White and Williams LLP

Securities

In *Rahman v. Kid Brands, Inc.,* the **United States Court of Appeals for the Third Circuit** addressed a claim that a furniture importer was guilty of **customs violations** premised on its **misidentification of certain manufacturers and shippers** in an effort to circumvent certain fines. The court dismissed the claim because of the lack of a **strong inference of scienter** required by the **Private Securities Litigation Reform Act.** (November 15, 2013)

In *In re: Herald, Primeo, and Thema,* the **United States Court of Appeals for the Second Circuit** reiterated the **broad protections** of the **Securities Litigation Uniform Standards Act** of 1998 (SLUSA). The court granted defendants' motion to dismiss on the grounds that the claims against defendants JP Morgan Chase & Co and the Bank of New York Mellon were **precluded** by the SLUSA even though they were not styled as **securities fraud claims.** The court held that plaintiffs cannot avoid SLUSA "merely by consciously **omitting** references to securities or to the federal securities law." (September 16, 2013)

In *In re ProShares Trust Securities Litigation*, the **United States Court of Appeals for the Second Circuit** addressed whether an investment management company's prospectuses **violated Sections 11 and 15 of the Securities Act of 1933** for containing **material omissions and misrepresentations and failing to warn** investors about the magnitude and likelihood of loss on their investments. After reviewing the prospectuses at issue, the court found that **no reasonable investor** who read them would have been misled about the risks of the investments. (July 22, 2013)

In *New Hampshire Ins. Co. v. MF Global, Inc.,* the **New York Supreme Court, Appellate Division, First Department,** addressed whether a **"direct financial loss,"** as defined under a **fidelity bond agreement,** has occurred when a broker's **failed trades** trigger an entity's **contractual reimbursement obligations.** An MF Global broker made several large unauthorized trades resulting in certain **shortfalls** for which MF Global was obligated to reimburse CME, the **clearinghouse** for the trades. The court rejected the insurer's view that MF Global's payment did not constitute a "direct financial loss" in light of "the immediacy of the payment, which was made only hours after the discovery" of the trades, in addition to "the regulatory scheme upon which it was premised." (July 16, 2013)

In *Hugenberger v. Alpha Management Corp.*, the **Appeals Court of Massachusetts** addressed whether failure to offer the **demand letter** required by **Chapter 93A**, the **Massachusetts Consumer Protection Statute**, into evidence in an action brought under that chapter is a fatal mistake requiring a **directed finding** for the defendant. The court held that the existence of a demand letter is both a **precondition for filing suit** under Chapter 93A and a **necessary element** to be proved at trial. The court explained that the letter further functions as a **control on the amount of damages** which the complainant can ultimately recover if he proves his case. As such, failure to show that a demand letter was sent will result in **dismissal** of the case. (June 28, 2013)

In *Baer v. USA*, the **United States Court of Appeals for the Third Circuit** addressed whether customers of Bernard L. Madoff Investment Securities LLC (BLMIS) could recover damages under the **Federal Tort Claims Act**, 28 U.S.C. § §1346(b), 2671 (FTCA), for injuries resulting from the **failure** of the **Securities and Exchange Commission (SEC) to uncover and terminate Madoff's Ponzi scheme** in a timely manner. The court held that the **customers' claims were barred** by the **discretionary function exception** to the FTCA, which affords examiners discretion regarding the timing, manner, and scope of investigations. (July 1, 2013)

In *Sipko v. Koger, Inc.*, the **Supreme Court of New Jersey** addressed the revocability of a **gift of stock** and the enforceability of **a transfer of stock**. The court ruled that the gift of stock was **unconditional** and, therefore, **irrevocable**. The court also determined that the surrender of stock was not supported by **consideration** and, therefore, void. Although the court further held that the minority shareholder was not an **oppressed shareholder**, pursuant to N.J. S.A . 14A:12–7(1)(c), the court recognized that N.J.S.A. 14A:12–7(1)(c) does not supersede other equitable remedies available to minority shareholders in common law. (July 2, 2013)

