Robbins Geller Rudman & Dowd LLP

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# Supreme Court's *Amgen* Decision Adopts Position Urged by Law Professors Represented by Robbins Geller

With its February 27, 2013 decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, No. 11-1085, the U.S. Supreme Court has dealt a blow to the defense bar's efforts to terminate securities fraud class actions prematurely, before plaintiffs have a full opportunity to develop and present their evidence of fraud. The Court's decision adopts precisely the position urged by Robbins Geller attorneys in a brief filed on behalf of law professors as "friends of the court."

The case deals with what a plaintiff investor must prove in order to have a securities fraud case certified as a class action. A plaintiff investor seeking to assert securities fraud claims on behalf of a class of other similarly situated investors is required by the rules of civil procedure to demonstrate that common questions will predominate over individual issues if the case is tried as a class action. In some cases alleging fraud, however, proving class members' reliance on the defendants' fraudulent statements can present individualized issues. Recognizing that an actively traded security's market price is ordinarily determined by publicly available information, the Supreme Court held in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), that investors may rely on the "integrity" of that price, establishing this reliance with common evidence that the defendants disseminated material misstatements in an open and developed market.

Defendants' counsel endeavored to end such cases prematurely by asking courts to demand proof that statements were materially false before certifying a class – long before the plaintiffs had an opportunity to develop evidence of fraud for trial. Lower courts were divided on what investors must prove in order to obtain class certification. Some held that plaintiffs seeking to represent a class must demonstrate the materiality of fraudulent statements before a class may be certified. Others, including the Seventh Circuit and Ninth Circuit, held that class certification requires a plaintiff to merely demonstrate that statements were publicly disseminated into a market sufficiently "efficient" for material public information to be incorporated in the price, leaving proof of materiality – like proof of falsity and of the defendants' culpable state of mind – for trial, after the plaintiffs have had a chance to develop their case.

When Amgen Inc. asked the Supreme Court to reject this approach, Robbins Geller attorneys worked with Professor David Marcus of the University of Arizona's James E. Rogers College of Law to file an *amicus curiae* brief on behalf of 18 civil procedure and securities law professors. The brief traced the history and purpose of Civil Procedure Rule 23, whose framers stated that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action." It also traced the history of common law fraud and market manipulation, and of fraud-on-the-market precedents preceding *Basic*. "Though proof of materiality supports an inference of reliance under *Basic*," the *amicus* brief emphasized, if proof of statements' materiality fails at trial, "there is no point in proving individualized reliance on them – as investors who rely on an immaterial misstatement have no claim in any event." Thus, the brief urged, the case "would not produce individualized issues of reliance if the misrepresentations at issue turned out to be immaterial."

The Supreme Court agreed, holding that "there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating." A failure of proof on materiality "will never cause individual questions of reliance or anything else to overwhelm questions common to the class."

The decision is a good one for investors, who can no longer be required to prove material falsity before they have had a chance to develop their evidence for trial. ■

# Private Equity Antitrust Victory for Plaintiffs

On March 13, 2013, a federal court in Boston largely denied defendants' motion for summary judgment, allowing the case to proceed against 11 private equity firm defendants accused of suppressing competition in large leveraged buyouts ("LBOs").

Defendants Kohlberg Kravis Roberts & Company, L.P. ("KKR"), Bain Capital Partners, LLC, The Blackstone Group, and eight other of the world's largest private equity firms are accused of conspiring to suppress the prices paid to shareholders in LBOs. An LBO is a financial transaction in which purchasers, in this case 11 private equity firms, acquire substantially all of a target company's outstanding shares using some of their own capital along with a substantial amount of debt financing. The purchaser then typically takes the company private (by withdrawing its shares from the public trading exchange), operates it for a period of time, and sells it or conducts an IPO whereby the company stock is again introduced to a public trading exchange. At issue in this case are 19 LBOs that occurred during the 2003-2007 time period, which were each valued at more than $2.5 billion, as well as certain other LBO-related transactions in which the defendants engaged in anti-competitive conduct.

Some of the largest LBOs in history are at issue in this action, including the $45 billion TXU, $32 billion HCA, and $17 billion Freescale LBOs. The evidence in the case shows that when a group of private equity firms agreed to buy a public company through an LBO, not once did any other private equity firm submit a bid to buy the company or compete in any way. In some instances, the other private equity firms had actually valued the target company at a much higher price than the going-private price, but still declined to submit a bid to "jump" the deal.

