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WHAT'S INSIDE

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CLASS CERTIFICATION/SECURITIES FRAUD

U.S. top court sets new limit on securities class actions

(Reuters) – The U.S. Supreme Court on June 23 imposed new curbs on securities class-action lawsuits filed by investors against publicly traded companies while declining to overturn a key precedent that favors plaintiffs in such cases.

Halliburton Co. et al. v. Erica P. John Fund Inc., No. 13-317, 2014 WL 2807181 (U.S. June 23, 2014).

The court held on a 9-0 vote in a case brought by Halliburton Co. that defendants can, at the preliminary class certification stage, rebut the plaintiffs' presumption of reliance on an efficient market if they can show that an alleged misrepresentation did not affect the stock price.

In an opinion written by Chief Justice John Roberts, the court stopped short of overturning a key 26-year-old precedent, *Basic Inc. v. Levinson*,

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REUTERS/Win McNamee/Pool

U.S. Supreme Court Chief Justice John Roberts wrote the opinion.

COMMENTARY

Cyber governance: What every director needs to know

Paul A. Ferrillo of Weil Gotshal & Manges discusses the responsibilities of public company directors to oversee their company's cyber security program and what they can do to better ensure the safety of confidential information, as well as the finances and reputation of the company, following a breach.

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2nd Circuit reverses lower court in SEC–Citigroup settlement case

Ben Coulter of Burr & Forman summarizes the 2nd U.S. Circuit Court of Appeals' decision to reverse a district court ruling rejecting a consent decree entered into by the Securities and Exchange Commission and Citigroup Global Markets.

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Cyber governance: What every director needs to know

By Paul A. Ferrillo, Esq.
Weil Gotshal & Manges

The number, severity and sophistication of cyber attacks — whether on our retail economy, health care sector, educational sector, or even our government and defense systems — grows worse by the day.[1]

Among the most notable cyber breaches in the public-company sphere was that hitting Target Corp. Allegedly 40 million estimated credit and debit cards were stolen, along with 70 million or more pieces of personal data. The total estimated cost of the Target attack to date is $300 million.[2]

"cyber" is new for many directors and is certainly far from intuitive. Public company directors must know their responsibilities for the cyber security program within the framework of the company's enterprise risk management structure. Directors should ask basic questions about their company's cyber security, incident response and crisis management program. Finally, they should consider the potential value of a stand-alone cyber insurance policy to transfer some of the risk of a cyber attack to a reputable insurance carrier.

Allegedly, 40 million estimated credit and debit cards were stolen in the Target attack, along with 70 million or more pieces of personal data. The total estimated cost of the attack to date is $300 million.

Justified or not, Institutional Shareholder Services has just issued a voting recommendation against the election of all members of Target's audit and corporate responsibility committees (seven of its 10 directors) at the upcoming annual meeting. ISS' reasoning is that, in light of the importance to Target of customer credit cards and online retailing, "these committees should have been aware of, and more closely monitoring, the possibility of theft of sensitive information."[3]

Unlike many other aspects of directing the affairs of a public company (*e.g.*, overseeing its financial reporting function and obligations)

DIRECTORS' DUTY OF OVERSIGHT WITH RESPECT TO CYBER SECURITY

A public company director's "duty of oversight" generally stems from the concept of good faith. As noted in the seminal case *In re Caremark International Inc. Derivative Litigation,* 698 A.2d 959 (Del. Ch. 1996), as a general matter:

> A director's obligation includes a duty to attempt, in good faith, to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that the failure to do so in some circumstances may, in theory, at least render a director liable for losses caused by noncompliance with applicable legal standards.

The business judgment rule protects a director's "informed" and "good faith" decisions unless the decision cannot be attributed to any rational business purpose. In today's world, it would be hard to question that cyber security should not be part of any organization's enterprise risk management function, and thus, by inference, part of any director's duty of oversight.

Indeed, the plaintiffs' securities-class-action bar has recently filed two shareholder derivative actions against the boards of both Target and Wyndham Worldwide Hotels as a result of their publicly reported cyber breaches. In these complaints, the plaintiffs alleged, among other things, that the directors "failed to take reasonable steps to maintain their customers' personal and financial information in a secure manner."[4]

As made clear by the questioning of the panelists in the recent Securities and Exchange Commission Cyber Roundtable on March 26, there are other reasons for directors to be intimately involved with decisions concerning a company's cyber security (*i.e.*, "the regulators").[5] Not only has the SEC been more active with cyber "thinking" and security issues, but the Office of Compliance, Inspections and Examinations of the SEC (governing investment advisers and asset managers) and the Financial Industry Regulatory Authority are also involved.[6]

The Federal Trade Commission, as well as state regulators, such as the New York State Department of Financial Services, have also been tackling the issue. Each of these organizations has its own exhaustive list of factors or areas of examination. We have yet to see whether the SEC will issue additional guidance to public companies concerning what information is required to be disclosed to investors concerning cyber security incidents.[7]

CYBER GOVERNANCE QUESTIONS FOR DIRECTORS TO CONSIDER

Here are some basic questions public company directors should be asking when

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reviewing their company's cyber security framework:

- What part of the board should handle examination of cyber security risks? Should it be the whole board? Should this responsibility be assigned to the audit committee or the risk committee (if there is one)? Should the board create a "cyber committee" to exclusively deal with these issues? Should additional board members be recruited who have specific cyber security experience?
- How often should the board or committee be receiving cyber security briefings? In this fast-paced world in which cyber breaches are reported daily, are quarterly briefings enough? Should the board be receiving monthly briefings or more, given the industry type of the company (*e.g.*, tech/IP company)?
- Given the sheer complexity and magnitude of many cyber security issues, should the board hire its own "cyber advisers" to consult on cyber security issues and to be available to ask questions of the company's senior management, CTOs and CIOs?
- What are the greatest threats and risks to the company's highest-value cyber assets? Does the company's human and financial capital line up with protecting those high-value assets?
- What is the company's volume of cyber incidents on a weekly or monthly basis? What is the magnitude or severity of those incidents? What is the time taken and cost to respond to those incidents?
- What would the worst-case cyber incident cost the company in terms of lost business (because of downtime of systems that were attacked and need to be brought back and the harm to the company's reputation as a result of the attack)?
- What is the company's specific cyber incident plan and how will it respond to customers, clients, vendors, the media, regulators, law enforcement and shareholders? Does the company have a crisis-management plan to respond to all these various constituencies, as well as the media (both print and electronic/high-activity bloggers)? Finally, has the cyber incident plan been tested so it is ready to be put into place on a moment's notice?
- What cyber security training does the company give its employees?
- What sort of "cyber due diligence" does the company perform with respect to its third-party service providers and vendors?[8]
- In a mergers-and-acquisitions context, what is the level of cyber due diligence done as part of the consideration of any acquisition?
- Has the company performed an analysis of the "cyber-robustness" of the company's products and services to analyze potential vulnerabilities that could be exploited by hackers?
- Finally, should the company consider adopting, in whole or in part, the National Institute of Standards and Technology cyber security framework as a way of showing affirmative action to protect the company's IP assets?

