BLB&G Seminar: Protecting Securities Portfolios Against Fraud

March 31 - April 1, 2014

This program has received CLE accreditation in certain states and is pending for others. Please contact us for more information.

The global protections afforded investors by the U.S. securities laws have been significantly eroded in recent years, and the assault continues. In 2010, the Supreme Court's *Morrison v. NAB decision* drastically curtailed investors' ability to pursue claims in the United States to recover damages incurred on foreign exchanges.

In the wake of *Morrison*, fiduciaries increasingly must consider whether to engage their institutions in litigation in foreign jurisdictions to recover assets lost to fraud. It is critical for fiduciaries to fully understand the risks and potential rewards associated with foreign securities litigation. This BLB&G seminar assisted institutional investors in implementing systems to effectively monitor diverse securities portfolios; to identify losses caused by foreign corporate misconduct impacting international equities and other financial instruments traded abroad; and to select the preferred option for recovery of such losses.

Institutional investors gained a comprehensive understanding of the legal recourse available in the U.S. and abroad to address foreign corporate fraud and other misconduct impacting their global investment portfolios.

Halliburton - The Latest Attack on Investor Rights

On November 15, the U.S. Supreme Court granted review in what commentators are calling the most important securities case in decades, *Halliburton v. Erica P. John Fund*.

In *Halliburton*, the Supreme Court will revisit its landmark decision establishing the "fraud-on-the-market" doctrine in securities fraud cases. This foundational principle recognizes that investors are entitled to rely on the integrity of stock prices in well-developed markets, i.e., that stock prices reflect publicly available information. The fraud-on-the-market theory is a cornerstone of modern private class action litigation, and has been utilized for decades by public pension funds and other institutional investors to recover billions of dollars of assets lost to fraud.

Like *Morrison*, an adverse ruling in *Halliburton* would have ripple effects in the global institutional investor community.

Agenda (Click here to download full PDF)

Day 1 - Monday, March 31, 2014

2:00 - 3:15 pm Registration

3:15 - 3:30 pm Opening Remarks

Max Berger – Founding Partner, BLB&G

3:30 - 5:00 pm Presentation and Panel Discussion : Halliburton and its Implications: Investor Rights Under Attack

Salvatore Graziano – Partner, BLB&G
John Rizio-Hamilton – Partner, BLB&G
Boris Feldman – Partner, Wilson Sonsini Goodrich & Rosati
Jill Fisch - Perry Golkin Professor of Law, University of Pennsylvania Law School
Jonathan Massey - Partner, Massey & Gail LLP

In 2013, the U.S. Supreme Court agreed to hear one of the most important securities cases in decades, *Halliburton v. Erica P. John Fund*. In *Halliburton*, the Supreme Court will revisit the "fraud-on-the-market" presumption of reliance in securities fraud cases. This foundational principle, recognized by the Court over twenty-five years ago, acknowledges that investors rely, and are entitled to rely, on the prices of securities traded in developed markets as reflecting all publicly available information about the company. The fraud-on-the-market theory is a cornerstone of modern shareholder litigation. By agreeing to hear the *Halliburton* case and in previous statements by four of the Court's nine justices, the Court has indicated an interest in potentially revisiting the doctrine, which could result in a sea change in future shareholder litigation.

This session discussed:

- The theoretical underpinnings of the fraud-on-the-market doctrine.
- *Halliburton's* impact on pending securities fraud litigation.
- The future of U.S. securities litigation if the fraud-on-the-market doctrine is no longer available.
- Steps fiduciaries can take to preserve the ability to obtain securities fraud recoveries if the fraud-on-the-market doctrine is modified or overturned.
- The importance of the *Halliburton* decision on the development of shareholder litigation outside the U.S.

6:00 - 9:00 pm - Dinner with Reception and Keynote Address

Matt Taibbi - Best-selling author on the causes of the financial crisis

Mr. Taibbi is a renowned and insightful commentator on finance and politics.

Through his books and his columns for *Rolling Stone*, Mr. Taibbi has written extensively on the ways in which Wall Street has perpetrated frauds on the American people and investors internationally. *Griftopia*, his best-selling, critically acclaimed account of the financial crisis, combines deep sources and provocative analysis, and has established him as an original voice in financial literature. Mr. Taibbi has put the spotlight on the ways in which major financial institutions are using political leverage and suspect practices to manipulate the multitrillion-dollar public pension market in the U.S. In what he sees as "a shocking epilogue to the crisis era," Mr. Taibbi cautions institutional investors to be wary as "all across America, Wall Street is grabbing money meant for public workers."

Day 2 - Tuesday, April 1, 2014

8:00 am Breakfast and Registration

9:30 - 10:30 am Workshop: U.S. Securities Litigation Post-Morrison: Fighting Fraud by Foreign Companies

Salvatore Graziano – Partner, BLB&G
George Conway – Partner, Wachtell, Lipton, Rosen & Katz
John Kuchno – Assistant Attorney General, State of Maryland

The U.S. Supreme Court decision in *Morrison v. Nat'l Australia Bank* drastically limited investors' ability to recover securities fraud damages on securities that are listed outside the U.S. *Morrison* has led to the rise of foreign jurisdiction litigation, which is the primary focus of this conference.

Before *Morrison*, investors who were defrauded when investing on foreign exchanges could use the powerful tools provided by the federal securities laws to recover their losses so long as there were sufficient connections with the U.S. Under *Morrison's* new listing standard – which focuses exclusively on the trading location of the securities – investors may only pursue fraud claims under the federal securities laws if they purchased their securities on a U.S. exchange, or if the transaction is otherwise classified as "domestic." Some lower courts have also extended *Morrison* to preclude claims under other federal laws, state laws, and even foreign laws.

