

SPRING 2009

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

Class Actions and Securities Cases:

- On April 8, 2009, the SEC proposed several regulations to restrict short selling of stock. Among other proposals, the Commission is weighing whether to allow speculators to bet against a stock only when it moves at a higher price than its last trade, or to ban short selling in a stock if the stock has already declined by a set percentage in a day. The proposed rules are aimed at giving investors confidence that the Commission is evaluating whether abusive techniques are unfairly driving down share prices. SEC officials say that it is not a foregone conclusion that the new rules will take effect. To read the entire article, go to: <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/08/AR2009040801205.html?hpid=topnews>
- On March 31, 2009, the United States Supreme Court dismissed an appeal in a decade-old legal battle over punitive damages. In *Phillip Morris v. Williams*, the tobacco giant Altria Group, Inc. had sought to overturn a \$79.5 million punitive damages verdict in favor of the widow of a smoker who died from lung cancer in 1997. After a state court jury trial, the plaintiff was awarded \$821,485 in actual damages and \$79.5 million in punitive damages. The case had been before the high court on two earlier appeals, in 2003 and again in 2007. In the second appeal, the Court ordered that the punitive damages award be brought into compliance with recent high court rulings on such awards. On remand, the Oregon Supreme Court declined to reconsider the award. In dismissing the appeal from that ruling as "improvidently granted," the high court allowed the award to stand. To read the Oregonian's report, visit: <http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/12385581128870.xml&coll=7>
- On March 26, 2009, SEC Chairman Mary Schapiro announced that the SEC will impose new rules on money managers to safeguard client holdings, following public outrage surrounding Bernard Madoff's \$65 billion fraud. The SEC will propose that all investment advisers who have custody of customer assets undergo "surprise" annual audits. Money managers may also be subject to compliance audits by professional examiners to make sure they are adhering to securities laws, she said. "For our markets to be fair and efficient and to operate in the best interests of investors, those who control access to our capital markets must be competent, financially capable and honest," Schapiro said. For more, visit <http://www.bloomberg.com/apps/news?pid=20601087&sid=amkjR0Yt9ryY&refer=home>
- On March 20, 2009, the National Law Journal reported that a New Jersey state court judge denied class certification in an action seeking recovery of out of pocket expenses paid by consumers for the painkiller Vioxx. The action, *Kleinman v. Merck & Co., Inc.*, was brought on behalf of a putative class of consumers who took Vioxx during the five years it was on the market and paid some or all of its costs. The proposed nationwide plaintiff class brought its claims under the state Consumer Fraud Act, alleging that Merck engaged in a deceptive marketing campaign to hide known evidence of cardiovascular risks associated with use of Vioxx. In denying certification, the court found that the plaintiffs failed to meet, among other things, the requirements of predominance and typicality. To read the article, go to: <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429215405>



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Firm Beat:

STOLL BERNE is proud to announce that [Rob Shlachter](#) has been nominated to be a fellow of the American College of Trial Lawyers. The American College of Trial Lawyers is recognized as the premier organization of trial lawyers in the country.

For more Recent News, please go to:

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- On March 16, 2009, the website [stateline.org](http://www.stateline.org) reported on an alleged fraud by an "enhanced equity index fund" managed by WG Trading. According to the report, WG's owners are accused of stealing tens of millions of dollars from the Iowa and North Dakota pension funds, as well as a number of other institutional investors. The owners allegedly used the stolen money to buy lavish personal items such as horses and New York apartments. In the shadow of that and other high profile frauds, together with reported median losses for state funds of 25 percent, many states have looked to rebalance investments, reduce monthly payments, increase contributions, and generally reform their pension systems. To read the report, go to:
<http://www.stateline.org/live/details/story?contentId=384374>
- On March 11, 2009, the SEC announced that it will begin contacting investors to verify that they have the assets that their investment advisers are reporting. "The commission's examination staff has determined that in order to perform a valid verification of assets, the staff must request independent confirmation of investor assets from various third parties," Gene Gohlke, associate director of the SEC's Office of Compliance Inspections and Examinations, wrote in a March 9 letter sent to several trade associations representing advisory firms that are examined by the SEC. For more details, visit <http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20090310/REG/903109956>
- As investors' wrath reached a boiling point last year, more investors went to the courts to do something about it. In 2008, 210 class-action suits alleging securities fraud were filed in federal court, a 19 percent increase over the year before, according to data by Cornerstone Research and Stanford Law School. Nearly half of the firms sued were in the financial services sector. For more, visit http://www.nytimes.com/2009/02/15/business/15count.html?_r=1

