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REPORT

ENFORCEMENT

Top 10 SEC Enforcement Developments of 2008

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This article highlights significant developments during 2008 in the enforcement program of the U.S. Securities and Exchange Commission ("SEC"). Developments were selected because they may signal future trends or establish new legal standards.

Many commentators predicted that SEC enforcement actions arising from the freezing of the auction rate securities market or the subprime lending meltdown would lead the list of important SEC enforcement developments in 2008. Such cases have been overshadowed, however, by the unraveling of the $50 billion Ponzi scheme allegedly perpetrated by Bernard Madoff and the intense scrutiny of the SEC that has followed. Indeed, in the weeks following the initial Madoff disclosures, the SEC has been subjected to a firestorm of criticism by the media and Congress, leading to an announcement that the SEC's Inspector General was investigating the SEC's regulatory failures relating to Madoff[1], as well as to the departure of the SEC's Director of the Division of Enforcement, Linda Thomsen.[2] The Madoff scandal and its fallout are the Number One enforcement development of 2008.

The SEC's enforcement actions and investigations relating to auction rate securities and the subprime lending market during 2008 were noteworthy, and include the largest settlements in the history of the SEC on behalf of investors. While it is difficult to make any predictions in the current economic and regulatory climate, these proceedings provide some guidance as to the types of cases the SEC is likely to pursue in 2009. The SEC's response to the freezing of the auction rate securities market is the Number Two enforcement development, while the SEC's cases relating to the subprime market, including actions against mortgage brokers, is the Number Three enforcement development, of 2008.

The remaining Top Ten developments highlight other significant issues and trends in the SEC enforcement program:

- The Number Four enforcement development of 2008 is the emphasis that the SEC has placed on pursuing insider trading, including the highest number of in-

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[1] Press Release No. 2008-297 (available at http://www.sec.gov/news/press/2008/2008-297.htm).

[2] Press Release No. 2009-22 (available at http://www.sec.gov/news/press/2009/2009-22.htm).

sider trading cases in the SEC's history as well as the first Section 21(a) report since 2005.

- Number Five is the SEC's continued focus on violations of the Foreign Corrupt Practices Act of 1977.
- Number Six is the Ninth Circuit's reversal of a district court opinion challenging ''stealth'' parallel proceedings.
- Number Seven is the SEC's first market manipulation case based on rumor mongering.
- Number Eight is the First Circuit's decision potentially expanding the scope of primary liability for misstatements contained in prospectuses.
- Number Nine is the Second Circuit's decision affirming dismissal of an indictment based on the government's interference with an employer's advancement of legal fees to individuals.
- Number Ten is the Eleventh Circuit's decision upholding penalties and disgorgement despite the defendant's claimed inability to pay.

1. The Fallout from the Madoff Scandal

On December 11, 2008, the SEC filed a complaint with the U.S. District Court for the Southern District of New York against Bernard L. Madoff (''Madoff'') and Bernard L. Madoff Investment Securities LLC (''BMIS'').[3] The SEC alleged that Madoff had admitted to two senior employees of BMIS that the investment advisory business was ''basically, a giant Ponzi scheme'' and estimated losses from this fraud to be approximately $50 billion.[4]

Within days of the SEC's filing of its complaint, the *Wall Street Journal* reported that a competitor of Madoff had, for almost ten years, attempted to alert the SEC to Madoff's misconduct. Harry Markopolous, then chief investment officer at Rampart Investment Management Co., even submitted a paper to the SEC entitled ''The World's Largest Hedge Fund is a Fraud'' in November 2005, in which he surmised that Madoff was either front-running his customers or, more likely, that ''Madoff Securities is the world's largest Ponzi Scheme.''[5] The thrust of Mr. Markopolous's analysis was that there simply were not enough options traded in any market to support the trading strategy that Madoff was allegedly pursuing according to the materials provided to Madoff's investors. While the SEC investigated Mr. Markopolous's tips, the SEC's enforcement staff closed the case asserting that, while the staff had found minor disclosure violations, ''[t]he staff found no evidence of fraud'' and that the violations they had found ''were not so serious as to warrant an enforcement action.''[6]

The SEC has been widely criticized in the media for not taking earlier action on complaints against Madoff and BMIS.[7] On December 16, 2008, then Chairman Cox issued a statement acknowledging that ''credible and specific allegations'' regarding Madoff's conduct going back to at least 1999 were repeatedly brought to the staff's attention, but never recommended to the Commission for action.[8] He further stated that he was ''gravely concerned by the apparent multiple failures over at least a decade to thoroughly investigate these allegations or at any point to seek formal authority to pursue them.'' Cox also noted that the failure to seek a formal order of investigation meant that the staff relied on information voluntarily produced by Madoff and BMIS, rather than using subpoena power. Cox stated that he had directed the SEC's inspector general to conduct an investigation into ''the past allegations regarding Mr. Madoff and his firm and the reasons they were not found credible. . . .''

On January 5, 2009, SEC Inspector General H. David Kotz testified before the U.S. House of Representatives Committee on Financial Services and reported that his office had opened an investigation and that it intended to investigate the following specific issues: (1) the SEC's response to complaints regarding Madoff; (2) allegations of conflicts of interest regarding relationships between SEC staff and members of the Madoff family; (3) the conduct of examinations and/or inspections of BMIS and whether any red flags were overlooked; and (4) the extent to which Madoff's reputation, his membership on SEC Advisory Committees, his participation on securities industry boards and panels, and his social and professional relationships with SEC officials may have affected decisions regarding investigation and examinations.[9] Perhaps of more far-reaching consequence, Inspector General Kotz also testified that his office also ''plans to consider analyzing'' certain broader issues, including: (1) the Division of Enforcement's complaint handling procedures; (2) the SEC's Office of Compliance, Inspection and Examination's

[3] Complaint in *SEC v. Bernard L. Madoff & Bernard L. Madoff Inv. Sec. LLC*, Case No. 08 CIV 10791 (available at http://www.sec.gov/litigation/complaints/2008/comp-madoff121108.pdf). On that same day, the U.S. Attorney for the Southern District of New York filed a criminal complaint against Madoff based on the same allegations. *See* criminal complaint in *U.S. v. Bernard L. Madoff*, Case No. 08 MAG 2735 (available at *http://www.usdoj.gov/usao/nys/madoff/criminalcomplaint.pdf*).

[4] SEC Complaint, at ¶ 23.

[5] Available at http://online.wsj.com/documents/madoff_SECdocs_20081217.pdf.

