

WINTER 2009

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

Class Actions and Securities Cases:

- On July 10, 2008, District of Oregon Magistrate Judge Thomas Coffin conditionally certified a collective action against Texas computer maker Dell, Inc. The collective action, brought in 2007, alleges violations of the federal Fair Labor Standards Act on behalf of Dell Consumer Sales Representatives, who sell Dell computers to consumers over the phone. The plaintiffs allege that Dell improperly classified them as "salaried nonexempt" employees and failed to pay, or improperly calculated, overtime wages. The Court's order allows the plaintiffs' FLSA claim to go forward on behalf of all Consumer Sales Representatives but denies, without prejudice, the plaintiffs' concomitant motion to certify a state law class under Oregon's wage and hour laws. The case is titled Norman v. Dell, Inc., Civil No. 07-6028-TC.
 - On July 21, 2008, Labaton Sucharow announced a \$303 million settlement with General Motors and Deloitte & Touche LLP. The settlement disposes of claims brought on behalf of a class of purchasers of GM securities between April 13, 2000, and March 30, 2006. The case was filed in September 2005, and led by two of Europe's leading pension funds, Deka Investment GmbH, and Deka International S.A., Luxembourg. For more details, visit <http://www.labaton.com/en/cases/General-Motors-Corp.cfm>
 - On August 7, 2008, New York Attorney General Andrew Cuomo announced a multi-billion dollar agreement with Citigroup. The agreement settles allegations that Citigroup was making misrepresentations in its marketing and sales of auction rate securities, which it marketed as safe instruments akin to money markets. Among other things, the agreement requires Citigroup to buy back all illiquid auction rate securities from all Citigroup retail customers, charities, and small to mid-sized businesses. There are roughly 40,000 such customers with securities valued at over \$7 billion. Citigroup will also pay a \$50 million civil penalty to the State of New York and a separate \$50 million penalty to the North American Securities Administrators Association. For the full announcement, visit http://www.oag.state.ny.us/media_center/2008/aug/aug7a_08.html
- Unfortunately, the Citigroup and similar settlements did not include ARS purchasers who were not direct customers of the settling brokerage firms even though the non-direct customers purchased in auctions managed by the brokerage firms.
- On August 19, 2008, the Securities and Exchange Commission announced that it will replace the agency's EDGAR database with a new system called IDEA (Interactive Data Electronic Applications). IDEA will give investors faster and easier access to financial information about public companies and mutual funds. Unlike the time-intensive task of searching EDGAR for SEC filings, IDEA will allow investors to quickly gather information, and create reports, from thousands of companies and filings. To facilitate the system, the SEC has formally proposed that, as early as next year, U.S. companies be required to provide financial information using interactive data. Interactive data for companies' filings should be available via IDEA as early as the end of 2008. To read the entire press release, visit <http://sec.gov/news/press/2008/2008-179.htm>
 - On September 9, 2008, the Houston Chronicle reported that purchasers of Enron stock between Sept. 9, 1997 and Dec. 2, 2001 will receive part of a \$7.2 billion settlement under a court-approved settlement plan. The settlement is said to be the largest ever in U.S. securities litigation. Under the plan, settlement proceeds will be distributed to about 1.5 million individuals and entities. Roughly \$6.6 billion of the settlement comes



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Firm Beat:

Stoll Berne has received recent honors in the 2008 *Oregon Super Lawyers*, the 2008 *Best Lawyers* and the 2009 *Benchmark Litigation* publications.

In addition, the firm was ranked by *Best Lawyers* as #1 in both Oregon and Portland in the practice area of Mass Tort Litigation.

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from banks and other large corporations that did business with Enron, and who, according to the plaintiffs, played a major role in the fraud. For the full article, visit

<http://www.chron.com/disp/story.mpl/special/enron/5991449.html>

- On November 24, 2008, McKesson Corp. agreed to pay \$350 million to settle a class action asserting that the nation's largest drug distributor had fraudulently inflated the price of more than 400 prescription medications. The suit was originally brought in 2005 on behalf of a class of consumers and health and welfare mutual funds, alleging violations of the Racketeer Influenced and Corrupt Organizations Act. The case is titled New England Carpenters Health Benefits Fund, et al. v. McKesson Corp., et al.
- Two recent California district court rulings denying motions to dismiss in class actions against Countrywide and New Century demonstrate that plaintiffs are having some success in subprime fraud litigation. On December 1, 2008, Los Angeles federal district court judge Mariana Pfaelzer denied a motion to dismiss in In re Countrywide Financial Corporation Securities Litigation, except as to accounting firm Grant Thornton. Two days later, Los Angeles federal district court judge Dean Pregerson denied a motion to dismiss against plaintiffs in In re New Century. For more information, visit <http://amlawdaily.typepad.com/amlawdaily/2008/12/plaintiffs-win.html>

Recent Decisions:

Second Circuit: Securities fraud against research analysts

On September 30, 2008 the Second Circuit held that plaintiffs alleging securities fraud against research analysts under federal law are entitled to the fraud-on-the-market (FOTM) presumption of reliance announced in Basic, Inc. v. Levinson and, further, need not make a heightened evidentiary showing in order to benefit from that presumption.