"The court found that the defendants' internal statements that 'no one in private equity ever jumps an announced deal,' in combination with other evidence showing for example that no announced deals for the proprietary transactions at issue were ever 'jumped,' tended to show that such conduct was the practice in the industry during this time period," said Robbins Geller's primary litigator in the case, partner **David W. Mitchell**.

The court issued its ruling after holding a two-day summary judgment hearing in late December 2012. The case is pending in the District of Massachusetts before U.S. District Judge Edward F. Harrington. Robbins Geller attorneys prosecuting this action include **Patrick J. Coughlin**, **David W. Mitchell**, **Randi D. Bandman** and **Phong L. Tran**.

*Kirk Dahl, et al. v. Bain Capital Partners, LLC, et al.*, No. 07-12388-EFH, Memorandum and Order (D. Mass. Mar. 13, 2013). ■

## Robbins Geller Announces Portfolio Monitoring Program℠ Enhancements

Well over a decade ago, Robbins Geller began offering the first in-house, complimentary monitoring of the financial impact of securities fraud on its clients' portfolios.

Beginning in 2013, Robbins Geller announced several improvements to its Portfolio Monitoring Program℠, including monthly electronic delivery. "We recognize that our clients' time is valuable," said Robbins Geller partner **David C. Walton**. "With monthly reporting, our clients will be empowered to make timely assessments of the impact of misconduct on their portfolios and whether their exposure warrants closer attention," he noted. "By delivering the monthly reports electronically, our clients have secure and instant access to their reports."

These changes will allow Robbins Geller to continue to deliver the best-in-class advice and analysis to its clients in a timely and accessible manner. Robbins Geller looks forward to continuing to evolve and improve its products to better meet – and exceed – its clients' needs. ■

## News Brief

### Robbins Geller Inauguration Reception

Pictured (from left to right): James P. Hoffa, General President of International Brotherhood of Teamsters; Senator Mark Begich; Mary Anne Pintar, Chief of Staff to Rep. Scott Peters; and Patrick W. Daniels, Partner at Robbins Geller

In January, Robbins Geller co-hosted a DC inauguration reception along with investment manager Entrust Capital and the largest Labor-owned insurance and investment company in the U.S., ULLICO. The event was held at culinary hotspot Jaleo and was attended by a bipartisan crowd of national leaders, including U.S. Senators, House members, Guests of Honor Congressmen Scott Peters and International Brotherhood of Teamsters General President James P. Hoffa, ambassadors and fund managers (and at least one professional DC party crasher).

# The Future of Corporate Reform Celebrates Its Fifth Year

GMI Ratings, a leading source for independent corporate governance information and analysis, is pleased to announce its Fifth Annual The Future of Corporate Reform 2013 Public Funds Forum, an invitation-only educational conference.

Designed to educate representatives of public pension funds with the knowledge and tools to create long-term value and shape corporate reform, the 2013 Forum will be held from September 17-19 at The Resort at Pelican Hill in Newport Coast, California. **Robbins Geller Rudman & Dowd LLP**, the premier securities litigation firm, and **Gilardi & Co. LLC**, class action administration experts, will also be sponsoring the event.

Officials from public pension systems throughout the United States and abroad will meet to participate in panel discussions ranging from investment strategies for public funds, the use of private securities actions as remedies, and a review of new tools being used to protect assets. The keynote address will be delivered by President Bill Clinton. Other speakers will include James Carville, political commentator, consultant, and media personality; Robert A.G. Monks, co-founder of GMI Ratings; and Chesley (Sully) Sullenberger, "Miracle on the Hudson" pilot and best-selling author.

In addition to educational sessions and informative panel discussions, an exciting variety of activities will allow guests ample opportunity to network and build relationships. For the most current information about the sessions agenda and to register, please visit www.GMIconferences.com. ■

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# Robbins Geller Remembers the Life of Appellate Partner Sanford "Sandy" Svetcov

Robbins Geller remembers and honors the life of its late appellate partner **Sanford "Sandy" Svetcov**, who died in February after an exhausting 16-month battle with pancreatic cancer. He was 72. Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit stated that Svetcov was "a respected lawyer who cared deeply about achieving justice for all."

In between wearing rounds of chemotherapy, Svetcov spent his last few months doing what he loved most, appellate practice in the U.S. Court of Appeals. He argued in front of the Ninth Circuit last May, pleading with the judges regarding a summary judgment decision that had gone against his client, pulling out all the stops in his arguments, with a legal mind honed by decades of appellate work. A valued mentor at Robbins Geller, Svetcov refused to dwell on his diagnosis, instead staying busy with the work he loved. Svetcov stated last year that the appellate practice was "great emotional therapy," and that trying to solve the problem in the briefing and getting the physical strength to prepare for and give the argument had been "fabulous."

