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WHAT'S INSIDE

EMPLOYEE STOCK OWNERSHIP PLAN

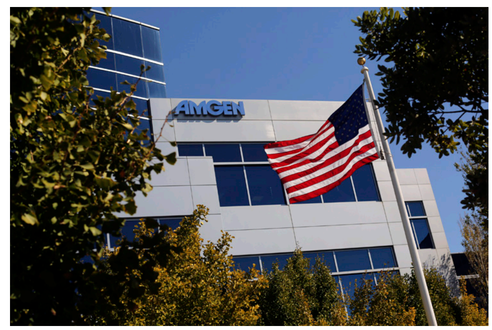
Supreme Court hands Amgen win in suit over employee stock plan

By Peter H. Hamner, Esq., Senior Legal Writer, Westlaw Journals

The U.S. Supreme Court has ruled Amgen Inc. employees did not adequately allege the biopharmaceutical developer violated its fiduciary duties by offering its stock to employees when it knew the company was in trouble.

Amgen Inc. et al. v. Harris et al., No. 15-278, 2016 WL 280886 (U.S. Jan. 25, 2016).

In an unsigned, unanimous decision, the high court on Jan. 25 reversed the 9th U.S. Circuit Court of Appeals, saying the appeals panel failed to properly apply the Supreme Court's holding in *Fifth Third Bancorp v. Dudenhoeffer,* 134 S. Ct. 2459 (2014).



REUTERS/Robert Galbraith

This is the second time the case reached the Supreme Court. The first time around, the court remanded the case to 9th Circuit, asking that it review its decision in light of *Fifth Third*.

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EXPERT ANALYSIS

FCPA: To disclose or not to disclose, that is the question

Mark A. Berube of Barton LLP analyzes the risk incurred when a company self-discloses violations of the Foreign Corrupt Practices Act in light of the fact that the government will grant credit for cooperation only if the company fully assists in any resulting investigation.

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EXPERT ANALYSIS

15 years of fraud — And the government's attempt to restore investor confidence

Douglas Small and Drew Hauge of the Berkeley Research Group discuss the government's enforcement actions against corporate fraud since the collapse of Enron and how the current trend of prosecuting individuals, with an emphasis on the Foreign Corrupt Practices Act, is restoring investor confidence.

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FCPA: To disclose or not to disclose, that is the question

By Mark A. Berube, Esq.
Barton LLP

Corporations that uncover evidence of foreign bribery are left in a quandary. The legal landscape is such that the decision to voluntarily disclose Foreign Corrupt Practices Act violations must be carefully vetted.

What type of voluntary disclosure and cooperation is required to garner any leniency from the government? What benefits might be engendered by such disclosure and cooperation? What serious risks should be considered before deciding to approach the government?

THE REQUIRED SCOPE OF DISCLOSURE

At the outset, it is important to note that mere disclosure will likely confer no benefit. Through published deferred and non-prosecution agreements, official publications, internal memoranda and prepared remarks, the government has made clear that a corporation hoping to garner credit for voluntarily disclosing must do more than merely disclose the fact that evidence of bribery has been uncovered.

Indeed, what the government envisions is more aptly labeled voluntary cooperation. A corporation is expected to conduct a thorough internal investigation that fully develops the facts, disclose all of these facts to the government, identify all individuals involved in or responsible for the criminal behavior, and fully aid the government in any resulting investigation.

Many of the hallmarks of effective disclosure and cooperation are set forth in the Principles of Federal Prosecution of Business Organizations, otherwise known as the Filip memorandum. The fourth factor the Filip memorandum directs prosecutors to consider in deciding whether to criminally charge a corporation is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."[1]

The Filip memorandum goes on to provide further detail as to the contours of effective disclosure and cooperation, providing that a prosecutor may consider "whether the corporation made a voluntary and timely disclosure, the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives."

Relevant factual information includes how and when the alleged misconduct occurred, who promoted or approved it, and who was responsible for committing it. This emphasis on disclosing information to allow the government to hold individuals accountable is a theme of many of the authorities cited in this analysis.

After outlining the elements necessary for effective disclosure and cooperation, the Filip memorandum ends its discussion of cooperation on a cautionary note, warning that "even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a relevant potential mitigating factor, but it alone is not dispositive."

Many of the prominent themes of the Filip memorandum have been recently espoused and expanded upon by Assistant U.S. Attorney General Leslie R. in public remarks. At New York University School of Law's April 17, 2015, Program on Corporate Compliance and Enforcement, Caldwell emphasized the need for corporations seeking cooperation credit to identify individual wrongdoers.

What the government envisions is more aptly labeled voluntary cooperation.

"Perhaps most critically," she said, "we expect cooperating companies to identify culpable individuals — including senior executives if they were involved — and provide the facts about their wrongdoing."[2]

She further reiterated that mere disclosure is not sufficient.

"The mere voluntary disclosure of corporate misconduct — by itself — is not enough. All too often, corporations expect cooperation credit for voluntarily disclosing and describing the corporate entities' misconduct, and issuing a corporate mea culpa," Caldwell said. "True cooperation, however, requires identifying the individuals actually responsible for the misconduct — be they executives or others — and the provision of all available facts relating to that misconduct."

Caldwell re-emphasized the need to disclose facts of individual wrongdoing at the New York City Bar Association's Fourth Annual White Collar Crime Institute on May 12, 2015. Corporations hoping for cooperation credit must disclose all relevant facts, "be they good or bad," she said, and "[i]mportantly that

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includes facts about individuals responsible for the misconduct, no matter how high their rank may be."[3]

Caldwell went on to address other elements of effective cooperation.

With regard to corporate internal investigations specifically, she emphasized that the government expects and appreciates an "orderly internal investigation," which usually means the government does not expect a call on "day one." In attempting to suggest parameters for the scope of an internal investigation, Caldwell made clear that if a company becomes aware of an FCPA violation in one country, it will be expected to thoroughly investigate the facts as to that violation/country. However, she added that it will not usually be expected to engage in an all-encompassing investigation designed to provide "a clean bill of health for the entire company worldwide."

Of note, she specifically addressed the provision of evidence to the government, and, in this regard, foreign privacy laws. Caldwell noted that rather than "a kneejerk invocation of foreign data privacy laws designed to shield critical information," a corporation's "first instinct when providing cooperation should be 'how can I get this information to the government?'"

An internal memorandum that was finalized Sept. 9, 2015, from Deputy U.S. Attorney General Sally Quillian Yates — the second most-senior official at the DOJ — to government attorneys and investigators even more sharply makes the point that cooperation credit hinges on the disclosure of individual misconduct. The Yates memorandum provides that "[i]n order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the department all relevant facts about individual misconduct."[4]

The memo further clarifies that "the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide the department all facts relating to that misconduct." If a corporation omits any wrongdoers or pertinent facts in its disclosure, it will forfeit any credit for cooperation and, as the Yates memorandum makes clear, any cooperation-related reduction at sentencing.

On the civil front, the earmarks of effective disclosure and cooperation before the SEC echo the factors enunciated by the DOJ. In 2001 the SEC issued what has become known as the Seaboard report. The report set forth factors for evaluating a corporation's cooperation in order to determine the appropriate charges to levy, including whether the company:

- Uncovered the improper conduct through its own self-policing.
- Voluntarily self-reported the conduct.
- Took steps to remediate the improper conduct.
- Cooperated with the SEC's investigation.[5]

> "We expect cooperating companies to identify culpable individuals," Assistant U.S. Attorney General Leslie R. Caldwell said.

Andrew Ceresney, director of the SEC's Division of Enforcement, commented on the Seaboard factors in remarks given May 13, 2015, at the University of Texas School of Law's Government Enforcement Institute. Again, central in his remarks on the issue of cooperation credit was the necessity to identify the individuals responsible for misconduct and all details related to it.

When a company commits to cooperation and expects credit for that assistance, the enforcement staff expects them to provide us with all relevant facts, including facts implicating senior officials and other individuals," Ceresney said. "In short, when something goes wrong, we want to know who is responsible so that we can hold them accountable. If a company helps us do that, they will benefit."[6]

Finally, while also not arising in the context of criminal prosecutions, the World Bank has developed its own detailed program to encourage and monitor voluntary disclosure of FCPA violations. Titled the Voluntary Disclosure Program, it outlines, in very specific terms, the steps an entity doing business with the World Bank must take if it uncovers instances of bribery and wishes to avoid debarment from World Bank projects.

The three primary required steps are to cease the corrupt practice; conduct an internal investigation and voluntary disclose the information gleamed about the misconduct; and adopt a "robust" compliance program that is monitored by a compliance monitor for three years.[7] Failure to cease the corrupt practice (or engaging in new ones), as well as failure to disclose "voluntarily, completely, and truthfully," will result in a mandatory 10-year public debarment from World Bank projects.

THE BENEFITS OF DISCLOSURE/ COOPERATION

In the FCPA context, there are undoubtedly concrete examples of situations where self-reporting and cooperation have produced tangible benefits, as well as those where the failure to report and cooperate have occasioned the opposite result. One example of the benefits flowing from a decision to aid the government involves PetroTiger Ltd., a British Virgin Islands oil and gas company that self-reported and fully cooperated with the DOJ's investigation into a scheme to secure a $39 million oil services contract through the bribery of a Colombian official. While the general counsel and two former chief executive officers of the company were charged with bribery and fraud, the DOJ declined to prosecute the company itself.[8]

On the flip side, the failure to self-report and cooperate has resulted in demonstrable harm. The French power and transportation conglomerate Alstom SA paid a record $772 million penalty as a result of FCPA violations involving tens of millions of dollars in bribes paid around the world. The extraordinary magnitude of this penalty in large part resulted from Alstom's failure to voluntarily report and refusal to cooperate with the government's investigation.[9]

Indeed, Patrick Stokes, deputy chief of the DOJ's FCPA unit, told attendees at a Georgetown University Law Center event that had the company cooperated, prosecutors would have sought a penalty of as little as $207 million in accordance with the sentencing guidelines — a 73 percent reduction.[10]

But the benefits of self-reporting and cooperation are not always so obvious. In the case of mining giant BHP Billiton, even with extensive cooperation in an investigation involving dubious alleged FCPA violations, the company was still required to pay a substantial civil penalty to resolve an SEC proceeding.

