BLB&G

Bernstein Litowitz Berger & Grossmann LLP

Volume 5
First Quarter 2003

INSTITUTIONAL INVESTOR

Advocate

A SECURITIES FRAUD AND CORPORATE GOVERNANCE QUARTERLY

YOUR PORTFOLIO HAS BEEN HURT BY A SECURITIES FRAUD…NOW WHAT?

Deciding Between Stepping Forward As The Lead Plaintiff, Pursuing An Individual Lawsuit In State Court, Or Doing Nothing …In Sixty Days Or Less

by Max Berger and David Stickney

Max Berger (above) and David Stickney (right).

Mr. Berger is a senior partner of Bernstein Litowitz Berger & Grossmann LLP and heads the firm's litigation practice. He also is a frequent commentator on securities litigation and corporate law, particularly as it relates to public pension funds. Mr. Stickney is a senior associate in the firm's California office and prosecutes complex securities cases in state and federal courts.

Lessons Learned From Last Year's Corporate Meltdown

In the past, public pension funds and other institutional investors relied on traditional gatekeepers to protect their stock market investments against corporate wrongdoing. But the spate of recent securities fraud cases, along with the plunging market, revealed the very real danger of this approach. All too often, the outside auditors, securities analysts, bankers and other gatekeepers who are supposed to keep a check on corporate greed are either asleep at the wheel or, worse, active participants in the fraud.

Open-market securities fraud—like the swindles that occurred at Enron, Worldcom, Tyco, Global Crossing, Waste Management, Adelphia, Xerox, Qwest, Sunbeam, and Lucent (to name just a few)—and the resulting bear market eliminated an estimated 1 trillion dollars in market capital. Unquestionably, public pension funds and other institutional investors incurred the greatest losses from this meltdown because such investors own approximately 80% of the stock in public companies. Given their profound financial stake in the capital markets, institutional investors stand to benefit the most from deterring future wrongdoing and restoring credibility to the capital markets.

As New York Attorney General Eliot Spitzer explained during the recent BLB&G Institutional Investor *Forum*: "Institutional investors have a responsibility that flows from a very simple proposition: It's your money. You are the ones that have the capacity to stand up and say, 'we've had enough. You cannot continue to take us for granted.'"

When institutions stand on the sidelines, corporations and their boards naturally take them for granted. We now know, for example, that during the boom years of the late 1990s, boards of directors readily relinquished control to corrupt management, rather than risk losing the many perquisites bestowed upon directors of a modern public corporation—such as use

Continued on next page.

SECURITIES FRAUD

Continued from page 1.

of the corporate jet. With little actual work and a lavish lifestyle, directors readily approved massive stock-option awards to management while turning a blind eye to corporate overreaching. Hitting short-term targets for the company's stock price (and unloading shares for personal profit) quickly displaced the goal of increasing value for large investors.

Before institutional investors stepped forward in significant numbers to serve as the Lead Plaintiff in federal securities class actions, corporate wrongdoers had little reason to think twice.

Special interests had eroded the very laws that had been designed to deter corporate wrongdoing and provide investor protection. The centerpiece of this campaign was the Private Securities Litigation Reform Act of 1995 (the "PSLRA" or "Reform Act"), enacted over a presidential veto, which significantly tipped the playing field against defrauded investors. For example, the PSLRA gave corporate defendants a "Safe Harbor" for certain false statements and required the victims of securities fraud to allege their claims up front with unprecedented detail while automatically staying all discovery against the corporate defendants.

Meanwhile, the Securities Exchange Commission ("SEC"), the regulatory agency charged with enforcing the securities laws, clearly lacked the resources to police the entire market, giving dishonest insiders every reason to believe that they could cover their tracks and take the market for a ride. As Peter Hellman, a Qwest board member, stated in an internal email that captured the attitude of much of corporate America, "there are well known consequences for not making the numbers, but no clear consequences for cutting corners."

Given their profound financial stake in the capital markets, institutional investors stand to benefit the most from deterring future wrongdoing and restoring credibility to the capital markets.

