

CORPORATE OFFICERS & DIRECTORS LIABILITY

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

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MISREPRESENTATION

To tell the truth: U.S. top court mulls Omnicare securities case

(Reuters) – U.S. Supreme Court justices raised doubts Nov. 3 about an appeals court ruling that revived securities class-action claims against Omnicare Inc. over whether the top U.S. provider of pharmacy services to the elderly misled investors prior to a public stock offering.

Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund et al., No. 13-435, oral argument held (U.S. Nov. 3, 2014).

The legal question before the court is whether, under Section 11 of the Securities Act, the plaintiffs need only to show that a statement expressing an opinion turned out to be untrue or whether they also need to show the company had reason to believe it was false.

Judging from questions posed during an hour of oral arguments, the most likely outcome is that the nine justices will throw out the appeals court decision.

But it is not clear whether they might allow the plaintiffs who say the company made untrue



REUTERS/Jonathan Ernst

The U.S. Supreme Court is hearing a case in which Omnicare Inc. stockholders allege the company made untrue statements before a \$765 million public offering in 2005. The Supreme Court building is shown here.

statements before the \$765 million public offering in December 2005 to have a second chance to pursue their claims.

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COMMENTARY

Believe it or not: In *Omnicare*, Supreme Court considers standard of liability for statements of opinion

Jordan Eth and Mark R.S. Foster of Morrison & Foerster outline the issue of liability for challenged opinion statements in the *Omnicare* securities case just argued before the U.S. Supreme Court, examine the possible outcomes, and predict what impact each might have in the boardroom and the courtroom.

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Believe it or not: In *Omnicare*, Supreme Court considers standard of liability for statements of opinion

By **Jordan Eth, Esq.**, and **Mark R.S. Foster, Esq.**
Morrison & Foerster

Americans take as given the right to hold and express opinions. So it may come as a surprise to many that the federal securities laws impose civil liability for statements of opinion.

It may be even more surprising that strict liability arises for sincerely held statements of opinion that turn out to be incorrect, at least according to the 6th U.S. Circuit Court of Appeals in a decision that is now under review by the U.S. Supreme Court.

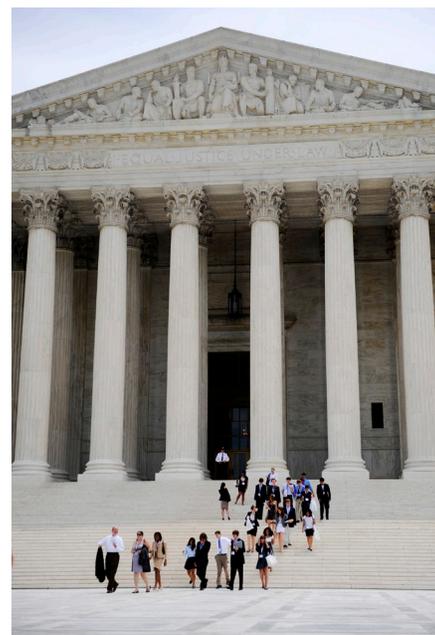
The Supreme Court is likely to choose among competing standards of liability proposed by defendants, plaintiffs and the government.

On Nov. 3 the Supreme Court heard oral argument in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, No. 13-435, to decide the standard of liability for statements of opinion. Is it enough for a plaintiff to show that a statement of opinion was incorrect or lacked a reasonable basis? Or should a plaintiff also be required to show that the opinion was subjectively false? Liability under that standard would turn on whether the speaker sincerely believed the opinion or not.

How the Supreme Court resolves the issue is likely to shape whether, when and how the nation's 5,200 public companies, as well as directors, officers and other market participants, express opinions about myriad subjects, including financial and accounting judgments, appraisals of product quality, descriptions of operations, characterizations of the marketplace, evaluations of competitors, and assessments of risks and opportunities. Adoption of the 6th Circuit standard — which conflicts with the rule adopted by every other circuit court of appeal that has considered the issue — could increase the exposure of companies and other speakers to liability for inherently subjective judgments that prove incorrect, mistaken, too optimistic or even too cautious. Given the stakes, *Omnicare* promises to be an interesting and potentially game-changing securities opinion.

THE CONTROVERSY: WHEN IS AN OPINION ACTIONABLE?

The *Omnicare* case centers on interpretation of Section 11 of the Securities Act of 1933, the statute of choice invoked by plaintiffs challenging statements contained in registration statements that are issued in connection with initial public offerings (and other registered securities offerings). The reason why plaintiffs gravitate to Section 11 when possible is that it imposes strict liability. That means plaintiffs do not need to prove



REUTERS/Jonathan Ernst

a defendant's negligence, let alone intent to deceive, reliance on false statements or proximate causation.

Liability under Section 11 is virtually absolute (subject to certain affirmative defenses) when a registration statement issued in connection with a securities offering makes "untrue statement of material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading." That formulation in Section 11 of what constitutes a false statement is nearly identical to the formulation of falsity stated in over 15 other federal securities law provisions. Given that similarity, the Supreme Court's decision in *Omnicare* could shape the standard of liability for statements of opinion under other federal securities laws as well.

What is readily apparent from reading Section 11 is that it does not expressly prohibit untrue statements of opinion. The statutory language focuses, instead, on misleading "facts." So there must be a "factual" hook to make opinions actionable, given that opinions convey subjective judgments that are not objectively verifiable. With one



Jordan Eth (L) is chair and **Mark Foster** (R) is a partner in **Morrison & Foerster's** securities litigation, enforcement, and white-collar criminal defense group based in the San Francisco office.

exception, the circuit courts of appeal that have confronted this issue have concluded that statements of opinion implicitly convey one “fact” that is potentially actionable: the speaker’s sincere belief in the statement. Thus liability arises only when a plaintiff can show that sincere belief in the opinion was lacking. At least that is the currently prevailing rule that has been adopted by the 1st, 2nd, 4th, 5th, 9th and 10th circuits.

