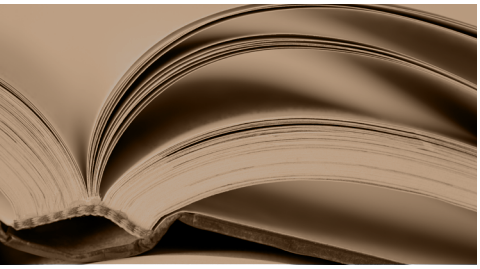
SUMMER 2013

TRENDS™ in Litigation



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ALSTON & BIRD LLP

INTRODUCTION

Trends features updates on key legal issues in litigation and about Alston & Bird's litigation practices. In this edition's lead article, Craig Carpenito, co-leader of the Government & Internal Investigations Group, interviews several litigation partners who have joined Alston & Bird in recent months—Stephanie Clouston in Dallas; Charles Cox, Jim Evans and Mark Johnson, all in Los Angeles; John Roesser in New York; and Ted Kang in Washington, D.C. These six seasoned litigators add breadth and depth to the firm's litigation practice. Next, Susan Hurd and Cara Peterman of our Securities Litigation Group examine the impact of the recent Supreme Court *Amgen* decision on the standard for certification of a class action. Bill Jordan and Jason Popp in our Litigation & Trial Practice Group then consider the new *Resource Guide to the U.S. Foreign Corrupt Practices Act* and how it may help companies conducting business in foreign countries comply with the FCPA. Finally, Matt McGuire and Rich McAvoy, also members of our Litigation & Trial Practice Group, review the Consumer Financial Protection Bureau's newly issued qualified mortgage and mortgage servicing rules, which take effect in early 2014.

We hope you enjoy *Trends*, and, as always, we value your comments.

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NEW VOICES IN LITIGATION

New Alston & Bird Litigation Partners Bring Top-Shelf Talent

Recently, Craig Carpenito, New York partner and co-leader of Alston & Bird's Government & Internal Investigations Group, sat down with six of the firm's newest litigation partners to discuss their practices and what they see on the horizon in their respective fields. Joining Carpenito were Stephanie Clouston, litigation partner in the firm's Dallas office; Charles Cox, securities litigation partner in Los Angeles; Jim Evans, class action partner in Los Angeles; Mark Johnson, environmental and land use partner in Los Angeles; Ted Kang, government investigations partner in Washington, D.C.; and John Roesser, securities litigation and arbitration partner in New York.

Craig Carpenito: *First, thank you all for speaking with me. By way of introduction to our audience, can you please speak a little about your practices and when you joined the firm?*

Charles Cox: I'm a new comer to the Alston & Bird Los Angeles office, having arrived in February of this year. My practice is focused on securities litigation where I represent officers, directors, companies, accounting firms and other professionals, whether it be securities class actions, Section 11 claims, challenges to M&A deals, derivative litigation, regulatory investigations or a corporate governance dispute among directors. I also have an active arbitration trial practice, which fits well within the context of a sophisticated securities litigation practice.

John Roesser: Craig, I think I'm the most recent arrival to the firm—certainly here in New York. My practice covers two primary areas: one is securities litigation—traditional 10b-5 cases, D&O cases and shareholder derivative cases—the whole spectrum of securities actions. The second area is international arbitration. I've done a fair number of international arbitrations under the rules of most of the major international arbitral institutions, including LCIA, the ICC and the ICDR. While I have represented clients in treaty arbitration, I focus primarily on commercial arbitration. I am a member of the ICC Commission on Arbitration, and I sit on the board of the New York International Arbitration Center, which will open this spring. The common link between these two practices is that much of the work I've done has involved financial institutions and D&O issues. I represented a German bank in a very large ICC arbitration, for example, related to collapsed financial institutions in South America and issues that came up with respect to the members of the board and fiduciary duties they had to the banks. So there is some connection between the securities litigation and the arbitration work.

Jim Evans: I'm beginning to feel like a veteran compared to Chuck and John—I joined the firm here in Los Angeles in November of 2012. I'm a civil trial lawyer specializing in complex litigation, with particular emphasis in employment matters and consumer class action claims. The bulk of my time presently is spent defending large companies against employment class actions and individual employment claims, with the balance spent defending companies in connection with false advertising and other sorts of consumer claims.

Mark Johnson: Jim Evans and I joined just about the same time here in Los Angeles. I'm a trial lawyer with more than 25 years of experience, and I specialize in construction and environmental matters. However, I also have trial experience in cases involving a variety of other issues, including breach of fiduciary duty, fraud, oil and gas lease disputes, real estate, products liability and unfair competition.

Stephanie Clouston: Craig, I've been practicing in the Dallas market since 1997 and joined the firm in late 2011. My practice is, in many ways, a broad trial practice, but with a focus on consumer and products claims primarily in certain industries, especially telecommunications. I also have a strong group of manufacturing clients. I'm involved with representation of a lot of HVAC, chemical, gas and other energy-related companies.

Ted Kang: For the last eight years, I served as a federal prosecutor in the U.S. Attorney's Office in the District of Connecticut, and then in the Department of Justice's Criminal Division. I had the privilege of working on several high-profile matters at DOJ, including investigations into the CIA's destruction of video tapes depicting enhanced interrogation techniques on terrorist suspects, allegations of corruption of both federal and state officials throughout the country, and—in 2010—the Deep Water Horizon disaster in Louisiana. I worked on the criminal end of that investigation, which was resolved at the end of 2012 with BP PLC entering a guilty plea relating to obstruction of justice and criminal Clean Water Act violations, as well as criminal indictments against four employees and executives of the company.

