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A Quarterly Newsletter for Institutional Investors by Kessler Topaz Meltzer & Check, LLP

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Bank of America Shareholders Achieve Historic $2.425 Billion Recovery Related to Merrill Lynch Acquisition

Richard A. Russo, Jr., Esquire

In what is by far the largest shareholder recovery to come out of the recent financial crisis, the court-appointed Lead Plaintiffs in *In re Bank of America Corp. Securities Litigation* announced on September 28, 2012 that they had obtained a landmark $2.425 billion recovery for shareholders of Bank of America Corporation ("BofA") related to the company's ill-fated 2008 merger with Merrill Lynch & Co., Inc. ("Merrill"). In addition to being the eighth largest monetary award ever obtained in a federal securities class action, the $2.425 billion recovery achieved by the Lead Plaintiffs is also one of the four largest recoveries ever funded by a single corporate defendant, and the single largest recovery ever obtained for an alleged violation of Section 14(a) of the Securities Exchange Act of 1934, which protects shareholders from misstatements made in connection with a proxy solicitation.

The Lead Plaintiffs, who litigated this case for nearly four years on behalf of BofA shareholders, consist of some of the largest institutional investors in the world, and include the State Teachers Retirement System

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The World's Most Important Number: A Look Into the LIBOR Manipulation Scandal

Ben de Groot, Esquire and Ryan Degnan, Esquire

Scandals are not new to the banking industry, but if regulators are correct that banks successfully manipulated the London Interbank Offered Rate ("LIBOR") — a benchmark rate used to set payments on $800 trillion worth of financial instruments globally — the recent rate fixing scandal may well be the largest in history. While Barclays PLC ("Barclays") is the only bank thus far to have been fined for its role in the scandal, new details emerge almost daily. Increasingly, reports suggest that the banks responsible for setting LIBOR rates manipulated their submissions in order to benefit their investment positions and to project a false image of their strength and stability during the recent financial crisis (in particular when the interbank lending market was weakest). The banks' ability to do so was made possible, in part, by the subjective nature of LIBOR and the weak oversight of the rate-setting process. While a full analysis of the LIBOR-fixing scan-

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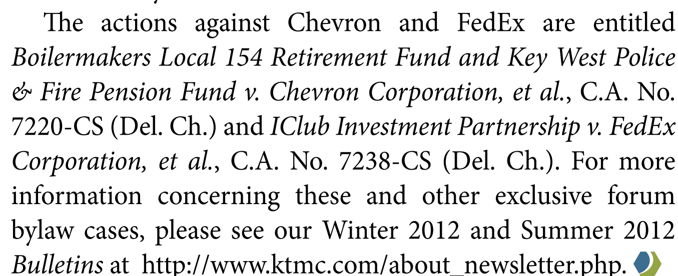
Kessler Topaz Continues Campaign Against Exclusive Forum Bylaw Provisions

James H. Miller, Esquire

Beginning in February 2012, Kessler Topaz commenced litigation against sixteen different companies that either unilaterally adopted exclusive forum provisions or sought stockholder approval of these provisions without disclosing to stockholders all material information relating to the vote. These actions produced immediate and meaningful results by protecting stockholder rights and preventing corporate fiduciaries from using a company's organizational documents to steer the course of corporate litigation. Indeed, ten companies promptly repealed the forum selection bylaw provisions adopted by their boards of directors.[1] Three additional companies withdrew their annual meeting proposals to adopt forum selection bylaw and certificate provisions.[2] And stockholders of one company rejected the company's proposal to adopt a forum selection certificate provision after the company amended its annual proxy statement to disclose additional information in support of its proposal.[3] The effect of this litigation stretches far beyond the subject companies. As one commentator and proponent of exclusive forum provisions has acknowledged, these actions have substantially slowed the pace at which corporations are adopting exclusive forum bylaw provisions.

Still, not all companies have repealed their exclusive forum bylaws. Two of these companies are Chevron Corporation and FedEx Corporation. In response to litigation by Kessler Topaz, Chevron has already amended its bylaw once, and Kessler Topaz continues to litigate claims against these two companies in an effort to repeal their exclusive forum bylaws. Following limited discovery, the Delaware Chancery Court recently ordered the parties to file briefs regarding the legal validity of the subject bylaws, which motions will likely be heard early in 2013.



The actions against Chevron and FedEx are entitled *Boilermakers Local 154 Retirement Fund and Key West Police & Fire Pension Fund v. Chevron Corporation, et al.*, C.A. No. 7220-CS (Del. Ch.) and *IClub Investment Partnership v. FedEx Corporation, et al.*, C.A. No. 7238-CS (Del. Ch.). For more information concerning these and other exclusive forum bylaw cases, please see our Winter 2012 and Summer 2012 *Bulletins* at http://www.ktmc.com/about_newsletter.php.

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[1] These companies are: Air Products and Chemicals, Inc.; AutoNation, Inc.; Curtiss-Wright Corporation; Danaher Corporation; Franklin Resources, Inc.; Jack in the Box, Inc.; Navistar International Corporation; Priceline.com Incorporated; SPX Corporation; and Superior Energy Services, Inc.

[2] These companies are: Calix, Inc; Fairchild Semiconductor International, Inc.; and Hittite Microwave Corporation.

[3] This company is Cameron International Corporation.

Amgen v. Connecticut Retirement Plans and Trust Funds – Will the Supreme Court Heighten a Plaintiffs' Burden on Class Certification?

Michelle M. Newcomer, Esquire

Must investors who bring a class action lawsuit under federal securities law prove that a defendant's misstatements were material in order for the court to certify the class? And should the defendant in such an action be given the opportunity to defeat class certification by showing that the alleged misstatements were immaterial? These are the questions that the United States Supreme Court was asked to resolve when it heard oral argument on November 5, 2012 in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, No. 11-1085. How the Court decides these questions will likely have a profound impact on investors pursuing securities fraud litigation. This article explores the background of this potentially landmark decision, the most likely outcomes and its potential ramifications for investors.

Amgen's Path to the Supreme Court

Connecticut Retirement Plans and Trust Funds ("Plaintiff") brought suit against Amgen, Inc. and certain of its directors and officers ("Defendants") in the Central District of

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Kessler Topaz Historic $2 Billion Post-trial Verdict Against Grupo Mexico Upheld on Appeal

James H. Miller, Esquire

In late September 2012, the Delaware Supreme Court finally put an end to nearly a year of appeals by Grupo Mexico in the wake of a historic trial victory by Kessler Topaz in the Delaware Court of Chancery. The Delaware Supreme Court unanimously affirmed the lower court's ruling that Grupo Mexico had unlawfully diverted more than a billion dollars in value from the public company it controlled, Southern Peru Copper Corporation, in a 2005 merger between Southern Peru and a private company owned by Grupo. The verdict, obtained after a week-long trial in the summer of 2011, reaffirmed important principles of fiduciary duty law, and resulted in what is believed to be the largest post-trial verdict ever in a shareholder suit.

The Merger and Trial

In 2004, Grupo owned approximately 54% of Southern Peru, and approximately 99% of Minera Mexico, both of which were primarily copper mining companies. While Southern Peru had strong operations and no debt, Minera was in financial distress. Grupo proposed a transaction whereby the publicly-traded company (Southern Peru) would buy Minera from Grupo in exchange for Southern Peru stock. Specifically, Grupo proposed that Southern Peru issue $3.1 billion worth of Southern Peru stock to Grupo in exchange for Minera.

Southern Peru's board, which was dominated by Grupo, formed a "Special Committee" comprised of putatively independent directors. The Committee was assigned to evaluate the Grupo proposal, and was supposed to negotiate on behalf of Southern Peru's minority shareholders. The supposedly independent directors failed to do so, as the trial court found, and "instead took strenuous efforts to justify a transaction at the level originally demanded by the controller." After a trial in which Special Committee members, Grupo employees, and experts testified, Chancellor Leo Strine, in a 106-page

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Kessler Topaz Enjoins Annual Meeting to Force Additional Disclosures About Equity Compensation

James H. Miller, Esquire and Matthew A. Goldstein, Esquire

On October 23, 2012, Kessler Topaz successfully enjoined a vote at the Abaxis, Inc. ("Abaxis" or the "Company") annual meeting of stockholders (the "Annual Meeting") because the Company and its board of directors failed to disclose material information concerning a proposed amendment (the "Amendment") to the Company's 2005 Equity Incentive Plan (the "2005 Plan"). Absent additional disclosures, which were issued following the injunction, Abaxis stockholders would have been irreparably harmed by being forced to cast an uninformed vote on the Amendment, which seeks to retroactively validate hundreds of thousands of restricted stock units ("RSUs") granted in violation of the 2005 Plan. This result represents a significant victory for Kessler Topaz and Abaxis stockholders.

The Company's 2005 Plan allows the Company to issue equity-based awards, including RSUs[1], to Company employees. The 2005 Plan plainly states "in no event shall more than five hundred thousand (500,000) shares [of Abaxis common stock] in the aggregate be issued under the [2005] Plan pursuant to the exercise or settlement of . . . Restricted Stock Units." This provision thus restricts the Company from issuing more than 500,000 shares of Abaxis common stock upon the settlement (i.e., vesting) of RSUs (the "Limit"). The Company's only public admission concerning its violation of the Limit appeared in an August 28, 2012 Form 8-K (the "8-K"). The 8-K acknowledged that the Company granted and settled 370,179 more RSUs than allowed under the 2005 Plan, but did not disclose that an additional 1,174,821 RSUs remained

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[1] RSUs are an obligation of the Company to issue a fixed number of shares of common stock on a given date in the future, subject to the RSU holder's continued service with the a prescribed vesting date or other vesting criteria.

How a Dissent Produced a Majority Rationale

Ramzi Abadou, Esquire and Stacey Kaplan, Esquire

Bringing a successful securities fraud claim against a corporate entity requires plaintiffs to demonstrate that the corporation itself acted with the required culpable mental state (*i.e.*, scienter). While a slim majority of the United States Supreme Court believes that corporations are, in fact, people under some instances, *see Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 900 (2010), in the securities context, corporations can still only "speak" through their employees and agents.[1] Historically, corporate scienter could be adequately pled ***even when*** the corporate agent did not make a misleading statement, so long as her fraudulent conduct was committed within the scope of her employment and for the benefit of the corporation.[2]

In *Janus Capital Grp., Inc. v. First Derivative Traders*, however, a sharply divided United States Supreme Court held that only persons who possess "ultimate authority" over publicly-disseminated false statements, including their "content and whether and how to communicate them," can be held primarily liable as speakers under §10(b) and Rule 10b-5.[3] While *Janus* did not address scienter, crafty defense lawyers have recently tried to use *Janus* to argue that ***only*** the state of mind of the employee who "makes" a statement can be imputed to a corporate entity. According to this view, "as a result of *Janus*, the scope of what it means to 'make' a statement has narrowed. Accordingly . . . a strong argument exists that *Janus* should also consequently and logically narrow the scope of employees or agents whose intent can impute to a corporation for securities fraud purposes."[4]

Of course, such a reading of *Janus* would enable corporate defendants to escape securities fraud liability by compartmentalizing information and shielding agents who speak on a corporation's behalf from information contradicting their public statements. Not good. As Justice Breyer's dissent in *Janus*

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[1] *See, e.g., Commodity Futures Trading Com. v. Weintraub*, 471 U.S. 343, 348 (1985) ("As an inanimate entity, a corporation must act through agents.").

[2] *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 707-10 (7th Cir. 2008).

[3] 131 S. Ct. 2296, 2302 & n.6 (2011).

[4] BNA Securities Law Daily, "Corporate Scienter After *Janus*," Aug. 31, 2012, at 2.

The Second Circuit Weighs in on the Issue of Class Standing: *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*

Jennifer L. Joost, Esquire

On September 6, 2012, the U.S. Court of Appeals for the Second Circuit issued an opinion in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.,* holding that representative plaintiffs have "class standing" to pursue claims under the Securities Act of 1933 (the "Securities Act") for material misrepresentations in offering documents tied to the issuance of mortgage-backed securities ("MBS")[1] on behalf of absent class members who bought MBS pursuant to similar or identical material misrepresentations in a shelf registration statement concerning origination standards, provided that the mortgages underlying the MBS were originated by the same lender(s). 693 F.3d 145, 148-49 ("*Goldman Sachs*"). This opinion represents the first time that any federal court has found the nexus of material misstatements in a shelf registration statement sufficient to allow a plaintiff to represent a class of investors who purchased MBS pursuant to the same shelf registration statement.