In sum, the alleged FCPA violations involved inviting government officials to attend the 2008 Beijing Summer Olympic Games without adequate internal controls to ensure that those invited were not involved in contract negotiations with BHP Billiton as a party.[11]

Even though the SEC acknowledged that "BHPB provided significant cooperation with the commission's investigation by voluntarily producing large volumes of business, financial, and accounting documents from around the world in response to the staff's requests, and by voluntarily producing translations of key documents," the company was still required to pay a $25 million civil penalty for failing to have the requisite internal controls in place to detect and prevent FCPA violations.

THE RISKS INHERENT TO DISCLOSURE/COOPERATION

While it would be hard to argue (both in terms of the threshold decision to indict for FCPA violations, as well as the magnitude of any monetary penalty) that self-reporting and cooperation do not often garner substantial benefits, there are serious risks that should be considered and, at minimum, prepared for prior to disclosure.

At the outset, the government may launch (or require the company internally to launch) an expensive and expansive investigation of a company's internal controls and compliance mechanisms, which may in turn lead to the discovery of additional FCPA (or other) violations. Indeed, notwithstanding Caldwell's general remarks about the scope of internal investigations, the DOJ has recently taken the extraordinary step of appointing a private sector compliance expert, Hui Chen, to aid the government in evaluating the efficacy of a company's existing procedures.[12] Depending on the results of any such evaluation, any consensual resolution with the government may entail entering into a post-resolution monitoring agreement requiring broad and costly compliance monitoring for years.[13]

There is also the very real risk that disclosure will lead to collateral investigations. As discussed above, the World Bank now has a detailed voluntary disclosure program in place. If a company doing business with the bank decides not to participate in this program, disclosure to the government would very likely put the bank on notice as well — and might lead to debarment from World Bank projects for 10 years.[14]

Debarment from World Bank projects is not the only potential collateral damage. Rather, disclosure to U.S. authorities may also lead to simultaneous investigation and prosecution by any number of foreign jurisdictions. Indeed, cooperation and joint prosecutions between U.S. and foreign authorities are becoming more commonplace, especially in light of conventions such as the United Nations Convention Against Corruption and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[15]

> On the flip side, the failure to self-report and cooperate has resulted in demonstrable harm.

Apart from potential governmental or quasi-governmental investigations, civil shareholder derivative suits are often the real-world consequence of disclosing FCPA violations. Such suits often allege breach of fiduciary duty by officers and directors complicit in — or at fault for failing to uncover — the underlying bribery.

Finally, there is the very real risk of criminal prosecution faced by those who must decide whether to have the company voluntarily disclose in the first place. The government appears wholly committed to punishing individual offenders (especially high level management) to the full extent of the law. The Yates memorandum makes this point in detail.

Government attorneys are directed to focus on individual wrongdoing from the outset of an investigation to pursue from the beginning the "most efficient and effective way to determine the facts and extent of any corporate misconduct"; encourage cooperation by lower level employees and, in turn, obtain information about those higher up in the corporate hierarchy; and ensure that any eventual resolution of an investigation holds individual wrongdoers accountable.[16]

Further, criminal and civil government attorneys are instructed to communicate continuously to ensure that the full measure of penalties for wrongdoing is being pursued at every juncture.

Moreover, the Yates memorandum provides, in perhaps its most troublesome edict, that "[b]ecause of the importance of holding responsible individuals to account, absent extraordinary circumstances of approved departmental policy…, department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees."

Indeed, emphasizing the gravity of this directive, all declinations or grants of immunity must now be approved in writing by the relevant assistant attorney general or U.S. attorney. And, in accord with this directive, prior to resolving any action against a corporation, government attorneys are directed to address, in writing, potentially liable individuals and the resolution of actions as to them, including the need for tolling agreements.

CONCLUSION

Two important points emerge from the above discussion. First, a corporation that has engaged in FCPA violations and hopes to receive cooperation credit must be willing to commit to an extensive internal investigation and disclose all pertinent facts, including facts related to individual wrongdoing, to the government. Second, the very nature of this detailed disclosure raises potential collateral risks that must be carefully evaluated. WJ

NOTES

1 Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys (Aug. 28, 2008), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

2 Leslie R. Caldwell, Remarks at N.Y.U. Program on Corp. Compliance and Enforcement (Apr. 17, 2015) (transcript *available at* http://justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law).

3 Leslie R. Caldwell, Remarks at N.Y.C. Bar Association's Fourth Annual White Collar Crime Institute (May 12, 2015) (transcript *available at* http://justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-city-bar-0).

[4] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., to Gov't Attorneys and Investigators (Sept. 9, 2015) (*available at* http://justice.gov/dag/file/769036/download).

[5] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969, Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001).

[6] Andrew Ceresney, Remarks at University of Texas School of Law's Government Enforcement Institute (May 13, 2015) (transcript *available at* http://sec.gov/news/speech/sec-cooperation-program.html). Indeed, a company runs a very significant risk in the context of SEC actions if it fails to voluntarily disclose: an internal whistleblower may disclose anyway in the hopes of garnering 10 percent to 30 percent of any monetary sanctions recovered. *See* SEC.gov, Frequently Asked Questions, http://www.sec.gov/about/offices/owb/owb-faq.shtml (last visited Nov. 24, 2015).

[7] *See* World Bank Department of Institutional Integrity, VDP Guidelines for Participants, § 3 (July 20, 2006), http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDPGuidelinesforParticipants.pdf.

[8] *See* Press Release, Dep't of Justice, Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company (Jan. 6, 2014), http://justice.gov/opa/pr/foreign-bribery-charges-unsealed-against-former-chief-executive-officers-oil-services-company; Caldwell, Remarks at White Collar Crime Institute, *supra* note 3.

[9] *See* Press Release, Dep't of Justice, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

[10] *See* Jimmy Hoover, *Feds Say Sky-High Fines Show Perks of FCPA Self-Reporting*, Law360 (Mar. 12, 2015, 8:11 PM), http://www.law360.com/articles/631116/feds-say-sky-high-fines-show-perks-of-fcpa-self-reporting.

[11] *See* BHP Billiton Ltd. and BHP Billiton Plc, Exchange Act Release No. 74998 (May 20, 2015) (https://www.sec.gov/litigation/admin/2015/34-74998.pdf).[12] *See* Ed Beeson, *DOJ's New Compliance Counsel to Scope Company Efforts*, Law360 (Nov. 2, 2015, 6:47 PM), http://www.law360.com/articles/ 722115/doj-s-new-compliance-counsel-to-scope-company-efforts.

[13] Also, any subsequent infractions may result in the company being treated as a recidivist by the government. *See* Caldwell, Remarks at N.Y.U. Program, supra note 2 ("Just as with individuals, companies are expected to learn from their mistakes. A company that is already subject to a DPA or NPA for violating the law should not expect the same leniency when it crosses the line again.").

[14] While debarment for 10 years is often the most onerous penalty a World Bank partner can suffer, there are potential alternatives. For example, Siemens AG agreed to settle a World Bank investigation by paying $100 million over 15 years to support anti-corruption work, agreeing to an up-to-four-year debarment for its Russian subsidiary, and consenting to a two-year no-bid period on World Bank projects. *See* Press Release, The World Bank, Siemens to Pay $100m to Fight Corruption as Part of World Bank Group Settlement (July 2, 2009), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,print:Y~isCURL:Y~contentMDK:22234573~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

[15] *See United Nations Convention against Corruption,* U.N. Office on Drugs and Crime, http://www.unodc.org; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

[16] Yates Memorandum, supra note 4. While the potential inability of an individual defendant to satisfy any eventual civil judgment remains a relevant factor in determining whether to proceed with litigation, government attorneys are cautioned that the twin goal of "accountability for and deterrence of individual misconduct" is just as important.

15 years of fraud — and the government's attempt to restore investor confidence

By Douglas Small, CPA, CFE, and Drew Hauge, CPA
Berkeley Research Group

In the early 2000s, the U.S. corporate landscape was in the midst of an accounting fraud epidemic with no end in sight. Through creative accounting, many corporate executives and employees artificially inflated their companies' values and lined their own pockets. The U.S. government responded by forming the Corporate Fraud Task Force, an institution created under the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A, and initiating enforcement actions against corporate giants including Enron, Tyco and WorldCom. The litigation over this corporate criminal activity resulted in a monumental shift, both in terms of investor perception and the scope of corporate compliance efforts.

AFTER ENRON

In July 2002, President George W. Bush signed an executive order establishing the Corporate Fraud Task Force to prosecute the increasing number of corporate and accounting fraud cases under investigation. The stated goal of the task force was to "clean up corruption in the board room, restore investor confidence in our financial markets, and to send a loud and clear message that corporate wrongdoing will not be tolerated."[1]

A July 2004 report on the Corporate Fraud Task Force trumpeted the group's achievements over its first two years, including over 500 corporate fraud convictions or guilty pleas and charges against over 900 defendants. The victories included the massive Enron case, which saw 31 defendants charged and over $161 million seized for the benefit of injured parties — as well as a record-breaking $2.25 billion penalty against WorldCom.

> Following the credit crisis of 2008, only one investment banker received jail time.

THE SUBPRIME CRISIS

In 2009, in the wake of the subprime crisis, the Corporate Fraud Task Force was replaced by the Financial Fraud Task Force. Once again, investor confidence had sustained a devastating blow, this time at the hands of the mortgage banking industry. The newly formed (or perhaps just retitled) interagency task force sought to "hold accountable those who helped bring about the last financial meltdown [and] prevent another meltdown from happening."[2]

In both 2002 and 2009, the goals of enforcement policy shared the common theme of restoring investor confidence and combatting future occurrences of the accounting fraud that led to the crises.

