreme Court, said of Strine's asides on religion.

Nevertheless, Strine has been a full-throated cheerleader for Delaware's courts, which are a key reason businesses choose to incorporate in the state. Business fees generate up to 40 percent of the state's general revenue.

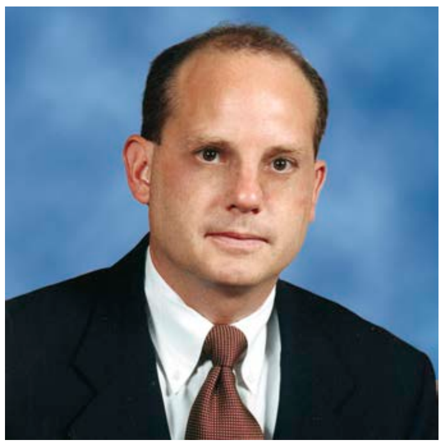
"The name of Strine being known in the corporate world will be good for the franchise," said a local attorney, who did not want to be identified speaking about the sensitive topic.

Among his recent rulings, Strine prevented investor Carl Icahn from upending the Dell Inc. buyout, and he blocked Martin Marietta's $4.9 billion hostile bid for its larger rival, Vulcan Materials. *High River LP et al. v. Dell Inc. et al.*, No. 8762, *oral ruling issued* (Del. Ch. Aug. 16, 2013); *Martin Marietta Materials Inc. v. Vulcan Materials Co.*, 56 A.3d 1072 (Del. Ch. 2012).

He has made it is easier for a controlling shareholder to buy out public stockholders in a case involving Ron Perelman's acquisition of M&F Worldwide and has slashed fees for shareholder attorneys whose work he thought was wanting. *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013).

But controversy is never far away.

In identifying potential conflicts of interest at



REUTERS/Delaware governor office /Handout

Delaware Chancery Court Chancellor Leo Strine, shown in this undated photograph released in 2011, has been nominated by the state's governor to lead the Delaware Supreme Court.

Goldman Sachs over a deal by Kinder Morgan to buy El Paso, he mockingly compared a call by Goldman Sachs Chief Executive Lloyd Blankfein to the lyrics of Lionel Richie. *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432 (Del. Ch. 2012).

Just after becoming chancellor in 2011 he awarded what was arguably one of the highest legal fees — $305 million, which worked out to $35,000 an hour — in a case involving Southern Copper Corp. *In re S. Peru Copper Corp.*, 2011 WL 6382006 (Del. Ch. 2011).

"What is it about lawyers getting money that's ickier than investment bankers or other people in society?" Strine asked when he approved the fee, noting that the lawyers had battled through a trial rather than accept an easy settlement.

Some saw the high fees as an attempt to reverse a trend by shareholders to file cases in supposedly friendlier courts outside the state.

Just weeks earlier, Strine declared at a New York law conference that "Delaware is open for business" and called on those lawyers in attendance who had received multimillion fee awards by his court to stand up and identify themselves.

OUTSPOKENNESS MAY COUNT AGAINST STRINE

In a statement Jan. 8, Strine said: "If the Senate confirms me to this important position, I will do everything I can to repay the confidence they and the governor will have entrusted in me."

Strine's nomination to the state Supreme Court must be confirmed by the state's 21-member Senate, where the governor's Democratic party holds 13 seats.

The biggest mark against the nomination is likely to be Strine's tendency to speak his mind.

His musings came to national attention in 2012 when a transcript from a hearing involving fashion entrepreneur Tory Burch made the rounds.

Strine livened a routine scheduling hearing by comparing Burch's dispute to a "drunken WASP-fest" and referred to one attorney's beard as a "Hasidic rattail." He also inquired if Burch or her former husband were Jewish.

Strine, who has said he was raised a Catholic, later said he regretted what he called attempted humor.

There has been no suggestion among attorneys who have appeared in front of him that he is anti-Semitic.

The job of chief justice has come to be associated with the even temperament of Myron Steele, who retired after nine years on the job in November.

Unlike the chancellor, who alone oversees high-profile cases, the chief justice leads a court of five that tends to rule unanimously.

The chief justice also must maintain relations with lawmakers to ensure funding for the courts.

Strine's dealings with politicians in Dover has had a rocky history. In 2013, the Wilmington News Journal newspaper published excerpts of emails from Strine to lawmakers that revealed the chancellor was taking an unusually active role in drafting legislation, raising questions about blurring the separation of powers of government.

