Robbins Geller Rudman & Dowd LLP

Corporate Governance Bulletin

1st Quarter 2011

IN THIS ISSUE

FEATURES

DEPARTMENTS

Claims Process Moves Forward in *Household*

On May 7, 2009, 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 may ultimately allow class members to recover in excess of $1 billion in damages.

On November 22, 2010, the court issued an order regarding Phase II of the case. The court ruled that the claims process can proceed for class members to seek recovery for their losses in Household common stock that was purchased from March 23, 2001 through October 11, 2002. The jury determined how much Household stock was inflated on each day during this time period. The court has approved a formula for calculating each class member's eligible recovery. The court approved a notice, which was sent to class members on January 24, 2011 along with a claim form, and a deadline of May 24, 2011 for class members to file their claims. A dedicated website (www.householdfraud.com) has been set up which contains information about the case (court orders, pleadings, and other information) and explains how to file a claim. An independent claims administrator, Gilardi & Co. LLC (www.gilardi.com), can also be contacted about how to file claims.

The *Household* case was tried by Robbins Geller Rudman & Dowd 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**. Robbins Geller Rudman & Dowd LLP'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 Robbins Geller attorneys also played key roles during the prosecution of the case and at trial.

Continued on p. 6

Kinder Morgan: Shareholders Fight Back

In November 2010, Shawnee County District Court Judge David Bruns in Topeka Kansas granted preliminary approval of a $200 million settlement of a class action lawsuit arising from the leveraged buyout of Kinder Morgan Inc. Not only is the case one of the largest securities class action cases to be settled in 2010, it is also believed to be the largest post-merger common fund settlement ever.

Kinder Morgan was a preeminent energy transportation and distribution company that, while a Kansas corporation, was headquartered in Houston, Texas. As an energy infrastructure provider, it owned an interest in or operated over 50,000 miles of oil and gas pipelines and terminals. It also owned and operated retail natural gas distribution businesses with nearly 900,000 customers in Canada and over 200,000 in Colorado, Nebraska and Wyoming. Kinder Morgan became an attractive target for a form of private equity leveraged buyout. In this type of buyout scheme, some management, despite fiduciary responsibilities to shareholders, essentially both buy and sell a company while in possession of detailed knowledge about the target's future potential. Instead of a competitive-bidding style takeover effort, management in these instances can team up with pre-selected private equity buyers and discourage other suitors.

Plaintiffs alleged that in the spring of 2006, defendants, including company insiders led by co-founder Richard Kinder, along with non-management participants led by The Goldman Sachs Group, "improperly developed a proposal to take [Kinder Morgan] private" for $100 per share – a price that did not reflect the fair value of the company – without permission from Kinder Morgan's board. The non-management defendant buyout group also consisted of entities controlled by Carlyle Group, Riverstone and AIG. Plaintiffs alleged that defendants were lying in wait while the company paid down its debt and became poised for excellent growth and profitability in the near future, and if the $22 billion acquisition were to be approved, Kinder Morgan's infrastructure-related investments already made at the expense of the company's shareholders would begin bearing fruit after defendants had taken the company private in what would be the third largest leveraged buyout transaction in history.

Once defendants' acquisition intentions were announced, a Special Committee of non-management directors was formed, but plaintiffs alleged that the Special Committee was either unwilling or unable to pursue sufficient alternative options. Plaintiffs also alleged that the insider defendants attempted to conceal the true value of the company from the Special Committee. Documents that the Special Committee requested from the buyout group were not provided. The offer price was increased to $107.50 in August 2006, although plaintiffs contend that the proposed price did not reflect full value. In fact, early in the process, the Special Committee had decided the offer price needed to be at least $110 per share. Plaintiffs alleged that the $107.50 price was a result of the improper influence of Mr. Kinder. Then, on August 28, 2006, the board of Kinder Morgan publicly announced that it had approved the merger agreement.

The litigation began in both Kansas and Texas courts at the time of the first offer of $100 per share, and all actions were eventually consolidated in Kansas. A special master was appointed before the merger to coordinate pretrial activity. However, the special master decided against plaintiffs on December 18, 2006, recommending plaintiffs' motion to enjoin a shareholder vote be denied and further writing that the business judgment rule would be a "formidable, if not conclusive, barrier" to plaintiffs' ultimate success on the merits. On December 19, 2006, the merger vote was held, and Kinder Morgan announced that the merger would proceed.

