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18 Calendar of Events

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Finding a Way Around Morrison: Texas Court Sustains BP Investors' English Law Claims in Deepwater Horizon Suit

Matthew L. Mustokoff, Esquire, Michelle M. Newcomer, Esquire and Margaret E. Onasch, Esquire

The U.S. Supreme Court's 2010 decision in *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), dealt a heavy blow to investors who purchase securities on non-U.S. exchanges, holding that the antifraud provisions of the federal securities laws do not apply to losses suffered in overseas transactions. As a result, the U.S. courts have effectively been closed to these investors. However, on September 30, 2013, U.S. District Court Judge Keith Ellison of the Southern District of Texas issued a landmark decision in the BP *Deepwater Horizon* oil spill litigation in which the court sustained common law fraud claims premised on shareholder losses on the London Stock Exchange (LSE). *See In re BP p.l.c. Securities Litigation*, 2013 WL 5716880 (S.D. Tex. Sept. 30, 2013). The decision illustrates that there is still a role for the common law in the vindication of investor rights after *Morrison*.

This action was filed by Kessler Topaz on behalf of six public pension funds in April 2012. Specifically, plaintiffs alleged that BP made fraudulent representations regarding

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Will the U.S. Supreme Court Shut the Courthouse Doors for Investors?

David Kessler, Esquire and Joshua E. D'Ancona, Esquire

On November 15, 2013, the Supreme Court of the United States agreed to hear a case that could eliminate the viability of a broad category of federal securities class actions that has existed for over 25 years and has yielded tens of billions of dollars in recovery for investors claiming injury from corporate securities fraud.

The case, *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 ("*Halliburton*"), presents the question whether "the Court should overrule or substantially modify the holding of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) ["*Basic*"], to the extent that it recognizes a presumption of classwide reliance derived from the fraud-on-the-market theory."[1] *Basic* established a legal presumption that investors in a public company rely on that company's material public statements — and in particular, its material

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[1] Petition for a Writ of *Certiorari* in Case No. 13-317, filed by Halliburton Co., et al., at (i).

The Rise of Securities Class Actions and Third Party Litigation Funding in Australia

Emily Christiansen, Esquire

Even though Australia adopted a procedure for class action litigation in 1991, its class action system only recently began garnering a lot of international attention as an attractive potential forum for securities class action. There are a few reasons for this recent increase including, *inter alia*, the U.S. Supreme Court's 2010 decision in *Morrison v. National Australian Bank*, which limited the ability for investors (both U.S. and non-U.S. based) to recover losses related to stocks purchased on foreign exchanges, and the plaintiff-friendly aspects of Australian law (including an objective test for determining whether companies intended to deceive shareholders). But perhaps the most important driver in the rise of class action litigation is the development of third-party litigation funding.

Australian attorneys are prohibited from representing clients on a contingent fee basis. That coupled with the fact that Australia is a loser-pays jurisdiction (where the losing party can be required to pay the costs and attorney fees of the prevailing party) means there is risk involved in pursuing an action in Australian courts. However, the Australian High Court mitigated some of that risk when, in a 2006 decision in *Campbells Cash & Carry v. Fostif*, it held that third party funding (where an independent party pays all attorney fees and costs and assumes the risk of paying the opposing party's fees and costs in exchange for a percentage of the plaintiff's recovery) was allowable and in no way contrary to public policy. This decision opened the door to the widespread use of third party litigation funding in Australia. While third party litigation has increased access to justice and alleviated some of the risk involved in pursuing litigation, it has created new challenges in the Australian legal system.

Australia's class action regime is technically an opt-out system in which individual members and the amount of their damages need not be identified. However, the involvement of third party funders is changing the system from an opt-out regime to something more akin to an opt-in regime. Third party funders sought to limit or control who was able to participate in a class action in order to eliminate the problem of free-riders. Attorneys and third party litigation funders began using "closed class" definitions, where potential class members are defined not only on the basis of the losses they sustained but also on the basis of whether they signed an agreement with a third party litigation funder prior to the commencement of the class action. The "closed class" definition is not truly an opt-in requirement because there is no ability for potential class members to join an already existing proceeding. In fact, in *Larsson v. WealthSure Pty Ltd*, a 2013 case, the Australian court rejected a class action when the action defined class members by reference to individuals who retained a certain law firm both prior to and after the commencement of the proceedings.

The use of a closed class poses some unique challenges to parties to the litigation. Defendants, for example, are increasingly concerned that agreeing to a settlement does not com-

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A New Challenge (and Challenger) Facing Public Pension Funds

How a Select Few Are Framing the Pension Debate for Financial Gain

Jonathan R. Davidson, Esquire

In recent *Bulletin* articles we have addressed the challenges facing the public pension industry — from difficulties meeting investment return targets and funding issues, to demographic issues within the aging plan participant population, to significant public and media pressures. In the years following the financial crisis, and the resultant perceived pension crisis, many U.S. public pension systems took steps to protect their respective funds by cutting retiree benefits in all areas, modifying asset allocations, and reducing administrative costs. And on an annual basis, public pension funds in many states across the country have been faced with stiff battles in their respective state legislatures to protect their defined benefit plans. In the past few months, several pension industry authors and analysts have shed increasing light on another challenge.

David Sirota, nationally syndicated newspaper columnist, magazine journalist and best-selling author, has offered another wrinkle to the raging public debate over pensions. In a report completed in September 2013 for the Institute

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Chadbourne & Park, LLP v. Troice — Supreme Court Hears Oral Arguments on SLUSA's "In Connection With" Requirement

Meredith L. Lambert, Esquire

On the first day of its new term, October 7, 2013, the Supreme Court of the United States heard oral arguments in three related cases — *Chadbourne & Parke, LLP v. Troice*, *Willis of Colorado v. Troice*, and *Proskauer Rose LLP v. Troice* — arising from the multi-billion-dollar Ponzi scheme run by Allen Stanford and various entities that he controlled, including the Antigua-based Stanford International Bank ("SIB"). Central to the scheme was SIB's issuance of fixed-return certificates of deposit (CDs) that it falsely represented were backed by safe, liquid investments, when, in fact, such investments did not exist. After the fraud was discovered, multiple class actions were filed by different groups of investors alleging violations of state law. The question before the Supreme Court was whether these lawsuits were barred by the Securities Litigation Uniform Standards Act ("SLUSA"), which precludes "covered class actions" based upon allegations of fraud "in connection with the purchase or sale of a covered security."

Overview of SLUSA

Following its enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which established numerous reforms — including heightened pleading standards, an automatic stay of discovery, and a safe harbor for forward-looking statements — to combat perceived abuses in securities class actions, Congress observed a significant increase in the number of securities class actions alleging only state-law claims. In response to this unintended consequence,

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Standing in MBS Cases: Implications for Investors Seeking Class-Wide Relief

Jonathan F. Neumann, Esquire and Sharan Nirmul, Esquire

I. Introduction

As investors seek to recover losses flowing from their purchases of mortgage backed securities ("MBS"), class standing — the ability of one investor to represent the interests of similarly situated investors — has emerged as a central issue.[1] Within the last year, the Second Circuit Court of Appeals has addressed class standing in the context of MBS actions in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 148 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 1624 (2013) and *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 128 (2d Cir. 2013), and is poised to hand down a third opinion which will further shape the contours of class standing. The future of class standing will undoubtedly continue to have widespread impact on whether investors are able to recover any losses from these securities. This article traces the evolution of the class standing landscape in the Second Circuit and explores the specific issues facing MBS investors seeking to recover their investment losses through a class vehicle.

At the outset, it is helpful to briefly overview the MBS structure that informs the class standing analysis. An investor in MBS purchases a right to the income stream from pools of mortgages. Each MBS consists of tiered tranches of securities, with each tier entitled to a more senior claim to the income from the mortgage pools. Each tranche represents different risk to the investors, and thus different returns. An MBS may have more than one pool of mortgages securing the income flowing to the tranches, and some tranches may have a claim to income from more than one group of such mortgage pools, a feature called "cross-collateralization." All of the mortgages in the pools are held in trust for the benefit of the certificate holders of the MBS, and are delivered into the trust by the originator/depositor of the MBS. During

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[1] Kessler Topaz has litigated several such MBS cases in recent years. See, *e.g., Maine State Retirement System v. Countrywide Fin. Corp., et al.,* No. 2:10-cv-0302 (C.D. Cal. 2010); *Washington State Investment Bd., et al. v. Bank of America, N.A., et al.*, No. 1:13-cv5978 (S.D.N.Y. 2013).

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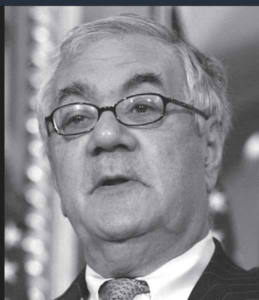

The Evolving Fiduciary Obligations of Pension Plans will offer a thorough overview of these and other critical issues plan sponsors and their legal advisors are grappling with to fulfill their obligations as fiduciaries and as shareholders. Through a series of panel sessions, case studies, presentations and workshops, this one-day event will provide constructive insights into the ways in which fiduciaries can be most effective in engaging with and influencing the management of portfolio companies. We will review the most crucial legal decisions and developments investors should be aware of, and offer insights on the approaches successful plans have implemented to meet their investment return targets strategically and with a long term vision.

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No Time for Repose: *Police & Fire Retirement System v. IndyMac MBS, Inc.*

Ryan T. Degnan, Esquire and Andrew N. Dodemaide, Esquire

Following the United States Supreme Court's 1974 decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), courts commonly tolled (or suspended) statutes of limitations and statutes of repose under the Securities Exchange Act of 1934 (the "Exchange Act") and the Securities Act of 1933 (the "Securities Act") until a ruling on class certification was issued. *American Pipe* tolling permitted investors to monitor the progress of an action, tailor litigation strategies to rulings in a case and decide, at the class certification stage, whether to pursue an individual action (in the hopes of recovering a potential premium versus their share of the class's recovery) or to remain passive class members. However, investors may no longer have the ability to take a "wait and see" approach when deciding whether to actively pursue an individual action after a class action has been filed. Specifically, in *Police & Fire Retirement System v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), the Second Circuit Court of Appeals issued an opinion that fundamentally altered the application of *American Pipe* tolling rules in that circuit by holding that the Securities Act's repose period could not be tolled during the pendency of a class action.

