

SPRING 2008

The **TWO & OAK** *Legal Beat*

Class Actions and Securities Cases:

- On April 7, 2008, major oil companies, including ExxonMobil Corp. and Chevron Corp., were named in a purported federal class-action lawsuit filed in California regarding the use of ethanol as a fuel additive. The suit alleges that the companies' use of ethanol as a fuel additive corrodes fiberglass marine fuel tanks, causes damage to engines, and harms California's marine environment. For more information visit: <http://www.marketwatch.com/news/story/exxon-chevron-face-ethanol-class/story.aspx?guid=%7B58B1D94E-1F37-4BE4-BD01-7EDB60D9D33B%7D>
- In a lawsuit that alleges Federal Express illegally misclassified FedEx Ground/Home Delivery drivers as independent contractors, class-action certification has now been granted in 20 states and nationwide. Lawyers, including David Rees at Stoll Berne, are now preparing to file motions for summary judgment seeking a determination that thousands of Federal Express workers were collectively deprived of millions of dollars in lost wages, benefits, and expenses. For more information visit: <http://sev.prnewswire.com/transportation-trucking-railroad/20080331/NEM10631032008-1.html>
- JPMorgan Chase & Co. (JPM) faces a possible class-action lawsuit for allegedly misleading investors about its auction-rate securities. The suit alleges that JPMorgan violated Sections 10(b) and 20(a) of the Securities Exchange Act by misrepresenting the investment characteristics of auction rate securities and the market in which auction securities are traded. The New York financial services firm allegedly represented that the securities were highly liquid alternatives to money market funds, yet holders have been prevented from liquidating their positions. The suit is on behalf of purchasers of the auction-rate securities between March 31, 2003 and February 13, 2008. For more information visit: <http://www.forbes.com/businesswire/feeds/businesswire/2008/03/31/businesswire20080331006623r1.html>
- New York's attorney general has issued subpoenas to Aetna, Cigna, the UnitedHealth Group, WellPoint and other health insurers in investigating a practice that is causing consumers to pay increased out-of-pocket expenses when choosing out-of-network providers. The health insurers used a company called Ingenix, which is owned by UnitedHealth, to set payment rates for medical treatments that resulted in consumers being reimbursed at unjustifiably low rates. For more information visit: <http://www.nytimes.com/2008/03/07/business/07health.html?r=3&ref=todayspaper&oref=slogin&oref=slogin&oref=slogin>
- On March 6, 2008, the Securities and Exchange Commission issued a report and press release aimed at reminding public pension funds of their obligations to have and enforce policies and procedures to head off violations of securities laws in its money-management function. The report follows an inquiry into the Alabama retirement system which uncovered that the fund purchased securities



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Firm Beat:

Lincoln High School – 2nd in State Mock Trial Competition

STOLL BERNE attorneys Rob Shlachter, Josh Ross and Yoona Park, along with coaches Mara Shlachter and Gardner Ashmanskas, led Lincoln High School's mock trial team through the regionals and into the State Rounds, where Lincoln garnered the second place trophy. This is Rob's 12th year of coaching mock trial, Josh's second year and Yoona's first.

while in possession of material, non-public information about a prospective acquisition. The fund failed to have adequate policies in place to ensure staff understood and complied with federal laws. For more information visit:

<http://www.sec.gov/news/press/2008/2008-35.htm>

- On March 4, 2008, a class-action lawsuit was filed against energy solutions provider EnerNoc, Inc. (NASDAQ: ENOC) in the United States District Court for the District of Massachusetts, for violations of federal securities laws, Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5. The company is alleged to have issued a series of material misrepresentations, including overstating the company's growth in an earnings announcement, which resulted in artificial inflation of the company's stock.
- On March 3, 2008, Merck & Co. Inc. reported on its website that over 44,000 individuals have submitted materials in the VIOXX litigation that could qualify them for settlement payments. If completed within the terms of the settlement agreement, those submissions would represent over 93 percent of the eligible MI and IS claims previously registered. Under the agreement, Merck did not admit any fault or concede causation of the alleged injuries. According to Merck, as of the end of 2007 the company had been named a defendant in roughly 26,500 lawsuits relating to VIOXX. For more information visit: http://www.merck.com/newsroom/press_releases/corporate/2008_0303.html

