Robbins Geller Rudman & Dowd LLP

Corporate Governance Bulletin

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DEPARTMENTS

The Impact of the New SEC Whistleblower Rules

On May 25, 2011, the U.S. Securities and Exchange Commission ("SEC") announced new regulations aimed at incentivizing individuals who have information about possible violations of SEC rules to come forward with this information. Created by Congress on July 21, 2010 in Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the Whistleblower Program became effective as of August 12, 2011, after the SEC issued its final rules governing the program. The Dodd-Frank Act authorized the Whistleblower Program to reward individuals who offer information that leads to an SEC enforcement action.[1] To be considered for an award, the SEC's final rules state that a whistleblower must voluntarily provide the SEC with high quality, original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than $1 million.[2] Awards granted by the SEC can range from 10% to 30% of the money collected. The Dodd-Frank Act also included enhanced anti-retaliation employment protections for whistleblowers to protect their identity, specifying that the SEC cannot disclose any information, including information the whistleblower provided to the SEC, that could reveal a whistleblower's identity.

The potential for individuals to receive large cash rewards for their information while being protected from retribution is expected to significantly impact corporate compliance.[3] It may be too soon to tell what impact the Whistleblower Program will have in the long term; however, in the short term it seems to be benefitting shareholders, as the new rules have incentivized corporations to create a stronger culture of compliance within their organizations.[4] Corporations are being encouraged by outside advisors to strengthen their culture of ethics, compliance and communication within their companies by setting the tone from the top, rewarding compliance-driven individuals and ensuring that the rules are well defined, known, and enforced. Corporations are even considering including compliance goals in their managers' annual performance evaluation metrics and rewarding those managers who achieve their goals with higher compensation.[5]

While the new rules are seen by some as benefitting shareholders, certain corporations are arguing that the new rules are actually harming shareholders because enhancing their internal compliance programs is costing corporations and their shareholders a premium and undermining the compliance and reporting programs already developed and implemented under the rules of the Sarbanes-Oxley Act of 2002.[6] In addition, they argue that the rules are causing management to spend an inordinate amount of time ensuring that the company maintains an effective internal reporting program and educating employees about the internal reporting mechanisms so that they are not compelled to run directly to the SEC. Clearly, the SEC's incentives appear to have executives and directors on edge.

In addition to concerns about employees not reporting problems internally, many corporations are concerned that the award system incentivizes people to deliberately delay reporting in the hope that the issues grow in size and scope, in order to generate a more substantial SEC penalty and thus a larger payout for the whistleblower. This is a specious argument. Indeed, if there is no incentive to report the fraud to the SEC, employees may not report potential fraud at all.

In terms of receiving important tips, the Whistleblower Program has so far proven to be effective. Since the program was established in August 2011, the SEC reports that it is receiving about eight tips a day.[7] On August 21, 2012,

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The Convergence of Global Corporate Governance Practices

"With a widely held belief that failures in corporate governance contributed to the global financial crisis, this uncertainty and turbulence has made effective corporate governance exceedingly important on an international level."

Corporate governance practices vary widely from country to country. The myriad cultures and legal systems around the world influence not only how corporations are run, but also how shareholders respond to them. However, the fragmented global governance structure appears to be in a state of convergence, as the globalization of financial markets creates the need for international synchronization of corporate governance.[1] Despite this movement, it is unlikely that a single international system of corporate governance will ever fully develop.

One of the primary reasons for the convergence in corporate governance practices is that the largest public pension systems in North America, Western Europe and Asia have developed substantial ownership and influence over corporate governance and corporate strategy.[2] Public pension plans owned almost a tenth of the European market share in 2008, while U.S. pension funds own between 10% and 20% of the U.S. equity market.[3] As large investors with significant assets, these pension plans have the power to exercise considerable influence over equity markets, and as such are increasingly using their ownership control to monitor corporate management. While there is a great diversity of investment and shareholder engagement policies in different countries, it is clear that engagement and activism are common tools among them, and their objectives are increasingly similar.

The global economic situation has also become a major force in how corporate governance practices are converging. With a widely held belief that failures in corporate governance contributed to the global financial crisis, this uncertainty and turbulence has made effective corporate governance exceedingly important on an international level. The excessive risk taking that started in the United States spread to hundreds of financial firms worldwide. These failures of risk management systems were made worse by incentive systems that encouraged and rewarded high levels of risk taking. Macroeconomic and structural conditions worldwide exposed the universal need for improved risk management, tightened incentive structures, and stricter board oversight worldwide, even when each country exhibits a unique system of corporate governance.

In an effort to improve global corporate governance practices, Robbins Geller is in the process of building international capabilities with U.S.-style securities practices, including hiring a new attorney in the U.K. in order to further establish corporate governance reforms in Europe through securities litigation. Robbins Geller is also working with internationally renowned GMI Ratings to expand this practice to other countries.

