

# THE DEFENDER

LEGAL ISSUES IN SECURITIES LITIGATION,  
GOVERNMENT ENFORCEMENT AND WHITE COLLAR DEFENSE

**SPRING 2009**

**IN THIS ISSUE**

**Caution! SIGTARP Approaching**

The Special Inspector General for the Troubled Asset Relief Program is wasting no time using his broad authority and considerable resources to target fraud and abuse..... 1

**FERA Expands Potential False Claims Act Liability**

Ostensibly aimed at mortgage and securities fraud and misuse of TARP funds, FERA also makes it easier for private plaintiffs to bring whistleblower and other suits under the False Claims Act. .... 9

**Certifiably Mad? Evolving Standards for Class Certification in Securities Fraud Actions**

Vigorous challenges to class certification are contributing to an evolving landscape of applicable evidentiary standards and burdens. .... 11

**Contact Information** ..... 18

The views expressed in this publication are solely those of the authors and do not necessarily reflect the views of the firm or of any of the firm's clients. This publication is not intended to and does not give legal advice in relation to specific cases. If advice is required in relation to a specific matter, please call Howrey using the contact details provided at the end of this document.

© 2009 HOWREY LLP. ALL RIGHTS RESERVED. "HOWREY" AND "THE ADVANTAGE OF FOCUS" ARE REGISTERED TRADEMARKS OF HOWREY LLP. ACCORDING TO NY STATE BAR RULES, THIS MAY CONSTITUTE ATTORNEY ADVERTISING. PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME.

Howrey LLP is the Data Controller for any personal data that it holds about you. To correct your personal details or if you do not wish us to provide you with information that we believe may be of interest to you, please contact Eric Gruis at +1 202.383.6996 or at GruisE@howrey.com.

## Caution! SIGTARP Approaching

*By Mary Carter Andrues, Fiona A. Philip and Wendy McGuire Coats*

Troubled Asset Relief Program ("TARP") fund recipients in the financial services and other sectors should be closely monitoring the words and actions of the new officer on the beat, Neil Barofsky ("Barofsky"), the Special Inspector General for the Troubled Asset Relief Program (a.k.a. "SIGTARP"). Legal departments and ethics and compliance officers of TARP fund recipients must act now to ensure companies are not found in the cross-hairs of SIGTARP, the Securities and Exchange Commission ("SEC"), Department of Justice ("DOJ"), and other regulatory bodies. Mr. Barofsky is on a mission to protect bailout funds distributed by the Department of Treasury ("Treasury") through TARP. Just four short months into his tenure, Barofsky is barreling full-steam ahead. He has established a fully operational office staffed with former prosecutors and law enforcement agents. He has testified six times before Congress, issued two lengthy reports, initiated detailed audits of TARP fund recipients, opened 20 criminal investigations, and obtained the first TARP-related federal criminal charges, along with a quick guilty plea.

This article is a primer for those who have received or anticipate receiving TARP funds. TARP fund recipients must recognize that the heightened scrutiny and accountability imposed by Barofsky and his office will require instituting transparent accounting controls and compliance measures to avoid becoming a SIGTARP target. Indeed, Barofsky has made this expectation patently clear, stating "to the extent that any financial institution is deciding not to seek TARP funds because we're asking them to account for how they're using that money – good. We're happy for that. We believe that any financial institution that for some reason is afraid to tell the American people how they're using that money, then we're better off without them."<sup>1</sup> It is important to note that it is not only SIGTARP with whom TARP fund recipients must contend, but also with individual state attorney generals, the DOJ and the SEC. Companies should take proactive measures now to ensure they successfully pass SIGTARP audits and address allegations of fraud, waste, abuse, and wrongdoing with regard to TARP funds.

### A. THE CREATION OF SIGTARP

In an effort to infuse capital into the American financial system and to shore-up a sagging U.S. economy, Congress passed the Emergency Economic Stabilization Act of 2008 ("EESA") on October 3, 2008.<sup>2</sup> TARP was created as part of EESA to purchase distressed assets, particularly troubled mortgages and mortgage-backed securities. According to the Government Accountability Office

[Continued on page 2]

**FOOTNOTES**

<sup>1</sup> *Bailout Overseer Reports Progress to Congress*, 04/21/09, www.npr.org.

<sup>2</sup> Emergency Economic Stabilization Act of 2008, P.L. 110-343, 10/03/2008.



**Mary Carter Andruess**  
Partner, Los Angeles  
+1 213.892.1865  
AndruessM@howrey.com



**Fiona A. Philip**  
Partner, Washington DC  
+1 202.383.7482  
PhilipF@howrey.com



**Wendy McGuire Coats**  
Associate, Los Angeles  
+1 213.892.1959  
CoatsW@howrey.com

(“GAO”) as of March 27, 2009, over \$300 billion in TARP funds have been disbursed.<sup>3</sup> In examining the first six months of TARP, EESA’s Congressional Oversight Panel reported that “while Treasury has spent or committed \$590.4 billion of TARP funds . . . the Federal Reserve Board has expanded its balance sheet by more than \$1.5 trillion in loans and purchases of government-sponsored enterprise securities.”<sup>4</sup> In addition to its swelling purse, TARP’s scope has expanded to include 12 separate programs ranging from the Capital Purchase Program (“CPP”) and Systemically Significant Failing Institutions (“SSFI”) program, which funded investments into American International Group, Inc. (“AIG”) to the Automotive Industry Financing Program (“AIFP”) and the Making Home Affordable Program (“MHA”).<sup>5</sup>

SIGTARP was created as part of the EESA to protect TARP funds from fraud and abuse. President Bush appointed Barofsky, a former federal prosecutor from the Southern District of New York, as the first Special Inspector General for TARP. Barofsky has a reputation as an aggressive prosecutor known for high stakes and high profile matters and has commented that “[w]hether it was attacking the FARC in the jungles of Colombia or Refco on Wall Street, all I’ve done is go after those who violate the law, and I will take that same tenacity and dedication to this job.”<sup>6</sup> Barofsky’s speedy confirmation in December 2008 signaled Congress’s intent to ensure there was a watchdog with an unprecedented scope of authority to scrutinize the use of TARP funds. This concept was captured in a statement by Finance Committee Chairman Sen. Max Baucus (D-MT) at Barofsky’s confirmation hearing: “I want you to assume that you do have [the authority to act] and you go ahead until someone raises a ruckus and says no, and even then I want you to continue and assume that you have it. . . . I

want you to have the tenacity of a mongoose or, as some say, the tenacity to be as mean as a junkyard dog.”<sup>7</sup>

Congress certainly found its “junkyard dog” with Barofsky. Since his confirmation, Barofsky has rapidly established himself and SIGTARP as a force to be reckoned with.

## B. SIGTARP UP AND RUNNING

### SIGTARP Structure

Within the first 53 days of his confirmation, Barofsky undertook the following:

- staffed SIGTARP with former federal prosecutors and law enforcement agents;
- created a Hotline for reporting fraud, waste, abuse, mismanagement or misrepresentations regarding TARP funds;
- formed liaisons and partnerships with other federal agencies, such as the Federal Reserve, SEC, Treasury, Department of Housing and Urban Development (“HUD”) and the Federal Deposit Insurance Corporation (“FDIC”);
- consolidated his own authority to enforce the manner in which TARP funds are used; and
- issued SIGTARP’s first report to Congress.<sup>8</sup>

In his February 6, 2009 Initial Report to Congress, Barofsky boldly stated that SIGTARP’s mission was to “conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets under TARP.” He pledged to carry out SIGTARP’s mission by “robust criminal and civil enforcement against those, whether inside or outside of government, who waste, steal, or abuse TARP funds.”<sup>9</sup> In executing this mission, Barofsky organized SIGTARP into three divisions: Audit, Investigations and Administration.

### FOOTNOTES

<sup>3</sup> GAO, *Testimony Before the Committee on Finance, U.S. Senate: Troubled Asset Relief Program*, 03/31/09, [www.gao.gov](http://www.gao.gov). According to Treasury Secretary Tim Geithner, as of April 21, 2009 \$134.6 billion in resources under EESA remain available. See *Treasury Secretary Tim Geithner Written Testimony Congressional Oversight Panel*, 04/21/09, [www.financialstability.gov](http://www.financialstability.gov).

<sup>4</sup> *Congressional Oversight Panel, April Oversight Report: Assessing Treasury’s Strategy: Six Months of TARP*, 04/07/09, <http://cop.senate.gov>.

<sup>5</sup> 04/21/09 SIGTARP Quarterly Report to Congress, pg. 38.

<sup>6</sup> *Bailout Watchdog Nominee Touts Experience*, 11/17/08, [www.govexec.com](http://www.govexec.com).

<sup>7</sup> *Id.*

<sup>8</sup> 02/06/09 SIGTARP Initial Report to Congress.

<sup>9</sup> *Id.* at pg. 3.