Svetcov was also honored last August at the 2012 Ninth Circuit Judicial Conference, receiving the John Frank Award, which recognizes an outstanding lawyer practicing in the federal courts of the western states. The John Frank Award was established in 2003 by the Judicial Council of the Ninth Circuit at the recommendation of the Ninth Circuit Advisory Board, a group of experienced attorneys who advise on circuit governance issues. The award recognizes "a lawyer or judge whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law." The late Mr. Frank was a renowned attorney in Phoenix who, over the course of a 62-year career, argued more than 500 appeals before the Arizona Court of Appeals, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, other federal circuit courts and the U.S. Supreme Court.

*Sanford "Sandy " Svetcov*
*1941-2013*

Svetcov briefed and argued more than 300 cases in state and federal courts, including the Supreme Court of the United States. He practiced law for 47 years and was considered to be the dean of appellate lawyers appearing before the Ninth Circuit Court of Appeals. He was also well known for volunteer work on behalf of the court, including recruiting lawyers from the Northern District of California to participate in the Ninth Circuit Pro Bono Program. He began his legal career in government service. He worked as deputy legislative counsel to the California Legislature from 1965 to 1966, then served as a legal officer in the Navy from 1966 to 1969. After completing military service, he served as a deputy attorney general for the State of California from 1969 to 1977. In 1978, Svetcov joined the Office of the U.S. Attorney for the Northern District of California. He served as Chief Assistant for Appellate Matters from 1978 to 1981; as the Attorney-in-Charge of the office's Organized Crime Strike Force from 1981 to 1984; and as Chief of the Appellate Section from 1984 to 1989. Svetcov was a partner in the law firm of Landels Ripley & Diamond LLP until 2000, when he joined Robbins Geller.

Partner **Darren J. Robbins** of Robbins Geller commented that Svetcov was "one of the most accomplished, committed and selfless people to ever grace the firm. He touched so many of our lives with his guidance and wisdom and will be deeply missed by all of us." ■

# Litigation Update

## Plaintiffs Prevail in Madoff/ERISA Actions' Motions to Dismiss

U.S. District Judge Thomas P. Griesa recently issued two important decisions striking down defendants' motions to dismiss plaintiffs' claims brought under the Employee Retirement Income Security Act of 1974 ("ERISA") in connection with defendants' roles as sub-feeder funds to the infamous Ponzi scheme orchestrated by Bernard L. Madoff.

In the *Meridian* class action, lead plaintiff **Pension Trust Fund for Operating Engineers** filed ERISA claims, among others, against Meridian Capital Partners, Inc. and others on its own behalf and on behalf of similarly situated multi-employer pension plans governed by ERISA who purchased or held shares in the Meridian Diversified ERISA Fund, Ltd. Meridian Diversified ERISA Fund, Ltd. made a significant investment in the Rye Select Broad Market XL Portfolio Ltd., which was managed by Tremont Partners, Inc. and served as one of the feeder funds for Bernard L. Madoff. Lead plaintiff alleged that, unbeknownst to the class, defendants had invested a significant portion of Rye Select funds into Madoff-managed investments that failed to align with defendants' marketed due diligence, risk management and manager vetting procedures, and violated defendants' fiduciary duties under ERISA.

Because lead plaintiff and the class were ERISA plans and named fiduciaries of those plans, the assets invested with defendants were deemed "plan assets." By the funds holding plan assets, those who controlled the funds were considered functional fiduciaries with attendant duties and liabilities. The litigation team at Robbins Geller, led by **David A. Rosenfeld**, **John K. Grant** and **Edward Y. Kroub**, successfully argued that defendants deliberately breached their duty of prudence by way of their "unawareness of, or blindness to," the red flags raised by Madoff's fraud. Judge Griesa wrote that "[t]he ERISA prudence standard is one of the highest duties known to the law," and further noted that had defendants completed any of their purported due diligence and risk management, they would have or "should have been aware [that Madoff was managing the money under his scheme] and other red flags which should have set off alarms and made defendants question their investment."

In the *Austin Capital* class action, lead plaintiffs **Pension Trust Fund for Operating Engineers, Sheet Metal Workers' National Pension Fund** and **International Brotherhood of Teamsters Local 705 Pension Fund** represent a class of pension plans and other institutional investors that invested in hedge funds controlled by Austin Capital Management Ltd. Austin Capital, in turn, forwarded the investments to Rye Select Broad Market Prime Fund, LP ("Rye Select Prime Fund"), managed by Tremont Partners. The Rye Select Prime Fund was, in turn, invested with Madoff and his investment firm, Bernard L. Madoff Investment Securities LLC. Once Madoff's fraud was exposed, Austin Capital's entire investment in the Rye Select Prime Fund was lost.

