SIMPSON THACHER

# *THE AMERICAN LAWYER* LITIGATION DEPARTMENT OF THE YEAR

AUGUST 1, 2009

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# Simpson Thacher & Bartlett LLP

THE AMERICAN LAWYER LITIGATION DEPARTMENT OF THE YEAR SUBMISSION 2008-2009

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COURTS FILED IN: Southern District of New York; appealed to Second Circuit

CLIENT NAMES: Aurelius Capital Master, Ltd.; Aurelius Capital Partners, LP; Blue Angel Capital I LLC

LEAD ST&B PARTNERS: Barry R. Ostrager; Tyler B. Robinson

OPPOSING COUNSEL: Cleary Gottlieb Steen & Hamilton LLP; Chadbourne & Parke LLP; Skadden, Arps, Slate, Meagher & Flom LLP

JUDGE: Hon. Thomas P. Griesa

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COURT FILED IN: New York Supreme Court

CLIENT NAME: Equitas Ltd.; Equitas Reinsurance Ltd.; Equitas Policyholders Trustee Ltd.

LEAD ST&B PARTNERS: Kevin J. Arquit; Mary Kay Vyskocil; Arman Y. Oruc

OPPOSING COUNSEL: Cahill Gordon & Reindel LLP

JUDGE: Hon. Bernard J. Fried

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LEAD ST&B PARTNERS: Bruce D. Angiolillo; Chet A. Kronenberg; Jonathan K. Youngwood

OPPOSING COUNSEL: Coughlin Stoia Geller Rudman & Robbins LLP and Kiesel Boucher & Larson (in Los Angeles Superior Court); Harwood Feffer LLP and Vianale & Vianale LLP (in Delaware Chancery Court)

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OPPOSING COUNSEL: Kamber Edelson LLC; Boni & Zack LLC; Spector Roseman & Kodroff; Parisi & Havens LLP; Law Offices of Peter N. Wasylyk; Edelson & Associates, LLC; Law Office of David P. McLafferty & Associates

JUDGE: Hon. Rya W. Zobel

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| Client Name: | Daiichi Sankyo Company, Ltd. |
| Lead ST&B Partners: | Henry B. Gutman; Robert A. Bourque |
| Opposing Counsel: | Leydig, Voit & Mayer, Ltd.; Katten Muchin Rosenman LLP |
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| Lead ST&B Partners: | Henry B. Gutman; Kerry L. Konrad |
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| Client Name: | United States Fidelity and Guaranty Co. (USF&G) |
| Lead ST&B Partner: | Andrew T. Frankel |
| Opposing Counsel: | Morgan, Lewis & Bockius, LLP; Snyder, Miller & Orton LLP |
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| Opposing Counsel: | Dickstein Shapiro LLP |
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| Lead ST&B Partners: | Henry B. Gutman; Robert A. Bourque |
| Co-Counsel: | Fitzpatrick, Cella, Harper & Scinto |
| Opposing Counsel: | Perkins Coie, LLP (formerly Heller Ehrman LLP) |
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CLIENT NAMES: Moody's Investors Service, Inc.; Moody's Latin America

LEAD ST&B PARTNER: Robert H. Smit

OPPOSING COUNSEL: Julio C. Speranza, Esq.; Israel Creimer, Esq.; Alejandra Kemper, Esq.; Juan Rodriguez Sanguinetti, Esq.

JUDGES: Hon. José Lobelcho; Hon. Alvaro Gonzalez; Hon Loreley Pera Hon. Edgardo Ettlin; Hon. Alejandro Recarey; Hon. Teresita Rodriguez Mascardi; Hon. Estella Jubette


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LEAD ST&B PARTNER: Barry R. Ostrager

OPPOSING COUNSEL: Morgan Lewis & Bockius LLP

JUDGES: Hon. Joan D. Klein; Hon. H. Walter Croskey; Hon. Patti S. Kitching

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COURTS FILED IN: New York Supreme Court, Erie County; Appellate Division, Fourth Department

CLIENT NAME: Bond, Schoeneck & King, PLLC

LEAD ST&B PARTNERS: Thomas C. Rice; Paul C. Gluckow

OPPOSING COUNSEL: Harter, Secrest & Emery LLP; Phillips Lytle LLP

JUDGES: At the trial court: Hon. John M. Curran

In the Appellate Division: Hon. Robert G. Hurlbutt; Hon. Nancy E. Smith; Hon. John V. Centra; Hon. Jerome C. Gorski

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| CLIENT NAME: | JPMorgan Chase Bank |
| LEAD ST&B PARTNERS: | Thomas C. Rice; David J. Woll |
| OPPOSING COUNSEL: | Bartlit Beck Herman Palenchar & Scott LLP; Hagens Berman Sobol Shapiro LLP; Weiss & Lurie |
| JUDGES: | Hon. Karla Moskowitz; Hon. Eileen Bransten (Appellate Division, First Department Justices) |

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| COURT FILED IN: | Southern District of New York |
| CLIENT NAMES: | J.P. Morgan Chase & Co.; William B. Harrison, Jr.; Marc J. Shapiro |
| LEAD ST&B PARTNERS: | Bruce D. Angiolillo; Thomas C. Rice; George S. Wang |
| OPPOSING COUNSEL: | Hagens Berman Sobol Shapiro LLP; Weiss & Lurie |
| JUDGES: | Hon. Sidney H. Stein; Second Circuit Justices |

| | |
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| COURTS FILED IN: | Southern District of Texas and various Texas state courts |
| CLIENT NAMES: | JPMorgan Chase & Co.; JPMorgan Chase Bank, N.A.; and J.P. Morgan Securities Inc. |
| LEAD ST&B PARTNERS: | Thomas C. Rice; Jonathan K. Youngwood |
| OPPOSING COUNSEL: | Fleming & Associates LLP |
| JUDGES: | Hon. Melinda Harmon; Fifth Circuit Judges |

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| CLIENT NAME: | Entities affiliated with The Blackstone Group |
| LEAD ST&B PARTNERS: | Bruce D. Angiolillo; Jonathan K. Youngwood; Paul C. Gluckow |
| OPPOSING COUNSEL: | Akin Gump Strauss Hauer & Feld LLP; Shapiro Forman Allen & Sava LLP |
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| CLIENT NAME: | Express Scripts, Inc. |
| LEAD ST&B PARTNERS: | Joseph F. Wayland; Kenneth R. Logan |
| OPPOSING COUNSEL: | Haynes & Boone, LLP |
| JUDGE: | Hon. David J. Folsom (District Court) |

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Case Name: Hanwha/ORIX/Macquarie v. KDIC

Tribunal: ICC

Client Name: Hanwha Co., Ltd.; ORIX Corp.

Lead ST&B Partners: Barry R. Ostrager; John J. Kerr, Jr.; Robert H. Smit; Mary Beth Forshaw; Linda H. Martin

Opposing counsel: Freshfields Bruckhaus Deringer; Bae Kim & Lee

Arbitrators: Hon. Marc Lalonde (Chairman); Hon. Abraham D. Sofaer; Prof. Michael W. Reisman

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Tribunal: ARIAS

Client Name: AXA Equitable Life Insurance Company

Lead ST&B Partners: Barry R. Ostrager; Linda H. Martin

Opposing counsel: Cahill Gordon & Reindel LLP; Boies Schiller & Flexner LLP

Arbitrators: [Confidential]

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Client Name: Government of the Dominican Republic

Lead ST&B Partners: John J. Kerr, Jr.; Peter C. Thomas

Opposing Counsel: Paul Hastings LLP

Case Name: Société Générale in respect of DR Energy Holdings Ltd. & Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic

Tribunal: UNCITRAL

Arbitrators: Professor Francisco Orrego Vicuña (Chair); Bernardo M. Cremades; R. Doak Bishop

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Tribunal: UNCITRAL

Arbitrators: Professor Karl-Heinz Böckstiegel (Chair); Professor Juan Fernández-Armesto; Mark Kantor (appointed following the death of Professor Thomas W. Wälde)

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Tribunal: AAA

Client Name: ITT Corporation, Inc., f/k/a ITT Industries

Lead ST&B Partner: Andrew S. Amer

Opposing Counsel: Milbank, Tweed, Hadley & McCloy LLP

Arbitrators: Hon. John J. Gibbons

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LEAD ST&B PARTNERS: Barry R. Ostrager; Mary Kay Vyskocil; Michael J. Garvey; Michael D. Kibler

OPPOSING COUNSEL: Zelle, Hofmann, Voelbel, Mason & Gette, LLP

ARBITRATORS: Robert B. Green; Caleb L. Fowler; Robert Lippincott III


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CLIENT NAME: Travelers Indemnity Company

LEAD ST&B PARTNERS: Barry R. Ostrager; Myer O. Sigal, Jr.; Andrew T. Frankel

OPPOSING COUNSEL: Cozen O'Connor; Prof. Samuel Issacharoff, NYU School of Law

JUDGES: United States Supreme Court Justices

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LEAD ST&B PARTNER: Henry B. Gutman

OPPOSING COUNSEL: Prof. Deborah Jones Merritt, Ohio State University School of Law

JUDGES: United States Supreme Court Justices

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CASE NAME: Oliver v. Quarterman

COURT FILED IN: United States Supreme Court

CLIENT NAME: Former federal and state prosecutors

LEAD ST&B PARTNER: Joshua A. Levine

OPPOSING COUNSEL: Office of the Attorney General of Texas

JUDGES: United States Supreme Court Justices

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COURT FILED IN: United States Supreme Court

CLIENT NAME: Robert Norwood

LEAD ST&B PARTNER: Michael D. Kibler

OPPOSING COUNSEL: Elena Kagan, Solicitor General of the United States

JUDGES: United States Supreme Court Justices

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LEAD ST&B PARTNERS: Michael J. Chepiga; James Gamble

OPPOSING COUNSEL: N/A

JUDGES: United States Supreme Court Justices

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LEAD ST&B PARTNERS: David W. Ichel; Joseph M. McLaughlin

OPPOSING COUNSEL: Bernstein Liebhard LLP; Milberg LLP

JUDGE: Hon. Shira A. Scheindlin

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CLIENT NAMES: Princeton University; Shirley M. Tilghman; Peter Wendell; Stephen Oxman

LEAD ST&B PARTNERS: Kenneth R. Logan (Of Counsel); Victoria B. Bjorklund; Mark G. Cunha

CO-COUNSEL: Lowenstein Sandler PC

OPPOSING COUNSEL: Shartsis Friese LLP; Blank Rome LLP; Milbank, Tweed, Hadley & McCloy LLP

JUDGE: Hon. Maria M. Sypek

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COURT FILED IN: District of New Jersey

CLIENT NAME: The Toronto-Dominion Bank

LEAD ST&B PARTNERS: Michael J. Chepiga; Lynn K. Neuner

OPPOSING COUNSEL: Barrack Rodos & Bacine; Bernstein Litowitz Berger & Grossmann LLP; Greenfield & Goodman LLC; Motley Rice LLC; Pashman Stein; Robbins Umeda & Fink, LLP; Trujillo Rodriguez & Richards, LLC

JUDGE: Hon. Robert B. Kugler

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COURTS FILED IN: Colorado District Court for the City and County of Denver

CLIENT NAMES: AIG affiliates National Union Fire Insurance Co. of Pittsburgh, PA and AIG Domestic Claims, Inc.

LEAD ST&B PARTNERS: Seth A. Ribner; Chet A. Kronenberg

OPPOSING COUNSEL: Featherstone Petrie DeSisto LLP

JUDGE: Hon. Herbert Stern

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COURT FILED IN: Northern District of California

CLIENT NAME: Virgin Atlantic Airways Ltd.

LEAD ST&B PARTNERS: David E. Vann Jr.; Charles E. Koob (Of Counsel)

OPPOSING COUNSEL: Hausfeld LLP; Cotchett, Pitre & McCarthy

JUDGE: Hon. Charles R. Breyer

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CLIENT NAME: JPMorgan Chase & Co. and certain of its affiliates

LEAD ST&B PARTNERS: Thomas C. Rice; Peter H. Bresnan; Jonathan K. Youngwood

Pending securities cases:

CASE NAMES: *Fulton Financial Advisors, N.A. v. J.P. Morgan Securities, Inc.*; *Fulton Financial Advisors, N.A. v. Bear, Stearns & Co., Inc. n/k/a J.P. Morgan Securities, Inc.*

COURT FILED IN: Eastern District of Pennsylvania

OPPOSING COUNSEL: Hodgson Russ LLP; Blakinger, Byler & Thomas, P.C.

JUDGE: Hon. Joel H. Slomsky

Pending antitrust cases:

CASE NAMES: *Mayfield, et al. v. Citigroup, Inc., et al.* and *Mayor and City Council of Baltimore, Maryland v. Citigroup, Inc., et al.*

COURT FILED IN: Southern District of New York

OPPOSING COUNSEL: Hausfeld LLP; Susman Godfrey LLP; Steyer Lowenthal Boodrookas Alvarez & Smith LLP; Heins Mills & Olson PLC

JUDGE: Hon. Barbara S. Jones

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TRIBUNAL: U.S. DOJ, Antitrust Division; FCC

CLIENT NAME: Sirius Satellite Radio

LEAD ST&B PARTNERS: Kevin J. Arquit; Aimee H. Goldstein

OPPOSING COUNSEL: N/A

JUDGE: N/A

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CLIENT NAME: Neff Corporation

LEAD ST&B PARTNER: Joseph M. McLaughlin

OPPOSING COUNSEL: Kleinberg Kaplan Wolff & Cohen, P.C.; Stutman Treister & Glatt, P.C.

JUDGE: Hon. Barbara R. Kapnick

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CLIENT NAMES: Motor Coach Industries International, Inc.; MCII Holdings, Inc.; MCI Financial Services, Inc.; MCI Sales and Service, Inc.; MCI Service Parts, Inc.; MCII Financial Services II, Inc.; Motor Coach Industries, Inc.

LEAD ST&B PARTNERS: Kenneth S. Ziman; Mary Beth Forshaw; Bryce L. Friedman

OPPOSING COUNSEL: Brown Rudnick

JUDGE: Hon. Brendan L. Shannon

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TRIBUNAL: National Advertising Division

CLIENT NAME: Schering-Plough Consumer HealthCare, Inc.

LEAD ST&B PARTNERS: Robert A. Bourque; Lynn K. Neuner

OPPOSING COUNSEL: Kramer Levin Naftalis & Frankel, LLP; Venable LLP

JUDGE: N/A


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CLIENT NAMES: Banc of America Securities LLC; Barclays Capital Inc.; Bear, Stearns & Co.; Citigroup Global Markets Inc.; Deutsche Bank Securities Inc.; E*Trade Securities LLC; FTN Financial Securities Corp.; Goldman, Sachs & Co.; J.P. Morgan Securities Inc.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; Morgan Stanley & Co. Incorporated; UBS Securities LLC; Wachovia Capital Markets, LLC; Wells Fargo Securities LLC

Cases Related to Fannie Mae:

LEAD ST&B PARTNERS: Michael J. Chepiga; Paul C. Curnin; George Wang

CASE NAME: In re Fannie Mae 2008 Sec. Litig., No. 08-cv-7831

TRIBUNAL: Southern District of New York

OPPOSING COUNSEL: Kaplan Fox Labaton Sucharow; Berman DeValerio

JUDGE: Hon. Gerard E. Lynch

CASE NAME: Comprehensive Investment Services, Inc. v. Mudd, et al., No. 09-cv-01444

TRIBUNAL: Southern District of Texas

OPPOSING COUNSEL: Greer, Herz & Adams, L.L.P.

JUDGE: Hon. Lee H. Rosenthal

| | |
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| CASE NAME: | Liberty Mutual Insurance Company, et al. v. Goldman, Sachs & Co., et al., No. 09-cv-10668 |
| TRIBUNAL: | District of Massachusetts |
| OPPOSING COUNSEL: | Kaplan, Miller & Ciresi LLP |
| JUDGE: | Hon. Nancy Gertner |

Cases Related to Freddie Mac:

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| LEAD ST&B PARTNERS: | Michael J. Chepiga; Bruce D. Angiolillo; George Wang |
| CASE NAME: | Jacoby v. Syron, et al., No. 08-cv-10894 |
| TRIBUNAL: | Southern District of New York |
| OPPOSING COUNSEL: | Pomerantz Haudek Block Grossman & Gross LLP |
| JUDGE: | Hon. Miriam Goldman Cedarbaum |
| CASE NAME: | Kreysar, et al. v. Syron, et al., No. 09-cv-832 |
| TRIBUNAL: | Southern District of New York |
| OPPOSING COUNSEL: | Cotchett, Pitre & McCarthy |
| JUDGE: | Hon. Miriam Goldman Cedarbaum |
| CASE NAME: | Liberty Mutual Insurance Company, et al. v. Goldman, Sachs & Co., No. 09-cv-10670 |
| TRIBUNAL: | District of Massachusetts |
| OPPOSING COUNSEL: | Kaplan, Miller & Ciresi LLP |
| JUDGE: | Hon. Nancy Gertner |

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| COURTS FILED IN: | Southern District of New York; Florida Circuit Court, Miami-Dade County; Northern District of Texas; Commonwealth Of Massachusetts Securities Division |
| CLIENT NAMES: | Entities and individuals associated with the Fairfield Greenwich Group |
| LEAD ST&B PARTNERS: | Mark G. Cunha; Michael J. Chepiga; Mark J. Stein; Peter E. Kazanoff |
| JUDGES: | Hon. Victor Marrero; Hon. Theodore H. Katz |
| OPPOSING COUNSEL: | Boies, Schiller & Flexner LLP; Lovell Stewart Halebian LLP; Wolf Popper, LLP; Cohen, Milstein, Sellers & Toll, P.L.L.C.; Wolf Haldenstein Adler Freeman & Herz LLP; Milberg LLP; Crowell & Moring LLP; Rivero Mestre & Castro LLP; Zwerling, Schachter & Zwerling, LLP; SEC; Baker Hostetler; Seward & Kissel LLP; Conyers Dill & Pearman; Massachusetts Securities Division |

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| COURTS FILED IN: | Southern District of New York |
| CLIENT NAMES: | John F. Akers; Roger S. Berlind; Thomas H. Cruikshank; Marsha Johnson Evans; Lana Franks; Sir Christopher Gent; David Goldfarb; Joseph M. Gregory; Edward Grieb; Jerry A. Grundhofer; Roland A. Hernandez; Henry Kaufman; Ian Lowit; John D. Macomber; Richard McKinney; Christopher M. O'Meara; Thomas Russo; Kristine Smith; James J. Sullivan; Samir Tabat; Wendy M. Uvino; Mark Walsh; Mark L. Zusy |
| LEAD ST&B PARTNERS: | Michael J. Chepiga; Mary Elizabeth McGarry; Jonathan K. Youngwood; Joshua A. Levine |
| OPPOSING COUNSEL: | Barroway Topaz Kessler Meltzer & Check, LLP; Berger & Montague, P.C.; Bernstein Litowitz Berger & Grossman LLP; Carney Williams Bates Bozeman & Pulliam, PLLC; Cohn, Lifland, Pearlman, Herrman & Knopf, LLC; Cotchett Pitre & McCarthy; Coughlin Stoia Geller Rudman & Robbins LLP; Gainey & McKenna; Pearson Simon Warshaw & Penny, LLP; Wolf Haldenstein Adler Freeman & Herz LLP; and others |
| JUDGE: | Hon. Lewis A. Kaplan |

CLASS ACTION LITIGATION AGAINST MBIA 90

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| CASE NAME: | Aurelius Capital Master, Ltd., *et al.* v. MBIA Inc., *et al.* |
| COURT FILED IN: | Southern District of New York |
| CLIENT NAMES: | Aurelius Capital Master, Ltd.; Aurelius Capital Partners, LP; Fir Tree Value Master Fund, L.P.; Fir Tree Capital Opportunity Master Fund, L.P.; and Fir Tree Mortgage Opportunity Master Fund, L.P. |
| LEAD ST&B PARTNERS: | Barry R. Ostrager; David W. Ichel |
| OPPOSING COUNSEL: | Dewey & LeBouef LLP |
| JUDGE: | Hon. Richard J. Sullivan |

TITLE INSURANCE ANTITRUST LITIGATION 92

| | |
|---|---|
| CASE NAME: | Dolan, *et al.* v. Fidelity National Title Insurance Co., *et al.* |
| COURT FILED IN: | Eastern District of New York (similar cases filed in multiple other jurisdictions) |
| CLIENT NAMES: | Fidelity National Financial, Inc.; Fidelity National Title Insurance Company; Ticor Title Insurance Company; Chicago Title Insurance Company; Commonwealth Land Title Insurance Company; LandAmerica NJ Title Insurance Company; Lawyers Title Insurance Corporation |
| LEAD ST&B PARTNERS: | Barry R. Ostrager; Kevin J. Arquit |
| OPPOSING COUNSEL: | Constantine Cannon LLP |
| JUDGE: | Hon. Thomas C. Platt |

JUSTICE FOR TAISHAWN B. 94

CASE NAME: In re Shaun B., et al.

COURT FILED IN: New York Supreme Court, Appellate Division, First Department

CLIENT NAME: Taishawn B.

LEAD ST&B PARTNER: Joseph M. McLaughlin

OPPOSING COUNSEL: Corporation Counsel, New York

JUDGES: Hon. Jonathan Lippman (Presiding Justice); Hon. Peter Tom; Hon. Milton L. Williams; Hon. James M. McGuire; Hon. Helen E. Freedman

NYS COURT OF APPEALS VICTORY FOR CHARTER SCHOOLS ON CONSTITUTIONAL LAW ISSUE 95

CASE NAME: In the Matter of New York Charter Schools Ass'n, Inc. et al. v. DiNapoli, et al.

COURT FILED IN: New York State Court of Appeals

CLIENT NAMES: New York Charter Schools Association, Inc.; The New York City Center for Charter School Excellence, Inc.; The Opportunity Charter School; New Heights Academy Charter School; Renaissance Charter School; International Leadership Charter School; Hellenic Classical Charter School; Harlem Children's Zone Promise Academy Charter School; Harlem Children's Zone Promise Academy II Charter School; John V. Lindsey Wildcat Academy Charter School; Hyde Leadership Charter School; New York Center for Autism Charter School; Brooklyn Charter School; Manhattan Charter School; South Bronx Charter School for International Cultures and the Arts; Community Roots Charter School; Ross Global Academy Charter School

LEAD ST&B PARTNER: Joseph F. Wayland

OPPOSING COUNSEL: Office of the New York State Attorney General

JUDGES: Judges of the New York State Court of Appeals

SECURING ACCESS TO HOUSING FOR MENTALLY DISABLED ELDERLY ADULTS 97

CASE NAME: Cal. Ass'n of Mental Health Patients' Rights Advocates v. Allenby

COURT FILED IN: California Superior Court

CLIENT NAME: California Association of Mental Health Patients' Rights Advocates

LEAD ST&B PARTNERS: Alexis S. Coll-Very; Patrick E. King

CO-COUNSEL: Public Interest Law Firm of the Law Foundation of Silicon Valley; Mental Health Advocacy Project of the Law Foundation of Silicon Valley

OPPOSING COUNSEL: Office of the Attorney General of the State of California

JUDGE: Hon. Neal A. Cabrinha

FIGHTING FOR AN IMMIGRANT DETAINEE'S RIGHT TO ADEQUATE MEDICAL CARE 98

CASE NAME: Brown v. United States

COURT FILED IN: Eastern District of New York

CLIENT NAME: "Mark"

LEAD ST&B PARTNER: Joseph F. Tringali

OPPOSING COUNSEL: Office of the U.S. Attorney, Eastern District of New York

JUDGES: Hon. Sandra L. Townes; Hon. Steven M. Gold (Magistrate Judge)

ASYLUM SUCCESS FOR GUINEAN VICTIM OF FEMALE GENITAL MUTILATION 99

CASE NAME: In re Application for Asylum, Withholding of Removal, and Relief Under the Convention Against Torture for "Sarah"

VENUE FILED IN: Newark Asylum Office

CLIENT NAME: "Sarah"

LEAD ST&B PARTNER: Barry R. Ostrager

OPPOSING COUNSEL: N/A

JUDGE: N/A

## Most Significant Loss — Page

THE AMERICA'S CUP LITIGATION 102

CASE NAME: Golden Gate Yacht Club v. Société Nautique de Genève

COURTS FILED IN: New York Supreme Court, New York County; appealed first to the Appellate Division, First Department and subsequently to the New York Court of Appeals; Southern District of New York

CLIENT NAME: Société Nautique de Genève

LEAD ST&B PARTNERS: Barry R. Ostrager; Jonathan K. Youngwood; George S. Wang

OPPOSING COUNSEL: Latham & Watkins, LLP; Boies, Schiller & Flexner LLP

JUDGES: Hon. Herman J. Cahn; Hon. Shirley W. Kornreich; Hon. William H. Pauley III; First Department Justices; Court of Appeals Justices

# Simpson Thacher's Litigation Department

Our frontline role in a diverse array of the highest stakes lawsuits and governmental investigations that are defining the fallout from the bruising financial crisis has enhanced our record of achievement in handling complex litigation of national and international importance. Our belief that we cemented our reputation as the go-to firm for the key parties in the most challenging controversies of our time is evident from the headlines: Madoff, Lehman Brothers, AIG, Enron, Merrill Lynch, WaMu, Bear Stearns, UBS, subprime litigation, auction rate securities, rating agency liability, Fannie Mae/Freddie Mac – in these and virtually every other front-page, multi-faceted controversy with billions of dollars at stake, Simpson Thacher has been instrumental in shaping the pivotal litigations of our time.

We believe the reason the most sophisticated clients in the world consistently entrust Simpson Thacher with their most threatening and complex litigation problems is simple: our long record of extraordinary results in matters of every description.

In the past year, we persuaded the United States Supreme Court to grant certiorari and then issue a 7-2 decision – an increasingly rare margin – in favor of our longstanding client Travelers Indemnity Company, reversing a unanimous Second Circuit decision that permitted a broad collateral challenge to the subject matter jurisdiction of the nation's bankruptcy courts, thereby threatening the finality and repose provided by federal court judgments. The Supreme Court ruling is one of the most important business law decisions of the decade, and represents the capstone to 25 years of hard-fought litigation through which we secured an unprecedented injunction protecting Travelers against all claims relating to its insurance relationship with Johns-Manville, and which became the model for a federal statutory provision, 11 U.S.C. §524(g).

After our predecessor counsel in a patent infringement case was sanctioned and our client 3Com lost an important damages right, the Firm turned the case around and after a two-week trial obtained a unanimous jury verdict of willful infringement, ultimately resulting in a $70 million recovery by 3Com. Combining our antitrust and insurance capabilities, we obtained dismissal on the pleadings of antitrust claims brought against the Equitas companies – even though before we entered the case the same judge had sustained the allegations of antitrust violation. On the eve of trial in an ERISA suit challenging amendments to J.P. Morgan Chase's retirement plan, plaintiffs representing a certified class that at one point had multi-billion dollar claims agreed to voluntarily dismiss the individual and class claims with prejudice. In a several hundred million dollar insurance coverage dispute against Honeywell International, Inc., the Firm achieved multiple appellate victories in courts in New York and New Jersey in a contentious forum dispute that raised important issues of inter-state comity. The parties at one point were simultaneously litigating in two states (New York and New Jersey) on identical issues after a New Jersey court twice refused to dismiss New Jersey-based Honeywell's complaint. After prevailing on appeal in New York, we obtained reversal of the New Jersey decision on rarely granted interlocutory appeals that we twice obtained from the New Jersey Supreme Court. We have blazed new trails in overcoming protections from judgment creditors that sovereign nations enjoy, securing rulings for Aurelius Capital Partners, LP that assets of the Republic of Argentina are subject to execution, and unprecedented findings that Argentina was in civil contempt of a U.S. federal court. Our litigators are currently on trial in three separate cases in courts across the country. And on July 30, 2009, as we go to press, we achieved an unprecedented victory for the Swiss yacht club Société Nautique de Geneve, convincing a New York State court that the Racing Rules of Sailing do not prohibit the use on our client's yacht of engines to trim sails and move water ballast, the first time in the 158-year history of the America's Cup a competitor has been allowed use of non-manual power.

Described in 2008 as "[t]he cream of the crop" in Euromoney's Benchmark litigation survey, the Firm is proud of the recognition its litigators have received for their achievements. In 2009, Chambers & Partners singled out Simpson Thacher's litigators as "[c]ounsel of choice for major financial institutions, private equity/hedge fund clients and high ranking executives, . . . the firm's litigators are active in

significant litigation arising out of the subprime crisis and the global financial crisis." In addition, the *Legal 500* recognized that "with a 'depth of reputation in the market', clients remark how Simpson Thacher & Bartlett LLP offers 'superior trial skill capacity and a tremendous bench strength of qualified attorneys.'" The *Legal 500* also observed that, complementing our overall marquee litigation practice, our litigators "have successfully applied these skills to the field of international arbitration" and impress clients with "broad experience in complex commercial arbitrations," citing our conduct of "arbitrations in English, French, Spanish, German and Dutch, before arbitration tribunals in a number of countries, including Geneva, Paris, London, Amsterdam, Hong Kong, and Buenos Aires." Barry R. Ostrager, Head of the Litigation Department, was named in 2009 by the *Legal 500* one of the top ten "Leading Trial Lawyers" in the nation for the third consecutive year. Kevin Arquit, Head of the Firm's antitrust practice—which was awarded top-tier ranking in *Chambers USA* 2009—was described by *Chambers* "as a standard setter for other attorneys. He is regarded as one of the pillars" of the antitrust bar and "clients hail him as a sage counselor who 'understands the nuances of the agencies, in addition to being strategically minded, unflappable and immensely capable in litigation matters.'" The Firm's younger lawyers are emerging as recognized leaders in the profession. Simpson Thacher intellectual property partner Lori E. Lesser has been named one of the "World's Leading IP Strategists" by *Intellectual Asset Management* magazine. Lynn K. Neuner Chaired The Association of the Bar of the City of New York Subcommittee to Evaluate United States Supreme Court Nominee Sonia Sotomayor. Litigation associate Robert J. Pfister, based in the Firm's Los Angeles office, was named a 2009 "Rising Star" by *Southern California Super Lawyers* magazine. New York litigation associate Jacob Press was awarded Immigration Equality's Safe Haven Pro Bono Award for his work representing a Brazilian client who was granted asylum in 2008, and associates Susan Cordaro and Natalie Shimmel-Drucker in 2009 were awarded the Sanctuary for Families Associates Committee Award for Excellence in Pro Bono Advocacy for their successful representation of a Kenyan victim of domestic violence in her asylum claim.

Our broad-gauged litigation practice has solidified positions in the first rank of diverse practice areas, reflecting a versatility that we believe is without peer. The talent pool in all our Offices enables us to field across numerous fronts integrated teams of lawyers with a depth and breadth of relevant experience, and commitment to a tailored 360-degree strategy that advances the legal, business and other interests of our geographically and commercially diverse clients.

## Antitrust Litigation

The Firm's unparalleled global experience in every facet of antitrust practice—from complex mergers and acquisitions that require clearance from multiple competition authorities, to high stakes litigations that threaten our clients' economic survival, to government investigations that challenge our clients' core business practices—has earned it widespread praise as "an 'absolutely fantastic team of talented lawyers' who are highly active in major [antitrust] litigation" (*Chambers Global* 2008), with "'peerless' merger clearance capability" (*Legal 500* 2009), and the "go-to destination for clients . . . under [antitrust-related] government investigations" (*Chambers USA* 2008). Over the last two years, Simpson Thacher litigators have continued to distinguish themselves both in the courtroom and before enforcement agencies. Our fast-growing and "flourishing" Washington, D.C. office (*Legal 500* 2009) has enhanced our ability to serve clients in their most significant national and international antitrust matters.

We have represented plaintiffs and defendants in many of the most significant antitrust litigations of recent years. We have a history of successfully taking criminal and civil antitrust matters to verdict in courts around the country, and have represented our clients before the administrative tribunals of the FTC. In the process, we have shaped antitrust law through cutting-edge legal arguments on issues such as monopolization, price-fixing and tying claims. In the past two years, the Firm obtained dismissal of putative class claims against Staples in a case of first impression alleging that a business agreement between Staples, a retailer, and Hewlett-Packard, a manufacturer, should be

treated as a horizontal market allocation—a *per se* antitrust violation. In the Fifth Circuit we obtained an appellate victory for Express Scripts, Inc., one of the largest Pharmacy Benefit Managers in the U.S. An integrated team of Simpson Thacher litigators from multiple offices represented MasterCard for several years in landmark antitrust litigations brought by American Express and Discover challenging MasterCard and Visa's brand dedication rules, in which in 2008 we obtained dismissal of all of Discover's claims premised on the existence of a conspiracy between MasterCard and Visa, and on the theory that MasterCard had prevented Discover from entering the debit card market. Having eliminated exposure under these key theories, we negotiated a very favorable settlement for MasterCard. We are representing the Fidelity family of title insurance companies and their parent, and leading a coordinated joint defense effort, in more than 70 putative class actions pending across the country challenging as alleged price fixing the setting of title insurance rates in numerous states. Our motions to dismiss these cases have resulted in numerous plaintiffs dismissing cases, and multiple court-ordered dismissals with prejudice.

"[R]egarded by many as the first port of call for advice on merger clearance" (*Chambers Global* 2009), the Firm frequently obtains approval for transactions that analysts considered unlikely to pass regulatory muster. Our record of success is a testament to our thorough knowledge of the regulatory process, gained through decades of experience working with competition authorities in all of the major global markets. Since 2007, our litigators have represented Wyeth in its sale to Pfizer Inc. in a $68 billion cash and-stock transaction; Sirius Satellite Radio in its $13 billion merger of equals with XM Satellite Radio, in which we demonstrated before the DOJ, the Federal Communications Commission, and in Congressional hearings that a historic transaction that combined the only two providers of satellite radio service in the United States would have no monopoly power; DoubleClick Inc. and its majority shareholder Hellman & Friedman in the sale of DoubleClick to Google Inc. for $3.1 billion in cash; The Blackstone Group in its $26 billion acquisition of Hilton Hotels Corporation; The Board of Directors of Dow Jones & Company in Dow Jones' $5.6 billion sale to News Corporation; and Sanyo Electric Co., Ltd. in its $8.6 billion cash tender acquisition by Panasonic Corporation.