But that is not the case within the 6th Circuit, where Omnicare was sued for alleged violation of Section 11. In Omnicare’s registration statement and other Securities and Exchange Commission filings, Omnicare expressed its belief that its practices complied with the law. For example, Omnicare stated, “We believe that our contract arrangements with other health care providers, our pharmaceutical suppliers and our pharmacy practices, are in compliance with applicable federal and state laws.” Plaintiffs suing on behalf of a class of purchasers of Omnicare stock claimed that this and similar statements of belief were false or misleading because Omnicare allegedly had engaged in illegal conduct. The plaintiffs supported that allegation by pointing to allegations that were asserted in *qui tam* actions that had been filed against and settled by Omnicare, even though those actions had not resulted in any admissions or adjudications of liability.

Those competing positions are sketched out below.

According to Omnicare, defendants should not be liable for statements of opinion unless there is a showing of subjective falsity. In support of its argument, Omnicare draws principally on the Supreme Court’s ruling in *Virginia Bankshares Inc. v. Sandberg*, 501 U.S. 1083 (1991).

The court in *Virginia Bankshares* considered whether a statement of opinion could ever be actionable as a misleading statement of material fact. It held that an opinion can be actionable, but only if it conveys “a misstatement of the psychological fact of the speaker’s belief in what he says.” In other words, the rule articulated by *Virginia Bankshares* requires a plaintiff show that a speaker did not believe his or her stated opinion. Some say that the defendant’s position would encourage defendants to preface factual statements with qualifying words like “I think” or “we believe” as a means to avoid liability. Indeed, during oral argument, Chief Justice John Roberts immediately seized upon that concern.

The plaintiffs, for their part, largely advocate for the rule adopted by the 6th Circuit. At oral argument, however, there did not appear to be any support for the 6th Circuit’s position that honestly held opinions that turn out to be incorrect are actionable, without more.

Justice Elena Kagan appeared particularly supportive of this argument and its grounding in the text of Section 11. Other justices seemed to suggest that the importance and solemnity of a registration statement might justify finding that statements of opinion are accompanied by an implied warranty that the statement is supported by a reasonable basis.

Other justices inquired about how much detail a complaint would have to plead about the lack of a reasonable basis to survive dismissal based on an apparent concern that conclusory allegations should not suffice to plead a reasonable basis was lacking. Justice Samuel Alito went further, asking for “more concrete guidance as to what is reasonable.” The answer is that it will always be a “context-specific inquiry.” That answer exposes the problem with a reasonable-basis test: It may not provide clarity or predictability to speakers, and could lead to subjective second-guessing by courts about whether a basis for an opinion was, in fact, reasonable.

WHETHER, WHEN AND HOW TO OPINE

The Supreme Court’s decision in *Omnicare* could affect both the quality and quantity of information disclosed to investors. If the court rules that subjective falsity is not required to establish liability for opinions, there could be a dampening effect on information that companies provide to the market. After all, subjective falsity is currently required in most jurisdictions today. That change in controlling law may require corporations and those who speak on their behalf to reassess what opinions are conveyed and how they are communicated to investors.

If a subjective-falsity requirement is rejected, two equally plausible results seem possible.

Either corporations would cut down on making opinions or they would change how and what opinions they give. Opinions might only follow a speaker’s deliberative consultation with those in the know, including subject matter experts and professional advisers. Opinions might then be accompanied by an avalanche of qualifying information, including cautionary language, the specific reasons supporting a volunteered opinion, and perhaps even countervailing points. The *Omnicare* decision may thereby change the total mix of information available to investors in one way or another.

A decision in *Omnicare* is expected by the end of June. [WJ](#)

At oral argument there did not appear to be any support for the 6th Circuit’s position that honestly held opinions that turn out to be incorrect are actionable, without more.

The District Court dismissed the case, finding that the complaint failed to plead that Omnicare did not believe that it was in compliance with the law. The 6th Circuit reversed, holding that a statement of opinion is actionable when the expressed belief turns out to be objectively wrong, even if the statement was sincerely believed by the speaker at the time it was made. The 6th Circuit acknowledged that its decision was at odds with decisions from sister circuits. Soon thereafter, the Supreme Court granted review. Competing beliefs about the standard of liability

The Supreme Court is likely to choose among competing standards of liability proposed by defendants, plaintiffs and the government, represented by the U.S. solicitor general.

A middle-ground approach of sorts is offered by the government and appeared to attract support from several justices during the argument. The government posits that a statement of opinion should be actionable if it lacked a reasonable basis under the circumstances in which it was made, even if it was sincerely held. In support of its proposed “reasonable basis” test, the government contends that statements of opinion, at least in registration statements, implicitly convey the representation that the speaker had a reasonable basis for the opinion. Under the government’s logic, it is fair to hold a speaker liable if he or she lacks a reasonable basis for an opinion yet fails to disclose the reasonable basis is lacking.

Salix Pharmaceuticals misled investors about inventory levels, suit says

By Phyllis L. Skupien, Esq., Managing Editor, Westlaw Journals

A Salix Pharmaceuticals shareholder has filed a proposed class action alleging the company inflated its stock price by misrepresenting the wholesale inventory levels of its premier drug, Xifaxan.

Woburn Retirement System v. Salix Pharmaceuticals et al., No. 14-8925, complaint filed (S.D.N.Y. Nov. 7, 2014).

The suit, filed by the Woburn Retirement System in the U.S. District Court for the Southern District of New York, says misleading information about inventory affects investors' ability to determine the accuracy of projected revenues.