From Barofsky's first hires and his partnerships with several law enforcement agencies, it is evident that he views the Investigations Division as the driving force at SIGTARP and criminal and civil enforcement actions as a top priority.<sup>10</sup> As of press time, the office consists of:

- Kevin Puvalowski, Chief of Staff. Like Barofsky, Puvalowski is a former federal prosecutor from the Southern District of New York, with extensive experience in financial fraud investigations and prosecutions.
- Christopher Sharpley, Deputy SIG for Investigations. Sharpley previously supervised the Office of Investigations and Inspections for the Department of Energy Inspector General's Office.
- Richard Rosenfeld, Chief Investigative Counsel. He is a former senior counsel with the SEC.
- Scott Rebein, Special Agent-in-Charge. Rebein supervises federal law enforcement agents assigned to the Investigations Division.
- Barry Holman, Deputy SIG for Audit. Holman, a career civil servant, most recently served as Deputy Assistant Inspector General for Auditing for the Special Inspector General for Iraq Reconstruction from August 2007 to January 2009.<sup>11</sup>

#### Interagency Coordination

Further demonstrating his intention to police the use of TARP funds vigorously, Barofsky joined the President's Corporate Fraud Task Force and has met with prosecutors from the DOJ and several United States Attorney's Offices to forge criminal and civil enforcement partnerships. SIGTARP also made a formal request to the DOJ to receive briefings on all investigations involving entities

that have received TARP funds.

Barofsky formed and chairs the TARP Inspector General Council ("TARP-IGC") composed of Inspector Generals from eight federal agencies, including HUD, Tax Administration, and the U.S. Comptroller's Office.<sup>12</sup> The TARP-IGC serves to coordinate cooperation among the various inspector generals to ensure comprehensive oversight of TARP.

#### Initial Recommendations

In his first 53 days, Barofsky demonstrated the premium he places on transparency regarding the manner in which TARP funds are allocated and being used, coupled with the significant degree of accountability he expects of TARP fund recipients. Barofsky first recommended that all TARP agreements, whether with TARP fund recipients or vendors, be posted on Treasury's website.<sup>13</sup> Treasury agreed and launched [www.FinancialStability.gov](http://www.FinancialStability.gov), which lists all TARP agreements and provides a chronological log of TARP fund recipients starting with the \$15 billion provided to Bank of America Corporation on October 28, 2008 through to the \$20.3 million given to Market Street Bancshares, Inc. on May 15, 2009.<sup>14</sup>

Second, SIGTARP recommended that TARP contract language include a term sheet in which the recipient acknowledges SIGTARP's oversight role and expressly grants SIGTARP access to all relevant documents and personnel.<sup>15</sup> SIGTARP suggested that the "appropriate senior official" for each TARP fund recipient be required to certify in writing that all internal controls required under the TARP agreement have been established and implemented. This language has been incorporated into

[Continued on page 4]

From Barofsky's first hires and his partnerships with several law enforcement agencies, it is evident that he views the Investigations Division as the driving force at SIGTARP and criminal and civil enforcement actions as a top priority.

#### FOOTNOTES

<sup>10</sup> EESA gives SIGTARP the authorities listed in Section 6 of the Inspector General Act of 1978, Title 5, United States Code, Appendix 6, (the "IG's Act") including the power to obtain documents, and other information from Federal agencies and to subpoena reports, documents, and other information from persons or entities outside of government. The Act does not provide Barofsky power to bring criminal charges,

however. Thus, as described later in this article, he actively has entered into partnerships with other law enforcement agencies.

<sup>11</sup> About Us, Senior Staff, [www.sig tarp.gov](http://www.sig tarp.gov).

<sup>12</sup> SIGTARP also formed liaisons with several TARP oversight entities, including the Financial Stability Oversight Board, Congressional Oversight Panel, and the General Accounting Office.

<sup>13</sup> Barofsky, *Testimony to the Senate Committee on Banking, Housing, and Urban Affairs*, 02/05/09, [www.sig tarp.gov](http://www.sig tarp.gov).

<sup>14</sup> Treasury, *Transactions Report*, 04/20/09, [www.financialstability.gov](http://www.financialstability.gov).

<sup>15</sup> 02/06/09 SIGTARP Initial Report to Congress, pg. 97.

subsequent agreements, including those with GMAC, General Motors, Chrysler and Citigroup.<sup>16</sup>

### Audits

After Treasury determined that it would be too arduous to seek details regarding an individual recipient's use of TARP funds, SIGTARP undertook the audit process in early February 2009 by issuing Use of Funds audit letters to 364 TARP fund recipients.<sup>17</sup> The letter required TARP fund recipients to explain the manner in which they were spending or planned to spend TARP money. Audit letters required recipients to include a narrative explanation supported by documentation, plus a description of the manner in which the recipient will comply with restrictions on executive compensation, and a "certification by a duly authorized senior executive officer . . . as to the accuracy of all statements, representations, and supporting information provided."<sup>18</sup>

asking for a certification of compliance with TARP but rather a certification of the accuracy of the statements, representations, and supporting information provided to SIGTARP in the recipient's audit response.

This was just the beginning. As set forth below, Barofsky has continued rapidly to forge ahead to consolidate his authority and police the use of TARP money.

## C. SIGTARP ON THE MOVE

### Expanded Powers

Further extending Barofsky's reach, Congress unanimously passed the Special Inspector General for Troubled Asset Relief Protection Act of 2009 (the "SIGTARP Act"), which provides Barofsky with additional authority that no other inspector general has under the IG Act. The SIGTARP Act expands EESA's already broad scope for SIGTARP by:

- providing SIGTARP with the authority, with limited

**TARP FUND RECIPIENT CERTIFICATION: "I certify that: I have reviewed this response and supporting documents, and, based on my knowledge, this response and supporting documents do not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which statements were made, not misleading."<sup>20</sup>**

To provide clarification and direction to TARP fund recipients, SIGTARP posted on its website "Questions & Answers Regarding the February 6, 2009 SIGTARP Letter."<sup>19</sup> SIGTARP explained that it expected recipients to use "good faith" efforts to explain the anticipated and actual use of TARP funds, including the retention of relevant supporting documentation and the recipient's plan for addressing executive compensation requirements. Most importantly, SIGTARP clarified that it was not

exceptions, to conduct, supervise, and coordinate audits and investigations into . . . any action taken under EESA;

- clarifying that SIGTARP can undertake law enforcement functions without first obtaining Attorney General approval;
- giving SIGTARP the responsibility to coordinate and cooperate with other inspectors general on oversight of TARP-related activities;<sup>21</sup> and

### FOOTNOTES

<sup>16</sup> A listing of all contracts are available at [www.financialstability.gov](http://www.financialstability.gov) under the "About" section addressing "Transparency & Accountability."

<sup>17</sup> The letters were sent to all TARP fund recipients who received funds as of January 31, 2009.

<sup>18</sup> A sample of SIGTARP's "Use of Funds Request Letter" can be found on its website at [www.sig tarp.gov](http://www.sig tarp.gov).

<sup>19</sup> *Questions and Answers Regarding the February 6, 2009 SIG TARP Letter*, 02/25/09, [www.sig tarp.gov](http://www.sig tarp.gov).

<sup>20</sup> *Questions and Answers Regarding the February 6, 2009 SIG TARP Letter*, 02/25/09, [www.sig tarp.gov](http://www.sig tarp.gov).

<sup>21</sup> <http://thomas.loc.gov>.

<sup>22</sup> The SIGTARP Act was signed into law by President Barack Obama on April 24, 2009.

<sup>23</sup> 04/21/09 SIGTARP Quarterly Report to Congress, pg. 16; SIGTARP Hotline [www.sig tarp.gov](http://www.sig tarp.gov).

- permitting Barofsky to hire former government officials and staff without being delayed by the normal time-consuming civil service process.<sup>22</sup>

### Investigations

Barofsky clearly views SIGTARP as the primary law enforcement agency for TARP funds and its Hotline as a critical tool in rooting out fraud and abuse.<sup>23</sup> As of April 21, 2009, the SIGTARP Hotline had received and analyzed approximately 200 tips, which coupled with other sources have resulted in SIGTARP initiating nearly 20 preliminary and full criminal investigations.<sup>24</sup> Barofsky stated that a third of the criminal investigations launched from SIGTARP were derived from Hotline tips.<sup>25</sup>

According to Barofsky, the criminal investigations involve securities fraud, insider trading, mail fraud, public corruption, and mortgage-modification fraud. As if to prove his point, the day after Barofsky issued his second report to Congress, the U.S. Attorney's Office for the Middle District of Tennessee, in conjunction with SIGTARP, issued the first TARP-related criminal charges against Franklin Financial Adviser Gordon B. Grigg for mail fraud and wire fraud.<sup>26</sup> As part of Mr. Grigg's fraudulent investment scheme, he represented to potential clients that he had committed \$5 million to purchase TARP guaranteed debt. Another investigation Barofsky is pursuing, in conjunction with the New York Attorney General's Office, involves the end-of-the-year bonuses handed out by Merrill Lynch as the struggling company was being taken over by Bank of America.<sup>27</sup>

Concerned about the fraud vulnerabilities of the Term Asset-Backed Securities Loan Facility ("TALF"), Barofsky organized and leads a multi-agency TALF Task Force to deter, detect, and prosecute fraud.<sup>28</sup> SIGTARP's TALF Task Force is designed to combine the agencies' shared expertise in securities fraud investigations, to maximize resources to deter potential criminals, to identify and stop fraud schemes before they can fully develop, and to bring to justice those seeking to commit fraud through TALF.<sup>29</sup>

### Audits

On the Audit side, Barofsky reported "a 100 percent response rate" to the Use of Funds audit letters issued to TARP fund recipients.<sup>30</sup> SIGTARP expects to issue a preliminary report summarizing its analysis of the responses in June 2009, with additional reports focused specifically on the use of funds and executive compensation to be completed by summer 2009.<sup>31</sup>

Additional audits also are underway. The Executive Compensation Compliance audit is examining how TARP fund recipients implement controls regarding executive compensation restrictions. The Bank of America audit is examining the review and approval processes associated with TARP assistance to Bank of America, including Treasury's role in connection with the bank's acquisition of Merrill Lynch. The External Influences audit is examining the possible influence exerted on the Treasury or bank regulators regarding a recipient's application for TARP funding. The AIG Bonuses audit is examining executive compensation and large bonuses paid to AIG employees. Finally, the AIG Counterparty Payments

[Continued on page 6]

"If the American taxpayer is to be expected to fund this extraordinary effort to stabilize the financial system, it is not unreasonable that the public be entitled to know how those funds have been used by the recipients."<sup>32</sup>

### FOOTNOTES

<sup>24</sup> 04/21/09 SIGTARP Quarterly Report to Congress, pg. 18.