One difference, however, related to whether the government prosecuted individuals and held them accountable for the fraud. Following the credit crisis of 2008, only one investment banker received jail time.[3] Some may argue that the credit crisis lacked the illegal activity present in early-2000s cases like Enron. However, even the savings-and-loan crisis of the 1980s led to significant convictions, with over 1,000 individuals prosecuted as a result.[4]

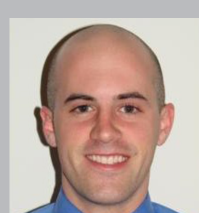
AN INCREASE IN INDIVIDUAL PROSECUTIONS

Fast-forward to 2015, and the portfolio of ongoing investigations by the Department of Justice and the Securities and Exchange Commission looks much different. The number of corporate prosecutions has dropped by 29 percent over a 10-year period, from 335 cases in 2004 to just 237 in 2014.[5] The government appears to be focusing its resources back on individual prosecutions rather than corporate criminal penalties.

This shift in enforcement approach raises several important questions. Is the change a result of an enhanced regulatory environment? Have the regulators successfully "disincentivized" most corporations and executives from committing accounting fraud? Or does the decrease in corporate prosecutions and lack of large-scale fraud investigations reflect a shift in government policy?

EMPHASIS ON FOREIGN CORRUPTION

A review of the past year's major enforcement cases provides a picture of the government's current focus. At the second annual Global Investigations Review Conference on Sept. 22, 2015, Assistant U.S. Attorney General Leslie Caldwell discussed major recent prosecutions. The highlighted cases included



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a number of enforcement actions under the Foreign Corrupt Practices Act, 15 U.S.C.A. § 178dd-1.

In December 2014, French power company Alstom SA agreed to a penalty in excess of $772 million, which was the largest foreign bribery resolution ever attained by the Department of Justice. In addition to the corporate penalty, five individuals, including four corporate executives, faced criminal charges. Additionally, IAP Worldwide Services and Louis Berger International faced FCPA charges of their own, and in 2015 they paid penalties of $7.1 million and $17.1 million respectively. In both cases, one or more corporate executives also pleaded guilty to FCPA charges.[6]

Caldwell pointed out several common themes among these cases. First and most important was the DOJ's increased focus on individual criminal prosecutions. Caldwell stated that prosecuting the corporate entity alone "simply is not enough — in most instances — to fully punish and, more importantly, deter corporate misconduct."[7]

When determining corporate penalties, the DOJ has strongly considered companies' cooperation with internal investigations and proactive remediation efforts. While consistent cooperation can lead to a lighter penalty, failure to be forthright with investigators can lead to harsh punitive measures.

lawyer who claimed to have been personally involved in orchestrating many of the bribes. Despite the laundry list of evidence uncovered and an ensuing investigation by the DOJ, a recent Wall Street Journal article states that (according to sources familiar with the probe and barring any last-minute discoveries), it now appears that the case will likely avoid formal prosecution or criminal charges through the ever-popular non-prosecution agreement or deferred prosecution agreement.[9]

The investigation has not been without cost to Wal-Mart, which has already paid over $650 million on the investigation and related compliance improvements.[10] Additionally, even as the probe of Wal-Mart's activities in Mexico draws to a conclusion, investigations of potential bribes in other foreign markets are ongoing. The Wal-Mart case illustrates the importance of conducting in-depth investigations and cooperating early and often with federal investigators.

Although Wal-Mart's fees related to the investigation have already exceeded $650 million, this amount pales in comparison to what it likely would have faced if it had not cooperated in the federal investigation.

For example, a 2014 FCPA case against Marubeni Corp., which had pleaded guilty and was charged an $88 million fine, specifically cites, "Marubeni's decision not to cooperate

> Fast-forward to 2015, and the ongoing investigations by the Department of Justice and Securities and Exchange Commission look much different.

In addition to those prosecutions, the anticipated conclusion of the Wal-Mart FCPA investigation may be construed as the bellwether for the current state of enforcement policy. In December 2012, The New York Times published the results of its detailed investigation of Wal-Mart's Mexico division, which alleged a widespread system of bribery payments to government officials to obtain building permits throughout the country.[8] The investigation included the review of tens of thousands of permit-related documents and dozens of on-the-ground interviews.

Among others, the Times interviewed Sergio Cicero Zapata, a former Wal-Mart de Mexico

with the department's investigation when given the opportunity to do so, its lack of an effective compliance and ethics program at the time of the offense, its failure to properly remediate and the lack of its voluntary disclosure of the conduct as some of the factors considered by the department in reaching an appropriate resolution."[11]

Though the government appears to go out of its way to suggest Marubeni was charged because it did not cooperate, it does not indicate what the penalty would have been had the company cooperated.

Analysis of these recent trends in prosecution statistics shows that regulators believe their best course of action is to penalize the individual rather than the corporate entity. The decline in corporate prosecutions could also stem from a shift by the DOJ. DOJ officials have recently acknowledged that they are turning their focus toward "higher-impact" bribery cases, which take longer to investigate.[12]

Though U.S. regulatory and enforcement efforts still have room for improvement, the continued focus on FCPA prosecutions signals that the U.S. regulatory environment has made strides in the right direction. While many prosecutions of the early 2000s were a reaction to a system that had grown too lenient, FCPA prosecutions are more proactive. Unlike when the Sarbanes-Oxley Act was instituted in 2002, the FCPA has been in place since 1977. While other countries have recently issued stepped-up regulations, such as the U.K. Bribery Act of 2010, bribery and corruption in developing markets around the world have long been widely known. Having successfully performed damage control with regard to investor confidence domestically, the United States is moving forward with continued cooperation with foreign jurisdictions in an attempt to improve investor confidence globally.

JAPAN'S ENRON

One area of the world currently under scrutiny is Japan, which has been rocked by two major accounting scandals in recent years. First, in October 2011, Japanese corporate giant Olympus was accused of perpetrating a 13-year loss-hiding scheme. The Japanese regulatory authorities commissioned a high-profile independent investigation of Olympus, ending in the criminal prosecution of three executives and a $7 million fine. On top of that, Olympus' stock price dropped precipitously, and it faced a number of civil lawsuits seeking additional damages to the tune of $273 million.[13]

The Olympus scandal turned from a single data point to the start of a trend when its biggest rival, Toshiba Corp., was found guilty of overstating operating profits over a multiyear period. Ongoing investigations of the company's books continue to unearth additional violations — what was previously thought to have been $780 million of misstatements over three years is now known to have been more than $2 billion over seven years. The company has already seen a change in management and is sure to face harsh sanctions from Japanese regulators. As with the Toshiba accounting scandal, poor corporate culture was cited as a factor in how these frauds began and were able to continue for so long.[14]

The nature of these two cases and the underlying corporate landscape of Japan is reminiscent of the accounting fraud scandals in the United States in the early 2000s. Despite Japan's internal control provisions outlined in the Financial Instruments and Exchange Act of June 2006 (also referred to as J-SOX), it is likely that we will see enhanced regulatory actions in the coming years as Japan attempts to alter a deeply embedded and broken corporate culture that fosters fraudulent accounting.

If the past experience of the U.S. is any indication, the situation in Japan is likely to get worse before it gets better — and investors in Japanese companies should take note.

RESTORING INVESTOR CONFIDENCE

While the decrease in large-scale domestic accounting fraud cases can be seen as an encouraging sign, U.S. regulators must stay vigilant against growing risks to domestic investor confidence. There will likely always be people who will try to commit fraud, so through enforcement and regulation we must limit the incentive and opportunity for fraud to occur.

This can be done through transparency, independence and accountability. To achieve transparency, regulators must promote an understanding of complex accounting and financial issues. This is especially important in the ever-developing realm of securities. Sarbanes-Oxley went a long way toward promoting truly independent third-party audits, but continued enforcement efforts are needed to ensure that these audits stay free from bias.

Further, board members and key employees must be held accountable to ensure that proper compliance measures are implemented and observed. With a greater focus on individual prosecutions, regulators aim to foster a greater culture of accountability among key players.

It appears clear that the enhanced regulatory environment of the DOJ and SEC over the past 15 years has had a significant impact on the number of accounting frauds committed in the U.S. The current enforcement policies of more individual accountability and the DOJ's focus on "higher-impact" bribery cases have had a positive effect on investor confidence in corporate America.

This confidence is bolstered as corporations see the benefits and incentives of having robust compliance programs that deter fraudulent activity. Though large fines may still be levied in cases of noncompliance, companies that self-disclose and cooperate in investigations may be able to avoid criminal prosecution — and enjoy Wall Street's continued support. WJ

> Board members and key employees must be held accountable to ensure proper compliance measures are implemented and observed.

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U.S. securities class actions rebound to 7-year high

(Reuters) – A wheezing stock market and the prospect of greater damages stemming from corporate fraud may be driving the biggest rush of U.S. securities class actions since the financial crisis.

Shareholders in 2015 filed 189 lawsuits accusing companies of making false or misleading statements or concealing bad news about their businesses or mergers, a study released Jan. 26 by Cornerstone Research and Stanford Law School shows.

The number rose from 170 a year earlier, and was the highest since 223 lawsuits were filed in 2008. A separate study from NERA Economic Consulting also noted a seven-year high.

Big cases drove some of the increase.

Joseph Grundfest, a Stanford University law professor, said in a phone interview. "A large majority of these cases are stimulated by stock price declines."

Forty-three class actions targeted biotechnology, drug and health care companies, Cornerstone said. Just 11 targeted energy companies. None targeted banks, sparing that sector for the first time since 2006.

Though not legally obligated, lawyers were in a hurry to sue. Half took no more than 10

> "All other things equal, a down market is likely a positive factor that drives more business for plaintiffs' class-action lawyers," Stanford University law professor Joseph Grundfest said.

days after the end of proposed class periods to sue, which Grundfest attributed to a "Twitter-verse" driving lawyers to quickly line up the best plaintiffs.

Cornerstone's "maximum dollar loss," or the largest sums that shareholders might claim in damages, rose to $371 billion from $215 billion in 2014, though it remained below the $816 billion level from 2008.

There were also five "mega" lawsuits, filed after companies' market values shrank at least $5 billion immediately after bad news became public. In 2014, there were no such cases.

