SIMPSON THACHER
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This month's edition of the Alert addresses: the D.C. Circuit's decision vacating the new proxy access rule promulgated by the Securities & Exchange Commission; the Second Circuit's decision holding that Madoff's customers may only seek recovery of their net investments under the Securities Investor Protection Act, not the "profits" reflected on their final account statements; and two related decisions, one from the Second Circuit and one from the Sixth Circuit, affirming the dismissal of auction rate securities suits.

This Alert also discusses three decisions from the Southern District of New York: one dismissing in part the Lehman securities fraud action; another dismissing in part the Bank of America/Merrill Lynch securities fraud action; and a third reiterating the "irrevocable liability" test for determining when a purchase or sale is made in the United States for *Morrison* purposes.

Finally, this Alert addresses recent guidance from the Delaware Chancery Court on fee negotiations and applications for fee awards in multi-forum litigation settlements.

The D.C. Circuit Vacates the SEC's New Proxy Access Rule

On July 22, 2011, the United States Court of Appeals for the District of Columbia struck down the Securities & Exchange Commission's ("SEC") proxy access rule, pursuant to which companies would have been required to include shareholder-nominated board candidates on proxy ballots under certain circumstances. *See Business Roundtable v. SEC*, 2011 WL 2936808 (D.C. Cir. July 22, 2011) (Ginsburg, D.).

The D.C. Circuit held that the SEC had "acted arbitrarily and capriciously" in adopting the new proxy access rule. *Id.* at *3. Specifically, the court found that the SEC had "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters." *Id.* The court did not reach the First Amendment challenges to the rule.

Background

Section 971(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorized the SEC to promulgate proxy access rules. *See* Pub. L. No. 111-203, § 971(b), 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78n(a)(2)). In August 2010, the SEC adopted Rule 14a-11, which would have required

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"a company's proxy materials to provide shareholders with information about, and the ability to vote for" shareholder nominees. SEC Facilitating Shareholder Director Nominations, 17 C.F.R pts. 200, 232, 240 and 249, at 1 (Aug. 25, 2010) *available at* http://www.sec.gov/rules/final/2010/33-9136.pdf. Proxy access rights under Rule 14a-11 would have been limited to a shareholder or group of shareholders who had "continuously held 'at least 3% of the voting power of the company's securities entitled to be voted' for at least three years prior to [and] … through the date of the annual meeting." *Business Roundtable*, 2011 WL 2936808, at *1.

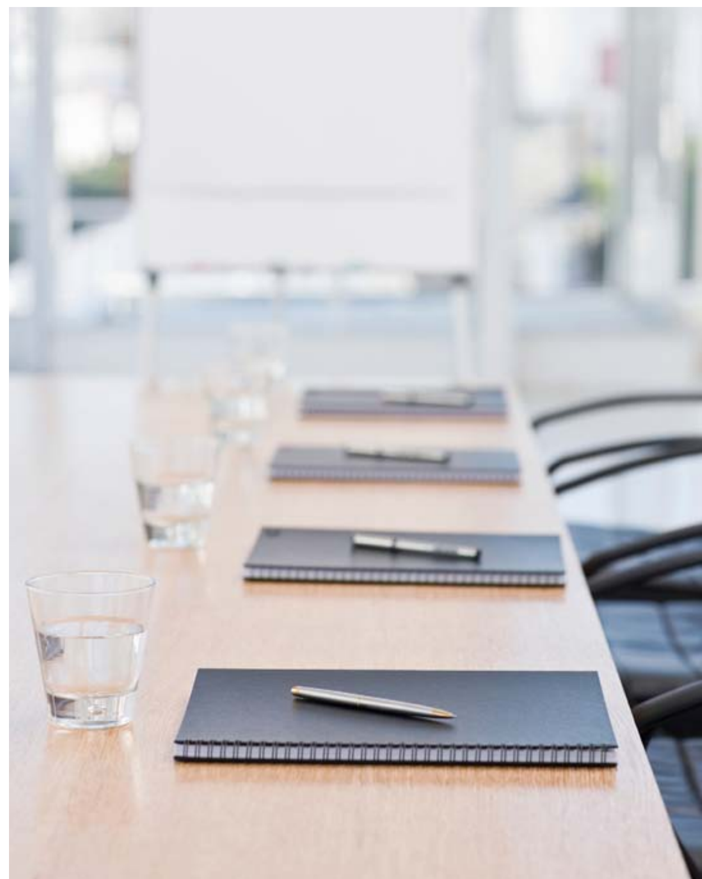
In September 2010, the Business Roundtable and the Chamber of Commerce of the United States filed suit, contending that the SEC's adoption of Rule 14a-11 violated the Administrative Procedure Act because, *inter alia*, the SEC had "failed adequately to consider the rule's effect upon efficiency, competition, and capital formation, as required by Section 3(f) of the Exchange Act and Section 2(c) of the Investment Company Act of 1940." *Business Roundtable*, 2011 WL 2936808, at *1. The SEC issued a stay of Rule 14a-11 pending appellate review.

The Court Finds That the SEC Failed to Weigh the Costs and Benefits of the Proxy Access Rule

While the SEC acknowledged that Rule 14a-11 would impose additional solicitation and campaign costs on companies, the agency argued that those expenses "'may be limited by two factors.'" *Id.* at *4. First, "directors might choose not to oppose shareholder nominees." *Id.* Second, "the required minimum amount and duration of share ownership [would] limit the number of directors nominated under the new rule." *Id.* at *5.

On appeal, the D.C. Circuit found that there was "no basis beyond mere speculation" for the SEC's "prediction" that directors might decide not to oppose shareholder nominees. *Id.* at *4. The court noted that the SEC "has presented no evidence that such forbearance is ever seen in practice." *Id.* With respect to the SEC's expectation that the ownership and holding period requirements would limit the number of nominations under the new rule, the court explained that this argument only provides "a reason to expect election contests to be infrequent; it says nothing about the amount a company will spend on solicitation and campaign costs when there is a contested election." *Id.* at *5. Finding that the SEC had done "nothing to estimate and quantify the costs it expected companies to incur" in connection with Rule 14a-11, the court held that the agency had "neglected its statutory obligation to assess the economic consequences of its rules." *Id.*

As to the anticipated benefits of the proxy access rule, the court held that the SEC had not "sufficiently supported its conclusion that increasing the potential for election of directors nominated by shareholders will



result in improved board and company performance and shareholder value." *Id*. The court noted that the empirical evidence on this issue was "admittedly (and at best) 'mixed.'" *Id*.

The Court Holds That the SEC Did Not Consider Potential Misuse of the New Rule by Shareholders with Special Interests

The petitioners argued that the SEC had failed to consider how "union and state pension funds might use Rule 14a-11." *Id*. at *6. Specifically, they contended that the SEC had not responded to comments that "investors with a special interest, such as unions and state and local governments whose interest in jobs may well be greater than their interest in share value, can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value, and will likely cause companies to incur costs even when their nominee is unlikely to be elected." *Id*. at *7. "By ducking serious evaluation of [these] costs," the court found that the SEC had "acted arbitrarily." *Id*.