I'm looking to build a practice at Alston & Bird that will leverage my experience in white collar litigation and investigations honed from my time as a prosecutor at DOJ.

Carpenito: *Each of you is a sophisticated, experienced litigator. Would you please share what enticed you to join Alston & Bird?*

Roesser: One of the things that I'm trying to accomplish here in New York is to build and expand the international arbitration practice. And, from my vantage point, Alston & Bird has a fantastic track record in building out intelligently—looking at the market, seeing where the market is going, seeing what areas are hot and building practices in those areas. When you put that together with the firm's incredible culture, it's a potent combination. The culture very much emphasizes cross-selling and working together, and it's been terrific how much of that has turned out to be true.

Kang: One of the things that appealed to me about the firm was its culture—the firm's commitment to excellence, as well as to fostering an environment conducive to collegiality and teamwork. I knew that Alston & Bird was well-known as a major player within DOJ and the federal law enforcement and regulatory communities. The presence of Senators Dole and Lincoln and Congressmen Tauzin and Pomeroy and everybody else in the regulatory practice lifts Alston & Bird's reputation to the top of the list. Also, with the increasing regulatory environment, I believe that Alston & Bird's strength in this arena can present numerous opportunities to grow a white collar enforcement practice. Regulators are moving toward the trend of becoming more and more like an enforcement agency—and the SEC's stepped-up enforcement of securities laws in the past four years is a clear sign of that movement. I expect other agencies to do the same in the coming years.

Cox: A couple of things stood out. One was the people—at every step in the process, the first thing that impressed me was the quality of the Alston & Bird people; that's important because you're considering a possible partnership with these folks, but also you must rely on them and collaborate with them and spend a

lot of time with them. So that would be item one. Item two was the collaborative approach that the firm has, particularly in the Securities Litigation Group. That is something that is different from some other firms. The third item is one that's really a benefit for clients—particularly on large matters, whether they be securities or antitrust or the sort of consumer class action work that Jim and Stephanie do. Alston & Bird's Special Resources Group provides a service to clients that is outstanding.

> "…Alston & Bird has a fantastic track record in building out intelligently—looking at the market, seeing where the market is going, seeing what areas are hot and building practices in those areas."
>
> – John Roesser

Clouston: Prior to joining Alston & Bird, I had the benefit of having worked with and developed friendships with several of the partners. I had also been co-counsel with attorneys from Alston & Bird. As Ted noted, the culture was also very attractive; its reputation precedes it, both among clients and peers. For me, though, there was another element as well: namely, I was excited by the opportunity to really be a part of a growing, relatively new office here in Dallas. And to do it with a strong presence on both the East and West Coasts has been very beneficial to our litigation group and clients.

Evans: Just as Chuck mentioned, what Alston & Bird offered was a real opportunity to work collaboratively with others, instead of forging my own way out in the wilderness. The firm offered experience and a reputation that I believed would be attractive to my clients—both current and prospective. It offered an environment of collegiality that—to me—was huge. That is a different experience for me, and since I've joined, all of the reasons that influenced my decision have become realities in the sense of incredible support from a very strong L.A. office that works collaboratively with the other offices of the firm.

Carpenito: *Laterals always want to make law firm transitions as easy as possible for the client. Has that been the case for you?*

Clouston: Oh, absolutely. I think that the keen atmosphere of Alston & Bird—the synergy among the offices, the incredible talent that we have here, along with the willingness to dig in and help—has been very positive for the clients. Several of my clients have now worked with other partners in other areas, including patent litigation, trademarks, patent prosecution and matters on the corporate transactional side. It has all been very positive.

Evans: Among my clients, there has been a great appreciation of the focus and attention they received early on from Alston & Bird, in addition to the benefits and reach you would expect from a large national firm. For a couple of my clients, having a very strong products liability team was of particular importance, and they are quite impressed by our products team's capabilities, including the firm's recent experience handling the complex Toyota litigation. The transition has been relatively easy because of the support provided by the firm's lawyers and staff.

Roesser: I have one client that has already brought a number of matters to the firm—things that I don't do. They've been serviced fantastically, and they're very happy. As Stephanie noted, having my clients working with other attorneys in litigation or M&A or privacy law has been a great experience.

Carpenito: *Let's look out into the future. Ted, you mentioned earlier that one trend you saw for white collar prosecutions is stepped-up enforcement activities by federal agencies. Any advice on what our clients can do to try to protect themselves in this climate?*

Kang: That's a great question. A lot of these cases are being brought based upon information that the government obtains through whistleblowers. I think our clients should be setting up internal mechanisms within the corporate structure so that the whistleblowers are incentivized and feel comfortable bringing their complaints and concerns to the company *first*, before going directly to the government. Companies—big and small alike—need to be revising their internal policies and communicating to their workforce that these potential concerns are an important issue for the company. They should have open lines of communication with anybody that has concerns about any of the company's practices or even personal views that there may be wrongdoing or fraud or abuse within the company.