In this environment, securities fraud flourished—particularly accounting fraud. A simple statistic makes this point: Between 1990 and 1997, the average number of financial restatements by public companies was only 49 per year. This increased to 91 in 1998; 156 in 2000; 270 in 2001; and a staggering 330 in 2002.

Against this backdrop (and with investor confidence at an all-time low), institutional investors are increasingly taking pro-active steps to protect their investments, recover their losses, and deter future wrongdoing. Such active participation includes retaining experienced and trusted counsel to evaluate potential securities fraud cases and, where appropriate, seeking appointment as the Lead Plaintiff or taking another course of action.

First Things First: Retain Competent Counsel

To make an informed decision after suffering a loss in an apparent securities fraud, it is critical for institutional investors to pre-select experienced securities litigation counsel and to implement effective procedures for monitoring their portfolios. In this manner, an informed decision can be made on a case-by-case

Inside Look

In this issue of the *Advocate*, we focus on a single important subject: What should an institutional investor do after it discovers that its portfolio suffered losses due to an apparent securities fraud. As many *Advocate* readers already know, some law firms are urging institutions to "chart their course" in an individual lawsuit in state court, rather than serve as the Lead Plaintiff in a federal class action. But, while there are theoretical advantages to pursuing claims in state court, there are also profound disadvantages.

In *Your Portfolio Has Been Hurt By A Securities Fraud…Now What?*, we outline the pros and cons of (1) doing nothing, (2) pursuing an individual lawsuit in state court; (3) or serving as the Lead Plaintiff in a federal class action. While particular decisions can only be made on a case-by-case basis and will depend upon the particular facts of the situation, the factors discussed in this issue of the *Advocate* should guide the outcome.

Institutional investors should also have procedures in place to monitor their portfolios for losses caused by possible securities fraud and should also have pre-selected litigation counsel to investigate the situation and offer advice on appropriate courses of action. By taking such steps, institutions will have maximum flexibility and the ability to make informed decisions in a timely manner.

Apart from the main article of this issue, I refer you to Tim DeLange's regular *Eye on The Issues* column. With so much media coverage of the problems afflicting corporate America, trying to keep on top of current corporate events and securities matters is like trying to drink from a fire hydrant. The *Eye*, however, provides an excellent overview of breaking news and important legislative developments since the last issue of the *Advocate*.

I enjoy hearing from our *Advocate* readers. As always, please feel free to contact me with any comments, questions or input.

basis in a timely fashion. The PSLRA, after all, requires that anyone seeking to serve as the Lead Plaintiff must file a motion within 60 days of the publication of the statutory notice, which is the notice published in each case by the plaintiff who filed the first complaint (ordinarily a small investor with little at stake in the case) in a business-oriented publication or wire service.

Therefore, in order to have the maximum flexibility in your decision making, public pension funds should be prepared, within 60 days, to make an informed decision about which of the three alternatives discussed below is most appropriate for the given situation.

Three Choices to Recover Assets After a Securities Fraud

Consider this familiar scenario: A public pension fund purchases shares of a company's stock after it announced record financial results. A month later, the company announces that its "record financial results" were the result of improper revenue recognition, and the company would "restate" those results to reflect a loss. On this news, the price of the company's stock plummets. Small shareholders file a securities class action in federal court and simultaneously publish the required notice, which advises all investors that they may seek to serve as the Lead Plaintiff by filing a motion within 60 days.

After further investigation by experienced counsel reveals an apparent securities fraud, the pension fund has three choices:

1 ***Do nothing upfront,*** but remain a class member and file a proof of claim if there is a recovery at the end of the case;

2 ***File an individual action in state court*** to recover the fund's losses; or

3 ***Move to be appointed as the Lead Plaintiff*** (either alone or together with other institutions) in the federal securities class action. Each option has its material advantages and disadvantages.

The Advantages and Disadvantages of "Doing Nothing"

In every securities fraud case, one option is to do nothing, wait until the case is resolved, and, if there is a recovery, file a proof of claim.