<sup>25</sup> Bank Bailout Needs Makeover, 02/05/09, [www.money.cnn.com](http://www.money.cnn.com).

<sup>26</sup> Press Release, 04/22/09, United States Attorney's Office Middle Dist. of Tennessee, "Mail and Wire Fraud Charges Filed Against Franklin Financial Advisor Gordon B. Grigg." On April 29, 2009 Mr. Grigg plead guilty to all eight counts under a plea agreement that should net him no more than eight years in prison

instead of facing 20 years on each count if convicted.

<sup>27</sup> *Bank Bailout Needs Makeover*, 02/05/09, [www.money.cnn.com](http://www.money.cnn.com).

<sup>28</sup> In addition to SIGTARP, the TALF Task Force includes the Federal Reserve Board IG, FBI, Treasury's Financial Crimes Enforcement Network ("FinCEN"), and the U.S. Immigration and Customs Enforcement ("ICE"), IRS-CI, SEC, and the U.S. Postal Inspection Service ("USPIS"). 04/21/09 SIGTARP Quarterly Report to Congress, pg. 17.

<sup>29</sup> 04/21/09 SIGTARP Quarterly Report to Congress, pg. 17.

<sup>30</sup> *Bailout Overseer Reports Progress to Congress*, 04/21/09, [www.npr.org](http://www.npr.org).

<sup>31</sup> 04/21/09 SIGTARP Quarterly Report to Congress, pg. 21.

<sup>32</sup> *Statement of Neil Barofsky, SIGTARP, Before the U.S. House of Representatives Committee on Ways and Means Subcommittee on Oversight*, 03/19/09, [www.sig tarp.gov](http://www.sig tarp.gov).

Barofsky is particularly concerned about what he perceives as the danger of allowing investors to use government monies to purchase potentially unsound mortgage-backed securities.

audit is examining AIG's payments to counterparties at 100% of face value, and whether efforts were made to negotiate reductions in those payments.

#### Recommendations to Treasury

Barofsky's recommendations to Treasury Secretary Geithner signal where SIGTARP is likely to focus its law enforcement energies. SIGTARP's most urgent recommendation is for Treasury to develop and implement a system to determine the value of the shares the government now owns from the CPP program.<sup>33</sup> The valuation of government shares increasingly is becoming more important with the Administration considering converting preferred shares into common shares.<sup>34</sup>

Barofsky is sounding an alarm regarding the recent announcement to expand the \$200 billion TALF program with increased lending of up to \$1 trillion, supported by \$80 billion of TARP funds in the event of default.<sup>35</sup> Barofsky is particularly concerned about what he perceives as the danger of allowing investors to use government monies to purchase potentially unsound mortgage-backed securities. According to Barofsky, purchasing asset-backed securities can be a risky business, because many of the underlying loans have been "overvalued due to fraud or lax underwriting."<sup>36</sup>

TALF is not the only TARP program which concerns Barofsky. SIGTARP has recommended that efforts be taken to safeguard the new Public-Private Investment Program ("PPIP"). This would require barring conflicts of interest among participants to prevent collusion and shoring up the program's vulnerabilities to money laundering.<sup>37</sup> Barofsky also voiced concerns with the fledgling Mortgage Modification Program ("MMP"). To help combat fraud in this area, SIGTARP provided Treasury with detailed recommendations to address MMP

concerns. Several of the recommendations attempt to ensure that loan modifications are based on accurate information, including the verification of residences, income levels and of individuals through the creation and maintenance of a global database tracking MMP participants.<sup>38</sup>

It is clear that Barofsky believes SIGTARP's mission is to advance economic stability through transparency, coordinated oversight, and robust enforcement to root out waste, theft, or abuse of TARP funds.

#### D. PROCEED WITH CAUTION

##### Responding to Audits

TARP fund recipients should be prepared to provide accurate, full, and detailed accountings of their use of TARP funds. SIGTARP's February 2009 Use of Funds audit letters make clear that TARP fund recipients must pay particular attention to accounting, management, and use of TARP monies. Based on the Use of Funds audit letters, Barofsky intends every recipient of TARP money to:

- delineate the anticipated use of the funds;
- segregate the funds from other institutional funds;
- account for the anticipated and actual use of funds;
- justify any executive compensation derived from the funds;
- ensure such compensation is consistent with Treasury guidelines;
- segregate and preserve TARP-related documents; and
- make available to SIGTARP all documents, including e-mail, accounting records, budgets, internal memoranda, media statements, and shareholder statements pertaining to the management, accounting and use of the funds.

#### FOOTNOTES

<sup>33</sup> *Bailout Cop Busy on the Beat*, 04/21/09, [www.money.cnn.com](http://www.money.cnn.com).

<sup>34</sup> *Bailout Cop Busy on the Beat*, 04/21/09, [www.money.cnn.com](http://www.money.cnn.com).

<sup>35</sup> 04/21/09 SIGTARP Quarterly Report to Congress, pg. 14.

<sup>36</sup> *Bank Bailout Needs Makeover*, 02/05/09, [www.money.cnn.com](http://www.money.cnn.com).

<sup>37</sup> 04/21/09 SIGTARP Quarterly Report to Congress, pg. 148-50.

<sup>38</sup> Other recommendations include heightened closing procedures such as notarized signatures and thumb prints of each applicant paired with verbal and written warnings regarding fees; delayed payment of 90 days to

the modification servicer ensuring that the homeowner has made several payments on the modified mortgage; and education regarding foreclosure rescue scams. 04/21/09 SIGTARP Quarterly Report to Congress, pg. 154-58.

---

### Potential Liability

The TARP fund recipient should respond carefully to SIGTARP, as any false or misleading response to audit letters can potentially lead to liability. TARP fund recipients should work closely with their advisors, outside counsel, and internal and external auditors, to name a few, in responding to these audit letters. False or fraudulent statements provided to SIGTARP or any other regulator can expose the TARP fund recipient to criminal, civil and SEC violations.

### False Statements

In addition to the audit responses themselves, the certification can lead to liability for senior executives. As previously noted, a senior executive will be required to certify “the accuracy of all statements, representations, and supporting information . . . subject to the requirements and penalties set forth in Title 18, United States Code, Section 1001,” submitted to SIGTARP. The Section 1001, federal false statement certification must be taken seriously by anyone certifying the accuracy of information provided to SIGTARP because false, fraudulent or fictitious statements and representations, and the concealment of material facts can result in criminal liability. Violations of the statute can subject the certifier to imprisonment of up to five years for each false statement, omission or misrepresentation, as well as to monetary penalties.

Barofsky also has stated that he intends to use criminal statutes involving securities fraud, tax fraud, insider trading, public corruption, and mortgage-modification fraud to combat TARP fraud and abuse.

A false statement to SIGTARP does not simply carry with it criminal liability, but can subject the recipient to civil liabilities and penalties under the False Claims Act.<sup>39</sup> The False Claims Act permits both the government and a whistleblower to file a civil complaint, which can subject the TARP fund recipient to treble damages, civil penalties ranging from \$5,500 to \$11,000 per claim, and attorney’s fees and costs. A collateral consequence

for individuals and companies found criminally or civilly liable for submitting false claims or making false statements to the government is the potential suspension, debarment or exclusion from participating in federally-funded programs.

### Collusion

Special attention will be paid to prevent collusion between investors or banks with possible kickbacks among bidders or sellers. For example, Barofsky will be looking at indicators that a bank created a phony subsidiary to bid up the value of its own troubled loans or that a network of banks conspired to bid up one another’s assets, kicking back profits to one another.<sup>40</sup>

### Securities Law Violations

Securities fraud violations will focus on, among other things, the antifraud, reporting, books and records, and internal controls provisions. For SEC registrants, not only must information provided in response to a SIGTARP inquiry be accurate, but also consistent with information contained in SEC filings and public disclosures. Given the partnership between SIGTARP and the SEC, it is likely that government investigators and auditors will closely examine the completeness of toxic asset disclosures, including comparing past disclosures with more recent disclosures or information used to obtain TARP funds or to describe the use of TARP funds. The valuation of assets also will be scrutinized to determine whether valuation models and changes to valuation models were accurately disclosed to investors or manipulated to reach a desired result or to ensure maximum or minimum receipt of TARP funds.

As Barofsky’s announced investigation of AIG executive bonuses make clear, TARP fund recipients also should prepare for heightened scrutiny of their disclosures concerning executive compensation or the restructuring of such compensation, including golden parachutes and bonuses.

[Continued on page 8]

Violations of Section 1001 can subject the certifier to imprisonment of up to five years for each false statement, omission or misrepresentation, as well as to monetary penalties.

