KESSLER TOPAZ

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PGGM Appointed as Lead Plaintiff in Investors' Class Action Lawsuit Against HP — Kessler Topaz to Serve as Lead Counsel

Darren J. Check, Esquire and Naumon A. Amjed, Esquire

On March 4, 2013, District Court Judge Charles R. Breyer appointed PGGM Vermogensbeheer B.V. ("PGGM") as the sole lead plaintiff in a securities class action lawsuit against Hewlett Packard Company ("HP" or the "Company") and certain of its officers for HP's botched acquisition of Autonomy Corporation ("Autonomy"), a British software company (the "Order").[1] The Order reaffirms the importance of institutional investors with significant stakes in actions taking a lead role in securities lawsuits. PGGM was appointed over several U.S. state funds.

"[A] desperate HP suspended disbelief" — Facts Leading To Investors' Lawsuits

In March 2011, Léo Apotheker, HP's (former) CEO, announced a new corporate strategy to transform the Company from a low-margin computer hardware producer to a high-margin corporate software and services provider. Autonomy — a British enterprise infrastructure software company with reported gross margins of nearly 90%, and operating margins of more than 40% (as compared to HP's gross margins of 23.8% and operating margins of 9.1%) — purport-

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[1] *See Nicolow v. Hewlett Packard* Co., 2013 WL 792642, at *10 (N.D. Cal. Mar. 4, 2013).

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds: Supreme Court's Holding Levels the Playing Field at Class Certification in Securities Cases

Meredith L. Lambert, Esquire

On February 27, 2013, the Supreme Court issued a landmark securities law decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. __ (2013). In a 6-3 opinion, the Court affirmed the Ninth Circuit's finding that proof of materiality is not a prerequisite to class certification, and that a defendant is not entitled to offer rebuttal evidence of immateriality at the class certification stage. By removing a burdensome procedural obstacle to class certification, the Court's ruling not only clarifies a previous split among Circuits but also marks a significant victory for plaintiffs.

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Kessler Topaz Secures $10 Million Settlement Fund for Moneygram Minority Shareholders

Michael C. Wagner, Esquire and J. Daniel Albert, Esquire

Kessler Topaz, serving as Co-Lead Counsel for the minority shareholders of MoneyGram International, Inc. ("MoneyGram" or the "Company"), recently obtained court approval of a settlement of litigation challenging a recapitalization transaction between MoneyGram and its controlling shareholders (the "Recapitalization"), Thomas H. Lee Partners, LP ("THL") and The Goldman Sachs Group, Inc. ("Goldman") and certain of their respective affiliates. The settlement provides for a $10 million settlement fund to be disbursed to MoneyGram's stockholders unaffiliated with THL and Goldman, who collectively own approximately 84% of the Company.

During the financial crisis in 2008, MoneyGram, the global money transfer and payment services company, received a large capital infusion from THL and Goldman in exchange for convertible preferred stock that gave THL and Goldman control of the Company. The preferred stock entitled THL and Goldman to quarterly cash dividends at the rate of 10% per annum, or accrued in-kind dividends of preferred stock at 12.5%. Goldman also acquired senior secured notes with an interest rate of 13.25%. THL and Goldman took control of MoneyGram's board of directors (the "Board"), naming four THL managing directors to the Board as well as two Goldman observers.

Since MoneyGram was unable to pay cash dividends on the preferred stock, THL and Goldman's position in the Company continued to grow as they acquired more preferred stock as a result of their quarterly in-kind dividends. Particularly over time, these quarterly stock dividends substantially diluted all other stockholdings — including THL and Goldman's as well as the public stockholders'.

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Eleventh Circuit Limits Private Securities Plaintiffs' Ability to Plead Loss Causation

Richard A. Russo, Jr., Esquire

In *Meyer v. St. Joe Company*, No. 12-11488, slip op. (11th Cir. Feb. 25, 2013) ("*St. Joe*"), the United States Court of Appeals for the Eleventh Circuit held that analyst and short-seller reports based on publicly-available information, and announcements of governmental investigations into a company, do not, without more, constitute "corrective disclosures" under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). The court's decision, though limited in some key respects, is likely to impede investors' ability to successfully plead loss causation in the Eleventh Circuit.

Relevant Facts and Procedural History

St. Joe is one of the largest real-estate development corporations in Florida. It was heavily invested in Florida real estate at the time the real estate market plummeted in 2008. The real estate downturn caused the value of St. Joe's real estate assets to decline markedly between 2008 and 2011, and caused the Company to halt many of its ongoing development projects.

During an October 13, 2010 presentation at the Value Investing Conference, David Einhorn — a prominent short seller — stated that, in his view, St. Joe would not be able to recover the current carrying value of many of its real estate holdings. As a result, Einhorn opined that St. Joe's assets were currently overvalued and "should be" impaired. The Company's share price declined by approximately 20% in response to Einhorn's comments.