The Court Determines That the SEC Did Not Properly Factor in the Frequency of Election Contests

The SEC maintained that the new proxy access rule would lead to "'[d]irect cost savings' for shareholders in part due to 'reduced printing and postage costs' and reduced expenditures for advertising compared to those of a 'traditional' proxy contest." *Id*. at *3. However, the court determined that the SEC had "arbitrarily ignored" the question of "whether and to what extent Rule 14a-11 will take the place of traditional proxy contests" in "weighing the rule's costs and benefits." *Id*. at *8. "Without this crucial datum," the court found that "the [SEC] ha[d] no way of knowing whether the rule will facilitate enough election contests to be of net benefit." *Id*.

The court "agree[d] with the petitioners that the [SEC]'s discussion of the estimated frequency of nominations under Rule 14a-11 [was] internally inconsistent and therefore arbitrary." *Id*. While the SEC "anticipated frequent use of Rule 14a-11 when estimating benefits," it "assumed infrequent use when estimating costs." *Id*.

The Court Holds That the SEC's Proxy Access Rule Is Specifically Invalid as Applied to Investment Companies

Because it found the SEC's proxy access rule to be "arbitrary and capricious on its face," the D.C. Circuit held that Rule 14a-11 is "assuredly invalid as applied specifically to investment companies." *Id*. at *9. The court nonetheless addressed the application of Rule 14a-11 to investment companies to guard against the possibility that the SEC might "on remand apply to investment companies a newly justified version of the rule." *Id*.

The D.C. Circuit noted that the SEC had "failed adequately to address whether the regulatory requirements of the [Investment Company Act] reduce the need for, and hence the benefit to be had from, proxy access for shareholders of investment companies." *Id*. The court further determined that the SEC had neglected to "deal with the concern that Rule 14a-11 will impose greater costs upon investment companies by disrupting [their] unitary and cluster board structures with the introduction of shareholder-nominated directors who sit on the board of a single fund, thereby requiring multiple, separate board meetings and making governance less efficient." *Id*. at *10. In sum, the court found that the SEC's "observations [did] not adequately address the probability [that] the rule will be of no net benefit as applied to investment companies. *Id*.

The Second Circuit Holds That Madoff's Customers May Only Seek Recovery of Their Net Investments Under SIPA, Not the "Profits" Reflected on Their Last Statements

On August 16, 2011, the Second Circuit held that the Trustee in the liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") properly used the "Net Investment Method" to calculate "net equity" under the Securities Investor Protection Act ("SIPA"). *See In re Bernard L. Madoff Inv. Sec. LLC*, 2011 WL 3568936 (2d. Cir. Aug. 16, 2011) (Jacobs, D.) ("*BLMIS*"). Pursuant to the Net Investment Method, BLMIS customers may only seek recovery under SIPA for the cash deposited into their BLMIS accounts, less any withdrawals. They are not entitled to recover the market value of the securities reflected on their final BLMIS account statements.

Background

"When Madoff's fraud came to light," the Securities & Exchange Commission ("SEC") filed a civil action in the Southern District of New York, alleging that "Madoff and BLMIS were operating a Ponzi scheme." *Id.* at *2. The Securities Investor Protection Corporation ("SIPC") then "stepped in," seeking a decree that BLMIS customers are "in need of the protections afforded by SIPA." *Id.*

SIPA "establishes procedures for liquidating failed broker-dealers." *Id.* at *3. "In a SIPA liquidation, a fund of 'customer property,' separate from the general estate of the failed broker-dealer, is established for priority distribution exclusively among customers." *Id.* "Each customer shares ratably in this fund of assets to the extent of the customer's 'net equity.'" *Id.*; *see also* 15 U.S.C. § 78fff-2(c)(1)(B). The statute provides that "net equity" is determined by "calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer …" minus "any indebtedness of such customer to the debtor on the filing date." 15 U.S.C. § 78lll(11).

The district court appointed Irving H. Picard as Trustee for BLMIS's liquidation, and removed the action to the bankruptcy court. The Trustee determined that "each customer's 'net equity' should be calculated by the 'Net Investment Method,' crediting the amount of cash deposited by the customer into his or her BLMIS account, less any amounts withdrawn from it." *BLMIS*, 2011 WL 3568936, at *3. A number of customers objected to this approach, contending that they were "entitled to recover the market value of securities reflected on their last BLMIS customer statements (the 'Last Statement Method')." *Id.* The Trustee moved the bankruptcy court for an order upholding the use of the Net Investment Method for calculating net equity; the SIPC and the SEC both submitted briefs supporting the Trustee's view.

In March 2010, the bankruptcy court "upheld the Trustee's use of the Net Investment Method on the ground that the last customer statements could not 'be relied upon to determine [n]et [e]quity' because

customers' account statements were 'entirely fictitious' and did 'not reflect actual securities positions that could be liquidated.'" *Id*. at *4 (*quoting In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 135 (Bkrtcy. S.D.N.Y. 2010)). The bankruptcy court "reasoned that the definition of 'net equity' under SIPA 'must be read in tandem with SIPA section 78fff-2(b), which requires the Trustee to discharge [n]et [e]quity claims only 'insofar as such obligations are [1] ascertainable from the books and records of the debtor or [2] are otherwise established to the satisfaction of the trustee.'" *Id*.

The bankruptcy court certified an immediate appeal to the Second Circuit to review whether the Net Investment Method of calculating "net equity" was "legally sound under the language of the statute." *Id*. at *1.

The Second Circuit Affirms the Trustee's Use of the Net Investment Method for Calculating "Net Equity"

At the outset, the Second Circuit explained that "the statutory language does not prescribe a single means of calculating 'net equity' that applies in the myriad circumstances that may arise in a SIPA liquidation." *Id*. at *5. Here, the Second Circuit held that "the Trustee's selection of the Net Investment Method was more consistent with the statutory definition of 'net equity' than any other method advocated by the parties or perceived by this Court." *Id*. "[T]he Net Investment Method allows the Trustee to make payments based on withdrawals and deposits, which can be confirmed by the debtor's books and records, and results in a distribution of customer property that is proper under SIPA." *Id*. at *8. The court "express[ed] no view on whether the Net Investment Method should be adjusted to account for inflation or interest." *Id*. at *5, n. 6.

The Second Circuit noted that "in more conventional cases," the Last Statement Method would "likely be the most appropriate means of calculating 'net equity.'" *Id*. at *8. But in this case, "[u]se of the Last Statement Method … would have the absurd effect of treating fictitious and arbitrarily assigned paper profits as real and would give legal effect to Madoff's machinations." *Id*. at *5. Moreover, "those [customers] who had already withdrawn cash deriving from imaginary profits in excess of their initial investment would derive additional benefit at the expense of those customers who had not withdrawn funds before the fraud was exposed." *Id*. at *8. "Because the main purpose of determining 'net equity' is to achieve a fair allocation of the available resources among the customers, the Trustee properly rejected the Last Statement Method." *Id*. at *10.