---

### FOOTNOTES

<sup>39</sup> 31 U.S.C. § 3729 *et seq.*

<sup>40</sup> 04/21/09 SIGTARP Quarterly Report to Congress.

### **Insider Trading**

SIGTARP, along with the SEC and DOJ, surely will pay close attention to the timing of trades by insiders and their relatives, hedge funds, and others associated with them. Intense scrutiny, among other things, may be placed on the timeframe in which disclosures were made concerning the need for or receipt of TARP funds. Both the SEC and SIGTARP will examine trading volume of certain financial institutions to determine whether there are noticeable increases in trading patterns prior to certain TARP related announcements, filings or government requests. Investors can expect this same type of scrutiny around the TALF program and the release of the information concerning bank stress tests.

It is far better for the TARP fund recipient to receive and address an internal complaint about the accounting and use of TARP funds than for a disgruntled employee to contact SIGTARP. A complaint to SIGTARP can result in a lengthy government investigation involving multiple agencies, including SIGTARP, the SEC, DOJ and state attorney generals, and the significant expenditure of funds to respond to such investigations. If fraud, waste and abuse are alleged or detected, recipients are encouraged to have a system and structure in-place for reporting the misconduct to management, including in-house counsel, and procedures for evaluating, remediating and self-reporting the alleged misconduct to the government. When misconduct is alleged or detected,

---

When misconduct is alleged or detected, it is highly advisable to enlist the assistance of outside counsel to determine the next steps to be taken, such as establishing the basis of the allegation, the need for an internal investigation, whether it is necessary to self-report and the manner in which to do so.

---

### **E. PROACTIVE STEPS**

To reduce the risk of becoming a SIGTARP target, recipients of TARP funds should implement an accurate and segregated accounting system and a comprehensive document management and retention system. Companies should consider enhanced employee training and compliance programs about the receipt, recordation, segregation, and use of TARP funds, including standards of conduct and procedures for employees to report concerns about the manner in which TARP funds are being used. None of this should await a SIGTARP investigation; nor is a brand new system required. Rather, companies can use what is already in place as a result of the Sarbanes-Oxley Act, such as their whistleblower or ethics hotlines to reduce cost. Employees should be encouraged to report concerns regarding fraud, waste and abuse of TARP funds in the already existing whistleblower and ethics hotlines framework. Such prophylactic measures will enhance the TARP fund recipient's ability to respond to any inquiry from SIGTARP or law enforcement.

it is highly advisable to enlist the assistance of outside counsel to determine the next steps to be taken, such as establishing the basis of the allegation, the need for an internal investigation, whether it is necessary to self-report and the manner in which to do so.

### **F. LOOKING AHEAD . . .**

In addition to SIGTARP's oversight, TARP fund recipients should expect heightened scrutiny from both the DOJ and SEC. With the appointments of Eric Holder as the Attorney General and Lanny Breuer as the Chief of DOJ's Criminal Division, coupled with the selection of Robert Khuzami, the new SEC Enforcement Chief, the Obama Administration has assembled a group of seasoned federal prosecutors with significant white collar crime experience. With this new federal law enforcement team now in place, TARP fund recipients must pay close attention to the accounting and management of TARP funds.

# FERA Expands Potential False Claims Act Liability

By John Letteri

President Obama signed the Federal Enforcement and Recovery Act (“FERA”) into law on May 21, 2009. Ostensibly designed to enable the federal government to better pursue mortgage and securities fraud and those who might misuse TARP funds, the FERA also contains provisions that have gone largely unnoticed that expand the ability of private plaintiffs to bring whistleblower and other suits under the federal False Claims Act (“FCA”).

First, FERA does provide government prosecutors with more weapons to pursue mortgage fraud and securities fraud. For example, the legislation broadens the definition of “financial institution” under a series of criminal statutes to include private mortgage brokers and other non-bank lenders.<sup>1</sup> The new law also amends the criminal securities fraud statute at 18 U.S.C. § 1348 to specifically prohibit fraud schemes involving “any commodity for future delivery, or any option on a commodity for future delivery.”<sup>2</sup> The change expressly expands the reach of the statute to cover schemes involving the derivative and other financial products that contributed to the current distress in the banking and securities markets.

FERA also provides substantial amounts of new funding for federal fraud prevention, investigation and enforcement efforts. The legislation authorizes a total of up to \$330 million in new spending by the Attorney General over the years 2010 and 2011, and an additional \$140 million for financial fraud investigation and prosecution by other federal agencies, including \$20 million per year to the Securities and Exchange Commission.<sup>3</sup> These agencies undoubtedly will use the extra funds to pursue to increase the number of fraud investigations and prosecutions.

For companies that do business with the federal government, that is not the end of the FERA story, however. FERA also amended the FCA to make it easier for: (1) private plaintiffs to bring suits on behalf of the federal government to recover monies allegedly wrongly

paid to individuals and entities; and (2) government attorneys to obtain the authority they need to investigate and prosecute these claims.

Under the FCA, private persons may bring suit as *qui tam* relators in an attempt to prove that monies were wrongly paid to companies by the government and to recover that money on behalf of the government. Often, these *qui tam* relators are whistleblower ex-employees of the companies that allegedly violated the FCA.

Once the *qui tam* relator files suit, the government has 60 days to decide whether to intervene in the case and prosecute the matter.<sup>4</sup> During this time, which is often extended well beyond the 60 day statutory period, the government conducts an investigation into the allegations, which can be very burdensome and costly for the accused company. FCA liability carries with it treble damages and other very onerous penalties.<sup>5</sup> The private plaintiff *qui tam* relator shares in any recovery by the government.<sup>6</sup>

Prior to the FERA amendments, the FCA imposed liability on any person who knowingly used a “false record or statement *to get* a false or fraudulent claim paid or approved *by the Government*.”<sup>7</sup> A plaintiff had to prove that a defendant had the specific intent to make the federal government pay a false claim directly.<sup>8</sup> Without that specific intent to defraud the government, no FCA liability could attach.<sup>9</sup>

Under the new FCA language from FERA, however, plaintiffs no longer will have to prove that a company submitted a false claim or invoice with the specific intent “to get” the federal government to pay a fraudulent claim directly. Rather, a plaintiff only will have to prove that a defendant “knowingly presents, or causes to be presented a false or fraudulent claim for approval” or “knowingly makes, uses or causes to be made a false record or statement material to a false or fraudulent claim.”<sup>10</sup>

In addition, under the new, expanded definition of an FCA “claim” in FERA, the false invoice or statement



**John Letteri**

*Of Counsel, Washington DC*  
+1 202.383.6519  
LetteriJ@howrey.com

## FOOTNOTES

<sup>1</sup> FERA § 2 (a-d).

<sup>2</sup> FERA § 2 (e).

<sup>3</sup> FERA § 3(e).

<sup>4</sup> 31 U.S.C. § 3730 (b).

<sup>5</sup> *Id.* § 3731(b)(2-3).

<sup>6</sup> *Id.* § 3730(d).

<sup>7</sup> See *Allison Engine Co., Inc. v. United States*, 128 S.Ct. 2123, 2128-30 (2008).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

no longer must be presented to the federal government to establish liability. An FCA claim will lie if the false statement is presented to the government or to a “contractor, grantee or recipient” if “the money or property is to be spent or used on the Government’s behalf or to advance a government program or interest.”<sup>11</sup>

This new language specifically overrules the 2008 Supreme Court decision in the *Allison Engine* case, in which a unanimous Court held that to prove FCA liability, a plaintiff must show that a defendant intended specifically “to get” the government “itself” to pay that claim.<sup>12</sup> In fact, Congress was so intent on overruling *Allison Engine* that it made the amended

In addition to making it easier to bring and prove FCA claims, the FERA also makes it easier for government attorneys to obtain CIDs, which give them the authority they need to investigate potential FCA claims through subpoenas, requests for documents, interrogatories and sworn depositions.<sup>14</sup>

Prior to FERA, government attorneys could acquire CIDs only from the Attorney General of the United States and the CID had to bear the AG’s signature.<sup>15</sup> FERA provides that government attorneys now will be able to obtain CIDs from “the Attorney General, or a designee.”<sup>16</sup> Undoubtedly, the AG will designate this authority down the line. While the CID process will be

---

**Companies doing business with the federal government directly, or on federally funded projects, or arguably with entities that just receive federal funds, now face a seriously increased risk of FCA liability, with its attendant risk of treble damages and severe penalties.**

---

FCA language effective retroactive to the date of the *Allison Engine* decision. The retroactivity provision certainly will come under attack.

The *Allison Engine* Court had held that if a subcontractor makes a false statement to a private entity and does not intend the federal government to rely on that statement as a condition of getting paid, then no FCA liability can exist.<sup>13</sup> Otherwise, the Court stated, the FCA and its treble damages and onerous penalties could be awarded in a garden variety fraud case, as opposed to a case of a fraud perpetrated on the federal government.

Under the FERA amendments, however, that is arguably exactly what has happened. With the FERA amendments in place, the Court’s subcontractor could be liable under the FCA even if the subcontractor did not intend to defraud the government and did not present the claim to the government directly.

less cumbersome for government attorneys, it likely will prove more onerous for targeted companies. FERA also makes it easier for government attorneys and private plaintiff *qui tam* relators to share claim investigation information with each other and with affected State and local officials.<sup>17</sup>

Companies doing business with the federal government directly, or on federally funded projects, or arguably with entities that just receive federal funds, now face a seriously increased risk of FCA liability, with its attendant risk of treble damages and severe penalties. Companies in this position would be well-advised to quickly update their FCA compliance materials and training to inform employees of the broader, more dangerous reach of the FCA.