Statutes of limitation vs. statutes of repose. Although they have similarities, statutes of limitation and statutes of repose also have important differences. A statute of limitations sets a time limit on how long a person can wait to bring suit after discovering (or after he should have discovered) that he has a claim. A statute of repose, on the other hand, prevents any suit from being brought over a wrongful act after a certain amount of time has elapsed, regardless of whether or not anyone harmed by the wrongdoing knows a claim could be brought. For example, the statute of limitations for Securities Act

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Will the U.S. Supreme Court Shut the Courthouse Doors for Investors? *(continued from page 1)*

misrepresentations, which perpetuate a "fraud-on-the-market" by artificially inflating or maintaining the company's stock price above its true value. Among the bases for this rule was the "efficient market" hypothesis, an economic theory which posits that if the market in which a company's stock trades processes information in a reasonably efficient manner, the company's stock price will reflect all publicly available information about the company — including the price-inflating effects of any fraudulent misrepresentations by the company. The so-called "*Basic* presumption" of reliance allows investors to establish the requisite reliance element of a securities fraud claim without showing that they personally digested and invested due to the misrepresentations in question. The *Basic* presumption has been invoked to establish reliance in securities fraud class actions against broadly-traded public companies since 1988.

Halliburton is a securities class action brought by the investment fund for the Archdiocese of Milwaukee ("Plaintiffs") against the U.S. multinational corporation Halliburton Co. Plaintiffs sued Halliburton for various alleged fraudulent misstatements under the antifraud provisions of the federal securities laws on behalf of a class of similarly situated investors, and asserted that the class's reliance on Halliburton's misstatements was established through the *Basic* presumption, since Halliburton's stock traded in an efficient market. After years of highly contentious litigation over class certification including numerous appeals, the class was certified. Plaintiffs demonstrated classwide reliance at the class certification stage through evidence that supported the application of the *Basic* presumption.[2]

Halliburton petitioned the Supreme Court to review the lower courts' rulings on reliance at class certification. Halliburton argued that the Court should overturn or substantially revise *Basic* because the economic theory on which it rests has been "roundly rejected" by economists and has proven difficult for courts to apply.[3] In opposition, Plaintiffs argued that "*Basic* is a seminal decision that has been reaffirmed by [the

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[2] *See Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423, 433-36 (5th Cir. 2013) (affirming district court's grant of motion for class certification that relied on *Basic* presumption of reliance when analyzing question of classwide reliance).

[3] Petition for a Writ of *Certiorari* in Case No. 13-317, filed by Halliburton Co., et al., at 12-23. Petitioners independently argued for a rule that would permit defendants to attempt to rebut the *Basic* presumption prior to class certification with evidence showing that the alleged misrepresentations did not impact the relevant company's stock price, such that reliance through the stock price was (purportedly) impossible. *Id.* at 26-32.

Chadbourne & Park, LLP v. Troice — Supreme Court Hears Oral Arguments on SLUSA's "In Connection With" Requirement *(continued from page 3)*

Congress enacted SLUSA, the stated purpose of which is to provide national standards for securities class action lawsuits involving nationally traded securities in order to prevent state securities fraud class actions from being used as an end-run around the PSLRA. To that end, SLUSA provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." Under SLUSA, a "covered security" is a security registered and traded on a U.S. national exchange. If a suit falling within this "preclusion provision" is brought in state court, the action may be removed to federal court, where it is subject to dismissal.

Factual Background and Procedural History

Three groups of investors brought four private civil suits under state law based upon the same underlying fraud — the infamous Ponzi scheme run by entities controlled by Stanford, including SIB, located in Antigua. For over fifteen years, SIB sold to more than 25,000 investors approximately $7 billion in CDs, which it falsely claimed to be backed by safe, liquid investments. In fact, SIB used part of the proceeds from new CD sales to cover interest payments and redemptions on pre-existing CDs, while Stanford used the remainder of the investors' money on personal luxuries and unprofitable investments. Upon the scheme's collapse, thousands of investors suffered devastating losses.

Two groups of Louisiana residents filed separate lawsuits in Louisiana state court under Louisiana state law (*Roland v. Green* and *Farr v. Green*). Both lawsuits brought claims against SEI Investments Company ("SEI"), the Stanford Trust Company (the "Trust"), the Trust's employees, and its investment advisors for their role in selling CDs. Other purchasers of the CDs filed two separate complaints under Texas law in the District Court for the Northern District of Texas. The first of these two complaints (*Troice v. Willis*) brought claims against SIB's insurance brokers for their role in misrepresenting the CDs as a safe investment, while the second complaint (*Troice v. Proskauer*) brought claims against two of SIB's law firms for aiding and abetting the scheme by assisting SIB in evading regulatory oversight.

Invoking SLUSA, the *Green* defendants removed the Louisiana state cases to federal district court, which the Judicial Panel on Multidistrict Litigation then transferred to the Northern District of Texas. The defendants filed motions to dismiss all four cases under SLUSA, which the district court granted. While the district court recognized that the CDs were not "covered securities" because they were not traded on a national exchange, it nevertheless inferred that the marketable securities purportedly backing the CDs were. The district court further determined that the complaints alleged a fraudulent scheme that coincided and depended upon the purchase or sale of securities because in order to purchase the CDs, at least one of the plaintiffs had liquidated an investment retirement account, which commonly include covered securities.

At the appellate level, the Fifth Circuit Court of Appeals reversed the district court's dismissal of the plaintiffs' claims, holding that they were not precluded by SLUSA because the defendants' alleged fraud was not "in connection with" the purchase or sale of any covered securities. In reaching this decision, the Fifth Circuit adopted the Ninth Circuit's "more than tangentially related" test for satisfying SLUSA's "in connection with" requirement. While recognizing that the defendants' alleged misrepresentations included "vague references" to SIB's portfolio being backed by "covered securities," the court concluded that this was "but one of a host of (mis)representations" made to the investors, which was "merely tangentially related to the 'heart,' 'crux', or 'gravamen' of the defendants' fraud[,]" *i.e.*, their representation that the CDs were safe, secure, and preferable investments. As such, the Fifth Circuit held that the alleged fraud was not sufficiently connected to the purchase or sale of covered securities to trigger SLUSA preclusion. The Fifth Circuit further distinguished the present case from the so-called "feeder fund" cases arising from the Madoff Ponzi scheme, where SLUSA preclusion was found. Unlike the funds in the Madoff scheme, which were mere "ghost entities" or "cursory pass-through vehicles" to invest in covered securities, the Fifth Circuit noted, the CDs were debt assets that promised a fixed rate of return not tied to the success of SIB's purported investments. Finally, the Fifth Circuit rejected the district court's holding that SLUSA precluded the complaints based upon at least one plaintiff's sale of covered securities to generate funds to purchase a CD, finding that the defendants' accomplishment of the fraud did not depend upon convincing investors to sell their covered securities. Accordingly, any such sale of covered securities by a plaintiff was "not more than tangentially related to the fraudulent scheme." The defendants then appealed the Fifth Circuit's decision to the Supreme Court.

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A New Challenge (and Challenger) Facing Public Pension Funds *(continued from page 2)*

for America's Future, entitled "The Plot Against Pensions," Sirota explains how billionaire former Enron trader John Arnold, aided by non-partisan groups, is attempting to undermine America's retirement security to protect states' corporate welfare, and tangentially, enrich Wall Street.[1] The report evaluates both the general state of the national debate over pensions and the specific effects of the partnership between the Pew Charitable Trusts' Public Sector Retirement Systems Project and the Laura and John Arnold Foundation (run by conservative political operatives and funded by John Arnold) — offering some alarming findings:

- Conservative activists are manufacturing the perception of a public pension crisis in order to both slash modest retiree benefits and preserve expensive corporate subsidies and tax breaks.
- The amount states and cities spend on corporate subsidies and so-called tax expenditures is far more than the pension shortfalls they face. Yet, conservative activists and lawmakers are citing the pension shortfalls and not the subsidies as the cause of budget squeezes. They are then claiming that cutting retiree benefits is the solution rather than simply rolling back the more expensive tax breaks and subsidies.
- The pension "reforms" being pushed by conservative activists would slash retirement income for many pensioners who are not part of the Social Security system. Additionally, the specific reforms they are pushing are often more expensive and risky for taxpayers than existing pension plans.
- The Pew Charitable Trusts and the Laura and John Arnold Foundation are working together in states across the country to focus the debate over pensions primarily on slashing retiree benefits rather than on raising public revenues.
- The techniques used by conservative activists to gain public support to privatize the public pensions that public workers have instead of Social Security are, if successful, likely to be used in efforts to privatize Social Security in the future.

Sirota contends that the Pew-Arnold partnership began informally in 2011 and 2012 when both organizations worked to set the stage for retirement benefit cuts in California, Florida, Rhode Island and Kansas, and with legislative success in three of those four states, a formal partnership was created in late 2012 to target Arizona, Kentucky and Montana. Sirota says the partnership continues today (with the organizations issuing joint reports and conducting joint legislative briefings advocating cuts to guaranteed retirement income), and could expand into Colorado, Pennsylvania, Oklahoma and Nevada. But Sirota argues that cutting payments to retirees is not the endgame — but rather — preserving money for corporate welfare. His study estimates that states spend up to $120 billion a year on offshore tax loopholes, gifts and other corporate subsidies, which is more than 2.5 times as much as the $46 billion a year that Pew says states are short on pension payments.

