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Market + Litigation Monthly

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State And Local Pension Funds Increasingly Looking To Section 18(a) Of The Securities Exchange Act Of 1934 When Pursuing Individual Opt-Out Cases

One of the stated goals of the Private Securities Litigation Reform Act of 1995 (the "PSLRA") was to encourage institutional investors such as state and local pension funds to serve as lead plaintiffs in securities class action lawsuits. In this regard, the PSLRA has been a tremendous success. According to a recent study released by PricewaterhouseCoopers, in 2010 alone, institutional investors served as the lead plaintiff in over 52% of all securities class action filings.

There is no question that the increased involvement of institutional investors in securities class action lawsuits has been very good for investors and very good for the institutions that have chosen to step forward and serve as a lead plaintiff for the overall class.

Factors to Consider When Bringing an Individual Securities Case

There are situations, however, when it may make economic sense for an institutional investor to consider pursuing its own individual securities action. For instance, an institutional investor may choose to pursue an individual action if the institutional investor was not appointed lead plaintiff but wants to maintain control over its own lawsuit. An institutional investor also may choose to pursue an individual action where a court has found that a defendant made false statements, but did so without the requisite fraudulent intent.

It is this latter situation—i.e., where a class action securities case has been dismissed for failure to establish the requisite fraudulent intent—that is the focus of this article. In this situation, institutional investors should consider using Section 18(a) of the Securities Exchange Act of 1934 to pursue an individual securities case.

Advantages of Bringing an Individual Action Under Section 18(a)

Section 18(a) is particularly well-suited for an institutional investor pursuing an individual case because it allows investors to hold defendants liable for false statements made in any document filed with the SEC so long as the investor actually reviewed and relied on the document containing the false statement. Securities lawyers refer to this as "eyeball reliance" because the investor must show that he or she actually reviewed the specific false statements at issue and relied upon those statements when purchasing the security.

Scott+Scott's **Market + Litigation Monthly** highlights current market and litigation trends and court filings that are of interest to all investors.

It can be difficult for the small, individual investor to prove this type of eyeball reliance. However, a sophisticated institutional investor—who is likely to have

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State And Local Pension Funds Increasingly Looking To Section 18(a) Of The Securities Exchange Act Of 1934 When Pursuing Individual Opt-Out Cases

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retained outside investment advisors to make stock purchase recommendations—is likely to have actually relied on the false statements at issue in the case, and will be able to satisfy the "eyeball reliance" requirement. This is important because bringing a securities case under Section 18(a) provides an investor with several important advantages, including:

+ **No Need to Prove Fraudulent Intent:** Unlike claims under Section 10(b) of the Securities Exchange Act of 1934, investors pursuing claims under Section 18(a) need not plead or prove that the defendants acted with fraudulent intent when making a false statement. Pleading and proving that the defendant made a material false statement, and that the investor relied upon it when purchasing the security, is enough.

Section 18(a) allows investors to hold defendants liable for false statements made in any document filed with the SEC so long as the investor actually reviewed and relied on the document containing the false statement.

+ **No Heightened Pleading Requirement:** In addition, an investor pursuing a Section 18(a) claim does not have to satisfy the PSLRA's pleading requirements. The fact that an investor need not plead fraud with particularity could come in very handy where a court concludes that the defendant has made material false statements, but goes on to dismiss the case because the plaintiffs have not been able to plead fraudulent intent with sufficient particularity.
+ **Persons Liable:** Section 18(a) further provides that "any person who shall make or cause to be made" a materially false or misleading statement in an SEC filing shall be liable. The fact that liability extends to persons who "cause" the false statement is another way in which Section 18(a) is broader than other sections of the securities laws.
+ **Defenses:** Under Section 18(a), the burden is on the defendant to prove that he or she "acted in good faith and had no knowledge that such statement was false or misleading." This lies in sharp contrast to other provisions of the securities laws, which require the investor to affirmatively prove that the defendant knew that the statement was actually false.

In summary, institutional investors who choose not to pursue a class action should take a hard look at pursuing an individual action under Section 18(a). In the right situation, this will make economic sense and can allow an investor to recover damages for false statements made in SEC filings where it is not possible to prove that those statements were actually made with fraudulent intent. For more information on Section 18(a) claims, please contact Geoffrey M. Johnson at (619) 229-6088 or gjohnson@scott-scott.com.