---

**FOOTNOTES**

<sup>10</sup> FERA § 4(a)(1)(A-B). Some commentators have argued that FERA definition of “material” is less rigorous than the materiality burden imposed by the courts to date.

<sup>11</sup> *Id.* § 4 (b)(2)

<sup>12</sup> *Allison Engine*, 128 U.S. at 2128-30.

<sup>13</sup> *Id.* at 2130.

<sup>14</sup> FERA § 4(c).

<sup>15</sup> 31 U.S.C. § 3733.

<sup>16</sup> *Id.* § 4(c)(1)(A).

<sup>17</sup> *Id.* § 4(c)(2-3).

# Certiably Mad?

## Evolving Standards for Class Certification in Securities Fraud Actions

By Kevin Burke, Neil Dennis and Charles Manice

Class certification increasingly has become a hotly contested issue in actions arising under § 10(b) of the Securities Exchange Act of 1934. More than ever before, defendants are mounting vigorous challenges, and in particular, challenges implicating the fraud-on-the-market doctrine that is so essential to securities fraud plaintiffs. This new trend changes the traditional landscape of securities fraud actions by providing another—or at least an earlier—battlefront on which defendants can create pressure points in the litigation.

In the last several years, a number of courts have addressed and clarified the required levels of inquiry at the class certification stage. In many of these actions, courts have addressed application of the fraud-on-the-market presumption, and whether defendants should be allowed to put on a rebuttal at the class certification stage. Not surprisingly, the resulting landscape of evidentiary standards and burdens is varied. Highlighted below are some of the more notable, and recent, opinions across jurisdictions.

### I. BACKGROUND: RULE 23 AND THE § 10(b) CLAIM

Class-certification determinations rest on the sound discretion of the district court, exercised within the framework of Federal Rule of Civil Procedure 23.<sup>1</sup> As a

general matter, a district court may certify a class where (i) the proposed representative satisfies the requirements of numerosity, commonality, typicality, and adequacy under Rule 23(a), and (ii) the proposed action meets the requirements of one of the subsections of Rule 23(b). Class actions premised on subsection (3) of the latter provision requires that “questions of law or fact common to the members of the class predominate over questions affecting only individual members ... .”

Notwithstanding *Eisen v. Carlisle & Jacquelin*,<sup>2</sup> in which the Supreme Court held that Rule 23 did not authorize courts “to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action,” most Circuits agree that district courts are allowed, if not obliged, to assess merits issues to the extent that they overlap with Rule 23 requirements.<sup>3</sup> Because reliance, and loss causation, are essential elements of a § 10(b) claim, a proposed class representative in a § 10(b) action invoking Rule 23(b)(3) must establish that individual questions will not predominate over common questions with respect to whether each proposed class member relied to his detriment on an alleged misrepresentation. To do this, plaintiffs typically invoke the fraud-on-the-market doctrine adopted by the Supreme

[Continued on page 12]



**Kevin Burke**

Partner, New York  
+1 212.896.6541  
BurkeK@howrey.com



**Neil Dennis**

Associate, Washington DC  
+1 202.383.7166  
DennisN@howrey.com



**Charles Manice**

Associate, New York  
+1 212.896.6555  
ManiceC@howrey.com

#### FOOTNOTES

<sup>1</sup> See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

<sup>2</sup> 417 U.S. 156, 177 (1974).

<sup>3</sup> See, e.g., *Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 484 (2d Cir. 2008) (quoting *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006)) (noting that district court has an obligation to make factual determinations that are “not lessened by overlap between a Rule 23 requirement and a merits issue.”); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001) (it “would be contrary to the rigorous analysis of the prerequisites established by Rule 23 before certifying

a class to put blinders on as to an issue simply because it implicates the merits of the case”); *Gariety v. Grant Thornton, LLP*, 368 F.3d. 356, 366 (4th Cir. 2004) (“the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits”); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (court may be “required to resolve disputes concerning the factual setting of the case”); *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003) (noting that a court “should consider the merits of the case to the degree necessary to determine whether the requirements

of Rule 23 will be satisfied”); *Wagner v. Taylor*, 836 F.2d 578, 587 (D.C. Cir. 1987) (“It is readily apparent that a decision on class certification cannot be made in a vacuum ... . [S]ome inspection of the circumstances of the case is essential to determine whether the prerequisites of Federal Civil Rule 23 have been made.”); cf. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n. 7 (10th Cir. 1999) (“when deciding a motion for class certification, the district court should accept the allegations contained in the complaint as true”).

Other Circuits have adopted the preponderance of the evidence standard with respect to class certification. Nevertheless, to date, *Oscar* stands alone in shifting the burden to plaintiffs to demonstrate a price impact on the security when relying on the fraud-on-the-market doctrine to satisfy Rule 23(b)(3).

Court in *Basic Inc. v. Levinson*, which creates a rebuttable presumption of reliance when the alleged material misstatements become public and the security is traded on an efficient market.<sup>4</sup> A defendant can rebut this presumption by “sever[ing] the link between the alleged misrepresentation and ... the price received (or paid) by the plaintiff.”<sup>5</sup> Without the presumption, questions of individual reliance would predominate, and the proposed class would fail.

## II. SEVERAL CIRCUITS INVOKE A PREPONDERANCE OF THE EVIDENCE STANDARD AT THE CLASS CERTIFICATION STAGE

### A. Fifth Circuit

One of the most prominent recent opinions addressing class certification in a securities fraud action is *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*<sup>6</sup> In *Oscar*, the Fifth Circuit held, over a dissent, that securities fraud plaintiffs relying on the fraud-on-the-market doctrine to satisfy Rule 23(b)(3) must *first* prove loss causation by showing that correction of an alleged misrepresentation, and not other public reports or disclosures, impacted the price of the security at issue. Thus, the Court in effect shifted the burden to plaintiffs with respect to loss causation rather than requiring defendants to rebut the fraud-on-the-market presumption.

Previously, the district court in *Oscar* had ruled, relying on *Basic*, that the fraud on-the-market presumption applied to the securities at issue, thereby

establishing a rebuttable, class-wide presumption of reliance on defendants’ alleged representations. The court further had reasoned that “the class certification stage is not the proper time for defendants to rebut lead Plaintiffs’ fraud-on-the-market presumption.”<sup>8</sup>

On appeal, however, the Fifth Circuit, which historically has exercised latitude under *Basic* to constrain the impact of the fraud-on-the-market doctrine,<sup>9</sup> vacated the decision.<sup>10</sup> The Court explained that, because market efficiency and the fraud-on-the-market presumption are central to a Rule 23(b)(3) inquiry in a securities fraud action, a district court must “address and weigh factors both for and against market efficiency” at the class certification stage.<sup>11</sup> After applying a “preponderance of all admissible evidence” standard,<sup>12</sup> the Court held that plaintiffs must prove “that it is more probable than not that it was ... [the alleged] negative statement, and not other unrelated negative statements, that caused a significant amount of the decline.”<sup>13</sup> Notably, such proof, the Court explained, “demands a peek at the plaintiff’s damages model—an empirically-based inquiry, not speculation about materiality alone.”<sup>14</sup>

As discussed below, other Circuits have adopted the preponderance of the evidence standard with respect to class certification. Nevertheless, to date, *Oscar* stands alone in shifting the burden to plaintiffs to demonstrate a price impact on the security when relying on the fraud-on-the-market doctrine to satisfy Rule 23(b)(3).

### FOOTNOTES

<sup>4</sup> 485 U.S. 224, 244 (1988). The doctrine provides that public information is reflected in the market price of a security and it can be assumed that an investor who buys or sells the security at the market price relies upon the statement.

<sup>5</sup> *Id.* at 245.

<sup>6</sup> 487 F.3d 261 (5th Cir. 2007).

<sup>7</sup> *Id.* at 262.

<sup>8</sup> *Id.* at 266.

<sup>9</sup> See, e.g., *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 665 (5th Cir. 2004) (plaintiffs must show “that the cause of the decline in price is due to the revelation of the truth and not the release of unrelated negative information”); *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (district courts must “find” facts supporting class certification pursuant to “a complete analysis of fraud on the market indicators”).

<sup>10</sup> 487 F.3d at 262.

<sup>11</sup> *Id.* at 267-68.

<sup>12</sup> *Id.* at 269.

<sup>13</sup> *Id.* at 270 (internal quotations omitted).

<sup>14</sup> *Id.* Ultimately, plaintiffs failed to demonstrate loss causation because their evidence consisted chiefly of analyst commentary and “well-informed speculation,” as opposed to any “post-mortem” data that showed that the line count restatement individually moved the market. *Id.* at 271.