Carpenito: *Do the rest of you see what Ted sees? What trends are developing in your practice areas?*

Clouston: I see a lot of what Ted sees, particularly in the activity of the feds on the regulatory side. There are a lot of new telecommunication and energy-related regulations, leaking over into the consumer and product claims worlds, that are now touching every aspect of homes and businesses that use energy. The government has pitched a tent, as it were, in that regulatory space, and I think the consumer cases are just beginning. I think we're going to see an increase in labeling and consumer product issues that will come from alleged violations of the new federal regulatory regime. Clients need to be prepared for this.

> "…what Alston & Bird offered was a real opportunity to work collaboratively with others, instead of forging my own way out in the wilderness."
>
> – Jim Evans

Evans: There are increasing numbers of employment cases that are being filed here in California, and the question becomes, "How can we assist our clients in dealing with these in a fair way to the employees, but in a way that helps clients avoid the specious cases sometimes brought by the plaintiffs' bar?" I think this is a challenge we are facing going forward, both in California and nationally, and the firm has spent a lot of time considering it. Our national labor and employment practice, I feel, is well-positioned to handle this question by providing meaningful answers for our clients.

Cox: On the securities litigation side, clients today need and want more than just one-off services. Clients are growing more sophisticated, as are their legal challenges, and they

want their lawyers to be counselors and advisors on these more complex matters. So, if the issue is securities litigation that's right in your wheelhouse, that's one thing. But if there are additional complex issues, you need to be able to bring in other litigators to do the job. You need to show clients that you have the capability and the experience available, and that trend isn't changing anytime soon.

Johnson: On the environmental front, I see a growing trend toward increased enforcement of environmental statutes and regulations. Given the media attention around such high-profile issues as climate change and hydraulic fracturing, government enforcement agencies are politically motivated to file civil and criminal penalty actions with respect to alleged environmental violations. Also, the penalties potentially recoverable for many environmental violations can be significant and represent an appealing potential source of revenue for government coffers. In addition, many environmental statutes provide for private enforcement actions, as well as incentives for environmental groups to pursue claims for alleged or real environmental violations.

Roesser: To follow-up on Chuck's comment, we believe that 2013 will be an active year in securities litigation—not to the extent of 10 years ago, but the number of cases is rising. With regard to international arbitration, I think, for several years, this is going to be a growth area, both on the commercial and treaty arbitration side. New York has always been one of the major centers for arbitration, but it is poised to take a leap to the next level. Two examples of this effort in the arbitration arena: the ICC announced that it will open an office of the Court's Secretariat in New York. This new office is to increase the ICC's presence in North America and to make the services of the Secretariat directly available to parties in the region. We have a deep relationship with the ICC here in New York and are looking forward to working with them as they increase their presence. Second, as noted earlier, the New York International Arbitration Center opened this spring. This is the result of an effort led by many of the top arbitration firms in New York, including Alston & Bird. So, I believe the city is poised to become a real first-tier international arbitration center. We hope to build a practice here that will take advantage of that. This is a strategic growth area for the firm, and I think, within the next couple of years, we'll become a go-to firm for international arbitration.

Carpenito: *Needless to say, I am pleased that each of you is now a partner with the firm. There are challenging days ahead for our clients, and I appreciate you sharing your personal experience, as well as a look into the "crystal ball" relative to your area of practice. Thank you all.* ■

IN THE COURTROOM

The Supreme Court Issues a Narrow Ruling in *Amgen*

By Susan E. Hurd and Cara M. Peterman

On February 27, 2013, the United States Supreme Court issued its opinion in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013).[1] The Court affirmed the Ninth Circuit's conclusion that a plaintiff need not prove the materiality of the alleged misstatements in a secu-

[1] Justice Ginsburg wrote the opinion for the majority of the Court in which she was joined by Chief Justice Roberts and Justices Breyer, Alito, Sotomayor and Kagan. Justices Scalia, Thomas and Kennedy dissented from the majority opinion.

rities class action to certify a class of investors.[2] The Court likewise ruled that rebuttal evidence from the defendants demonstrating a lack of materiality need not be considered at class certification.[3] The plaintiffs' bar was quick to hail this decision as a victory for their side, but a closer examination of the opinion reveals that the issue decided by the Court was a narrow one and reflects an argument that is seldom made by the defendants in opposition to class certification. Accordingly, it remains to be seen whether this decision will have a meaningful impact on how class certification issues are litigated in the vast majority of securities cases.

> "In *Amgen*, however, the defendants conceded both that Amgen's stock traded in an efficient market and that their rebuttal evidence related not to the question of market efficiency, but to the issue of materiality."

A critical issue frequently debated at class certification in securities class actions relates to the separate requirement under Section 10(b) of proof of reliance and, specifically, whether plaintiffs can invoke a presumption of reliance to satisfy the predominance requirement for certification under Fed. R. Civ. P. 23(b)(3). The Supreme Court has previously held that (1) to invoke that presumption at class certification, a plaintiff must show, *inter alia*, that the stock at issue traded in an efficient market and (2) once this presumption is established, it may be rebutted by the defendants.[4] In opposition to class certification, defendants often challenge whether plaintiffs have offered sufficient evidence to carry their burden of establishing the existence of an efficient market and/or offer in rebuttal direct evidence of the market's inefficiency.