The "business judgment rule" can protect defendants and destroy plaintiffs' cases when a judge or jury decides a board has acted in the company's interest in good faith and with independence. A mere "bad decision" by the board may not be actionable, and judges are reluctant to second-guess the business decisions of boards. Plaintiffs must show that actions are disloyal and/or in bad faith. In this case, the special master's report illustrated the high risk to plaintiffs' counsel in going forward, expending their firms' time and money on a contingent basis with no guarantees of recovery or success. Even if plaintiffs were to prevail in proving defendants breached their fiduciary duties, they would still face the task of establishing an appropriate amount of damages given the lack of competing offers.

The special master's report and shareholder vote notwithstanding, plaintiffs' counsel persevered and litigation continued over the next few years. In February 2009, a nationwide class was certified in the action. Over 30 depositions were taken and over 650,000 pages of documents were produced by defendants and third parties. When the $200 million settlement was reached, five separate summary judgment motions were pending before the court.

The $200 million settlement achieved by plaintiffs' counsel excludes defendants and their immediate family members and majority-owned affiliates. It brings the total recovery to the class members (who held their shares and were cashed out at $107.50) to a level at or near the original Special Committee amount without further subjecting the class to the considerable risks of recovering absolutely nothing that continued litigation would have brought. The settlement is the largest recovery resulting from a corporate takeover litigation case to date. "We're pleased we were able to achieve such a phenomenal settlement for shareholders," commented Robbins Geller Rudman & Dowd LLP partner **Randall J. Baron**.

In re Kinder Morgan, Inc. Shareholders Litigation, No. 06-C-801 (Shawnee County District Court, Kan.).

The Failure of Regulation

Enacted on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173) (the "Act") was intended to be a sweeping overhaul of the country's financial regulatory scheme. In terms of investor protection, the Act has turned out to be a disappointing failure, as most of the meaningful investor protections were effectively removed or obstructed from passage during the legislative process. Massive lobbying efforts by the Business Roundtable and the U.S. Chamber of Commerce were instrumental in preventing the adoption of any real investor protection or corporate governance reform.

Most of the Act's provisions relating to securities litigation are being sent to the Securities and Exchange Commission ("SEC") to be "studied" and are subject to public comment. Those studies will then go back to Congress to be reviewed and perhaps some then adopted via new legislation. This could take months or even years to accomplish. One important example of this process relates to the U.S. Supreme Court's June 24, 2010 Opinion in *Morrison v. National Australia Bank*, No. 08-1191, a case where the court rejected the notion that the antifraud provisions of §10 of the Securities Exchange Act of 1934 ("Exchange Act") apply to private claims by investors for securities transactions that take place outside the United States. The Act directs the SEC to conduct a study on whether extraterritorial jurisdiction should apply to private actions under the antifraud provisions of the securities laws. While the deadline to submit comments to the SEC is February 2011, the SEC's study, including its recommendations, will not have to be submitted to the SEC until the end of 2011. And, given that Republicans now control the U.S. House of Representatives, Congressional approval of an amendment overturning *Morrison* is about as likely as the Cincinnati Bengals winning the Super Bowl.

Another section of the Act provides for aiding and abetting liability for persons who provide substantial assistance to one who violates the Exchange Act. Unfortunately, the Act limits civil liability for "aiding and abetting" fraud to SEC enforcement actions. It does not create a private right of action for those who knowingly aid or abet a fraud. Instead the Act directs the Government Accountability Office to study whether shareholders should also be allowed to sue aiders and abettors. Notably, shareholders have not been able to bring claims against persons who knowingly aid or abet a fraud since the Supreme Court's 1994 decision in *Central Bank*.[1] And the Court's 2008 *Stoneridge* decision blocked shareholders from asserting similar "scheme" liability claims.[2]

The pace of corporate governance reform at the SEC has likewise been stalled. On October 4, 2010, the SEC confirmed that it does not expect proxy access to be available for the 2011 proxy season, and instead is seeking a court ruling by the summer of 2011, so that if the rules are upheld, they may be used in the 2012 proxy season.[3] The motion stated that the stay "necessarily means that the [SEC's] rule changes will not be available for use by shareholders during the 2010-2011 proxy season."