## B. Second Circuit

In consecutive opinions last fall, the Second Circuit clarified that district courts, prior to certifying a class, must find that each element of Rule 23 is established by a preponderance of the evidence. See *In re Salomon Analyst Metromedia Litig.*, (“*Salmon*”);<sup>15</sup> *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.* (“*Teamsters*”)<sup>16</sup> Specifically in *Salomon*, a case involving an analyst rather than issuer statements, the Court ruled that all “evidence must be assessed as with any other threshold issue” and “[s]uch an assessment can be made only if the judge resolves the factual disputes relevant to each Rule 23 requirement and is persuaded” that the requirements have been met.<sup>17</sup> The Court disavowed the ambiguous “some showing” standard at the class certification stage, which had been invoked by the lower court, as well as any suggestion that a district court may not weigh conflicting evidence in a Rule 23 assessment if it overlaps with an issue on the merits.<sup>18</sup> Seeking to “dispel any remaining confusion”, the Court reiterated in *Teamsters* that district courts must find that each element of Rule 23 is established by a “preponderance of the evidence.”<sup>19</sup>

Unlike the Fifth Circuit, the Second Circuit in *Salomon* ruled, with respect to application of the fraud-on-the-market doctrine, that “[p]laintiffs do not bear the burden of showing an impact on the price” at the class certification stage.<sup>20</sup> Rather, the “point of *Basic* is that an effect on the market is *presumed*.”<sup>21</sup> Thus, in reversing the district court, the Second Circuit ruled that “the burden of showing that there was no price impact is properly placed on defendants at the rebuttal stage.”<sup>22</sup> At the same time, because a district court’s obligation to make factual determinations “is not lessened by overlap between a Rule 23 requirement and

a merits issue,” the Court made clear that securities fraud defendants must be afforded an opportunity to rebut the fraud-on-the-market doctrine prior to certification of any class.<sup>23</sup>

## C. Third Circuit

In an opinion after *Oscar* but before *Salomon/Teamsters*, the Third Circuit confirmed in *In re Hydrogen Peroxide Antitrust Litig.* that “[f]actual determinations supporting Rule 23 findings must be made by a preponderance of the evidence.”<sup>24</sup> Likewise, the Court confirmed that factual or legal issues relevant to class certification must be resolved “even if they overlap with the merits.”<sup>25</sup> It also clarified that a district court’s obligation to consider all relevant evidence extended to expert testimony.<sup>26</sup> However, given that *Hydrogen Peroxide* did not involve claims of securities fraud, the Court did not assess the fraud-on-the-market doctrine.

Several years earlier in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Third Circuit ruled in the securities fraud context that a district court must conduct “a thorough examination of the factual and legal allegations,” which may require “prob[ing] behind the pleadings.”<sup>27</sup> *Newton* did not involve an alleged misrepresentation or omission that impacted the value of a stock, but instead broker-dealers’ alleged breaches of their duties of best execution. Distinguishing this case from a fraud-on-the-market or excessive over-pricing policy claim, the Court ruled that “a putative class may presumptively establish economic loss on a common basis only if the evidence adequately demonstrates some loss to each individual plaintiff.”<sup>28</sup> Accordingly, the Court affirmed the lower court’s denial of class certification, ruling that plaintiffs failed to establish

Unlike the Fifth Circuit, the Second Circuit in *Salomon* ruled, with respect to application of the fraud-on-the-market doctrine, that “[p]laintiffs do not bear the burden of showing an impact on the price” at the class certification stage.”

[Continued on page 14]

## FOOTNOTES

<sup>15</sup> 544 F.3d 474 (2d Cir. 2008).

<sup>16</sup> 546 F.3d 196 (2d Cir. 2008).

<sup>17</sup> 544 F.3d at 483.

<sup>18</sup> *Id.* at 484 (quoting *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006)).

<sup>19</sup> *Teamsters*, 546 F.3d at 202.

<sup>20</sup> *Salomon*, 544 at 483.

<sup>21</sup> *Id.* (emphasis in original).

<sup>22</sup> *Id.* (citation omitted).

<sup>23</sup> See *Salomon*, 544 F.3d at 485.

<sup>24</sup> 552 F.3d 305, 307 (3d Cir. 2008).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 259 F.3d 154, 166 (3d Cir. 2001) (citation omitted).

<sup>28</sup> *Id.* at 180.

a presumption of economic loss because they were unable to demonstrate that each class member had in fact been economically injured.<sup>29</sup>

#### D. District Courts

Notably, at least two district courts in the Fourth Circuit have invoked the preponderance of the evidence standard at the class certification stage. See *In re The Mills Corp. Sec. Litig.*<sup>30</sup> *In re Safety-Kleen Corp. Bondholders Litig.*<sup>31</sup> In both *Mills* and *Safety-Kleen*, the courts explained that the Fourth Circuit requires “findings” after “rigorous analysis” but has not adopted a precise evidentiary standard.<sup>32</sup> After acknowledging a split with respect to any assessment of loss causation in the context of Rule 23, the *Mills* court concluded that requiring plaintiffs “to ‘prove’ loss causation at class certification risks converting this stage into a hearing on the merits.”<sup>33</sup> “[R]equiring a factual showing of loss causation at the class certification stage would be—to

borrow a cliché—putting the cart before the horse.”<sup>34</sup>

Likewise, a district court in the Eleventh Circuit, a Circuit which has not adopted a precise evidentiary standard for class certification,<sup>35</sup> recently invoked the preponderance of the evidence standard in a securities action.<sup>36</sup> Citing *Salomon* and *Hydrogen Peroxide*, this court noted that such standard “seems to be gaining momentum.”<sup>37</sup> Nevertheless, after concluding that the market for the securities at issue was efficient based on the *Cammer* factors,<sup>38</sup> the court rejected *Oscar’s* requirement that plaintiffs prove loss causation at the class certification stage.<sup>39</sup>

### III. MOST CIRCUITS HAVE NOT DEFINED A PRECISE EVIDENTIARY STANDARD BUT NONETHELESS REQUIRE RIGOROUS INQUIRY

In addition to the Fourth and Eleventh Circuits,<sup>40</sup> the jurisdictions discussed below have not adopted a precise

#### FOOTNOTES

<sup>29</sup> See *id.* at 181 (“[T]he putative class would be entitled to a rebuttable presumption of reliance but not of economic loss. Therefore, their claims do not warrant a rebuttable presumption of class-wide injury.”).

<sup>30</sup> No. 1:06-cv-077, 2009 WL 1032792, at \*3 (E.D. Va. Apr. 16, 2009) (“The Court ... will apply the preponderance standard in this Rule 23 inquiry.”).

<sup>31</sup> No. 3:00-1145-17, 2004 WL 3115870, at \*2 (D.S.C. Nov. 1, 2004) (“Although there is a scarcity of cases on point, the existing authority suggests that the preponderance of the evidence standard should be applied.”).

<sup>32</sup> *Id.* (citing *Gariety*, 368 F.3d 356 (4th Cir. 2004)). In *Gariety*, the Fourth Circuit ruled that failing to look beyond the pleadings frustrates a district court’s obligation to “tak[e] a ‘close look’ at relevant matters”, “conduct[] a ‘rigorous analysis’ of such matters”, and “mak[e] ‘findings’ that the requirements of Rule 23 have been satisfied”. 368 F.3d at 365 (citation omitted).

<sup>33</sup> 2004 WL 3115870, at \*7 (citation omitted).

<sup>34</sup> *Id.*

<sup>35</sup> Eleventh Circuit law requires a district court to conduct a “rigorous analysis” while stopping short of “determin[ing] the merits of the plaintiffs’ claim at the class certification stage”. *Vega v. T-Mobile USA, Inc.*, No. 07-13864, 2009 WL 910411, at \*4 (11th Cir. Apr. 7, 2009) (citing *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003)). The court “should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.” *Valley Drug Co.*, 350 F.3d at 1188 n.15. Notably, in *Katz v. MRT Holdings, LLC*, a district court recently cited an old Eleventh Circuit decision for the proposition that to establish application of the fraud-on-the-market theory, plaintiffs need to “establish that the security at issue would have been unmarketable but for the alleged fraud.” No. 07-61438-CIV, 2008 WL 4725284, at \*5 (S.D. Fla. Oct. 24, 2008) (citing *Ross v. Bank South, N.A.*, 885 F.2d 723, 729 (11th Cir. 1989)). This burden “is a substantial one.” *Ross*, 885 F.2d at 729.

<sup>36</sup> See *In re HealthSouth Corp. Sec. Litig.*, No. CV-03-BE-1500-S, 2009 WL 1040107, at \*9 (N.D. Ala. Mar. 31,

2009) (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008) and *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008)). “The Eleventh Circuit, however, has not clearly articulated the standard of proof required at the class certification stage when courts must perform a ‘rigorous analysis’ of the Rule 23 prerequisites without determining the merits of the case.” *HealthSouth*, 2009 WL 1040107, at \*8.

<sup>37</sup> *HealthSouth*, 2009 WL 1040107, at \*9.

<sup>38</sup> See *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989).

<sup>39</sup> *HealthSouth*, 2009 WL 1030107, \*19. Nevertheless, the Court proceeded to note that “[n]ot even [Defendant] UBS argues that Plaintiffs could not establish a unified loss causation theory”, which under Eleventh Circuit law “requires only that a cause—defendants’ fraud—be proximately linked to an effect—plaintiffs’ economic losses.” *Id.* (citing *Robbins v. Kroger Props., Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997)).

<sup>40</sup> See *supra* notes 32-35 and accompanying text.

evidentiary standard for Rule 23 determinations but rather have required varying degrees of rigorous inquiry. Likewise, to the extent they have addressed the fraud-on-the-market doctrine, these courts have declined to adopt *Oscar's* burden-shifting and, in some instances, have shown a reluctance to assess rebuttal arguments at all prior to class certification.