Matt Taibbi, an author and journalist for *Rolling Stone*, has also written extensively on the interplay between Wall Street and public pension funds and may have said it best: "the bottom line is that the 'unfunded liability' crisis is, if not exactly fictional, certainly exaggerated to an outrageous degree. Yes, we live in a new economy and, yes, it may be time to have a discussion about whether certain kinds of public employees should be receiving sizable benefit checks until death. But the idea that these benefit packages are causing the fiscal crises in our states is almost entirely a fabrication crafted by the very people who actually caused the problem."[2] In his September feature entitled *Looting the Pension Funds: How Wall Street Robs Public Workers* (intentionally released on the same day as Sirota's report), Taibbi looks at the hiring of expensive hedge funds by public pensions and the role of right-wing financiers like Third Point billionaire Dan Loeb in the pension reform movement.[3] Loeb, whom Taibbi refers to as a Gordon Gekko wanna-be (hey, this is *Rolling Stone*), received a $66 million mandate for his hedge fund from the State of Rhode Island (part of $1 billion of the state fund, or 14% of the overall portfolio, that was re-allocated to hedge funds). This award came after the Rhode Island General Assembly in 2011 approved a monumental overhaul of the state retirement system that cut public employees' benefits, froze retirees' cost-of-living increases and attempted to put the severely underfunded pension fund on firmer financial footing. Taibbi states that Loeb and his cohorts are "positioned to receive tens of millions in fees every single year by the already overburdened taxpayers of an ostensibly flat-broke state."[4] Separately,

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[1] David Sirota, *The Plot Against Pensions*, available at http://ourfuture.org/wp-content/uploads/2013/09/Plot-Against-Pensions-final.pdf (last visited Nov. 8, 2013).

[2] Matt Taibbi, *Looting the Pension Funds: How Wall Street Robs Public Workers*, available at http://www.rollingstone.com/politics/news/looting-the-pension-funds-20130926 (last visited Nov. 8, 2013).

[3] *Id.*

[4] *Id.*

No Time for Repose: *Police & Fire Retirement System v. IndyMac MBS, Inc.* *(continued from page 5)*

claims is one year, whereas the statute of repose is three years. 15 U.S.C. § 77m. Thus, under the Securities Act's statute of repose, investors cannot pursue claims more than three years from when a claim accrued (*i.e.*, from the date of an offering) irrespective of whether they knew (or could have known) that a violation occurred. The repose period prohibits claims even where defendants actively conceal their misconduct.

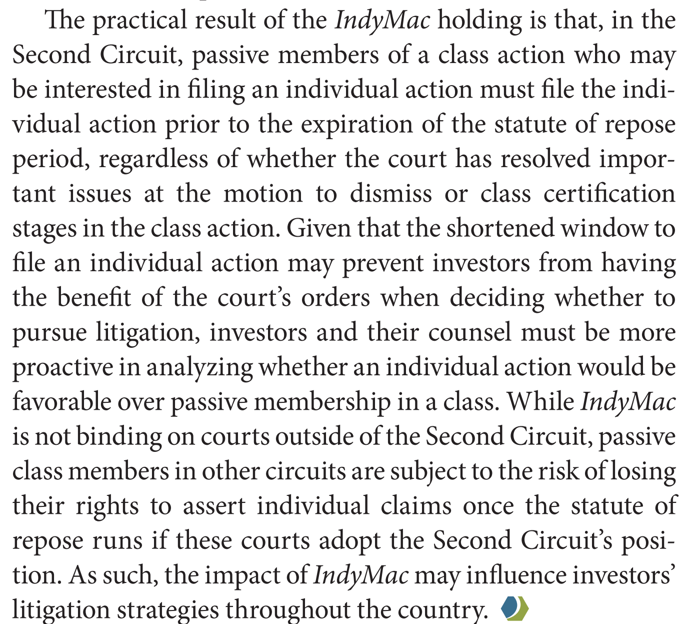
American Pipe tolls statutes of limitations and repose. In *American Pipe*, the Supreme Court considered whether the filing of a class action suspends the applicable statute of *limitations* for all members of the putative class who would have been parties if the case were allowed to proceed as a class action. 414 U.S. at 544-45. The petitioners in *American Pipe* were initially passive members in an antitrust class action brought over the alleged price fixing of concrete and steel pipe. *Id.* at 541. Class certification was denied after the trial judge determined that the plaintiffs could not meet the "numerosity" requirement for class certification under Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 542-43. Eight days later, the petitioners filed motions to intervene in that action, but their motions were denied because the statute of limitations had run during the pendency of the litigation. *Id.* at 543-44.

Upon review, the Supreme Court reasoned that statutes of limitations are designed to ensure fairness to defendants and to prevent plaintiffs from "sleeping on their rights." *Id.* at 554-55. As explained by the Court, tolling statutes of limitations when a class action is pending does not interfere with those policy objectives because the filing of the class action notifies the defendants of the claims against them. *Id.* at 555. Additionally, the Court recognized that courts have an inherent, judicial power to toll statutes of limitations "under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559. Given that Rule 23 of the Federal Rules of Civil Procedure (the rule allowing class actions in federal court) was designed, in part, to prevent the duplicative filing of complaints, the Court reasoned that unless the statute of limitations were tolled, the policy behind avoiding duplicative filings would be undermined as class members would need to assert their rights individually while the class action was still pending. *Id.* at 553-54. For these reasons, the Court held that the statute of limitations is suspended for absent class members as to the claims asserted in the class action until a ruling on class certification is issued. *Id.* at 561.

After *American Pipe*, courts began to apply its tolling rules to Exchange Act and Securities Act class actions. For instance, in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), the Tenth Circuit held that the *American Pipe* rule should apply to the Securities Act's statute of repose. The Tenth Circuit explained that because the members of a putative class were effectively parties to the class action (which had been brought before the statute of repose had run), their claims were timely. *Id.* at 1168 (noting that "in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all"). Subsequently, in *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650 (S.D.N.Y. 2011), Judge Laura Taylor Swain of the Southern District of New York also held that the *American Pipe* rule applies to the Securities Act's statute of repose, but for slightly different reasons. Judge Swain reasoned that application of the *American Pipe* rule to the Securities Act's statute of repose was consonant with Rule 23's goal of reducing duplicative motions from large numbers of plaintiffs, because if the *American Pipe* rule did not apply, litigants would "have significant incentives to file protective motions to secure their claims." *Id.* at 668. Judge Swain therefore concluded that because the *American Pipe* rule was "consistent with the Rule 23 goals of efficiency and judicial economy," it would appropriately toll the Securities Act's statute of repose. *Id.* This application of the *American Pipe* rule allowed investors whose claims were covered by a putative class action to assess the merits of bringing individual actions and wait until a class certification ruling was issued before determining whether to pursue an individual action or to remain passive class members. Even if class certification was denied, the investors would be allowed to file individual actions to vindicate their rights.

IndyMac alters the American Pipe tolling rule for statutes of repose. With the Second Circuit's opinion in *IndyMac*, however, passive class members may need to be more proactive in order to protect their interests. In *IndyMac*, a class action was brought under the Securities Act asserting claims on behalf of a putative class that had suffered losses arising from the issuance of mortgage-backed securities. 721 F.3d at 101-03. The trial court dismissed certain claims after concluding that plaintiffs lacked standing for the dismissed claims. *Id.* at 103. Thereafter, several members of the putative class who potentially had standing to assert the dismissed claims moved to intervene to reassert the dismissed claims. *Id.* By then, however, more than three years had passed since the intervenors purchased the securities at issue and the District Court, refusing to apply *American Pipe* tolling, found that the Securities Act's three-year *statute of repose* barred their claims. *See In re IndyMac Mortg.-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 642 (S.D.N.Y. 2011) ("neither *American Pipe* nor any other form of tolling may be invoked to avoid the three year statute of repose") (citing *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 626 (S.D.N.Y. 2011)).

On appeal, the Second Circuit affirmed the lower court's dismissal and distinguished the considerations that would allow the tolling of a statute of *limitations* from those that would allow the tolling of a statute of *repose*. As explained by the court, statutes of limitations are subject to equitable tolling principles that allow otherwise untimely claims to be brought. *Id.* at 106. By contrast, statutes of repose, the Second Circuit reasoned, are subject only to those exceptions that are legislatively created. *Id.* Moreover, the court noted that statutes of repose provide defendants with the substantive right to be free from suit after a certain time. *Id.* at 109. The court further concluded that the Rules Enabling Act, which gives the Supreme Court the power to make rules of court (such as Rule 23, which the Supreme Court relied upon in its reasoning in *American Pipe*), prohibits such rules from abridging or enlarging substantive rights. *Id.*; *see also* 28 U.S.C. § 2702(b). The Second Circuit determined, therefore, that *American Pipe* tolling could not apply to a statute of repose, such as that of the Securities Act, because tolling would serve to abridge defendants' substantive rights. Accordingly, the Second Circuit held that *American Pipe* tolling applied to the Securities Act's



statute of limitations, but it did not apply to the Securities Act's statute of repose.[1]

The practical result of the *IndyMac* holding is that, in the Second Circuit, passive members of a class action who may be interested in filing an individual action must file the individual action prior to the expiration of the statute of repose period, regardless of whether the court has resolved important issues at the motion to dismiss or class certification stages in the class action. Given that the shortened window to file an individual action may prevent investors from having the benefit of the court's orders when deciding whether to pursue litigation, investors and their counsel must be more proactive in analyzing whether an individual action would be favorable over passive membership in a class. While *IndyMac* is not binding on courts outside of the Second Circuit, passive class members in other circuits are subject to the risk of losing their rights to assert individual claims once the statute of repose runs if these courts adopt the Second Circuit's position. As such, the impact of *IndyMac* may influence investors' litigation strategies throughout the country.

[1] While *IndyMac's* discussion was limited to the Securities Act's statute of repose, the Second Circuit's reasoning could apply to other statutes of repose, such as the Exchange Act's five-year statute of repose.