In *Amgen*, however, the defendants conceded both that Amgen's stock traded in an efficient market and that their rebuttal evidence related not to the question of market efficiency, but to the issue of materiality.[5] Thus, the debate in *Amgen* focused exclusively on whether proof of the materiality of the alleged misstatements was a ***further*** requirement for invoking the presumption of reliance ***in addition to*** market efficiency. The Supreme Court's refusal to impose this additional requirement leaves untouched the Court's prior decisions that specifically acknowledge plaintiffs bear the burden of demonstrating market efficiency at class certification and certification must be denied where they fail to meet their burden.[6] Nor does the decision

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[2] *Amgen*, 133 S. Ct. at 1199, 1204. For claims brought pursuant to Section 10(b) of the Securities Exchange Act of 1934, a plaintiff must prove that the alleged misstatements contained material misstatements or omissions in order to recover. *Id.* at 1192.

[3] *Id.* at 1203-04.

[4] *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011); *Erica P. John Fund v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011); *Basic Inc. v. Levinson*, 485 U.S. 224, 242, 248-49 (1988). As the *Amgen* Court observed, a market is "efficient" when a company's stock trades in a well-developed market that is an efficient processor of all publicly available information about the company. *Amgen*, 133 S. Ct. at 1191.

[5] *Amgen*, 133 S. Ct. at 1190.

[6] *See, e.g., Dukes*, 131 S. Ct. at 2552 n.6; *Halliburton*, 131 S. Ct. at 2184-85; *Basic*, 485 U.S. at 242.

in *Amgen* affect the right of a defendant also recognized in the Court's prior decisions to attempt to rebut the presumption of reliance by showing, for example, that the market for the stock was not efficient.[7]

At best, *Amgen* can be said to have removed the possibility of imposing a further hurdle for plaintiffs at class certification. It did not and could not change the fact that other requirements previously recognized by the Supreme Court—like proof of market efficiency—still exist for certification of a shareholder class, and a defendant may successfully oppose class certification by raising plaintiffs' failure to satisfy these long-standing requirements.

The *Amgen* ruling also reflects a clear difference of opinion among the Justices regarding the wisdom of allowing plaintiffs to prevail at class certification based on a "judicially invented" presumption of reliance.[8] The separate opinions from Justices Scalia, Thomas and Alito in *Amgen* strongly suggest that some members of the Court in the future may be willing to reconsider what they view as "the regrettable consequences" of recognizing this presumption in the first place based on recent evidence that the presumption "may rest on a faulty economic principle."[9]

Overview of the Opinion

It has long been the rule that, in order to satisfy the predominance requirement of Fed. R. Civ. P. 23(b)(3) (i.e., to show that issues common to the class predominate over issues that pertain to individual class members), a plaintiff in a securities class action must show an entitlement to invoke a presumption that he relied on each of the alleged misstatements that is sometimes available to investors based on the "fraud-on-the-market" theory.[10] Without the ability to presume reliance on public statements by the class as a whole, individualized reliance issues would necessarily predominate, making class certification impossible.[11] As noted above, prior to *Amgen*, the Supreme Court previously made clear that (1) proof of the issuer's stock trading in an efficient market is a necessary prerequisite for invoking the fraud-on-the-market theory ***at class certification*** and (2) the presumption of reliance based on this theory is rebuttable by the defendants.[12]

> "The *Amgen* ruling also reflects a clear difference of opinion among the Justices regarding the wisdom of allowing plaintiffs to prevail at class certification based on a 'judicially invented' presumption of reliance."

The defendants in *Amgen* argued that, in addition to showing market efficiency, a plaintiff should be required to prove the materiality

[7] *Basic*, 485 U.S. at 248-49.

[8] *Amgen*, 133 S. Ct. at 1213.

[9] *Id.* at 1204, 1206.

[10] *Basic*, 485 U.S. at 243-44.

[11] *See Id.* at 242; *see also Amgen*, 133 S. Ct. at 1193 ("[T]he requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class.").

[12] *See, e.g., Dukes*, 131 S. Ct. at 2552 n.6; *Halliburton*, 131 S. Ct. at 2184; *Basic*, 485 U.S. at 242.

of the alleged misstatements to invoke the fraud-on-the-market theory.[13] They reasoned that the fraud-on-the-market theory is premised on the notion that the defendants' alleged misstatements must have an effect on the company's trading price (i.e., artificially inflating the stock price). Thus, according to the *Amgen* defendants, if the alleged misstatements were immaterial, it necessarily follows that they could have no impact on a company's stock.[14] The defendants in *Amgen* also argued that the district court wrongly refused to consider the rebuttal evidence demonstrating that the truth behind the defendants' alleged misstatements was already known to the market, rendering these alleged misstatements immaterial as a matter of law.[15]

The Supreme Court rejected the defendants' views on both points. The Court first held that, while the plaintiffs must certainly prove materiality to prevail on their claims at summary judgment or trial, such proof was not a prerequisite to class certification.[16] Following the logic employed by the Seventh and Ninth Circuits, the Court held that materiality is judged by an objective standard and "'is a question common to all class members.'"[17] Thus, "the plaintiff class's inability to prove materiality would not result in individual questions predominating" but rather "a failure of proof on the issue of materiality would end the case…for one and for all."[18] Thus, "[a]s to materiality,…the class is cohesive: It will prevail or fail in unison."[19] Even though the Court explicitly stated that materiality is "indisputably" "an essential predicate of the fraud-on-the-market theory," it nevertheless concluded that materiality, unlike reliance, "is a 'common questio[n]' for purposes of Rule 23(b)(3)."[20]

The Court also held that the Ninth Circuit did not err in refusing to consider the defendants' rebuttal evidence.[21] Again, the Court's decision on this point turned on the atypical nature of the arguments presented by the defendants. The Supreme Court noted that "[t]he Court of Appeals concluded, and *Amgen* does not contest, that *Amgen*'s rebuttal evidence aimed to prove that the misrepresentations and omissions alleged in [the] complaint were immaterial."[22] Having classified the rebuttal evidence as going to the question of materiality, the Court's prior ruling that the immateriality of *Amgen*'s alleged misstatements presented no barrier to predominance controlled the outcome.[23] Accordingly, the Court ruled that "just as a plaintiff class's inability to prove materiality creates no risk that individual questions will predominate, so even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class."[24]

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[13] *Amgen*, 133 S. Ct. at 1191.

