

SUMMER 2008

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

### Class Actions and Securities Cases:

- On April 8, PricewaterhouseCoopers released its annual evaluation of private securities class actions. The evaluation notes that in 2007 nearly 50 percent more cases were filed than in 2006 (163 total cases versus 109 in 2006) and that the majority of those cases were filed in the second half of the year. 37 of the cases filed related to the "subprime debacle." For the full story, view [http://www.pwc.com/extweb/pwcpublications.nsf/docid/71BC6FB788E2FE8785257425006DEE88/\\$file/2007\\_security\\_litigation\\_study.pdf](http://www.pwc.com/extweb/pwcpublications.nsf/docid/71BC6FB788E2FE8785257425006DEE88/$file/2007_security_litigation_study.pdf).
- In the Southern District of Florida, the court conditioned approval of a class settlement in *Love v. Blue Cross, Blue Shield, et. al*, on a portion of attorney fees being granted to the law firms who filed an objection to the settlement, stating that the court has "equitable authority to award attorneys' fees to non-designated counsel who prosecute a parallel state court action as long as they confer material benefit to the class." The court reasoned that because objectors had prosecuted two state cases that conferred a benefit to plaintiffs by pressuring defendants to settle, the court awarded the objectors nearly \$1 million in fees. See, US District Court for the Southern District of Florida (Miami Division), Case No. 03-21296-CIV-MORENO.
- On April 30, 2008 a class action suit was filed in New York on behalf of all purchasers of Auction Rate Securities from TD Ameritrade Holding Corporation between March 19, 2003 and February 13, 2008. The suit alleges damages caused by TD Ameritrade's violation of the federal securities laws. For details, view <http://www.primenewswire.com/ca/news.html?d=141376>.
- On May 1, 2008, a billion-dollar class action lawsuit was filed against the top five baby bottle manufacturers (Avent America, Evenflo, Gerber, Handi-Craft (Dr. Brown's), and Playtex) for their use of Bisphenol A in polycarbonate plastic baby bottles, bottle liners, and training cups. The lawsuit has been filed in the United States District Court for the District of Kansas pursuant to Kansas Consumer Protection Laws on behalf of persons living in Kansas who purchased polycarbonate plastic baby bottles, bottle liners, and training cups containing the chemical Bisphenol-A. For the full story, view <http://www.earthtimes.org/articles/show/the-law-firm-of-robert,389455.shtml>.
- On May 20, Merck & Co., Inc. announced a \$58 million settlement with Attorneys General from 29 states, including Oregon, over allegations that Merck engaged in a deceptive advertising campaign relating to Vioxx. The settlement is said to be the largest ever for a multi-state consumer protection drug case. The state AGs alleged that Merck's advertising misrepresented the safety of Vioxx and concealed known risks associated with the drug; they also alleged that Merck engaged in "ghostwriting" positive articles and studies about Vioxx. In addition to the monetary settlement, Merck agreed to no longer engage in "ghostwriting," to refrain from deceptively using scientific data to market to doctors, and to submit all ad campaigns to the FDA before release.
- On June 26, 2008, the Wall Street Journal reported that officials in California, Illinois, and Washington filed legal actions against Countrywide Financial Corp. The actions allege that Countrywide used discriminatory lending practices and engaged in



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### **Firm Beat:**

The Stoll Berners fielded a strong team at the annual St. Andrew Legal Clinic's Race for Justice. Shareholder David Rees finished first in the race out of 334 runners!

SALC provides legal services to families in need. For more information on the St. Andrew Legal Clinic, please visit [www.salcgroup.org](http://www.salcgroup.org)

misleading marketing to push home buyers into risky home loans without regard to the borrowers' ability to pay. The allegations raise questions about Countrywide's marketing and practices in placing payment-option ARMs taken by prime borrowers. The states are seeking restitution for borrowers. The actions came on the same day that Countrywide shareholders approved the sale of the company to Bank of America. Countrywide already faces numerous state and federal investigations and lawsuits, and it is estimated that BOA could face more than \$9 billion in write-downs related to Countrywide. Attorneys General in Connecticut, Florida, and Iowa are also considering filing lawsuits. For the full story, view [http://online.wsj.com/article/SB121444553874905819.html?mod=todays\\_us\\_page\\_one](http://online.wsj.com/article/SB121444553874905819.html?mod=todays_us_page_one).

## **Recent Decisions:**

### **Eleventh Circuit: Control Person Liability Survives PSLRA**

*LaPerriere v. Vesta Insurance Group, Inc.*, 526 F.3d 715 (11<sup>th</sup> Cir. 2008)

The Eleventh Circuit, in an interlocutory appeal of an issue of first impression in the circuit courts, held that control persons can still be held jointly and severally liable under Section 20(a) of the 1934 Act, despite the adoption of the Private Securities Litigation Reform Act (the "PSLRA").