> In today's world, it would be hard to question that cyber security should not be part of any organization's enterprise risk management function, and thus, part of any director's duty of oversight.

These and other tough questions should be asked by directors of senior management and senior IT staff. Directors may need their own advisers and professionals to help fulfill their oversight duties in assessing the answers to these questions.

AVAILABILITY OF CYBER INSURANCE TO MITIGATE CYBER-RELATED RISKS AND COSTS

Given the past two years of major cyber breaches, one additional question directors should consider is whether the company should be purchasing cyber insurance to mitigate its cyber risk. This could cover forensic costs, incident and crisis management response costs, and the litigation costs, expenses and settlements that could be incurred as a result of a major cyber breach.

Though in the past many companies tried to insure cyber breaches through their comprehensive general liability policies, today's "gold" standard is to purchase stand-alone cyber insurance coverage. Though some in the industry have called the area of cyber insurance the "Wild West," rules of thumb have started to emerge regarding coverages frequently found in stand-alone cyber insurance policies. For example, such a policy may cover:

- Loss arising from third-party claims resulting from a security or data breach (*i.e.*, a lawsuit for damages by a financial institution against a retailer following a breach or regulatory actions in connection with a cyber breach).
- The direct, first-party costs of responding to a breach, like the forensic costs of determining what caused the cyber breach.
- Loss of income and operating expenses ("business interruption insurance") resulting from a cyber breach.
- Cyber extortion threats against a company.

The better stand-alone cyber insurance policies go even further. Some will provide a rapid response team staffed by IT experts to consult with a company and help manage their response to the cyber incident. Some have a 24/7 hotline available to help guide companies through a cyber breach. Additionally, some policies help reimburse the costs of required customer notification, as well as the cost of a crisis management team to help the company communicate with its key customers and vendors to help minimize reputational harm after a breach.

Because stand-alone cyber insurance policies are relatively new phenomena, it would be important to check if your cyber carrier has a good claims-handling and claims-paying reputation, or a reputation as a "strict constructionist" of exclusions. No two policies are alike, so offered terms, exclusions and endorsements should also be compared.

Experts, like sophisticated insurance brokers or insurance coverage lawyers, can be consulted here to make sure the company gets the best policy. Further, as certain large-scale cyber security breaches have also resulted in shareholder derivative actions alleging breach-of-fiduciary-duty claims against directors, it would be wise for directors to consider the sufficiency of the company's directors and officers liability insurance.

Finally, given the reported costs of companies that have had to respond to cyber breaches, directors should question how much cyber insurance is available in the marketplace for a company to purchase. The company's insurance broker should be consulted, and bench-marking information may be available on a company- or industry-specific basis to advise how much insurance other similarly situated companies are purchasing.

We are told by the brokerage community that up to $300 million in cyber insurance may be available for a company to purchase if it truly wants to transfer some of its cyber-related risk to a good insurance carrier. Risk-transfer mechanisms like cyber insurance are certainly no substitute for a robust cyber security and battle-tested incident response plan, along with rigorous training of all employees, but it can be an important component of a comprehensive cyber risk mitigation plan. WJ

NOTES

[1] *Report: Growing Risk of Cyber Attacks on Banks*, Wall St. J., May 6, 2014, *available at* http://online.wsj.com/article/AP05cf3e82176f4e7fb3aa644ee4b37db9.html (noting that "a yearlong survey of New York bank security has found that cyber thieves are using increasingly sophisticated methods to breach bank accounts).

[2] *See* Brian Krebs, *The Target Breach: By the Numbers*, Krebs on Security (May 14, 2014), *available at* http://krebsonsecurity.com/2014/05/the-target-breach-by-the-numbers/.

[3] Paul Ziobro & Joann S. Lublin, *ISS' View on Target Directors Is a Signal on Cybersecurity*, Wall St. J., May 28, 2014, *available at* http://online.wsj.com/articles/iss-calls-for-an-overhaul-of--board-after-data-breach-1401285278?mod=_newsreel_4.

[4] Kevin LaCroix, *Wyndham Worldwide Board Hit with Cyber Breach-Related Derivative Lawsuit*, The D&O Diary (May 7, 2014), *available at* http://www.dandodiary.com/2014/05/articles/cyber-liability/wyndham-worldwide-board-hit-with-cyber-breach-related-derivative-lawsuit/.

[5] *See* Webcast of SEC Cybersecurity Roundtable (Mar. 26, 2014), *available at* http://www.sec.gov/news/otherwebcasts/2014/cybersecurity-roundtable-032614.shtml.

[6] John Reed Stark, *Cybersecurity & Financial Firms: Bracing for the Regulatory Onslaught* (Apr. 21, 2014), *available at* http://www.strozfriedberg.com/wp-content/uploads/2014/04/Cybersecurity-and-Financial-Firms-Bracing-for-the-Regulatory-Onslaught_BloombergBNA_Stark_April2014.pdf.

[7] CF Disclosure Guidance: Topic No. 2 (Oct. 13, 2011), *available at* http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

[8] Trustwave 2013 Global Security Report, *available at* http://www2.trustwave.com/rs/trustwave/images/2013-Global-Security-Report.pdf (noting that 63 percent of all investigations showed that a cyber breach emanated from a third-party vendor or IT administrator).

