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IN THIS ISSUE:

Feature 1:

Plaintiffs Win Jury Verdict in *Household* 1

Feature 2:

Investors Achieve Landmark Victories in *HealthSouth* 2,6

Feature 3:

The Future of Corporate Reform Public Funds Forum 3

Departments:

Litigation Update 4-6

Recommended Reading 7

Calendar of Upcoming Events 8

PLAINTIFFS WIN JURY VERDICT IN *HOUSEHOLD*

FEATURE 1

On May 7, a jury returned a verdict in favor of the plaintiff class in an action against Household International, Inc. ("Household"). The verdict followed a six-week trial before the Honorable Ronald A. Guzman in the United States District Court for the Northern District of Illinois. The jury found that Household and the individual defendants, William Aldinger, David Schoenholz and Gary Gilmer, collectively made 16 false and misleading statements concerning the Illinois lender's financial results and operations in violation of §10(b) of the Securities Exchange Act of 1934 ("1934 Act") and SEC Rule 10b-5. Although certain post-trial proceedings are ongoing, plaintiffs' counsel anticipate that the verdict will ultimately allow class members to recover between $1 billion and $3 billion in damages.

The *Household* case was tried by Coughlin Stoia Geller Rudman & Robbins LLP on behalf of court-appointed lead plaintiffs the **International Union of Operating Engineers, Local 132 Pension Plan, PACE Industry Union-Management Pension Fund**, and **Glickenhaus & Company**. Coughlin Stoia's trial team was led by partners **Michael J. Dowd, Spencer A. Burkholz** and **Daniel Drosman** of the Firm's San Diego office. In addition to the lead trial lawyers, other Coughlin Stoia attorneys also played key roles during the prosecution of the case and at trial. **Azra Z. Mehdi**, a San Francisco-based partner, was in charge of the Firm's pre-trial efforts. Associate **Luke O. Brooks** handled key assignments during both the pre-trial prosecution of the case and during the trial. **Cameron Baker**, Of Counsel, and associates **Jason C. Davis** and **Maureen E. Mueller** were also critical to plaintiffs' success at trial.

The jury determined that Household and the individual defendants made fraudulent misrepresentations concerning the company's predatory lending practices, the quality of its loan portfolio and the company's financial results between March 23, 2001 and October 11, 2002. The jury declined to find that other statements made by defendants prior to March 2001 were false and misleading.

During the relevant time period, William Aldinger was the company's Chief Executive Officer. In addition to finding that Mr. Aldinger knowingly violated §10(b) of the 1934 Act and SEC Rule 10b-5, the jury also found that Aldinger violated the control person provisions of the 1934 Act in connection with public statements made by other defendants. David Schoenholz was Household's Chief Financial Officer between 2001-2002 and was found responsible for his role in the fraud. The jury found that Mr. Schoenholz violated the control person provisions of the 1934 Act as well. Defendant Gary Gilmer headed Household's Consumer Lending Group between 1999-2002, during which time the majority of the predatory lending practices asserted by plaintiffs took place.

The jury also returned an award of per-share damages for each day between March 23, 2001 and October 11, 2002. The jury found that class members who submit valid claims could receive as much as $23 per share – depending on when they bought and sold their Household stock and the outcome of certain post-trial proceedings.

Since the enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), trials in securities fraud cases have been rare. According to published reports, only seven such cases have gone to trial since the passage of the PSLRA. Coughlin Stoia is well equipped to handle such trials. The Firm boasts over 20 former federal and state prosecutors among its partners and associates, as well as a number of other experienced trial lawyers. Coughlin Stoia is unique among firms that specialize in plaintiffs' class-action litigation in its ability to handle such cases. In addition to a wealth of trial experience, the *Household* trial was an excellent example of Coughlin Stoia's willingness to shoulder the burden of such litigation. In addition to the four partners and five associate attorneys who relocated to Chicago for approximately 70 days of pre-trial preparation, pre-trial hearings and trial, another 12 Coughlin Stoia employees, including forensic accountants, contract attorneys, paralegals, litigation support specialists and administrative assistants, were part of the team that moved to Chicago for the trial.

Despite the verdict for the plaintiff class, defendants claim that there must be a second trial at which they should be permitted to litigate whether certain class members actually relied on the integrity of the financial markets in deciding to purchase Household stock. Plaintiffs believe that defendants' arguments regarding the scope of post-trial proceedings should be limited. The court is expected to rule on the scope of the next phase of the litigation this summer.

Jaffe v. Household Int'l, Inc., No. 1:02-CV-05893 (N.D. Ill.).