[6] SEC Division of Enforcement Case Closing Recommendation (available at http://online.wsj.com/public/resources/documents/Madoff_SECRecommend_20081217.pdf).

[7] *See* Julie Creswell & Landon Thomas Jr., *The Talented Mr. Madoff*, N.Y. Times, Jan. 24, 2009, at BU1 (''Current and former S.E.C. regulators have come under fire, accused of failing to adequately supervise Mr. Madoff and being too cozy with him.'').

[8] Press Release 2008-297 (available at http://www.sec.gov/news/press/2008/2008-297.htm).

[9] H. David Kotz, Inspector General, SEC, Testimony Before the U.S. House of Representatives Committee on Financial Services (Jan. 5, 2009) (available at http://www.sec.gov/news/testimony/2009/ts010509hdk.htm).

procedures, including whether there are gaps in the procedures relating to hedge funds that may lead to a failure to detect fraud; and (3) the relationship between different divisions and offices within the SEC and whether there is adequate communication and collaboration.

It is too early to assess the full impact of the fallout from the Madoff scandal on the SEC. Early signals suggest that the number of enforcement actions in 2009 will be much greater than in 2008—a year that witnessed the second-highest number of enforcement actions in the SEC's history.[10] For example, in a recent speech, Commissioner Luis A. Aguilar complained that the Enforcement staff had been ''coping with less staff and fewer resources'' including a 10 percent reduction in attorneys between 2005 and 2008.[11] He stated that ''the Commission should act quickly to rebuild and empower the enforcement staff.'' To do so, he urged that the SEC hire and staff the Enforcement Division at full capacity, streamline and expedite the process for approving formal orders of investigation, and ''focus resources on cases involving the most egregious behavior with broad market effect and to be able to clearly send a message of deterrence.'' Commissioner Aguilar also encouraged the SEC to discontinue its policy of requiring staff to seek Commission approval of a settlement range before initiating settlement discussions involving a monetary penalty against a company. Shortly after her appointment as SEC Chairman, Mary Schapiro announced that such policy would be discontinued in order to ''expedite the Commission's enforcement efforts to ensure that justice is swiftly served to those public companies who commit serious acts of securities fraud.''[12] Additionally, in the month following the Madoff filing, the SEC brought three actions against large Ponzi schemes.[13]

[10] SEC 2008 Report (available at http://www.sec.gov/2008annual/SEC_2008annual_trustp2.htm).

[11] Luis A. Aguilar, SEC Commissioner, Empowering the Markets Watchdog to Effect Real Results, Speech Address at the North American Securities Administrators Association's Winter Enforcement Conference (Jan 10, 2009) (available at *http://www.sec.gov/news/speech/2009/spch011009laa.htm*). On January 27, 2009, Senators Schumer, Shelby, Durbin, Feinstein, Bayh, Tester, Graham, Sessions and Roberts introduced legislation to increase the number of federal law enforcement officials prosecuting financial fraud by authorizing the hiring of 500 additional FBI agents, 50 additional Assistant U.S. Attorneys and 100 additional SEC enforcement staff members (S. 331, 111th Cong., 1st Sess.).

[12] Mary L. Schapiro, SEC Chairman, Address to Practising Law Institute's ''SEC Speaks in 2009'' Program (Feb. 6, 2009) (available at http://www.sec.gov/news/speech/2009/spch020609mls.htm).

[13] *See SEC v. CRE Capital Corp*., Litig. Rel. No. 20853 (Jan. 15, 2009) (available at http:/*/www.sec.gov/litigation/litreleases/2009/lr20853.htm*) (action accusing CRE and its CEO and president of raising at least $25 million from 120 investors in Ponzi scheme); *SEC v. Joseph S. Forte*, Litig. Rel. No. 20847 (Jan. 8, 2009) (available at *http://www/sec/gov/litigation/litreleases/2009/lr20847.htm*) (action accusing Forte of conducting $50 million Ponzi scheme); SEC v. Creative Capital Consortium, LLC, Litig. Rel. No. 20840 (Dec. 30, 2008) (available at *http://www/sec/gov/litigation/litreleases/2008/lr20840.htm*) (action accusing Creative Capital of raising $23.4 million from thousands of Haitian-Americans in Ponzi scheme consisting of a network of ''investment clubs'').

2. The SEC's Response to the Freezing of the Auction Rate Securities Market

Auction Rate Securities (ARS) are securities with variable interest rates or dividend yields which are reset periodically through auctions. In these auctions, bidders submit buy bids at increasing interest or dividend rates to the pool of ARS holders willing to sell. The highest rate accepted in the auction then becomes the ARS interest or dividend rate until the next auction. The ARS market froze in February 2008, as ARS auctions began to fail in large numbers.[14]

During 2008, the SEC reached preliminary settlements with Bank of America, RBC Capital Markets Corp., Wachovia, and Merrill Lynch, and reached final settlements with Citigroup and UBS.[15] These settlements provide that up to approximately $50 billion will be provided to customers who invested in ARS before the market froze. The settlements in the ARS cases are, according to the SEC, ''[t]he largest in the agency's history.''[16]

The SEC's allegations against each firm have centered around claims that the firms misrepresented to investors that ARS were safe, liquid investments, despite knowing that the ARS market had been deteriorating since late 2007, and that their ability to support the market had been impacted by the broader credit crisis. The exact terms of the SEC settlements and settlements in principle vary from firm to firm, but share a common framework. In each case, the primary objective appears to be provision of liquidity to the holders of the ARS. In some cases, the settlements address individual and institutional investors separately, requiring the settling firm to first cover losses from sales or purchase ARS at par from individual investors who purchased ARS from the firm prior to the collapse in the ARS market, but requiring only that the firm use ''best efforts'' to provide

14 In testimony before the House of Representatives on September 18, 2008, Linda Thomsen, then the Director of the Division of Enforcement at the SEC, listed a number of possible factors that had resulted in the freezing of the ARS market, including (1) the size of the ARS market, which had grown to $330 billion; (2) downgrades of the credit ratings for ARS bond insurers; and (3) the larger credit crisis, which limited firms' ability to make support bids in the ARS auction. Linda Chatman Thomsen, Director, Division of Enforcement, Testimony Before the U.S. House of Representatives Committee on Financial Services (Sept. 18, 2008) (available at http://www.sec.gov/news/testimony/2008/ts091808lct.htm).