The DoubleClick representation, which is not featured below, illustrates our abilities to obtain deal clearances in the face of multiple, all-out assault on a transaction. Almost immediately after announcement of the sale to Google, the deal was assailed in lobbying efforts before Congress and complaints to the Federal Trade Commission ("FTC") by both competitors and consumer privacy advocates who argued that the transaction would harm consumer privacy. Microsoft and other large companies sought to challenge the deal both by launching aggressive public relations campaigns against Google and DoubleClick, and by entering into competing alliances. In addition, the Electronic Privacy Information Center, the Center for Digital Democracy and the U.S. Public Interest Research Group argued that the government should block the deal out of concerns about the merged entity's ability to collect and use personal information in ways that would infringe the privacy of individual Internet users. The U.S. House of Representatives Committee on Energy and Commerce conducted an inquiry into the deal, and the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, held public hearings at which opponents of the deal raised a number of concerns. Despite initial threats by a number of Congressmen to withhold the FTC's funding if the deal was approved, and after a lengthy Second Request investigation which included individual meetings with many of the FTC commissioners, the Simpson Thacher antitrust team ultimately obtained unconditional clearance for the Google-DoubleClick transaction in the United States. We successfully argued that privacy concerns, even if valid, did not impact the competitive analysis. The deal faced similar opposition in the European Union, where competitors and consumer privacy advocates also launched attacks on the deal. The European Commission ("EC") closely examined a number of novel antitrust theories, focusing on potential vertical and conglomerate effects, and delved deeply into competitive issues related to the operation of Google and DoubleClick's

technology. We responded to a series of information requests from the EC, met the with EC staff, and submitted several "mini" white papers to the EC. After a full Phase II investigation, the EC also cleared the transaction unconditionally.

## Securities Litigation

Our extensive experience in securities litigation—coupled with our fluency in the complex financial issues involved—has made our securities litigators, as the Legal 500 2008 observed, "clearly stand[] above the competition." For the past two years, the Firm's securities litigators have augmented the historic position of the Firm as the first call to defend financial services institutions and their senior management when a litigation siege environment follows economic distress. When various entities and individuals associated with the Fairfield Greenwich Group (which did not have an historical relationship with the Firm) faced a daunting array of Madoff-related purported class actions and derivative litigations in multiple fora across the country, they reached out to Simpson Thacher litigators. When Lehman Brothers collapsed, numerous current and former officers and directors of Lehman reached out to the Firm to represent them in scores of putative debt/equity securities, mortgage-backed securities, auction rate securities and ERISA class actions filed around the country relating to Lehman's bankruptcy and the events and disclosures that preceded it. We represented Lehman Brothers CEO Richard Fuld and other members of senior management before the highly publicized U.S. House of Representatives Committee on Oversight and Government Reform.

Cited by the Legal 500 for its "[a]bsolutely first-rate," "superb litigators" and for its "deep bench strength," the Firm's securities litigators have "been at the forefront of efforts to defend financial services firms faced with a raft of subprime mortgage-related litigations and regulatory investigations." We represent more than a dozen top-tier underwriters who requested that a single firm – Simpson Thacher – represent them in a raft of lawsuits across the country relating to Fannie Mae and Freddie Mac securities offerings and alleged misrepresentations concerning exposure to subprime mortgage risks. We represented numerous senior officers of AIG at their testimony before a congressional committee probing the Firm's central role in the financial crisis. We are also representing Morgan Stanley's outside directors in shareholder derivative litigation alleging various fraud and breach of fiduciary duty claims related to the Company's subprime related losses. In addition, we are representing Morgan Stanley's outside directors in an ERISA action alleging various fraud and breach of fiduciary duty claims arising out of the Company's subprime related losses. We also represent those directors in shareholder derivative litigation alleging various fraud and breach of fiduciary duty claims related to the Company's trading of auction rate securities. We represent E. Stanley O'Neal, former Chairman of the Board and CEO of Merrill Lynch & Co., in connection with all civil actions (including securities class actions, an ERISA class action and derivative litigation) and government investigations concerning Merrill Lynch's collateralized debt obligations and subprime mortgage exposure. We also represented Mr. O'Neal in connection with his testimony before the U.S. House of Representatives Committee on Oversight and Government Reform in March 2008 concerning executive compensation. And we represent Samuel L. Molinaro, Jr., former CFO of The Bear Stearns Companies, Inc., in connection with securities and ERISA class actions, derivative litigation, and related matters arising out of Bear Stearns' March 2008 collapse and acquisition.

Time and again we have achieved results for our clients that defy the odds. Through a tactical discovery strategy, the Firm obtained dismissal of all claims brought against Hilton Hotels and its Board arising out of Blackstone's $26 billion acquisition of Hilton, one of the largest deals of the year. In two closely watched lawsuits, the Firm convinced courts that high-profile decisions, which our adversaries vigorously contended mandated victory for them, were inapplicable and we obtained total wins for Blackstone – in which we obtained dismissal of Alliance Data Systems Corp.'s claim it was owed a $170 million merger termination fee under

Hexion – and for Neff Corp. – where we defeated an attempt to enjoin an exchange offer that resembled Realogy's recent court-barred exchange offer and convinced plaintiffs to abandon the suit. The Firm obtained dismissal of all claims against its client Moody's in the first non-U.S. decision addressing the liability of a rating agency to investors who allegedly relied on credit rating opinions in making investment decisions. Subsequently, we have obtained dismissals of similar claims against Moody's in eight additional cases.

Amid heated charges of wrongdoing at Washington Mutual, Inc. when it filed for bankruptcy in September 2008, the Firm was approved by the bankruptcy court to represent the Company in connection with federal and state government inquiries and investigations relating to key events preceding the bankruptcy. We also represent certain of the Company's former officers and, in Washington federal court, successfully secured the dismissal of derivative claims against our clients and obtained the dismissal of a securities class action against a former senior officer. We are actively guiding JP Morgan Chase through a broad range of securities and antitrust litigation and government investigations relating to the highly publicized failure of certain auctions for auction rate securities. We have continued our string of success in representing JP Morgan Chase in litigation arising from its relationship with Enron, securing dismissals of claims ranging from federal securities to ERISA to breach of contract and fiduciary duty.

## Insurance Coverage

Since 2007, Simpson Thacher has extended its singular status and achievements in insurance and reinsurance coverage litigation, areas in which we have done more to establish the controlling U.S. precedents than any other law firm in the United States. The Firm recently received the Chambers & Partners 2009 Award for Excellence in Insurance, which recognized in particular the Firm's work on behalf of insurers and reinsurers. Of the Firm's insurance practice, Chambers & Partners stated: "Clients describe this outstanding outfit as 'one of the best one-stop shops' they have seen, confirming its Band 1 status and national reputation." The Firm has been a recognized leader in the development of law on leading insurance coverage issues, including the duty to defend, expected or intended occurrences, allocation, trigger of coverage, the pollution exclusion and asbestos bankruptcy. Our recent domestic and international insurance representations have included many of the largest insurance groups, including Travelers, Swiss Re, AIG, Lloyd's of London (Resolute Management), AXA Equitable, SCOR, Equitas, Mitsui-Sumitomo and ACE. Based on its decades of experience, Simpson Thacher attorneys have authored two widely-cited treatises: *Handbook on Insurance Coverage Disputes* and *Modern Reinsurance Law and Practice*.

The Firm's recent engagements amply justify its undisputed status as the premiere firm in the practice of insurance and reinsurance law. We represent Travelers in scores of high-stakes lawsuits and arbitrations. We conducted a three-month trial for Travelers against a Pfizer subsidiary regarding insurance coverage for asbestos-related claims under hundreds of policies issued by dozens of insurers over nearly half a century, in which mid-trial Pfizer moved to disqualify the judge and declare a mistrial. Travelers ultimately settled the case on extraordinarily favorable terms. We represented AIG in a "bad faith" lawsuit brought by Newmont (one of the world's biggest gold producers) concerning AIG's right to control the defense of a suit against Newmont relating to a mercury spill at the largest gold mine in Latin America, and obtained a settlement at a fraction of the amount at issue after the judge ordered Newmont and its counsel to appear and show cause why sanctions should not be imposed for discovery abuses we laid bare.

## International and Domestic Arbitration

Simpson Thacher has one of the most dynamic and successful international arbitration practices in the world. Our arbitration practice "attracts clients due to its track record and its 'continually great judgment' in high-stakes and widely publicized matters." *Legal 500 2008*. Our litigators act as counsel and arbitrator in international arbitrations under all of the major international arbitration rules, including the ICC, AAA, LCIA and UNCITRAL arbitration

rules, and are widely recognized as leaders in arbitration practice: "[Clients] greatly respect 'incredible practitioner' John Kerr, who 'really can do it all'" (*Chambers USA 2009*); "Managing partner of the firm's Washington, DC office, Peter Thomas is regarded as 'a very special lawyer'. With the whole office focusing on international arbitration [and other high-profile litigation and counseling matters], clients view him as 'very skilled'" (*Legal 500 2008*); and "the highly regarded Robert Smit is described as 'one of the main driving forces of the practice.'" (*Chambers USA 2009*).

Building on the Firm's successes in international bilateral investment treaty arbitrations, we achieved a major victory on behalf of the Hanwha Group and ORIX Corporation in a widely-followed international arbitration our clients brought against Korea Deposit Insurance Corporation, an agency of the Korean government. The American Lawyer named it one of the top fifty contract disputes of 2007 and estimated the stakes to be $1.16 billion. We successfully represented AXA Equitable Life Insurance Company at trial against claims brought by Centre Life Insurance Company, with the panel denying Centre's request to rescind a reinsurance contract between the companies and awarding Centre a very small fraction of their requested hundreds of millions of dollars in damages. Representing the Dominican Republic in the first ever investment arbitrations initiated against it, which arose out of the Republic's auctioning off parts of the state's electricity infrastructure, we assembled a team of bilingual lawyers and achieved a highly favorable resolution in three separate arbitrations for the sovereign nation, including an arbitration under the ICC Rules. The Firm obtained a federal court ruling compelling arbitration of claims by Fencourt Reinsurance Company against our client ITT Industries, and then after arbitration before Judge John Gibbons obtained a 20-page decision confirming that any liabilities incurred by Fencourt and/or Hartford under numerous reinsurance contracts were to be borne solely by Fencourt and/or Hartford under an agreement governing the disaggregation of ITT's predecessor company. We commenced litigation in federal district court and obtained rulings there and in the Ninth Circuit permanently enjoining French businessman François Marland from pursuing claims in arbitration against our client Thelen Reid Brown Raysman & Steiner LLP. We are currently in our fourth week of trial representing French reinsurer SCOR SE in an arbitration against Allianz Global Risks U.S. Insurance. SCOR reinsured 100% of Allianz's 10% quota share participation on the World Trade Center property insurance program. At issue is Allianz's May 2007 settlement with Silverstein Properties for property loss arising from the events of September 11.

## Mass Tort

Recognized in the *Legal 500 2009* for its "grasp on the issues and a strategic vision that far surpasses the competition," the Firm's product liability and mass tort practice has built its reputation on stellar performance. In addition to securing in the U.S. Supreme Court final and nationwide protection for Travelers from hundreds of so-called "direct action" claims that were based on the company's nearly half-century relationship with Johns-Manville, the Firm continues to represent insurers in scores of high stakes asbestos-related lawsuits and arbitrations, including Travelers in an ongoing trial in California concerning coverage relating to asbestos litigation, in which we are alleging collusion between an asbestos distributor and the leading members of the West Coast asbestos plaintiffs' bar. The Firm attained a perfect record of success in obtaining "with prejudice" dismissals at the pleading stage in ten putative class action lawsuits filed across the country against Heineken for advertising allegedly targeting persons below the 21-year-old legal purchase age. The Firm represents Seagram Export Sales Company, Inc. in a very unusual action commenced in October 2004 by the Republic of Colombia—together with certain of its Departments and the Capital District of Bogotá—in the Eastern District of New York against Seagram and liquor companies Diageo plc and Pernod Ricard, SA, claiming that the liquor company defendants and their unaffiliated distributors were complicit in smuggling and in an alleged long-running scheme to launder Colombian drug money through alleged "illegal distribution" of the defendants' products—mostly scotch whiskies—into Colombia. For six years we represented

Argenbright Security, which provided checkpoint screening services for two of the 9/11 flights, in litigation brought on behalf of victims of the 9/11 terrorist attacks and alleging various failings in the aviation security system in place on 9/11. We took a lead role for defendants in a long series of mediations that resolved all of the 100 wrongful death and personal injury claims brought against Argenbright. The Firm also represents Gennesee & Wyoming, a major owner and operator of short line and regional freight railroads, and its subsidiaries, in product liability, class action and related litigation. The Firm obtained the voluntary dismissal of its client without any payment to plaintiffs in class action litigation in Kentucky federal court arising from an allegedly defective "coupler" which caused a derailment and the release of hazardous materials, and we are handling litigation and prosecuting a confidential arbitration that arose from a trestle collapse and derailment of a train carrying NASA rocket motors. Based on our decades of experience, Simpson Thacher attorneys have authored widely-cited treatises in the area, *McLaughlin on Class Actions*, cited by the Second Circuit in 2009 as "authoritative" on the subject, and *Primer on Product Liability Law*.

## Intellectual Property

The lawyers in our intellectual property group are—first and foremost—trial lawyers, and they have recently demonstrated their ability to try to verdict cases involving the most complicated technologies in the world. In addition to reversing a deteriorating situation for 3Com in a patent infringement case, and obtaining a jury verdict of willful infringement and an award of $45.3 million for 3Com following a two-week trial in San Francisco, we represented Daiichi Sankyo Company at a 2009 trial asserting patent infringement claims against Mylan, one of the world's largest generic pharmaceutical companies and its supplier, Indian pharmaceutical company Matrix Laboratories, relating to Mylan's marketing of a generic version of hypertension treatments developed by Daiichi Sankyo, and obtained a bench verdict in favor of our client on patent validity and infringement. The Firm has achieved additional vital intellectual property successes for Daiichi Sankyo, securing through litigation the validity of a patent term extension for its blockbuster drug levofloxacin, and obtaining as successor counsel federal court dismissal of antitrust and state law claims alleged by Apotex contending our client obtained its Floxin® Otic patent for monopolization purposes. For *pro bono* client Apollo Theater, we defended against trademark infringement claims asserted by Soul Circus against the Apollo's urban-themed circus show, ultimately convincing Judge Lewis Kaplan not to allow Soul Circus to voluntarily dismiss its claims "without prejudice" to refiling elsewhere, a key ruling which facilitated a settlement without ramifications to the Apollo's show. In an action certain to affect the market for Intel-compatible chipsets, the Firm represents Intel in a dispute with its licensee NVIDIA concerning whether the license extends to certain post-license Intel technology. We are also representing GPS specialist SRF Technology in a dispute unfolding in multiple fora including federal courts, the ITC and reexamination proceedings before the U.S. Patent and Trademark Office through which Broadcom is trying to establish commercial hegemony in the GPS space.

## Business Crimes and Investigations

Simpson Thacher's demand among the most prominent national and international business entities, and their senior executives, has kept our government investigation and business crimes practice exceptionally active representing these clients in internal corporate investigations; government investigations, including grand jury, congressional and regulatory investigations; criminal litigation; and related civil and administrative proceedings, including qui tam actions. On any given day, our litigators are representing high profile clients across the country in investigations conducted by the DOJ, the SEC, the Commodity Futures Trading Commission, and State Attorneys General offices, and conducting confidential internal investigations. We have defended clients against allegations of insider trading; securities and accounting fraud; tax and antitrust violations; money laundering; alleged violations of the Foreign Corrupt Practices Act, and regulations promulgated by the Food and Drug Administration, the Federal Trade Commission and the Federal Communications Commission.

We also advise companies, Boards of Directors and Special Litigation Committees in internal investigations, and guide them through the appropriate remedial steps necessary to come into compliance with the law and mitigate any potential collateral litigation or business threat. Our client confidentiality restrictions limit our ability to disclose the details of many of our engagements, but this sampling of recent representations illustrates the scope of our practice:

- The Firm represents an investment advisor to funds with significant exposure to Bernard L. Madoff Investment Securities, Inc. in investigations by the Massachusetts Securities Division, the SEC, the U.S. Attorney's Office for the Southern District of New York and the Financial Industry Regulatory Authority.

- The Firm represents a marquee broker-dealer that underwrote, sold, and managed auctions for auction rate securities ("ARS") and placed bids to purchase ARS in auctions it managed, in several investigations commenced by various government agencies—including the SEC, the Financial Industry Regulatory Authority ("FINRA"), and multiple state agencies—following the widespread failure of ARS auctions in 2008. We have actively guided our client through these investigations, and successfully negotiated comprehensive settlements in principle with the New York State AG's office and the Office of Financial Regulations of the State of Florida (on behalf of the North American Securities Administrator's Association). In these settlements we architected a buy-back of ARS from certain investors and repayment of fees to various issuers.

- The Firm represented the Audit Committee of a multi-national corporation in an internal investigation and related inquiries from governmental agencies regarding the valuation of the multi-billion dollar investment portfolio of a wholly-owned subsidiary of the corporation. The investigation centered on the appropriateness of the valuation methodologies employed by the subsidiary, and the efficacy of the corporation's internal control function in overseeing the valuation process.

- The Firm represented the CEO and President of a major mortgage company (the "Company") in connection with an investigation by the Securities and Exchange Commission ("SEC") into the Company's collapse during the subprime mortgage crisis. After representing the CEO and President during a number of interviews with the SEC, we successfully negotiated a settlement with the SEC.

- The Firm represents the board of directors of an international oil and gas exploration company (the "Company") in connection with a significant ongoing Foreign Corrupt Practices Act ("FCPA") matter. Beginning in late 2007 and continuing through the present, counsel for the Company and counsel for one of the Company's joint venture partners have been conducting extensive FCPA due diligence relating to the Company's local partner in the joint venture. We were retained in late 2008 to advise the board on both the ongoing due diligence process as well as on informal inquires by the U.S. Department of Justice and a foreign attorney general.

- The Firm represented a major corporation in connection with its simultaneous applications under both the Department of Justice's ("DOJ") and the Office of Fair Trading's ("OFT") corporate leniency programs for immunity from prosecution for antitrust violations, and in the resulting investigations. Under Simpson Thacher's guidance, the corporation obtained immunity from prosecution by the DOJ and the OFT, protecting it and its employees from any criminal fines or penalties. The corporation's competitor, and alleged co-conspirator, pled guilty to antitrust violations and was fined hundreds of millions of dollars by both the U.S. and U.K. governments.

- For the past several months, the Firm has represented three different financial institutions in ongoing government investigations related to the institutions' trading activities in certain securities following the disruptions in the housing and credit markets.

- The Firm represents several major investment firms in connection with investigations by the Department of Justice, the New York AG, and

multiple offices of the SEC into allegations that certain individuals affiliated with Alan Hevesi and the New York State Common Retirement Fund ("NYSCRF"), or Aldus Equity and the New Mexico Investment Council demanded and received improper incentives in return for investments by the NYSCRF or New Mexico.

- For more than a year, the Firm has represented an individual Citigroup executive in ongoing government investigations related to Citigroup's 2007 disclosures about its subprime-related assets. In the course of the investigations, which primarily concern disclosures of subprime-related write downs and exposures within Citigroup's Markets and Banking division, Simpson Thacher has defended its client in voluntary interviews with the Securities and Exchange Commission and worked extensively with company counsel.

- The Firm represents a former senior executive of The Bear Stearns Companies Inc. in connection with ongoing government investigations, civil litigations, and related matters arising out of the company's March 2008 collapse and acquisition. For more than a year, we have defended our client's interests on multiple fronts, working closely with counsel to the company's successor and participating in several voluntary interviews, including with the Securities and Exchange Commission.

- The Firm represented a former outside director of Hollinger International (n/k/a Sun-Times Media Group) in government investigations arising out of alleged improprieties by the majority shareholder of Hollinger, Conrad Black, and others.

- The Firm currently represents a global technology company that received a subpoena from the Securities and Exchange Commission ("SEC") seeking information relating to potential accounting irregularities at one of the company's customers. Although the customer, rather than the Firm's client, appears to be the target of the investigation, the client faces theoretical aiding and abetting liability simply by virtue of its transactions with the customer. The Firm has engaged in an extensive investigation and document production over the last 18 months into a variety of transactions over many years, and has represented the company's senior executives when they provided testimony to the SEC.

## Commitment to Public Service

The Firm's long and distinguished history of pro bono service is embedded in our culture. Acutely aware that legal services to the poor are especially vulnerable to cutbacks during prolonged economic downturn, we have renewed and redoubled our commitment to widespread public service. In 2008 alone, Simpson Thacher partners, associates and summer associates devoted more than 54,000 hours to pro bono projects, and our efforts have been recognized with awards from such distinguished organizations as inMotion, Sanctuary for Families, the City Bar Justice Center, the United Federation of Teachers, The Legal Aid Society, the New York State Bar Association, Volunteer Lawyers for the Arts, the Puerto Rican Legal Defense and Education Fund, Lawyers Alliance for New York, Immigration Equality, the Legal Community Against Violence and the Nonprofit Coordinating Committee of NY. In the past two years, more than 173 Simpson Thacher lawyers represented victims of political oppression in proceedings to obtain political asylum in the United States, winning asylum for more than two dozen different individuals from nearly as many different countries, both at the administrative interview and immigration court levels. In the same period, more than 130 Simpson Thacher lawyers provided legal assistance to clients who were victims of domestic violence. The Firm provides legal representation of all kinds, and has repeatedly obtained orders of protection, facilitated support payments to ensure housing and food for mothers and their children, resolved child custody issues, and helped clients obtain divorces from abusive spouses. The Firm's commitment to public service is further illustrated by its sponsorship of summer associate public interest fellowships each year, under which summer associates spend four to six weeks of their summer on a significant

public service project while receiving full salary from the Firm. Recent Public Interest Fellows have worked at organizations such as the NAACP-Legal Defense Fund, the Ghana Legal Resource Center, the ICTR/Rwanda War Crimes Tribunal, GreenHome NYC, Texas RioGrande Legal Aid, the District of Columbia Public Defender Service, and the Center for Legal Rights at Grahamstown, South Africa. Simpson Thacher litigation partner Mark G. Cunha was recently elected the new Chair of the Board of Directors of Legal Services NYC, the largest organization devoted to providing free civil legal services in the United States. Mary E. McGarry is the Firm's liaison to numerous public service organizations with which the firm has established relationships, including inMotion, Inc., which has given Commitment to Justice Awards to the Firm, several of its associates, and to Ms. McGarry. Michael J. Chepiga is a Director of Volunteers of Legal Services and the City Bar Justice Center, Bruce D. Angiolillo is a Director and Secretary of Common Ground Community, which develops innovative solutions to homelessness N.Y. City, and Barry R. Ostrager is a Director of Sanctuary for Families. David W. Ichel is a Director of MFY Legal Services and the Chair of the Board of Visitors of Duke Law School.

We are proud of the vast difference our lawyers' efforts have made in the lives of individuals confronting crushing circumstances. We restored an indigent mother to her two children by obtaining a rare appellate reversal of a Family Court ruling that was intensely fact-based. Through our relationship with Sanctuary for Families, we successfully represented in her application for asylum a West African woman who was subjected to genital mutilation when she was five or six years old and horrific physical and sexual assault by a husband nearly 30 years her senior.

In addition to vital successes for individual clients, our commitment to long-term, large scale pro bono representations has yielded important systemic changes and benefits. The Firm successfully represented a group of charter schools and two charter school organizations in obtaining reversal of an Appellate Division decision that had permitted New York's Comptroller to conduct audits of charter schools. In 2009, the New York State Court of Appeals in a unanimous ruling agreed with our position that the State Constitution precludes the Legislature from directing the Comptroller to conduct such audits. The charter school representation augmented our proud tradition of promoting education, which includes our representation of the Campaign for Fiscal Equity through a seven-month trial and numerous appeals, including obtaining a landmark ruling from New York Court of Appeals affirming that the New York City school system did not provide students with the opportunity to obtain a sound basic education as required by the state constitution. We have devoted more than $20 million in time and disbursements to these representations. Through a hard-fought litigation against the State of California run by our Palo Alto office, the Firm's representation of the California Association of Mental Health Patients' Rights Advocates recently secured historic changes to State regulations which, as previously drafted, denied elderly adults with mental health disabilities meaningful access to facilities designed to accommodate such individuals. The Firm was awarded the 2009 Equal Justice Award from the Law Foundation of Silicon Valley for its achievements in the case. We also successfully represented the Natural Resources Defense Council in environmental actions in federal district court in Florida and the Eleventh Circuit, in which we secured essential protections for endangered species and the nation's wilderness areas.

We also appreciate the valuable training associates gain from pro bono litigation, and we regularly give associates first-chair experience. For example, our associates obtained a complete win at trial for the Mount Morris Park Community Improvement Association in an action for back wages brought in New York City Small Claims Court. Two New York associates conducted a hearing in Immigration Court for our client, a native of the Dominican Republic but a twenty year resident of the Bronx, who faced deportation based on a misdemeanor drug possession conviction and his original attorney's missing (by four days) a filing deadline on a key application for relief. The Immigration Court worded its decision strongly in our client's favor and re-authorized his status as a Legal Permanent Resident without any restriction, and apologized to our client on behalf of the

Executive Office of Immigration Review for the injustice he had suffered. Two of our New York associates will soon be on trial in New York City Housing Court in a suit regarding rights to a rent-controlled apartment, and next month two Palo Alto associates will conduct a hearing in California state court for a client convicted of second degree murder in 1990. The hearing is under a recent California law authorizing retroactive habeas corpus for individuals, such as our client, who were convicted of violent felonies against their abusers before an amendment of the California evidence code to allow evidence of battering and its effects; the hearing will determine whether evidence of battering and its effects would have changed the outcome of our client's trial. The Firm also has acted as co-counsel for the City of New York in separate litigations arising from arrests during the 2004 Republican National Convention, and arrests of bicyclists in connection with so-called "Critical Mass" events and related protests. Associates at the firm have recently taken nearly 100 depositions in the RNC case, and are in the process of taking another 100 or more depositions in the Critical Mass litigation.

* * *

We remain believers in simplicity. Our trial-focused approach employs strategic creativity, tactical agility and unrelenting preparedness. We know that even the most sprawling cases are won by identifying two or three issues that complement each other and pressing them to successful conclusion. This submission illustrates how Simpson Thacher litigators shaped the outcome of massive cases and series of cases by distilling complicated factual and legal issues to the essentials that determined the conclusion.

# Significant Pretrial Achievements

## AGAINST-THE-ODDS VICTORIES IN THE ARGENTINE PENSION ASSET LITIGATION

In December 2001, the Republic of Argentina (the "Republic") defaulted on $95 billion in global debt obligations—the largest sovereign debt default in history. Simpson Thacher represents institutional investors Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP, and Blue Angel Capital I LLC ("Aurelius"), which hold beneficial interests in defaulted Argentine debt obligations, in their suit against the Republic arising out of the default. The Firm has overcome substantial obstacles in U.S. law, international law and Argentine law to obtain orders restraining assets of the government of Argentina—a sovereign nation—and the country's social security agency—and holding a sovereign nation in contempt of court for its failure to provide full discovery in litigation by holders of its defaulted bonds.

After Aurelius obtained summary judgment in the Southern District of New York on its breach of contract claims under the bonds, our Firm was retained to institute judgment enforcement proceedings to execute on those judgments—no easy task given that the Republic is a foreign sovereign government entitled to exceptional protections from judgment creditors in the United States, has relocated its assets outside of the United States to avoid judgment collection, has refused to participate in the global market in any way that might subject its assets to attachment or execution, and has a long list of bondholder creditors represented by other leading law firms who similarly seek to execute on their judgments.

To date, we have rigorously pursued multiple initiatives to enforce our clients' judgments against assets of the Republic, and we have received favorable rulings on several fronts.

First, in April 2008, Judge Thomas P. Griesa of the Southern District of New York granted Aurelius's application for an order to show cause and restrained certain bond assets held for the benefit of the Republic in a trust created in connection with a pre-default exchange offer, in which certain holders of interests in Argentine debt securities issued and deposited in New York were permitted to exchange their bond interests for domestic Argentine loans that were guaranteed by a stream of tax revenues. The bond interests that were swapped for the loans were placed in a trust, which named the Republic as the primary beneficiary, and served as secondary collateral to the guaranteed loans. As the guaranteed loans are paid by the Republic, the Republic obtains the unencumbered right to receive the beneficial interests in the securities. The District Court's order restrained the Republic from taking any action with respect to the bond interests it stands to receive from the trust pending discovery and further judicial determination on whether the interests are subject to attachment and execution under the Foreign Sovereign Immunities Act.

The Republic has appealed the District Court's restraining order, arguing that the order was automatically converted into an appealable preliminary injunction. That appeal is fully briefed and awaiting an oral argument date before the Second Circuit.

Second, on December 11, 2008, Judge Griesa issued a 40-page opinion in favor of our clients, adopting our position that certain nationalized Argentine pension assets held in the United States were subject to execution under the Foreign Sovereign Immunities Act. The December 11 opinion was issued upon Aurelius's application to restrain Argentine pension assets invested through accounts in the United States in the wake of press reports that the Republic was in the process of nationalizing and transferring these assets from private management to government control. Aurelius was the first creditor to freeze these assets, which totalled more than $200 million, and argue that upon their nationalization they became property of the Republic subject to judgment enforcement in the United States. Our application was quickly copied in a series of "me too" applications filed on behalf of a number of other bondholder creditors represented by Hogan & Hartson, Debevoise & Plimpton, Dechert and others. In a lengthy opinion, the District Court rejected in full the Republic's arguments that under the Foreign Sovereign Immunities Act the pension assets were immune from judgment enforcement in the United States. The Republic appealed this opinion too. The Second Circuit heard oral

argument on an expedited basis on March 11, 2009, and the parties are awaiting decision in what promises to be path-breaking new law under the Foreign Sovereign Immunities Act.

Third, on May 27, 2009, Judge Griesa granted Aurelius' request for the extraordinary relief of holding the Republic in civil contempt. We demonstrated in detail the Republic's refusal to comply with repeated court orders requiring it to disclose documents concerning complex financial transactions through which certain pension assets held and traded in the United States were removed from the country, potentially in violation of restraining notices which Aurelius had obtained from the District Court to prevent the Republic from removing pension assets from the United States. Specifically, in April 2009, Judge Griesa granted Aurelius's motion to compel discovery against the Republic and its social security administration, ANSES, and from third-party garnishee institutions that act as custodians for Argentine pension assets. The predicate opinion for the contempt ruling – ordering the Republic to provide discovery to Aurelius – was itself a notable ruling because it required the production of information regarding assets located outside the United States in light of evidence (marshalled by our Firm) that ANSES may have violated the court's previous orders by transferring $80 million in assets out of the United States. In May, Judge Griesa granted Aurelius's application for an order to show cause and ordered discovery on an expedited basis following Argentine press reports detailing transactions undertaken by the Republic/ANSES in which assets were removed from the United States through a third-party's liquidation of ANSES-held Certificados de Depósito Argentino ("CEDEARs"). Aurelius argued that the CEDEARs represented ANSES's beneficial ownership of U.S. securities and were subject to the restraints issued pursuant to the District Court's prior orders. This application was immediately joined by additional "me too" creditors represented by Hogan & Hartson, Debevoise & Plimpton, and Dechert.

When the Republic/ANSES then refused to disclose documents detailing the nature of CEDEAR liquidations, we moved on behalf of our clients to hold the Republic in civil contempt and for sanctions. At a hearing on May 27, 2009, Judge Griesa held the Republic in contempt for its failure to produce the court-ordered discovery. The court imposed sanctions in the form of a case-altering adverse inference that the Republic undertook the CEDEAR-related transactions in order to remove funds from the United States in violation of the restraining notices that Aurelius had obtained from the court, and further reserved the right to impose monetary sanctions and award attorney's fees at a later date. Other creditors immediately submitted "me too" orders to join in the relief obtained by Aurelius. The Republic has appealed the contempt order, which will be subject to an abuse of discretion standard of review.

### CASE NAMES:
Aurelius Capital Partners, LP, et al. v. Republic of Argentina; Aurelius Capital Partners, LP, et al. v. Republic of Argentina; Blue Angel Capital I LLC v. Republic of Argentina

### COURTS FILED IN:
Southern District of New York; appealed to Second Circuit

### CLIENT NAMES:
Aurelius Capital Master, Ltd.; Aurelius Capital Partners, LP; Blue Angel Capital I LLC

### LEAD ST&B PARTNERS:
Barry R. Ostrager; Tyler B. Robinson

### OPPOSING COUNSEL:
Cleary Gottlieb Steen & Hamilton LLP; Chadbourne & Parke LLP; Skadden, Arps, Slate, Meagher & Flom LLP

### JUDGE:
Hon. Thomas P. Griesa

### RELEVANT CITATIONS:
Aurelius Capital Partners, LP v. Republic of Argentina, No. 07 Civ. 2715 (TPG), 2008 U.S. Dist. LEXIS 101764 (S.D.N.Y. Dec. 11, 2008); Aurelius Capital Partners, LP v. Republic of Argentina, No. 07 Civ. 2715 (TPG), 2009 U.S. Dist. LEXIS 20417 (S.D.N.Y. Mar. 4, 2009); Aurelius Capital Partners, LP v. Republic of Argentina, No. 07 Civ. 2715 (TPG), 2009 U.S. Dist. LEXIS 30207 (S.D.N.Y. Apr. 3, 2009)

## TURNAROUND DISMISSAL FOR EQUITAS IN INSURANCE-RELATED ANTITRUST LITIGATION

Clients look to Simpson Thacher's litigation department for exceptional results. That is what we achieved in persuading a trial court to reverse its prior decision sustaining antitrust claims—and dismiss those same claims with prejudice when they were asserted in a presumptively stronger amended complaint.