> The biggest mark against the nomination is likely to be Strine's tendency to speak his mind.

Strine, who was chief legal counsel to former Gov. Thomas Carper, joined the Court of Chancery in 1998 after one of the closest Senate votes in memory.

Critics at the time said that Strine's old firm, Skadden, Arps, Slate, Meagher & Flom, wielded too much influence in the state.

But by the time he was nominated to be chancellor in 2011, Strine was easily confirmed.

Chatter in Wilmington has already focused on Andre Bouchard as a possible replacement on the Court of Chancery. He currently leads the small litigation firm Bouchard Margules & Friedlander, which Markell's administration has tapped to represent Delaware in various federal lawsuits.

Bouchard chaired the judicial nominating commission that sent Strine's name to the governor, which could raise questions about conflicts of interest if he were to be nominated to the Court of Chancery.

Bouchard did not immediately respond to a request for comment. WJ

(*Reporting by Tom Hals*)

BREACH OF DUTY

U.S. Bank shareholder has 45 days to fix complaint against directors

A Minnesota federal judge, applying Delaware corporate law, has dismissed a lawsuit brought by a pension fund against U.S. Bank's officers and directors for breach of fiduciary duty but gave the fund a chance to file a more specific complaint.

Iron Workers Mid-South Pension Fund v. Davis, No. 13-289, 2013 WL 6858567 (D. Minn. Dec. 30, 2013).

U.S. District Judge John R. Tunheim of the District of Minnesota gave the Iron Workers Mid-South Pension Fund 45 days to file an amended complaint addressing the shortcomings in its breach-of-duty count.

Iron Workers alleged that before the financial crash of 2008, the directors of U.S. Bank, a subsidiary of U.S. Bancorp, failed to oversee its performance as trustee of several trusts invested in defective mortgage-backed securities sold by two now-defunct investment banks, Bear Stearns & Co. and Washington Mutual Bank.

> "The theory that paying the salaries of directors who commit breaches of fiduciary duty constitutes waste … is completely unprecedented under Delaware law," the judge said.

Iron Workers made a pre-suit demand on U.S. Bank. Under pre-suit demand rules, shareholders must ask corporate directors to bring an action on behalf of the company before the shareholders file such a suit on their own.

After U.S. Bank denied Iron Workers' demand, the fund filed a derivative suit on behalf of the bank last year, alleging breach of fiduciary duty, waste and unjust enrichment.

Iron Workers alleged U.S. Bank breached its role as trustee by failing to take physical possession of the underlying mortgage documents, failing to review the mortgage documents and failing to certify that they had been properly executed.

Prior to the crash, the directors should have recognized and acted on various "red flags," including numerous newspaper articles and government investigations, showing there were defects in the mortgages underlying the securities. That would have then put the onus on Bear Stearns and WaMu to correct the deficiencies, the complaint said.

U.S. Bank, which is incorporated in Delaware, moved to dismiss, arguing Iron Workers did not make a proper pre-suit demand on the board and therefore lacked standing to pursue a derivative action under Delaware business law.

The bank claimed Iron Workers' pre-suit demand letter failed to verify that the pension fund was a shareholder and did not describe each director's suspected wrongdoing in sufficient detail to convince the board to take its own action.

In addition, the derivative complaint that followed failed to allege that the defendant directors consciously or knowingly disregarded their oversight duties, U.S. Bank said.

Judge Tunheim, applying Delaware law, ruled that the pre-suit demand letter adequately established that Iron Workers was a shareholder and that it gave the board of directors sufficient notice of the fund's concerns.

However, he said the breach-of-fiduciary-duty claims were merely "conclusory" and were insufficient to state a claim that the defendants consciously disregarded their oversight duties.

The "red flags" highlighted in the complaint reflected a growing awareness of issues surrounding mortgage-backed securities in general, but the pension fund failed to present any facts suggesting that the directors were aware of problems with the specific securities the U.S. Bank trusts held, Judge Tunheim explained.

He dismissed the pension fund's allegation of breach of fiduciary duty without prejudice but dismissed its claims for waste of corporate assets and unjust enrichment without leave to refile because those claims were based solely on the argument that the directors continued to be paid while allegedly failing to oversee the securities.