The Pros

✔ The obvious advantage of this approach is that there is no commitment and no expense. By doing nothing, the institution will avoid depositions, document production and other forms of compulsory discovery. At the end of the case — if there is a recovery — the pension fund may recover some of its losses as a passive class member.

The Cons

✔ The profound disadvantage to doing nothing, however, is that the pension fund loses all control over the litigation. If the Lead Plaintiff is not a strong institutional investor with outstanding counsel, class members are likely to receive only "pennies on the dollar" and future wrongdoing will go undeterred.

When it's appropriate to do nothing: Doing nothing makes sense when the pension fund suffered small losses or has very limited resources. It also makes sense when another public fund, with a larger loss, steps forward to serve as the Lead Plaintiff and retains counsel that the institution knows and trusts. In that case, the pension fund with the larger loss can ably protect the interests of all investors.

The Advantages and Disadvantages of Filing an Individual Case in State Court

When "doing nothing" is not optimal, the pension fund faces a choice between filing an individual action in state court, on the one hand, or seeking appointment as the Lead Plaintiff in the federal class action on the other. Theoretically, there are certain advantages to filing an individual lawsuit in state court:

The Pros

✔ A state court plaintiff may attempt to "chart its own course," separate and

Continued on page 6.

BLB&G: INSTITUTIONAL INVESTOR ADVOCATE is published quarterly by Bernstein Litowitz Berger & Grossmann LLP, 1285 Avenue of the Americas, New York, NY 10019, 212-554-1400 or 800-380-8496. The materials in this newsletter have been prepared for information purposes only and are not intended to be, and should not be taken as, legal advice.

Eye On The Issues

LEGISLATIVE/REGULATORY UPDATES
AND RECENT DECISIONS OF INTEREST

By Timothy DeLange

SEC Withdraws "Noisy Withdrawal" Rule For Corporate Lawyers. Initial proposed rules, drafted by the SEC to implement provisions of the recently passed Sarbanes-Oxley Act, would have required corporate lawyers who suspect fraud to notify senior officers, the board of directors and, if no action is taken, the SEC. The initial proposed rules also would have required attorneys to disaffirm any submission to the SEC that the lawyer believes is tainted. Such a procedure, known as a "noisy withdrawal," would not have violated attorney-client privilege, according to the proposals. The SEC, however, withdrew the proposals after a barrage of lobbying by corporate lawyers. *New York Law Journal, November 7, 2002; New York Law Journal, Vol. 229 p.1 col. 3, January 23, 2003.*

2002, A Record-Setting Year For Restatements And Securities Class Actions. Marred by accounting restatements and drops in the stock prices of many companies, 2002 set a record for the number of securities fraud class actions, Stanford Law School reported. The 260 companies sued for securities fraud last year was 54 percent higher than 2001. In addition, a total of 330 restatements were filed last year, a 22 percent jump from 2001, wiping out billions of dollars in previously reported revenue. Two major events arguably contributed to the increase in restatements. First, the conviction of Arthur Andersen LLP created a free-for-all among its clients and may have prompted increased scrutiny. Second, the new Sarbanes-Oxley Act required chief executives to personally attest to the accuracy of their company's financial statements. *Bloomberg, January 7, 2003; The Wall Street Journal, January 21, 2003.*

Exposing The Gap In GAAP. Financial statements issued in accordance with generally accepted accounting principles ("GAAP") do not always give investors a true economic picture of what is going on with the company. While accounting rules allow for interpretations ranging from conservative to aggressive, companies either receive a signature from their accountants attesting to their compliance with the rules, or they do not. There is no indication in a company's audited results whether or not it is fluffing its numbers through aggressive tactics. For example, both Tyco and WorldCom, two scandal-ridden companies, used aggressive accounting tactics during their mergers and acquisitions to artificially inflate the companies' current earnings. Unfortunately, the lesson learned is that accounting rules give ample leeway to companies that keep Wall Street happy with a constant flow of acquisitions. *The New York Times, December 31, 2002.*