In In Re: Salomon Analyst Metromedia Litigation, 544 F.3d 474 (2d Cir 2008), the plaintiffs brought class claims alleging that the defendants issued and disseminated research analyst reports that failed to reveal certain information regarding problems the defendants were experiencing in funding a credit facility. The plaintiffs alleged that the defendants' actions were actionable as materially false and misleading statements and omissions because the analyst had previously emphasized the importance of that credit facility to the defendant company's future prospects. In weighing the plaintiffs' motion for class certification under FRCP 23(b)(3), the trial court rejected the defendants' suggestion that, because proof of reliance is a required element of the cause of action, individual questions will predominate. Instead, the court applied the FOTM presumption and, further, found no reason why that doctrine could not apply to analyst statements. On interlocutory appeal, the defendants argued that the FOTM presumption should be limited to suits against issuers only. Alternatively, the defendants argued that the plaintiffs should face a heightened burden of showing that the alleged misrepresentations had an actual impact on the market price in order to warrant application of the FOTM presumption. The Court rejected both arguments.

In doing so, the Court cited the fundamental premise of Basic: in

a claim under Rule 10b-5, proof of reliance or "transaction causation" provides "the requisite causal connection" between the misrepresentation and the plaintiff's injury. Where a plaintiff shows that the defendant has "(1) publicly made (2) a material misrepresentation (3) about a stock traded on an impersonal, well-developed (i.e., efficient) market, [the] investors' reliance on those misrepresentations may be presumed." That is so, the Court noted, because the price of shares traded on well-developed markets is based on "all publicly available information and, hence, any material misrepresentations." The Court also noted that "It does not matter, for purposes of establishing entitlement to the presumption, whether the misinformation was transmitted by an issuer, an analyst, or anyone else."

Further, the Court held that a plaintiff need not prove that the alleged misrepresentations or omissions "moved the market" before the FOTM presumption will apply. Again citing Basic, the Court noted that the Supreme Court framed the question of materiality "in terms of how the information would be viewed by a reasonable investor, rather than in terms of actual impact on market price." Applying the presumption on that basis was justified "not by scientific certainty, but by considerations of fairness, probability, judicial economy, congressional policy, and common sense." Thus, the Court concluded, "plaintiffs do not bear the burden of showing an impact on price." Instead, it is the defendants' burden at the rebuttal stage to show that there was no price impact. To read the full opinion, visit http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA2LTMyMjUtY3Zfb3BuLnBkZg==/06-3225-cv_opn.pdf?xml=http://www.ca2.uscourts.gov:8080/isysquery/irl21d5/1/hilite

Tenth Circuit: Class action tolling

On September 12, 2008, the Tenth Circuit, answering a question certified from the trial court, held that a class member in a putative class action may take advantage of American Pipe tolling and file an individual lawsuit before a class certification decision, even when the statute of limitations on her claim has run out.

In August 2000 Clark filed a putative class action. Boell-storff was injured in September 2001 and indisputably became a putative member of the Clark action. At that time, a decision on class certification in Clark had not been issued. In October 2005, and after the three-year limitations period had run, Boell-storff filed an individual action alleging identical claims, and seeking identical damages, to those in Clark. Defendant moved to dismiss arguing that Boellstorf's action accrued more than three years before she filed her action and that Boellstorf forfeited her American Pipe tolling rights by filing a claim before a decision on class certification was rendered in Clark.

The Court disagreed, citing the underlying policy reasons discussed in American Pipe and its progeny. While those cases addressed the question of whether a plaintiff may file an individual suit *following* a class certification decision, those same justifications supported a rule allowing putative class members to take advantage of tolling following filing of the class case, and to file claims *before* a decision on class certification. Noting a split in the four circuits that have considered the issue, the Court found most persuasive

decisions from the Ninth and Second Circuits and held that American Pipe “preserves for class members a range of options pending a decision on class certification, “including the ability to bring an individual action during the pendency of a trial court’s consideration of class certification. To read the full opinion in *State Farm v. Boellstorff*, 540 F.3rd 1223 (10th Cir 2008), go to <http://www.ca10.uscourts.gov/opinions/07/07-1241.pdf>

Inside Stoll Berne:

STOLL BERNE is pleased to announce that **Mark Friel** has become a shareholder of the firm, as of January 1st, 2009. Mark’s practice will continue to focus on securities litigation, class actions and complex commercial litigation.

Steve Larson was named to the Partners Council of the National Consumer Law Center and was recently elected to the Oregon State Bar Board of Governors.

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