Supreme Court

CONTINUED FROM PAGE 1

485 U.S. 224 (1988), which kick-started the securities class-action industry.

In *Basic*, the court had embraced the "fraud on the market" theory. This assumes that public information about a company is known to the market. Plaintiffs do not have to show that they relied on a specific misrepresentation, only that they purchased shares before the truth came out.

Chief Justice Roberts wrote that Halliburton failed to show a special justification for overturning the court's precedent. But the court held that defendants, like Halliburton, should be able to introduce evidence on the lack of price impact at the class certification stage. Companies can already make such a showing after a class action is certified, but the change is noteworthy because most securities class actions settle once a judge allows the case to move forward.

Chief Justice Roberts wrote that the court's ruling was consistent with the ruling in *Basic* because it allows "direct evidence when such evidence is available" instead of relying exclusively on the efficient markets theory.

"[W]e see no reason to artificially limit the inquiry at the certification stage to indirect evidence of price impact," Chief Justice Roberts wrote.

Halliburton shareholders, led by the Erica P. John Fund Inc., sued the company in 2002, saying the company understated its asbestos liabilities while overstating revenues in its engineering and construction business and the benefits of its merger with Dresser Industries.

Halliburton sought Supreme Court review after losing in lower courts. The company now has another opportunity to argue in lower courts that the class should not be certified. WJ

(*Reporting by Lawrence Hurley; editing by Howard Goller*)

Related Court Document:
Opinion: 2014 WL 2807181

2nd Circuit reverses lower court in SEC–Citigroup settlement case

By Ben Coulter, Esq.
Burr & Forman

The 2nd U.S. Circuit Court of Appeals recently vacated and remanded an order from the U.S. District Court for the Southern District of New York refusing to approve a consent decree between the Securities and Exchange Commission and Citigroup Global Markets Inc. *SEC v. Citigroup Global Mkts.*, Nos. 11-5227, 11-5377 and 11-5242, 2014 WL 2486793 (2d Cir. June 4, 2014).

In doing so, the 2nd Circuit held that the proper standard for reviewing a consent decree with an enforcement agency requires that a District Court "determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the 'public interest would not be disserved' in the event that the consent decree includes injunctive relief."

In the underlying case, the SEC alleged Citigroup had "negligently misrepresented its role and economic interest" in structuring and marketing a "$1 billion fund that was sold to investors."

According to the SEC, Citigroup told fund investors that an independent investment adviser selected the contents of the fund, but Citigroup — not an independent investment adviser — selected "negatively projected mortgage-backed assets" for a large portion of the fund's contents.

Not long after filing suit, the SEC filed a consent judgment for the District Court's approval. According to the consent judgment, Citigroup would be permanently enjoined from violating Sections 17(a)(2) and (3) of the Securities Act, disgorge its $160 million profit, pay an additional $30 million in prejudgment interest and pay a $95 million civil penalty.

U.S. District Judge Jed S. Rakoff, however, refused to accept the consent judgment and set the case for trial.

"When a public agency asks a court to become its partner in enforcement … the court, and the public, need some knowledge of what the underlying facts are," the judge said. *SEC v. Citigroup Global Mkts.*, No. 11-7387, 827 F. Supp. 2d 328 (S.D.N.Y Nov. 28, 2011).

The SEC and Citigroup both appealed, and the SEC sought an emergency stay and writ of *mandamus* in the 2nd Circuit.

The 2nd Circuit found that only the SEC, and not the District Court, had the authority to require Citigroup to admit liability in a consent judgment. Therefore, any request Judge Rakoff made for Citigroup to admit or deny liability in the consent judgment was an abuse of his discretion.

The 2nd Circuit also said federal policy strongly "favor[s] the approval and enforcement of consent decrees."

The 2nd Circuit clarified the standard for reviewing consent judgments, which means "assessing whether the settlement is fair, reasonable and adequate." The court determined the traditional standard for reviewing consent judgments was inaccurate and inappropriate for consent judgments involving enforcement agencies.

The appeals court then clarified the standard, holding that a proposed consent decree must be fair and reasonable, with the added requirement that the public interest not be disserved if the consent decree includes injunctive relief.

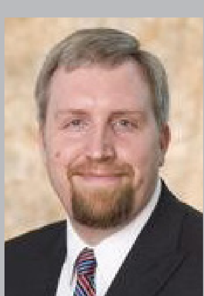
> According to the consent judgment, Citigroup would be permanently enjoined from "violating Sections 17(a)(2) and (3), disgorge its $160 million profit, and pay an additional $30 million in prejudgment interest and a $95 million civil penalty.

"Absent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the District Court is required to enter the order," the appeals court said.

A review of a consent judgment for fairness and reasonableness should, "at a minimum," determine "the basic legality of the decree … whether the terms of the decree, including its enforcement mechanism, are clear … whether the consent decree reflects a resolution of the actual claims in the complaint and … whether the consent decree is tainted by improper collusion or corruption of some kind," according to the opinion.

The "primary focus of the inquiry … should be on ensuring the consent decree is procedurally proper, using objective measures similar to the factors set out above, taking care not to infringe on the SEC's discretionary authority to settle on a particular set of terms," the court added.

Judge Rakoff will now review the consent judgment to determine that it is fair, reasonable and not a disservice to the public interest. Regardless of the outcome, courts



Ben Coulter is a member of the commercial litigation group at **Burr & Forman** in Birmingham, Ala. He focuses on securities litigation, commercial litigation and real property litigation. The author thanks Katherine West for her contribution to this article.

throughout the 2nd Circuit and elsewhere will take notice of the appeals court opinion.

In a related opinion last April, for example, U.S. District Judge Victor Marrero conditioned approval of a consent judgment between the SEC and investors on the outcome of the Citigroup appeal. *SEC v. CR Intrinsic Investors,* 939 F. Supp. 2d 431 (S.D.N.Y. 2013) *abrogated by SEC v. Citigroup Global Mkts.*, No. 11-5227-CV L, 2014 WL 2486793 (2d Cir. June 4, 2014).

> The 2nd Circuit found that only the SEC, and not the District Court, had the authority to require Citigroup to admit liability in a consent judgment.

In his opinion, Judge Marrero expressed concern that certain of the defendants could "resolve the serious allegations against them involving a massive insider-trading scheme 'without admitting or denying the allegations of the complaint.'"

