KESSLER TOPAZ

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Kessler Topaz Commences Litigation Challenging Mandatory Forum Selection Bylaw Provisions

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Kessler Topaz recently commenced litigation challenging bylaw provisions of twelve companies that purport to compel stockholders to litigate a broad range of claims against companies, officers, and directors exclusively in the Delaware Court of Chancery. These "forum selection bylaws" are overbroad, unlawful, and inequitable. Among other things, forum selection bylaws were adopted by boards of directors with no notice to stockholders and without a stockholder vote, yet purport to dictate the manner in which stockholders enforce their rights as investors of public companies. This article provides an overview of the key provisions of forum selection bylaws, the reasons why forum selection bylaws are invalid, and the efforts taken by Kessler Topaz to invalidate forum selection bylaws.

What Is a "Forum Selection Bylaw" Provision?

A forum selection bylaw provision is a provision in a company's bylaws that purports to make the Delaware Court of Chancery the sole and exclusive forum for a wide variety of corporate disputes. Although

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Class Certified in the *Bank of America* Securities Litigation

Meredith Lambert, Esquire and Joshua D'Ancona, Esquire

Extending a string of plaintiff successes in the case, the proposed securities class action in *In re Bank of America Corp. Securities, Derivative, and ERISA Litigation*, No. 09-MD-2058 (S.D.N.Y.) ("*Bank of America*") was certified on February 6, 2012.[1] The case continues to surge towards trial, set for October, 2012.

In a comprehensive opinion and order (the "Opinion"), United States District Judge P. Kevin Castel of the Court for the Southern District of New York granted the *Bank of America* Lead Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Class Counsel, essentially in full. In notable rulings, Judge Castel:

- Held that questions of law or fact common to class members predominate over questions affecting only individual class members ("predominance");

[1] *In re Bank of Am. Corp. Sec., Deriv. and ERISA Litig.*, No. 09 MD 2058 (PKC), 2012 WL 370278 (S.D.N.Y. Feb. 6, 2012) (hereinafter "Opinion").

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Kessler Topaz Upholds Shareholders' Inspection Rights

Richard Kim, Esquire

Section 220 of the Delaware General Corporation Law entitles any shareholder of a Delaware-chartered corporation to inspect the books and records of the corporation for any "proper purpose," including investigating mismanagement and breaches of fiduciary duty by corporate officers and directors in advance of filing a shareholder derivative action on behalf of the corporation. Amidst numerous media reports of fraud involving China-based companies publicly traded in the United States, Kessler Topaz Meltzer & Check, LLP recently utilized Section 220 to make demands on behalf of shareholders to investigate allegations of wrongdoing at China MediaExpress, Inc. ("CME") and China Integrated Energy, Inc. ("China Integrated"), both Delaware corporations.

Pursuant to Section 220, Kessler Topaz on behalf of shareholder Marc Paul made a demand on CME to inspect certain documents relating to it purported business operations, including contracts that it claimed to have with significant entities such as Coca-Cola, Lenovo, and Toyota. CME's misconduct was also the subject of a federal securities fraud action pending in the U.S. District Court for the District of Delaware. CME refused Kessler Topaz's inspection demand, and pursuant to Section 220, Kessler Topaz commenced an action in the Delaware Court of Chancery ("Chancery Court") to enforce Mr. Paul's inspection rights.

CME's response was a rarely litigated issue with no precedent in the Chancery Court or the District of Delaware. Specifically, CME filed in the federal securities fraud action a motion to stay the Chancery Court matter pursuant to the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which provides, among other things, that "upon a proper showing," a federal district court "may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Kessler Topaz, on behalf of Mr. Paul, specially appeared in the federal securities fraud action to oppose CME's motion to stay the Chancery Court action. At the same time, in the Chancery Court matter, CME

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So Happy Together: New York Securities Plaintiffs & The Martin Act

Joshua D'Ancona, Esquire

New York's Blue Sky Law,[1] the Martin Act, does not preempt a private litigant's ability to bring common law claims related to securities transactions, the state's highest court ruled on December 20, 2011, in the case *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management, Inc.*. --- N.E. 2d ----, 18 N.Y. 3d 341, 2011 N.Y. Slip Op. 09162, 2011 WL 6338898, at *1 (N.Y. Dec. 20, 2011) ("*Assured Guaranty*"). With that ruling, the New York Court of Appeals resolved a basic uncertainty in New York law that had perplexed courts for decades. A resulting split in the case law had, in turn, perplexed litigants. *Assured Guaranty* answered core questions about the Martin Act's preemptive effect in ways that make it easier for investors to bring common law claims concerning securities transactions under New York law.

The Martin Act

Adopted in 1921, the Martin Act (N.Y. General Business Law art 23-A) grants the New York Attorney General ("Attorney General") "broad regulatory and remedial powers" to investigate, enjoin and prosecute "fraudulent practices in the marketing of stocks, bonds and other securities within or from New York." *Assured Guaranty*, 2011 WL 6338898, at *2 (citations and quotations omitted). The Martin Act authorizes the Attorney General to bring both civil and criminal prosecutions of entities committing securities fraud, and also "to seek monetary restitution on behalf of investors who were the victims of fraudulent activities." *Id.* (citation omitted). Notably, the Attorney General is required to prove neither scienter nor intent in

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[1] The term "blue sky law" refers to a state's securities regulation act, which typically imposes certain requirements on the registration of securities offerings, securities brokers and broker-dealers, and investment advisory activities within the state. As the U.S. Supreme Court noted in 1917, "[t]he name that is given to the law indicates the evil at which it is aimed, that is . . . speculative schemes which have no more basis than so many feet of 'blue sky.'" *Hall vs. Geiger-Jones Co.*, 242 U.S. 539 (1917).

NORTHERN EXPOSURE: A Summary of the Lead Plaintiff Appointment Process in Canadian Securities Class Action Lawsuits

Naumon A. Amjed, Esquire and Ryan T. Degnan, Esquire

The Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, 130 S.Ct. 2869 (2010), severely curtailed investors' ability to pursue litigation under the federal securities laws where the transactions forming the basis of the claims occurred outside of the United States.[1] *Morrison* has forced investors to, among other things, evaluate the risks of non-U.S. investments where federal law no longer provides a private remedy and consider whether litigation in non-U.S. forums is a viable means of recovering fraud-related losses. Increasingly, Canadian courts may provide investors purchasing shares on the TSX such a forum as securities class action litigation in Canada continues to develop. As noted by a January 31, 2012 report by NERA Economic Consulting, 2011 was the most active year for securities class action filings in Canada with fifteen new securities

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[1] In summary, *Morrison* holds that claims under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") may not be heard in the United States if the transaction forming the basis of liability occurred outside of the United States (*e.g.*, shares purchased on the Toronto Stock Exchange("TSX")). The Court's ruling appears to apply to all investor lawsuits under the Exchange Act irrespective of the plaintiff's residence. Thus, a U.S. investor who is defrauded in the U.S. but purchased the relevant securities on a non-U.S. exchange would have no recourse for any resulting losses under federal law.

