

CORPORATE OFFICERS & DIRECTORS LIABILITY

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 29, ISSUE 10 / NOVEMBER 18, 2013

WHAT'S INSIDE

PRE-SUIT DEMAND

- 5 California appeals court won't reinstate suit against Yahoo directors

Leyte-Vidal v. Semel
(Cal. Ct. App.)

BREACH OF DUTY

- 6 'Opportunistic' merger is no opportunity for Symmetricom investors, suits say

Young v. Symmetricom
(Cal. Super. Ct.)

SECURITIES FRAUD

- 7 Shareholder suit slams J.C. Penney for alleged misstatements, stock price drop

Gilbert v. J.C. Penney Co.
(E.D. Tex.)

- 8 Real estate trust backers misled investors, suit claims

Booth v. Strategic Realty Trust
(N.D. Cal.)

- 9 *Amici* want Supreme Court to revisit securities fraud litigation standards

Halliburton Co. v. Erica P. John Fund (U.S.)

- 10 Investor hits insurance info purveyor with fraud claim

Ark. Teacher Ret. Sys. v. Bankrate Inc. (S.D.N.Y.)

LIMITED LIABILITY COMPANY DISPUTE

- 11 Newspaper ownership board to hash out dispute in Philadelphia

Intertrust GCN v. Interstate Gen. Media (Pa. Ct. Com. Pl.)

COMMENTARY

FIRREA: The Justice Department's expansive (and expensive) tool of choice

Allyson B. Baker and Andrew Olmem of Venable LLP warn that federal regulators plan to use a series of favorable court rulings to dramatically expand their use of a little-known provision of the Financial Institutions Reform, Recovery and Enforcement Act to accelerate investigations and prosecutions of bank officials for financial crisis claims.

SEE PAGE 3

D&O INSURANCE/FAILED BANK

D&O insurer can't sue other carrier to recoup cost of bad-faith-claim pact

After two D&O insurers settled underlying claims against the failed Corona Vineyard Bank's officers and directors, a third insurer cannot sue one of those carriers to recoup its \$9.3 million settlement with the creditors, a California appeals court has ruled.

XL Specialty Insurance Co. v. St. Paul Mercury Insurance Co., No. GO47371, 2013 WL 5888473 (Cal. Ct. App., 4th Dist., Div. 3 Nov. 4, 2013).

The Court of Appeal, 4th District, upheld the dismissal of XL Specialty Insurance Co.'s suit against one of two D&O insurers that paid \$10.7 million to settle claims by regulators and creditors against the directors and officers who allegedly caused Corona's crash.

XL can't recoup its payment because the \$9.3 million was paid not to protect the insured bank and its directors and officers but rather to insure that XL would not be sued for bad faith, according to the appellate court's opinion deciding the novel issue.



XL didn't write a D&O policy for Corona in 2008 — the policy year in which the underlying claims arose — and it didn't contribute to the initial \$10.7 million settlement, the opinion says.

CONTINUED ON PAGE 15

41391336



Westlaw Journal Corporate Officers & Directors Liability

Published since November 1985

Publisher: Mary Ellen Fox

Executive Editor: Donna M. Higgins

Managing Editor: Phyllis Lipka Skupien, Esq.

Senior Editor: Frank Reynolds
Frank.Reynolds@thomsonreuters.com

Managing Desk Editor: Robert W. McSherry

Senior Desk Editor: Jennifer McCreary

Desk Editor: Sydney Pendleton

Westlaw Journal Corporate Officers & Directors Liability (ISSN 2155-5885) is published biweekly by Thomson Reuters.

Thomson Reuters

175 Strafford Avenue, Suite 140
Wayne, PA 19087

877-595-0449

Fax: 800-220-1640

www.westlaw.com

Customer service: 800-328-4880

For more information, or to subscribe, please call 800-328-9352 or visit west.thomson.com.

Reproduction Authorization

Authorization to photocopy items for internal or personal use, or the internal or personal use by specific clients, is granted by Thomson Reuters for libraries or other users registered with the Copyright Clearance Center (CCC) for a fee to be paid directly to the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923; 978-750-8400; www.copyright.com.

How to Find Documents on Westlaw

The Westlaw number of any opinion or trial filing is listed at the bottom of each article available. The numbers are configured like this: 2013 WL 000000. Sign in to Westlaw and on the "Welcome to Westlaw" page, type the Westlaw number into the box at the top left that says "Find this document by citation" and click on "Go."



TABLE OF CONTENTS

D&O Insurance/Failed Bank: <i>XL Specialty Ins. Co. v. St. Paul Mercury Ins. Co.</i> D&O insurer can't sue other carrier to recoup cost of bad-faith-claim pact (Cal. Ct. App.)	1
Commentary: By Allyson B. Baker, Esq., and Andrew Olmem, Esq., Venable LLP FIRREA: The Justice Department's expansive (and expensive) tool of choice	3
Pre-Suit Demand: <i>Leyte-Vidal v. Semel</i> California appeals court won't reinstate suit against Yahoo directors (Cal. Ct. App.)	5
Breach of Duty: <i>Young v. Symmetricom</i> 'Opportunistic' merger is no opportunity for Symmetricom investors, suits say (Cal. Super. Ct.)	6
Securities Fraud/Misrepresentation: <i>Gilbert v. J.C. Penney Co.</i> Shareholder suit slams J.C. Penney for alleged misstatements, stock price drop (E.D. Tex.)	7
Securities Fraud: <i>Booth v. Strategic Realty Trust</i> Real estate trust backers misled investors, suit claims (N.D. Cal.)	8
Securities Fraud/Class Certification: <i>Halliburton Co. v. Erica P. John Fund</i> <i>Amici</i> want Supreme Court to revisit securities fraud litigation standards (U.S.)	9
Securities Fraud: <i>Ark. Teacher Ret. Sys. v. Bankrate Inc.</i> Investor hits insurance info purveyor with fraud claim (S.D.N.Y.)	10
Limited Liability Company Dispute/Venue: <i>Intertrust GCN v. Interstate Gen. Media</i> Newspaper ownership board to hash out dispute in Philadelphia (Pa. Ct. Com. Pl.)	11
Merger Challenge: <i>In re BioClinica Inc. S'holder Litig.</i> Shareholders shut down in BioClinica merger suit (Del. Ch.)	13
Bankruptcy Fraud: <i>United States v. Shankman</i> Former Enron exec hid \$950,000 from bankruptcy court, feds claim (S.D. Tex.)	14
News in Brief	16
Case and Document Index	17

FIRREA: The Justice Department's expansive (and expensive) tool of choice

By **Allyson B. Baker, Esq., and Andrew Olmem, Esq.**
Venable LLP

A series of recent court rulings has effectively expanded the Department of Justice's authority to investigate and prosecute banks for claims related to the financial crisis.

These rulings have broadly interpreted a little-known provision of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 to allow the DOJ to seek millions of dollars in penalties from federally insured financial institutions for violations of criminal fraud statutes. Under Section 951 of FIRREA, codified as 12 U.S.C. § 1833a, the DOJ need only rely on a civil burden of proof to prove criminal fraud, provided that the alleged fraud "affects" a federally insured financial institution.