#### A. First Circuit

Going back several years, in *In re PolyMedica Corp. Sec. Litig.*, the First Circuit confirmed, in light of prior precedent, that district courts were entitled to “look beyond the pleadings in...[their] evaluation of the applicability of the fraud-on-the-market presumption of reliance, and...[their] resolution of the class-certification question.”<sup>41</sup> Defendants in that case had argued that the fraud-on-the-market presumption was inapplicable because the market for its stock was not “efficient.” The district court agreed with plaintiffs, whose expert proffered “widely-accepted market-efficiency factors” under *Cammer*.<sup>42</sup> In affirming the decision, the First Circuit noted that the question of how much evidence of efficiency is necessary to apply the fraud-on-the-market presumption is one of “degree.”<sup>43</sup> Further, courts “must draw these lines sensibly, mindful that ... other more accessible and manageable evidence may be sufficient at the certification stage to establish the basic facts that permit a court to apply the fraud-on-the-market presumption.”<sup>44</sup>

More recently, the First Circuit in *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, described the level of inquiry required at the class certification stage by the Second and Fifth Circuits, along with the Fourth and Seventh Circuits, as “around the more rigorous

end of this spectrum.”<sup>45</sup> In discussing the fraud-on-the-market presumption addressed in *PolyMedica*, the Court reiterated that a district court should “probe the factual basis of the ... presumption to make sure it will be a viable form of proof in a given case.”<sup>46</sup> The Court concluded more generally, “reliance on a novel theory to establish a primary element of a claim necessitates a more searching inquiry into whether plaintiffs will be able to prove the pivotal elements of their theory at trial.”<sup>47</sup>

Likewise, several weeks ago, a district court in Massachusetts applied that guidance in ruling that a plaintiff “need only present basic facts that the fraud-on-the-market presumption could be invoked, while the theory’s *actual* applicability should be resolved on summary judgment or at trial.”<sup>48</sup> Such “basic facts should be sufficient for the court to determine whether the fraud-on-the-market theory was reasonably applicable, specifically whether ... the market was efficient.”<sup>49</sup>

#### B. Seventh Circuit

The Seventh Circuit has not issued any recent opinion involving review of a class certification decision, let alone in a securities action. Nevertheless, as set forth in *Szabo v. Bridgeport Mach., Inc.*, Seventh Circuit law requires that district courts make “whatever factual and legal inquiries are necessary.”<sup>50</sup> If some of the considerations overlap with the merits, “then the judge must make a preliminary inquiry into the merits.”<sup>51</sup>

However, several years ago in *West v. Prudential Sec., Inc.*, the Seventh Circuit did consider whether the fraud-on-the-market doctrine could be extended to “non-public” statements.<sup>52</sup> The district court had certified a

[Continued on page 16]

More recently, the First Circuit in *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, described the level of inquiry required at the class certification stage by the Second and Fifth Circuits, along with the Fourth and Seventh Circuits, as “around the more rigorous end of this spectrum.”

#### FOOTNOTES

<sup>41</sup> 432 F.3d 1, 6 (1st Cir. 2005).

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.* at 17.

<sup>44</sup> *Id.*

<sup>45</sup> 522 F.3d 6, 24-25 (1st Cir. 2008).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 26, 29 (“We are looking here not for hard factual proof, but for a more thorough explanation of *how* the pivotal evidence behind plaintiff’s theory can be established.”).

<sup>48</sup> *In re Boston Scientific Corp. Sec. Litig.*, No. 05-cv-11934, 2009WL 723490, at \*\*34-35 (D. Mass. Mar. 10, 2009) (internal quotations omitted) (citing *New Motor Vehicles*, 522 F.3d at 25).

<sup>49</sup> *Id.*

<sup>50</sup> 249 F.3d 672, 676 (7th Cir. 2001).

<sup>51</sup> *Id.* at 676.

<sup>52</sup> 282 F.3d 935 (7th Cir. 2002). In the case, a corrupt stockbroker spread false “material” inside information about a company to eleven of his clients.

Notably, in the wake of *Oscar* and *Salomon/Teamsters*, district courts in the Ninth Circuit have indicated a disinclination to heighten the evidentiary standard.

class of purchasers who purchased securities during the period of the alleged false statements. On appeal, the Seventh Circuit reversed, holding that a district court must identify a “causal link between non-public information and securities prices.”<sup>53</sup> The Court noted that “[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.”<sup>54</sup>

### C. Eighth Circuit

The Eighth Circuit, in a recent antitrust action, recognized that a “preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case.”<sup>55</sup> However, the Court cautioned that factual disputes “may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff’s general allegations were true, to make out a prima facie case for the class.”<sup>56</sup> Previously, in *Alpern v. UtiliCorp United, Inc.*, the Court instructed a district court to “consider the requirements of Rule 23(a) in light of the evidence in the record.”<sup>57</sup> The Court also noted that typicality is a “burden ‘fairly easily met’” and expressed disappointment that the district court summarily had denied certification without citing any evidence or legal authority.<sup>58</sup>

### D. Ninth Circuit

The Ninth Circuit also has not recently issued an opinion involving review of a class certification decision. Never-

theless, in *Hanon v. Dataproducts Corp.*, the Court held that “[a] class may only be certified if we are ‘satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’”<sup>59</sup> While affirming the denial of class certification on the basis of a lack of typicality, the Court ruled that “reliance on the integrity of the market” with respect to loss causation would be subject to dispute given plaintiff’s “extensive experience in prior securities litigation” and other conduct that would lead one to conclude that he bought stock in order to bring the lawsuit.<sup>60</sup> The Court further noted that district courts are “at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case.”<sup>61</sup>

Notably, in the wake of *Oscar* and *Salomon/Teamsters*, district courts in the Ninth Circuit have indicated a disinclination to heighten the evidentiary standard. See *In re Cooper Co. Inc. Sec. Litig.*;<sup>62</sup> see also *In re LDK Solar Sec. Litig.*<sup>63</sup> In *Cooper*, the court rejected defendants’ attempt to rebut the fraud-on-the-market presumption, concluding that it was “not obligated to discern the meaning and impact of specific, possibly corrective, statements at this stage of the case.”<sup>64</sup> Likewise, in *LDK Solar*, the court expressly rejected *Oscar*’s requirement at the class certification stage of proof of a material misstatement that moved the market, *i.e.*, loss causation. The court concluded that Ninth Circuit precedent rejects such a requirement because “a price impact is not *required* for a finding of materiality.”<sup>65</sup> Moreover, the court concluded that *Oscar*’s burden-shifting was inconsistent with *Basic*.<sup>66</sup>

#### FOOTNOTES

<sup>53</sup> *Id.* at 938.

<sup>54</sup> *Id.*

<sup>55</sup> *Blades*, 400 F.3d at 575 (citing *Szabo*, 249 F.3d at 676-77).

<sup>56</sup> *Id.*

<sup>57</sup> 84 F.3d 1525, 1540 (8th Cir. 1996).

<sup>58</sup> *Id.* at 1540.

<sup>59</sup> 976 F.2d 497, 509 (9th Cir. 1992) (quoting *Gen. Tel. Co. Southwest v. Falcon*, 457 U.S. 147, 161 (1982)).

<sup>60</sup> *Hanon*, 976 F.2d at 508.

<sup>61</sup> *Id.* at 509 (citing *In re Unioil Sec. Litig.*, 107 F.R.D. 615, 618 (C.D. Cal.

1985)); see also *Parra v. Bashas', Inc.*, 536 F.3d 975, 979 (9th Cir. 2008) (finding that district court in a Title VII action abused its discretion in failing to find commonality after plaintiffs presented “extensive evidence” of discriminatory pay practices).

<sup>62</sup> 254 F.R.D. 628 (C.D. Cal. 2009).

<sup>63</sup> 255 F.R.D. 519 (N.D. Cal. 2009).

<sup>64</sup> 254 F.R.D. at 641-42.

<sup>65</sup> 255 F.R.D. at 531 (emphasis in original)(citing *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 934 (9th Cir.

2003) (reversing motion to dismiss, and finding that bright-line stock-price impact rule would contravene Supreme Court’s “reasonable investor” standard in *Basic*)). Separately, the court also found that a partial disclosure does not defeat plaintiffs’ reliance on the market, and complications with respect to damage computations should be left to a later time. *LDK Solar*, 255 F.R.D. at 528-30.

<sup>66</sup> *Id.* at 531.

## E. Tenth Circuit

Finally, the Tenth Circuit has not defined a precise evidentiary standard for class certification.<sup>67</sup> Outside the securities arena, the Court has ruled that “[a] party seeking class certification must show ‘under a strict burden of proof’ that all four requirements [of Rule 23(a)] are clearly met.”<sup>68</sup> However, a “district court should avoid focusing on the merits”<sup>69</sup> and commits error if “the denial of class certification was influenced by the court’s preliminary evaluation of the merits of [plaintiff’s] claim.”<sup>70</sup> Likewise, in a recent decision from a district court in the Circuit, the court expressly rejected the reasoning of *Oscar*, noting “*Oscar* appears to be in conflict with Supreme Court and Tenth Circuit precedent that warn against determining the merits at the class certification stage.”<sup>71</sup>

## IV. CONCLUSION

As seen above, there has been little inclination in other jurisdictions to follow the lead of the Fifth Circuit in shifting the burden of the fraud-on-the-market doctrine to securities fraud plaintiffs to prove a price impact at the class certification stage. Nevertheless, it is clear that courts are amenable to conducting increasingly rigorous inquiries at the class certification stage to satisfy themselves that each requirement of Rule 23 has been met. Likewise, whether in the Fifth, Second or Third Circuits where courts are required to apply a preponderance of the evidence standard, or in other jurisdictions without precise evidentiary standards, defendants should carefully consider the strength of their class certification arguments and the ways in which such arguments may impact the cost-benefit analyses that parties face at different stages of a securities fraud action.

