Robbins Geller Rudman & Dowd LLP

Corporate Governance Bulletin

1st Quarter 2012

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DEPARTMENTS

Plaintiffs Uncover Wall Street Misconduct and Secure an $89.4 Million Settlement

On December 1, 2011, the Delaware Court of Chancery granted final settlement approval in the landmark case of *In re Del Monte Foods Company Shareholders Litigation*, an action that challenged the 2011 leveraged buyout of Del Monte Foods Company by a consortium of private equity firms led by Kohlberg Kravis Roberts & Co. L.P. ("KKR").

Prior to its acquisition, Del Monte was one of the country's largest producers, distributors, and marketers of premium quality branded pet products and food products for the U.S. retail market, generating $3.7 billion in net sales in fiscal 2010. Through their litigation efforts, plaintiffs, led by **NECA-IBEW Pension Fund (The Decatur Plan)**, uncovered evidence unknown not only to shareholders, but to the Del Monte board of directors itself.

"Everybody does it, but Barclays is the one that got caught with their hand in the cookie jar. Now everybody has to rethink how we conduct ourselves in financing situations."

-Anonymous Wall Street Banker

As alleged by plaintiffs, Barclays Capital, Inc. – Del Monte's financial advisor – embarked on a plan to arrange for Del Monte to be acquired by private equity interests, for which Barclays would not only receive tens of millions of dollars in fees for rendering sell-side advice to Del Monte, but would also receive tens of millions of dollars more for providing buy-side loans to the buyout group. Thereafter, Barclays, without the knowledge of the Del Monte board, approached a number of private equity firms to generate interest in a possible acquisition of Del Monte, and then persuaded the Del Monte board of directors to entertain such offers. Participants in this initial sales process included Vestar Capital Partners, which submitted the highest indication of interest, and a consortium comprised of KKR and Centerview Partners, which submitted the second highest indication of interest. All participants, including Vestar, KKR and Centerview, were required to execute confidentiality agreements as part of the sales process that prohibited them from communicating with each other or banding together to make a joint bid without the prior written consent of the Del Monte board.

After the initial sales process fell apart, Barclays arranged – again without the knowledge or approval of the Del Monte board – for KKR, Centerview and Vestar to band together in contravention of the confidentiality agreements they signed and make a new bid to acquire Del Monte, and for Barclays to participate in financing the acquisition. Thereafter, the Del Monte board, advised by Barclays, approved a sale of the company to this private equity consortium for $19 per share in a transaction announced in November 2010.

Pursuant to its agreements with the Del Monte board and the buyout group, Barclays stood to reap approximately $50 million in advisory and lending fees. However, plaintiffs stepped in to challenge the transaction and halt this scheme. Through their litigation efforts, which ultimately included obtaining and reviewing over 650,000 pages of documents and taking numerous depositions, plaintiffs sought and were granted an unprecedented injunction order postponing the shareholder vote on the merger and invalidating the merger agreement's termination fee, no solicitation clause and other so-called "deal protection devices." Continued litigation efforts after the injunction resulted in a settlement payment by Barclays and the buyout group totaling $89.4 million, one of the largest post-merger common funds ever recovered in Delaware or anywhere else.

Noting that plaintiffs' counsel "have an established track record of generating meaningful results in this Court," the Chancery Court held that "it was only through the effective use of discovery that the plaintiffs were able to 'disturb[] the patina of normalcy surrounding the transaction.'" The court elaborated: "Lead Counsel engaged in hard-nosed discovery to penetrate and expose problems with practices that Wall Street considered 'typical.'" As one Wall Street banker noted, "Everybody does it, but Barclays is the one that got caught with their hand in the cookie jar. Now everybody has to rethink how we conduct ourselves in financing situations."

In approving the $89.4 million settlement, the court concluded that "this is a very significant settlement involving a lot of money for a deal case…. [It] provides excellent consideration for the class." Commenting on the outcome, **Randall Baron** of Robbins Geller Rudman & Dowd LLP, one of the lead counsel for plaintiffs, said, "I am very proud of the tremendous results we achieved for shareholders here. We not only obtained one of the largest post-merger recoveries ever for shareholders, but we also exposed and put a halt to a long-standing pattern of misconduct by Wall Street bankers. I have been in conferences where people have said the entire director community knows it now has to ask questions of its financial advisors regarding financing-related conflicts of interest. This case very much changed the way investment banking is practiced."

In re Del Monte Foods Company Shareholders Litigation, No. 6027-VCL (Del. Ch.). ■

Occupy Wall Street: Lessons for Investors and the Shareholder Movement

"To me, the failure of corporate governance is at the core of the problem. CEO autocracy must end and institutional shareholders must exercise their responsibility to monitor corporate power."
- Robert A.G. Monks

The news story of this fall has been the colorful, noisy and curiously persistent movement called "Occupy Wall Street." Initially dismissed by its critics, the Occupy movement has spread across the country to at last count 1,462 cities and towns, attracting supporters from all walks of life. These loosely linked groups are sending the message that the status quo of unchecked corporate dominance is unacceptable, and have taken actions ranging from moving their money out of Wall Street banks to linking arms to physically prevent home foreclosures. If one can look past the overblown media imagery, there are useful lessons for shareholder activists and institutional investors to glean from this movement, particularly that direct sustained action can yield unexpected successes.