[14] *Id.* at 1194.

[15] *Id.*

[16] *Id.* at 1194-1203.

[17] *Id.* at 1197 (quoting *Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010)).

[18] *Id.* at 1196.

[19] *Id.* at 1191.

[20] *Id.* at 1195.

[21] *Id.* at 1203.

[22] *Id.* at 1204.

[23] *Id.*

[24] *Id.*

Key Factors That Distinguish *Amgen* and Limit Its Potential Impact on Future Cases

As noted above, the Supreme Court specifically acknowledged that "*Amgen* . . . conceded the efficiency of the market for the securities at issue . . . ."[25] It was, therefore, undisputed on appeal that the market for Amgen's stock "'promptly digested current information regarding Amgen from all publicly available sources and reflected such information in Amgen's stock price.'"[26] Defendants seldom challenge materiality at class certification, but they do often challenge whether the market for a particular stock is efficient. *Amgen* should have no impact on defendants' ability to continue to challenge whether plaintiffs have met their burden of demonstrating market efficiency at class certification because no disputed issues on market efficiency were properly before the Court in that case.

> "Defendants seldom challenge materiality at class certification, but they do often challenge whether the market for a particular stock is efficient."

To be sure, the Court in *Amgen* refused to consider certain "rebuttal" evidence offered by the defendants at class certification. Again, however, that evidence was presented solely for the purpose of showing the immateriality of the alleged misstatements and not for the purpose of attacking market efficiency (because market efficiency was conceded). At the most, *Amgen* stands for the proposition that, at class certification, a court need not consider defendants' evidence that the alleged misstatements were immaterial (i.e., that no reasonable investor would have viewed the statements as important given "the total mix of information" available about the company).[27] But that is not the approach typically taken by defendants.

Defendants more often submit rebuttal evidence directed at challenging market efficiency, which, as the Court's opinion in *Basic* makes clear, is a separate inquiry from materiality and relates to the independent requirement of reliance.[28] *Amgen* cannot be read to suggest that rebutting the presumption of reliance on other grounds is no longer possible at class certification. Indeed, such a reading would be contrary to the Supreme Court's decision in *Basic*, where the Court specifically acknowledged ***in its review of a class certification decision*** that the fraud-on-the-market theory was a prerequisite for certification

[25] *Id.* at 1190.

[26] *Id.* at 1193 (quoting Amgen's answer to the amended consolidated complaint).

[27] *Basic*, 485 U.S. at 231-32 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[28] At pages 230 through 241 of *Basic*, the Supreme Court set forth the standards at summary judgment for assessing the materiality of merger discussions (i.e., the total mix of information test) and, *separately* at pages 241 through 249, the Court discussed the possible application of the fraud-on-the-market theory at class certification and the requirement of market efficiency to invoke that theory.

and could be rebutted by the defendants.[29] *Amgen* states nothing to the contrary. Indeed, the *Amgen* Court specifically acknowledged the long-standing rule that "'the presumption,' . . . is 'just that, and [can] be rebutted by appropriate evidence.'"[30]

Amgen also contains some helpful guidance on what type of evidence might be sufficient to rebut claims of market efficiency. The majority opinion referenced the fact that, in an efficient market, an investor should not be able to engage in a trade or a series of trades that will guarantee a profit. In other words, in an efficient market, persistent and unexploited arbitrage opportunities cannot exist. The Court specifically stated that "[f]ew investors in [an efficient market], if any, can consistently achieve above-market returns by trading based on publicly available information alone, for if such above-market returns were readily attainable, it would mean that market prices were not efficiently incorporating the full supply of public information."[31] Presumably, therefore, if a defendant can show that such arbitrage opportunities existed for investors during the alleged class period, then the market for that particular stock could not qualify as "efficient" under the *Amgen* Court's definition of market efficiency.

[29] *See Basic*, 485 U.S. at 248 ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.").

[30] *Amgen*, 133 S. Ct. at 1193 (citing *Halliburton*, 131 S. Ct. at 2185).

[31] *Id.* at 1192 (citing R. Brealey, S. Myers, & F. Allen, *Principles of Corporate Finance* 330 (10th ed. 2011) ("[I]n an efficient market, there is no way for most investors to achieve consistently superior rates of return.").