In *In re IndyMac Mortgage-Backed Sec. Litig.,* the **United States Court of Appeals for the Second Circuit** addressed whether the **three-year statute of repose in Section 13 of the Securities Act of 1933** is subject to the **tolling rule** that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." The court also determined whether **non-party members of a putative class** can avoid the effect of a **statute of repose** using the **"relation back" doctrine of Federal Rule of Civil Procedure 15(c)** to amend the class complaint and intervene in the action as named parties. The court held that (1) the **tolling rule** does not apply to the **three-year statute of repose in Section 13;** and (2) absent circumstances that would render the newly asserted claims independently timely, the **"relation back" doctrine** does not permit members of a putative class, who are not named as parties, to **intervene in the class action** as named parties in order to revive claims that were dismissed for lack of **jurisdiction.** (June 27, 2013)

In *In re: Bernard L. Madoff Investment Securities LLC,* the **United States Court of Appeals for the Second Circuit** addressed whether the Madoff trustee (standing in Madoff's shoes) could assert claims directly against certain financial institutions for **aiding and abetting** Madoff's wrongdoing. The court upheld the district court's decision dismissing the claims, noting that the trustee's claims were barred by the doctrine of ***in pari delicto*** (*i.e.,* both parties were equally at fault). The court further stated that the trustee did not have **standing** to proceed with the claims on behalf of Madoff's customers. (June 20, 2013)

In *Mercer v. Gupta,* the **United States Court of Appeals for the Second Circuit** addressed whether plaintiff adequately alleged that defendant was a **"beneficial owner"** under Section 16 (b) of the **Securities and Exchange Act,** 15 U.S.C. § 78p(b) . The court held that plaintiff failed to plead that defendant was a beneficial owner and **refused to extend** the term **"beneficial owner"** to encompass those who provide **insider information to another party** who engages in the **short-swing trading** of shares. (April 5, 2013)

In *Molschatsky v. United States,* the **United States Court of Appeals for the Second Circuit** addressed whether the **Discretionary Function Exception** to the **Federal Torts Claims Act** barred plaintiffs action seeking to hold the United States liable for the **SEC** employees' failure to detect **Bernard Madoff's Ponzi scheme.** The court held that the **Discretionary Function Exception applied** and the lower court properly dismissed plaintiffs' claims for **lack of subject matter jurisdiction.** (April 10, 2013)

In *WC Capital Management. LLC v. UBS Securities, LLC,* the **United States Court of Appeals for the Second Circuit** addressed the **disclosures** a **broker** must make to customers regarding **margin maintenance requirements for margin accounts** under Section 10(b) of the **Securities and Exchange Act** of 1934. The court held that, when a

broker **discloses its generally applicable margin policies** and also indicates that **more specific information about its policies is available** to the customer, it "need not disclose the precise, complex formulas it uses to calculate its collateral requirements." (April 1, 2013)

In *Belmont v. MB Investment Partners,* the **United States Court of Appeals for the Third Circuit,** addressed whether the District Court erred in granting the defendant's motion for summary judgment on claims alleging violation of **SEC Rule 10(b), breach of fiduciary duty,** violation of Pennsylvania's **Unfair Trade Practice and Consumer Protection Law** (UTPCPL), **negligent supervision,** and that its officers and directors were liable as **"controlling persons"** under **Section 20(a) of the Securities and Exchange Act.** The Court of Appeals affirmed in all respects, but found that there were issues of fact as to whether a former MB Investment director's wrongdoing could be **imputed** to MB Investment under the UTPCPL and Rule 10-b and reversed the grant of summary judgment accordingly. (February 22, 2013)

In *Gabelli v. SEC,* the **Supreme Court of the United States** addressed whether the **five-year limitations period** under **28 U.S.C. § 2462** begins to run when the government discovers an alleged violation or when the alleged violation actually took place. The Court **unanimously held** the five-year clock in §2462 **begins to tick when the fraud occurs,** not when it is discovered. The Court further held that when the **government** seeks punitive sanctions in the form of civil penalties, it gets **no benefit** from the so-called **"discovery rule,"** even in cases alleging fraud. (February 27, 2013)