Salix did not respond to a request for comment on the suit.

Xifaxan is an antibiotic approved primarily to treat a liver disorder and "traveler's diarrhea" caused by E. coli.

The company sells Xifaxan through wholesalers that distribute it to pharmacies, and sales of the drug make up about 70 percent of Salix's revenue, the suit says.

According to the complaint, information on the inventory wholesalers hold gives investors critical insight into the volume of sales and net revenue, since sales may be subject to discounts, rebates and returns.

Salix has been touting the success of Xifaxan since Nov. 7, 2013, when it issued its third-quarter results. A company press release cited "impressive prescription growth of 24 percent" for the third quarter of 2013 as compared with the previous year.

CEO Carolyn J. Logan, who is named as a defendant in the suit, said in February that sales continued the positive momentum of 2013 into the first quarter of this year. In August the company reported a net revenue increase of 62 percent for the second quarter of 2014 to \$382 million as compared with the previous year.

But, on Nov. 6, Salix issued a series of disclosures that changed the outlook, the suit says.

for Xifaxan, rather than the 10 to 12 weeks investors and analysts were told.

At the same time, during an earnings conference call Logan announced an internal investigation into "management's prior characterization of wholesaler inventory levels," according to the complaint.

Salix also lowered expectations for net product revenue for year-end 2014 from \$1.6 billion to \$1.4 billion.

Information on the inventory held by wholesalers give investors critical information regarding the volume of sales and net revenue, as sales may be subject to discounts, rebates and returns.

The company announced that Chief Financial Officer Adam C. Derbyshire had resigned and been replaced without explanation. It also announced financial results for the quarter that ended Sept. 30, showing net revenue of \$354.7 million — a 49 percent increase over the third quarter of 2013, but below its projections of \$395 million.

Moreover, Salix announced what the suit calls a "dramatic increase" in wholesaler inventory levels with nine months of inventory on hand

In reaction to these disclosures, Salix's stock price declined \$47.08 per share, or 34 percent, to close at \$91.47 in heavy trading Nov. 7. The company lost \$3 billion in market capitalization, the suit says.

The stock price was as high as \$169.17 per share during the class period of Nov. 8, 2013, to Nov. 6.

Disclosure of the three-fold growth in inventories revealed to shareholders that the company had been deceiving them about net revenues, the plaintiff alleges.

The complaint says Salix, Logan and Derbyshire misled shareholders in violation of the anti-fraud provisions of federal securities laws outlined in Sections 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a).

The plaintiff seeks unspecified compensatory damages, attorney fees and costs. **WJ**

Attorneys:

Plaintiff: Christopher J. Keller, Michael W. Stocker and Rachel A. Avan, Labaton Sucharow LLP, New York

Related Court Document:

Complaint: 2014 WL 5802675

Courtesy of salix.com

The suit focuses on Salix Pharmaceuticals' claims about the success of its antibiotic Xifaxan. A screenshot advertising the drug on the company's website is shown here.

Dynavax investors oppose dismissal of vaccine-claims class action

Plaintiffs in a class-action lawsuit alleging Dynavax Technologies Corp. falsely inflated stock prices with misleading public statements about the development of a hepatitis B vaccine have asked a California federal judge to deny the company's motion to dismiss the case.

In re Dynavax Securities Litigation, No. 3:13-cv-02796, plaintiffs' memorandum in opposition to motions to dismiss filed (N.D. Cal. Nov. 10, 2014).

The plaintiffs say the complaint in the U.S. District Court for the Northern District of California was filed in accordance with Private Securities Litigation Reform Act requirements to plead particularized facts demonstrating the defendants intended to defraud the investing public and had knowledge of misstatements of material facts.

These actions directly harmed the plaintiffs in violation of Sections 10(b), 20A and 20(a) of the Securities Exchange Act, the memo says.

The complaint is premised on Dynavax's alleged withholding of material facts from investors concerning the hepatitis B vaccine Heplisav. Dynavax is a clinical-stage biopharmaceutical firm that develops treatments for infectious and inflammatory diseases.

The plaintiffs say there is enough evidence of wrongdoing to at least survive a motion to dismiss under the Private Securities Litigation Reform Act.

In the suit, plaintiffs Khaled Khalafallah and Ron Franklin say Dynavax accepted a \$50 million cash infusion in 2006 to develop cancer and hepatitis drugs from Symphony Capital Partners LP, which was founded by Dynavax board member Mark Kessel, a named defendant in the suit.

Faced with a looming \$15 million note due to Symphony by the end of 2012 and inadequate cash on hand early in the year, Dynavax allegedly rushed a biologics license application for the Heplisav vaccine to the Food and Drug Administration and announced the filing in an April 2012 public release, the plaintiffs assert.

The application allegedly was lacking validation for manufacturing and control processes, but the company nonetheless took advantage of the enthusiasm the filing generated with a public stock offering that brought in about \$74.4 million and drove Dynavax stock to a class-period high of \$5.26 per share in May 2012.

But the plaintiffs claim the Dynavax defendants, including former CEO Dino Dina and Chief Medical Officer J. Tyler Martin, failed to inform the public that an FDA inspector recorded 27 "significant" manufacturing problems at a company facility in Dusseldorf, Germany, within four

months after the filing of the license application. Several weeks later, in October 2012, Kessel allegedly sold two-thirds of his beneficial stock in Dynavax through Symphony at \$4.72 a share, netting him \$28.3 million.

Dynavax eventually revealed the FDA required additional data on manufacturing and quality assurance before approving Heplisav, causing stock prices to tumble 32 percent to \$2.01 on Feb. 25, 2013.