As disorganized as the nationwide Occupy movement has been portrayed, it has nonetheless been successful in changing the political conversation from one of budget cuts and austerity to a broader discussion that includes reform of financial institutions, compensation on Wall Street and elsewhere, foreclosures, pension losses, student debt, and basic fairness for all Americans. During a time in which one in two Americans has fallen into poverty or low-income status, corporate profits and CEO pay are hitting new records. The palpable but unfocused anger of the Occupy movements gives even more urgency to institutional investors taking action as effective monitors of and checks on CEO and corporate management.

Investor and shareholder advocates have been following the movement from their unique vantage points both inside and outside the shareholder-owned corporate structure. As well-known shareholder advocate Robert A.G. Monks wrote in October, the Occupiers "are a daily, hourly reminder of the dysfunctionality of our political and economic system, and of the power appropriated by a small group of people in this country."

Whether by protest or political organizing, some governance victories have been achieved already – for instance, a "say on pay" provision allowing shareholders to vote on CEO pay packages is now law. But the time appears to be approaching in which the "people power" of the Occupy marches should join forces with the shareholder movement to enunciate concrete demands. What might those demands be? For starters, one could be the dismantling of systemically dangerous financial institutions. Second, as many economists are discussing, might be a very modest transaction fee on Wall Street speculation (0.1% on stocks, bonds and derivatives), which could generate enough revenue to fund any future bailouts, as well as deterring the most reckless aspects of high-speed and computerized casino finance. Borrowing from activist shareholder resolutions, aligning CEO pay incentives with long-term growth and prudent risk management, under threat of clawback or legal penalty, is another worthy demand, as is deterring and punishing the worst actors, so that bad behavior cannot gain advantage or drive out good.

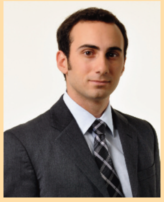
Institutional investors and public funds can take advantage of the buzz generated by those taking to the streets. Given the attention generated by the Occupy movements, we might see future shareholder advocacy actions that are more public, more creative, more street-focused, and resonate better with the middle class. Monks also sees a possible role for Occupy in the political sphere in 2012, stating that "we need to see a clear, persistent message that identifies solutions in a way that people running for office are obligated to take a position on these issues of corporate power and economic inequality." As institutional investors begin to take up the mantle of the 99% in their own direct sustained actions, it is likely that positive change will result. ■

News Brief

Robbins Geller Associates Named to List of Top Young Attorneys

Darryl J. Alvarado
Attorney
Robbins Geller Rudman & Dowd LLP

Nathan W. Bear
Attorney
Robbins Geller Rudman & Dowd LLP



Francis A. DiGiacco
Attorney
Robbins Geller Rudman & Dowd LLP

Regis C. Worley
Attorney
Robbins Geller Rudman & Dowd LLP

Four Robbins Geller Rudman & Dowd LLP attorneys have been nominated to a list of outstanding young attorneys by *The Daily Transcript*, a San Diego publication focusing on the legal community. **Darryl J. Alvarado**, **Nathan W. Bear**, **Francis A. DiGiacco** and **Regis C. Worley** are among the new attorneys who were nominated by peers and mentors and represent rising young talent in San Diego's highly competitive field.

Mr. Alvarado was a member of the team of attorneys responsible for obtaining $27 million for aggrieved investors in *In re Cooper Cos. Sec. Litig.*, No. 06-CV-00169 CJC(RNBx) (C.D. Cal.); Mr. Bear has an active role in cases that go to the heart of the current worldwide financial crisis, with a focus on residential mortgage-backed securities, as well as numerous structured investment vehicle, collateralized debt obligation and credit default swap transactions and related litigation; Mr. DiGiacco, who teaches trial advocacy at the University of San Diego School of Law, focuses on class action and derivative securities litigation; and Mr. Worley, an intellectual property litigator and registered patent attorney, focuses his practice on assisting inventors and patent owners in defending their patent rights and protecting their inventions from infringement.

According to the *Transcript's* requirements, nominees are hard working and detail-oriented, knowledgeable and enthusiastic, ethical and professional, and display character traits which further the interests of justice in society.

Using Securities Litigation to Achieve Corporate Reform

Across the nation, institutional investors are increasingly using shareholder litigation to achieve substantial economic recovery and drive corporate reform. Although there remains some hesitation among investors to assert their rights as shareholder litigants, institutions are increasingly choosing to participate in shareholder litigation.[1]

In light of the meltdown of the world's financial system during 2008 and 2009, institutional investors began taking an even closer look at how they could incorporate shareholder litigation into their repertoire to obtain corporate reform and/or management accountability with respect to their holdings of securities issued by corporations. While in many instances the appropriate response to corporate fraud may be to take no direct action at all, the potential benefits of taking action should, at a minimum, be assessed.[2] This is particularly true given that the losses suffered by institutions have, in some recent frauds, reached into the hundreds of millions of dollars with respect to a single investment in a U.S. corporation. Targeted shareholder actions offer the real prospect of not just the recoupment of financial losses, but the achievement of real governance reforms that enhance the interests of all company shareholders going forward.[3]