The case arose when investors filed a securities class action against Vesta, its auditor, and the former parent company of Vesta, Torchmark. The investors settled with Vesta and its auditor. Torchmark was the sole remaining defendant. The district court certified the following question to the Eleventh Circuit: whether, and to what extent, the proportionate liability provisions of Section 21(D)(f), enacted as part of the PSLRA, amended the joint and several liability provisions of Section 20(a) of the 1934 Act.

The Eleventh Circuit held that the proportionate liability provisions of Section 21(D)(f) apply to Section 20(a) claims against controlling persons, but the PSLRA did not amend the joint and several liability provisions of Section 20(a). The court noted that under the new statutory regime, once liability is established, the court will then look to the proportionate liability provisions of the PSLRA to determine whether the controlling person is responsible for the entire amount of the damages or only its proportionate share. The controlling person will only be responsible for all the damages, jointly and severally, if the fact finder specifically determines that the controlling person knowingly committed the violation. Where the fact finder does not specifically find a knowing violation, the responsibility for damages will only be proportionate.

### **Second Circuit Weighs In On Class Action Fairness Act**

*Estate of Pew v. Cardarelli*, 527 F.3d 25 (2<sup>nd</sup> Cir. 2008)

On May 15, 2008, the Second Circuit strengthened federal courts' jurisdiction over securities suits brought under state laws, by ruling to reverse a lower court decision that had remanded a putative class action back to state court. In doing so, the court interpreted the Class Action Fairness Act, which expands federal jurisdiction and gives appellate courts jurisdiction to review orders granting or

denying remand to removed cases. One of the purposes of CAFA was to provide a federal forum for securities cases with national impact, by allowing removal of such cases even when the action is based solely on a state claim.

*Estate of Pew*, a putative class action, was originally filed in 2003 in New York Supreme Court claiming violations of federal securities laws. The defendants removed the case, and plaintiffs amended their complaint to plead violations of the state consumer fraud statute. Judge Norman Mondue dismissed the federal claim and declined to exercise supplement jurisdiction over the state claim, dismissing it without prejudice. In 2005, the plaintiffs returned, pleading only violations of the state consumer fraud claim. Again, the action was removed, where Mondue agreed that he lacked jurisdiction because the case constituted one of the exceptions to the Class Action Fairness Act. Defendants petitioned for permission to appeal the remand order. The Second Circuit granted the petition.

The court also ruled on the merits of the case. The majority held that none of CAFA's three exceptions were applicable to the case, which centered on Agway Inc. and its accounting firm, for issuing money-market certificates while failing to disclose on the company's financial troubles. The Agway certificates did not fit into two of CAFA's exceptions because 1) the certificates were not traded nationally and were not listed on any national exchange; and 2) the plaintiffs' claims did not concern corporate governance. There was some question as to whether the third exception, spelled out in 28 U.S.C. 1132(d)(9)(C), for actions related "to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security" applied to the facts of the case. The court ultimately decided that the third exception did not apply.

## **Inside Stoll Berne:**

Shareholders Steve Larson and David Rees, and Associate Mark Friel, recently obtained a favorable summary judgment ruling for class action plaintiffs, in *Ashby, et al. v. Farmers Insurance*. U.S. District Court Judge Brown granted partial summary judgment on behalf of plaintiffs in the action based upon the Fair Credit Reporting Act, holding that defendants took adverse actions against three named plaintiffs. The case will proceed to trial in late 2008 or early 2009.

In May, Stoll Berne and San Francisco firm Schubert & Reed filed a new lawsuit against 3P, the company that makes all home deliveries for Home Depot. Following *Slayman v. FedEx Ground Package System, Inc.*, this is the second Stoll Berne lawsuit based upon misclassification of delivery company employees as independent contractors.

Associate Josh Ross was recognized by the Multnomah Bar Association for his pro bono work and was the recipient of the 2008 Michael E. Haglund Pro Bono Award at the MBA's 102nd Annual Meeting on May 21, 2008. Josh volunteers for the Legal Aid Domestic Violence Project representing victims of domestic violence in contested restraining order hearings. Stoll Berne associate Kelly Struhs won the award in 2005. At the MBA dinner, Kelly was also honored for her service to the Young Lawyers Section Board.

Chambers and Partners, an independent researcher of the legal

profession, has ranked Stoll Berne as one of Oregon's top firms. In addition, individual recognition was given to Shareholders Gary Berne, Rob Shlachter, Robert Stoll (Commercial Litigation), and David Lokting (Real Estate).

Six Stoll Berne shareholders were included in Portland Monthly's "Top Lawyers" issue: Robert Stoll, Gary Berne (Commercial Litigation and Mass Tort Litigation) and Rob Shlachter (Commercial Litigation and Intellectual Property Law), Keith Ketterling (Commercial Litigation), Timothy DeJong (Intellectual Property Law), and David Lokting (Real Estate Law and Taxation Law).

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