On November 3, 2010, St. Joe investors brought claims against the Company under Section 10(b) of the Securities Exchange Act of 1934 based on Einhorn's statements and the resulting decline in St. Joe's share price. Lead Plaintiff the City of Southfield Police & Retirement System ("Southfield") alleged that St. Joe management knew that the carrying value of its real estate assets would never be recovered, but

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Kessler Topaz Achieves Milestone Victory in Exchange Rate Litigation

Benjamin J. de Groot, Esquire and Ryan T. Degnan, Esquire

In a significant victory for one of the Firm's institutional clients — the Southeastern Pennsylvania Transit Authority ("SEPTA") — Kessler Topaz successfully defeated a motion by The Bank of New York Mellon Corp., Mellon Bank N.A. and The Bank of New York Mellon (collectively, "BNY Mellon") to dismiss allegations that BNY Mellon manipulated foreign exchange ("FX") currency rates charged to SEPTA and a class of similarly situated custodial clients.[1] On January 23, 2013, Judge Lewis A. Kaplan of the Southern District of New York issued an opinion preserving SEPTA's central claims.[2]

The premise of the Action is that BNY Mellon, rather than charging clients the prevailing FX rate available at the time an FX trade was executed, charged its clients the least favorable rate that occurred that trading day and profited off the margin.[3] While narrowing certain aspects of SEPTA's claims, the Opinion preserves the full class period and allows to proceed the core theory that BNY Mellon breached its contractual and/or fiduciary obligations by secretly profiting from FX transactions it executed for custodial clients.

1. Procedural Status of the Action

The Action was originally filed in the United States District Court for the Eastern District of Pennsylvania in March 2011, seeking recovery on behalf of all public and private pension funds and other trusts or funds for which BNY Mellon served as a custodial bank and executed FX trades pursuant to "standing instructions" from 2000 through May 2, 2011.

The Action was the first class action lawsuit filed on behalf of BNY Mellon's clients asserting claims for manipulating FX rates. Several other actions were subsequently filed throughout the United States asserting various claims — all derived from BNY Mellon's manipulation of FX rates. On April 16, 2012, prior to a ruling on BNY Mellon's motion to dismiss in the Eastern District of Pennsylvania, each of the FX cases against BNY Mellon pending in federal court were transferred by the Judicial Panel on Multidistrict Litigation to the Southern District of New York before Judge Lewis A. Kaplan.[4] In January, Judge Kaplan issued his Opinion preserving SEPTA's claims on behalf of the class.

2. The Opinion

Judge Kaplan's Opinion outlines the documents and facts governing the relationship between SEPTA and BNY Mellon. In particular, the Opinion points to the Master Trust Agreement ("MTA") as setting forth "the principal relationship among the parties" and notes that "BNY Mellon's provision of custodian services to SEPTA and the Class included execution of its clients' FX trades." In addition, the Opinion explains that "FX Procedure Forms" executed by SEPTA in 2000, 2003, 2004, 2007 and 2011 also govern the contractual relationship.

a. Claim for Breach of Contract Survives

The central question before the court is whether the plaintiffs adequately pleaded that "best execution" standards were incorporated into the parties' contractual relationship. As argued by SEPTA, "best execution" standards, if incorporated into the Contract, would require BNY Mellon to extend every effort to obtain the best price for its clients.

In evaluating BNY Mellon's contractual obligations, Judge Kaplan noted that the 2011 FX Procedure Form stated that the execution of FX trades would occur "per procedure posted at" the Daily Schedule Web Page (which, in turn, pointed to the Standing Instruction Web Page containing the "best execution" language).[5] Specifically, Judge Kaplan explained:

> [The 2011 FX Procedure Form] indicates that the FX trades will be executed per the procedures available at . . . [the] Daily Schedule Web Page.
>
> Thus, a manager considering whether to elect to receive standing instruction services who followed that link

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[1] The case is entitled *Southeastern Pennsylvania Transportation Authority v. The Bank of New York Mellon Corp.,* Case No. 12-cv-03066 (LAK) (S.D.N.Y.) (the "Action").

[2] *See In re Bank of N.Y. Mellon Corp. Forex Transactions Litig*., 2013 U.S. Dist. LEXIS 9345 (S.D.N.Y. Jan. 23, 2013) (the "Opinion").

[3] *Id.* at *19.

[4] During a status conference before Judge Kaplan in late May, the parties agreed that a master complaint would be filed jointly by SEPTA and the plaintiffs prosecuting *Int'l Union of Oper. Eng'rs v. BNY Mellon Corp.*, 12-md-02335 *("Operating Engineers")* (consolidated before Judge Kaplan), ***after*** the court ruled on the pending motions to dismiss in the SEPTA Action. Now that the ruling has been issued, Kessler Topaz anticipates filing a master amended complaint consistent with the MTD Opinion and Judge Alsup's earlier ruling in *Operating Engineers,* 2012 WL 476526 (N.D. Cal. Feb. 14, 2012) (denying BNY Mellon's motion to dismiss claims brought by an ERISA plaintiff).

[5] *Id.* at *13, 16-18.