To be able to make an informed decision about how to respond when securities fraud adversely impacts an institution's investment portfolio, investors should, at a minimum, monitor their portfolios for securities fraud.[4] "Portfolio monitoring" is often a no-cost service that enables institutions to ensure that they are aware when class action recoveries are obtained and the institution is entitled to a recovery.[5] Then, by completing an appropriate claim form, institutions can easily recover millions of dollars annually in connection with the billions of dollars paid out each year via securities class actions. In fact, it has been widely reported that $2 billion has not been claimed by institutional investors that were entitled to recovery simply because they failed to file claim forms.[6] By using a portfolio monitoring service, institutions are able to meaningfully increase returns by simply completing and submitting a claim form and/or directly participating in shareholder actions where appropriate.

In past years, portfolio monitoring has proven its value time and again to fund trustees. In the case of one large pension fund, the fund trustees were unaware that anything was amiss. So were the administrator and fund counsel. While corporate executives walked away with $600 million in insider trading proceeds, the pension fund lost $35 million in participants' pension proceeds – that's the equivalent of thousands of workers' pensions lost. It happened because the fund did not have a system in place to track fund losses due to fraud.

When institutions suffer losses due to fraud, they should have in place the processes and procedures to enable the institution to timely assess whether it should: (i) file a claim form if the institution is qualified to make a claim; (ii) seek to be lead plaintiff in a securities class action; or (iii) opt out and file its own suit. Implementing a "portfolio monitoring system" enables institutional investors to actively monitor class action suits that affect them and make timely, informed decisions regarding losses they have suffered. Unless an institution has its portfolio monitored on an ongoing basis, it is extremely difficult for the institution to timely identify whether it has suffered compensable losses, let alone be in a position to obtain a recovery with respect to losses it has suffered. Notably, only about one-third of eligible investors file claims, resulting in "institutional investors leav[ing] more than $1 billion unclaimed each year."[7]

A recent example comes from a case dismissed against Countrywide Financial Corp. over losses stemming from mortgage-backed securities that the lender underwrote. The court dismissed the case, holding that "a reasonable plaintiff exercising reasonable diligence . . . should have discovered facts sufficient to state every element of its claim" prior to filing the relevant complaint.[8] In a similar case against Wells Fargo, the court dismissed the case, holding that the plaintiffs "knew or should have known of the basis for the revived claims more than a year before the [amended consolidated complaint] was filed."[9] Had those plaintiffs been actively monitoring their portfolios, they may have discovered that they were entitled to recover losses sooner.

While investors have historically avoided litigation as active engagement, they are increasingly recognizing that targeted shareholder actions can yield multi-million dollar recoveries and significant governance reform as well. By monitoring their portfolios for securities fraud, institutional investors are able to stay informed about whether securities fraud is adversely impacting their portfolio, ensure that they obtain their pro rata share of settled class actions, and, where appropriate, take affirmative action to obtain multi-million dollar recoveries and/or effect governance reform. In this way, institutions are able to not only comply with their obligations to their participating clients and/or beneficiaries, but also enhance and maximize portfolio returns.

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[1] Shareholder actions in the U.S. generally take one of three forms: (i) securities class actions, where investors sue on behalf of themselves and all other similarly situated investors; (ii) derivative actions, where a shareholder brings claims against certain officers and directors or other third parties on behalf of a company; or (iii) individual actions, where one or more investors bring their own claims against a company, seeking either financial remuneration and/or specific corporate governance reforms.

[2] "[I]n a class action context, a fiduciary ***must*** determine whether it would be in the best interest of the plan to serve as the lead plaintiff….The Secretary has previously taken the position that it may not only be prudent to initiate litigation, but also a breach of a fiduciary's duty to not pursue a valid claim." *See* Secretary of Labor's Memorandum of Law as Amicus Curiae in Support of FSBA's Motion for Appointment as Lead Plaintiff in *Bragdon v. Telxon Corp.*, No. 98-CV-2876 (N.D. Ohio) (emphasis added).

[3] In 2010, litigation brought against UnitedHealth Group resulted in a $925.5 million recovery for shareholders, including $30 million to be paid from the pocket of the former CEO. The settlement also provided for extensive governance reforms to remedy the weaknesses in corporate governance that allowed such malfeasance to occur in the first place. *See In re UnitedHealth Group Inc. PSLRA Litig.*, No. 06-cv-01691-JMR-FLN (D. Minn.).

[4] "Portfolio monitoring" is the regular monitoring of a fund's securities holdings by qualified securities legal counsel. "This service allows the firm to quickly identify large losses suffered by its clients due to corporate fraud or misconduct so that clients can carefully and deliberately weigh their options. Clients appreciate the fact that the Portfolio Monitoring Program℠ is a non-intrusive service that gets them important information quickly," said Robbins Geller Rudman & Dowd LLP partner Darren J. Robbins. Indeed, PricewaterhouseCoopers reports that "pension funds benefit from free Portfolio Monitoring Services."