Despite the movement toward a convergence of corporate governance systems, complete harmonization is unlikely to occur.[4] Cultural, political and legal constraints, which affect the system of corporate governance in different countries, will always constrain economic evolution in different ways and prevent a complete and formal convergence of international corporate governance practices.

[1] *See* Shamsher Mohamad and Zulkarnain Muhamad Sori, *Corporate Governance from a Global Perspective* (April 21, 2011), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1817082.

[2] *See* Siona Robin Listokin, *Global Pension Fund Activism* (June 30, 2011), *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480964.

[3] *Id.*

[4] *See* Brian Ikol Adungo, *An Analysis of the View that the Corporate Governance Systems Worldwide Are Inevitably Converging Towards a Model Based on Shareholder Primacy and Dispersed Ownership Structure* (May 2, 2012), *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049764. ■

News Brief

Robbins Geller and USD Team Up to Provide a Lasting Legal Education

Patrick W. Daniels and Cherie Blair at the University of San Diego

On September 19, 2012, **Cherie Blair, QC** and **Patrick W. Daniels, Esq.** attended a luncheon at the University of San Diego ("USD") in order to acknowledge the generous contribution of **Robbins Geller** and USD in providing an LLM education to a student from Ethiopia through Mrs. Blair's Africa Justice Foundation ("AJF").

The AJF provides assistance to lawyers from African nations who will receive a year of training and education in the United States with the understanding that they will return to their home countries with a wealth of knowledge to share with other lawyers and apply to their daily work.

Mrs. Blair is a leading barrister specializing in public law, human rights, employment and European Community law, arbitration and mediation. She has appeared in a number of leading cases both at home and abroad. She is also a noted speaker on human rights and a staunch supporter of women's rights.

Mrs. Blair was very pleased with the results of the joint efforts of AJF and Robbins Geller. Mrs. Blair said, "I thank Robbins Geller for its commitment to the legal field and for its assistance to the Africa Justice Foundation. I look forward to continuing our relationship in helping others become great lawyers."

The Second Circuit Court of Appeals Hands Plaintiffs a Significant Victory in *Goldman Sachs*

On September 6, 2012, the Second Circuit Court of Appeals in New York City issued a precedent-setting ruling when it revived a lawsuit accusing Goldman Sachs of misleading investors in connection with billions of dollars in mortgage-backed securities offerings.

The court's decision overturned key parts of a dismissal by U.S. District Judge Miriam Goldman Cedarbaum that had shut down the entire lawsuit in 2010. The appellate decision allows institutional investor lead plaintiff **NECA-IBEW Welfare Trust Fund** (the "Fund") to resume prosecuting a class action against several Goldman Sachs entities on behalf of investors in various mortgage-backed securities.

The lawsuit had its genesis in a series of securities offerings during 2007, when a Goldman Sachs unit sold investors billions of dollars in mortgage-backed certificates in 17 separate offerings using the same common shelf registration statement and supplemental prospectuses for each offering (the "Certificates"). In addition, each of the offerings' securities were further divided into various tranches, or levels of seniority. Plaintiffs alleged that the shelf registration statement and prospectuses contained false and misleading statements and omissions as to the Certificates' true nature, risk, and overall quality, and sued several Goldman Sachs units under the Securities Act of 1933. While the Fund had purchased Certificates in just two of the offerings, it sought to represent a class composed of purchasers in all 17 offerings based upon the common misstatements and omissions in the offering materials.

In a series of rulings – some made orally from the bench – Judge Cedarbaum whittled away at the lawsuit before ultimately dismissing it with prejudice. Although §11 of the Securities Act requires only diminished value to establish a redressable injury, Judge Cedarbaum held that the Fund had not been injured because (i) it was still receiving monthly payments from its Certificates, and (ii) it had not yet sold the Certificates at a loss. In addition, Judge Cedarbaum held that the Fund did not have standing to represent the other members of the as-yet-uncertified class of purchasers in all 17 offerings; she believed that the Fund could represent only those putative class members who had purchased Certificates from (i) the same two offerings that the Fund had, and (ii) in the same tranches.

Following briefing and argument in February 2012, on September 6, 2012, the Second Circuit vacated key parts of the lower-court dismissal in a landmark published opinion. The Second Circuit held that the Fund had class standing to assert claims on behalf of purchasers of securities that were backed by pools of mortgages originated by the same lenders who had originated mortgages backing the Fund's securities. The court noted that, given those common lenders, the Fund's claims as to its purchases implicated "the same set of concerns" that purchasers in several of the other offerings possessed. The court also rejected the notion that the Fund lacked standing to represent investors in different tranches. It held that the varying payment-priority levels across the tranches did not raise a "fundamentally different set of concerns" so as to defeat class standing, and noted the well-established rule that individual damages are not enough to defeat class standing.