The Second Circuit further found that its "precedent is consistent with the Trustee's decision to utilize the Net Investment Method under the circumstances of this case." *Id*. In *In re New Times Sec. Serv., Inc*., 371 F.3d 68 (2d. Cir. 2004) (Straub, C.), customers were misled into believing that they were investing in mutual funds, and were provided with "account statements [that] mirrored what would have happened had the given transaction[s] been executed." *Id*. at 74. The *New Times* court declined to calculate "net equity" using the "fictitious securities positions reflected in the [c]laimants' account statements," because "basing customer recoveries on 'fictitious amounts in the firm's books and records would allow customers to recover arbitrary amounts that necessarily have no relation to reality.'" *Id*. at 75, 88.

Here, "Madoff constructed account statements retrospectively, designating stocks based on advantageous historical price information and arbitrarily distributing profits among his customers." *BLMIS*, 2011 WL 3568936, at *11. Against this backdrop, it would have been "legal error for the Trustee to 'discharge claims upon the false premise that customers' securities positions are what the account statements purport them to be.'" *Id*.

The Second and Sixth Circuits Affirm the Dismissal of Auction Rate Securities Suits

In related decisions filed on July 28, 2011, the Second and Sixth Circuits affirmed the dismissals of auction rate securities ("ARS") suits brought by Ashland Inc., a global chemical company, against brokers Morgan Stanley and Oppenheimer, respectively. *See Ashland Inc. v. Morgan Stanley & Co., Inc.*, 2011 WL 3190448 (2d Cir. July 28, 2011) (Winter, R.); *Ashland Inc. v. Oppenheimer & Co., Inc.*, 2011 WL 3181277 (6th Cir. July 28, 2011) (Cook, D). Both cases involved Ashland's purchases of ARS, and its subsequent inability to liquidate those securities when the ARS market collapsed in February 2008.

Background

ARS are "long-term bonds whose interest rates periodically reset through recurring auctions." *Oppenheimer*, 2011 WL 3181277, at *1. "[I]nvestors can liquidate their positions at each auction—*assuming demand exceeds supply*." *Id*. When sellers exceed buyers, however, the auction "fails" and "*no* ARS owner may sell his position." *Id*. "Though they have no obligation to do so, ARS underwriters (generally investment banks) may partake in the auctions, placing proprietary bids, to help ensure that the auctions do not fail." *Id*.

The Second Circuit Holds That Ashland Failed to Allege Reasonable Reliance

Ashland's case against Morgan Stanley involved ARS backed by student loan obligations ("SLARS"). According to the complaint, a Morgan Stanley broker had represented that SLARS were "'safe, liquid instruments that were suitable to [Ashland's] conservative investment policies.'" *Morgan Stanley*, 2011 WL 3190448, at *1. The broker also allegedly stated that "in the event of any instability or weakness in the market for SLARS … Morgan Stanley's brokers and other brokers would step in and place sufficient proprietary bids to prevent auction failure and ensure the liquidity of Ashland's SLARS.'" *Id*.

In March 2010, the Southern District of New York dismissed the complaint in its entirety, finding that the plaintiffs had failed to allege scienter or plead reasonable reliance. The court "relied in part" on "several relevant disclosures" contained in Morgan Stanley's online statement of it ARS policies and practices. *Id*. at *2. This online statement explained that "'Morgan Stanley routinely places one or more bids in an auction for its own account … to prevent a failed auction.'" *Id*. However, the statement clarified that "'Morgan Stanley is not obligated to bid in any auction to prevent an auction from failing or clearing at an offmarket rate,'" and "'[i]nvestors should not assume that Morgan Stanley will do so.'" *Id*. The online statement cautioned that "'the fact that an auction clears successfully does not mean that an investment in the ARS involves no significant liquidity or credit risk.'" *Id*. at *3. Finally, the online statement acknowledged that ARS holders "'may be disadvantaged if there is a failed auction because they are not able to exit their position through the auction.'" *Id*.

On appeal, the Second Circuit found that Morgan Stanley's online statement "explicitly disclosed the very liquidity risks about which [Ashland] claim[s] to have been misled." *Id*. at *4. As a "sophisticated investor," Ashland was "not justified in relying on

[the broker's] statements that SLARS 'had no liquidity issues,' or that 'in the event of 'instability or weakness,' Morgan Stanley would 'come in and make a market,' as it had always done in the past." *Id*.

With respect to the "alleged misrepresentation that the liquidity of SLARS was assured because of a federal government guarantee of the underlying student loans," the Second Circuit found that this allegation did not "save [Ashland's] claim." *Id*. "While the reduced risk of the collateral's default may affect the liquidity of ARS, a government guarantee of the collateral does not eliminate the risk of SLARS becoming illiquid." *Id*. "A reasonable sophisticated investor knows this." *Id*.

The Second Circuit Dismisses Ashland's Common Law Claims

The Second Circuit dismissed most of Ashland's common law claims on grounds of lack of reasonable reliance. With respect to the remaining claim for unjust enrichment, the court found that it "simply does not fit the facts of this case." *Id*. at *5. Here, "Ashland, a sophisticated investor, failed to apprise itself of the publicly disclosed riskiness of ARS as liquid investments." *Id*. "There is little in equity and good conscience that weighs in favor of the return of the fees it paid in connection with those transactions." *Id*.

The Sixth Circuit Holds That Ashland Failed to Plead Scienter

In its case against Oppenheimer, Ashland alleged that "Oppenheimer actually knew about the ARS meltdown months in advance." *Oppenheimer*, 2011 WL 3181277, at *2. "As support for its allegation," Ashland pointed to the fact that two of Oppenheimer's executives sold their own ARS between December 2007 and early February 2008. *Id*. "In addition to this central claim," Ashland also alleged that Oppenheimer "never provided offering documents for ARS issuances until *after* Ashland purchased the instruments," nor did Oppenheimer "disclose the ARS' true liquidity risks, including their lack of organic demand and the degree to which underwriters supported the auction market." *Id*. Finally, Ashland asserted a number of other allegedly actionable omissions, such Oppenheimer's failure to disclose "that employees lost commissions if clients resold their ARS before a 'minimum holding period' had passed." *Id*.

In February 2010, the Eastern District of Kentucky dismissed Ashland's complaint for failure to allege "'facts or scienter with the requisite particularity.'" *Id*. at *3. On appeal, the Sixth Circuit found that "many of Oppenheimer's purported misstatements are not actionable, either because they lacked materiality or because Oppenheimer had no duty to disclose them." *Id*. at *4. For example, the court explained that "'[t]here is no duty [for a company] to disclose the incentives that [it] provides to its own employees to encourage those employees to sell specific products.'" *Id*.