[15] Press Release No. 2008-246 (Oct. 8, 2008) (available at *http://www.sec.gov/news/press/2008/2008-246.htm*) (announcing settlement in principle with RBC Capital Markets); Press Release No. 2008-247 (Oct. 8, 2008) (available at *http://www.sec.gov/news/press/2008/2008-247.htm*) (announcing settlement in principle with Bank of America); Press Release No. 2008-181 (Aug. 22, 2008) (available at http://www.sec.gov/news/press/2008/2008-181.htm) (announcing settlement in principle with Merrill Lynch); Press Release No. 2008-176 (Aug. 15, 2008) (available at *http://www.sec.gov/news/press/2008/2008-176.htm*) (announcing settlement in principle with Wachovia); *SEC v. Citigroup Global Markets, Inc.* and *SEC v. UBS Securities LLC*, Litig. Rel. No. 20824 (Dec. 11, 2008) (announcing finalized settlements with Citigroup and UBS). On February 5, 2009, the SEC announced that its settlement with Wachovia had been finalized. Press Release No. 2009-17 (Feb. 5, 2009) (available at http://sec.gov/news/press/2009/2009-17.htm).

[16] SEC 2008 Report, note 11 *supra*, at 2.

liquidity to institutional investors.[17] The settling firms have also been required to agree to arbitrations under a new FINRA arbitration process, at individual investors' option. Neither the finalized settlements nor the settlements in principle impose penalties. However, in announcing the settlements in principle, the SEC stated that it has deferred the decision to impose penalties, and may consider imposing a financial penalty in the future based on factors including whether the individual firm has fulfilled its obligations under its settlement agreement.[18]

The SEC staff has also indicated that, with respect to the firms with which the SEC has reached settlements, the focus of the investigations is shifting to the conduct of particular individuals.[19] Thus far, details of most of these individual investigations have not been made available. One ARS-related enforcement action against individuals was filed on September 3, 2008, accusing two brokers formerly of Credit Suisse Securities (USA) LLC of defrauding customers by leading them mistakenly to believe that ARS purchased in their accounts were backed by federally guaranteed student loans and that ARS "were a safe and liquid alternative to bank deposits or money market funds."[20]

The SEC, FINRA, and various state regulatory authorities, including the NASAA and the New York Attorney General (NYAG), responded to the freeze in the ARS market by coordinating their activities closely, including the sharing of investigative files and proceeding together in disposing of cases. State regulators, who have been a part of the SEC settlements, have also reached separate settlements with JP Morgan, Morgan Stanley, Credit Suisse, Deutsche Bank, and Goldman Sachs.[21] The terms of the state settlements are parallel to the terms of the SEC settlements, except that fines have already been assessed. In some cases, such as the settlements with UBS and Citigroup, the fines have been split evenly between New York and the other states participating in the investigation.[22]

FINRA has also pursued settlements with firms involved in the sale of ARS, directing their attention to firms not focused on by the SEC.[23] To date, settlements have been reached with SunTrust Investment Services, Inc., SunTrust Robinson Humphrey, Inc., Comerica Securities, Inc., First Southwest Co., WaMu Investments, Inc., City National Securities, BNY Mellon Capital Markets, LLC, and Harris Investor Services.[24] Like the SEC and state settlements, the FINRA settlements provide a buyback and loss coverage guarantee for individual investors and certain institutions with accounts up to $10 million, and require the settling firms to use best efforts to provide liquidity for those investors not covered by the initial buyback. The FINRA settlements also include fines ranging from $150,000 to $1.65 million.

The Department of Justice has also initiated criminal investigations into the collapse of the ARS market, apparently focusing on potential misconduct involving investing client money in ARS to prop up auctions that might otherwise fail, investing client money in ARS despite knowing the market could collapse, and insider trading.[25]

3. SEC Actions and Investigations in Connection with the Subprime Lending Meltdown

The SEC's 2008 Report stated that the Division of Enforcement had "more than 50 pending . . . investigations in the subprime area . . .," and, as of February 6, 2009, Los Angeles Regional Director Rosalind Tyson reported that the SEC had "25 very active investigations

[17] *See, e.g.,* Press Release No. 2008-181 (Aug. 22, 2008) (available at http://www.sec.gov/news/press/2008/2008-181.htm) (establishing different timing and standards for three classes of Merrill Lynch investors: (1) individual, charitable, and small business investors with account values up to $4 million; (2) remaining individual and charitable investors and small businesses with account values up to $100 million; and (3) institutional customers and business customers with accounts of more than $100 million); Press Release No. 2008-176 (Aug. 15, 2008) (available at *http://www.sec.gov/news/press/2008/2008-176.htm*) (establishing different deadlines and standards for two classes of Wachovia investors: (1) individual investors, small businesses and charitable organizations, and (2) other Wachovia investors).

[18] Press Release No. 2008-246 (Oct. 8, 2008) (available at *http://www.sec.gov/news/press/2008/2008-246.htm*) (announcing settlement in principle with RBC Capital Markets); Press Release No. 2008-247 (Oct. 8, 2008) (available at *http://www.sec.gov/news/press/2008/2008-247.htm*) (announcing settlement in principle with Bank of America); Press Release No. 2008-181 (Aug. 22, 2008) (available at http://www.sec.gov/news/press/2008/2008-181.htm) (announcing settlement in principle with Merrill Lynch); Press Release No. 2008-176 (Aug. 15, 2008) (available at *http://www.sec.gov/news/press/2008/2008-176.htm*) (announcing settlement in principle with Wachovia).

[19] Linda Chatman Thomsen, Director, Division of Enforcement, Testimony Before the U.S. House of Representatives Committee on Financial Services (Sept. 18, 2008) (available at http://www.sec.gov/news/testimony/2008/ts091808lct.htm).

[20] *SEC v. Julian T. Tzolov*, Litig. Rel. No. 20698 (Sept. 3, 2008) (available at http://www.sec.gov/litigation/litreleases/2008/lr20698.htm).

[21] NASAA Press Release (Sept. 16, 2008) (available at *http://www.nasaa.org/NASAA_Newsroom/Current_NASAA_Headlines/9289.cfm*) (announcing settlements with Credit Suisse); NASAA Press Release (Aug. 21, 2008) (available at *http://www.nasaa.org/NASAA_Newsroom/Current_NASAA_Headlines/9216.cfm*) (announcing settlements with Merrill Lynch, Goldman Sachs, and Deutsche Bank); NASAA Press Release (Aug. 14, 2008) (available at *http://www.nasaa.org/NASAA_Newsroom/Current_NASAA_Headlines/9197.cfm*) (announcing settlements with JP Morgan and Morgan Stanley).