Even if Iron Workers had stated a claim for breach of fiduciary duty, "the theory that paying the salaries and standard fees of officers and directors who commit breaches of fiduciary duty constitutes waste … is completely unprecedented under Delaware law," the judge said, citing *Taylor v. Kissner*, 893 F. Supp. 2d 659 (D. Del. 2012). WJ

Attorneys:
Plaintiffs: Julia M. Williams, Robbins Arroyo LLP, San Diego; Henry Helgen, Anderson Helgen Davis & Nissen, Minneapolis

Defendants (U.S. Bank): Peter W. Carter and Hugh D. Brown, Dorsey & Whitney Minneapolis

Related Court Document:
Opinion: 2013 WL 6858567

BANKRUPTCY ISSUES/SETTLEMENT

'Milestone' Nortel settlement gets court approval

(Reuters) – Defunct telecoms equipment maker Nortel Networks Inc. received court approval Jan. 7 for a $75 million deal it called a "significant milestone" in ending its five-year bankruptcy.

In re Nortel Networks Inc., No. 09-10138, settlement approved (Bankr. D. Del. Jan. 7, 2014).

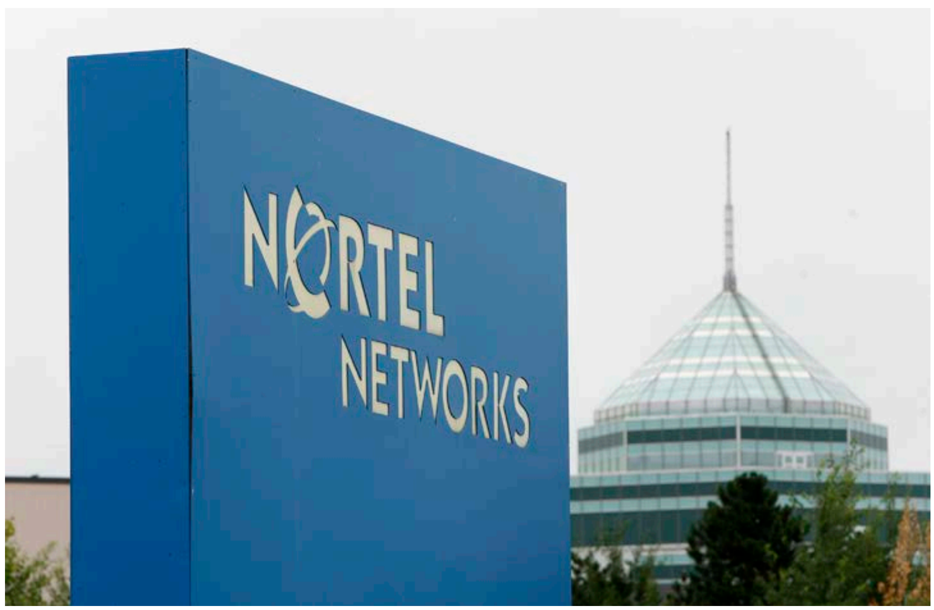
In return for the payment, insolvent Nortel affiliates in Europe will drop claims seeking more than $3 billion from Nortel's U.S. bankruptcy proceeding.

> Nortel's global business, once worth $250 billion with 93,000 employees, collapsed in January 2009.

"I am intimately familiar with the claims being settled, and it gives me great comfort in approving this," said Kevin Gross, a U.S. Bankruptcy Court judge in Wilmington, Del.

Nortel's global business, once worth $250 billion with 93,000 employees, collapsed in January 2009. Its businesses and patents were quickly auctioned off, raising $7.5 billion.

The settlement resolves some of the biggest claims against the U.S. estate, including that it allegedly short-changed a pension in Britain. The agreement does not affect a looming fight over how to divide the billions in cash among insolvency and bankruptcy proceedings in different countries.



REUTERS/Blair Gable

The Canadian estate has claimed it should get the lion's share of that cash because Nortel's intellectual property was developed in Canada, a claim disputed by the other estates. A trial is scheduled for May.

A side agreement in the settlement pledges that Nortel's U.S. and European estates will work together to try to form a common position on dividing the pile of cash ahead of the May trial.

Judge Gross overruled an objection to the settlement from the Canadian estate, which argued that the side agreement might be used to change the trial protocol.

"Courts should encourage the parties to try to sit down and settle," he said. WJ

(Reporting by Tom Hals in Wilmington, Del.; editing by Peter Galloway)

For law firms, 2014 will be year of extreme change — and challenge

By Alison Frankel

Just before Christmas, a partner at one of the most perennially profitable law firms in the land told me a funny story about a former colleague's explanation for jettisoning his career at the firm and entering academia. The Big Law refugee told his partners that being elected to their ranks was like winning a pie-eating contest, only to discover that the prize is more pie. It wasn't worth it to put in years of crushing work to become a partner, he said, when partnership's only reward (aside from heaps of money) is the right to continue to work yourself into numbness.

