COUGHLIN DUFFY LLP

ATTORNEYS AT LAW

Financial and Securities Litigation Update: Trending, Scandals and More

11 October 2012

Suzanne C. Midlige, Esq.
Sally A. Clements, Esq.

350 MOUNT KEMBLE AVENUE
P.O. BOX 1917
MORRISTOWN, NEW JERSEY 07962-1917
PHONE: (973) 267-0058
FACSIMILE: (973) 267-6442

WALL STREET PLAZA
88 PINE STREET, 28TH FLOOR
NEW YORK, NEW YORK 10005
PHONE: (212) 483-0105
FACSIMILE: (212) 480-3899

WWW.COUGHLINDUFFY.COM

TABLE OF CONTENTS

Page

Table of Contents i

I. Introduction 1

II. Securities Litigation Trends 1

A. Securities Class Action Filings Trends – Interpreting Conflicting Data 1
B. 2012 Filing Trends For Securities Class Actions – Differing Reports 2
1. Advise And Cornerstone Report New Securities Class Actions Decreasing 2
2. Nera Reports New Securities Class Actions Increasing 2

C. Market Capitalization – Differing Reports 2
D. Suits Against Chinese Firms – Differing Perspectives & Future Projections 3
E. Experts Agree That Subprime Claims Are Waning 4
F. Settlement Trends In Securities Class Actions 5
1. 2012 Average Settlement Amount Increased 5
2. Significant Third Quarter 2012 Settlements 5
a. Citigroup $590 Million Settlement 5
b. Bank of America $2.43 Billion Settlement 6
G. FDIC Claims Against Failed Banks 7
H. ERISA Litigation Filing Trends And The *AMARA* Decision 8

III. FINANCIAL SECTOR SCANDALS IN 2012 10

A. LIBOR Rate Fixing Scandal 10
B. Peregrine Financial Group Embezzlement Scandal 12
C. Capital One Fine & Disgorgement of Profits 13
D. Facebook/NASDAQ IPO Debacle 14
E. MF Global Collapse – Employees Tap Into Customers' Funds 15

F. Bear Stearns Alleged Fraud Results In New Suit Against JP Morgan Chase 17
G. Ponzi Schemes – Persistent And Evolving 18
a. R. Allen Stanford Sentenced For $7 Billion Ponzi Scheme 18
b. Claims Against The Sec In Connection With The Stanford Scheme Will Go Forward 19
c. Madoff Ponzi Scheme – Distribution To Investors And Status Of Suits And Claims 20
d. Online Ponzi Schemes – ZeekRewards.com 21

IV. Regulatory & Litigation Update 23

A. Dodd-Frank Update 23
B. Supreme Court To Address Fraud On The Market Allegations For Class Certification 24

V. Conclusions 26

I. Introduction

We are entering a period of uncertainty as to the future direction of financial and securities litigation. Experts agree that the number of new suits relating to the credit crisis is waning, but no one is certain from where the next big wave of suits will originate. For two years, securities suits against Chinese companies dominated the statistics, but such claims are reaching a plateau and decreasing both in number and as a percentage of all filed securities class actions. We may be in a transition year in which the new wave will make itself known.

One possible source of the next wave of securities litigation in the U.S. is the LIBOR rate-fixing scandal in the U.K. that has already fueled suits against banks across the globe. In this paper, we review the details of this scandal and the resulting suits as well as the other key scandals that are making headlines and forming the basis of civil suits against financial institutions and others. We also provide an update on recent and upcoming court decisions and the Dodd-Frank Act that may likewise impact the filing rate of securities class actions in coming months and years.

II. Securities Litigation Trends

A. Securities Class Action Filings Trends – Interpreting Conflicting Data

Following the crash of the U.S. stock market in 2008, experts unanimously reported that securities class action claims, including stock drop and breach of fiduciary duty claims in connection with significant subprime losses, were increasing. In subsequent years, the experts tracking statistics on state and federal lawsuit filings have agreed on the trends in place in certain respects and have disagreed in others.

B. 2012 Filing Trends for Securities Class Actions – Differing Reports

Whether filing rates for securities class actions are trending up or down over the last 12 months depends on the particular statistics and the types of claims that are included in the counts. Because of the way they collect and count suits, some experts are showing the claim trends declining, while others show the filing rates remaining stable or increasing slightly.

1. Advisen and Cornerstone Report New Securities Class Actions Decreasing

Economic consulting company Advisen's quarterly report on securities litigation (other than class actions) for the second quarter of 2012, reports that new securities suits filed in the second quarter of 2012 "tumbled" to 412 from 447 in the prior quarter (859 for the half year, annualized by Advisen to 1,648).[1] However, the annualized rate of 224 securities class actions is reported to be "on par" with the number filed in 2011.[2]

Similar to Advisen's results, Cornerstone Research reports in its mid-year assessment that there has been a slight decrease in securities class action filings from the first half of 2012 (88 annualized to 176) as compared to 2011 (197).[3]

2. Nera Reports New Securities Class Actions Increasing

Nera Economic Consulting's Mid-Year Review, issued 24 July 2012, reports federal securities class action filings to be increasing slightly from the levels over the past three years.[4] Nera reports 208 such cases filed in 2009, 232 in 2010 and 224 filed in 2011. In the first half of 2012, 116 securities class actions suits (annualized to 232) were filed in federal court.[5] This is an increase of eight such suits over the 2011 filings and 24 over the 2009 filings.

C. Market Capitalization - Differing Reports

Just as the leading experts differ on the number of filed actions and their interpretation of their respective results, these experts also have differing views on the market capitalization

losses of the newly filed securities class actions. By market capitalization losses we are referring to the claimed damages, or losses the class members claim as a result of the alleged securities violations by the defendants. Advisen reports that "the aggregate and average market capitalization losses shot up in 2008 and 2009, remained high in 2010 and 2011, but dropped substantially in 2012."[6]

Cornerstone reports a slight increase in its Maximum Dollar Loss Index (defined as the dollar value change in the defendant firm's market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period) in the first half of 2012 from 2011 levels.

Nera reports a slight increase in aggregate investor losses claimed in federal securities actions (limited to those alleging violation of Rule 10b-5, Section 11 or Section 12) filed in the first half of 2012, from the levels reported in 2011 filed actions.[7] However, Nera reports a significant increase in the median investor losses in the first half of 2012 for similar suits. The increased median investor loss indicates that the investor losses for a particular case have increased for new filings in 2012.

