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CORPORATE GOVERNANCE BULLETIN

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INSIDE:

FEATURE 1

SHAREHOLDERS ACHIEVE RECORD $925-MILLION SETTLEMENT IN *UNITEDHEALTH*

On July 1, **California Public Employees' Retirement System ("CalPERS")** and **Alaska Plumbing and Pipefitting Industry Pension Trust ("Alaska")** announced a preliminary settlement with UnitedHealth Group Inc. and certain individual defendants for a record-breaking $895 million. Just over two months later, a preliminary settlement was also reached with the two remaining defendants – bringing the total recovery for the class to over $925 million.

In addition to the monetary recovery, UnitedHealth will make critical changes to a number of its corporate governance polices, including electing a shareholder-nominated member to the company's Board of Directors. Other key corporate governance changes will include: (i) enhanced standards for director independence; (ii) a mandatory holding period for options issued to executives; (iii) a shareholder approval requirement for any stock options re-pricing; and (iv) a peer group comparison requirement when establishing incentive compensation.

Chief Judge James M. Rosenbaum compared defendants' scheme to the movie The Sting, a story about "'past posting,' or betting on horse races after the results are known."

Since March 2006, when *The Wall Street Journal* published its Pulitzer Prize-winning article "The Perfect Payday," UnitedHealth's stock options backdating practices have been scrutinized by journalists, academics and numerous government agencies.

The Wall Street Journal identified UnitedHealth as a company with "wildly improbable option-grant patterns." By April 2006, the SEC had begun an informal inquiry prompting UnitedHealth to initiate an independent investigation into its own historical stock options granting practices.

After being selected as lead plaintiff, CalPERS filed a consolidated complaint in December 2006. Chief Judge James M. Rosenbaum denied defendants' motions to dismiss the consolidated complaint in their entirety, and compared defendants' scheme to the movie *The Sting*, a story about "'past-posting,' or betting on horse races after the results are known."

During the discovery process, counsel for plaintiffs carefully scoured more than 22 million pages of documents obtained from defendants, as well as hundreds of thousands of additional documents from more than 15 third parties.

Coughlin Stoia attorneys **Michael J. Dowd, Arthur C. Leahy, Andrew J. Brown, Anne L. Box, Ramzi Abadou, Shannon M. Matera, Jennifer L. Gmitro** and **Maureen E. Mueller** prosecuted the action on behalf of plaintiffs. An additional 20 contract attorneys and forensic accountants also aided in the prosecution of the case.

The team delved into the company's documents and internal correspondence, uncovering UnitedHealth's pervasive options backdating scheme. Coughlin Stoia attorneys also collectively took more than 50 depositions and engaged in significant motion practice in the months leading up to the close of discovery. Plaintiffs' success on these fronts was resounding.

Although accounting issues concerning stock options grants are complex, the documents and testimony plaintiffs acquired during discovery established a strong case regarding liability. Regardless, plaintiffs faced significant legal hurdles to show loss causation – that the actions of defendants were responsible for causing the stock losses – as well as damages. Determined to find the pressure points that could lead to settlement, plaintiffs pursued two separate discovery matters, which ultimately forced the company's hand.

First, plaintiffs moved to compel defendants to produce documents compiled and drafted by the company's outside counsel during the course of its independent investigation – documents the court had previously determined were protected by the work product doctrine. At the hearing on the motion, Magistrate Judge Franklin L. Noel cautioned plaintiffs' counsel, "I think I [previously] . . . thought about this . . . [y]ou are certainly free to try to change my mind." A combination

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Perverse Incentives: Executive Compensation and Performance

FEATURE 2

While shareholders of commercial banks and lenders continue to suffer devastating losses, executive compensation has never been more lucrative. In response to this dichotomy, earlier this year Congressman Henry A. Waxman convened hearings to solicit testimony on how to bridge the gap between executive compensation and performance at the U.S. House of Representatives' Committee on Oversight and Government Reform. **Nell Minow**, editor and co-founder of The Corporate Library, testified at the hearings and offered solutions on how to solve the problems inherent with today's executive compensation packages.