Securities Firms Pay $1 Billion For Misleading Investors. Citigroup, Inc., Credit Suisse First Boston and eight of the other largest securities firms agreed to pay $1 billion to settle claims that they misled investors with stock recommendations in exchange for investment banking contracts. The agreement with the SEC, New York Attorney General Eliot Spitzer, and other regulators calls for the firms to pay fines and restitution to investors and provide funding for independent research for customers. The settlement includes important reforms on past Wall Street practices - such as the separation of stock analysts and investment bankers and a ban on brokerages dispensing shares in IPOs to company executives with whom they do business. *Bloomberg, December 20, 2002.*

Delaware Chief Justice Issues Warning Shot On CEO Compensation. In a roundtable discussion, Chief Justice of the Delaware Supreme Court E. Norman Veasey warned that corporate directors who don't follow basic good-faith standards when setting executives' compensation could face legal liability. Chief Justice Veasey warned that directors who are disingenuous, dishonest or don't follow stated measures of compensation could be liable for breach of good faith. Veasey advised compensation committees to hire outside advisors and lawyers to demonstrate independence from management. *Fortune, December 19, 2002.*

Directors Increasingly Face Personal Liability. Facing large losses from the string of accounting scandals over the past 18 months, insurers are fighting back. Among their arsenal, some insurers are eliminating a policy feature in directors' and officers' insurance policies, known as the "severability" feature. Under the "severability" clause, an insurer can end coverage for a director who cooks the books, but must still pay for the remaining board members. Without the "severability" feature, all directors stand to lose their coverage if any board member is found to have committed fraud. *Dow Jones Newswire, January 27, 2003.*

Yet Another Massive Fraud By A Big 5 Firm. The SEC charged KPMG LLP, the world's No. 3 accounting firm, and four of its partners with civil fraud for allegedly allowing Xerox Corp. to manipulate its books to inflate revenue. Xerox was forced to restate its revenue from 1997 to 2001 by a whopping $6.4 billion! The lawsuit alleges the firm and its partners were aware of the accounting manipulations at Xerox and still signed off on them. KPMG had audited Xerox's books for 30 years, but was fired in 2001. "There was no watchdog at Xerox," the SEC statement said. "KPMG's bark sounded no warning to investors; its bite was toothless." *Bloomberg, January 29, 2003.*

SEC Names Acting Chairman For New Board. Charles Niemeier, former chief accountant of the SEC's enforcement division, was named acting chairman of a new U.S. Board set up to police corporate accountants. Mr. Niemeier will serve as acting chairman for the board set up by the SEC under orders from Congress after a wave of corporate book-cooking scandals

until the commission selects a permanent chair. William Webster, the first chairman, resigned in November amid the controversy over his selection that also resulted in the resignation of former SEC Chairman Harvey Pitt. *Reuters, January 8, 2003.*

Governance Reforms Challenged By Two Delaware Judges. Chancellor William B. Chandler III and Vice-Chancellor Leo E. Strine, Jr., two influential Delaware judges, have raised pointed questions about the particular aspects of new regulations and the implementation of prescriptive measures they see intruding onto what has traditionally been state-law turf. Taking a decidedly shareholder-friendly approach, the judges take the position that it is time to examine the "management-biased corporate election system." Currently, incumbent directors can spend an almost unlimited amount of their companies' money in order to get reelected. As a counter, the judges suggest requiring equal access to the proxy machinery between incumbents and insurgents with significant nominating support. "The rhetorical analogy of our system of corporate governance to republican democracy will ring hollow so long as the corporation election process is so tilted toward the self-perpetuation of incumbent directors." *Dow Jones Newswires, February 10, 2003.*

Donaldson Confirmed As New SEC Chief. The Senate confirmed President Bush's nominee, William H. Donaldson, as head of the Securities and Exchange Commission. During his confirmation hearing, Donaldson vowed to aggressively enforce corporate antifraud rules and said his top priority was selecting a chairman of the new accounting oversight board. Donaldson was sworn in as Chairman on February 18, 2003. *The New York Times, February 14, 2003; Chicago Tribune, February 19, 2003.*