D. Suits against Chinese Firms - Differing Perspectives & Future Projections

We also see a difference of opinion between the leading experts on the makeup of the securities litigation defendants over the past six months to a year. Nera has documented a decrease in securities class action lawsuits filed against Chinese companies. Such suits were filed in record numbers in 2010 (15 suits) and 2011(38 suits), however only 10 such suits (annualized to 20) were filed in the first half of 2012.[8] This drop-off in filings is attributed to the stricter documentation requirements for listing in the U.S. through reverse mergers (merger of a Chinese company with an existing U.S. company) and the "flurry of filings" against Chinese

companies in recent years that make U.S. listings less attractive.[9] Similarly, Cornerstone also documents a decrease in the securities class actions against Chinese companies. They document 40 such suits filed in 2011, and 12 filed in the first half of 2012 (annualized to 24).[10]

Advisen, on the other hand, reports that cases in U.S. courts against companies from China "mushroomed in 2010 and 2011, and remained elevated in 2012."[11] Advisen reports 28 suits filed in 2010, and 74 suits filed in 2011. They report 33 suits against Chinese companies in the first half of 2012 (annualized to 66). While this is a slight decrease from 2011, it supports Advisen's view that filing rates against Chinese companies remain elevated in view of the increased number of Chinese companies that have chosen to list their stock on U.S. exchanges.

According to The Wall Street Journal, "[i]t has been a rocky year for deals in Asia. The European sovereign-debt crisis and slowing growth in China have been swords of Damocles hanging over investors as they try to keep the Asian wealth engine churning. IPOs have been delayed, scaled down, even canceled, while some banks have cut staff."[12] This slowdown in Asia may ultimately impact the level of securities litigation in the U.S. against Chinese companies in coming periods.

E. Experts Agree that Subprime Claims are Waning

Claims related to the collapse of the subprime mortgage market were predicted to be the next big claim type, perhaps even the next "asbestos" of the U.S. litigation landscape. It is almost universally accepted at this point that the subprime claims are waning and other claims are taking the lead in percentage claims. Nera reports that only four credit crisis claims (annualized to eight) have been filed so far in 2012.

F. Settlement Trends in Securities Class Actions

1. 2012 Average Settlement Amount Increased

The Nera and Advisen reports discussed above both track average settlement amounts for securities class actions and both agree that the average settlement amount for such suits increased in the first half of 2012 from the averages in 2011. Of course, the reports differ in their calculated amounts. Nera reports that the average settlement in the first half of 2012 was $71 million.[13] Advisen reports that the average settlement was $40.9 million.[14] It should be borne in mind that the fortuity of the date of a particular settlement can significantly affect the calculated average and the experts' various methods of including or excluding settlements can also significant affect the results. With that said, Nera suggests comparison of the median settlement amounts as they are "more robust to extreme observations than are averages." Nera reports the median settlement value in the first half of 2012 to be $7.9 million, just slightly up from the $7.5 million reported for 2011.[15]

2. Significant Third Quarter 2012 Settlements

Two recent settlements are likely to significantly affect the third quarter 2012 average settlement figures. In August 2012, Citigroup reported a $590 million settlement of a securities class action suit brought by shareholders alleging misrepresentations as to Citigroup's exposure to subprime mortgage debt. Additionally, it was reported in September 2012, that Bank of America reached a $2.43 billion settlement with its investors to resolve claims that it misled investors in its 2009 acquisition of Merrill Lynch & Co ("Merrill Lynch")

a. Citigroup $590 Million Settlement

On 29 August 2012, Citigroup settled a class action suit brought by shareholders alleging that Citigroup misled investors as to its exposure to subprime mortgage debt.[16] Citigroup agreed

to pay $590 million, one of the largest subprime related settlement amounts,[17] to settle the suit that had been pending since late 2007.

Lead plaintiff in the class action was David Whitcomb, founder of Automated Trading Desk LLC ("ATD"). Whitcomb and other shareholders of ATD received Citigroup stock when Citigroup bought ATD in 2007. Other class members include the Public Employee's Retirement Association of Colorado and Pensionkasernes Administration A/S, a Danish pension fund manager.[18] Plaintiffs alleged that Citigroup tried to conceal the deteriorating value of its holdings by improper accounting practices, specifically alleging that "Citigroup used inflated, unreliable and unsupportable marks to keep its C.D.O.-related quasi-Ponzi scheme alive and to give the appearance of a healthy asset base."[19]

Citigroup's $590 million settlement follows the $360 million Citigroup agreed to pay to settle civil mortgage securities actions brought by U.S. regulators.

b. Bank of America $2.43 Billion Settlement

On 28 September 2012, Bank of America ("BofA") reportedly agreed to pay $2.43 billion to settle a shareholder class action relating to BofA's purchase of Merrill Lynch & Co. in 2008.[20] This settlement is reportedly <u>the</u> <u>largest</u> settlement of a financial crisis-related shareholder class action.[21]

In this action, plaintiffs alleged that BofA and certain of its officers made false or misleading statements about the financial health of BofA and Merrill Lynch. This settlement is BofA's eleventh settlement agreement and brings the bank's total legal payouts to more than $29 billion (although not all in cash).[22] Most of the claims have stemmed from its purchase of Merrill Lynch for $19 billion and Countrywide Financial Group (a significant subprime lender) for $2.5 billion.[23]

The BofA settlement also ranks as the eighth largest securities class action settlement of all time.[24] For comparison, the Enron settlement with shareholders was $7.2 billion and the WorldCom settlement with shareholders was $6.1 billion.[25]

G. FDIC Claims Against Failed Banks

The first half of 2012 saw a decrease in the number of failed U.S. banks. The Federal Deposit and Insurance Agency ("FDIC") reports 31 failed institutions during this period (for an annual total of 62). This continues the declining trend from 157 in 2010 and 92 in 2011.[26] As the receiver for these failed institutions, the FDIC is empowered to file suits against professionals who played a role in the failure, including officers and directors, attorneys, accountants, appraisers, brokers, or others.[27] The FDIC can also bring direct actions against insurers such as fidelity bond carriers and title insurance companies.[28] From 2010 through August 2012, the FDIC filed 32 lawsuits with 14 filed in 2012.[29]

The FDIC's claims against directors and officers typically allege negligence, gross negligence, and breach of fiduciary duty.[30] A number of additional such suits may also be filed in upcoming months based on FDIC statistics that demonstrate that in the first nine months of 2012, the FDIC authorized suits against 244 directors and officers of failed financial institutions. This results in an annualized number of 325 target defendants, a significant increase from the 264 authorized in 2011. Given the number of authorized suits and the failed institution statistics over the past few years, we can expect a continuation, if not an increase, in the FDIC filing rate for suits against directors and officers of failed banks.