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds: Supreme Court's Holding Levels the Playing Field at Class Certification in Securities Cases

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Rule 23(b)(3)

At issue in *Amgen* was whether the plaintiff had met the requirement under Rule 23(b)(3) of the Federal Rules of Civil Procedure that "questions of law or fact common to class members predominate over any questions affecting only individual members." To satisfy Rule 23(b)(3)'s requirement with respect to reliance, an essential element of a claim under Section 10(b) of the Securities Exchange Act of 1934, plaintiffs commonly invoke the fraud-on-the-market presumption of classwide reliance, which the Supreme Court established in *Basic v. Levinson*, 485 U.S. 224 (1988). As explained in *Basic*, if a market is shown to be efficient, courts may presume that investors who traded in that market relied on public, material misrepresentations regarding those securities. *See* 485 U.S. at 245-247. Accordingly, as the *Amgen* Court observed, the fraud-on-the-market theory "facilitates class certification by recognizing a rebuttable presumption of classwide reliance on public, material misrepresentations when shares are traded in an efficient market." 568 U.S. __ (slip op. at 6). Materiality is an essential predicate of the fraud-on-the-market theory. *See Basic*, 485 U.S., at 247 ("[W]here ***materially*** misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed." (emphasis added)).

Majority Opinion

Amgen raised two arguments on appeal. First, Amgen contended that because materiality is an essential predicate of the fraud-on-the-market theory, it must be proved before a securities-fraud class action can be certified. In support of this argument, Amgen highlighted the Supreme Court's statement in *Halliburton* that "securities fraud plaintiffs must prove certain things in order to invoke Basic's rebuttable presumption of reliance," including "that the alleged misrepresentations were publicly known . . . , that the stock traded in an efficient market, and that the relevant transaction took place 'between the time the misrepresentations were made and the time the truth was revealed.'" 563 U.S., at __ (slip op., at 5-6). Based upon this statement, Amgen argued that if certain fraud-on-the-market predicates must be proved before class certification, materiality should be treated no differently.

The majority rejected this argument, finding that proof of materiality was not necessary to satisfy Rule 23(b)(3)'s predominance requirement for two reasons: (1) because the question of materiality is an objective one, materiality can be proved through evidence common to the class; and (2) because materiality also goes to the merits of a Rule 10b-5 claim, failure of proof on this element would not cause individual reliance questions, as it would simply end the litigation. In reaching this conclusion, the majority distinguished the Court's statement in *Halliburton* on two bases. First, the requirement that a putative class representative establish that it executed trades "between the time the misrepresentations were made and the time the truth was revealed" relates primarily to the Rule 23(a)(3) and (a)(4) inquiries into typicality and adequacy of representation, not to the Rule 23(b)(3) predominance inquiry. And second, market efficiency and publicity, in contrast to materiality, were not indispensable elements of a Rule 10b-5 claim. As such, failure to prove market efficiency and publicity would preclude a plaintiff from invoking the fraud-on-the-market theory and thus raise individualized reliance issues, whereas failure to prove materiality would preclude the plaintiff from prevailing on the merits a Rule 10b-5 claim and thus end the case in its entirety.

Amgen additionally insisted that "policy considerations" mandated proof of materiality prior to class certification. Specifically, Amgen contended that an order granting class certification pressures defendants to settle, thereby foregoing adjudication of the issue of materiality. The majority was not persuaded by this contention, recognizing that the same could be said for the other essential elements of a Rule 10b-5 claim. Further, the majority noted that such policy concerns were inappropriate matters for the judiciary to address, as Congress had already employed its own means to alleviate the settlement pressures associated with securities-fraud class actions. Moreover, in response to Amgen's position that requiring proof of materiality before class certification would conserve judicial resources, the majority found that in reality, such a requirement "would waste judicial resources" by "necessitat[ing] a mini-trial on the issue of materiality at the class-certification stage" which "would entail considerable expenditures of judicial time and resources, costs scarcely anticipated by Federal Rule of Civil Procedure 23(c) . . ." 568 U.S. __ (slip. op. at 21).

Second, Amgen argued that it should be entitled at class certification to offer rebuttal evidence aimed to prove that the alleged misstatements and omissions were immaterial. The majority disagreed. Consistent with its holding that proof of materiality is not a prerequisite to class certification, the majority determined that the potential immateriality of the alleged misstatements and omissions would not preclude a finding that common questions predominate. Therefore, the district court need not consider rebuttal evidence of immateriality in determining predominance under Rule 23(b)(3).

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Kessler Topaz Achieves Milestone Victory in Exchange Rate Litigation *(continued from page 3)*

> then would have been presented not with a set of procedures or guidelines, but instead with, *inter alia*, the latest daily schedule of prices, a link to the FX Policies and Procedures, *and* a link to the Standing Instructions Web Page. . . . The Standing Instructions Web Page set forth a number of features of the trading program [including "best execution"].[6]

Accordingly, Judge Kaplan concluded that "SEPTA plausibly has alleged that BNY Mellon's statements that the program provided these benefits were part of the bargain when SEPTA elected to sign the February 2011 form."[7]

Having concluded that SEPTA has properly alleged that "best execution" standards were incorporated into the contract, the court also found that SEPTA properly alleged BNY Mellon failed to fulfill its obligation to get the best available prices for its custodial clients, stating, "there is nothing in the FX Policies and Procedures that says that BNY Mellon was free to price FX however it wished."[8] The Opinion also notes that this "conclusion is consistent with that of Judge Alsup in [*Operating Engineers*] which held that the construction of a disputed term such as 'best execution standards' was best left to a motion for summary judgment after discovery has been conducted."[9]

b. Claim for Breach of Fiduciary Duty to Provide Full and Fair Disclosure Survives