[5] For more information, *see* http://www.rgrdlaw.com/services-portfolio-monitoring-program.html.

[6] Jonathan D. Glater, *Suits Contend Mutual Funds Fail to Collect Settlements*, N.Y. Times, Jan. 19, 2005.

[7] *Id.*

[8] *See Stichting Pensioenfonds ABP v. Countrywide Financial Corp.*, No. 10-CV-07275 MRP (MANx), 2011 U.S. Dist. LEXIS 91441, at *36 (C.D. Cal. Aug. 9, 2011).

[9] *See In Re: Wells Fargo Mortgage-Backed Certificates Litigation*, No. 09-cv-01376-LHK, Order at 11 (N.D. Cal. Oct. 19, 2010).

Litigation Update

Motion to Dismiss Energy*Solutions* Suit Not Nuked

On September 30, 2011, Judge John G. Koeltl of the United States District Court for the Southern District of New York declined to dismiss the majority of lead plaintiffs **New England Carpenters Guaranteed Annuity and Pension Funds**, **Building Trades United Pension Trust Fund** and **City of Roseville Employees' Retirement System's** suit against Energy*Solutions*, Inc.; 11 of the 12 individual defendants; Credit Suisse Securities (USA) LLC, J.P. Morgan Securities Inc. and Morgan Stanley & Co. Incorporated (collectively, the "Underwriter Defendants"); and ENV Holdings, LLC.

Before Energy*Solutions* ("ES") "went public," ENV Holdings ("ENV"), which plaintiffs allege "was owned and controlled by [ES] senior executives and directors," owned 100% of ES shares. The November 2007 initial public offering of ES common stock at $23 per share raised over $765 million and made over $40 million for the underwriters. A subsequent offering at $19 per share by ES in July 2008 raised over $760 million and brought fees of $28 million to the underwriters. On October 14, 2008, ES closed at $5.64 per share, having dropped 44% in just 24 hours. Lead plaintiffs' complaint alleged that the Prospectuses and Registration Statements for these offerings issued by defendants negligently omitted and/or misrepresented material facts about ES and its business and, in the case of the Underwriter Defendants, had been prepared without adequate due diligence about ES's prospects.

ES was created from a combination of existing nuclear engineering, waste removal and cleanup companies acquired by a holding company, ENV. All but two of the individual defendants held some interest in ENV. The Registration Statements for the IPO and the July 2008 offering, and other statements issued by defendants during the class period (November 14, 2007 through October 14, 2008), portrayed ES as a company with a strong client base and two principal core growth markets: (i) a $2.9 to $3.1 billion market for decommissioning and decontaminating nuclear reactors that were shut down; and (ii) a $1 billion opportunity for disposal of large radioactive components at the 104 nuclear facilities in the United States that were still in operation. As alleged in the complaint, however, neither of these were meaningful or realistic near-term – or even medium-term – business opportunities for the company. Based upon facts that defendants knew, these business opportunities did not exist as represented and could not occur for decades, if at all. Three months after the July 2008 offering, ES revealed to investors that these two growth markets would not generate revenues in the foreseeable future, causing ES's stock to plummet.

Additionally, ES claimed in the Registration Statements that it had entered into life of plant ("LOP") contracts with 84 of the 104 operating nuclear reactors in the United States, and that these contracts would provide a strong platform for additional business and growth. Contrary to these representations, the LOP contracts were actually structured to ES's financial detriment, and many of the nuclear reactors were not likely to be decommissioned by ES as the company's statements had implied. Plaintiffs also alleged that defendants made materially false and misleading statements about the opportunities for the disposal of large radioactive components at nuclear facilities that were still in operation. That business opportunity was dependent upon ES convincing the Nuclear Regulatory Commission ("NRC") to permit ES to use trust funds that were set aside for other purposes. As alleged by plaintiffs, ES knew that it was a virtual certainty that the NRC would deny ES's petition to access the funds, but failed to disclose this to investors.

Defendants moved to dismiss all claims in the amended class action complaint. Defendants stated that claims for violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 against ENV should be dismissed, as defendants claimed that ENV "did not 'make' any material misstatements or omissions." Defendants argued that lead plaintiffs' Section 10(b) and Rule 10b-5 allegations were not sufficient for multiple reasons, beginning with the defendants' assertion that the allegations were "wholly conclusory and speculative." The judge disagreed with defendants' argument, stating that "[t]his is incorrect. The plaintiffs allege specific contract terms and explain a simple and plausible way in which these terms create an economic incentive that would significantly affect the value of those contracts." Additionally, the judge ruled that the warnings of "economic pressure" included in the Registration Statements could not be ruled as adequate as a matter of law, as a jury might conclude that the contract issues alleged might go beyond those warnings. Judge Koeltl held that plaintiffs sufficiently alleged that defendants' statements concerning the LOP contracts and waste disposal business were false or materially misleading in that the disclosures made lacked necessary information.