The Second Circuit also made short work of Judge Cedarbaum's damages holding. The key to §11 injury under that statute, the panel said, was not the securities' "market price," but rather whether the Fund had "plausibly" alleged a decline in their value. In this case, the Fund had done just that with "well-pleaded facts" showing that rating agencies had downgraded the Certificates, and allegations that purchasers were now exposed to more risk concerning both the timing and amount of absolute cash flow to be received. Whether the Certificate holders still received monthly payments was not determinative.

By vacating and remanding key parts of the putative class action lawsuit, the Second Circuit has issued a watershed ruling in these types of cases. Many district courts around the country have been dismissing mortgage-backed securities actions based upon the same purported lack of standing by lead plaintiffs, and defendants are insisting that the securities purchasers in these actions have not incurred a requisite injury redressable under the federal securities laws. This latest decision rejects those arguments. And, while the Second Circuit's contrary decision is not binding on courts outside of its jurisdiction, the court's reputation for considered analysis in securities cases may prove to be influential. Legal and financial media have reported that the decision represents a "substantial victory" for plaintiffs in these types of suits, and that the Second Circuit has provided a "potent tool" for fighting defendants' class-standing arguments.

Robbins Geller appellate partner **Joseph D. Daley**, who argued the appeal (with the briefing aided by litigation partner **Arthur C. Leahy** and litigation associate **Nathan R. Lindell**), applauded the Second Circuit's rulings. "We knew all along that the district court had erred in several significant respects. The 'damages' ruling was patently wrong, and we thought that the 'class standing' ruling, both on a certificate and tranche level, required a more-nuanced analysis than had been given by the district court. It was gratifying to see the Second Circuit undertake that analysis and revive the suit for the class members."

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145 (2d Cir. 2012). ■

Litigation Update

Motion for Summary Judgment
Trial Looms in Cheyne SIV Case

On August 17, 2012, United States District Judge Shira A. Scheindlin issued a landmark opinion that cleared the way for the majority of plaintiffs' claims to proceed to trial in the Southern District of New York. In four years of hard-fought litigation leading to the court's decision, a team of Robbins Geller attorneys, led by partners **Daniel S. Drosman** and **Luke O. Brooks**, uncovered substantial evidence of malfeasance by each of the defendants. The plaintiffs, more than a dozen large institutional investors, including banks and funds such as **Abu Dhabi Commercial Bank** and **King County, Washington**, seek to recover damages they suffered in connection with their purchases of "fraudulently rated" Cheyne SIV debt securities structured and marketed by Morgan Stanley.

After reviewing the evidence submitted by both sides in connection with defendants' motions for summary judgment, the court upheld plaintiffs' fraud claims against defendants Moody's and Standard & Poor's, holding that a jury could reasonably infer the rating agencies acted fraudulently in assigning top AAA/Aaa ratings to the Cheyne SIV, which was, in fact, a risky debt vehicle packed with securities backed by subprime mortgages. The court also upheld plaintiffs' allegations that Morgan Stanley, who designed and promoted the Cheyne notes, aided and abetted the rating agencies' fraud.

Judge Scheindlin found that the rating agencies could not escape liability if their ratings "both misstated the opinions or beliefs held by the Rating Agencies and were false or misleading with respect to the underlying subject matter they address." She observed that plaintiffs "offered a statement from a Moody's analyst explaining that a Triple-A rating describes assets that 'should survive the equivalent of the US Great Depression, undoubtedly with downgrades but with no loss to Aaa holders.' Nonetheless, in an e-mail, a lead analyst for Moody's observed that there was 'no actual data backing the current model assumptions' on the Cheyne deal," and "[t]he same [Moody's] analyst admitted that, although the Cheyne SIV contained a high percentage of RMBSs, he had little knowledge of the U.S. RMBS market when he rated Cheyne." The Cheyne SIV's ratings proved wildly false when, the court noted, two years after the Cheyne SIV was launched, it "breached its 'Major Capital Loss Test,' thus triggering 'enforcement,' an irreversible operating state requiring that a receiver be appointed" to liquidate the SIV, leading to plaintiffs' losses.

As a result of Robbins Geller's efforts, the court found that "[p]laintiffs have offered extensive evidence from which a jury could infer that the ratings were either disbelieved when made or issued in a manner that was 'highly unreasonable and which represent[ed] an extreme departure from the standards of ordinary care.'" Judge Scheindlin also held that plaintiffs submitted evidence that "Morgan Stanley manipulated the Cheyne SIV modeling process to create the ratings it desired," and that "a jury could reasonably infer that . . . Morgan Stanley had actual knowledge that the Rating Agencies were assigning ratings they did not believe in; and . . . Morgan Stanley not only substantially assisted the Rating Agencies in perpetrating a fraud, but actively encouraged them to do so."