"All other things equal, a down market is likely a positive factor that drives more business for plaintiffs' class action lawyers,"

Settlements, meanwhile, were on the upswing, rising to 108 from 99 in 2014 according to NERA. The average was $52 million, topped by $970.5 million for the insurer American International Group Inc, NERA said.

One other factor that may encourage more federal class actions relating to mergers is Delaware judges' growing antagonism to "disclosure-only" settlements.

Such accords, where shareholders get no cash, must meet a high bar to win approval in that state under new standards announced Jan. 22.

"This is a fascinating new development," Grundfest said. "At the margin, if it drives some of these lawsuits away from Delaware under state law theories and into federal court, then it could actually increase the number of (federal) filings." WJ

(Reporting by Jonathan Stempel)

New York federal judge rejects bid to send IPO suit back to state court

A Manhattan federal judge has refused to send back to a New York state court a shareholder lawsuit accusing a Chinese mobile game company of misleading investors who relied on its 2014 initial public offering documents.

Mansour v. iDreamSky Technology Ltd. et al., No. 15-cv-3794, 2016 WL 299034 (S.D.N.Y. Jan. 25, 2016).

U.S. District Judge J. Paul Oetken of the Southern District of New York in a Jan. 25 ruling said it would go against the legislative intent of Securities Act of 1933, 15 U.S.C.A. § 77a, to remand Stephen Mansour's proposed class action against iDreamSky Technology Ltd. to the court where it was filed originally.

ALLEGATIONS

Mansour's complaint is one of four shareholder lawsuits filed against iDreamSky.

The company is an independent mobile game publishing platform that works with international game developers to redesign their games for the Chinese market.

According to the lawsuits, iDreamSky priced its initial public offering of American depositary shares at $15 per share Aug. 7, 2014. Foreign companies issue ADSs to trade on the New York Stock Exchange.

After the market closed on Friday, March 13, 2015, iDreamSky lowered its revenue numbers for the fourth quarter of 2014.

As a result, the company's share price fell $3.60 per share, or 33 percent, to $7.22 when markets reopened the following Monday.

Shareholders filed suit in federal and state courts, claiming the company's IPO registration statement and prospectus contained material misstatements and omissions regarding its distribution channels and its ability to make money.

JURISDICTION

Mansour's complaint in the New York County Supreme Court did not allege violations of state law, but only violations of the Securities Act.

The company removed the action based on the federal securities law claims to the federal court, and Mansour followed with a motion for remand.

Reading the statute to mean that state law class actions may be removed to federal court, while federal law class actions would have to stay in state court, would run counter to the purposes of the Securities Litigation Uniform Standards Act of 1998 and the Private Securities Litigation Reform Act of 1995, the judge said.

Both laws seek to make federal courts the exclusive venue for federal law class actions involving securities, he said.

Judge Oetken also consolidated Mansour's suit with the three others filed against iDreamSky:

> Shareholders claim the company's IPO registration statement and prospectus contained material misstatements and omissions regarding its distribution channels and its ability to make money.

In a response, iDreamSky said that while the Securities Act provides concurrent federal and state jurisdiction over alleged violations of the law, it excludes from state jurisdiction class actions, like Mansour's, involving more than 50 people.

Thus, the New York state court would not have jurisdiction over Mansour's suit, making it removable, the company said.

The Securities Act has a "complicated" jurisdictional scheme, Judge Oetken noted, but he ultimately agreed with iDreamSky that Mansour's reading of the act "produces an odd result."

- *Hung v. iDreamSky Technology Ltd. et al.,* No. 15-cv-2514.
- *Griffith v. iDreamSky Technology Ltd. et al.,* No. 15-cv-2944.
- *Jeremias v. iDreamSky Technology Ltd. et al.,* No. 15-cv-3484.

He appointed Melvyn Boey Kum Hoong as lead plaintiff, with the Rosen Firm PA and Glancy Prongay & Murray as co-lead counsel. WJ

Related Court Document:
Opinion: 2016 WL 299034

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

Nevada casino seeks summary judgment in shareholder suit

By Peter H. Hamner, Esq., Senior Legal Writer, Westlaw Journals

Las Vegas Sands Corp. and its top executives are asking a Nevada federal judge to throw out a lawsuit accusing the company of artificially inflating its stock price with misleading statements about its ability to obtain financing for future projects.

Fosbre v. Las Vegas Sands Corp. et al., No. 10-cv-765, motions for summary judgment filed (D. Nev. Jan. 22, 2016).

In memos supporting their motions for summary judgment, the casino and resort operator, its current CEO and its former president argue that the suit ignores the effect the recent financial crisis had on the gaming industry and Las Vegas Sands' stock.

The defendants also say LVS disclosed the risks associated with obtaining financing.

> "Plaintiffs cannot ignore LVS' robust disclosures, nor the global financial crisis and its unprecedented effects upon the gaming industry as a whole," the company and its CEO say.

While LSV and current CEO Sheldon G. Adelson filed separately from former President and Chief Operating Officer William P. Weidner, they joined in each other's motions.

REUTERS/Bobby Yip

LAS VEGAS SANDS' BUSINESS

LVS owns and operates casinos and resorts in Las Vegas, Macau and Singapore.

The company operated two gaming properties prior to 2007 — the Venetian Resort Hotel Casino in Las Vegas and the Sands Macao in China — the plaintiff shareholders allege.

Between 2007 and 2008, LVS informed investors of its plans to develop additional properties in Las Vegas, Macau and Singapore and to expand its current operations, they claim.

Although the company lacked cash and funding sources for its future projects, LVS and its officers and directors continued assuring investors that it could continue with its plans, the shareholders claim.

LVS eventually disclosed its problems with obtaining funding and a liquidity crisis that threatened the business. As a result, the company's stock dropped from $36.11 on Oct. 1, 2008, to $7.85 on Nov. 6, 2009.

Shareholders Frank J. Fosbre Jr. and Shirley and Wendell Combs separately sued the company and its top executives alleging violations of federal securities laws. After the suits were consolidated, the lead plaintiff pension funds filed an amended complaint saying LVS and its top officers and directors knew the company could not fund its projects and failed to disclose its problems to investors.

SUMMARY JUDGMENT

In their memo supporting their summary judgment motion LVS and Adelson argue the lawsuit fails to allege they improperly misled investors over the company's funding and liquidity.

The company adequately disclosed the risks associated with its future projects and financing the project, they say. Moreover, the financial crisis caused the funding problems and stock drop, not the alleged misrepresentations, they argue.

"Plaintiffs cannot ignore LVS' robust disclosures, nor the global financial crisis and its unprecedented effects upon the gaming industry as a whole," the memo says.

Moreover, many of their alleged misstatements are shielded under the "safe harbor" provision of the Private Securities Litigation Reform Act, 15 U.S.C.A. § 78u-5(c), which protects certain forward-looking statements or management predictions that later turn out to be inaccurate, the defendants argue.

The statements at issue referred to projections and management plans for future operations and are not actionable under the PSLRA, the memos say.

Weidner adds in his memo that his statements were not false or misleading, and that the plaintiffs have failed to allege he intended to deceive investors. WJ

Related Court Document:
LVS and Adelson's motion for summary judgment: 2016 WL 286893

Semiconductor manufacturer hit with shareholder suit

By Peter H. Hamner, Esq., Senior Legal Writer, Westlaw Journals

Tower Semiconductor Ltd. and top executives violated federal securities laws by misleading investors over the values of several Japanese acquisitions and a debt issuance, according to a recently filed proposed class-action lawsuit.

Walker v. Tower Semiconductor Ltd. et al., No. 16-cv-487, complaint filed (C.D. Cal. Jan. 22, 2016).

The complaint, filed by Tower shareholder Brandon Walker in the U.S. District Court for the Central District of California, cites a Jan. 14 analyst report that said Tower overpaid for a Japanese facility and an equity stake in a Panasonic subsidiary. The report also allegedly said the company misrepresented the accounting method for notes it issued in 2010 and 2012.

The suit also names CEO Russell C. Ellwanger and Chief Financial Officer Oren Shirazi as defendants.

But in a Jan. 14 report, analyst firm Spruce Point Capital Management said Tower overpaid for the Nishiwaki facility and the Panasonic stake, and that it used improper accounting methods for the debt notes, the complaint says.

Tower's share price dropped on the news about 10 percent to $11.24 that day, the suit says.

Walker claims the company, Ellwanger and Shirazi failed to notify investors of the overvaluations and improper accounting in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78j(b) and 78t(a), and Rule 10b-5, 17 C.F.R. § 240.10b-5.

> The suit claims the company, and its CEO and CFO failed to notify investors of the overvaluations and improper accounting in violation of federal securities laws.

Israel-based Tower and U.S. subsidiary Jazz Semiconductor Inc. operate under the trade name TowerJazz.

According to the complaint, Tower issued $100 million worth of debt notes in October 2010.

Then in June 2011 it acquired a semiconductor manufacturing facility in Nishiwaki, Japan, for $63.6 million.

Tower in February 2012 allegedly expanded its debt note issuance by about $80 million.

Two years later it acquired a 51 percent stake in TowerJazz Panasonic Semiconductor Co. so that it could manufacture semiconductors for Panasonic and others, according to the complaint.

Tower in a Jan. 25 statement said it would vigorously oppose the lawsuit.

The company called the Spruce Point report a "short sell thesis … by a self-styled analyst with false and misleading information about the company's strategy, business model and financials."

