

**Klausner & Kaufman Conference**  
**March 22-23, 2011**

**MEETING DATE**

**MAR 30 2011**

**AGENDA ITEM**

*misc.*

The difficulties faced by shareholders bringing and prevailing in securities litigation were discussed.

1. Boards of Directors' decisions are protected by the "business judgment rule".
2. Proving loss causation in securities fraud case is becoming increasingly difficult.
3. Third-party liability is extremely limited as evidenced by the investment banks in the sub prime loan crisis.
  - a. Recently a court held: "Although the complaint alleges facts that, if true, would make the third party defendants (a law firm advising the corporation in how to commit fraud) guilty of aiding and abetting the securities fraud ... the Supreme Court and Congress have declined to provide a private right of action for victims of security fraud against those who merely – if otherwise substantially and culpably – aid a fraud that is executed by others."
4. The SEC is not protecting shareholder interests. There appears to be conflicts of interest with high-level agency employees and the corporations the agencies are charged with regulating.
  - a. They failed to uncover Madoff's ponzi scheme despite more than ample information over the years to warrant a thorough and comprehensive examination.
  - b. Inadequately settled claims against Bank of America for its purchase of Merrill Lynch that the presiding judge called "half-baked justice".
  - c. They turned a blind eye to questionable practices in the allocation of IPOs for nearly a decade until the Wall Street Journal exposed the practices.
  - d. The SEC Director of Enforcement is being investigated for going easy on Citigroup executives in connection with the bank's nondisclosure of \$50 billion in sub prime securities
  - e. They failed to intervene in Lehman Brothers' collapse
    - i. The Lehman bankruptcy examiner stated "I saw nothing in my investigation to suggest that the SEC asked even the most fundamental questions that might have uncovered this practice (of hiding debt) early on, before Lehman escalated it to a \$50 billion issue.
  - f. The SEC is cash strapped leading to cutbacks in enforcement and market oversight efforts
    - i. Postponing depositions
    - ii. Limiting travel for on-site investigations
    - iii. Capping the number of expert witnesses used
    - iv. Hindering the process of implementing financial reforms

5. In amicus briefs the SEC has argued against investors' rights:
  - a. Argued for strict interpretation of loss causation
  - b. Argued that judges, before trial, should dismiss cases if negative inferences of scienter (intention) outweigh positive inferences.
  - c. Argued that secondary actors could not be primary violators unless plaintiffs relied on their statements.
6. Private securities litigation is under assault.
  - a. The Chamber of Commerce has stated that "Private securities class action lawsuits present a serious threat to the health of U.S. businesses, the prosperity of American families and the strength of our nation's competitiveness."
  - b. The Chamber of Commerce has for years sought to end private securities litigation by pressing Congress to implement stiff reforms.
  - c. The Supreme Court has recently issued a wave of bad decisions for shareholders.
    - i. Private lawsuits cannot be filed against "secondary actors"
    - ii. A secondary actor that does not make a misstatement cannot be held liable
    - iii. A complaint must establish a strong inference of guilty intent
    - iv. An inflated purchase price does not by itself demonstrate loss causation
7. Shareholders are kept in the dark by the boards of directors.
8. Shareholder proposals for corporate governance reform are non-binding.
9. **In the Morrison case, the Supreme Court severely limited foreign investors' access to U.S. courts. The holding has been broadly interpreted as preventing fraud claims in U.S. courts by any investor – either from the U.S. or abroad – who purchased their shares on a foreign exchange.**
  - a. **To avoid this potential exclusion from U.S. courts, if given the choice, it would be preferable to purchase shares on a U.S. exchange.**
  - b. **The possibility of a merger or takeover of the NYSE by a Germany based exchange could create additional problems for fraud suits in U.S. courts due to the Morrison ruling.**

Based on the changing landscape of securities fraud litigation, it would appear that our Board's decision to retain securities monitoring services is a very good decision.

Respectfully submitted,

Brian Hast  
March 22, 2011