After addressing the contract claim, the court considered several theories of fiduciary breach advanced by SEPTA. Although the court concluded that "BNY Mellon, when executing FX trades through the standing instructions program, had no fiduciary obligation to price those trades in SEPTA's best interest [but] as SEPTA's custodian under the MTA, [BNY Mellon] ***did owe a duty of loyalty . . . including a duty to disclose to the principal all relevant information***."[10]

In doing so, the court noted that the "strong connections between custodial services and the FX trading program amplified the need for BNY Mellon to have made full and clear disclosures with respect to its roles as fiduciary and as principal" and that it was "not persuaded that [BNY Mellon's] simple reference [to conducting FX trades on a 'principal basis'] demonstrates as a matter of law that BNY Mellon provided 'the full and complete disclosure of all the material facts' regarding the nature of its relationship that Pennsylvania law requires before a fiduciary seeks to profit from its confidential relationship."[11] Moreover, Judge Kaplan concluded that "in marketing its program and thus seeking to extract additional profit from clients like SEPTA to whom it owed fiduciary duties of loyalty and care, BNY Mellon was obligated to provide the full and fair disclosure of relevant information that the law requires."[12] The Opinion thus recognized BNY Mellon's fiduciary relationship with its custodial clients and preserved SEPTA's claim that BNY Mellon breached its fiduciary obligations to its custodial clients by failing to properly disclose the compensation it earned from FX trading at its custodial clients' expense.

c. Statute of Limitations Defense Is Rejected

Finally, the Opinion rejected BNY Mellon's attempt to narrow the class period by arguing that statutory tolling was not applicable. According to the court, "[t]he allegations of the [Complaint] arguably permit the inference that BNY Mellon nevertheless consistently priced the transaction within the daily interbank range — against its immediate economic interest — ***to give clients the impression that the trades were executed at or near prevailing interbank rates***, but that the executions unfortunately occurred at times of day when prices were less favorable."[13] The court further noted that "where the wrongdoing underlying causes of action has been perpetrated by a fiduciary to the detriment of its principal [as it was here], this fact militates strongly against . . . judgment on the issue of whether the principal . . . exercised reasonable diligence in failing to discover the fiduciary's malfeasance within the applicable statutes of limitations."[14]

3. Conclusion

Surviving a motion to dismiss is a critical milestone in every case. In succeeding at this critical juncture, Kessler Topaz has preserved SEPTA's ability to pursue its core allegations, on behalf of the class, for the entire class period originally pled. Now that the ruling has been issued, Kessler Topaz looks forward to aggressively pressing the case that BNY Mellon breached its obligations to its custodial clients by manipulating and profiting from their clients' FX transactions.

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6 *Id.* at *33-34.

7 *Id.* at *34.

8 *Id.* at *42.

9 *Id.* at *47, n. 119.

10 *Id.* at *64 (emphasis added).

12 *Id.* at *74.

13 *Id.* at *88.

14 *Id.* at *90.

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edly provided HP such an opportunity. Despite Autonomy's reported success, several analysts and short sellers questioned Autonomy's growth rate and accounting practices since at least 2008. For example, one short seller stated (in 2009) that Autonomy "appears to have consistently overstated revenue and grossly understated expenses." Others suggested that Autonomy was using corporate acquisitions to mask lower organic growth.

Notwithstanding these concerns, on August 18, 2011, HP announced that the Company would acquire Autonomy for approximately $11 billion. In the days following HP's announcement some analysts described the deal as "value-destroying" and "expensive," while others concluded that HP was "massively overpaying." Moreover, the announcement of the acquisition prompted Oracle's CEO, Larry Ellison, to publicly call the purchase price "absurdly high" and disclose that Oracle had previously rejected a deal to acquire Autonomy at nearly half the price HP was paying. HP rejected these concerns. Specifically, Apotheker assured investors that the Company applies a "very conservative" and "rigorous" process when evaluating acquisitions and explained that HP ran "an extremely tight and very professional due diligence process" when considering Autonomy. According to Apotheker, these valuation and due diligence processes resulted in "a very fair price for Autonomy."

Just over a month after announcing HP's acquisition of Autonomy, Apotheker was replaced by Meg Whitman as HP's CEO. The leadership change, however, did not alter the Company's commitment to Autonomy. In fact, Whitman assured investors that "the Autonomy acquisition, which I'm excited about, is proceeding as planned." Over the following months, Whitman continued to express her excitement for the acquisition while the Company's CFO, Cathie Lesjak, explained that "[t]he integration [with Autonomy] is going well thus far." HP's acquisition of Autonomy officially closed on October 3, 2011.