In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,* the **Supreme Court of the United States** addressed whether **plaintiffs in securities fraud cases** should be **required to prove** that the defendant had made a **material misstatement before a class action may be certified.** The Court held that **proof of materiality** is **not a prerequisite** to certification of a secu¬rities-fraud class action seeking money damages for alleged violations of §10(b) and Rule 10b–5. (February 27, 2013)

In *NASDAQ OMX PHLX, Inc. v. Pennmont Securities,* the **Superior Court of Pennsylvania** held that that the Exchange-plaintiff had no authority to initiate a **private right of action to collect disciplinary fines** imposed by **Exchange Rule 651** (a rule enacted by the Exchange pursuant to the federal Securities Exchange Act of 1934). The court further held that, even if the Exchange had the authority to initiate such an action, the **Exchange Act preempted the Exchange's common law cause of action for breach of contract** and the courts of the Commonwealth of Pennsylvania do not have **subject matter jurisdiction** for breach of contract claims arising from Rule 651. (July 16, 2012)

In *Kahn v. Kolberg Kravis Roberts & Co., L.P.,* the **Supreme Court of Delaware** addressed the standards for when a **derivative suit** for **insider trading** can be brought. The court held that the plaintiff does not need to demonstrate that the corporation actually suffered harm as a result of the alleged insider trading in order to survive a motion to dismiss on the pleadings. (June 20, 2011)

In *Nostrame v. Natividad Santiago,* the **Superior Court of New Jersey, Appellate Division,** addressed whether an **attorney discharged by his client** and replaced by a successor attorney may maintain an action for **tortious interference with contract** against the **successor attorney.** The court held that in the **absence** of any allegation that the successor attorney used **wrongful means,** such as **fraud or defamation,** to induce the client to discharge the

original attorney, such an **action is not maintainable.** (June 10, 2011)

In *In Re: DVI, Inc. Securities Litigation,* the **United States Court of Appeals for the Third Circuit** held that a plaintiff cannot invoke the **fraud-on-the market presumption of reliance** in a private action under **Rules 10b-5(a) and (c)** unless the deceptive conduct has been **publicly disclosed and attributed to the actor**. (March 29, 2011)

In *Matrixx Initiatives, Inc. v. Siracusano,* the **Supreme Court of the United States** addressed whether a plaintiff can state a claim for **securities fraud under § 10b-5 of the Securities Exchange Act** based on a pharmaceutical company's failure to disclose **reports of adverse events** if those reports are not **statistically significant.** The Court held that the **materiality and scienter elements** of a securities fraud claim **do not require statistically significant evidence,** and that a plaintiff may adequately plead both elements without such evidence. (March 22, 2011)

In *In re: Aetna, Inc. Securities Litigation*, the **United States Court of Appeals for the Third Circuit** addressed a **safe harbor** provision in the **Private Securities Litigation Reform Act, 15 U.S.C. § 78u-5(c)(1)**, which protects **forward-looking statements**. The statements at issue characterized Aetna's pricing of medical insurance premiums as "disciplined." The court held that the statements fell within the safe harbor for forward-looking statements because they: 1) expressed **expectations about a measure of future performance**; 2) were accompanied by **meaningful cautionary statements**; and 3) were **immaterial** in that no reasonable investor would consider them important in deciding how to act. (August 11, 2010)

In *Malack v. BDO Seidman, LLP*, the **United States Court of Appeals for the Third Circuit** addressed the **validity of the "fraud created the market" theory** of reliance, an **issue of first impression** in the Third Circuit. The theory posits that a **presumption of reliance** is established where a plaintiff proves that the defendants conspired to bring to market securities that were not entitled to be marketed. The court **rejected** the theory, finding that it lacked a basis in common sense, probability, or any of the other reasons commonly cited for the creation of a presumption. (August 16, 2010)