The Act also mandates clawback requirements for any company listed on a U.S. securities exchange where the company requires a material financial restatement. There are, however, many ambiguities in the legislative language which will have to be clarified via the adoption of regulations by the SEC. For example, what is the triggering event of corporate malfeasance or non-performance? And does the board have discretion in seeking recoupment? Meanwhile, other executive compensation provisions in the Act are so riddled with exemptions that many companies will not be obligated to comply with basic requirements such as "say-on-pay" or compensation committee independence.

The prospect for corporate reform via SEC action is also hindered by the fact that the SEC may well lack the resources to accomplish the tasks assigned to it. Even though the Act grants increased powers to the SEC, the current budgets for U.S. financial regulators do not appear to allow them to simultaneously handle new responsibilities while at the same time maintaining regulatory oversight of the market. For example, the Act tasks the SEC with monitoring thousands of hedge funds, as well as creating new units to oversee credit-rating agencies and handle whistleblower tips. In light of current economic realities, many activities provided for by the Act have already been deferred due to budget uncertainty.[4] For example, tasked with writing most of the rules dictated by Dodd-Frank, the SEC sought a 10% budget increase for staffing, technology and infrastructure as, according to regulators, without such funding, new initiatives would have to be postponed or scrapped.[5]

In sum, the high hopes for the Dodd-Frank Act providing significant improvements in investor protection may well be grounded on the shoals of current economic and political realities.

1. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

2. *Stoneridge Investment Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008).

3. *Business Roundtable, et al. v. SEC*, No. 10-1305 (D.C. Cir.).

4. *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act – Dates to be Determined*, Securities and Exchange Commission, December 2, 2010, *available at* http://www.sec.gov/spotlight/dodd-frank/dates_to_be_determined.shtml

5. *SEC May Have Trouble Implementing Dodd-Frank Provisions*, Bloomberg News, December 22, 2010, *available at* http://www.fa-mag.com/fa-news/6561-sec-may-have-trouble-implementing-dodd-frank-provisions.html

Litigation Update

Motion to Dismiss Wyeth Pristiq Hype Unfounded

On September 29, 2010, the **Pipefitters Union Local 537 Pension Fund** and the **City of Livonia Employees' Retirement System** won a significant victory against Wyeth and its top officers and directors, defeating defendants' motion to dismiss the class action suit. Judge Richard J. Sullivan of the United States District Court for the Southern District of New York held that plaintiffs' complaint demonstrated that defendants "recklessly omitted [material] information when making their statements during the Class Period" about one of Wyeth's new leading drug candidates, Pristiq.

Wyeth had a business model that depended on the continued development of a new drug "pipeline," whereby newly patented, regulatory approved products were needed to replace brand-name drugs as they lost patent protection. As described by Robbins Geller Rudman & Dowd LLP attorney **Laurie Largent**, Wyeth was developing Pristiq as a "me-too" antidepressant designed to replace revenue streams from the company's top-selling drugs Effexor and Effexor XR. Because Pristiq and Effexor were so closely related, however, Wyeth needed to make a material distinction between the two drugs to gain FDA approval and create a niche for Pristiq. Analysts were also concerned about the similarities between the two drugs, questioning why a doctor would prescribe Pristiq for depression when it was no better than generic Effexor. In order to differentiate Pristiq from Effexor, defendants focused on marketing Pristiq as a treatment for post-menopausal vasomotor symptoms ("VMS") and other women's health issues, and in June 2006 filed a new drug application ("NDA") with the FDA for this treatment. Wyeth promoted Pristiq to investors as a drug with anticipated annual sales of $2 billion or more.

Prior to filing the NDA, from 2003 to 2006, Wyeth conducted clinical trial studies on Pristiq. As set forth in the complaint filed on behalf of the **Pipefitters Union Local 537 Pension Fund**, **City of Livonia Employees' Retirement System** and Wyeth investors during the June 26, 2006 – July 24, 2007 class period, the studies showed serious adverse effects associated with the use of Pristiq for the treatment of VMS. The data from the studies showed that the use of Pristiq for the treatment of VMS could cause serious liver damage and cardiovascular side effects, such as heart attacks, coronary artery obstruction and hypertension. In one of Wyeth's studies, Study 315, 27 of the 707 participants suffered serious adverse effects, including three coronary occlusions and two heart attacks. Women in the study who were taking Pristiq were 353% to 508% more likely to suffer hypertension than those taking placebo.