The FDIC has also recently filed suits against large investment banks and their subsidiaries seeking damages the failed institutions suffered as a result of residential mortgage backed securities ("RMBS") purchased by these institutions. The FDIC has filed 11 such suits

between the period of May and September 2012.[31] The defendants include 15 major firms, including underwriters and issuers of mortgage backed securities.[32] In these actions, the FDIC alleges the defendants made untrue or misleading statements about: a) the loan-to-value ratios of the mortgage loans in the RMBS market; b) the occupancy status of the properties that secured the mortgage loans in the collateral pools; c) the underwriting standards of the originators of the mortgage loans in the collateral pools; and d) the ratings of the RMBS securities.[33] The total damages sought in these suits are $92 million.[34]

The FDIC is also directly suing D&O insurers for coverage for failed banks. Insurers have raised the "insured versus insured" exclusion in these policies where the FDIC is a receiver for the failed bank, and arguably an insured, suing the insured director or officer. Insurers are also asserting regulatory and fraud or dishonesty exclusions, where applicable.[35]

H. ERISA Litigation Filing Trends and the *Amara* Decision

Litigation under the Employee Retirement Income Security Act ("ERISA") has increased significantly over the last decade. Most of these suits follow the filing of securities suits and stem from declines in the value of employer stock offered in corporate-defined contribution plans. Approximately 21 such suits, termed "stock drop" cases, have been filed each year between 2002 and 2011 with fluctuations in the numbers based on the variations in the stock market. Consistent with this rule, the number of stock drop cases filed this year, in a strong stock market period, have been greatly reduced with only six cases having been filed in 2012 through the end of August.

In May 2011, the U.S. Supreme Court handed down a decision in an ERISA benefits action that may have far-reaching effects on the future of ERISA litigation concerning the terms of employee benefit plans. In *Cigna Corp. v. Amara*, 131 S.Ct. 1866 (2011), the Supreme Court

significantly broadened the scope of relief available to plaintiffs under the ERISA statute. Prior to this decision, the vast majority of federal judicial circuits held that plaintiffs were not entitled to reformation of the benefits plan but could only seek monetary damages for breach of plan provisions. In *Amara*, the Supreme Court held that ERISA § 502(a)(1)(B) [29 U.S.C. §1132(a)(1)(B)], which provides that a "civil action may be brought by a plan participant or beneficiary … to recover benefits due to him under the terms of his plan," did not authorize the District Court to reform the employee benefit plan to conform to CIGNA's representations as to its terms.[36] However, the Court held that ERISA § 502(a)(3) [29 U.S.C. § 1132(a)(3)] could support the District Court's reformation of the plan.[37]

Section 502(a)(3) provides that a civil action may be brought:

> By a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) **to obtain other appropriate equitable relief** (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.
>
> [29 U.S.C. §1132(a)(3)(emphasis added)]

The Supreme Court held that the above section 502(a)(3) authorizes "appropriate equitable relief" for ERISA violations that would permit the District Court to employ any of the categories of relief that were typically available in the U.S. courts of equity.[38] The Court found that such typically available remedies would include reformation of the plan, estoppel to reform the plan to conform to the terms promised by CIGNA, and surcharge to allow a monetary payment to compensate the plaintiffs for CIGNA's breach of its fiduciary duties.[39] The Court further clarified that to receive a reformation or surcharge remedy, i.e. for the payment of money damages, the class members need not show detrimental reliance on CIGNA's representations as to the terms of the Plan. The class members need only show actual harm, and that such actual

harm could be shown by the loss of a right protected by ERISA or its trust-law antecedents. The Court even posited that an individual employee need not have seen the actual Plan summary documents, "for they might have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful."[40] This holding eases the proof requirements for employees in such plan cases.

The *Amara* decision potentially increases the number of ERISA suits that can be brought by employees to enforce or change employee benefit plans. Previously, claimants could only bring suits to enforce plan provisions, but now the scope of available remedies has been broadened to allow courts to reform specific plan provisions. The *Amara* decision also eases the standard to receive monetary damages by allowing a showing of loss of a right under ERISA rather than specific detrimental reliance that would be difficult to prove for all class members.

III. Financial Sector Scandals in 2012

A. LIBOR Rate Fixing Scandal

Clearly, the scandal of the year in both the U.S. and the U.K., and the one that may have the most far-reaching impact on financial institutions and others as well as their insurers, is the LIBOR rate fixing scandal. The story began with a Wall Street Journal investigation in 2008 and evolved into a global scandal in June 2012, with the disclosure by Barclays Bank that it had reached a $450 million settlement with U.K. and U.S. regulatory authorities for allegedly manipulating the LIBOR rate.

The British Bankers' Association ("BBA"), a private association representing U.K. banks, created LIBOR (that stands for London Interbank Offered Rate) in 1986 "as a tool to help its members set interest rates on big corporate loans that are issued collectively by multiple banks."[41] The member banks were apparently struggling to determine the rates for such loans.

The BBA undertook to collect the rates charged by banks on inter-bank loans. The LIBOR was then established as the average of the collected rates and currently serves as the basis for interest rates on trillions of dollars in lending.[42] In later years, it was issued in other currencies across the globe. The rate fixing scandal centers on evidence that one or more financial institutions falsely understated their applicable rates to mask their financial problems. As a result of this mis-reporting, the LIBOR may have been set artificially low.[43]

U.S. suits concerning LIBOR rate fixing began even before the 20 June 2012 announcement of Barclay's $450 million settlement, but have reportedly increased significantly following the announcement. The majority of U.S. suits brought against financial institutions are antitrust suits. Over 20 such suits have been consolidated into a Multi-District Litigation venued in the Southern District of New York and styled *In re: Libor-Based Financial Instruments Antitrust litigation* (MDL No. 2262). Shareholder derivative actions have been filed against Bank of America and Citigroup alleging breach of fiduciary duty by the directors and officers of both for failure to provide oversight with respect to LIBOR. Holders of Barclays American Depository Receipts ("ADRs") filed a class action suit against Barclays, its former CEO Robert Diamond and former Chairman Marcus Agius in July 2012. The putative class in this action includes purchasers of Barclays ADRs from 10 July 2007 to 27 June 2012. Berkshire Bank also recently filed a class action fraud suit in New York against 16 banks alleging that because Libor was fraudulently depressed, it and other New York banks in the putative class lost money in issuing loans at lower rates than they would have if the LIBOR rate had not been artificially depressed.[44]

Regulatory authorities in the U.S., Switzerland, Japan and the United Kingdom have ongoing investigations and criminal investigations have also begun. A number of financial

institutions have agreed to enter into tolling agreements with U.S. agencies as statute of limitation deadlines under various U.S. laws are reportedly approaching.[45] These institutions are agreeing to the proposed tolling agreements to avoid the filing of these agency suits that may also subject them to additional civil suits.