Limiting *Concepcion*: Federal Courts Continue to Invalidate Contractual Arbitration Provisions

Naumon A. Amjed, Esquire and Ryan T. Degnan, Esquire

In *AT&T Mobility LLC v. Concepcion* the Supreme Court of the United States considered whether the Federal Arbitration Act (the "FAA") "prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. 1740, 1744 (2011) ("*Concepcion*").[1] Specifically at issue was a California common law doctrine that rendered most class action arbitration waivers in consumer contracts unconscionable.[2] Ultimately, the Supreme Court upheld the enforceability of the arbitration clause and held that California's rule "manufactured" a requirement of class arbitration that "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 1748, 1751.

The Court's ruling raises significant questions as to how consumers and small business could have a meaningful opportunity for recovery, particularly when asserting small claims, if compelled to arbitrate individually. For example, the plaintiffs in *Concepcion* sought to recover $30.22 in sales tax they paid on "free phones" that they received in connection with their purchase of AT&T cellular service. *Id.* at 1744. Forcing such a case into individual arbitration would effectively end litigation against a defendant. Echoing these concerns, the dissent in *Concepcion* asked, "[w]hat rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?" *Id.* at 1761 (noting

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[1] As noted by *Concepcion*, "The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." 131 S. Ct. at 1745 (citations omitted). As set forth in Section 2 of the FAA: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* (citing 9 U.S.C. § 2).

[2] California's class action arbitration waiver doctrine is frequently referred to as the *Discover Bank* rule because it was first articulated by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

Class Certified in the *Bank of America* Securities Litigation *(continued from page 1)*

- Reaffirmed the viability of plaintiffs' claims that defendants made material misstatements about employee bonuses awarded by Merrill, Lynch & Co., Inc. ("Merrill") and material omissions concerning Merrill's huge fourth quarter 2008 losses remained, despite new defendant attacks;
- Reaffirmed the viability of plaintiffs' claims under Section 14(a) of the Securities Exchange Act of 1934, rejecting defendants' argument that the claims were meritless because they rested on an inappropriate theory of damages.

Class certification is a critical juncture in any federal class action. Having passed this threshold, the *Bank of America* plaintiffs now plan to proceed to the conclusion of fact and expert discovery with their theories of liability, damages and class definition essentially intact — a notable success.[2]

Background of Case

Kessler Topaz Meltzer and Check, LLP, along with court-appointed co-lead counsel Bernstein Litowitz Berger & Grossman, LLP and Kaplan Fox & Kilsheimer, LLP, filed the Consolidated Amended Class Action Complaint (the "CAC") on behalf of court appointed Lead Plaintiffs in *Bank of America* on September 25, 2009, alleging that from September 18, 2008 to January 21, 2009 (the "Class Period"), defendants violated Sections 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (the "Securities Act") by making a series of material false statements and omissions regarding BoA's acquisition of Merrill. The CAC alleged that defendants misrepresented or failed to disclose (i) BoA's secret agreement with Merrill that allowed Merrill to pay up to $5.8 billion in discretionary bonuses to Merrill employees on an accelerated basis before the merger closed, and (ii) that Merrill had suffered enormous losses during the fourth quarter of 2008.

Defendants moved to dismiss. The Court decided the motion on August 27, 2010, upholding claims alleging: (i) securities fraud and false proxy statements related to the secret bonus agreement; (ii) false proxy statements for failure to disclose Merrill's fourth quarter 2008 losses; (iii) false offering statements related to the secret bonus agreement; and (iv) control person liability with respect to these claims. However, the Court dismissed plaintiffs' fraud claims tied to BoA's nondisclosure of Merrill's losses, on a single ground: an apparent lack of a fraudulent state of mind, or scienter, on the part of defendants.

Plaintiffs filed a Second Amended Complaint (the "SAC") on October 22, 2010 to cure the deficiencies that the Court had identified in the CAC's scienter allegations. Defendants moved to dismiss the SAC, and in an opinion dated July 29, 2011 (the "2011 Opinion"), Judge Castel substantially denied the motion, reinstating plaintiffs' Section 10(b) claims concerning Merrill's fourth quarter losses as to multiple defendants including BoA.

Class Certification

In July 2011 Judge Castel also entered a Scheduling Order directing the parties to commence class certification discovery "immediately" and allowing barely over three months to complete class certification discovery and briefing on a motion for class certification. Pursuant to the Court's expedited schedule, on October 17, 2011, plaintiffs moved to certify the following classes:

> (i) As to claims under Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") all persons and entities who held BoA common stock as of October 10, 2008, and were entitled to vote on the merger between BoA and Merrill, and were damaged thereby; and
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> (ii) as to claims under Sections 10(b) and 20(a) of the Exchange Act, all persons and entities who purchased or otherwise acquired BoA common stock during the period from September 28, 2008 through January 21, 2009, inclusive, excluding shares of BoA common stock acquired by exchanging stock of Merrill for BoA stock through the merger between the two companies consummated on January 1, 2009, and were damaged thereby; and
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> (iii) as to claims under Sections 10(b) and 20(a) of the Exchange Act, all persons and entities who purchased

[2] As was their right, on February 21, 2012, the *Bank of America* defendants filed a petition under Federal Rule of Civil Procedure 23(f) ("Rule 23(f)") asking that court for permission to appeal from the District Court's class certification ruling. Plaintiffs filed an answer in opposition to the petition on March 2, 2012. The circuit court may be expected to rule on the petition within three to four months. While "the standards of Rule 23(f) will rarely be met," *In re Sumitomo Copper Litig.,* 262 F.3d 134, 140 (2d Cir. 2001), it is not possible to predict how the circuit court will decide the petition. If the petition were granted, a full-blown appeal of any question for which the appeal was allowed would ensue.

or otherwise acquired January 2011 call options of BoA from September 18, 2008 and January 21, 2009, inclusive, and were damaged thereby; and

(iv) as to claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, all persons and entities who purchased BoA common stock issued under the Registration Statement and Prospectus for the BoA common stock offering that occurred on or about October 7, 2008, and were damaged thereby.[3]

Defendants filed their opposition to plaintiffs' motion on October 31, 2011, and plaintiffs filed their reply on November 11, 2011. Defendants principally argued that plaintiffs failed to establish the requisite predominance under Fed. R. Civ. P. 23(b)(3) because plaintiffs' Section 14(a) claim was meritless and because plaintiffs could not prove either materiality or shareholder reliance as to the alleged misstatements and omissions.[4] Defendants further argued that plaintiffs' class definitions were overbroad and that plaintiffs' Section 11 claim would raise individualized issues, rendering it inappropriate for class treatment.[5] Finally, defendants argued that plaintiffs' options class should be limited to only holders of the particular series of options purchased by Lead Plaintiff Grant Mitchell.[6]

