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THE INSTITUTIONAL INVESTOR'S GUIDE TO SECURITIES CLASS ACTION LITIGATION

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Court Protects Institutional Lead Plaintiff From Unreasonable Discovery In Securities Class Action

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Since the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), large pension funds and institutional investors have recognized the importance of participating in securities class actions to protect the integrity of America's financial markets and to maximize investor recoveries. As a direct consequence of institutional participation, settlements and returns to investors in class action securities cases have increased, much to the chagrin of corporate fraudsters and their insurers. No doubt recognizing the significant and positive role that public pension funds and institutional investors have been playing in the protection of our capital markets and their important contribution to these private enforcement actions, defendants have increasingly resorted to overly aggressive and oft-times abusive discovery tactics to both discourage institutional investors from becoming actively involved and

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DaimlerChrysler Agrees to Pay \$300 Million to Settle Class Action

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After more than two and one-half years of vigorous litigation and extensive mediation proceedings in late July of this year, DaimlerChrysler AG agreed to settle the securities class action pending against it in the United States District Court for the District of Delaware for \$300 million. Lead Plaintiffs – the Policemen's Annuity and Benefit Fund of Chicago ("PABF"), Municipal Employees Annuity and Benefit Fund of Chicago ("MEABF"), Denver Employees Retirement Plan ("DERP"), and Florida State Board of Administration ("FSBA") – will seek approval of the settlement from the Court, asking the judge to find that the settlement is fair, reasonable and in the best interests of the class. The decision to resolve the litigation was approved by the Lead Plaintiffs and DaimlerChrysler's Supervisory Board. The settlement is possibly the largest settlement ever for a securities fraud litigation that did not involve fraudulent accounting.

As previously reported in the Barrack Bulletin (Jeffrey W. Golan, "Delaware Court Appoints Group of Institutional Investors to Lead Class Action Against DaimlerChrysler AG," Vol. 2, Spring 2001; Jeffrey W. Golan, "District Court Upholds Class Complaint Against DaimlerChrysler," Vol. 4, Spring/Summer 2002), former Chrysler Corporation shareholders and purchasers of DaimlerChrysler stock sued DaimlerChrysler for securities fraud in connection with the merger of the two companies in 1998. Plaintiffs have alleged that to induce approval of the merger by Chrysler stockholders, Daimler-Benz touted the transaction as a "merger of equals" that would create a combined company in which Chrysler and Daimler-Benz would each constitute 50% of the new company. Based upon these representations, 97% of Chrysler's shareholders voted to approve the

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merger at a price of \$57.50 per Chrysler share, including a premium of only 28% over Chrysler's market price, which was set at that level to reflect the relative value the two companies brought to the transaction. Daimler-Benz convinced Chrysler management, which wanted a premium of at least 40%, that the lower premium was appropriate since this was not an acquisition but rather a merger of equals.

However, on October 30, 2000, Jürgen Schrempp, former CEO of Daimler-Benz and current CEO of DaimlerChrysler, stated to the Financial Times that he no longer had any reason to maintain the fiction of the "merger-of-equals"; that "the structure we have now with Chrysler (as a standalone division) was always the structure I wanted....We had to go a roundabout way but it had to be done for psychological reasons. If I had gone and said Chrysler would be a division, everybody on their side would have said: 'There is no way we'll do a deal.' But it's precisely what I wanted to do." In the two years after the merger, the former Daimler-Benz executives effectively took over DaimlerChrysler and forced Chrysler to become a standalone division of the new company. Contrary to

what Chrysler shareholders were led to expect, there has been no dual operational control or dual operational headquarters, because the Daimler defendants never intended such a union. Indeed, plaintiffs allege that the former Daimler-Benz and its executives misled Chrysler shareholders and DaimlerChrysler investors to fulfill their plan to acquire Chrysler at a bargain price and subordinate it as just another operating division of the company.



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The PABF, MEABF, DERP and FSBA were each appointed by the Court on March 30, 2001, as Lead Plaintiffs for the Action. In March 2002, defendants' motion to dismiss Lead Plaintiffs' First Amended Complaint was denied in part and granted in part by the Court. By that order, the Court denied the motions to dismiss Lead Plaintiffs' claims that defendants misrepresented the merger as a "merger of equals" in obtaining approval of the merger from Chrysler shareholders and during the class period.

Discovery commenced in May 2002 following Court approval of the filing of the Lead Plaintiffs' Second

Amended Complaint and entry of a scheduling order for the action. Lead Counsel served upon defendants interrogatories and document requests and reviewed and analyzed defendants' responses thereto and hundreds of thousands of documents produced by the defendants and by non-parties, including documents produced by the investment banking firms retained by Chrysler and by Daimler-Benz, respectively, in connection with the negotiation and consummation of the Merger. Lead Counsel also initiated proceedings in the United Kingdom to obtain evidence in the possession of the Financial Times Ltd. Lead Counsel conducted and/or participated in more than 36 depositions in the United States, Germany and England, and made extensive additional inquiries as to pertinent facts, including through consultation with German speaking attorneys retained by Lead Counsel, independent financial advisors, merger and acquisition experts, and damages experts.