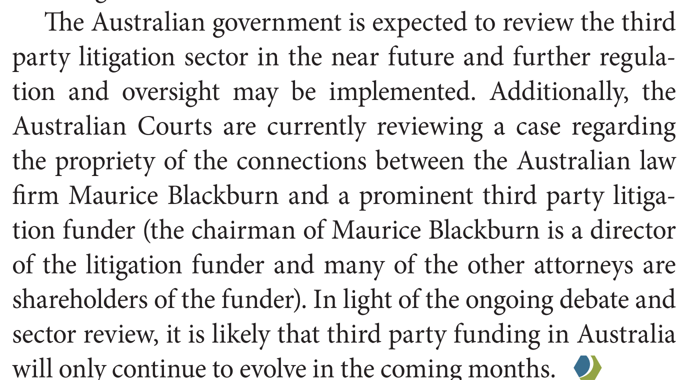
The Rise of Securities Class Actions and Third Party Litigation Funding in Australia

(continued from page 2)

pletely resolve their liability because other investors, outside the closed class, are not precluded from pursuing litigation. Given defendants' concern over their potential remaining liability, this also means that class members might not be able to recoup as much of their losses as they otherwise would in an opt-out action.

The use of a closed class has also turned third party funding into lucrative business and more and more third party funders are appearing. In 2012, Australia's securities class action settlements totaled more than one billion Australian dollars and with third party funders charging fees anywhere from twenty to fifty percent of the settlement or award, the sector has become quite large and profitable. With the increase in the number of third party funders there is an increase in competition. Potential plaintiffs could benefit from more competitive rates and less of a percentage of a recovery being turned over to the litigation funder upon successful conclusion of the case.

With the increase in the number of third party funders, however, there is also an increasing debate and increasing action being taken with regard to regulation and oversight of third party funders. Earlier this year, the Australian Securities



and Investments Commission issued regulations on third party funders and conflicts of interest in order to protect the interests of members and potential members. The regulations mandate that funders implement written procedures for identifying and managing conflicts of interest, managing recruitment of potential members, and managing conflicts when settlement offers are made and considered. These recently adopted regulations, however, do not address other concerns such as capital adequacy requirements, consumer protection, licensing, and other ethical issues.

The Australian government is expected to review the third party litigation sector in the near future and further regulation and oversight may be implemented. Additionally, the Australian Courts are currently reviewing a case regarding the propriety of the connections between the Australian law firm Maurice Blackburn and a prominent third party litigation funder (the chairman of Maurice Blackburn is a director of the litigation funder and many of the other attorneys are shareholders of the funder). In light of the ongoing debate and sector review, it is likely that third party funding in Australia will only continue to evolve in the coming months.

Standing in MBS Cases: Implications for Investors Seeking Class-Wide Relief *(continued from page 3)*

the mortgage boom between 2003 and 2007, major institutions like Countrywide and Washington Mutual served as the originators and depositors for mortgage trusts, applying common (often faulty) underwriting practices for originating the mortgages in MBS. MBS certificates related to each MBS trust are then sold via a common offering prospectus which defines the features of the mortgage pools underlying the MBS trust.

Widespread losses to MBS investors have followed from the systemic deficiencies in underwriting practices that plagued the origination of mortgages underlying these MBS. Class action suits premised on these systemic deficiencies have attempted to obtain class-wide relief for investors by bringing claims against the originators and underwriters for misrepresenting the risks of these securities. Class actions have also sought recovery against the trustees of the MBS trusts for their failure to take action on behalf of the trusts to cure deficiencies and known defects in the mortgages. Defendants in these suits have sought to limit their exposure by challenging the ability of investors to act as representatives in class actions for any investor other than those who purchased within the very same trusts that the class representative purchased, or even more narrowly, within the specific tranches of the trusts those investors purchased.

Two paradigms for class standing have emerged from these battles which are discussed in this article: trust standing and tranche standing. Trust standing refers to a plaintiff's ability to represent investors from trusts in which that plaintiff did not invest. Tranche standing, on the other hand, refers to a plaintiff's ability to represent different tranches within a single trust. The Second Circuit's guidance in *Policemen's v. Bank of New York Mellon*, which is currently pending appeal, will be important to the future of both issues. Case No. 13-1776 (L) (2d Cir. filed May 7, 2013).

II. Class Standing Prior to NECA-IBEW

District Courts in the Second Circuit have been historically split as to whether a named plaintiff can assert claims in a putative class action on behalf of purchasers of a security which that plaintiff has not also purchased. *Compare Hoffman v. UBS–AG*, 591 F. Supp. 2d 522, 530 (S.D.N.Y. 2008) (plaintiffs lacked standing to sue on behalf of shareholders of funds in which plaintiffs did not invest); *In re Smith Barney Transfer Agent Litig.,* 765 F. Supp. 2d 391, 399 (S.D.N.Y.2011) (same); *In re Salomon Analyst Level 3 Litig.,* 350 F. Supp. 2d 477, 497 (S.D.N.Y.2004) (same); *with In re AIG Sec. Litig.*, 265 F.R.D. 157, 165 (S.D.N.Y. 2010) (granting standing to purchasers of ordinary shares to represent purchasers of bonds that no named plaintiff bought). One district court recently attempted to reconcile the case law within the Southern District of New York as follows:

> When the injury suffered by absent security holders was based on a legal theory or course of conduct apart from the injury suffered by named plaintiffs, courts typically did not permit lead plaintiffs to represent the absent security holders. Conversely, courts found standing when claims were brought under the same legal theory and alleged a course of conduct that injured both types of security holders in a similar manner.

In re Winstar Commc'ns Sec. Litig., 290 F.R.D. 437, 450 (S.D.N.Y. 2013) (Daniels, J.). Given this confusion (or at least inconsistency), the Second Circuit endeavored in *NECA-IBEW* to craft a consistent rule for analyzing class standing.

III. NECA-IBEW & New Jersey Carpenters

In *NECA-IBEW*, the Second Circuit considered a plaintiff's standing to assert claims on behalf of purchasers of securities issued under the same allegedly false offering documents. 693 F.3d at 148. The court held that "a plaintiff has class standing to assert the claims of purchasers of certificates backed by mortgages originated by the same lenders that originated the mortgages backing plaintiff's certificates, because such claims implicate 'the same set of concerns' as plaintiff's claims." *Id.* at 148-49.

There the plaintiff pension fund sued alleging violations of §§ 11, 12(a)(2), and 15 of the Securities Act on behalf of a putative class of all persons who acquired certain MBS certificates underwritten and issued by the defendants. *Id.* at 149. The certificates were sold in 17 separate offerings through 17 different trusts. *Id.* Although the plaintiff only purchased certificates in two of the 17 trusts, it nonetheless sought to represent all investors from all trusts and all tranches. *Id.* The plaintiff claimed the offering documents contained common false and misleading statements about the underwriting guidelines, property appraisals and risks. *Id.*

The district court dismissed the plaintiff's claims for lack of standing. *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, 743 F. Supp. 2d 288 (S.D.N.Y. 2010). That court held, first, that the plaintiff did not have standing to represent "non-investment" trusts because (1) they themselves had no injury with respect to those trusts and (2) those trusts were backed by distinct sets of loans. *Id.* Second, the district court dismissed the plaintiff's claims with respect to trusts in which it invested because it could

not show a "cognizable loss" under § 11. *Id.*[2]

The Second Circuit reversed the district court's findings. It began by discussing the difference between Article III standing and class standing. To establish Article III standing in a class action, "for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant, and . . . only then will the inquiry shift to a class action analysis." *NECA-IBEW*, 693 F.3d at 159 (citing *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.*, 504 F.3d 229, 241 (2d Cir.2007) (quotation marks omitted)). The Court of Appeals concluded that the plaintiff had met this standard because the plaintiff could state a claim against the defendant with respect to the trust that the plaintiff invested in. *Id.* at 158-59. Article III did not, however, require the plaintiff to show that it suffered injury with respect to each of the trusts forming the basis of a putative class. *Id.*

Next, after a careful analysis of relevant Supreme Court jurisprudence, the Court of Appeals held that a plaintiff has *class* standing where he plausibly alleges (1) "that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant," and (2) "that such conduct implicates '***the same set of concerns***' as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Id.* at 162 (citations and quotations omitted) (emphasis added). The Court noted that in the context of claims alleging injuries based on misrepresentations, "the misconduct alleged will almost always be the same: the making of a false or misleading statement." *Id.* at 162.

In *NECA-IBEW*, the "same set of concerns" were implicated across different ***trusts*** when those trusts were backed by loans from common originators. Thus, where the plaintiff brought claims alleging misstatements about origination guidelines, originator-specific allegations provided the "necessary link" between (1) "the Offering Documents' representations in a vacuum" and (2) "the *falsity* of those representations." *Id.* at 163 (noting the Complaint's emphasis on the "abandonment by specific loan originators of their stated underwriting guidelines"). The same three defendants, moreover, inserted "nearly identical misrepresentations" into the offering documents associated with all of the certificates. *Id.* at 162. In contrast, plaintiffs did not have class standing to represent trusts backed by different originators because those trusts involved misstatements "sufficiently different in character and origin." *Id.* at 164.

Turning to ***tranche***-level standing, the Second Circuit did "not believe the Certificates' varying levels of payment priority raise[d] such a 'fundamentally different set of concerns' as to defeat class standing." *Id.* at 164. Simply put, "each Certificate-holder within an Offering or Group backed by loans originated by similar lenders has the same 'necessary stake in litigating' whether those lenders in fact abandoned their underwriting guidelines." *Id.* (citation omitted).

As to both trust- and tranche-level standing, the Court of Appeals therefore rejected the district court's view that the plaintiffs needed to allege identical injuries (purchases of the same securities) in order to have standing.

In *New Jersey Carpenters*, the Second Circuit reiterated and affirmed its guidance under *NECA-IBEW*. 709 F.3d at 128. In that case, the district court dismissed the plaintiff's Securities Act claims, brought on behalf of trusts in which it did not invest, for lack of standing. *Id.* The plaintiff investor there brought claims similar to *NECA-IBEW*, alleging the MBS' offering documents contained false and/or misleading statements. Because the district court's decision was issued prior to *NECA-IBEW*, the Second Circuit vacated the ruling and remanded. *Id.* It instructed the lower court to reconsider its standing decision in light of *NECA-IBEW*. *Id.* The *New Jersey Carpenters* court identified a nonexhaustive list of issues for the district court to consider: (1) "whether the relevant prospectuses contained 'similar if not identical' descriptions of the underwriting standards," (2) whether the loans backing the trusts shared common originators, and (3) whether any "differences among the originators of the mortgages in each trust prevent the Fund's claims based on the different securities from raising 'the same set of concerns.'" *Id.* (citing *NECA–IBEW*, 693 F.3d at 162–64).