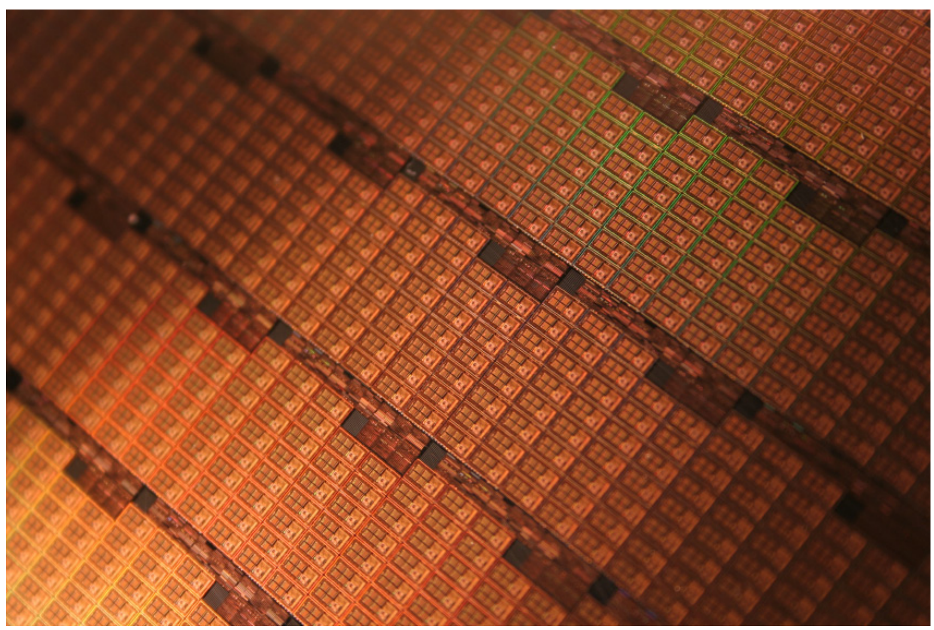
Short-selling is an investment strategy that bets a company's share price will drop.

Ellwanger in the statement added that the "alleged claims are totally without merit and we will forcefully pursue this matter until dismissal of all claims."

Walker seeks unspecified damages on behalf of Tower investors who bought the company's stock between April 30, 2012, and Jan. 13, 2016. WJ

Related Court Document:
Complaint: 2016 WL 309793

See Document Section C (P. 33) for the complaint.



Tower acquired a 51 percent stake in TowerJazz Panasonic Semiconductor Co. so it could manufacture semiconductors, like those shown here, for Panasonic and others, the complaint says.

Investor fights KPMG's bid to toss fraud suit over inflated revenue

By Jason Seashore, J.D., Senior Content Writer, Westlaw Daily Briefing

A Poseidon Concepts Corp. shareholder says in federal court papers that auditor KPMG LLP cannot escape liability for allegedly looking the other way while the now-bankrupt energy services firm overstated its revenues in 2011 and 2012.

In re Poseidon Concepts Securities Litigation, No. 13-cv-1213, memo opposing dismissal filed (S.D.N.Y. Jan. 22, 2016).

Lead plaintiff Gerald Kolar argues that his third amended complaint is not procedurally defective and adequately alleges that KPMG, Poseidon's independent auditor, made false statements with scienter, or fraudulent intent.

The Nov. 30 complaint, filed in the U.S. District Court for the Southern District of New York, names as defendants Poseidon founders Lyle Michaluk, Matt MacKenzie, A. Scott Dawson, Clifford Wiebe, Harley Winger and Dean Jensen, as well as director Neil Richardson and KPMG.

Canada-based Poseidon is not named because it has gone bankrupt, the complaint says.

OVERSTATED REVENUES

According to the complaint, Poseidon reported astonishing growth in 2011 and 2012 that was based upon "little more than fraud."

The company, which provides storage tanks for hydraulic fracturing fluid, earned a large percentage of its revenues from "take or pay" master agreements related to the leasing of the tanks, the suit says.

Those agreements required customers to pay a minimum daily rate for the right to lease a tank or a higher daily rate to actually use a tank, the suit says.

In generally accepted accounting practices in the oil-and-gas services industry, revenues are not recognized unless the provider obtains a field ticket signed by the customer evidencing the services provided and the rate, the complaint says.

REUTERS/Mike Blake

Most of Poseidon's master agreements provided that without a signed field ticket, it would not be paid, the suit says.

In 2011 and 2012, most of Poseidon's recognized revenue stemmed from transactions with neither a signed field ticket nor a signed master agreement, according to the complaint.

Poseidon allegedly did not even try to conceal its fraud from KPMG. As Poseidon's auditor, KPMG had actual knowledge of and consciously disregarded red flags, the suit says.

KPMG employees attended meetings in which Poseidon employees stated that the company was recognizing revenues even though it had no enforceable contract, according to the complaint.

Poseidon employees separately explained to KPMG that "Poseidon's ballooning accounts receivable and collection delays were caused by 'systematic' issues like 'not getting signed field tickets,'" the suit says.

During the course of a series of corrective disclosures between November 2012 and February 2013, in which Poseidon revealed that it had materially overstated revenues, the company's share price lost about 98 percent of its value, the complaint says.

The suit alleges violations of the anti-fraud and control-person provisions of the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78j(b) and 78t(a).

KPMG SEEKS DISMISSAL

In a Dec. 15 memo supporting dismissal, KPMG says the court has no jurisdiction over it and that the case should be litigated in Canada, where a pending suit addressing the same claims already exists.

The auditor also says the suit fails to state a claim against it because Poseidon told KPMG that a missing field ticket would merely delay the collection of payment, not prevent it.

"A delay in collecting amounts owed does not suggest that revenue should not be recognized. It suggests the delay in collections should be disclosed in the financial statements, which it was," KPMG says.

REASONS NOT TO DISMISS

In his Jan. 22 memo opposing dismissal, Kolar says the court has personal jurisdiction over KPMG, despite Poseidon's status as a Canadian company.

Poseidon's operations took place largely in the United States and were conducted through a subsidiary incorporated in Delaware and with principal executive offices in Denver, the memo says.

KPMG therefore audited a U.S. company, it says.

Kolar says he adequately alleges that KPMG made false statements.

The complaint claims with particularity that KPMG's audit did not comport with Canadian generally accepted auditing standards, which required KPMG to respond to red flags that Poseidon's financial statements were not accurately stated, the memo says.

KPMG was aware of numerous red flags, such as Poseidon's failure to evaluate its accounts receivable for collectability and the company's internal control deficiencies, the memo says. WJ

Related Court Document:
Opposition memo: 2016 WL 283405

Investment adviser, client seek class certification in Schwab bond index suit

By Peter H. Hamner, Esq., Senior Legal Writer, Westlaw Journals

An investment adviser and its investor client have asked a California federal court to certify as a class action their lawsuit accusing brokerage firm Charles Schwab of putting risky mortgage-backed securities into a bond index mutual fund.

Northstar Financial Advisors Inc. et al. v. Schwab Investments et al., No. 08-cv-4119, motion for class certification filed (N.D. Cal. Jan. 21, 2016).

The pair says the U.S. District Court for the Northern District of California should grant class certification because the class meets the four threshold requirements for certification under Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality and adequacy of representation.

Northstar Financial Advisors and Odessa Hall, a client who invested about $170 million in the fund, are seeking to represent the class. The adviser added Hall as a class representative to avoid Schwab further challenging standing because Hall, and not Northstar, owned shares in the fund.

They are also asking that law firms Greenbaum Rowe Smith & Davis and Wolf Popper LLP be appointed counsel of record.

THE FUND

According to Northstar's amended complaint, Schwab told bond index fund investors in 1997 that it would not invest more than 25 percent of the fund's assets in mortgage-backed securities and that it would track the Lehman Brothers U.S. Aggregate Bond Index.

But Schwab deviated from its policy and invested more than 25 percent of the fund's assets in mortgage-backed securities and failed to track the Lehman index, the suit says.

Mortgage-backed securities are debt obligations secured by pools of mortgage loans. Principal and interest payments are distributed to investors with varying maturity dates, cash flows and default risks. Along with the housing market crash, the securities are largely blamed for the financial crisis of the late 2000s.

From Aug. 31, 2007, to Feb. 27, 2009, the Schwab index fund had a negative 4.8 percent return, while the Lehman index had a 7.85 percent positive return, the suit says.

Northstar says the Schwab fund's deviation cost its shareholders tens of millions of dollars.

The financial adviser sued Schwab Investments, its board of trustees and advisory arm Charles Schwab Investment Management Inc. in August 2008 on behalf of Northstar clients and other investors in the fund. The suit alleged breach of fiduciary duty, breach of contract, aiding and abetting breach of fiduciary duty, breach of the implied contractual covenant of good faith and fair dealing, and violation of Section 13(a) of the Investment Company Act of 1940, 15 U.S.C.A. § 80a-8(b).

STANDING

The court dismissed the suit in February 2009, saying Northstar lacked standing because it did not own shares in the fund — its customers did. *Northstar Fin. Advisors v. Schwab Invs. et al.,* 609 F. Supp. 2d 938 (N.D. Cal. 2009).

Northstar subsequently obtained an assignment of rights from one of its customers and filed an amended complaint.

U.S. District Judge Lucy H. Koh of the Northern District of California granted Schwab's motion to dismiss the lawsuit in August 2011. *Northstar Fin. Advisors v. Schwab Invs. et al.,* 807 F. Supp. 2d 871 (N.D. Cal. 2011).

Although the judge determined that Northstar had standing to sue, she ruled the complaint failed to allege a breach of contract because no contract existed between the financial adviser and Schwab.

Northstar appealed the decision, and the 9th U.S. Circuit Court of Appeals found last March that the plaintiff had standing and reinstated its breach-of-contract claim. *Northstar Fin. Advisors v. Schwab Invs. et al.,* 779 F.3d 1036 (9th Cir. 2015).

The panel said Schwab's adoption of the investment policies for the fund was "sufficient to form a contract" with the fund's shareholders.

The U.S. Supreme Court denied Schwab's petition to review the 9th Circuit's decision in a one-page order without comment Oct. 5. *Schwab Invs. et al. v. Northstar Fin. Advisors,* No. 15-134, *cert. denied* (U.S. Oct. 5, 2015).

On the same day, Judge Koh ruled that the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C.A. § 77p, precluded Northstar's breach-of-contract claim. *Northstar Fin. Advisors et al. v. Schwab Invs. et al.,* No. 8-cv-04119, 2015 WL 5785549 (N.D. Cal. Oct. 5, 2015).

SLUSA precludes common law claims regarding alleged material misrepresentations or omissions made in connection with the purchase or sale of securities.

Northstar's claims of breach of fiduciary duty and aiding and abetting against the fund's trustees and Schwab's advisory arm survived.