Prior to the financial crisis, investment banks and mortgage originators issued MBS pursuant to registration statements known as "shelf registration statements." Just prior to issuing a new MBS offering, the issuer updated the shelf registration

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[1] An MBS is a security that is backed by a pool of mortgages. Each MBS offering contains several different tranches, each with a different rating from AAA to B; the lowest tranche is known as the equity tranche and often is not rated.

Getting Serious About ESG

2012 Signals Increased Attention and Focus on ESG Issues by Public Pension Funds

Jonathan R. Davidson, Esquire

The prevailing investment model among U.S. and international public pension funds has long been the attempt to achieve positive financial returns at predetermined risk levels. These investors have historically been hesitant to incorporate non-financial related factors into the investment decision process. But in recent years, primarily within the international public pension fund industry, Environmental, Social and Governance (ESG) considerations have slowly become interwoven into the fabric of investment strategy. In 2012, this trend continued, and the argument is being made at the highest levels of the global public pension fund industry that support of a long-term ESG investment policy is not in conflict with present fiduciary duty and may be able to help funds achieve the returns they are tasked with achieving.

Overview of ESG

As an investment strategy, ESG focuses on the economic implications of long-term risks and opportunities that are associated with strategies of the companies in which investments are made. ESG strategies fall within the rubric of SRI (Socially Responsible Investing) and these two abbreviations are often used interchangeably to convey the same focus: long-term value creation and the generation of financial and sustainable value. The theory is that ESG factors offer portfolio managers added insight into the quality of a company's management, culture, risk profile and other characteristics — all of which may help them identify companies with superior business models. Historically, the implementation of ESG investment strategies have been challenged by financial critics and academics who have argued such a strategy will produce inferior returns — by excluding portions of the investible universe. However, the SRI industry, led by the United Nations-backed Principles for Responsible Investment Initiative (PRI) among others, have attempted to shed light on the importance of ESG factors on investments and have been responsible for integrating ESG information into mainstream investment decision-making, particularly within the institutional investor community. Further,

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The Federal Circuit Strengthens Method Patents

Michael J. Bonella, Esquire and Jenna Pellecchia, Esquire

Patents can claim inventions as either a method or an apparatus. Previously, method patents raised "divided infringement" issues because a method patent could only be infringed either directly or indirectly if a single actor alone or with his agent performed all of the claimed method steps. This single-actor rule often limited the application of method patents, particularly, electrical or software patents, because the infringement was divided among multiple actors, who did not have an agency relationship, with each actor performing some steps of the claimed method. In this "divided infringement" scenario, there was no liability. However, on August 31, 2012, the Federal Circuit issued an *en banc*, *per curiam* opinion holding in two cases that there can be indirect infringement of a method claim under an inducement theory where the infringement is divided. *Akamai Technologies, Inc. v. Limelight Networks, Inc*, 629 F.3d 1301 (Fed. Cir. 2012); *McKesson Techs., Inc. v. Epic Sys. Corp.*, 692 F.3d 1301 (Fed. cir. 2012). This change in the law provides broader application to method patents, particularly electrical and software patents, where a customer may practice some steps of a method claim and a software provider may practice the other steps. Accordingly, patents that previously were not infringed may now be infringed.

Standard of Infringement

In patent law, there are two general theories of infringement: direct and indirect infringement. For there to be direct infringement of a method claim under 35 U.S.C. §271(a), a single actor alone or together with an agent must use the claimed method by performing every step of the claimed method. A type of indirect infringement is inducement under 35 U.S.C. §271(b), which provides that whoever "actively induces infringement of a patent shall be liable as an infringer." Previously, in order for there to be liability for inducement of a method claim, there had to be direct infringement by a single

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Institutional Investor
FORUMS

KESSLERTOPAZ MELTZERCHECK LLP

4TH ANNUAL

Evolving Fiduciary Obligations of Pension Plans

FEBRUARY 5, 2013 | CAPITAL HILTON | WASHINGTON, DC

Keynote Speaker

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This Forum will offer a thorough overview of the critical issues plan sponsors and their legal advisors are grappling with to fulfill their obligations as fiduciaries and as shareholders. We will provide insight into the ways in which fiduciaries can be most effective in engaging with and influencing the management of publicly traded companies. We will review the crucial legal decisions and developments investors should be aware of, and examine the tactics which successful plans have implemented to meet their investment return targets.

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Bank of America Shareholders Achieve Historic $2.425 Billion Recovery Related to Merrill Lynch Acquisition *(continued from page 1)*

of Ohio, the Ohio Public Employees Retirement System, the Teacher Retirement System of Texas, Stichting Pensioenfonds Zorg en Welzijn, represented by PGGM Vermogensbeheer B.V., and Fjärde AP-Fonden. The Lead Plaintiffs were represented by Co-Lead Counsel Kessler Topaz Meltzer & Check, LLP, Bernstein Litowitz Berger & Grossmann, LLP, and Kaplan Fox & Kilsheimer, LLP.

The BofA-Merrill Merger

On September 15, 2008, at the peak of the financial crisis and on the same day that one of Merrill's chief competitors, Lehman Brothers, became the largest company in U.S. history to file for bankruptcy protection, Ken Lewis, BofA's CEO, and John Thain, Merrill's CEO, convened a press conference to announce that BofA had agreed to acquire Merrill in a stock-for-stock transaction valued at $50 billion. The deal, which valued Merrill's common stock at a 70 percent premium over its previous day closing price, was conceived, negotiated, and inked over the preceding weekend. On Saturday, September 13, with a Lehman Brothers' bankruptcy all but certain, Lewis and Thain met in New York to discuss a potential merger between the two companies. Less than 48 hours later, the merger agreement had been drafted and signed. For BofA, the Merrill deal represented not only the largest acquisition in Wall Street history, but also the culmination of Ken Lewis's goal to transform BofA from a regional commercial bank to an international financial powerhouse.

Before BofA could officially acquire Merrill, however, its shareholders had to vote to approve the deal. When shareholder approval is needed for important corporate actions such as mergers, the federal securities laws require that companies provide their shareholders with a proxy statement containing all "material" facts related to the proposed transaction prior to the vote. As a result, federal securities claims arising out of a shareholder vote typically turn on whether the information that was withheld from shareholders was "material" under the federal securities laws.

When BofA shareholders overwhelmingly voted to approve the merger on December 5, 2008, they did so without knowing two critical pieces of information about Merrill. First, shareholders were not informed that Merrill's financial condition had dramatically deteriorated since the merger was announced on September 15. In the eleven weeks between the announcement of the merger and the shareholder vote, BofA executives closely monitored Merrill's financial condition in the context of a tumultuous stock market. By December 5, 2008, these executives knew that Merrill stood to suffer a staggering $16 billion fourth-quarter loss, and that these losses were severely weakening Merrill's financial health. Given the breathtaking size of Merrill's losses, BofA executives sought advice from BofA's in-house and outside counsel as to whether Merrill's losses should be disclosed to shareholders in advance of the vote. Initially, BofA's attorneys agreed that disclosure of the losses was required, but abruptly reversed course one week later. The attorneys reasoned that because Merrill's anticipated fourth quarter losses were within the range of losses that Merrill had suffered over the previous five quarters, they were not material to shareholders. Within days of the vote, BofA's CFO learned that Merrill's losses had exceeded the historical range, but did not convey this information to BofA's attorneys. As a result, BofA shareholders remained unaware of Merrill's fourth quarter losses at the time they voted to approve the merger.

Second, prior to the shareholder vote, BofA shareholders were led to believe that the terms of the merger agreement prohibited Merrill from paying bonuses in 2008 without first obtaining BofA's written consent. What BofA shareholders were not told was that just before the merger was publicly announced, BofA and Merrill entered into a agreement that gave Merrill untrammeled discretion to pay up to $5.8 billion in bonuses prior to the merger closing notwithstanding its financial performance. Rather than including the side agreement in the terms of merger agreement itself, BofA and Merrill memorialized the agreement in a document (ironically) called a Disclosure Schedule but which was never disclosed to shareholders. As a result, when shareholders voted in favor of the merger on December 5, they were unaware of the secret bonus agreement.

Deprived of this information, BofA shareholders were left unable to assess the true impact of the Merger on their investment in BofA. In fact, less than two weeks after BofA shareholders voted to approve the merger, the company's executives, including Lewis, decided to back out of the merger due to Merrill's losses, and informed Treasury Department and Federal Reserve officials of this intent. This course of action was spurred by the fact that the losses had dramatically undermined Merrill's capital position, requiring it to shed hundreds of billions of dollars in assets and impairing its value. Because of this, BofA's executives determined that the merger would be severely dilutive to BofA's earnings over the next two years, contrary to the analysis disclosed to shareholders at the time the deal was struck which suggested that the merger would be breakeven within two years. Ultimately, BofA agreed to proceed with the merger after

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Institutional Investor
FORUMS

8TH ANNUAL

The Rights & Responsibilities of Institutional Investors

MARCH 21, 2013 | RENAISSANCE AMSTERDAM HOTEL | AMSTERDAM

Keynote Speaker

Nicolas Sarkozy

President of the French Republic (2007-2012)

On March 21, 2013, the 8th Annual Rights and Responsibilities of Institutional Investors will again be co-sponsored by Institutional Investor and Kessler Topaz Meltzer Check LLP. **Michael Woodford, former president and CEO of the Olympus Corporation, will provide insights from his own experience in a session entitled, *Corporate Governance in the Real World: What Does this Really Mean?*** The day-long meeting, hosted in Amsterdam, will bring together leading investment, legal, and compliance officers from European public pension, insurance fund and mutual fund companies. Through panels, workshops and case studies, participants will engage with industry peers and thought leaders on the question of shifting corporate governance structures and as such, their fiduciary duties and rights as active shareholders.

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Kessler Topaz Historic $2 Billion Post-trial Verdict Against Grupo Mexico Upheld on Appeal

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opinion, found that Grupo had forced Southern Peru to overpay by more than a billion dollars in value.[1]

The Appeal

Grupo appealed the trial judgment to the Delaware Supreme Court. The parties filed briefs in March and April, and the Delaware Supreme Court heard oral argument on June 7, 2012. Grupo alleged several errors made by the trial court. It alleged that Chancellor Strine had improperly excluded a witness, improperly construed the burden of proof, wrongly calculated damages, and unreasonably awarded attorneys' fees to plaintiff's counsel in the amount of 15% of the judgment. Plaintiff noted that each of these trial decisions was subject to a deferential "abuse of discretion" standard of review, and that the Delaware Court of Chancery had carefully and meticulously applied the law in its rulings below.

On August 27, 2012, the Delaware Supreme Court affirmed each of the Chancery Court's rulings in a 110-page opinion.[2] Among other things, the Delaware Supreme Court reaffirmed that under Delaware law, transactions involving self-dealing by a controlling stockholder, such as the Southern Peru/Minera transaction, are reviewed for "entire fairness."[3] Defendants have the initial burden to show that the price and process of the transaction are fair.[4] However, the defendants can shift this burden back to the plaintiff if a "well functioning" independent special committee of directors is employed to negotiate the transaction.[5] The question of whether a special committee is "well functioning" is highly fact intensive.[6]

Grupo argued before and at trial and on appeal that the Southern Peru Special Committee, which was comprised solely of independent directors, was "well functioning" and that the burden of proof should be shifted to the plaintiff. However, Chancellor Strine refused to do so before trial because he believed there were too many questions about how the Special Committee actually negotiated the transaction. Ultimately, upon a full record at trial, Chancellor Strine determined that Grupo bore the burden of proof because "from inception, the Special Committee fell victim to a controlled mindset and allowed Grupo Mexico to dictate the terms and structure of the Merger."[7]

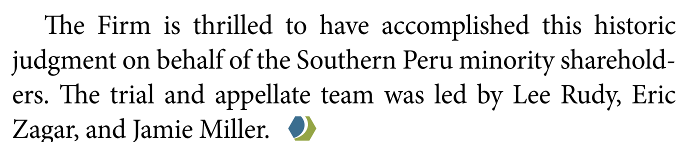
The Delaware Supreme Court affirmed, concluding that the burden of proof need not be decided before trial because the decision of whether to shift the burden of proof requires careful judicial scrutiny. Here, after applying such scrutiny,[8] the Chancery Court properly concluded at trial that Grupo bore the burden of proof.[9] Importantly, the Delaware Supreme Court affirmed the Chancery Court's determination that who had the burden of proof did not matter here because "the evidence of unfairness was so overwhelming that the question of who had the burden of proof at trial was irrelevant to the outcome."[10]

After affirming the unfairness of the negotiation of the transaction, the Delaware Supreme Court also affirmed the unfairness of the merger price. The paramount consideration in an entire fairness analysis is whether the price was a fair one.[11] To this end, the Delaware Supreme Court found that "the Court of Chancery explained the reasons for its calculation of damages with meticulous detail" and reiterated that the Chancery Court "has the historic power to grant such . . . relief as the facts of a particular case may dictate."[12] In short, the Delaware Supreme Court found that Grupo did not present any basis to disturb the Chancery Court's well-reasoned determination that Grupo caused Southern to overpay for Minera by more than $1.3 billion.