Repatriate, Says Public Fund. The California Public Employees' Retirement System (CalPers) voted to lend support to shareholder proposals urging three companies — McDermott International, Ingersoll-Rand Company and Tyco International — to incorporate their businesses in the United States. McDermott currently uses a Panama mailbox, while the other two have Bermuda addresses. By maintaining these offshore mailboxes and holding annual board meetings in a country with a favorable tax treaty, companies can earn profits tax free in the U.S. Such shareholder moves are critical in the wake of "the biggest corporate scandals since the 1920's," said Philip Angelides, the California state treasurer. *The New York Times, November 17, 2002.*

Analysts Must Vouch For Reports. Prompted by recent scandals which revealed that stock analysts have publicly given favorable reports or analysis that they internally view as bad investments, the SEC approved a new regulation requiring stock research analysts to certify that opinions expressed in their reports accurately reflect their personal views. The analysts must also disclose whether their compensation is dependent upon any specific positive or negative judgment about a company. If their compensation is tied to the opinion, the analyst must disclose who paid for the research, how much and must state that such compensation could influence their opinions. *Los Angeles Times, February 7, 2003.*

BLB&G OPENS LOUISIANA OFFICE

Bernstein Litowitz Berger & Grossmann LLP is pleased to announce the opening of its newest office:

One Shell Square — Tel 504-525-3373
701 Poydras St., Suite 3640 — Fax 504-525-3372
New Orleans, LA 70139 — www.blbglaw.com

Together with the firm's established offices in New York, California and New Jersey, the Louisiana office will enable us to continue to provide the best possible representation for our pension fund clients in Louisiana, as well as other southern states. Tony Gelderman, formerly a partner at Tarcza & Gelderman, has served as Of Counsel to BLB&G for the last several years focusing on the areas of legislative counseling and pension law. Mr. Gelderman now joins the firm full-time as the managing attorney of the Louisiana office. Tony can be reached at 504-525-3373 or by email at tony@blbglaw.com.

Panel Blasts Enron's Tax Shelters. The Senate's Joint Committee on Taxation said that before collapsing into bankruptcy, lawyers and accountants helped Enron amass nearly $1 billion in questionable tax and accounting benefits. Various tax shelters allowed the Houston energy company to report identical amounts in earnings and tax losses from the same investment. Senate investigators said that Enron's advisers generated $87.6 million in fees by creating financial ruses that served no economical purpose. *USA Today, February 14, 2003.*

Ex-Tyco CFO Indicted For Tax Fraud. Mark H. Swartz, former CFO of Tyco International, was indicted by a federal grand jury in New Hampshire on charges of tax evasion. The indictment accuses Mr. Swartz of avoiding almost $5 million in federal taxes by filing a tax return in 1999 that failed to report a $12.5 million bonus he received from Tyco. *The New York Times, February 20, 2003.*

Timothy A. DeLange is an associate in the California office of Bernstein Litowitz Berger & Grossmann LLP. He prosecutes securities actions on behalf of the firm's institutional investor clients. He can be reached at timothyd@blbglaw.com.

Continued from page 3.

independent from the class of other investors;

✔ A state court plaintiff may avoid the PSLRA discovery stay (if there is no analogous state law);

✔ An individual plaintiff may attempt to complete all discovery and get to trial faster than the class action;

✔ A state court plaintiff may have more success than federal plaintiffs in asserting aiding-and-abetting claims against secondary actors, like lawyers and bankers.

The Cons

✔ State law causes of action frequently have jurisdictional limits, such as limiting the remedy to "in state" conduct or imposing a short statute of limitations, which can eliminate or reduce recovery that is available in federal court;

✔ Attorney fees will be significantly higher in an individual action because capable securities trial lawyers frequently charge a substantial percentage of the recovery for non-class cases, whereas attorney fees are carefully scrutinized in class actions and fees of 10-15% are common;

✔ Some law firms are filing multiple state court actions in many courts for different institutional investors, and therefore, unless the public fund insists that counsel represent only it, the institution will lose its independence and any ability to chart its own course because counsel's attention and loyalty will be divided among various clients with different ongoing cases in different states;

✔ Individual lawsuits in state court have no leverage, unless the individual loss is enormous, because the defendants will be far more concerned with the collective power of the class action than with the individual case;

Multiple state lawsuits will greatly undermine the fundamental purpose of the Reform Act's Lead Plaintiff provisions.