Plaintiffs allege that by the beginning of the class period defendants were aware of the statistically significant link between the use of Pristiq for the treatment of VMS and liver damage and cardiovascular side effects. Despite this knowledge, defendants touted the safety and benefits of Pristiq – both for women with VMS and Wyeth's corporate coffers – and expressed their confidence in a timely launch of Pristiq. Had defendants fully disclosed what they knew about Pristiq, it would have had disastrous consequences for Wyeth. The negative safety data would have undermined defendants' claims that Pristiq was safe for treating VMS, and it would have cast serious doubt on the chances of FDA approval of the drug for the treatment of VMS. Finally, the truth about Pristiq's negative safety profile came out on July 24, 2007, when Wyeth announced that the FDA had not approved the drug for VMS due to concerns about the liver and cardiovascular side effects. On this announcement, Wyeth's stock dropped more than 10%.

Based on these facts, Judge Sullivan concluded that the complaint sufficiently alleged a claim for securities fraud. While defendants argued that the serious adverse events were not statistically significant, and thus immaterial, the court found otherwise, holding that on a motion to dismiss, "the court cannot determine as a matter of law whether such links were statistically insignificant because statistical significance is [ordinarily] a question of fact." Judge Sullivan concluded by ruling that plaintiffs "have made sufficient allegations that Defendants should have been aware of the impact of Study 315's results on Wyeth's stock and that they recklessly omitted the information" from their class period statements.

Shortly following the court's ruling denying their motion, defendants made another attempt to persuade Judge Sullivan to dismiss the case. On November 23, 2010, however, Judge Sullivan issued an order denying defendants' motion for reconsideration, stating that defendants' "arguments merely rehash those made by Defendants in their earlier motion to dismiss" and "[t]he Court is not interested in re-litigating an issue it has already decided."

In addition to Ms. Largent, Robbins Geller Rudman & Dowd LLP partners **Tor Gronborg** and **Trig Smith** are prosecuting the case on behalf of Wyeth investors.

City of Livonia Employees' Retirement System v. Wyeth, et al., No. 07 Civ. 10329 (RJS), Memorandum and Order (S.D.N.Y. September 29, 2010).

Motion to Dismiss Rhinebridge Over Troubled Waters

On October 29, 2010, Federal District Court Judge Shira A. Scheindlin denied defendants Morgan Stanley Inc.'s and Morgan Stanley International Limited's ("Morgan Stanley") motion to dismiss a class action complaint filed by two institutional investors, **King County, Washington** and **Iowa Student Loan Liquidity Corporation** ("plaintiffs"). Plaintiffs amended the initial complaint

in June 2010 to add Morgan Stanley as a defendant, alleging that Morgan Stanley conspired with its co-defendants to structure, market and assign false credit ratings to the Rhinebridge SIV – "the shortest-lived 'Triple A' investment fund in the history of corporate finance."

In her opinion denying Morgan Stanley's motion to dismiss, Judge Scheindlin noted that the Rhinebridge SIV case involves some of the same defendants as in the *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.* action (the "*Abu Dhabi*" case), which is also pending before Judge Scheindlin. Judge Scheindlin further pointed out that plaintiffs in the Rhinebridge SIV action "allege that Morgan Stanley used the Cheyne SIV at issue in *Abu Dhabi* as a roadmap for arranging Rhinebridge and for selling its senior debt securities." In both cases, Morgan Stanley participated in the structuring, marketing and rating of the fraudulent SIVs.

In the Rhinebridge SIV case, plaintiffs contend that the credit ratings assigned to the Rhinebridge SIV were false and misleading. Plaintiffs also allege that Morgan Stanley conspired with its co-defendants to fill the Rhinebridge SIV with toxic assets, such as risky home equity loans, all the while knowing that the subprime market was already severely "depressed and illiquid" by 2007. Morgan Stanley was highly motivated to create, market and obtain top ratings for the Rhinebridge SIV because Morgan Stanley stood to gain millions of dollars in fees once the SIV was successfully launched.

Previously, other defendants in the action, including Moody's, Standard & Poor's, Fitch, IKB Credit Asset Management and IKB Deutsche Industriebank, moved to dismiss the claims against them. Judge Scheindlin denied their motions to dismiss, ruling that plaintiffs' complaint adequately met the pleading requirements as to each of these defendants.

