

2010 Year in Review: Securities Enforcement, Litigation and Compliance

December 29, 2010



Agenda

- Introduction
- Presentation
- Questions and Answers — (anonymous)
- Slides — now available on front page of Securities Docket
 - www.securitiesdocket.com
- Wrap-up

Webcast Series

- Approximately every other week
- January 13, 2011: **“100 Days And Counting: The Impact of the UK Bribery Act on U.S. Companies”**

Panel

- Lyle Roberts
- Francine McKenna
- Matt Kelly



- Francis Pileggi
- Mike Koehler



- Kevin LaCroix
- Tracy Coenen
- Bruce Carton





Lyle Roberts

- Three Most Significant Developments of 2010
 - National Australia Bank decided
 - The Supreme Court and securities litigation (Merck, Janus, Matrixx)
 - Business as usual (the credit crisis subsides)
- Three Most Interesting Developments of 2010
 - Applying the PSLRA's Safe Harbor
 - Settlements - Up, up, and away
 - Is it time to revisit loss causation (Halliburton, Apollo)?



Lyle Roberts

- One bold prediction
 - The Supreme Court continues on its cert binge and takes the Halliburton and Apollo cases
 - Next stop: corporate scienter



Francine McKenna

- Three Most Significant Developments
 - New York Attorney General Cuomo suit against EY for Lehman.
 - NY State Court of Appeals *in pari delicto* opinion re: Kirshner v. KPMG et al (Refco) and Louisiana Retirement v. PwC (AIG).
 - House of Lords testimony by Big 4: *“We did not issue going concern opinions because BOE and UK Treasury secretly told us they would support.”*



Francine McKenna

- Three Most Interesting Developments
 - Satyam still has not been dismissed against PwC (motioned *forum non conveniens* maybe *Morrison*, potentially *in pari delicto*) but Glitnir sent back to Iceland. Landsbanki litigation pending.
 - SEC sanctions in Deloitte Vice Chairman Flanagan case, there's another Deloitte partner insider trading scandal (McClellan) but no charges against Deloitte as a firm. Jail sentence in the EY partner scandalous insider trading case.
 - KPMG settles New Century and Countrywide liability in fell swoop.
- Bold Prediction
 - Public testimony before Senate Banking committee in 2011 for Lehman and to answer similar questions as they did in UK.



Matt Kelly

- Three Most Significant Developments of 2010
 - Passage of Dodd-Frank Act
 - Amended U.S. Sentencing Guidelines
 - Passage of Bribery Act in United Kingdom
- Three Most Interesting Developments of 2010
 - SEC Requires Climate Change Disclosure
 - Supreme Court Punts on PCAOB
 - Hewlett-Packard Fumbles Governance Yet Again



Matt Kelly

- One Bold Prediction for 2011
 - Congress will make no significant changes to the Dodd-Frank Act

Key Decisions on Delaware Corporate Law in 2010

- The Delaware Supreme Court decision in *Selectica* as well as the Court of Chancery decision in the Barnes & Noble case continued a 25 year span of precedents upholding the poison pill, or shareholder rights plan, as a defense to unwanted takeover attempts in appropriate situations. Both decisions upheld the pill as a reasonable defensive measure in light of the threat presented.
- A recent Chancery decision in *Hampshire Group v. Kuttner*, in which a corporate officer was found liable for breaching his fiduciary duty by approving for payment by the company, various personal expenses of a CEO, should give all officers pause--and make them insist on indemnification and advancement contracts.

Key Decisions on Delaware Corporate Law in 2010

- In the *Airgas* case, the Delaware Supreme Court upheld a bylaw provision providing for a staggered board. The court said that the term of a staggered board member could not be cut short by holding a second annual meeting a few months after the prior one as a means of circumventing the intent of the staggered board as a defensive measure.
- In the case involving eBay's minority interest in privately-held craigslist, the Court of Chancery also upheld a staggered board provision that effectively limited eBay's role on that board.

Key Decisions on Delaware Corporate Law in 2010

- Fiduciary duties of directors of distressed companies: *Shandler v. DLJ Merchant Banking* is a recent Chancery decision that gave the board the protection of the business judgment rule and did not second-guess a decision to attempt to keep the company alive with additional financing instead of filing for bankruptcy sooner--even though in hindsight it turned out to be the wrong decision. The key is for the board to be fully informed and fulfill its duty of loyalty when making its decision.
- Unlike in the corporate context, in which creditors of an insolvent company have a right to file a derivative suit against the directors, in the LLC context, the Chancery Court has ruled that unless the right is provided for in an LLC agreement, the LLC statute does not allow creditors to pursue derivative suits in the LLC context. *CML V, LLC v. Bax*.



Mike Koehler

- Four Significant Developments of 2010
 - The **Foreign** Corrupt Practices Act
 - Two Tiers of Justice
 - Is the Facilitating Payments Exception Meaningless?
 - Emergence of a Plaintiff's Bar



Mike Koehler

- Three Interesting Developments of 2010
 - Giffen Enforcement Action
 - Africa Sting Cases
 - Greater Scrutiny and “Why” Questions



Mike Koehler

- **Bold** Predictions for 2011
 - The Dodd-Frank Whistleblower Provisions Will Have a Negligible Impact on FCPA Enforcement
 - Enforcement of the U.K. Bribery Act Will Be Disciplined and Measured



Kevin LaCroix/ The D&O Diary

- Three Most Significant Developments of 2010
 - Changing Mix of Corporate/Securities Litigation
 - Banks Fail, Litigation Machine Gets Going
 - SCA Filings Shift From Credit Crisis to Traditional Cases
- Three Most Interesting Developments of 2010
 - Mega Settlements in Derivative Cases
 - The Dog that Didn't Bark: Why so few Credit Crisis Settlements?
 - The Other Dog that Didn't Bark: Why so few FDIC Failed Bank Lawsuits?



Kevin LaCroix/The D&O Diary

- One Bold Prediction for 2011
 - Lawsuits Involving Failed Banks (Brought by FDIC and by Private Litigants) Will be Rampant, Growing in Numbers as the Year Progresses



Tracy Coenen

- Three Most Significant Developments of 2010
 - SEC “getting tough” on financial fraud
 - “Honest services” fraud law narrowed
 - Focus on independent internal investigations
- Three Most Interesting Developments of 2010
 - Madoff red flags revealed in Markopolos book
 - People still think Sarbanes-Oxley prevents fraud
 - Companies like Lehman Bros and Citigroup prettying up financial statements



Tracy Coenen

- One Bold Prediction for 2011
 - SEC’s “get tough” stance will be bewildering. Tough enforcement for some companies and individuals, but no rhyme or reason behind which companies or people are investigated.



Bruce Carton

- Three Most Significant Developments of 2010
 - Intense focus on insider trading by SEC and DOJ
 - Congress' 11th hour decision to deny SEC self-funding
 - Dawn of the whistleblower era
- Three Most Interesting Developments of 2010
 - Mark Cuban offering to pay SEC's lawyer fees in order to expedite receipt of docs from SEC
 - U.S. Attorney in E.D. Virginia asserts jurisdiction over all securities fraud
 - Massive \$1 million bounty paid to ex-wife of insider trading defendant



Bruce Carton

- One Bold Prediction for 2011
 - Congress passes first-ever statutory definition of “insider trading”

Questions?

Thank You
for Attending This Webcast