As asbestos and pollution claims mounted in the 1980's and 1990's, companies turned to insurers, who turned to reinsurers, who turned to the entities that reinsured them, known as retrocessional reinsurers. Among those retrocessional reinsurers were certain underwriters in the Lloyd's of London insurance market. Facing mounting liability and the threat of collapse of the entire Lloyd's market, Lloyd's embarked on a massive and complex effort to develop a restructuring plan. Pursuant to that plan, in the mid-1990's, Equitas Reinsurance Ltd. and Equitas Ltd. (collectively, "Equitas") were formed to reinsure the underwriters' pre-1993 non-life liabilities.

In 2007, however, disgruntled reinsurer Global Reinsurance Corporation-U.S. Branch ("Global") sued Equitas and certain of its affiliates in New York Supreme Court. Global alleged that the Equitas companies had violated the Donnelly Act, New York's antitrust law, by conspiring with the Lloyd's underwriters to drive down retrocessional claims payments to reinsurers such as Global below the payments that would prevail in a competitive market. The Equitas companies retained Simpson Thacher after the partial denial of a motion to dismiss the complaint, and Global's subsequent amendment of the complaint.

The Simpson Thacher litigation team, led by partners Kevin J. Arquit, Mary Kay Vyskocil and Arman Y. Oruc, persuaded Judge Bernard J. Fried of New York Supreme Court to consider a second motion to dismiss even though the court had previously upheld Global's allegations of an antitrust violation, including its market definition allegations. We contended that Global had failed to properly allege a relevant antitrust market because the allegations were insufficient to differentiate the alleged market from other similar insurance services available outside of Lloyd's. We also sought to dismiss the amended complaint for failure to allege adequately restraint of trade in the relevant market, and for lack of subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 and comity principles.

Despite Global's objection that its new complaint merely added further allegations to the complaint already sustained by the court, on March 4, 2009, Justice Fried agreed with our challenge to Global's market definition and power allegations, finding that Global's amended complaint cast its prior allegations "in an entirely new light."

Consequently, Justice Fried dismissed Global's complaint in its entirety with prejudice and costs, rendering a complete victory for the Equitas companies.

### CASE NAME:
Global Reinsurance Corp. – U.S. Branch f/k/a Gerling Global Reinsurance Corp. – U.S. Branch v. Equitas Ltd., Equitas Reinsurance Ltd., and Equitas Policyholders Trustee Ltd.

### COURT FILED IN:
New York Supreme Court

### CLIENT NAMES:
Equitas Ltd.; Equitas Reinsurance Ltd.; Equitas Policyholders Trustee Ltd.

### LEAD ST&B PARTNERS:
Kevin J. Arquit; Mary Kay Vyskocil; Arman Y. Oruc

### OPPOSING COUNSEL:
Cahill Gordon & Reindel LLP

### JUDGE:
Hon. Bernard J. Fried

### RELEVANT CITATIONS:
Global Reins. Corp. - U.S. Branch v. Equitas Ltd., et al., 20 Misc.3d 1115(A), 867 N.Y.S.2d 16 (N.Y. Sup. Ct., N.Y. Co. 2008); Global Reins. Corp. - U.S. Branch v. Equitas Ltd., et al., 876 N.Y.S.2d 325 (N.Y. Sup. Ct., N.Y. Co. 2009)

## DISMISSAL OF SHAREHOLDER SUITS CHALLENGING BLACKSTONE'S $26 BILLION ACQUISITION OF HILTON HOTELS

Through the use of tactical discovery strategies and sound legal analysis, Simpson's litigators played an integral role in allowing one of The Blackstone Group's biggest deals of the year to go forward—its $26 billion cash acquisition of Hilton Hotels. On July 3, 2007, Blackstone announced its agreement to pay $47.50 a share for the hotel chain, a 40 percent premium to Hilton's closing price on the day before the deal was announced. With the purchase of Hilton, Blackstone would own, manage or franchise the rights to 3,700 hotels representing about 600,000 rooms, including the renowned Waldorf-Astoria Hotel in mid-town Manhattan.

Within days of the deal's announcement, a total of eleven stockholder class actions lawsuits were filed in California (where Hilton was headquartered) and Delaware (where Hilton was incorporated). The central allegation was that Hilton's Board of Directors, aided and abetted by Hilton and Blackstone, was attempting to complete the sale of Hilton to Blackstone at an inadequate price. Blackstone, which had turned to Simpson in connection with the merger transaction, also retained our securities litigation team to handle the ensuing litigations.

In September 2007, the California plaintiffs filed a motion to enjoin the shareholder vote on the proposed transaction, alleging that the defendants had failed to disclose all material information to shareholders in the Proxy Statement. Although Hilton believed its disclosures were appropriate and adequate under applicable law, Hilton issued a Supplemental Proxy Statement disclosing some (but not all) of the immaterial items the plaintiffs had requested in order to ensure a timely closing of the transaction. Following the filing of this Supplemental Proxy Statement, the plaintiffs withdrew their preliminary injunction motion.

On September 18, 2007, shareholders owning a total of more than 80% of the outstanding shares of Hilton, and 98.6% of the voting shares, voted to approve the merger. The merger closed on October 24, 2007.

The plaintiffs in Delaware then dismissed their lawsuits, but the plaintiffs in California filed an amended consolidated complaint and continued litigating. The Simpson Thacher litigation team, led by Bruce D. Angiolillo, Chet A. Kronenberg and Jonathan K. Youngwood, saw an opportunity to undercut that effort decisively through a tactical discovery strategy. We refused to produce confidential internal presentation materials shared by Blackstone with its co-investors and lenders, based on a two-fold argument: (1) the material was not discoverable because it constituted trade secrets; and (2) because the material was never shared with Hilton or Hilton's directors, it was irrelevant. The Los Angeles Superior Court agreed with both positions, and issued a detailed ruling denying discovery of the materials.

That same month, the Simpson Thacher litigation team moved to dismiss the plaintiffs' consolidated amended complaint. After hearing oral argument, the Los Angeles Superior Court granted the motion with prejudice with respect to Hilton and dismissed the amended consolidated complaint without leave to amend. The court accepted Hilton's argument that, under Delaware law, a corporation cannot aid and abet its own directors' alleged breach of fiduciary duties.

With respect to Hilton's directors and Blackstone, the Los Angeles Superior Court granted the motions to dismiss without prejudice, giving the plaintiffs thirty days to file a second amended consolidated complaint. However, counsel for the plaintiffs soon advised the Simpson Thacher litigation team that they did not believe they could amend their complaint in a way that would satisfy the court. In July 2008, the parties filed a stipulation reflecting their agreement that the action be dismissed with prejudice.

# Significant Pretrial Achievements

### Case Name:
In re Hilton Hotels Corporation Shareholder Litigation

### Courts Filed in:
Los Angeles Superior Court; Delaware Chancery Court

### Client Names:
The Blackstone Group, L.P.; Hilton Hotels Corporation

### Lead ST&B Partners:
Bruce D. Angiolillo; Chet A. Kronenberg; Jonathan K. Youngwood

### Opposing Counsel:
Coughlin Stoia Geller Rudman & Robbins LLP and Kiesel Boucher & Larson (in Los Angeles Superior Court); Harwood Feffer LLP and Vianale & Vianale LLP (in Delaware Chancery Court)

### Judges:
Hon. Peter D. Lichtman (Los Angeles Superior Court); Hon. John W. Noble (Delaware Chancery Court)

## MAJOR ANTITRUST LITIGATION AVERTED WITH EARLY DISMISSAL FOR STAPLES

Retailers compete against other retailers. Manufacturers compete against other manufacturers. But what happens when plaintiffs' lawyers allege that retailers and manufacturers should compete just as fiercely against one another?

Staples, Inc., a leading retailer of office supply products, has long sold products manufactured by Hewlett-Packard ("HP"), a manufacturer of computers and computer equipment. Staples also sells products purchased from other manufacturers and marketed under the Staples house-brand. These goods are often sold at a lower price than goods carrying the brand names of other well-known manufacturers.

Staples competes against other office supply retailers, and HP competes against other manufacturers of computers and computer equipment. In an effort to compete more vigorously in their respective fields, the two companies agreed, among other things, that HP would allow Staples to offer its customers special promotions for HP products. In return, Staples would help promote HP products in its retail stores. Included in the agreement was a provision whereby Staples would no longer sell Staples-branded HP-compatible ink cartridges in its retail stores.

In December 2007, a plaintiff filed a purported class action in the District of Massachusetts against both Staples and HP, claiming that the alleged arrangement deprived customers of cheaper Staples-brand ink cartridges, and should be treated as a horizontal market allocation—a *per se* violation of the Sherman Act. Staples retained our antitrust team to defend the company against these allegations.

Seeking to avoid the potentially massive costs of discovery in a nationwide class action proceeding, Simpson Thacher litigation partners Kevin J. Arquit and Arman Y. Oruc aggressively sought to dismiss the complaint. In the Staples suit, unlike most antitrust cases, there was no dispute regarding the existence of an agreement between Staples and HP. The Simpson Thacher litigation team presented the court with a copy of the Staples-HP agreement as part of their motion to dismiss. Citing the clear pro-competitive benefits of the agreement, we argued that *per se* treatment under the Sherman Act was unwarranted.

Judge Rya W. Zobel agreed, holding that *per se* treatment was unwarranted because the Staples-HP agreement "falls within the category of restraints imposed on the context of business relationships where the economic impact of certain practices is not immediately obvious." Agreeing with our argument that the plaintiff had ample opportunity to state a broader claim, Judge Zobel dismissed the purported class action with prejudice. Her ruling prevented the plaintiff's attorneys from filing another claim on the same grounds, and safeguarded Staples and HP from similar claims in the future.

Through a forceful and decisive strategy, we prevented years of costly discovery and litigation. The case was one of first impression, involving issues never previously addressed by a court, and has significant repercussions for all retailers whose own brands are in apparent competition with products from other suppliers distributed by the same retailer.

CASE NAME:
Bedi v. Hewlett-Packard Co.

COURT FILED IN:
District of Massachusetts

CLIENT NAME:
Staples, Inc.

LEAD ST&B PARTNERS:
Kevin J. Arquit; Arman Y. Oruc

OPPOSING COUNSEL:
Kamber Edelson LLC; Boni & Zack LLC; Spector Roseman & Kodroff; Parisi & Havens LLP; Law Offices of Peter N. Wasylyk; Edelson & Associates, LLC; Law Office of David P. McLafferty & Associates

JUDGE:
Hon. Rya W. Zobel

## TWO WINS FOR DAIICHI SANKYO IN TWO WEEKS

The Firm obtained two recent victories on behalf of its client, Daiichi Sankyo, on issues of growing significance to pharmaceutical companies—including patent term extensions which have been increasingly challenged by generic pharmaceutical companies, and antitrust and state law monopolization claims which have proliferated in recent years.

### Summary Judgment Success in the Lupin Litigation

For years, we have represented and advised Daiichi Sankyo Company, Ltd. in worldwide patent litigation over the multi-billion dollar blockbuster drug levofloxacin (sold in the United States as Levaquin®). In litigation related to levofloxacin in the United States, we represented Daiichi Sankyo in an eight-week trial in federal court in West Virginia in 2003 and 2004, winning a judgment that Daiichi Sankyo's U.S. levofloxacin patent is valid and enforceable, and enjoining generics Mylan Laboratories and Mylan Pharmaceuticals from marketing their generic levofloxacin product. We then represented Daiichi Sankyo in Mylan's appeal of that judgment to the Federal Circuit, which affirmed the West Virginia court's decision. Subsequently, we successfully moved for summary judgment against four other generics in federal court in New Jersey on the same patent.

Most recently Lupin Pharmaceuticals, Inc., another generic, challenged the term extension that was granted by the Patent and Trademark Office ("PTO") for the levofloxacin patent. The litigation efforts of Simpson Thacher resulted in a favorable ruling by Chief Judge Garrett E. Brown of the District of New Jersey which, notably, is the first court decision addressing the validity of a patent term extension in the particular context presented here—an issue that generic pharmaceutical companies are raising with increasing frequency.

The parties filed cross-motions for summary judgment on the validity of the levofloxacin patent's term extension. Lupin argued that because levofloxacin is an enantiomer and its racemate (ofloxacin) had been previously marketed, the levofloxacin patent was not eligible for patent term extension. We argued on behalf of Daiichi Sankyo that the "active ingredient" in levofloxacin is different from the "active ingredient" in the racemate ofloxacin, and that the court should defer to the decisions of the PTO and the FDA that levofloxacin had not been previously marketed by virtue of the marketing of the racemate ofloxacin. Our response to Lupin's summary judgment motion and our cross-motion relied on five expert declarations, including that of a former Commissioner of the PTO, supporting our position that the agency has consistently granted term extensions to enantiomer patents despite the prior approval of the corresponding racemate.

In a decision entered on May 1, 2009, Judge Brown granted Daiichi Sankyo's summary judgment motion and denied Lupin's motion, agreeing with our argument that the PTO's decision to extend the levofloxacin patent term is entitled to "great deference."

This was an enormously important win for Daiichi Sankyo, as the levofloxacin patent would otherwise have expired last year; with its term extended, the patent remains in force until December 2010. The financial impact of this win for Daiichi Sankyo is quite significant: U.S. sales of levofloxacin were more than $1.5 billion in 2008.

Lupin has appealed Judge Brown's decision to the Federal Circuit, briefing has been completed and the case will be argued to a panel of the Federal Circuit in September.

CASE NAME:

Daiichi Sankyo Company, Ltd., et al. v. Lupin Pharmaceuticals Inc., et al.

COURT FILED IN:

District of New Jersey

CLIENT NAME:

Daiichi Sankyo Company, Ltd.

LEAD ST&B PARTNERS:

Henry B. Gutman; Robert A. Bourque

OPPOSING COUNSEL:

Leydig, Voit & Mayer, Ltd.; Katten Muchin Rosenman LLP

JUDGE:
Hon. Garrett E. Brown

RELEVANT CITATION:
Ortho-McNeil Pharmaceutical, Inc. v. Lupin Pharmaceutical, Inc., No. Civ. 06-4999 (GEB), 2009 WL 1228448 (D.N.J. May 1, 2009)

## Motion to Dismiss Win in the Apotex Suit

In 2003 Daiichi Sankyo sued Apotex for patent infringement related to its ofloxacin antibiotic ear drops (sold in the United States as Floxin® Otic). The District of New Jersey found Daiichi Sankyo's Floxin® Otic patent valid, and ruled that Daiichi Sankyo had not engaged in inequitable conduct before the PTO. But in 2007, the Federal Circuit reversed that decision in part, finding the patent obvious and invalid, but not reaching the issue of inequitable conduct.

Following the Federal Circuit's reversal on the issue of obviousness, Daiichi Sankyo asked us to replace our predecessor counsel and represent the company in the matter. The litigation then returned to the District of New Jersey to address antitrust and state law counterclaims filed by Apotex, which asserted, among other things, that Daiichi Sankyo had fraudulently obtained its Floxin® Otic patent to monopolize the market.

We moved to dismiss Apotex's counterclaims on the ground that the district court's prior decision finding no inequitable conduct, which was not disturbed by the Federal Circuit, survived as law of the case and precluded Apotex from re-litigating the same issues to a different result, as was necessary to sustain its counterclaims.

On May 19, 2009, Judge Susan Wigenton of the District of New Jersey entered an order adopting our argument and dismissed with prejudice all antitrust and state law counterclaims against Daiichi Sankyo. The effect of the Federal Circuit's decision not to reach the inequitable conduct issue on appeal featured prominently in the briefing and oral argument. Judge Wigenton was particularly critical of Apotex's contention that the Federal Circuit's reversal on the issue of obviousness erased the district court's inequitable conduct decision, finding that "[t]o hold that the Federal Circuit's reversal eviscerates the inequitable conduct portion of that decision—even though it expressly declined to reach it—exceeds the bounds of reason." Apotex has appealed Judge Wigenton's decision to the Federal Circuit and the parties are in the process of briefing that appeal.

The decision is of particular interest in the pharmaceutical arena, in which antitrust and state monopolization law counterclaims have proliferated in response to Hatch-Waxman patent suits.

CASE NAME:
Daiichi Sankyo Company, Ltd., et al. v. Apotex Inc., et al.

COURT FILED IN:
District of New Jersey

CLIENT NAME:
Daiichi Sankyo Company, Ltd.

LEAD ST&B PARTNERS:
Henry B. Gutman; Robert A. Bourque

OPPOSING COUNSEL:
Katten Muchin Rosenman LLP

JUDGE:
Hon. Susan D. Wigenton

RELEVANT CITATION:
Daiichi Sankyo, Inc. v. Apotex, Inc., No. Civ. 03-0937 (SDW-MCA), 2009 WL 1437815 (D.N.J. May 19, 2009)

# Significant Trial Achievements

## A LITIGATION TURNAROUND CULMINATES IN AN OUTSTANDING JURY VERDICT FOR 3COM CORPORATION

Simpson Thacher was hired by client 3Com Corporation to take over a patent infringement case in 2005, after our predecessor counsel was sanctioned and 3Com's right to seek past damages against adversary D-Link Systems Inc. was extinguished. Our mission—which we achieved—was to restore 3Com's credibility with the court and to turn the case around.

3Com has been a major contributor to the development of networking technology since the invention of Ethernet in the 1970's by 3Com's founder. In 2003, 3Com initiated suit against D-Link, accusing it of infringing ten claims across five separate patents that involved vital network interface card technology developed and patented by 3Com. Because a number of the accused products contained network interface controllers supplied by Realtek Semiconductor Corporation, Realtek intervened in the case in 2004. The asserted patents cover some of the original technology in this field, which 3Com created and with which it dominated this business in the 1990s, before being driven from the market by low cost competition from Realtek and others.

Led by partners Henry ("Hank") B. Gutman and Kerry L. Konrad, the Simpson Thacher litigation team developed a strategy whereby 3Com was able to obtain a fresh start through serving amended infringement contentions on Realtek, the world's largest seller of network interface cards and chips (with a 65% market share). We successfully guided 3Com through claim construction proceedings against Realtek based on the amended infringement contentions that our team developed. On summary judgment, Chief Judge Vaughn R. Walker of the Northern District of California dismissed many of Realtek's counterclaims and found infringement of three of the asserted claims. The remaining issues proceeded to trial.

At trial, the Simpson Thacher team explained the complicated concepts underlying the patented technology in a manner that could be readily understood by the jury, which did not have particular technical expertise. The team's ability to craft a compelling narrative of Realtek's deliberate and willful infringement of 3Com's patents kept the jurors engaged throughout the lengthy and highly technical testimony of the witnesses, several of whom testified through an interpreter. The trial featured numerous challenges, including last-minute additions to Realtek's witness list and damages theories, producing several dramatic cross-examinations. In one "cold" cross, Gutman forced Realtek's CEO to admit key elements of 3Com's case. In another notable example, Konrad's systematic dismantling of Realtek's damages expert from NERA Economic Consulting prompted one juror to seek Konrad out after the verdict was delivered to compliment him on what the juror characterized as the "highlight" of the trial.

On April 9, 2008, after two weeks of trial, the jury delivered a unanimous verdict, finding that (1) Realtek directly infringed each of the asserted claims of four separate 3Com patents; (2) Realtek's infringement was willful; (3) Realtek induced its customers (major computer and network equipment companies) to infringe 3Com's patents by importing and selling in the United States equipment that includes Realtek chips; and (4) all of the 3Com patents were not invalid. The jury also awarded 3Com $45.3 million dollars for past damages.

While sizable, this damage award did not include pre-judgment interest (dating back to 1997), any provision for future damages during the remaining years of life of the patents and, most importantly, the "enhanced" damages (up to treble) the court could award based upon the willfulness findings. On June 26, 2008, the parties returned to Judge Walker's courtroom to argue a series of post-trial motions, including 3Com's motions seeking an award of enhanced damages, prejudgment interest, attorneys' fees, and a permanent injunction against continued infringement.

While those motions were pending, 3Com reached an agreement with Realtek pursuant to which Realtek paid 3Com $70 million. The amount not only substantially exceeded the jury's award, but the settlement also allowed 3Com to avoid all risks and delay associated with appeals.

# Significant Trial Achievements

Case Name:
3Com Corporation v. D-Link Systems, Inc.

Court Filed in:
Northern District of California

Client Name:
3Com Corporation

Lead ST&B Partners:
Henry B. Gutman; Kerry L. Konrad

Opposing Counsel:
Akin Gump Strauss Hauer & Feld LLP; Fish & Richardson.

Judge:
Hon. Vaughn R. Walker

## LEADING THE PLANT DEFENSE GROUP THROUGH AN ONGOING TRIAL

Simpson Thacher is defending United States Fidelity and Guaranty Company ("USF&G") (a wholly owned subsidiary of The Travelers Companies, Inc.) in the ongoing trial in San Francisco Superior Court of a declaratory judgment action brought in 2006 by Plant Insulation Company ("Plant"), a former California insulation distributor. The Plant case illustrates Simpson Thacher's ability to play a leading role in a large joint defense effort requiring bankruptcy, insurance and general commercial litigation expertise through and beyond trial.

Plant seeks insurance coverage under a controversial theory pursuant to which insurers would have nearly unlimited liability for asbestos-related personal injury and wrongful death claims under policies that were previously exhausted through payment of the full amount of the policies' aggregate limits of coverage. USF&G and the other insurers argue that no additional coverage is available under the policies issued to Plant for a variety of reasons. The lawsuit is similar to other cases in which companies with asbestos liabilities have been represented on a contingency fee basis by coverage counsel (including Morgan Lewis & Bockius) by essentially teaming up with lawyers for asbestos claimants, their former litigation adversaries, to pressure insurers into inflated settlements. In the Plant litigation, Plant and the asbestos claimants have contended that insurers have billions of dollars in liabilities under their theory of coverage.

USF&G and the other defendants have argued that Plant, its lawyers and the leading Northern California asbestos plaintiffs firms have engaged in collusion, and that as a threshold matter the Court should conduct a trial on equitable defenses of unclean hands, waiver and judicial estoppel. After the Court agreed with this proposal and scheduled a phased trial on these affirmative defenses, Plant filed a petition for bankruptcy on the eve of trial, which was originally set to commence on May 26, 2009. The defendants argued that the bankruptcy was part of Plant's and the asbestos plaintiffs lawyers' strategy of seeking to extract large settlements from the insurers. After a round of hearings immediately following the bankruptcy filing, Simpson Thacher partner Andrew T. Frankel negotiated a resolution of the initial bankruptcy issues and successfully argued to bankruptcy Judge Thomas E. Carlton that the trial should proceed notwithstanding the automatic stay of proceedings resulting from Plant's bankruptcy filing.

On June 2, 2009, trial commenced before the Honorable John E. Munter. To date, the Court has heard 11 days of testimony. Remaining testimony and closing arguments are scheduled for July 27-31, 2009. Frankel and the Simpson Thacher team has acted as lead counsel for USF&G and, along with counsel for two other insurers, has presented the case on behalf of all defendants. Defendants have presented their case exclusively through adverse witnesses. Although a decision is not expected until Fall given the schedule for post-trial briefing, defendants believe that the testimony elicited to date, including the testimony elicited by Simpson Thacher, prove that Plant, its lawyers and the asbestos plaintiffs lawyers have engaged in fraud, self-dealing and collusion.

If defendants are successful, the case will have a significant impact on asbestos and insurance coverage litigation in California and in other jurisdictions in which similar lawsuits have been filed.

### CASE NAMES:
Plant Insulation Co. v. Fireman's Fund Insurance Co., et al. (San Francisco Super. Ct.); In re Plant Insulation Co. (Bankr. N.D. Cal.)

### COURTS FILED IN:
Superior Court of California, County of San Francisco; United States Bankruptcy Court, Northern District of California

### CLIENT NAME:
United States Fidelity and Guaranty Co. (USF&G)

### LEAD ST&B PARTNER:
Andrew T. Frankel

### OPPOSING COUNSEL:
Morgan, Lewis & Bockius, LLP; Snyder, Miller & Orton LLP

### JUDGE:
Hon. John E. Munter

## EXTRAORDINARY RESOLUTION FOR TRAVELERS IN THE AMERICAN OPTICAL TRIAL

What does it mean when your adversary moves to disqualify the presiding judge in the middle of a bench trial? It almost certainly means that things are not going well for your adversary, and that your trial strategy and cross examinations are working. This is what happened when Travelers went to trial for three months against a Pfizer subsidiary, and, after scoring numerous courtroom victories, settled on very favorable terms on the last day of testimony at trial.

At stake in the litigation was the availability of insurance coverage for asbestos-related claims under hundreds of policies issued by dozens of insurers over the course of forty-plus years. Beginning in the early 1980s, plaintiffs brought suit against American Optical alleging personal injury as a result of defects in the respirators and asbestos-containing clothing the company manufactured. Throughout the 1980's and 1990's, American Optical, Warner-Lambert and its insurers enjoyed a cooperative relationship handling the litigation pursuant to an agreement concerning how the defense and indemnity costs for those claims would be allocated.

That cooperative model changed dramatically in 2001 when American Optical and Warner-Lambert sued their insurers in an effort to change the allocation methodology and then began secretly entering into numerous, multi-million dollar settlements without the insurers' consent. At the center of the parties' dispute were two critical issues: first, whether a binding agreement existed between the parties concerning the allocation of defense and indemnity costs and, second, whether the insurers were obligated to fund settlements entered into without the insurers' consent.

The Simpson Thacher team, led by partners David J. Woll and Mary Beth Forshaw, won summary judgment for Travelers on several policies and coverage issues prior to trial. Woll and Forshaw then served as lead trial counsel for the defense group, which included more than thirty insurer defendants. The bench trial started in early November 2008, lasted three months and involved cross examinations of twenty-three witnesses, including in-house counsel, several trial lawyers, multiple doctors, senior corporate executives and a sitting judge. In early December, following cross examinations of the plaintiffs' first ten witnesses, the plaintiffs surprised the court and the defendants by moving to disqualify the trial judge, Judge Marianne Espinosa, and requesting a mistrial. The Simpson Thacher team defeated the plaintiffs' motion, as well as their motion for leave to appeal the denial on an expedited, interlocutory basis.

The trial resumed in January 2009, with an additional thirteen fact and expert witnesses testifying over twenty trial days. Travelers ultimately settled the case on highly favorable terms on the last day of testimony.

### CASE NAME:
American Optical Corp., et al. v. Admiral Ins. Co., et al.

### COURT FILED IN:
Superior Court of New Jersey (Union County)

### CLIENT NAMES:
Travelers Casualty and Surety Company; The Travelers Indemnity Company; St. Paul Fire and Marine Insurance Company; St. Paul Mercury Insurance Company

### LEAD ST&B PARTNERS:
David J. Woll; Mary Beth Forshaw

### OPPOSING COUNSEL:
Dickstein Shapiro LLP

### JUDGE:
Hon. Marianne Espinosa

## SUCCESSFUL ENFORCEMENT OF PHARMACEUTICAL PATENT RIGHTS FOR DAIICHI SANKYO

High blood pressure, or hypertension, is one of the leading risk factors for heart attack, congestive heart failure, stroke, end-stage kidney disease and death. Approximately seven million deaths per year worldwide are attributable to hypertension. Because uncontrolled hypertension often manifests few if any symptoms, nearly one-third of those with hypertension don't know they have it, leading doctors to label hypertension "the silent killer." Despite the growing number of options for antihypertensive therapy, uncontrolled hypertension remains a major public health concern.

Against this background, scientists in the 1980's and 1990's sought to find and develop new antihypertensive treatments. One potentially promising area of research during this time was to lower blood pressure by administering an agent that blocks certain receptors in the body to which a protein called angiotensin normally binds. Angiotensin, when bound to its receptor, ordinarily raises blood pressure; thus, it was theorized that blocking the angiotensin receptor would keep blood pressure low.

In 1989, Sankyo Company initiated a research program to find a new angiotensin receptor blocker. In April 1991, the Sankyo scientists succeeded in inventing olmesartan medoxomil, a highly potent, long-lasting, orally active angiotensin receptor blocker which was orders of magnitude better than the leading clinical candidates at the time. After nearly a decade of further pre-clinical and clinical trials, olmesartan medoxomil was approved for sale by the Food and Drug Administration ("FDA") in 2002, under the trade name BENICAR®. Additional products that combined olmesartan medoxomil with other antihypertensive agents followed, under the names BENICAR® HCT and AZOR®. By 2008, the three olmesartan medoxomil products had achieved blockbuster success, with combined annual U.S. sales of over $1 billion.

Shortly before Sankyo merged with Simpson's litigation client Daiichi Pharmaceutical Company in 2007, Sankyo was hit with a generic challenge to its olmesartan medoxomil franchise. Mylan, one of the world's largest generic pharmaceutical companies, requested FDA approval to market a generic version of the three olmesartan medoxomil products under the Hatch-Waxman Act. Sankyo filed suit for patent infringement against Mylan and its supplier, Indian pharmaceutical company Matrix Laboratories, and the generics counterclaimed that Sankyo's patent covering olmesartan medoxomil is invalid for obviousness over certain prior patents and references. Following the Daiichi-Sankyo merger, the combined entity, now Daiichi Sankyo Company, turned to Simpson Thacher's patent litigators to prepare and try the case along with the law firm that had been retained previously by Sankyo.

The Simpson Thacher litigation team, led by Henry ("Hank") B. Gutman and Robert A. Bourque, tried the case with co-counsel in the District of New Jersey, a leading forum for Hatch-Waxman Act patent challenges, over three weeks in March and April 2009.

The trial included testimony by ten expert witnesses as well as the lead inventor on the Daiichi Sankyo patent, who testified in Japanese through an interpreter. Experts for Daiichi Sankyo included a world-renowned medicinal chemist, pharmacologist, economist and physician. On July 30, 2009, the district court ruled in favor of Daiichi Sankyo on all issues, holding that Daiichi Sankyo's patent was not invalid for obviousness and was infringed by Mylan's proposed generic product.

### CASE NAME:
Daiichi Sankyo Company, Ltd., et al. v. Mylan Pharmaceuticals Inc., et al.

### COURT FILED IN:
District of New Jersey

### CLIENT NAME:
Daiichi Sankyo Company, Ltd.

### LEAD ST&B PARTNERS:
Henry B. Gutman; Robert A. Bourque

### CO-COUNSEL:
Fitzpatrick, Cella, Harper & Scinto

### OPPOSING COUNSEL:
Perkins Coie, LLP (formerly Heller Ehrman LLP)

### JUDGE:
Hon. William J. Martini

## INTERNATIONAL LIABILITY PROTECTION FOR MOODY'S

In a decision that resulted in dismissal of all claims against client Moody's Investor Service, Simpson Thacher's litigation strategies recently resulted in the first non-U.S. decision worldwide on the liability of a rating agency to investors who allegedly relied on credit rating opinions in making their investment decisions.

Not long ago, Uruguay was a banking haven for wealthy South Americans. International billionaires often deposited their funds in Uruguayan banks—believing them to be more secure than banks elsewhere in the region. But when nearby Argentina fell into a depression after defaulting on its debts, the government froze bank deposits. This prompted Argentines to withdraw their deposits from Uruguay's banks *en masse*; Uruguayans soon followed suit.

The bank runs exposed a massive fraud at Banco de Montevideo, one of Uruguay's largest private banks. Bank insiders had been siphoning off hundreds of millions of dollars in customer funds. Banco de Montevideo was soon depleted of funds and collapsed—leaving furious, empty-handed bank investors to search for some alternative source from which to recoup their losses.

Investors filed approximately thirty-five separate lawsuits in the Uruguayan courts seeking to recover approximately $80 million from the remains of Banco de Montevideo, as well as from the Central Bank of Uruguay and our client Moody's Investors Service, which had rated certain of Banco de Montevideo's financial instruments. The plaintiffs claimed to have relied on Moody's ratings in making their investments, and sought to recover against Moody's based on a negligence theory of liability arising out of Moody's alleged failure to discover the internal fraud at the bank in the course of performing its credit risk analysis.

For Moody's, much more was at risk than just the $80-odd million at issue in the litigations. International and emerging market operations are an important growth area for the credit rating industry. Competitiveness depends upon a rating agency's reputation for reliable and independent risk analysis, based on specialized methodologies and expertise in the assessment of credit risk.

In the United States, First Amendment speech protections shield rating agencies from negligence liability in connection with the publication of credit rating opinions. But in Uruguay and other emerging markets, comparable free speech protection either does not exist or is unsettled. Moreover, foreign courts do not always factor in the valuable contribution credit rating services make to capital market efficiency. The Uruguayan investor suits held out the prospect of a first-ever adverse precedent against Moody's in a foreign civil law jurisdiction, to investors with whom Moody's had no contractual privity, inviting a flood of similar investor lawsuits in other civil law jurisdictions and emerging markets around the world. Representing Moody's, Simpson Thacher partner Robert H. Smit implemented a two-fold defense strategy through local counsel in Uruguay: First, try to win the case on the law, by educating the Uruguayan courts about the valuable public good that credit rating agencies provide to investors—furnishing them with sophisticated yet efficient market information they otherwise would not have—in order to establish a narrow scope of liability for rating agencies like that adopted in the United States.

Second, in the event that Moody's did not prevail in Uruguay, to create a record in the Uruguayan proceedings to establish that Moody's was not afforded appropriate free speech protection in order to resist enforcement of any adverse judgment against Moody's in the courts of the United States on public policy grounds.

Smit coordinated a team of associates, whom he entrusted with an active role in preparing all aspects of the case for trial. Senior, mid-level and even junior associates traveled frequently to Uruguay and Argentina to coordinate with local counsel, interview fact witnesses, meet with Uruguayan and Argentine legal experts to assist with the preparation of their reports, and prepare and file Moody's statements of case in the Uruguayan courts.

In March 2007, after the first merits hearing (the civil law equivalent of a U.S. trial), the Uruguayan court rendered a decision holding both the Banco de Montevideo and the Central Bank of Uruguay liable for the plaintiff investors' losses, but dismissing all of the plaintiffs' claims against Moody's. In finding for Moody's, the court adopted virtually all of Moody's defenses and arguments both on the law and on the facts.

Since then, eight other cases have concluded, and Moody's has prevailed in all eight. Four of the cases were dismissed on statute of limitations grounds, and four were dismissed after hearings on the merits that in some instances spanned several days and required live direct and cross-examination testimony of over ten witnesses.