The Concurring and Dissenting Opinions

Each of these opinions voiced a common theme—a desire by certain members of the Court to revisit the fraud-on-the-market presumption, in general. Justice Alito makes this point directly in his concurring opinion. He explained that he joined the majority's opinion only because "the petitioners did not ask us to revisit *Basic*'s fraud-on-the-market presumption."[32] He nevertheless filed a separate opinion to make clear that he believes "reconsideration of the *Basic* presumption may be appropriate."[33] Justice Scalia similarly observed in his separate opinion that the failure to require proof of materiality at class certification not only does an injustice to *Basic*, which clearly "envision[ed] a demonstration of materiality" for class certification, but also expands the "consequences [of recognizing the fraud-on-the-market theory] from the arguably regrettable to the unquestionably disastrous."[34]

Justice Thomas' dissenting opinion echoed these concerns. His opinion references the fact that, in *Basic*, "four Justices of a six-Justice Court created the fraud-on-the-market presumption from a combination of newly minted economic theories."[35] He questioned the wisdom of imposing lower burdens on plaintiffs at class certification based on "a judicially invented doctrine . . . adopted to ease the burden on plaintiffs bringing claims under an implied cause of action."[36] He reasoned that "[t]here is nothing untoward about requiring

[32] *Id.* at 1204.

[33] *Id.*

[34] *Id.* at 1206.

[35] *Id.* at 1212.

[36] *Id.*

plaintiffs to take the steps that the *Basic* Court created in an effort to save otherwise inadequate claims."[37] Like the dissent in *Basic*, Justice Thomas emphasized that "the Court is 'not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory.'"[38] ■

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[37] *Id.*

[38] *Id.* at 1208, n. 4 (quoting *Basic*, 485 U.S. at 252-253 (White, J., concurring in part and dissenting in part).

About the Authors

Susan E. Hurd is a partner in the Securities Litigation Group, where she represents officers and directors in a variety of litigation matters, including securities class actions, shareholder derivative suits and merger-related litigation. She also routinely advises clients on disclosure issues and electronic discovery best practices. Susan received her undergraduate degree, summa cum laude, from Vanderbilt University and her J.D. from Vanderbilt University School of Law.

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U.S. Government Releases Guide for FCPA Compliance

By William H. Jordan and Jason D. Popp

From 2010-2012, the federal government recovered a record $2.5 billion in fines and penalties for violations of the Foreign Corrupt Practices Act (FCPA). Not surprisingly, this tremendous increase in enforcement activity has caused anti-corruption compliance to become one of the top priorities for corporate counsel. Faced with an uncertain and evolving enforcement environment, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have attempted to provide some clarity around FCPA compliance through the November 2012 release of their long-awaited guidance. Although not legally binding, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "Resource Guide") contains helpful information for companies conducting business in foreign countries. The Resource Guide provides guidance similar to what practitioners have viewed as "best practices" for many years. It is helpful, however, to have the government's view on

this as well, even if the guidance fails to clarify all the outstanding issues. Set forth below are some of the most notable areas.

> "Companies have struggled mightily with gift policies, and the Resource Guide provides some help here."

Gift-Giving

Companies have struggled mightily with gift policies, and the Resource Guide provides some help here. In order for liability to attach under the FCPA's anti-bribery provisions, a payment to a government official must be made with an intent to wrongfully influence or induce the recipient to misuse his official position. Even though the FCPA does not contain a de minimis exception, the Resource Guide indicates that the government has never investigated the provision of cups of coffee, taxi fares, or promotional items of nominal value—i.e., free pens, hats, or t-shirts with a company's logo. Moreover, the Resource Guide recognizes that reasonable gifts or tokens of gratitude made in conformity with local custom, such as wedding gifts, are an appropriate way for business people to show respect. At all times, the Guide stresses the "reasonableness" of the gift.

Travel and Entertainment Expenses

As an illustration of an improper, non-business-related expense, the Resource Guide describes a situation in which a company covered the expenses of a $12,000 birthday trip, including visits to wineries, for a government decision-maker. In contrast, the Resource Guide provides a hypothetical scenario involving foreign officials that wish to tour and inspect facilities at a U.S. company with which they have contracted. In that situation, the company could lawfully pay for the officials' airfare, hotels and transportation, as well as a night of entertainment, including a moderately priced dinner and a sporting event. Again, the reasonableness of the expenses associated with the visit is important.

Instrumentality of a Foreign Government

The qualities that make someone a foreign official can be fact-specific and difficult to identify with precision. The Guide notes that the FCPA's anti-bribery provisions proscribe payments to "foreign officials." At its most basic level, foreign officials include officers and employees of a foreign government and individuals acting on the government's behalf. However, employees of government-controlled entities may be considered foreign officials by virtue of their affiliation with a foreign government instrumentality. The Resource Guide offers practical guidance regarding when such entities qualify as a foreign government's "instrumentality," including a list of factors courts have used to make such determinations in the past. These factors include the foreign state's degree of control over the entity, characterization of the entity, and the purpose of the entity's activities.

FCPA Risk in the Merger and Acquisition Context

The Resource Guide provides practical tips on how companies can reduce FCPA risk in the context of a merger and acquisition. For example, a company contemplating an

acquisition may seek an opinion regarding DOJ's enforcement position in various circumstances. Within 30 days, DOJ will issue an opinion about whether, under present enforcement policy, the proposed conduct would violate the FCPA.

Generally, comprehensive FCPA due diligence and appropriate disclosures will reduce FCPA risk. The Resource Guide recommends the following steps:

- Conduct thorough risk-based anti-corruption due diligence on potential acquisitions.
- Ensure that the acquiring company's code of conduct and policies regarding anti-corruption laws quickly apply to merged entities.
- Train directors, officers and employees of merged entities on anti-corruption laws and the company's code of conduct and compliance policies.
- Conduct an FCPA-specific audit of all newly acquired or merged business as soon as practicable.
- Disclose corrupt payments uncovered during due diligence of newly acquired or merged entities.