The Business Roundtable and its allies rely on a return-on-investment argument to justify the multi-million-dollar compensation packages paid to corporate executives. However, the executive compensation format frequently employed by big business often fails to hold CEOs accountable when they perform poorly or make risky decisions. The current structure of executive compensation, including bundling massive stock options grants into "retirement" packages for CEOs, is often no longer attached to the performance of the company during the CEO's tenure. As a result, CEOs are driven by what Minow terms "perverse incentives" when making their decisions – the knowledge that they will receive large retirement and options packages even if the value of their company's stock tanks. According to Minow, "[W]ith executive compensation you get what you pay for and you pay for what you get. If you make compensation all upside and no downside, that will affect the executive's assessment of risk . . . it will make it clear to him that he can easily offload the risk . . . onto the shareholders . . . . It is heads they win, tails we lose." The moral hazard is clear.

Angelo Mozilo

Charles Prince

Stanley O'Neal

To illustrate her point, Minow presented evidence to Chairman Waxman's Committee on the most notorious instances of the effects of perverse incentives by highlighting the tenures of CEO Angelo Mozilo of Countrywide Financial Corp., Charles Prince of Citigroup Inc., and Stanley O'Neal of Merrill Lynch & Co., Inc. All three CEOs received lavish payouts at their departures, despite the fact that each of the corporations they ran wrote off billions of dollars of losses as a result of their mismanagement.

A review of the subprime debacle reveals that tying compensation to earnings targets does nothing to assure that corporate executives actually earn their salaries. In fact, it may actually provide executives with an incentive to artificially inflate earnings. In 2006, Mozilo received a $20.5-million cash award after Countrywide topped its 2005 earnings per share and the stock price rose 26%. However, by mid-2007, the mortgage lender had revealed losses obscured in its 2006 reports. The ensuing $388 million in write-offs caused the company's stock to fall over 75%. This catastrophic news had little effect on Mozilo, who strolled away from the disaster with $121 million from cashed out stock options.

Prince of Citigroup and O'Neal of Merrill Lynch also departed their positions on carpets of gold, paid for by shareholders. As a result of risky investments, Citigroup took nearly $55 billion in losses and fired 14,000 of its employees. Nevertheless, Prince was handed $33.4 million. Merrill Lynch, with O'Neal at the helm, saw $52 billion in losses, yet the CEO retired with $161.5 million worth of stock plus another $28.8 million in retirement. The payouts to these and other failed executives turn the very idea of "pay for performance" upside down.

Minow suggested a policy that would hold executives accountable, requiring CEOs to return their inflated and unearned compensation to its rightful owners. "The undue compensation awarded to these failed CEOs should be returned to shareholders. In addition, they should be liable for providing false and misleading statements to investors and held accountable for the impact of their poor strategic decision-making policies. That is first and foremost the responsibility of the directors. If they fail, it is up to the shareholders to replace the board and it is up to lawmakers and regulators to make sure they have the power to do that."

According to Minow, there is an equally important reason to close the accountability gap between CEO performance and pay – to continue to attract investors to the American markets. Minow advised U.S. lawmakers that American capital markets depend on credibility and transparency. "If we want our capital markets to be credible and competitive, we must stop paying executives who destroy shareholder value."

The Corporate Library is the leading independent source for U.S. corporate governance information and analysis. For more information on The Corporate Library, visit: www.thecorporatelibrary.com

Analyst Alert
From The Corporate Library

Environmental Alliance Wins in California

FEATURE 3

A coalition of environmental and labor groups has helped bring California one step closer to adding perfluorooctanoic acid, or PFOA, to the state's published list of cancer-causing chemicals. Responding to years of governmental inaction, a coalition of organizations including the **Sierra Club, United Steel Workers, Environmental Working Group**, **Natural Resources Defense Council, Inc.**, **California Labor Federation AFL-CIO**, **Environment California**, and **Environmental Law Foundation** has brought a lawsuit to pressure California's Governor Arnold Schwarzenegger and the Office of Environmental and Health Hazard Assessment ("OEHHA") to designate PFOA as a potential carcinogen. This legal move may force the state to add PFOA to the published list of toxic chemicals mandated by California's Proposition 65.