Although the provision was originally viewed as a measure to protect banks from fraud by third parties, three separate courts have recently construed this "affects" requirement broadly and affirmed that a bank can be both a "victim of" and a "participant in" the predicate fraud that gives rise to a FIRREA claim. As a result, FIRREA has become the DOJ's statute of choice when proceeding against financial institutions. Given the serious consequences of a FIRREA suit, financial institutions should be aware of its unique reach and legal standards.



REUTERS/Chip East

The Justice Department's use of FIRREA suits has been linked closely to its role on the Financial Fraud Task Force, which comprises more than 20 federal agencies, including the SEC and the IRS.

FINANCIAL CRISIS FRAUD FORCE

The DOJ's use of FIRREA suits has been linked closely to its role on the Financial Fraud Task Force. President Barack Obama formed the task force in 2009 in response to the financial crisis. The task force comprises more than 20 federal agencies, including the Department of Justice, the Consumer Financial Protection Bureau, the Securities and Exchange Commission, the

Internal Revenue Service, and the banking regulatory agencies and consists of several working groups on areas including consumer protection and mortgages.

A recent press release describes the task force as "the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to combat fraud." Although the task force comprises numerous federal agencies, it operates under the leadership and guidance of the Department of Justice, as Attorney General Eric Holder serves as its chair.

RELYING ON FIRREA

The DOJ has relied on FIRREA heavily in conjunction with its work on the Financial Fraud Task Force because of the statute's broad reach, lower burden of proof, substantial penalties and long limitations period. Specifically, FIRREA provides that the DOJ may seek civil penalties for violations of 14 different federal criminal laws, including mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. Certain of those violations, including the most commonly alleged predicate violations, such as mail and wire



Allyson Baker (L), 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. Venable partner **Andrew Olmem** (R) just finished up a seven-year tenure as Republican chief counsel and deputy staff director at the Senate Banking Committee. He was lead Senate staff negotiator during the passage of Dodd-Frank and he was involved with the Housing and Economic Recovery Act and the TARP Act.

fraud, must also affect federally insured financial institutions. See 12 U.S.C. § 1833a.

Under FIRREA, however, the DOJ need only prove that there was a violation of one of these 14 predicate criminal offenses “by a preponderance of the evidence,” which is a civil evidentiary burden. 12 U.S.C. § 1833a(f). If the DOJ successfully proves a violation of one or more predicate offenses, then under FIRREA, a court can impose a civil penalty that is as much as \$1 million for each violation. But in the case of continuing violations a civil money penalty can be imposed that is the lesser of \$1 million a day or a total of \$5 million. See 12 U.S.C. §§ 1833a(b)(1), (2).

NEW POWERS

Furthermore, under FIRREA, the DOJ can gather evidence through formal process in advance of filing a civil action. FIRREA allows the DOJ to issue administrative subpoenas seeking documents and testimony in connection with a civil investigation initiated “in contemplation of a civil proceeding under” FIRREA. 12 U.S.C. § 1833a(g)(1). This investigative authority is akin to the enforcement authority of other agencies like the SEC, the CFPB and the Federal Trade Commission.

In addition, FIRREA has a 10-year limitations period; this allows the DOJ to investigate

enforcement actions against individuals and related parties whose fraudulent activities caused the failure of savings and loan institutions.

CONCLUSION: LIMITING FIRREA?

As the DOJ has increased its use of FIRREA suits, courts have increasingly examined the question of whether there are limits on its scope and application. In several high-profile matters pending in the U.S. District Court for the Southern District of New York, banks that are defendants in FIRREA cases have contended that their cases should be dismissed on grounds that the banks could not — as a matter of FIRREA’s plain language and intent — engage in self-inflicting conduct. In other words, they could not engage in alleged wrongdoing that “affects” themselves.

The courts, however, have disagreed. On Sept. 24, in *United States v. Wells Fargo Bank*, No. 12-civ-7527, 2013 WL 5312564 (S.D.N.Y. 2013), a case alleging that Wells Fargo engaged in fraudulent mortgage underwriting, the court held that a “financial institution, through its own misconduct, can affect itself within the meaning of FIRREA.” This holding builds on an earlier and even more expansive opinion issued by Judge Lewis Kaplan in *United States v. Bank of New York Mellon*, 2013 WL 1749418 (S.D.N.Y. Apr. 24, 2013), and has further validated the DOJ’s expansive use of FIRREA and made it the tool of choice for bringing civil fraud cases against banks in the aftermath of the financial crisis. **WJ**

A series of recent court rulings has effectively expanded the Department of Justice’s authority to investigate and prosecute banks for claims related to the financial crisis.

However, many of the larger FIRREA cases the DOJ is currently prosecuting against banks alleging mortgage fraud seek penalties well in excess of these numbers, because FIRREA also imposes a penalty if there is a finding that “any person [including any corporation] derives pecuniary gain from the violation,” or if the violation results in a loss to a person other than the violator. “[T]he amount of the civil penalty may exceed the amounts [described above] but may not exceed the amount of such gain or loss.” 12 U.S.C. § 1833a(b)(3).

conduct alleged to have occurred several years earlier during the financial crisis, further enhancing the appeal of FIRREA in the eyes of the DOJ. In recent years, the DOJ has brought numerous FIRREA cases and pursued even more investigations under FIRREA.

The DOJ’s current use of FIRREA has, in many ways, strayed from the statute’s origins. Congress passed FIRREA in response to the savings and loan crisis of the late 1980s. The statute’s legislative history suggests that Congress focused little if any debate on Section 1833a. Rather, the congressional debate indicates that Congress was focused more on expanding authority to bring

California appeals court won't reinstate suit against Yahoo directors

A California appeals court has affirmed the dismissal of a derivative lawsuit brought against the directors of Yahoo Inc., finding that the plaintiff shareholder failed several times to demonstrate that a pre-suit demand on the board would have been futile.

Leyte-Vidal v. Semel et al., No. H037762, 2013 WL 5744224 (Cal. Ct. App., 6th Dist. Oct. 23, 2013).

The 6th District Court of Appeal said the plaintiff shareholder repeatedly failed to clear a key threshold test for suits brought on behalf of the company because he never showed that Yahoo's directors — as the firm's managers — lacked the independence or objectivity to give the charges a fair review.

Yahoo shareholder Miguel Leyte-Vidal brought the suit in the Santa Clara County Superior Court in 2009.

He alleged that the company's officers and directors had breached their fiduciary duty through improper financial reporting, insider trading, misappropriation of material nonpublic information, abuse of control, gross mismanagement, waste of corporate assets and unjust enrichment.

Leyte-Vidal's class-action lawsuit was one of a rash of suits filed after Yahoo's board of directors fought off an acquisition offer from Microsoft Corp. in 2008 and its stock price then plunged from \$27 to \$13 a share.

The suit alleged that Yahoo founder and former CEO Jerry Yang and the board of directors stymied the Microsoft offer so they could retain their executive positions. The lead defendant, Terry S. Semel, became CEO after Yang left.

The directors also made misrepresentations to the investing public, sold large portions of their holdings of company stock based on insider information and failed to adequately manage the company, the complaint said.