CLASS CERTIFICATION

Northstar is seeking to represent investors in the index fund who either owned shares as of Aug. 31, 2007, or purchased shares between Sept. 1, 2007, and Feb. 27, 2009.

It argues the case should proceed as a class action because there are numerous plaintiffs, common questions of law exist, the lead plaintiffs' claims are typical of the classes', and Northstar and Hall will adequately represent the class.

According to the motion, the fund had 157 million outstanding shares in late 2007 with well over 1,000 fund investors.

Additionally, the plaintiffs say the proposed class meets Rule 23(b)(3)'s requirements that common questions of law and fact predominate across members of the class, and a class action is the superior method for adjudication. WJ

Related Court Document:
Class certification memorandum: 2016 WL 309794

Supreme Court should not review 'repo' case, Lehman trustee and SIPC argue

The trustee of now-bankrupt Lehman Bros. and the Securities Investor Protection Corp. say the U.S. Supreme Court should not review an appellate decision that declined to grant a Lehman repurchase agreement client special protections afforded creditors of broker-dealers under federal law.

CarVal UK Ltd. v. Giddens et al., No. 15-372, opposition brief filed (U.S. Jan. 15, 2016).

The 2nd U.S. Circuit Court of Appeals correctly determined that parties to Lehman repurchase agreements, or repos, are not customers within the meaning of the Securities Investor Protection Act, 15 U.S.C.A. § 78aaa, Lehman trustee James W. Giddens and the SIPC argue in a brief opposing investment manager CarVal UK Ltd.'s petition for certiorari.

The Securities Investor Protection Act, administered by the SIPC, provides certain protections to customers of broker-dealers during a broker-dealer's liquidation proceedings. For instance, it covers losses up to $500,000 for customers of failed brokerages and gives them priority over other creditors.

Under the law, the SIPC appoints a trustee to oversee the distribution of the failed broker-dealer's cash and securities to customers.

REPO AGREEMENTS

The dispute at issue stems from repurchase agreements Doral Bank and Doral Financial Capital entered into with Lehman in the early 2000s.

Repos consist of one party selling assets or securities to another with an agreement to repurchase them later at a set price on a set date. In essence, repos operate as loans with the assets held as collateral. The lender is paid back the loan when the creditor buys back the assets.

Lehman filed for bankruptcy protection Sept. 15, 2008, with debt totaling $613 billion against total assets of $639 billion. The case was the largest bankruptcy filing in history and is widely believed to have played a key role in the 2008 financial crisis.

REUTERS/Gary Cameron

Lehman trustee James W. Giddens, shown here in 2012

'CUSTOMER' STATUS

Doral sought protections under the Securities Investor Protection Act for its claims in Lehman's bankruptcy proceeding but trustee Giddens denied the bank "customer" status under the law. Doral then transferred its claims to CarVal.

The U.S. Bankruptcy Court for the Southern District of New York in 2013 approved Giddens' decision, holding that Doral had not entrusted the securities to Lehman, as required to invoke the SIPA's protections. The bank's account with Lehman did not hold the repo collateral and Lehman was free to — and did — use the collateral for its own purposes, including other repo transactions with different counterparties, the court said. *In re Lehman Bros.,* 492 B.R. 379 (Bankr. S.D.N.Y. 2013).

CarVal appealed the decision to the District Court, and U.S. District Judge Denise Cote of the Southern District of New York affirmed in 2014, saying Doral had not entrusted the securities to Lehman and therefore it had no fiduciary relationship with Lehman. *In re Lehman Bros.,* 506 B.R. 346 (S.D.N.Y. 2014).

CarVal again appealed, and the 2nd Circuit agreed with Judge Cote. *CarVal UK Ltd. v. Giddens et al.,* 791 F.3d 277 (2d Cir. 2015).

"Lehman's unrestricted ownership of the securities defeats any suggestion that Doral entrusted the securities to Lehman when it entered into the repos," the appeals court said.

PETITION CITES CIRCUIT SPLIT

CarVal has asked the Supreme Court to overturn the 2nd Circuit's ruling.

It argues that the appeals court's decision creates a circuit split with the 11th Circuit, requiring the high court's review.

According to CarVal's petition, the 11th Circuit held in *In re ESM Government Securities Inc.,* 812 F.2d 1374 (11th Cir. 1987), that parties to a repurchase agreement are indeed customers under SIPA.

Moreover, the statute's plain language makes Doral a customer of Lehman because it sold the securities to Lehman to be sold back at a later date to Doral, the petition says.

Doral also entrusted the securities to Lehman because it expected them back, and the bank recorded the securities on its own books and records, and not on Lehman's, the petition says.

TRUSTEE: NO CIRCUIT SPLIT

Giddens and the SIPC disagree that a circuit split exists.

The 11th Circuit in *ESM* came to the same conclusion as the 2nd Circuit in this case, their opposition brief says.

The 11th Circuit ultimately ruled that the claimant in *ESM* was not entitled to customer status because it did not entrust property to the debtor, Giddens and the SIPC argue.

The opposition brief also says Doral did not entrust the securities because Lehman could do what it wanted with them.

"As the [2nd Circuit] correctly recognized, [Lehman's] freedom to use the securities at issue as [it] saw fit under the plain terms of the contracts makes it clear that the claimant, now CarVal, had no property 'entrusted' with [Lehman]," the brief says. WJ

Related Court Documents:
Opposition brief: 2016 WL 212705
Petition: 2015 WL 5676949

Hospital filed $128 million auction-rate-securities suit too late, judge rules

Morgan Stanley and Goldman Sachs have won dismissal of a lawsuit accusing the investment banks of misrepresenting to a Michigan hospital the risks associated with issuing $128 million in auction-rate securities, a federal judge has decided.

William Beaumont Hospital v. Morgan Stanley & Co. et al., No. 14-cv-10404, 2016 WL 213028 (E.D. Mich., S. Div. Jan. 19, 2016).

U.S. District Judge Arthur J. Tarnow of the Eastern District of Michigan said William Beaumont Hospital failed to file its lawsuit alleging fraud and misrepresentation within the state's applicable six-year limitations period.

The clock began to run when the hospital executed its agreement with the banks in 2006 but it did not file suit until 2014, making the suit untimely, he ruled.

THE SECURITIES

Auction-rate securities are long-term instruments traded at periodic auctions in which the instruments' interest rates are reset and investors can redeem their investments for cash.

Issuers of ARS pay investors interest or dividends based on a rate that is set at auction every seven, 14, 28 or 35 days. At the auctions, investors bid on the securities, seeking a long-term investment with interest or dividend rates slightly higher than those of a money market fund.

If bids are not high enough to buy all the securities, the auction "fails" and the securities pay interest at a higher predetermined "maximum," or "penalty," rate until the next auction.

According to its complaint, Beaumont wanted to raise money to finance some renovations.

It hired Morgan Stanley and Goldman in 2006 as its advisers to raise the funds, and the investment banks recommended that Beaumont issue $128 million in auction-rate securities, the suit said. The banks also advised the hospital to enter into an interest rate swap agreement to hedge against fluctuations in the securities' interest rate, the suit said.

ARS MARKET FAILURE

Beaumont alleged Morgan Stanley, Goldman and other broker-dealers secretly propped up the ARS market by entering bids to keep the securities' interest rates that issuers pay to investors artificially low.

The broker-dealers suddenly stopped supporting the ARS market without warning in early 2008, causing widespread auction failures. Beaumont claimed it had to restructure the ARS and terminate its swap agreement, forcing it to pay high termination fees and make high-interest-rate payments on the ARS.

REUTERS/Mike Segar

REUTERS/Brendan McDermid

The hospital alleged Morgan Stanley (L), Goldman (R) and other broker-dealers secretly propped up the ARS market by entering bids to keep the securities' interest rates that issuers pay to investors artificially low.

TIMELINESS

The hospital's 2014 lawsuit against Morgan Stanley and Goldman alleged common law claims of fraud and misrepresentation. Beaumont alleged the investment banks failed to disclose the secret bids that propped up the market and that it would not have issued the securities if it knew the realities of the ARS market.

> The hospital claimed it had to restructure the ARS and terminate its swap agreement, forcing it to pay high termination fees and make high-interest-rate payments on the ARS.

Judge Tarnow dismissed the suit because it was filed eight years after Beaumont entered into its agreement with the investment banks.

Even if the hospital had filed the complaint on time, he said, it failed to state a claim for fraud or misrepresentation.

According to Judge Tarnow, Morgan Stanley and Goldman disclosed the risks associated with ARS.

"The disclosures acknowledge that defendants' bids supporting the auction, and preventing its failure, could in fact occur, but also that defendants were not obligated to make these bids, and that there was thus no assurance that the auctions might not fail as a result of a decision to refrain from issuing such bids," he said. WJ

Related Court Document:
Order: 2016 WL 213028

Luis v. United States: How the Supreme Court should decide a landmark case in white collar criminal law

By Alexander Klein, Esq.
Barket Marion Epstein & Kearon

Imagine a rule of baseball that says the pitcher gets to choose the hitter's bat, or a rule of chess that allows a player to eliminate an opponent's pawns before the game begins. Imagine a rule of blackjack that allows a casino to deal the cards and then determine the bettor's bankroll. Each of these scenarios should sound fundamentally unfair. The reason why is simple: Competitions and contests no longer yield fair results when one side picks the other's resources.

Nevertheless, in 2016 the U.S. Supreme Court might institutionalize this imbalance in the realm of white collar criminal law. The court heard oral argument Nov. 10 in *Luis v. United States*, No. 14-419, and this important decision is pending.

Instead of baseball bats or chess pawns or blackjack chips, however, the high court will decide whether to permit the government to dictate the resources that defendants may use to hire attorneys.

What follows is an explanation of why this result would be as unfortunate as it is plausible, and what the court can do to avoid entering such an Orwellian conclusion.

THE QUARTER-CENTURY MARCH TOWARD *LUIS*

The Sixth Amendment to the U.S. Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense."