After losing its appeal, Grupo fired its lawyers (again — it fired trial counsel before appealing), and sought "reargument" before the Delaware Supreme Court on the issue of the attorneys' fees awarded to Kessler Topaz and its Delaware co-counsel Prickett Jones & Elliott. The fee award was again affirmed on re-argument. As Chancellor Strine had noted in the trial court, Kessler Topaz and its co-counsel had "indisputably prosecuted this action through trial and secured an immense economic benefit for Southern Peru," which justified the fee awarded.

Following denial of its motion for reconsideration, Grupo conceded defeat. Grupo paid the $2 billion judgment to Southern Peru in October 2012, and Southern Peru distributed the cash to shareholders in a historic $2.75 per share cash dividend.

The Firm is thrilled to have accomplished this historic judgment on behalf of the Southern Peru minority shareholders. The trial and appellate team was led by Lee Rudy, Eric Zagar, and Jamie Miller.



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[1] *In re Southern Peru Copper Corporation Shareholder Derivative Litigation*, 30 A.3d 60 (Del. Ch. 2011), also available at http://courts.delaware.gov/opinions/download.aspx?ID=165450.

[2] *Americas Mining Corporation v. Theriault*, 51 A.3d 1213 (Del. 2012), also available at http://courts.delaware.gov/opinions/download.aspx?ID=177520.

[3] *Id.* at 1239.

[4] *Id.* (citations omitted).

[5] *Id.* at 1240-41.

[6] *See Kahn v. Lynch Communications Systems, Inc.*, 638 A.2d 1110, 1121 (Del. 1994).

[7] *In re Southern Peru*, 30 A.2d at 98.

[8] *Ams. Mining Corp.*, 51 A.3d at 1241.

[9] *Id.* at 1242.

[10] *Id.* at 1242-43.

[11] *Id.* at 1244.

[12] *Id.* at 1251 (internal quotations omitted).

Amgen v. Connecticut Retirement Plans and Trust Funds – Will the Supreme Court Heighten a Plaintiffs' Burden on Class Certification? *(continued from page 2)*

California, under Sections 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Specifically, Plaintiff alleged that Defendants made material misrepresentations and omissions regarding the safety of Amgen's anemia drugs, Aranesp® and Epogen®, which were approved to reduce the need for transfusions in patients with anemia, including those undergoing chemotherapy. According to Plaintiff, Defendants misrepresented that Amgen's drugs were "safe" for approved uses when, *inter alia*: (1) off-label use of other, similar drugs was associated with increased mortality, accelerated tumor growth and other health problems, and (2) Amgen had no clinical trial data affirmatively demonstrating the safety of these drugs for these risk factors.

After defeating Defendants' motion to dismiss, Plaintiff moved for class certification on March 4, 2009. In opposing this motion, Defendants argued that the Plaintiff failed to satisfy the procedural requirements for class certification under Fed. R. Civ. P. 23(b)(3), which requires that common issues of law and fact "predominate" over individual questions, because it could not invoke the presumption of reliance adopted by the United States Supreme Court in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). In securities fraud suits, proof of reliance may be subject to individualized issues and, thus, has the potential to overwhelm the litigation. In *Basic*, however, the Supreme Court adopted a class-wide presumption of reliance, based on the fraud-on-the-market-theory, which recognized that: (1) when a stock trades in an efficient market, its price reflects all material, public information, including misstatements; (2) investors who buy or sell stock at the price set by the market do so "in reliance on the integrity of that price"; and (3) "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." *Id.*, 485 U.S. at 242-247. Because investors commonly rely on the integrity of the market price, the *Basic* presumption provides securities plaintiffs a mechanism for satisfying Rule 23(b)(3)'s requirement that common issues of law and fact "predominate" over individual questions.

Relying on *dicta* found in a footnote of the *Basic* opinion, Defendants in *Amgen* argued that Plaintiff could not invoke the reliance presumption because it had not established that the alleged misstatements were material. The District Court rejected Defendants' arguments and certified the class on August 12, 2009. Specifically, it held that the *Basic* footnote merely observed the Sixth Circuit's factors below, did not adopt these factors as a mandate and that, to interpret them as such would be inconsistent with the remainder of the *Basic* opinion. *See Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, No. CV 07-2536 PSG (PLAx), 2009 U.S. Dist. LEXIS 71653, at *27-33 (C.D. Cal. Aug. 12, 2009). It further stated that Ninth Circuit decisions interpreting *Basic* made clear that the only showing Plaintiff was required to make to invoke the fraud-on-the-market presumption was to establish that the securities traded in an efficient market. *See id.* The District Court also rejected Defendants' arguments that they could rebut the presumption of reliance at the class certification stage of the proceedings, stating "the Supreme Court noted that proof of [matters rebutting the presumption of reliance] 'is a matter for trial.'" *Id.*, 2009 U.S. Dist. LEXIS 71653, at *41 (quoting *Basic*, 485 U.S. at 249 n.29).

On August 28, 2009, Defendants petitioned the United States Court of Appeals for the Ninth Circuit for interlocutory review of the District Court's decision granting class certification. The Ninth Circuit granted Defendants' petition, but affirmed the District Court's Order. In so ruling, it joined the Third and Seventh Circuits in holding that in order to invoke the fraud-on-the-market presumption of reliance under *Basic*, a plaintiff need only show that the security in question was traded in an efficient market, and that the alleged misrepresentations were public. *See Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1172 (9th Cir. 2011). Materiality, it held, was "a merits issue that abides the trial or motion for summary judgment." *Id.* This interpretation of *Basic*, it further held, found support in "the Supreme Court's more recent formulations of the presumption in *Erica P. John Fund* and *Dukes*, which require the plaintiff to show that the stock was traded in an efficient market but do not mention materiality as a requirement." *Id.*, 660 F.3d at 1176. (citing *Erica P. John Fund v. Halliburton*, 131 S. Ct. 2179, 2185 (2011); *Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541, 2552 n.6 (2011)). For these same reasons, it also held that a defendant may not rebut the fraud-on-the-market presumption at the class certification stage with evidence that the alleged misrepresentations were not material. *See id.* at 1177.

Undeterred by the courts' successive rejections of their arguments, Defendants filed a petition for *writ of certiorari* to the United States Supreme Court. In addition to re-asserting the arguments raised below, Defendants also argued that the Supreme Court's review was necessary to resolve a split among the Circuit Courts of Appeals on this issue. Specifically, Defendants asserted that the First, Second and Fifth Circuits require proof of materiality at the class certification stage in order to invoke the fraud-on-the-market presumption of reliance under *Basic*, and allow defendants an opportunity to rebut the presumption with evidence that a misstatement was not material. The Seventh and Ninth Circuits require no such showing, while Third Circuit has adopted a hybrid approach, not requiring proof of materiality at the class certification stage, but allowing defendants to offer evidence of immateriality to rebut

the presumption of reliance. In addition, Defendants argued that public policy concerns militated in favor of imposing a materiality requirement at the class certification stage because of the powerful tool provided by the class action device and the purportedly enormous settlement pressure that class certification places on defendants in securities fraud suits. The Supreme Court granted Defendants' *certiorari* petition on June 11, 2012.

Oral Argument Before the Supreme Court

Oral argument was held on November 5, 2012. The questions and comments posed by the Justices shed some light on how they may resolve this appeal.

Comments made by Justices Elena Kagan and Ruth Bader Ginsberg most clearly suggested that they view the materiality question as a purely common one, such it need not be proven to invoke the fraud-on-the-market theory for purposes of class certification, as the materiality of a misstatement will be subject to class-wide proof at trial. For example, Justice Kagan stated, "[t]here is class cohesion as to materiality. People win or lose on materiality together." 11/5/12 Hr'g Tr. at 15. Similarly, Justice Ginsberg stated that "I don't understand why this isn't just a clear case of a question common to the class; that is, the question of materiality." *Id.* at 16. Indeed, Justice Ginsberg noted that in the *Basic* opinion, materiality "is listed as a common question, and that made perfect sense to [her]." *Id.* at 20. As such, Justice Ginsberg was "nonplussed" by Amgen's argument that "if the judge says it's immaterial [for purposes of class certification], that doesn't end it for everybody." *Id.* at 10, Justice Breyer likewise recognized that, "of course [materiality] is, a common issue in the case." *Id.* at 29.

Chief Justice Roberts also stated that, "I would suppose if there's no materiality, that means that the effect on the market price just happens to be zero" and queried, "why isn't that common to all parties?" *Id.* at 4. He also queried why, as a substantive matter, *amici* believed plaintiffs would need to establish materiality to avail themselves of the fraud-on-the-market theory to establish reliance even on the merits. *See id.* at 45. Indeed, the Chief Justice stated, "I don't understand why that is. If you're trying to show reliance, and you show that it's an efficient market, and that the information as — was public, doesn't that show reliance without regard to whether the statement's material or not?" *Id.*

Justices Scalia and Kennedy appeared to sympathize with Defendants' arguments. For example, Justice Scalia stated that "the issue is not whether — whether it's a common question or not. . . . The issue is whether there's any reason to believe that the — that the market reflects reality." *Id.* at 30. Justice Scalia further questioned the viability of the fraud-on-the-market theory itself, stating, "the whole purpose of it is . . . to assume that . . . the whole class . . . was damaged and relied — because you can rely on an efficient market. But you can only rely on an efficient market where there has been a material misrepresentation." *Id.* at 41. As such, he postulated that, "maybe we should overrule *Basic* because it was certainly based upon a theory that . . . simply collapses once you remove the materiality element." *Id.* Justice Scalia also accredited Defendants' policy argument for requiring proof of materiality at the class certification stage, stating, "there is a reason for deciding it earlier, and the reason is the — the enormous pressure to settle once the class is certified." *Id.* at 34. In this same vein, Justice Kennedy noted that it was plaintiffs' burden to justify class certification and queried how plaintiffs could satisfy that burden simply by proving market efficiency, if there is no impact on the stock price. *See id.* at 35-36.

Only Justice Sotomayor inquired into a defendants' ability to rebut the *Basic* presumption at class certification with evidence of immateriality. In this regard, she asked, "why shouldn't we hold *Basic* to its position that all of the presumptions can be rebutted as well, not just [market] efficiency? Why do we set out efficiency as the one issue that can be rebutted?" *Id.* at 23.

The tone and tenor of the questions and comments posed during the November 5th hearing suggest that the resulting opinion issued by the Court will reflect a split among the Justices. However, who will form the majority is unclear at this time.

Potential Ramifications for Investors

Several outcomes could result from the Supreme Court's *Amgen* ruling. Should the Supreme Court resolve the Circuit split in favor of plaintiffs, and confirm that materiality is not a threshold to class certification, it will overrule contrary law in the First, Second and Fifth Circuits, and alleviate the burden on plaintiffs seeking class certification there. Similarly, to the extent the Supreme Court rules that defendants may not rebut the presumption of reliance with evidence of immateriality at the class certification stage, plaintiffs also will not be required to elicit expensive expert opinions and testimony to refute any such showing defendants may attempt to make.

The potential adverse implications of the *Amgen* appeal for securities plaintiffs, however, are severe. At a minimum, injecting a materiality requirement into class certification proceedings, or allowing defendants to offer evidence of immateriality, will create yet another hurdle for plaintiffs to overcome before earning the right to try their cases on the merits. Further, it will likely increase the cost of litigation for plaintiffs without any guarantee of a trial, as plaintiffs will likely be required to

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The World's Most Important Number: A Look Into the LIBOR Manipulation Scandal

(continued from page 1)

dal is beyond the scope of this article, we briefly examine the origins of LIBOR, its rise to prominence, and recent developments surrounding the scandal.