More than 20 years ago, by a 2-1 margin, California voters approved Proposition 65 – a ballot measure specifically designed to protect adults and children against potentially toxic chemicals. The measure was surprisingly simple, less than one page, but showed a profound distrust of government regulation. Chemicals "known to the state" to cause cancer or birth defects were banned from drinking water, which carries a high risk of exposure. Other exposures to potentially toxic substances in food or consumer products (such as children's toys) required a "clear and reasonable" warning. Proposition 65 placed the safety burden on businesses to demonstrate that a risk from their product or chemical was not significant. Moreover, the California law stipulated that the governor was by a "date certain" to promulgate a list of known carcinogens or reproductive toxins. The public disclosure of the Proposition 65 list alerts the public to toxic chemicals via product warning labels, preventing harmful exposure through informed consumer choices – in other words, "self-defense" from chemicals likely to cause cancer.

The public's skepticism of California regulation appears to be well-placed. It has taken years, and a lawsuit, to enforce the relevant provisions of Proposition 65. The decision in the PFOA litigation highlights the failure of successive administrations of California's governors to take action.

A synthetically produced compound made by DuPont, PFOA is used in consumer and industrial products, including "Teflon" and other non-stick surfaces found on cookware. It is also used in the aerospace, automotive, building and construction, chemical processing, and electrical industries, as well as for grease-proof food wrapping. Frighteningly, PFOA has been found in the bloodstreams of over 96% of American children tested. Higher doses of PFOA are associated with tumors in animals. In 2006, the Environmental Protection Agency's ("EPA") scientific panel recommended that the chemical be considered as "likely to be carcinogenic," prompting action from California's health and environmental watchdogs, who petitioned the OEHHA to add the DuPont chemical to the Proposition 65 list. The state agency refused, despite the fact that the EPA has been aggressively pushing the manufacturer to eliminate the use of the chemical, citing health risks.

In a decision in Alameda County Superior Court, Judge Frank Roesch ruled for the plaintiffs, rejecting the state's motion to dismiss the legal challenge. In the ruling, Judge Roesch noted that it has "typically taken years, sometimes more than 10," for OEHHA and the governor to add chemicals to the Proposition 65 list. "The [c]ourt," he said, "cannot find that, as a matter of law, such delays were reasonable."

In a press release, California Sierra Club Director **Bill Magavern** commented that "[a]dding PFOA to the list of known toxins is an important and long-overdue step for public health and the environment," and further stated that the "lawsuit will force the state to take more aggressive action to list toxic chemicals when health threats become apparent."

Sierra Club v. Schwarzenegger, No. RG 07356881, Order (Alameda County Sup. Ct., Cal. June 25, 2008).

NEWSBRIEF

Coughlin Stoia Partner Donates $250,000 to Oklahoma State University

Helen J. Hodges has established a plant and soil science professorship in honor of her parents at her *alma mater*, Oklahoma State University ("OSU"). Hodges' parents farmed in Major County, Oklahoma for over 30 years.

The $250,000 donation will be used to create the Dillon and Lois Hodges Professorship in Plant and Soil Sciences located at OSU's College of Agricultural Sciences and Natural Resources. The Professorship will focus on research aimed at increasing grain production and will be committed to ensuring that the benefits of OSU's expertise are made available to farmers around the world.

"It is my great pleasure to make this gift to honor my parents and ensure that OSU's world-class expertise will help farmers sustain themselves and hopefully thrive," said Hodges. "My parents knew from experience the challenges that farmers face, and they would be thrilled if their legacy leads to advances in agriculture that help struggling farmers around the world."

Helen J. Hodges

University President Burns Hargis applauded Hodges' generosity. "We sincerely appreciate what Helen has done for the benefit of OSU academics and research and value this lasting way she has chosen to honor her parents."

Hodges is rated AV by *Martindale Hubble* and was selected as a Super Lawyer in 2007 by the *Southern California Super Lawyers – San Diego Edition*. Hodges practices in Coughlin Stoia's San Diego office and is currently prosecuting the *Enron* and *Dynegy* securities class actions.

Motion to Dismiss Shareholders Take a Byte Out of MySpace

The former public shareholders of Intermix Media, Inc. may soon get a chance to share in some of the profits from the popular social networking website MySpace.com. On July 14, Judge George H. King of the Central District of California denied defendants' motions to dismiss the former shareholders' class-action complaint.

In September 2005, Rupert Murdoch-owned News Corp. bought Intermix for $580 million – including MySpace, Intermix's "crown jewel." At the time of the sale, the value of MySpace was skyrocketing, as new members began joining the website in ever-increasing numbers. In fact, shortly after the sale, MySpace was valued by analysts as worth somewhere between $12 billion and $20 billion, or 34 times as much as News Corp. had paid Intermix shareholders for the asset.