FEATURE 2

INVESTORS ACHIEVE LANDMARK VICTORIES IN *HEALTHSOUTH*

For nearly a decade, HealthSouth Corp. ("HealthSouth"), its investment bankers UBS Warburg and UBS Securities LLC ("UBS"), and its outside auditor Ernst & Young LLP ("E&Y") perpetrated the largest and most pervasive securities fraud in the history of U.S. healthcare, causing billions of dollars in losses to investors. A team of attorneys at Coughlin Stoia Geller Rudman & Robbins LLP, led by co-founder **Patrick J. Coughlin**, recently achieved two decisive victories against E&Y and UBS on behalf of stockholders.

On March 23, stockholder plaintiffs **Central States, Southeast and Southwest Areas Pension Fund, Michigan Public School Employees Retirement System, State of Michigan Employees' Retirement System, Michigan State Police Retirement System, Michigan Judges Retirement System, New Mexico State Investment Council**, and **Educational Retirement Board of New Mexico** announced a preliminary settlement with E&Y for $109 million, the eighth largest securities class-action settlement entered into by an accounting firm since the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Additionally, on March 31, the Honorable Karon Owen Bowdre in the Northern District of Alabama certified a class of stockholders to proceed against UBS, rejecting the bank's defense that the Supreme Court's recent decision in *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.* shielded it from liability for defrauding the market.

Both litigation events follow on the heels of the landmark $445-million settlement HealthSouth investors recently reached with the company and certain of its former directors and officers. The settlement is among the top 15 settlements achieved against any defendant after the passage of the PSLRA. All three victories – the settlements with HealthSouth and E&Y and the class certification order against UBS – result from nearly six years of tenacious and hard-fought litigation.

HealthSouth is the nation's largest provider of outpatient surgery and rehabilitative healthcare services. Between 1997 and 2003, HealthSouth, UBS, and E&Y, led by former Chief Executive Officer Richard Scrushy, knowingly engaged in a massive fraudulent scheme. The fraud had several components. HealthSouth and its insiders reported false financial and operating results, "fixing" earnings shortfalls by entering fictitious accounting entries that totaled close to $2.7 billion by the end of 2002. Meanwhile, UBS funded the fraud, primarily by arranging and directly marketing bond offerings to investors, thereby enabling HealthSouth to raise sufficient cash to continue in business and pay taxes on the fictitious revenue. UBS also issued positive analyst reports on HealthSouth and structured dozens of acquisitions, credit facilities, and other transactions that kept HealthSouth afloat. Finally, E&Y turned a blind eye to the fraud, ignoring multiple red flags and issuing clean audit opinions, year after year, to maintain its lucrative relationship with HealthSouth.

This immense fraud ceased only after the FBI raided HealthSouth's corporate headquarters in March 2003. Subsequent to the raid, the New York Stock Exchange halted trading in HealthSouth stock indefinitely and the stock plunged to $0.10 per share. Mr. Scrushy, other HealthSouth executives, and E&Y were fired. Congressional and law enforcement entities launched inquires, resulting in guilty pleas of 15 former HealthSouth executives in federal criminal prosecutions, including all 5 former Chief Financial Officers. The Securities and Exchange Commission ("SEC") instituted enforcement actions against HealthSouth, UBS, and several of UBS's former and current bankers and analysts. In April 2007, HealthSouth settled with the SEC for $100 million. The SEC's enforcement actions against UBS and its former and current personnel are ongoing. Mr. Scrushy was indicted and acquitted on all charges in June 2005, but was convicted on non-related public corruption charges in June 2006 and is presently serving a six-year sentence in federal prison.

In the aftermath of these prosecutions, scores of private securities class actions were brought on behalf of HealthSouth investors against the company, UBS and E&Y. Over the past two years, Coughlin Stoia steadily dismantled UBS's core defense that UBS's "deceptive conduct" was purportedly non-public, behind-the-scenes, and amounted to nothing more than UBS "whisper[ing] in a client's ear." In January 2007, Judge Bowdre wholly rejected UBS's characterization of its own conduct, finding that plaintiffs' allegations involved far more than "UBS merely whispering in the ears of HealthSouth. . . . [UBS's] conduct can, in fact, be the basis for a 10b claim." A year and a half later, in May 2008, UBS filed a special motion contending that the Supreme Court's decision in *Stoneridge* required the dismissal of plaintiffs' complaint, arguing once again that UBS's deceptive conduct was non-public and behind-the-scenes.

By then Coughlin Stoia, along with a group of forensic accountants and other experts, had conducted rigorous and extensive fact and expert discovery, including the review of 83 million pages of documents produced by defendants and nonparties and the taking and defending of 130 fact and expert witness depositions.