Similar to *Meridian*, lead plaintiffs in *Austin Capital*, who are represented by Robbins Geller and co-counsel, were able to successfully allege defendants' breaches of fiduciary duties under ERISA. Specifically, defendants consistently misrepresented the extent of the due diligence that they had undertaken. As aptly stated by Judge Griesa, defendants' actions raise "a significant doubt about whether defendants employed the appropriate methods to inform themselves before making the decision to invest in the Rye Select Prime Fund."

As a result of the lead plaintiffs' successful opposition to defendants' motions to dismiss, both cases will proceed to discovery. According to Robbins Geller partner **David A. Rosenfeld**, "The hallmark of ERISA is to provide pension funds with significant protective measures and safeguards. Schemes like Madoff's provide the quintessential example of why ERISA laws must be given teeth in order to adequately protect pension funds and their members." **John K. Grant**, a partner at Robbins Geller, added that "these outstanding results are a testament to the firm's capacity to protect fund assets in ERISA matters."

*In re Austin Capital Management, Ltd., Securities & Employee Retirement Income Security Act (ERISA) Litigation*, No. 09-md-2075, Opinion (S.D.N.Y. Dec. 21, 2012).

*In re Meridian Funds Group Securities & Employee Retirement Income Security Act (ERISA) Litigation*, No. 09-md-2082, Opinion (S.D.N.Y. Jan. 7, 2013). ■

## Rating Agencies and Morgan Stanley Still on the Hook After Summary Judgment in *Rhinebridge*

On January 3, 2013, Judge Shira A. Scheindlin of the Southern District of New York denied defendants' motions for summary judgment on plaintiffs' fraud claims against three rating agencies and an aiding and abetting fraud claim against Morgan Stanley over what was dubbed "the shortest-lived 'Triple-A' investment fund in the history of corporate finance."

Rhinebridge Plc was a $2.5 billion structured investment vehicle ("SIV") that was structured by its placement agent, Morgan Stanley. Rhinebridge collapsed four months after its creation and a matter of weeks after plaintiffs **King County, Washington** and **Iowa Student Loan Liquidity Corporation** invested in it. The rating agencies Standard & Poor's ("S&P"), Moody's and Fitch all gave Rhinebridge their highest ratings despite the fact that they knew the SIV contained toxic assets, such as unsellable home equity loans.

The recent decision in *King County, Washington v. IKB Deutsche Industriebank AG* ("*Rhinebridge*") comes after Judge Scheindlin denied similar motions in August 2012 in the $9.5 billion Cheyne SIV action (*Abu Dhabi Commercial Bank, et al. v. Morgan Stanley & Co., Inc., et al.*, No. 1:08-cv-7508-SAS, Opinion & Order (S.D.N.Y. Aug. 17, 2012)) ("*Abu Dhabi*"), for fraud claims against rating agencies and aiding and abetting against Morgan Stanley. The cases share so many issues, counsel and parties that Judge Scheindlin repeatedly referred to her findings in the summary judgment order in *Abu Dhabi* in her *Rhinebridge* decision.

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Judge Scheindlin wrote that the rating agencies' ratings were, by their nature, not merely opinions, but opinions based on facts after "the rating agency has analyzed data, conducted an assessment, and reached a fact-based conclusion as to creditworthiness. If a rating agency knowingly issues a rating that is either unsupported by reasoned analysis or without a factual foundation, it is stating a fact-based opinion that it does not believe to be true." The court held that plaintiffs need show only "that the rating agency issued a rating that it knew was unsupported by facts or analysis – that the rating agency did the equivalent of issuing a restaurant review despite never having dined at the restaurant."

As to Moody's, the judge referred to similiarities between Rhinebridge and Cheyne: "First, plaintiffs provide a litany of e-mails, deposition quotes and internal documents indicating an awareness that the rating model was unsupported and a concern with the state of the Residential Mortgage Backed Securities ('RMBS') market. Second, plaintiffs offer ample evidence that Moody's viewed Rhinebridge as being extremely similar to Cheyne, [in] that it used the same rating model for both SIVs," as both were arranged by Morgan Stanley, the Rhinebridge capital model was "identical to that of Cheyne's," and Moody's methodology for determining capitalization sufficiency, known as "haircut matrices," was, "if not identical, very similar" to Cheyne. "Thus," the judge wrote, "as in the Abu Dhabi matter, plaintiffs' evidence is sufficient to create a disputed issue of fact as to whether Moody's believed its rating when it issued it."