### CASE NAMES:
Gigli v. Moody's Investors Serv., Inc.; Blos v. Moody's Investors Serv., Inc.; Rodriguez Lois v. Moody's Latin America; Schneider v. Moody's Latin America; Lijtenstein v. Moody's Investors Serv., Inc.; Gen. Tunipar S.A. v. Moody's Investors Serv., Inc.; Baywell v. Moody's Investors Serv. Inc.; Lijtenstein v. Moody's Latin America

### COURTS FILED IN:
Uruguay Civil Court for the First Circuit; Uruguay Civil Court for the Fifth Circuit; Uruguay Civil Court for the Ninth Circuit; Uruguay Civil Court for the Eighteenth Circuit; Uruguay Bankruptcy Court of the First Circuit; Uruguay Bankruptcy Court of the Second Circuit; Uruguay Administrative Court of the Second Circuit

### CLIENT NAMES:
Moody's Investors Service, Inc.; Moody's Latin America

### LEAD ST&B PARTNER:
Robert H. Smit

### OPPOSING COUNSEL:
Julio C. Speranza, Esq.; Israel Creimer, Esq.; Alejandra Kemper, Esq.; Juan Rodriguez Sanguinetti, Esq.

### JUDGES:
Hon. José Lobelcho; Hon. Alvaro Gonzalez; Hon Loreley Pera; Hon. Edgardo Ettlin; Hon. Alejandro Recarey; Hon. Teresita Rodriguez Mascardi; Hon. Estella Jubette

# Significant Appellate Achievements

## ESTABLISHING LANDMARK PRECEDENT REGARDING ASBESTOS CLAIMS

Simpson Thacher continues to lead the way in litigating issues of critical importance to our insurance industry clients, as demonstrated by our recent victory on behalf of clients Employers Reinsurance Corporation and Westport Insurance Company—two subsidiaries of Swiss Re.

Simpson has been defending its clients against a bid by Thorpe Insulation Company, along with the asbestos plaintiffs' bar, to advance a number of novel theories for obtaining millions, if not billions, of dollars in indemnification for asbestos claims. Most notably, plaintiffs have attempted to recast asbestos-related products liability claims as "non-products" claims. Under typical insurance policies, products liability claims are subject to specified limits of aggregate liability. But "non-products" claims are typically not subject to such limits—and thus hold out the prospect of virtually unlimited indemnity.

Historically, Thorpe had considered all of its asbestos claims to be subject to the aggregate limits of all its insurance policies. When its insurance coverage was exhausted nearly three decades after Thorpe was first sued for asbestos-related personal injuries, the company did an about-face, claiming that thousands of pending asbestos claims are, in fact, "non-products" claims that are exempt from the exhausted aggregate limits of its policies.

Prior to our entry to the case, the Swiss Re subsidiaries had sought to introduce evidence of the parties' course of performance to demonstrate that Thorpe had historically considered its asbestos claims to be subject to its policies' aggregate limits, and that Thorpe had leveraged this approach in order to obtain $150 million in excess coverage to which Thorpe would not have been entitled if its new "no limits" theory were true. The trial court granted Thorpe's motion in limine to block this vital evidence.

Shortly after this crucial setback, the Swiss Re subsidiaries asked Simpson Thacher to lead their defense team. Chair of the Firm's litigation department, Barry R. Ostrager, led a team that immediately petitioned the California Court of Appeal for a writ of mandate to reverse the trial court's highly prejudicial decision.

The chances of obtaining appellate review were exceedingly slim: the California Court of Appeal grants review of only about 3% of all petitions submitted. The California Court of Appeal determined, however, that our petition raised a question concerning "course of performance" evidence that was a "novel and important issue of law which warrants immediate appellate review."

Just a few months after granting appellate review, in April 2008, the California Court of Appeal issued a landmark decision in our clients' favor on the use of "course of performance" evidence in the interpretation of insurance policies. The Court of Appeal held that where parties "have, for years, harmoniously performed the contract in a way that reflects a particular, reasonable understanding of the terms of the contract," that performance is relevant and admissible in a subsequent dispute over the meaning and application of the contract. Under the terms of this ruling, the trial judge must admit all evidence of the parties' dealings during the years in which Swiss Re's subsidiaries insured Thorpe, as well as in subsequent years through the date of a claim handling and settlement agreement that governed the defense and indemnification of asbestos claims from 1984 forward.

The lengthy, published ruling authored by one of California's leading appellate jurists makes an important contribution to insurance law generally, and constitutes a critical victory for Swiss Re in this long-running insurance coverage matter.

# Significant Appellate Achievements

### Case Name:
In re Thorpe Asbestos Coverage Cases

### Court Filed in:
Los Angeles Superior Court; appealed to the California Court of Appeal

### Client Name:
Employers Reinsurance Corporation and Westport Insurance Company, two subsidiaries of Swiss Re

### Lead ST&B Partner:
Barry R. Ostrager

### Opposing Counsel:
Morgan Lewis & Bockius LLP

### Judges:
Hon. Joan D. Klein; Hon. H. Walter Croskey; Hon. Patti S. Kitching

### Relevant Citations:
Employers Reinsurance Co. v. Superior Court (Thorpe Insulation Company), 161 Cal. App. 4th 906 (Cal. Ct. App. 2008)

## SIMPSON THACHER OBTAINS REVERSAL AND DISMISSAL ON APPEAL FOR CLIENT BOND, SCHOENECK & KING ON MALPRACTICE CLAIMS SUSTAINED BY TRIAL COURT

Azon Corporation went bankrupt in July 2002, as technological changes rendered the company's products—wide-format coated papers and films for use in the reprographics industry—obsolete. In the litigation that followed, HSBC Bank, USA and former Azon directors/shareholders settled an ERISA class action alleging that they had breached their fiduciary duties to Azon's Employee Stock Ownership Program (the "Azon ESOP") in a 1999 transaction. In an attempt to recover the costs of defending and settling the ERISA class action, HSBC and the former Azon directors/shareholders filed suit seeking indemnification from two law firms, including our client, Bond, Schoeneck & King, PLLC, ("Bond, Schoeneck") which had represented the Azon ESOP in the 1999 transaction.

The individual plaintiffs in the indemnification suit were former shareholders of Azon (the "Former Shareholders"). All but one of the Former Shareholders was also a member of Azon's Board of Directors. Beginning in 1998, these individuals considered several transactions that would allow them to sell a substantial portion of their ownership in Azon. During this time, Bond, Schoeneck served as counsel for the Azon ESOP, a stock benefit plan for Azon employees that is regulated by the federal Employee Retirement Income Security Act (ERISA).

The Former Shareholders ultimately decided to sell their stock to the Azon ESOP in a transaction where Azon borrowed $25 million from Manufacturers and Traders Trust Company and loaned this money to the Azon ESOP, which used the loan proceeds to purchase 20,000 shares of Azon's stock from the Former Shareholders, making the Azon ESOP the majority owner of Azon. In connection with the transaction, HSBC was appointed trustee for the Azon ESOP.

Azon's Board of Directors approved the transaction and authorized Azon to pay change-in-control bonuses to two of Azon's officers, as required by their employment agreements.

At the time of the transaction, Bond, Schoeneck submitted an opinion letter to HSBC, stating the firm's opinion that the transaction did not violate ERISA, but disclaiming any responsibility for the valuation of the shares acquired by the ESOP.

Two months after Azon's bankruptcy in 2002, current and former Azon employees filed a putative class action, *Beam v. HSBC Bank USA*, against the Former Shareholders and HSBC, alleging a breach of fiduciary duty arising from the 1999 transaction. The *Beam* plaintiffs alleged that the Azon ESOP paid an excessive price for the shares it purchased and that the debt burden Azon and the Azon ESOP incurred in connection with the transaction could not reasonably be serviced, destroying the value of the shares the Azon ESOP held. The Former Shareholders paid $8,850,000 to settle the *Beam* action; HSBC paid an additional $500,000.

Following this settlement, the Former Shareholders and HSBC sought to recover these amounts from Bond, Schoeneck, which represented the Azon ESOP in the 1999 transaction, and the firm that separately represented Azon in the transaction. But the Former Shareholders faced a major obstacle: By settling the *Beam* suit, they were barred from seeking contribution from Bond, Schoeneck and its co-defendant under New York law. An indemnification claim for breach of fiduciary duty also seemed to be barred because in order to succeed on an indemnification claim, the Former Shareholders would have to demonstrate that they themselves were entirely without fault.

The Former Shareholders sought to sidestep these obstacles by recharacterizing their settlement in *Beam*. They argued that they had settled *Beam* not because of the breach of fiduciary duty claims, but because they faced strict liability because the change-of-control bonuses paid to Azon officers supposedly rendered the 1999 transaction a prohibited transaction under ERISA. Notably, the *Beam* plaintiffs had never alleged any such claim under ERISA in the *Beam* action. The Former

Shareholders argued that because they faced strict liability—liability without fault—for this ERISA claim, indemnification was available. They further alleged that the statement in Bond, Schoeneck's opinion letter that the transaction complied with ERISA was a negligent misrepresentation that entitled them to indemnification.

Bond, Schoeneck turned to Simpson Thacher partners Thomas C. Rice and Paul C. Gluckow to defend the firm against these claims. The Simpson Thacher team filed a motion to dismiss on three grounds, each sufficient to independently defeat the claims brought by the Former Shareholders. First, the Former Shareholders could not seek indemnification for claims that were never pleaded in the Beam litigation. Second, the Former Shareholders were really bringing a claim for contribution, which was barred under New York law, and any liability was due to their own wrongdoing and cannot be indemnified. Third, the bonus payments made under the 1999 transaction did not actually violate ERISA, so the Former Shareholders did not face any liability on the claims for which they sought indemnification.

The trial court rejected each of these arguments, and went even further by opening the door to additional claims for contribution under federal law. Without prompting by the parties, the court found that federal law governed claims for contribution stemming from ERISA. The trial court dismissed the negligent misrepresentation claim and the claims by HSBC, but denied the motion to dismiss the contribution claim asserted by the Former Shareholders.

Confident that the trial court had erred, the Simpson Thacher team appealed the partial denial of the motion. After briefing and oral argument, a panel of the Appellate Division, Fourth Department agreed with all of our arguments, unanimously reversing the partial denial and dismissing the entire complaint. The Fourth Department went on to find that even if federal law applied and allowed a claim for contribution, no such claim would lie here, effectively foreclosing any chance for the Former Shareholders and HSBC to replead under a different theory, resulting in total victory for our client.

### CASE NAME:
HSBC Bank, USA, Janet S. Bordages, John F. Bordages, Nicole L. Bordages, James G. Bannon, William H. Bannon, and Judith B. Ballew v. Bond, Schoeneck and King, PLLC, and Coughlin & Gerhart

### COURT FILED IN:
New York Supreme Court, Erie County; Appellate Division, Fourth Department

### CLIENT NAME:
Bond, Schoeneck & King, PLLC

### LEAD ST&B PARTNERS:
Thomas C. Rice; Paul C. Gluckow

### OPPOSING COUNSEL:
Harter, Secrest & Emery LLP; Phillips Lytle LLP

### JUDGES:
At the trial court: Hon. John M. Curran
In the Appellate Division: Hon. Robert G. Hurlbutt, Hon. Nancy E. Smith, Hon. John V. Centra, and Hon. Jerome C. Gorski

### RELEVANT CITATIONS:
HSBC Bank USA v. Bond, Schoeneck and King, 838 N.Y.S.2d 419 (N.Y. Sup. Ct., Erie County 2007); HSBC Bank USA v. Bond, Schoeneck & King, PLLC 866 N.Y.S.2d 469 (N.Y. App. Div., 4th Dep't 2008)

## CONTINUED SUCCESSFUL DEFENSE OF JPMORGAN CHASE IN THE ENRON LITIGATIONS

For nearly eight years, we have successfully represented JPMorgan Chase in diverse litigations and government inquiries around the world stemming from the bank's relationship with Enron. Most recently, we have achieved two notable appellate victories in Enron-related matters on JPMorgan Chase's behalf.

### The Racepoint Litigation

In Racepoint Partners, LLC v. J.PMorgan Chase Bank, N.A., we obtained the dismissal of claims brought by alleged successors in interest to Enron bondholders holding approximately $1.25 billion of Enron Zero Coupon Notes. The plaintiffs alleged breach of contract and breach of fiduciary duty based on JPMorgan Chase's role as Indenture Trustee for the $1.9 billion note issuance. Specifically, the plaintiffs claimed that JPMorgan Chase breached its duties by failing to issue a notice of default after Enron provided SEC filings to JPMorgan Chase as Indenture Trustee that were misleading and false.

On May 24, 2007, we moved to dismiss the complaint on multiple grounds, including failure to state a claim, preemption of the applicable New York assignment statute by federal securities laws, and preclusion by JPMorgan Chase's settlement of Newby, et al. v. Enron Corp., et al. (the consolidated MDL shareholder class action proceeding in the Southern District of Texas), which released the plaintiffs' claims.

The trial court denied our motion to dismiss and we appealed the decision, adopting a more streamlined approach. We emphasized that plaintiffs had not alleged the occurrence of a default under the terms of the Indenture Agreement, an essential requisite to any claim predicated on an alleged default. In oral arguments before the Appellate Division, First Department, Simpson Thacher partner Thomas C. Rice argued that, contrary to the plaintiffs' allegations, Enron's provision of materially false SEC filings to JPMorgan Chase did not constitute a default under the Indenture Agreement.

On December 23, 2008, the Appellate Division issued a written opinion adopting our arguments. Dismissing the plaintiffs' claims, the court held that "contrary to [the] plaintiffs' contentions, section 4.02 [of the Indenture Agreement] did not require Enron to file with the indenture trustee financial statements the contents of which comply with federal securities law."

CASE NAME:
Racepoint Partners, LLC, et al. v. JPMorgan Chase Bank, N.A.

COURT FILED IN:
New York Supreme Court, New York County; appealed to the Appellate Division, First Department

CLIENT NAME:
JPMorgan Chase Bank

LEAD ST&B PARTNERS:
Thomas C. Rice; David J. Woll

OPPOSING COUNSEL:
Bartlit Beck Herman Palenchar & Scott LLP; Hagens Berman Sobol Shapiro LLP; Weiss & Lurie

JUDGES:
Hon. Karla Moskowitz; Hon. Eileen Bransten (Appellate Division, First Department Justices)

### The JPMorgan Chase Securities Litigation

In January 2009, we obtained a complete dismissal of federal securities class action claims brought against JPMorgan Chase and two of its executive officers by its own investors for alleged injuries they suffered due to the loss in value of JPMorgan Chase stock after its dealings with Enron came to light (In re JPMorgan Chase Secs. Litig.). According to the plaintiffs, JPMorgan Chase violated certain federal securities laws by, among other things, improperly accounting for certain Enron-related transactions, known as prepays, as trades rather than loans and by failing to disclose these prepays as related-party transactions in its financial statements.

We recognized that a complete dismissal of the plaintiffs' claims was only possible if we could demonstrate the immateriality of each alleged

misstatement. As a result, in the motion to dismiss filed on behalf of our client, the Simpson Thacher litigation team focused much of our analysis on the quantitative and qualitative impact of the alleged misstatements on JPMorgan Chase's financial statements, arguing that any impropriety in the accounting treatment of the prepay transactions was neither quantitatively or qualitatively material because the prepays comprised only a minute part of JPMorgan Chase's total assets and any change in their accounting treatment would not have communicated any inherent risks in the transactions to investors.

In March 2005, Judge Sidney H. Stein of the Southern District of New York agreed, dismissing the action for failure to allege a material misstatement. The plaintiffs filed a second class action complaint two months later, this time adding to their complaint volumes of new material obtained from the Senate, SEC and Bankruptcy Examiner investigations into JPMorgan Chase's involvement with Enron. In March 2007, Judge Stein again dismissed the complaint, this time with prejudice, finding that despite the addition of new material, the plaintiffs had again failed to allege in a particularized fashion that "[JPMorgan] Chase or its officers intended to deceive its own shareholders or in fact did deceive them in a material way."

Despite two successive losses below, the plaintiffs wasted no time in appealing the dismissal to the Second Circuit. Relying on certain qualitative factors set out in the SEC's Staff Accounting Bulletin (SAB) No. 99, they argued that they had demonstrated, based on those factors, that the alleged misstatements were qualitatively material.

In January 2009, the Second Circuit affirmed Judge Stein's ruling in JPMorgan Chase's favor. With respect to the alleged mis-accounting of the prepays as trades rather than loans, the Second Circuit held that the accounting treatment was quantitatively immaterial because "[c]hanging the accounting treatment of approximately 0.3% of [JPMorgan] Chase's total assets from trades to loans would not have been material to investors." Turning next to qualitative materiality, the Second Circuit recognized that while SAB No. 99's qualitative factors "are intended to allow for a finding of materiality if the size of the misstatement is small, but the effect of the misstatement is large," the plaintiffs had failed to allege that "reporting these transactions as loans instead of trades would have made a qualitative difference in [JPMorgan Chase]'s financial statements." Similarly, with respect to any alleged failure to disclose the prepay transactions as "related party" transactions, the Second Circuit again noted that the prepays were only "a minute fraction of assets" on JPMorgan Chase's balance sheet and that while the plaintiffs had contended that "disclosure of these transactions as related-party transactions would have revealed [JPMorgan Chase]'s alleged duplicity with respect to Enron," they had offered no facts to support such a contention.

CASE NAME:
In re J.P. Morgan Chase & Co. Secs. Litigation

COURT FILED IN:
Southern District of New York

CLIENT NAMES:
J.P. Morgan Chase & Co.; William B. Harrison, Jr.; Marc J. Shapiro

LEAD ST&B PARTNERS:
Bruce D. Angiolillo; Thomas C. Rice; George S. Wang

OPPOSING COUNSEL:
Hagens Berman Sobol Shapiro LLP; Weiss & Lurie

JUDGES:
Hon. Sidney H. Stein; Second Circuit Justices

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## John Odam, et al. v. Enron Corp., et al.

The law firm Fleming & Associates LLP filed a lawsuit in the Southern District of Texas and nine similar suits in various Texas state courts. The state court actions were removed to federal court and, along with the federal action, coordinated or consolidated with Newby , et al. v. Enron Corp., et al., the putative Enron shareholder class action. Plaintiffs in the actions, who were purchasers of Enron common stock, alleged that various directors and officers of Enron, along with Arthur Andersen, prepared

and disseminated false, misleading, and incomplete information on Enron's financial condition that caused plaintiffs to purchase and continue their ownership of Enron stock.

After plaintiffs sought to add JPMorgan Chase & Co. and related entities, as well as other financial institution defendants, we opposed their motions for leave to file amended complaints on the grounds that the Fleming Matters are preempted by the Securities Litigation Uniform Standard Act of 1998, and should therefore be dismissed. In December 2006, the trial court ruled in our favor and dismissed the Fleming Matters. Plaintiffs appealed the trial court's decision.

In July 2008, the United States Court of Appeals for the Fifth Circuit entered an order affirming the trial court's dismissal of the Fleming Matters on the grounds that they are preempted by the Securities Litigation Uniform Standard Act of 1998. The case is significant not only for the result obtained for the client but because through the appeal, the Fifth Circuit flatly rejected the Fleming Plaintiffs' arguments and, for the first time at the Circuit Court level, applied SLUSA to a group of lawsuits pending in the same district court.

CASE NAME:
John Odam, et at. v. Enron Corp., et al.

COURT FILED IN:
Southern District of Texas and various Texas state courts

CLIENT NAMES:
JPMorgan Chase & Co .; JPMorgan Chase Bank, N.A.; and J.P. Morgan Securities Inc.

LEAD ST&B PARTNERS:
Thomas C. Rice; Jonathan K. Youngwood

OPPOSING COUNSEL:
Fleming & Associates LLP

JUDGES:
Hon. Melinda Harmon; Fifth Circuit Judges

## BREAKING THE HEXION HEX FOR BLACKSTONE

Not too long ago, termination fee provisions—a standard feature of merger agreements—were rarely invoked because mergers and acquisitions typically proceeded as scheduled. However, the recent economic turmoil has precipitated the termination of numerous mergers and acquisitions, giving rise to disputes under the termination provisions of the deal documents. After precedent was established in connection with the Huntsman-Hexion transaction, parties who determined not to proceed with a transaction as scheduled were presented with significant risks of an adverse ruling by the Courts. We nonetheless were able to achieve a different, and successful, result for our Blackstone Group clients.

In July 2007, Hexion Specialty Chemicals, Inc. (a portfolio company of the private equity firm Apollo Global Management) signed a deal worth $10.6 billion to purchase Huntsman Corporation for $28 per share, plus a "ticking fee" if the deal was not consummated by a specific date. Nearly a year later, in June 2008, Hexion and Apollo filed suit in Delaware Chancery Court claiming that Huntsman had suffered a "material adverse effect" as defined in the merger agreement and therefore Hexion had no obligation to close the merger and had no liability to Huntsman under the agreement.

In October 2008, in a decision closely-watched by the business community, the Delaware Chancery Court held that Hexion had willfully violated the merger agreement in connection with its failed acquisition of Huntsman. The Hexion ruling raised serious questions regarding the consequences for acquirers in failed M&A deals.

Against this back-drop, we represented entities affiliated with The Blackstone Group LP (the "Blackstone Affiliates") in connection with the planned $8 billion acquisition of Alliance Data Systems Corp. ("ADS"), a Dallas-based company that offers private-label rewards credit cards, customer service and marketing support for retailers. The merger agreement was signed in May 2007, and the transaction was originally scheduled to close no later than April 2008.

ADS's various subsidiaries include the World Financial Network National Bank (the "Bank"), a credit card bank regulated by the Office of the Comptroller of Currency ("OCC"). The OCC's review of the transaction ultimately led to the termination of the merger agreement on April 18, 2008.

The OCC's approval of the change in control of the Bank was a condition to the closing of the merger. Pursuant to the merger agreement, the Blackstone Affiliates were obligated to use their reasonable best efforts to obtain regulatory approval from the OCC. However, the OCC demanded, as a condition to its approval, that The Blackstone Group itself provide a backup "source of strength" commitment upon which the Bank could draw if certain events occurred. The Blackstone Group, a non-party to the merger agreement, declined. In January 2008, the Blackstone Affiliates informed ADS that they did not anticipate that the OCC approval closing condition would be satisfied.

On January 29, 2008, ADS filed its first lawsuit in the Delaware Court of Chancery seeking specific performance of the merger agreement. The Simpson Thacher litigation team, led by partners Bruce D. Angiolillo, Jonathan K. Youngwood, and Paul C. Gluckow, immediately filed a motion to dismiss. A scheduling hearing was held the same day the motion to dismiss was filed, and a date was set for the filing of an amended complaint. Without amending its complaint or responding to the motion to dismiss, ADS voluntarily dismissed its suit without prejudice.

Following the dismissal of the suit, the Blackstone Affiliates continued to seek OCC approval, but none of their proposals were accepted by the OCC. In April 2008, after numerous failed attempts to obtain OCC approval, the Blackstone Affiliates terminated the merger agreement in accordance with its terms.

ADS responded by filing a second suit in the Delaware Court of Chancery, this time alleging breach of contract and seeking a $170 million termination fee and other related damages. ADS

argued that the Blackstone Affiliates had not used their reasonable best efforts to close the deal because they failed to force The Blackstone Group to commit its capital in order to comply with the OCC's demands.

The Simpson Thacher litigation team once again filed a motion to dismiss. In the motion, Simpson Thacher argued that, notwithstanding ADS's contention that the OCC's demands upon the Blackstone Group were risk-less, the Blackstone Group had no obligations under the merger agreement to accede to any demands, regardless of the magnitude of the risks. The motion further argued that ADS could not turn the covenant that the Blackstone Group would not take any actions to thwart the merger into an obligation that would compel the Blackstone Group to agree to the OCC's demands. Finally, Simpson Thacher argued that the court could not impose terms on the Blackstone Group that the parties did not see fit to negotiate for themselves. In dismissing the case, the court essentially adopted all of the arguments set forth in the motion papers.

ADS appealed the decision to the Delaware Supreme Court. After the appeal was argued by Simpson Thacher partner, Bruce Angiolillo in June 2009, the Delaware Supreme Court affirmed the Court of Chancery's dismissal of ADS's complaint.

The courts' rulings departing from Hexion marked a significant victory for our clients, and a notable precedent for a wave of similar merger-related litigation resulting from current market conditions.

### CASE NAMES:
Alliance Data Sys. Corp. v. Aladdin Solutions, Inc.; Alliance Data Sys. Corp. v. Blackstone Capital Partners V, L.P.

### COURT FILED IN:
Delaware Court of Chancery

### CLIENT NAME:
Entities affiliated with The Blackstone Group

### LEAD ST&B PARTNERS:
Bruce D. Angiolillo; Jonathan K. Youngwood; Paul C. Gluckow

### OPPOSING COUNSEL:
Akin Gump Strauss Hauer & Feld LLP; Shapiro Forman Allen & Sava LLP

### JUDGES:
Vice Chancellor Leo E. Strine, Jr. (Delaware Court of Chancery); Justices Carolyn Berger, Jack B. Jacobs and Henry duPont Ridgely

### RELEVANT CITATIONS:
Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P., 963 A.2d 746 (Del. Ch. 2009); Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P., No. 65, 2009, 2009 WL 1740171 (Del. June 18, 2009)

## FIFTH CIRCUIT VICTORY FOR EXPRESS SCRIPTS IN RX.COM LITIGATION

Pharmacy Benefit Managers ("PBMs") emerged in the 1970s to provide health plans with a more efficient and cost-effective mechanism for distributing and administering their members' prescription drug benefits. Many companies, unions, and government entities use PBMs to manage their prescription drug benefits and to control the costs of those benefits. PBMs design prescription drug plans, develop lists of preferred drugs, negotiate rebates from drug manufacturers for their preferred drugs, and administer the processing of millions of drug claims. PBMs also provide networks of retail pharmacies where plan members can fill prescriptions at a discount, and offer mail order services for members. For mail order services, PBMs buy prescription drugs from drug wholesalers or manufacturers, fill prescriptions for plan members and then mail the drugs directly to the members.

When internet-based mail order pharmacies emerged in the late 1990s, our client Express Scripts, Inc.—one of the largest PBMs in the United States—considered these online pharmacies to be competitor mail order pharmacies using a website and refused to allow these entities into Express Scripts' retail pharmacy networks.

In January 2000, one such internet-based pharmacy—Rx.com—sought admission into Express Scripts' network (and thus access to all the plan members Express Scripts served) and was refused. Rx.com also sought (and was refused) access to the networks of two other large competing PBMs, Medco Health Solutions, Inc. and Caremark RX, Inc. In May 2001, like many internet start-up companies, Rx.com failed and closed its doors. Rx.com blamed its demise on Express Scripts and the other two PBMs that refused the company access to their networks.

In October 2004, Rx.com (which existed in name only by then) sued Express Scripts and the other two PBMs in the Eastern District of Texas for antitrust violations alleging that the defendants colluded to exclude Rx.com from their networks in violation of sections 1 and 2 of the Sherman Act.

The Simpson Thacher litigation team, led by Of Counsel Kenneth R. Logan and partner Joseph F. Wayland, recognized that the key to winning the case was the statute of limitations defense. Rather than simply relying upon various motions to dismiss filed by the defendants at the outset of the case, we convinced Judge David J. Folsom to allow the parties to take limited discovery solely on the statute of limitations issue, and then to file motions for summary judgment only on the issue of whether the statute of limitations barred Rx.com's claims. The strategy paid off handsomely: the Simpson Thacher litigation team was able to uncover incontrovertible evidence that within a month after Rx.com was refused access to the defendants' various networks, Rx.com was sufficiently aware of its antitrust claims that it could have filed its complaint. Because Rx.com did not do so for another four years (the relevant statute of limitations period), we contended that its claim should be barred as untimely. Judge Folsom agreed and dismissed the case.

Rx.com appealed the dismissal to the Fifth Circuit, arguing that Judge Folsom had applied the incorrect standard for determining when a statute of limitations accrued and offering a mountain of allegedly material facts as to the breadth of the alleged conspiracy. According to Rx.com, its claim did not accrue until it was able to uncover the full details of the alleged conspiracy—something that it allegedly could not do for many years after it was denied access to the PBM networks. And even if it did accrue outside the limitations period, Rx.com contended that its claim should have been tolled, among other reasons, because of the efforts the defendants took to conceal the alleged conspiracy.

In our opposition to the appeal and at oral argument, the Simpson Thacher litigation team argued that the Fifth Circuit did not need to examine the multitude of factual allegations regarding the alleged conspiracy but only had to focus on one specific issue: When did Rx.com feel the adverse impact of the alleged conspiracy? We contended that this adverse impact was all that was necessary to put Rx.com on notice of its

claim, and to start the statute of limitations clock. Our brief focused the Fifth Circuit's attention on a handful of uncontested facts that conclusively demonstrated that as soon as Rx.com was denied access to the defendants' networks, Rx.com immediately believed that its denial of access was due to an antitrust conspiracy and that these denials injured its business:

- Rx.com immediately contacted the Federal Trade Commission and a private attorney, seeking their assistance due to the defendants' refusal to grant Rx.com access to their networks, a denial which caused Rx.com to lose two-thirds of its potential clients;
- Rx.com's founder in an unrelated suit testified that he always believed that the defendants' denials of access to their networks were illegal; and
- Rx.com's failure to identify any event other than the denials of access (either in its pleadings or when directly questioned by the trial court) that prompted it to file its complaint.

In an important decision on applying the statute of limitations on antitrust claims, the Fifth Circuit agreed that these key facts were enough to start the statute of limitations clock, stating that "[e]ven though Rx.com may not have known all the details of the Defendants' concerted conduct, it knew it was injured, suspected illegality, and had sufficient knowledge to complain to the FTC." The Fifth Circuit further concluded that all of Rx.com's arguments to toll the statute of limitations period were without merit, and accordingly affirmed the dismissal of the case.

CASE NAME:
Rx.com, Inc. v. Medco Health Solutions, Inc., Caremark RX, Inc., and Express Scripts, Inc.

COURTS FILED IN:
Eastern District of Texas, Texarkana Division; Fifth Circuit

CLIENT NAME:
Express Scripts, Inc.

LEAD ST&B PARTNERS:
Joseph F. Wayland; Kenneth R. Logan

OPPOSING COUNSEL:
Haynes & Boone, LLP

JUDGE:
Hon. David J. Folsom (District Court)

RELEVANT CITATION:
Rx.com, Inc. v. Medco Health Solutions, Inc., No. 08-40388, 2009 U.S. App. LEXIS 8469 (5th Cir. April 22, 2009)

# Significant Arbitration Achievements

## THE HANWHA ARBITRATION

Nine years ago, Korea Life Insurance Ltd. ("KLI") was an insolvent corporation devastated in the wake of the Asian financial crisis. Its equity had been cancelled, corruption ran rampant, and management had been taken over by the Korean government. The government tasked KDIC—a state-owned entity that investigates and supervises distressed companies—with selling KLI. The government was under pressure to preserve Korea's credit rating and standing among international investors, and to meet Korea's commitments to the IMF.

KDIC ran three unsuccessful public auctions in an attempt to sell KLI. It was not until a fourth public auction, which concluded in October 2002, that KDIC finally managed to sell 51% of its stock in KLI. A consortium of investors, composed of seven Korean companies (all part of the Hanwha Group); ORIX Corporation, a Japanese financial services group; and Australian life insurer Macquarie Life Limited, purchased the majority stake in KLI for the equivalent of over $850 million. As part of this acquisition, the Hanwha Group negotiated the right to purchase an additional 16% of KLI's stock at the original sale price within five years of the transaction.

Over the course of the next four years, the consortium revitalized KLI and dramatically improved its profitability. The value of the company's stock more than doubled, and the consortium planned to schedule an initial public offering. In June 2006, the Hanwha Group decided that market conditions were ripe for it to exercise a call option over the 16% stake in KLI; but KDIC balked. Instead of honoring its agreement, the state-owned entity demanded a reversal of the original sale of the 51% stake in Hanwha, alleging fraud and mistake.

Both Hanwha and KDIC simultaneously filed for arbitration of this dispute before the International Chamber of Commerce ("ICC"). Hanwha sought the delivery of shares representing 16% of KLI's stock covered by the option. KDIC requested rescission of the sale and recovery of the consortium's 51% stake in KLI at the original acquisition price—at a potential capital gain of close to a billion dollars.

Together with the Korean law firm Kim & Chang, we represented both the Hanwha Group and ORIX Corporation in this high-profile arbitration. We argued that there was no basis in Korean law or equity for rescinding the consortium's acquisition of KLI stock nearly five years after the fact. We underscored that KDIC's refusal to honor the consortium's option was motivated by seller's remorse and current political pressures. KDIC received a remarkably good deal in the transaction. Only one other bidder, MetLife, had expressed interest in the final auction for KLI, and MetLife dropped out of the bidding after only a few months. KDIC was nevertheless able to negotiate no fewer than nine price increases from the consortium, as well as significant substantive concessions from the Hanwha Group. Since the consortium assumed control of KLI, KLI rose from ashes to become a thriving life insurance company in Korea—a direct result of the consortium's outstanding management efforts. KDIC's *post-facto* argument that it only entered the transaction with the consortium because it was deceived about the consortium's life insurance experience was unsupported by the evidence and governing Korean law.

Following a ten-day hearing, the Tribunal issued a unanimous award in favor of the consortium in late July 2008. The Tribunal rejected all of KDIC's claims for relief, concluding that the consortium's conduct did not constitute fraud or mistake under Korean law. The award ordered KDIC to honor Hanwha's right to exercise its option to purchase an additional 16% of KLI's stock. In addition, the award directed KDIC to bear 50% of the Hanwha Group and ORIX Corporations' attorneys' fees and other costs, which totaled some US $9.7 million. *The American Lawyer* named the arbitration one of the top fifty contract disputes of 2007 and conservatively estimated the stakes to be $1.16 billion.

The Hanwha case has had far-reaching implications in Korea. The award affirms the rule of law and the enforceability of contracts in Korea, reassuring foreign and domestic investors, whose confidence had been shaken by

some high profile efforts by the government to rescind the sale of distressed assets during the Korean financial crisis.