Nonetheless, the Sixth Circuit "look[ed] past these allegations and focus[ed] instead on [Ashland's] central claim: Oppenheimer peddled ARS to Ashland as liquid, short-term investments, all while withholding a crucial factor about the market—that its continued health depended upon the intervention of underwriters, many of whom were abandoning ARS auctions." *Id*. at *4. The court "assume[d]" that this claim "satisf[ied] the materiality requirement," and "therefore proceed[ed] to the issue of scienter." *Id*.

Rather than conducting an "itemized claim analysis," the Sixth Circuit followed the "collective assessment" approach to scienter set forth in *Frank v. Dana Corp.*, 2011 WL 2020717, at *5 (6th Cir. May 25, 2011) (Martin, B.). (To read our discussion of the *Frank* case in the June edition of the Alert, please click here.) The Sixth Circuit "conclude[d] that Ashland's factual allegations, when considered together, do not give rise to a strong inference that Oppenheimer acted with scienter." *Oppenheimer*, 2011 Wl 3181277, at *5. "[A]part from conclusory allegations, Ashland fails to provide

any facts explaining why or how Oppenheimer possessed advance, non-public knowledge that underwriters would jointly exit the ARS market and cause its collapse in February 2008." *Id.* "While the existence of scienter is *possible* in this case," the Sixth Circuit found that "the more compelling explanation is that the near-spontaneous collapse of the ARS market caught Oppenheimer and its employees off guard." *Id.* at *6.

The Sixth Circuit noted that courts have "readily granted" dismissal motions in other ARS-related cases "involving only vague allegations that market participants knew of, yet failed to disclose, risks surrounding the ARS market." *Id.* (*citing Oughtred v. E*Trade Fin. Corp.*, 2011 WL 1210198, at *1 (S.D.N.Y. Mar. 31, 2011) (Stein, S.); *Ashland Inc. v. Morgan Stanley*, 700 F. Supp. 2d 453, 468-69 (S.D.N.Y. 2010) (Patterson, R.)). Courts have permitted ARS cases to proceed where the plaintiffs "sufficiently explained *why or how* the defendants knew about the ARS market's impending liquidity" or alleged "market manipulation—for example, that defendants propped up a languishing ARS market in order to unload inventories on unsuspecting clients." *Id.* at *6 (*citing In re Merrill Lynch Auction Rate Sec. Litig.*, 2011 WL 1330847, at *2 (S.D.N.Y. Mar. 30, 2011) (Preska, L.); *Dow Corning Corp v. BB & T Corp.*, 2010 WL 4860354, at *10 (D.N.J. Nov. 23, 2010) (Hochberg, F.); *Defer LP v. Raymond James Fin. Inc.*, 2010 WL 3452387, at *5 (S.D.N.Y. Sept. 2, 2010) (Kaplan, L.)). The Sixth Circuit held that "[t]he distinctions among these decisions reinforce our conclusion that Ashland has insufficiently alleged scienter." *Oppenheimer*, 2011 WL 3181277, at *6.

The Sixth Circuit Dismisses Ashland's State and Common Law Claims

The Sixth Circuit dismissed Ashland's claim under Kentucky's Blue Sky Laws and its common law fraud claim for failure to allege scienter.

With respect to Ashland's promissory estoppel claim, the court found that Oppenheimer's "descriptions about ARS' safety and liquidity do not qualify as promises" because these "vague statements do not implicate any commitment on Oppenheimer's part." *Id.* at *8.

The court also found that Ashland could not state a claim based on Oppenheimer's alleged "promises to guarantee the ARS' liquidity," explaining that "'[a]n investor may not justifiably rely on a misrepresentation if, through minimal diligence, the investor should have discovered the truth.'" *Id.* Here, Oppenheimer's online ARS Brochure "explicitly warned that it 'is not obligated to submit a bid to prevent an auction failure,' and 'provide[d] no assurance … as to the outcome of any auction.'" *Id.* "Oppenheimer repeated similar admonitions in each of the offering statements that accompanied its ARS sales." *Id.* Although Ashland "claims to have lacked these offering statements at the time of its purchases," the ARS Brochure, "which Ashland possessed, instruct[ed] investors to 'read and understand the relevant offering documents' before purchasing ARS." *Id.* The Sixth Circuit held that Ashland's "failure to do so renders any reliance upon Oppenheimer's vague oral assurances unreasonable." *Id.*

Finally, with respect to Ashland's negligent misrepresentation claim, the Sixth Circuit found that Ashland not only failed to plead reasonable reliance "on Oppenheimer's ambiguous representations" but also "failed to allege facts indicating that Oppenheimer supplied false information about ARS' liquidity—i.e., facts demonstrating that the securities were actually illiquid between July 2007 and early February 2008, the period during which Ashland made its purchases." *Id.* at *9. The court noted that "Ashland's assertion that Oppenheimer executives sold large sums of personal ARS holdings through early February 2008 implies just the opposite—that the market remained liquid right up until its collapse." *Id.*

The Southern District of New York Dismisses in Part the Lehman Securities Fraud Action

In a lengthy decision dated July 27, 2011, the Southern District of New York narrowed the claims in a consolidated securities action involving the collapse of Lehman Brothers Holdings. *See In re Lehman Bros. Sec. and ERISA Litig.*, 2011 WL 3211364 (S.D.N.Y. July 27, 2011) (Kaplan, L.). While the court dismissed a number of claims, including those involving Lehman's risk mitigation practices and its liquidity position, the court permitted certain other claims to go forward.[1]

Background

The case concerns billions of dollars in Lehman debt and equity securities issued pursuant to a May 30, 2006 shelf registration statement and related offering materials. According to the plaintiffs, these offering materials and the financial statements they incorporated by reference contained "false and misleading statements" with respect to: (1) "Repo 105" transactions, a type of repurchase agreement; (2) Lehman's risk management practices; (3) the company's liquidity risk; (4) "concentrations of credit risk;" and (5) the alleged overvaluation of Lehman's commercial real estate holdings. *Id.* at *2-3.

The Court Dismisses Claims Involving Offerings in Which No Plaintiff Purchased a Security

The complaint "purport[ed] to assert claims based on fifty [principal protection notes ('PPN')] offerings in which no named plaintiff purchased a security," on the grounds that "each PPN was offered pursuant to 'common prospectuses [that] incorporated the [common] SEC filings that contained the misstatements and omissions.'" *Id.* at *7. Noting that "[t]his [c]ourt and others have rejected this argument," the Southern District of New York held that the plaintiffs "have no standing to bring claims with respect to the fifty PPN offerings in which they did not purchase securities." *Id.*

The Court Permits Certain Claims Involving the Repo 105 Transactions to Go Forward

The plaintiffs challenged Lehman's accounting treatment for Repo 105 transactions, which were booked as sales rather than financings. The assets representing collateral for Repo 105 transactions were allegedly "treated as though [they] actually had been sold and therefore [were] removed from Lehman's balance sheet." *Id.* at *4. Lehman later allegedly "used the cash received from Repo 105 transactions to pay down other existing liabilities," which had the effect of decreasing the company's net leverage ratio. *Id.*