The ultimate impact to the target defendants and their insurers is uncertain at this time. Specific exclusions may preclude coverage under D&O and other policies for the alleged antitrust violations, but staggering defense costs will likely be an early issue in these cases. Criminal charges may also implicate fiduciary bond policies for financial institutions and insurers should be mindful of their potential liability on that front as well. We will be monitoring the filings in this area.

B. Peregrine Financial Group Embezzlement Scandal

One of the most dramatic U.S. financial scandals of 2012 is the alleged $200 million fraud committed by Peregrine Financial Group's former Chief Executive Russ Wassendorf, Sr. Following a failed suicide attempt at which he left a note confessing to a 20-year fraud on Peregrine investors, the 64-year old Wassendorf was charged with "mail fraud, embezzling customer funds and making false statements to two regulatory agencies."[46] Wassendorf built the Peregrine Financial Group over decades and was a respected businessman and philanthropist until this scandal broke. On 17 September 2012, Wassendorf pleaded guilty to all counts and faces up to 50 years imprisonment. Wassendorf claims that he acted alone in the fraud, however his son alleges in a recently filed suit that a woman claiming to work for a U.S. bank assisted in the fraud.

Wassendorf's request to be released on bail pending his sentencing was denied. Prosecutors claimed "[i]f even the smallest portion of such a vast amount of money were hidden

away, it could be all (the) incentive and means that defendant might need to flee a probable life sentence."[47] A magistrate judge in Iowa had recommended his release as Wassendorf's "chances to flee were limited because he had surrendered his passport and assets to authorities."[48] However, Judge Linda Reade of the U.S. District Court for the Northern District of Iowa ruled that Wassendorf would remain incarcerated until further order of the court.[49]

Peregrine Financial Group filed for bankruptcy protection this July and investors have been unable to access funds that have been frozen by the bankruptcy proceedings. The bankruptcy trustee has begun selling Wassendorf's personal assets, including his jet, his Chicago and Iowa homes, his 4,000-bottle wine collection, an upscale restaurant he owned in Iowa and Peregrine's $20-million headquarters. Peregrine's financial trustee has confirmed the existence of only $181 million in customer funds out of the $400 million recorded in company records.[50]

C. Capital One Fine & Disgorgement of Profits

U.S. consumer bank, Capital One, has agreed to pay a $210 million fine to resolve an enforcement action brought by the newly created U.S. Consumer Financial Protection Bureau ("CFPB"). The CFPB alleged that Capital One employees at call centers pressured and misled consumers into paying for "add-on products" including payment protection and credit monitoring. Capital One employees allegedly misled customers by saying the add-on products would improve their credit scores or by falsely telling them the products were free. Of the $210 million fine, $150 million will be reimbursed to customers. The remaining penalty will be paid to both the Office of Comptroller of the Currency and the CFPB. CFPB Director Richard Cordray advises that he anticipates bringing actions against other banks over similar tactics.[51]

D. Facebook/NASDAQ IPO Debacle

The 18 May 2012 Initial Public Offering of the global social media site, Facebook, was highly anticipated but quickly turned into the debacle issuance of the year, sparking lawsuits against founder, Mark Zuckerberg, underwriters and NASDAQ, the listing exchange.

Suits against Facebook and Zuckerberg include allegations that negative information concerning its advertising model for mobile users in light of increased mobile use of the Facebook site were provided only to underwriters, and that its offering Prospectus was not amended until 9 May 2012, nine days before the $16 billion IPO.[52] Reports claim that in February 2012, the Securities and Exchange Commission ("SEC") wrote to Facebook, CFO David Ebersman, noting: "Assuming that the trend toward mobile continues and your mobile monetization efforts are unsuccessful, ensure that your disclosure fully addresses the potential consequences to your revenue and financial results rather than just stating that they 'may be negatively affected.'"[53]

Suits against NASDAQ allege that technical glitches in NASDAQ's trading systems caused investor losses. NASDAQ reportedly changed its IPO procedures the night before the Facebook IPO to allow orders to be captured beginning at 7:00 EST rather than only in the 15 minute pre-opening bookbuilding phase. The greater number of orders that were gathered during this extra time "exposed a software glitch that gummed up the IPO trading."[54] These trading errors allegedly created market uncertainty and caused investor losses.[55] The technical malfunctions also allegedly caused investors' systems to re-enter orders multiple times, leaving investors with "huge positions of unwanted stock."[56] Investors and financial firms allegedly lost a collective $500 million on Facebook shares they were unable to sell or needed to take back from angry investors.[57] NASDAQ CEO, Bob Greifeld, was also apparently unavailable for a

five-hour period during the trading day as he flew from California to New Jersey and missed a call from the SEC Chairman, Mary Schapiro concerning the Facebook IPO.[58]

NASDAQ has been severely criticized for its response to the claims concerning the Facebook IPO. Its initial offer of $40 million in cash and discounted trading fees for future trades was described by UBS, which allegedly lost $350 million, as "woefully inadequate" and by Citigroup, which allegedly lost $20 million, as "insufficient and poorly constructed."[59] NASDAQ increased its offer to $62 million in cash in July 2012. The SEC's review of the proposal has been extended and may not be concluded until 2013.[60]

Plaintiffs and defendants in the private suits against Facebook and NASDAQ have jointly requested that the Multi-District Litigation panel agree to consolidate dozens of suits brought in New York, California and Florida to be heard before Judge Robert Sweet in the U.S. District Court for the Southern District of New York who already has been assigned to hear the New York venued cases.[61] Facebook has reportedly been named in 29 of the 53 securities class actions filings related to IPOs so far in 2012.[62] Reports also predict hundreds of arbitration actions to be initiated by investors against brokers and securities firms that "pitched" the Facebook IPO shares.[63] Some investors may delay bringing any action, however, until the NASDAQ offer is finalized.[64] Facebook share price opened at $20.57 per share on 28 September 2012, down approximately 46% from the $38.23 IPO offering price.

