

Eleventh Circuit Provides Greater Leeway for Corporate Settlements Without Full Release of Culpable Individual Defendants - A Victory for Increased Accountability

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In response to the massive accounting fraud at Alabama-based HealthSouth Corporation, Bernstein Litowitz Berger & Grossmann LLP has been prosecuting litigation on behalf of the Retirement Systems of Alabama and other HealthSouth bondholders. The defendants include a number of HealthSouth's senior officers, including its former CEO Richard Scrushy, the company's outside auditor Ernst & Young LLP, and its chief investment bank and underwriter - UBS Warburg. The latest developments in the litigation bode well for holding individual wrongdoers accountable.

In 2006, HealthSouth agreed to pay \$445 million to settle the securities claims brought in the U.S. District Court for the Northern District of Alabama on behalf of both bondholders and stockholders. Scrushy, one of the chief masterminds of the fraud at HealthSouth, was not a party to the settlement. The settlement included a bar order that prohibited any non-settling party from claiming "contribution" against HealthSouth, i.e. barring individual officer defendants from asserting that the corporation would be liable for payment of their legal defense fees and reimbursement of settlement monies if they acted in good faith. The Court approved the bar order over Scrushy's objections that the order wrongfully extinguished his contractual rights - as a corporate officer - to indemnification and advancement of attorneys' fees from HealthSouth.

On appeal to the Eleventh Circuit, Scrushy raised several legal and public policy arguments challenging the district court's order. In June 2009, the Eleventh Circuit rejected all of Scrushy's arguments, explicitly noting that the public policy arguments favoring settlements in class actions outweighed Scrushy's public policy arguments favoring indemnification of and advancement of legal fees to officers and directors so that they may resist unjustified litigation.

This decision by the Eleventh Circuit is extremely significant as it should have a positive impact on future settlements with corporate wrongdoers. Often, in order to preclude future claims of indemnification and recoupment of litigation fees from individual wrongdoers, settling corporations demand a release of all claims against individual defendants. The Eleventh Circuit's approval of the HealthSouth bar order provides support to corporations who wish to settle without fear of future payments to culpable individual wrongdoers.

BLB&G continues to vigorously prosecute the Class's case against Scrushy, UBS Warburg and Ernst & Young LLP. Notably, just last week, a trial court in Alabama ordered Scrushy to pay \$2.88 billion to shareholders in a related derivative action.