[22] NYAG Press Release, *Attorney General Cuomo Announces Landmark Settlement with Citigroup to Recover Billions in Auction Rate Securities for Investors Nationwide* (Aug. 7, 2008) (available at http://www.oag.state.ny.us/media_center/2008/aug/aug7a_08.html) (announcing $50 million in fines to be paid to New York state, and $50 million in fines to NASAA); NYAG Press Release, *Attorney General Cuomo Announces Landmark Settlement with UBS to Recover Billions for Investors in Auction Rate Securities* (Aug. 8, 2008) (available at *http://www.oag.state.ny.us/media_center/2008/aug/aug8a_08.html*) (announcing $75 million in fines to be paid to New York state and $75 million in fines to NASAA).

[23] Susan Merrill, Chief of Enforcement, FINRA, Testimony before the U.S. House of Representatives Committee on Financial Services (Sept. 18, 2008) (available at http://www.finra.org/Newsroom/Speeches/Merrill/P117018).

[24] FINRA News Release (Sept. 18, 2008) (available at http://www.finra.org/Newsroom/NewsReleases/2008/P117019); FINRA News Release (Oct. 23, 2008) (available at http://www.finra.org/Newsroom/NewsReleases/2008/P117292).

[25] Amir Efrati, *U.S. Auction-Rate Investigation Picks Up Steam*, Wall Street J., Oct. 2, 2008.

in the subprime area, involving securities sellers, mortgage originators, securitizers, credit rating agencies and others.''[26] However, the SEC brought only a few enforcement actions in 2008 that directly concern subprime mortgage-backed securities, so it seems likely that the SEC will be very active in this area in 2009.

On June 19, 2008, the SEC charged two former portfolio managers for Bear Stearns Asset Management (''BSAM'') with securities fraud.[27] The SEC alleged that Ralph Cioffi and Matthew Tannin misled investors about the financial state of BSAM's two largest hedge funds.[28] The SEC's complaint alleges that Cioffi and Tannin misrepresented the performance of the funds and the level of redemption requests. The SEC also accused Cioffi and Tannin of misrepresenting the exposure of the funds to subprime mortgage-backed securities, claiming that the exposure was about 6 to 8 percent when, in fact, it was approximately 60 percent. The SEC also alleged that Cioffi and Tannin exaggerated their personal investment in the two funds as a selling point to keep other investors from redeeming. The U.S. Attorney's Office for the Eastern District of New York has also secured an indictment against Cioffi and Tannin on conspiracy and fraud charges.[29]

On October 3, 2008, the SEC charged five mortgage brokers with securities fraud, accusing them selling unsuitable securities to their customers paid for by refinancing their fixed-rate mortgages into unaffordable subprime adjustable rate mortgages.[30] The SEC alleged that these brokers convinced their customers—who were mostly of modest means with little investment experience, little or no post-high school education and, in some cases, limited or no English skills—to purchase variable life insurance policies. In order to pay for such policies, the brokers urged their customers to refinance their fixed-rate mortgages into subprime adjustable rate negative amortization mortgages that they could not afford. The brokers were also registered representatives and received commissions in connection with both the refinancings and the securities purchases.

4. The SEC's Emphasis on Insider Trading

Early in 2008, SEC staff members gave a number of speeches in which they emphasized that insider trading would be an area of focus.[31] And, in fact, in 2008, the SEC brought the highest number of insider trading cases in its history.[32] These cases include actions against accountants,[33] senior executives of public companies,[34] and other Wall Street professionals.[35]

A number of recent cases involve allegations of insider trading in connection with Private Investment in Public Equity (''PIPE'') transactions. In late 2007 and early 2008, however, numerous district courts rejected SEC arguments that covering short positions with PIPE stock violates Section 5 of the Securities Act.[36] In *SEC v. Mangan*, the district court subsequently entered summary judgment in favor of the defendant on the remaining securities fraud claims under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, finding that the information regarding the PIPE transaction was not material.[37] The court rejected the SEC's position that the court evaluate materiality based on market reaction during a window of time prior to the short sale, during which time the SEC alleged information about the PIPE transaction was leaked into the market.[38] The court instead concluded that the materiality of the information concerning the PIPE transaction was to be determined at the time the short sale was executed and, therefore, examined the stock price movement from the time of the trade until the close of the market, during which time the price of stock was rela-

[26] SEC 2008 Report, note 11 *supra*, at 4; Remarks at ''The SEC Speaks in 2009,'' reported in *Enforcement Division Reports on Past Year's Activities*, SEC Today (Feb. 11, 2009) at 1.

[27] *SEC v. Ralph R. Cioffi & Matthew M. Tannin*, Litig. Rel. No. 20625 (June 19, 2008) (available at http://www.sec.gov/litigation/litreleases/2008/lr20625.htm).

[28] *Id.*

[29] *Id.*

[30] *SEC v. Ainsworth, et al.*, Litig. Rel. No. 20768 (Oct. 3, 2008) (available at http://www.sec.gov/litigation/litreleases/2008/lr20768.htm).

[31] *See, e.g.*, Lori Richards, Director, Office of Compliance, Inspections and Examinations, Address at the SIFMA Compliance and Legal Division January General Luncheon Meeting (Jan. 17, 2008) (available at *http://www.sec.gov/news/speech/2008/spch011708lar.htm*); Linda Chatman Thomsen, Director, Division of Enforcement, Regulatory Key Note Address at the Second Annual Capital Markets Summit, U.S. Chamber of Commerce (Mar. 26, 2008) (available at *http://www.sec.gov/news/speech/2008/spch032608lct.htm*).

[32] SEC 2008 Report (available at *http://www.sec.gov/2008annual/SEC_2008annual_trustp2.htm*).

[33] *See, e.g., SEC v. James E. Gansman*, Litig. Rel. No. 20603 (May 29, 2008) (available at http://www.sec.gov.litigation/litreleases/2008/lr20603.htm) (action against former Ernst & Young partner accused of providing material, non-public information learned through his work at Ernst & Young to others who used the information to trade).

[34] *See, e.g., SEC v. Lou L. Pai*, Litig. Rel. No. 20658 (Jul. 29, 2008) (available at *http://www.sec.gov.litigation/litreleases/2008/lr20658.htm*) (settled action against former Chairman and CEO of a division of Enron Corp. accused of selling Enron stock on basis of material, non-public information and ordered to pay $30 million in disgorgement and a $1.5 million penalty).