In a complete about-face from prior assurances about HP's diligence into Autonomy and the fairness of Autonomy's $11 billion price tag, on November 20, 2012, HP revealed that the Company would take an $8.8 billion impairment charge related to Autonomy. According to the Company, "[t]he majority of this impairment charge, more than $5 billion, is linked to serious accounting improprieties, misrepresentation and disclosure failures discovered by an internal investigation . . . into Autonomy's accounting practices prior to its acquisition by HP." Based on the investigation, the Company concluded that "Autonomy was substantially overvalued at the time of its acquisition" as the result of "a willful effort on behalf of certain former Autonomy employees to inflate the underlying financial metrics of the company in order to mislead investors and potential buyers." Investors also learned that CFO Lesjak had warned HP's Board of Directors before the acquisition closed that Autonomy was "too expensive" and "not in the best interests of the company." The CFO's concerns were not shared with HP's investors. On this news, the Company's common stock fell approximately 12%, from a close of $13.30 per share on November 19, 2012 to close at $11.71 per share on November 20, 2012. This decline eliminated more than $3.1 billion from the Company's market capitalization value in a single-trading day. A post-write-down analysis of the Autonomy deal by *Reuters* suggested that HP was so "desperate" to close the deal that it "suspended disbelief" and fully accepted Autonomy's reported financials.

HP's write-down of Autonomy was not an isolated event. Rather, the write-down was the most recent example of the Company taking billions of dollars in impairment charges in connection with failed acquisitions. Prior to the Autonomy write-down, HP took significant impairment charges in connection with two other corporate transactions. First, on November 21, 2011, the Company revealed that it would take nearly $1.65 billion in impairment charges as the result of the Company's decision to abandon products based on technology acquired when HP purchased Palm Inc. for $1.2 billion in 2010. Second, on August 8, 2012, HP announced that it would take an $8 billion goodwill impairment charge in connection with the Company's $13.9 billion acquisition of Electronic Data Systems in 2008.

The multibillion dollar write-downs come on top of significant corporate governance lapses at HP. HP is currently named as a defendant in multiple (separate) shareholder class action lawsuits accusing it of securities fraud. The Company has also had shifting leadership with three different CEOs in the past three years. HP's revolving door of CEOs has cost the Company tens of millions in bonuses and severance payments.

PGGM Is Appointed as Lead Plaintiff

The Autonomy fiasco led to a number of lawsuits being filed against the Company and its officers, among others, for violating the federal securities laws. On January 25, 2013, PGGM and several U.S. based state pension funds moved for appointment as lead plaintiff in the HP securities class action lawsuit. On March 4, 2013, Judge Breyer issued the Order which concluded that PGGM asserted the largest financial interest of the various movants seeking appointment as lead plaintiff and was otherwise adequate and typical. Based on these findings, Judge Breyer appointed PGGM as the sole lead plaintiff in the investors' class action lawsuit. Judge Breyer also approved PGGM's selection of Kessler Topaz as sole lead counsel for the class. As lead plaintiff, PGGM will be responsible for directing Kessler Topaz and prosecuting all investors' claims. PGGM is currently investigating potential claims against HP and its officers and will file a consolidated complaint in the coming weeks.

PGGM has previously served as a lead plaintiff in investors' class action lawsuit against Bank of America Corp. ("Bank of America") for misstatements and omissions made in connection with its 2008 acquisition of Merrill Lynch.[2] PGGM, along with its co-lead plaintiffs, recently settled investors' claims against Bank of America for $2.4 billion and a number of significant corporate governance reforms. The corporate governance portion of the Bank of America settlement includes: enhancing Bank of America's disclosures to shareholders relating to future mergers; enhancing the board's review of incentive compensation tied to merger and acquisition activity; in cases where a director receiving less than a majority of votes tenders his or her resignation and the resignation is not accepted, requiring the board to publicly disclose resignation was refused; and mandating the extension of U.S. Securities and Exchange Commission led reform set to expire at the end of 2012 (*e.g.*, "say on pay" provisions, super-independence of the compensation committee, and requirements that the CEO and CFO certify that they reviewed any merger-related proxies).

[2] *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, 258 F.R.D. 260, 270 (S.D.N.Y. 2009).

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds: Supreme Court's Holding Levels the Playing Field at Class Certification in Securities Cases *(continued from page 4)*

Concurring and Dissenting Opinions

Justices Scalia and Thomas each wrote dissenting opinions, with Justice Kennedy joining Justice Thomas's dissent in full, and Justice Scalia joining in part. Justice Scalia disagreed that proof of materiality was not required before class certification. He further characterized the majority's holding as an expansion of the "arguably regrettable" consequences of the Court's *Basic* decision "to the unquestionably disastrous." Justice Thomas opined that all of the predicates of the fraud-of-the-market theory, including materiality, must be proven at class certification in order to demonstrate classwide reliance and satisfy Rule 23(b)(3)'s predominance requirement. Similarly, he criticized the fraud-on-the-market presumption as "questionable." Justice Alito wrote a concurring opinion, agreeing with the dissent's observation that the fraud-on-the-market presumption "may rest on a faulty economic premise."