Few cases have had the breadth of international exposure—substantively, procedurally, or logistically—of the Hanwha arbitration. The case entailed multiple layers of law, including Korean contract and criminal law; the Korean Civil Code; and the ICC Rules of Arbitration. The case also required the Tribunal to consider several difficult issues of international arbitration practice, such as whether the burdens and standards of proof are determined by the applicable substantive law or a more general standard of international practice, and the proper weight an arbitral tribunal should accord decisions of national courts on related issues. Discovery spanned several jurisdictions, and the relevant documents were in three different languages. The hearing itself involved more than a dozen fact witnesses and multiple experts, many of which testified and were cross-examined through translators.

The Hanwha arbitration illustrates the type of complicated, high-stakes disputes that define our practice and are illustrative of our growing arbitration capabilities in Asia. Our litigation/arbitration partners have the experience and the ability to work in partnership with foreign counsel to handle these challenging and sensitive matters on behalf of clients around the world.

CASE NAME:
Hanwha/ORIX/Macquarie v. KDIC

TRIBUNAL:
ICC

CLIENT NAMES:
Hanwha Co., Ltd.; ORIX Corp.

LEAD ST&B PARTNERS:
Barry R. Ostrager; John J. Kerr, Jr.; Robert H. Smit; Mary Beth Forshaw; Linda H. Martin

OPPOSING COUNSEL:
Freshfields Bruckhaus Deringer; Bae Kim & Lee

ARBITRATORS:
Hon. Marc Lalonde (Chairman); Hon. Abraham D. Sofaer; Prof. Michael W. Reisman

## SUCCESSFUL REINSURANCE ARBITRATION FOR AXA EQUITABLE

In July 2000, AXA Equitable Life Insurance Company (formerly known as The Equitable Life Assurance Society of the United States) ("AXA Equitable") transferred its closed book of individual disability income policies to Centre Life Insurance Company ("Centre"). The transfer was accomplished through a reinsurance contract pursuant to which Centre agreed to reinsure AXA Equitable's disability income book, on a 100% quota share basis, in exchange for a payment from AXA Equitable.

Six years later, in June 2006, Centre—at this point in run-off and under new management—initiated an arbitration seeking rescission of the transaction or, in the alternative, a price adjustment in excess of $200 million for alleged errors in materials received by Centre during the nine months of due diligence prior to the transaction.

Immediately preceding the trial of Centre's claims before a panel of arbitrators, the Simpson Thacher litigation team moved in federal court for an order requiring Centre to comply with its obligations under certain credit support agreements relating to the transaction. As a result of these efforts, Centre agreed to transfer $180 million into a trust established under the credit support agreements.

Centre's claims were tried before an arbitration panel in March and July 2008. While Centre sought to focus the trial on expert analysis of the extent of their claimed damages, we focused the arbitration panel on the significant diligence conducted by Centre's team, and inconsistencies in the documentary record and witness testimony. After more than three weeks of trial involving a dozen fact and expert witnesses, the panel largely rejected Centre's claims. The panel denied Centre's request for rescission and issued an award in favor of Centre for $21 million—a small fraction of its claimed damages.

This highly favorable outcome for our client AXA Equitable ensures that Centre remains responsible for what likely will be hundreds of millions of dollars in future losses for the disability business, which has performed poorly since the business was sold to Centre in 2000.

### CASE NAME:
Centre Life Ins. Co. v. AXA Equitable Life Ins. Co.

### TRIBUNAL:
ARIAS

### CLIENT NAME:
AXA Equitable Life Insurance Company

### LEAD ST&B PARTNERS:
Barry R. Ostrager; Linda H. Martin

### OPPOSING COUNSEL:
Cahill Gordon & Reindel LLP; Boies Schiller & Flexner LLP

### ARBITRATORS:
[Confidential]

## SUCCESSFUL RESOLUTION OF THE FIRST EVER INTERNATIONAL ARBITRATIONS FOR THE DOMINICAN REPUBLIC

In 2009, Simpson Thacher successfully guided the Dominican Republic to a favorable resolution of the first ever investment arbitrations launched against it, as well as a parallel arbitration under the ICC Rules. The backdrop to the disputes was the wave of privatization that swept Latin America in the 1980s and 1990s. Governments expected that private companies would be more efficient and would also modernize operations at faltering state-owned utility companies. Investors, for their part, saw the opportunity to make tidy profits delivering basic water and power services across the developing world.

As part of this trend, a decade ago, the government of the Dominican Republic began auctioning off parts of the state's electricity infrastructure. More than a dozen foreign utility companies vied for the chance to participate in what *The Wall Street Journal* called "one of the biggest foreign investment opportunities" in the Dominican Republic's history. AES Corporation, an American power company, won the bid for a 50% stake in EDE Este, the energy distribution enterprise responsible for serving the eastern region of the Dominican Republic. As part of its investment obligations, AES was required to make capital contributions to improve the quality of the distribution service and infrastructure, a key objective of the government's privatization efforts.

Instead of following through on its obligations to modernize the Dominican Republic's energy infrastructure, AES transferred its stake in EDE Este in 2004 to Trust Company of the West (TCW), a U.S.-based investment management firm owned by the French bank, Société Générale.

Three years later, in 2007, Société Générale and TCW each initiated international arbitrations against the government of the Dominican Republic, seeking approximately $700 million for losses allegedly incurred in connection with their investment in EDE Este. Both entities alleged that the Dominican Republic had expropriated their investment, and failed to accord them with the rights and protections granted under a bilateral investment treaty between France and the Dominican Republic and under the Central America-Dominican Republic-United States Free Trade Agreement ("CAFTA-DR").

These disputes marked the first international investment arbitrations that the Dominican Republic ever faced. It was also only the second ever arbitration under the CAFTA-DR, which entered into force in March 2007.

The arbitrations involved matters of national significance for the Dominican Republic, where the provision of electricity has historically been a major political issue. Simpson Thacher partners John J. Kerr, Jr. and Peter C. Thomas mounted an aggressive defense to the investors' claims, presenting jurisdictional and substantive challenges based on established principles of international and investment treaty law.

In late 2007, a third arbitration was launched by EDE Este under its concession agreement against the Corporación Dominicana de Empresas Eléctricas Estatales (CDEEE), a company owned by the Dominican Republic, which coordinates the partially privatized companies operating in the Dominican Republic's electricity sector. This arbitration under the ICC Rules was based on virtually identical factual allegations to those raised in the treaty arbitrations.

The Firm assembled a team of bilingual lawyers with expertise in investment treaty arbitration to defend the sovereign nation. High profile tribunals were convened to hear each of the three arbitrations. In the Société Générale arbitration, the tribunal issued an award on jurisdiction on September 19, 2008 that substantially limited the scope of the claims against the Dominican Republic, including the potential extent of any damages. In the CAFTA-DR arbitration, we successfully argued for bifurcation and preliminary consideration of the Dominican Republic's objections to jurisdiction, prior to an examination of the merits of the case. As a result of these two successes in favor of the Dominican Republic, in June 2009, Société Générale and TCW agreed to settle their claims. The terms of the settlement were extremely

favorable to the Dominican Republic, which paid just $26.5 million to settle three arbitrations, each of which involved claims for about $700 million. The settlement also led to TCW's transfer of its EDE Este stake to the Dominican Republic, which has now recovered complete control of the company.

CLIENT NAME:
Government of the Dominican Republic

LEAD ST&B PARTNERS:
John J. Kerr, Jr.; Peter C. Thomas

OPPOSING COUNSEL:
Paul Hastings LLP

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CASE NAME:
Société Générale in respect of DR Energy Holdings Ltd. & Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic

TRIBUNAL:
UNCITRAL

ARBITRATORS:
Professor Francisco Orrego Vicuña (Chair); Bernardo M. Cremades; R. Doak Bishop

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CASE NAME:
TCW Group, Inc., Dominican Energy Holdings, L.P. v. The Dominican Republic

TRIBUNAL:
UNCITRAL

ARBITRATORS:
Professor Karl-Heinz Böckstiegel (Chair); Professor Juan Fernández-Armesto; Mark Kantor (appointed following the death of Professor Thomas W. Wälde)

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CASE NAME:
Empresa Distribuidora de Electricidad del Este, S.A. v. Corporación Dominicana de Empresas Eléctricas Estatales

TRIBUNAL:
ICC

ARBITRATORS:
Professor Gabrielle Kaufmann-Kohler (Chair); Professor Albert Jan van den Berg; Judge Stephen M. Schwebel

## THE ITT INDUSTRIES ARBITRATION

When multi-national conglomerate ITT Corporation ("Old ITT") split up into three separate companies in 1995, the manufacturing operations went to ITT Industries ("ITT"), the insurance and financial services operations went to Hartford Financial Services Group ("Hartford") and the hotel and entertainment operations went to ITT Destinations (now "Starwood"). In the agreement governing the breakup and distributing Old ITT's operations (the "Distribution Agreement"), ITT, Hartford and Starwood agreed to each assume the liabilities associated with the operations that were allocated to it, but to share equally any liabilities that might arise from previously divested companies, including those that might still have exposure for asbestos and silica claims.

Recently, a dispute arose when Hartford sought to hold ITT responsible for approximately $80 million in asbestos and silica losses noticed under reinsurance policies issued by a former captive reinsurer of Old ITT, Fencourt Reinsurance Company ("Fencourt"), which business had been allocated to Hartford under the Distribution Agreement. The Fencourt reinsurance contracts reinsured policies issued by Ace covering certain of Old ITT's manufacturing operations as part of a captive, self-insurance program. Hartford claimed that prior to the breakup, Old ITT had an oral agreement with Fencourt to reimburse Fencourt for any losses incurred under the self-insurance program with Ace in order to make Fencourt whole. Hartford sued ITT in Fencourt's name in federal court in Philadelphia (the "EDPA Action") in an attempt to enforce this oral agreement against ITT on the theory that ITT had assumed responsibility for the oral agreement to make Fencourt whole when ITT assumed the liabilities of Old ITT's manufacturing operations. Our strategy in defending ITT was to focus on and enforce the allocation of liabilities under the Distribution Agreement, which expressly stated that all liabilities arising from any insurance operations (including Fencourt's business) were to be assumed entirely by Hartford.

Our first step in carrying out this strategy was to derail the litigation in favor of arbitration under the arbitration clause in the Distribution Agreement. To that end, on the same day that we moved to dismiss or stay the EDPA Action, we also initiated arbitration against both Hartford and Fencourt seeking to enforce the allocation provisions of the Distribution Agreement. This first step in our strategy succeeded when the federal court granted our motion and stayed the action pending the outcome of the arbitration, holding that Fencourt was bound by the arbitration clause in the Distribution Agreement as a nonsignatory because it was a third-party beneficiary of the agreement.

The second step in our strategy was to argue before the arbitrator by way of dispositive motion that the allocation to Hartford under the Distribution Agreement of all liabilities arising from Old ITT's insurance operations includes the $80 million in losses under Fencourt's reinsurance contracts and supersedes any alleged oral agreement between Old ITT and Fencourt to make Fencourt whole. In opposing our motion, Hartford and Fencourt argued that the reinsurance liability arose, not out of Fencourt's reinsurance business, but out of the conduct of Old ITT's previously divested companies and therefore is to be shared equally among Hartford, ITT and Starwood. The arbitrator agreed with our construction. In a 20-page decision, the arbitrator granted partial summary judgment to ITT, finding that the Distribution Agreement unambiguously provided that all liability arising from Fencourt's reinsurance business, regardless of the underlying source of that liability, is to be allocated 100% to Hartford, and that under the merger clause in the Distribution Agreement, this allocation supersedes any alleged prior agreement between Old ITT and Fencourt, effectively gutting Fencourt's claims in the EDPA Action. Having disposed of Fencourt's claims, the arbitrator is now proceeding to address other disputes between Harford and ITT under the Distribution Agreement with respect to other liabilities.

The ITT team, led by Andrew Amer, recognized immediately that arbitration under the Distribution Agreement to enforce the allocation

agreed to as part of the breakup of Old ITT, rather than protracted discovery and litigation in federal court over an alleged oral agreement entered into as part of a captive insurance program, would garner the best result for the client. With a combination of law and logic, the team was able to successfully shift the forum from federal court to arbitration and then deconstruct the opposing team's arguments, thereby enforcing the allocation of the Distribution Agreement in arbitration and gutting Fencourt's claims in federal court.

CASE NAME:
ITT Corporation, Inc. v. Fencourt Reinsurance Co., Ltd. and The Hartford Financial Services Group, Inc.

TRIBUNAL:
AAA

CLIENT NAME:
ITT Corporation, Inc., f/k/a ITT Industries

LEAD ST&B PARTNER:
Andrew S. Amer

OPPOSING COUNSEL:
Milbank, Tweed, Hadley & McCloy LLP

ARBITRATOR:
Hon. John J. Gibbons

## 9/11-RELATED ARBITRATION FOR FRENCH REINSURANCE GIANT SCOR

Just six weeks before September 11th, the Port Authority granted a 99-year lease for the World Trade Center to companies controlled by New York real estate developer Larry Silverstein. Silverstein needed to obtain property insurance for the complex and, therefore, Silverstein's insurance broker in the summer of 2001 approached major insurers throughout the world to participate in a $3.54 billion multi-layered insurance program covering the World Trade Center ("WTC"). One of the insurers that Silverstein's broker approached was French reinsurance giant SCOR. SCOR underwrote a 10% quota share participation on the WTC insurance program on the basis of a policy form circulated by Silverstein's broker. Because SCOR was not licensed as a direct insurer in New York, Silverstein, through his broker, asked Allianz to act as a "front" for SCOR, a common arrangement in the insurance industry. Allianz, which had separately written a smaller participation on the program, agreed.

After the September 11th terrorist attack, Silverstein asserted a claim against his insurers that the terrorist attack constituted "two occurrences" for insurance purposes, thereby entitling him to a double payout under the insurance program. It was then that SCOR first learned that, just prior to the loss, Allianz had issued its own proprietary policy that contained an "occurrence" definition that differed materially from the broker-drafted policy on the basis of which SCOR had agreed to participate in the insurance program. Allianz did not obtain SCOR's approval prior to issuing its own policy. As a result of Allianz's issuance of its own policy with an unfavorable definition of the term "occurrence," SCOR faced double exposure under the insurance program.

In 2003, Allianz and SCOR commenced arbitration to resolve certain issues regarding the WTC insurance program, including the terms of coverage and periodic payments made to Allianz by SCOR. Later, after SCOR financed years of coverage litigation by Allianz under the Allianz policy, Allianz settled the claim with Silverstein over SCOR's expressed objections due to public relations pressure being brought to bear on Allianz.

In 2007, SCOR retained Simpson Thacher to assume the representation of SCOR in the arbitration. Our extraordinarily successful representation of Swiss Re in the WTC insurance proceedings, featured in *The American Lawyer* in January 2006, convinced SCOR that we could reinvigorate the Allianz arbitration proceedings, which had languished for years. As soon as we were appointed as SCOR's new counsel, Allianz immediately sought to disqualify our Firm through a petition filed in New York state court, an application deemed "frivolous" by the court.

We moved quickly, filing a preliminary statement within weeks of being retained, pursuing discovery in the matter (including the production of nearly a half million pages of documents and the handling of dozens of depositions), and engaging in active motion practice including, among other things, successfully defending SCOR against two summary disposition motions by Allianz and convincing the panel of the need to hold a final hearing on the merits. After an irreconcilable conflict between two of the panel members, who were disbanded from the original panel, the Simpson Thacher litigation team convinced the new panel to hold the merits hearing in the summer of 2009, over the objection of Allianz's counsel, which sought to delay the hearing.

At the hearing, we asserted two key claims on behalf of SCOR: (1) Allianz, the fronting company, breached the 100% fronting arrangement by issuing, prior to the loss and without SCOR's authorization, a final policy that was materially different from the terms and conditions of coverage that SCOR already had underwritten and bound; and (2) Allianz breached the 100% fronting arrangement by settling the underlying claim with Silverstein, over SCOR's expressed objection, for reasons having nothing to do with the merits of the claim and everything to do with political, regulatory and media pressure on Allianz. The hearing concluded on July 31, following four weeks of testimony and the examination of seventeen witnesses, including four experts and four law firm partners.

This arbitration is another chapter in the high-profile insurance litigation arising out of the September 11th attack on the World Trade Center. Our Firm has played a prominent role throughout the various September 11th insurance disputes, including our successful representation of Swiss Re against Silverstein.

The outcome of this arbitration will likely have significant ramifications for the fronting industry and the reinsurance industry as a whole. We expect a favorable decision on behalf of SCOR in the near future.

CASE NAME:
Allianz Global Risks US Insurance Company v. SCOR

TRIBUNAL:
N/A

CLIENT NAME:
SCOR SE

LEAD ST&B PARTNERS:
Barry R. Ostrager; Mary Kay Vyskocil; Michael J. Garvey; Michael D. Kibler

OPPOSING COUNSEL:
Zelle, Hofmann, Voelbel, Mason & Gette, LLP

ARBITRATORS:
Robert B. Green; Caleb L. Fowler; Robert Lippincott III

# Significant Supreme Court Engagements

## SUPREME COURT VICTORY FOR TRAVELERS IN HISTORIC ASBESTOS CASE

When the Second Circuit overturned on collateral review a decades-old bankruptcy channeling injunction that shielded Travelers Indemnity Company and its affiliates from all claims arising out of its insurance relationship with former asbestos giant Johns-Manville Corporation, the ruling threatened the ability of bankruptcy courts to resolve asbestos-related bankruptcies with finality.

In 2008, Simpson Thacher successfully petitioned the United States Supreme Court for a writ of certiorari in the case, *Travelers Indemnity Co. v. Bailey*, and on March 30, 2009, Barry R. Ostrager, Chair of Simpson Thacher's litigation department, argued the case for Travelers.

On June 18, 2009, in one of the most important business law decisions of the decade, the Court in a 7-2 ruling reversed the Second Circuit and ruled in favor of Travelers. The ruling is now the single most important precedent for debtors—and third parties with litigation exposure arising out of relations with debtors—that seek to effect a comprehensive resolution of claims and potential claims under bankruptcy court supervision.

### The Manville Bankruptcy

We have represented Travelers in the Johns-Manville matter since the early 1980s, when Manville became the first Fortune 500 company to file for bankruptcy as a result of asbestos-related liabilities. Its Chapter 11 filing commenced one of the most complex bankruptcy reorganizations in history.

At the time of its bankruptcy, Manville's most valuable asset was its insurance coverage, which was illiquid and of uncertain value due to coverage litigation. The bankruptcy court crafted a novel solution. Manville's plan of reorganization provided that its insurers "buy back" the insurance policies issued to Manville in exchange for a promise of finality expressly contained in the confirmation order. The proceeds of this "sale," in turn, were deposited into the Manville Personal Injury Settlement Trust for the benefit of current and future asbestos claimants. Travelers contributed to the trust and secured an injunction barring "any Person" from commencing "any claims" "based upon, arising out of or related to" the insurance policies that Travelers issued to Manville. The bankruptcy court's confirmation order was affirmed on direct appeal, and Congress subsequently used the Manville trust/channeling mechanism as a model for Section 524(g) of the Bankruptcy Code. This procedure has been used as a model in dozens of asbestos-related bankruptcies over the last twenty years.

### Direct Action Lawsuits

In 2002, after Travelers was named in a series of lawsuits (so called "direct actions") claiming that it "conspired" with Manville to conceal the dangers of asbestos, we sought to enforce the Manville confirmation order designed to protect Travelers from such suits. The bankruptcy court found as a matter of fact that these direct actions were part of a global strategy developed by the asbestos plaintiffs' bar to put Travelers "in Manville's chair" and thereby collect on claims that had already been channeled to the Manville Trust. In other words, the bankruptcy court found that these new direct action claims were indirect attempts to do what plaintiffs' lawyers were barred from doing directly, and amounted to double-dipping from the trust. On appeal, the district court affirmed the decision.

### The Second Circuit Missteps

The Second Circuit agreed with the bankruptcy court's conclusion that the direct actions against Travelers fell squarely within proscriptions of the Manville confirmation order, which enjoined "any Person" from commencing "any claims" "based upon, arising out of or related to" the insurance policies that Travelers had issued to Manville. But the Second Circuit concluded that the bankruptcy court, in 1986, exceeded its authority by enjoining all claims that literally "arise out of" the insurance policies Manville purchased from Travelers, and retroactively narrowed the Manville confirmation order so that only certain claims against Travelers arising out of its insurance relationship with Manville are barred: those that are "derivative" of Manville's liability, or that directly affect the "*res*" of the bankruptcy estate.

### The Supreme Court Reverses

Although the Court grants less than one percent of the nearly nine thousand certiorari petitions filed

annually, the Simpson Thacher litigation team successfully obtained United States Supreme Court review of the Second Circuit's decision for Travelers and on March 30, 2009 Barry R. Ostrager argued the case to a highly engaged Supreme Court bench. On June 18, 2009, in an opinion delivered by Justice Souter, and joined in by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer and Alito, the Supreme Court reversed the Second Circuit.

In a landmark decision, the Court held that the Second Circuit erred in refusing to enforce the plain terms of the decades-old bankruptcy channeling injunction that shielded Travelers from any and all claims "based upon, arising out of or related to" its insurance relationship with Manville. In addition to impeding the attempts by the plaintiffs' bar to hold Travelers liable as a result of its insurance relationship with Manville, the Court's decision reaffirms the critical role that finality and repose play in the day-to-day functioning of our judicial system. Permanent injunctions contained in fully affirmed plans of reorganization do not expire, and parties must be able to rely on the continued enforceability of injunctive relief even decades after an underlying bankruptcy plan is confirmed.

The Court's reversal of the Second Circuit's countenance of a collateral attack also restores the certainty necessary to achieve effective, workable and equitable bankruptcy reorganizations. The Second Circuit's decision risked eroding the finality of federal bankruptcy confirmation orders underlying resolution of hundreds of thousands of potential individual lawsuits and tens of billions of dollars in trusts held for the benefit of asbestos claimants. Had the decision stood, it likely would have had far-reaching and pernicious effects on the ability of bankruptcy courts to address mass tort-related bankruptcies.

CASE NAME:
Travelers Indemnity Co., et al. v. Bailey, et al.

COURT FILED IN:
United States Supreme Court

CLIENT NAME:
Travelers Indemnity Company

LEAD ST&B PARTNERS:
Barry R. Ostrager; Myer O. Sigal, Jr.; Andrew T. Frankel

OPPOSING COUNSEL:
Cozen O'Connor; Prof. Samuel Issacharoff, NYU School of Law

JUDGES:
United States Supreme Court Justices

RELEVANT CITATIONS:
Travelers Indem. Co. v. Bailey, 129 S.Ct. 2195 (2009)

## PRESERVING ONLINE ACCESS TO FREELANCERS' WORK

In *New York Times v. Tasini*, 533 U.S. 483 (2001), the United States Supreme Court determined that freelance authors have rights to their works that newspaper and magazine publishers—and, by extension, online database operators—cannot ignore. Under Tasini, news-paper and magazine publishers and electronic archives must obtain consensual licenses from freelance authors before reproducing and distributing their works. Today, as one of the primary architects of a class action settlement designed to resolve Tasini-like claims, Simpson Thacher is at the center of a new Supreme Court controversy, one which will not only have significant implications for authors, publishers, and database operators, but could also affect the future of class action settlements generally.

In the wake of Tasini, the online database community, fearing an onslaught of litigation, purged hundreds of thousands of unlicensed newspaper and magazine articles from their databases. Their fear of litigation was well founded. A host of freelance authors, supported by authors rights organizations, initiated class action litigation against online databases and publishers, and ultimately, four of these lawsuits were consolidated in the Southern District of New York. In addition to publishers like *The New York Times* itself, our client Factiva, an online business information database then operated jointly by Dow Jones and Reuters, was included as a defendant alongside other prominent electronic databases such as LexisNexis.

Given the result in Tasini, the presiding district court judge urged the parties to mediate their dispute. Four years of serious negotiation overseen by famed mediator Kenneth Feinberg ensued, and in 2005, Simpson Thacher and others brokered a comprehensive settlement. Under the settlement agreement, the defendants agreed to provide $18 million to fund authors' claims for compensation for all freelance articles for which electronic licenses had not been granted, even if the authors' copyrights in the articles were never registered. The authors also retained the right to deny future electronic use of their articles. In exchange, the authors released the defendants from all past, present and future claims arising from their freelance articles that had been in the databases, effectively allowing the databases to restore the works purged four years prior and to include, on a going-forward basis, any articles possibly written by freelance authors without fear of liability.

Over a handful of objections, a settlement-only class was approved by the district court in 2005. More than two years later, in a 2-1 decision, the Second Circuit stunned the publishing and database communities by overturning the settlement on grounds never before raised by any of the parties. Specifically, the Second Circuit held that because Section 411 of Copyright Act provides (with certain exceptions) that a lawsuit alleging infringement cannot be filed until the work is properly registered or pre-registered, the district court did not have jurisdiction to approve any settlement including unregistered works. By contrast, the dissenting judge reasoned that the Copyright Act's "register-before-suit" requirement bears more resemblance to a claims-processing rule that can be waived than a true jurisdictional bar, that the legislative history of the Copyright Act reinforces the view that registration is a prerequisite to certain remedies, but not to jurisdiction, and that in the class-action context, at not all members of a settlement-only class need to have a valid cause of action.

Without a settlement that includes unregistered works, Factiva and the other database defendants have serious concerns about their future operations. Not only do publishers commonly lack the means to identify freelance articles and locate freelance authors, but the cost and burden of registering works far outweigh the benefits for many such authors. Therefore, they and the other settling parties have taken their case to the Supreme Court, which granted certiorari in March of this year to resolve whether Section 411 restricts courts' jurisdiction over copyright infringement claims. Chief among the arguments advanced by the settling defendants, including Factiva, are that the structure and language of Section 411 demonstrates that Congress had no intent to strip courts of jurisdiction to adjudicate claims concerning unregistered works. Their brief further argues that the authority of federal courts to ratify private settlement agreements—even where they

lack jurisdiction over certain of the claims—is well-established under general federal jurisdictional statutes and longstanding Supreme Court precedent.

All of the parties before the Second Circuit, including the objectors to the settlement, agree that Section 411 is not jurisdictional. Accordingly, the Court has appointed amici curiae to argue in favor of the Second Circuit's opinion. The case will be heard during the October 2009 term.

CASE NAME:
Reed Elsevier Inc. v. Muchnick

COURT FILED IN:
United States Supreme Court

CLIENT NAME:
Dow Jones Reuters Business Interactive LLC (Factiva)

LEAD ST&B PARTNER:
Henry B. Gutman

OPPOSING COUNSEL:
Prof. Deborah Jones Merritt, The Ohio State University Moritz College of Law

JUDGES:
United States Supreme Court Justices

RELEVANT CITATIONS:
In re Literary Works in Electronic Databases Copyright Litigation, 509 F.3d 116 (2d Cir. 2007)

## DEFENDING A DEATH ROW INMATE'S RIGHT TO A FAIR TRIAL

In 2008, we continued our long tradition of advocating for the full protection of the law for death row inmates by speaking out before the Supreme Court against permitting a jury in a capital murder case to consult the Bible during its deliberations.

In 1999, Oliver was convicted of capital murder during the commission of a burglary. While Oliver's co-defendant was the one who fatally shot the victim, Oliver also struck the victim several times in the head with the butt of his rifle, acts which an expert found could have been fatal on their own. The jury then sentenced Oliver to death. His attorneys later discovered, post-sentencing, that several members of the jury had brought copies of the Bible into the deliberation room and read passages aloud during the sentencing proceedings. These pages included one from the Old Testament stating that if a man killed another man by striking him with a weapon, he should be put to death.

Oliver's lawyers appealed the jury verdict to the Fifth Circuit. The Fifth Circuit concurred that there is a constitutional rule forbidding these types of external influences on the jury, but held that the Bible's presence in the jury room did not ultimately prejudice the jury's decision in Oliver's case. Counsel for Oliver, Scott Gant of Boies, Schiller & Flexner LLP, filed a petition for a writ of certiorari appealing the Fifth Circuit's decision.

At the request of petitioner's counsel, our Firm represented a group of former federal and state prosecutors as amici curiae in the case. Thirty-three former United States Attorneys and numerous Assistant United States Attorneys and state prosecutors signed on to the brief. Simpson Thacher partner Joshua A. Levine, a former Assistant United States Attorney in the Southern District of New York, led a team of lawyers in the Firm's New York office in preparing the brief.

In our amicus brief, we argued that juror consultation of the Bible during deliberations is an improper external influence. The brief explained that protecting constitutional guarantees is uniquely important in the capital punishment context, and that enabling tainted capital sentences to stand undermines public confidence in the U.S. criminal justice system's ability to render unbiased judgments.

Regrettably, the Court ultimately declined to grant certiorari in the case.

### CASE NAME:
Oliver v. Quarterman

### COURT FILED IN:
United States Supreme Court

### CLIENT NAMES:
Former federal and state prosecutors

### LEAD ST&B PARTNER:
Joshua A. Levine

### OPPOSING COUNSEL:
Office of the Attorney General of Texas

### JUDGES:
United States Supreme Court Justices

### RELEVANT CITATIONS:
Oliver v. Quarterman, 541 F.3d 329 (5th Cir. 2008); Oliver v. Quarterman, 129 S.Ct. 1985 (2009)

## HONORING THE SIXTH AMENDMENT'S RIGHT TO CONFRONTATION

After the Ninth Circuit issued an opinion affirming the federal criminal conviction of Robert L. Norwood based in part on the affidavit of a government witness who was not subject to cross-examination, attorneys in Simpson Thacher's Los Angeles office volunteered to represent Norwood in seeking Supreme Court review to vindicate a criminal defendant's right "to be confronted with the witnesses against him," as guaranteed by the Sixth Amendment. Norwood accepted the Firm's offer, and attorneys and summer associates at Simpson Thacher filed a petition for certiorari on Norwood's behalf on July 17, 2009.

Norwood was indicted on narcotics and firearms charges stemming from a police search of his home in Spokane, Washington. The key issue at trial was whether Norwood was a drug dealer (as the prosecution contended) or a drug user (as the defense argued). If the government could persuade the jury that Norwood was selling drugs, he would face a mandatory minimum of fifteen years in federal prison; mere use, on the other hand, would result in a fraction of that sentence. As the trial judge expressed before charging the jury, the evidence in the case was mixed (the jury at one point even sent a note indicating a deadlock). The prosecution argued that a stash of bills found in Norwood's car was evidence that he was selling cocaine. The defense offered contravening evidence that the cash came from a lump sum distribution he received from his prior employer's 401(k) plan.

On the critical question of where the cash in Norwood's possession came from, the prosecution tipped the scales with an affidavit signed by an employee of the State of Washington. The affiant—who did not appear at trial and was never subject to cross examination—attested that she had performed "a diligent search of the department's files" yet was unable to find any record of wages reported for Norwood during the two-year period preceding his arrest. Over defense counsel's Sixth Amendment objection, the district court admitted the affidavit as circumstantial evidence that Norwood had no legal source for the cash that was found on his person and in his automobile, and the jury voted to convict.

On appeal to the Ninth Circuit, Norwood's counsel—a public defender—renewed his Sixth Amendment objection to the district court's admission of the affidavit. The Ninth Circuit nevertheless affirmed, ruling that the affidavit was a non-testimonial business record not subject to Sixth Amendment scrutiny.

The Supreme Court has recently shown a renewed interest in the Sixth Amendment's guarantee that anyone charged with violating the law has the right to confront his accusers in open court. Starting with the Court's 2004 decision in Crawford v. Washington (which overruled the Court's 1980 decision in Ohio v. Roberts), and continuing with the 2006 decision in Davis v. Washington, the Supreme Court has been closely scrutinizing prosecutors' efforts to sidestep the Sixth Amendment's substantive and procedural safeguards. Indeed, on June 25, 2009, the Supreme Court decided Melendez-Diaz v. Massachusetts, and held that "certificates of no record," like the affidavit admitted into evidence at Norwood's trial, are "testimonial" and therefore subject to Sixth Amendment scrutiny. Given the strength of the Court's holding in Melendez-Diaz and its direct applicability here, we are hopeful that the Court will correct the Ninth Circuit's erroneous interpretation of the Confrontation Clause.

CASE NAME:
Norwood v. United States

COURT FILED IN:
United States Supreme Court

CLIENT NAME:
Robert Norwood

LEAD ST&B PARTNER:
Michael D. Kibler

OPPOSING COUNSEL:
Elena Kagan, Solicitor General of the United States

JUDGES:
United States Supreme Court Justices

RELEVANT CITATIONS:
United States v. Norwood, 555 F.3d 1061 (9th Cir. 2009)

## DEFENDING THE FIRST AMENDMENT'S PROTECTION OF BOOKS CONTAINING POLITICAL SPEECH

In January 2008, a Virginia-based advocacy group called Citizens United released a feature-length documentary movie that it had produced entitled *Hillary: The Movie*, which was shown in theaters and made available for purchase on DVD. To promote the movie, Citizens United produced several television advertisements that it intended to run on broadcast and cable television networks. It also intended to distribute the movie via Video On Demand to digital cable subscribers. The 90-minute movie, as described by Citizens United, "discusses [Senator Clinton's] Senate record, her White House record during President Bill Clinton's presidency, and her presidential bid." Although it did not expressly call for her defeat in the Democratic presidential primaries, the movie was critical of Senator Clinton and arguably brought into question her character and fitness to be President of the United States.

Because the proposed distribution of the movie and the accompanying television advertisements fell within 30 days of the presidential primaries, and the movie and advertisements mentioned Senator Clinton by name, their broadcast on cable television potentially could be considered an "electioneering communication" under the Bipartisan Campaign Reform Act of 2002 ("BCRA")—commonly known as the "McCain-Feingold Act". Accordingly, under Section 203 of BCRA, the movie's production could not be funded from Citizen United's general treasury funds, but rather only through a political action committee or other segregated funds. The Act also imposed disclosure and disclaimer requirements obliging Citizens United to file a report with the Federal Election Commission ("FEC") listing the names and addresses of any individual or organization contributing $1,000 or more to finance the movie's production, and to state at the end of any television advertisements that it was responsible for their contents.