NECA-IBEW and *New Jersey Carpenters* are fairly read as endorsing the ability of an investor in a class action to represent all investors across different trusts and tranches when their claims arise from the same set of false statements or misconduct (i.e., the allegedly false offering prospectus and/or underwriting practices that made the offering prospectuses false).

IV. Class Standing after NECA-IBEW

NECA-IBEW has proved to *not* be the last word when it comes to standing for plaintiffs in MBS class actions arising from the lax underwriting standards that fueled the mortgage crisis. In particular, disagreement among district courts has extended to other types of class claims by MBS investors. Although these claims also arise from the lax underwriting standards that *NECA-IBEW* and *New Jersey Carpenters* addressed, they differ with respect to the legal theories advanced and the defendants from whom recovery is sought.

(continued on page 13)

[2] The Second Circuit reversed the district court's findings as to cognizable loss. This portion of the court's ruling is not addressed by this article.

Finding a Way Around Morrison: Texas Court Sustains BP Investors' English Law Claims in Deepwater Horizon Suit

(continued from page 1)

its implementation of process safety reforms following a 2005 incident at its Texas City refinery, which resulted in fifteen deaths, as well as the oil spill flow rates in the aftermath of the April 2010 explosion onboard the *Deepwater Horizon* rig in the Gulf of Mexico. These plaintiffs, which purchased shares of BP abroad, were left without a remedy under the federal securities laws in the wake of *Morrison*. Judge Ellison sustained the large majority of plaintiffs' claims, upholding allegations that BP and its senior executives made 27 false and misleading statements between 2007 and 2010. The key aspects of the court's opinion are discussed below.

Court Applies English Law

As an initial matter, the court engaged in a choice of law analysis to determine whether Texas or English law should govern the plaintiffs' common law claims. At BP's urging, Judge Ellison applied English law. The most significant factors swaying the court in this determination included the fact that the shares at issue were purchased in England (on the LSE) and that the only face-to-face encounters between plaintiffs' investment advisors and BP executives occurred during a series of meetings in London. The court also identified the factors militating against application of Texas law, including that the various pension fund plaintiffs are based in six different states (but none in Texas) and that the alleged misstatements were not predominantly made in Texas (several were made in Massachusetts, Washington D.C. and Louisiana, as well as England). The court thus determined that England had the most significant relationship to plaintiffs' claims and applied English law.

Forum Non Conveniens Dismissal Not Warranted

Notwithstanding the court's application of English law, Judge Ellison rejected the defendants' contention that the court should decline to exercise jurisdiction over plaintiffs' claims under the doctrine of *forum non conveniens*, whereby courts may refuse to assert jurisdiction in cases where there is a more appropriate, available forum. BP contended that the case raised issues of first impression under English law and that it would therefore be more appropriate for the case to be heard by an English court. The court rejected BP's bid to send the case overseas, holding that it was "certainly capable of applying English law, which shares so many strong similarities with U.S. law due to a common heritage." The court also reasoned that because it also had jurisdiction over (1) some of the pension funds' federal securities claims based on purchases of BP American Depositary Receipts (ADRs) on the New York Stock Exchange — separate but related claims that were not barred by *Morrison* — and (2) the concurrently pending federal securities class action arising out of the *Deepwater Horizon* oil spill, it would be more practical to retain jurisdiction over *all* of plaintiffs' claims, stating, "[i]t would be *in*efficient to send these claims to England, when nearly the same issues will be adjudicated here in the Class Action and in individual actions asserting [federal Securities] Exchange Act claims."

The court's ruling on *forum non conveniens* is especially significant because it stands in contrast to the New York Appellate Division's 2012 decision in *Viking Global Equities, LP v. Porsche Automobil Holding SE*, 101 A.D.3d 640 (N.Y. App. Div. 2012). In *Porsche Automobil*, the state appellate court found that because the plaintiffs failed to allege a substantial nexus with New York, the case did not belong in the U.S. courts, and accordingly dismissed the case. In reaching this decision, the court noted that the defendants and most of the plaintiffs were not New York residents, the stock at issue was traded only on foreign exchanges, and many of the witnesses and documents were located in Germany, which had stated its interest in the underlying events through the initiation of a regulatory enforcement action.

By contrast, in the *BP* case, Judge Ellison highlighted the "unquestionably local" nature of the conflict, emphasizing that "[t]he oil spill which prompted these claims occurred only 50 miles off the coast of Louisiana, in the Gulf of Mexico" and "[t]he majority of the misrepresentations alleged by Plaintiffs touch on the adequacy of, and the attention paid to, the safety of BP's *U.S.* operations, conducted largely by its *U.S.* subsidiaries based in this very district" (emphasis in original).

Constitutional Challenge and *Morrison* Arguments Mooted by Application of English Law

Having determined to apply English law, the court also held that it need not reach defendants' argument that plaintiffs' common law claims (pled under Texas law) were barred by the dormant Commerce Clause of the U.S. Constitution. In their motion to dismiss, defendants asserted that the dormant Commerce Clause bars the extraterritorial application of state law to claims based on securities transactions on foreign exchanges because such an application would create a substantial risk of conflicts with foreign governments and undermine the ability of the federal government to "speak with one voice in regulating commercial affairs with foreign states." BP further argued that even though *Morrison* does not technically apply to the plaintiffs' common law claims, the *Morrison* Court's preclusion of recovery for investors on foreign stock exchanges under U.S. law demonstrates the policy imperative of deference to foreign governments in the regulation of overseas securities transactions and enhances the dormant Commerce Clause concerns presented by the plaintiffs' suit.

(continued on page 17)

Standing in MBS Cases: Implications for Investors Seeking Class-Wide Relief

(continued from page 11)

In the context of breach of contract and Trust Indenture Act of 1939 ("TIA"), 15 U.S.C. § 77aaa et seq., cases (sometimes referred to collectively as "breach of contract cases" below), district courts have reached different conclusions with respect to both trust and tranche standing in assessing what constitutes "the same set of concerns." *Compare Policemen's Annuity & Benefit Fund of City of Chicago v. Bank of Am., NA*, 907 F. Supp. 2d 536, 546-547 (S.D.N.Y. 2012) ("*Policemen's*") (finding no standing to represent purchasers from different trusts and tranche standing only where loans are cross-collateralized), *with Oklahoma Police Pension & Ret. Sys. v. U.S. Bank Nat. Ass'n*, 291 F.R.D. 47, 60 (S.D.N.Y. 2013) ("*Oklahoma*") (purchasers have standing to represent all trusts and all tranches from a given offering). These cases are discussed below.

A. *Policemen's & BNY Mellon* Class Standing

Following *NECA-IBEW*, the *Policemen's* court held that the plaintiffs did not have standing to represent investors in trusts outside of those trusts in which the plaintiffs invested, thereby narrowing the scope of the case from 41 Washington Mutual MBS trusts that the plaintiffs sought to represent to just 19. 907 F. Supp. 2d at 546-547. There, the plaintiff investors sued U.S. Bank and Bank of America for breach of contract in their capacities as trustees for MBS in which the plaintiffs had invested. *Id.* at 546-547. The plaintiffs alleged that the trustees breached their obligations under the relevant governing agreements (and under the TIA) by, inter alia, failing to (1) review loan files for missing, incomplete and defective documentation; (2) provide notice of incomplete mortgage files and breaches of the seller's representations and warranties; and (3) enforce the MBS-holders' rights to have the seller repurchase defective loans. *Id.* at 544.

According to the court, since each trust had a "unique loan composition" and was administered under a "unique (even if similar) PSA," "a breach of the Trustee's duties with respect to one Trust [did] not necessarily implicate the same 'set of concerns' that certificate-holders in another Trust would have." *Id.* at 547. Critically, according to the court, a breach of the trustee's duty in connection with one trust would not "***infect***" the value of certificates held in another trust. *Id.* at 546-74 (emphasis added).[3] The court left open the issue of tranche standing, subject to a later determination as to whether the tranches were, *inter alia,* cross-collateralized with one another. *Id.* at 549. With respect to tranche standing specifically, the court observed that "the 'set of concerns' implicated are whether plaintiff's certificates lost value as a result of defendants' alleged breaches of the duties set forth in the PSAs." *Id; see also Ret. Bd. of the Policemen's Annuity & Ben. Fund of City of Chicago v. Bank of New York Mellon*, 914 F. Supp. 2d 422, 423 (S.D.N.Y. 2012) ("*BNY Mellon*") (holding plaintiffs lacked standing to represent investors in trusts in which they themselves had not also invested).[4]

B. *Oklahoma* Class Standing

One Southern District of New York case has thus far taken a view contrary to *Policemen's* and *BNY Mellon*. In *Oklahoma*, the court held that under *NECA-IBEW*, the plaintiff — who had only invested in one of 14 trusts from the offering at issue — had class standing to represent all trusts and all tranches in the issuance. 291 F.R.D. at 60. The plaintiff investor there brought claims against U.S. Bank, as trustee, under similar breach of contract and TIA theories of liability. Like *Policemen's* and *BNY Mellon*, the plaintiff alleged that U.S. bank failed to take actions to protect its investment under the same "form" governing agreement. *Id.* at 59.