Impact of *Amgen*

By eliminating the need for plaintiffs to prove materiality and precluding defendants from rebutting the fraud-on-the-market presumption on materiality grounds at the class certification stage, *Amgen* resolves a Circuit split in plaintiffs' favor, overruling law in the First, Second, and Fifth Circuits requiring plaintiffs to prove materiality at the class certification stage in order to invoke the fraud-on-the-market presumption, and superseding law in the Second and Third Circuits permitting defendants to rebut materiality at the class certification stage. Although this is a huge win for securities plaintiffs, the doubts expressed by Justices Alito, Scalia, Thomas and Kennedy regarding the viability of the fraud-on-the-market presumption should not be overlooked, as the majority acknowledged that the Court had not been asked to "revisit" that issue. Consequently, the fraud-on-the-market presumption appears vulnerable to future attack by defendants, which, if successful, would make it significantly more difficult to bring securities fraud cases as class actions. For the time being, however, plaintiffs can rest assured that the fraud-on-the-market presumption, left intact by *Amgen*, remains a powerful tool for them to establish classwide reliance and thereby satisfy Rule 23(b)(3)'s predominance requirement.

Eleventh Circuit Limits Private Securities Plaintiffs' Ability to Plead Loss Causation

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nonetheless failed to adequately write-down the value of these assets in St. Joe's quarterly and annual filings with the Securities and Exchange Commission ("SEC"). Southfield thus alleged that St. Joe materially misstated its reported asset values and overall financial performance in violation of Generally Accepted Accounting Principles ("GAAP"). The district court dismissed Southfield's claims after concluding that it failed to allege a material misrepresentation, scienter and loss causation, but granted Southfield leave to amend.

Southfield filed an amended complaint, again alleging loss causation based on Einhorn's presentation. Additionally, Southfield alleged two additional corrective disclosures: (1) St. Joe's January 10, 2011 announcement that the SEC had lodged an informal inquiry into "St. Joe's policies and practices concerning impairment of investment in real estate assets"; and (2) St. Joe's July 1, 2011 announcement that the SEC issued an order of private investigation regarding, among other things, St. Joe's compliance with federal antifraud securities provisions, and its books, records and internal controls. St. Joe's share price declined by 7% and 9%, respectively, on January 10, 2011 and July 1, 2011. The district court nevertheless dismissed Southfield's amended complaint, again finding that it had failed to sufficiently plead a material misrepresentation, scienter or loss causation.

On January 27, 2012, St. Joe announced that it would record a $325 million impairment change in connection with a $375 million portfolio of real estate assets. Southfield moved to alter or amend the district court's judgment based on this disclosure, but its motion was denied. Thereafter, Southfield appealed the district court's decision to the Eleventh Circuit.

The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the district court's dismissal of Southfield's complaint on loss causation grounds, holding that the Einhorn presentation and the two announcements concerning the SEC investigations did not, as Southfield alleged, constitute corrective disclosures.

At the outset, the court stated that because Southfield's alleged that St. Joe common stock traded in an efficient market, it was required to assume that all publicly-available information concerning St. Joe was impounded into its share price during the class period. Op. at 10.

The court began its discussion of loss causation by stating that although Section 10(b) of the Exchange Act is designed to protect shareholders from fraud, it "is not a prophylaxis against the normal risks attendant to speculation and investment in the financial markets." Op. at 13. Loss causation, which requires a plaintiff to "demonstrate that the fraudulent statement was a 'substantial' or 'significant' cause" of a company's share price decline, thus "ensures that private securities actions remain a scalpel for defending against [fraud], while not becoming a meat axe exploited to" insulate investors from normal investment risks. *Id.*

Against this backdrop, the court rejected each of Southfield's loss causation allegations. A corrective disclosure must present facts to the market that are new (i.e., that have not been previously revealed). Op. at 16-17. Here, Einhorn's presentation contained a disclaimer stating that it was based solely on information "obtained from publicly available sources," and Einhorn did not "suggest[] that the Company obfuscated or concealed the information on which [he] relied." *Id.* at 16-17, 19 n.10. Thus, the court found that under the efficient market theory, the facts underlying Einhorn's presentation were already incorporated into St. Joe's share price. *Id.* at 16-17. Accordingly, the court concluded that Einhorn's presentation revealed no new information to the market, and did not constitute a corrective disclosure. *Id.* In so holding, the court described the efficient market theory as a "Delphic sword" that "cuts both ways," and stated that private securities plaintiffs "cannot contend that the market is efficient for purposes of reliance and then cast the theory aside when it no longer suits their needs for purposes of loss causation." *Id.* at 17.

The court also rejected Southfield's argument that Einhorn's "expert analysis" of St. Joe's prior disclosures constituted previously-undisclosed corrective information. Op. at 18; *see also* n.12. The court found that the "mere repackaging of already-public information by an analyst or short-seller is simply insufficient to constitute a corrective disclosure," regardless of the quality or insightfulness of the analyst's research or opinions. *Id.* at 18-19 & n.11. The court went on to posit that given Einhorn's reputation for accurately predicting the downfalls of numerous companies, including Lehman Brothers, the decline in St. Joe's share price was not due to Einhorn's disclosure of fraud, but instead resulted from "'changed investor expectations' after an investor who wielded great clout in the industry voiced a negative opinion about the Company." *Id.* at 20.