Scott+Scott Attorneys Win $4.1 Million Jury Verdict

Mr. Noss was satisfied with the jury's findings stating, "We asked the jury to hold the defendant accountable for promises and statements he made to our client. And they did." ... The jury found that the defendant knew these statements were false, that the plaintiff reasonably relied on the statements, and that he had suffered damage as a result.

Scott+Scott Partner Walter W. Noss won a $4.1 million jury verdict this month in the case of *Novak v. Gray,* No. 09-0880, in the United States District Court for the Middle District of Florida, Tampa Division. The case concerned the existence and breach of an oral agreement between two business partners to share the value of the net proceeds of stock options held in the name of the defendant. In return for sharing the proceeds, the plaintiff alleged that he continued to participate in business opportunities through which he incurred additional risk and costs, including working for years without a paid salary with the prospect of higher returns for both partners. The plaintiff also pled a cause of action for fraud regarding statements made by the defendant with respect to the stock options.

Scott+Scott filed the original complaint in *Novak v. Gray* in May 2009. By the time of trial, the plaintiff's claims had already cleared several pretrial hurdles, including a challenge to personal jurisdiction and motions to dismiss and for summary judgment. The defendant also filed counterclaims against the plaintiff which were dismissed by order of summary judgment in January 2011. Following summary judgment briefing, Mr. Noss presented the plaintiff's case to the jury.

The trial, led by Mr. Noss and second-chaired by Scott+Scott Associate Penelope Abdiel, lasted a total of three days. After deliberating for approximately four hours, the jury found that the defendant had breached his agreement with the plaintiff to share the proceeds of the stock options. On this count, the jury awarded the plaintiff over $1.3 million in damages.

The jury further found that the defendant made fraudulent statements to the plaintiff concerning the stock options. The jury found that the defendant knew these statements were false, that the plaintiff reasonably relied on the statements, and that he had suffered damage as a result. For this count, the jury awarded over $2.7 million, bringing total damages awarded to $4.1 million. Mr. Noss was satisfied with the jury's findings stating, "We asked the jury to hold the defendant accountable for promises and statements he made to our client. And they did."

Scott+Scott Achieves Significant Recovery For Shareholders In Suit Against Credit Suisse

In another significant achievement for the Scott+Scott securities practice, the plaintiffs reached a settlement agreement with the defendants in a securities fraud suit against Credit Suisse and certain of its officers. The case is captioned *Cornwell v. Credit Suisse Group,* No. 08-3758 (S.D.N.Y.). In the suit, the plaintiffs alleged that the defendants had committed securities fraud by misrepresenting exposure to subprime assets and had concealed certain internal control deficiencies. These misrepresentations allegedly inflated the price of Credit Suisse shares and ADRs and caused investors a significant loss when the truth was revealed.

The parties filed a settlement agreement on March 10, 2011. Under the terms of the settlement agreement, Credit Suisse and/or its insurers will pay $70 million to be distributed to the class of investors on whose behalf the claims were brought. On March 24, 2011, United States District Judge Victor Marrero, who was presiding in the case, granted preliminary approval of the settlement. A final approval date for the settlement is scheduled for July 18, 2011.

The settlement agreement comes after approximately three years in which Scott+Scott and its co-counsel have aggressively advocated for the rights of Credit Suisse investors. The plaintiff in this action filed his complaint in May 2008. In June 2008, the case was consolidated with another related action. After significant motion practice between the parties, the United States District Court of the Southern District of New York ruled on February 11, 2010, that the plaintiffs had adequately alleged a fraud that complied with the heightened pleading requirements imposed by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Based on that finding, the district court found that the plaintiffs were entitled to proceed to discovery. The discovery phase of the case lasted for approximately one year before the parties filed a settlement agreement.

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Scott+Scott Partner Christopher M. Burke Speaks On Panel Addressing Mediation

Scott+Scott Partner Christopher M. Burke recently contributed his opinions as a panelist on the American Bar Association's April 2011 teleconference on "Ten Things Lawyers Love/Hate about Mediators." Lawyers and mediators from around the country attended the teleconference. Parties are increasingly using mediation to resolve disputes because mediation often saves courts and parties time and money in dispute resolution.