The *Oklahoma* court based its ruling on *NECA-IBEW's* findings that the plaintiff in that case had class standing to represent all purchasers from trusts in which the underlying mortgages shared a common originator. *Id.* at 58-59; *see also infra.* at Section III. Applying *NECA-IBEW*, the court reasoned that the presence of a common trustee (U.S. Bank) was analogous to the common originator in *NECA-IBEW. Id.* at 60. It was similarly important that the plaintiffs in *Oklahoma* had alleged the same breaches (i.e., failure to review incoming loans, failure to provide notice, failure to enforce repurchase rights) against the same defendant (U.S. Bank). *Id.* Together, these facts convinced the court that the "same set of concerns" were implicated across all trusts:

> It is sufficient that the plaintiff has pleaded [1] that the defendant breached the same obligations [2] in the same way in connection with the trusts in which the plaintiff invested and the trusts in which putative class members invested, [3] that those trusts were substantially similar, and [4] that those breaches by the defendant caused injury to the plaintiff and to the putative class in the same way.

(continued on page 14)

[3] This point is discussed further below.

[4] In February, the court denied the plaintiffs' motion for reconsideration of its standing ruling in *BNY Mellon*, but certified the order for interlocutory appeal. 2013 WL 593766 (S.D.N.Y. Feb. 14, 2013). Briefing in this appeal began in October of this year. As is further discussed below, the Second Circuit's ruling will undoubtedly affect issues in the *Policemen's* action and will help clarify certain points either left open or not addressed by *NECA-IBEW*.

Standing in MBS Cases: Implications for Investors Seeking Class-Wide Relief *(continued from page 13)*

Id. Said differently, the plaintiff had standing to represent the putative class of investors from other trusts because it alleged similar misconduct against a common defendant.

C. Comparison of *Policemen's* and *Oklahoma*

One point of disagreement that highlights the differences of opinion among district courts is the application and scope of the Second Circuit's "infection" hypothetical in *NECA-IBEW*. As discussed above, the *Policemen's* court found the infection discussion to be essentially dispositive. The *Oklahoma* court, in contrast, found it inapplicable.

The Second Circuit offered its "infection" discussion as an example of a hypothetical scenario where the "same set of concerns" would be clearly present. It was proffered primarily to rebut the defendants' argument that the misrepresentations must have all been located in the same offering documents. The example envisioned a series of debt offerings, issued over the course of a year, which all contained an identical misrepresentation about the issuing company's impending insolvency. *NECA-IBEW*, 693 F.3d at 163. In such a case, "Sections 11 and 12(a)(2) claims brought by a purchaser of debt from one offering would raise a 'set of concerns' nearly identical to that of a purchaser from another offering: the misrepresentation would ***infect*** the debt issued from every offering ***in like manner***, given that all of it is backed by the same company whose solvency has been called into question." *Id.* (emphasis added). Thus, the defendants' emphasis on the location of the misrepresentation was unavailing because it would be "patent[ly] inappropriate to deny class standing on the 'happenstance' that the misrepresentation could be located in one offering but not another." *Id.*

Applying its hypothetical, the Second Circuit observed that there were no similar blanket "debt offerings" across trusts and loans because the putative class members bought MBS backed by different loans issued by distinct originators. *Id.* at 163 ("to the extent the representations in the Offering Documents were misleading with respect to one Certificate, they were not necessarily misleading with respect to others"). False statements in one certificate, therefore, would not necessarily "infect" other certificates "*in like manner*" because each of the alleged injuries would have the potential to be "very different" and likewise could turn on "very different proof." *Id.* Importantly, however, false statements in certificates from common originators *would* infect different trusts in like manner. *See infra* Section III (discussing how common originators provide the "necessary link").

Based on this hypothetical, the *Policemen's* court determined that a trustee's breach with respect to "Trust A" would not "'infect' the value of the certificates in Trust B." 907 F. Supp. 2d at 547. But instead of looking to whether the breach would infect certificates *in like manner*, the *Policemen's* court looked to whether any resulting diminution in value of "Trust A" would (literally) infect "Trust B" by triggering a corresponding diminution in value in that trust. *Id.* The propriety of such an analysis is one issue that will likely be addressed by the Second Circuit in *BNY Mellon*. Had the court considered whether the breaches infected the other trusts "in like manner," it may have reached a conclusion similar to the *Oklahoma* court.

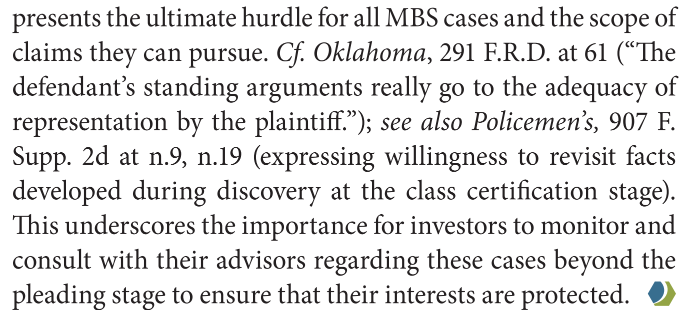
The *Oklahoma* Court rejected the view taken in *Policemen's*. 291 F.R.D. at 60. It concluded that "the discussion of 'infection' in *NECA-IBEW* [was] not relevant." *Id.* Specifically, it noted, as in *NECA-IBEW*, the hypothetical was inapposite "where purchasers bought certificates backed by a distinct set of loans issued by distinct originators." *Id.* More importantly, however, that court recognized that the "Court of Appeals did not require that the loan defaults in one trust 'infect' the value of the loans in another trust for there to be class standing." *Id.* To the contrary, the Second Circuit observed that the misconduct must infect other certificates *in like manner*. *Id.* According to the *Oklahoma* court, the breaches infected the trusts in like manner because the same defendants committed the same breaches with respect to similar trusts that resulted in similar injuries. *Id.*

V. Implications for Investors

This much is clear: under *NECA-IBEW*, in order to have class standing a plaintiff must show (1) that he personally has suffered some injury at the hands of the defendant, and (2) that the defendant's conduct implicates "the same set of concerns" for other members of the putative class. On the one hand, Securities Act cases would appear to be on sound footing in the Second Circuit. That is to say, class plaintiffs are on notice as to what they must plead in order to survive a motion to dismiss. *See, e.g., New Jersey Carpenters*, 709 F.3d at 128 (discussing relevant factors under *NECA-IBEW*).

But with respect to the scope of *NECA-IBEW's* application to breach of contract and TIA cases, a clear split has emerged. Put simply, in analyzing what constitutes "the same set of concerns," the *Policemen's* model focuses on the injury whereas the *Oklahoma* model focuses on the misconduct. While the Second Circuit will address this split when it decides the *BNY Mellon* appeal, there remains a degree of uncertainty for MBS investors who may have been harmed by a trustee's alleged failure to act. Such investors should therefore not assume that their interests are being protected through class action litigations, even where the MBS trusts in which they have invested are named in the case.

Finally, one point of clarification bears noting: class standing alone will not satisfy the requisite standard under Fed. R. Civ. P. 23. Thus, although "a little bit of standing will go a long way," *cf. Policemen's Annuity & Ben. Fund of the City of Chicago v. Bank of Am., NA*, 2013 WL 5328181, at *5 (S.D.N.Y. Sept. 23, 2013) (discussing Article III standing), the inquiry is not over. *See NECA-IBEW*, 693 F.3d at 158 n. 9 ("What the district court thought was a 'standing' issue was in reality a class certification issue.") (quoting Appellants' Brief). Rule 23 still



presents the ultimate hurdle for all MBS cases and the scope of claims they can pursue. *Cf. Oklahoma*, 291 F.R.D. at 61 ("The defendant's standing arguments really go to the adequacy of representation by the plaintiff."); *see also Policemen's,* 907 F. Supp. 2d at n.9, n.19 (expressing willingness to revisit facts developed during discovery at the class certification stage). This underscores the importance for investors to monitor and consult with their advisors regarding these cases beyond the pleading stage to ensure that their interests are protected.

A New Challenge (and Challenger) Facing Public Pension Funds *(continued from page 7)*

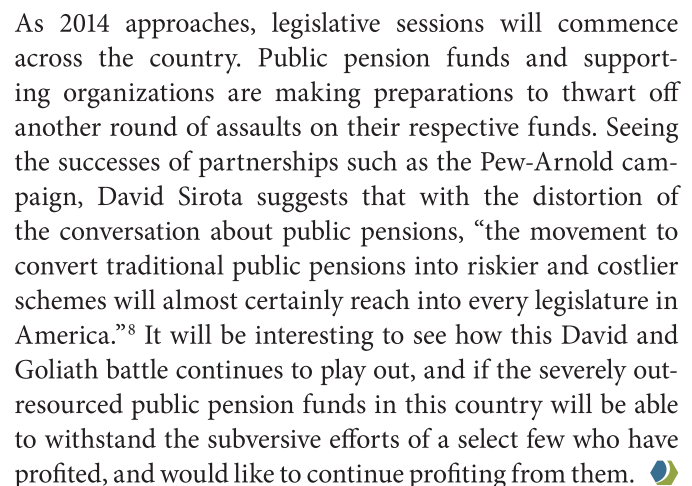
Taibbi points to three main themes that are applicable to the overall pension v. Wall Street fight: [5]

1) Many states and cities have been under-paying or non-paying their required contributions into public pension funds for years, causing massive shortfalls that are seldom reported upon by local outlets.

2) As a solution to the fiscal crises, unions and voters are being told that a key solution is seeking higher yields or more diversity through "alternative investments," whose high fees cost nearly as much as the cuts being demanded of workers, making this a pretty straightforward wealth transfer. A series of other middlemen are also in on this game, siphoning off millions in fees from states that are publicly claiming to be broke.

3) Many of the "alternative investments" these funds end up putting their money in are hedge funds or PE funds run by men and women who have lobbied politically against traditional union pension plans in the past, meaning union members have been giving away millions of their own retirement money essentially to fund political movements against them.