S&P's arguments fared no better, and Judge Scheindlin wrote that "plaintiffs have offered evidence that S&P used the same rating methodology for Rhinebridge as it did for Cheyne. I held in the Abu Dhabi opinion that there was sufficient evidence from which a jury could infer that S&P did not believe its Cheyne rating when it issued it. Not only is there no reason to believe that S&P was more confident in its SIV rating methodology when it rated Rhinebridge, but plaintiffs have offered evidence that S&P was even more concerned about the state of the RMBS market when it rated Rhinebridge than when it rated Cheyne two years earlier."

Fitch had opted out of rating the Cheyne SIV, and thus was not a defendant in that action. However, Judge Scheindlin held that "[p]laintiffs have offered evidence that Fitch assigned its top rating to Rhinebridge despite concerns just as pronounced as those held by Moody's and S&P. There are documents and testimony indicating that Fitch was expecting the mortgages underlying the RMBSs in Rhinebridge to see an increased delinquency rate." Fitch correspondence revealed that one of its primary Rhinebridge analysts considered the ratio of home equity loans in the SIV to be "aggressive" and "pushing the boundaries," while another wrote that he did not have the resources to give an analysis of the SIV. The judge wrote that "[d]espite the paucity of information and the risky boundary-pushing nature of Rhinebridge, Fitch assigned the Rhinebridge CP its highest rating. That Fitch refused to rate Cheyne – an SIV very similar to Rhinebridge – is further support for the inference that Fitch viewed the rating of SIVs as a dubious endeavor. In sum, plaintiffs have provided sufficient evidence from which a jury could infer that Fitch did not believe its Rhinebridge rating when it issued it." Shortly after the court denied Fitch's summary judgment motion, Fitch entered into a settlement with the plaintiffs.

As to scienter and reliance, the judge wrote that based on what plaintiffs had provided, she found that a jury could reasonably infer scienter, and that as to reliance, "given plaintiffs' evidence of asymmetric access to information and the fact that SIVs like Rhinebridge were – as a Moody's employee called them – 'the most opaque structured credit vehicles and transactions in the market'… 'plaintiffs had no choice but to rely on the ratings and thus reliance may be presumed.'"

Morgan Stanley could not escape plaintiffs' allegations that it aided and abetted the rating agencies' fraud, as the judge held that, just as in *Abu Dhabi*, "plaintiffs had 'offered sufficient evidence from which a jury could infer that Morgan Stanley: (1) had actual knowledge of the Rating Agencies' fraud; and (2) provided substantial assistance to the Rating Agencies in perpetrating the fraud.' There is evidence that Morgan Stanley not only did the same with Rhinebridge, but that it was even more aware of how inaccurate the top ratings were."

Now that Judge Scheindlin has ruled that there is sufficient evidence from which a reasonable jury could render a verdict in favor of plaintiffs, both cases are gearing up for trial: *Abu Dhabi* has a scheduled trial date of May 13, and the *Rhinebridge* trial will take place shortly after the conclusion of the trial in the *Abu Dhabi* case.

Robbins Geller attorneys litigating the *Rhinebridge* action include **Daniel S. Drosman**, **Luke O. Brooks**, **Darryl J. Alvarado** and **Angel P. Lau.**

*King County*, *Washington v. IKB Deutsche Industriebank AG*, No. 09-Civ.-8387, Opinion and Order (S.D.N.Y. Jan. 3, 2013). ■

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

## Pension Fund Past Summary Judgment in *Idearc*

On February 20, 2013, U.S. District Court Judge Ed Kinkeade issued an order denying defendants' motion for summary judgment, allowing the securities fraud claims against Idearc senior executives to proceed to trial. In so holding, the court rejected defendants' arguments that there were no issues of material fact to be determined by a jury. The **Kentucky State District Council of Carpenters Pension Trust Fund** ("Kentucky Carpenters") is serving as lead plaintiff in the action.

In February 2010, shareholders filed a securities fraud class action complaint against senior executives at Idearc based on their false and misleading statements regarding decreases in Idearc's bad debt. More specifically, the action alleged that while defendants were assuring investors that Idearc's revenues were being driven by the company's "stringent" credit and collection policies, defendants had actually significantly relaxed Idearc's credit policies to inflate its reported revenue. By selling to non-creditworthy customers, the

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# Settlement Update

## $67.5 Million Obtained for Wyeth Shareholders

After nearly five years of intense litigation, lead plaintiff **Pipefitters Union Local 537 Pension Fund** and Robbins Geller successfully obtained $67.5 million for Wyeth shareholders in settlement of claims that defendants misled investors about the safety and commercial viability of one of the company's leading drug candidates, Pristiq, for the treatment of vasomotor symptoms ("VMS") associated with menopause. On March 1, 2013, the Honorable Richard J. Sullivan of the United States District Court for the Southern District of New York approved the settlement. "This is an excellent result for the class and reflects our firm's dedication to shareholders' rights. No other firm was willing to take this case on, which makes the outcome even more satisfying," said Robbins Geller attorney **Laurie L. Largent**, who worked on the case from the beginning.