The Origins of LIBOR

In the early 1980s, before LIBOR came into existence, international banking was conducted differently than it is today. Transaction times were slower, trading automation had not yet taken hold, and the U.S. Treasury Bill rate was the leading reference rate for financial instruments. While much has changed since then, many similarities remain. Then as now, U.S. banks were required to hold an adequate amount of cash on hand to manage any spikes in withdrawals. If a bank found itself unable to meet its liquidity requirements, it could turn to the interbank lending market, centered in London, to borrow money necessary to cover the shortfall. Likewise, banks with excess liquidity lent money in the interbank market in exchange for interest payments from their fellow banks.

In the 1980s, banks also began using innovative financial instruments to manage interest rate fluctuations, which were particularly volatile at the time. One such influential instrument is the now ubiquitous forward rate agreement — a financial instrument in which the buyer hedges against the risk of rising interest rates while the seller hedges against the risk of falling interest rates. The increased use of forward rate agreements — a type of increasingly complex "swap" transaction — was largely inhibited by the fact that banks had to rely on inconsistent interbank negotiations that resulted in different interest rates being charged for differing types of loans.

By September 1985, the British Bankers Association ("BBA"), a U.K. trade group comprised of member banks, had a solution: a standardized rate structure, or *benchmark rate*, that could normalize these and similar transactions by reporting an average interest rate for interbank borrowing based on a survey of "Panel Banks." In January 1986, this standard was formalized and became known as LIBOR — the "World's Most Important Number" according to the BBA.

Despite its ostensible reflection of interbank borrowing costs, LIBOR is not set by actual market transactions or government regulators. Instead, LIBOR is set by Panel Banks who *subjectively* report, or "submit," the interest rates they believe they would pay to borrow from other Panel Banks in the interbank market.[1] Once the individual submissions are gathered, an average rate, which excludes the high and low extremes, is published to reflect borrowing rates for various currencies and borrowing lengths. In total, LIBOR rates are reported for 10 different currencies and 15 different borrowing periods — resulting in 150 LIBOR rates being reported daily. Each currency has its own set of Panel Banks. The U.S. Dollar LIBOR panel consists of 18 banks including Citibank, JP Morgan Chase, Bank of America, UBS, and Barclays.

The Manipulation

Twenty-six years after the introduction of LIBOR, a crisis of confidence in this once-innovative approach to standardizing interest rates has set in. Reports and investigations suggest that the Panel Banks responsible for submitting interbank interest rates have gamed the system — submitting inaccurate interest rates in order to manipulate the published LIBOR rates for their own benefit.

Beginning in April 2008, *The Wall Street Journal* released two articles suggesting that some Panel Banks might have understated the borrowing rates they reported for LIBOR during the 2008 credit crunch, and thus, may have misled others about the financial position of these banks.[2] *The Wall Street Journal* identified wide gaps between the LIBOR rates submitted by banks and estimated LIBOR submissions based on the market for credit default insurance for those same banks. *The Wall Street Journal*'s analysis found that LIBOR submissions failed to rise as the Panel Banks' probability of default (risk) increased. *The Wall Street Journal* also noted that Panel Banks' submissions for the U.S. Dollar LIBOR were nearly identical despite significant differences in the Panel Banks' risk of default. For example, during a three-month period in 2008 Citigroup submitted LIBOR bids barely diverging from other Panel Bank submissions — around 2.95% — despite that their credit default risk should have dictated a submission 0.87% higher.

Similarly, an April 2010 study corroborated the claim that LIBOR submissions by some Panel Banks were being understated and suggested that the reason for the manipulation was not because the banks were trying to appear financially strong, but because the Panel Banks sought to make sub-

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[1] Specifically, the Panel Banks are asked to submit: "[t]he rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for and then accepting interbank offers in reasonable market size just prior to 11:00 London time." British Bankers' Association, *BBA LIBOR — Definitions*, available at: http://www.bbalibor.com/bbalibor-explained/definitions.

[2] *See* Carrick Mollenkamp, *Bankers Cast Doubt on Key Rate Amid Crisis*, The Wall Street Journal, April 16, 2008; Carrick Mollenkamp, *Study Casts Doubt on Key Rate*, The Wall Street Journal, May 28, 2008.

Bank of America Shareholders Achieve Historic $2.425 Billion Recovery Related to Merrill Lynch Acquisition *(continued from page 7)*

securing a $20 billion taxpayer bailout and a $118 billion asset-guarantee from the federal government to cover future losses on Merrill's high-risk assets.

In all, Merrill lost over $21 billion during the fourth quarter of 2008. Despite these losses, it used the secret bonus agreement with BofA to dole out over $3.6 billion in bonuses to its employees and executives for 2008 on an accelerated basis before the merger closed. When Merrill's losses and bonus payments were finally revealed to the market in mid-January 2009, BofA's share price plummeted, erasing over $50 billion in market capitalization.

The Litigation

Based upon these facts, Lead Plaintiffs asserted claims against BofA, Merrill, and certain of their officers and directors, including Lewis and Thain, for the harm inflicted upon BofA shareholders due the defendants' concealment of Merrill's losses and bonus payments. Lead Plaintiffs principally alleged violations of Section 14(a) of the Exchange Act, a negligence-based claim concerning material misstatements and omissions in the defendants' proxy solicitations, on behalf of all BofA shareholders who were entitled to vote on the merger, and violations of Section 10(b) of the Exchange Act, a fraud-based claim alleging that certain defendants recklessly misstated or omitted material facts concerning the merger, on behalf of all investors who purchased BofA common stock and certain call options between September 18, 2008 and January 21, 2009.

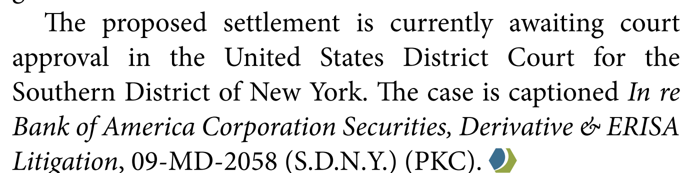
Although, at the outset of the case, the defendants obtained a dismissal of Lead Plaintiffs' fraud claims relating to Merrill's losses, Lead Plaintiffs were able to successfully re-plead these claims based on their further investigation. Thereafter, Lead Plaintiffs completed discovery on an expedited basis, participating in approximately 60 depositions and reviewing millions of pages of documents in under one year. The case was highly contested, with the defendants represented by no less than eight law firms. The defendants' principal defenses to the litigation were that they acted in good faith by consulting with their attorneys regarding whether to disclose Merrill's losses, that information concerning Merrill's bonus payments was not "material" because the market knew that Merrill intended to pay bonuses in 2008, and that the class had suffered no damages in connection with their Section 14(a) claim. Notably, because of a dearth of case law on the appropriate measure of damages under Section 14(a), there was serial briefing on this issue at various stages during the case, including an interlocutory appeal to the U.S. Court of Appeals for the Second Circuit.

Lead Plaintiffs successfully obtained class certification on February 6, 2012, and moved for partial summary judgment in June based upon Ken Lewis's startling admission during his deposition that he provided BofA shareholders with false information concerning the dilutive impact of the merger at BofA's December 5, 2008 shareholder meeting. At the meeting, Lewis affirmed to shareholders BofA's statements made at the time that the deal was announced that the merger would be breakeven — as opposed to dilutive — within two years. Defendants also sought summary judgment principally on the issue of the damages available under Section 14(a) and their lack of intent to commit fraud under Section 10(b).

Over the span of the litigation, at the guidance of the District Judge overseeing the case, the parties enlisted the help of former United States District Judge Layn R. Phillips to explore avenues for resolution. Yet these efforts came to naught until very late in the litigation, almost on the eve of trial. On September 28, with trial scheduled to begin on October 22 and after a series of lengthy settlement negotiations, many of which involved one-on-one, face-to-face meetings between representatives of the Lead Plaintiffs and the defendants, the parties announced that they had resolved their claims. The terms of the proposed settlement include a $2.43 billion cash payment to be funded by BofA, and BofA's agreement to implement and maintain significant corporate governance reforms, including reforms relating to majority voting requirements for directors, mandatory disclosures to the board of directors in the context of significant corporate transactions, minimum stock ownership requirements for directors and executives, and super-independence of BofA's board of directors' compensation committee.

Lead Plaintiffs' recovery on behalf of BofA shareholders represents an important victory for shareholders of all public companies by reinforcing their right to cast fully informed votes on matters of corporate significance. Additionally, Lead Plaintiffs' $2.425 billion recovery will be paid on top of the $150 million recovery obtained by the Securities and Exchange Commission in an enforcement action arising out of the same alleged misconduct, thus underscoring the continuing need for private securities litigation to supplement government actions.

The proposed settlement is currently awaiting court approval in the United States District Court for the Southern District of New York. The case is captioned *In re Bank of America Corporation Securities, Derivative & ERISA Litigation*, 09-MD-2058 (S.D.N.Y.) (PKC).



The Second Circuit Weighs in on the Issue of Class Standing: *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* *(continued from page 4)*

statement by filing a prospectus supplement, which provides current data tailored to the proposed offering. The vast majority of actions against the investment banks and mortgage originators under the Securities Act allege that the MBS offering documents contained material misrepresentations concerning the underwriting standards utilized to originate the mortgages underlying the MBS. Often times these statements first appeared in the shelf registration statements and remained unchanged with the filing of the prospectus supplements.

The plaintiffs who filed the initial MBS actions sought to represent themselves and all other investors who purchased securities pursuant to the same MBS shelf registration statement. Defendants, however, argued that the representative plaintiffs' "class standing" was limited to the representative plaintiffs' standing under Article III of the U.S. Constitution. Thus, according to defendants, plaintiffs' "class standing" only allowed them to represent those claims of absent class members who purchased in the same offering, i.e., pursuant to the same prospectus supplement, or, in some cases, absent class members that purchased in the same tranche of the same offering.

Until the *Goldman Sachs* decision, federal courts uniformly had refused to allow "class standing" based on material misrepresentations in a shelf registration statement in the MBS context. However, these same courts split over whether to allow "class standing" based on (i) purchases within the same offering, *see, e.g., In re Bears Stearns Mortgage Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 778 (S.D.N.Y. 2012), or (ii) purchases within the same tranche of the same offering, *see, e.g., In re Washington Mutual MBS Sec. Litig.*, 276 F.R.D. 658, 663-65 (W.D. Wash. 2011). The lower court in the *Goldman Sachs* litigation held that plaintiffs in that case only had standing to represent the Securities Act claims of purchasers of the same tranche purchased by the representative plaintiffs. *Goldman Sachs*, 693 F.3d at 154-55.

Given the lack of clarity concerning when a plaintiff has standing to represent a group of MBS investors seeking damages for material misstatements under the Securities Act, the Second Circuit agreed to hear the *Goldman Sachs* appeal in 2011.

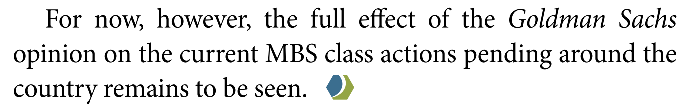
Based in part on the U.S. Supreme Court's decision in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Second Circuit held that a representative plaintiff has class standing if (i) he or she has "'some actual . . . injury as a result of the putatively illegal conduct of the defendant,'" otherwise known as standing under Article III of the Constitution, and (ii) defendants' 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." *Goldman Sachs*, 693 F.3d at 162. In the context of Securities Act claims alleging that defendants issued MBS pursuant to material misstatements about the underwriting guidelines used to originate the mortgages underlying the MBS in a shelf registration statement, the Second Circuit held that "differences in the identity of the originators matters for the purposes of assessing whether those claims raise the same set of concerns" because "[t]he originator-specific allegations provide the necessary link between (1) the [shelf registration statements'] representations . . . and (2) the *falsity* of those representations." *Goldman Sachs*, 693 F.3d at 163. Thus, while investors who bought MBS pursuant to the same allegedly materially misleading shelf registration may have the same injury, that injury only implicates the same set of concerns where the allegedly abusive mortgage underwriting practices were the same for both the representative plaintiff and the absent class member. No court previously has allowed such wide-ranging "class standing" in the MBS context.