[35] *See, e.g., SEC v. Matthew C. Devlin*, Litig. Rel. No. 20831 (Dec. 18, 2008) (available at *http://www.sec.giv/litigation/litreleases/2008/lr20831.htm*) (action against nine defendants and three relief defendants alleging that registered representative of Lehman Brothers, Inc. traded on and tipped clients and friends with inside information about 13 impending corporate transactions and was rewarded with cash and luxury items); *SEC v. Mitchell S. Guttenberg*, Litig. Rel. No. 20022 (Mar. 1, 2007) (available at *http://www.sec.gov/litigation/litreleases/2007/lr20022.htm*) (action against fourteen defendants in connection with two alleged insider trading schemes involving insiders at UBS Securities LLC and an attorney at Morgan Stanley & Co., Inc. provided material, non-public information in exchange for kickbacks).

[36] *See, e.g., SEC v. Mangan*, Civ. A. No. 06-CV-531 (W.D.N.C. filed Dec. 28, 2006); *SEC v. Lyon*, Civ. A. No. 06-CV-14338 (S.D.N.Y., filed Dec. 12, 2006); Order in *SEC v. Berlacher*, Civ. A. No. 07-cv-3800 (ER) (E.D. Pa., Feb. 5, 2008).

[37] *SEC v. Mangan*, 2008 WL 3925059, *5 (W.D.N.C. Aug. 20, 2008). On August 18, 2008, Hilary Shane, a former hedge fund manager who had been accused of trading on inside information concerning the same PIPE transaction as the one at issue in *Mangan*, agreed to a deferred prosecution agreement with the Office of the U.S. Attorney for the Southern District of New York. Shane had previously settled charges brought by the SEC and NASD in 2005. Thom Weidlich, *Shane, Ex-Fund Manager, Won't Face Prosecution*, Bloomberg.com, Aug. 18, 2008 (available at http://www.bloomberg.com/apps/news?pid+emailen&refer=funds&sid=aVUZBCH8yTdU).

[38] *SEC v. Mangan*, 2008 WL3925059 at *2-3.

tively stable.[39] The SEC has nonetheless continued to pursue insider trading actions based on non-public information concerning PIPE transactions, including bringing a high profile action against Mark Cuban, in which the SEC has alleged that Cuban sold his entire position, 600,000 shares, in Mamma.com after learning of an impending PIPE offering, avoiding losses in excess of $750,000.[40]

While the SEC has encountered some judicial roadblocks pursuing its PIPE-related insider trading actions, it won a significant victory in the Ninth Circuit in an insider trading case. In *SEC v. Talbot*, the SEC alleged that J. Thomas Talbot, a member of the board of directors of Fidelity National Financial, Inc. (''Fidelity'') traded on confidential information about an impending acquisition of LendingTree, Inc. (''LendingTree''), which he received in his capacity as a director of Fidelity.[41] The district court had entered summary judgment in favor of Talbot, holding that Talbot could only be held liable if he or Fidelity owed a duty of confidentiality to LendingTree, *i.e.*, that Talbot, Fidelity, and LendingTree were ''linked though a continuous chain of fiduciary relationships.''[42] The Ninth Circuit reversed, holding that a continuous chain of duties is not required for liability under the misappropriation theory of insider trading.[43] Rather, the court concluded that it was enough that Talbot breached the duty of confidentiality that he owed to Fidelity.[44]

The SEC also made clear in 2008 that it intends not only to pursue those who engage in insider trading, but also public companies and other market participants that fail to enact, maintain or enforce anti-insider trading policies and procedures. In its first Section 21(a) Report in three years, the SEC discussed its investigation of whether The Retirement Systems of Alabama (''RSA'') violated federal securities laws by purchasing shares of The Liberty Corporation (''Liberty'') on the basis of material, nonpublic information regarding a prospective acquisition of Liberty by Raycom Media, Inc., a company founded by RSA.[45] RSA did not have a compliance officer or any program, policy, practice or training to ensure compliance with federal securities laws, in particular insider trading laws. The SEC concluded that RSA had in fact purchased stock on the basis of material, nonpublic information, and that such trading likely would not have happened had there been a ''reasonable compliance program'' in place at the time of the trading. The SEC stated that it was issuing its report in order to ''emphasize the responsibilities of all investment professionals, including large public retirement systems and other public entities, under the federal securities laws and to highlight the risks they undertake when they operate without a compliance program.''

[39] *Id*. at *4.
[40] *SEC v. Mark Cuban*, Litig. Rel. No. 20810 (Nov. 17, 2008) (available at *http://www.sec.gov/litigation/litreleases/2008/lr20810.htm*).
[41] 530 F.3d 1085, 1087 (9th Cir. 2008).
[42] *Id*. at 1089-90 (quoting *SEC v. Talbot*, 430 F. Supp. 2d 1029, 1049-50 (C.D. Cal. 2006).
[43] *Id*. at 1094.
[44] *Id*.
[45] Securities Exchange Act Rel. No. 57446 (Mar. 6, 2008) (available at *http://www.sec.gov/litigation/investreport/34-57446.htm*).

5. The SEC's Continued Focus on Violations of the Foreign Corrupt Practices Act

Continuing a trend from 2007, in 2008 the SEC aggressively pursued violations of the Foreign Corrupt Practices Act of 1977 (''FCPA''). Although the SEC brought fewer FCPA actions than in 2007—a record year—the SEC assessed markedly higher penalties than in prior years. Indeed, the highest penalty assessed in 2007—$44.1 million assessed against Baker Hughes, Inc.—is dwarfed by the $800 million settlement reached by Siemens AG (''Siemens'') with the SEC and the U.S. Department of Justice (''DOJ'') in December 2008.[46] Indeed, the Siemens settlement is by far the largest payment of fines and disgorgement in the history of the FCPA.

The SEC alleged that Siemens made thousands of payments totaling approximately $1.4 billion to foreign officials around the world in connection with numerous contracts, including the sale of medical devices in China, Russia, and Vietnam, the sale of telecommunication devices in Nigeria and Bangladesh, and the sale of other equipment in Venezuela, China, Israel, China, Argentina, Russia, and Mexico. The SEC's Director of Enforcement at the time, Linda Thomsen, described Siemens' conduct as ''unprecedented in scale and geographic reach.''[47]

While the SEC detailed Siemens' ''widespread and systematic practice of paying bribes,'' its ineffective system of internal controls, and a corporate culture that ''tolerated and even rewarded'' bribery, the SEC also acknowledged Siemens' cooperation and prompt remedial action.[48] In particular, the SEC noted that Siemens' ''massive'' internal investigation and amnesty program were ''essential in gathering facts regarding the full extent of Siemens' FCPA violations.''