Morgan Stanley moved to dismiss the complaint on grounds that it failed to properly allege materiality, reliance and scienter. However, Judge Scheindlin ultimately rejected Morgan Stanley's motion in its entirety, holding that the complaint sufficiently alleged that Morgan Stanley not only "knew (1) that the Rated Notes were neither safe nor stable, but also (2) that the ratings process was flawed and (3) that the Rating Agencies could not issue objective ratings – none of which was disclosed to investors or discoverable through reasonable diligence."

Judge Scheindlin also recognized that Morgan Stanley's arguments were similar to those they raised unsuccessfully in the *Abu Dhabi* case. In addition, Judge Scheindlin held that Morgan Stanley's arguments were similar to those put forth previously by other defendants in the *Rhinebridge* case, which she had already rejected. "Because [Morgan Stanley's] motion relies almost entirely on arguments this Court has already considered and rejected … it is denied."

Plaintiffs' attorney **Daniel Drosman** of Robbins Geller Rudman & Dowd LLP commented, "Morgan Stanley's reckless behavior in structuring and marketing the Rhinebridge vehicle is inexcusable. Judge Scheindlin's ruling allows us to advance our case on behalf of damaged investors."

King County, Washington v. IKB Deutsche Industriebank AG, et al., No. 09-Civ.-8387, Opinion and Order (S.D.N.Y. October 29, 2010).

Supreme Court of Ohio Defendants' Forum Shopping Rejected

On December 1, 2010, the Supreme Court of Ohio put an emphatic end to nearly two years of unabashed forum shopping by the defense in a stock-option backdating case involving American Greetings Corporation. The unanimous high court decision sent the matter back to the original trial judge, where the claims asserted will finally be addressed on the merits.

The suit was brought by **Electrical Workers Pension Fund, Local 103, I.B.E.W.**, derivatively on behalf of American Greetings Corporation. Although American Greetings is commonly known for its benign greeting cards, the complaint alleges that the company's officers and directors engaged in outrageously unlawful conduct in breach of their strict fiduciary duties. Stock option backdating refers to the practice of selecting an option grant date by hindsight. Pricing the options more

Continued on p. 6

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

News Brief

Employee Benefits Conference Hits High Notes

The 56th Annual Employee Benefits Conference, held this past November, brought together pension fund managers, academics, and policy experts for two days of workshops and sessions designed to put the best tools in the hands of those who manage employee benefits. Robbins Geller Rudman & Dowd LLP was honored to host a reception for conference attendees, which provided an opportunity for fund managers and administrators to forge new relationships and share innovative ideas.

The recent turmoil in pension funds and health care means that every decision and every dollar counts. Trustees, both veteran and new, learned the latest developments in legislation and ERISA law, while health and wellness plan managers shared best practices to manage health care costs while improving employee quality of life. Commented one returning participant, James F. Ward, the Employee Benefits Conference is "[c]onsistently the best conference for the benefits industry."

For more information, please visit: www.ifebp.org

Household continued from page 1

Partners **Luke O. Brooks** and **Jason C. Davis** handled key assignments during both the pre-trial prosecution of the case and during the trial. Associate **Maureen E. Mueller** was 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 and 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 and 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.

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 eight such cases have gone to trial since the passage of the PSLRA. Robbins Geller 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, making Robbins Geller unique among firms that specialize in plaintiffs' class-action litigation in its ability to handle such cases. The trial not only added to Robbins Geller's wealth of trial experience, it showcased the Firm's willingness to shoulder the burden of sustained litigation. In addition to the partners and associate attorneys who relocated to Chicago for approximately 70 days of pre-trial preparation, pre-trial hearings and trial, another 12 Robbins Geller employees, including forensic accountants, project attorneys, paralegals, litigation support specialists and administrative assistants, were part of the team that moved to Chicago for the trial.

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

Litigation Update continued from page 5

favorably to the recipient secretly increases the options' value, a method of quietly looting the company's assets.

Plaintiff initiated the suit in the Ohio Court of Common Pleas in March 2009. Refusing to answer the complaint, defendants immediately tried to remove the case to the United States District Court for the Northern District of Ohio. Unsurprisingly, this gambit failed, as there was no basis for federal jurisdiction. Plaintiff had sued under state law and therefore properly sought relief in state court. In March 2010, the federal judge granted plaintiff's motion to remand to the Ohio Court of Common Pleas.