Where the complaint alleged that defendants made statements about the expectations of NRC approval of ES's petition, defendants argued that since the NRC's actions in other decisions were a matter of public record, defendants' statements of the likelihood of an outcome inconsistent with historical precedent could not be considered to be a material omission. Judge Koeltl wrote that "[t]hese allegations plainly survive the motion to dismiss. [Defendants] stated in unmistakable language that they 'expect[ed] the NRC to change their rule' and that they were 'comfortable' and 'confident' in the chance of approval of their petition," despite being informed that "the chances of NRC approval were minimal."

After initial briefing, Judge Koeltl asked the parties to submit additional letter briefs on any effects the recent Supreme Court case of *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), might have on the *ES* case in determining ENV's liability for offering-related statements that might be subject to Rule 10b-5 and Section 10(b). Judge Koeltl wrote, "There is no dispute that ES and each of the Individual Defendants who signed the Registration Statements 'made' the statements under Janus." But while, like the defendants in the *Janus* case, ENV and ES were legally distinct entities, "ENV was the sole owner of outstanding stock in ES at the time of the IPO and was the selling stockholder in both Offerings." Unlike the defendants at issue in *Janus*, the judge concluded that ENV was subject to suit, as it had "ultimate authority" over both offerings. Defendants' argument "overlook[ed] ENV's ownership of ES, its direct control over all corporate transactions, and its authority to determine when and whether to sell the shares being sold.… Accordingly, the plaintiffs have sufficiently pleaded that ES and ENV made the Registration Statements."

In arguing that plaintiffs had not properly alleged loss causation, defendants claimed the October 14, 2008 announcement of the NRC's denial of ES's petition and a deteriorating financial outlook only disclosed intervening events, rather than corrective statements. However, Judge Koeltl held that "plaintiffs are not required to show a correction of a previous misstatement, but only a loss that was foreseeable and that was caused by the materialization of the risk concealed."

Judge Koeltl upheld plaintiffs' scienter allegations against three key individual defendants who were officers of ES and principals of ENV as sufficiently alleging "conscious misbehavior or recklessness." And, the judge concluded, because the complaint properly alleged scienter against the three officers of ES and principals of ENV, it necessarily alleged scienter against ES and ENV as well. The judge also held that the shares sold through the offerings, for proceeds to defendants exceeding $1.5 billion, "could clearly be characterized as 'unusual insider trading activity during the class period' which may permit the inference of … scienter" under a "motive and opportunity" theory against ES, ENV, and most of the individual defendants. Judge Koeltl also upheld plaintiffs' Section 11 and 12(a) allegations against the Underwriter Defendants, most individuals, ES and ENV as sufficiently pleaded, as well as denied defendants' attempt to dismiss allegations that the Registration Statements omitted disclosures required by Item 503 and Item 103 of SEC Regulation S-K (where the "risk factors" and "legal proceedings" sections of the Registration Statements lacked sufficient information regarding the NRC's consistent rejection of proposals similar to ES's petition).

Robbins Geller Rudman & Dowd LLP partner **Evan J. Kaufman** said, "This case involves complex factual and legal issues and we are very pleased with the court's opinion denying, in most part, defendants' motion to dismiss. We look forward to presenting evidence to prove our allegations."

City of Roseville Employees' Retirement System v. EnergySolutions, Inc., No. 09-cv-08633, 2011 U.S. Dist. LEXIS 113630 (S.D.N.Y. Sept. 30, 2011).

Motion to Dismiss
First Amendment Not a Shield for Rating Agencies in *Thornburg*

It's no secret that purportedly "AAA-rated" mortgage-backed securities have proven to be a nightmare for investors. Multiple government investigations have been highly critical of the rating agencies and their Wall Street partners for their roles in offerings gone wrong. These deals ended up being disasters for main street and institutional investors alike, with investigations accusing the rating agencies of flawed ratings, conflicted business practices, and insufficient disclosures to investors and the public. While there has been no shortage of litigation, success for plaintiffs suing rating agencies has been difficult, especially when trying to bring class actions against the agencies. While underwriters can be held liable for the offerings they participate in, the courts have been loath to consider rating agencies as underwriters when it comes to alleged violations of federal securities laws on behalf of classes of aggrieved investors.

However, an amended class action complaint filed in federal court in New Mexico by Robbins Geller Rudman & Dowd LLP, on behalf of lead plaintiffs **The Maryland-National Capital Park & Planning Commission Employees' Retirement System** and **Midwest Operating Engineers Pension Trust Fund**, has found some traction against rating agency defendants by alleging violations of state law that prohibit the making of untrue statements or omitting material facts with regard to the selling of securities. In ruling on defendants' motions to dismiss, Judge James O. Browning of the United States District Court for the District of New Mexico also held that the claims against the rating agency defendants, including Moody's, The McGraw-Hill Companies, Standard & Poor's and Fitch Ratings, were not barred by the First Amendment of the United States Constitution – the first known victory on that front for class action plaintiffs in mortgage-backed securities ("MBS") related litigation.

The case concerns the creation, ratings and sale of a series of Thornburg Mortgage Securities Trust pass-through certificates that would pay certificate holders out of the pooled income from the securitized mortgages. The rating agency defendants were allegedly paid "substantial amounts of money … for their participation in the issuance and sale of the certificates." The certificates were designed from the beginning to have the rating agencies' top (AAA/Aaa) ratings, which historically had a yield-default rate of less than one-twentieth of one percent, because they could not be sold to their intended customers otherwise.