Among other advantages, the Resource Guide emphasizes that the enforcement agencies will give "meaningful credit" to companies that act in accordance with these recommendations and that demonstrate a genuine commitment to uncovering and preventing FCPA violations.

FCPA Accounting Provisions

The FCPA's "books and records" and "internal controls" provisions affect all issuers of publicly traded securities, including those companies required to file annual or periodic reports and whose stock trades in over-the-counter markets. These accounting provisions compel accurate financial representations by public companies.

The "books and records" provision requires companies to "make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the [company]." The most common violation of this section involves the financial mischaracterization of bribes, such as classifying illicit payments as "consulting fees," "petty cash withdrawals," and "entertainment expenses."

> "The 'books and records' provision requires companies to 'make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the [company].'"

The "internal controls" provision combats foreign bribery by requiring public companies to "devise and maintain a system of internal accounting controls." Although the provision does not recommend specific procedures, the Resource Guide suggests internal controls tailored to certain factors. These factors include, among others, the nature of the company's products or services, how those products and services get to market, and the degree

to which the company operates in countries with a high risk of corruption.

Importantly, the FCPA's Accounting Provisions can create liability for a company regardless of whether the company has violated the FCPA's anti-bribery provision.

Compliance Programs

There is not a one-size-fits-all program for compliance, and companies must tailor policies that suit their specific needs. Nevertheless, the Resource Guide provides a list of the "Hallmarks of Effective Compliance Programs," which includes, but is not limited to, the following elements:

- *Code of Conduct and Compliance Procedures.* Companies should have clear, concise, and accessible codes of conduct, as well as internal procedures outlining compliance responsibilities, internal controls, auditing practices, documentation policies and disciplinary procedures.
- *Oversight, Autonomy and Resources.* It is critical for a company to assign responsibility for the oversight and implementation of its compliance program to specific executives with appropriate authority, adequate autonomy and sufficient resources to effectively implement compliance.
- *Incentives and Disciplinary Measures.* Companies should set forth appropriate disciplinary and incentive schemes to encourage employees and executives alike.

Principles of Enforcement

The DOJ and SEC take into account a variety of factors in investigating a corporation, determining whether to charge, and negotiating a plea agreement, including:

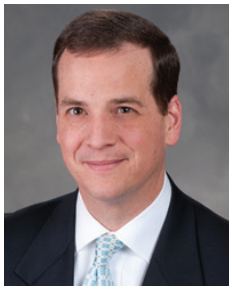
- the nature and seriousness of the offenses;
- the corporation's history of misconduct and whether the misconduct is ongoing;
- the corporation's remedial actions, including timely and voluntary disclosure of wrongdoing and willingness to cooperate;
- the existence and effectiveness of the company's compliance program; and
- the collateral consequences, such as harm to shareholders and employees.

"Importantly, the FCPA's Accounting Provisions can create liability for a company regardless of whether the company has violated the FCPA's anti-bribery provision."

The Resource Guide's discussion of six recent, anonymous declinations provides a rare and valuable glimpse into the enforcement process. The most important takeaway from these examples is that, in determining the appropriate resolution of FCPA matters, DOJ and SEC place a high premium on self-reporting, cooperation and remedial efforts, and the existence of effective compliance programs.

Alston & Bird's November 20, 2012, Government Investigations advisory provides a more comprehensive overview of the Resource Guide (http://www.alston.com/advisories/government-investigations-advisory-doj-sec-resource-guide/). The Resource Guide can be accessed in full on DOJ's website (http://www.justice.gov/iso/opa/resources/29520121114101438198031.pdf). ■

About the Authors



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MORTGAGE LITIGATION

The CFPB's "Qualified Mortgage" Rule and New Mortgage Servicing Requirements Will Significantly Impact Residential Mortgage Lending Litigation

By Matthew P. McGuire and Richard A. McAvoy

Since the start of the new year, the Consumer Financial Protection Bureau (CFPB) has issued two final rules that will undoubtedly make a tremendous impact on residential mortgage lending and servicing, including the litigation trends that affect both. These rules take effect on January 10, 2014.

Ability to Repay and Qualified Mortgages

On January 10, 2013, the CFPB released its highly anticipated regulations implementing the Dodd-Frank requirement that mortgage lenders consider a borrower's ability to repay a loan and the associated definition of a "qualified mortgage" (QM). Despite the fears of commentators and lenders alike, the final rule has been regarded by most as far less burdensome on lenders than was originally anticipated.

Dodd-Frank prohibits residential mortgage lenders from making "a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan." Dodd-Frank also established a presumption of compliance for all mortgages that fit the requirements of a "qualified mortgage," but failed to provide sufficient detail as to the degree of presumption to which a QM lender is entitled or the specifics regarding which loans qualify as a QM. The final rule clarified both of these issues.

Qualified Mortgages

Under the final rule, loans having interest-only or balloon payments, loans exceeding 30 years and loans with negative amortization are excluded from the definition of a QM. Also, the new rule limits QM qualification to those loans where the points and fees paid by the borrower are less than or equal to three percent of the total loan amount and where the borrower has a debt-to-income ratio that is less than or equal to 43 percent. Additionally, in order to satisfy the QM standard, mortgage lenders must collect significant documentation from borrowers justifying their ability to repay the debt.