E. MF Global Collapse – Employees Tap Into Customers' Funds

In October 2011, the commodities' brokerage firm MF Global collapsed and filed for bankruptcy following large losses on bets made on European sovereign debt. The bankruptcy revealed that approximately $1.6 million was allegedly missing from MF Global customer accounts and a federal investigation ensued. In addition to the large sums at issue, U.S.

headlines featured the prominent Chief Executive of MF Global, former New Jersey Senator Jon Corzine, the alleged engineer of the failed $6.3 billion European investment. This investment reportedly worried investors, counterparties and audit rating agencies, which resulted in rating changes that triggered additional capital requirements. MF Global allegedly could not meet these capital requirements without dipping into customer accounts that were required to be maintained separately from fund accounts.[65] Federal authorities were under public pressure to bring criminal charges against Corzine given the amounts lost.[66] Also, the demographics of MF Global investors were headline-grabbing given that they included U.S. ranchers and farmers, who invested heavily in futures contracts to hedge against losses, as well as individual retirement investors.[67] In fact, the U.S. Senate Agriculture Committee has been involved in the investigation of MF Global.

Over the past year, the possibility of criminal charges being brought against Corzine has decreased. Corzine has denied knowledge of the shortfall in customer accounts until hours before the bankruptcy filing and denied "directing anyone to break rules related to customer funds protection."[68] Prosecutors are also likely to face allegations that "a chaotic torrent of requests for money overwhelmed employees who didn't know customer funds were at risk." [69] As the criminal investigation is nearing a close, it is instead expected that the government authorities, specifically the Commodity Future Trading Commission and the SEC, will shortly file civil actions seeking fines and penalties against Corzine and MF Global executives.

A number of private civil suits have also been filed against Corzine and other executives of MF Global. According to the MF Global bankruptcy trustee, insurance coverage for such suits is "dwindling" with a resulting impact on the amounts that can be recovered through such suits.[70] Additionally, a 5 September 2012 bankruptcy court ruling allows the bankruptcy

trustee's claims against Corzine and the other executives to be joined to a pending class action suit brought by MF Global customers. According to a spokesman for the trustee "[w]e think this will bring tremendous efficiencies and will jump-start the discovery and the prosecution of the claims against Corzine and others."[71] The availability of insurance proceeds will not affect the government's impending civil actions that will seek fines and penalties not typically covered by otherwise applicable insurance.[72]

F. Bear Stearns Alleged Fraud Results in New Suit Against JP Morgan Chase

In late-breaking news, on 1 October, 2012, New York Attorney General Eric Schneiderman, filed a civil lawsuit against JP Morgan Chase in connection with alleged fraud claims directed to its Bear Stearns unit. The suit is the first to be filed as a result of the Residential Mortgage-Backed Securities Working Group formed by President Obama to investigate the pooling and sale of mortgage-backed securities.[73] The suit alleges that in Bear Stearns' sale of mortgage-backed securities, there was a "systematic abandonment of underwriting guidelines" and due diligence was compromised "in order to increase their volume of securities."[74] Investors allegedly lost $22.5 billion on the securities sold by Bear Stearns. Additional similar suits are expected as a result of the efforts of this working group.

JP Morgan had purchased Bear Stearns for $10 per share in March 2008 at the U.S. Government's request when Bear Stearns was reportedly facing severe liquidity problems and was at risk of collapse.[75] In June 2012, JP Morgan settled for $275 million a shareholder class action alleging that Bear Stearns had masked the firm's failing health in the year and a half prior to its sale to JP Morgan.[76]

G. Ponzi Schemes – Persistent and Evolving

Ponzi schemes are named after Charles Ponzi, a con-man who promised huge returns to investors in foreign postage coupons in 1919 but instead paid original investors with the sums received from subsequent investors.[77] Ponzi's scheme eventually collapsed and he was sentenced to prison and later deported to Italy penniless. He died in a charity ward in a Brazilian hospital at the age of 66.

In the last few years, the schemes of several famous contemporary U.S. Ponzi scheme artists have collapsed and their masterminds have been sentenced to or are serving prison terms as a result. On the SEC's website, the agency touts its success in discovery of such schemes and vigorous prosecution of the relevant parties. "Since the fiscal year 2010, the SEC has brought more than 100 enforcement actions against nearly 200 individuals and 250 entities for carrying out Ponzi schemes. In these actions, more than 65 individuals have been barred from working in the securities industry. The SEC has also worked closely with the U.S. Department of Justice and other criminal authorities on parallel criminal and civil proceedings against Ponzi scheme operators."[78] Several headline-grabbing developments related to Ponzi schemes and their engineers are outlined below.

a. R. Allen Stanford Sentenced for $7 Billion Ponzi Scheme

In 2009, R. Allen Stanford was arrested for masterminding one of the largest Ponzi schemes in U.S. history. Allen reportedly used $7 billion from investors in certificates of deposit issued by his Caribbean bank, Stanford International Bank, to fund "a string of failed businesses, bribe regulators and pay for a lavish lifestyle that included yachts, a fleet of private jets and sponsorship of cricket tournaments."[79] This fraud allegedly spanned 20 years and affected

30,000 investors in 113 countries.[80] Civil actions have been brought against the corporate entities as well as attorneys and law firms allegedly involved in the scheme.[81]

Stanford was convicted in March 2012 of 14 fraud-related counts.[82] On 14 June 2012, he was sentenced to a prison term of 110 years.[83] Prosecutors had asked for a term of 230 years, the maximum sentence possible. Stanford's counsel asked for a maximum of 41 months that would have resulted in his release in five months after considering time served.[84] Stanford was also required to forfeit $5.9 million, but Stanford is penniless and this forfeiture was viewed as merely symbolic.

Stanford Financial Group executive, Laura Pendergest-Holt was also sentenced in September 2012 to a three-year prison term for her involvement in the Ponzi scheme.[85] Pendergest-Holt allegedly conspired with other executives to hide the bank's financial health and to provide misleading testimony to the SEC.[86] Criminal actions against two additional executives, Gilbert Lopez, the ex-chief accounting officer, and Mark Kuhrt, the ex-global controller, are set for trial this fall. The former chief financial regulator, James M. Davis, pleaded guilty and may be sentenced to 30 years in prison.[87]

b. Claims Against the SEC in Connection with the Stanford Scheme Will Go Forward

In 2011, investors brought an action in a Florida district court against the SEC claiming the agency's investigations in 1997, 1998, 2003 and 2004 had concluded that Stanford was running a Ponzi scheme but it failed to notify the Securities Investor Protection Corporation ("SIPC") as required by statute.[88] The plaintiffs further allege the SEC continued to renew the registration of Stanford's company after concluding that Stanford was operating a Ponzi scheme.[89]