As a result of its novel holding, the Second Circuit reinstated plaintiffs' Securities Act claims "to the extent they are based on similar or identical misrepresentations in the [shelf registration statement] associated with certificates backed by mortgages originated by the same lenders that originated the mortgages backing the plaintiff's certificates." *Goldman Sachs*, 693 F.3 at 149. Thus, plaintiffs in the *Goldman Sachs* MBS litigation are now able to represent the claims of all absent class members provided that (i) the absent class members purchased their securities pursuant to similar or identical statements in the shelf registration statement and (ii) the securities purchased by the absent class members reference mortgages issued by the same lenders involved in the origination of mortgages underlying the securities purchased by the representative plaintiffs.

The issuance of the *Goldman Sachs* opinion already is having an effect on MBS litigation across the country. If a court previously had limited class standing to either class members who purchased in the same offering or, more restrictively, to the same tranche, now accepts the Second Circuit's holdings in *Goldman Sachs*, defendants could be exposed to exponentially greater liability associated with a greatly enlarged class of investors. For example, each MBS offering includes 10-20 tranches. Each shelf registration statement could include 50-60 different offerings. Where a court has endorsed class standing based on purchases of identical tranches and the representative plaintiff only has purchased one tranche of one MBS offering, that means that instead of defending against claims of class of investors who purchased one tranche of one offering, defendants may now be defending against claims of investors who purchased 10-20 tranches in each of 50-60 offerings. *See, e.g., Plumbers' & Pipefitters' Local #562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I*, 2012 U.S. Dist. 132057 (E.D.N.Y. Sept. 12, 2012) (augmenting plaintiffs' case from 8 tranches to 30 offerings based on *Goldman Sachs*).

While the *Goldman Sachs* opinion only is binding on the lower courts within the Second Circuit — which includes the U.S. District Court for the Southern District of New York where many of the MBS class action cases currently are pending — it likely will have an effect on district and appellate courts within other circuits as well, if only that courts outside the Second Circuit will have to either accept, harmonize or distinguish the *Goldman Sachs* opinion with prior orders they have issued on class standing in the MBS context. Perhaps understanding the potentially wide-ranging effect the *Goldman Sachs* opinion could have on these cases — which collectively involve the issuance of hundreds of billions of dollars of MBS — defendants in the *Goldman Sachs* case filed a petition for certiorari with the U.S. Supreme Court on October 30, 2012. It remains to be seen whether the U.S. Supreme Court will grant defendants' petition and hear the appeal.

For now, however, the full effect of the *Goldman Sachs* opinion on the current MBS class actions pending around the country remains to be seen.



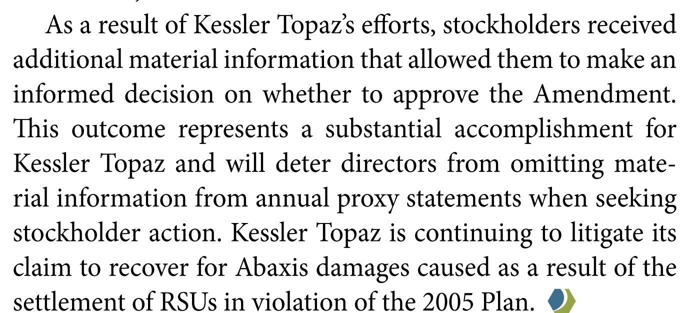
Kessler Topaz Enjoins Annual Meeting to Force Additional Disclosures About Equity Compensation *(continued from page 3)*

outstanding and would violate the 2005 Plan if settled and converted into shares of Abaxis common stock. Many of the RSUs — approximately 960,000 — were granted to Abaxis senior officers and directors.

In advance of the Company's October 24, 2012 Annual Meeting, Abaxis and its board of directors distributed to stockholders the 2012 Proxy soliciting stockholder approval of the Amendment that would, among other things, remove the Limit and increase the total number of shares available under the 2005 Plan. Essentially, the board of directors was asking stockholders to ratify the board's *ultra vires* conduct. However, the 2012 Proxy stated only that the Amendment would "eliminate the limitation on the number of shares that may be issued pursuant to restricted stock awards, restricted stock units and performance share awards granted under the 2005 plan." It did not disclose any other material information to stockholders, such as why the board decided to eliminate the Limit, the effect of the Amendment on outstanding RSUs and RSUs that had already been settled, and what would happen if the Amendment is not approved.

On October 1, 2012, Kessler Topaz commenced litigation against the Abaxis board of directors seeking to (i) recover for Abaxis damages caused as a result of the issuance of RSUs in violation of the 2005 Plan, and (ii) force the board to disclose all material information concerning the Amendment in advance of the Annual Meeting.[2] Because stockholders are irreparably harmed when forced to make voting decisions without full disclosure,[3] on October 1, 2012, Kessler Topaz filed a Motion for Preliminary Injunction seeking to enjoin the Annual Meeting until the materially false and misleading 2012 Proxy is corrected. After expedited briefing by both parties, on October 23, 2012, Judge Gonzalez Rogers agreed with Kessler Topaz that the 2012 Proxy omitted material information concerning the Amendment. Defendants argued that all material information concerning the Amendment had been disclosed in the 8-K, and was thus available to stockholders. However, Judge Gonzalez Rogers agreed with Kessler Topaz that material information was missing from the 8-K and, in any event, the 2012 Proxy did not "incorporate the Form 8-K by reference or mention it all, must less include the information contained therein." Accordingly, Judge Gonzalez Rogers held that the 2012 Proxy did not "accurately depict the purposes or effects of the Proposed Amendment to the 2005 Plan." Judge Gonzalez Rogers thereafter issued an order enjoining the vote on the Amendment and requiring Defendants to correct the materially false and misleading 2012 Proxy. Abaxis issued a supplemental proxy statement on October 26, 2012.

As a result of Kessler Topaz's efforts, stockholders received additional material information that allowed them to make an informed decision on whether to approve the Amendment. This outcome represents a substantial accomplishment for Kessler Topaz and will deter directors from omitting material information from annual proxy statements when seeking stockholder action. Kessler Topaz is continuing to litigate its claim to recover for Abaxis damages caused as a result of the settlement of RSUs in violation of the 2005 Plan.



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[2] The action is entitled *St. Louis Police Retirement System v. Severson, et al.*, Case No. 12-CV-5086 YGR, and is presently pending before the Honorable Yvonne Gonzalez Rogers in the United States District Court for the Northern District of California.

[3] See ODS Techs., *L.P. v. Marshall*, 832, A.2d 1254, 1262 (Del. Ch. 2003); *In re Pure Res., Inc. S'holder Litig.*, 808 A.2d 421, 452 (Del. Ch. 2002).

The World's Most Important Number: A Look Into the LIBOR Manipulation Scandal

(continued from page 12)

stantial profits on their large asset portfolios that were tied to LIBOR rates.[3]

These concerns have triggered numerous governmental investigations. On February 28, 2012, it was revealed that the U.S. Department of Justice ("DOJ") was conducting a criminal investigation into LIBOR abuse.[4] Among the abuses being investigated were allegations that traders employed by Panel Banks were in direct communication with the bankers responsible for submitting interest rates for LIBOR and had attempted to improperly influence these submissions.

Recent investigations by the U.K. Financial Services Authority (the "FSA") and the U.S. Commodity Futures Trading Commission ("CFTC") have further demonstrated that certain Panel Bank submissions were, in fact, not accurate. The FSA determined that not only were the submissions inaccurate, but also that certain Panel Banks colluded with each other to manipulate LIBOR.[5] According to the FSA, they did so for two reasons: (i) to make themselves seem stronger than they were (if a bank reports that the rate it pays to borrow from other banks is low, the financial world will think they are strong and pose little risk); and (ii) to generate profits and avoid losses on certain trading positions through the timed manipulation of the LIBOR rates.[6]

As a result of these investigations, on June 27, 2012, Barclays was fined $450 million: $200 million by the CFTC,[7] $160 million by the DOJ,[8] and £59.5 million by the FSA[9] for attempted manipulation of LIBOR and EURIBOR[10] rates. Specifically, the CFTC found that "Barclays attempted to manipulate interest rates and made related false reports to benefit its derivatives trading positions" at the direction of members of senior management, "to protect its reputation during the global financial crisis."[11] Compounding matters, regulators concluded that the offenses occurred on a "near daily basis" over a four-year period. By and large, the actions of Barclays' traders, interest rate submitters, and senior management were conducted openly and communicated in email messages.

As one submitter noted:

> "*I will be contributing rates which are nowhere near the clearing rates for unsecured cash and therefore will not be posting honest prices.*"[12]

In addition to the fines levied against Barclays, the governmental investigations have triggered a shakeup of Barclays' top management as Marcus Agius (Barclays' Chairman), Robert Diamond (Barclays' CEO), and Jerry del Missier (Barclays' COO) have all resigned.[13] Moreover, the Barclays investigations appear to be just the beginning as recent reports indicate that the U.K. Serious Fraud Office, the European Commission's antitrust division, and the New York Attorney General, among others, are currently investigating many of the Panel Banks.[14]

Private Litigation Against the Panel Banks

In addition to the governmental investigations of the Panel Banks' conduct, private litigation in the United States based on LIBOR-related manipulation has been underway since mid-2011 and has been consolidated in the Southern District of New York. The complaints — both direct actions and class actions — allege U.S. antitrust claims in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, violations of the Rack-

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3 *See* Conan Snider and Thomas Youle, *Does the LIBOR Reflect Banks' Borrowing Costs?* Social Science Research Network, April 2, 2010, at pp. 13-14, available at: http://ssrn.com/abstract=1569603.

4 Carrick Mollenkamp, *U.S. Conducting Criminal LIBOR Probe,* Reuters, February 28, 2012.

5 *See* U.K. Financial Services Authority, *Final Notice*, June 27, 2012, available at: http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf ("FSA Report")

6 *See id.* at 2; *see also LIBOR: Eagle Fried*, The Economist, June 30, 2012 (quoting a trader's email that indicated that for each basis point (0.01%) that LIBOR was moved, those involved could net "about a couple of million dollars.").

7 *See In the Matter of: Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.*, Dkt. No. 12-25 (C.F.T.C June 27, 2012); available at: http://www.cftc.gov/ucm/ groups/public/@lrenforcementactions/documents/ legalpleading/enfbarclaysorder062712.pdf (the "CFTC Order").

8 *See* U.S. Department of Justice, *Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty*, June 27, 2012, available at: http://www.justice.gov/opa/pr/2012/June/12-crm-815.html.

9 *See* FSA Report at p. 1.

10 EURIBOR, or the Euro Interbank Offered Rate, is a similar benchmark rate that reports Euro-denominated interbank interest rates. *See* Euribor-EBF, *About Euribor*, http://www.euribor-ebf.eu/euribor-org/about-euribor.html.

11 CFTC Order at p. 3; *see also* FSA Report, at pp. 2-3.

12 CFTC Order at p. 24.

13 *See* Mark Scott, *Former Senior Barclays Executive Faces Scrutiny in Parliament*, The New York Times, July 16, 2012.

14 *See* Carla Main, *LIBOR Criminal Probe, CFTC Exemptions, Canada: Compliance*, Bloomberg News, July 9, 2012; Foo Yun Chee, *Banks Cooperate for Lower Fines in EURIBOR Probe,* Reuters, July 30, 2012; Reed Albergotti and Jean Eaglesham, *9 More Banks Subpoenaed Over Libor*, The Wall Street Journal, October 25, 2012.

eteer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, and a variety of state law claims, including unjust enrichment. The central element a plaintiff must establish in order to prove an antitrust claim is that the defendants conspired to restrain trade.