Recent Decisions:

Houston v. Seward & Kissel LLP, 2008 WL 818745 (SDNY, March 27, 2008)

A federal judge in New York held that claims alleging aider and abettor liability against a New York law firm are permissible under Oregon law. The lawsuit stems from the collapse of the Wood River Partners hedge fund in 2005. Plaintiff, an Oregon-based investor, sued the defendant law firm for its role in drafting the fund's offering documents which, he alleged, contained material misrepresentations and omissions and for allowing its name to be used in the prospectus. The defendant sought dismissal, alleging that the Oregon securities claim was preempted by federal law and, further, that applying Oregon law to a New York law firm representing an Idaho-based fund would violate the federal Constitution's Dormant Commerce Clause.

The court disagreed, holding that the federal National Securities Markets Improvement Act only preempts states from imposing disclosure requirements for securities offerings and that the federal act specifically did not intend to

interfere with state authority to regulate securities fraud. The court also rejected the defendant's commerce clause argument, stating that the Oregon law affected in-state and out-of-state residents equally. However the court agreed with the defendant's argument that the plaintiff failed to properly plead that the fund's shares were not exempt from registration requirements and dismissed a claim for unlawful sale of unregistered securities.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., --- F.3d --- (7th Cir. Jan. 17, 2008)

On remand from the Supreme Court, the Seventh Circuit reconsidered whether the plaintiffs' adequately pleaded the "strong inference" of scienter required under the Private Securities Litigation Reform Act of 1995 to adequately state a claim for securities fraud under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The Seventh Circuit adhered to its prior decision reversing the district court's dismissal. The court identified "[t]he critical question . . . how likely it is that the allegedly false statements . . . were the result of merely careless mistakes at the management level based on false information . . . from below, rather than of an intent to deceive or a reckless indifference to whether the statements were misleading." The court pragmatically concluded that, though it was "conceivable" that Tellab's CEO was unaware of problems with the company's two major products, such a scenario was "exceedingly unlikely." The *Tellabs* court distinguished *Higginbotham v. Baxter International, Inc.*, 495 F.3d 753, 756-57 (7th Cir.2007); there, the plaintiff relied on confidential sources "described merely as three ex-employees of Baxter and two consultants" to establish that Baxter -- the parent company -- was aware of fraud committed by a Brazilian subsidiary. The *Tellabs* court held that "the absence of proper names does not invalidate the drawing of a strong inference from informants' assertions" where the sources are described sufficiently to determine they were in a position to know the facts they reported.

Stoneridge Investment Partners v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008)

In a 5-3 decision, the Supreme Court held that there is no implied cause of action for aiding and abetting under §10(b) of the Securities Exchange Act of 1934 or SEC Rule 10b-5. The Court held that although in holding that certain suppliers were not subject to §10(b) liability—even though they actively assisted in a scheme that allowed Charter Communications to mislead its auditor and issue a misleading financial statement—the Court greatly limited the scope of §10(b) and Rule 10b-5.

Defendants supplied Charter with certain materials. In

an effort to meet cash flow projections, Charter hatched a scheme whereby it overpaid the defendants for the materials with the understanding that the defendants would then purchase advertising from Charter, allowing Charter to record the advertising purchases as revenue and capitalize its purchase of the materials. The defendants sent documents to Charter falsely stating the reason for the price increase of the materials and back-dated their agreements to convey the impression that they were signed before the advertising agreements. Charter's auditors were misled and the company issued a misleading financial statement. Stoneridge purchased Charter and then brought suit, alleging losses.