Noting that the 2nd Circuit's decision in the Citigroup appeal was imminent, the court held that the most prudent course was to approve the settlement. That is, subject to the condition that if the 2nd Circuit determined district courts lacked the authority to reject settlements on the basis of concerns about "neither admit nor deny" provisions, the settlement would become final.

There can be little doubt that Judge Rakoff's decision and the 2nd Circuit's reversal will have an important impact on consideration of future consent judgments. WJ

NEWS IN BRIEF

NO-SHOW PUDA COAL DIRECTORS HIT WITH DEFAULT JUDGMENT

Delaware Chancery Court Chancellor Andre G. Bouchard on June 2 entered a default judgment against three Puda Coal directors who never responded to a shareholder suit that claimed they allowed their chairman to pirate the China-based firm's assets. In a Feb. 19, 2013, bench ruling then-Chancellor Leo E. Strine allowed the shareholders in a consolidated suit to move forward with charges that the directors failed to mind the store and breached their fiduciary duty to watch over the assets. The ruling was seen as a shot across the bow of a fleet of foreign-based "reverse merger" companies that had gained listings on American stock exchanges by inhabiting empty shell corporations that are chartered in the U.S., most often in Delaware. Chancellor Bouchard's order said defendants Ming Zhao, Liping Zhu, Jianfei Ni, Yao Zhao and the company itself failed to appear to answer the charges and must be found in default. He scheduled an Aug. 16 hearing to determine the amount of the judgment.

In re Puda Coal Inc. Stockholders Litigation, No. 6476, 2014 WL 2469666 (Del. Ch. June 2, 2014).

Related Court Document:
Order: 2014 WL 2469666

CREDIT SUISSE BEATS BACK FRAUD SUIT OVER EXCHANGE-TRADED NOTES

A Manhattan federal judge has dismissed a lawsuit that accused Credit Suisse AG of defrauding investors by downplaying the risks associated with debt securities it offered. U.S. District Judge Laura Taylor Swain of the Southern District of New York threw out the suit June 9, finding that the bank adequately warned investors of the risks associated with holding the securities for an extended time. The suit concerned Velocity Shares Daily 2x VIX Short Term Exchange Traded Notes, or TVIX, a type of debt security Credit Suisse issued in 2010. The securities were tied to equities futures on the S&P 500 market index. After the securities performed badly, investors filed suit. In dismissing the case, Judge Swain said a reasonable investor could not conclude that holding the securities for any period of time was safe or recommended.

In re TVIX Securities Litigation, No. 12-cv-04191, 2014 WL 2575776 (S.D.N.Y. June 9, 2014).

Related Court Document:
Opinion: 2014 WL 2575776

BROKERAGE FINED FOR MISUSING CONFIDENTIAL CLIENT INFORMATION

The U.S. Securities and Exchange Commission has charged brokerage firm Liquidnet with improperly using it subscribers' confidential trading information to market its services, the agency announced June 6. The brokerage firm, which manages about $13 trillion, allegedly provided some of its clients with confidential trading data between 2009 and 2011 about the "dark pools" it operates. "Dark pools" are a type of alternate trading system for large institutional investors that are over-the-counter and not exchange-based. According to the SEC, employees used confidential information about Liquidnet's dark pool subscribers during marketing presentations and various communications to other customers. The company will pay a $2 million penalty to settle the charges and has agreed to a cease-and-desist request without admitting or denying wrongdoing, the SEC statement said.

In the Matter of Liquidnet Inc., No. 3-15912, administrative order issued (S.E.C. June 6, 2014).

Related Document:
Administrative order: 2014 WL 2547522

Retired judges file *amicus* brief in Supreme Court securities dispute

A group of retired federal judges has filed an *amicus* brief in a dispute before the U.S. Supreme Court concerning whether courts should suspend the filing windows for shareholder suits while they decide whether to certify a plaintiff class.

Public Employees' Retirement System of Mississippi v. IndyMac MBS Inc. et al., No. 13-640, amicus brief filed (U.S. May 28, 2014).

Although the eight retired judges do not take a position on the merits of the case, their brief supports a group of petitioners who are trying to ensure that the tolling provisions of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), apply to the three-year statute of repose for securities class actions.

"Securities class actions present unique challenges that make them among the most difficult cases for federal district courts to manage," the judges say.

"Securities class actions present unique challenges that make them among the most difficult cases for federal district courts to manage," the judges say.

Securities class actions are "among the most complicated and time-consuming" cases, the brief adds, and there will be a substantial uptick in "protective filings" if the high court affirms the decision by the 2nd U.S. Circuit Court of Appeals.

At issue is a 2013 ruling in which the 2nd Circuit held that the tolling provisions did not apply to the three-year statute of repose under Section 13 of the Securities Act, 15 U.S.C. § 77m.

The statute of repose requires plaintiffs to sue within three years of a security's public offering. Unlike the law's statute of limitations — which requires securities plaintiffs to bring their claims within a year of discovering an alleged violation — the statute of repose is not generally subject to tolling, or equitable suspension.

REUTERS/Molly Riley

In *American Pipe* the high court held that the filing of a proposed class action tolls the limitations period for all potential class members until a decision on class certification is reached. Although the issue was decided in an antitrust case, the tolling holding has been applied in other contexts.

CLAIMS AGAINST INDYMAC

In the underlying dispute, investors sued IndyMac after the bank collapsed in the 2008 financial crisis, claiming that it made materially false and misleading statements in stock-offering documents about its underwriting standards for mortgage-backed securities.

In late 2009 the lawsuit was consolidated with others in the U.S. District Court for the Southern District of New York and a lead plaintiff was appointed.

IndyMac moved to dismiss, arguing that the named lead plaintiff did not have standing to sue over certain offerings.

The court dismissed some claims, including those over the "mortgage pass-through certificates" at the heart of the federal judges' *amicus* brief.

At that point, the Mississippi Public Employees' Retirement System, which bought IndyMac stock between 2005 and 2007, sought to intervene.