Leyte-Vidal argued that he should be excused from making a pre-suit demand on the board because a majority of the 15 director defendants were under the "domination and



REUTERS/Rick Wilking

The suit alleged that Yahoo founder and former CEO Jerry Yang and the board of directors stymied a merger offer from Microsoft so they could retain their executive positions.

control" of Yang and therefore would not have authorized litigation on the corporation's behalf.

Judge James P. Kleinberg, applying Delaware law, found Leyte-Vidal failed to allege that such a demand would be futile with sufficient particularity to justify being excused from the pre-suit requirement.

The judge had sustained the defendants' demurrers, or motions for dismissal, three times but granted Leyte-Vidal leave to amend each time.

After each amendment, Judge Kleinberg ruled that Leyte-Vidal did not have standing to sue on behalf of the company because he still failed to allege facts specifically demonstrating demand futility with respect to at least half of the director defendants.

Finally, on Sept. 20, 2011, the judge sustained the defendants' demurrer but denied Leyte-Vidal a fourth shot at amendment. He said the plaintiff's repeated failure to establish standing compelled the court to conclude that any further amendment would itself be futile.

Leyte-Vidal appealed, and the court affirmed Judge Kleinberg's judgment in its entirety in an Oct. 23 opinion.

The three-judge appellate panel held that Leyte-Vidal had failed to sufficiently plead that a majority of the directors were so self-interested as to reject a shareholder demand and he failed to show that a majority were "dominated and controlled" by Yang.

Leyte-Vidal's arguments were completely "circular and conclusory," the appeals court said.

His allegations were based on the "vague assertion" that Yang caused six of the directors to thwart further advances from Microsoft only because they "allowed" Yang to adopt an entrenchment strategy that in turn allegedly demonstrated his domination and control over the rest of the board, the court said.

"In summary, plaintiff failed to plead particularized facts manifesting a reasonable doubt that the board could not have exercised its independent and disinterested judgment in responding to his demand, had he made one at the time he brought the action," the appeals court said. [WJ](#)

Related Court Document:
Opinion: 2013 WL 5744224

See Document Section B (P. 30) for the opinion.

'Opportunistic' merger is no opportunity for Symmetricom investors, suits say

Shareholders of precision-timing device manufacturer Symmetricom have asked courts in California and Delaware to halt a \$230 million merger with semiconductor maker Microsemi Corp., claiming the sale price is unfair and the agreement was reached in bad faith.

Young et al. v. Symmetricom Inc. et al., No. 3-CV-255292, complaint filed (Cal. Super. Ct., Santa Clara County Oct. 29, 2013).

Rapien et al. v. Symmetricom Inc. et al., No. 9058, complaint filed (Del. Ch. Nov. 4, 2013).

Investor Barron Young alleges in the California suit that the merger agreement unfairly benefits current and former board members to the detriment of stockholders who won't get the best value for their shares.

According to Young's class-action complaint, filed in the Santa Clara County Superior Court, Symmetricom would sell its outstanding stock to Microsemi at just \$7.18 per share — 5 cents below the company's most recent 52-week high of \$7.23.



Young says the deal is taking advantage of the temporary low in the company's stock price caused by the federal government's sequestration policy, which will cut government and contractor spending across the board for the next several years, because many of Symmetricom's customers are government entities.

Further, the proposed merger does not take into account the immediate synergies Microsemi could realize from such a deal, the complaint says.

The lawsuit also accuses eight current and former board members and executives of self-dealing as the merger would allow them to realize a collective \$19 million in currently illiquid shares of stock.

Though the deal includes limited "go shop" provisions that would allow Symmetricom to seek a better offer, Young claims those are illusory and provide Microsemi with unfair advantages over competitors, including an option to match any superior offer. Symmetricom also would have to pay Microsemi \$5.1 million to \$10.4 million if it accepts a better offer.

The sale, expected to close in late November, could be effected with a vote by a simple majority of shareholders in favor, according to the complaint. But the merger also includes a provision wherein Symmetricom could potentially issue and sell new "top up" shares to Microsemi at the tender offer of \$7.18 per unit until the purchaser owns 91 percent of all outstanding shares. Under relatively recent Delaware corporation law, this would allow the company to effect a "short-form" merger that circumvents a shareholder vote, according to Young.

He alleges breach of fiduciary duty against the individual board members and aiding and abetting that alleged breach against Symmetricom, Microsemi and Microsemi subsidiary PETT Acquisition Corp.

Young is seeking an injunction barring the merger until a new sales process is put in place and an order directing the board to seek a better price. He has also asked the court to certify the class action, rescind any elements of the sale that might already have taken place and grant an award of legal fees.

WJ

Attorneys:

Plaintiff (Young): Randall J. Baron, Robbins Geller Rudman & Dowd, San Diego

Plaintiff (Rapien): Seth D. Rigrodsky, Brian D. Long and Gina M. Serra, Rigrodsky & Long, Wilmington, Del.

Related Court Documents:

Young complaint: 2013 WL 5913291
Rapien complaint: 2013 WL 5949921

The complaint says Symmetricom board members sold out shareholders with a bad deal in exchange for a \$19 million payday.

A suit filed by William Rapien one week later in the Delaware Chancery Court makes similar charges. Since Symmetricom is based in California but incorporated in Delaware, both plaintiffs have standing to sue and seek a preliminary injunction.

Shareholder suit slams J.C. Penney for alleged misstatements, stock price drop

Another disgruntled J.C. Penney shareholder has filed a class-action suit alleging the national retailer and its chief officers lied to the investing public about the company's cash reserves, boosting stock prices with rosy, but false, financial outlooks.

Gilbert v. J.C. Penney Co. et al., No. 6:13-cv-00810, complaint filed (E.D. Tex. Oct. 24, 2013).

In his complaint, filed in the U.S. District Court for the Eastern District of Texas, Shawn Gilbert says those stock prices plummeted after analysts questioned Penney's ability to make it through the year with cash on hand and the company's planned public offering of additional shares.

Shareholders making similar charges filed suits in the same court in October. *Erdem v. J.C. Penney Co. et al., No. 13-00750, 2013 WL 5523902, complaint filed (E.D. Tex. Oct. 7, 2013); Murphy v. J.C. Penney Co. et al., No. 13-008000, 2013 WL 5705675, complaint filed (E.D. Tex. Oct. 21, 2013).*



REUTERS/Rick Wilking

The suit says J.C. Penney's executives painted a false picture of cash holdings that inflated stock prices, which ultimately collapsed.

According to Gilbert's complaint, J.C. Penney issued a press release Aug. 30 indicating the company expected to end the year with \$1.5 billion in overall liquidity, echoing claims made by CEO Myron E. Ullman and CFO Kenneth H. Hannah during an Aug. 3 conference call with the press and industry analysts.

During the call, Ullman allegedly said the company had bolstered its financial position with a \$2.25 billion loan from Goldman Sachs and that he assumed it would need no further financing.

Hannah also reported business improvements were starting to develop traction and that the company expected to have inventory at appropriate levels throughout the store and

online in advance of the holiday season, the complaint says.