During the discovery process, Coughlin Stoia uncovered key evidence that exposed UBS's deceptive conduct regarding HealthSouth's bond offerings. This evidence included that UBS targeted the equity market during the public marketing of the offerings and that UBS sent financial models of the bond offerings' positive impact on HealthSouth's stock price to equity investors. Coughlin Stoia also uncovered evidence of UBS boasting to the HealthSouth board about the positive impact of the bond offerings on the price of HealthSouth's stock.

Based in part on submissions of this key evidence by Coughlin Stoia, in March Judge Bowdre issued an order holding that UBS's deceptive conduct and misrepresentations "were not behind the scenes, in

Continued on page 6

THE FUTURE OF CORPORATE REFORM PUBLIC FUNDS FORUM

FEATURE 3

The global financial crisis has revealed critical weaknesses in the regulation of U.S. capital markets, with devastating consequences for public funds and pensions. While some are bemoaning their losses, others are gathering to take action. This fall, representatives from public funds across the country will meet in San Diego, California to share the tools critical to help create a future which includes robust oversight and accountability in corporations and financial markets.

Recognized internationally for its independent corporate governance information and analysis, **The Corporate Library** will be hosting **The Future of Corporate Reform Public Funds Forum** from September 8-10 at the Hotel del Coronado. Sponsors at the conference include Coughlin Stoia Geller Rudman & Robbins LLP, the premier plaintiffs' securities litigation firm, and Gilardi & Co. LLC, class-action administration experts. The exclusive conference is designed to give representatives of public pension systems the knowledge and tools to repair the markets, shape corporate reform and create long-term value.

Institutional investors will join leading academic and political thinkers to provide solutions through changes in public policy, litigation, and investment strategy to restructure corporations and ensure that they deliver on the promise of wealth creation for shareholders and society. Attendees will share analyses with corporate governance thought-leaders and participate in three days of informative panel sessions, mixed with informal networking opportunities around the beautiful San Diego coast.

The educational sessions offered at the conference will be led by a dynamic and diverse group of experts. **President Bill Clinton** will deliver the keynote address and reflect on the challenges facing public funds today. President Clinton will also share his unique insight on the challenges of globalization, our growing interdependence and the way toward a common future based on shared goals and values.

Nassim Nicholas Taleb, noted author of *The New York Times* bestsellers *The Black Swan* and *Fooled by Randomness*, will discuss how rare events in the equity markets can arise as outliers beyond the predictive reach of the computer models used by Wall Street's Ph.D. "quants" and how human investment psychology can be re-examined to build resilience to unexpected events.

President Bill Clinton
Founder of the William J. Clinton Foundation, 42nd U.S. President

Nassim Nicholas Taleb
Author of *The New York Times* Bestsellers *The Black Swan* and *Fooled by Randomness*

Ben J. Stein
Attorney, Economist, Hollywood Personality

Luminaries from the communities of academia, pension fund management and private investment are also among the speakers at the conference and will dissect what went wrong – from the breakdown in regulatory agency oversight to how the "smartest people in the world" inadvertently created a disaster of financial engineering gone awry. Speakers include **John C. Bogle**, founder of The Vanguard Group, Inc., respected securities and corporate law professor **Frank Partnoy**, and **Robert A.G. Monks**, referred to by *Fortune* and *The Economist* magazines as the world's leading shareholder activist and governance advocate. **Matthew Bishop,** renowned business editor of *The Economist*, and **Knut N. Kjaer**, former Chief Executive Officer of Norges Bank Investment Management, will give an international perspective on the global equity markets.

Denise L. Nappier, State Treasurer of Connecticut, **Lucian Bebchuk**, Director of the Program on Corporate Governance at Harvard Law School, **Richard C. Ferlauto**, Director of Corporate Governance and Pension Investment for the American Federation of State, County and Municipal Employees, **Rocky Delgadillo**, Los Angeles City Attorney, **Gary D. Preszler**, Commissioner of the North Dakota State Land Department, and others will address why the successful future of corporate reform and avoidance of future calamities require collaboration and participation from boards of directors, regulatory agencies and government. Speakers including **Ben J. Stein**, economist and Hollywood personality, **Ralph V. Whitworth**, founder of Relational Investors LLC, and **Barbara Hackman Franklin,** former U.S. Secretary of Commerce, will detail investment strategies that emphasize long-term sustainable returns. Additionally, **Darren J. Robbins** and **Byron S. Georgiou** of Coughlin Stoia Geller Rudman & Robbins LLP and **Peter H. Mixon**, General Counsel of the California Public Employees' Retirement System, will present a case study of successful corporate governance reforms achieved through private securities litigation.