But the District Court denied the motion, finding that Section 13's three-year period

The 8 judges

Michael Burrage
Then: U.S. District Courts for the Eastern, Northern and Western Districts of Oklahoma, 1994-2001
Now: Partner, Whitten Burrage

Frank C. Damrell Jr.
Then: U.S. District Court for the Eastern District of California, 1997-2011
Now: Principal, Cotchett, Pitre & McCarthy

William Royal Furgeson Jr.
Then: U.S. District Court for the Western District of Texas, 1994-2013
Now: Dean, University of North Texas at Dallas College of Law

Nancy Gertner
Then: U.S. District Court for the District of Massachusetts, 1994-2011
Now: Professor, Harvard Law School

Barbara S. Jones
Then: U.S. District Court for the Southern District of New York, 1995-2013
Now: Partner, Zuckerman Spaeder LLP

G. Patrick Murphy
Then: U.S. District Court for the Southern District of Illinois, 1998-2013
Now: Partner, Murphy & Murphy

T. John Ward
Then: U.S. District Court for the Eastern District of Texas, 1999-2011
Now: Partner, Ward & Smith

Alexander Williams Jr.
Then: U.S. District Court for the District of Maryland from 1994-2014
Now: Adjunct professor, Howard University Law School

of repose had continued to run and had therefore time-barred MissPERS' claims. *In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637 (S.D.N.Y. 2011).

On appeal, the 2nd Circuit affirmed the lower court ruling last June. After noting that it was addressing an "unsettled area of law," the appellate panel found that the *American Pipe* tolling provisions did not apply to the statute of repose. *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS Inc.*, 721 F.3d 95 (2d Cir. 2013).

JUDGES SUPPORT INVESTORS

In their friend-of-the-court brief, the retired judges argue that the appeals court decision would create pressure on investors to file duplicative suits. The ruling effectively requires investors to intervene in class proceedings, or file their own independent actions, to preserve their claims, the judges note.

"Over the decades the *American Pipe* doctrine has crystallized into a settled expectation that potential class members need not intervene in a class action or file their own complaint to preserve their claims, at least until class certification had been denied," the brief says.

From *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553-4 (1974)

"A … rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive [Federal Rule of Civil Procedure] 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. In cases such as this one, where the determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions. We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." (Footnotes omitted.)

Allowing the 2nd Circuit decision to stand would burden the courts needlessly with extra litigation, the judges argue.

Applying *American Pipe* to the Section 13 statute of repose, on the other hand, would minimize case-management problems and promote fair resolution, they say.

Several securities-law professors, private and public pension funds and the AARP also filed briefs in support of the petitioners. WJ

Attorneys:
Amici: Graeme W. Bush, Andrew N. Goldfarb and Keisha N. Stanford, Zuckerman Spaeder LLP, Washington

Related Court Documents:
Judges' *amicus* brief: 2014 WL 2361889
Law professors' *amicus* brief: 2014 WL 2361893
Pension funds' *amicus* brief: 2014 WL 2361892
AARP *amicus* brief: 2014 WL 2361885

See Document Section A (P. 19) for the judges' amicus brief.

Electronics firm Maxwell facing amended shareholder fraud suit

By Michael Nordskog, Senior Content Writer, Westlaw Daily Briefing

Maxwell Technologies Inc. shareholders have filed an amended securities fraud complaint against the electronics maker and current and former executives, including one not previously named, to fix a pleading defect identified in May by a California federal judge.

In re Maxwell Technologies Inc. Securities Litigation, No. 13-cv-580, amended complaint filed (S.D. Cal. June 4, 2014).

U.S. District Judge Roger T. Benitez of the Southern District of California on May 5 dismissed the 2013 class-action suit, saying the plaintiff's theory — that Maxwell's alleged bad accounting was intentional — was "not as cogent and compelling as the innocent explanation." *In re Maxwell Techs. Sec. Litig.*, 2014 WL 1796694 (S.D. Cal. 2014).

In a 157-page amended complaint filed June 4, lead plaintiff Employees' Pension Plan of the City of Clearwater says Maxwell executives "specifically directed and authorized" an accounting scheme to defraud investors by inflating revenue estimates.

The suit alleges San Diego-based Maxwell, ex-CEO David J. Schramm, CFO Kevin S. Royal and former senior vice president of sales Van M. Andrews artificially inflated the company's stock price by failing to disclose in Securities and Exchange Commission filings that it had prematurely reported $19 million in revenue.

Andrews was not named as a defendant in the original complaint.

The company's subsequent announcements of accounting problems led to successive drops in its share price totaling about 50 percent on "enormous" trading volume, the suit says.

In a February motion to dismiss, the original defendants argued that the plaintiff failed to plead specific facts showing they were aware of alleged secret side deals made by members of Maxwell's sales organization that were ultimately exposed.

"The question is not whether the company made statements that proved to be incorrect," but whether Schramm and Royal acted with fraudulent intent, or *scienter*, they said in a memo supporting the motion.

STRONG INFERENCE OF *SCIENTER* NOT SHOWN

In granting the motion, Judge Benitez said the complaint did not raise an inference of *scienter* sufficient to meet the standards of the Private Securities Litigation Reform Act, 15 U.S.C.A. § 78u-4.

The judge said the evidence of misconduct, including confidential witness statements, the "noisy" resignation of the company's auditor and numerous admitted violations of generally accepted accounting standards, was insufficient to support a strong inference of the executives' knowledge.

"The confidential-witness accounts do not indicate that the individual defendants were aware of the recognition problem," the judge said. "To the extent the [witnesses] actually heard or saw something that indicated that the individual defendants knew the terms were secret or that sales were improperly booked, plaintiff should clearly lay these facts out."

Acknowledging that the plaintiff might be able to supplement the complaint with well-pleaded *scienter* allegations, the judge declined to address "loss causation," another key element of proof in a securities fraud case.

PSLRA Section78u–4

(b) Requirements for securities fraud actions

…

(2) Required state of mind

(A) In general

Except as provided in subparagraph (B), in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

AMENDED COMPLAINT

The amended complaint includes extensive additional excerpts from confidential-witness testimony suggesting the defendants' knowledge of their wrongdoing.

"Defendants' *scienter* is beyond reasonable dispute," the plaintiff argues, adding that the allegedly fraudulent accounting scheme "involved intentional deviations from Maxwell's standard payment terms and conditions that were specifically directed and authorized" by the individual defendants.

According to the amended complaint, Schramm's, Royal's and Andrews' understanding of Maxwell's manipulation of its financial results is borne out by the timing and manner of the side deals, which occurred during the final days of various reporting periods.