While plaintiffs' initial complaint had been filed in New Mexico state court, it was removed to federal court in March 2009. The amended complaint filed in December 2010 alleged violations of the New Mexico Securities Act, as well as violations of federal securities laws by the underwriters, rating agencies and individual defendants.

After full briefing on the motions to dismiss and nine hours of oral argument in September, Judge Browning's 273-page order was filed in November 2011. Robbins Geller Rudman & Dowd LLP partner **Jonah Goldstein** and associate **Danielle Myers** argued for the plaintiffs. Despite defendants' arguments to the contrary, Judge Browning held that plaintiffs' claims were not time-barred; that the allegations that the non-rating agency defendants abandoned their underwriting guidelines, utilized improper appraisal practices with regard to an offering and inflated loan-to-value ratios in offering documents were sufficient; that the complaint's federal Section 12(a)(2) claims were adequately alleged; and that the credit ratings qualified as actionable misrepresentations by the non-rating agency defendants because the complaint alleged a failure to disclose material information while the ratings were part of the offering documents.

As to the rating agency defendants, Judge Browning ruled their New Mexico Securities Act liability was sufficiently alleged, as well as allegations of material misrepresentations or omissions made by Standard & Poor's. Cautionary language regarding the ratings in the offering documents was ruled to be inadequate because, "[w]hile it warned ... that the Rating Agency Defendants may subsequently withdraw or revise their rating – which occurred – it did not warn Plaintiffs that the Rating Agency Defendants did not believe their ratings when they made them, that the ratings lacked any basis, or that

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

Supreme Court Report

Two Robbins Geller Rudman & Dowd LLP cases were the subject of attention due to defendants' appeal of lower court decisions to the United States Supreme Court. In both instances, the Court denied the defendants' petitions for writs of *certiorari*, leaving the current decisions intact.

In *Frank v. Dana Corporation*, the Sixth Circuit Court of Appeals in Cincinnati reversed the district court's dismissal of an action filed by plaintiffs **SEIU Pension Plans Master Trust**, **West Virginia Laborers' Pension Trust Fund**, and **Plumbers and Pipefitters National Pension Fund** for the second time in three years. (*See* 3Q11 Corp. Gov. Bulletin.) Citing recent Supreme Court authority, the Sixth Circuit had held that plaintiffs' scienter allegations were adequate and that the method for determining so was to analyze the facts alleged in the pleadings not by looking at each allegation individually, but by taking a holistic approach and viewing them collectively.

The Sixth Circuit also ruled that the defendants' contentions that plaintiffs had not properly alleged defendants' "control person" status were incorrect because plaintiffs had met the requirements to show scienter, and plaintiffs were not required to plead that those defendants had acted in bad faith. Calling the Sixth Circuit's reasoning "particularly lax," the defendants petitioned the Supreme Court for a writ of *certiorari* in September 2011, arguing that the "Sixth Circuit has, without warrant, seriously weakened the protections that the [Private Securities Litigation Reform Act] sought to provide to public companies and their executives. If left standing, its decision will have the effect of … expanding the judicially created private right of action implied under Section 10(b)." Plaintiffs waived their right to file a response (letting the Sixth Circuit's opinion speak for itself), and the Supreme Court denied defendants' petition on November 7, 2011.

Meanwhile, in the Countrywide Financial Corp. mortgage-backed securities case, defendants petitioned the Supreme Court for a writ of *certiorari* in an effort to overturn a decision of the California Court of Appeal after the California Supreme Court denied review of the decision. The Court of Appeal had ruled that the superior court had erred in deciding that it lacked jurisdiction under the Securities Litigation Uniform Standards Act of 1998 (SLUSA) because mortgage pass-through certificates were not covered securities under SLUSA and therefore the class action was not removable to federal court.

The class action, which had been shuttling between state and federal courts for four years, was originally filed in the Superior Court of Los Angeles County. The complaint accused Countrywide Financial, which was subsequently acquired by Bank of America, of making false claims regarding the quality of loans in connection with the sale of mortgage-backed securities for billions of dollars. Defendants had the case removed to federal court twice, but both times it was remanded back to state court. After the second trip back, the defendants' demurrer in superior court was sustained, and the case was ordered back to federal court for a third time. However, plaintiffs successfully appealed this order to the California Court of Appeal, which reversed the trial court on the demurrers and ruled that the plaintiffs' claims had been improperly dismissed because the case was not removable. The appellate court ruled that because "the case is not precluded and can be maintained, but cannot be removed to federal court if it is filed in state court, [this] tells us that the state court has jurisdiction to hear the action" and "an intent to prevent certain class actions does not tell us that this class action, or all securities class actions must be brought in federal court." Defendants were not through, however, first appealing to the California Supreme Court (where review was denied), and then petitioning the U.S. Supreme Court, where *certiorari* was denied.

Frank v. Dana Corp., 646 F.3d 954 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 559 (2011).