The complaint, filed in November 2007, asserted that Wyeth (now part of pharmaceutical giant Pfizer) and certain of its officers and directors intended to market Pristiq for both the treatment of VMS and major depressive disorder. However, it was Pristiq's use for the treatment of VMS that was essential to make the drug commercially successful and provide much-needed profits to the company. Prisitq for VMS was critical to Wyeth's long-term financial health; its new drug pipeline was drying up and the company faced the loss of significant income from its other key drugs going off patent, including its blockbuster drug, Effexor.

Lead plaintiff alleged that before the beginning of the class period, Pristiq clinical trials showed a number of women had suffered serious adverse events while taking the drug. In particular, one of the studies, Study 315, revealed that the use of Pristiq for the treatment of VMS was associated with serious liver damage and cardiovascular side effects. In June 2006, defendants submitted a new drug application ("NDA") to the U.S. Food and Drug Administration ("FDA") for approval of Pristiq for VMS, which included the results of Study 315. Throughout the June 26, 2006 through July 24, 2007 class period, defendants discussed with analysts and investors the results of the Pristiq clinical trials, the purported safety and benefits of Pristiq, and the NDA, but never disclosed Study 315's cardiovascular and hepatic side effects. When the truth about Pristiq's negative safety profile became public through a company press release issued on July 24, 2007, announcing that the FDA had not given final approval to the NDA due to the FDA's concerns about the potential for serious adverse cardiovascular and liver effects associated with the use of the drug, Wyeth's stock price dropped more than 10%.

Defendants aggressively fought lead plaintiff at each stage of the litigation, beginning with a motion to dismiss the consolidated complaint and subsequent motion for reconsideration, both of which they lost. Plaintiff also successfully obtained class certification despite defendants' challenges concerning materiality and typicality of the proposed class representative, the Pipefitters Union Local 537 Pension Fund. Unhappy with lead plaintiff's class certification win, defendants filed an appeal with the Second Circuit Court of Appeals, which defendants ultimately withdrew when the settlement was reached. "Defendants battled us on every factual and legal issue in this case, but we were able to overcome their arguments and obtain a favorable result for the class," commented Ms. Largent.

Based on lead plaintiff's persistence, defendants produced over 1.3 million pages of documents, including documents relating to the Pristiq VMS clinical trials, Wyeth's internal executive and safety meetings about the drug, defendants' emails, and other critical documents that eventually led to the settlement of this case just two months before the fact discovery cut-off. Lead plaintiff also deposed company representatives and defendants' market efficiency and loss causation expert.

Robbins Geller attorneys **Tor Gronborg**, **Trig Smith**, **Laurie L. Largent**, **Christopher D. Stewart** and **Susannah R. Conn** prosecuted the case on behalf of the Pipefitters Union Local 537 Pension Fund.

*City of Livonia Employees' Retirement System v. Wyeth, et al.*, No. 07-cv-10329 (RJS) (S.D.N.Y.). ■

## Attorney to Watch

**Susan K. Alexander**
**Robbins Geller Rudman & Dowd LLP**

Susan K. Alexander

**Susan K. Alexander** of Robbins Geller Rudman & Dowd LLP was recently elected to the California Academy of Appellate Lawyers. The California Academy of Appellate Lawyers was founded in 1972 and is the nation's oldest lawyers' organization dedicated to appellate practice. Members are elected on the basis of good character and professional reputation, outstanding appellate ability, and a continuing commitment to quality appellate practice. All members must have a minimum of 10 years of practice, having served as lead counsel in no fewer than 25 appeals and having argued at least 15 appeals or writs.

Alexander specializes in federal appeals of securities fraud class actions on behalf of investors. With over 26 years of appellate experience, she has briefed or argued on behalf of defrauded investors in the First, Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. Representative results include *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114 (2d Cir. 2012) (reversing dismissal of §11 claim); *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169 (2d Cir. 2011) (reversing dismissal of securities fraud complaint, focused on statute of limitations); and *In re Gilead Scis. Sec. Litig., 536 F.3d 1049* (9th Cir. 2008) (reversal of district court dismissal of securities fraud complaint, focused on loss causation).