Stock prices soared on the news, reaching a class period high of \$14.47 per share Sept. 9. But on Sept. 25, a Goldman Sachs analyst reported J.C. Penney would need to take on additional debt to ensure it had enough cash on hand to keep business operations going and that liquidity problems were looming in the third quarter, Gilbert claims.

The price per share dropped 15 percent on high trading following the report, to close at \$10.12 on Sept. 25. The next day, the company announced it would make 84 million shares of public stock available, leading an analyst with Citigroup to say the company might need to raise more capital

to make it through the holiday season, the complaint says.

J.C. Penney announced Sept. 27 that the new public offering would be priced at \$9.65 per share. Stock prices plummeted again by 13 percent, to close at \$9.05 a share — a 37 percent drop from the class period high.

Gilbert is seeking to have a class certified for all investors who bought shares of J.C. Penney from Aug. 30 to Sept. 27. He is alleging two violations of the Securities and Exchange Act against J.C. Penney, Ullman and Hannah for knowingly disseminating false information.

Gilbert is also seeking damages, including interest, legal fees, and equitable or injunctive relief. [WJ](#)

Attorneys:

Plaintiff: Joe Kendall and Jamie J. McKey, Kendall Law Group, Dallas

Related Court Document:

Complaint: 2013 WL 5761259

Real estate trust backers misled investors, suit claims

In a securities fraud suit filed in San Francisco, investors in a real estate trust claim its creators and guarantors already were nearly insolvent when they produced prospectus after prospectus falsely touting that the new venture would be profitable.

Booth et al. v. Strategic Realty Trust et al., No. 13-04921, complaint filed (N.D. Cal. Oct. 23, 2013).

The plaintiffs allege that Anthony W. Thompson, Thompson National Properties LLC and several related TNP companies Thompson controlled made an initial public offering in September 2010 at \$10 a share for 9 million shares of a new company, Strategic Realty Trust Inc., which would finance the acquisition of income-generating property located primarily in the western United States.

Plaintiffs Lewis Booth and Stephen Drews filed a class action Oct. 23 in the U.S. District Court for the Northern District of California against Thompson, Thompson National Properties LLC, TNP Strategic Advisors LLC, TNP Securities LLC and eight of those companies' officers and directors.

TNP LLC was in "de facto insolvency" before the public offering, and the extent of its debts was never revealed until last summer, the suit says.

The plaintiffs allege that Thompson and the TNP entities misled potential investors in SRT from the class period of Sept. 23, 2010, to Feb. 7 this year.

According to the suit, each of the TNP companies had a role to play: TNP Securities was to attract investors and market SRT shares while TNP Strategic Advisors was to run the day-to-day operations of SRT, for which it was to get several large fees based on its management skills. Thompson and TNP controlled the entire enterprise, the complaint says.

SRT was never traded on any national exchange, but because it recruited public investors, it was required to file with the Securities and Exchange Commission, the suit says.

Those filings show that the plaintiffs and other class members were never told that TNP was experiencing badly deteriorating operating results and that its financial condition was collapsing even as it offered the SRT prospectuses to new investors, the complaint says.

The investors say they learned of TNP's financial collapse Aug. 28 when the company revealed it had established a "special committee" a year earlier "for the protection of shareholders" because TNP allegedly was paying itself fees it had not earned out of SRT's assets and it had defaulted on two large corporate debt obligations.

All the SRT public filings omitted any meaningful disclosures of TNP's financial crisis that existed before and throughout the three-year offering period, the plaintiffs assert.

In July the Financial Industry Regulatory Authority began a disciplinary proceeding against Thompson and TNP that revealed that, by the end of 2011, TNP's total equity had declined to negative \$41.1 million following a loss in 2011 of \$17.1 million, the complaint says.

TNP was in "de facto insolvency" before and throughout the public offering, and the extent of its debts was never revealed until last summer, according to the plaintiffs.

Losses stemming from the defaulted loans that had been guaranteed by Thompson together totaled \$67.2 million by the beginning of this year, the plaintiffs say.

The suit alleges violations of the Securities Act, 15 U.S.C. § 77, against Thompson, the TNP companies and their directors for allegedly publishing and promoting untrue public statements to entice investors to shore up their collapsing enterprises by investing in SRT.

The suit seeks damages for all class members and legal costs. [WJ](#)

Attorneys:

Plaintiff: Jonathan K. Levine and Daniel C. Girard, Girard Gibbs LLP, San Francisco; John A. Kehoe, Girard Gibbs LLP, New York; Joseph C. Peiffer, Peiffer Rosea Abdullah & Carr, New Orleans

Related Court Document:

Complaint: 2013 WL 5797101

Amici want Supreme Court to revisit securities fraud litigation standards

Amicus briefs by the U.S. Chamber of Commerce and former Securities and Exchange Commission officials support Halliburton Co.'s petition to the U.S. Supreme Court to review the "fraud on the market" standard applied to securities fraud lawsuits.

Halliburton Co. et al. v. Erica P. John Fund Inc., No. 13-317, amicus briefs filed (U.S. Oct. 11, 2013).

In its petition for writ of *certiorari*, Halliburton says the high court should overrule or modify the holding in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which created the fraud-on-the-market presumption that allows investors to assert that common issues predominate for class certification.

"The approach that courts have taken to the fraud-on-the-market theory has provided securities fraud plaintiffs with a free pass to class certification," the U.S. Chamber of Commerce and the National Association of Manufacturers say in their brief.

The former SEC officials and prominent law professors who filed the second *amicus* brief are equally concerned about the sweeping reach of the presumption that all investors rely on the accuracy of all relevant public documents when making investing decisions. "At issue in this case is the viability and scope of the most powerful engine of civil liability ever established in America law: the fraud-on-the-market presumption of reliance under Section 10 (b) of the Securities Exchange Act," their brief says.

Both briefs point out that *Basic's* presumption of reliance is a judicially created procedural device.

APPELLATE COURT RULING

The case before the court has a long procedural history. In the original complaint filed in 2002, Erica P. John Fund Inc. asserted that Halliburton misled investors about its potential liability in asbestos litigation. The proposed class-action period is June 3, 1999, to Dec. 7, 2001. The plaintiffs moved for class certification in 2007.



REUTERS/Alessia Pierdomenico

Former SEC commissioner Paul S. Atkins, shown here in 2008, is one of seven ex-agency officials who filed an amicus brief with the U.S. Supreme Court.

Earlier this year, in its second ruling on the case, the 5th U.S. Circuit Court of Appeals affirmed a lower court finding that Halliburton was not allowed, prior to certification, to proffer rebuttal evidence about the impact of alleged misleading statements on its stock price. *Erica P. John Fund v. Halliburton Co. et al.*, No. 12-10544, 2013 WL 1809760 (5th Cir. Apr. 30, 2013).

Citing *Basic*, the appeals court said reliance in securities fraud actions is shown by the fraud-on-the-market presumption that says the market price of a security will incorporate any material public information, and an

"The courts' acceptance of the fraud-on-the-market theory has provided securities fraud plaintiffs with a free pass to class certification," the U.S. Chamber of Commerce said.

investor will be presumed to have relied on this representation.