The stock fell further to close at \$1.40 on June 10, 2013, when new CEO Eddie Gray revealed that Dynavax still could not resolve manufacturing issues and did not expect to do so, according to the plaintiffs.

While the defendants argue they adequately warned investors that the FDA "may" delay production after receiving the negative inspection report, the plaintiffs say the report never was disclosed to the public, rendering those statements materially misleading.

The plaintiffs also point to statements Martin and Dynavax allegedly made that the company was continuing to "work" with the FDA without disclosing that this "work" focused on attempting to resolve the manufacturing deficiencies that ultimately put the kibosh on the vaccine's development.

Dina's assurances following the February 2013 stock drop that the FDA still might approve Heplisav in a more restricted role even though he had the still-undisclosed report outlining the manufacturing and validation deficiencies likewise amount to his making a materially misleading statement, the plaintiffs say.

The plaintiffs also highlight Kessel's sale of his 6 million shares in October 2012. Neither Kessel nor Symphony had ever sold Dynavax shares prior to that point, indicating a high likelihood that the divestment was based directly on the negative FDA report, the plaintiffs say.

The plaintiffs say there is enough evidence of wrongdoing to at least survive a motion to dismiss under the PSLRA. In the event the court disagrees, they alternatively request permission to file a third amended complaint.

The case is pending before U.S. District Judge Charles R. Breyer. [WJ](#)

Attorney:

Plaintiff: Richard W. Gonnello, Faruqi & Faruqi, New York

Related Court Documents:

Opposition memorandum: 2014 WL 5823087

Class-action complaint: 2013 WL 3231600

Shareholder suit: SandRidge accounting irregularities prompted stock price drop

A shareholder of SandRidge Energy has filed a class-action lawsuit against the company and three officers for allegedly making misstatements in financial filings that ultimately harmed investors when the errors came to light.

Bohrer v. SandRidge Energy Inc. et al., No. 5:14-cv-1239, complaint filed (W.D. Okla. Nov. 10, 2014).

John L. Bohrер claims SandRidge improperly recorded liabilities on annual and quarterly reports filed with the Securities and Exchange Commission between December 2012 and June 2014, which caused stock prices to drop when the company announced it would likely have to restate finances for those periods.

The complaint, filed in the U.S. District Court for the Western District of Oklahoma, says the oil and natural gas exploration company entered into a 30-year agreement with Occidental Petroleum Corp. for carbon dioxide extraction from natural gas at a Texas facility.

SandRidge is required to deliver 3,200 billion cubic feet of carbon dioxide over the life of the agreement and must pay annual fees if it does not deliver certain volumes in any given year. It must also pay a higher fee for missed targets if it falls below 3,200 Bcf by the contract expiration in 2041, according to the complaint.

Bohrer says SandRidge recorded \$32.7 million in accrued payments to Occidental in 2013 and expects to pay between \$30 million and \$37 million this year.

Though SandRidge was to make payments to Occidental annually, it was supposed to be calculating and reporting those amounts quarterly, according to the complaint. Likewise, the company had not calculated liabilities it might suffer associated with the 2041 contract expiration, the suit says.

SandRidge announced Nov. 4 that annual statements for 2012 and 2013, as well as quarterly statements filed between March 2013 and June 2014, could no longer be relied upon as accurate and might have to be restated, according to the suit.



REUTERS/Brendan McDermid

The suit claims SandRidge Energy improperly recorded liabilities on annual and quarterly reports filed with the SEC, which caused stock prices to drop when the company announced it would likely restate finances for those periods. This photo shows the company's electronic display on the New York Stock Exchange.

The company indicated that it did not believe any potential corrections would be material to the prior periods, but Bohrер says the news caused stock prices to drop by 25 cents per share, down to \$3.56 at closing Nov. 4.

The suit says this share price decrease followed an earlier 25-cent drop June 20, 2013, to close at \$4.83, when SandRidge CEO Tom Ward was fired and replaced with James Bennett, who had been the company's CFO. Eddie M. LeBlanc replaced Bennett as CFO at that time.

Bohrer contends that Ward, Bennett and LeBlanc violated Sections 10(b) and 20(a) of the Securities Exchange Act, and Rule 10b-5 promulgated thereunder, by making false and misleading statements regarding payments to Occidental, overstating annual and quarterly reports by failing to properly account for the accrued fees, and failing to implement proper internal controls.

All three signed off on SEC filings as accurate at various times over the life of the class period, according to the complaint.

The complaint also claims Ward "engaged in improper related-party transactions" leading to his ouster, although there is no further description of what Ward is alleged to have done.

Bohrer is looking to establish a class of people who bought SandRidge securities between Feb. 28, 2013, and Nov. 3, 2014. He has demanded a jury trial and is seeking unspecified damages, along with legal fees.

WJ

Attorney:

Plaintiff: Michael A. Rubenstein, Rubenstein & Pitts, Edmond, Okla.

Related Court Document:

Complaint: 2014 WL 5823474

See Document Section A (P. 19) for the complaint.

REIT execs hit with derivative suit over 'intentional' accounting errors

By Brett Goncher, Esq., Senior Content Writer, Westlaw Daily Briefing

American Realty Capital Properties Inc. executives are liable to the real estate investment trust for "millions, if not billions, of dollars" in costs stemming from its alleged concealment of accounting errors, according to a shareholder lawsuit filed in Manhattan federal court.

Turner ex rel. Michele Graham Turner 1995 Revocable Trust v. Schorsch et al., No. 14 CV 9140, complaint filed (S.D.N.Y. Nov. 17, 2014).

ARCP shareholder Michele Graham Turner 1995 Revocable Trust filed the suit on behalf of the company and names as defendants 12 current and former officers and directors, including chairman and ex-CEO Nicholas Schorsch and current CEO David Kay.