"Under the final rule, loans having interest-only or balloon payments, loans exceeding 30 years and loans with negative amortization are excluded from the definition of a QM."

However, to mitigate the risk that lenders would be hesitant to make loans that did not qualify as QMs and the resulting impact, the final rule also establishes a second, albeit temporary, category of QMs. This more flexible QM definition requires that mortgages satisfy the general product features of a QM (no interest-only, balloon payments, etc.), but they only need to satisfy the underwriting requirements of a loan eligible to be purchased, guaranteed or insured by a government-sponsored enterprise, the Department of Housing and Urban Development, the Department of Veterans Affairs or the Department of Agriculture Rural Housing Service. This temporary category of QMs will be fully phased out within seven years.

The Presumption

The CFPB's final rule creates a conclusive presumption of compliance with the ability to repay requirements for all QMs that are not "higher-priced." Although it was already clear under the Dodd-Frank Act that lenders of QMs were entitled to a presumption of compliance,

it was not clear to what degree. This "safe harbor" provision should strongly discourage, though not completely eliminate, borrower lawsuits against lenders relating to ability-to-repay issues.

> "The CFPB's final rule creates a conclusive presumption of compliance with the ability to repay requirements for all QMs that are not 'higher-priced.'"

With regard to "higher-priced" transactions, the final rule creates a rebuttable presumption of compliance where the underlying loan is a QM. Under the rule, a borrower may rebut such a presumption by showing that at the time the loan was made, the borrower's income relative to his debt did not leave sufficient funds for the borrower to meet his living expenses. A "higher-priced" transaction includes first mortgages with an annual percentage rate that exceeds the prime offer rate by 1.5 or more percentage points.

Impact on Mortgage Lenders

Despite the fact that many commentators have suggested that the QM rule was more favorable than expected for mortgage lenders, it should not be viewed as a "silver bullet" to protect lenders from consumer-driven litigation, state attorney general investigations and scrutiny from consumer advocacy groups. The new rule does not provide any reason for lenders to be confident that litigation surrounding their lending practices will be dramatically lessened. Rather, it is more likely that the issuance of the QM rule will merely shift the focus of lending-related litigation from old issues to new.

Although the new rule provides a "safe harbor" for lenders of QMs and a "rebuttable presumption" of compliance for lenders of "higher-priced" QMs, there is nothing in the rule that prevents a borrower from challenging the QM status of his loan in court. Also, for "higher-priced" QMs, it is important to remember that a "rebuttable presumption" is just that. It is not a basis for preventing litigation, just discouraging it. That said, even the new presumptions will do little to discourage borrowers in default from bringing suits arguing that their loans were unsuitable under the regulations as a basis for delaying foreclosure actions and seeking to compel servicers to negotiate loan modifications and forbearance agreements.

Mortgage Servicing Rules

On January 17, 2013, the CFPB released its final rules amending Regulation Z, which implements TILA , and Regulation X, which implements RESPA . The rules were made pursuant to the power given to the CFPB by the Dodd-Frank Act, and both implement the servicing standards created by Dodd-Frank, as well as other requirements deemed necessary by the bureau. The new rules are the first example of nationwide standards for the servicing of mortgages.

The new rules have several purported aims, including improving the information that borrowers receive from their servicers, enhancing the protections available to borrowers and establishing baseline servicer requirements to provide protections to borrowers who have fallen behind on their mortgage payments. Among other requirements, the new rules

require that servicers must provide adequate periodic billing statements, provide notice of changes in the interest rate or payment amount for adjustable rate mortgages, process mortgage payments as of the day of receipt, comply with the stringent requirements related to force-placed insurance, properly respond to borrower information requests or complaints, establish policies and procedures for implementing the new rules, inform delinquent borrowers that loss mitigation options may be available, ensure that borrowers have access to personnel available to assist them with their loss mitigation options, and comply with specific loss mitigation application and review procedures articulated in the rule.

> "The implementation of the new mortgage servicing requirements will, if nothing else, lead to much-improved 'best practices' within the servicing industry."

Many of these rules provide exemptions for servicers that service fewer than 5,000 mortgage loans and only those loans that they or an affiliate originated or own. The CFPB justified this distinction on the grounds that by all accounts, small servicers already conducted their customer services very well.

Impact on Mortgage Servicers

The implementation of the new mortgage servicing requirements will, if nothing else, lead to much-improved "best practices" within the servicing industry. In fact, it's likely that a significant amount of the residential mortgage litigation over the past several years could have been avoided if mortgage servicers had self-implemented some of these procedures before the housing bubble burst and revealed the flaws in old systems. That said, these improvements do not come without a significant cost. These new procedures will almost certainly require mortgage servicers to employ significantly greater numbers of customer service staff and may also require many servicers to implement new data management systems. Furthermore, the new requirements associated with loan modification reviews and the prohibition on "dual tracking" will force mortgage servicers to retain delinquent (and thus money-losing) loans for even longer. The significant expenditures associated with meeting these standards will undoubtedly result in increased costs that are passed on to consumers. Also, as with any substantially revised regulatory scheme, more rules equals more opportunities for servicers to violate them inadvertently. This inevitably will lead to more litigation in the short run as servicers adapt to the new world order mandated by the CFPB. ■

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