"These modifications enabled Maxwell to book sales and record a profit for the first time in years while beating analyst estimates," the plaintiff says.

The ongoing accounting fraud only came to an end when whistleblower Daniel Reineck, Maxwell's former SEC compliance director and one of Royal's direct reports, exposed the accounting misconduct at the company and said Royal and Schramm were well aware of the scheme, according to the complaint.

The Maxwell audit committee's conclusion that the side deals were never communicated to the individual defendants is "patently false," the complaint says.

The plaintiff also asserts a motive for the individual defendants' wrongdoing, claiming they would have received "little to no" bonuses if the company's financial results had not been artificially inflated.

The defendants allegedly violated the anti-fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78j(b) and 78t(a). WJ

Related Court Document:
Complaint: 2014 WL 2533839

Suit says Infoblox deceived investors about revenue

Global technology support company Infoblox Inc. misled shareholders in 2013 about the outlook for its network systems protection products, a securities fraud suit in California has alleged.

Achey v. Infoblox Inc. et al., No. 14-cv-2644, complaint filed (N.D. Cal. June 9, 2014).

According to the proposed class action stockholder Donna Achey filed in the U.S. District Court for the Northern District of California, Infoblox failed to tell investors it was steeply discounting products to retain business.

An Infoblox representative did not respond to a request for comment on the suit.

Based in San Jose, Calif., Infoblox was founded in 1999 and sells information technology products that manage and protect networks. The company's network services and security optimizing software are designed to reduce the vulnerabilities of computer systems.

Visa, Chevron, Starbucks, Audi, Barclays, Boeing and the federal government are Infoblox clients, according to the complaint.

On Sept. 5, 2013, Infoblox reported its results for the fourth quarter and for the fiscal year ending July 31. The company reported record net revenue of $63.1 million for the quarter (higher than the $58 million predicted) and $225 million for the year, a 33 percent revenue increase over the previous year.

> The suit says Infoblox's revenues "were obtained by aggressive price discounting that it was continuing to conceal from analysts and investors."

In addition, CEO Robert Thomas made rosy projections for 2014, the plaintiff says.

The suit says Thomas, in an earnings call held the same day, denied any pressure to discount the company's products or services.

In response, Infoblox's stock price jumped 15.5 percent from $35.24 per share to $40.69 the following day, the suit says.

REUTERS/Brendan McDermid

The suit, which says Infoblox Inc. misled investors on the company's 2014 financial prospects, names CEO Robert Thomas among the defendants. Here, Thomas (center, R) celebrates the company's April 2012 IPO on the floor of the New York Stock Exchange.

Shortly thereafter, seven company insiders capitalized on the increased stock price and sold $21.25 million in stock between Sept. 9 and Sept. 20, the suit says.

On Nov. 26, Infoblox announced its financial results for the quarter ending Oct. 31, and net revenue for the first fiscal quarter of 2014 was $63.5 million, an increase of 28 percent over the previous year.

On Feb. 10, the company announced that it was lowering its revenue projections for the year because of weaker demand. Infoblox said it now expected to earn between $250 million and $254 million for the year, below its previous forecast of $270 million to $276 million.

The company attributed the decline to weaker sales in January, fewer big-ticket sales and lower federal government revenue.

Infoblox's share price tumbled nearly 50 percent from $33.14 per share to $17.19 per share Feb. 11 on heavy trading volume.

Then in a call with analysts Feb. 26, Thomas disclosed for the first time that Infoblox had been "discounting enormously to get deals," the complaint says.

The suit alleges Infoblox's revenues "were obtained by aggressive price discounting that it was continuing to conceal from analysts and investors."

The complaint says Infoblox misled investors in violation of the anti-fraud provisions of federal securities laws contained in Sections 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a).

Thomas and CFO Remo Canessa also are named as defendants.

The proposed class period is from Sept. 6 to Feb. 10. WJ

Attorneys:
Plaintiff: Lionel Z. Glancy, Michael M. Goldberg, Robert V. Prongay, Glancy Binkow & Goldberg, Los Angeles; Jeremy A. Lieberman, Francis P. McConville, Pomerantz LLP, New York; Peretz Bronstein, Bronstein Gewirtz & Grossman, New York

Related Court Document:
Complaint: 2014 WL 2572112

See Document Section B (P. 28) for the complaint.

Bankrupt Coldwater Creek gets exec bonus plan tied to past work

(Reuters) – A U.S. bankruptcy judge on June 2 approved a $1.7 million incentive payment plan for four top executives of the bankrupt Coldwater Creek Inc., a women's apparel retailer, even though the bonuses were linked to previously achieved targets.

In re Coldwater Creek Inc., No. 14-10867, order entered (Bankr. D. Del. June 2, 2014).

Judge Brendan Shannon in Wilmington, Del., overruled an objection that argued the plan would reward the executives even if they did nothing because it was based on past work.

The judge said the evidence showed that even before the plan was presented, the four unidentified executives were motivated in anticipation of the plan to maximize the company's cash.

Bonus plans like Coldwater Creek's are known as key employee incentive plans or KEIPs, and have been a source of controversy in Chapter 11. Critics say they are actually retention plans, which Congress tried to sweep away in 2005.

Bankrupt companies must prove the bonuses are based on difficult targets that might actually be missed.

Judge Shannon said the speed of the case prevented Coldwater Creek from seeking approval for the bonus plan prior to the main event in the bankruptcy: an agreement with liquidators to shut the 330 stores and sell everything from merchandise to fixtures.

The specialty retailer filed for bankruptcy in April. Two groups of liquidators battled to run the going-out-of-business sale, eventually pushing up the value of the liquidation agreement to $161 million, which Shannon called "a home run."

Coldwater Creek lawyer William Roll of Shearman & Sterling told the court the four executives were key to the success of the liquidation plan.

REUTERS/Rick Wilking

The bonus agreement proposed paying four unidentified top executives up to 250 percent of their annual salary if certain cash-flow targets were met.

The U.S. Trustee had objected to the bonus plan, arguing that the executives were being rewarded for past work, not incentivized for future performance since the company had been largely wound down.

The trustee said the executives will receive the maximum bonus if costs do not run $15 million over budget.