Along these lines, just last week, it was announced that New York state financial regulators have subpoenaed numerous investment consultants to determine whether any outside advice given to New York's pension funds is clouded by undisclosed financial incentives or other conflicts of interest.[6] Benjamin M. Lawsky, the New York financial services superintendent, sent letters to the top New York state and city pension trustees, who collectively serve as stewards for $350 billion in retirement money, that he wanted to look at "controls to prevent conflicts of interest, as well as the use of consultants, advisory councils and other similar structures."[7] New York State's pension funds, some of the most well-funded in the country, paid $2.1 million in private



equity consulting and $1 million to hedge fund consultants in 2012, compared to $63,000 to consultants who work with U.S. stocks. Again, New York pension funds are doing very well compared to their counterparts across the country, and it is also true that hedge fund consultants have a much tougher job than consultants who monitor U.S. large cap equity managers, but these figures do provide an example of one type of "middleman" which Taibbi asserts is involved in the alternative investment space — and the lucrative opportunity these investments present.

Conclusion

As 2014 approaches, legislative sessions will commence across the country. Public pension funds and supporting organizations are making preparations to thwart off another round of assaults on their respective funds. Seeing the successes of partnerships such as the Pew-Arnold campaign, David Sirota suggests that with the distortion of the conversation about public pensions, "the movement to convert traditional public pensions into riskier and costlier schemes will almost certainly reach into every legislature in America."[8] It will be interesting to see how this David and Goliath battle continues to play out, and if the severely out-resourced public pension funds in this country will be able to withstand the subversive efforts of a select few who have profited, and would like to continue profiting from them.

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[5] Matt Taibbi, *Looting Public Pensions: A New Think Tank Study*, available at http://www.rollingstone.com/politics/blogs/taibblog/looting-public-pensions-a-new-think-tank-study-20130926 (last visited Nov. 8, 2013)

[6] Mary Williams Walsh, *New York Is investigating Advisers to Pension Funds*, available at http://dealbook.nytimes.com/2013/11/05/new-york-is-investigating-advisers-to-pension-funds/?_r=1 (last visited Nov. 8, 2013).

[7] *Id.*

[8] Sirota, 25.

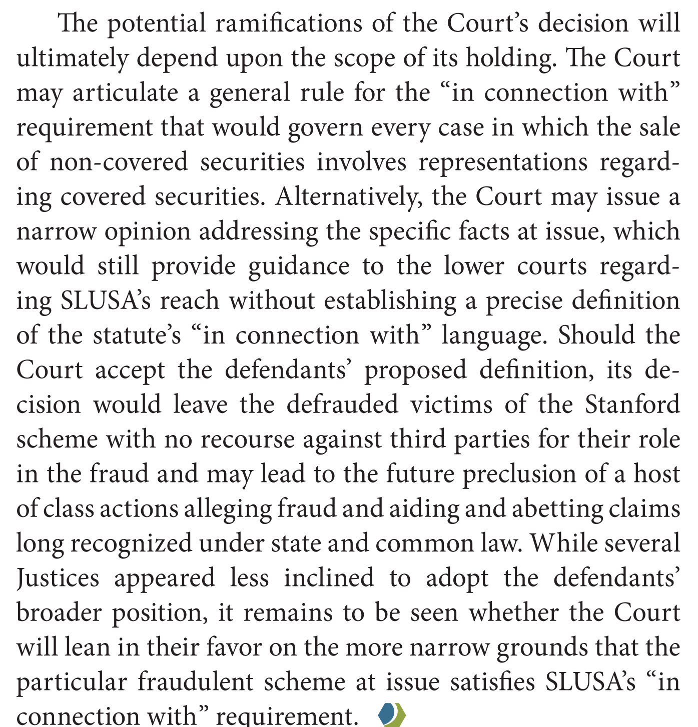
Chadbourne & Park, LLP v. Troice — Supreme Court Hears Oral Arguments on SLUSA's "In Connection With" Requirement *(continued from page 6)*

Oral Argument

At oral argument, the defendants (petitioners before the Court) urged the Court to adopt a broad interpretation of the "in connection with" standard, which "can take something that might otherwise be plain fraud and if there's a misrepresentation in connection with a security or a covered security, that makes it securities fraud." Several of the Justices seemed uncomfortable with this proposition. For example, Chief Justice Roberts asked, "If I'm trying to get a home loan and they ask you what assets you have and I list a couple of stocks and, in fact, it's fraudulent, I don't own them, that's a covered transaction?" Similarly, Justice Kagan queried, "What if people reach a prenuptial agreement and as part of the prenuptial agreement they agree that in a year, one party to the marriage is going to sell as many shares of Google stock and buy a home with it. Is that covered by the securities laws now?" Also struck by the strained result of the defendants' argument, Justice Breyer remarked, "My goodness. . . . I guess if those fall within the securities laws, we would have expected to see billions of actions." The defendants explained that such scenarios were distinguished because there were no representations about a purchase or sale. Not satisfied with this response, Justice Kagan noted the following distinction between other cases subject to SLUSA's preclusion provision and the fraud at issue: "In all our cases, there's been something to say when somebody can ask the question: How has this affected a potential purchaser or seller in the market for the relevant securities? And here there's nothing to say." Justice Scalia went even further to suggest that the "in connection with" standard requires an actual purchase or sale of a covered security and not merely a "promise to purchase," as proposed by the defendants.

In support of the defendants, the United States, through the Department of Justice and the Securities and Exchange Commission ("SEC") similarly argued before the Court that "a false promise to purchase covered securities using the fraud victims' money in a way they are told is going to benefit them is a classic securities fraud." The SEC further stated that the Stanford scheme satisfied Justice Kagan's "market effect test" because it harmed investor confidence. Unconvinced, Justice Kennedy replied, "Well, I mean if you went to church and heard a sermon that there are lots of people that are evil, maybe then you wouldn't invest."

The plaintiffs (respondents before the Court) requested that the Court adopt a rule narrowly limited to the facts at issue: "[A] false promise to purchase securities for one's self in which no other person will have an interest is not a material misrepresentation in connection with the purchase or sale of covered securities." In doing so, they sought to distance the case from both the Fifth Circuit's holding, which had set forth a broader standard that would apply to all cases in which someone purchased something that was supposedly invested in covered securities, as well as the Madoff situation, which involved a false representation to investors that Madoff was purchasing securities on their behalf when in fact he purchased nothing. Specifically, the plaintiffs offered the following distinctions between the Stanford scheme and the Madoff scheme: (1) SIB did not represent that the CDs were backed by securities it purportedly held because the CDs promised a fixed rate of return that was not tied to the value of their underlying assets; (2) SIB was a foreign bank, not a broker-dealer; (3) the fraud did not have the same negative effect on investor confidence in the markets; and (4) the plaintiffs never purchased a "covered security" (or anything promised or represented to be a "covered security"). Justice Alito appeared less receptive to the plaintiffs' position, as he observed that the text of the statute itself did not support their argument that the "in connection with" language should be construed more narrowly, stating, "All that's in the text of the statute is 'in connection with,' which is open-ended." Whether the plaintiffs' arguments persuaded the rest of the Court was unclear.



The potential ramifications of the Court's decision will ultimately depend upon the scope of its holding. The Court may articulate a general rule for the "in connection with" requirement that would govern every case in which the sale of non-covered securities involves representations regarding covered securities. Alternatively, the Court may issue a narrow opinion addressing the specific facts at issue, which would still provide guidance to the lower courts regarding SLUSA's reach without establishing a precise definition of the statute's "in connection with" language. Should the Court accept the defendants' proposed definition, its decision would leave the defrauded victims of the Stanford scheme with no recourse against third parties for their role in the fraud and may lead to the future preclusion of a host of class actions alleging fraud and aiding and abetting claims long recognized under state and common law. While several Justices appeared less inclined to adopt the defendants' broader position, it remains to be seen whether the Court will lean in their favor on the more narrow grounds that the particular fraudulent scheme at issue satisfies SLUSA's "in connection with" requirement.

Will the U.S. Supreme Court Shut the Courthouse Doors for Investors? *(continued from page 5)*

Supreme] Court and repeatedly endorsed by Congress," and that the economic theory that underpins *Basic* remains sound, along with several other procedural arguments regarding why the Court should decline to hear the case.[4] The United States Chamber of Commerce and other corporate-defense-oriented entities submitted *amici* (or "friend of the court") briefs in support of Halliburton's argument that the Court should overturn *Basic*. On November 15, 2013, at least four Justices of the nine-member Court voted to grant Halliburton's petition for *certiorari*.

The Court is slated to decide *Halliburton* during the present Term, which concludes in June 2014. The Court could reaffirm *Basic*, overrule *Basic* and disavow the fraud on the market economic theory as a proper basis for any sort of broad legal rule, or do something in between, such as specify additional ways in which the market for a stock may be shown to be inefficient. But to overrule or substantially alter *Basic* is what the Court, in granting *certiorari*, has agreed to consider doing — and that outcome is entirely possible.

The *Basic* presumption of reliance in many respects allows for the certification of large classes of investors in publicly traded companies, and a powerful tool for shareholder recovery from corporate fraud will be undercut if the *Basic* presumption is eliminated or weakened. The Supreme Court

(continued on page 20)

[4] Brief in Opposition to Petition for *Certiorari* in Case No. 13-317, at 30-40.

Finding a Way Around Morrison: Texas Court Sustains BP Investors' English Law Claims in Deepwater Horizon Suit *(continued from page 12)*

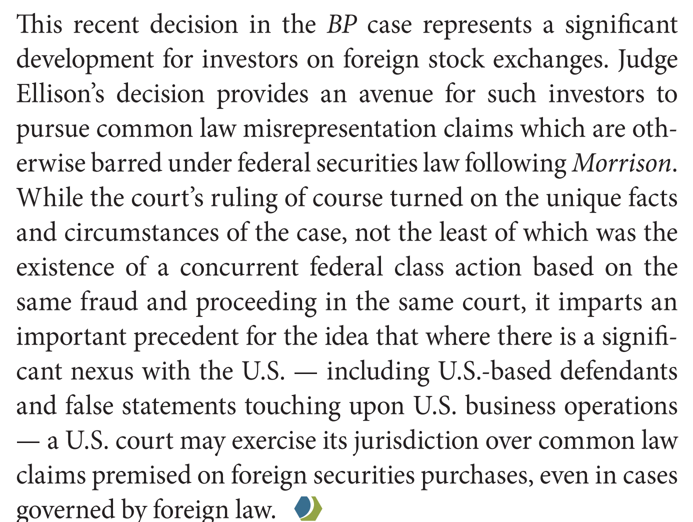
Rejecting these arguments, the court concluded that with the application of English law, there is no conflict between U.S. state and federal law, thus eliminating the federalism concerns which underlie the dormant Commerce Clause. By logical extension, the court eliminated the need to address the policy implications of *Morrison*.