Moreover, the 5th Circuit noted that in a recent Supreme Court decision, *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (Feb. 27, 2013), the high court allowed Amgen's shareholders to sue the biotechnology company as a class without first having to show the alleged misinformation materially and fraudulently inflated the stock price.

Several law professors and former SEC officials filed an *amicus* brief:

Paul S. Atkins, SEC commissioner, 2002-2008

Stephen M. Bainbridge, University of California, Los Angeles School of Law

Brian G. Cartwright, SEC general counsel, 2006-2009

Richard A. Epstein, Hoover Institution

Allen Ferrell, Harvard Law School

Edward H. Fleischman, SEC commissioner, 1986-1992

Joseph A. Grundfest, Stanford Law School; SEC commissioner, 1985-1990

M. Todd Henderson, University of Chicago Law School

Simon M. Lome, SEC general counsel, 1993-1996

Jonathan R. Macey, Yale Law School

Richard W. Painter, University of Minnesota Law School

Kenneth E. Scott, Stanford Law School

Laura S. Unger, SEC commissioner, 1997-2002; acting SEC chairman, February-August 2001

Andrew N. Vollmer, SEC deputy general counsel, 2006-2009

Halliburton says the 5th Circuit overlooked that in *Amgen*, the justices signaled their willingness to reconsider the fraud-on-the-market presumption. It also says the 5th Circuit ruling has created a circuit split on the issue that the high court needs to resolve.

The Chamber of Commerce contends in its brief that private securities class-action litigation significantly burdens American businesses without producing corresponding

benefits for investors. The group says insurers pick up the tab, as most suits settle and do not go to court.

The former SEC officials and law professors point out in their brief that more than 3,000 private securities class actions were filed between 1997 and 2012, generating settlements of more than \$73 billion.

They contend that the fraud-on-the-market presumption is “effectively not rebuttable”

and “essentially eradicates the element of reliance” as a standard for class certification.

Congress passed the Private Securities Litigation Reform Act of 1995 to curb abusive securities fraud suits but did not address the relationship between Federal Rule of Civil Procedure 23, which defines the standards for all class actions, and the presumption of reliance endorsed in *Basic*, the Chamber of Commerce says.

“By granting *certiorari*, the court can consider whether and, if so, to what extent *Basic*’s presumption should survive in light of the significant developments that have occurred since 1988 in our understanding of how markets operate,” the group’s brief says. **WJ**

Related Court Documents:

Amicus brief (U.S. Chamber of Commerce):
2013 WL 5652546
Amicus brief (SEC officials, law professors):
2013 WL 5652547

SECURITIES FRAUD

Investor hits insurance info purveyor with fraud claim

A public employee pension fund has filed suit against Bankrate Inc., alleging the company misled investors about the quality of the financial information it was selling for more than a year after its initial public offering.

Arkansas Teacher Retirement System et al. v. Bankrate Inc. et al., No. 13-7183, complaint filed (S.D.N.Y. Oct. 10, 2013).

The Arkansas Teacher Retirement System filed the class-action suit in the U.S. District Court the Southern District of New York Oct. 10 on behalf of all investors who bought shares in Bankrate from its IPO on June 16, 2011, to Oct. 15, 2012.

ATRS alleges that Bankrate and its two most senior officers, CEO Thomas R. Evans and CFO Edward J. DiMaria, perpetrated a fraud on investors by claiming that the company

would make a profit by selling high-quality insurance leads to insurance carriers and agents.

Bankrate said the leads were composed of consumers who were ready to buy insurance when in fact the vast majority of them were consumers who were not in the market for insurance products, the suit says.

“Defendants’ misrepresentations and omissions about the quality of the company’s primary product created the false impression that Bankrate could extract higher referral fees and be more profitable than its competitors,” the complaint says.

The company said as a policy it did not comment on pending litigation.

The pension fund says that, as a result those false statements, the company’s stock price rose from \$15 per share at its IPO to a high of \$24.75 nine months later.

However, on May 1 and Oct. 15 of last year, Evans and DiMaria informed investors that Bankrate’s revenues for the first and third quarters of 2012 were below earnings expectations because it was clearing out its inventory of poor-quality, high-volume insurance leads, according to the suit.



REUTERS/Brendan McDermid



REUTERS/Shannon Stapleton



REUTERS/Pascal Lauener



REUTERS/Mike Segar

The defendant underwriters include Goldman Sachs, JPMorgan, Credit Suisse and Merrill Lynch.

Bankrate's share price dropped 15 percent after the May 1 announcement and declined another 22 percent after the Oct. 15 announcement, closing at \$11.26 a share the next day, the pension fund says.

The complaint says the defendants admitted that Bankrate began to cut poor-quality insurance leads in 2011 after the IPO and had hoped to mask its losses in that sector by increasing its revenues from noninsurance products, such as credit cards, mortgages and deposits.

During the class period, Evans profited by selling 280,000 Bankrate shares at artificially inflated prices for \$4.7 million, about 10 times his base salary for 2011, and DiMaria sold 232,000 shares for \$4.9 million, or 12.5 times his base salary for 2012, ATRS alleges.

The pension fund asserts fraud and misrepresentation against Bankrate and all its directors; Apex Partners LLP, which held 85 percent of Bankrate's outstanding stock at the time of the initial public offering; and the IPO's underwriters.

The underwriters include Citigroup Global Markets Inc., Goldman Sachs & Co., JPMorgan Securities LLC, Credit Suisse Securities (USA) and Merrill Lynch.

The complaint alleges the defendants violated the Securities Act, 15 U.S.C. § 77a, 77k and 77o, and Section 10(b) of the Securities and Exchange Act, 15 U.S.C. § 78j, and Rule 10b-5 by making false and misleading material statements in the IPO offering materials and other public documents that investors relied on in making stock purchases.

The complaint also says Evans and DiMaria violated Section 20 of the Exchange Act because they were controlling officers of the company and caused it to disseminate the false and misleading statements and engaged in other fraudulent conduct.

The suit seeks compensatory damages for all investors who purchased Bankrate stock during the class period. [WJ](#)

Attorneys:

Plaintiff: Gerald H. Silk, Avi Josefson and Jeroen van Kwawegen, Bernstein Litowitz Berger & Grossmann, New York

Related Court Document:

Complaint: 2013 WL 5590088

LIMITED LIABILITY COMPANY DISPUTE/VENUE

Newspaper ownership board to hash out dispute in Philadelphia

Competing lawsuits over whether the publisher of the Philadelphia Inquirer had the ability to fire editor Bill Marimow in October will be heard in Philadelphia, not Delaware, a Pennsylvania judge has ruled.

Intertrust GCN LP et al. v. Interstate General Media LLC et al., No. 1310000654, 2013 WL 5966493 (Pa. Ct. Com. Pl., Phila. County Oct. 31, 2013).

Intertrust GCN LP et al. v. Interstate General Media LLC et al., No. 131001681, complaint filed (Pa. Ct. Com. Pl., Phila. County Oct. 18, 2013).

General American Holdings v. Intertrust GCN LP et al., No. 9013, complaint filed (Del. Ch. Oct. 17, 2013).



The judge found that Philadelphia, as home of the Inquirer and site of the complained of actions, is the proper venue to handle the competing claims in the case.