I laughed at the story, mostly at the vision of expensively suited law firm partners with their faces planted in coconut cream pies, but the context was serious. We were talking about the decline in law school applications. My Big Law companion — whose own children have avoided legal careers — said kids are smart to opt against a future in which the only certainty is law school debt. Too gloomy an outlook, especially from a partner at the pinnacle of the profession? He's still working as hard as ever, after all. After we plowed through the Christmas party crowds at the restaurant bar and said our goodbyes, he headed back to his office to log a few more hours.

I think my Big Law friend is dead-on — and not just about the prospects for young lawyers. I suspect that 2014 is going to be a pivotal year for big-case litigators, a moment when the normal cycles of litigation combine with changes wrought by the U.S. Supreme Court to undermine the foundation of their practice. If firms fail to anticipate and adapt to looming declines in the cases they're built to handle, new law school graduates won't be the only lawyers looking for work.

The fall-off in smart device patent cases and litigation over mortgage-backed securities — two of the mainstays of big-firm litigation over the last five years — is a troubling, but not unusual, change for law firms, which are accustomed to the waxing and waning of particular practice areas as clients' business strategies (and business conduct) change. To be sure, law firms will mourn the end of smart device and MBS litigation.

> Litigation over the esoteric financial instruments that precipitated the financial crisis was also bound to fade away as we move further from the housing crash.

There probably hasn't ever been a set of patent cases as lucrative for lawyers as the smartphone wars, which have generated hundreds of millions, if not billions, of dollars in legal fees for such firms as Quinn Emanuel Urquhart & Sullivan, Morrison & Foerster, Wilmer Cutler Pickering Hale & Dorr, Sidley Austin and others lucky enough to represent Google, Samsung, Apple, Microsoft or one of the handful of smaller smart device players. Appeals of some of the many, many patent cases in which these competitors attempted to obliterate one another's products are still under way; but, as I've said before, if the smartphone patent wars have taught us anything, it's that cooperation in the form of cross-licensing deals — and not litigation — will be the only economically rational way forward for makers of products that employ dozens or more patents.

Alison Frankel updates her blog, "On the Case," multiple times throughout each day on WestlawNext Practitioner Insights. A founding editor of Litigation Daily, she has covered big-ticket litigation for more than 20 years. Frankel's work has appeared in The New York Times, Newsday, The American Lawyer and several other national publications. She is also the author of "Double Eagle: The Epic Story of the World's Most Valuable Coin."

Litigation over the esoteric financial instruments that precipitated the financial crisis was also bound to fade away as we move further from the housing crash. Law firms with securities and white-collar defense practices have gotten fat in the last five years from representing banks accused of selling fraudulent mortgage-backed securities and collateralized debt obligations. And a long list of firms on the other side have done extremely well for themselves in asserting fraud and breach-of-contract claims against those banks, perhaps none more so than the tiny Texas firm of Gibbs & Bruns, which stands to earn about $150 million if both the Bank of America and JPMorgan Chase put-back settlements with private MBS investors go through. Plaintiffs shops like Quinn Emanuel (again!); Patterson Belknap Webb & Tyler; Kasowitz, Benson, Torres & Friedman; Bernstein Litowitz Berger & Grossmann; Labaton Sucharow; Robbins Geller Rudman & Dowd; and Cohen Milstein Sellers & Toll (among many others) deserve credit for pioneering the theories that pushed the government to bring cases against MBS issuers and the credit rating agency Standard & Poor's.

But while the Justice Department still has plenty of time to assert claims and bring charges under the Financial Institutions Reform, Recovery and Enforcement Act, private investors don't have the luxury of a 10-year statute of limitations. As the New York state appeals court highlighted in a ruling in December on when the clock begins to tick on MBS breach-of-contract claims, time is almost up for MBS litigation. *Ace Sec. Corp. v. DB Structured Prods.*, 2013 WL 6670379 (N.Y App. Div., 1st Dep't Dec. 19, 2013).