Citizens United sued the FEC challenging BCRA's constitutionality as applied to distribution of the movie via Video On Demand, and seeking to enjoin the application to the movie or the advertisements of the Act's disclosure and disclaimer provisions. A three-judge panel of the U.S. District Court for the District of Columbia ruled in July 2008 that a Video On Demand broadcast of the movie constituted an "electioneering communication" within BCRA. Consequently, its broadcast was prevented as it had been produced using Citizens United's general treasury funds. The Court also held that applying BCRA's extensive disclosure and disclaimer provisions to the advertisements for *Hillary: The Movie* did not violate the First Amendment.

Citizens United appealed this ruling directly to the U.S. Supreme Court. During Oral Argument, there was a broad discussion of what forms of campaign expression are subject to federal regulation. Several Justices were troubled by the Deputy Solicitor General's suggestion that BCRA's definition of an "electioneering communication" encapsulates a book distributed wirelessly to an electronic reading device, such as the Kindle—even though books enjoy a specific exemption from the Act's coverage. The Government went further—making what Justice Alito called a "pretty incredible" proposition—that any book incorporating campaign advocacy or "the functional equivalent" could be banned if paid for using corporate treasury funds.

The Supreme Court has ordered reargument during a special session in September 2009 to consider whether it should overrule its prior rulings on federal campaign finance law in *Austin v. Michigan Chamber of Commerce* (1990), in which the Justices upheld the government's right to impose restrictions on the use of corporate funds to pay for campaign advocacy, and part of *McConnell v. F.E.C.* (2003), in which the Court upheld the constitutionality of Section 203 of BCRA. Acting *pro bono* on behalf of publishing clients, Simpson Thacher agreed to write an *amici curiae* brief clarifying that BCRA's restrictions do not extend to books, whether in published in traditional format or downloaded via a wireless reading device. The Firm also challenged the government's blanket assertion that all books containing campaign advocacy are automatically caught by FECA, advocating that books typically do not present the same kind of political corruption concerns as, for example, the broadcast advertisements and infomercials that dominate the networks during election season. The case has engendered significant debate and interest, and

the decision is expected to play a key role in the development of First Amendment law in the context of political speech.

CASE NAME:
Citizens United v. F.E.C.

COURT FILED IN:
United States Supreme Court

CLIENT NAME:
Hachette Book Group, Inc.; HarperCollins Publishers L.L.C.

LEAD ST&B PARTNERS:
Michael J. Chepiga; James Gamble

JUDGES:
United States Supreme Court Justices

## UPDATE:

### LANDMARK SUPREME COURT RULING IN THE GUANTANAMO CASE

In our October 2007 supplemental submission, we described the work of the Firm's Palo Alto office in submitting an *amici curiae* brief to the United States Supreme Court in support of the right of Guantánamo detainees to petition for the writ of *habeas corpus*. Working with Professor Beth Van Schaack of the Santa Clara University Law School and a distinguished group of experts in the field of humanitarian law, including a former principal of the International Committee of the Red Cross, we argued that the Court should overturn the ruling below, affirm the prisoners' right of *habeas corpus*, and be mindful of the obligations imposed by international humanitarian law.

On June 12, 2008, the United States Supreme Court ruled in favor of Guantánamo detainees in *Boumediene v. Bush* and *Al Odah v. United States*, striking down the Military Commissions Act of 2006 provision that stripped federal courts of jurisdiction to hear detainees' *habeas* petitions. In delivering the outcome requested by our *amici*, the Supreme Court ruled that the procedures implemented by the Military Commissions Act constituted an inadequate substitute for *habeas corpus* procedures. The Court noted that "few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person" and that access to the writ of *habeas corpus* by Guantánamo detainees "is a necessity to determine the lawfulness of their status."

This landmark ruling clears the way for detainees to resume pressing *habeas* petitions challenging the grounds of their continued detention by the U.S. military at Guantánamo Bay. In doing so, detainees may seek to vindicate rights afforded under various international humanitarian law instruments, including two provisions that formed the basis of our *amici curiae* brief, Common Article III and Article 75 of Additional Protocol I.

# Significant Settlements

## SUCCESSFUL RESOLUTION OF THE IPO ALLOCATION LITIGATION CASES

The Firm represents JPMorgan Securities Inc., individually and as successor in interest to Hambrecht & Quist LLC, J.P. Morgan Securities, Inc., Chase Securities Inc., and Bear, Stearns & Co. Inc., and JPMorgan Chase & Co., The Bear Stearns Companies Inc., Bear Stearns International Limited, and Robert Fleming, individually (collectively, "JPMorgan") in *In re IPO Sec. Litig.*—a proceeding of unprecedented scope, involving hundreds of consolidated securities class action lawsuits, each alleging tens of millions of dollars in damages, that have been coordinated for pre-trial purposes before Judge Shira A. Scheindlin of the Southern District of New York.

Simpson Thacher partners David W. Ichel and Joseph M. McLaughlin have taken a leading role in all aspects of the defense of what the plaintiffs had described as "one of the greatest financial scandals in our nation's history," in which more than fifty underwriters, including JPMorgan, are alleged to have engaged in pervasive and industry-wide misconduct with respect to initial public offerings ("IPO") and certain "follow-on" offerings during the Internet bubble of the late 1990s and 2000. Specifically, the complaints alleged, *inter alia*, that the underwriters manipulated the IPO market by tying allocations of IPO securities to customers' (i) payment of undisclosed additional commissions on other stock trades, and (ii) agreement to purchase additional aftermarket shares at pre-determined higher prices. In addition, the complaints alleged that underwriters utilized false and misleading analyst reports to maintain artificially high prices of the IPO securities.

This coordinated litigation—the largest securities proceedings in history—has been actively litigated for nearly eight years, and yielded in 2006 the most significant class certification decision of the decade. Much of the history of the case saw the District Court rejecting efforts by the defendants to dismiss or narrow portions of the case until the Second Circuit reversed class certification granted by the District Court in 2006. In addition to defeating class certification, one of the key defense achievements in the proceedings before the District Court was one spearheaded by Simpson Thacher.

After the Second Circuit's reversal of class certification, the Plaintiffs' Executive Committee moved to certify new revised classes in the 310 coordinated actions that did not include in the classes those individuals or entities that had received initial allocations from the Underwriter Defendants. Simpson Thacher architected and litigated a motion to strike the class allegations in certain cases, which reduced the Underwriter Defendants' potential exposure in the cases by several hundred million dollars. In the course of discovery, the Simpson Thacher litigation team discovered that there were twenty-six cases in which the plaintiffs had moved for class certification while lacking a putative class representative. In December 2007, the Simpson Thacher litigation team filed a motion to strike the class allegation in the twenty-six putative class actions on behalf of all the defendants, arguing that in eight of the consolidated actions, the plaintiffs had moved for certification without putative class representatives and, after this was brought to their attention, the plaintiffs improperly proposed class representatives for the revised proposed classes who were not members of the proposed classes because they received initial allocations in the relevant offering. We also argued that the plaintiffs' continued failure to provide the defendants with a complete picture of the identity, availability, viability, and specific class membership of the proposed class representatives in each of the twenty-six cases at the time they moved for class certification and after was unreasonable and impermissible.

Although motions to strike are rarely granted, on May 13, 2008, Judge Scheindlin issued an Opinion and Order striking the Aftermarket Class allegations in eight cases, and ordering the plaintiffs to provide specified information concerning the representation of the putative classes in eighteen additional cases, after which time the defendants could renew the motion to strike if the plaintiffs' class disclosures were inadequate. Thus by digging into the record and eliminating the possibility of certification of the key class proposed in eight cases through a device infrequently used by defendants, and even less frequently with success, the Simpson

Thacher litigation team reduced the potential exposure in the IPO allocation cases by hundreds of million of dollars, thereby enhancing the defendants' bargaining power in settlement negotiations with the plaintiffs.

In addition to the dismissal of the class allegations in eight cases, the Simpson Thacher litigation team also obtained the only outright dismissal of an entire case in these coordinated actions, taking the lead in 2004 on behalf of all the defendants in demonstrating to the court that the case involving the Numerical Technologies, Inc. IPO was time-barred.

Following a lengthy mediation before the Honorable Dan Weinstein and the Honorable Nicholas H. Politan, in which Simpson Thacher litigation partners Ichel and McLaughlin actively participated, the parties reached an agreement to resolve all 309 cases as against all defendants. The Global Settlement of $586 million, which was submitted to the District Court for preliminary approval in April 2009, represents only a fraction of the billions originally sought by the plaintiffs.

The IPO litigation defense team also asked McLaughlin, whose two-volume treatise on class actions was described this year by the Second Circuit as one of two "authoritative" texts in the area, to take a leading role in the many months-long negotiation and drafting of the Stipulation of Settlement with representatives of the Plaintiffs' Executive Committee, the Issuer Defendants and their scores of insurers, as well as the other Underwriter Defendants.

CASE NAME:
In re Initial Public Offering Securities Litigation

COURT FILED IN:
Southern District of New York

CLIENT NAMES:
JPMorgan Securities Inc., individually and as successor in interest to Hambrecht & Quist LLC; J.P. Morgan Securities, Inc.; Chase Securities Inc.; Bear, Stearns & Co. Inc.; JPMorgan Chase & Co.; The Bear Stearns Companies Inc.; Bear Stearns International Limited; Robert Fleming, individually

LEAD ST&B PARTNERS:
David W. Ichel; Joseph M. McLaughlin

OPPOSING COUNSEL:
Bernstein Liebhard LLP; Milberg LLP

JUDGES:
Hon. Shira A. Scheindlin

RELEVANT CITATIONS:
*In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65 (S.D.N.Y. 2004); *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24 (2d Cir. 2006); *In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92, 2008 U.S. Dist. Lexis 38768 (S.D.N.Y. May 13, 2008)

## FAVORABLE SETTLEMENT IN THE PRINCETON UNIVERSITY FOUNDATION LITIGATION

The *Wall Street Journal* wrote that "*Robertson v. Princeton* may be the most important case higher education has faced over the question of honoring the wishes of a donor." On December 9, 2008, five weeks before a six month trial was set to begin, the *Robertson* litigation was settled on terms overwhelmingly favorable to Simpson Thacher client Princeton University.

In 1961, Marie Robertson bestowed a generous gift on Princeton in the form of shares of A&P stock (then valued at $35 million) to expand and support the graduate program at the Woodrow Wilson School of Public and International Affairs. The gift, made through a foundation established as a non-profit Delaware corporation, called the "Robertson Foundation," was dedicated "to and for the use of" Princeton University. According to the Foundation's Certificate of Incorporation, its purpose was to maintain and support at Princeton and as part of the Woodrow Wilson School a graduate school in which men and women dedicated to public service may prepare themselves for careers in government service (particularly federal government service in areas concerned with international relations and affairs). In accordance with the donor's wishes (and as required by tax law), the Foundation was controlled by a majority of Princeton-designated trustees.

More than forty years later, in July 2002, the three Robertson family members who are family-designated trustees of the Robertson Foundation sued Princeton University and the Foundation's four Princeton-designated trustees in the Superior Court of New Jersey, Chancery Division. Through the litigation, the plaintiffs sought to redefine some of the fundamental principles of academic freedom and American philanthropy. The plaintiffs demanded that Princeton return certain educational support paid to the university by the Robertson Foundation based upon their allegation, among others, that certain payments were made for purposes not consistent with the terms of the Foundation's Certificate of Incorporation. The plaintiffs aimed to narrow the Foundation mission from the one agreed to by Princeton and the plaintiffs' parents in 1961, and to take control of the Foundation themselves. Specifically, the plaintiffs claimed that the Woodrow Wilson School graduate program supported by Foundation funds should have been limited to a kind of vocational program, designed for the sole purpose of training students for positions in the State Department and a handful of other federal government departments that graduates would be expected to fill upon graduation. The lawsuit also sought to reverse the decision by the Robertson Foundation Board in 2002 to appoint the Princeton University Investment Company as the Foundation's investment manager. Ultimately, the plaintiffs wanted the Woodrow Wilson School of Princeton University replaced by another institution as the beneficiary of the Foundation's assets, which were valued in excess of $900 million as of June 2008.

On October 25, 2007—more than seven years into the litigation—the court issued more than 300 pages of decisions concerning seven motions for partial summary judgment made by both Princeton and the plaintiffs. The summary judgment rulings significantly narrowed the issues remaining to be tried.

Based on the strength of the summary judgment rulings, Princeton's defense team prepared for trial, poring over thousands of potential trial exhibits and deposition transcripts, and drafting numerous motions *in limine* and witness scripts. After numerous failed attempts to resolve the case, [and settlement demands hundreds of millions of dollars apart], the parties reached out for one last effort. On December 9, 2008, the parties reached a settlement pursuant to which Princeton agreed to pay $50 million to a new foundation that will support the preparation of students for government service, and another $40 million to reimburse legal fees. The most important aspect of the settlement was that the Robertson Foundation was dissolved, and Princeton gained complete control over the use of the remaining funds.

**Case Name:**
William Robertson, *et al.* v. Princeton University, *et al.*

**Court Filed in:**
Superior Court of New Jersey, Chancery Division, Mercer County

**Client Names:**
Princeton University; Shirley M. Tilghman; Peter Wendell; Stephen Oxman

**Lead ST&B Partners:**
Kenneth R. Logan (Of Counsel); Victoria B. Bjorklund; Mark G. Cunha

**Co-Counsel:**
Lowenstein Sandler PC

**Opposing Counsel:**
Shartsis Friese LLP; Blank Rome LLP; Milbank, Tweed, Hadley & McCloy LLP

**Judge:**
Hon. Maria M. Sypek

## RESOLUTION FOR TD BANK IN TD BANK/COMMERCE BANCORP MERGER-RELATED LITIGATION

Simpson Thacher obtained a favorable settlement for The Toronto Dominion Bank ("TD Bank") in one of the hardest-fought series of merger litigations in memory.

On October 2, 2007, TD Bank announced an agreement to acquire Commerce Bancorp, Inc., subject to regulatory and Commerce shareholder approval. The consideration offered in the merger was approximately 75% stock and 25% cash, and based on TD Bank's share price at the announcement of the merger had an aggregate value of $8.5 billion.

A little over two weeks later, Pearl E. Lucas, a Commerce shareholder who had previously filed a derivative action against former-Commerce CEO Vernon W. Hill, II, filed a motion in the District of New Jersey for leave to amend her complaint to assert causes of action for breaches of fiduciary duty and unjust enrichment against Commerce and its directors in connection with the merger. In December 2007, Lucas filed an amended complaint including these additional causes of action, and a putative class action claim that TD Bank aided and abetted the Commerce Board members' alleged breaches of fiduciary duty.

In addition, upon announcement of the merger, ten putative class action complaints on behalf of Commerce stockholders (in addition to the Lucas complaint) were filed in New Jersey Superior Court. Each putative class action challenged the merger and asserted breaches of fiduciary duty by Commerce's directors in the negotiation and approval of the merger. Most of the ten complaints also asserted causes of action for aiding and abetting breaches of fiduciary duty by a TD Bank entity. The New Jersey Superior Court consolidated the state action and appointed Louisiana Municipal Police Employees' Retirement System ("LAMPERS") and Police & Fire Retirement System of the City of Detroit ("City of Detroit") as lead plaintiffs. At our request, the New Jersey Superior Court thereafter stayed the state action in favor of the federal action.

LAMPERS and City of Detroit immediately filed a new complaint in the District Court of New Jersey, alleging essentially the same class action claims already asserted in the Lucas federal action, and which was consolidated for pretrial purposes with the Lucas action.

The parties to the federal action agreed to expedited discovery and briefing schedules on Plaintiff Lucas' motion for injunctive relief, which sought to block the shareholder vote on the merger. The parties engaged in expedited discovery, including the production of approximately thousands of pages of documents by Commerce and TD Bank and depositions of the key negotiators of the merger agreement.

In late December 2007 the parties to the federal action participated in a mediation supervised by retired United States Magistrate Judge Joel Rosen in an effort to resolve both the derivative and purported class claims asserted in the federal action. On December 31, 2007, the parties reached an agreement-in-principle under which they agreed, *inter alia*, that the definitive proxy statement would include certain additional disclosures. The parties also agreed to modify the merger agreement to (i) reduce the termination fee from $332 million to $255 million and (ii) reduce to one year an agreed fifteen-month period following termination during which the termination fee would be payable if Commerce agreed to another acquisition proposal.

Days after the January 2, 2008 announcement of the settlement, two plaintiffs from the state court action (the "Intervenors"), sought to topple the settlement, seeking leave in federal court to file a complaint-in-intervention, to obtain expedited discovery, and to schedule an expedited preliminary injunction hearing. We fended off the attempt, as Judge Kugler denied the application in every single respect, even denying the *pro hac vice* applications of Intervenors' out-of-state counsel, Robbins Umeda & Fink, LLP.

On January 22, 2008, Intervenors filed a notice of appeal, in which they characterized the District Court's orders "final." On January 25, 2008, the District Court issued an order clarifying its earlier orders, clarifying that its ruling was not final not otherwise appealable.

The Intervenors persisted, filing on the same day an emergency motion for stay and for injunctive relief in the Third Circuit. The motion sought a "stay," expedited discovery, fast-track review of the District Court's denial of their proposed complaint-in-intervention, and reversal of the District Court's denial of their out-of-state counsel's pro hac vice applications. Intervenors also raised a hodgepodge of jurisdictional arguments.

Days later, the Third Circuit Court directed TD Bank and Commerce to submit their jurisdictional response and respond to the merits of Intervenors' motion in five days. Hoping to knock the Intervenors out of court at the threshold, we requested permission to brief the jurisdictional issues before responding to Intervenors' motion. The Third Circuit declined, requiring responses to all issue in two days based on the "emergency" nature of the Intervenors' filing. Simpson Thacher had 48 hours to research, draft and file two separate appellate briefs addressing numerous issues.

On February 1, 2008, the Third Circuit issued a ruling entirely in our favor, dismissing Intervenors' appeal for lack of jurisdiction, and also along with their emergency motion for a stay and injunctive relief. Undeterred, three days later and approximately 24 hours before the Commerce shareholder vote on the merger, Intervenors sought rehearing of the order dismissing their appeal for lack of jurisdiction, essentially rearguing their jurisdictional claims and the merits of their emergency motion. Because Intervenors indicated that they wished to file exhibits along with the petition, a motion was required. They stumbled, never filing this motion, and the petition was not docketed. On February 6 the Commerce shareholders approved the merger, which closed on March 31.

Believing the Intervenors' appeal and emergency motion had not been filed in good faith, we moved in the Third Circuit for an award of damages incurred in responding to frivolous filings. In a rare sanctions award, the Third Circuit granted our motion, finding that both the appeal and emergency motion were frivolous and instructed Intervenors to pay TD Bank and Commerce the requested damages.

Intervenors refused to go down without a fight, submitting an objection to the proposed settlement. We promptly served deposition notices on the two intervenors, and sought discovery related to their stockholdings. Intervenors' counsel moved to quash the deposition notices, relief the District Court rejected. Intervenors then failed to appear for their scheduled depositions, and withdrew their objections to the settlement the same day.

On May 9, 2008, the District Court held a hearing on the final settlement, and approved the settlement same day.

### CASE NAME:
Lucas v. Hill, et al.

### COURT FILED IN:
District of New Jersey

### CLIENT NAME:
The Toronto-Dominion Bank

### LEAD ST&B PARTNERS:
Michael J. Chepiga; Lynn K. Neuner

### OPPOSING COUNSEL:
Barrack Rodos & Bacine; Bernstein Litowitz Berger & Grossmann LLP; Greenfield & Goodman LLC; Motley Rice LLC; Pashman Stein; Robbins Umeda & Fink, LLP; Trujillo Rodriguez & Richards, LLC

### JUDGE:
Hon. Robert B. Kugler

## SETTLEMENT FOR AIG IN THE NEWMONT LITIGATION

Newmont is one of the world's biggest gold producers, and the Yanacocha mine in rural Peru is the largest and most profitable gold mine in Latin America. When Newmont was sued by over a thousand Peruvian villagers following a mercury spill near the Yanacocha gold mine, AIG stepped up to the plate to defend the lawsuits under Newmont's insurance policy. To square off against the villagers (who were represented by the plaintiffs' lawyers featured in the movie Erin Brockovich), AIG appointed a nationally recognized defense firm with broad experience in "toxic tort" cases. The match was set—except that Newmont wanted to cut AIG out of the defense of the case and use its own counsel instead (at AIG's expense), even though the insurance policy gave AIG the right to select counsel and control the defense.

AIG and Newmont reached a deal in January 2005 to resolve the impasse: AIG's appointed counsel would be lead counsel, with Newmont's chosen lawyers serving as co-counsel. The deal provided that AIG would pay all fees incurred by lead counsel, plus fees for any work by Newmont's chosen lawyers if the work in question was requested by lead counsel and was otherwise appropriate (e.g., non-duplicative, etc.). Under this arrangement, lead counsel billed AIG directly, while Newmont agreed to separately submit any invoices from co-counsel that fell within the parameters of the parties' reimbursement agreement.

As trial on the villagers' claims approached, everything seemed to be proceeding nicely. AIG was receiving significant monthly bills from lead counsel, and Newmont was funding the work of its additional counsel. Then, just before trial was about to begin, Newmont started to submit years of defense invoices ultimately totaling many millions of dollars in additional defense fees and costs. While Newmont attempted to conceal the details of the work for which it was asking to have AIG pay, it soon became clear that Newmont had directed its chosen lawyers to take over the defense of the case (in violation of the agreement it struck with AIG in January 2005). When AIG questioned the charges it was being asked to pay, Newmont promptly filed a lawsuit accusing AIG of "bad faith."

AIG asked Los Angeles-based litigation partners Seth A. Ribner and Chet A. Kronenberg to take on the new "bad faith" lawsuit and get to the bottom of what had happened. A team of associates from the Firm's Los Angeles office was assembled and intensive discovery soon began. When the Simpson Thacher litigation team zeroed in on the central question of whether Newmont had ever actually allowed AIG's appointed counsel to lead the defense, Newmont adopted a foot-dragging, run-out-the-clock strategy. Among other things, Newmont claimed "attorney-client privilege" for every communication between Newmont and the attorneys who had supplanted AIG-appointed lead counsel—even though these were the very communications that were necessary to determine whether Newmont satisfied the parties' agreement concerning the appointment of lead counsel, and constituted the work for which Newmont was demanding "reimbursement."

Judge Herbert Stern rebuffed Newmont's efforts to hide the truth. Granting the Simpson Thacher litigation team's motion to compel, he ruled that Newmont had waived any applicable privileges and ordered Newmont to come clean by producing the work product for which it was trying to make AIG pay. Newmont stonewalled, first by seeking leave to appeal to the Colorado Supreme Court (which denied Newmont's request), and then by refusing to instruct its California-based counsel to comply with the court's order.

Judge Stern halted Newmont's recalcitrance by ordering Newmont and its counsel to appear and show cause why sanctions should not be imposed. Newmont quickly capitulated and settled the case against AIG for a fraction of the defense fees at issue.

# Significant Settlements

### Case Name:
Newmont Mining Co. v. National Union Fire Ins. Co.

### Court Filed in:
Colorado District Court for the City and County of Denver

### Client Names:
AIG affiliates National Union Fire Insurance Co. of Pittsburgh, PA and AIG Domestic Claims, Inc.

### Lead ST&B Partners:
Seth A. Ribner; Chet A. Kronenberg

### Opposing Counsel:
Featherstone Petrie DeSisto LLP

### Judge:
Hon. Herbert Stern

## FAVORABLE SETTLEMENT FOR VIRGIN ATLANTIC IN PASSENGER AIRFARE FUEL SURCHARGE ANTITRUST CLASS ACTION

In 2008, we enabled Virgin Atlantic Airways Ltd. to successfully resolve a massive multi-district class action lawsuit in the Northern District of California, involving several million U.S. and U.K. class members. The class action consolidated more than a hundred purported class actions filed in numerous U.S. federal district courts against Virgin Atlantic and other airlines, arising out of investigations by the United States Department of Justice ("DOJ") and the United Kingdom Office of Fair Trade ("OFT") into an alleged conspiracy between Virgin Atlantic and British Airways to fix fuel surcharges on long-haul passenger airline flights.

The DOJ and OFT investigations began when Virgin Atlantic, acting on our Firm's advice, made simultaneous applications in March 2006 under both the DOJ's and OFT's corporate leniency programs for immunity from prosecution for antitrust violations. Under the guidance of the Simpson Thacher litigation team, Virgin Atlantic fully cooperated with the regulatory authorities' investigations and obtained immunity from prosecution by the DOJ and the OFT, protecting Virgin Atlantic and its employees from any criminal fines or penalties. British Airways, Virgin Atlantic's alleged co-conspirator, pled guilty to antitrust violations and was fined $300 million by the U.S. government and £121.5 million by the U.K. government respectively, amounting to total fines of nearly $550 million.

The class plaintiffs in the consolidated action alleged, among other things, that Virgin Atlantic and British Airways participated in an unlawful conspiracy to restrain trade by allegedly agreeing to fix prices of long-haul passenger fares or components thereof, including fuel surcharges. During the course of 2007 and early 2008, the Simpson Thacher litigation team engaged in significant hard fought negotiations and mediations with the plaintiffs, which included the introduction of expert economic analyses and submissions regarding numerous legal issues.

While Virgin Atlantic acknowledged that it participated in certain communications regarding fuel surcharges in violation of the antitrust laws, significant issues remained in dispute between the parties, including: the U.S. district court's jurisdiction over claims arising under foreign laws, the amount of antitrust injury (damages) resulting from the alleged conspiracy, and whether class certification was possible under U.S. and U.K. laws for the proposed plaintiff classes. Notably, Virgin Atlantic's successful participation in the DOJ's leniency program eliminated the plaintiffs' entitlement to seek treble damages in the civil action.

In February 2008, Virgin Atlantic entered into a multi-national settlement under which passengers who purchased tickets for commercial long-haul flights in both the United States and the United Kingdom during the alleged conspiracy period could receive a refund amounting to a third of the fuel surcharge they paid on those flights, in return for releasing their claims against the defendants. The settlement resolved the claims of both U.S. and U.K. class members alike. The district court rejected several objections and granted final approval to the settlement in September 2008, and an appeal from that ruling has since been dismissed.

The Simpson Thacher litigation team's guidance in connection with Virgin Atlantic's participation in the DOJ and OFT leniency programs, and settlement of the class action, have enabled the company to avoid hundreds of millions of dollars in potential fines and civil damages.

CASE NAME:
In re International Air Transportation Surcharge Antitrust Litigation

COURT FILED IN:
Northern District of California

CLIENT NAME:
Virgin Atlantic Airways Ltd.

LEAD ST&B PARTNERS:
David E. Vann Jr.; Charles E. Koob (Of Counsel)

OPPOSING COUNSEL:
Hausfeld LLP; Cotchett, Pitre & McCarthy

JUDGE:
Hon. Charles R. Breyer

# Other Significant Results

## SETTLEMENT OF AUCTION RATE SECURITIES-RELATED GOVERNMENT INVESTIGATIONS FOR JPMORGAN CHASE

In February 2008, unprecedented paralysis in the credit markets caused the widespread failure of certain auctions for auction rate securities (ARS). ARS are municipal bonds, corporate bonds and preferred stocks with interest rates or dividend yields that are periodically reset through auctions. Our client, JPMorgan Chase & Co. and certain of its affiliates (collectively, "JPMorgan"), underwrote, sold, and managed auctions for ARS. JPMorgan and other broker-dealers, also placed bids to purchase ARS in auctions they managed, which had the effect of supporting certain auctions that would otherwise fail. In February 2008, JPMorgan and other broker-dealers stopped their practice of routinely placing bids in auctions. As a result, many ARS auctions failed, leaving certain investors unable to sell their securities.

Following the widespread failure of ARS auctions in February 2008, a number of government agencies—including the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), and multiple state agencies—opened investigations into the role that financial institutions, including JPMorgan Chase, played in supporting ARS auctions. We have actively guided JPMorgan Chase through these investigations, and successfully negotiated comprehensive settlements in principle with the New York State Attorney General's office and the Office of Financial Regulations of the State of Florida (on behalf of the North American Securities Administrator's Association). These settlements involve a buy back of ARS from certain investors and the repayment of fees to various issuers.

In addition to representing JPMorgan Chase in connection with these regulatory requests and government investigations, the Simpson Thacher litigation team is also defending JPMorgan Chase in civil antitrust and securities fraud lawsuits arising out of the collapse of the ARS market. We are currently defending JPMorgan Chase in two putative class actions in the Southern District of New York alleging that our client and several other broker-dealers (including Citigroup, UBS, Merrill Lynch, Morgan Stanley, Lehman, Bank of America, Wachovia, Goldman, Royal Bank of Canada and Deutsche Bank) violated Section 1 of the Sherman Act by colluding to cause a perception among investors that ARS were a liquid, cash equivalent investment, and by ultimately agreeing to cease their support for auctions in February 2008. We recently took a lead role in drafting a motion to dismiss the antitrust actions on behalf of all the defendants in those two actions, which is fully briefed and pending before the court.

We also represent JPMorgan Chase in private securities actions alleging that the company failed to fully disclose the nature and risks of ARS, or the existence of certain practices that purportedly manipulated the market and led to its failure. We recently filed motions to dismiss two securities actions pending in the Eastern District of Pennsylvania. Another action, pending in the Southern District of New York, was recently dismissed without prejudice and the plaintiffs have indicated their intent to file an amended complaint.

### CLIENT NAME:

JPMorgan Chase & Co. and certain of its affiliates

### LEAD ST&B PARTNERS:

Thomas C. Rice; Peter H. Bresnan; Jonathan K. Youngwood

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Pending securities cases:

### CASE NAMES:

Fulton Financial Advisors, N.A. v. J.P. Morgan Securities, Inc.; Fulton Financial Advisors, N.A. v. Bear, Stearns & Co., Inc. n/k/a J.P. Morgan Securities, Inc.

### COURT FILED IN:

Eastern District of Pennsylvania

### OPPOSING COUNSEL:

Hodgson Russ LLP; Blakinger, Byler & Thomas, P.C.

### JUDGE:

Hon. Joel H. Slomsky

Pending antitrust cases:

CASE NAMES:
Mayfield, *et al.* v. Citigroup, Inc., *et al.* and Mayor and City Council of Baltimore, Maryland v. Citigroup, Inc., *et al.*

COURT FILED IN:
Southern District of New York

OPPOSING COUNSEL:
Hausfeld LLP; Susman Godfrey LLP; Steyer Lowenthal Boodrookas Alvarez & Smith LLP; Heins Mills & Olson PLC

JUDGE:
Hon. Barbara S. Jones

## ANTITRUST CLEARANCE FOR SIRIUS SATELLITE RADIO'S $13 BILLION MERGER OF EQUALS WITH XM SATELLITE RADIO

Satellite radio has been one of the most significant innovations in the delivery of entertainment within the last decade, and XM Satellite Radio and our client Sirius Satellite Radio have been the two trailblazers for this technology. In 2007, the two companies agreed to combine in a merger of equals valued at $13 billion, creating a nationwide audio entertainment provider with fourteen million subscribers and combined 2006 revenues of $1.5 billion.

The Sirius-XM merger was the subject of tremendous media and public attention. Congress showed unusual interest in the deal, holding four separate hearings to examine the merger. In addition, the National Association of Broadcasters ("NAB"), one of Washington's most well funded interest groups, which represents terrestrial radio stations, launched an all-out assault on the deal, spending millions of dollars on advertisements and studies that opposed the transaction.

From an antitrust perspective, the key issue was whether satellite radio is in a market of its own, or whether satellite radio providers compete against other audio entertainment outlets, such as traditional AM/FM radio, internet radio, iPods, MP3 players, and emerging wireless technologies.

Our antitrust team represented Sirius before the Department of Justice ("DOJ"), the Federal Communications Commission ("FCC"), and in Congressional hearings. On behalf of Sirius, we argued that a combined Sirius-XM satellite radio entity would have no monopoly power because the company would face fierce competition from a wide and growing range of audio entertainment providers.

On March 24, 2008, the DOJ approved the Sirius-XM merger and FCC approval followed shortly thereafter, resulting in a historic transaction that combines the only two providers of satellite radio service in the United States. In a total and complete victory for our client, the DOJ adopted our key arguments that the transaction would not result in a monopoly.

On July 29, 2008, the merger was completed.

CASE NAME:
Merger of XM Satellite Radio Holdings Inc. with Sirius Satellite Radio Inc., DOJ File No. 60-513111-001

TRIBUNALS:
U.S. DOJ, Antitrust Division; FCC

CLIENT NAME:
Sirius Satellite Radio

LEAD ST&B PARTNERS:
Kevin J. Arquit; Aimee H. Goldstein

OPPOSING COUNSEL:
N/A

JUDGE:
N/A

## BREAKING THE REALOGY HEX TO ENABLE A VITAL TENDER OFFER FOR NEFF CORPORATION

The Firm's complete victory in a complex litigation that unfolded in a compressed time frame illustrates its litigators' understanding that if you have an important point to make, don't try to be subtle or clever. Simplify and press the point.

With debt maturities looming and the cash refinancing market remaining severely constrained for non-investment-grade issuers, 2008 saw a sharp increase in debt exchange offers and debt repurchases. The stakes of these complex transactions often rise to "bet the company" status because the combination of debt trading at a deep discount to par value and an increased role of hedge funds in the corporate bond market has spurred a wave of aggressive efforts by activist bondholders and their asset managers to declare a default under protective covenants and accelerate the entire debt, making principal and any accrued interest immediately due and payable, sometimes at a premium. The consequences of breaching a covenant that permits acceleration can be catastrophic if the company lacks the liquidity or financial resources to repurchase the debt.

In this bruising economy, Neff Corp., the nation's largest equipment rental company, understood that if it could not conserve cash by reducing outstanding debt and de-leveraging its balance sheet, the only alternative left was bankruptcy. On November 17, 2008, the Board announced a tender offer, through which holders of unsecured notes could exchange them for term loans under the company's existing first lien credit agreement. Scheduled to close on December 16, 2008, the proposed tender offer would allow Neff to eliminate approximately $100 million in debt from its books.