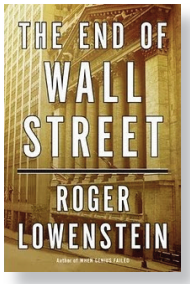
Defendants, however, were not done with their procedural evasions, and promptly filed a motion to transfer the case to the "commercial docket" of the Common Pleas Court. Ohio's commercial docket is reserved for business-related disputes, typically one business against another. Defendants evidently perceived the commercial docket as more receptive to their litigation positions. As plaintiff observed, however, the rules governing Ohio's commercial docket contain multiple exceptions specifying that a case, even if business-related, will not be transferred to the commercial docket. One exception is where a "labor organization" is a party. Given its undeniable status as a labor organization, plaintiff argued that transfer to the commercial docket was clearly improper. The trial court agreed and denied defendants' motion. On review, this ruling was upheld by the administrative judge of the Common Pleas Court.

Further delaying the proceedings, defendants then filed a *mandamus* action with the Supreme Court of Ohio, urging the appellate justices to overturn the docket assignment. After receiving full briefing, the Supreme Court of Ohio rejected defendants' plea in a summary order.

"We are gratified that both the United States District Court and the Supreme Court of Ohio have returned this case to the right forum where plaintiff's serious backdating allegations will finally be addressed," commented **Kevin K. Green** of the Appellate Practice Group at Robbins Geller Rudman & Dowd LLP. **James I. Jaconette** also works on the case and, having overcome the stalling tactics, is prosecuting the claims on the merits.

State of Ohio ex rel. American Greetings Corp. v. Fuerst, No. 2010-582 (Ohio Sup. Ct. Dec. 1, 2010).

Recommended Reading



The End of Wall Street

Roger Lowenstein

Penguin Press, 2010

Roger Lowenstein has done it again. Following on his 2001 work, *When Genius Failed*, the landmark exposé of the collapse of hedge fund Long Term Capital Management, the former *Wall Street Journal* reporter turns his pen toward the recent Wall Street-led financial crisis. Although the field is getting crowded, Lowenstein's contribution, *The End of Wall Street*, is a worthy addition.

The title of the book can be understood to mean the end of not Wall Street *per se*, but of the paradigm or cultural construct that governed the last decade of American finance. For years, Wall Street and its chief high priest, Alan Greenspan, had come to be worshipped with what bordered on idolatry. Lowenstein describes how the crisis of 2008 has called all of that into question, including the articles of faith in the infallibility of financial markets. One core issue links both of Lowenstein's books: derivatives. These complex "financial innovations," which derive their value from some other underlying asset, were once heralded as the end of risk, and led to an interconnected web of swaps and bets. Greenspan himself forcefully defended derivatives from even the mere idea that they should be regulated, nearly puffing himself red in the face to tell regulator Brooksley Born that in fact regulation would be "harmful" since derivatives, no matter how mind-bogglingly complex, were contracts negotiated "between professionals" – an echo of Simon Johnson's *13 Bankers*, which relates the same tale from the standpoint of Larry Summers screaming down the telephone wires at Ms. Born.

Lowenstein traces the collapse from its roots in deregulation and the securitization chain of mortgages. He has very well-informed chapters on the demise of Lehman Brothers, and how then-Secretary of the Treasury Henry Paulson was transformed from ardent free-market ideologue into a reluctant advocate of bailouts and government intervention. Along the way, we meet insiders from Merrill Lynch, Countrywide, Bank of America, Goldman Sachs, and JP Morgan, many of whom were in a state of near-constant negotiation over acquisitions, mergers, and backstop financing during September 2008, as the bottom fell out of Wall Street's house of cards.

Lowenstein's conclusion informs us that, just like in the 1998 failure of Long Term Capital Management, "genius" is still at work on Wall Street, and still failing. We brace ourselves for what genius will bring next.

EYE ON WALL STREET:
Peter Kraus

The nationwide drop in real estate prices has claimed a victim on Wall Street. AllianceBernstein CEO Peter Kraus recently finalized the sale of his posh 10-room co-op on Park Avenue for $7.65 million, a full $1.5 million less than the 2008 asking price. Mr. Kraus rose to uncomfortable popularity in late 2008 as the poster boy for excessive compensation, when it was revealed that Merrill Lynch's then-CEO John Thain had overseen a payment of $25 million to his fellow Goldman alum Kraus for a scant three months of work at the embattled brokerage. According to *The Wall Street Journal*, the acquisition of Merrill Lynch by Bank of America triggered a contract clause resulting in the massive payout to Kraus. Kraus took the money and ran, fleeing the implosion of the bullish brokerage for the relative safety of AllianceBernstein, where he oversees investments for the wealthy.