The DOJ's settlement papers provide considerably more detail about the magnitude of Siemens' investigation and its amnesty program. The DOJ noted, among other things, that 1.6 million billable hours had been devoted to the internal investigation at a cost of over $850 million, that over 1750 interviews and 800 informational meetings were held, that over 100 million documents had been preserved, and that 127 million accounting records had been reviewed.[49] The DOJ also emphasized that Siemens permitted the law firm conducting the investigation to do so in a completely independent fashion, without limitations as to scope or duration, and that Siemens stressed to all employees that they were to fully cooperate in the investigation. Siemens even es-

[46] *SEC v. Siemens Aktiengesellschaft*, Litig. Rel. No. 20829 (Dec. 15, 2008) (available at *http://www.sec.gov/litigation/litreleases/2008/lr20829.htm*). This amount does not include an additional $569 million to be paid and $285 million previously paid to the Office of the Prosecutor in Munich, Germany. *Id*. In total, Siemens agreed to pay $1.6 billion to resolve the corruption charges. *Id*.
[47] Press Release No. 2008-294 (Dec. 14, 2008) (available at http://www.sec.gov/news/press/2008/2008-294.htm).
[48] *SEC v. Siemens Aktiengesellschaft*, Litig. Rel. No. 20829 (Dec. 15, 2008).
[49] *U.S. v. Siemens Aktiengesellschaf*, Department's Sentencing Memorandum, at 18-19 (filed Dec. 12, 2008) (available at http://www.usdoj.gov/opa/documents/siemens-sentencing-memo.pdf).

tablished an office staffed by 16 full-time employees to facilitate interviews and document collection. With the input of the DOJ, Siemens also designed and implemented a company-wide amnesty program to facilitate the internal investigation. The program created an amnesty period, during which all lower-level employees who disclosed information regarding possible violations of anticorruption regulations were protected by the company against termination or damage claims. For more senior employees (as well as lower-level employees who did not volunteer information during the amnesty period), the Company made individualized leniency determinations. While the SEC has not indicated that this level of cooperation and remediation is expected, the DOJ has stated that the ''reorganization and remediation efforts of Siemens have been extraordinary and have set a high standard for multi-national companies to follow.''

Another emerging trend in the SEC's pursuit of FCPA violations is the SEC's efforts to hold individuals responsible for such violations. One noteworthy case involved the former CEO of Kellogg, Brown & Root, Inc., a wholly-owned subsidiary of Halliburton Company.[50] The SEC charged that Albert Jackson Stanley, over the course of ten years, schemed to bribe Nigerian officials in order to obtain over $6 billion in construction contracts. Stanley consented to the entry of final judgment permanently enjoining him from violating the antibribery, record keeping and internal controls provisions of the Exchange Act. He also agreed to cooperate with the SEC's on-going investigation. In a related criminal proceeding brought by the DOJ, Stanley pleaded guilty to conspiring to violate the FCPA and to commit mail and wire fraud. He faces up to seven years in prison and a fine of $10.8 million.

In its press release, the SEC quoted Acting Assistant Attorney General Matthew Friedrich as saying that ''[t]oday's plea demonstrates that corporate executives who bribe foreign government officials in return for lucrative business deals can expect to face prosecution.''[51]

6. The Ninth Circuit's Reversal of a District Court Opinion Challenging ''Stealth'' Parallel Proceedings

In *United States v. Stringer*, the Ninth Circuit vacated an Oregon federal district court's dismissal of a criminal indictment against three individual defendants charged with criminal violations of federal securities laws,[52] confirming the fear of many targets of SEC enforcement investigations that undisclosed criminal prosecutions may lurk behind SEC investigations.

The district court in *Stringer*, in a decision which received considerable attention, dismissed a criminal indictment against three former executives of FLIR Systems, Inc., finding that the cooperation between the SEC and the Department of Justice in pursuing parallel civil and criminal investigations deprived the defendants of fundamental rights.[53] According to the district court, shortly after the SEC began investigating the defendants in mid-2000, the U.S. Attorney's Office requested access to SEC investigative files pursuant to ongoing investigations by the U.S. Attorney's Office, the Federal Bureau of Investigation and the Department of Justice.[54] The U.S. Attorney's Office identified the defendants as potential targets and determined that prosecution was likely, but asked the SEC to continue to lead the investigation, fearing that disclosure of a criminal investigation would alert the defendants to their exposure to criminal prosecution and jeopardize the opportunity to obtain information.[55]

Throughout the SEC's investigation, the U.S. Attorney's Office remained actively involved: meeting with the SEC, obtaining documents, making requests and even giving advice such as how best to conduct interviews to gather evidence.[56] The involvement of the U.S. Attorney's Office, however, was concealed from the defendants, with, for example, the SEC instructing court reporters not to mention the U.S. Attorney in front of defense counsel.[57]

Prior to testifying before the SEC, defendants were provided copies of SEC Form 1662, which lists among the ''routine uses'' of information provided to the SEC the sharing of information with criminal authorities.[58] When defense counsel specifically inquired as to SEC cooperation with criminal enforcement agencies, the SEC stated that it was its policy to not answer such questions but to refer them to the agency in question.[59]

The district court held that the SEC failed to adequately warn the defendants of the extent of the SEC's cooperation with the Department of Justice, depriving them of due process and Fifth Amendment rights. The court further found that the prosecution abused the investigative process by effectively using the SEC to carry out its criminal investigation rather than conducting a parallel investigation, and also by exploiting conflicts of interest between defendants and their attorney. The court concluded that the government had engaged in ''deceit and trickery'' to conceal the criminal investigation from the defendants.[60] Finding this conduct to be ''so grossly shocking and so outrageous as to violate the universal sense of justice,'' the district court dismissed the indictment.[61]

The Ninth Circuit vacated the dismissal of the indictment, holding that the SEC's investigation was not simply a pretext to pursue a criminal investigation, but was a bona fide parallel investigation because the SEC's civil investigation was opened first, led to SEC sanctions and was conducted pursuant to the SEC's civil enforcement jurisdiction.[62] The Ninth Circuit further held that there was no bad faith on the part of the government or other unusual circumstances warranting dismissal of the indictment, finding that:

[50] *SEC v. Albert Jackson Stanley*, Litig. Rel. No. 20700 (Sept. 3, 2008) (available at http://www.sec.gov/litigation/litreleases/2008/lr20700.htm).