Addressing the issue of predominance with respect to plaintiffs' Exchange Act claims, Judge Castel first noted that defendants' merit-based challenges to plaintiffs' Section 14(a)[7] claims went "far beyond Rule 23 considerations." Defendants, he noted, were inappropriately asking the Court to conduct a second round of review of the substantive merits of plaintiffs' claims and the Court's prior conclusion that "there plausibly may be distinct, non-overlapping grounds for both direct and derivative recovery" under Section 14(a). He both declined to revisit his prior rulings, and also held that the issue of whether the proxy materials misled and damaged shareholders would not require individualized state-of-mind inquiries regarding BoA shareholders' expectations as to the value of the Merrill acquisition, as would defeat predominance. [8]

Next, Judge Castel found with respect to plaintiffs' Section 10(b) bonus claims that defendants had not rebutted the so-called fraud-on-the-market presumption of reliance, rejecting[9] defendants' arguments that the investing public was already aware of Merrill's bonuses and that there was no statistically significant drop of BoA share prices related to reports about the bonuses.[10] Specifically, Judge Castel concluded that BoA experienced a statistically significant decline in share value on January 22, 2009, one day after the press reported that Merrill was accelerating bonus payments and had already paid $3 to 4 billion in bonuses, and that prior press reports about Merrill's bonuses had been too indefinite to bear decisive weight.[11]

With respect to plaintiffs' Section 10(b) claims for misleading omissions regarding Merrill's fourth quarter 2008 losses, Judge Castel found that defendants failed to rebut the *Affiliated Ute* presumption of reliance,[12] as plaintiffs had adequately shown both duty and materiality with respect to Merrill's fourth quarter losses. Judge Castel rejected defendants' arguments that a December 7, 2008 report authored by Morgan Stanley analyst Betsy Graseck (the "Graseck report") established that the alleged omissions regarding Merrill's losses were immaterial because Merrill's losses were already known to the market and factored into BoA's share price.[13] Indeed, Judge Castel found that defendants' arguments were belied by statements by other analysts and company insiders reflecting their surprise at the extent of Merrill's losses.[14] Finally, Judge

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[3] *Id*. at *1-2.

[4] *Id*. at *2.

[5] *Id*.

[6] Opinion at *16.

[7] *Id*. at *5-6.

[8] *Id*. at 11.

[9] The "fraud-on-the-market" presumption of reliance, as set forth by the U.S. Supreme Court in *Basic Inc. v. Levinson*, raises a rebuttable presumption that plaintiffs relied on defendants' misstatements in making their investment decision if plaintiffs can show: (1) that the defendant made public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; (4) that the misrepresentations would induce a reasonable, relying investor to misjudge the value of the shares; and (5) that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed. 485 U.S. 224, 248 (1988). Defendants may rebut the fraud-on-the-market presumption by "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price. . . ." *Id.*

[10] *See* Opinion at *7-9.

[11] *Id*.

[12] Plaintiffs alleging that they were misled by defendants' omissions may invoke the *Affiliated Ute* presumption of reliance by showing that the facts withheld by defendants were material. *See Affiliated Ute v. Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972).

[13] *See* Opinion at *9-11.

[14] *Id*. Additionally, Judge Castel noted that the Graseck report's conclusions were insufficient to rebut the *Affiliated Ute* presumption of reliance because "the Graseck report was not based on the value of Merrill's actual assets, which were not publicly disclosed, but upon a comparison of Merrill's general assets against a generic index known as the ABX index." *Id.*

So Happy Together: New York Securities Plaintiffs & The Martin Act *(continued from page 2)*

Martin Act enforcement actions, whether civil (*id.* (citing *State of New York v. Rachmont Corp.,* 71 N.Y. 2d 718, 725 n.6 (1988)) or criminal (*id.* (citing *People v. Landes,* 84 N.Y. 2d 655, 660 (1994)).

The Martin Act explicitly grants public enforcement powers, but does not reference a private right of action. See *CPC Intl. v. McKesson Corp.*, 70 N.Y. 2d 268, 276 (1987) ("*CPC Intl.*"). Prior to *Assured Guaranty,* the New York Court of Appeals had held that the Martin Act does not impliedly authorize private enforcement of its terms, and also had allowed a private fraud claim related to securities transactions — but not premised on the Martin Act — to proceed. *Id.* at 276-279.

Prior Split in Case Law over Martin Act's Preemptive Effect

After *CPC Intl.,* courts sharply divided over the scope of the Martin Act's preemptive effect on securities-related New York common law claims (aside from fraud claims, which *CPC Intl.* plainly allowed). Some courts held that the Martin Act preempted all nonfraud New York common law claims that concerned securities transactions or otherwise overlapped with conduct covered by the Act. See, e.g., *Indep. Order of Foresters v. Donaldson, Lufkin & Jenette, Inc.*, 919 F. Supp. 149, 153-154 (S.D.N.Y. 1996). These courts reasoned that to allow New York common law claims concerning securities-related activities would be tantamount to recognizing an implied private right of action under the Martin Act, which *CPC Intl.* excluded. See *Stephenson v. Citco Group Ltd.,* 700 F. Supp. 2d 599, 613 (S.D.N.Y. 2010). Other courts held that the Martin Act did not generally preempt nonfraud New York common law claims. See, e.g., *Anwar v. Fairfield Greenwich Ltd.,* 728 F. Supp. 2d 354, 357-358 (S.D.N.Y. 2010). These courts reasoned that such preemption would reduce the overall enforcement power brought to bear against unlawful conduct in New York's securities marketplace, "which can hardly have been the goal of [the Martin Act's] drafters." *Id.* at 371.

Assured Guaranty

In *Assured Guaranty,* financial guarantor Assured Guaranty (UK) Ltd. ("Assured") sued J.P. Morgan Investment Management, Inc. ("J.P. Morgan") for gross negligence, breach of fiduciary duty and breach of contract, claiming that J.P Morgan mismanaged the investments of an entity whose obligations Assured guaranteed. J.P. Morgan successfully argued to the trial court that the Martin Act preempted Assured's breach of fiduciary duty and gross negligence claims, and won their dismissal. 28 Misc. 3d 1215 [A], 2010 N.Y. Slip. Op. 51362[U] 2010. Assured appealed. The New York Appellate Division, First Department reversed, reinstating the tort claims and holding that "there is nothing in the plain language of the Martin Act, its legislative history or appellate level decisions in this state that supports defendant's argument that the Act preempts otherwise validly pleaded common-law causes of action." 80 A.D.3d 293, 304 (1st Dept 2010). J.P. Morgan appealed, and the Court of Appeals affirmed, rendering a crystal clear statement of the Martin Act's limited preemptive effect.

The Court of Appeals held that, while private litigants may not bring a claim for violation of the Martin Act itself, "an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies." *Assured Guaranty,* 2011 WL 6338898, at *4. In so holding, the court looked to the Martin Act's legislative history, prior cases and policy considerations. *Id.* Numerous *amicus curiae* (or "friend of the court") briefs filed by interested third parties to the case sought to influence the court's analysis. In its own *amicus* brief, the office of the New York Attorney General argued against a broad preemption theory, asserting that "neither the language nor the history of the Martin Act requires preemption" of common law securities-related claims, and that "the purpose of the Martin Act is not impaired by private common law actions that have a legal basis independent of the [Martin Act] because proceedings by the Attorney General and private actions further the same goal — combatting fraud and deception in securities transactions." *Id.* at *1, *4. Multiple references to the Attorney General's position within *Assured Guaranty* suggest that the Court of Appeals may have accorded it special weight.