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company was able to report tens of millions of dollars of sales that it otherwise would not have been able to report. At the same time, the company was also accumulating tens of millions of dollars of uncollectible receivables. The defendants caused the company to carry these uncollectible receivables on its books as though they were collectible until mid-2008, when the company finally began to admit that it would have to begin writing off these uncollectible receivables in a piecemeal fashion over several quarters.

In denying defendants' motion for summary judgment, the court ruled that lead plaintiff had presented sufficient evidence supporting its allegations to warrant a jury trial. In so holding, the court rejected numerous defenses raised by defendants. For example, the court rejected defendants' contention that they did not play any role in determining Idearc's bad debt expense or allowance for doubtful accounts. To the contrary, the court found that there was sufficient circumstantial evidence establishing that each defendant played a key role in accounting for Idearc's bad debt expense. The court also rejected defendants' contention that they could not be liable for fraud because they purportedly relied in good faith on Idearc's auditor's approval of Idearc's reported bad debt expense and allowance for doubtful accounts. The court instead agreed with plaintiff that no good-faith defense exists where defendants intentionally failed to provide their auditors with pertinent information or affirmatively lied to them. Finally, the court rejected defendants' arguments regarding loss causation (*i.e.*, that defendants' misstatements caused plaintiff's losses), again agreeing with plaintiff that defendants cannot avoid liability on loss causation grounds simply by refusing to admit to the falsity of their prior statements. The trial in this action is scheduled for June 3, 2013.

Robbins Geller is lead counsel for the Kentucky Carpenters. Said plaintiff's attorney **Debra J. Wyman**, "We concur with Judge Kinkeade's ruling and look forward to aggressively prosecuting this case on behalf of the plaintiff."

*Buettgen v. Harless,* No. 3:09-cv-00791, Order (N.D. Tex. Feb. 20, 2013). ■

## Deutsche Bank Investors Defeat Motion to Dismiss

On March 27, 2013, Judge Katherine B. Forrest issued an order upholding a complaint against Deutsche Bank AG in the United States District Court for the Southern District of New York. Agreeing with plaintiffs, the court found that Deutsche Bank and senior bank management could be held responsible for not only making false statements, but also for engaging in "a fraudulent scheme designed to mislead investors." The court ruled that plaintiffs adequately alleged that "defendants effectuated their scheme by originating or acquiring residential mortgages and by packaging them into residential mortgage-backed securities ('RMBS') and collateralized debt obligations ('CDOs'), which they knew presented far greater risk than they told the market."

Although most litigation involving the residential mortgage crisis in the United States has been brought on behalf of investors in the securities that were backed or collateralized by faulty mortgages, Robbins Geller filed this action on June 21, 2011, on behalf of investors in Deutsche Bank itself, one of the banks accused of originating the faulty mortgages and misrepresenting the quality of the mortgage-backed securities that the bank created and marketed. Robbins Geller represents the lead plaintiffs appointed by the court to oversee the case, **Building Trade United Pensivon Trust Fund**, the **Steward Global Equity Income Fund** and the **Steward International Enhanced Index Fund**.

As summarized by Judge Forrest, the case alleges that defendants knew the market had an appetite for such securities, that the bank benefitted by having the revenues associated with sales of such securities prop up its stock price, and that defendants knew the RMBS and CDOs were increasingly risky and approaching junk status. Indeed, the bank was sufficiently certain that such securities would lose value that they allowed a trader to take a multi-billion dollar short position on (that is, a bet against) RMBS and CDOs, some of which the bank itself had structured and marketed.

The complaint, as cited by the court, read like a Hollywood script. Greg Lippmann, a senior Deutsche Bank trader, warned officers and employees that the RMBS Deutsche Bank was marketing were "crap," and described the process of structuring and selling CDOs as a "ponzi scheme." The complaint also details how Deutsche Bank, on Lippmann's advice and with the knowledge of senior bank executives, bet against mortgage-related securities by taking a short position in the billions of dollars. Lippmann described the very assets that Deutsche Bank was marketing as already risky and "generally horrible," stating that they "stink[]."

During this same period, however, bank management was assuring investors that Deutsche Bank was "not exposed to further deterioration in the US sub-prime mortgages across its books," that "exposure to US mortgage originators [is] tightly managed and largely hedged," and assured investors of "the quality of our risk management."

In a detailed opinion summarizing current law and plaintiffs' allegations, Judge Forrest found that plaintiffs had satisfied the high pleading standards required by the Private Securities Litigation Reform Act of 1995, both with respect to specific misleading statements and an overall scheme to deceive. Importantly, the court found that the complaint had succeeded in identifying communications and meetings between Lippmann and senior bank management demonstrating a high-level awareness of the bank's problems, and rejected defendants' arguments that the alleged misrepresentations consisted only of inactionable opinions.