To obtain the time and money-saving benefits of mediation, however, the selection of the right mediator is essential. Mr. Burke discussed the importance of researching proposed mediators prior to retaining them. Mr. Burke advised the attorneys to poll others to determine the mediator's reputation, as well as interview the mediator. When interviewing a mediator, Mr. Burke asks for the mediator's experiences with opposing counsel, the opposing party, and types of claims at issue.

Mr. Burke also discussed mediator tools and styles that enhance the mediation process. A good mediator will spend time preparing for the mediation by reading the parties' mediation briefs and engaging in pre-mediation discussions with the parties. If the mediator does not call prior to the mediation, Mr. Burke advised the attorneys to pick up the phone because some key information is not capable of being communicated in a mediation brief. Mr. Burke suggested communicating what the interpersonal dynamics in the mediation might be,

including attorney-client dynamics and the personalities of the attorneys on both sides. The advocate might even recommend to the mediator how the mediation might proceed, such as whether a joint session is an appropriate way to begin the process. Mr. Burke also suggested previewing for the mediator the client's views on the most important legal issues in the dispute.

Scott+Scott attorneys are experienced in mediation. To prepare for a mediation, the firm typically forms a mediation team comprised of legal and fact experts on the dispute. The mediation team is always headed by the senior-most partners on the cases. The team prepares mediation briefs and presentations, which are often presented to the mediator as well as the opposing party. Scott+Scott has successfully resolved scores of disputes through effective mediation.

Scott+Scott Files Sherman Act Allocation And Bid-Rigging Lawsuit On Behalf Of Pension Fund

Scott+Scott recently filed a class action complaint on behalf of a pension fund alleging that several private equity firms and investment banks engaged in illegal bid-rigging in violation of federal antitrust laws. The allegations of the complaint involve the leveraged buyout ("LBO") of Del Monte Foods Company ("Del Monte"). The alleged conspiracy implicates a consortium of private equity firms, namely, Kohlberg Kravis Roberts & Co. L.P. ("KKR"), Vestar Capital Partners ("Vestar") and Centerview Partners ("Centerview"), who bought the company at the rigged price of $19 per share, as well as investment banks Barclays Capital Inc. ("Barclays") and Goldman Sachs Group, Inc. ("Goldman Sachs").

An LBO occurs when a purchaser, such as a private equity firm, acquires a controlling majority of shares in a target company by using the target company's assets as collateral for the debt—hence the term leveraged buyout. Upon purchasing the target company, the purchaser withdraws the company's stock from public stock exchanges taking the company private.

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Purchasers should participate in a competitive bidding process against one another to offer stockholders of the target company the highest price for each share. Purchasers who agree to not compete with one another for the purchase violate Section 1 of the Sherman Act under which private litigants have a right to sue in federal court for treble damages.

> Purchasers who agree to not compete with one another for the purchase violate Section 1 of the Sherman Act

On November 24, 2010, three private equity firms – KKR, Vestar and Centerview – agreed with Del Monte to purchase the company through an LBO for $5.3 billion, or $19 per share of common stock. Del Monte's board of directors engaged Barclays to act as financial advisor.

The complaint alleges the defendants agreed to rig the purchase of Del Monte so that they could pay an artificially low price. It alleges that the conspirators engaged in a variety of illegal practices, namely:

+ The private equity firms KKR, Vestar, and Centerview agreed not to compete against each other for the sale of Del Monte, and instead, the firms agreed to work together to jointly acquire the company for a much lower price than if they had competed;
+ Barclays induced agreement among the private equity firms (and sabotaged any potentially competitive bidding process) in order to obtain a role in the buy-side financing of the purchase; and
+ Barclays and KKR conspired to prevent Goldman Sachs from "scaring up competition" in exchange for a piece of the buy-side financing used to purchase Del Monte.

The complaint alleges that these illegal activities reduced the purchase price (and per share price) of Del Monte below competitive market levels, and were undertaken in direct violation of the federal antitrust laws. Scott+Scott will be aggressively litigating this case to recover damages for Del Monte shareholders, such as the pension fund, who tendered their shares into the LBO.