While the court found that the plaintiffs had "failed to allege any manner in which Lehman violated SFAS 140 in treating the Repo 105 transactions as sales rather than financings," the court explained that GAAP "imposes an overall requirement that the statements as a whole accurately reflect the financial status of the company." *Id.* at *11. The court held that the "repetitive, temporary and undisclosed reduction of net leverage at the end of each quarter [was] sufficient to make out a claim that the Offering Materials and oral statements about net leverage violated the overriding GAAP requirement to present the financial condition of the company accurately." *Id.*

The Court Declines to Dismiss Claims Involving Lehman's Risk Management Policies

The plaintiffs contended that Lehman's disclosures about its risk management policies, such as statements

1. Simpson Thacher represents certain former Lehman officers in the *Lehman* litigations.

that the company "monitor[ed] and enforce[ed] adherence to [its] risk policies," were false and misleading. *Id.* at *15. The court held that the allegations, "assumed here to be true, establish that Lehman routinely exceeded various risk limits it had created." *Id.* "Moreover, given the allegations of frequent, significant departures from Lehman's internally stated policies, there is enough in the [complaint] to permit the inference that its senior officers' statements to the effect that Lehman had 'strong' and 'conservative' risk management were false in the sense that these individuals knew or recklessly disregarded their misleading effect." *Id.*

The Court Dismisses Claims Concerning Risk Mitigation

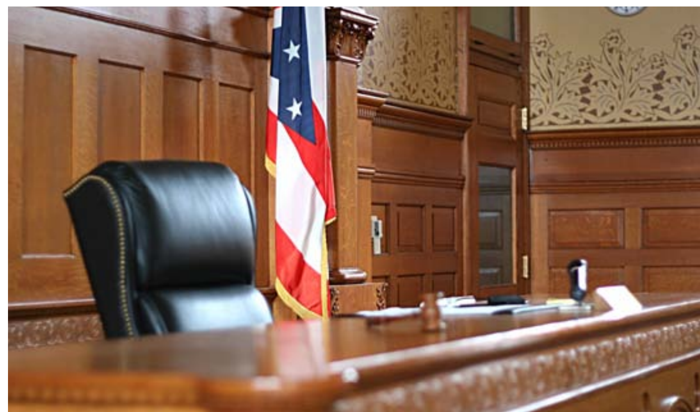
The plaintiffs challenged Lehman's representation that it had "ensure[d] that appropriate risk mitigants" were in place. *Id.* at *16. The court held that "[t]he question [of] whether a particular risk mitigant was appropriate when implemented is inherently a matter of judgment or opinion." *Id.* To state a claim, the plaintiffs "were obliged to allege facts that would support a plausible inference that Lehman did not believe that it had [put appropriate risk mitigants in place] or, at least, that it was reckless in believing that it had appropriate measures in place." *Id.* Because the complaint was "devoid of any such allegations," the court held that the plaintiffs had "fail[ed] to state a claim on this basis." *Id.*

The Court Dismisses Claims Involving Lehman's Liquidity Position

The offering materials "stated that Lehman had a 'very strong liquidity position' and 'maintain[ed] a liquidity pool … that covers expected cash outflows for twelve months in a stressed liquidity environment.'" *Id.* at *17. The plaintiffs alleged that these statements were "materially false and misleading[,]" because (1) "they failed, in violation of Item 303 of Regulation S-K, to disclose Lehman's obligations to repurchase the assets used in the Repo 105 transactions immediately after each quarter closed;" and (2) Lehman allegedly had "'liquidity concerns' due to its accumulation of illiquid assets." *Id.*

Item 303 of Regulation S-K requires a registrant to "disclose commitments and off-balance sheet arrangements only if they [are] reasonably likely to affect its liquidity in a material way." *Id.* "To state a claim," the plaintiffs were "required to allege that the Repo 105 transactions had a material effect on Lehman's liquidity," which they "failed to do." *Id.* As to allegations regarding the "strength and sufficiency of Lehman's liquidity and the size of [its] liquidity pool," the court found that the complaint "does not allege any facts contradicting the statements that Lehman's liquidity position was sufficient to cover its liquidity needs at the time any particular statement was issued." *Id.* at *18.

With respect to allegations that "Lehman's liquidity pool was sufficient to meet its expected needs over the next twelve months and that its liquidity position was 'strong,'" the court found that these were "statements of opinion." *Id.* "Such statements are not actionable unless it is alleged sufficiently that the speaker did not truly believe them when they were made." *Id.* Because "[t]here are no such allegations here," the court held that the complaint "fails to state a claim based on the alleged liquidity misstatements." *Id.*



The Court Dismisses Claims Involving Lehman's Leveraged Loans, but Permits Certain Other Concentration of Credit Risk Allegations to Go Forward

The plaintiffs alleged that "the Offering Materials were false and misleading because they did not disclose adequately Lehman's significant concentrations of credit risk related to … its exposure to (1) Alt-A mortgage-related assets, (2) commercial real estate, and (3) leveraged loans." *Id*. The court held that the plaintiffs "have alleged sufficiently that Lehman … failed adequately to disclose significant concentrations of credit risk" in certain Alt-A and commercial real estate holdings. *Id*. at *20.

However, the court determined that "[t]he allegations regarding leveraged loans … [were] insufficient." *Id*. "Even if Lehman's leveraged loans had increased as plaintiffs allege," the court found that the plaintiffs "pointed to no authority obliging Lehman to make more granular disclosures about its lending commitments, even assuming that the positions amounted to sufficient concentrations of credit risk." *Id*.

The Court Finds That the Plaintiffs Adequately Alleged Scienter

At the outset, the court found that the complaint "fail[ed] to allege that any of the defendants had a motive to commit the alleged fraud … [or] that any of them benefited from the alleged misrepresentations and omissions in a concrete way." *Id*. at *21. The court therefore ruled that the complaint "fail[ed] to allege *scienter* on a motive-and-opportunity basis." *Id*.

However, the court found that the plaintiffs had sufficiently alleged circumstantial evidence of conscious misbehavior or recklessness with respect to certain of the claims. The court held that the complaint "alleges sufficient red flags to give rise to an inference of *scienter* with respect to the Repo 105 transactions for any Insider Defendant who, because of his or her corporate role, responsibilities, and actions, knew or recklessly did not know of the misleading nature of the financial reporting of those transactions." *Id*. at *22. The court further held that the complaint "sufficiently alleges facts giving rise to an inference that [the Insider Defendants] were involved in setting Lehman's risk policies and knew that the statements concerning enforcement of risk management policies were false." *Id*. at *24.

As to certain other specific claims, such as allegations concerning concentrations of credit risk in Alt-A holdings, the court held that the plaintiffs had failed to allege scienter.