Filed in the U.S. District Court for the Southern District of New York, the complaint alleges the defendants caused the New York City-based REIT to issue false financial statements for the year 2013 and the first and second quarters of 2014.

ARCP markets itself as "the largest publicly traded net lease REIT by enterprise value."

A "net lease" is a lease under which the tenant pays taxes, fees and maintenance costs for the property, in addition to rent.

According to the suit, ARCP overstated its earnings in the first quarter of 2014 and

understated its net loss in the first and second quarters in a series of public statements and Securities and Exchange Commission filings.

In an Oct. 29 statement the company announced the financial information in its 2013 annual report and its first two quarterly reports for 2014 "should no longer be relied upon."

According to the complaint, Kay admitted that its second-quarter results were misstated intentionally "in order to conceal the error from the first quarter."

That same day, the SEC announced it had opened an investigation into ARCP's accounting, the suit says.

The FBI and the U.S. attorney's office for the Southern District of New York also announced criminal probes because of the fraud admissions, it says.

On Nov. 3, Cole Capital Advisors Inc. announced that it was renegeing on a deal to purchase \$700 million of ARCP's assets as

many brokerages were refusing to sell non-publicly traded REITs owned by Schorsch, according to the suit.

One of ARCP's directors, former Pennsylvania Gov. Edward Rendell, allegedly has admitted that the false statements were tied to employee bonuses. Rendell is not named as a defendant in the suit.

According to the suit, Schorsch resigned from his position as CEO on Oct. 1, and CFO Brian Block and chief accounting officer Lisa McAlister resigned Oct. 28, the day before the fraud was exposed.

The suit asserts claims for breach of fiduciary duties, abuse of control, gross mismanagement and unjust enrichment. [WJ](#)

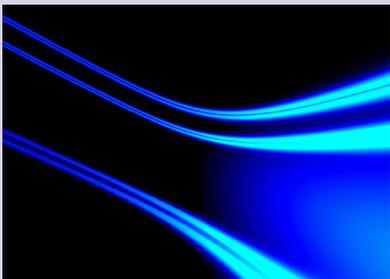
Attorneys:

Plaintiffs: Timothy W. Brown, The Brown Law Firm, Oyster Bay Cove, N.Y.

Related Court Document:

Complaint: 2014 WL 6386752

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Losses stemming from complex derivatives investments linked to subprime mortgages and other debt instruments have led to a number of major lawsuits across the nation involving billions of dollars and many new important legal issues. This newsletter reviews cutting-edge cases, informing you of the most crucial developments in derivatives litigation nationwide. You'll receive detailed, continual coverage of litigation involving fiduciary duties, mortgage-backed securities, collateralized debt obligations, swaps, options, futures, and hedge funds.

Suit claims nursing home developer's \$3 billion merger shorts investors

Shareholders in nursing facility developer Aviv REIT Inc. will be shortchanged in a \$3 billion stock-swap merger with rival Omega Healthcare that shuts out other suitors, an investor suit in Maryland state court says.

Rauschier v. Aviv REIT Inc. et al., No. 24-C-14-006353, complaint filed (Md. Cir. Ct., Balt. County Nov. 10, 2014).

In a complaint filed in the Baltimore County Circuit Court, Aviv REIT shareholder Michael Rauschier says the CEO and directors of the Chicago-based real estate investment trust breached their duty of loyalty to investors by unplugging them from the firm's rapidly rising revenue.

Rauschier asks the court to enjoin the merger and find that Aviv CEO Craig M. Bernfield and nine directors disloyally accepted too little for their company and then agreed to

deal-protection provisions that will effectively keep any competing bidder out of the loop.

According to the complaint, the Maryland-chartered developer of nursing and acute care facilities has been reporting substantial increases in revenue and profit in the past year.

However, the merger with Maryland-based Omega Healthcare Investors Inc., announced Oct. 31, will cut investors off from those profits in return for an unfair price of \$34.97 per share, the suit says.

In the joint merger announcement, Bernfield said the merger would create "the premier

consolidator of SNF [skilled nursing facility] real estate for years to come" with 874 properties in 41 states.

However, Rauschier's complaint says, Bernfield, the Aviv board and Omega engineered the deal so that it was "designed to insure the sale of Aviv to one buyer, and one buyer only — Omega," so Aviv's shareholders did not benefit from a competition among bidders.

According to the suit, the Aviv board disloyally agreed to deal-protection measures including:

- A no-solicitation provision that bars Aviv from talking to other prospective bidders.
- A matching-rights measure that gives Omega the right to know about and match any offer.
- A \$65 million termination fee that any other successful suitor would owe to Omega.

Rauschier alleges the Aviv negotiating committee was not independent and objective, and he asks the court to find that the deal was the result of an unfair process.

The suit asks the court to enjoin or undo the merger and to hold the Aviv officers and directors individually responsible for any economic damage the investors may suffer.

WJ

Attorneys:

Plaintiff: Charles J. Piven and Yelena Trepetin, Brower Piven PC, Stevenson, Md.

Related Court Document:

Complaint: 2014 WL 5861831

See Document Section B (P. 30) for the complaint.



Courtesy of www.avivreit.com

The suit says Aviv REIT Inc. CEO Craig Bernfield and other company directors breached their duty of loyalty to investors by unplugging them from the firm's rapidly rising revenue. Bernfield is shown here in a screenshot from the Aviv REIT website.

Atlas–Targa merger a ‘bad deal,’ class action says

An investor in natural gas company Atlas Pipeline Partners LP is seeking to halt a \$7.7 billion merger with Targa Resources Corp., citing inadequate compensation and prohibitive deal preclusions that deter competing bidders.