The class complaints purport to represent several broad classes of plaintiffs harmed by the manipulation of LIBOR rates between August 2007 and May of 2010 (the "Class Period"), including: (i) direct purchasers of over-the-counter swap (and related) contracts from Panel Banks in the U.S.; (ii) exchange-based purchasers who transacted futures contracts and options on the Chicago Mercantile Exchange ("CME"); (iii) debt purchasers who owned U.S. dollar-denominated debt securities on which interest was payable during the Class Period; and (iv) community banks, defined as those with $1 billion or less in assets, who held loans with rates tied to LIBOR. The underlying allegation made by the plaintiffs is that the defendants conspired to restrain trade by engaging in concerted efforts to manipulate LIBOR submissions and rates.[15]

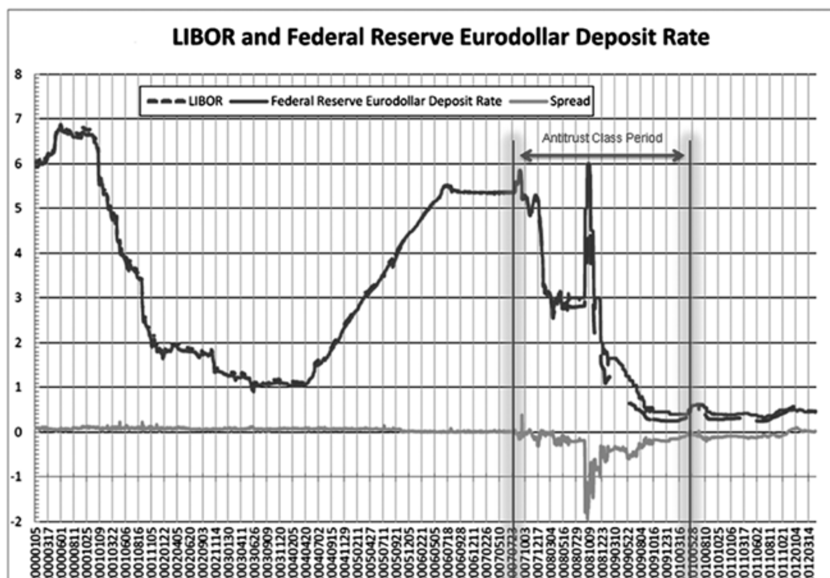
Among other evidence, plaintiffs cite to the divergence between actual overnight interbank lending rates (compiled and published by the Federal Reserve and referred to as the Eurodollar Deposit Rate) and LIBOR rates during the Class Period. The Federal Reserve's Eurodollar Deposit Rate is based on a survey of actual transactions in the interbank lending market.[16] Given the overlapping macroeconomic factors influencing both LIBOR and the Eurodollar Deposit Rate, the correlation between the two has shown remarkable consistency over the years. However, as seen in the chart below, a gap between the rates begins to emerge in August 2007 and does not close again until May 2010. It is during this period — the Class Period — that plaintiffs allege Panel Banks successfully conspired to manipulate LIBOR.[17]

In response to the central antitrust claims, the defendant Panel Banks have argued that plaintiffs have failed to plead facts establishing a conspiracy and have failed to demonstrate that the Panel Banks acted to restrict competition, even if LIBOR rates were misstated by the individual banks.[18] Defendants' central arguments address both the reputational and profit motives identified in the CFTC and FSA reports and advanced by the plaintiffs. Defendants argue that the reputational motive, if true, suggests that each bank operated individually in order to avoid being the "odd man out" (*i.e.*, submitting a rate materially higher or lower than other Panel Banks). At best, defendants argue, the plaintiffs have accused individual defendants of making false LIBOR reports for their own purposes which might impact financial results to those who chose to incorporate the index in their transactions but is not a restraint of trade. With respect to the profit motive, defendants argue that the theory is plausible only if all of the defendants were uniformly *net short* on LIBOR-linked financial instruments throughout the Class Period (*i.e.*, all of the defendants would have benefited from low rates at the same time). In response to both points, plaintiffs argue that various statistical analyses and Barclays' admissions to regulators are sufficient to infer that the Panel Banks colluded to manipulate LIBOR. Ultimately, resolution of these arguments (and others) raised on motions to dismiss will greatly impact what, if any, claims private plaintiffs have against the Panel Banks in the United States.

Will the Panel Banks Pay?

Regardless of the specific defenses the Panel Banks have raised thus far in private litigation, two perplexing issues have yet to be resolved: who lost money and will the Panel Banks pay?

(continued on page 18)



[15] *See generally*, *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 11-md-2262 (S.D.N.Y.); *City of Baltimore v. Barclays, et al.*, 11-md-2262 (S.D.N.Y) (Consolidated Amended Complaint filed April 30, 2012); *Metzler et al. v. Bank of America et al.*, 11-md-2262 (S.D.N.Y.) (Consolidated Amended Complaint filed April 30, 2012); *Community Bank & Trust v. Bank of America, et al.*, 11-md-2262 (S.D.N.Y.).

[16] The data comes from ICAP, a large broker-dealer in London that handles interbank lending and publishes a daily survey of its clients' transactions. *See* http://www.federalreserve.gov/releases/h15/data.htm. (Eurodollars are time deposits denominated in U.S. Dollars outside the United States.)

[17] *See, e.g.,* Consolidated Amended Complaint (filed April 30, 2012) at p. 20, *Metzler et al. v. Bank of America et al.*, 11-md-2262 (S.D.N.Y.).

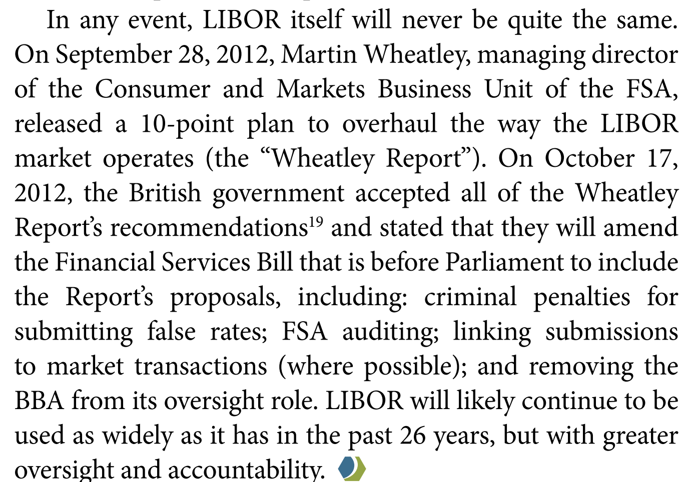
[18] For representative arguments, *see generally,* Memorandum of Law in Support of UBS AG's Motion to Dismiss, *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 11-md-2262 (S.D.N.Y. filed June 30, 2012).

The World's Most Important Number: A Look Into the LIBOR Manipulation Scandal

(continued from page 17)

Due to the widespread economic impact of LIBOR, an extraordinarily broad range of investments are affected by its manipulation — from complex derivatives to adjustable-rate mortgages. Because of the scope of LIBOR's use, allegations of rate-fixing could mean trillions of dollars in damages. Nonetheless, it also makes it difficult for a potential plaintiff to determine exactly what, if any, harm they have personally suffered. While depressed LIBOR rates may have hurt an investor on one transaction, that same investor could have benefited from the depressed LIBOR rates on another. For example, while borrowers holding certain types of debt instruments such as adjustable-rate mortgages and student loans may have benefited from lower LIBOR rates, certain investors that have invested in mortgage and loan-backed financial instruments may have earned less than they should have.

As a result of the varying impacts of the "World's Most Important Number," a potential plaintiff may have to analyze her entire portfolio over a several-year period before she even knows how much she has been harmed. This challenge is



especially true for large institutional investors that have broad, diversified portfolios that are frequently changing. For this reason, some analysts have argued the Panel Banks' ultimate liability in these private actions may pale in comparison to the net impact the manipulation had on the market.

In any event, LIBOR itself will never be quite the same. On September 28, 2012, Martin Wheatley, managing director of the Consumer and Markets Business Unit of the FSA, released a 10-point plan to overhaul the way the LIBOR market operates (the "Wheatley Report"). On October 17, 2012, the British government accepted all of the Wheatley Report's recommendations[19] and stated that they will amend the Financial Services Bill that is before Parliament to include the Report's proposals, including: criminal penalties for submitting false rates; FSA auditing; linking submissions to market transactions (where possible); and removing the BBA from its oversight role. LIBOR will likely continue to be used as widely as it has in the past 26 years, but with greater oversight and accountability.

[19] *See generally,* HM Treasury, *Government accepts recommendations from the Wheatley Review of LIBOR in full*, October 17, 2012, available at: http://www.hm-treasury.gov.uk/press_94_12.htm

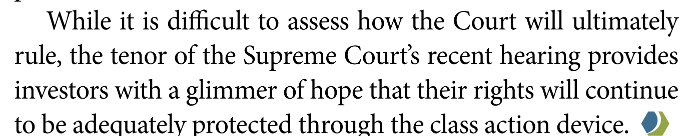
Amgen v. Connecticut Retirement Plans and Trust Funds – Will the Supreme Court Heighten a Plaintiffs' Burden on Class Certification?

(continued from page 11)

retain costly forensic economic experts to opine on the impact of an alleged misstatement on the stock price as evidence of its materiality.

Mandating proof of materiality at the class certification stage also would alter the Supreme Court's landmark ruling in *Basic, Inc. v. Levinson*, 485 U.S. 227 (1988). As discussed herein, to invoke the presumption all a plaintiff need establish is that the market for the company's stock was efficient and that the alleged misstatement was public. In adopting this theory, the Supreme Court did not expressly mandate proof of materiality as an element required to invoke this presumption. Although some courts have read a materiality requirement into this decision, to do so would unnecessarily upset years of settled law.

Perhaps most importantly, because materiality is an element of a plaintiff's Section 10(b) claims, and is assessed by the standard of a reasonable investor, the proof of which is common to all class members, requiring such proof at class certification would threaten the rights of absent class members to have their claims tried on the merits. Indeed, the failure to prove materiality at class certification would end the litigation for everyone, even absent class members. Although Defendants argued to the Supreme Court that this damning consequence would not result from imposing its requested materiality bar at class certification, it is clear from the Court's questions and comments at oral argument that several Justices did not accept this faulty premise.



While it is difficult to assess how the Court will ultimately rule, the tenor of the Supreme Court's recent hearing provides investors with a glimmer of hope that their rights will continue to be adequately protected through the class action device.

The Federal Circuit Strengthens Method Patents *(continued from page 5)*

actor alone or together with the actor's agent, and inducement of the actor to perform the claimed method steps. Accordingly, where a customer performed some steps of a method and a supplier performed the other steps, there was no liability for either direct infringement or inducement because there was no direct infringement under the divided infringement doctrine.

The *Akamai* Decision

In *Akamai Technologies, Inc. v. Limelight Networks, Inc.* and *McKesson Techs. Inc. v. Epic Sys. Corp*., the Federal Circuit addressed issues of whether direct infringement by a single actor was necessary in order for there to be liability for inducement of a method claim. In the first case, Akamai owned a patent covering a method of delivering web content. The district court held that defendant Limelight was not liable for inducing infringement because the infringement was divided; Limelight performed some of the claimed method steps with its servers and its customers performed the others. Similarly, in *McKesson*, the patentee owned a patent covering a method of electronic communication between healthcare providers and their patients, and the district court held that there was no liability for inducement because the method steps were divided among patients who initiate communications and healthcare providers. Thus, *Akami* presented facts where the defendant practiced some but not all of the claimed method steps, and *McKesson* presented facts where the defendant did not perform any of the claimed method steps, but others performed all of the claimed method steps. At the heart of the two cases was the question of whether a party can be liable for inducement of a method claim where all of the claimed steps are not performed by a single actor and his agent.

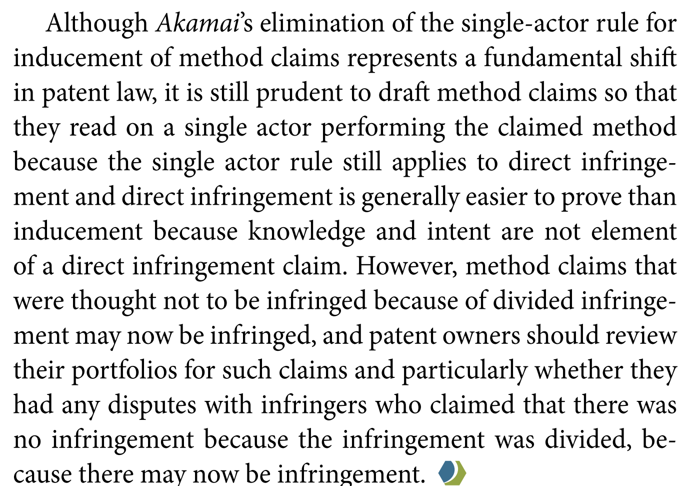
Overruling *BMC Resources, Inc. v. Paymentech, L.P.*, the Federal Circuit held that inducement of a method claim can be found even if a single actor does not perform all of the claimed method steps. The Federal Circuit held that infringement can be found under a theory of inducement, under 35 U.S.C. § 271(b), as long as all of the steps of the method are performed, even if the inducer does not practice any of the claimed steps as in *McKesson*. In order to show liability for inducement, however, it still must be shown that the inducer knew of the patent and induced others to perform the claimed steps of the claimed method.