Judge Forrest explained, "[P]laintiffs allege that, at [the] very time the market was beginning to experience the early effects of the sub-prime implosion, Deutsche Bank made statements that it had acted conservatively with respect to risk and that it had adhered to conservative lending standards. Plaintiffs allege that at the time of these statements, the same individuals who had made the statements had been provided information indicating the opposite. These allegations present different facts from those in *City of Omaha* or *Fait* — and present facts supportive of both objective and subjective falsity."

"Given the damage caused both to investors and to the country as a whole, it is astounding how little accountability there has been," said **John K. Grant**, the partner heading the case. "The decision is really an important advance in litigation arising from the financial crisis."

*IBEW Local 90 Pension Fund v. Deutsche Bank AG, et al.*, No. 1:11-cv-04209-KBF, Opinion & Order (S.D.N.Y. Mar. 27, 2013). ■

# Calendar of Upcoming Events

**April 21-24, 2013**

**AFL-CIO Building & Construction Trades Legislative Conference**

Washington Hilton and Towers Hotel
Washington, District of Columbia

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

This annual conference will highlight the many challenges and opportunities members face in order to rise together and influence change in their industry for working men and women.

For more information, visit: www.bctd.org

**April 24-25, 2013**

**BC Public Sector Pension Conference**

Victoria, British Columbia

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

This conference is an initiative of four multi-employer, defined benefit British Columbia public sector pension boards of trustees: the College, Municipal, Public Service and Teachers' Pension Boards of Trustees.

For more information, visit: www.pensionsbc.ca

**May 9-10, 2013**

**Democratic Attorneys General Association (DAGA) 2013 Spring Policy Conference**

The Hyatt Regency Newport
Newport, Rhode Island

DAGA is a political organization formed to support the election of Democrats to the office of Attorney General in all of the states and territories of the United States. DAGA will make contributions to and expenditures on behalf of Democratic candidates for Attorney General and contributions to state and local Democratic Party committees as appropriate.

For more information, visit: www.democraticags.org

**May 19-22, 2013**

**CFA Institute 66th Annual Conference**

Sands Expo & Convention Center at Marina Bay Sands
Singapore, Asia

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

Top economists, legendary investors, well-known investment authors, governmental leaders, and other experts will gather at this conference and share insights on today's most critical investment issues, examine market trends, uncover new investment opportunities, and deliver practical investment advice.

For more information, visit: www.cfainstitute.org

**May 19-23, 2013**

**National Conference on Public Employee Retirement Systems (NCPERS) 2013 Annual Conference and Exhibition**

Hilton Hawaiian Village
Honolulu, Hawaii

More than 1,000 trustees, administrators, state and local officials, investment, financial and union officers, pension staff and regulators attend this annual conference. Attendees benefit from the comprehensive educational programming, dynamic speakers, and networking opportunities with money managers, investment service providers and public fund colleagues from across the nation.

For more information, visit: www.ncpers.org

**May 26-29, 2013**

**International Pension & Employee Benefits Lawyers Association (IPEBLA) 2013 International Conference**

Starhotels Metropole
Rome, Italy

The program will address current issues relating to public and private pension plan design, governance, investment, operation and supervision, as well as deferred income arrangements for executives. Several plenary and concurrent workshop sessions will provide opportunities to interact with leading professionals.

For more information, visit: www.ipebla.org

**June 24-26, 2013**

**National Association of Securities Professionals (NASP) 24th Annual Pension & Financial Services Conference**

Crowne Plaza Times Square
New York City, New York

Attendees of this educational forum include investment professionals, corporate treasurers, public trustees, asset allocation experts, municipal issuers and world-renowned economists. General sessions will focus on pension plan fiduciary education, asset allocation for today's environment, challenges and opportunities in the municipal markets, strategic and financial considerations for corporations, the changing face of risk and its potential consequences, geo-political considerations for portfolios, alternative investment strategies, and the exploration of global opportunities.

For more information, visit: www.nasphq.org

**June 26-28, 2013**

**International Corporate Governance Network (ICGN) 2013 Annual Conference**

Grand Hyatt Hotel
New York City, New York

This annual conference will inform institutional investors, business leaders, policymakers and professional advisors on best practice guidance, leadership development, and emerging issues in corporate governance.

For more information, visit: www.icgn.org


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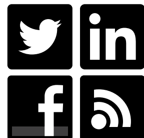


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