The court dismissed Southfield's remaining loss causation allegations after concluding that the announcement of an SEC investigation, without "any subsequent disclosure of actual wrongdoing," cannot constitute a corrective disclosure under Section 10(b). *Id.* at 22-23 & n.13. The court reasoned that a company's stock price may decline following the announcement of an SEC investigation "because the investigation can be seen to portend an additional *risk* of future corrective action." *Id.* at 23. The stock price decline "does not mean that the investigations, in and of themselves, reveal to the market that a company's previous statements were false or fraudulent." *Id.* Where, as here, investors did not allege any subsequent disclosure of wrongdoing, disclosure of an SEC investigation alone was not sufficient to plead loss causation. *Id.*

The Eleventh Circuit recognized "the importance of private securities fraud actions in deterring fraud and promoting confidence in the marketplace." Op. at 24-25. However, it noted that the purpose of the federal securities laws "is 'not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause.'" *Id.* at 25 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005)).

Potential Ramifications

The court's decision in *Meyer v. St. Joe Company* could alter dramatically the manner in which private securities plaintiffs plead loss causation in the Eleventh Circuit. While a disclosure of fraud may come from the company itself, in many instances the fraud is uncovered and revealed by third parties like analysts or short-sellers, who analyze public companies for a living. Recognizing this reality, courts have held that third-party statements from analysts, news media, and other third-party sources can constitute corrective disclosures under Section 10(b). *See, e.g., In re Initial Pub. Offering Secs. Litig.*, 544 F. Supp. 2d 277 (S.D.N.Y. 2008) (noting that there is "no requirement that corrective disclosures emanate from the company itself") (citation and quotation marks omitted). However, private securities plaintiffs in the Eleventh Circuit can no longer plead loss causation simply by alleging that an analyst or short-seller uncovered and disclosed a company's misrepresentations. Instead, plaintiffs will also have to allege that the third-party disclosures revealed facts that the market could not have gleaned from any of the company's public statements. No matter how revelatory a third party statement is, it will only constitute a corrective disclosure in the Eleventh Circuit if it is based on non-public information.

Likewise, the announcement of an SEC investigation is oftentimes the first indication of fraudulent misconduct at a public company. Under the Eleventh Circuit's ruling in *St. Joe*, the SEC's commencement of such an investigation will not constitute a corrective disclosure unless and until the SEC or the company subsequently reveal the actual existence of fraud. In a time where companies routinely enter into settlements with the SEC without acknowledging any misconduct, the Eleventh Circuit's holding in *St. Joe* could drastically diminish a plaintiff's ability to plead loss causation, even in circumstances where the SEC has determined that fraudulent misconduct has occurred.

However, plaintiffs may take some solace in the fact that the Eleventh Circuit limited the scope of its ruling in several important ways. First, the court did not determine whether an analyst or short seller report, or the announcement of an SEC investigation, could be used to plead loss causation under a "materialization of risk" theory because Southfield only pled loss causation under a corrective disclosure theory. *See* Op. at 14 n.8. Second, the court stopped short of holding that an analyst or short seller's opinion can never constitute a corrective disclosure. *Id.* at 19 n.10. Instead, citing to *In re Winstar Communications*, 2006 WL 473885, at *15 (S.D.N.Y. Feb. 27, 2006), the court acknowledged that analyst opinions that "reveal to the market something previously hidden or actively concealed" could qualify as corrective disclosures, though it noted that, "such opinions — like black swans — will be the exception, not the rule." *Id.* Third, the court likewise did not hold that an SEC investigation can never serve as a corrective disclosure. Rather, as discussed above, it merely held that an SEC investigation, standing alone and "without any subsequent disclosure of actual wrongdoing," does not qualify as a corrective disclosure. *Id.* at 23 n.13. Citing to *In re Take-Two Interactive Securities Litigation*, 551. F. Supp. 2d 247 (S.D.N.Y. 2008) and *In re IMAX Securities Litigation*, 587 F. Supp. 2d 471 (S.D.N.Y. 2008), the court acknowledged that in a different case, where an SEC investigation is in fact coupled with a later finding of fraud or wrongdoing, the announcement of the investigation could serve as a partial corrective disclosure. *Id.*

These limitations may provide private securities plaintiffs with some breathing room in pleading Section 10(b) claims in the Eleventh Circuit. Nevertheless, the court's decision in *St. Joe* will undoubtedly constrain such plaintiffs' ability to plead loss causation on the basis of a corrective disclosure.

Kessler Topaz Secures $10 Million Settlement Fund for Moneygram Minority Shareholders

(continued from page 2)

However, in 2010, the Company became aware that because of Goldman's substantial equity and debt interests in the Company, MoneyGram was now subject to regulatory scrutiny by the Federal Reserve System. This was because Goldman, during the financial crisis, became a "bank holding company" subject to the Fed's oversight, and MoneyGram was deemed Goldman's controlled subsidiary under Fed regulations. This set in motion negotiations between the Company and its controllers concerning the Recapitalization, which THL and Goldman used as an opportunity to exit their investment and monetize their preferred stock that was slowly cannibalizing MoneyGram equity.

On May 26, 2010, THL appointed four new independent directors to the MoneyGram Board, and on the same day, tasked them with negotiating with THL and Goldman concerning converting their preferred stock into MoneyGram common stock or its equivalent. This special committee of directors immediately chose conflicted legal and financial advisors and then waited for Goldman to inform them of what the Federal Reserve would require for MoneyGram to no longer be deemed a controlled subsidiary. After several months, the special committee resolved to negotiate a conversion of the preferred stock without Federal Reserve guidance, but they quickly rolled over and agreed to pay THL and Goldman $327.5 million to "induce" them to convert their preferred stock.