The Future of Corporate Reform is this year's must-attend conference. Participants and speakers alike will develop new contacts and exchange views while taking advantage of networking activities, including a clambake on the beach, closing day at the Del Mar horse races and a barbeque on the track, racing aboard the America's Cup yacht or a hot air balloon tour of the panoramic Del Mar coastline.

For the most current information about speakers, the sessions agenda and to register, please visit www.TCLconferences.com or contact The Corporate Library at (207) 874-6921.

LITIGATION update

Motion to Dismiss
No Cure for America Service Group

Lead plaintiff **MARTA/ATU Local 732 Employees Retirement Plan** ("Local 732") recently scored a major victory for investors in America Service Group, Inc. ("ASGR") when its complaint detailing a two-and-a-half-year scheme by the company to cut costs by manipulating drug prices and deliberately withholding necessary medical treatment from prison inmates under its care was upheld by the Honorable William J. Haynes, Jr. in the Middle District of Tennessee.

The complaint seeks recovery on behalf of a class of investors who purchased ASGR securities between September 24, 2003 and March 16, 2006. Among the injured investors is the **Plumbers and Pipefitters Local 51 Pension Fund**, which, although not serving as a lead plaintiff, initiated one of the first lawsuits against the company and continues to appear as a named plaintiff alongside Local 732 in its efforts to obtain full recovery on behalf of all defrauded investors.

The 150-page complaint filed by Coughlin Stoia Geller Rudman & Robbins LLP on Local 732's behalf details a complex scheme to mislead investors into believing that ASGR, which had repeatedly struggled with cost control issues in its history as a public company, had successfully cut costs to levels necessary to begin earning profits on the government contracts under which it operates. Local 732 alleges that ASGR had been artificially reducing its costs through a variety of fraudulent business practices, including deliberately understaffing the health clinics it operated in prisons around the U.S., refusing to provide expensive medical treatments to inmates under its care, overcharging prisons for prescription drugs, and failing to credit prisons for returned drugs and then reselling those drugs to other prisons at inflated prices.

ASGR's misconduct came to light through a series of public disclosures, beginning with a three-part exposé published on the front page of *The New York Times* in February 2005, which detailed hundreds of incidents around the country in which inmates were sickened or died as a result of the company's deliberate practices. Later that year, ASGR announced an internal investigation of price manipulation by its pharmaceutical subsidiary, which ultimately resulted in an extensive restatement of the company's reported financial results. While that investigation was ongoing, three members of ASGR's audit committee resigned from the company's board of directors, including committee chair Michael Gallagher, who left after making a public declaration that the company's chairman, defendant Michael Catalano, could not be trusted to run the company.

In a 100-page opinion upholding the complaint in nearly all respects, Judge Haynes specifically found that Local 732 had sufficiently alleged that ASGR's misleading practices were "widespread and systemic" such that the case should be permitted to go forward to discovery. "We are extremely pleased with the court's ruling, which reflects a thoughtful, careful and detailed analysis of the complex facts and interrelated circumstances demonstrating that ASGR's purported cost-saving achievements were nothing but a sham," said Coughlin Stoia partner **Dennis J. Herman**, who is spearheading the litigation. "We look forward to obtaining the company's internal records, which will provide the detailed information necessary to prove Local 732's claims and recover the millions of dollars lost by defrauded investors."

In re America Service Group, Inc., No. 3:06-CV-00323, 2009 U.S. Dist. LEXIS 28237 (M.D. Tenn. Mar. 31, 2009).

Motion to Dismiss
Apollo Learns a Lesson

A class action against Apollo Group, Inc. ("Apollo") is moving forward after the Arizona District Court rejected efforts by the defendants to have the case dismissed. Apollo, which was dubbed a "poster child of poor [corporate] governance" by a leading New York research firm, is a provider of on-line education services. Beginning in May 2006, Apollo's stock price began a precipitous decline as revelations of stock options backdating began to leak into the market, causing extensive losses to investors.

In late 2007, lead plaintiff **Pension Trust Fund for Operating Engineers**, represented by Coughlin Stoia Geller Rudman & Robbins LLP, filed a consolidated complaint against Apollo and certain of its top executives and directors. The consolidated complaint alleges that Apollo inflated its reported income and earnings by failing to account for backdated stock options, which allowed Apollo to provide undisclosed windfall bonuses to its executives and employees. As detailed in the consolidated complaint, by backdating these options, Apollo was able to grant options to its executives at the lowest price of the year in 2000, 2001, 2002 and 2004, resulting in large insider trading gains. Apollo was later forced to restate its financial statements for five years and admit that the company prepared and maintained false documentation regarding the stock option grants.