Although the Federal Circuit eliminated the single-actor requirement for inducing infringement under 35 U.S.C. § 271(b), it retained the single actor requirement for proving direct infringement under 35 U.S.C. § 271(a). According to the Court, eliminating the single actor requirement for inducement but not direct infringement made sense because inducement has an intent component that gives rise to culpability, while direct infringement does not, and it makes sense to have liability for inducement where a party arranges for others to practice the claimed method.

Implications of *Akamai*

Akamai has strengthened method patents somewhat. Previously, there was no liability for divided infringement of method claims. Now, however, there is the potential for liability for inducement where there is divided infringement. However, inducement still presents a higher burden of showing infringement than direct infringement because inducement requires the inducer to have had knowledge of the patent and to have induced others to perform the claimed method or steps of the claimed method. Thus, where the infringement is divided and the alleged inducer had no knowledge of the patent, there is still no infringement.

Accordingly, patent owners should review their portfolio for patents with method claims that they previously did not assert because of divided infringement issues and reconsider whether there is now infringement of those claims. Typical patent claims that were previously thought not to be infringed because of divided infringement were method claims where some steps were provided by a supplier and others by a customer or where some steps were performed by the operator of a central computer or server and others were performed locally at a computer. For example, some method claims require steps to be carried out at a remote server and other steps to be performed at a personal computer connected to the server through the internet. Another example is where some steps were performed at a remote server and others were performed on a mobile device.



Although *Akamai*'s elimination of the single-actor rule for inducement of method claims represents a fundamental shift in patent law, it is still prudent to draft method claims so that they read on a single actor performing the claimed method because the single actor rule still applies to direct infringement and direct infringement is generally easier to prove than inducement because knowledge and intent are not element of a direct infringement claim. However, method claims that were thought not to be infringed because of divided infringement may now be infringed, and patent owners should review their portfolios for such claims and particularly whether they had any disputes with infringers who claimed that there was no infringement because the infringement was divided, because there may now be infringement.

How a Dissent Produced a Majority Rationale *(continued from page 4)*

observed, "[t]he possibility of guilty management and innocent board is the 13th stroke of the new rule's clock. What is to happen when guilty management writes a prospectus (for the board) containing materially false statements and fools both board and public into believing they are true?"[5] Under such facts, an executive with the requisite scienter would not be the "maker" of the actionable statement, and the board which ***did*** "make" the statement would lack scienter. In other words, the corporate entity would escape liability because the person whose scienter would otherwise be imputed to the corporation would not qualify as a speaker under *Janus*' view of what it means to "make" a statement. This article highlights a recent line of cases that have circumvented this apparent boon to corporate America by relying on the common law tort doctrine of *respondeat superior* to hold corporate entities accountable for securities fraud even while letting individual fraudsters off the hook.[6]

Pre-*Janus* Corporate Scienter

Prior to *Janus*, courts relied on common law agency principles to find corporate scienter where an employee acting within the scope of his or her employment possessed the requisite culpable mental state. In *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, the Sixth Circuit found scienter adequately alleged against the corporate defendant based on an executive vice president's knowledge of malfeasance ***even though*** he was not involved in drafting the misstatement because corporate scienter turns on the "knowledge of a corporate officer or agent acting within the scope of [his] authority."[7] Other circuit courts similarly found that scienter could be adequately alleged against a corporate entity if "at least one corporate agent acted with the required state of mind," irrespective of whether that person "made" an actionable statement.[8]

In *Teamsters Local 445 Freight v. Dynex Capital*, the Second Circuit explained that "[w]hen the defendant is a corporate entity, . . . the pleaded facts must create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scienter."[9] It explained that while "[t]he most straightforward way to raise [an inference of corporate scienter] will be to plead it for an individual defendant," "it is possible to raise the required inference of scienter with respect to a corporate defendant without doing so with regard to a specific individual defendant." *Id.* "Confining the pool of employees from which a corporation's scienter may be inferred to those that made an underlying misstatement, as [d]efendants suggest is unduly limiting."[10] "While there is no simple formula for how senior an employee must be [] to serve as a proxy for corporate scienter, courts have readily attributed the scienter of management-level employees to corporate defendants." *Id.*

In *Southland Sec. Corp. v. INSpire Ins.*, the Fifth Circuit explained that, "[f]or purposes of determining whether a statement made by a corporation was made by it with the requisite Rule 10(b) [sic] scienter we believe it appropriate to look to the state of mind of the individual corporate officer or officials who make or issue the statement (***or*** order or approve it or its making or issuance, ***or*** who furnish information or language for inclusion therein, ***or*** the like) rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment."[11] In the Fifth Circuit, therefore, corporate scienter is imputable to the corporate entity through a person who, without making a statement, furnished information to the speaker.

In addition, in *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, the Seventh Circuit explained that "it is possible to draw a strong inference of corporate scienter ***without being able to name the individuals*** who concocted and disseminated the fraud."[12] "The critical question . . . is how likely it is that the allegedly false statements . . . were the result of merely careless mistakes at the management level based on false information fed it from below, rather than of an intent to deceive or a reckless indifference to whether the statements were misleading." *Id.* The court also clarified that "the doctrines of *respondeat*

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5 *Janus*, 131 S. Ct. at 2310.

6 "*Respondeat superior* is a common law principle of secondary liability and generally summarizes the doctrine that a master or other principal is responsible, under certain conditions, for the conduct of a servant or other agent. A common application of this doctrine is the liability of an employer for a tort committed by one of its employees acting within the scope of his employment, or for a misleading statement made by an employee or other agent who has actual or apparent authority." *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1577 (9th Cir. 1990) (citing Restatement (Second) of Agency §§ 219, 257, 261 (1958)).

7 399 F.3d 651, 688-89 (6th Cir. 2005).

8 *Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc.*, 576 F.3d 172, 189-90 (4th Cir. 2009); *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 184 (4th Cir. 2007); *In re Cabletron Sys., Inc.*, 311 F.3d 11, 40 (1st Cir. 2002); *In re Sonus Networks Inc. Sec. Litig.*, 2006 U.S. Dist. LEXIS 28272, at *80 (D. Mass. 2006); *see also Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106 (10th Cir. 2003); *SEC v. Johnson*, 565 F. Supp. 2d 82 (D.D.C. 2008).

9 531 F.3d 190, 195-97 (2d Cir. 2008).

10 *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 481 (S.D.N.Y. 2006).

11 365 F.3d 353, 366 (5th Cir. 2004).

12 513 F.3d at 707-10.

superior and apparent authority ***remain applicable*** to suits for securities fraud." Similarly, as set forth above, prior to *Janus*, courts generally refused to limit corporate scienter to the scienter of employees or agents only to those who made the statements. Since *Janus*, courts around the country have continued to be similarly disinclined and shown outright hostility to Justice Thomas's weak, dictionary-definition view of what it means to "make" a statement under the federal securities laws.

Post-*Janus* Corporate Scienter

In *Kerr v. Exobox Tech. Corp.*, plaintiffs alleged that defendant corporation Exobox and several of its founders and controlling shareholders had defrauded investors by omitting material information in the company's SEC filings, including "[t]he fact that Exobox had no product, no operations, and no value."[13] Plaintiffs asserted claims against the company and individual defendant Sonfield, who owned 100% or 88% of Exobox during the relevant time period. The court held that, under *Janus*, despite Sonfield's control over Exobox, plaintiffs had not shown that he had "ultimate authority" over the misstatements and he was thus not liable, "even if he supplied Exobox with the false statements. . . ."[14] Instead, the court held that "Exobox was the entity with ultimate authority over the statement."[15] As a result, the question turned on "whether Exobox had scienter when it made the statements. . . ." *Id.*

Following *Southland*, the court examined whether any employee who "made ***or prepared the statement***" or who "order[ed] or approve[d] its making or issuance or who furnish[ed] information or language for inclusion therein or the like" acted with scienter.[16] The court rejected the notion that *Janus* limited the attribution of scienter to those with "ultimate authority" over the statement: "[t]he Court finds no reason to read *Janus* to limit the liability of the corporation on grounds of scienter. Exobox 'made' the statements contained in the public filings under *Janus*; [p]laintiffs need only assert that Sonfield furnished the information or language for inclusion in order to attribute his scienter to Exobox." *Id.* Consequently, the court held that "Sonfield's scienter may be attributed to Exobox under *Southland*." In refusing to apply *Janus* in the manner requested by defendants, *Exobox* sidestepped the "13th stroke of the new rule's clock" Justice Breyer envisioned — namely, a blatant corporate fraud deemed inactionable against both an individual and the corporation itself because the executive-level perpetrator was found not to have "ultimate authority" over the alleged false statements.

Similarly, *Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.* alleged that Bank of America ("BoA"), its current and past officers and directors, and its underwriters, purposefully concealed the bank's reliance on Mortgage Electronic Registration Systems and exposure to billions of dollars of loan repurchase claims arising from the sale of mortgage-backed securities.[17] The court found that "taken together [plaintiffs' allegations] fail[ed] to raise strong circumstantial evidence of conscious misbehavior and recklessness. . . ."[18] The court reasoned that while "[t]he most straightforward way to raise [an inference of corporate scienter] will be to plead it for an individual defendant," "it is possible to raise the required inference of scienter with respect to a corporate defendant ***without doing so with regard to a specific individual defendant***."[19] After noting that "[c]ourts routinely impute to the corporation the intent of officers and directors acting within the scope of their authority," the court held that "[w]hile [p]laintiffs' allegations are not sufficient to allege scienter as to the Executive Defendants, several of the allegations, taken together, raise a strong inference of scienter as to BoA."[20] The court gave three examples of such allegations. First, "[p]laintiff's allegation that a BoA vice president and assistant vice president signed false affidavits representing that they personally reviewed hundreds of loan files raises a strong inference of scienter." This was because "[s]uch fraudulent conduct suggests that BoA knew that it . . . had not properly transferred or assigned mortgages."[21] Second, "while [p]laintiff does not allege that any of the Executive Defendants reviewed an audit report indicating serious errors in amortization schedules, the fact that BoA's senior managers saw these reports is sufficient to impute knowledge of their contents to BoA."[22] Third, "the Court can impute the knowledge of BoA's general counsel to BoA" and "BoA's general counsel['s] [letter] summarized the negative effects flowing from BoA's overemphasis on generating loans for securitization without due regard to prudent lending." *Id.*

Subsequently, Bank of America filed a motion for reconsideration suggesting that "*Janus* impose[d] an additional requirement that the Court ignored: that an individual whose scienter is imputed to BoA must also be the 'maker' of the false and misleading statement at issue."[23] The court disagreed, reasoning that "*Janus* does not concern corporate scienter.

(continued on page 23)

13 2012 U.S. Dist. LEXIS 7523 (S.D. Tex. Jan. 23, 2012).

14 *Id.* at *30-32.

15 *Id.* at *39.

16 *Id.* at **40-42.

17 2012 U.S. Dist. LEXIS 96317 (S.D.N.Y. July 11, 2012).

18 *Id.* at **32-51.

19 *Id.* at **51-52.

20 *Id.* at *52.

21 *Id.* at **52-53.

22 *Id.* at *53.

23 *Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 2012 U.S. Dist. LEXIS 129529, at *5 (S.D.N.Y. Aug. 28, 2012).

Getting Serious About ESG *(continued from page 5)*

some recent academic research appears to suggest that ESG funds perform competitively to non-ESG funds over time and may provide potential long-term performance advantages for investors.[1] It is also argued that ESG integration in investing has, and will continue to, put pressure on companies to transform corporate reporting. Finally, many of the largest public pension funds in the world have implemented well-defined ESG and responsible investment policies.