"We are pleased that the court, after examining the evidence, has recognized the validity of our fraud claims against Morgan Stanley and the rating agencies," said Drosman.

The landmark litigation will be the first United States civil action against the rating agencies to proceed to trial since the financial crisis. "We believe that the rating agencies and investment banks like Morgan Stanley were instrumental in causing the financial crisis, and we look forward to presenting evidence of their fraud to a jury," said Brooks.

Abu Dhabi Commercial Bank, et al. v. Morgan Stanley & Co., Inc., et al., No. 08-cv-7508-SAS, Opinion and Order (S.D.N.Y. Aug. 17, 2012).

Motion for Class Certification
Case Against Las Vegas Sands Certified as a Class Action

On July 11, 2012, Judge Kent J. Dawson of the United States District Court for the District of Nevada certified a plaintiff class and also ruled on defendants' motion for reconsideration of his order denying much of defendants' previous motion to dismiss, ensuring that the class action will continue against Las Vegas Sands Corp. ("LVS"), Chairman and CEO Sheldon G. Adelson and former President and COO William P. Weidner.

Lead plaintiffs **Pompano Beach Police & Firefighters' Retirement System** and **Alaska Electrical Pension Fund**, through their lead counsel at Robbins Geller, proposed a class period of August 2, 2007 to November 6, 2008, alleging that the defendants had "knowingly or recklessly made misrepresentations and omissions about LVS, its development plans, and its financial condition." LVS develops and operates a wide array of resorts and casino properties, including major operations in Las Vegas and Macao. The defendants allegedly made false and misleading statements about LVS's liquidity and its ability to continue construction of ongoing projects in Macao and the United States while internal company projections showed LVS was running out of cash and sources of cash. Indeed, by November 2008, LVS was forced to announce that it might have to default on some of its loans and that its ability to operate as a going concern was threatened.

Judge Dawson first ruled on defendants' motion to dismiss the amended consolidated complaint in August 2011, finding that while certain of the defendants' projections and overoptimistic statements were protected by the Safe Harbor provision of the Private Securities Litigation Reform Act, plaintiffs nonetheless had adequately alleged that the "defendants understated true projected costs for the large development scheme undertaken by LVS in Macao," where internal documents showed completion cost projections to be "about $4 billion higher than the $12 billion LVS publicly stated." Likewise, Judge Dawson wrote that plaintiffs "adequately pled facts asserting that investors were misled by statements that liquidity was not an issue and that development was steadily progressing," and that defendants knew their statements were false. He also refused to dismiss plaintiffs' allegations regarding operating conditions and visitation rates in Macao, writing that "[t]he pleadings set forth specific facts asserting that investors were misled about LVS's ability to operate profitably given conditions in Macao," where VIP volumes and commission rates were declining.

In the July 11, 2012 order, the court certified a class of purchasers from February 4, 2008 to November 6, 2008. However, for purchasers from August 2, 2007 to February 3, 2007, the court reconsidered its prior ruling on the motion to dismiss (August 2011) and dismissed those claims. Nevertheless, he gave plaintiffs leave to amend their complaint to state further details of actionable misconduct prior to February 2008, and if plaintiffs did so he would "entertain a motion to expand the class period accordingly and include individuals who purchased the stock beginning August 2, 2007." On September 7, 2012, plaintiffs filed an amended complaint with further detail uncovered in discovery.

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Settlement Update

BancorpSouth Fails to Foreclose on Shareholder Lawsuit; Plaintiff Secures $29.25 Million Settlement

Since the beginning of the recent financial crisis, Robbins Geller attorneys and staff have worked tirelessly to secure recoveries on behalf of shareholders and investors who were defrauded by what the Financial Crisis Inquiry Commission described as "dramatic failures of corporate governance and risk management" at financial institutions and "a systemic breakdown in accountability and ethics." In one of their latest successes, Robbins Geller secured a $29.25 million settlement, subject to final court approval, on behalf of shareholders of BancorpSouth, Inc., who plaintiff alleged were defrauded by the company's false and misleading statements about its loan loss reserves and purportedly conservative underwriting standards.

BancorpSouth is a regional bank based in Tupelo, Mississippi. The bank was founded over 130 years ago in the back of a hardware store in Verona, Mississippi, and today conducts commercial banking and financial services operations in Tennessee, Mississippi, Alabama, Arkansas, Texas, Louisiana, Florida, Missouri and Illinois.

By 2008 and 2009, the financial crisis was hitting its peak. The Federal Deposit Insurance Corporation ("FDIC") was shutting down record numbers of struggling banks – as many as nine in a single day – and investors were looking for a safe port in the economic storm roiling the credit markets. Many such investors were attracted to BancorpSouth, which claimed to have a stronger loan portfolio that was more resistant to rising credit delinquency and foreclosure rates than its peers. BancorpSouth's loan loss reserves – a balance sheet entry designed to reflect anticipated losses from loans that were currently at risk of not being repaid – appeared to support defendants' claims. BancorpSouth attributed the purportedly high credit quality of the company's loans to its extensive internal controls, detailed analysis of repayment risks, longstanding relationships with and granular insight into its borrowers, and conservative lending practices.