Conclusion

Assured Guaranty swept aside a legal "wildcard" that had long worried litigants — the inconsistently applied theory of broad Martin Act preemption of common law claims — and replaced it with a clear rule. The decision is plaintiff-friendly, providing certainty that the Martin Act in general poses no obstacle to private litigants' New York common law claims related to securities transactions. The case may also exemplify a way in which government officials, outside of enforcement actions, legislation or regulation, can help to shape legal precedent in furtherance of the aim of reducing fraud in the securities marketplace.

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companies have adopted various permutations of forum selection bylaws, forum selection bylaws generally contain a form of one or more of the following three provisions.

The "Sole and Exclusive Forum Provision"

The "Sole and Exclusive Forum Provision" provides that the Delaware Court of Chancery will be the "sole and exclusive forum" for four broad categories of claims. These categories are: (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law ("DGCL"), or (iv) any action asserting a claim governed by the internal affairs doctrine. The broad language of the "Sole and Exclusive Forum Provision" requires that "any action" asserting "a claim", *i.e.*, *one claim*, must be brought in the Delaware Court of Chancery.

The "Corporate Control of Forum Provision"

While forum selection bylaws require stockholders to bring litigation in Delaware, a majority of these bylaws permit the board of directors to bring litigation in the forum of their choosing. Numerous forum selection bylaws begin by stating "[u]nless the Corporation consents in writing to the selection of an alternative forum[.]" This "Corporate Control of Forum Provision" essentially means that forum selection bylaws are inapplicable to boards of directors who deem it advantageous to their own personal interests to litigate a matter outside of Delaware. [1]

The "Consent Provision"

Many forum selection bylaws contain a "Consent Provision" that provides that "[a]ny person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the corporation" consents to the forum selection bylaw. The Consent Provision not only concedes that stockholders have not agreed to the bylaw and that it was adopted without notice to them, but it purports to make the provision binding on anyone acquiring *any interest* in any of the company's shares. This would include both beneficial and record stockholders, and also holders of options, rights, warrants, and convertible debentures.

Problems with Forum Selection Bylaws

Boards of directors' purported justification for forum selection bylaws is twofold. First, forum selection bylaws purportedly will prevent duplicative stockholders lawsuits by requiring all corporate litigation to be brought in the Delaware Court of Chancery. Second, forum selection bylaws will add certainty to the outcome of corporate litigation because the Delaware Court of Chancery is best qualified to determine issues of Delaware corporate law.

However, most forum selection bylaws are so overbroad that they undermine their purported purposes and are harmful to stockholders. Indeed, proxy advisory firm Glass Lewis recently stated that "charter or bylaw provisions limiting a shareholder's choice of legal venue are not in the best interests of shareholders" because they "effectively discourage the use of shareholder derivative claims by increasing their associated costs and making them more difficult to pursue." In addition, the following concerns demonstrate why forum selection bylaws are overbroad, inequitable, and invalid, and therefore should be repealed.

First, forum selection bylaws were adopted unilaterally by company boards of directors. Company stockholders were not given any notice that these bylaws were being adopted, and were not afforded the opportunity to vote on them. Thus, forum selection bylaws purport to force upon stockholders a mandatory forum for the litigation of corporate disputes.

Second, forum selection bylaw provisions are not equally enforceable. Rather, they were adopted by self-interested directors who retained for themselves the option to select a litigation forum outside of Delaware. Thus, while forum selection bylaws are mandatory and binding upon stockholders, corporate directors may elect to avoid the forum selection bylaw if doing so suits their personal interests.

Third, the Sole and Exclusive Forum Provision requires that *any action* containing a single claim falling within any of the four enumerated categories must be brought in the Delaware Court of Chancery. Thus, forum selection bylaws require stockholders to bring in the Delaware Court of Chancery any action asserting *even one* of the covered claims regardless of whether the other claim(s) fall within the bylaw or whether the Delaware Court of Chancery is a proper forum for the other claim(s).

Fourth, forum selection bylaws are not limited to class and derivative actions. Indeed, forum selection bylaws

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[1] Because most corporate bylaws may be amended by the board of directors, all forum selection bylaws are in essence elective because the board may amend them at any time.

Limiting *Concepcion*: Federal Courts Continue to Invalidate Contractual Arbitration Provisions

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that "only a lunatic or a fanatic sues for $30"). Congress initially expressed concern over the ruling as a group of U.S. Senators and Congressmen, including Senator Al Franken, called for the passage of the Arbitration Fairness Act to "help rectify the Court's most recent wrong by restoring consumer rights."[3] While Congress' interest in passing the Arbitration Fairness Act has waned, several decisions from federal district and circuit courts have limited *Concepcion*. This article discusses two opinions, one from the Second Circuit and one from the Northern District of California, that have limited *Concepcion*.

Amex III: Class Actions Seeking to Enforce Federal Statutory Rights Survive *Concepcion*

In *In re American Express Merchants' Litigation* ("*Amex III*"), the Second Circuit was asked to revisit previous opinions finding that a class arbitration waiver in an American Express merchant agreement was unenforceable "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." 2012 U.S. App. LEXIS 1871 (2d Cir. Feb. 1, 2012).[4] Specifically, *Amex III* considered what, if any, impact *Concepcion* had on the plaintiffs' ability to litigate federal antitrust claims as a class action.

As an initial matter, the court accepted that "*Concepcion* plainly offers a path for analyzing whether a ***state*** contract law is preempted by the FAA." *Id*. at *21-22 (emphasis added). Here, however, the court noted that its decision "rests squarely on '***a vindication of [federal] statutory rights analysis***'" — an issue not addressed by *Concepcion*. *Id*. at *22 (emphasis added). Moreover, the Second Circuit stated that *Concepcion* does not require that all class arbitration waivers be deemed *per se* enforceable. *Id*. at *24.

After establishing that *Concepcion* does not require the enforceability of arbitration clauses in all cases, *Amex III* turned to the Supreme Court's statements concerning the arbitrability of federal statutory claims in *Green Tree Fin. Corp.-Alabama v. Reynolds*, 531 U.S. 70 (2000). *See Amex III*, 2012 U.S. App. LEXIS 1871, at *30-31. Critically, the *Green Tree* Court held that "where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive [in asserting the statutory claim], that party bears the burden of showing the likelihood of incurring such costs." *Green Tree*, 531 U.S. at 91-92. As such, an arbitration provision may be deemed unenforceable if a plaintiff is precluded "from effectively vindicating her federal statutory rights in the arbitral forum." *Id*. at 90.

In applying this framework to *Amex III*, the Second Circuit concluded that "[t]he evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with [American Express] would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id*. at 35. In reaching this conclusion, the court noted that plaintiffs presented expert testimony suggesting that, if brought as an individual claim, the average merchant could expect four-year damages of $5,252 (when trebled) but would incur out-of-pocket costs for an expert economic study that "would be at least several hundred thousand dollars, and might exceed $1 million." *Id*. at 36-37. In essence, "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Id*. at 37.