Not long after the sale was finalized, Coughlin Stoia filed an action on behalf of former shareholders of Intermix, entitled *Brown v. Brewer*. The complaint alleges that Intermix and its Board of Directors, aided and abetted by the venture capital firm VantagePoint Venture Partners, failed to inform shareholders as to the true value of MySpace. As a result of this deception, Intermix shareholders approved the sale of Intermix to News Corp., essentially giving away MySpace for pennies on the dollar.

After several rounds of briefing on defendants' motions to dismiss, Judge King issued a ruling permitting Coughlin Stoia to move forward with the former shareholders' claims that the proxy issued by Intermix and its Board of Directors should have contained updated financial information about MySpace. The court also ruled that Coughlin Stoia may prosecute claims that the Board of Directors breached its fiduciary duties by selling Intermix to News Corp.

According to Coughlin Stoia partner **Randall J. Baron**, this is an important step in recovering some of what shareholders lost when Intermix was sold. "While we realize that we still have a significant amount of work ahead of us to secure a recovery for the class, Judge King's ruling permits us to get the information that we need to move this case forward and understand the full extent of what shareholders lost when the MySpace.com asset was sold for far less than fair value."

Coughlin Stoia intends to vigorously pursue discovery from defendants on behalf of former Intermix shareholders in the upcoming months.

Brown v. Brewer, No. CV-06-3731-GHK (JTLx), Order Re: Defendants' Motions to Dismiss (C.D. Cal. July 14, 2008).

Appeal to the Ninth Circuit Gilead Still on the Hook

Investors won a decisive victory in the Ninth Circuit on August 11, convincing the appellate court to reinstate their securities-fraud claims against Gilead Sciences Inc. The court's decision adopted the investors' arguments and clarified the law regarding loss causation.

In *Gilead*, plaintiffs allege that the company inflated its revenues by "off-label" marketing of its anti-retroviral drug, Viread – meaning, for purposes and to patients beyond the FDA's approval. An initial private warning letter from the FDA demanding that the company immediately cease its off-label marketing did not stop the company from continuing its illegal practices. As a result, the FDA issued a second, public warning letter, again demanding that Gilead's off-label marketing stop.

Plaintiffs allege that doctors, once learning of the off-label marketing, prescribed less of the drug. Nevertheless, there was a three-month lag between doctors' reduced prescriptions and the corollary reduction in end-user demand – which became clear when Gilead announced its reduced earnings estimates. When the truth about Gilead's financial condition emerged, its stock dropped. Defendants argued in the trial court that investors did not suffer any loss caused by their off-label marketing because the stock price did not drop following the FDA's publication of its second warning letter.

Plaintiffs argued that defendants' off-label marketing did cause a loss to the market when the impact of defendants' fraud became clear through the company's reduced earnings. The appellate court agreed and "rejected 'a bright-line rule requiring an immediate market reaction' because '[t]he market is subject to distortions that prevent the ideal of a free and open public market from occurring.'" In short, the court held that plaintiffs' complaint presented a convincing case that the drop in Gilead stock price was caused by the warning letter. As the court stated, "It is not unreasonable that physicians – the targets of the off-label marketing – would respond to the [w]arning [l]etter while the public failed to appreciate its significance."

Plaintiffs' theory was well articulated in a succinct complaint, drafted by Coughlin Stoia attorneys **David J. George** and **Robert J. Robbins**. Coughlin Stoia special counsel **Susan K. Alexander** briefed and argued the case in the Ninth Circuit. According to George, a partner in Coughlin Stoia's Boca Raton, Florida office, this decision is a significant victory for shareholders because it makes clear that the losses caused by corporate fraud need not be recognized instantaneously to be compensable. "Just because fraud is well hidden does not mean that the harm it causes should not be remedied."

In re Gilead Sciences Inc. Sec. Litig., No. 06-16185, 2008 U.S. App. LEXIS 17076 (9th Cir. Aug. 11, 2008).

Appeal to the Ninth Circuit
No Removal for *Countrywide*

In a case of first impression, a unanimous three-judge panel of the Ninth Circuit Court of Appeals has ruled that class-action plaintiffs who filed federal securities-law claims in California state court could not be forced to pursue their action in federal court. The panel's opinion analyzes the interplay between the Class Action Fairness Act of 2005 ("CAFA") that permits defendants to "remove" many class actions from state to federal court, and the anti-removal provisions of the Securities Act of 1933 (the "1933 Act"), which provides for concurrent jurisdiction in state and federal courts.