In truth, plaintiff alleged, BancorpSouth's loan loss reserves were significantly understated because the company's internal controls, credit loss analyses and lending standards were much weaker – and its borrowers' risks much greater – than represented to investors. Indeed, plaintiff alleged that defendants deliberately disregarded the FDIC's warning that BancorpSouth's existing controls over problem loans were inadequate, ignored conditions revealing the declining credit quality of its borrowers, and repeatedly agreed to modify troubled loans to defer repayment obligations rather than record a bad debt expense or reserve for a loss that would decrease earnings.

In January 2010, BancorpSouth reported financial results for its fourth quarter and full year 2009. Defendants would later admit that these results were false because BancorpSouth's loss reserves were significantly understated in violation of Generally Accepted Accounting Principles, thereby materially inflating the company's revenues for the quarter and the year. When the company admitted the falsity of its prior results, BancorpSouth's stock price immediately fell by nearly 14%, causing millions of dollars in damages to plaintiff and others who had purchased their shares at inflated prices in reliance upon the truth of defendants' repeated misrepresentations.

While shareholders got cashed out, BancorpSouth's top executives cashed in. The defendants, as well as over 60 other management employees, were awarded millions of dollars in bonuses based on BancorpSouth's false financial results. Had their bonuses been based on the company's true financial results, none of executives would have been entitled to any bonus at all. Nevertheless, the company refused to ask any of the executives to repay their lavish bonuses, and was simultaneously lobbying the FDIC to reject a proposed rule that would have increased costs on banks like BancorpSouth that engaged in risky compensation practices.

In November 2010, defendants filed a comprehensive motion to dismiss, contending that plaintiff's complaint should be dismissed with prejudice for failing to plead loss causation or economic loss, an actionable misrepresentation or omission of material fact, and a strong inference of scienter. Plaintiff opposed defendants' motion to dismiss, and in April 2011, Magistrate Judge John S. Bryant issued a Report and Recommendation that recommended defendants' motion to dismiss be denied in its entirety. Defendants challenged Magistrate Bryant's Report and Recommendation to the District Judge, which plaintiff successfully defended, and District Judge Kevin H. Sharp denied defendants' motion to dismiss in January 2012.

In May 2012, after commencing discovery on plaintiff's claims, the parties reached the $29.25 million settlement for BancorpSouth investors. "The settlement is a terrific result for investors that were harmed by the alleged misconduct," said **Dennis J. Herman**, a partner in Robbins Geller's San Francisco office who, together with associate **Christopher M. Wood**, prosecuted the action. "It provides a significant and immediate recovery while eliminating the significant risks of continued and protracted litigation."

Winslow v. BancorpSouth, Inc., No. 3:10-CV-00463 (M.D. Tenn.).

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For more information on these and other cases, please visit: www.rgrdlaw.com

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$12.5 Million Recovery After Financial Results Turn into Pipe Dream

How many different types of accounting fraud can a company perpetuate at once? That was the question facing lead plaintiff **Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund** and its attorneys at Robbins Geller in their recently settled action against Northwest Pipe Company and its former CEO and CFO.

Northwest Pipe is a Vancouver, Washington-based company that manufacturers high-pressure steel piping and tubing for use in water infrastructure projects, hydroelectric power systems, wastewater systems and other applications. In November 2010, and again in April 2012, the company was forced to restate its historical financial results to account for millions of dollars in understated expenses and prematurely booked revenues stemming from at least 12 separate alleged accounting schemes.

For example, plaintiffs alleged that the company's former CEO was at the helm of a scheme to prematurely recognize revenue on purchased steel. Northwest Pipe accounted for its large water transmission projects under a "percentage of completion" method, which allowed the company to recognize revenues based on the costs it had incurred in connection with a given project, so long as such costs fairly represented the percentage of a project's completion. The complaint alleged that when Northwest Pipe needed to increase its reported revenues for a given quarter to meet Wall Street expectations, the former CEO would demand that the company's plant managers order more steel regardless of whether it was needed for a given project at that time, and in some instances before the company even had contracts in place that could utilize the steel.

Defendants also artificially inflated the company's revenues and earnings by concealing material liabilities caused by penalty provisions, liquidated damages and back charges claimed by the company's customers as a result of shoddy or late work performed by Northwest Pipe. Instead of correctly accounting for such costs, the former CEO concealed such penalties from investors by converting the penalties into discounts on future work to be performed by Northwest Pipe. Such arrangements created off-balance-sheet liabilities, which were never disclosed to investors. This practice also allowed Northwest Pipe to avoid accruing losses on unprofitable contracts and resulted in the artificial inflation of Northwest Pipe's reported "backlog," which was a critical metric that investors and Wall Street analysts used to assess the strength of the company's future revenues.