On March 31, after having received 154 pages of briefing on defendants' motions to dismiss, the Honorable Robert C. Broomfield substantially denied defendants' motions to dismiss lead plaintiff's §10(b) claims against Apollo, its former Chief Executive Officer ("CEO"), former Chief Financial Officer ("CFO"), and two outside directors who served on Apollo's compensation committee.

After examining the allegations, Judge Broomfield held that lead plaintiff had pled a strong inference of *scienter* as to these defendants. With respect to Apollo's former CEO and CFO, the lead plaintiff alleged that they received backdated stock options, made false and misleading statements, signed inaccurate Sarbanes-Oxley certifications, profited from insider trading, violated Apollo's stock option plans, failed to monitor the stock option granting process, and were supposedly unaware of simple accounting rules. Such allegations,

Continued on page 5

Litigation Update continued from page 4

the court held, were sufficient to plead a strong inference of *scienter* and to defeat their motions to dismiss.

The court also rejected defendants' contention that there was a more compelling innocent explanation for Apollo's restatement and stock option errors. Defendants asserted that because the SEC had closed an investigation into Apollo's stock option granting practices without recommending any enforcement action, it could be inferred that no misconduct occurred. The court rejected this contention, noting that under the relevant SEC regulations, such a "purported defense [was] . . . clearly inappropriate and improper." Defendants also asserted that, at most, Apollo had "'failed . . . to dot all 'i's and cross all 't's when completing the paperwork necessary to grant stock options,'" and that such conduct did not amount to fraud. The court rejected this argument as well, noting Apollo's admissions that "former officers took steps that may have been intended to mask failures in the grant approval process," and holding that lead plaintiff's allegations were "neither 'trivial [n]or irrelevant,'" but rather created an inference that defendants "acted with knowledge or at least were deliberately indifferent as to the falsity of their statements."

"Defendants' motions to dismiss are a classic example of an attempt to 'gain dismissal by de-contextualizing every statement in a complaint,' which the court correctly rejected," said Coughlin Stoia partner **Jeffrey W. Lawrence**. "The court's order is an important step in our efforts to secure a recovery for Apollo's aggrieved shareholders."

Teamsters Local 617 Pension & Welfare Funds v. Apollo Group, Inc., No. 06-CV-02674, 2009 U.S. Dist. LEXIS 31832 (D. Ariz. Mar. 31, 2009).

Motion to Dismiss
Call Drops on UTStarcom

Plaintiffs advanced their case against UTStarcom, Inc. ("UTSI") and certain of its directors when the defendants' motions to dismiss their class action were rejected. In March, the Honorable James Ware in the United States District Court for the Northern District of California issued an order denying defendants' motions to dismiss in their entirety, ruling that the allegations brought by plaintiffs properly satisfied the legal standards required by the Private Securities Litigation Reform Act of 1995 ("PSLRA").

Lead plaintiffs **Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust** and Erwin DeBruycker, represented by lead counsel Coughlin Stoia Geller Rudman & Robbins LLP, alleged that UTSI defrauded investors through false and misleading statements during the February 21, 2003 to October 12, 2007 class period. As detailed in the complaint, certain UTSI officers misled investors concerning the company's present and future financial results and projected demand for their products. UTSI, an Alameda-based wireless technology manufacturer, was forced to restate its financial statements three times and "admitted that every financial statement [issued by the company] during the class period was materially false and misleading."

On March 27, Judge Ware issued a ruling rejecting defendants' arguments for dismissal in their entirety, declaring that plaintiffs had met the pleading standards required by the PSLRA regarding issues of falsity, *scienter*, and loss causation. In his order, Judge Ware cited that defendants, including UTSI officers Hong Liang Lu and Michael J. Sophie, made knowingly false statements about UTSI's future financial results and demand for their products. Moreover, the court found that defendants had "knowledge of declining foreign business while simultaneously making statements about increases in foreign business, as well as unreasonably optimistic financial guidance relating to the [c]ompany's foreign business," and that defendants had made large transactions of UTSI securities while "[d]efendants possessed undisclosed information that had the potential to negatively impact the stock price."

Coughlin Stoia partner **Christopher P. Seefer** commented, "Judge Ware's decision to uphold the complaint is a decisive win for UTStarcom shareholders as it allows the case to proceed to discovery and gives plaintiffs the opportunity to further examine the alleged fraud defendants perpetrated on the class. We look forward to aggressively pursuing plaintiffs' claims in the next phase of the litigation."