The federal appeal arose out of the multi-billion-dollar mortgage-backed securities debacle allegedly perpetrated by Countrywide Home Loans Servicing LP and various entities, including Countrywide subsidiaries, loan trusts, and underwriters. Plaintiffs originally filed their class action in Los Angeles County Superior Court, asserting violations of the 1933 Act arising from false and misleading registration statements and prospectuses. Section 22(a) of the 1933 Act expressly provides (with a limited exception not at issue in the case) that no 1933 Act case brought in any state court of competent jurisdiction may be removed to any federal court.

Despite the 1933 Act's prohibition against removal, the Countrywide defendants removed the case to a federal district court under CAFA's broad removal provisions aimed at class actions of "national importance." After plaintiffs briefed the issue in the district court, the federal judge agreed with plaintiffs' argument that removal of the case to federal court was improper and granted their motion to remand the action back to state court.

Although remand orders are not ordinarily appealable, defendants invoked a CAFA provision allowing them to petition the Ninth Circuit Court of Appeals for an immediate, permissive appeal. The Ninth Circuit agreed to hear defendants' appeal, and ordered the parties to submit accelerated, simultaneous briefing with oral argument scheduled soon afterward.

Two days after the July 14 oral argument, the panel published a unanimous opinion agreeing with the arguments made by plaintiffs. Citing a canon of statutory interpretation, the Ninth Circuit ruled that defendants could not use CAFA to remove a 1933 Act case from state court. The court held that CAFA's general grant of the right of removal of high-dollar class actions involving diverse parties does not trump §22(a)'s long-standing, specific bar to removal of cases arising under the 1933 Act.

Coughlin Stoia partner **Joseph D. Daley** argued the appeal and was pleased by the court's ruling: "The published opinion isn't very long – just eight pages – but its analysis tracks the main points we made in plaintiffs' briefing and at oral argument. We are gratified that the Ninth Circuit affirmed injured investors' right to the forum of their choice when bringing 1933 Act claims."

Luther v. Countrywide Home Loans Servicing LP, No. 08-55865, 2008 U.S. App. LEXIS 15115 (9th Cir. July 16, 2008).

For more information on these and other cases, check out our website at csgrr.com

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Coughlin Stoia Named One of Southern California's Leading Litigation Firms

The *Daily Journal* recently added Coughlin Stoia to its list of leading Southern California law firms, highlighting the addition of a powerful patent litigation group headed by **John Herman** and **Ryan K. Walsh** and the Firm's stellar performance over the last year.

The publication recognized several of Coughlin Stoia's litigation achievements, including a $600-million settlement with Cardinal Health Inc. negotiated by **Henry Rosen**, a $25-million settlement in a stock options backdating action brought against Activision, Inc. led by Firm co-founder **Darren J. Robbins,** and the appellate argument made by lawyers in Coughlin Stoia's consumer practice group to preserve a $138-million judgment against Farmers Group Inc.

Coughlin Stoia was also commended for its landmark shareholder recovery of over $7 billion in the *Enron* securities class-action litigation.

UnitedHealth Settlement continued from page 1

of novel legal argument, defendants' own documents, and testimony did just that. On June 4, Magistrate Judge Noel ordered that defendants produce the previously withheld documents to plaintiffs.

Next, plaintiffs moved the court to unseal the record and publicly expose the company's fraudulent options practices. The court ordered that certain previously redacted facts and evidence revealing the true scope of defendants' fraud be made available to the public.

With a court order requiring UnitedHealth to produce documents defendants considered to be work product, and the knowledge that devastating information would be made available for all the world to see, plaintiffs gave defendants no choice but to come to the bargaining table and resolve the case.

Shortly after reaching the $895-million settlement with the company, the remaining defendants, former CEO William W. McGuire and former General Counsel and Corporate Secretary David J. Lubben, also entered into a preliminary settlement of the action. McGuire will pay $30 million and return stock options representing more than 3 million shares to shareholders,

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Fruit of the Loom Appellate Briefs Resolved

On July 18, the Sixth Circuit issued a published opinion rejecting a challenge to class notice of settlements entered in two separate securities class actions brought against Fruit of the Loom, Inc.