In yet another scheme, defendants inflated the company's earnings by manipulating expenses relating to the depreciation of assets. Notwithstanding defendants' representations that the company depreciated some equipment over a three to 18 year schedule, defendants caused Northwest Pipe to depreciate its equipment at a rate of under 4% a year – a rate which was patently inconsistent with the stated useful life of such equipment.

Defendants also routinely falsified the assignment of costs in order to make unprofitable contracts appear profitable. To accomplish this, defendants intentionally assigned costs from money-losing contracts to profitable contracts, and improperly reassigned labor hours budgeted for profitable contracts to money-losing contracts. This deceptive practice allowed Northwest Pipe to circumvent accounting rules that require the accrual of a loss on money-losing contracts at the time a loss is known.

Defendants' alleged fraudulent practices eventually caught up with them. In a somewhat bizarre turn of events, the head of the company's Water Transmission Division blew the whistle on his own CEO by instructing subordinates to call the company's fraud reporting hotline and report the alleged fraud. An internal investigation ensued, and a year later the company issued a massive restatement which revealed that defendants had overstated the company's earnings by $44 million between 2006 and the second quarter of 2009.

In December 2010, following the company's November restatement, lead plaintiff filed a consolidated complaint. The consolidated complaint was the culmination of a year-long investigation by plaintiffs and their counsel, and included allegations from 10 former Northwest Pipe employees who corroborated many of plaintiffs' claims. In February 2011, Northwest Pipe and its former CEO and CFO filed motions to dismiss the consolidated complaint. The motions to dismiss asserted that plaintiffs had failed to allege loss causation – that the disclosure of the alleged fraud was causally related to plaintiffs' losses. Defendants also contended that plaintiffs had failed to meet the rigorous standards for pleading defendants' scienter, or intent.

In August 2011, following comprehensive briefing by the parties, the court denied defendants' motions to dismiss. First, the court held that plaintiffs had adequately alleged loss causation, finding that stock drops linked to multiple disclosures that the company's financial filings would be delayed and that the SEC was investigating the company's revenue recognition practices were "sufficiently linked to defendants' prior statements about the company's financial results and are sufficient to plausibly allege loss causation." Furthermore, the court held that plaintiffs had alleged a strong inference of scienter, finding that plaintiffs' numerous allegations, considered collectively, were sufficient to meet their burden of alleging an "inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."

Following the denial of defendants' motions to dismiss, the parties began to participate in discovery. As part of the discovery process, Northwest Pipe produced over 3.2 million pages of documents to plaintiffs regarding the claims at issue in the complaint. Plaintiffs carefully reviewed the documents produced by defendants for evidence to support their claims. During the discovery process, the parties participated in several mediation sessions, and in July 2012, an agreement was reached to resolve the action for $12.5 million. The settlement is subject to court approval.

"This was a highly complex action that required plaintiffs to unravel over a dozen alleged accounting improprieties in order to plead their claims," said **Christopher M. Wood**, an associate in Robbins Geller's San Francisco office, who, together with partner **Christopher P. Seefer**, prosecuted the action. "The strong recovery in this case appropriately reflects the strength of plaintiffs' claims, while recognizing the significant hurdles plaintiffs would have had to overcome to prevail on intricate accounting claims at trial and on any potential appeal."

Richard v. Northwest Pipe Company, et al., No. 3:09-CV-05724-RBL (W.D. Wash.). ■

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Partner **Spencer A. Burkholz**, who together with partner **Steven W. Pepich** and associates **Eric I. Niehaus** and **Christopher D. Stewart** has prosecuted the case, said, "The case is now certified as a class, and we hope the judge will expand the case to include the earlier time period after reviewing our new amended complaint."

Fosbre v. Las Vegas Sands Corp., No. 2:10-cv-00765, Order (D. Nev. July 11, 2012). ■

Recent Institutional Investor Forum Examines the Future of Corporate Governance

Four years into the global financial crisis, numerous public funds have mobilized to reclaim their power to mend critical weaknesses in the regulation of U.S. capital markets. Tired of enduring devastating losses to pension funds caused by reckless governance and fraud, institutional investors gathered at The Future of Corporate Reform 2012 Public Funds Forum to share ideas designed to strengthen governance reform and increase long-term value. The event was hosted by **GMI Ratings**, the world's leading independent firm dedicated to monitoring corporate risk ratings and providing suites of tools to active institutional investors. Sponsors of the conference included **Robbins Geller Rudman & Dowd LLP**, the premier plaintiffs' securities litigation firm, and class-action administration experts **Gilardi & Co. LLC**. The forum provided an opportunity for public fund representatives to join with a diverse panel of speakers.