Judge Patricia McInerney of the Philadelphia County Court of Common Pleas found the actions complained of in the suits occurred in the City of Brotherly Love, not the neighboring state of Delaware, where the paper's parent company, Interstate General Media, is incorporated and one of three dueling lawsuits was filed.

The judge rejected arguments that the dispute was really about a contest for corporate control and therefore should be heard in Delaware Chancery Court, where a related suit was filed.

IGM is a Delaware-chartered limited liability company, a hybrid business entity that has some of the characteristics of a corporation but in other ways resembles a partnership in that it is governed by "members" rather than directors.

The two corporate entity members in this battle for control are Intertrust GCN LP and General American Holdings Inc.

WARRING MEMBERS AND OWNERS

These two members, controlled by various warring IGM co-owners, are the official litigants in the three lawsuits in Pennsylvania

and Delaware. However, the underlying dispute concerns which co-owners have the right to control the operation of the subsidiary company that publishes the Inquirer and Daily News.

The first Pennsylvania lawsuit, filed Oct. 10 in the Common Pleas Court by IGM co-owners Lewis Katz and H.F. "Gerry" Lenfest (who collectively represent a 42 percent interest in IGM), claims Inquirer publisher Robert J. Hall overstepped his bounds in firing Marimow on Oct. 7.

According to Katz and Lenfest, this was "solely a business decision" that required approval of the IGM management committee, made up of Katz and fellow board member George Norcross III, and violated the limited liability company's agreement governing IGM's management of the paper.

That complaint is seeking an order declaring the firing null and void and reinstating Marimow as editor.

MISSED MEETING

Following the filing of the Oct. 10 complaint, Norcross called a meeting of the IGM board Oct. 15 to appoint legal counsel for the

company in that matter, to discuss whether Katz had breached his duties under the agreement by attempting to influence editorial decisions at the paper, and whether IGM should form a special committee and appoint counsel to commence an investigation into Katz's actions.

The actions taken in that meeting are the subject of a second lawsuit filed Oct. 18 in Philadelphia Common Pleas Court.

In that second suit, Katz and Lenfest are seeking an injunction to nullify the actions taken at the Oct. 15 meeting. Katz claims he was unable to make that meeting because he was out of state and asked that it be postponed for one week.

Norcross allegedly claimed that Katz and Lenfest had a conflict due to the pending prior suit and continued the meeting, during which he and three other members of the board voted to approve all of the proposals.

In that second Pennsylvania suit, Katz and Lenfest claim those votes violated the provisions of the management agreement requiring a quorum, and they have asked

the court to issue an injunction barring IGM from taking any actions related to them, with the exception of approving counsel in the original suit.

Norcross, meanwhile, filed a related suit in the Delaware Chancery Court on Oct. 17, alleging Katz and Lenfest's Oct. 10 lawsuit in Pennsylvania violated a provision of the management agreement that bars members of the board or management committee from interfering in "editorial or journalistic policies and decisions of the company."

The Delaware complaint also asserts Katz is purposely attempting an end run around IGM's board by seeking judicial intervention with regard to Marimow's rehiring.

COMPETING VENUES

Norcross asked for declarations from the Chancery Court that the votes taken Oct. 15 be deemed valid, that the firing of an editor is a journalistic decision over which the management company has no authority and that Katz breached his duties under the management agreement by attempting to usurp Hall's authority.

In her Oct. 31 bench ruling, Judge McInerney found all parties are either located in Philadelphia or areas near enough to the courthouse that travel would not be an undue burden. She added that IGM publishes its papers, which also include the Philadelphia Daily News, in and around the city. She appeared to hold that the issues in the Delaware action could be resolved in the main Pennsylvania suit before her.

The judge set a hearing for Nov. 13 on Katz's petition for a preliminary injunction declaring Marimow's firing null and void.

The Delaware Chancery Court has not ruled on the jurisdiction issue. [WJ](#)

Attorneys:

Plaintiffs (Katz, Lenfest): Richard A. Sprague, Joseph R. Podraza Jr., Charles J. Hardy, Alan Starker and Neal R. Troum, Sprague & Sprague, Philadelphia

Plaintiff (Norcross): P. Clarkson Collins Jr., Peter B. Ladig and Brett M. McCartney, Morris James LLP, Wilmington, Del.

Related Court Documents:

Complaint (Oct. 10, Pa.): 2013 WL 5669178
Complaint (Oct. 18, Pa.): 2013 WL 5576175
Complaint (Delaware): 2013 WL 5760969
Order: 2013 WL 5966493

WESTLAW JOURNAL GOVERNMENT CONTRACT



This publication focuses on litigation between private contractors and the federal government arising out of contracts for the military and the Department of Defense. It also covers those entered into by various branches of government for construction, communications and computer systems, and transportation. Disputes between contractors and state and local governments are covered, primarily those involving discrimination in public contracting. Rulings and filings in the U.S. Court of Federal Claims, the federal district and circuit courts and the various Boards of Contract Appeals are featured. You'll also find coverage of litigation involving The False Claims Act and its whistleblower provisions.

Call your West representative for more information about our print and online subscription packages, or call 800.328.9352 to subscribe.

Shareholders shut down in BioClinica merger suit

The Delaware Chancery Court has dismissed a shareholder suit challenging the acquisition of BioClinica Inc. because the plaintiffs could not show that the clinical research company's board had acted in bad faith or failed to negotiate the best price.

In re BioClinica Inc. Shareholder Litigation, No. 8272-VCG, 2013 WL 5631233 (Del. Ch. Oct. 16, 2013).

Vice Chancellor Sam Glasscock III said in his opinion that the board actually took several steps to ensure stockholders were getting the best possible deal, including seeking numerous potential bidders, and had settled on an acquisition by JLL Partners Inc. at a price that was in the top range of offers.

According to the opinion, BioClinica began soliciting offers in mid-2012. It hired EP Securities LLC to act as an outside financial adviser and established a committee of independent board members to oversee negotiations.

The court found no evidence that BioClinica's board failed to attempt to maximize shareholder value or breached its duty of loyalty.

The company contacted 17 potential private equity bidders, including JLL Partners, which was not initially interested. Eventually, another bidder indicated interest at a price of \$6.85 to \$7.26 per share. EP reported that while that bidder was "serious" about the acquisition, its board would not pull the trigger on a final offer, Vice Chancellor Glasscock explained.

Shortly thereafter, JLL expressed an interest in acquiring BioClinica for a \$7 to \$7.25 per share. Because it was the only bidder remaining out of 21 potential buyers, BioClinica entered an exclusivity agreement with JLL.

A merger agreement was finalized in January at a price of \$7.25 per share, valued at about \$123 million. The share price represented

a 23.2 percent premium over the average closing price in the previous three months and a 28.7 percent premium over the average in the last year, the opinion says.

A group of BioClinica shareholders filed a complaint in February, as well as a motion to expedite. The court denied the motion, and the merger closed March 13.

In an amended complaint filed in April, the plaintiffs asserted the exclusivity agreement precluded other offers. They also claimed that upward revisions to capital expenditure estimates entered sometime during the sales process were purposely introduced to depress BioClinica values.