The Court Holds That the Plaintiffs Adequately Alleged Loss Causation

The court rejected the defendants' argument that it was the "market-wide phenomenon" of the credit crisis, and not the alleged misstatements and omissions at issue, that caused the plaintiffs' losses. *Id*. at *31. "Even granting *arguendo* the contribution to Lehman's demise of the market-wide circumstances to which defendants refer, the existence of such a causative factor would not of itself exclude a sufficient causal connection between the alleged misstatements and omissions and a portion of the losses plaintiffs sustained." *Id*.

The Court Dismisses GAAS Claims Against Ernst & Young, but Permits Certain GAAP Claims to Go Forward

With respect to E&Y's statements of GAAS compliance, the court found that most of the plaintiffs' allegations were "conclusory" and did not "contain factual matter sufficient to support a plausible claim for relief." *Id*. at *27. The court explained that "E & Y's GAAS opinion … is explicitly labeled as just that—an

opinion that the audit complied with these broadly stated standards." *Id.* "[M]ore is necessary to make out a claim that the statement of opinion was false than a quarrel with whether these standards have been satisfied." *Id.* Here, the court held that the plaintiffs had "fail[ed] to allege that E&Y made any false statements with respect to GAAS compliance …, much less that it did so with *scienter*." *Id.* at *29.

As to E&Y's statements regarding GAAP compliance, the court held that the plaintiffs "must allege specific departures from GAAP and, in addition, set forth facts sufficient to warrant a finding that the auditor did not actually hold the opinion it expressed or that it knew that it had no reasonable basis for holding it." *Id.* at *29. The "only such [alleged] departure" that the court found "sufficient" was the plaintiffs' claim that Lehman's use of Repo 105 transactions "temporarily resulted in the financial statements portraying the company's leverage in a misleading way." *Id.* Based on the allegations in the complaint, the court determined that "E&Y arguably was on notice by June 2008 that Lehman had used Repo 105s to portray its net leverage more favorably than its financial position warranted." *Id.* at *30. Accordingly, the court held that the complaint "sufficiently allege[d] that E&Y, with the requisite *scienter*, made a false or misleading statement in Lehman's 2Q08 in that it professed ignorance of facts warranting material modifications to Lehman's balance sheet when in truth it had received information … that cast into doubt the balance sheet's consistency with GAAP." *Id.*

The Court Dismisses Certain Section 11 Claims as Time Barred

In addition to claims under Section 10(b), the plaintiffs also brought claims under Section 11 and 12 of the Securities Act of 1933. The third amended complaint asserted claims on behalf of newly added plaintiffs who were "the only alleged purchasers of securities in thirty-five of the challenged offerings." *Id.* at *33. The defendants contended that these claims were time-barred under the applicable one year statute of limitations, arguing that the filing of the second amended complaint—which was more than a year prior to the filing of the third amended complaint—put the plaintiffs on actual or inquiry notice of the facts giving rise to the action.

Relying on the *American Pipe* tolling doctrine, the court held that "the filing of a class action suspends the running of applicable statutes of limitations for all putative class members even where the putative class plaintiff did not have standing to assert the claims at issue." *Id.* at *34. The court therefore determined that the newly-added plaintiffs' claims were not barred under the one year statute of limitations. *Id.*

However, the court did dismiss as time-barred all claims involving offerings that took place more than three years prior to the filing of the third amended complaint. The court explained that "neither *American Pipe* nor any other form of tolling may be invoked to avoid the three year statute of repose set forth in Section 13." *Id.*

The Southern District of New York Dismisses in Part the Bank of America/Merrill Lynch Securities Fraud Action

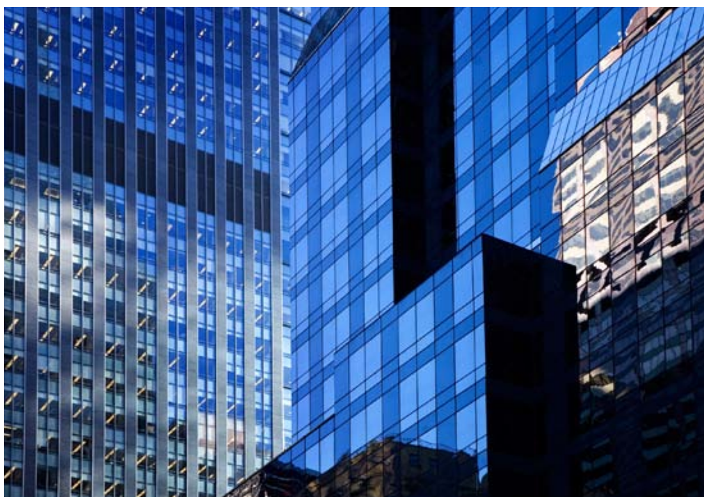
On July 29, 2011, the Southern District of New York dismissed in part the second amended complaint in the securities fraud litigation arising out of the acquisition of Merrill Lynch & Co. by Bank of America Corporation ("BofA"). *See In re Bank of America Corp. Sec., Der., and ERISA Litig.*, 2011 WL 3211472 (S.D.N.Y. July 29, 2011) (Castel, K.). The court dismissed claims brought on behalf of BofA securities owners with respect to securities that the named plaintiffs did not themselves purchase or sell during the class period. The court also dismissed claims involving the alleged

nondisclosure of federal financial support for the BofA/Merrill Lynch transaction. However, the court declined to dismiss claims concerning the defendants' failure to disclose Merrill's fourth quarter 2008 losses.

Background

In September 2008, Bank of America agreed to acquire Merrill Lynch. "Between the acquisition's announcement and its consummation," Merrill allegedly incurred extensive losses. *Id.* at *2. The plaintiffs alleged that "BofA officers had contemporaneous knowledge of Merrill's [fourth quarter 2008] losses, but elected not to disclose the losses to shareholders until January 16, 2009, by which point, BofA shareholders had already approved the Merrill transaction, and the acquisition had been finalized." *Id.* According to the complaint, "BofA officers were aware of a significant disparity between the market's favorable perceptions of Merrill's value and the truth of its deteriorating finances." *Id.*

After BofA approved the transaction, BofA's Chief Executive Officer Kenneth D. Lewis allegedly "began to question whether BofA could absorb Merrill's losses, and contemplated invoking a Material Adverse Change clause, which [would have] allowed BofA a conditional basis to terminate the transaction." *Id.* at *3. Lewis allegedly "communicated his concerns" to then-Treasury Secretary Henry Paulson. *Id.* Government officials allegedly "strongly urged BofA to complete the acquisition, arguing that any other action would undermine investor confidence in BofA and Merrill." *Id.*



BofA subsequently received "what plaintiffs characterize as 'a $138 billion taxpayer bailout.'" *Id.* Allegedly "at Lewis's direction, BofA did not publicly disclose federal financial support contemporaneous with its acceptance of the assistance." *Id.* Rather, BofA disclosed this support when it announced fourth-quarter earnings. *See id.*

Plaintiffs ultimately brought the instant securities fraud action. In August 2010, the Southern District of New York issued a ruling on the original complaint. While the court found that the complaint adequately alleged "material omissions" with respect to Merrill's fourth-quarter losses and BofA's receipt of government support for the transaction, the court held that the plaintiffs had failed to satisfy the scienter requirement. *Id.* at *2. The plaintiffs amended their complaint, and the defendants again moved to dismiss.