Luther v. Countrywide Financial Corp., 195 Cal. App. 4th 789 (2011), *cert. denied*, 181 L. Ed. 2d 527 (2011). ■

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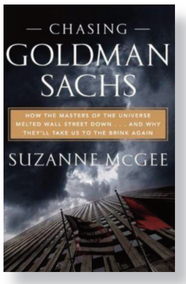
the rating agencies knowingly omitted undisclosed facts tending to seriously undermine the accuracy of the statement."

While the rating agency defendants argued that their ratings were protected opinions under the First Amendment, because they were not provably false or alternatively were made without actual malice, the judge quoted *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.* (where Robbins Geller Rudman & Dowd LLP was also plaintiff's counsel): "where a rating agency has disseminated their ratings to a select group of investors rather than to the public at large, the rating agency is not afforded the same protection." Because the ratings were alleged to be specifically targeted by defendants to a limited group of institutional investors, the First Amendment did not cover them. Also, while publicly traded companies have qualified as public figures, the ratings in this case were for statutory trusts, which did not qualify. Judge Browning's order stated that "[c]redit ratings are commercial speech, and thus they receive 'reduced protection,'" and as "[t]he basic allegations in this case are that the credit ratings were false or misleading," a "rating not addressing a matter of public concern receives no special protection."

Because plaintiffs are amending their complaint to deal with a jurisdictional issue and to address some dismissed allegations, the final outcome of the case will not be decided for some time to come. In any event, the *Thornburg* case has already marked the first known use of a new tool to bring justice for victims of the MBS ratings catastrophe.

Genesee County Employees' Retirement System v. Thornburg Mortgage Securities Trust 2006-3, No. CIV 09-0300, Memorandum Opinion and Amended Order (D. NM Nov. 12, 2011). ■

Recommended Reading



Chasing Goldman Sachs:

How the Masters of the Universe Melted Wall Street Down . . . and Why They'll Take Us to the Brink Again

Suzanne McGee
Crown Business, October 2011

Utter the name "Goldman Sachs" anywhere in America and you'll hear some colorful responses. *Rolling Stone* magazine columnist Matt Taibbi famously compared the venerable investment bank to a "great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money." True, Goldman's fingerprints are on everything from the securitized mortgage catastrophe to the ongoing Greek debt crisis. Whether you admire or despise Goldman, it is undeniable that the highly profitable investment bank's pursuit of the highest return on its capital has generated a curious knock-on effect: other major investment banking houses from Morgan Stanley to the defunct Lehman Brothers used Goldman as a yardstick to compare their own success, chasing after Goldman's aggressive trading strategies, market share, and above all its quarterly financial numbers, in pursuit of Goldman-sized annual bonuses. Suzanne McGee walks us through the causes and effects of the "Goldman Envy Syndrome" in the revised and updated paperback edition of her book, *Chasing Goldman Sachs*.

McGee, a contributor to *Barron's*, describes Wall Street's basic classical function: to be a utility on the "money grid," helping ensure the flow of capital from investors to borrowers. As times and laws changed (particularly the rollback of the Glass-Steagall Act), the modest returns provided by the money-utility function of investment banks began to become overshadowed by profit-maximizing activity, like trading. The already lucrative work of advising corporate clients and helping structure deals and initial public offerings didn't generate the same returns as the banks could generate trading on their own accounts.

No good disaster happens with a single step; in the case of the financial meltdown of 2008, there were numerous discrete stages. McGee identifies several, including the growing dominance of private equity and hedge funds as market participants, the reliance on computer trading systems, and the transition of investment banks from private partnerships to publicly traded corporations. The last point is worth reflecting on – when investment houses like Goldman and Lehman Brothers were owned by their partners, the long-term ramifications of major decisions were carefully weighed and debated by a small interested group. As the investment house Donaldson, Lufkin & Jenrette demonstrated in 1970, going public could vastly increase the available capital to put to work making money, with a few major drawbacks – among them, the loss of the internal checks and balances provided by self-interested partners making sure that short-term profit seeking did not jeopardize their long-term equity interest. As investment banks transmogrified themselves into corporations, the mechanism of effective ownership became diluted – and shareholders demanded that each bank be as aggressive as Goldman, or its stock price would be punished. Similarly, if Goldman didn't compensate its top producers as highly as other banks, its own talent might defect.

In every step of the transformation of financial markets towards higher risk and higher return, Goldman led the way. Still, the reader should be warned that the book reveals very little about Goldman itself. Rather, it is the aggressive pursuit of the same risks and returns of Goldman that provides McGee's thesis (and subtitle) – that the "Masters of the Universe" who melted down Wall Street can and will take the system to the brink again. Absent radical changes (breaking up too big to fail, ending proprietary trading, a return to the money grid utility function), the fabled returns of Goldman will continue to be chased relentlessly, even to the gates of destruction. ■

EYE ON WALL STREET

Brian Moynihan

Bank of America ("BofA") CEO Brian Moynihan has had a tough quarter at the helm of the embattled investment and commercial bank. Facing a capital shortfall of an estimated $45 billion, BofA stock has "plumbed lows" according to *Reuters*, and impairments stemming from BofA's acquisitions of the collapsed investment bank Merrill Lynch and subprime mortgage factory Countrywide Financial have not helped. Adding to the fiasco, Moynihan proposed to levy a $5 monthly fee on debit card users, spurring an ongoing consumer revolt in which thousands of customers have withdrawn their deposits in protest.