[51] Press Release No. 2008-189 (available at *http://www.sec.gov/news/press/2008/2008-189.htm*).

[52] 535 F.3d 929 (9th Cir. 2008).

[53] *United States v. Stringer*, 408 F. Supp. 2d 1083, 1089 (D. Or. 2006).

[54] *Id*. at 1085.

[55] *Id*.

[56] *Id*. at 1086.

[57] *Id*. at 1085-88.

[58] *Id*. at 1086-87.

[59] *Id*. at 1087.

[60] *Id*. at 1089.

[61] *Id*. (quoting *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991)).

[62] *Stringer*, 535 F.3d at 939.

> There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.[63]

The Ninth Circuit further found that the defendants' waiver of the privilege against self-incrimination were not ineffective as defendants had received sufficient notice of their due process rights because SEC Form 1662 ''alerts SEC investigative witnesses that the information can be used in a criminal proceeding'' and ''the government's request for information could be refused pursuant to the Fifth Amendment's protection against compelled self incrimination.''[64] Moreover, the SEC advised the defendants of their rights against self-incrimination prior to their testimony.[65] Under these circumstances, the court found, ''the possibility of criminal investigation should have been well known to both the defendants and their counsel.''[66]

The Ninth Circuit's decision has undoubtedly dashed the hopes of some in the defense bar while confirming that, absent affirmative misrepresentations, the government can simultaneously conduct civil investigations while pursuing parallel behind the scenes criminal investigations.

7. The SEC's First Market Manipulation Case Based on Spreading False Rumors

The SEC brought its first fraud and market manipulation case based on the intentional spreading of false rumors. In *SEC v. Paul S. Berliner*, the SEC alleged that Berliner, formerly a trader for Schottenfeld Group LLC, disseminated a false rumor about The Blackstone Group's acquisition of Alliance Data Systems (''ADS'').[67] Specifically, the SEC alleged that Berliner sent instant messages to a number of people, including traders at brokerage firms and hedge funds, indicating falsely that ADS's board was meeting to consider a revised proposal from Blackstone to acquire ADS at a much lower price than previously announced. This rumor was picked up by the media and, within 30 minutes, caused the price of ADS stock to drop by 17 percent. The New York Stock Exchange temporarily halted trading and ADS issued a press release announcing that the rumor was false. Berliner short sold ADS stock at the same time he disseminated the rumor and covered those sales as the price of stock began to decline, making approximately $25,000 in profits.

Without admitting or denying liability, Berliner agreed to a consent judgment requiring that he disgorge his profits and interest ($26,129) and pay a third-tier penalty in the amount of $130,000. He also consented to a cease and desist order and a bar from association with any broker or dealer.

[63] *Id*. at 933.
[64] *Id*. at 938.
[65] *Id*.
[66] *Id*. at 941.
[67] Litig. Rel. No. 20537 (Apr. 24, 2008) (available at http://sec.gov/litigation/litreleases/2008/lr20537.htm).

In the press release announcing the charges, the SEC strongly emphasized that this case is indicative of the SEC's future efforts to prosecute the spreading of false rumors. Then SEC Chairman Christopher Cox stated ''The message of this case is simple and direct. The Commission will vigorously investigate and prosecute those who manipulate markets with this witch's brew of damaging rumors and short sales.''[68]

8. The First Circuit's Decision Potentially Expanding the Scope of Primary Liability For Misstatements in Prospectuses

In *SEC v. Tambone*, the First Circuit reversed the district court's dismissal of the SEC's complaint against two officers of an underwriter for a mutual fund family, issuing an opinion that arguably expands the scope of primary liability under the antifraud provisions of the securities laws.[69]

The SEC's complaint alleged that two senior executives of Columbia Funds Distributor, Inc., the principal underwriter for the Columbia Mutual Funds, had violated Section 17(a)(2) of the Securities Act and Section 10(b) of the Exchange Act for using false or misleading fund prospectuses to sell mutual fund shares.[70] Charging both primary and aiding and abetting violations, the SEC alleged that these two individuals approved or knowingly allowed market timing arrangements despite language in the fund prospectuses prohibiting market timing.[71] The district court dismissed the complaint because, among other things, the false statements in the prospectus were not attributable to the defendants.[72]

The First Circuit reversed, holding that, as senior executives of the primary underwriter for the mutual funds, the defendants had a duty to confirm the accuracy and completeness of the prospectuses used by the distributor to sell the funds.[73] In light of that duty, the court concluded that the defendants in fact made implied statements regarding the accuracy and completeness of the prospectuses for purposes of Rule 10b-5.[74] The court acknowledged that Rule 10b-5 only renders it unlawful to ''make'' an untrue statement, but asserted that Rule 10b-5 must be read in conjunction with the text of Section 10(b) of the Exchange Act, which makes it unlawful to ''use or employ'' a deceptive device.[75]

Judge Selya, who dissented with respect to the ruling on Rule 10b-5, described the majority's opinion as a ''radical departure'' and an ''unwarranted usurpation of legislative and administrative authority.''[76] He was particularly troubled by the majority's interpretation of the word ''make,'' accusing the majority of ''casually conflat[ing] this carefully chosen verb ('make') with a very different verb ('use') in order to impose primary liability on defendants who have not 'made' any misstatements but, rather, are alleged to have used prospec-

[68] Press Release No. 2008-64 (Apr. 24, 2008) (available at *http://sec.gov.news/press/2008/2008-64.htm*).
[69] 550 F.3d 106 (1st Cir. 2008)
[70] *Id*. at 110.
[71] Id. at 113.
[72] Id. at 117.
[73] *Id*. at 135.
[74] *Id*. at 131.
[75] *Id*. at 131-32.
[76] *Id*. at 150.