The Court Dismisses Claims Involving Securities That the Named Plaintiffs Did Not Purchase

The second amended complaint purported to "expand[ ] the plaintiff class to encompass additional categories of BofA securities owners" and bring claims with respect to securities that "the class plaintiffs did not themselves purchase or sell." *Id.* at *12. Relying on the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Scalia, A.), the defendants contended that these additional claims must be dismissed for lack of Article III standing.

In *Lujan*, the Supreme Court held that "in order to have Article III standing, a plaintiff must have suffered an injury in fact, one that is concrete and particularized." *Bank of America*, 2011 WL 3211472, at *12 (citing *Lujan*, 504 U.S. at 560). Several years later, the Supreme Court stated that "'named plaintiffs

who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (Scalia, A.). "Several district courts have [since] relied on *Lujan* and its progeny to conclude that plaintiffs ha[ve] no standing to bring claims seeking to recover losses in securities in which the named plaintiffs themselves had no stake." *Bank of America*, 2011 WL 3211472, at *12.

Noting that the plaintiffs "have not articulated any meaningful basis to distinguish this line of authority," the court held that "plaintiffs do not have standing to bring claims on behalf of purchasers or sellers of securities that the plaintiffs did not themselves purchase or sell during the class period." *Id*. at *13.

The Court Finds That the Complaint Raises a Strong Inference of Recklessness as to Two Executives with Respect to the Failure to Disclose Merrill's Fourth Quarter Losses

The court found that the complaint "fails to raise a strong inference that the defendants had a motive to commit securities fraud" in allegedly withholding information regarding Merrill's fourth quarter losses. *Id*. at *4. The court explained that neither "[a] long-held motivation to acquire Merrill" nor BofA management's "motive to 'prolong the benefits of holding corporate office'" was sufficient to "support an inference of scienter." *Id*.

However, the court found that the complaint "alleges recklessness" and satisfies the scienter requirement as to BofA's former Chief Financial Officer Joe L. Price. *Id*. at *9. According to the complaint, BofA's General Counsel Timothy Mayopoulos allegedly advised Price on November 12, 2008 that "'a disclosure [of Merrill's anticipated losses] is likely warranted.'" *Id*. at *5. Following that conversation, Price allegedly "cherry-picked figures" and was "untimely in giving [Mayopoulos] updated information" regarding Merrill's fourth-quarter losses. *Id*. at *8. When Mayopoulos ultimately learned of the magnitude of Merrill's losses and allegedly attempted to ask Price about the revised loss figures, Mayopoulos was allegedly "terminated without explanation." *Id*. at *6. The court found it "plausible to infer that, upon receiving Mayopoulos's initial disposition to recommend disclosure, Price engaged in 'conscious recklessness' amounting to 'an extreme departure from the standards of ordinary care.'" *Id*. at *9.

The defendants argued that Price's "'[c]onsultation with counsel is the very antithesis of scienter.'" *Id*. at *8. "But [t]o establish a reliance on the advice of counsel defense," the court explained that "a defendant has to show that he made complete disclosure to counsel." *Id*. (internal quotations omitted). Here, however, "legal counsel was [allegedly] left out of the loop," and Price allegedly "impeded counsel from making a fully informed analysis." *Id*. The court found Price's alleged "failure to update counsel about Merrill's losses" particularly significant in light of the allegation that "BofA's corporate treasurer was [also] strongly advocating to Price that BofA make a public disclosure." *Id*. at *9.

The defendants further contended that "BofA was working with estimated losses amounting to 'soft' data, and that such information is not sufficiently concrete to support a scienter inference." *Id*. at 7. The court determined that "[w]hether these figures were concrete and reliable … can be assessed only on a more complete factual record." *Id*. at *8. For pleading purposes, the court found it sufficient that the plaintiffs had "alleged with particularity that BofA received ongoing updates on Merrill's finances and that Price was personally informed of Merrill's losses." *Id*.

The court also held that the complaint raises a strong inference of recklessness as to BofA's Chief Executive Officer Kenneth D. Lewis, who was allegedly fully informed of Merrill's fourth quarter 2008 losses but "took no action to review or ensure

compliance with BofA's disclosure obligations." *Id.* at *10. Lewis allegedly failed "to see whether counsel had complete and recent information as to Merrill's losses, and did not discuss the losses or disclosure with the BofA board or company auditors." *Id.* at *9.

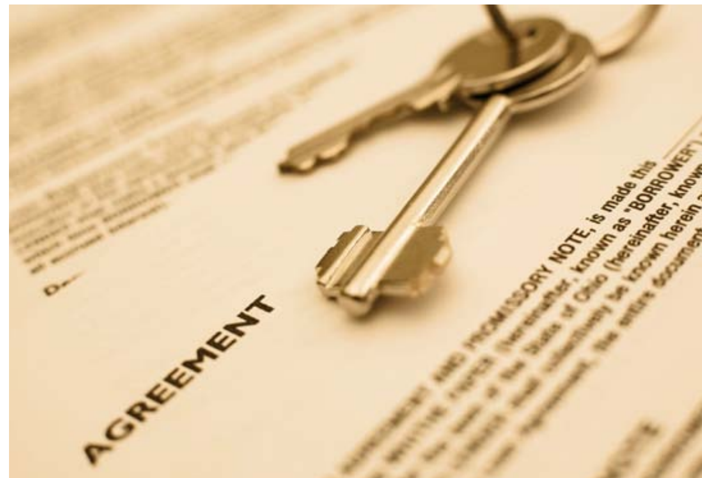
The Court Dismisses Claims Involving the Nondisclosure of Federal Financial Support for the BofA/Merrill Lynch Transaction

The court rejected the plaintiffs' argument that "disclosure of the federal support was required because it represented a material change for BofA's 'intended approach for' consummating the transaction." *Id.* at *11. Since the complaint "cites no representations made by BofA concerning its financing or the role *vel non* of federal financial support," the court found that the plaintiffs had failed to "allege with particularity how the federal financial assistance contradicted prior statements describing the acquisition and its financing." *Id.* at *11.

The court also held that pursuant to 17 C.F.R. § 240.13a-11(c), "the failure to disclose a material definitive agreement under Form 8-K at Item 1.01(a) does not, itself, amount to an actionable omission under Section 10(b) and Rule 10b-5." *Id.* at *10.