Vice Chancellor Glasscock said the BioClinica board members — all stockholders themselves — would have little incentive to artificially raise capital expenditure estimates in order to depress the sale offer from JLL.

The judge likewise pointed out that more than 88 percent of shareholders found the offer price adequate and that there was no indication any superior offer would have been coming had BioClinica not entered into exclusivity with JLL.

The only other offer on the table at that time was nearly identical in terms of price and came from a company whose board was unwilling to make a final offer, the vice chancellor noted. Though the BioClinica board did not reveal why it revised its capital expenditure estimate upward, he found the plaintiffs could not show that action was either material or done in bad faith.

The complaint had also alleged JLL aided and abetted the board in violating its duty of care, but the judge found there was no evidence of support of that claim either.

While JLL negotiated exclusively with BioClinica and was granted access to the company's confidential information, there was nothing to indicate either that JLL



REUTERS/Delaware governor office/Handout

In dismissing a shareholder merger challenge, Delaware Chancery Court Vice Chancellor Sam Glasscock, shown here, said BioClinica Inc.'s board took several steps to ensure stockholders were getting the best possible deal and agreed to be acquired by JLL Partners Inc. at a price that fell in the top range of offers.

pressed the board to make certain decisions in the merger or that any deal-protection devices were unreasonable, given the overall sales process, Vice Chancellor Glasscock held.

He found the plaintiffs failed to state any claim upon which relief might be granted and dismissed the amended complaint with prejudice. **WJ**

Attorneys:

Plaintiffs: R. Bruce McNew, Taylor & McNew, Wilmington, Del.; Seth D. Rigrodsky, Brian D. Long and Gina M. Serra, Rigrodsky & Long, Wilmington

Defendants: Gregory V. Varallo, Rudolf Koch, Robert L. Burns and Christopher H. Lyons, Richards, Layton & Finger, Wilmington

Related Court Document:
Opinion: 2013 WL 5631233

Former Enron exec hid \$950,000 from bankruptcy court, feds claim

A former Enron Corp. executive has pleaded not guilty to bankruptcy fraud and related charges for allegedly hiding more than \$950,000 in assets, according to arraignment papers filed in the U.S. District Court for the Southern District of Texas.

United States v. Shankman, No. 4:13-cr-00605, defendant arraigned (S.D. Tex., Houston Div. Oct. 3, 2013).

Prosecutors claim that Jeffrey Adam Shankman concealed his ownership interest in a partnership that held \$500,000 worth of real estate.

Shankman, 46, of Houston, was the head of the global markets division at Enron in 2001, where he served on the art committee. He later served as CEO of Monotech Corp. and was a partner in Jeffrey A. Shankman LLC, 1818 Art Partners Fund and J&L Leghorn, according to the indictment.

Prosecutors say Shankman filed for Chapter 7 bankruptcy in 2008, offering a petition that listed certain financial information, including assets, liabilities and earning potential. The bankruptcy judge appointed a trustee to liquidate all non-exempt assets to pay off creditors.

But Shankman allegedly concealed numerous pieces of art, jewelry and other assets that he transferred, sold or pawned throughout his bankruptcy. Prosecutors put the total value of the items at around \$952,000.

Shankman allegedly lied about the extent of his ownership in the various partnerships,

including a 50 percent interest in J&L Leghorn, and claimed to have transferred many pieces of art to his stepfather sometime in 2006 or 2007. A 24-count indictment filed against him Sept. 8 in the Texas federal court claims no such transfers ever took place.

Former Enron Corp. executive Jeffrey Adam Shankman hid more than \$950,000 worth of assets from bankruptcy court officials, prosecutors claim.



REUTERS/Richard Carson

Former Enron Corp. executive Jeffrey Adam Shankman is charged with concealing his ownership interest in a partnership that held \$500,000 worth of real estate. Here, an worker polishes the company logo at the bankrupt energy giant's corporate headquarters in Houston.

Shankman did donate several pieces of art to a Kentucky museum between 2007 and 2011, and he pawned other items from 2009 to 2012, according to the indictment, but he never notified the trustee or the court.

Shankman remains free on \$100,000 unsecured bail, according to court records. A jury trial has been scheduled for Dec. 9 before U.S. District Judge Vanessa D. Gilmore. If convicted, Shankman could face up to five years in prison and a fine of \$250,000 on each count in the indictment. **WJ**

Attorneys:

Plaintiff: Quincy L. Ollison, U.S. attorney's office, Houston

Defendant: Samy K. Khalil, Gerger & Clarke, Houston

D&O insurer

CONTINUED FROM PAGE 1

It did, however, write a \$15 million policy for Corona in 2009 and feared it would face a bad-faith claim that the creditors had received as part of their settlement with the officers and directors, who originally possessed that right as the insureds.

Therefore, XL decided to pay the creditors \$9.3 million to be released from those potential claims, the appeals court's opinion noted.

"The \$9.3 million paid by XL was paid not to protect the insureds from the claims of the unsecured creditors," the appellate panel said. "It was paid by XL to extricate itself from the insureds' own bad-faith claims against it."

The unusual declaratory judgment action by XL had its roots in the 2008 takeover of the failed Corona Vineyard Bank, which sparked suits by creditors and federal banking regulators who claimed the officers and directors pushed Corona over the fiscal edge with recklessly risky subprime loans.

Corona turned to its D&O insurers to pay for a settlement of the underlying actions. When it was determined that the key wrongdoing was first reported in 2008, the spotlight was on the carriers that provided coverage for that year: St. Paul Mercury Insurance

Co., which wrote a \$15 million policy, and National Union Fire Insurance Co., which wrote a \$5 million policy.

Together, those two carriers crafted a \$10.7 million settlement of the regulator and creditor claims in June 2011.

XL wrote a \$15 million policy for 2009, but because of the claims-made nature of the insurance coverage, was not called on to

The judge granted St. Paul's motion to dismiss, finding that XL had no viable basis upon which to recoup its settlement payment because the payment was not made to protect the insureds.

XL appealed.

The appellate panel agreed that XL's settlement could only be the result of "XL's own business decision to protect itself

XL Specialty Insurance Co. can't recoup a \$9 million payment because it was paid not to protect its insured bank and its directors and officers, but rather to insure that XL would not be sued for bad faith, the appellate court said.

fund the initial settlement of the underlying suits and did not contribute to it.

Nevertheless, when the officers and directors, as part of their settlement with the creditors, transferred any bad-faith claims they might have against XL, XL negotiated a separate, \$9.3 million settlement that released those potential claims.

Then XL sued St. Paul in the Orange County Superior Court on the theory that the \$10.7 million settlement it made in the underlying actions should have included the release of those bad-faith claims and made it necessary for XL to spend the money to get that release.

from whatever bad-faith claims had been transferred from the insureds to the third-party claimant."

"The payout was not prompted by some wrongful act of St. Paul ... but by excess insurer XL's own caution in being unwilling to contribute to the initial settlement of the claims against the insureds," the appellate court wrote in affirming dismissal.

The panel assessed the cost of the appeal to XL. **WJ**

Related Court Document:
Opinion: 2013 WL 5888473

See Document Section A (P. 19) for the opinion.