In 2005, Coughlin Stoia obtained a $23.2-million settlement of an action filed on behalf of investors who purchased Fruit of the Loom stock between July 24, 1996 and September 5, 1997, and a further $19.1-million settlement of a second action filed on behalf of investors who purchased stock between September 28, 1998 and November 4, 1999.

Notice of the settlements was formally approved by the district court and provided to investors through 84 entities, including major brokerage houses. Notice of the settlements was mailed to investors 46 days before the deadline to opt out of or object to the settlements. The brokerage houses were asked to either provide a list of beneficial owners to the claims administrator, who would then mail the notice, or forward the notice to the beneficial owners themselves. Additionally, notice of the settlements was provided to investors by publication in the national edition of *Investor's Business Daily* and on the Internet.

Nevertheless, a sole investor who had purchased Fruit of the Loom stock during the period covered by the second settlement filed a late objection, complaining that notice to the two classes was inadequate. Specifically, the investor's stockbroker had failed to take the steps necessary to ensure that he received notice of the proposed settlement before the deadline for objecting or opting out had passed. The investor, who held in street name and received his notice late, argued that not enough time was afforded to securities holders who held in street name to receive notice through their nominees. Although the investor could come up with no substantive objection to the terms of either settlement, he insisted that defective notice procedures meant the settlements could not be approved.

The district court rejected the investor's arguments and approved the settlements in an opinion published on March 17, 2006. In response, the investor filed an appeal to the Sixth Circuit, which was fully briefed by the summer of that year. More than two years later, the Sixth Circuit published its opinion, definitively rejecting the investor's contentions.

The Sixth Circuit emphasized that the 46 days provided between the initial notice to brokerage houses and the deadline for objections and opt outs "was significantly longer than the notice periods approved by the Ninth and the Tenth Circuits in similar securities class action cases." Moreover, the Sixth Circuit noted that when the investor's own brokerage house "did not respond to the initial notice letter, the claims administrator sent two follow-up letters on January 4, 2006 and January 20, 2006." Ultimately, the Sixth Circuit held that the lead plaintiffs and their counsel had done all that was reasonably required to ensure that class members received timely notice of the settlements. Further, the Sixth Circuit held that the investor had not suffered prejudice from his stockbroker's failure to act in a timely fashion because the district court had considered and rejected his objection to the settlement on the merits.

Coughlin Stoia partner **Eric Alan Isaacson**, who briefed the appeal, remarked that "it's a shame that one class member's complaints about a communications problem between him and his personal stockbroker held things up for more than two years, even though he could not identify shortcomings of any kind in terms of either settlement. They were excellent results, and it's about time we got on with things." Isaacson added that "the Sixth Circuit's opinion should help to obviate similar delays in other cases."

Fidel v. Farley, 534 F.3d 508 (6th Cir. 2008).

Sprint Nextel Big Refund for Consumers

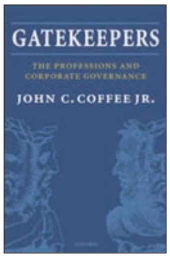
An Alameda County Superior Court judge issued a preliminary ruling ordering Sprint Nextel Corp. to refund $18.25 million to California consumers who were forced to pay big early termination fees ("ETFs") to get out of their mobile-phone contracts. According to the ruling issued by Judge Bonnie Sabraw, Sprint broke consumer law by charging ETFs.

In its mobile-phone contracts, Sprint characterized the imposition of ETFs as liquidated damages. Under California law, a company must satisfy several conditions before it may impose liquidated damages in a consumer contract, including that the amount of damages be reasonable. Plaintiffs argued that Sprint failed to comply with this condition, and the court agreed, holding that "the Sprint ETF is an unlawful penalty." In addition to ordering that Sprint refund $18.25 million to those class members who paid their ETFs, Judge Sabraw will also require that the company credit $54.75 million to class members with unpaid ETF charges on their Sprint bill. According to counsel for the class, Coughlin Stoia partner **Jeffrey W. Lawrence**, "This is a victory for every cell phone user who's been defrauded by illegal and deceptive charges. Frustrated cell phone customers are fighting back – and winning."

The telecommunications industry had unsuccessfully argued that the matter of fees and rates should be subject to federal regulations, rather than those of the states. **Chris Murray**, senior legal counsel for Consumers Union, said he hoped the California court decision would "drive a stake through the heart" of the industry's hopes for removing state regulators from having oversight over the fees.