Welborn v. Atlas Pipeline Partners LP et al., No. GD-14-020729, complaint filed (Pa. Ct. Com. Pl., Allegheny County Nov. 10, 2014).

Mike Welborn filed the proposed class-action complaint in Pennsylvania’s Allegheny County Court of Common Pleas. The suit alleges that executives at Atlas and its general partner, Atlas Pipeline Partners GP LLC, breached their fiduciary duties by failing to get the best price for the company and ignored significant synergies the resulting Atlas–Targa entity will realize following the sale.

The proposed merger, announced Oct. 13, is a mixed cash-and-stock transaction that awards Atlas unitholders \$1.26 per unit in cash and 0.58 units in Targa subsidiary Targa Resources Partners LP.

Targa also would acquire all outstanding units of Atlas Energy LP, which owns and operates Atlas Pipeline Partners, under a concurrent and cross-conditioned agreement valued around \$1.87 billion. Both deals are expected to close in early 2015, according to the complaint.

Welborn notes that Atlas and its subsidiaries are well-positioned for growth as evidenced by recent filings with the Securities and Exchange Commission.

Atlas announced in February that it achieved \$86.7 million in adjusted EBITDA (earnings before interest, taxes, depreciation and amortization) for the fourth quarter of 2013 – 35 percent increase over the same period in 2012 – as well as a 28 percent increase in year-over-year distributable cash flow, according to the complaint.

That success continued through 2014 with a \$90.8 million adjusted EBITDA for the first quarter – up 34 percent over the same period in 2013 – and distributable cash flow of \$60.8 million, a 40 percent increase from the 2013 first quarter, the complaint says.

Welborn says Atlas also undertook significant expansion projects while continuing to improve finances throughout the year. The complaint says one Wall Street analyst set a price target of \$43 per unit with a median price target of \$40 per unit.

The suit refers to a Seeking Alpha blog post that noted Atlas unitholders had seen a 487 percent return over a five-year period with “one of the most attractive asset footprints in the industry.”

The complaint cites statements allegedly made by former Atlas Pipeline Partners CEO and managing board member Eugene N. Dubay that the resulting entity would expand access to top players in the field, be able to fund multibillion-dollar projects with significantly lower capital cost over multiple years, and generate increased cash flow using Targa’s world-class logistics and marketing facilities.

The suit refers to a blog post that noted Atlas unitholders had seen a 487 percent return over a five-year period with “one of the most attractive asset footprints in the industry.”

The proposed deal includes a “no shop” provision barring Atlas from soliciting a better bid and granting Targa 72 hours to match any competing offer that might come in, according to the complaint. Atlas would also have to pay a \$122.9 million termination fee if it decided to pursue a competing offer – a cost that would have to be included as a premium in any superior bid.

The complaint is seeking class certification for all public unitholders of Atlas Pipeline Partners LP and an order halting the merger or awarding rescissory damages in the event the deal goes through.

Welborn also seeks damages for breach of duty, the cost of bringing suit and any other relief the court deems proper. **WJ**

Attorney:

Plaintiff: Stuart J. Guber, Faruqi & Faruqi, Jenkintown, Pa.

Related Court Document:

Complaint: 2014 WL 6240690

See Document Section C (P. 40) for the complaint.

Casino gaming company investor seeks to halt \$1.2 billion sale

Slot machine maker Multimedia Games Holding Co. is facing a shareholder class-action lawsuit in Texas federal court alleging its directors are selling the company too cheaply to Global Cash Access Holdings Inc. for \$1.2 billion.

Maciel v. Multimedia Games Holding Co. et al., No. 1:14-cv-00964, complaint filed (W.D. Tex., Austin Div. Oct. 23, 2014).

Investor Jose Maciel says the proposed transaction undervalues Multimedia's future and fails to adequately compensate shareholders for the company's "inevitable future success" in the casino gaming market.

"Any economic upside will enrich Global Cash," the suit says.

According to the complaint, filed in the U.S. District Court for the Western District of Texas, Multimedia was on the verge of shutting down in 2010 during an economic downturn in the casino gaming industry.

But the company has turned itself around in recent years by acquiring more state gaming licenses and expanding operations across the United States, the suit says.

As a result, the company has seen a 432 percent increase in its stock price from Jan. 1, 2010, to Oct. 22, 2014, according to the suit.

"In spite of the progress that the company has made since 2010, the market, including Global Cash, continues to penalize and undervalue the company because most of Multimedia Games' competitors are still struggling," the suit says.

Under the terms of the proposed transaction, the company's common shareholders are slated to receive \$36.50 per share in



REUTERS/Cheryl Ravelo

cash, which "drastically undervalues" the company's worth and robs shareholders of any opportunity to share in the Multimedia's anticipated future success, the suit says.

Multimedia's board of directors also agreed to unreasonable deal-protection devices that unfairly favor Global Cash and discourage other potential bidders from coming forward with a superior offer for the company, the suit adds.

Among these devices is a "no shop" provision preventing Multimedia from seeking superior bids and calling for Multimedia to pay Global

Cash a \$32.5 million termination fee in the event the company goes with an alternative proposal, according to the suit.

On behalf of investors holding the nearly 29.7 million shares of common stock, Maciel seeks a court order halting Multimedia's directors from taking any steps to close the proposed transaction. **WJ**

Attorneys:

Plaintiff: Joe Kendall and Jamie J. McKey, Kendall Law Group, Dallas

Related Court Document:

Complaint: 2014 WL 5395781

Massey Energy directors seek to delay discovery in Upper Big Branch mining disaster suit

Massey Energy Co.'s ex-directors are asking the Delaware Chancery Court to stay discovery pending their motion to dismiss the fourth version of a shareholder suit that claims their intentional neglect caused the Upper Big Branch mine explosion that killed 29 workers in 2010.