✔ The discovery imposed on an individual plaintiff in state court is often extensive, intrusive and far more burdensome than the discovery required of the Lead Plaintiff in a federal class action—including, for example, many time-consuming depositions in the state court action and a pointed probe into all investments, not just the specific investment at issue;

✔ State lawsuits are subject to being stayed because judges do not like "splintered litigation" in multiple courts and will frequently seek to coordinate discovery with the dominant federal action to avoid unnecessary duplication and burden on the court, defendants and witnesses;

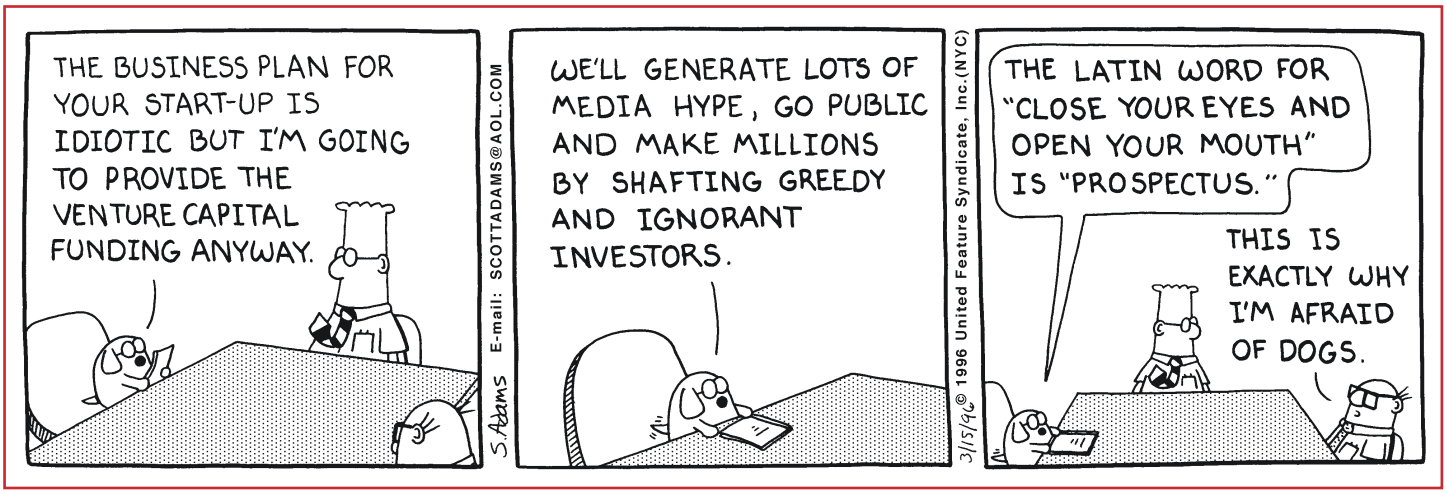
✔ Individual state lawsuits offer no real opportunity to effect systemic corporate governance changes as part of a recovery—like eliminating "staggered boards" and requiring shareholder approval for changes to stock-option incentive plans;

✔ By filing an individual action in state court, the public fund may be forced to waive its federal claims under §10b-5 because such claims can only be brought in federal court;

✔ Individual plaintiffs in state court experience delayed recovery because defendants almost never settle an individual lawsuit before resolving a class case, and rarely on more favorable terms;

✔ Multiple state lawsuits will greatly undermine the fundamental purpose of the Reform Act's Lead Plaintiff provisions—which Congress enacted specifically to give institutions control over securities litigation—because multiple state lawsuits undeniably interfere with the ability of the institution serving as Lead Plaintiff to run the class action effectively for the benefit of all institutional and other investors.