Even though respondents participated in a course of conduct that included both oral and written statements, the Court held that they were not liable under §10(b) because they had no role in actually preparing or disseminating Charter's financial statements. The Court focused on the reliance element, holding that Stoneridge could not show that they had relied upon any of the defendants' actions except "in an indirect chain" that was "too remote for liability." In reaching its conclusion, the Court reasoned that Congress had the opportunity to create an express cause of action for aiding and abetting within the Securities Exchange Act, and failed to do so. Instead, Congress gave the SEC the authority to prosecute aiders and abettors via the Private Securities Litigation Reform Act of 1995, thereby revealing its intent to disallow such claims under §10(b).

The *Stoneridge* opinion also reveals the Court's concern that extending the reach of §10(b) to aiders and abettors might result in federal encroachment into the realm of "ordinary business operations," an area "beyond the securities markets" and mostly governed by state law. The Court wrote that if the implied cause of action under §10(b) and Rule 10b-5 were extended to aiders and abettors, there would be a risk that "the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees."

Opinion available at:

<http://www.supremecourtus.gov/opinions/07pdf/06-43.pdf>

Wyly v. Milberg Weiss Bershad and Schulman, LLP, 2007 WL 4533380 (NY Supr., App. Div., Dec. 27, 2007)

A recent New York Supreme Court case held that an absent class member is not entitled to the files of co-lead counsel accumulated during the course of two consolidated federal class actions, nor was the absent class member entitled to attorney work product. After a federal court approved a settlement and an award of attorneys' fees and dismissed the case, a class member filed a collateral attack on the settlement by filing a special proceeding in state court

seeking a judgment directing class counsel to turn over its files. The hearing court granted the petition and directed class counsel to turn over the files finding that generally a client has full access to those files at the conclusion of the attorney/client relationship.

The appellate court reversed the lower court and rejected the argument that an absent class member was entitled to the same range of rights and privileges that a traditional client was entitled to, especially after the case was closed. The *Wyly* court stated that it has been observed by courts and commentators alike, that the relationship between appointed counsel and an absent class member in a class-action differs substantially from that found in a traditional attorney/client relationship.

Although the court acknowledged that an absent class member is entitled to some of the benefits of an attorney/client relationship, such as the right to privileged communications with class counsel and the prohibition against attempts by defendants' counsel to communicate with him, he has no right to direct the course of the litigation, testify at trial, participate in discovery or dismiss class counsel. The court noted that if a more traditional attorney/client relationship was sought, the absent class member was free to hire his own individual counsel or opt out of the class action altogether if he was unsatisfied with his limited role.

In order to avoid the unduly burdensome potential, even after the end of litigation, that would result from a multitude of requests from absent class members for counsel's entire file, the court adopted a requirement that absent class members establish their entitlement to class counsel's file on a case-by-case basis.

Inside Stoll Berne:

Stoll Berne, representing the State of Oregon on behalf of Oregon Public Employee Retirement Fund, filed suit on February 27, 2008, against American International Group, Inc. ("AIG") alleging violations of the Oregon Securities Laws in connection with AIG's involvement in a bid-rigging scheme and AIG's significant restatements of the company's financials, which restatements were first announced in March 2005. The suit seeks in excess of \$15 million in damages.

On March 19th, Gary Berne spoke to the Oregon State Bar Securities Law Section about the impact of Stoneridge Investment Partners on future securities cases.

On March 4th, The Lawyers Campaign for Equal Justice honored Robert Stoll with The Henry H. Hewitt Access to Justice Award, which is reserved for recognition of an individual who, through strong leadership, consistent effort and commitment to the ideal of equal justice under the law, has made a substantial contribution to legal aid for low-income Oregonians.

Stoll Berne welcomes Keil Mueller as an associate in the firm's litigation practice. Keil is a graduate of Williams College and New York University School of Law. Keil comes to Stoll Berne after practicing in New York at Covington & Burling LLP.

For more information please visit:

www.stollberne.com