In re Massey Energy Co. Derivative and Class Action Litigation, No. 5430-CB, opening brief in support of motion to stay filed (Del. Ch. Nov. 12, 2014).

In a brief in support of their motion for a stay, the former directors argue that Massey's sale to rival mining company Alpha Natural Resources Inc. eliminated the stock that gave Massey shareholders standing to sue them derivatively on claims they "brazenly disregarded" perennial safety problems.

The ex-directors argue that since the plaintiffs can no longer sue on behalf of the company, they are now down to a single class-action claim of breach of the fiduciary duty to properly supervise the operation of the company within federal regulations.

And, the brief says, even that claim is simply a reworded version of the derivative breach-of-duty charge so that it can be brought on behalf of a specific group of shareholders rather than the company as a whole.

For that reason, the brief says, no discovery should be allowed until plaintiffs can show

that the remaining claim can withstand a motion to dismiss, which the defendants filed the same day as the stay motion.

MOCKING THE REGULATORS?

The fourth amended complaint, filed Oct. 22, claims that instead of addressing serious safety issues at the company's coal mines in the decade before the Upper Big Branch disaster, then-Massey CEO Donald Blankenship, with the directors' support, "repeatedly attacked and mocked the regulators."

Blankenship was indicted by a federal grand jury Nov. 13 on four criminal counts: conspiring to violate mine safety standards, conspiring to defraud the United States, making false statements to the U.S. Securities and Exchange Commission, and securities fraud.

Blankenship, who led Massey from 2000 to 2010, faces a maximum 31 years in prison.

Alpha Natural Resources bought Massey in 2011 and agreed that December to pay

\$209 million to settle criminal and civil charges over the Upper Big Branch mine disaster, including \$1.5 million each to the families of the 29 miners who were killed, Reuters reported.

The April 5, 2010, coal gas explosion at the mine near Charleston, W.Va., was the country's worst mining disaster in 40 years.

Massey shareholders began suing in the Chancery Court in April 2010, and the lawsuits were later combined into this action.

4 STRIKES

The original complaint and the three amended versions that followed each faced a motion to dismiss, and many of the main charges were whittled away by the court's rulings on those motions.

The fourth amended complaint says the directors' alleged indifference to safety directly caused the Upper Big Branch disaster.

Massey continued to run its mines with "willful disregard for the most basic safety regulations," resulting in "tens of thousands" of citations and the explosion at Upper Big Branch, the fourth amended complaint says.

During the regulatory and criminal investigations that followed, 19 Massey officers, directors and other employees refused to answer questions, and four were criminally convicted.

That left the company with no option but to sell to Alpha, which had a much better relationship with employees and regulators and "was waiting to buy Massey on the cheap." **WJ**

Attorneys:

Plaintiffs: Stuart M. Grant and Cynthia A. Calder, Grant & Eisenhofer, Wilmington, Del.; Mark Lebovitch and David Wales, Bernstein Litowitz Berger & Grossmann, New York

Defendants: Kevin G. Abrams and Matthew L. Miller, Abrams & Bayliss, Wilmington; Stuart W. Gold and Julie A. North, Cravath, Swaine & Moore, New York

Related Court Documents:

Fourth amended complaint: 2014 WL 5429519
Individual defendants' opening brief in support of motion for stay of discovery: 2014 WL 6388769



REUTERS/Chris Keane

The suit says the Massey Energy Co. directors' indifference to safety caused the 2010 Upper Big Branch Mine disaster that killed 25 coal miners. An entrance to the Montcoal, W.Va., mine is shown here.

Directors had option to award stock options, Expedia tells Delaware high court

Delaware's Chancery Court rightly tossed a shareholder suit after recognizing that Expedia's directors had the latitude to waive the trip-planning company's performance goals and award stock options to their CEO, the board members have told the state's high court.

Friedman v. Khosrowshahi et al., No. 442, 2014, appellees' answering brief filed (Del. Nov. 3, 2014).

Expedia Inc. CEO Dara Khosrowshahi and the board made that argument to the Delaware Supreme Court in their brief in opposition to a shareholder's bid to revive her charges that the directors breached their duty by awarding the CEO 400,000 stock options in 2012.

Plaintiff Julie Friedman's suit had alleged the board violated the terms of a compensation plan and Expedia's bylaws when it gave him

The appeal raises the issue of how far the deferential business-judgment rule — which gives the reasonable decisions of directors the benefit of the doubt — allows directors to push the envelope regarding interpreting company policy and top officers' compensation.

Executive pay levels have recently faced rising shareholder unrest, but the Delaware courts have consistently ruled that directors have the last word in interpreting company compensation plans.



Expedia CEO Dara Khosrowshahi

REUTERS/Lucas Jackson

The plaintiff says the court erred in dismissing the suit with prejudice because the option award "intentionally violated an express and unambiguous provision of the plan."

the shares early because the CEO would be unjustly enriched and, if the award was not for increased performance, it would not be tax-deductible.

But Chancellor Andre G. Bouchard dismissed the suit after finding Friedman had at best discovered an ambiguity in the Expedia compensation agreement concerning its definition of a "performance goal" and a "business goal." *Friedman v. Khosrowshahi et al.*, No. 9161, 2014 WL 3519188 (Del. Ch. July 16, 2014).

Since Expedia, like most major American companies, is chartered in Delaware, corporate law experts have watched this case to see whether shareholders can successfully challenge the protection of any compensation decision under the business-judgment rule.

Friedman's opening brief claims the chancellor erred in dismissing the suit with prejudice because the option award "intentionally violated an express and unambiguous provision of the plan, thus raising a reasonable doubt that the payment to Khosrowshahi resulted from a valid exercise of business judgment."