The SEC filed a motion to dismiss asserting that the SEC maintained sovereign immunity under the Federal Tort Claims Act for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government."[90] The agency further argued that it was within its discretion to determine whether the Stanford company was approaching financial difficulty such that it was required by statute to be reported to the SIPC.[91] The court disagreed, holding that as it was required in its consideration of a motion to dismiss to assume the truth of the plaintiff's allegations, it must assume that the SEC had found prior to 2009 that Stanford was operating a Ponzi scheme. By definition, a Ponzi scheme would qualify as a company "approaching financial difficulty." It was therefore a statutory requirement, rather than a discretionary decision, for the SEC to notify the SIPC. The SEC's motion to dismiss was denied as to this claim.[92]

The court held that the SEC's approval or denial of registration statements, and yearly amendments thereto, were discretionary actions that would be entitled to immunity under the Federal Tort Claims Act. As a result, the SEC's motion to dismiss was granted as to this claim.

c. Madoff Ponzi Scheme - Distribution to Investors and Status of Suits and Claims

The largest U.S. Ponzi scheme to date was orchestrated by investment advisor and fund manager, Bernard Madoff, over a period of decades and originally estimated to cause losses to investors of over $50 billion. The scheme was uncovered in 2008 after the U.S. stock market crash revealed that Madoff's investment advisory business was a fraud and that allegedly high returns to investors were paid out of the principal received from other investors. Madoff is currently serving a 150-year prison term while the appointed trustee has been pursuing recovery of assets from various sources. In August 2012, the trustee obtained bankruptcy court approval to release $2.4 billion in funds to investors. The trustee calculated losses to investors at $17

billion, of which $9.1 billion has been recovered.[93] The trustee is appealing a ruling limiting his claims against banks such as JP Morgan Chase & Co. that did business with Madoff.[94]

On 29 June 2012, Madoff's brother, Peter Madoff, pleaded guilty to criminal charges that he helped advance the Ponzi scheme but denied knowledge of the decades-long fraud.[95] The trustee is seeking recovery of $255.3 million from Peter Madoff and other family members.[96] On 1 October 2012, a federal grand jury returned additional criminal charges against a group of former employees alleging a conspiracy to defraud investors dating back to the 1970s. According to recent reports, "[t]he 33-count indictment adds additional counts of conspiracy, fraud and false filing charges against former Madoff operations director Daniel Bonventure, former back-office employees Annette Bongiorno and Joann Crupi and former Madoff computer programmers Jerome O'Hara and George Perez."[97]

d. Online Ponzi Schemes - ZeekRewards.com

Ponzi schemes have evolved with technology and online markets. The SEC filed on 17 August 2012 a federal civil action in the U.S. District Court for the Western District of North Carolina against Rex Venture Group, LLC, doing business as ZeekRewards.com and its sole owner, 65-year-old Paul Burks.[98] In this action, the SEC seeks to halt the fraudulent unregistered offer and sale of securities in a combined Ponzi and Pyramid scheme perpetuated by Rex Ventures and Burks.[99] The SEC alleges that the defendants have raised at least "$600 million through the offer and sale of securities … to more than 1 million domestic and international investors." The defendant, Rex Ventures, allegedly holds approximately $225 million in investor funds and the SEC suit seeks to freeze the assets and prevent any further violation of applicable securities' laws. The suit also seeks $4 million in civil penalties and a disgorgement

of all profits. The individual defendant, Burks, allegedly withdrew approximately $11 million for his personal use and distributed an additional $1 million to family members.

The Complaint details the complex online schemes allegedly perpetrated by the defendants. Specifically, the defendants operated a website self-described as an "affiliate advertising division" of a separate website that allowed users to engage in penny auctions, i.e. auctions for various items in which bidders pay a penny to the auction host for each bid placed. The affiliated advertising division, Zeek Rewards, promised participants a 50% share of "profits" earned by the site as a result of the participants' online marketing efforts, such as selling auction bid packages directly to retail customers or purchasing "VIP Bids" (the rights to make bids in the penny auction) and giving them away as samples to retail customers or to other personally-sponsored affiliates.[100] In fact, however, there was no real profit to the defendant company and 98% of the amounts paid out to the participants were paid by the overall revenues generated from new investors.[101] This aspect of the scheme fits the profile of a classic Ponzi scheme. The Complaint also alleges that participants were rewarded with points for every new member they recruited, and in this way, the scheme also contained elements of a traditional pyramid scheme. The SEC alleges that based on the small dividend amount the defendant company had been paying to the participants over time based on their election to take most of their compensation in reinvested points, if the participants all elected to redeem their accumulated points and be paid instead in cash, the SEC projected that the defendant company would be required to pay $45 million per day. With only $225 million in reserves, the company would quickly become insolvent.

The SEC actions include causes of action for violation of Sections 5(a) and 5(c) of the Securities Act for the sale of securities without filing a registration statement with the SEC; for

violation of Section 17(a) of the Securities Act of 1933 for fraud in the sale of securities; and for violation of Section 10(b) Exchange Act of 1934 for fraud or making untrue statements or omissions of material fact in connection with the purchase or sale of a security.[102] Subsequent to the filing of this action, both defendants entered into stipulated judgments enjoining them from soliciting investment in any security, requiring disgorgement of profits and requiring Burks to pay a $4 million fine.[103] By agreed order, the assets of Rex Ventures were frozen and a receiver has been appointed.[104]

IV. Regulatory & Litigation Update

A. Dodd-Frank Update

On 21 July 2010, U.S. President Barack Obama signed into law the Wall Street Reform and Consumer Protection Act of 2009 (commonly referred to as the Dodd-Frank Act after its congressional supporters). This legislation was intended to implement broad reforms and increased oversight of Wall Street. Now, over two years later, only one third of the implementing regulations have been put in place.[105] Lloyd Blankfein, chief executive of Goldman Sachs, reportedly stated in a CNN interview "[a] lot of Dodd-Frank, as a bill, was skeletal and a lot of the very, very important details were left to the regulatory process. The regulators themselves are having problems coming to the right conclusions and filling those in."[106] Banks, including Goldman Sachs, have been heavily lobbying regulators, reportedly spending more than $101 million on lobbying efforts in 2011 and $103 million in 2010.