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U.S. Conferences and Educational Seminars

- May 1-3, 2011
  Michigan Association of Public Employees Retirement System (MAPERS)
  Grand Traverse Resort
  Acme, MI
  "Tomorrow's Future Through Today's Education." This conference promises a roster of speakers, timely sessions with practical training and education to enhance the fiduciary duties of administrators and trustees alike.

- May 1-4, 2011
  National Association of State Treasurers (NAST)
  Marriott Marquis
  Atlanta, GA
  Presented in a series of multiple issue tracks, these in-depth educational workshops provide tools, resources, experiences, and contacts to move forward and boost efficiency in spite of current and future challenges.

- May 10-13, 2011
  State Association of County Retirement Systems (SACRS)
  Fess Parker's Doubletree Resort
  Santa Barbara, CA
  An association of 20 California county retirement systems have made education and legislation their principle focus, particularly education in the investment and fiduciary responsibility area. SACRS conferences provide its members with speakers from various financial and legal fields.

- May 16-17, 2011
  Native American Finance Conference (NAFC)
  Talking Stick Resort
  Scottsdale, AZ
  As the 12th installment, this event has become the forum for the sharing of ideas and information related to Native American finance and economic development issues.

- May 21-26, 2011
  National Conference on Public Employee Retirement Systems (NCPERS)
  Fountainebleau Hotel
  Miami, FL
  Attendees benefit from a wide selection of educational programs and dynamic speakers as well as the opportunity to network with money managers, investment service providers, and public fund colleagues from across the nation.

- May 22-24, 2011
  International Foundation of Employee Benefit Plans (IFEBP)
  The Capital Hilton
  Washington, DC
  The Washington Legislative Update offers a unique opportunity to communicate with government officials and get the answers on recent and proposed legislation—including health care reform. Hear from those who know and let them hear from you. Don't miss this one-of-a-kind opportunity beginning Monday, May 23, 2011. Preconference Workshop begins 8:00 a.m., Sunday, May 22, 2011—Scenario Planning—The Future of Retirement.

- May 24-25, 2011
  Pennsylvania Association of Public Employees Retirement System (PAPERS)
  Crowne Plaza
  Harrisburg, PA
  PAPERS primary purpose in conducting an annual educational forum is to provide the basis for improved financial and operational performance of the public employee retirement systems in the state. PAPERS acts as a central resource for educational purposes as well as a networking agent.

- May 25-27, 2011
  Police Officers Association of Michigan (POAM)
  Amway Grand Hotel
  Grand Rapids, MI
  POAM is a full service labor organization formed to provide labor related services and representation. This highly attended conference promises to deliver comprehensive legislative updates.

Government Finance Officers Association Conferences

- May 22-25, 2011
  Government Finance Officers Association (GFOA) 105th Annual Conference
  Henry B. Gonzalez Convention Center
  San Antonio, TX
  Navigating the New Normal in Government Finance. High-quality professional development training dedicated to enhancing and promoting sound government financial management, delivering the latest information on best practices, and addressing serious fiscal pressures. Earn 21 CPE Credits.

- May 1-4, 2011
  Pennsylvania GFOA *25th Anniversary Conference
  Nittany Lion Inn
  State College, PA

- May 2, 2011
  South Carolina GFOA
  Columbia Convention Center
  Columbia, SC

- May 5-6, 2011
  New Hampshire GFOA
  Red Jacket Mountain View
  North Conway, NH

- May 11-13, 2011
  Louisiana GFOA
  Lafayette Hilton
  Lafayette, LA

- May 12-13
  Great Plains GFOA
  UNO College of Public Administration
  Omaha, NE

SCOTT+SCOTT LLP'S PORTFOLIO TRACKING + LOSS RECOVERY SYSTEM℠

Scott+Scott's PT+℠ System is the firm's proprietary investment portfolio tracking service. Carefully combining the firm's proprietary computer-based portfolio monitoring software with Scott+Scott's hands-on approach to client relations is a proven method for institutional investors and their trustees to successfully:

- **Monitor** their investment portfolios
- **Identify** losses arising from corporate fraud
- **Consider** what level of participation any given situation requires
- **Recover** funds obtained on their behalf through investor litigation action

To obtain more information about Scott+Scott's PT+℠ services or to schedule a presentation to fund trustees, fund advisors or asset managers, please contact:

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