In re UTStarcom, Inc. Sec. Litig., No. C-04-4908, 2009 U.S. Dist. LEXIS 36864 (N.D. Cal. Mar. 27, 2009).

Motion for Class Certification
Class Moves Forward in Abercrombie

The City of Dearborn Heights Act 345 Police and Fire Retirement System ("Dearborn Heights"), represented by lead counsel Coughlin Stoia Geller Rudman & Robbins LLP, recently prevailed on its motion to certify a class in the case against Abercrombie & Fitch Co. ("Abercrombie") pending in the United States District Court for the Southern District of Ohio. On May 21, the Honorable Edmund Sargus granted Dearborn Heights' motion in its entirety and certified a class of institutions and individuals who bought stock in the clothing company between June 2, 2005 and August 16, 2005.

The class certification motion was vigorously litigated for over a year, during which time Dearborn Heights produced substantial documents to the defendants and provided deposition testimony through its treasurer, **John J. Riley II**. Five briefs were filed, three by Dearborn Heights and two by defendants, and a hearing was held before Judge Sargus on March 24.

Judge Sargus' opinion, issued on May 21, is very thorough and renders holdings on several important points for plaintiffs, including: (i) when conducting a rigorous analysis of Rule 23 requirements, a court cannot pass judgment on the merits of a claim, including a plaintiff's loss causation theory or fraud on the market; (ii) the timing of a plaintiff's purchase does not create a unique defense that renders it atypical of other class members; and (iii) Dearborn Heights "has vigorously prosecuted the interests of the class through qualified counsel and will likely continue to do so." The court also held that expert matters "address the merits of

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

Continued on page 6

Litigation Update continued from page 5

[p]laintiff's claims, and cannot be adjudicated at the class certification stage."

"Plaintiff Dearborn Heights and its treasurer Mr. Riley have devoted considerable time to obtaining the certification of the class," said Coughlin Stoia partner **Laura Andracchio**. "We are pleased with this outcome and look forward to continuing the litigation on plaintiff's behalf."

Ross v. Abercrombie & Fitch Co., No. 2:05-CV-00819, 2009 U.S. Dist. LEXIS 43289 (S.D. Ohio May 21, 2009).

Certified Questions to Washington Supreme Court
Backdating Shenanigans at F5 Networks

Handing down a major victory for shareholders, the Washington Supreme Court recently ruled in a unanimous opinion that "Washington is a demand futility state." In so holding, the court agreed with investors who brought a derivative action on behalf of F5 Networks, Inc. ("F5") that shareholders are excused from making demands on the company's board of directors before filing their derivative suit where such demand would be futile.

Plaintiffs' action arose from alleged stock option backdating at F5, a Washington corporation. The complaint alleges that 17 of the company's officers and directors engaged in a scheme to grant in-the-money stock options to themselves and others, and made off with over $161 million by exercising these backdated options. The complaint also details the substantial harm defendants' misconduct caused to the company and its shareholders.

F5 sought dismissal of the case on the grounds that the shareholders failed to make a presuit demand on the company's board of directors. F5 urged the court to apply a "universal demand" standard that requires shareholders to first make a demand on the board as a prerequisite to filing a derivative action in all but extraordinary circumstances. Plaintiffs argued that the court should follow Delaware's demand futility standard, under which a demand is deemed futile if there is a reasonable doubt that the company's directors are independent or that the challenged transaction is the product of a valid exercise of business judgment.

Unsure of which standard to apply, the Honorable Robert S. Lasnik of the United States District Court for the Western District of Washington certified two questions to the Washington Supreme Court. First, Judge Lasnik asked the high court to decide the applicable demand futility standard in Washington. Next, he asked the court to determine whether Washington follows Delaware's seminal case, *Ryan v. Gifford*, in derivative actions that allege stock options backdating.

The Washington Supreme Court held that the applicable statute in Washington provides for demand futility. "The legislature clearly contemplated that there would be times demand would not be made and did not, as they could, require dismissal," said Justice Tom Chambers, writing for the court. "Instead, they required the plaintiff to tell the court why, giving the court the opportunity to decide whether demand was excused. Had the legislature intended to impose a universal demand standard, it would have said so more clearly."

The court further determined that Washington follows Delaware's demand futility standard. Noting that the Delaware courts are "well versed in this area," the court concluded that "Washington is a demand futility state and follows Delaware." Moreover, with respect to derivative actions where options backdating is alleged, the Washington Supreme Court held that Washington courts should follow the reasoning set forth in *Ryan*, which allows plaintiffs to "rely on circumstantial evidence that tends to show a pattern indicative of wrongdoing" to demonstrate demand futility. The court explained that "'[g]iven the choice between improbably good fortune and knowing manipulation of option grants, the [c]ourt may reasonably infer the latter,' at least for the purposes of meeting the threshold burden of showing that a demand upon the board would be futile."