WESTLAW JOURNAL **BANKRUPTCY**



This reporter offers comprehensive coverage of significant issues in both business and consumer bankruptcy proceedings. The editors track dockets, summarizing recent developments and their implications for the debtor, its creditors, officers and directors, employees, and other parties. This reporter covers a wide range of topics regarding business and consumer bankruptcies and includes analysis of the most noteworthy case law and legislation. Important litigation documents are also included.

Call your West representative for more information about our print and online subscription packages, or call 800.328.9352 to subscribe.

UNCOVER VALUABLE INFORMATION ABOUT YOUR OPPOSING EXPERT WITNESS



Expert Intelligence Reports give you the information you need to evaluate your opposing counsel's expert witness. In every Expert Intelligence Report you request, you'll find comprehensive, logically organized documentation of an expert's background and performance as an expert witness: transcripts, depositions, challenges, resumes, publications, news stories, social media profiles – even hard-to-get expert testimony exhibits from dockets.

Learn more at TRexpertwitness.com/intelligence.



THOMSON REUTERS™

© 2012 Thomson Reuters L-378400/7-12 Thomson Reuters and the Kinesis Logo are trademarks of Thomson Reuters.

NEWS IN BRIEF

\$43 MILLION SUIT AGAINST ING SURVIVES DISMISSAL MOTION

A lawsuit alleging ING invested a bank client's money in collateralized debt obligations without authorization will move forward, a New York federal judge has ruled. U.S. District Judge Lorna G. Schofield of the Southern District of New York denied ING's motion to dismiss, saying plaintiff MashreqBank PSC adequately alleged that ING breached its agreement with the bank by investing in CDOs. Collateralized debt obligations are securities backed by pools of other debt securities, including mortgage-backed securities, credit derivatives and other structured debt securities. MashreqBank allegedly opened a \$108 million investment account with ING and expressly told ING not to invest in CDOs. ING did invest in CDOs, and MashreqBank allegedly lost a total of \$43 million.

MashreqBank PCS v. ING Group N.V. et al., No. 13-CV-2318, 2013 WL 5780824 (S.D.N.Y. Oct. 25, 2013).

Related Court Document:

Order: 2013 WL 5780824

HOTEL STAFFING COMPANY PURSUES ASSET SALE

One of the nation's largest suppliers of hotel staffing services has agreed to be sold through a stalking-horse auction as part of a Chapter 11 restructuring. Atlanta-based Hospitality Staffing Solutions said in a statement that it will sell all its assets as a going concern to HS Solutions Corp. A. Jeffrey Zappone, HSS' chief restructuring officer, said in court papers that HSS acquired substantially all its assets in September 2010 through the acquisition of Hospitality Staffing Solutions Group. Thereafter, HSS discovered employee verification and compliance issues, according to Zappone. He said the issues caused HSS to lose certain contracts. The loss of revenue, coupled with costs of addressing the operational issues and a sluggish economy created significant economic challenges for HSS. The company said the deal with HS Solutions will allow it to reduce its debt, shed certain legacy obligations and emerge with the strong financial backing of a new owner. HSS said it intends to continue with uninterrupted service through the sale process.

In re HSS Holding LLC et al., No. 13-12740, petition filed (Bankr. D. Del. Oct. 24, 2013).

OUSTED CEO SAT ON HIS RIGHTS, DELAWARE CHANCERY COURT FINDS

A company director and major shareholder whose fellow board members removed him as CEO cannot legally challenge his removal because he waited too long to object and even acquiesced in the decision, the Delaware Chancery Court has determined. Moreover, plaintiff Eldon Klaassen's attempt to reconstitute the board of directors in his favor fell flat as he could not remove the new CEO from the board or make two appointments that would have given him a majority, Vice Chancellor J. Travis Laster explained in an Oct. 11 opinion. Klaassen, who was board chairman and the single largest common shareholder, sued software provider Allegro Development Corp. and four of his fellow directors earlier this year, alleging they violated company bylaws by removing him as CEO in 2012. Klaassen properly appointed a new common-stock director but improperly appointed two other directors, and they cannot sit on the board, the vice chancellor said.

Klaassen v. Allegro Development Corp. et al., No. 8626-VCL, 2013 WL 5739680 (Del. Ch. Oct. 11, 2013).

CASE AND DOCUMENT INDEX

<i>Arkansas Teacher Retirement System et al. v. Bankrate Inc. et al.</i> , No. 13-7183, complaint filed (S.D.N.Y. Oct. 10, 2013)	10
<i>Booth et al. v. Strategic Realty Trust et al.</i> , No. 13-04921, complaint filed (N.D. Cal. Oct. 23, 2013)	8
<i>General American Holdings v. Intertrust GCN LP et al.</i> , No. 9013, complaint filed (Del. Ch. Oct. 17, 2013)	11
<i>Gilbert v. J.C. Penney Co. et al.</i> , No. 6:13-cv-00810, complaint filed (E.D. Tex. Oct. 24, 2013)	7
<i>Halliburton Co. et al. v. Erica P. John Fund Inc.</i> , No. 13-317, amicus briefs filed (U.S. Oct. 11, 2013)	9
<i>In re BioClinica Inc. Shareholder Litigation</i> , No. 8272-VCG, 2013 WL 5631233 (Del. Ch. Oct. 16, 2013)	13
<i>In re HSS Holding LLC et al.</i> , No. 13-12740, petition filed (Bankr. D. Del. Oct. 24, 2013)	16
<i>Intertrust GCN LP et al. v. Interstate General Media LLC et al.</i> , No. 131001681, complaint filed (Pa. Ct. Com. Pl., Phila. County Oct. 18, 2013)	11
<i>Intertrust GCN LP et al. v. Interstate General Media LLC et al.</i> , No. 1310000654, 2013 WL 5966493 (Pa. Ct. Com. Pl., Phila. County Oct. 31, 2013)	11
<i>Klaassen v. Allegro Development Corp. et al.</i> , No. 8626-VCL, 2013 WL 5739680 (Del. Ch. Oct. 11, 2013)	16
<i>Leyte-Vidal v. Semel et al.</i> , No. H037762, 2013 WL 5744224 (Cal. Ct. App., 6th Dist. Oct. 23, 2013)	5
Document Section B	30
<i>MashreqBank PCS v. ING Group N.V. et al.</i> , No. 13-CV-2318, 2013 WL 5780824 (S.D.N.Y. Oct. 25, 2013)	16
<i>Rapien et al. v. Symmetricom Inc. et al.</i> , No. 9058, complaint filed (Del. Ch. Nov. 4, 2013)	6
<i>United States v. Shankman</i> , No. 4:13-cr-00605, defendant arraigned (S.D. Tex., Houston Div. Oct. 3, 2013)	14
<i>XL Specialty Insurance Co. v. St. Paul Mercury Insurance Co.</i> , No. GO47371, 2013 WL 5888473 (Cal. Ct. App., 4th Dist., Div. 3 Nov. 4, 2013)	1
Document Section A	19
<i>Young et al. v. Symmetricom Inc. et al.</i> , No. 3-CV-255292, complaint filed (Cal. Super. Ct., Santa Clara County Oct. 29, 2013)	6