Dodd-Frank regulations that have not yet been implemented include those requiring larger capital cushions for banks, those requiring greater transparency in derivative trades, and the proposed Volcker Rule that restricts banks from making large trades on their own accounts.[107]

Despite the fact that the Dodd-Frank Act is not yet completely implemented, it has already been the subject of several lawsuits challenging its constitutionality. In September 2012, the states of Michigan, Oklahoma and South Carolina joined in suits already filed in the U.S. District Court for the District of Columbia by a conservative think-tank, a Texas bank and a senior citizens group. These suits challenge the portion of the Dodd-Frank Act that authorizes the Treasury secretary to order liquidation of failing financial institutions.[108] The suits allege that under the new regulations, the process would have little government oversight and would restrict the ability of a company and its creditors to be heard.[109]

On 28 September 2012, the U.S. District Court for the District of Columbia struck down the Commodity Futures Trading Commission's so-called "position limits rule."[110] This rule caps the number of derivatives contracts a trader can hold on certain commodities. The agency is expected to file an appeal of this ruling.[111]

B. Supreme Court to Address Fraud on the Market Allegations for Class Certification

In the upcoming October term, the U.S. Supreme Court will address the "fraud-on-the-market" presumption used to show reliance in support of class certification. Class actions alleging violations of the Securities Exchange Act of 1934, and specifically Section 10b-5 alleging fraud, must allege reliance on the misstatements of the defendants by the purported class members. Because the class members may number in the thousands, proving reliance by each member is unworkable. As a substitute, the courts have fashioned the "fraud-on-the-market" doctrine that presumes that the market price of a security reflects all publicly available information. As a result, investors are presumed to have relied on the truthfulness of the information in purchasing the security. In a November 2011 opinion, the U.S. Court of Appeals for the Ninth Circuit joined similar courts in the Third and Seventh Circuits to hold that to

invoke the fraud-on-the-market presumption to obtain class certification, the plaintiff putative class need not prove the materiality of the alleged omissions or misstatements but must merely allege materiality of the statements with "sufficient plausibility" to withstand a motion to dismiss under 12(b)(6).[112] This decision in *Connecticut Retirement Plans and Trust Funds v. Amgen, Inc.*, 660 F.3d 1170 (9th Cir. 2011) ("*Amgen*") has been accepted by the Supreme Court for consideration of this issue and a resolution of the conflicting rulings of the various Courts of Appeal.

In *Amgen*, the Connecticut Retirement Plan brought a securities fraud action against Amgen, a biotechnology company and several of its officers. This suit alleged that "by misstating and failing to disclose safety information about two Amgen products used to treat anemia (a red blood cell deficiency), they violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934."[113] The alleged misstatements allegedly inflated the price of Amgen's stock when plaintiff purchased it and later "corrective disclosures" allegedly caused the price of the stock to drop.

The Ninth Circuit upheld the District Court's determination that the plaintiff class only needed to prove at the class certification stage that "the market for Amgen's stock was efficient and that Amgen's supposed misstatements were public." At that stage, plaintiffs did not need to prove materiality of the omissions or misstatements of fact (an element of their substantive claims), but only to sufficiently allege materiality.[114] In light of this holding, the Court also held that Amgen was not entitled to the opportunity at the class certification stage to rebut evidence of materiality by showing that the truth was already disclosed at the time of the alleged omissions and misstatements, the so-called "truth-on-the-market" defense.[115]

The Supreme Court will address in the upcoming term both the issue of whether materiality of the information must be proven at the class certification stage to invoke the "fraud-on-the-market" theory and whether the defendant in such a case must be permitted to present evidence to rebut the applicability of this theory before the class can be certified on this basis. If the Supreme Court upholds the Ninth Circuit's decision, this will significantly ease the burden of class certification in similar stock drop cases and may impact the value of the settlements in such cases before and after class certification. We will be closely monitoring the arguments and opinion of the Supreme Court in this case.

V. Conclusions

As outlined above, the experts who track securities class actions have come to differing conclusions on the trends in such suits. For the most part, however, the suits have continued without significant changes in the number of suits filed or the claimed damages.

There have been a number of scandals revealed over the past year and a number of key players in past scandals have been sentenced or convicted, clearing the way for a potential wave of new civil securities suits. We will be monitoring these claims and new developments over the coming year.

[1] John W. Molka III, et al., "Securities Suits Remain Off Recent Highs – An Advisen Quarterly Report – Q2 2012," Advisen, July 2012 at 4 (hereafter "Advisen 2012 Report").
[2] *Id.*
[3] Alexander Aganin, "Securities Class Action Filings – 2012 Mid-Year Assessment" Cornerstone Research, at 1 (hereafter "Cornerstone 2012 Report").
[4] Renzo Comolli et al., "Recent Trends in Securities Class Action Litigation: 2012 Mid-Year Review," Nera Economic Consulting, 24 July 2012 (hereafter "Nera 2012 Report").
[5] *Id.*
[6] Advisen 2012 Report at 14.
[7] Nera 2012 Report at 7-8.
[8] Nera 2012 Report at 9.
[9] *Id.*
[10] Cornerstone 2012 Report at 4.
[11] Advisen 2012 Report at 16.
[12] A. Morrow, "Dealing with a Drought Spell in Asia," The Wall Street Journal, wsj.com, Aug. 12, 2012.
[13] Nera 2012 Report at 24.
[14] Advisen 2012 Report at 12.
[15] Nera 2012 Report at 25.
[16] Donald Griffin and Patricia Hurtado, "Citigroup Pays ATD Executives Again in $590 Million Deal," businessweek.com, 30 Aug. 2012.
[17] *Id.*
[18] *Id.*
[19] Jessica Silver-Greenberg, "Citigroup in $590 Million Settlement of Subprime Lawsuit," The New York Times, NYT.com, 29 Aug. 2012.
[20] Christian Berthelsen, "BofA to Pay $2.43 Billion in Merrill Settlement," The Wall Street Journal, wsj.com, 28 Sept. 2012.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] FDIC website, Statistics at a Glance (last updated 28 August 2012).
[27] FDIC website, Professional Liability Lawsuits (last updated 14 September 2012).
[28] *Id.*
[29] Abe Chermin, "Characteristics of FDIC Lawsuits against Directors and Officers of Failed Financial Institutions," Cornerstone Research, Sept. 2012, p. 1.
[30] *Id.* at 6.
[31] *Id.* at 7.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Cigna Corp. v. Amara*, 131 S.Ct. 1866, 1878 (2011).
[37] *Id.*
[38] *Id.*
[39] *Id.* at 1880.
[40] *Id.* at 1881.
[41] David Enrich and Max Colchester, "Before Scandal, Clash Over Control of Libor," The Wall Street Journal, A1, 11 Sept. 2012.
[42] *Id.*
[43] *Id.*