But Judge Shannon said he was convinced that Coldwater Creek was right to delay presenting the bonus plan. He said the company had to wait for an official creditors' committee to be formed and by that time the liquidation agreement that determined the cash-flow targets for the bonuses was in place.

Roll, the company's lawyer, said the company agreed to reduce the potential bonuses to $1.7 million from $2.5 million to remove an objection by the official creditors' committee. WJ

(*Reporting by Tom Hals*)

Can ex-CEO force his company to pay for defense that led to plea bargain?

Nipro Diagnostics' ex-CEO is asking the Delaware Chancery Court to force the medical products developer to pay legal bills he ran up in a partly successful defense against insider-trading charges related to Nipro's purchase of the company he founded.

Holley v. Nipro Diagnostics Inc., No. 9679, complaint filed (Del. Ch. May 21, 2014).

George H. Holley's suit for advancement of legal fees claims Nipro reneged on its obligation to pay for all of the litigation and investigations that sprang from allegedly suspicious trading in advance of Nipro's 2010 acquisition of his medical products company Home Diagnostics Inc.

Since both HDI and Nipro are incorporated in Delaware even though based in Florida, Holley says, they are required to immediately reimburse him for any legal action he faces in connection with his service to the company.

Nipro initially did that but later cut off Holley's funds and sued him to recover the $175,000 it had advanced to him at that point, his suit says.

Two months after Nipro's acquisition of HDI in March 2010, the Securities and Exchange Commission and other government agencies began to investigate charges that Holley had tipped several friends about the merger, enabling them to profit by buying HDI stock cheaply, Holley's suit says.

The SEC and the U.S. attorney's office for the District of New Jersey charged Holley with insider trading and violating the federal securities laws in civil and criminal actions.

Although some of those charges were later dismissed or dropped, Holley eventually pleaded guilty to two counts of insider trading and was sentenced to probation, the complaint says.

Holley turned to Nipro for reimbursement of the defense costs related to the charges on which he was successful, but the company declined and brought a suit against him in the U.S. District Court for the Southern District of Florida, seeking the return of the money it had advanced him.

Holley says that suit was dismissed in June 2013 but Nipro continued to refuse to reimburse him, forcing him to file this action seeking advancement of the defense costs where he was successful, the cost of bringing this action and a judgment that he does not owe the company $175,000. WJ

Attorneys:
Plaintiff: Arthur L. Dent, Kevin P. Shannon and Matthew F. Davis, Potter Anderson & Corroon, Wilmington, Del.

Related Court Document:
Complaint: 2014 WL 2176246

> Two months after Nipro Diagnostics' acquisition of Home Diagnostics Inc., the SEC began to investigate charges that Nipro CEO George Holley had tipped several friends about the merger.

Courtesy of www.niprodiagnostics.com

Nipro Diagnostics Inc. ex-CEO George Holley says the company initially reimbursed his legal expenses but later cut off funds and sued him to recover the money it already had advanced him. A screenshot of the company's website is shown here.

Note offerings tied to Russian economy trigger new risk factors

By Cory Hester, Attorney Editor, Westlaw Capital Markets Daily Briefing

Several public companies updated their Form 10-K risk factors this year to reflect their concerns regarding the impact of the ongoing conflict in Crimea on the Russian economy. Several recent prospectuses in connection with public note offerings show that the crisis and related adverse impact have become a major concern when selling notes that use financial metrics tied to the Russian economy.

BARCLAYS DISCLOSES CONCERNS ABOUT RUBLE VALUE

Barclays Plc recently filed a prospectus June 3 for the sale of currency-linked step-up notes. The notes are linked to a basket of emerging market currencies, which measures the value of an equally weighted investment in "the Chinese renminbi, the Indian rupee and the Russian ruble" relative to the euro.

Since the notes are tied to the value of the Russian ruble, the company disclosed warnings that the ongoing crisis in Crimea could adversely impact the value of the notes, stating:

> An escalation of hostilities or other geopolitical developments between Russia and Ukraine and/or other nations may have a material adverse effect on the value of the Russian ruble, including its value relative to the euro and, accordingly, on the value of the Exchange Rate Measure.

BANK OF MONTREAL WARNS ABOUT ECONOMIC SANCTIONS

In addition to concerns regarding the ruble's value, issuers have also disclosed general concerns about adverse effects on the Russian economy as a result of the conflict. Bank of Montreal included such warnings in a prospectus filed June 3 in connection with the sale of senior medium-term notes linked to a Russian exchange-traded fund.

Since the underlying index for the notes tracks the stock price of certain Russian equity securities, the bank warned that rising tensions with bordering countries and Western nations could adversely impact the Russian economy. The bank warned:

> These events have resulted against a variety of international sanctions involving Russia, and even the possibility of military action involving Russia. The ultimate outcome of these events is currently not known, but could have an adverse impact on the [value of the notes].

Since the conflict is ongoing, issuers conducting business in Russia or holding ruble-denominated assets must consider how their business practices are adversely impacted by the ongoing conflict. WJ

REUTERS/Maxim Shemetov

Several public companies warn that the ongoing conflict in Ukraine and Crimea may have a material adverse effect on the value of the Russian ruble, including its value relative to the euro. Here, a man lays flowers on a ruble symbol in front of Bank Rossiya's Moscow office.

SCOTUS repose opinion is good news for securities defendants

By Alison Frankel

As of April, the Federal Housing Finance Agency has recovered about $15 billion from 15 big banks that supposedly misrepresented the quality of the mortgage-backed securities they peddled to Fannie Mae and Freddie Mac. FHFA is expecting more to come: The conservator still has cases under way against Goldman Sachs, HSBC, Nomura and Royal Bank of Scotland.

The National Credit Union Administration, meanwhile, has netted more than $330 million in settlements with banks that duped since-failed credit unions into buying deficient MBS. NCUA is also still litigating against several other defendants, some of which it sued only last September. When you add in MBS suits by the Federal Deposit Insurance Corp. on behalf of failed banks, there are about four dozen ongoing cases, involving some $200 billion in rotten mortgage-backed securities, brought by congressionally created stewards.