Coughlin Stoia partner **Kevin K. Green** and **Daniel J. Morrissey**, a professor of law at Gonzaga University School of Law, argued the case before the Washington Supreme Court. "The court is saying in these types of situations, we don't think the incumbent board should have the right to delay or block these lawsuits if there is enough evidence to prove they have been complicit," Morrissey said. "I think the Delaware standard is a good one and is a great precedent for the whole country."

In re F5 Networks, Inc. Deriv. Litig., 207 P.3d 433 (Wash. 2009).

HealthSouth continued from page 2

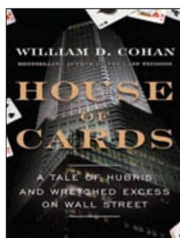
the shadows, nor immaterial to the mix of information on which the market relied." The court found that "the false analyst reports and the public funding activities undertaken and engaged in by UBS were a necessary and an inextricably intertwined part of [the HealthSouth] fraud." Judge Bowdre then certified a class of stockholders to pursue their claims against UBS for defrauding the market.

"Thousands of HealthSouth investors have suffered enormous losses as a result of UBS's deceptive conduct and misrepresentations. *Stoneridge* says deceptive conduct has to impact the market. Judge Bowdre found that UBS's conduct did," said Mr. Coughlin. "Coughlin Stoia will continue to rigorously prosecute UBS until a just and sound result is achieved for HealthSouth investors."

UBS has appealed Judge Bowdre's class certification order to the United States Court of Appeals for the Eleventh Circuit.

In re HealthSouth Corp. Sec. Litig., No. CV-03-BE-1500-S, 2009 U.S. Dist. LEXIS 33967 (N.D. Ala. Mar. 31, 2009); *In re HealthSouth Corp. Sec. Litig.*, No. CV-03-BE-1500-S, Final Judgment and Order of Dismissal with Prejudice as to Ernst & Young LLP (N.D. Ala. Jun. 12, 2009).

Recommended Reading



House of Cards: A Tale of Hubris and Wretched Excess on Wall Street

William D. Cohan
Doubleday; March 2009

In early March 2008, the fabled Wall Street brokerage Bear Stearns found itself in a death spiral: imploding derivatives bets in the billions made with dangerous amounts of borrowed money, with panicking investors pulling out their capital. The hour-by-hour story of the collapse of Bear Stearns is ably told by author William D. Cohan, a former bond trader and author of *The Last Tycoons* (about Lazard Frères).

The book benefits from Mr. Cohan's first-hand knowledge of the greed, self-deception, and human mechanics of Wall Street finance, and his seemingly open access to the top players at Bear Stearns, including disgraced Chief Executive Officer Jimmy Cayne and Warren Spector and other brokers. The book's title, "House of Cards," evokes Messrs. Cayne and Spector's passion for the card game Bridge – and Mr. Cayne found himself ousted not long after it was revealed that he had snuck out of town to play in a Bridge tournament during a crucial moment in the crisis.

Bear Stearns once enjoyed a reputation as one of the world's largest and most hard-nosed investment banks, securities traders and brokerage companies. During 2003-2007, Bear Stearns had made a killing aggressively investing in "mortgage-backed securities instruments," or, in other words, derivatives, as part of its "vertically integrated mortgage franchise, allowing us access to . . . origination, securitization, distribution and servicing." In mid-2007, when two of Bear Stearns' hedge funds (both heavily exposed to these derivatives) began to melt down, the firm found itself increasingly unable to meet margin calls and obtain essential overnight financing. The self-deception and denial rampant at Bear Stearns was illustrated by hedge fund manager Ralph Cioffi's reassurance that "we're going to make money on this," despite the fact that sub-prime mortgage-backed securities were detonating like land-mines.

Having once traded at $176 per share, the firm that *Fortune* magazine had nominated as "America's most admired securities firm" found itself on the auction block, sold to JPMorgan Chase for a humiliating offer of $2 per share – a mugging that bears the fingerprints of then-President of the New York Federal Reserve Bank Timothy Geithner and JPMorgan Chief Executive Officer Jamie Dimon, according to Cayne. What is most revealing in Mr. Cohan's book is the arrogance of Bear Stearns' management, and the utter inability to recognize and assess risk. "They looked at these high yields . . . they forgot about the basic concept of risk and return. They got caught drinking their own Kool-Aid." The book closes with an epilogue about the unfolding free-fall of Lehman Brothers.