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This right, the Supreme Court has recognized, is "by far the most pervasive for it affects [the defendant's] ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). The Sixth Amendment is thus not limited to enabling defendants to hire counsel in general. Instead, it extends to selecting counsel "of one's choice"— a tenet recognized as "the root meaning of the constitutional guarantee." *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

In the words of U.S. Circuit Judge Richard Posner, "This entitlement is infringed … even if the defendant is able to hire another competent, perhaps equally or even more competent, lawyer — otherwise, of course, there would not be a right to counsel *of one's choice*." *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000).

On June 22, 1989, the Supreme Court issued a pair of decisions that began the Sixth Amendment descent that may reach a new low point in *Luis*. The first, *Caplin & Drysdale v. United States,* 491 U.S. 617 (1989), involved a law firm's attempt to obtain payment from a criminal defendant who pleaded guilty and was subject to an order forfeiting virtually all his assets. The law firm argued that the forfeiture statute either contained an implicit exception for attorney fees or violated the Sixth Amendment right to counsel.

But the high court disagreed. "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney," it recognized. After all, the asset restraint did not infringe upon the right to counsel because of the very nature of post-trial forfeiture and tainted assets: Forfeiture is a post-trial remedy.

> Defendant Sila Luis has contested the freeze as an unconstitutional deprivation of her right to counsel and to due process.

Therefore, the court said, "it [is not] necessarily the case that a defendant who possesses nothing but assets the government seeks to have forfeited will be prevented from retaining counsel of choice." Indeed, the court said certain defendants "may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future."

As to tainted assets, it would be illogical to allow a defendant to spend such monies, the court held — otherwise, a "robbery suspect … [could] use funds he has stolen from a bank to retain an attorney to defend him."

The Supreme Court extended this analysis in the second case, *United States v. Monsanto,* 491 U.S. 600 (1989). There, the issue once again pitted prosecutorial asset restrictions against the Sixth Amendment right to counsel. But in *Monsanto*, the restriction was pretrial rather than post-conviction. In other words, it was a preliminary asset freeze rather than a permanent forfeiture. Yet the court issued its blessing for such restraints all the same.

"It would be odd," the court said, "to conclude that the government may not restrain property … based on a finding of probable cause, when we have held that … the government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense."

Indeed, the justices said, "if the government may, post-trial, forbid the use of forfeited assets to pay an attorney," as the court authorized in *Caplin & Drysdale* earlier that day, "then surely no constitutional violation occurs when, after probable cause is adequately established, the government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial."

The rule emanating from *Caplin & Drysdale* and *Monsanto* was simple: A showing of mere probable cause is sufficient to deprive a criminal defendant of money needed to hire counsel as long as the frozen or forfeited money stems from the crime.

RIGHT TO CHALLENGE

Twenty-five years later, the Supreme Court revisited the Sixth Amendment right to counsel — and relied on *Caplin & Drysdale* and *Monsanto* to deliver another blow. This time, in *Kaley v. United States*, 134 S. Ct. 1090 (2014), the issue was not whether prosecutors can freeze or forfeit tainted monies upon a showing of probable cause. Instead, it was whether defendants have a right to challenge such probable cause determinations at a hearing.

After all, by the time an asset freeze becomes an issue, probable cause has already been found by a grand jury, which authorized the criminal charges.[1] Yet grand jury proceedings are not adversarial hearings, and their targets are not permitted a full opportunity to defend themselves. In fact, probable cause determinations by grand juries have been found so easy to obtain that, the saying goes, a prosecutor can "indict a ham sandwich."[2]

So *Kaley* reached the Supreme Court for a decision on whether, on the question of probable cause, a secret and non-adversarial grand jury proceeding is all a criminal defendant may receive prior to having his allegedly tainted monies frozen before trial.

The high court in *Kaley* answered that question in the affirmative. It said grand juries are sufficient and defendants are not entitled to further hearings to preserve their assets for the sake of hiring counsel. Citing *Caplin & Drysdale* and *Monsanto*, the court "beg[a]n with those rulings not as mere background, but as something much more," noting that on "the single day the court decided both those cases, it cast the die on [*Kaley*] too."

The decision in *Kaley* sparked a vigorous dissent from Chief Justice John Roberts. Acknowledging the steep decline of rights afforded defendants accused of crimes, he recounted that, in the past, "[w]e have held … that the government may effectively remove a defendant's primary weapon of defense — the attorney he selects and trusts — by freezing assets he needs to pay his lawyer. That ruling is not in issue."

"But today, the court goes further, holding that a defendant may be hobbled in this way without an opportunity to challenge the government's decision to freeze those needed assets," Chief Justice Roberts wrote. After all, he said, *Kaley* made more realistic the "possibility that a prosecutor could elect to hamstring his target by preventing him from paying his counsel of choice" — an especially distasteful risk because, by definition, the "prosecutor [is] the party who wants the defendant to lose at trial."

> health care offense … the attorney general may commence a civil action in any Federal court — (A) to enjoin such alienation or disposition of property; or (B) for a restraining order to … prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value.

The law's reference to "property of equivalent value" is now being used against Sila Luis. The government has charged the defendant with a $45 million health care fraud. In connection with such robust charges, it obtained a freeze of virtually all her assets — including those she obtained lawfully. She has contested the freeze as an unconstitutional deprivation of her right to counsel and due process.[3]

Much is at stake. A decision in favor of the government would enable prosecutors to hobble the ability of criminal defendants to hire private counsel by freezing all monies, including those untainted by crimes.

> Without having to connect monies to crimes, prosecutors may bankrupt white collar suspects before they have a chance to hire counsel.

By curtailing a defendant's access to money — without a hearing, no less — *Kaley* flipped the presumption of innocence attendant to criminal prosecutions, violating the right of innocent-until-proven-guilty suspects "to vindicate that presumption by choosing the advocate they believe will best defend them," Chief Justice Roberts said.

The ruling in *Kaley* paved the way for prosecutors not only to influence which attorneys criminal defendants can afford but to exert this influence through the secrecy of grand jury proceedings.

LUIS AND ITS STAKES

As controversial as *Kaley* was, in *Luis* the Supreme Court has the opportunity to strike an even more devastating blow to those accused of white collar offenses.

Luis involves 18 U.S.C.A. § 1345(a)(2), which states:

> If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation … or a federal

Consider two hypothetical people accused of defrauding a bank. Person 1 has no job, and is alleged to have put the fraud proceeds into a newly created savings account; Person 2 washes cars for a living, is alleged to have donated fraud proceeds to a charity, but has a pre-existing savings account for money earned washing cars over many years. If the *Luis* court authorizes prosecutors to freeze untainted money, then not only will Person 1's fraud proceeds be susceptible to an asset-freeze, but so will Person 2's car-wash revenue.

Moreover, the size of this freeze will be limited only by the scope of the government's allegations — so that, perversely, defendants will be *less* capable of marshaling assets for their defense the *more* serious the charges. Unencumbered by a need to connect monies to crimes, prosecutors will be able to bankrupt white collar suspects before they have a chance to hire counsel .

Nevertheless, the high court is unlikely to agree with Luis that freezing her untainted assets violated her right to counsel. This is because money is fungible. A ruling that prosecutors can freeze tainted monies (*Monsanto*) but not untainted monies (*Luis*) would mean that criminal defendants could play the system by simply spending crime proceeds immediately. That way, they would benefit from spending stolen money while barring the government from freezing cleaner replacement money.

The court is unlikely to incentivize the accelerated dissipation of tainted assets. This reluctance is borne out by the court's recent behavior: As powerful a dissent as Justice Roberts authored in *Kaley*, it garnered only half as many votes as Justice Elena Kagan's majority opinion. And since *Kaley*, the justices' views have had less than two terms to evolve.

A PROPOSED SOLUTION

In the end, however, the court has a narrow opening to respect its recent precedent and preserve a fair system of incentives — while sparing the Sixth Amendment additional trauma. It can do so by punting on the constitutional issue altogether and focusing instead on basic statutory construction.

In a less headline-grabbing aspect of this case — indeed, it is an issue Luis did not even raise in her initial petition to the Supreme Court — the asset-freezing statute is itself unclear about what actions may be taken with respect to untainted assets.

While it permits an action to "enjoin" the dissipation of tainted assets, it separately permits an action for "a restraining order" over tainted or untainted assets. Compare Section 1345(a)(2)(A) and Section 1345(a)(2)(B). If, as is often the case, "restraining order" is interpreted as short-form for "temporary restraining order," then Section 1345 would not permit much of a pretrial asset freeze of untainted assets.

What it would permit is a very temporary hold of untainted assets, under subsection B — pending a hearing to determine the issuance of a longer-lasting freeze of tainted assets under subsection A.[4]

This precise reading of Section 1345 has three main channels of support.

- First, the terms "restraining order" and "temporary restraining order" are used interchangeably with custom. Even the prime federal statutory basis for temporary restraining orders —Rule 65 of the Federal Rules of Civil Procedure — refers generally to "Restraining Orders" in the statutory title.
- Second, the government's reading of the statute renders subsection A superfluous. If subsection B were not limited to temporary restraining orders, it would permit the full-blown freeze of any person's *tainted or untainted* assets. Subsection A's authorization to enjoin the disposition of just *tainted* assets, then, would be swallowed whole.
- Third, the Supreme Court has a rule of resolving statutory ambiguity to avoid constitutional friction.[5] So the ambiguity in Section 1345 is itself reason to find in the defendant's favor. If the court construes subsection B as a temporary restraint, as Luis argues, that interpretation will permit room for her to eventually use untainted monies to hire counsel of her choice, thereby avoiding Sixth Amendment entanglement.

To be sure, Luis' reading of the statute has weaknesses. Most notably, as the government points out, the statute is premised on steps the attorney general can accomplish by "commenc[ing] a civil action" for that purpose.[6] While civil actions may be commenced to obtain injunctions or permanent orders, they are not commenced for the ultimate purpose of issuing temporary restraining orders.