[44] Joseph B. Crace and David Killion, "LIBOR-related litigation: Update and forecast," Thomson Reuters News & Insight, 10 Sept. 2012.
[45] Jean Eaglesham, "Regulators Try to Beat Clock in Rate Probe," The Wall Street Journal, C1, 20 Sept. 2012.
[46] "Peregrine Financial Group CEO pleads guilty to cheating investors," Los Angeles Times, 17 Sept. 2012.
[47] Tom Polansek, Ryan Schlader, "Peregrine CEO pleads guilty to fraud; to stay in jail," Reuters.com, 17 Sept. 2012.
[48] *Id.*
[49] *Id.*
[50] Ann Saphir, "Peregrine trustee plans return of $123 mln client funds," Reuters.com, 6 Sept. 2012.
[51] Alexandra Alper and Aruna Viswanatha, "Consumer Watchdog's First Fine Goes to Capital One for 210M," Reuters, 23 Sept. 2012.
[52] Aaron Luchetti, "Facebook's Next Fight: Suits, and More Suits," The Wall Street Journal, C1, 26 Sept. 2012.
[53] "Facebook Outlines Defense in Messy IPO Case," Insurance Journal, 18 June 2012.
[54] *Id.*
[55] *Id.*
[56] Ashley Lau, "Nasdaq defends Facebook compensation plan – letter to SEC," Reuters.com, 19 Sept. 2012.
[57] Roland Jones, "Nasdaq faces years of litigation, ire over botched Facebook IPO," NBC news.com, 11 June 2012.
[58] *Id.*
[59] Matt Jarzemsky, "Nasdaq Defends Facebook IPO Compensation Plan," The Wall Street Journal, wsj.com, 19 Sept. 2012.
[60] *Id.*
[61] Facebook IPO Lawsuits Likely to Be Heard by New York Judge," Insurance Journal.com, 21 Sept. 2012.
[62] David Benoit, "Another Facebook IPO Superlative: Most 2012 Lawsuits," The Wall Street Journal, wsj.com, 26 Sept. 2012.
[63] Aaron Luchetti, "Facebook's Next Flight: Suits, and More Suits," The Wall Street Journal, C1, 26 Sept. 2012.
[64] *Id.*
[65] Devlin Barrett and Aaron Luchetti, "Hope for MF Global Clients," The Wall Street Journal, A1, 1 Aug. 2012.
[66] Aruna Viswanatha and Alexandra Alper, "As MF Global criminal probe nears end, civil cases become more likely," Reuters.com, 12 Sept. 2012.
[67] Jerry A. Dicolo and Dan Strumpf, "MF Global Collapse Felt in Farm Country," The Wall Street Journal, wsj.com, 7 Dec. 2011.
[68] Aaron Lucchetti and Mike Spector, "Corzine Meets with MF Global Investigators," The Wall Street Journal, p. C3, 13 Sept. 2012.
[69] *Id.*
[70] "Focus of MF Global Probes Turns to Civil Cases; Insurance Dwindling," Insurance Journal.com, 13 Sept. 2012.
[71] Joseph Checkler, "MF Global Claims Can Be Combined," The Wall Street Journal, wsj.com, 5 Sept. 2012.
[72] "Focus of MF Global Probes Turns to Civil Cases; Insurance Dwindling," Insurance Journal.com, 13 Sept. 2012.
[73] Karen Freifeld, "NY sues JPMorgan over Bear Stearns mortgage securities," Reuters.com, 1 Oct. 2012.
[74] *Id.*
[75] *Id.*
[76] Michael De La Merced, "Bear Stearns Investors Settle Claims for $275 Million," The New York Times, NYT.com, 7 June 2012.
[77] David Margolick, "His Last Name is Scheme," The New York Times, NYT.com, 10 April 2005.
[78] "Ponzi Scheme Enforcement Actions" SEC.gov/answers/ponzi.htm, (updated 6 September 2012).
[79] "Stanford gets 110 years for role in $7 billion Ponzi scheme," FoxNews.com, 14 June 2012.
[80] Leigh Jones, "Stanford Ponzi Scheme Verdict Could Boost Civil Claims," Insurance Journal.com, 7 March 2012.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] "Ex-Stanford Executive Sentenced to Three Years in Jail," The Wall Street Journal, wsj.com, 13 Sept. 2012.
[86] *Id.*
[87] *Id.*
[88] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss in the action styled, *Zelaya v. United States*, United States District Court Southern District of Florida, Case No. 11-cv-62644.

[89] *Id.*
[90] *Id.* at 3.
[91] *Id.* at 4-5.
[92] *Id.* at 5.
[93] Jacqueline Palank, "Madoff Trustee Cleared to Return $2.4 Billion," The Wall Street Journal, C3, 24 Aug. 2012.
[94] Jonathan Stempel, "Bernie Madoff Ponzi Scheme Victims Get $2.48 Billion Payout," Reuters.com, 20 Sept. 2012.
[95] Bail Katz, "Bernard Madoff brother pleads guilty in Ponzi case," Reuters.com, 29 June 2012.
[96] *Id.*
[97] Chad Bray, "Ex-Employees at Madoff Firm Hit with Additional Charges," The Wall Street Journal, wsj.com, 1 Oct. 2012.
[98] Complaint in the action styled, *Securities and Exchange Commission v. Rex Venture Group, LLC et al.*, Civil Action No. 3:2 cv 519 (Western District of North Carolina, Charlotte Division).
[99] *Id.* at ¶1.
[100] *Id.* at ¶25.
[101] *Id.* at ¶41.
[102] *Id.* at ¶¶59-68.
[103] Judgment as to Defendant Rex Venture Group, LLC and Judgment as to Paul R. Burns, filed 17 August 2012 in the matter *Securities and Exchange Commission v. Rex Venture Group, LLC et al.*, Civil Action No. 3:2 cv 519 (Western District of North Carolina, Charlotte Division).
[104] Agreed Order Appointing Temporary Receiver and Freezing Assets of Defendant Rex Venture Group, LLC in the matter *Securities and Exchange Commission v. Rex Venture Group, LLC et al.*, Civil Action No. 3:2 cv 519 (Western District of North Carolina, Charlotte Division).
[105] Jennifer Loberto, "Two-thirds of Dodd-Frank still not in place," CNNMoney.com, 21 July 2012.
[106] *Id.*
[107] *Id.*
[108] Emily Stephenson, "Three states join lawsuit challenging Dodd-Frank law," Reuters.com, 21 Sept. 2012.
[109] *Id.*
[110] Ben Portess, "Judge Strikes Down a Dodd-Frank Trading Rule," The New York Times, NYT.com, 28 Sept. 2012.
[111] *Id.*
[112] *Connecticut Retirement Plans and Trust Funds v. Amgen, Inc.*, 660 F.3d 1170, 1172 (9th Cir. 2011).
[113] *Id.*
[114] *Id.* at 1177.
[115] *Id.*