A hearing to finalize the court's judgment will be held in early October.

Ayyad v. Sprint Spectrum, L.P., No. RG03-121510, Proposed Statement of Decision (Alameda County Sup. Ct., Cal. July 28, 2008).



Gatekeepers: The Professions and Corporate Governance

John C. Coffee, Jr.
Oxford University Press

A number of professional advisors, including auditors, attorneys, rating agencies and analysts, are trusted with informing and alerting boards and shareholders to malfeasance. Yet, as the Enron debacle illustrates, these gatekeepers often fail to provide a useful warning. In his new text, *Gatekeepers: The Professions and Corporate Governance*, Professor and author John C. Coffee, Jr. takes an in-depth look at the professionals who provide expert services to corporations, boards and investors – and critically examines their shortcomings.

Coffee proposes a unique thesis: "[B]oards of directors are prisoners of their gatekeepers. No board of directors – no matter how able and well-intentioned its members – can outperform its professional advisors. Only if the board's agents properly advise and warn it, can the board function effectively." Coffee, the Adolf A. Berle Professor of Law at Columbia University, defines a gatekeeper as an agent who "acts as a reputational intermediary to assure investors as to the quality of the 'signal' sent by the corporate issuer." For the purpose of investors, who don't have access to inside information, the vouchsafe of an auditor or credit rating agency helps "reduce informational asymmetries," thereby increasing market transparency.

The question that Coffee poses is simple: Can the gatekeeping professions be trusted as watchdogs, when they are paid and fed by the same corporate managers they are hired to watch?

The gatekeeping professions have two principal motivations, which are somewhat in conflict – a desire for material gain, and a need to protect their reputation for accuracy and honesty – what Coffee terms "reputational capital." The events of the past decade suggest that the value of reputational capital has declined, and the gatekeeping professions look first to who rewards them most generously. Numerous conflicts abound: for example, as auditing firms began to add lucrative consulting services, the potential loss of consulting revenue compromised frank auditing – we need look no further than Arthur Andersen's Enron-linked demise.

Coffee's thesis places gatekeepers in a central role in corporate governance and examines how the role of the professions has evolved over time. Filling in this "blind spot" in governance studies is critical to developing real avenues of reform – one of which remains strong legal remedies, including the class action. For Coffee, the "deterrent threat of litigation is essential to holding gatekeepers accountable," but it is "not sufficient by itself" and does not offer a "'magic bullet solution.'" Refreshingly, Coffee proposes restoring "aiding and abetting" liability, acknowledging that the professions will need to be "dragged, some kicking and screaming, to any new world in which they both enjoy discretion, and face penalties, private or public, which are adequate to deter." Coffee's conclusions are intriguing and invite discussion.

UnitedHealth Settlement continued from page 5

while Lubben will pay an additional $500,000 to shareholders. The size of McGuire's settlement is "pretty amazing," according to **Charles Elson**, director of the Weinberg Center for Corporate Governance at the University of Delaware. Elson added that the settlement with McGuire is a "significant accomplishment" that "doesn't happen very often."

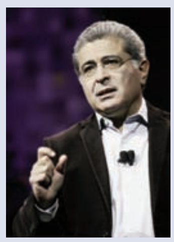
Overcoming serious obstacles, CalPERS and Alaska have recovered an unprecedented settlement for shareholders, and additional corporate governance measures that will ensure greater oversight in executive compensation in the future. The case is monumental for shareholders seeking to recover losses sustained as a result of improper accounting for backdated stock options and is the 10th largest recovery in a securities class action in U.S. history.

In re UnitedHealth Group Inc. PSLRA Litig., No. 06-1691JMR/FLN (D. Minn).

FAT CAT

Ousted Yahoo! Inc. CEO Terry Semel took home more than half a billion dollars before a board uprising forced him out of the position.

Semel's personal profit, made possible in part by big insider sell-offs and "perfect payday" grant options, equates to $282,000 a day (including Sundays) over the course of his six-year tenure at the company.


Terry Semel

One of Semel's options grants occurred on March 10, 2004 – the low-water mark of Yahoo! stock. Within a month, Yahoo! stock rose and netted Semel $50 million. In 2006, Yahoo!'s stock fell 35%, but Semel's bonus was still delivered with another 800,000 in stock options. The good news? Receiving word of Semel's ouster, investors cheered and Yahoo! stock rallied.