The Second Circuit's decision in *Amex III* also came with some important caveats. First, the court emphasized that it was not holding that class arbitration waivers were *per se* unenforceable, or even that they were *per se* unenforceable when asserting antitrust claims. Instead, the Second Circuit limited its decision to the merits of the case and the record before the court (*i.e.*, arbitration clauses would not be enforceable where the economic reality of a case would preclude plaintiffs from seeking to enforce a federal statutory right). Second, the court stressed that the practical result of its opinion is not compulsory classwide arbitration. Rather, plaintiffs were to be allowed to proceed as a class action in federal court given the Supreme Court's previous holding that a party cannot be compelled to submit to class arbitration unless provided for in the contractual agreement. *Id*. at *41-42 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010)).

The precedential nature of the Second Circuit's holding in *Amex III* is significant. In addition to affirming several

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[3] *See* Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts against Corporations, April 27, 2011, available at: http://www.franken.senate.gov/?p=press_release&id=1466.

[4] The Second Circuit had previously found the class arbitration waiver unenforceable on two occasions. *See In re American Express Merchants Litig.*, 554 F.3d 300 (2d Cir 2009) ("*Amex I*"); *In re American Express Merchants Litig.*, 634 F.3d 187 (2d Cir 2011) ("*Amex II*"). Plaintiffs in these cases brought claims on behalf of merchants alleging that American Express violated federal antitrust laws. Specifically, plaintiffs alleged that American Express improperly forced merchants to accept the same elevated discount rates on American Express credit cards that merchants previously accepted on American Express charge cards. As a result, plaintiffs allege that they were compelled to accept rates on the American Express credit cards that "vastly exceeded the rate for comparable Visa, MasterCard or Discover [credit cards]." *See Amex III*, 2012 U.S. App. LEXIS 1871, at *6-8.

recent district court decisions rejecting arbitration clauses in class actions seeking to vindicate federal statutory rights,[5] *Amex III* also supports several pre-*Concepcion* circuit opinions that reached similar conclusions as to the enforceability of class arbitration waivers.[6] Under the framework articulated in *Amex III*, plaintiffs seeking vindication of federal statutory rights should be afforded access to class action litigation.

Lau v. Mercedes-Benz: An Argument for Case-By-Case Analysis of Unconscionability

In *Lau v. Mercedes-Benz USA, LLC*, a plaintiff filed an individual lawsuit against defendant Mercedes-Benz USA, LLC ("Mercedes-Benz") for violation of the Song-Beverly Consumer Warranty Act (California's "lemon law") after he purchased an automobile that Mercedes-Benz was unable to properly repair. Mercedes-Benz moved to compel arbitration based upon a provision in the automobile purchase contract. 2012 U.S. Dist. LEXIS 11358 (N.D. Cal. Jan. 31, 2012). In his opposition to the motion, the plaintiff asserted that the arbitration provision was unconscionable under California law and could not be enforced. Mercedes-Benz argued that *Concepcion* required enforcement of the mutually agreed-upon arbitration provision.

Ultimately, the court held that "*Concepcion* does not affect the traditional analysis used to determine whether an arbitration clause is unconscionable." *Id*. at *20. While acknowledging that "[i]t is undisputed that at the core of *Concepcion* is the principle that a state law that prohibits the arbitration of claims is preempted by the FAA," the court noted that "generally applicable legal doctrines — such as duress or unconscionability" may still invalidate an arbitration provision. *Id*. at *17. Of particular importance is *Concepcion*'s recognition that the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id*. (quoting *Concepcion*, 131 S. Ct. at 1749).

To this end, the *Lau* court distinguished the *Discover Bank* rule (which *Concepcion* found to categorically define certain class arbitration waivers as unconscionable) from California's general unconscionability defense.[7] The critical distinction was the fact that California's general unconscionability principle "does not create a per se rule invalidating arbitration clauses, but instead looks more generally to the facts and circumstances of each case to determine whether a contract is unconscionable." *Id*. at 19. Specifically, California's general unconscionability analysis requires both procedural unconscionability ("'oppression' or 'surprise' due to unequal bargaining power") and substantive unconscionability ("'overly harsh,' or 'one-sided' results") "to come to the conclusion that the term is unenforceable." *Id*. at 20 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)).

In addressing the arbitration provision at issue in the case, the *Lau* court focused on the facts and circumstances surrounding the agreement and concluded that the arbitration provision was unenforceable under California law. First, the arbitration provision was procedurally unconscionable because the agreement was presented on a take-it or leave-it basis, the arbitration provision was buried "on the back of a dense pre-printed form" where the purchaser was required to sign on the front, and the plaintiff was not afforded "an opportunity to negotiate the inclusion or exclusion of specific pre-printed terms." *Id*. at *22-24. Second, the arbitration provision was found to be substantively unconscionable because the provision would require the plaintiff to advance prohibitively expensive arbitration fees (approximately $10,000 to $15,000 as compared to the $350 federal court filing fee) and the provision included an appellate process that was more favorable to Mercedes-Benz (effectively limiting the plaintiff's right to appeal to situations where he is awarded $0). *Id*. at 27-30. Under these circumstances, the court concluded that arbitration provision could not be enforced and the plaintiff should be allowed to proceed in federal court.

While the *Discover Bank* rule represented an effective short-cut for plaintiffs to demonstrate unconscionability of

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[5] *See, e.g., Sutherland v. Ernst & Young, LLP*, 2012 U.S. Dist. LEXIS 5024 (S.D.N.Y. Jan. 17, 2012) (finding class arbitration waiver unenforceable in the context of plaintiff's Fair Labor Standards Act claim); *Raniere v. Citigroup Inc.,* 2011 U.S. Dist. LEXIS 135393 (S.D.N.Y. Nov. 22, 2011) (same); *Chen-Oster v. Goldman, Sachs & Co.,* 2011 U.S. Dist. LEXIS 73200 (S.D.N.Y. July 7, 2011) (finding class arbitration waiver unenforceable in the context of plaintiff's Title VII claim).

[6] *See, e.g., In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274 (4th Cir. 2007); *Livingston v. Assocs. Fin., Inc.,* 339 F.3d 553 (7th Cir. 2003).

[7] California's general unconscionability defense is codified as Cal. Civ. Code §1670.5(a): "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Kessler Topaz Commences Litigation Challenging Mandatory Forum Selection Bylaw Provisions

(continued from page 7)

can be used to bring claims *against* stockholders in the Delaware Court of Chancery. Thus, these mandatory forum selection bylaws purport to require stockholders to submit to personal jurisdiction in the Delaware Court of Chancery even if that stockholder has no contact with Delaware other than owning stock in a Delaware corporation.