Indeed, seeking a temporary restraining order as ultimate relief would make no sense, as temporary restraining orders preserve the status quo pending the outcome of some other, more basic pursuit. Moreover, Section 1345 itself uses the word "temporary" elsewhere. In subsection (A)(3), for example, it refers to a "permanent or temporary injunction or restraining order" — showing that Congress knew how to use the word "temporary" when it saw fit. Its use of the term "restraining order" rather than *temporary* restraining order, then, appears intentional.[7]

While the government has a strong basis to support its reading of Section 1345, ultimately the fact that strong arguments exist on both sides of the debate proves how ambiguous and poorly worded the law truly is. One reading of the statute renders an entire subsection ambiguous, whereas another creates strange ultimate relief and writes the word "temporary" into a law that actually uses it elsewhere.

In the end, the court can leverage this ambiguity for its own benefit — allowing it to trigger the rule of constitutional avoidance—so that it can resolve *Luis* without having to roam onto the crisscrossing terrain of forfeiture law and the Sixth Amendment right to counsel. WJ

NOTES

1 In this regard, some statutes indicate that grand juries evaluate "reasonable cause" rather than "probable cause," but these terms have been recognized as equivalent. *See, e.g.,* N.Y. Crim. Proc. Law § 190.65 (referring to "reasonable cause"); *People v. Maldonado,* 86 N.Y.2d 631, 635 (1995) ("Reasonable cause means probable cause.").

2 *See, e.g., In the Matter of Grand Jury Subpoena of Stewart,* 144 Misc. 2d 1012, fn. 1 (N.Y. Sup. Ct., N.Y. Cty. 1989).

3 *See* Brief for Petitioner at i, *Luis v. United States,* No. 14-419, 2015 WL 5012824 (U.S. Aug. 18, 2015) (defining the "question presented" as "whether a pretrial injunction prohibiting a defendant from spending untainted assets to retain counsel of choice in a criminal case violates the Fifth and Sixth Amendments").

4 *Id.* at 37-38 (making this argument).

5 *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). *See also Luis,* Brief for Petitioner at 34 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder,* 557 U.S. 193, 205 (2009) ("normally the court will not decide a constitutional question if there is some other ground upon which to dispose of the case")). *See also Luis,* Brief for Petitioner at 38 (making these points).

6 *See* 18 U.S.C.A. § 1345(a)(2).

7 *See* Brief for Respondent at 18, *Luis v. United States,* No. 14-419, 2015 WL 5731783 (U.S. Sept. 30, 2015) (generally making this point).

Amgen

CONTINUED FROM PAGE 1

The court ruled in *Fifth Third* that fiduciaries of employee stock ownership plans under the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1001, are not entitled to a presumption of prudence and should be held to the same standard as ERISA fiduciaries in general.

But the *Fifth Third* court recognized the "potential for conflict" for fiduciaries between adhering to securities law disclosure requirements and their duty to ESOP participants.

"To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it," the *Fifth Third* court wrote.

The court applied this standard in the *Amgen* case and ruled that 9th Circuit panel did not assess whether the stockholders' complaint "plausibly alleged" that a prudent fiduciary could not have decided that acting on inside information and no longer offering

"[T]he Supreme Court's reproach of the 9th Circuit[] … sends a clear message to courts around the country that they should carefully scrutinize whether complaints truly meet the stringent requirement," Brian Neil Hoffman of Holland & Hart said.

The ruling further supports the idea that fiduciaries of employee stock plans should not be treated differently from other ERISA fiduciaries, John Schembari of Kutak Rock LLP said.

the company stock to employees "would do more harm than good."

"The 9th Circuit's proposition that removing the Amgen common stock fund from the list of investment options was an alternative action that could plausibly have satisfied *Fifth Third*'s standards may be true," the top court noted. "If so, the facts and allegations supporting that proposition should appear in the stockholders' complaint."

"Having examined the complaint, the court has not found sufficient facts and allegations to state a claim for breach of the duty of prudence," the opinion said.

EXPERTS REACT

Brian Neil Hoffman of **Holland & Hart**, who was not involved in the case, said the decision is a reaffirmation of the high bar plaintiffs face in these types of lawsuits.

"The decision does not break new legal ground — plaintiffs still must plead facts proving that a prudent plan fiduciary could not have concluded that an alternative action, such as stopping purchases in the company's stock, would do more harm than good," he said.

"Yet the Supreme Court's reproach of the 9th Circuit's seemingly cursory treatment of this standard sends a clear message to courts around the country that they should carefully scrutinize whether complaints truly meet the stringent requirement," Hoffman added.

The ruling further supports the idea that fiduciaries of employee stock plans should not be treated differently from other ERISA fiduciaries, said **John Schembari** of **Kutak Rock LLP**, who was not involved with the litigation.

"Establishing and following prudent processes for monitoring a plan's investments and operations continues to be the uniform standard for all retirement plan fiduciaries, including those whose plans offer company stock as an investment alternative," he noted.

Timothy Kennedy of **Montgomery McCracken Walker & Rhoads**, who was not involved in the case, said the Supreme Court in Amgen made it clear that Fifth Third was not a plaintiff-friendly decision.

"The Supreme Court's reminder in *Amgen* that plaintiffs must plausibly allege there was an alternative available to the fiduciaries that would not harm the fund, I think, is a pretty high hurdle for plaintiffs as it is tough to show how a prudent fiduciary might conclude

The Supreme Court in *Amgen* made it clear that *Fifth Third* was not a plaintiff-friendly decision, Timothy Kennedy of Montgomery McCracken Walker & Rhoads said.

that its employer stock fund would not be harmed by the public disclosing of negative information about the fund," he said.

AMGEN'S ESOP

Amgen employees Steve Harris and Dennis Ramos filed a proposed class action against Amgen in 2010, claiming the company and the fiduciaries of its employee stock ownership plan breached ERISA duties by continuing to hold and offer the company's stock while knowing the business was in trouble.

They alleged Amgen knew and concealed negative clinical study results for its anemia drugs Aranesp and Epogen between May 4, 2005, and March 9, 2007.

When the truth emerged, the company's stock price dropped significantly, harming the employees who participated in the ESOP, the suit said.

PRUDENCE

U.S. District Judge Philip S. Gutierrez of the Central District of California dismissed the suit, saying the plaintiffs failed to allege Amgen breached its ERISA fiduciary duties. *Harris et al. v. Amgen Inc. et al.,* No. 07-cv-5442, 2010 WL 744123 (C.D. Cal. Mar. 2, 2010).

The 9th Circuit reversed. *Harris et al. v. Amgen Inc. et al.,* 738 F.3d 1026 (9th Cir. 2013).

Amgen sough certiorari, and the Supreme Court remanded the case to the appeals court to reconsider its decision in light of *Fifth Third*, which the court decided while Amgen's petition was pending. *Amgen Inc. et al. v. Harris et al.,* 134 S. Ct. 2870 (2014).

The appellate panel affirmed its prior decision, saying it had already considered whether Amgen and the ESOP fiduciaries acted prudently without the presumption of prudence. *Harris et al. v. Amgen Inc. et al.,* 788 F.3d 916 (9th Cir. 2014).

The company again asked the Supreme Court to review the decision. And the high court again overturned the appellate holding and remanded the case to the 9th Circuit.

The justices noted that the District Court can decide whether to let the plaintiffs amend their suit. WJ

Related Court Document:
Opinion: 2016 WL 280886

See Document Section A (P. 25) for the opinion.

NEWS IN BRIEF

OIL COMPANY INVESTOR LOSES BID TO REVIVE SUIT AGAINST AUDITOR

The Chinese division of Ernst & Young has beaten back an attempt to overturn a decision that dismissed claims it improperly audited SinoTech Energy Ltd., a Chinese oil recovery company. The 2nd U.S. Circuit Court of Appeals declined to revive Zech Capital LLC's allegations against Ernst & Young Hua Ming, saying the complaint failed to show the auditor intentionally deceived investors. The investor had claimed E&Y's audits of SinoTech included untrue statements relating to SinoTech's financials. The oil recovery firm allegedly mislead investors over its lateral hydraulic drilling sales and it overstated the value of its property and equipment assets. The auditor participated in the scheme to inflate the company's financials to generate fees from its audits, Zech alleged. U.S. District Judge Alison J. Nathan of the Southern District of New York dismissed the allegations against E&Y, and the 2nd Circuit affirmed her ruling.

Zech Capital LLC et al. v. Ernst & Young Hua Ming et al., No. 15-824, 2016 WL 320874 (2d Cir. Jan. 27, 2016).

Related Court Document:
Summary order: 2016 WL 320874

$42.5 MILLION BAXTER SHAREHOLDER SETTLEMENT RECEIVES FINAL APPROVAL

An Illinois federal judge has given final approval to a $42.5 million settlement between shareholders and pharmaceutical company Baxter International Inc. U.S. District Judge John J. Tharp Jr. of the Northern District of Illinois gave the settlement preliminary approval late last year, and after holding a hearing Jan. 22 he entered his final judgment approving the deal. Baxter manufactures and markets health care products, including pumps used for plasma therapy. According to an earlier decision in the case, shareholders had accused the company of violating federal securities laws by misrepresenting and omitting material facts relating to a merger between its competitors and its ability to meet projections. The company also failed to disclose Food and Drug Administration restrictions placed on some of its products. After Baxter disclosed the problems, the stock price dropped, causing losses for its investors. The settlement affects individuals who purchased or acquired Baxter stock between June 10, 2009, and May 3, 2010.

City of Lakeland Employees Pension Plan v. Baxter International Inc. et al., No. 10-cv-6016, final judgment approving settlement filed (N.D. Ill. Jan. 22, 2016).

SEC ASSOCIATE DIVISION DIRECTOR LEAVES AGENCY

The Securities and Exchange Commission announced Jan. 20 that Susan Nash, associate director of the division of investment management, would leave the agency at the end of January. Nash has worked for the SEC for the past 26 years, first joining the office of general counsel in 1989 and then moving to the division of investment management in 1993. The division regulates investment companies and federally registered investment advisers, including mutual funds, private funds, investment trusts and exchange-traded funds. Nash played a key role in initiating disclosure policies for mutual funds and other investment companies, the SEC said. She also worked with the Commodity Futures Trading Commission to harmonize dual registration requirements and helped implement Sarbanes-Oxley Act requirements at the SEC, according to the agency.

CASE AND DOCUMENT INDEX