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tuses that contain misstatements by others."[77] Judge Selya further held that "[t]he majority's freewheeling approach blurs the line that the Supreme Court has taken pains to draw between primary and secondary liability with respect to the antifraud provisions of the securities laws."[78]

The court also concluded that the defendants' conduct was actionable under Section 17(a)(2) of the Securities Act, which prohibits individuals from "obtaining money or property by means of any untrue statement."[79] Acknowledging that the court had "previously analyzed section 17(a) claims identically to those made under section 10(b) and Rule 10b-5," the court held that such "treatment does not preclude our recognition that the scope of actionable conduct under the two statutes may be different."[80] The court concluded that it was not limited by the more narrow language of Section 10(b) or Rule 10b-5 requiring that the defendant have made the untrue statement; rather, liability attaches "so long as the statement is *used* 'to obtain money or property,' regardless of its source."[81]

The First Circuit's decision arguably expands the SEC's reach by (1) extending primary liability at least to parties who "use" prospectuses to sell funds if they knew or should have known of false statements in the prospectuses, and (2) confirming that Section 17(a)(2) is broader than Rule 10b-5. By holding that individuals can be liable as primary violators for making "implied statements" through the "use" of others' misstatements, the decision may dramatically expand the scope of primary liability in securities litigation.[82]

9. The Second Circuit's Decision Affirming Dismissal of Indictment Based on Government's Interference With Employer's Advancement of Legal Fees

In *U.S. v. Stein*, the Second Circuit upheld the district court's dismissal of an indictment against 13 former partners and employees of KPMG, LLP ("KPMG").[83] These individuals were indicted in connection with an investigation by the U.S. Department of Justice ("DOJ") into KPMG's alleged involvement in creating and marketing fraudulent tax shelters.[84] The opinion describes pressure placed on KPMG by the DOJ to cooperate with the investigation in accordance with the factors set forth in the Thompson Memorandum, particularly as it related to advancement of attorneys' fees.[85]

The Thompson Memorandum had set forth a number of principles governing the DOJ's decisions to bring actions against businesses, such as KPMG. A company's cooperation was included among these considerations, and the Thompson Memorandum states that prosecutors may consider "whether the corporation appears to be protecting its culpable employees and agents" by promising support to such employees, including through the advancing of attorneys' fees.[86]

KPMG adopted a policy of capping the amount of attorneys' fees advanced to each employee under investigation, conditioning the advancement of fees on the employee's cooperation with the government, and terminating the fees if informed by the government that the employee was not fully cooperating, *e.g.*, invoking the Fifth Amendment privilege against self-incrimination.[87] The Second Circuit described the government's involvement in the formation and execution of this policy including expressing disappointment with KPMG's first advisory memorandum to certain of its employees not identified as targets which encouraged the employees to cooperate with the government but also advised them that it might be advantageous for them to exercise their right to counsel and that KPMG would cover reasonable fees.[88] The government accused the memorandum of being "one-sided" and demanded that KPMG send out a supplemental memorandum advising that employees could deal directly with the government without counsel.[89] In addition, the government regularly reported to KPMG whenever an employee was not fully cooperating, knowing that KPMG would pressure the employee to speak with prosecutors through threats of cutting off attorneys' fees or termination.[90]

The partners and employees ultimately indicted moved to dismiss the indictment based on the government's interference with KPMG's advancement of fees.[91] After some procedural wrangling, the district court ultimately granted the motion to dismiss, holding that the government violated the defendants' right to substantive due process and that the prosecutors' conduct "independently shock[s] the conscience."[92]

The Second Circuit affirmed the dismissal of the indictment, holding that KPMG's policy as to advancing attorneys' fees constituted state action because it was the direct result of the government's "overwhelming influence" and that "the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment . . . ."[93]

On the same date that the Second Circuit issued its opinion in *U.S. v. Stein*, Deputy Attorney General Mark Filip issued a statement announcing that the DOJ had substantially revised its policies with regard to charging corporations with crimes, and expressly revoking the policies with regard to advances of attorneys' fees to employees at issue in *Stein*.[94]

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[77] *Id.*
[78] *Id.* at 151.
[79] *Id.* at 125-26.
[80] *Id.* at 127.
[81] *Id.*
[82] On February 23, 2009, the First Circuit denied panel rehearing of the decision, but asked the SEC, interested *amici* and the defendants to submit briefs on whether rehearing *en banc* should be granted on the issue of the scope of liability for implied statements under Section 10(b), including specifically whether the panel decision would apply to private actions for damages.
[83] 541 F.3d 130, 135-36 (2d Cir. 2008)
[84] *Id.* at 137.
[85] *Id.* at 137-39.
[86] *Id.* at 136.
[87] *Id.* at 138-39.
[88] *Id.* at 138.
[89] *Id.*
[90] *Id.* at 138-39.
[91] *Id.* at 140.
[92] *Id.* at 142 (quoting *U.S. v. Stein*, 495 F. Supp. 2d 390, 412-15 (S.D.N.Y. 2007)).
[93] *Id.* at 136.
[94] Mark R. Filip, Deputy Attorney General, Remarks Prepared for Delivery at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008) (available at

10. The Eleventh Circuit's Decision Upholding Penalties and Disgorgement Despite Defendant's Claimed Inability to Pay

In *SEC v. Warren*, the Eleventh Circuit affirmed a district court's decision granting summary judgment in favor of the SEC as to the amount of a civil penalty and disgorgement, notwithstanding the defendants' claimed inability to pay.[95]

The defendant had entered into a consent order with the SEC which stipulated that Warren would pay a civil penalty, disgorgement, and pre-judgment interest, but did not stipulate as to the amount of liability, which was to be determined by the court.[96] The consent order further provided that if Warren furnished a sworn statement that he was unable to pay, the SEC could elect to waive his liability.[97] Warren subsequently submitted financial statements, showing that he had over $150,000 in real estate equity and approximately $10,000 in monthly income.[98] The SEC did not elect to waive the liability and, instead, moved for summary judgment as to the amount of liability.[99] The district court granted summary judgment for the SEC and ordered disgorgement in the amount of $6.4 million, pre-judgment interest in the amount of approximately $1.99 million, and a $75,000 penalty.[100]

The defendant argued that the SEC had acted in bad faith by not waiving penalties and that summary judgment was not warranted because there were questions of fact as to his inability to pay and the SEC's good faith.[101] Rejecting defendant's arguments in their entirety, the Eleventh Circuit issued a *per curiam* opinion affirming the district court's decision, and holding that a defendant's inability to pay is at most a factor to be considered in imposing a penalty, but ''nothing in the securities laws expressly prohibits a court from imposing penalties or disgorgement in excess of a violator's ability to pay.''[102] The court noted that, even if inability to pay was decisive, the defendant's financial statement showed that he had some assets and regular income and therefore could pay a substantial judgment.[103] The court held that such a financial statement established that the SEC had a good faith basis for not waiving penalties.[104]

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http://www.justice.gov/archive/dag/speeches/2008/dag-speech-0808286.html).

[95] 534 F.3d 1368, 1370 (11th Cir. 2008).

[96] *Id*. at 1369.

[97] *Id*.

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] *Id*.

[102] *Id*. at 1370.

[103] *Id*.

[104] *Id*.

   ISSN 0037-0665