This workshop covered:

- The practical implications of *Morrison* in a world with global portfolios and trading.
- Application of *Morrison* to derivatives, swaps, and other off-exchange Investments.
- The impact of *Morrison* on purchasing ADRs.
- Options after *Morrison* to pursue litigation in U.S. courts in connection with a securities fraud.
- Case Study: *Toyota vs. BP*

10:30 - 10:45 am Break

10:45 am - 12:00 pm Panel Discussion: Investor Protection Regimes Outside the United States

Jeroen van Kwawegen – Senior Counsel, BLB&G
Elizabeth Clay – Associate, Bird & Bird (United Kingdom)
David Conklin – Partner, Goodmans (Canada)
Charles Demoulin – Managing Partner, Deminor International (Brussels)
Flip Wijers – Partner, Lemstra Van der Korst

This panel discussed real-world experiences with shareholder litigation outside the United States in the post-*Morrison* world. Institutional investors are increasingly seeking to recover losses due to issuer misrepresentations and securities fraud in Canada, Australia, England, the Netherlands, and Japan. The panel used the *Royal Bank of Scotland* securities action as a case study where investors were denied access to American courts on *Morrison* grounds and subsequently brought actions in England. Using this case study as a guide, the panel provided insights into the experiences with recent shareholder litigation in Canada, Australia, the Netherlands, and Japan. Finally, the panel looked at expected developments in shareholder litigation outside the United States.

Topics that were covered:

- Legal regimes governing shareholder litigation in relevant jurisdictions outside the U.S.
- Experiences with shareholder litigation outside the U.S.

- Where are all the cases? Trends and developments in shareholder litigation outside the U.S.
- Case Studies: *Royal Bank of Scotland*, *IMAX*, *Centro*, *Fortis* and *Olympus*

12:00 - 12:15 pm Break

12:15 - 1:30 pm Lunch and Keynote Address

Sheila Bair - Former Chair, Federal Deposit Insurance Corporation (2006-2011)

Ms. Bair has an extensive background in banking and finance in a career that has taken her from Capitol Hill to academia, and to the highest levels of government.

As Chair of the FDIC during the financial crisis, Ms. Bair was a leading advocate for common-sense capital and leverage ratios. For example, Ms. Bair supported a key provision in Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 requiring large financial entities to have capital cushions at least as strong as those that apply to U.S. community banks. Similarly, based on her recommendation, the Basel Committee on Banking Supervision adopted an international leverage ratio to constrain growing levels of leverage among the world's major financial institutions.

Ms. Bair is a regular columnist for *Fortune* magazine, and her recent book, *Bull by the Horns*, is a *New York Times* best seller. Known for her tough-minded independence, Ms. Bair continues to demonstrate that she is fiercely dedicated to the integrity and honesty of financial markets.

1:30 - 1:45 pm Break

1:45 - 2:45 pm Panel Discussion: Best Practices: Identifying Losses and Potential Claims for Securities Fraud on Foreign Exchanges

Jay Chaudhuri – General Counsel & Senior Policy Advisor, North Carolina Department of State Treasurer
Andrew Cottrell – Vice President, Institutional Shareholder Services, Inc./Securities Class Action Services, LLC
Caroline Goodman – Managing Director, Institutional Protection Services Ltd (IPS)
Michael Herrera – Senior Staff Counsel, Los Angeles County Employees Retirement Association (LACERA)

The *Morrison* decision, coupled with a variety of issues and concerns unique to foreign securities litigation, has created interest and concern over when, where, how and whether to initiate or join actions in jurisdictions outside the U.S. This panel discussed the characteristics of an effective foreign claims monitoring service and foreign litigation evaluation program, including:

- Identification of assets lost on foreign exchanges due to fraud and related forms of corporate misconduct.
- Analyzing the relevant facts and laws to determine whether meritorious claims for recovery exist.
- Calculating losses and recoverable damages.
- Potential "opt-in" deadlines.
- Evaluating the opportunities and risks presented by participation in meritorious litigation outside the U.S.
- Screening for misleading or false solicitations.
- Providing fiduciaries with the tools needed to make an informed decision on whether, and how, to engage their fund in non-U.S. litigation.

2:45 - 3:00 pm Break

3:00 - 4:00 pm Panel Discussion: Obtaining Representation Outside the U.S.: Litigation Aggregation, Funding and Related Risks and Considerations

Jerry Silk – Partner, BLB&G
Charles Demoulin – Managing Partner, Deminor International (Brussels)
Neil Purslow – Founder and Chief Investment Officer, Therium Capital Management Limited (United Kingdom)
Alexander Reus – Managing Partner, DRRT (Germany/USA)
Matthew Williams – Head of AmTrust Law, AmTrust Financial Services, Inc. (United Kingdom)

This panel discussed the "nuts and bolts" of pursuing shareholder litigation outside the United States once a potential claim or pending action is identified. Focusing on select foreign jurisdictions and using actual case examples, we will discuss the selection and retention of counsel; payment of attorneys' fees; litigation costs and upfront fees; the implications of "loser-pay" fee-shifting rules and obtaining proper insurance coverage; different litigation funding models; contingent and other "success fees;" affirmative client obligations with respect to discovery, depositions, court attendance or other aspects of case prosecution; ability of investors to oversee case strategy, and settlement; negotiation of the terms of retention; and procedures for payment of recovery.

Topics covered:

- Selection of counsel and negotiating the terms of retention.
- Litigation costs and funding, including upfront fees, and obtaining insurance.
- Client involvement and obligations post-retention.
- Spotting unfavorable contract terms.
- Ability to withdraw from the litigation and other risk mitigation.
- Payment of recovery.

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