Moynihan's recent flipflops over whether BofA needs to issue more stock and raise capital have undermined investor confidence. As BofA attempts to deal with fallout from lawsuits over its mortgage and foreclosure practices, the value of credit default swaps on BofA securities (a gauge of potential insolvency) has jumped, and investors now warily eye the $53 trillion in derivatives exposure held by the formerly solid bank.

Moynihan may have recent college graduate Molly Katchpole to thank for some of his trouble. Noting that BofA received infusions of Treasury and Federal Reserve bailout largesse in 2008, Katchpole, a part-time nanny, started an online petition decrying the hypocrisy of BofA's $5 fee on customers to access their own money. Her complaint went viral over social media networks, echoing similar consumer anger which inspired "Occupy Wall Street." In loosely organized marches, numerous BofA retail customers have yanked their funds from BofA accounts and decamped to local credit unions. Moynihan's retort? "We have a right to make a profit."

Facing consumer and shareholder revolt, Moynihan has withdrawn the proposed $5 debit fee. Still, with BofA's structural capital issues looming, do not expect Moynihan's fortunes to change anytime soon.

Calendar of Upcoming Events

February 5-7, 2012

NCPERS
Annual Legislative Conference

Hyatt Regency Washington Hotel
Washington, District of Columbia

This annual conference is the premier event for public fund trustees and plan administrators, highlighting the issues on Capitol Hill and in federal regulatory agencies that affect pension funds today.

For more information, visit: www.ncpers.org

February 27-28, 2012

Los Angeles Area Pension Trustees Network
Fifth Annual Conference 2012

Westin LAX
Los Angeles, California

The conference will provide unbiased education to members and other conference attendees on the issues trustees and fiduciaries must understand in order to make decisions to protect their funds. Speakers include California State Treasurer Bill Lockyer, AFT President Randi Weingarten and California State Controller John Chiang. Other panelists and speakers include pension fund CEOs and key staff, industry activists and leaders of national corporate governance campaigns. Topics discussed include current corporate governance issues and retirement security.

For more information, visit: www.latrustees.org

March 2, 2012

Opal Financial Group
Investment Consultants Forum

Crowne Plaza Times Square
New York, New York

This annual forum will provide a unique environment for developing dialogue between plan sponsors, managers and consultants, and will feature panel-driven discussions focused on specific investment techniques of fixed income and hedge fund managers, the evolving role of institutional consultants, the manager evaluation process, transition management, and investing in global markets. Complimentary registration for representatives of pension and Taft-Hartley funds.

For more information, visit: www.opalgroup.net

March 12, 2012

D.C. Finance
The Tel Aviv Institutional Investment Conference

David InterContinental Hotel
Tel Aviv, Israel

The conference brings together approximately 550 investment managers and investment committee members of pension, provident and mutual funds, nostro managers at the local banks and insurance firms, CFOs of large cap firms and private institutional investors with approximately US$350 billion under management. The agenda will explore asset allocation in the following areas: commodities, infrastructure, real estate, forex, asset allocation strategies, risk management, equities, fixed income, global private equity strategies, ETFs, green energy projects, Chilean pension system based investment vehicles, institutional credit loans and other related topics.

For more information, visit: www.tlvii.com

March 19-20, 2012

International Corporate Governance Network
2012 Mid-Year Conference

London Guildhall
London, England

An important theme of the mid-year conference is the interim findings on the Kay review into long termism with a focus on alignment and accountability along the investment chain. Sessions will explore lessons to be drawn from the EC Green Paper on Corporate Governance. Over 250 delegates will bring a global perspective to the debate from some of the largest investment houses and corporations in the world.

For more information, visit: www.icgn.org

March 21, 2012

Institutional Investor
The UAE Global Investment Forum

Emirates Palace
Abu Dhabi, United Arab Emirates

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

The 5th Annual UAE Global Investment Forum will be held in partnership with the Abu Dhabi Department of Economic Development and Institutional Investor Forums. CNBC is the official media partner and will be reporting live from the Forum with its flagship show "Squawk Box." The Forum's agenda will focus on the outlook for global and regional markets, and the opportunities being created for foreign investors in Abu Dhabi. The Forum will bring together high-profile global investors, business leaders and financiers with Abu Dhabi's key decision makers. It will be by invitation only and free of charge to delegates. Over 300 delegates are expected to participate.

For more information, visit: www.iiconferences.com

March 26-27, 2012

Information Management Network
17th Annual Public Funds Summit

Park Hyatt Aviara Resort
North San Diego, California

This event brings together leading pension trustees, board chairs, executive directors, investment officers, investment consultants and money managers from around the country for in-depth educational content and extensive networking opportunities. The conference provides attendees with a comprehensive overview of the public pension fund landscape, with in-depth, interactive discussions on asset allocation, investment strategies, manager selection, trustee issues and governance issues.

For more information, visit: www.imn.org

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