Fifth, forum selection bylaws purport to require stockholders to bring claims against defendants over whom the Delaware Court of Chancery lacks personal jurisdiction. Delaware law requires directors and certain senior officers of Delaware corporations to submit to personal jurisdiction in Delaware by virtue of their positions.[2] However, other officers and employees are *not* automatically subject to personal jurisdiction in Delaware. Forum selection bylaws that apply to "any director, officer or other employee of the Corporation" force stockholders to bring in Delaware claims for breach of fiduciary duty against lower level officers and employees over whom the Delaware Court of Chancery does not have personal jurisdiction, thus effectively precluding claims brought against these individuals unless stockholders violate the bylaw and bring litigation in an alternative forum.

Sixth, forum selection bylaws purport to require stockholders to bring claims over which the Delaware Court of Chancery lacks subject matter jurisdiction. For example, by covering "any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law," forum selection bylaws purport to require litigation concerning the constitutionality of forum selection bylaws to be brought in the Delaware Court of Chancery. This directly conflicts with United States federal law, pursuant to which U.S. federal district courts have original jurisdiction over all civil actions arising under the Constitution of the United States. In addition, the Delaware Court of Chancery is a court of equity and cannot hear claims for which a *legal* remedy exists. The DGCL contains numerous provisions that provide for a *legal* remedy and thus cannot be properly brought before the Delaware Court of Chancery.[3]

Kessler Topaz's Litigation Against Companies Adopting Forum Selection Bylaws

Kessler Topaz has recently commenced stockholder class actions in the Delaware Court of Chancery concerning the bylaws adopted by twelve Delaware corporations. Through these actions, Kessler Topaz seeks to invalidate these companies' forum selection bylaws and ensure that corporate directors do not inequitably use company bylaws to restrict stockholder rights and unlawfully limit stockholders' ability to enforce their rights through stockholder litigation.

[2] 10 *Del. C.* § 3114.

[3] *See, e.g.*, 8 *Del. C.* §§ 164, 324.

Limiting *Concepcion*: Federal Courts Continue to Invalidate Contractual Arbitration Provisions

(continued from page 9)

class action arbitration waivers under California law, *Lau* reaffirms the notion that general contract principles like unconscionability may still be used to invalidate arbitration provisions.[8] Although, it is yet to be seen whether future decisions will specifically invalidate class arbitration waiver provisions, holdings like *Lau*, which voided the entire arbitration provision without discussing the included class arbitration waiver, help protect consumers from the injustice of compulsory arbitration under certain circumstances.

Conclusion

Recent decisions like *Amex III* and *Lau* have limited the full impact of *Concepcion* and have helped identify situations where class arbitration waivers and arbitration provisions may be unenforceable. Continued development of the law is likely needed before litigants fully understand the scope of *Concepcion*.

[8] The reasoning applied in *Lau* has also been adopted by the California Court of Appeals. *See Sanchez v. Valencia Holding Co., LLC*, 201 Cal. App. 4th 74 (Cal. App. 2d Dist. 2011) (finding *Concepcion* inapplicable because "[t]he unconscionability principles on which we rely govern all contracts, are not unique to arbitration agreements, and do not disfavor arbitration").

Class Certified in the *Bank of America* Securities Litigation *(continued from page 5)*

Castel concluded that the statistically significant declines in BoA's share price on January 15 and 16, 2009 following disclosure of Merrill's fourth quarter losses established their materiality. [15]

Turning to Defendants' argument that plaintiffs' Section 11 claims raised individualized inquiries related to proof of harm and damages ("tracing"), Judge Castel held that no tracing issues would arise because the Section 11 class would be limited to shareholders who directly purchased shares in the October 7, 2008 offering (*i.e.*, "under" the offering documents) and excluding shareholders who subsequently acquired shares in the secondary market (*i.e.*, "traceable" to those offering documents).[16]

Next, Judge Castel considered the scope of plaintiffs' proposed Section 10(b) and 14(a) class definitions and determined that they were not overbroad.[17] As to plaintiffs' proposed Section 14(a) class definition in particular, Judge Castel rejected defendants' argument that it inappropriately included BoA shareholders who also held Merrill shares before the merger closed and thus benefited from an offset to their losses by their ownership of purportedly inflated Merrill shares.[18] In so dismissing this challenge to plaintiffs' proposed Section 14(a) class definition, Judge Castel noted that "[t]he ultimate issue of whether certain plaintiffs' losses are to be offset by any purported inflation of Merrill share prices need not be resolved at [class certification.]"[19]

Regarding plaintiffs' claims on behalf of options purchasers, Judge Castel addressed defendants' argument that named plaintiff Grant Mitchell could bring claims only on behalf of holders of a particular series of January 11 call options and not on behalf of holders of call options that he personally did not own.[20] Judge Castel found no "authority limiting a class to a particularized series of call options, as opposed to call options with a common expiration date," and therefore concluded that Mitchell could bring claims on behalf of other holders of January 22, 2011 call options.[21]

Finally, the Court held that all three firms seeking appointment as class counsel satisfied Rule 23(g), affirming Judge Chin's recognition that "[a]ll three firms are highly experienced in prosecuting securities class actions."[22]

Conclusion

Judge Castel's class certification decision represents a significant victory for plaintiffs in this matter. In rejecting defendants' repeated challenges to plaintiffs' Section 14(a) claims that the investors of an acquiring company cannot recover direct monetary damages and that plaintiffs must transact their shares in a merger in order to establish transaction causation, Judge Castel refused to allow defendants yet another opportunity to make merits-based arguments, which are particularly inappropriate at the class certification stage.

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[15] *Id*. at *11.

[16] *Id*. at *12.

[17] *Id*. at *14-15.

[18] *Id*.

[19] *Id*.

[20] Opinion at *16.

[21] *Id*.

[22] *Id*. (quoting *In re Bank of America Corp. Sec., Derivative & ERISA Litig.*, 258 F.R.D. 260, 271 (S.D.N.Y. 2009) (Chin, J.) (appointing firms as lead counsel pursuant to PSLRA).

Kessler Topaz Upholds Shareholders' Inspection Rights *(continued from page 2)*

requested that Vice Chancellor Donald F. Parsons, Jr. continue the upcoming trial of the Section 220 action until a determination was rendered on the motion to stay in the federal securities fraud action. In a pretrial conference Vice Chancellor Parsons denied this request, but gave the parties an opportunity to address CME's related request that the Court defer ruling on the Chancery Court action pending a decision in the federal securities fraud action.

On October 11, 2011, the parties conducted a day-long trial in the Chancery Court before Vice Chancellor Parsons on Mr. Paul's demand for books and records. Vice Chancellor Parsons noted that "the scope of information that you get in a 220 action is much less than full fledged discovery. Obviously, there are no depositions or anything like that. In addition, you don't get discovery of all documents that relate to a particular subject. You get discovery of what is necessary and sufficient for the stated purpose. . . ." Vice Chancellor Parsons took the matter under advisement and later issued an Order and Opinion dated January 5, 2012, holding that Mr. Paul had a proper purpose for inspection of his demanded books and records, and denying CME's request to stay the action pending the motion to stay in the federal securities fraud action. Vice Chancellor Parsons evaluated CME's requested stay under three factors federal courts generally rely on in deciding whether to stay a state action: (1) whether there is a risk that the federal plaintiffs will obtain the state plaintiff's discovery; (2) whether the underlying facts and legal claims in the state and federal actions overlap; and (3) the burden that the state court discovery proceedings will impose on the federal defendants. Vice Chancellor Parsons found all these factors in the negative, and denied CME's requested stay.