Known for his fashion-forward shirts and a stunning emerald-green BlackBerry, Kraus's spectacular payday remains a bone of contention, since it occurred at a time when Merrill Lynch was collapsing due to massive gambles on CDO instruments. At the same time, Merrill suitor Bank of America was secretly negotiating emergency rescue loans and zero-interest lines of credit backed by taxpayer money and the Federal Reserve. Both Merrill CEO Thain and Bank of America's Ken Lewis have since been sacked.

Despite not getting full price on his former Manhattan digs, Kraus remains a fixture in the exclusive Park Avenue neighborhood, having purchased a $37 million apartment in late 2008.

Calendar of Upcoming Events

January 12-14, 2011

Opal Financial Group
Public Funds Summit

The Phoenician
Scottsdale, Arizona

This conference addresses issues that are critical to the investment success of senior public pension fund officers and trustees in the new millennium. The summit will discuss 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 23-25, 2011

Corporate Directors Forum
Directors Forum 2011: Directors, Management & Shareholders in Dialogue

University of San Diego
San Diego, California

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

The sixth-annual Directors Forum uniquely brings together institutional investors, company directors and regulatory agencies, and offers intimate access to today's leading corporate governance thought leaders and policy makers in the United States. Network with other leading directors and officers from around the country, and discuss issues that matter most to management and shareholders in today's new world.

For more information, visit: www.directorsforum.org

January 23-25, 2011

Made in America 2011
The 8th Annual Taft-Hartley Benefit Fund Summit

Caesars Palace
Las Vegas, Nevada

This summit is just what trustees and administrators have long requested. For several years, thousands of trustees and administrators have come together at Made in America to receive no-nonsense, forthright information they need to navigate through their pension, health and welfare futures. A fantastic value, Made in America is really two conferences in one. Track "A" offers straight talk on all the hottest topics surrounding the Taft-Hartley investment world, everything from zone status upgrades to inflation protection strategies and everything in between. Track "B" delivers the need-to-know topics surrounding health and welfare. Learn about the impact of healthcare reform on multi-employer funds, as well as the latest on wellness initiatives, cost-cutting strategies, and so much more. Many of these practical sessions are discussed by administrators in the trenches surviving these rocky times.

For more information, visit: www.frallc.com

February 7-9, 2011

International Foundation
Trustees and Administrators Institute

Disney's Yacht & Beach Club Resort
Lake Buena Vista, Florida

This longstanding educational event has been the cornerstone of education for new and advanced trustees and administrators of multi-employer trust funds for more than 40 years. The International Foundation's time-honored tradition of quality, relevance and objectivity continues with the 2011 program, where session topics are developed by active trustees, administrators and professional advisors. The program will highlight the latest issues in benefit plan administration, benchmark your standards against the best practices in your field, and take a hands-on approach to the possible implementation of new administrative strategies.

For more information, visit: www.ifebp.org

February 9-11, 2011

Institutional Investor Conferences
19th Annual European Pensions Symposium

Hilton Molino Stucky
Venice, Italy

This symposium is one of the world's leading forums for heads of pension funds. Now in its 19th year, the 2-1/2 day event is attended by over 100 chief investment and executive officers from some of Europe's largest and most innovative pension funds. The event will focus primarily on investment issues facing pension funds. The entire program is driven by an expert advisory board representing corporate and public pension funds with varied structures, liabilities and investment strategies. The central theme for this year's event will be dealing with the new economic and financial environment that we find ourselves in. How can pension funds generate returns in a low interest rate and low return environment?

For more information, visit: www.iiconferences.com

February 28-March 2, 2011

International Corporate Governance Network
2011 Mid-Year Conference

Shangri-La Hotel
Kuala Lumpur, Malaysia

The focus of the conference is on the economic growth in Asia and its implications on corporate governance. Debates and prominent speakers will cover topics such as Asian IPOs, related party transactions, stewardship code, and much more. A palm oil industry tour and discussion is also being arranged for March 2, which has limited availability (60 delegates) on a first come, first served basis. The tour will provide an opportunity to gain insight into one of the region's most important sectors and the governance issues involved.

For more information, visit: www.icgn.org

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