The Southern District of New York Reiterates the "Irrevocable Liability" Test for Determining When a Purchase or Sale Is Made in the United States

On July 21, 2011, the Southern District of New York dismissed a securities fraud complaint with leave to



replead on the grounds that the plaintiff had "faile[d] to provide sufficient facts that allow the [c]ourt to draw the reasonable inference that the purchase or sale was made in the United States." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 2011 WL 3044149, at *4 (S.D.N.Y. July 21, 2011) (Jones, B.). The court echoed its prior opinion in *S.E.C. v. Goldman Sachs*, 2011 WL 2305988, at *8 (S.D.N.Y. June 10, 2011) (Jones, B.) ("*Goldman Sachs*") in holding that "a plaintiff must allege that the parties incurred *irrevocable liability* to purchase or sell the security in the United States" in order to "state a claim under Section 10(b)." *Basis Yield*, 2011 WL 3044149, at *4 (emphasis added). (To read our discussion of the court's decision in *Goldman Sachs*, please click here.)

Background

The *Basis Yield* case concerned credit default swaps between a Cayman Islands-based mutual fund and Goldman Sachs & Company (the "Timberwolf" transaction). The complaint "include[d] numerous instances of U.S.-based conduct that led up to the sale of the security, including most notably the alleged fraudulent statements of [Goldman Sachs'] New York-based Managing Director David Lehman on the June 13, 2007 conference call that allegedly induced [the Cayman-based fund] to purchase Timberwolf." *Id.* at *4.

The Court Dismisses the Complaint for Failure to Plead the Incurring of "Irrevocable Liability" in the United States

The Southern District of New York found that "[u]nder *Morrison*'s transactional test,'" the plaintiff had "fail[ed] to allege that any purchase or sale occurred in the United States." *Id*. The court explained that "[f]or the purposes of the Exchange Act, a 'purchase' has been held to occur when the parties incurred 'irrevocable liability' to complete the transaction." *Id*. (*citing Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 177 (S.D.N.Y. 2010) and *Goldman Sachs*, 2011 WL 2305988, at *8). Because the complaint did not allege that the plaintiff incurred "irrevocable liability" for the Timberwolf transaction in the United States, the court held that the plaintiff had "fail[ed] to state a claim that [the] [d]efendants violated Section 10(b) and Rule 10b-5." *Id*.

The Delaware Chancery Court Provides Guidance on Fee Issues in Multi-Forum Litigation Settlements

On August 2, 2011, Chancellor Leo E. Strine, Jr. presided over a settlement hearing in consolidated shareholder litigation arising out of Clarient, Inc.'s merger with an affiliate of General Electric Company. *In re Clarient, Inc. S'holders Litig*., Consol. C.A. No. 5932-CS (Del. Ch. Ct.). Although the court ultimately approved the settlement, the court cautioned counsel against engaging in fee discussions prior to the execution of a memorandum of understanding ("MOU"). The court also advised counsel to present a coordinated application for the approval of a settlement agreement and related fee awards before a single court.

Background

Following the merger announcement on October 22, 2010, plaintiffs brought suits in the Delaware Chancery Court and the California Superior Court. Both courts subsequently consolidated cases in their respective jurisdictions. On November 23, 2010, the California Superior Court declined to stay the California action in favor of the Delaware action. While the Delaware plaintiffs moved for a preliminary injunction, the California plaintiffs opted simply to monitor developments in Delaware. Settlement negotiations involving both Delaware and California plaintiffs ensued.

On December 1, 2010, the parties to the Delaware and California actions reached an agreement in principle regarding the substantive terms of a proposed settlement which would release all claims in both actions in exchange for additional disclosures. The parties contemplated that the agreement would be submitted to the Delaware Chancery Court for approval.

Before executing the MOU, the California plaintiffs negotiated a fee of $450,000, which was stipulated to be subject to California court approval. The Delaware plaintiffs did not engage in fee discussions prior to the execution of the MOU.

In the stipulation of settlement, negotiated and finalized after the execution of the MOU, the defendants agreed not to oppose the Delaware plaintiffs' application for a fee award in the amount of $450,000. The stipulation also memorialized the defendants' agreement to pay $450,000 to the California plaintiffs, subject to California court approval.

On June 15, 2011, then-Vice Chancellor Strine held an initial settlement hearing, during which he expressed his concern regarding the two separate fee applications. He noted that it was not clear that "we ought to have [multiple] fee awards in one case where there is a class certified and one benefit to the class." Transcript of June 15, 2011 hearing at 15. When he learned that fee negotiations in the California action had taken place prior to the execution of the MOU,

he stated that he "thought everybody knew the basic drill"—that "the best way to do this is to make sure that the MOU doesn't have anything about the fees." *Id*. at 46.

Rather than ruling on the settlement, then-Vice Chancellor Strine scheduled a second settlement hearing requiring the lawyers who negotiated the California fee arrangement to appear in person to explain "their idea of what went down." *Id*. at 45.

The Delaware Chancery Court Approves the Clarient Settlement with Reservations

During the second settlement hearing on August 2, 2011, Chancellor Strine made it clear that fee discussions should not take place until the substantive terms of a settlement agreement are finalized. "I thought it was fairly well understood, certainly [it] is in this court that you g[e]t an inked-up MOU and you deal with the substance, and then you worry about fees later." Transcript of August 2, 2011 hearing at 81.

The court explained that "this two-step dance" is necessary because of due process considerations: "[p]eople have the potential to trade off considerations about fees with substantive terms [when] they don't bind themselves to the substantive terms first and then only talk about fee considerations later." *Id*. at 64. By not finalizing the substantive terms of the settlement before addressing fee issues, Chancellor Strine found that the parties had "raise[d] real concerns about the integrity of the settlement that didn't have to be raised." *Id*. at 81.

Chancellor Strine explained that negotiations regarding which court will approve the fee fall within the ambit of fee discussions: "[I]f somebody is bargaining about where their fee is going to be approved, they're bargaining about the amount of it and about whether they'll get a fee award." *Id*. at 93.

Going forward, Chancellor Strine indicated that he expected parties to present the court with a coordinated settlement and related fee applications for review—the "whole kit and caboodle[,]" so to speak—rather than presenting courts in different jurisdictions with different fee applications in the same matter. *Id*. at 62. "[I]f you wish for the Court to approve the settlement, then the Court ought to … award all the fees by the lawyers who agreed to the settlement." *Id*. at 91.

Chancellor Strine also warned that in the future, he may not "rotely dismiss Delaware litigation in favor of an approved settlement in another state where it appears that people representing prospective classes [in that state] are able to simultaneously negotiate about the substance of the settlement to the class and what counsel gets in terms of fees." *Id*. at 92-93.

Finally, as to the *Clarient* litigation, Chancellor Strine ultimately approved the settlement. After a review of counsel's combined efforts, the court approved a fee of $700,000, of which $350,000 would be awarded to the Delaware plaintiffs. He explained that because the court was "granting the release against the class and preventing any further member of the class from litigation about these issues," it was "critical that this Court … look at the total benefit that justifies the release and award a fee proportionate to that." *Id*. at 87.

Chancellor Strine suggested that the California plaintiffs provide a copy of the transcript to the California court, and limit their fee application to $350,000. The California plaintiffs ultimately consented to a final Delaware Chancery Court order granting them $350,000 in fees and precluding a fee application to the California court.

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