When it's appropriate to file an individual case in state court: Filing an individual action in state court is appropriate when the institution has a large enough loss to warrant the time and economic com-



DILBERT reprinted with permission of United Feature Syndicate, Inc.

mitment, especially where the federal class action is not being handled by an institutional investor or lead counsel that the institution knows and trust. Further, before filing an individual state court action, the public fund must be confident that it is not waiving any substantial federal claims and that the public fund is represented by securities counsel that is free from conflicts or divided loyalty and can take the case to trial, if necessary.

The Advantages and Disadvantages of Being a Lead Plaintiff in Securities Class Actions

The Lead Plaintiff provisions of the PSLRA were enacted, in large measure, to encourage public pension funds and other institutions to take control of securities class action litigation. Unlike nominal investors, institutional investors can put real pressure on defendants and force them to settle on attractive terms.

The Pros

✔ A class action with an institution as the Lead Plaintiff has powerful leverage against defendants, in both small and large cases, leading to the greatest recoveries in both absolute terms and as a percentage of damages;

✔ As Lead Plaintiff, the institution will have unsurpassed control over negotiations and will, therefore, have the greatest opportunity to impose needed corporate governance changes;

✔ There are typically lower attorney fees when a public pension fund is a Lead Plaintiff in a class action;

✔ The discovery process tends to be less burdensome on institutional investors in federal class actions than in individual state lawsuits because defendants know that numerous investors are willing to step into the shoes of the Lead Plaintiff if, for some reason, the institution is found to be an unsuitable class representative;

✔ Courts are, generally speaking, loathe to impose onerous discovery against an institution in the class context because no individual reliance needs to be proven;

✔ Serving as Lead Plaintiff in a class action generally requires significantly less time commitment than prosecuting an individual state court action;

A class action with an institution as the Lead Plaintiff has powerful leverage against defendants, in both small and large cases.

✔ By serving as Lead Plaintiff, the institutional investor will protect against a cheap "pennies on the dollar" settlement;

✔ By serving as Lead Plaintiff, the institutional investor will protect against an unreasonable award of attorney fees that sometimes happens when nominal investors serve as Lead Plaintiff and do not adequately supervise counsel;

✔ Being Lead Plaintiff in a class action further promotes the institution's long term best interests by deterring corporate wrongdoing and restoring integrity in the markets, goals which generally cannot be achieved through individual actions in state court;

✔ Lead Plaintiffs are better able than individual plaintiffs in state court to force the culpable wrongdoers (not just their insurance companies) to pay.

The Cons

✔ Under the federal securities laws, there are no claims for aiding and abetting, which may (in certain circumstances) preclude claims against secondary actors such as lawyers, bankers and consultants;

✔ Securities class actions are subject to the pleading requirements of the PSLRA, which may be higher than the pleading requirements of some state law claims;

✔ The institution gets no greater recovery than its pro rata share of the settlement, although it can recover its costs;

✔ The Lead Plaintiff has a fiduciary responsibility to the class to monitor the litigation for the benefit of all investors, which requires the devotion of some time.

When it's appropriate to seek appointment as Lead Plaintiff: The determination to seek appointment as a lead plaintiff (alone or together with other institutions) must be made on a case-by-case basis, but it is most appropriate when the public fund incurred substantial losses, no other institution with a greater loss has stepped forward, and the institution is represented by trusted and experienced counsel. Seeking appointment as Lead Plaintiff is particularly appropriate when the facts of the case suggest that investors would benefit, not only from the return of their money, but also from

Quarterly Quote

"For the past 20 years, the financial services industry, in conjunction with the lawyers and accountants who surround them, have said to the public: 'Trust us, we are a self-regulatory industry and therefore our ethical mandate will protect you, the public.' That is a myth. Self-regulation was an absolute, complete, abject total failure. That is the problem, and if you want to sit hear and defend it and say maybe we need some marginal tinkering around the edge, that's fine. But that doesn't reflect the reality of what happened."

— New York Attorney Eliot Spitzer, at January 22, 2003 New York State Bar Summit.