Law firms face this kind of challenge cyclically. What's different now, however, is the threat to entire categories of litigation, not just particular causes of action. Let's begin with the most theoretical: the anti-troll movement. There seems to be hardening political consensus against entities that exist simply to assert intellectual property rights. It's too early to say whether or how lawmakers can limit the ability of such non-practicing entities to bring patent suits, but if they do, there will be an awful lot less patent litigation. I've seen studies estimating that patent trolls filed upward of 60 percent of all patent suits in 2012. If troll suits are somehow barred, troll lawyers won't be the only ones with a lot less work to do.

And what if the Supreme Court holds later this term in *Alice Corp. v. CLS Bank International et al.*, No. 13-298, *cert. granted* (U.S. Dec. 6, 2013), that computer-implemented business methods aren't eligible for patents, as the entire software industry is urging? As you know, the Supreme Court has consistently raised the standard for patent eligibility over the last few years. Fewer patents means less patent litigation.

Securities class action defenders should also be diversifying their expertise right about now. I've been sounding alarms for months about the Supreme Court's upcoming consideration of the fraud-on-the-market presumption of investor reliance that a different batch of justices established in 1988 in *Basic v. Levinson,* 485 U.S. 224 (1988) — the case that essentially launched the megabillion-dollar securities fraud class action industry.

Yes, I know, undoing *Basic* isn't a sure thing. And yes, plaintiffs lawyers will still have ways to bring securities fraud claims even if five or more justices repudiate *Basic*; they can frame class actions as omission cases, which don't require a showing of reliance, or they can bring individual suits on behalf of as many big institutional investors as they can round up. But big defense firms are built to dam a continuing stream of major securities class actions. If those cases dry up, firms won't need as many lawyers to defend them.

Similarly, if the corporate forum selection clauses that have come into vogue since the Delaware Chancery Court endorsed their enforcement in 2012 work as intended, there will be less shareholder M&A and derivative litigation to defend. Remember, these forum-selection charter amendments and bylaws were proposed as a way to save corporations from litigating the same shareholder claims in multiple jurisdictions. The clauses adopted by Delaware corporations typically require shareholders to litigate all of their causes of action in Chancery Court.

There are still some kinks to be worked out — specifically, whether it's up to non-Delaware judges to enforce forum-selection clauses when shareholders attempt to sue outside of Chancery Court — but if the provisions reduce multi-jurisdiction shareholder litigation, the reduction in corporate legal expenses means less revenue for defense firms. It is a peculiar truism of the law business that what's good for clients may not be so good for their lawyers.

That's just as valid when you look at non-securities class actions, for which the Supreme Court keeps erecting new obstacles. We've seen a lot of debate recently over whether class actions or arbitrations are more efficient at providing relief to injured consumers. That's an open issue for financial products and services overseen by the Consumer Financial Protection Bureau, which has the power to regulate mandatory arbitration provisions in contracts involving financial products like credit cards, payday loans and checking accounts.

Otherwise, as the Supreme Court told us last term in *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (June 20, 2013), underlining its previous holding in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), it doesn't much matter if class actions would do a better job of compensating claimants with small damages. If you've signed an arbitration agreement, you're pretty much stuck with it, even if the provision bars classwide claims. (The 5th U.S. Circuit Court of Appeals said as much in December when it struck down the National Labor Relations Board's ruling in *D.R. Horton*, one of the last shreds of hope for collective damages actions by employees. *D.R. Horton Inc. v. NLRB*, No. 12-60031, 2013 WL 6231617 (5th Cir. Dec. 3, 2013)).

The justices made it tougher to obtain class certification in their 2013 decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), but if they grant cert in *Sears Roebuck & Co. v. Butler*, No. 13-430, and *Whirlpool Corp. v. Glazer*, No. 13-431, we could see the end of consumer class actions based on "benefit of the bargain" theories. The more restrictive the class, the less of a threat it poses to defendants — and the less they have to pay lawyers to ward it off.

> Undoing *Basic* isn't a sure thing …
> [but] if securities class actions dry up, firms won't need as many lawyers to defend them.

There will, of course, always be litigation. As the U.S. Chamber of Commerce and its pro-business friends say all the time, plaintiffs lawyers are resourceful and entrepreneurial. When one road is barricaded, they'll find another route, even if they have to blaze a new trail. Look at the booming business in representing whistle-blowers who bring allegations to the Securities and Exchange Commission — a perfect example of plaintiffs lawyers adapting.

But I believe corporate litigators will be in trouble if they wait for plaintiffs firms to find the next new thing. In football, I'm a fan of the New York Giants, which means I've been steeped in the adage that the best offense is a good defense. Sometimes, the reverse makes more sense. For litigators in 2014 and beyond, the best defense will surely be a good offense.