Actual Reliance Adequately Pled Through Stock Purchases

Applying English law, the court also found plaintiffs' allegations sufficient on the merits. Of particular note, the court held that plaintiffs adequately pled the common law element of actual reliance. English common law has no analogue to the "fraud on the market" *presumption* of reliance which is available to investors pursuing claims under the federal securities laws. Therefore, to satisfy the reliance element of their fraud claims under English common law, plaintiffs are required to plead that they actually relied to their detriment on defendants' misstatements.

In addressing plaintiffs' reliance allegations, Judge Ellison recognized that the Court of Appeals for the Fifth Circuit, as well as other district courts within the Fifth Circuit, have held or strongly suggested that the heightened pleading requirements set forth in Rule 9(b) of the Federal Rules of Civil Procedure extend to allegations of actual reliance. Notwithstanding his personal skepticism as to whether the Rule 9(b) standard should apply to the reliance element, Judge Ellison followed Fifth Circuit precedent and applied Rule 9(b). Even under this more exacting standard, however, the court deemed sufficient plaintiffs' allegations of reliance on BP's misstatements. Specifically, the court found that plaintiffs' identification of the months within which they purchased BP shares, among other allegations, was sufficient to satisfy this requirement at the pleading stage with respect to any misrepresentation made prior to each plaintiff's final purchase. The Court noted that plaintiffs would not be relieved of their ultimate burden to *prove* actual reliance in order to recover damages at trial, stating that "any deficiency in the element of actual reliance is best tested on a full record, not on the pleadings."

Conclusion



This recent decision in the *BP* case represents a significant development for investors on foreign stock exchanges. Judge Ellison's decision provides an avenue for such investors to pursue common law misrepresentation claims which are otherwise barred under federal securities law following *Morrison*. While the court's ruling of course turned on the unique facts and circumstances of the case, not the least of which was the existence of a concurrent federal class action based on the same fraud and proceeding in the same court, it imparts an important precedent for the idea that where there is a significant nexus with the U.S. — including U.S.-based defendants and false statements touching upon U.S. business operations — a U.S. court may exercise its jurisdiction over common law claims premised on foreign securities purchases, even in cases governed by foreign law.

Ohio Institutional Investors Forum

January 22, 2014

Hyatt Regency Columbus — Columbus, OH

The Ohio Institutional Investor Forum is an educational conference designed to address the needs of Ohio's pension, foundation, and endowment community. The program's agenda will cover investments, fiduciary responsibilities, legal and legislative issues, healthcare benefits, actuarial assumptions, asset/liability management and best practices in Fund Management. The forum is specially designed to bring together 100 plus attendees representing over $225 Billion in pension fund assets from organizations like Ohio Public Employees, Ohio State Teachers, Ohio Police & Fire, Ohio School Employees, Ohio Deferred Comp, Cincinnati City and more.

National Conference on Public Employee Retirement Systems (NCPERS) Legislative Conference

January 26 – 28, 2014

Capital Hilton Hotel — Washington, D.C.

The Annual Legislative Conference is the premier conference for public fund trustees and plan administrators, highlighting the issues on Capitol Hill and in federal regulatory agencies that affect pension funds today. Past conferences have brought senior administration officials, Members of Congress and Washington insiders to help educate fund members on the critical issues affecting public pensions and equip them with the tools needed to deal with these issues effectively and meet-face-to-face with their elected leaders on the Hill. This year, in conjunction with the Legislative Conference, NCPERS will also host a one-day "*Healthcare Symposium*" on January 28. This program will focus on the Affordable Care Act (ACA) implementation and regulations, Medicare, and other federal and state healthcare issues.

Florida Public Pensions Trustees Association (FPPTA) Trustees School

February 2 – 5, 2014

Hyatt Regency Jacksonville River Front — Jacksonville, FL

Evolving Fiduciary Obligation of Pension Plans (EFOPP)

February 18, 2014

Capital Hilton — Washington, D.C.

Honing Active Engagement Through Strategic Action — The Institutional Investor Forum, in conjunction with co-host Kessler Topaz Meltzer & Check LLP, and with the essential input of an Advisory Board of your peers, will offer a thorough overview of these and other critical issues plan sponsors and their legal advisors are grappling with to fulfill their obligations as fiduciaries and as shareholders. Through a series of panel sessions, case studies, presentations and workshops, this one-day event will provide constructive insights into the ways in which fiduciaries can be most effective in engaging with and influencing the management of portfolio companies. We will review the most crucial legal decisions and developments investors should be aware of, and offer insights on the approaches successful plans have implemented to meet their investment return targets strategically with a long term vision.

National Association of Public Pension Attorneys (NAPPA) Winter Seminar

February 19 – 20, 2014

Capital Hilton — Washington, D.C.

Each February, NAPPA hosts Seminar meetings in Washington, D.C., which allow members to participate in more extensive discussion of specialized areas of pension law. The seminar meeting topics are Benefits, Fiduciary & Plan Governances, Investment and Tax. A number of speakers are staffers from Capitol Hill. NAPPA members are invited to any or all of the Seminar meetings.

Louisiana Trustee Education Council (LATEC) Investment Education Symposium

February 26 – 28, 2014

Astor Crowne Plaza — New Orleans, LA

This *investment education conference* aims to provide broad education and information on investing, fiduciary responsibility and selection of money managers to the key decision makers and other representatives of the nation's largest pension funds, endowments, foundations and other institutional investors. Participants of this conference will have the chance to exchange ideas and learn from other delegates and presenters who manage some of the largest capital flows within both the traditional and the alternative investment communities. Institutional investors will come from across the country not just to network but also to learn from the nation's leading institutional investors, asset managers, hedge fund managers, consultants and more.

Rights and Responsibilities of Institutional Investors (RRII)

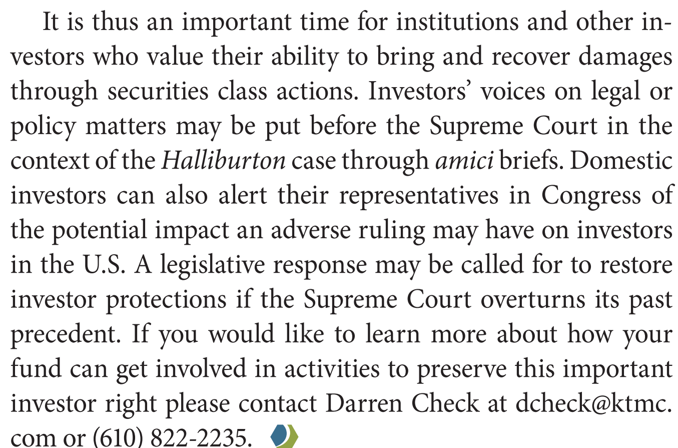
March 20, 2014

The Renaissance Hotel — Amsterdam, The Netherlands

Surpassing Expectations: Closing the Gap Between Rules and Reality in Shareholder Engagement — The 9th Annual Rights and Responsibilities of Institutional Investors will again be co-sponsored by the Institutional Investor Forum and Kessler Topaz Meltzer & Check LLP in Amsterdam. Many of the most pressing issues for investors and shareholders covered in this agenda address the ways that these legal and compliance officers from European public pension, insurance fund and mutual fund companies are connecting the dots, so to speak, to meet larger, long term ESG and governance goals. Through panels, workshops and case studies, participants will engage with industry peers and thought leaders on the question of closing the gap between rules and reality.

Will the U.S. Supreme Court Shut the Courthouse Doors for Investors? *(continued from page 17)*

has stated that the *Basic* presumption solves the problem of placing "an unnecessarily unrealistic evidentiary burden on the [securities fraud] plaintiff who has traded on an impersonal market."[5] Misrepresentations, causation, damages — these and other elements of a securities fraud claim may be established on a classwide basis, without reference to the decision-making of individual class members; reliance, absent the *Basic* presumption, quite possibly cannot, making class certification, which requires a predominance of common issues among class members, hard to win. The Court has also repeatedly noted that meritorious private security fraud actions are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by federal or state agencies.[6] Shareholder recoveries demonstrate the power of litigation to vindicate investor injuries from corporate fraud and perhaps indirectly to deter such fraud. Indeed, since 1997, settlements in securities fraud class actions have exceeded $73 billion dollars.[7] Implicitly, securities class actions have allowed large institutional investors, who ordinarily own many of the shares at issue in litigated actions, to recover millions of dollars on meritorious claims. The avenues for recovery for losses from securities fraud would change dramatically if *Basic* were reversed and securities class actions became rarer. Indeed, if securities class actions were eliminated or substantially curtailed, investors could recover for injuries suffered due to violations of the antifraud provisions of the federal securities laws only if they themselves initiated suit and could demonstrate their reliance on the misrepresentations at issue. Simply put, investor recovery through litigation for harmful securities fraud would become much more difficult to achieve.



It is thus an important time for institutions and other investors who value their ability to bring and recover damages through securities class actions. Investors' voices on legal or policy matters may be put before the Supreme Court in the context of the *Halliburton* case through *amici* briefs. Domestic investors can also alert their representatives in Congress of the potential impact an adverse ruling may have on investors in the U.S. A legislative response may be called for to restore investor protections if the Supreme Court overturns its past precedent. If you would like to learn more about how your fund can get involved in activities to preserve this important investor right please contact Darren Check at dcheck@ktmc.com or (610) 822-2235.

[5] *Basic*, 485 U.S. at 245.

[6] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007).

[7] CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS, 2012 YEAR IN REVIEW Figure 2 (2012).

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