On the Friday afternoon before a Monday tender offer closing, Neff's second lienholders rushed to New York State Court with an order to show cause, seeking a temporary restraining order to enjoin the closing. The plaintiffs alleged that their rights under an intercreditor agreement and their second lien credit agreement with Neff were being violated because the tender offer would permit unsecured creditors to "leapfrog" them in priority and acquire first lien status. The allegations were carefully crafted to parallel the successful challenge in Delaware that debtholders made in 2005 against Realogy Corp.'s highly-publicized debt exchange offer, which indeed had parallels to the Neff offer.

Led by Joseph M. McLaughlin, the Simpson Thacher litigation team captured the initiative. Refusing to settle for immediate assurance the offer would close, the Simpson team prepared a written submission and oral argument for Monday morning. The Simpson team crafted arguments that not only was the tender offer permissible under the applicable agreements, but the second lienholders had manufactured the supposed emergency by sitting on their rights until the last minute.

McLaughlin understood that there could be appeal to plaintiffs' position that a temporary restraining order was appropriate as a measure to preserve the status quo while the court had more time to consider the underlying claims. The credit agreements and the intercreditor agreement were voluminous, and the court would have only a short time to familiarize itself with them. McLaughlin therefore recognized that his chief task would be to distill the sprawling record—and the focus of the court's attention—to its essentials and demonstrate that nothing further was needed for Neff to prevail.

The intercreditor agreement offered the answer. It specifically provided that the terms of the first lien credit agreement could be modified without the consent of the second lien creditors provided that the first lien indebtedness, in the aggregate, did not exceed $467.5 million. It was indisputable that this cap would not be breached by the tender offer.

At the hearing, McLaughlin repeatedly directed the court's attention to the fact that the plaintiff second lien lenders agreed going into their investment to be subordinate to up to $467,500,000 in First Lien debt, and there was no allegation in the Complaint that they would now be subordinate to more than that amount. The court agreed and declined to enjoin the tender offer, allowing it to close the same day.

By preventing the plaintiffs from obtaining a temporary restraining order, the Simpson Thacher litigation team's presentation not only facilitated the closing of the tender offer and the continued viability of the company, but also convinced the plaintiffs that notwithstanding the litigation-derailed Reaology exchange offer, Neff would not settle this exchange offer case and would press its defenses on the merits. The plaintiffs voluntarily discontinued the action on March 12, 2009—a total win for Neff and the Simpson Thacher litigation team.

CASE NAME:
Springfield Associates, LLC v. Neff Corp.

COURT FILED IN:
New York Supreme Court

CLIENT NAME:
Neff Corporation

LEAD ST&B PARTNER:
Joseph M. McLaughlin

OPPOSING COUNSEL:
Kleinberg Kaplan Wolff & Cohen, P.C.; Stutman Treister & Glatt, P.C.

JUDGE:
Hon. Barbara R. Kapnick

## MOTOR COACH INDUSTRIES' SUCCESSFUL EMERGENCE FROM CHAPTER 11

Motor Coach Industries, headquartered in Schaumburg, Illinois, is the largest assembler of intercity motor coaches in the United States and in the Canadian tour, charter and commuter transit sectors. Motor Coach is also a leading supplier of aftermarket parts for most motor coach makes and models.

In 2008, Motor Coach faced a challenging operating environment. The rise in prices of raw materials, and unfavorable changes in the Canadian/U.S. dollar exchange rate, increased operating costs at the same time that the deteriorating economy made it increasingly difficult to sell coaches. More urgently, the unprecedented dislocation of the credit markets made it impossible for Motor Coach to refinance significant debt obligations that came due in December 2008.

In order to provide Motor Coach with new financing with a minimum amount of disruption to its operations, a multi-disciplinary team of Simpson Thacher attorneys worked to restructure the company's debt obligations and implement a pre-negotiated plan of reorganization that would allow Motor Coach to emerge from bankruptcy in a few short months. The centerpiece of the plan of reorganization was a $200 million investment by funds managed by Franklin Mutual Advisers, LLC, which also converted their existing debt into common stock. The plan also included hundreds of millions of dollars in exit financing from certain of Motor Coach's existing lenders. The plan was opposed by many parties in interest, most vigorously by Motor Coach's unsecured creditors' committee, whose constituents would receive no recovery under the plan.

Motor Coach filed for Chapter 11 protection on September 15, 2008 in the Bankruptcy Court for the District of Delaware. The Simpson Thacher litigation team appeared before the Bankruptcy Court the next day, seeking approval of numerous "first day" motions allowing Motor Coach to continue its normal business operations while in bankruptcy. Judge Brendan L. Shannon granted all of Motor Coach's motions, including a motion seeking approval of debtor-in-possession financing that included the extraordinary relief of allowing priority treatment for (also called a "roll-up" of) all of Motor Coach's prepetition first lien debt and more than half of Motor Coach's prepetition second lien debt. Our litigation team successfully rebuffed the Creditors' Committee subsequent challenge to the roll-up, and received final authority from the Bankruptcy Court to proceed with the debtor-in-possession financing. We also successfully opposed challenges by various pre-petition litigation adversaries to prohibit Motor Coach's payment of certain key vendors and to strip Motor Coach of its authorization to pay customers' warranty claims (which would have severely hampered its ability to attract and maintain its customers).

According to the terms of its plan of reorganization, Motor Coach was required to have its plan "confirmed" by the Bankruptcy Court in the short span of four months. The Creditors' Committee vigorously objected to Motor Coach's plan of reorganization, raising numerous challenges including that it under-valued Motor Coach and unfairly discriminated among equally-situated creditors. After months of litigation, and on the eve of the confirmation hearing, the Creditors' Committee requested an emergency hearing before the Bankruptcy Court at which it withdrew its expert reports and abandoned all of its factual arguments, preserving only a single legal challenge to the plan.

On January 28, 2009 the Bankruptcy Court held a confirmation hearing at which it overruled the Creditors' Committee's remaining objection and confirmed the Company's plan of reorganization. The Simpson Thacher litigation team also successfully opposed the Creditors' Committee's emergency motions to the District Court of Delaware and the Third Circuit for a stay of the confirmation order, resulting in the Creditors' Committee voluntarily withdrawing its appeal of the confirmation order.

CASE NAME:
In re: Motor Coach Industries International, Inc., et al.

TRIBUNAL:
District of Delaware

CLIENT NAMES:
Motor Coach Industries International, Inc.; MCII Holdings, Inc.; MCI Financial Services, Inc.; MCI Sales and Service, Inc.; MCI Service Parts, Inc.; MCII Financial Services II, Inc.; Motor Coach Industries, Inc.

LEAD ST&B PARTNERS:
Kenneth S. Ziman; Mary Beth Forshaw; Bryce L. Friedman

OPPOSING COUNSEL:
Brown Rudnick

JUDGE:
Hon. Brendan L. Shannon

## WIN FOR SCHERING-PLOUGH IN FALSE ADVERTISING LITIGATION

In late 2007, Schering-Plough was preparing for a significant change in the competitive marketplace for one of its most successful over-the-counter medications, the allergy medicine Claritin®. Zyrtec®, an antihistamine marketed by McNeil Consumer Healthcare, was set to become available over-the-counter in January 2008. Zyrtec® would compete directly with Claritin® for the first time since 2002, and McNeil was expected to launch an aggressive marketing campaign to promote the product.

In turn, Schering-Plough initiated its own marketing campaign to educate consumers about the comparative benefits of Claritin®. One of these benefits is that Claritin®, unlike Zyrtec® and many other competing allergy medications, is non-drowsy when taken as directed. Schering-Plough's print and television advertisements explaining this advantage to consumers were launched in December 2007.

In response, McNeil immediately filed a challenge with the National Advertising Division ("NAD"), a self-regulatory dispute resolution panel, and with the television networks. Critically, McNeil argued that the advertising overstated the incidence and severity of drowsiness associated with Zyrtec®, and produced a consumer survey purporting to support its claims. McNeil's direct challenge of a core attribute of the Claritin® products—the advantage on the issue of drowsiness—was intended to score a significant blow to Claritin®'s ability to compete.

Over the next six months, the Simpson Thacher litigation team aggressively defended the Claritin® advertising campaign, recognizing that a loss before the NAD or any of the networks would significantly hamper future comparative advertising for the Claritin® products. With the assistance of an expert in the field, the Simpson Thacher litigation team systematically dismantled the McNeil consumer survey for its poor design and heavy reliance on leading questions. McNeil responded by adding an ever-increasing number of claims to its challenge, ultimately arguing that a thirty-second television advertisement conveyed five false messages to consumers on topics ranging from driving safety to Claritin®'s Food and Drug Administration designation as a non-drowsy medication.

On June 30, 2008, the NAD rejected McNeil's challenge and agreed that Schering-Plough's claims were fully substantiated by the clinical evidence. The NAD found further that the Claritin® advertisements accurately conveyed the incidence and severity of drowsiness associated with Zyrtec®, and rejected McNeil's consumer survey as critically flawed and unreliable. In June and July 2008, the four television networks independently determined that the Claritin® advertising was fully substantiated and would not be pulled from the air.

We also represented Schering-Plough in an advertising challenge of McNeil's Zyrtec® advertising before the NAD and the television networks. The Schering-Plough challenge contended that McNeil's television and print advertisements misleadingly portrayed the amount of time Claritin® and Zyrtec® take to start working, and falsely suggested that Zyrtec®, but not Claritin®, is effective for 24 hours. In another success for the Simpson Thacher litigation team and client Schering-Plough, the NAD agreed that McNeil's advertisements were misleading in certain respects regarding the products' onset of action and Claritin®'s 24-hour effectiveness. The NAD requested modifications to McNeil's print advertisements. The networks similarly required changes to the "super" used in the advertising to clarify misleading aspects of the message.

The entrance of Zyrtec® into the over-the-counter market in 2008 was a significant event in which the education of consumers through marketing and advertising played a critical role. The defense of Schering-Plough's advertising, and challenges to McNeil's advertising, marked significant wins. We continue to represent Schering-Plough in its marketing of consumer healthcare products.

# Other Significant Results

### Case Name:
Claritin and Zyrtec Advertising Challenges

### Tribunal:
National Advertising Division

### Client Name:
Schering-Plough Consumer HealthCare, Inc.

### Lead ST&B Partners:
Robert A. Bourque; Lynn K. Neuner

### Opposing counsel:
Kramer Levin Naftalis & Frankel, LLP; Venable LLP

### Judge:
N/A

# Noteworthy New Matters

## SUBPRIME LITIGATION: REPRESENTING THE UNDERWRITERS IN CLASS ACTIONS RELATED TO FANNIE MAE AND FREDDIE MAC

Simpson Thacher's litigation department has been at the forefront of defending financial institutions against an onslaught of litigations filed in the wake of the subprime mortgage crisis. A perfect example is the Firm's representation of a number underwriters—including Banc of America Securities LLC; Barclays Capital Inc.; Bear, Stearns & Co.; Citigroup Global Markets Inc.; Credit Suisse Securities LLC; Deutsche Bank Securities Inc.; E*Trade Securities LLC; FTN Financial Securities Corp.; Goldman, Sachs & Co.; J.P. Morgan Securities Inc.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; Morgan Stanley & Co. Incorporated; UBS Securities LLC; Wachovia Capital Markets, LLC; Wachovia Securities, LLC; and Wells Fargo Securities LLC—in securities actions relating to securities issued by the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation (Freddie Mac).

Fannie Mae and Freddie Mac, companies focused solely on the home mortgage market, were among the companies hit hardest by the worldwide financial crisis that came to a head in 2008. Fannie Mae and Freddie Mac were chartered by Congress in 1970 to provide liquidity, stability, and affordability to the U.S. housing market, and thus had much exposure to subprime and Alt-A mortgages when the housing market cratered. This crippling exposure led the U.S. government to put Fannie Mae and Freddie Mac under the conservatorship of the Federal Housing Finance Agency ("FHFA") on September 6, 2008.

In the two years prior to the appointment of the FHFA as conservator, Fannie Mae and Freddie Mac each sold over $10 billion worth of preferred stock and approximately $340 billion in debt securities. Since the appointment of the conservator, plaintiffs seeking to recoup their losses have filed numerous lawsuits involving such Fannie Mae and Freddie Mac securities, including putative federal securities class actions and actions alleging solely state law claims, against the companies, their officers and directors, and the underwriters of their securities offerings.

Few firms have the breadth and depth of experience that Simpson Thacher's securities litigators have built through their involvement in the most significant securities matters of the past decade. Accordingly, instead of opting to hire separate counsel, the underwriters of the Fannie Mae and Freddie Mac securities offerings—all well-known financial institutions—requested that Simpson Thacher's securities litigation team represent them collectively in defending against the Fannie Mae and Freddie Mac lawsuits.

The lawsuits generally allege that the underwriters violated federal and/or state securities laws and that they made, caused to be issued, or failed to reasonably investigate false or misleading statements in offering materials for, or in connection with the purchase or sale of, various Fannie Mae- or Freddie Mac-issued securities. The alleged misstatements concern the financial health of Fannie Mae and Freddie Mac during the period leading up to the federal government's placement of Fannie Mae and Freddie Mac under conservatorship in September 2008.

Together with counsel for the other defendants, the Simpson Thacher litigation team successfully obtained consolidation and transfer of the various Fannie Mae-related cases to the Southern District of New York. On February 11, 2009, the Judicial Panel on Multidistrict Litigation transferred four Fannie Mae litigations to the Southern District of New York for coordination with the fifteen cases already pending before the Honorable Gerard E. Lynch. The Panel has also transferred and consolidated three additional cases, and the Simpson Thacher team is currently seeking transfer of another case filed recently in Massachusetts. In the Massachusetts case, the Simpson Thacher litigators filed a motion to stay the action pending the transfer decision by the Panel, arguing that it would be wasteful and inefficient to brief motions to dismiss in both the transferor and transferee courts. The Simpson Thacher team is currently briefing a motion to dismiss the consolidated action in the Southern District of New York.

In the Freddie Mac cases, the Simpson Thacher team obtained the consolidation of two of the actions pending in the Southern District of New York and filed a motion with the Judicial Panel on Multidistrict Litigation requesting transfer of an additional action filed in Massachusetts and consolidation of all cases in the Southern District of New York. That motion was heard in Portland, Oregon on July 30, 2009. The Simpson Thacher team also filed a motion to stay the Freddie Mac action brought in Massachusetts pending the transfer decision by the Panel and is briefing a motion to dismiss one of the New York actions.

The Simpson Thacher litigation team intends to mount a vigorous defense to the Fannie Mae and Freddie Mac investors' claims.

CLIENT NAMES:
Banc of America Securities LLC; Barclays Capital Inc.; Bear, Stearns & Co.; Citigroup Global Markets Inc.; Deutsche Bank Securities Inc.; E*Trade Securities LLC; FTN Financial Securities Corp.; Goldman, Sachs & Co.; J.P. Morgan Securities Inc.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; Morgan Stanley & Co. Incorporated; UBS Securities LLC; Wachovia Capital Markets, LLC; Wells Fargo Securities LLC

Cases Related to Fannie Mae:

LEAD ST&B PARTNERS:
Michael J. Chepiga; Paul C. Curnin; George Wang

CASE NAME:
In re Fannie Mae 2008 Sec. Litig., No. 08-cv-7831

TRIBUNAL:
Southern District of New York

JUDGE:
Hon. Gerard E. Lynch

OPPOSING COUNSEL:
Kaplan Fox Labaton Sucharow; Berman DeValerio

CASE NAME:
Comprehensive Investment Services, Inc. v. Mudd, et al., No. 09-cv-01444

TRIBUNAL:
Southern District of Texas

JUDGE:
Hon. Lee H. Rosenthal

OPPOSING COUNSEL:
Greer, Herz & Adams, L.L.P.

CASE NAME:
Liberty Mutual Insurance Company, et al. v. Goldman, Sachs & Co., et al., No. 09-cv-10668

TRIBUNAL:
District of Massachusetts

JUDGE:
Hon. Nancy Gertner

OPPOSING COUNSEL:
Kaplan, Miller & Ciresi LLP

Cases Related to Freddie Mac:

LEAD ST&B PARTNERS:
Michael J. Chepiga; Bruce D. Angiolillo; George Wang

CASE NAME:
Jacoby v. Syron, et al., No. 08-cv-10894

TRIBUNAL:
Southern District of New York

JUDGE:
Hon. Miriam Goldman Cedarbaum

OPPOSING COUNSEL:
Pomerantz Haudek Block Grossman & Gross LLP

CASE NAME:
Kreysar, et al. v. Syron, et al., No. 09-cv-832

TRIBUNAL:
Southern District of New York

JUDGE:
Hon. Miriam Goldman Cedarbaum

OPPOSING COUNSEL:
Cotchett, Pitre & McCarthy

CASE NAME:
Liberty Mutual Insurance Company, et al. v. Goldman, Sachs & Co., No. 09-cv-10670

TRIBUNAL:
District of Massachusetts

JUDGE:
Hon. Nancy Gertner

OPPOSING COUNSEL:
Kaplan, Miller & Ciresi LLP

## MADOFF-RELATED LITIGATION: DEFENDING FAIRFIELD GREENWICH GROUP ON MULTIPLE FRONTS

Since the revelation of Bernard M. Madoff's massive $60 billion Ponzi scheme, entities and individuals associated with Fairfield Greenwich Group ("FGG") have been the target of a variety of federal and state litigations, including purported class actions and derivative suits brought on behalf of FGG investors, as well as numerous governmental investigations, including an administrative complaint filed by the Massachusetts Securities Division.

A former chairman of the NASDAQ stock exchange and founder of the Wall Street firm Bernard L. Madoff Investment Securities LLC ("BLMIS"), Bernie Madoff has pleaded guilty to crimes related to his operation of a Ponzi scheme that has been described as the largest investor fraud ever committed by a single person. Federal prosecutors have estimated client losses of almost $65 billion. On June 29, 2009, Madoff was sentenced to 150 years in prison.

Investors in FGG-affiliated funds invested over $7 billion dollars with BLMIS. In addition to those investments, FGG principals and employees lost substantial amounts of their own money in the Madoff fraud.

FGG-associated entities and individuals have faced a challenging array of Madoff-related government investigations and purported class actions and derivative litigations in multiple fora across the United States. A single, integrated team of Simpson Thacher litigators led by partners Mark G. Cunha, Michael J. Chepiga, Mark J. Stein, and Peter E. Kazanoff is handling these matters on FGG's behalf.

Among the many claims at issue are allegations that FGG misrepresented the nature of the investments in Madoff-related funds, and breached its fiduciary duties associated with the management of those funds by failing to perform adequate due diligence. In fact, FGG engaged in substantial and ongoing diligence and risk management practices that were consistent with its representations to investors, and met or exceeded contemporaneous industry customs, practices and standards. Despite its due diligence efforts, the FGG management companies and their employees were unaware of the fraud, and shocked and appalled by it. Like their investors, FGG representatives and employees were victims in Madoff's scheme.

On January 15, 2009, Simpson Thacher scored a significant victory on behalf of FGG entities and associated individuals when Judge Victor Marrero of the Southern District of New York denied an application by a plaintiff in the purported class action for a preliminary injunction seeking: (a) to freeze the FGG defendants' assets, (b) an accounting, and (c) expedited discovery. Judge Marrero agreed with the arguments advanced by the Simpson Thacher litigation team, including that the plaintiff had failed to demonstrate irreparable harm if an injunction were not granted, did not show a likelihood of success on the merits of the plaintiff's claims, and that the balance of hardships in granting an injunction did not weigh in the plaintiff's favor.

Simpson Thacher continues to represent FGG entities and associated individuals in six ongoing governmental investigations, nine cases pending in the Southern District of New York (most of which have been consolidated into a single action), one case filed in the Northern District of Texas, and one case filed in Florida state court.

### CASE NAMES:

Anwar et al. v. Fairfield Greenwich Limited, et al.; Pacific West Health Medical Center Inc. Employees Retirement Trust v. Fairfield Greenwich Group et al.; Inter-American Trust, et al., v. Fairfield Greenwich Limited, et al.; Laor, et al. v. Fairfield Greenwich Group et al.; The Knight Services Holdings Limited v. Fairfield Greenwich Group et al.; David I. Ferber SEP IRA v. Fairfield Greenwich Group et al.; Frank E. Pierce and Frank E. Pierce IRA v. Fairfield Greenwich Group et al.; Bhatia et al. v. Standard Chartered International (USA) Ltd., et al.; Zohar et al. v. Fairfield Greenwich Group, et al.; Emilio H. Chavez Jr. and the Chavez Estate v. Fairfield Greenwich Group et al.

### COURTS FILED IN:

Southern District of New York; Florida Circuit Court, Miami-Dade County; Northern District of Texas; Commonwealth Of Massachusetts Securities Division

### CLIENT NAMES:

Entities and individuals associated with the Fairfield Greenwich Group

LEAD ST&B PARTNERS:
Mark G. Cunha; Michael J. Chepiga; Mark J. Stein; Peter E. Kazanoff

OPPOSING COUNSEL:
Boies, Schiller & Flexner LLP; Lovell Stewart Halebian LLP; Wolf Popper, LLP; Cohen, Milstein, Sellers & Toll, P.L.L.C.; Wolf Haldenstein Adler Freeman & Herz LLP; Milberg LLP; Crowell & Moring LLP; Rivero Mestre & Castro LLP; Zwerling, Schachter & Zwerling, LLP; SEC; Baker Hostetler; Seward & Kissel LLP; Conyers Dill & Pearman; Enforcement Section of the Mass. Securities Div. of the Office of the Sec. of the Commonwealth

JUDGES:
Hon. Victor Marrero; Hon. Theodore H. Katz

RELEVANT CITATION:
Anwar, et al. v. Fairfield Greenwich Limited, et al., No. 09 Civ. 0118, 2009 WL 1181278 (S.D.N.Y., May 1, 2009)

## REPRESENTATION OF LEHMAN BROTHERS DIRECTORS AND OFFICERS

In June 2008, the collapse of Bear Stearns was a still-recent memory, but the collapse of Lehman Brothers, the hurried sale of Merrill Lynch and the federal government's seizure of Washington Mutual were yet to come. On June 18, 2008, with Lehman's stock price having fallen by well more than half since the start of the year, a putative Lehman stockholder class action was filed in the Southern District of New York, asserting Section 10(b) violations by Lehman and its senior officers. The next day, a putative class action asserting federal securities claims was filed in state court against a Lehman subsidiary that sponsored mortgage-backed securities. And the day after that, a putative ERISA class action was filed against Lehman and its directors. Additional ERISA actions followed, as did a second putative class action on behalf of purchasers of Lehman-sponsored mortgage-backed securities. Simpson Thacher entered appearances on behalf of defendants in these cases, removed to federal court those that had been filed in state court, and awaited the appointment of lead plaintiffs and the filing of consolidated amended complaints. Then, on September 15, 2008, Lehman declared bankruptcy and the floodgates opened.

Since the bankruptcy filing, Lehman bondholders have commenced over a dozen more putative class actions against the company's directors and officers. Additionally, over a dozen state pension funds and local government entities have sued Lehman directors and officers in state courts across the country. Other defendants in some of these actions include underwriters of Lehman securities offerings, Lehman's former independent auditor and, in the case of the mortgage-backed securities cases, ratings agencies. Simpson Thacher, representing individual defendants, has coordinated a defense strategy with counsel for these co-defendants and with counsel for certain former Lehman officers who are separately represented.

Under Simpson Thacher's leadership, every case filed in state court – to date, 12 in California, 6 in Arkansas, 1 in New Jersey and 1 in Washington – has been removed to federal court. These cases typically assert claims under the Securities Act of 1933, which normally are not removable. However, the firm has invoked the statute permitting removal of claims related to bankruptcies. Although over a dozen plaintiffs filed motions to remand, Simpson Thacher successfully opposed each one.

Simpson Thacher also has successfully moved the Judicial Panel on Multidistrict Litigation to transfer the cases either filed in or removed to federal court to the Southern District of New York. To date, the Panel has not denied a single application for transfer. All of the cases in the Southern District of New York are progressing in coordination before Judge Lewis A. Kaplan. Including transferred cases, there now are approximately 40 Lehman cases before Judge Kaplan.

In the bondholders' and stockholders' consolidated putative class action, Simpson Thacher has taken the lead in briefing the defendants' motion to dismiss the Section 10(b) and related control-person claims. Briefing is now nearly complete on that motion, as well as on a motion to dismiss the claims against directors and officers in the mortgage-backed securities cases. Briefing is already completed on Simpson Thacher's motion to dismiss the ERISA consolidated class action. Judge Kaplan has stayed the non-class actions pending his decision on these motions to dismiss. The court has further ordered that discovery, once it begins, will be coordinated among all the cases that survive motions to dismiss.

Additionally, Simpson Thacher is serving as legal counsel to many Lehman officers in various ongoing investigations. These include several grand jury investigations and a formal SEC investigation, as well as a bankruptcy court-appointed examiner's investigation into the events leading up to the Lehman bankruptcy.

CASE NAME:
In re: Lehman Brothers Securities and ERISA Litigation

COURTS FILED IN:
Southern District of New York.

CLIENT NAMES:
John F. Akers; Roger S. Berlind; Thomas H. Cruikshank; Marsha Johnson Evans; Lana Franks; Sir Christopher Gent; David Goldfarb; Joseph M. Gregory; Edward Grieb; Jerry A. Grundhofer; Roland A. Hernandez; Henry Kaufman; Ian Lowit; John D. Macomber; Richard McKinney; Christopher M. O'Meara; Thomas Russo; Kristine Smith; James J. Sullivan; Samir Tabat; Wendy M. Uvino; Mark Walsh; Mark L. Zusy

LEAD ST&B PARTNERS:
Michael J. Chepiga; Mary Elizabeth McGarry; Jonathan K. Youngwood; Joshua A. Levine

OPPOSING COUNSEL:
Barroway Topaz Kessler Meltzer & Check, LLP; Berger & Montague, P.C.; Bernstein Litowitz Berger & Grossman LLP; Carney Williams Bates Bozeman & Pulliam, PLLC; Cohn, Lifland, Pearlman, Herrman & Knopf, LLC; Cotchett Pitre & McCarthy; Coughlin Stoia Geller Rudman & Robbins LLP; Gainey & McKenna; Pearson Simon Warshaw & Penny, LLP; Wolf Haldenstein Adler Freeman & Herz LLP; and others

JUDGES:
Hon. Lewis A. Kaplan

## CLASS ACTION LITIGATION AGAINST MBIA

On March 11, 2009, Simpson Thacher filed a highly publicized class action complaint on behalf of investments funds managed by Aurelius Capital Management, LP and Fir Tree Partners, which manage billions of dollars of assets for university endowments, public and private pension funds, corporations and other institutions, against MBIA Inc., MBIA Insurance Corp. ("MBIA Insurance"), and MBIA Insurance Corporation of Illinois ("MBIA Illinois") to address a multi-billion dollar fraudulent conveyance transaction orchestrated by the parent company of MBIA Insurance.

As of January 2009, MBIA Insurance was the world's largest "monoline" financial guaranty insurer with two main lines of business: insurance on government bonds and insurance on "structured finance" securities such as residential and commercial mortgage-backed securities, collateralized debt obligations ("CDOs") and other asset backed securities that today are the toxic securities at the very heart of the current worldwide financial crisis. MBIA Insurance had marketed its financial guaranty insurance as providing "triple A" credit enhancement insurance in which buyers of MBIA Insurance protection could look to MBIA Insurance's Triple-A rated balance sheet to back up the bonds and other securities offerings it insured.

Faced with the potential for many billions of dollars of policyholder claims on the $241 billion dollars in "toxic" structured finance securities insured by MBIA Insurance, MBIA Inc.—the parent company of MBIA Insurance—orchestrated a series of "restructuring" transactions that stripped MBIA Insurance of more than $5 billion in assets constituting more than 50% of its assets and more than 40% of its entire claims paying resources. The "restructuring" included transferring away from MBIA Insurance a subsidiary of MBIA Insurance, MBIA Illinois, to the sole ownership of the parent company and then transferring to that transferred-away subsidiary (1) approximately $2 billion dollars through a dividend and stock redemption in which MBIA Insurance received no consideration, and (2) the only potentially viable ongoing line of MBIA Insurance business—U.S. government insurance contracts in which there is little potential for liability and enormous premium revenue. This latter transfer was achieved through a "reinsurance" transaction in which all of the revenue from the entire U.S. government bond business was transferred to the stripped-away MBIA Illinois subsidiary, now renamed National Public Finance Guaranty Corp., with MBIA Insurance remaining liable on the bonds if the National Public Finance Guaranty Corp does not pay the claims. The "restructuring" left MBIA Insurance insolvent and with massive exposure to toxic securities that the Complaint alleges it will never be able to cover.

Upon announcement of the transaction, Moody's and other analysts immediately downgraded the credit ratings of MBIA Insurance to "junk" levels, and numerous credit analysts have questioned the ability of MBIA Insurance to pay its structured finance claims when due. The federal government is one of the largest victims of this fraudulent transaction because of loss sharing arrangements it has entered into with various banks that hold billions of dollars of the "toxic" structured finance securities insured by MBIA Insurance.

Our complaint, brought in the federal district court under the Class Action Fairness Act, claims that the intentional transferring away of billions of dollars in assets necessary to pay claims constitutes not only a fraudulent conveyance, but also a breach of the implied covenant of good faith and fair dealing inherent in the MBIA Insurance policy contracts. The putative class includes, in addition to the Aurelius and Fir Tree plaintiffs, all other holders of the mortgage-backed CDO, other asset backed securities, and foreign government securities that were left behind in MBIA Insurance following the asset-stripping "restructuring." These include investment funds, banks, insurance companies, other institutions and individuals. After we filed the Complaint, two other lawsuits were filed asserting similar claims, one in the Supreme Court—New York County and another in the Delaware Chancery Court.

The MBIA defendants moved to dismiss the complaint, arguing principally that various aspects of the "restructuring" were approved by the New York Superintendent of Insurance, and therefore the sole avenue to challenge the transaction is to appeal that approval in a State Court Article 78 proceeding. The motion to dismiss also asserted that the complaint failed to state valid causes of action for fraudulent conveyance or breach of an implied covenant. We vigorously opposed the motion, arguing that, *inter alia*, the Superintendent approvals were obtained privately with no notice to or opportunity to be heard by Plaintiffs, and therefore that Plaintiffs are entitled to pursue independent claims in a lawsuit against the MBIA defendants. The motion is fully briefed.

This is not the typical contingent fee class action. Our standard fees and costs are being paid by our clients. At the conclusion of the lawsuit, our clients will have the right to seek to recover such payments upon a successful judgment or settlement and we shall have the right to seek an award of additional fees from the court.

CASE NAME:
Aurelius Capital Master, Ltd., *et al.* v. MBIA Inc., *et al.*

COURT FILED IN:
Southern District of New York

CLIENT NAMES:
Aurelius Capital Master, Ltd.; Aurelius Capital Partners, LP; Fir Tree Value Master Fund, L.P.; Fir Tree Capital Opportunity Master Fund, L.P.; Fir Tree Mortgage Opportunity Master Fund, L.P.

LEAD ST&B PARTNERS:
Barry R. Ostrager; David W. Ichel

OPPOSING COUNSEL:
Dewey & LeBouef LLP

JUDGE:
Hon. Richard J. Sullivan

## TITLE INSURANCE ANTITRUST LITIGATION

We represent the Fidelity family of title insurance companies and their parent, Fidelity National Financial, Inc., in fifteen class actions pending in federal courts in twelve states. The actions allege price-fixing of title insurance rates in violation of Section 1 of the Sherman Act. Our clients have a larger share of the relevant market than any other defendant in these litigations, and we have acted as lead counsel in court arguments on behalf of all defendants.

In February 2008, plaintiffs' firms began filing putative class action antitrust suits against the Fidelity family of title insurers as well as other major title insurance companies and various state-licensed rate service organizations. The complaints in these actions allege that the title insurers engaged in a conspiracy to collectively fix title insurance rates charged to consumers in violation of Section 1 of the Sherman Act. A number of the complaints also contain related claims based on state statutory and common law. Taken together, the actions challenge title insurance rate-setting in twelve states, and involve the fees paid for title insurance in nearly every real estate transaction in those states over the last several years. The complaints allege hundreds of millions of dollars in damages (before trebling). As such, a finding of liability would have far-reaching implications for the business practices of title insurers and for the oversight practices of various state insurance departments.

Ultimately, plaintiffs' firms filed more than 70 complaints around the country. We obtained the consolidation of all the cases into fifteen actions in twelve federal district courts, and we moved to dismiss each action. In five of these actions, plaintiffs dismissed their case after we filed our dismissal motion. In another six actions, our motions to dismiss were granted in full—twice with prejudice. We have persuaded courts that the filed rate doctrine, which bars antitrust suits based on rates that have been filed and approved by federal agencies, and the a failure to set forth plausible allegations of a conspiracy in violation of the Sherman Act, preclude plaintiffs' claims. Our motion to dismiss was granted in part in one action, and decisions are pending in the remaining three.

In addition, we have defeated plaintiffs' requests in two actions for discovery as to the meaningful review of proposed title insurance rates filed with the respective state's department of insurance.

### CASE NAME:
Dolan, et al. v. Fidelity National Title Insurance Co., et al.

### COURTS FILED IN:
Eastern District of New York (similar cases filed in multiple other jurisdictions)

### CLIENT NAMES:
Fidelity National Financial, Inc.; Fidelity National Title Insurance Company; Ticor Title Insurance Company; Chicago Title Insurance Company; Commonwealth Land Title Insurance Company; LandAmerica NJ Title Insurance Company; and Lawyers Title Insurance Corporation

### LEAD ST&B PARTNERS:
Barry R. Ostrager; Kevin J. Arquit

### OPPOSING COUNSEL:
Constantine Cannon LLP

### JUDGE:
Hon. Thomas C. Platt

# Significant Pro Bono Achievements

## JUSTICE FOR TAISHAWN B.

In a case referred to the Firm by the Legal Services of New York's Bronx office, litigation associate Agnès Dunogué, under the supervision of partner Joseph M. McLaughlin, recently represented Taishawn B. in a successful appeal from Family Court to the Appellate Division, First Department, which reunited a mother with her children. The Administration for Children's Services ("ACS") charged Taishawn with abusing Kyla, the infant child of Taishawn's boyfriend, Shaun A. Kyla had been seriously injured when shaken by Shaun A. The Family Court nevertheless held Taishawn responsible for Kyla's injuries and also held that Taishawn's two children, Shaun, three years old at the time, and Justin, born during the Family Court proceedings, were "derivatively" abused and neglected, and ordered that they be placed in foster care. We appealed the Family Court's order.