Happy New Year. WJ

CHANCERY COURT CASES FILED

	CAPTION	CASE NO.	NATURE OF ACTION	DATE	ATTORNEY
1.	Furphy v. Nupathe	9217	Breach of duty	Jan. 2, 2014	Peter Andrews
2.	Benston v. Activision	9219	Books & records	Jan. 2, 2014	David Jenkins
3.	NCPTPP v. LSI Corp.	9220	Breach of duty	Jan. 2, 2014	Stuart Grant
4.	Equinox v. S. China	9224	Books & records	Jan. 6, 2014	Jonathan Stemerman
5.	Trillion Growth v. NIVS	9226	Books & records	Jan. 6, 2014	Jonathan Stemerman
6.	Bushey v. KKR Financial	9228	Breach of duty	Jan. 7, 2014	Seth Rigrodsky
7.	Strougo v. Coleman Cable	9229	Breach of duty	Jan. 7, 2014	Seth Rigrodsky
8.	In re MedCath Corp.	9230	Dissolution	Jan. 7, 2014	Daniel Dreisbach
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14.	Solak v. Performance Technology	9239	Breach of duty	Jan. 10, 2014	Seth Rigrodsky
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NEWS IN BRIEF

DELAWARE HIGH COURT REVIVES ASBESTOS CLAIMANTS' SUITS

The Delaware Supreme Court has reversed the Chancery Court's entry of summary judgment against a number of asbestos claimants, reaffirming that unexhausted insurance policies constitute "property" for purposes of appointing a receiver for a dissolved corporation. The high court's opinion explained that the insurance policies require the insurers to pay "all sums which the insured shall become legally obligated to pay as damages" covered by the policies. The court found that because the corporation is exposed to asbestos-related liabilities, the policies represent significant potential indemnification value to the corporation in bankruptcy proceedings. The appellants are asbestos claimants who have personal injury lawsuits pending in other jurisdictions against defendant Krafft-Murphy Co. which was engaged in the plastering business in the Washington, D.C., area prior to its dissolution in 1999. The justices effectively revived those suits.

Anderson et al. v. Krafft-Murphy Co. (In re Krafft-Murphy Co.), No. 85, 2013, 2013 WL 6174485 (Del. Nov. 26, 2013).

Related Court Document:
Opinion: 2013 WL 6174485

KKR MUST FACE SOME PRIMEDIA CLAIMS, DELAWARE JUDGE SAYS

Delaware Chancery Court Vice Chancellor J. Travis Laster has decided Kohlberg Kravis Roberts & Co. must continue to defend against certain claims in a shareholder lawsuit alleging investors received inadequate consideration in the 2011 sale of Primedia Inc. because some underlying insider-trading allegations are not stale. He held, therefore, that an insider-trading claim related to July 2002 purchases leading up to the sale was equitably tolled until the discovery of a May 21, 2002, memo in September 2007. The judge said the insider claim arguably relates back to the second amended complaint filed in August 2007. As such, he held it was filed within the equitable period. The plaintiffs are former owners of common stock of Primedia Inc. who sued in November 2005, claiming redemption of Primedia's preferred stock in 2004 and 2005 was unfair to Primedia and resulted in the enrichment of KKR at Primedia investors' expense.

In re Primedia Inc. Shareholders Litigation, No. 6511-VCL, 2013 WL 6797114 (Del. Ch. Dec. 20, 2013).

Related Court Document:
Opinion: 2013 WL679114

SEC ISSUES REPORT ON PUBLIC COMPANY DISCLOSURE

The Securities and Exchange Commission issued a staff report to Congress Dec. 20 on its disclosure rules for public companies as part of its ongoing efforts to simplify the regulations and reduce compliance costs for emerging growth companies. The report was mandated by the 2012 Jumpstart Our Business Startups Act, referred to as the JOBS Act. The report provides an overview of the SEC's Regulation S-K as well as the staff's preliminary conclusions regarding any proposed changes. "The report provides a framework for disclosure reform," SEC Chair Mary Jo White said in a statement. "As a next step, I have directed the staff to develop specific recommendations for updating the rules that dictate what a company must disclose in its filings. We will seek input from companies about how we can make our disclosure rules work better for them and will solicit the views of investors about what type of information they want and how it can best be presented."

CASE AND DOCUMENT INDEX