Opinions of Interest:

In re Vivendi Universal, S.A. Securities Litigation, No. 02 Civ. 5571 (S.D.N.Y. Mar. 31, 2009)

In this securities fraud class action, a class of shareholders of the French company Vivendi, S.A. accused the defendants of concealing a liquidity crisis that, upon public disclosure, caused a material drop in the price of Vivendi shares traded on U.S. and foreign stock markets. In May 2007, District Court Judge Richard Holwell granted plaintiffs' motion to certify a class of shareholders from the United States, France, England, and the Netherlands. In their request for reconsideration, the defendants argued that French shareholders should be excluded from the class because certain "recent events" in French jurisprudence and law clarified French policy on opt-out class actions and raised the possibility that a decision in the U.S. action would not be given *res judicata* effect as to French class members.

In its opinion upholding the certification order, the Court detailed the defendants' submission and the state of French law and policy, and ultimately held that "the defendants' contention that an opt-out

class action 'obviously' violates the right of personal freedom and international public policy is surely overstated, if only for the reason that no French court has yet considered the issue." With respect to the potential that French courts would not later give a judgment *res judicata* effect, the Court did "not treat Vivendi's concerns lightly, but the hypothetical possibility of less than complete *res judicata* effect is not dispositive in assessing whether a class action is 'superior to other available methods for the fair and efficient adjudication'" under FRCP 23. The Court ultimately held that a class action provides an efficient method for litigating French shareholders' claims under U.S. law, the outcome "is likely to be binding" on those shareholders, and those shareholders were unlikely to pursue individual claims otherwise. Accordingly, the Court upheld the certification of a class including French shareholders.

Inside Stoll Berne:

Class Action Lawsuit Filed on Chase Bank Credit Cards

Stoll Berne, along with other class counsel, filed a class action lawsuit regarding promotional offers from Chase Bank USA, N.A. ("Chase") that promised a low interest rate for the life of the loan or until paid off.

Chase credit card customers allege in the complaint that they were offered balance transfer loans or loans in the form of blank checks that were connected to but with different terms than the credit cards. The Plaintiffs also claim that the promotional rate loans offered by Chase had terms that were at low interest rates usually with APR's or interest rates set at 2.99% or 3.99% "for the life of the loan." Chase used the promise of these low fixed rates for the life of the loan to induce consumers to transfer their balances from other credit card accounts to a Chase account. Most people paid a substantial balance transfer fee to Chase to lock in the promotional rates for as long as there was a balance remaining on the transferred amounts.

In November 2008, Chase sent its customers a notice stating that the minimum monthly payments would go up by 150%, from 2% of the balance to 5% of the balance. The notice of change in terms sent by Chase also added a new finance charge misleadingly described as an "Account Service Charge of \$10 per month." This new account finance charge effectively increases the customers' interest rates even more. The case is filed in the federal court in the District of Oregon.

Model State Trademark Bill Introduced to Oregon Senate

[Tina Beatty-Walters](#), a member of the [International Trademark Association](#), is one of two Oregon members of the Model State Trademark Bill subcommittee who have recently introduced the model bill into the Oregon Senate as SB 636. Oregon's current trademark statute is largely based on a decades-old version of the Model State Trademark Bill (MSTB). This new bill, if passed, would bring Oregon trademark law into conformity with the 2007 version of the MSTB. This would align Oregon law with currently accepted trademark infringement and dilution principles, and would harmonize Oregon's statute with the trademark statutes of over 30 other states that have already adopted recent versions of the MSTB.

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