MoneyGram announced the Recapitalization on March 8, 2011, and Kessler Topaz quickly brought suit in the Delaware Court of Chancery (the "Court") on behalf of several MoneyGram stockholders as class representatives for MoneyGram's minority shareholders. The lawsuit challenged the Recapitalization as a violation of the preferred stock agreements and argued that the transaction was otherwise unfair to MoneyGram's minority stockholders. Kessler Topaz also alleged that MoneyGram's proxy statement soliciting support for the Recapitalization contained inadequate and misleading disclosures, and that the purported majority-of-the-minority vote provision in the Recapitalization was improperly structured and otherwise flawed.

Kessler Topaz then engaged in expedited discovery and sought a preliminary injunction to stop the vote on the Recapitalization. In response, THL and Goldman caused the Company to modify the transaction agreement to modify the majority-of-the-minority vote on the Recapitalization to provide greater protections to MoneyGram's minority shareholders and issue corrective disclosures concerning the Recapitalization. However, Kessler Topaz believed that the vote on the Recapitalization should nevertheless not be permitted to proceed, and moved forward with the injunction motion.

On May 16, 2011, the Court denied the preliminary injunction motion, ruling that as a result of the modifications to the Recapitalization agreement and corrective disclosures any harm to MoneyGram or its minority stockholders could be remedied with post-closing damages. The Court indicated that a trial on the merits should be held promptly after the transaction closed. On May 18, 2011, the Recapitalization was approved by MoneyGram shareholders and the transaction closed.

Trial was set for the spring of 2012, and over the next several months, Kessler Topaz engaged in extensive discovery of defendants, reviewing hundreds of thousands of pages of document discovery and taking 15 depositions. Defendants fought Kessler Topaz at every turn, forcing Kessler Topaz to litigate three motions to compel additional documents from defendants that were being improperly withheld. Kessler Topaz also successfully secured the Court's certification of a class of MoneyGram shareholders that were harmed by the Recapitalization.

Both Kessler Topaz and defendants had retained well-respected experts to opine on the damage calculations, and the parties understood that the trial would likely hinge on a battle of these experts. Defendants' experts claimed that the damages were zero, and in fact, the Recapitalization had actually transferred wealth from THL and Goldman to MoneyGram's minority shareholders. Plaintiffs' experts argued that the transaction had caused millions of dollars of harm to the Company's minority stockholders.

In recognition of these risks, the parties engaged in settlement discussions. After weeks of hard-fought negotiations and just 10 days before the start of trial, on May 11, 2012, the parties agreed to a settlement that required defendants to pay $10 million into a fund that would be disbursed only to MoneyGram minority shareholders who held stock on April 11, 2011, the record date for voting on the Recapitalization. On July 19, 2012, the parties submitted the settlement to the Court for approval.

The Court approved the settlement at a hearing on October 10, 2012. In so doing, the Court spoke favorably of Kessler Topaz's decision to seek a monetary payment purely to the class of minority shareholder, noting that a recovery to the Company at trial would have ultimately inured to THL and Goldman's benefit, since they owned more than 80% of MoneyGram. Kessler Topaz is proud of this recent successful outcome, and continues to represent shareholders of public companies in litigation in the Delaware Court of Chancery.

Calendar of Upcoming Events

Council of Institutional Investors 2013 Spring Conference — Eye on Investors

April 17 – 19, 2013

Capital Hilton Hotel — Washington, DC

CII's Spring conference will prove to be several days of high-level speakers addressing issues to all institutional investors.

NCPERS — 2013 Annual Conference & Exhibition

May 19 – 23, 2013

Hilton Hawaiian Village — Honolulu, Hawaii

In the current partisan political climate — with public sector pensions the whipping-boy for state budget ills across the country — it is more important than ever for pension trustees to speak with one voice in support of (a) their funds' performance, and (b) the importance of their funds as a model for the solution of the nation's worsening long-term retirement security problem. Attending the 2013 Annual Conference will help make your messages effective and consistent.

Australia Investment Management Summit

May 22 – 23, 2013

Grand Hyatt Melbourne — Melbourne, Australia

The 6th Annual Australian Investment Management Summit is an invitation-only gathering for senior investment executives from Australia's largest funds and a select group of international experts. The Summit focuses on investment issues facing superannuation schemes and other large investors. All sessions are held in private under Chatham House Rule and the entire programme is driven by an expert advisory board of investors. The 2013 Summit will focus on the challenges or Australian investors created by low global interest rates and will examine the latest trends towards new styles of portfolio construction and lifecycle investing.

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The Kessler Topaz *Bulletin* is a quarterly newsletter for our clients and all investors and consumers. In our continuing effort to educate our clients and keep them informed, the *Bulletin* strives to provide updates not only on the cases we are litigating, but also on trends in the law and other issues that are important to our readers. Our attorneys regularly contribute articles about the cases they are litigating, important legal precedents, and other issues relevant to our practice. Copies of the current issue and all previous issues of the *Bulletin* are available on our website and we welcome you to contact us to obtain a *Bulletin* by mail.

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