Recent Study

BNY Mellon conducted a 2012 survey of its more than 1,100 institutions in order to uncover how and why clients incorporate ESG approaches into their investment processes.[2] BNY Mellon found that 35% of public pension plans in the U.S. and Europe incorporate SRI and ESG concepts into their portfolios, with the research suggesting that even though many still view there to be a performance trade-off between SRI/ESG and traditional strategies, the majority of the plans they polled said they were likely to continue their SRI/ESG strategies over the next two years. Organizational values was cited as the main reason for the initiation of ESG strategies, and BNY Mellon proposes that public pension funds may see a link between a fund's values and their investments. Lack of interest and performance trade-offs have been the two largest reasons for the reluctance of funds to implement an ESG strategy, but those feelings are less widely-held in markets outside of the United States, where greater awareness and discussion of ESG has been prominent for many years. It is interesting to note that 31% of BNY Mellon's U.S. clients and 52% of clients outside the U.S. anticipate that SRI/ESG will become more important to their organization in the future.

CalPERS' Sustainability Report

In the U.S., CalPERS is taking the lead on sustainability and ESG. In April 2012, CalPERS released a report detailing its efforts on sustainable investing and their intention to create a fiduciary framework to integrate sustainability across the pension fund's $235 billion investment portfolio.[3] This is the first known report of its kind by a large public pension fund in the United States. For many years, CalPERS has engaged with companies on ESG issues and they are also a founding member of PRI. In 2011, the CalPERS Board approved the adoption of a Total Fund process for integrating ESG issues as a strategic priority in the Investment Office. To implement this, CalPERS adopted three core themes for integrating their ESG work: 1) alignment of interest through corporate governance (including issues such as shareowner rights, executive compensation, fund manager terms and conditions and investor protection); 2) climate change (including issues related to resource scarcity, water stress, carbon emissions, energy efficiency, clean technology and renewable energy); and 3) human capital (including issues of exploitative labor practices, health and safety, responsible contracting and diversity). CalPERS' roadmap is intended to aid the largest U.S. public pension fund in addressing ESG issues in a uniform fashion and further cement the importance they place upon sustainable investing.

Launch of SASB

Continuing with the move towards awareness and implementation of ESG strategies, and the desire to create sustainable value for current and future generations, October 2012 marked the launch of SASB — the Sustainability Accounting Standards Board. SASB is a 501(c)3 non-profit organization "engaged in the creation and dissemination of sustainability accounting standards for use by publicly-listed corporations in disclosing material sustainability issues for the benefit of investors and the public."[4] SASB intends, over the next 2.5 years, to develop standards for 89 industries in 10 sectors suitable for use in providing decision-useful information in the SEC Forms 10-K and 20-F. Their goals, in part, are to enable investors and the public to compare performance on critical dimensions of sustainability, better understand risks and opportunities and adjust behavior accordingly. SASB will define the materiality of key ESG issues within each industry to produce a set of concise, comparable industry-based sustainability accounting standards. SASB intends to complement the work of the Financial Accounting Standards Board (FASB) and support the Securities and Exchange Commission (SEC) by defining material sustainability issues and establishing standards for accounting for impacts that affect sustainable value creation in standard disclosure formats such as the Form 10-K and 20-F. Working with a well-qualified Board of Directors (which includes CalSTRS' Head of Corporate Governance), their hope is to improve the competitiveness of U.S. compa-

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1 *Forum for Sustainable and Responsible Investment*, available at http://ussif.org/resources/performance.cfm (last visited Nov. 2, 2012).

2 Gregory Stewart, et al., *Trends in Environmental, Social, and Governance Investing*, available at http://www.bnymellon.com/foresight/pdf/esg-investing-1012.pdf (last visited Nov. 2, 2012).

3 *Towards Sustainable Investment: Taking Responsibility*, available at http://www.calpers.ca.gov/eip-docs/about/press/news/invest-corp/esg-report-2012.pdf (last visited Nov. 2, 2012).

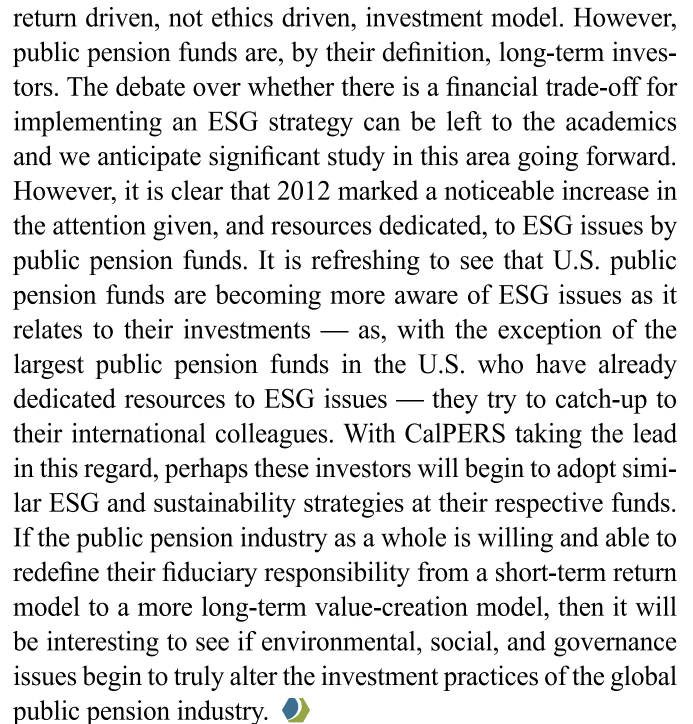
4 http://www.sasb.org/sasb/about/ (last visited Nov. 2, 2012).

nies by providing investors with a complete view of financial and non-financial risks and opportunities.

Conclusion

In previous *Bulletin* articles, we have examined the state of the U.S. public pension system and have documented the significant challenges facing these investors. As we approach 2013, the challenges persist. The economic climate has impaired the ability of funds to earn the investment returns they need, driving many plans to increase allocations to alternative investments and introduce greater risk into their portfolios. Across the country, the political climate and media attention on the pension industry has, in many cases, pitted plan sponsors against pension boards — battling over required contributions, modifications to pension benefits, and many other issues critical to the operation of these plans. Finally, for most public funds in the U.S., staffing issues simply do not allow for the dedication of resources to non-core activities and initiatives.

ESG strategies and responsible investment remain, to a large degree, an abstraction for public pension funds. The economic and political realities facing these investors, and a lack of total industry buy-in to ESG, preserve the short-term return driven, not ethics driven, investment model. However, public pension funds are, by their definition, long-term investors. The debate over whether there is a financial trade-off for implementing an ESG strategy can be left to the academics and we anticipate significant study in this area going forward. However, it is clear that 2012 marked a noticeable increase in the attention given, and resources dedicated, to ESG issues by public pension funds. It is refreshing to see that U.S. public pension funds are becoming more aware of ESG issues as it relates to their investments — as, with the exception of the largest public pension funds in the U.S. who have already dedicated resources to ESG issues — they try to catch-up to their international colleagues. With CalPERS taking the lead in this regard, perhaps these investors will begin to adopt similar ESG and sustainability strategies at their respective funds. If the public pension industry as a whole is willing and able to redefine their fiduciary responsibility from a short-term return model to a more long-term value-creation model, then it will be interesting to see if environmental, social, and governance issues begin to truly alter the investment practices of the global public pension industry.



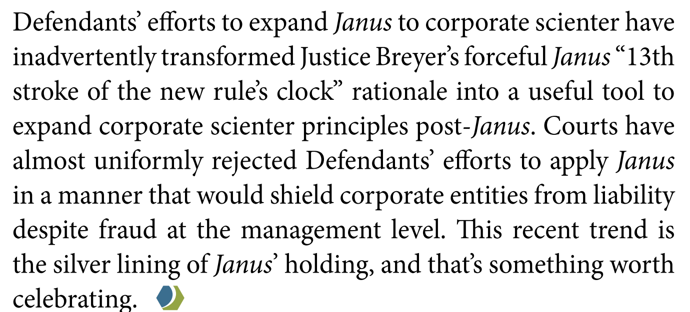
How a Dissent Produced a Majority Rationale *(continued from page 21)*

Rather, *Janus* addresses what it means to 'make' a statement for purposes of [§10(b) and Rule 10b-5]. And there is no dispute that BoA, through its various public filings, 'made' the statements and omissions at issue. . . ."[24]

Similarly, *Curry v. Hansen Med., Inc.* involved allegedly false statements "regarding Hansen's revenue recognition and sales performance."[25] Plaintiffs alleged that the company's former Senior Vice President of Commercial Operations, Christopher Sells ("Sells"), manipulated Hansen's financial results, thus making it inevitable that false statements regarding Hansen's financial condition would be disseminated to investors.[26] Defendants moved to dismiss. The court denied their motion even though, under *Janus*, Sells did not have "ultimate authority" over the false statements and, as a result, was found not liable under Rule 10b-5.[27] The court then reasoned that, "even if the Court finds that Sells did not make a false statement, his scienter of improper revenue recognition, inferred from the actions he took within the scope of his employment, can be imputed to Hansen."[28] The court held that "'*respondeat superior* liability establishes a form of secondary liability which does not require actual knowledge or recklessness on the part of the vicariously liable principal.'" Applying this standard, *Hansen* found that "[b]ecause the [complaint] adequately alleges Sells' scienter in regard to the scheme to recognize revenue prematurely and that Sells undertook this scheme in the scope of his employment, to benefit his employer, his scienter is imputed to Hansen through vicarious liability."[29]

Conclusion

Defendants' efforts to expand *Janus* to corporate scienter have inadvertently transformed Justice Breyer's forceful *Janus* "13th stroke of the new rule's clock" rationale into a useful tool to expand corporate scienter principles post-*Janus*. Courts have almost uniformly rejected Defendants' efforts to apply *Janus* in a manner that would shield corporate entities from liability despite fraud at the management level. This recent trend is the silver lining of *Janus*' holding, and that's something worth celebrating.



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[24] *Id.* at *6.

[25] 2012 U.S. Dist. LEXIS 112449 (N.D. Cal. Aug. 10, 2012).

[26] *Id.* at **3-4, 6, 12-13.

[27] *Id.* at **12-14.

[28] *Id.* at *35.

[29] *Id.* at **36-37.

Calendar of Upcoming Events

National Conference on Public Employee Retirement Systems – 2013 Legislative Conference

January 27 – 29, 2013 • The Capital Hilton — Washington, DC

This year's keynote speaker will be Mara Liasson, national political correspondent for National Public Radio (NPR). With President Barrack Obama re-elected, Mrs. Liasson will give her perspective on the outcome on the national elections and what can be expected on the legislative agenda for 2013. She will also review her predictions made at the 2012 Public Safety Conference in October and analyze what she got right and what she got wong and why.

The Evolving Fiduciary Obligations of Pension Plans

February 5, 2013 • The Capital Hilton — Washington, DC

The Evolving Fiduciary Obligations of Pension Plans roundtable, now in its fourth year, will examine various trends, from how large public pension plans are using impact investing to promote positive social and environmental goals as well as solid investment returns, to the practical ways plan sponsors are responding to the National Australian Bank decision, a seminal case that has limited how shareholders are able pursue lawsuits in the U.S. for securities traded on a foreign exchange. In addition, we will compare and contrast how public pension plans are dealing with their pension liabilities and discuss how new accounting guidelines, changes in plan structures and benefits and greater scrutiny by politicians and the public are affecting them.

The European Pensions Symposium

February 6 – 8, 2013 • Hotel Arts — Barcelona, Spain

Institutional Investor's 21st Annual European Pensions Symposium will bring together the biggest asset owners from across the continent to discuss the challenges the current economic environment presents to pension funds. The Symposium focuses primarily on the investment issues facing pension funds, and the entire program is driven and guided by an expert advisory board representing corporate and public pension funds with varied investment objectives and liabilities.

2013 ICGN Mid-Year Conference

March 4 – 5, 2013 • Palazzo Mezzanotte — Milan, Italy

ICGN returns to Italy after over a decade of progress (and peril!) in European financial markets. We will focus on lessons learned over this period and priorities for reform. This will include debate around: the likely impact of the EU corporate governance action plan, aligning remuneration with strategy and reward, the role and influence of minority shareholders in electing board representatives and how to ensure meaningful company and investor engagement, including improving the proxy voting system and annual general meetings.

Rights & Responsibilities of Institutional Investors: Turning Words Into Action

March 21, 2013 • Renaissance Hotel — Amsterdam, Netherlands

The day-long meeting, hosted in Amsterdam, will bring together leading investment, legal, and compliance officers from European public pension, insurance fund and mutual fund companies. Through panels, workshops and case studies, participants will engage with industry peers and thought leaders on the question of shifting corporate governance structures and as such, their fiduciary duties and rights as active shareholders.

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