Convening in Park City, Utah, attendees shared new tools critical to help create a future with robust oversight and accountability in corporate practice and financial markets. The three days of informative panel sessions permitted attendees to hear analyses from corporate governance experts, share their experiences, and enjoy informal networking opportunities.

Robert A.G. Monks, referred to by *The Economist* and *Fortune* magazines as the leading shareholder activist and governance advocate in the world, opened the conference. **General Colin Powell, USA (Ret.)** delivered the keynote address that followed, in which he shared his history and expertise of how public fund representatives should use emerging investment strategies to navigate the global economy. Panel leaders, including **Catherine LaMarr**, General Counsel at the Office of the Connecticut Treasurer, corporate governance expert **Nell Minow** and shareholder litigation expert **Darren J. Robbins**, explored a variety of issues of keen interest to public fund representatives, including traditional investment strategies and the threats posed to fund fiduciaries by the collapsing European economy, and how securities litigation can protect assets, secure remedies, and guard against future losses. Other notable session speakers included **Jonathan Feigelson,** Senior Managing Director, General Counsel and Head of Corporate Governance at TIAA-CREF; **Stephen Davis**, senior fellow at Harvard Law School on Corporate Governance; **Michelle Edkins**, Managing Director and Global Head of Corporate Governance and Responsible Investment at BlackRock Portfolio Management Group; **David R. Koenig**, CEO of The Governance Fund Advisors and CIO of Ram Investment Advisors LLC; and **Rudy Giuliani**, former Mayor of New York City.

More and more stakeholders in public funds now realize that their substantial investments give them the power to help take the lead in shaping corporate governance. Similarly, shareholders have also recognized that greater engagement in crafting new policy forms part of their fiduciary responsibility to protect fund assets. With a concentration of industry and academic experts, The Future of Corporate Reform 2012 Public Funds Forum provided a new outlook for the future and new momentum to the corporate governance movement. GMI Ratings once again was praised for bringing together leaders in the field for powerful panel sessions and useful networking opportunities. ■

GMI RATINGS'
2012 Public Funds Forum

SEC Whistleblower continued from page 1

the SEC announced that it had issued its first award to an anonymous whistleblower who helped the SEC stop a multi-million dollar fraud.[8] The award recipient, who does not wish to be identified, provided documents and other significant information that allowed the SEC's investigation to "move at an accelerated pace and prevent the fraud from ensnaring additional victims." The whistleblower's assistance led to a court ordering more than $1 million in sanctions, of which approximately $150,000 has been collected thus far. Any increase in the sanctions ordered and collected will increase payments to the whistleblower, who has received an award of $50,000 thus far. The court is considering whether to issue a final judgment against other defendants in the matter.

Despite the concerns expressed by corporations, the Whistleblower Program appears to have already become a success for the SEC and shareholders.[9] Not only has the program saved SEC investigators substantial time and resources, it has also incentivized corporations to strengthen internal reporting processes and encouraged the development of strong internal compliance cultures. The costs associated with these changes are minimal compared to the costs associated with being caught for engaging in fraud. In the long term, it appears as though the impact of the Whistleblower Program will, in fact, be beneficial for corporations and their shareholders.

In keeping up with the new Whistleblower Program, and increased administrative and court actions, Robbins Geller Rudman & Dowd LLP has expanded its whistleblower practice to include several former federal prosecutors. The firm has added attorneys **Jonah H. Goldstein**, **James E. Barz**, **Jason A. Forge** and **Robert K. Lu**, just to name a few. These attorneys have decades of experience dealing with confidential witnesses and sensitive investigations and are dedicated to protecting shareholders and holding large corporations accountable.

[1] *See* U.S. Securities and Exchange Commission Annual Report on the Dodd-Frank Whistleblower Program Fiscal Year 2011 (Nov. 2011), *available at*: http://sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf.

[2] *See* U.S. Securities and Exchange Commission, *SEC Adopts Rules to Establish Whistleblower Program* (May 25, 2011), *available at*: http://www.sec.gov/news/press/2011/2011-116.htm.

[3] *See* Robert S. Khuzami, *Speech by SEC Staff: Remarks at Open Meeting – Whistleblower Program* (May 25, 2011), *available at*: http://www.sec.gov/news/speech/2011/spch052511rk.htm.

[4] *See* Obiamaka P. Madubuko and Rick Firestone, *New SEC Whistleblower Program and Added Disclosure Rules in Dodd-Frank Act: Will These New Regulations Help or Hinder FCPA Compliance Efforts?* Bloomberg Law Reports, *available at*: http://www.mwe.com/info/pubs/firestone_madubuko_dodd-frank.pdf.