Continued on back page.

Continued from page 7.

corporate governance changes. Moreover, serving as the Lead Plaintiff makes sense when the institution wishes to maximize its bargaining power by having the considerable leverage of the class action.

Active Institutional Investor Participation Affects the Outcome of Securities Litigation

The future credibility of our capital markets will depend, in large measure, on the commitment and active participation of institutional investors. Based on the experience, so far, of institutions serving as Lead Plaintiffs under the PSLRA, it is clear that institutional investors make a difference.

In the Cendant case, for example, the New York State Common Retirement Fund, CALPERS and the New York City Pension Funds served together as Lead Plaintiffs for the federal class action and compelled defendants to settle for more than $3.2 billion in cash—the largest single recovery ever in a securities class action. Lead Plaintiffs made it clear to defendants at the outset of the case that Lead Plaintiffs would not settle for "pennies on the dollar," and they followed through on this commitment: The settlement will return approximately 40% of damages to class members. In addition, as part of the settlement, Lead Plaintiffs forced important changes in Cendant's corporate governance structure, including the creation of a truly independent board of directors (as well as key committees), the elimination of staggered boards and the requirement of shareholder approval for changes in stock option plans.

Likewise, in the 3Com case, the Louisiana School Employees' Retirement System and the Louisiana Municipal Police Employees Retirement System stepped forward after learning of numerous class actions by small investors. Together, the Louisiana Funds were appointed as Lead Plaintiffs and ultimately settled the case, after three years of litigation, for $259 million in cash—the largest securities settlement in the history of California and one of the largest nationally. Investors recovered approximately 50% of the estimated damages.

Having institutional investors serve as the Lead Plaintiff is a tremendous benefit in both large cases (like Cendant and 3COM) and relatively small cases. In the Assisted Living case, for instance, Miami Police Relief and Pension Fund (the "Miami Fund") served as the Lead Plaintiff and settled with the nearly-bankrupt company and its auditor for $43 million. This recovery amounted to approximately 60% of recoverable damages and is one of the largest securities fraud class action recoveries in Oregon history.

The future credibility of our capital markets will depend, in large measure, on the commitment and active participation of institutional investors.

Before institutions decided to take an active role in securities class action, the average recovery was 9% of damages. However, as Cendant, 3COM, Assisted Living and a host of additional cases show, institutions can achieve excellent recoveries both in terms of dollar amount and percentage of recovery.

Conclusion

The parade of recent securities frauds, and their aftermath, has awakened the institutional investor community to the necessity of taking active steps to recover losses and deter future wrongdoing. Restoring the integrity to our capital markets will depend, to a great extent, on the commitment of institutional investors and their resolve to serve as Lead Plaintiffs in appropriate cases.

Max Berger can be reached at max@blbglaw.com. David Stickney can be reached at davids@blbglaw.com.

BLB&G'S UPCOMING FORUM

BLB&G's next Institutional Investor Forum will be held June 12 and 13, 2003 at the New York Yacht Club. The June Forum features several distinguished speakers including former New York State Comptroller H. Carl McCall and Joel Seligman, Dean of the Washington University School Of Law. For more information, please contact Doug McKeige at 800-380-8496.

Contact Us

We welcome input from our readers. If you have comments or suggestions, please contact Editor David R. Stickney, at 858-793-0070 or by E-mail at davids@blbglaw.com. If you would like more information about our firm, please visit our website at

www.blbglaw.com

Editor: David R. Stickney
Editorial Director: Alexander Coxe
Contributors: Max W. Berger, David R. Stickney and Timothy A. DeLange

BLB&G
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

800-380-8496
E-mail: blbg@blbglaw.com

New York
1285 Avenue of the Americas
New York, New York 10019
Tel: 212-554-1400

California
12544 High Bluff Drive
San Diego, CA 92130
Tel: 858-793-0070

Louisiana
701 Poydras Street, Suite 3640
New Orleans, LA 70139
Tel: 504-525-3373

New Jersey
220 St. Paul Street
Westfield, NJ 07090
Tel: 908-928-1700