House of Cards is a tale of Wall Street corporate high finance played out in real time. Cohan's book is a potboiler of greed and intrigue which leaves the reader informed and entertained – a rare delight.

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FAT CAT

Joseph Cassano, a credit derivatives trader at American International Group, Inc. ("AIG"), has some explaining to do about the rule of "pay for performance."

Joseph Cassano

Over an eight-year career, Cassano pocketed over $300 million selling credit default swaps (CDS) while running AIG's London-based Financial Products division, which resulted in a $200 billion "divot" in AIG's books.

Cassano reportedly hassled and berated the internal control analyses that found "irregularities" in AIG-FP financial disclosures, and showed his powers of prognostication on a conference call in August 2007, when he scoffed that it would be hard for him to "ever see a scenario within any kind of realm of reason that would see [AIG] losing $1 in any of those [CDS] transactions."

Cassano's $3 trillion in CDS positions have unwound disastrously, bringing the global financial system to the brink and wiping out AIG shareholders as the stock price plunged from $69 to less than $1 per share.

Upon revelation of his reckless conduct, AIG promptly fired Cassano, who departed his full-time position with a $34-million "golden parachute" and a $1 million per month "consulting" position with the company. Cassano and AIG-FP now face an investigation launched by the Department of Justice.

CALENDAR

of Upcoming Events

July 13-15, 2009

International Corporate Governance Network
2009 Annual Conference: "The Route Map to Reform and Recovery"

Hilton Hotel
Sydney, Australia

The three-day conference hosted by the Australian Council of Superannuation Investors and the Australian Institute of Superannuation Trustees will bring together leaders in corporate governance from around the world to consider how to rebuild sustainability and trust for the long term.

The conference promises to attract around 500 delegates, including investors, directors, policymakers and stakeholders in a global dialogue with a focus on practical action for corporate governance reform in times of financial crisis.

For more information, visit: www.icgn.org

August 30-September 2, 2009

National Association of State Treasurers
Annual Conference

St. Regis Monarch Beach
Dana Point, California

The National Association of State Treasurers ("NAST") encourages the highest ethical standards, promotes education and the exchange of ideas, builds professional relationships, develops standards of excellence and influences public policy for the benefit of the citizens of the states.

The NAST Annual Conference is the premier forum for key financial officials to gather for urgent, in-depth discussions on the policy issues that may impact states' fiscal health. Discussions will focus on the latest trends that will influence public policy in the future.

Joining the state treasurers will be an impressive line-up of experts who will provide their insights into how the current economic upheaval came about and what measures can be taken to meet these challenges in the future.

For more information, visit: www.nast.org

September 8-10, 2009

The Corporate Library
2009 Public Funds Forum: "The Future of Corporate Reform"

Hotel del Coronado
San Diego, California

Join institutional investors and leading academic and political thinkers at this exclusive conference as we provide solutions through changes in public policy, litigation and investment strategy to restructure public corporations and ensure that they deliver on the promise of wealth creation for shareholders and society.

For more information, visit: www.TCLconferences.com or call The Corporate Library at (207) 874-6921.

September 13-15, 2009

Institute for International Research
Guns & Hoses 2009

Hyatt Regency Mission Bay
San Diego, California

Police and fire pension plan members depend on the board to secure their retirement. More than ever it is critical to invest in sound trustee education to ensure that you make the right decisions.

Now in its 18th year, Guns & Hoses continues to provide trustees with a forum to get answers, exchange ideas, and increase their knowledge and best practices on public pension funds.

For more information, visit: www.iirusa.com

September 22-23, 2009

Information Management Network
4th Annual Foundations & Endowments Summit

Four Seasons Resort Aviara
San Diego, California

The 4th Annual Foundations & Endowments Summit will provide the latest investment strategies for institutional investors in the cutting edge foundations and endowments arena. Join Information Management Network and immerse yourself in a discussion on the newest investment trends, best practices and innovations in the world of foundations and endowments investment management.

For more information, visit: www.imn.org

September 30-October 2, 2009

Council of Institutional Investors
2009 Fall Meeting: "Navigating the Future"

Wilshire Grand
Los Angeles, California

The Council of Institutional Investors ("CII") is a nonprofit association of public, union and corporate pension funds. Member funds are long-term shareowners with a duty to protect the retirement assets of millions of American workers.

CII strives to educate its members, policymakers and the public about good corporate governance, shareowner rights and related investment issues, and to advocate on our members' behalf.

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