[5] *Id.*

[6] *See* Brendan Sheehan, *SEC Whistleblower Rules Cause Alarm,* Business Insider (June 2, 2011), *available at*: http://articles.businessinsider.com/2011-06-02/wall_street/30081374_1_sec-chairman-mary-schapiro-troy-paredes-new-rules.

[7] *See* U.S. Securities and Exchange Commission, *SEC Issues First Whistleblower Program Award* (Aug. 21, 2012), *available at*: http://sec.gov/news/press/2012/2012-162.htm.

[8] *Id.*

[9] *Id.* ■

Calendar of Upcoming Events

November 11-14, 2012

International Foundation of Employee Benefit Plans (IFEBP)
58th Annual Employee Benefits Conference

San Diego Convention Center
San Diego, California

This annual conference is designed to meet the specific needs of multiemployer and public sector plan trustees and administrators, attorneys, accountants, actuaries, investment managers and others who provide service or who are involved in the overall management and administration of benefit trust funds in the United States by providing the essential tools to fulfill fiduciary obligation and understand requirements of new legislation and recent regulations.

For more information, visit: www.ifebp.org

November 15-16, 2012

Asia Pacific Association for Fiduciary Studies (APAFS)
12th Annual Pacific Region Investment Conference

New World Makati City Hotel
Manila, Philippines

Featured Speakers: **Darren J. Robbins**, Robbins Geller Rudman & Dowd LLP

This conference brings together investment experts and finance professionals in the Asia Pacific region and provides members with meaningful educational forums that cover the most current fundamental understanding of their roles as fiduciaries, focusing on regional specific issues and needs.

For more information, visit: www.apafs.org

November 28-30, 2012

Pensions Investment Research Consultants Ltd. (PIRC)
The 17th Annual Local Authority Pension Fund Forum Conference

Bournemouth Highcliff Marriott Hotel
Bournemouth, England

Featured Speaker: **Patrick W. Daniels**, Robbins Geller Rudman & Dowd LLP

This annual conference is designed for, and attended by, local authority delegates – treasurers, pension investment officers, and elected members. The conference focuses exclusively on pension investment, making it very topical in today's uncertain investment climate.

For more information, visit: www.lapfforum.org

December 3, 2012

International Corporate Governance Network (ICGN)
Oxford-Style Dinner Debate

SS Rotterdam
Rotterdam, Netherlands

This event will take place after ESG training on the evening of December 3, 2012. Leaders from four of Europe's largest asset managers will hotly debate the proposition that "companies that do not report on material ESG factors are less attractive to institutional investors." Keynote debaters include Angelien Kemna, CEO, APG AM, Netherlands; Roderick Munsters, Robeco, Netherlands; David Pitt-Watson, Chairman, Hermes Focus Asset Management, UK; and Philippe Zaouati, Deputy CEO, Natixis AM, France.

For more information, visit: www.icgn.org

December 3-4, 2012

Democratic Governors Association (DGA)
Annual Meeting and Holiday Party

Los Angeles, California

This event will be hosted by Governor Jerry Brown.

Founded in 1983, the DGA is an independent voluntary political organization that supports Democratic governors and candidates across the nation. As the only organization dedicated to electing Democratic governors and candidates, the DGA participates at all levels of campaigns, from providing resources to fund operations to helping articulate and deliver their messages. The DGA also provides expert advice in policy areas to Democratic governors and candidates, with several policy conferences a year on topics such as biotechnology and life sciences and the new energy economy.

For more information, visit: www.democraticgovernors.org

January 8-10, 2013

Opal Financial Group
Public Funds Summit

The Phoenician
Scottsdale, Arizona

This annual public funds conference addresses issues that are critical to the investment success of senior public pension fund officers and trustees in the new millennium. Although attendance is not limited to those in the public sector, the conference takes aim at topics that are of particular relevance to public pension funds. The sessions will explore how surplus returns should affect employee benefit plans, closely examine the processes for selection and evaluation of investment managers, investigate legal concerns with fund investment and management policies, as well as explore the benefits and pitfalls of a wide variety of investment strategies. By focusing on an atmosphere of education rather than sales or marketing, the Public Funds Summit provides a unique environment in which members of the public sector can exchange ideas and learn from other delegates, money managers and consultants.

For more information, visit: www.opalgroup.net

January 27-29, 2013

National Conference on Public Employee Retirement Systems (NCPERS)
2013 Legislative Conference

Capital Hilton Hotel
Washington, District of Colombia

This premier conference for public fund trustees and plan administrators will highlight the issues on Capitol Hill and in federal regulatory agencies that affect pension funds today. The conference brings in senior administration officials, members of Congress, and Washington insiders to help educate fund members on the critical issues affecting public pensions and equip them with the tools needed to deal with these issues effectively and allows them to meet face to face with their elected leaders on the Hill.

For more information, visit: www.ncpers.org

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