Just about all of those cases are alive only because of so-called "extender statutes" in which Congress lengthened the time frame for the agencies to bring claims under the Securities Act of 1933. (The Financial Institutions Reform, Recovery and Enforcement Act of 1989 addressed claims by NCUA and FDIC; the Housing and Economic Recovery Act of 2008, which created FHFA, gave it extra time for Fannie and Freddie claims.)

As you know if you're a faithful reader, bank defendants have tried to argue that the nearly identical extender provisions in FIRREA and HERA only addressed the Securities Act's one-year statute of limitations, not the law's three-year statute of repose.

Unfortunately for them, both the 2nd U.S. Circuit Court of Appeals, in an FHFA case against UBS, and the 10th Circuit, in an NCUA case against Nomura, concluded that when Congress enacted the FIRREA and HERA extender provisions, it intended to lift both time bars, the statutes of limitations and repose.

On June 9, in a case called *CTS Corp. v. Waldburger*, No. 13-339, 2014 WL 2560466 (U.S. June 9, 2014), the U.S. Supreme Court gave the banks that have stuck it out in litigation against FHFA, NCUA and FDIC a glimmer of hope. The *Waldburger* case presented the question of whether an extender statute in the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 preempts the statute of repose under North Carolina tort law.

Seven justices, in an opinion by Justice Anthony Kennedy, ruled that it does not. More broadly, though, the court drew a clear line between the statutes of limitation and repose — which is what bank defendants in MBS litigation have long argued for. It's going to be very interesting to see now what the justices do about Nomura's pending petition for *certiorari* in the NCUA case in which 10th Circuit rejected its statute-of-repose defense. The petition was first scheduled to be considered back in March but the justices haven't yet issued an order, presumably because they've been waiting to rule in *Waldburger*.

Alison Frankel updates her blog, "On the Case," multiple times throughout each day on WestlawNext Practitioner Insights. A founding editor of Litigation Daily, she has covered big-ticket litigation for more than 20 years. Frankel's work has appeared in The New York Times, Newsday, The American Lawyer and several other national publications. She is also the author of "Double Eagle: The Epic Story of the World's Most Valuable Coin."

The court's opinion "offers a baseline recognition of the difference between limitations and repose," said Timothy Bishop of Mayer Brown, who was not involved in the *Waldburger* case. According to the opinion, "there is considerable common ground in the policies underlying the two types of statute. But the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives."

The statute of repose, the opinion said, reflects the legislative judgment that a defendant should be free from liability after a set amount of time, like a discharge in bankruptcy or double-jeopardy protection for criminal defendants.

Historically, there's been some confusion between the two sorts of time bars, Justice Kennedy wrote. But fundamentally, the statute of limitations is aimed at plaintiffs, who are obliged to bring their claims in a timely manner, and the statute of repose addresses defendants, who, after a certain period of time, have the right to put the past behind them.

The *Waldburger* opinion emphasized that there's no equitable tolling of the statute of repose, referring back to the Supreme Court's 1991 ruling in *Lampf, Pleva v. Gilbertson,* 501 U.S. 350 (1991). That defendant-friendly view of the time limit does not bode well for investors in the IndyMac case, which the Supreme Court has already agreed to hear next term. *Pub. Employees' Ret. Sys. of Miss. v. IndyMac MBS Inc.,* No. 13-640, *cert. granted* (U.S. Mar. 10, 2014). The *IndyMac* appeal involves a 2nd Circuit holding that the filing of a class action does not toll the statute of repose for Securities Act claims, despite the Supreme Court's 1974 ruling in *American Pipe v. Utah,* 414 U.S. 538 (1974), that class actions toll the statute of limitations.

David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel, who represents some of the IndyMac investors who want to overturn the 2nd Circuit, contended in a May 21 brief for the Mississippi public employees' pension fund that the Supreme Court had never identified a substantive right under the statute of repose that is distinct from rights under the

From *CTS Corp. v. Waldburger et al.*, No. 13-339, 2014 WL 2560466 (U.S. June 9, 2014)

"A statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.' Black's Law Dictionary 1546 (9th ed. 2009). … A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant. … Although there is substantial overlap between the policies of the two types of statute, each has a distinct purpose and each is targeted at a different actor. Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.' Black's 1546 … Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons. But the rationale has a different emphasis. Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.' C.J.S. § 7, at 24 … One central distinction between statutes of limitations and statutes of repose underscores their differing purposes. Statutes of limitations … are subject to equitable tolling … Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control."

statute of limitations. The *Waldburger* opinion obliterates that argument.

The ruling's impact on the remaining FHFA, NCUA and FDIC cases doesn't seem to me to be as clear, but at the very least, it should give bank defendants another shot at arguing that both state and federal claims against them are time-barred. The Supreme Court said in the *Waldburger* opinion that courts must look first at statutory language (that's hardly a surprise) and if that's not the end of the inquiry, at other evidence of what legislators intended.

Before the environmental liability law was passed, a Senate working group issued a report on the issues that specifically noted the potential conflict between state law statutes of repose and the long latency of environmental injuries. Yet when the federal law was passed, Congress extended only the statute of limitations and did not address the statute of repose. The *Waldburger* majority read that evidence to show that whatever confusion existed about the distinction between the statutes of limitations and repose at the time the environmental law was enacted, Congress was warned about the statute of repose and didn't mention it in the law.

Based on Nomura's reply brief in its Supreme Court appeal of the 10th Circuit's NCUA ruling, I don't think the bank defendants have very strong evidence that Congress was specifically on notice about the statute of repose when it passed FIRREA. On the other hand, neither FIRREA nor HERA says in so many words that the laws extend the statute of repose for securities claims, and there's no doubt that the Securities Act imposes both kinds of time bars. Moreover, the banks in the FHFA litigation are also facing state law claims and can argue based on *Waldburger* that HERA does not preempt the time limit on their exposure to state law liability.

I reached out to defense lawyers in the FHFA and NCUA cases (Jenner & Block for Nomura in the NCUA litigation, Simpson Thacher & Bartlett for RBS and Sullivan & Cromwell for Goldman Sachs in the FHFA litigation) but didn't hear from them about how they intend to make use of the *Waldburger* opinion. Mayer Brown's Bishop, however, said the decision leaves the government agencies "in trouble." His prediction: The Supreme Court will hold Nomura's *cert* petition until it decides *IndyMac*. WJ

CASE AND DOCUMENT INDEX