Friedman does not have the authority to impose his interpretation of the company's compensation plan on the directors — that is the right of the board and its compensation committee, the answering brief says.

Even if there were a valid basis for Friedman's interpretation of the compensation plan, the court found the defendants had "articulated a reasonable construction of the plain terms" of the plan; that is good enough to give the directors the benefit of the doubt under the business-judgment rule, the brief says. [WJ](#)

Attorneys:

Plaintiff: David A. Jenkins, Neal C. Belgam, Smith Katzenstein & Jenkins, Wilmington, Del.

Defendant: Gregory P. Williams, Richards Layton & Finger, Wilmington

Related Court Document:

Answering brief: 2014 WL 5858085

Plaintiffs who subscribed to the offering sued after whistleblower lawsuits claimed the company had paid kickbacks to nursing homes and received kickbacks from drug companies.

Several justices appeared to agree that the May 2013 ruling by the Cincinnati-based 6th U.S. Circuit Court of Appeals would need to be thrown out. *Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund et al. v. Omnicare Inc. et al.*, 719 F.3d 498 (6th Cir. May 23, 2013).

But they seemed to differ over what standard the courts should adopt in weighing such claims. The appeals court said the plaintiffs had to claim only that the statement was objectively untrue.

Justice Samuel Alito said that the high court should "at a minimum" send the case back to the lower court even if it falls short of giving Omnicare a full victory. Justice Stephen Breyer said the appeals court ruling was wrong on two counts.

The U.S. government, which filed a friend-of-the-court brief, also urged the court to send the case back to lower courts.

Omnicare paid just under \$150 million to settle the whistleblower claims. The subsequent securities lawsuit filed by several pension funds focused on statements the company had made saying it was in compliance with the law.

A federal judge in the Eastern District of Kentucky dismissed the plaintiffs' lawsuit in February 2012, saying they had failed to allege that Omnicare had knowingly made an untrue statement. *Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund et al. v. Omnicare Inc. et al.*, 2012 WL 462551 (E.D. Ky. Feb 13, 2012).

Business groups, including the U.S. Chamber of Commerce, backed Omnicare, saying the appeals court ruling makes it too easy for investors to bring securities class-action claims.

A ruling is due by the end of June. [WJ](#)

Related Court Document:

Argument transcript: 2014 WL 5593456

NEWS IN BRIEF

HOME HEALTH AGENCY OWNER PLEADS GUILTY TO \$22 MILLION MEDICARE FRAUD

The former owner of two Michigan home health care agencies has pleaded guilty in Detroit federal court for his role in a conspiracy that resulted in Medicare paying more than \$22 million in fraudulent claims, the Justice Department announced Oct. 8. According to the agency's announcement and court documents, Usman Butt owned Prestige Home Health Services and Royal Home Health Care Inc. Butt admitted that between 2008 and 2013, he conspired to bill Medicare for services his companies did not provide or were medically unnecessary and were attained through the payment of illegal kickbacks. He also admitted to falsifying patient files to make it appear the services were provided and necessary. Butts will be sentenced Jan. 15.

United States v. Butt, No. 13-cr-20039, plea entered (E.D. Mich. Oct. 8, 2014).

DEFENSE CONTRACTOR WORKERS FINED FOR ALLEGEDLY BRIBING SAUDI OFFICIALS

The Securities and Exchange Commission has settled charges against two employees of a government contractor for allegedly taking Saudi Arabian government officials on a "world tour" to help secure business in violation of the Foreign Corrupt Practices Act. Stephen Timms and Yasser Ramahi worked in sales at FLIR Systems Inc., a maker of thermal binoculars and infrared cameras, and were the primary sales reps on a multimillion-dollar contract to provide binoculars to the Saudi government in November 2008. In 2009 Timms and Ramahi allegedly provided Saudi officials with expensive watches and arranged for two officials to visit FLIR's Boston facilities for an equipment inspection tour, the agency said. On the 20-day trip, the officials stopped in Casablanca, Paris, Dubai, Beirut and New York with no business purpose, the SEC said. The agency also said the men tried to cover up their bribery by submitting false documentation for the expenses. Without admitting or denying the charges in the administrative proceedings, Timms and Ramahi agreed to the entry of a cease-and-desist order against them and to pay \$50,000 and \$20,000 in civil money penalties, respectively.

In the Matter of Timms et al., No. 3-16281, order instituting cease-and-desist proceedings issued (S.E.C. Nov. 17, 2014).

EX-BANK EMPLOYEE PLEADS GUILTY TO INSIDER TRADING

A former Bank of New York Mellon Corp. employee has pleaded guilty to participating in an insider-trading scheme with a former classmate who provided him with tips about potential pharmaceutical acquisitions. David L. Post admitted in the U.S. District Court for the Southern District of New York that he received nonpublic information about pending acquisitions for Idenix Pharmaceuticals and Ardea BioSciences Inc. from former classmate Zachary Zwerko, who worked for an unidentified pharmaceutical company. Post generated nearly \$700,000 in illicit profits by trading on the inside information, according to prosecutors. Zwerko also is facing charges for his role in the scheme in a separate criminal complaint filed Oct. 14 in Manhattan federal court. Zwerko has yet to enter a plea in the case. The U.S. Securities and Exchange Commission has filed a parallel civil action against both men in the District Court.

United States v. Post, No. 14-cr-715, criminal complaint filed (S.D.N.Y. Oct. 24, 2014).

United States v. Zwerko, No. 1:14-mj-02253, criminal complaint filed (S.D.N.Y. Oct. 14, 2014).

Securities and Exchange Commission v. Zwerko et al., No. 14-CV-8181, amended complaint filed (S.D.N.Y. Oct. 24, 2014).

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