### FOOTNOTES

<sup>67</sup> Neither the Sixth Circuit nor D.C. Circuit has adopted a precise evidentiary standard either. In the Sixth Circuit, “a district court may not certify any class without ‘rigorous analysis’ of the requirements of Rule 23”. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (citation omitted); see also *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir. 2002). Notably, in a recent opinion, a magistrate judge reopened discovery after defendants, relying on *Oscar*, argued that plaintiffs had failed to establish loss-causation. Reasoning that *Oscar* “stretches” Rule 23 in a way “somewhat unique to the Fifth Circuit,” the court concluded that plaintiffs were not placed on “notice” that loss causation would be a class certification issue, and denied defendants’ motion to quash plaintiffs’ subpoena of defendants’ expert. *Ross v. Abercrombie & Fitch Co.*, No. 2:05-cv-0819, 2008 WL 4059873, at \*3 (S.D. Oh. Aug. 26, 2008); see also *In re Delphi Corp. Sec., Derivative & “ERISA” Litig.*, 248 F.R.D. 483 (E.D. Mich. 2008) (noting

that Rule 23(b)(3) predominance inquiry is “directed toward the issue of liability” and “is ‘readily met’ in securities fraud cases”).

The D.C. Circuit, in *Hartman v. Duffey*, a Title VII class action, recognized that in light of an “across-the-board class based solely upon a complaint alleging group discrimination ... class certification under Rule 23—even in Title VII group discrimination cases—could only be granted after a rigorous analysis of whether adjudication of the named plaintiffs’ claims and those of the class would indeed share common issues of fact or law.” 19 F.3d 1459, 1469 (D.C. Cir. 1994) (citing *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) and *Gen. Tel. Co. v. Falcon*, 457 U.S. 147 (1982)). Notably, in assessing the appropriate duration of a class period, a district court recently considered the fraud-on-the-market theory. See *In re Fannie Mae Sec. Litig.*, 247 F.R.D. 32 (D. D.C. 2008). To avoid any determination of the merits, the court limited its inquiry to whether there

was “a substantial question of fact as to whether the [press] release cured the market or was itself misleading.” *Id.* at 39. The court reasoned that, if there is “no substantial doubt as to the curative effect of the announcement ... [courts should] simply define the class period accordingly.” *Id.* (internal quotations omitted).

<sup>68</sup> *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006)(citations omitted).

<sup>69</sup> *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir.1988).

<sup>70</sup> *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982).

<sup>71</sup> *In re Nature’s Sunshine Product’s Inc. Sec. Litig.*, 251 F.R.D. 656, 665 (D. Utah 2008) (citing *Eisen*, 417 U.S. 156 (1974); *Adamson*, 855 F.2d 668 (10th Cir. 1988)).

## THE HOWREY SGW TEAM

Howrey's SGW practice offers corporations and their officers and directors a multi-disciplinary approach addressing the increasingly complex problems brought about by parallel civil, administrative and criminal proceedings. With more than 20 former federal and state prosecutors, Howrey offers an unrivaled depth of experience in litigation and trial practice, defense of civil and criminal government investigations, internal investigations, counseling and general crisis management.

## CONTACT US

### CHICAGO

+1 312.595.1239  
+1 312.595.2250 (fax)

**Gabriel Aizenberg - Partner**  
AizenbergG@howrey.com

**Stephen Libowsky - Partner**  
LibowskyS@howrey.com

**Scott Mendeloff - Partner**  
Former Supervisor, Criminal and Special Prosecutions Divisions - US Attorney's Office, Northern District of Illinois  
MendeloffS@howrey.com

**David Walters - Partner**  
WaltersD@howrey.com

### EAST PALO ALTO

+1 650.798.3500  
+1 650.798.3600 (fax)

**John Horan - Of Counsel**  
HoranJ@howrey.com

**David Lisi - Partner**  
LisiD@howrey.com

### HOUSTON

+1 713.787.1400  
+1 713.787.1440 (fax)

**Walter Berger - Partner**  
BergerC@howrey.com

**Sheryl Falk - Of Counsel**  
Sheryl.Falk@howrey.com

### IRVINE

+1 949.721.6900  
+1 949.721.6910 (fax)

**Isabelle Carrillo - Partner**  
CarrilloI@howrey.com

**Stephen Cook - Partner**  
Former Asst. US Attorney – US Attorney's Office, Southern District of California  
CookS@howrey.com

**Roman Darmer - Partner**  
Former Assistant US Attorney, Securities Fraud Division - US Attorney's Office, Southern District of New York  
DarmerR@howrey.com

**Robert Gooding - Co-Chair**  
GoodingR@howrey.com

### LOS ANGELES

+1 213.892.1800  
+1 213.892.2300 (fax)

**Mary Andruet - Partner**  
Former Chief of Public Corruption and Civil Rights Section; Deputy Chief, Public Corruption and Government Fraud Section, Criminal Division - US Attorney's Office, Central District of California  
AndruetM@howrey.com

**Terree Bowers - Partner**  
Former United States Attorney - Central District of California  
US Attorney General's Advisory Committee  
DOJ Economic Crime Council

Former Chief of Major Frauds Section  
Former Legal Coordinator - Investigative Section - Yugoslav War Crimes Tribunal  
Former Chief Deputy City Attorney, Los Angeles  
BowersT@howrey.com

**Jan Handzlik - Partner**  
Former Assistant US Attorney, Fraud and Special Prosecutions Section - US Attorney's Office, Central District of California  
HandzlikJ@howrey.com

### NEW YORK

+1 212.896.6500  
+1 212.896.6501 (fax)

**Gregory Ballard - Partner**  
BallardG@howrey.com

**Gary Bendinger - Partner**  
BendingerG@howrey.com

**Kevin Burke - Partner**  
BurkeK@howrey.com

### Gurbir Grewal - Of Counsel

Former Assistant US Attorney, Criminal Division, Business and Securities Fraud Section - US Attorney's Office, Eastern District of New York  
GrewalG@howrey.com

**Kostas Katsiris - Of Counsel**  
KatsirisK@howrey.com

**James McCarney - Partner**  
McCarneyJ@howrey.com

**William Purcell - Partner**  
Former Assistant District Attorney, New York County  
PurcellW@howrey.com

### SALT LAKE CITY

+1 801.533.8383  
+1 801.531.1486 (fax)

**Richard Casey - Partner**  
CaseyR@howrey.com

**Wesley Felix - Partner**  
FelixW@howrey.com

### SAN FRANCISCO

+1 415.848.4900  
+1 415.848.4999 (fax)

**Leigh Kirmssé - Partner**  
Kirmssel@howrey.com

### WASHINGTON DC

+1 202.783.0800  
+1 202.383.6610 (fax)

**Richard Beckler - Co-Chair**  
Former Section Chief, Criminal Fraud Section - US Dept of Justice

Former Assistant District Attorney - Manhattan  
BecklerR@howrey.com

**James Hibey - Co-Chair**  
Former Assistant US Attorney - US Attorney's Office, District of Columbia  
HibeyJ@howrey.com

**John Letteri - Of Counsel**  
Former SEC, Division of Enforcement - Senior Counsel  
LetteriJ@howrey.com

### Billy Martin - Partner

Former Assistant US Attorney - US Attorneys Office, Southern District of Ohio, District of Columbia

Former Special Attorney - US Dept of Justice, Organized Crime Strike Force, San Francisco  
MartinBilly@howrey.com

### John Nields - Partner

Former Chief Appellate Attorney - US Attorney's Office, Southern District of New York

Former Special Counsel - US Dept of Justice  
NieldsJ@howrey.com

### Dimitri Nionakis - Partner

Former Associate Counsel to President Clinton  
NionakisD@howrey.com

### Fiona Philip - Partner

Former Enforcement Counsel and Ethics Liason Officer; Senior Counsel, Financial Fraud Task Force - SEC, Office of the Chairman  
PhilipF@howrey.com

### Wm. Bradford Reynolds - Partner

Former Assistant Attorney General, Civil Rights Division; Assistant to US Solicitor General; Counselor to US Attorney General - US Dept of Justice  
ReynoldsW@howrey.com

### Laura Shores - Partner

ShoresL@howrey.com

### Peter Unger - Partner

Former Attorney, Division of Enforcement - SEC  
UngerP@howrey.com

### Joseph Walker - Partner

Former Trial Attorney, Criminal Division, Fraud Section - US Dept of Justice  
WalkerJ@howrey.com

### William Webber - Partner

Former Assistant US Attorney; Trial Attorney, Antitrust Division - US Attorney's Office, Central District of California  
WebberB@howrey.com

### Evan Werbel - Partner

WerbelE@howrey.com

# HOWREY<sup>LLP</sup>

THE ADVANTAGE OF FOCUS<sup>®</sup>  
ANTITRUST | GLOBAL LITIGATION | INTELLECTUAL PROPERTY

WWW.HOWREY.COM

Amsterdam Brussels Chicago East Palo Alto Houston Irvine London Los Angeles Madrid Munich  
New York Northern Virginia Paris Salt Lake City San Francisco Taipei Washington DC