Taishawn had been involved and lived with Kyla's father, Shaun A., who eventually confessed to having shaken Kyla because she would not stop crying. Shaun was charged with first degree assault and endangering the welfare of a minor. He pled guilty and was incarcerated. Despite Taishawn's testimony at trial—corroborated by Shaun A.—that she was not aware of and had nothing to do with Shaun's abuse of Kyla, the Family Court held her responsible for the shaking inflicted by Shaun A. on his daughter and for an unexplained prior tibia fracture with which Kyla was diagnosed. In doing so, the court implicitly found that Taishawn was a person legally responsible for Kyla's care at the time of the abuse, i.e., that she acted as the "functional equivalent of a parent" to Kyla at all relevant times.

After we briefed and argued the case to the Appellate Division, it unanimously reversed the Family Court's order on October 2, 2008, vacating the findings of abuse and neglect against Taishawn. Justice McGuire, joined by Justice Williams, stated in a separate concurrence memorandum that "the findings of abuse and neglect reflect a gross miscarriage of justice." ACS sought leave to appeal the Appellate Division's Order to the Court of Appeals, which we opposed. On January 15, 2009, the Court of Appeals denied ACS's motion.

### CASE NAME:
In re Shaun B., et al.

### COURT FILED IN:
New York Supreme Court, Appellate Division, First Department

### CLIENT NAME:
Taishawn B.

### LEAD ST&B PARTNER:
Joseph M. McLaughlin

### OPPOSING COUNSEL:
Corporation Counsel, New York

### JUDGES:
Hon. Jonathan Lippman (Presiding Justice); Hon. Peter Tom; Hon. Milton L. Williams; Hon. James M. McGuire, Hon. Helen E. Freedman

### RELEVANT CITATIONS:
In re Shaun B., 865 N.Y.S.2d 52 (1st Dept. 2008); In re Shaun B., 901 N.E.2d 1287 (N.Y. 2009)

## NYS COURT OF APPEALS VICTORY FOR CHARTER SCHOOLS ON CONSTITUTIONAL LAW ISSUE

The Firm successfully represented a group of charter schools and two charter school organizations before the New York Court of Appeals (the State's highest appellate court), in obtaining a ruling recognizing constitutional limitations on the State Comptroller's authority to audit charter schools. The case has important policy implications for the charter school movement in New York State.

In 1998, the State Legislature authorized the creation of charter schools to provide "opportunities for teachers, parents, and community members to establish and maintain schools that operate independently of existing schools and school districts." The Legislature was particularly concerned about expanding educational opportunities for the State's large number of at-risk students, many of whom reside in urban school districts with a long history of educational failure. Charter schools in New York City are now among the highest performing schools in the state.

Charter schools are independent public schools governed by their own boards of trustees and subject to extensive oversight by the Board of Regents and other state education officials and agencies. Despite this independence and existing oversight, the Legislature in 2005 directed the Comptroller to undertake fiscal and performance audits of charter schools. The Comptroller then began what the charter schools considered to be overly broad, intrusive and burdensome performance audits, which threatened the charter schools' independence and appeared to be designed to further the political aims of charter school opponents.

The charter schools and their umbrella organizations brought an action to enjoin the Comptroller's audits, arguing that the New York State Constitution places strict limits on the Legislature's authority to direct the Comptroller to audit entities that are not political subdivisions of the state. The trial court ruled in favor of the charter schools, but the Appellate Division reversed. Simpson Thacher partner Joe Wayland was then retained by the charter school organizations to take an appeal to the Court of Appeals. Mr. Wayland previously was the lead trial and appellate lawyer in the Campaign For Fiscal Equity v. State of New York case, in which the Court of Appeals, following a 7-month trial, issued what the New York Times described as a "landmark" ruling that the New York City schools failed to provide a constitutionally adequate education.

The Simpson Thacher team wrote the appellate briefs in the Court of Appeals for the charter schools and Mr. Wayland argued the case before the Court. The Court reversed the Appellate Division 7-0, with a 4 judge majority opinion and two separate concurrences. In the majority decision, the Court recognized that article V, § 1 of the State Constitution expressly limits the Comptroller's audit authority to "political subdivisions" and to "administrative duties" that are "incidental to" the audits of political subdivisions. The Court held that since charter schools not "political subdivisions" and the auditing of charter schools is not an "administrative duty" "incidental to" the audits of public school districts, concluding that "Legislature's delegation of auditing authority over charter schools to the Comptroller violates article V, § 1 of the New York State Constitution."

### CASE NAME:
In the Matter of New York Charter Schools Ass'n, Inc. et al. v. DiNapoli, et al.

### COURT FILED IN:
New York State Court of Appeals

### CLIENT NAMES:
New York Charter Schools Association, Inc.; The New York City Center for Charter School Excellence, Inc.; The Opportunity Charter School; New Heights Academy Charter School; the Renaissance Charter School; International Leadership Charter School; Hellenic Classical Charter School; Harlem Children's Zone Promise Academy Charter School; Harlem Children's Zone Promise Academy II Charter School; John V. Lindsey Wildcat Academy Charter School; Hyde Leadership Charter School; New York Center for Autism Charter School; Brooklyn Charter School; Manhattan Charter School; South Bronx Charter School for International Cultures and the Arts; Community Roots Charter School; Ross Global Academy Charter School

LEAD ST&B PARTNER:
Joseph F. Wayland

OPPOSING COUNSEL:
Office of the New York State Attorney General

JUDGES:
Judges of the New York State Court of Appeals

RELEVANT CITATION:
New York Charter Schools Ass'n, Inc. v. DiNapoli, No. 108, 2009 WL 1789115 (N.Y. June 25, 2009)

## SECURING ACCESS TO HOUSING FOR MENTALLY DISABLED ELDERLY ADULTS

On November 10, 2008, attorneys from Simpson Thacher's Palo Alto office filed with the Superior Court for the State of California a conditional settlement agreement that greatly expands the rights of elderly adults with mental health disabilities to access state licensed housing. The Firm was awarded the 2009 Equal Justice Award from the Law Foundation of Silicon Valley for its achievements in the case.

The settlement is the culmination of nearly three years of litigation. Our Firm partnered with co-counsel at the Law Foundation of Silicon Valley to bring claims on behalf of the California Association of Mental Health Patients' Rights Advocates ("CAMHPRA") against the California Department of Social Services ("DSS") and various state officials. CAMHPRA charged the defendants with disability discrimination, age discrimination, and violations of state and federal due process rights. These claims were based on regulations that, as drafted and applied, denied certain elderly adults with mental health disabilities meaningful access to facilities designed to accommodate such individuals.

Initially, DSS contended that the charged discrimination either did not exist, or merely reflected isolated misapplications of regulations that were fair and nondiscriminatory on their face. During the course of the ensuing litigation, however, Simpson Thacher litigation associates, working with the Law Foundation, took nearly a dozen depositions and conducted a statewide fact investigation that revealed extensive problems arising from the regulations. In this hard-fought litigation, CAMHPRA won every single dispositive, procedural, and discovery motion put before the court. All of these motions were argued by junior and mid-level associates in our Firm's Palo Alto office. Finally, a month before opening arguments were scheduled to begin, the defendants agreed to sit down to discuss settlement with CAMHPRA.

Facing the prospect of an imminent trial against a dedicated, enthusiastic, and organized trial team, the Attorney General for the State of California and DSS agreed to settle. The settlement effectively gave CAMHPRA everything it sought in bringing the case: a substantial rewrite of the offending regulations, extensive changes to the DSS policy manuals, and DSS's agreement to undertake significant re-training of personnel to ensure that the newly amended regulations are implemented consistently across the state. DSS is required under the settlement to make the newly-amended regulations effective by no later than August 2009. At such time, the conditions to settlement will be met and the settlement will be final.

### CASE NAME:
Cal. Ass'n of Mental Health Patients' Rights Advocates v. Allenby

### COURT FILED IN:
California Superior Court

### CLIENT NAME:
California Association of Mental Health Patients' Rights Advocates

### LEAD ST&B PARTNERS:
Alexis S. Coll-Very; Patrick E. King

### CO-COUNSEL:
Public Interest Law Firm of the Law Foundation of Silicon Valley; Mental Health Advocacy Project of the Law Foundation of Silicon Valley

### OPPOSING COUNSEL:
Office of the Attorney General of the State of California

### JUDGE:
Hon. Neal A. Cabrinha

## FIGHTING FOR AN IMMIGRANT DETAINEE'S RIGHT TO ADEQUATE MEDICAL CARE

In an exceedingly challenging case, litigation associate Ryan A. Kane and litigation partner Joseph F. Tringali represented an immigrant with HIV/AIDS who was detained by the United States for over four years. Prior to our client's detention, "Mark" was healthy and had an undetectable HIV viral load. While Mark was in detention, however, the government provided him with substandard medical care, including placing him on inappropriate medications, failing to supply his life-saving HIV medications on numerous occasions, and keeping him on failing drug regimens until he nearly developed full-blown AIDS. As a result of the government's inadequate medical care, Mark developed resistance to a number of the most useful HIV medications, which reduced his future treatment options and lowered his chances for long-term survival.

On his behalf, we filed a Federal Tort Claim Act lawsuit against the United States seeking damages as a result of the government's negligent medical treatment. The case involved extensive discovery regarding the medical treatment Mark received while in detention. In the course of discovery, we deposed the physician who primarily treated Mark while he was in detention, as well as a number of government officials, regarding the government's policies for providing medical care to immigrant detainees. We also conducted expert discovery and retained an HIV specialist who opined on the inadequacy of the medical treatment Mark received in detention.

The lawsuit presented a number of novel legal issues. This was one of the first suits to seek damages for substandard medical care which rendered an individual's HIV virus more resistant to medications and, in turn, decreased his or her chance for survival. This was also one of the first cases to address whether the government is responsible for the medical treatment of immigrant detainees while they are detained in local and state facilities pursuant to agreements between the federal government and those facilities.

At the close of discovery, the court conducted a settlement conference between the parties, and the United States government ultimately offered a settlement which Mark accepted. He is very pleased with the outcome of the lawsuit, and his health has improved substantially now that he is out of federal detention and receiving proper medical treatment.

### CASE NAME:
Brown v. United States

### COURT FILED IN:
U.S. District Court, Eastern District of New York

### CLIENT NAME:
"Mark"

### LEAD ST&B PARTNER:
Joseph F. Tringali

### OPPOSING COUNSEL:
Office of the U.S. Attorney, Eastern District of New York

### JUDGES:
Hon. Sandra L. Townes; Hon. Steven M. Gold (Magistrate Judge)

## ASYLUM SUCCESS FOR GUINEAN VICTIM OF FEMALE GENITAL MUTILATION

When our client "Sarah" first came to us in November of 2008, she could barely meet our eyes. She had just turned eighteen, but she lacked the vivaciousness of her age. Over the next several months, as we worked to earn her trust, Sarah shared her story with us, in hopes of applying for asylum.

Sarah was born in Guinea, West Africa, and had been subjected to female genital mutilation when she was only five or six years old, in accordance with the customs of her ethnic group. She could still recall screaming as she was held down in the woods and cut that night. The cutting was to prepare her for marriage, and in keeping with custom, she was promised to a man nearly thirty years her senior when she was still just a child. While growing in Guinea, Sarah was outgoing, charismatic and confident. But when she turned thirteen, she was forced to marry a strange man decades older than her who lived miles away in the United States.

Against her will, Sarah was sent to Delaware to live with this stranger as his wife. He presented himself to the public as her father, and enrolled her in the ninth grade of her local public high school. Though she did not speak English, school quickly became a haven for Sarah, because behind closed doors at home, her new husband raped and beat her on a nearly daily basis. Sarah begged him to stop, but he threatened to kill her if she ever sought help.

After three years of continual abuse, Sarah fled from him. She was alone and with scarcely enough money for bus fare, at the age of seventeen. Sarah went to live with friends in Maryland, and managed to graduate from high school that year. But when her husband located her, she fled once again, this time to New York.

Simpson Thacher litigation associates Chantale Fiebig and Colleen Gilg, with supervision and guidance from litigation department chair Barry R. Ostrager, used the compelling facts of her story to prepare her asylum application. Though Sarah had suffered past persecution in Guinea and was fearful of the repercussions of having escaped from her husband if ever she were forced to return—meeting two of the elements for an asylum application—she faced the technical bar of not having applied for asylum during her first year in the United States.

The asylum officer considering her case also raised an additional reservation: despite her husband's abuse, Sarah never went to the police. After the Simpson Thacher litigation team filed supplemental submissions addressing this issue, Sarah was granted asylum in May 2009.

Once Sarah was granted asylum, she once again allowed herself to dream of the future. She has applied for community college and will enroll in classes this coming fall.

### CASE NAME:
In re Application for Asylum, Withholding of Removal, and Relief Under the Convention Against Torture for "Sarah"

### VENUE FILED IN:
Newark Asylum Office

### CLIENT NAME:
"Sarah"

### LEAD ST&B PARTNER:
Barry R. Ostrager

### OPPOSING COUNSEL:
N/A

### JUDGE:
N/A

# Most Significant Loss

## THE AMERICA'S CUP LITIGATION

With a rich heritage and tradition dating back to 1851, the America's Cup is the most prestigious regatta and match race in the sport of sailing, and the oldest active trophy in international sport. When the modern Olympic Games were first held in 1896, the America's Cup was already 45 years old. The America's Cup has also been called the most difficult trophy in sport to win: in the more than 150 years since the first America's Cup race off the coast of England, only three nations other than the United States have won the trophy. In recent times, international interest in the America's Cup has grown to where it is now one of the world's most popular sporting events, with only the Olympics and the World Cup drawing larger audiences.

The America's Cup is governed by a Deed of Gift that dates back to the 1850s. The Deed of Gift provides rules on, inter alia, who can challenge for the Cup and how the challenge must be made. The Deed of Gift requires that a yacht club seeking to race for the America's Cup must qualify as an "organized Yacht Club … having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both." Under the Deed, the previous winning yacht club hosts the event and works with the first challenging club to make the rules for the event.

Following its victory in the 32nd America's Cup in 2007, the Swiss yacht club Société Nautique de Genève ("SNG") accepted a challenge for the America's Cup from a Spanish yacht club, Club Náutico Español de Vela ("CNEV"). Shortly thereafter, Golden Gate Yacht Club ("GGYC") filed an action in New York Supreme Court, New York County, alleging that CNEV was not qualified under the Deed of Gift to challenge for the Cup because, among other things, it had not held an annual regatta prior to lodging its challenge. SNG argued that CNEV was qualified to challenge, and with respect to the "having" requirement, would have held two annual regattas by the time the 33rd America's Cup is scheduled to take place.

In November 2007, prior to our Firm's involvement in the case, the New York Supreme Court, New York County agreed with GGYC, disqualified CNEV as the Challenger of Record, and also declared GGYC the valid Challenger of Record. Following this ruling, SNG retained Simpson Thacher as its new counsel and proceeded to ready the case for appeal. The appeal was argued before the Appellate Division, First Department on June 5, 2008.

In a 3-2 ruling on July 29, 2008, the Appellate Division reversed the trial court and ruled in our client's favor, holding that CNEV is the correct Challenger of Record for the 33rd America's Cup and that the race take place not less than ten months from the date of the decision. The Appellate Division held that the Deed of Gift does not require a challenger to hold an annual regatta prior to lodging a challenge, and that CNEV is a properly constituted yacht club. In a decision dated April 2, 2009, the New York Court of Appeals reversed the Appellate Division's ruling, holding that an annual regatta must be held prior to lodging a challenge.

In related litigation, Team New Zealand ("TNZ") brought two actions against SNG, one in New York Supreme Court, New York County alleging breach of contract and breach of fiduciary duty, and the other in the Southern District of New York alleging antitrust violations under the Sherman and Clayton Acts. Both complaints related to SNG's acceptance of CNEV. We successfully removed the breach of contract and breach of fiduciary duty cases to federal court and moved to dismiss the cases under the Federal Arbitration Act in favor of arbitration based on a broad arbitration provision in the rules governing the next America's Cup. That motion was argued in September 2008, and was favorably received by Judge William H. Pauley. Rather than receive a negative decision upholding the removal and ordering arbitration, TNZ chose to voluntarily dismiss both its cases with prejudice without requiring any concessions from our client.

While the New York Court of Appeals ultimately reinstated GGYC as the challenger of record for the 33rd America's Cup, our Firm's victory before the Appellate Division meant that SNG was not forced to compete on an expedited basis against GGYC and the unprecedently large catamaran they unveiled over the course of the litigation.

On July 30, 2009, we achieved as we go to press an unprecedented victory for SNG, convincing a New York State court that the Deed of Gift does not prohibit the use on our client's yacht of engines to trim sails and move water ballast, the first time in the 158-year history of the America's Cup a competitor has been allowed use of non-manual power.

### CASE NAME:

Golden Gate Yacht Club v. Société Nautique de Genève

### COURTS FILED IN:

New York Supreme Court, New York County; appealed first to the Appellate Division, First Department and subsequently to the New York Court of Appeals; Southern District of New York

### CLIENT NAME:

Société Nautique de Geneve

### LEAD ST&B PARTNERS:

Barry R. Ostrager; Jonathan K. Youngwood; George S. Wang

### OPPOSING COUNSEL:

Latham & Watkins, LLP; Boies, Schiller & Flexner LLP

### JUDGES:

Hon. Herman J. Cahn; Hon. Shirley W. Kornreich; Hon. William H. Pauley III; First Department Justices; Court of Appeals Justices

### RELEVANT CITATIONS:

Golden Gate Yacht Club v. Société Nautique de Genève, 907 N.E.2d 276 (N.Y. 2009); Golden Gate Yacht Club v. Société Nautique de Genève, 865 N.Y.S.2d 1 (1st Dep't 2008); Golden Gate Yacht Club v. Société Nautique de Genève, 856 N.Y.S.2d 24 (N.Y. Sup. Ct. 2007)

# Supplemental Information

## Statistics and Data

### SIZE OF LITIGATION DEPARTMENT AS OF JUNE 30, 2009

| | |
|---|---|
| Partners: | 51 |
| Counsel: | 7 |
| Associates: | 187 |
| Total attorneys | 245 |
| Number of attorneys in entire Firm: | 837 |
| Size of litigation department relative to entire Firm (%): | 29.3% |
| Number of partners in entire Firm: | 181 |
| Number of litigation partners relative to all partners (%): | 28.2% |

### PERCENTAGE CHANGE IN SIZE OF LITIGATION DEPARTMENT SINCE JUNE 30, 2007

| | |
|---|---|
| Partners: | 4% (2 partners more) |
| Counsel: | -29% (2 counsel fewer) |
| Associates: | -8% (17 associates fewer) |
| Total change in size of litigation department relative to entire firm between June 30, 2007 and June 30, 2009 (%) | - 5.7% |

### NEW PARTNERS

| | |
|---|---|
| Total new partners in 2009 | 7 |
| New litigation partner (effective Jan. 1, 2009; named from within Firm) | Joshua A. Levine (New York) |
| Percentage of new litigation partners among all new partners in 2009 | 14% |
| Total new partners in 2008 | 9 |
| New litigation partner (effective Jan. 1, 2008; named from within Firm) | Tyler B. Robinson (London) |
| New pro bono litigation counsel (effective Oct. 6, 2008) | Harlene Katzman (New York) |
| Percentage of new litigation partners among all new partners in 2008 | 11% |

### DEPARTMENT REVENUE

| | |
|---|---|
| Litigation department revenue as a percentage of Firm revenue in 2008 | 34% |
| Projected litigation department revenue as a percentage of Firm revenue in 2009 | 38% |

## All Cases and Arbitrations Tried to Verdict

| CASE NAME | COURT | WON OR LOST |
|---|---|---|
| Daiichi Sankyo Company, Ltd., et al. v. Mylan Pharmaceuticals Inc., et al. | District of New Jersey | Won |
| 3Com Corporation v. D-Link Systems, Inc. | Northern District of California | Won |
| Hanwha/ORIX/Macquarie v. KDIC | Arbitration | Won |
| Centre Life Ins. Co. v. AXA Equitable Life Ins. Co. | Arbitration | Won |
| Gigli v. Moody's Investors Serv., Inc.; Blos v. Moody's Investors Serv., Inc.; Rodriguez Lois v. Moody's Latin America; Schneider v. Moody's Latin America; Lijtenstein v. Moody's Investors Serv., Inc.; Gen. Tunipar S.A. v. Moody's Investors Serv., Inc.; Baywell v. Moody's Investors Serv. Inc.; Lijtenstein v. Moody's Latin America | Uruguay Civil Court for the First Circuit; Uruguay Civil Court for the Fifth Circuit; Uruguay Civil Court for the Ninth Circuit; Uruguay Civil Court for the Eighteenth Circuit; Uruguay Bankruptcy Court of the First Circuit; Uruguay Bankruptcy Court of the Second Circuit; Uruguay Administrative Court of the Second Circuit | Won |
| In re Lyondell Chemical Company, et al. | Bankruptcy Court for the Southern District of New York | Won |
| In re Application for Asylum, Withholding of Removal, and Relief Under the Convention Against Torture for [Name Withheld] | Immigration Court, New York, New York | Won |
| In re Application for Asylum, Withholding of Removal, and Relief Under the Convention Against Torture for [Name Withheld] | Immigration Court, Newark, New Jersey | Won |
| In re Application for Asylum, Withholding of Removal, and Relief Under the Convention Against Torture for [Name Withheld] | Immigration Court, Newark, New Jersey | Won |
| Joseph v. U.S. Attorney General, et al. | District of New Jersey | Lost |
| Johnson v. Mount Morris Park Community Improvement Association | Civil Court of the City of New York, Small Claims Part | Won |

## All Partners Who Tried Cases to Verdict

| PARTNER NAME | CASE |
|---|---|
| Robert A. Bourque | Daiichi Sankyo Company, Ltd., et al. v. Mylan Pharmaceuticals Inc., et al. |
| Mary Beth Forshaw | Hanwha/ORIX/Macquarie v. KDIC |
| Henry B. Gutman | 3Com Corporation v. D-Link Systems, Inc.<br><br>Daiichi Sankyo Company, Ltd., et al. v. Mylan Pharmaceuticals Inc., et al. |
| John J. Kerr, Jr. | Hanwha/ORIX/Macquarie v. KDIC |
| Kerry L. Konrad | 3Com Corporation v. D-Link Systems, Inc. |
| Linda H. Martin | Hanwha/ORIX/Macquarie v. KDIC<br><br>Centre Life Ins. Co. v. AXA Equitable Life Ins. Co.<br><br>In re Lyondell Chemical Company, et al. |
| Barry R. Ostrager | Hanwha/ORIX/Macquarie v. KDIC<br><br>Centre Life Ins. Co. v. AXA Equitable Life Ins. Co. |
| Robert H. Smit | Gigli v. Moody's Investors Serv., Inc.; Blos v. Moody's Investors Serv., Inc.; Rodriguez Lois v. Moody's Latin America; Schneider v. Moody's Latin America; Lijtenstein v. Moody's Investors Serv., Inc.; Gen. Tunipar S.A. v. Moody's Investors Serv., Inc.; Baywell v. Moody's Investors Serv. Inc.; Lijtenstein v. Moody's Latin America<br><br>Hanwha/ORIX/Macquarie v. KDIC |

## Five Clients Who Came to the Firm Through a Litigation Matter

Fairfield Greenwich Group

Paul, Weiss, Rifkind, Wharton & Garrison LLP *

Cisco Systems, Inc.

Stanley O'Neal

Société Nautique de Genève

* We respectfully request that our representation of Paul, Weiss not be referred to in any publication.

## Client References

| NAME | TITLE | ADDRESS | TELEPHONE | EMAIL |
|---|---|---|---|---|
| **JPMORGAN CHASE** | | | | |
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| Michael A. O'Connor | Vice President and Assistant General Counsel | One Chase Manhattan Plaza, 26th Floor New York, NY 10081 | 212-552-1693 | michael.a.oconnor@chase.com |
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| **MASTERCARD INTERNATIONAL INCORPORATED** | | | | |
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| **SWISS REINSURANCE COMPANY** | | | | |
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## Client References (continued)

| NAME | TITLE | ADDRESS | TELEPHONE | EMAIL |
|---|---|---|---|---|
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| Julie Petrini | Vice President; Corporate Counsel | 350 Campus Drive Marlborough, MA 01752 | 508-323-5000 | julie_petrini@3com.com |

## Litigation Support Information

| | |
|---|---|
| Software used by Firm to manage discovery documents and transcripts or to help map out a case | Discovery: Concordance in conjunction with Ipro, as well as several ASP solutions such as: Applied Discovery, Attenex, E-Direct by AlphaLIT, Lextranet, Ringtail and Stratify.<br><br>Transcripts: LiveNote<br><br>In addition, our litigation department routinely uses SharePoint to organize and share key case information and documents and transcripts among the members of a litigation team. |
| Primary coding and scanning vendors or litigation support service bureaus used by the Firm | EQD, Merrill, RVM, Scarab Consulting |
| Primary electronic evidence providers used by the Firm | FTI Consulting, Navigant Consulting |

# Appendix: Lead Counsel Contact Information

## Significant Pretrial Achievements

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **AGAINST-THE-ODDS VICTORIES IN THE ARGENTINE PENSION ASSET LITIGATION** | | | |
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| | Robert Edward Grossman | (212) 408-5236 | rgrossman@chadbourne.com |
| Skadden, Arps, Slate, Meagher & Flom LLP | Timothy G. Nelson | (212) 735-2193 | timothy.g.nelson@skadden.com |
| | Marco E. Schnabl | (212) 735-2312 | marco.schnabl@skadden.com |
| **TURNAROUND DISMISSAL FOR EQUITAS IN INSURANCE-RELATED ANTITRUST LITIGATION** | | | |
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| | Arman Y. Oruc | (202) 636-5599 | aoruc@stblaw.com |
| Cahill Gordon & Reindel LLP | Edward P. Krugman | (212) 701-3506 | ekrugman@cahill.com |
| **DISMISSAL OF SHAREHOLDER SUITS CHALLENGING BLACKSTONE'S $26 BILLION ACQUISITION OF HILTON HOTELS** | | | |
| Simpson Thacher & Bartlett LLP | Bruce D. Angiolillo | (212) 455-2000 | bangiolillo@stblaw.com |
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## Significant Pretrial Achievements (continued)

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **MAJOR ANTITRUST LITIGATION AVERTED WITH EARLY DISMISSAL FOR STAPLES** | | | |
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| | William G. Caldes | (215) 496-0300 | bcaldes@srkw-law.com |
| **TWO WINS FOR DAIICHI SANKYO IN TWO WEEKS** | | | |
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| Katten Muchin Rosenman LLP | Robert B. Breisblatt | (312) 902-5480 | robert.breisblatt@kattenlaw.com. |

## Significant Trial Achievements

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **A LITIGATION TURNAROUND CULMINATES IN AN OUTSTANDING JURY VERDICT FOR 3COM CORPORATION** | | | |
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| **LEADING THE PLANT DEFENSE GROUP THROUGH AN ONGOING TRIAL** | | | |
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## Significant Trial Achievements (continued)

| Firm | Name | Telephone | Email |
|---|---|---|---|
| **EXTRAORDINARY RESOLUTION FOR TRAVELERS IN THE AMERICAN OPTICAL TRIAL** | | | |
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| **SUCCESSFUL ENFORCEMENT OF PHARMACEUTICAL PATENT RIGHTS FOR DAIICHI SANKYO** | | | |
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| **INTERNATIONAL LIABILITY PROTECTION FOR MOODY'S** | | | |
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## Significant Appellate Achievements

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| **ESTABLISHING LANDMARK PRECEDENT REGARDING ASBESTOS CLAIMS** | | | |
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| **SIMPSON THACHER OBTAINS REVERSAL AND DISMISSAL ON APPEAL FOR CLIENT BOND, SCHOENECK & KING ON MALPRACTICE CLAIMS SUSTAINED BY TRIAL COURT** | | | |
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## Significant Appellate Achievements (continued)

| Firm | Name | Telephone | Email |
|---|---|---|---|
| **CONTINUED SUCCESSFUL DEFENSE OF JPMORGAN CHASE IN THE ENRON LITIGATIONS** | | | |
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| Weiss & Lurie | Joseph H. Weiss | (212) 682-3025 | jweiss@weisslurie.com |
| **BREAKING THE HEXION HEX FOR BLACKSTONE** | | | |
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| Akin Gump Strauss Hauer & Feld LLP | R. Laurence Macon | (214) 969-2800 | lmacon@akingump.com |
| **FIFTH CIRCUIT VICTORY FOR EXPRESS SCRIPTS IN RX.COM LITIGATION** | | | |
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## Significant Arbitration Achievements

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|---|---|---|---|
| **THE HANWHA ARBITRATION** | | | |
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| Shearman & Sterling | Henry Weisburg | (212) 848-4193 | hweisburg@shearman.com |
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## Significant Arbitration Achievements (continued)

### SUCCESSFUL REINSURANCE ARBITRATION FOR AXA EQUITABLE

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### SUCCESSFUL RESOLUTION OF THE FIRST EVER INTERNATIONAL ARBITRATIONS FOR THE DOMINICAN REPUBLIC

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### THE ITT INDUSTRIES ARBITRATION

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### 9/11-RELATED ARBITRATION FOR FRENCH REINSURANCE GIANT SCOR

| FIRM | NAME | TELEPHONE | EMAIL |
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## Significant Supreme Court Matters

### SUPREME COURT VICTORY FOR TRAVELERS IN HISTORIC ASBESTOS CASE

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## Significant Supreme Court Matters (continued)

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **PRESERVING ONLINE ACCESS TO FREELANCERS' WORK** | | | |
| Simpson Thacher & Bartlett LLP | Henry B. Gutman | (212) 455-2000 | hgutman@stblaw.com |
| N/A | Prof. Deborah Jones Merritt, The Ohio State University Moritz College of Law | (614) 688-4039 | merritt.52@osu.edu |
| **DEFENDING A DEATH ROW INMATE'S RIGHT TO A FAIR TRIAL** | | | |
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| Office of the Attorney General of Texas | James C. Ho Solicitor General of Texas | (512) 936-1700 | james.ho@oag.state.tx.us |
| **HONORING THE SIXTH AMENDMENT'S RIGHT TO CONFRONTATION** | | | |
| Simpson Thacher & Bartlett LLP | Michael D. Kibler | (310) 407-7515 | mdkibler@stblaw.com |
| **DEFENDING THE FIRST AMENDMENT'S PROTECTION OF BOOKS CONTAINING POLITICAL SPEECH** | | | |
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## Significant Settlements

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **SUCCESSFUL RESOLUTION OF THE IPO ALLOCATION LITIGATION CASES** | | | |
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| **FAVORABLE SETTLEMENT IN THE PRINCETON UNIVERSITY FOUNDATION LITIGATION** | | | |
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## Significant Settlements (continued)

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **RESOLUTION FOR TD BANK IN TD BANK/COMMERCE BANCORP MERGER-RELATED LITIGATION** | | | |
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| Trujillo Rodriguez & Richards, LLC | Lisa J. Rodriguez | (856) 795-9002 | lisa@trrlaw.com |
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| **SETTLEMENT FOR AIG IN THE NEWMONT LITIGATION** | | | |
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| Featherstone Petrie DeSisto LLP | John A. DeSisto | (303) 626-7100 | jdesisto@featherstonelaw.com |
| **FAVORABLE SETTLEMENT FOR VIRGIN ATLANTIC IN PASSENGER AIRFARE FUEL SURCHARGE ANTITRUST CLASS ACTION** | | | |
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| Hausfeld LLP | Michael Hausfeld | (202) 540-7200 | N/A |
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## Other Significant Results

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **SETTLEMENT OF AUCTION RATE SECURITIES-RELATED GOVERNMENT INVESTIGATIONS FOR JPMORGAN CHASE** | | | |
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| | Vincent J. Esades | (612) 338-4605 | vesades@heinmills.com |
| **ANTITRUST CLEARANCE FOR SIRIUS SATELLITE RADIO'S $13 BILLION MERGER OF EQUALS WITH XM SATELLITE RADIO** | | | |
| Simpson Thacher & Bartlett LLP | Kevin J. Arquit | (212) 455-2000 | karquit@stblaw.com |
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| **BREAKING THE REALOGY HEX TO ENABLE A VITAL TENDER OFFER FOR NEFF CORPORATION** | | | |
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| **MOTOR COACH INDUSTRIES' SUCCESSFUL EMERGENCE FROM CHAPTER 11** | | | |
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## Other Significant Results (continued)

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| **WIN FOR SCHERING-PLOUGH IN FALSE ADVERTISING LITIGATION** | | | |
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## Noteworthy New Matters

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **SUBPRIME LITIGATION: REPRESENTING THE UNDERWRITERS IN FANNIE MAE-RELATED CLASS ACTIONS** | | | |
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## Noteworthy New Matters (continued)

| FIRM | NAME | TELEPHONE | EMAIL |
|---|---|---|---|
| **MADOFF-RELATED LITIGATION: DEFENDING FAIRFIELD GREENWICH GROUP ON MULTIPLE FRONTS** | | | |
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| **MADOFF-RELATED LITIGATION: DEFENDING FAIRFIELD GREENWICH GROUP ON MULTIPLE FRONTS (CONTINUED)** | | | |
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## Noteworthy New Matters (continued)

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|---|---|---|---|
| **REPRESENTATION OF LEHMAN BROTHERS DIRECTORS AND OFFICERS** | | | |
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| **ASYLUM SUCCESS FOR GUINEAN VICTIM OF FEMALE GENITAL MUTILATION** | | | |
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## Biggest Loss

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