Calendar of Upcoming Events

October 26-29, 2008

Socially Responsible Investment ("SRI") Industry
19th Annual SRI in the Rockies Conference

Fairmont Chateau Whistler
Whistler, British Columbia, Canada

SRI in the Rockies is an annual gathering of socially responsible investment industry practitioners and related organizations. A professional conference, SRI in the Rockies offers many opportunities to meet and learn from passionate, creative people from all corners of the social investment community in the U.S. and around the world.

For more information, visit: www.sriintherockies.com

October 27-28, 2008

Information Management Network ("IMN")
9th Semiannual Native American Finance Conference

Foxwoods Resort and Casino
Ledyard, Connecticut

IMN's Native American Finance Conference ("NAFC") returns to Foxwoods Resort and Casino in Ledyard, Connecticut for its ninth installment, and promises to be IMN's biggest East Coast conference to date. IMN's NAFC events have become the forum for sharing of ideas and information related to Native American financial issues. The conference will include thought-provoking panel discussions from top-notch speakers, combined with excellent networking opportunities. NAFC East brings together Tribal finance leaders with representatives from Wall Street's leading investment banks and legal experts for two days of discussion on financial issues facing Indian Country.

For more information, visit: www.imn.org

November 11-12, 2008

Pensions & Investments and Nomura Securities
2nd Annual Global Pension Symposium

Mandarin Oriental
Tokyo, Japan

Featured Speakers: **Darren J. Robbins** and **Paul J. Geller**, Coughlin Stoia Geller Rudman & Robbins LLP

Pension funds in Japan face many of the same problems as those in the U.S. – under-funding, low interest rates, aging participant and beneficiary populations and the challenge of finding alpha. This conference gives asset managers the opportunity to highlight the many solutions that are being developed to address these issues, including new plan governance and fiduciary management structures, liability driven investing and portable alpha strategies. In searching for asset allocation solutions, many plan sponsors are considering new investment arenas such as emerging markets, infrastructure and commodities, while reconsidering some more familiar areas such as real estate, private equity and hedge funds. This conference will illustrate how these tools can be used to provide customized solutions for Japanese plan sponsors.

For more information, visit: www.pionline.com

November 11-12, 2008

Information Management Network ("IMN")
The 8th Annual U.K. & Irish Pension & Investing Summit

O'Callaghan Davenport Hotel
Dublin, Ireland

The 8th Annual U.K. & Irish Pension & Investing Summit will bring pension leadership from Ireland and the U.K. together to network and learn about the latest practices in investment strategy and fund management. Over its seven-year history, IMN's U.K. & Irish Pension & Investing Summit has served to facilitate dialogue between pension leadership, investment managers and consultants on investment strategies and innovations unfolding in Ireland, the U.K. and in key U.S., European and Asian markets.

For more information, visit: www.imn.org

November 16-19, 2008

International Foundation
54th U.S. Annual Employee Benefits Conference

Henry B. Gonzalez Convention Center
San Antonio, Texas

This 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 services or who are involved in the overall management and administration of benefit trust funds.

For more information, visit: www.ifebp.org

December 13-16, 2008

Institute for International Research
The 17th Annual Public Fund Boards Forum

Westin St. Francis
San Francisco, California

Featured Speaker: **Darren J. Robbins**, Coughlin Stoia Geller Rudman & Robbins LLP

Meet fellow trustees from across the nation with over 170 fund representatives attending last year. Take advantage of over 100 years of collective experience to best position your fund to come out on top of the current credit crunch. Topics will include the best practices on board governance policies to maximize investment decisions and strategies to ultimately increase funded status.

For more information, visit: www.iirusa.com

December 16-17, 2008

Information Management Network ("IMN")
The Investors and Issuers Summit

La Quinta Resort and Club
La Quinta, California

IMN's Investors and Issuers Summit spotlights on the key infrastructure programs for U.S. municipal bond issuers and investors. Investors will gain an inside track on new and existing financing projects, and have ample networking opportunities with a range of entities from both the not-for-profit and government sectors. Topics will include Issuer/Investor Roundtables and panels dealing with Infrastructure finance ranging from Energy/Utilities to Stadium Financing.

For more information, visit: www.imn.org

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