Kessler Topaz likewise utilized Section 220 to investigate reports of wrongdoing at China Integrated. Pursuant to Section 220, Kessler Topaz on behalf of shareholder Judith Bjornson made a demand on China Integrated requesting certain documents relating to China Integrated's purported acquisitions and alleged business operations. China Integrated, like CME, refused Kessler Topaz's inspection demand. Thus, Kessler Topaz commenced an action in the Chancery Court to enforce Ms. Bjornson's inspection rights. Because China Integrated was the subject of a securities fraud action in United States District Court, Central District of California, it responded the same way that CME responded: by filing a motion in the federal securities fraud action to stay the Chancery Court matter. While that motion to stay was pending in the federal securities fraud action, China Integrated requested that the Court defer ruling on the Chancery Court action until a determination was made on the pending motion. The Chancery Court action, however, proceeded to trial on a paper record with accompanying oral argument heard on January 30, 2012, before Chancellor Leo E. Strine, Jr.

After hearing arguments from both parties, Chancellor Strine determined that "there is more than enough to establish a credible basis to believe there may have been wrongdoing at this company, including a series of resignations by officers, directors, auditors and other professionals and internal investigation by the audit committee. . . ." As far as China Integrated's requested stay was concerned, Chancellor Strine opined that, "[w]hen the petitioner has a perfectly bona fide state law concern, which is 'I actually would like to sue them for breach of fiduciary duty potentially because they've injured me as an investor,' and when they pledge to sign a confidentiality agreement precluding them from sharing the information with the SLUSA plaintiffs, when the defendants can't put on one hint of anything in the world that suggests that counsel and their clients are going to violate that promise, to me, the only thing that would be served by granting a stay is to grant a blank check to the fiduciaries of Delaware corporations who are in the wonderful position of having a Court find that there's a colorable, and in this case, vividly colorable basis to conclude they may have engaged in mismanagement, and to allow them to have a stay and sweep information out of view." In denying China Integrated's requested stay of the Chancery Court action, Chancellor Strine further held that, "I firmly reject the basis for defendants' contention. I do not believe it is federal policy. There is not one word in SLUSA that supports it. In fact, I think it's subverting the proper purposes of SLUSA to turn it into a sword that eliminates the rights of state law, of investors in American corporations at precisely the time when those rights are most valuable. The idea that when a company is delisted when there are serious indicators of fraud and mismanagement that SLUSA acts to put the ability of investors to use their traditional state law rights is something that Congress would not do without saying it. I don't believe Congress came close to doing it."

The decisions by Vice Chancellor Parsons and Chancellor Strine are significant victories for shareholders and their advocates. Particularly in the case of foreign-based entities, where transparency is frequently lacking, shareholders' ability to inspect corporate books and records is an essential tool in ensuring that corporate fiduciaries are accountable to the shareholders they are duty-bound to serve. Kessler Topaz is proud to have successfully protected the ability of shareholders to use their inspection rights under Section 220 and not permit potential wrongdoers to use federal law to abrogate shareholders' rights under state law.

NORTHERN EXPOSURE: A Summary of the Lead Plaintiff Appointment Process in Canadian Securities Class Action Lawsuits *(continued from page 3)*

class action lawsuits being filed.[2] The NERA Report concludes that "[i]t now seems beyond question that the uptick in [Canadian] securities class action filings since 2008 is not a transient phenomenon. In each of the last four years we have seen at least nine new cases filed — more than in any prior year." NERA predicts *Morrison*'s holding, among other things, may fuel the growth in Canadian securities class action lawsuits "in 2012 and beyond."[3]

While a full analysis of Canadian securities class action laws is beyond the scope of this article, we briefly examine a particular component of Canadian class actions — the appointment of a lead plaintiff.[4]

Smith v. Sino-Forest Corporation and the Standard for Lead Plaintiff Appointment:

In order for a plaintiff to prosecute a Canadian class action lawsuit it must be granted "carriage" by the court. While there are no required criteria governing this selection, the Ontario Superior Court of Justice's recent decision in *Smith v. Sino-Forest Corporation*, [2012] ONSC24 (CanLII) ("*Sino-Forest*") is instructive. In *Sino-Forest*, the court conducted an extensive analysis of the plaintiffs and counsel seeking to represent investors bringing claims against Sino-Forest Corporation for defrauding investors by, *inter alia*, overstating the company's assets and sales. Specifically, the court analyzed three proposed class actions (*Smith v. Sino-Forest*, *Labourers v. Sino-Forest*, and *Northwest v. Sino-Forest*) and ultimately granted "carriage" (lead plaintiff appointment) to the named plaintiffs and counsel in *Labourers*.[5]

As an initial matter, the court noted that, like class action litigation in the United States, two or more class actions asserting similar claims with respect to similar putative classes should not be allowed to proceed concurrently. Accordingly, one of the class actions must be selected and granted carriage. *Sino-Forest* at ¶12. To this end, a proposed representative plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject matter. *Id*. at ¶13.

In selecting which action — and ultimately which plaintiff — will proceed on behalf of all class members, courts are given broad discretion under the Class Proceedings Act. *Id*. at ¶14. Under this framework, a court may "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination." *Id*.

As outlined in *Sino-Forest*, courts generally consider seven non-exhaustive factors in determining which action should be granted carriage: 1) differences in the alleged causes of action; 2) the supporting theories asserted by counsel; 3) the state of each class action, including preparation; 4) the characteristics and involvement of the proposed representative plaintiffs; 5) the relative priority of the commencement of the class actions; 6) the resources and experience of counsel; and 7) the presence of any conflicts of interest. *Id*. at ¶17. The court also found that other factors could be relevant, including plans for funding litigation, the scope of the class period and the class definition, the choice of named defendants, and the likelihood of certification. *Id*. at ¶18.

While the court noted that any of these factors could be determinative, the court focused its analysis on the attributes of the proposed representative plaintiffs and the factors concerning which "class action would best serve the class members' need for access to justice and the policies of fairness to defendants, behaviour modification, and judicial economy." *Id*. at ¶237. In this regard, important factors included: the class definition and class period; the theories of the case and the associated causes of action; the selected defendants; and the prospects of certification. *Id*. at ¶236.

In analyzing the merits of the proposed representative plaintiffs, the court noted that there is some disagreement in Canada as to whether a class is better served by representation from an individual or an institution. *Id*. at ¶281. Ultimately, however, the court concluded that "the expertise and participation of . . . institutional investors in the securities marketplace could contribute to the successful prosecution" of a class action lawsuit. *Id*. at ¶286. The

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[2] NERA Economic Consulting, *Trends in Canadian Securities Class Actions: 2011 Update*, Jan. 31, 2012, available at http://www.nera.com/nera-files/PUB_Recent_Trends_Canada_01.12.pdf (the "NERA Report").

[3] *See* NERA Report at p. 1 & n.4 ("Upward pressure on the pace of Canadian securities class action filings, and the associated dollar value at risk, may result from . . . the limits to claims in US courts for non-US investors in non-US stocks making Canada a more attractive venue for these cases").

[4] The section of a lead plaintiff in securities class action lawsuits in the United States is governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Generally, under the PSLRA, the movant with the largest financial interest in an action (largest loss) that is otherwise adequate and typical is — subject to certain limitations — appointed as the lead plaintiff and is empowered to prosecute claims on behalf of all class members.

[5] The court appointed two Canadian law firms as co-lead counsel and noted the cooperative agreement between these firms and Kessler Topaz.

NORTHERN EXPOSURE: A Summary of the Lead Plaintiff Appointment Process in Canadian Securities Class Action Lawsuits *(continued from page 13)*

court also noted that "[a]nother advantage of keeping the institutional plaintiffs in the case at bar in a class action is that the institutional plaintiffs are already to a large extent representative plaintiffs." *Id.* at ¶291 (noting that institutional investors "practically speaking, [are] suing on behalf of their own members").[6]

In reviewing the factors concerning the nature of the actions, the court placed particular emphasis on the inclusiveness of the class pled by the *Labourers* group. In particular, the court noted that the inclusion of both bondholder and shareholder claims prevented "multiplicity of litigation" and eliminated any need for separate class actions that inevitably would assert similar issues of law and fact. *Id.* at ¶296. Similarly, the court noted that the longer, more inclusive class period pled by the *Smith* group was preferable to the shorter class period alleged by the *Labourers* group.[7] While the court noted its preference for over-inclusiveness over under-inclusiveness, it pointed out that the *Labourers* group, with its inclusion of both bondholders and shareholders, could easily expand the class period at a future date to alleviate any concerns about its length. *Id.* at ¶304.

As evident from the court's discussion, a basic consideration of the competing claims and the possibility of success is also necessary when reviewing competing carriage motions. While noting that "[a] carriage motion is not the time to determine whether an action will . . . ultimately provide redress to the class members," the court was troubled by the *Northwest* group's selection of a fraudulent misrepresentation cause of action. *Id.* at ¶¶305-28. Specifically, the court noted that such claims were a "needless provocation" that would fuel the defendants' desire to defend the case when compared with the much easier to prove negligent misrepresentation claims asserted by the *Labourers* group. *Id.* at ¶311; *see also id.* at ¶325 ("conclude[ing] that the fraudulent misrepresentation action is a substantial weakness"). Thus, the court concluded "that the class members are best served by the approach in *Labourers*." *Id.* at ¶327.

In the end, the court's selection of the *Labourers* group evidences an attempt to assure that a broad group of potential class members are afforded representation by qualified named plaintiffs and their counsel. While the criteria utilized by Canadian courts to select the appropriate representative plaintiffs may differ from the loss-based analysis under U.S. securities laws, both systems appear to favor and encourage institutional investors and experienced counsel to represent absent class members in securities litigation.

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[6] The Court also noted that the Labourers group also included two individual investors who could give voice to the interests of similarly suited class members. Id. at ¶292.

[7] While the court seemed to indicate the longer class period was preferable, it did state that the shorter class period in Labourers complaint appeared to be "adequate, reasonable, certifiable, and likely consistent with the common issues that will be forthcoming." Id. at ¶303.

Calendar of Upcoming Events

Council of Institutional Investors 2012 Spring Conference — Shaping the Future

April 1 – 3, 2012

Omni Shoreham Hotel — Washington, D.C.

Confirmed speakers for the conference include: Spencer Abraham, *chairman and CEO, The Abraham Group; non-executive chair, AREVA; director, Occidental Petroleum;* Michele Hooper, *President and CEO, The Directors' Council;* Troy Paredes, *Commissioner, U.S. Securities and Exchange Commission;* David Rubenstein, *Co-Founder and Managing Director, The Carlyle Group;* Eric T. Schneiderman, *Attorney General of New York State;* Michael Woodford, *former chief executive, Olympus;* Meg Whitman, *president & CEO, Hewlett-Packard*

National Conference on Public Employee Retirement Systems • May 6 – 10, 2012

Hilton New York Hotel — New York, New York

When it comes to education, no other conference compares to the NCPERS Annual Conference. That's why more than 1,000 trustees, administrators, state and local officials, investment, financial and union officers, pension staff and regulators attend each year. Attendees benefit from the comprehensive educational programming, dynamic speakers, and networking opportunities with money managers, investment service providers and public fund colleagues from across the nation.

SACRS Spring Conference 2012 • May 8 – 11, 2012

The Resort at Squaw Creek — Olympic Valley, California

The State Association of County Retirement Systems (SACRS) is an association of 20 California county retirement systems and provides the information, education and legislative analysis necessary to assist their member systems in assuring their interests are appropriately served by the fiduciaries they elected or appointed. The Spring Conference is a forum for meeting this mission of SACRS. The agenda for this meeting is still under development.

PAPERS 8th Annual Spring Forum • May 23 – 24, 2012

Hilton Harrisburg — Harrisburg, Pennsylvania

The Pennsylvania Association of Public Employee Retirement Systems (PAPERS) 8th Annual Spring Forum is titled "Protecting Public Employee Benefits: What Lies Beneath." The Spring Forum is an opportunity for networking and education designed especially for Pennsylvania's public pension fund representatives and those companies providing service to the pension industry.

FPPTA Annual Conference • June 24 – 27, 2012

Hilton Disney — Orlando, Florida

The Florida Public Pension Trustees Association (FPPTA)'s Annual Conference provides their members education and information for the public pension system and protection of Defined Benefit Pension Plans. The agenda for this meeting is still under development.

2012 ICGN Annual Conference • June 25 – 27, 2012

Hotel Sofitel Rio de Janeiro Copacabana — Rio de Janeiro, Brazil

The 2012 ICGN Annual Conference will take place June 25 – 27 in the beautiful city of Rio de Janeiro, Brazil at the Hotel Sofitel Rio de Janeiro Copacabana. This conference is hosted by the Brazilian Institute of Corporate Governance (IBGC).

GAPPT Third Annual Conference • September 18 – 20, 2012

Macon Marriott City Center — Macon, Georgia

The Georgia Association of Pension Plan Trustees (GAPPT) Annual Conference provides their members with a forum for the discussion of benefit plan issues, a network for the sharing of benefit plan issues, solutions, and resources, and to provide support and information for education, training, advancement and accreditation for public plan trustees and personnel. The agenda for this meeting is still under development.

57th U.S. Annual Employee Benefits Conference • November 11 – 14, 2012

San Diego Convention Center — San Diego, California

The Annual Employee Benefits Conference provides an ideal venue for discussing the latest cost-saving ideas, getting updates on legislative developments, finding creative approaches to new challenges and collaborating with your peers who are dealing with the same issues you face.

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Kessler Topaz Bulletin

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