The Lead Plaintiffs have strongly endorsed the Settlement.

Lead Plaintiffs filed their motion for class certification in the fall of 2002, and the defendants conducted depositions of each of the Lead Plaintiffs in connection with the motion. The class motion was briefed by the parties, and submitted to the Court in early 2003. In addition, Lead Plaintiffs proffered reports by three experts concerning the effect of the alleged misrepresentations and omissions on the merger exchange ratio and prices at which DaimlerChrysler stock traded during the class period. Defendants proffered reports by four experts in response to Lead Plaintiffs' expert reports. All discovery was concluded by the spring of 2003, with the exception of limited depositions that the Court indicated would be allowed for a small number of defendants' trial witnesses.

By Order dated June 11, 2003, the Court certified the case as a class action. In addition, the Court certified: (1) Lead Plaintiffs FSBA, PABF and MEABF as Class representatives for those members of the Class who exchanged Chrysler shares for DaimlerChrysler shares in connection with the Merger; (2) Lead Plaintiffs PABF, MEABF, and DERP as class representatives for those members of the class who acquired DaimlerChrsyler stock during the class period; and (3) approved Co-Lead Counsel as counsel for the class. (See side bar.)

Before the class motion was decided, defendants had moved for summary judgment on February 10, 2003, on a number of grounds, including, among others, that Lead Plaintiffs' claims were not timely brought and were barred continued on page 3

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by the governing statute of limitations; that none of the documents disseminated by the defendants concerning the merger contained any false or misleading statements or omissions; and that Lead Plaintiffs' cannot recover any lost control premium. On June 25, 2003, the court rejected the statute of limitations argument and denied defendants' motion for summary judgment. (*See side bar.*) Trial of this action was scheduled to commence on December 1, 2003.

The \$300 million settlement was the product of extensive arm's length negotiations between the Lead Plaintiffs and Lead Counsel and counsel for the defendants. Commencing in May 2003, after the conclusion of virtually all fact and expert discovery and after the completion of briefing on defendants' motions for summary judgment, the parties began to discuss the possibility of settling the case. Those discus-



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sions, however, failed to result in a settlement. In June, 2003, the parties agreed to mediation and agreed upon an experienced mediator, a former federal judge, to facilitate

those negotiations. The mediation took place on July 29 and 30, 2003, during which the parties reached a settlement in principle. Each of the Lead Plaintiffs was present during the mediation sessions either in person or by phone. Counsel for the Lead Plaintiffs and the defendants set forth the agreement in principle in a Memorandum of Understanding executed in August, 2003. The terms of the Memorandum of Understanding were then incorporated into the Stipulation of Settlement between Lead Plaintiffs and defendants. On September 30, 2003, the parties intend to seek the Court's preliminary approval of the settlement. Should the Court preliminarily approve the settlement, members of the class will be notified of the details of the settlement and the date of the hearing on the fairness of the settlement. Members of the class will be given the opportunity to participate in the settlement by timely filing a claim form. Should the Court grant final approval of the settlement, it will dismiss the case against all of the defendants. Each of the Lead Plaintiffs has strongly endorsed the settlement. BR&B, along with other Lead Counsel, believe that the Settlement represents a very good recovery for the class, and shows the importance of public pension funds participating in class action lawsuits.

The Court will likely hear the motion for final approval of the settlement in late 2003 or early 2004. As always, class members will be required to file a proof of claim to participate in the settlement. If you have questions about the settlement, please contact Leslie Molder, Esquire, at 800/417-7305.

Important Legal Decisions In DaimlerChrysler

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In June 2003, United States District Judge Joseph J. Farnan issued two important decisions in favor of plaintiffs in the DaimlerChrysler Securities Litigation. First, on June 11, 2003, Judge Farnan certified the action as a class action and appointed Lead Plaintiffs Florida State Board of Administration, Municipal Employees and Benefit Fund of Chicago, Policemen's Annuity and Benefit Fund of Chicago, and Denver Employees Retirement Plan as the representatives of the class. Second, on June 25, 2003, Judge Farnan denied defendants' motions for summary judgment, holding that the statute of limitations did not bar plaintiffs' claims in this action.

Class Certification

On June 11, 2003, Judge Farnan certified a class consisting of (1) all persons who exchanged shares of Chrysler Corporation for shares of DaimlerChrysler AG in connection with the November 1998 merger of the two companies; and (2) all persons who purchased or acquired shares of DaimlerChrysler in the open market from the time of the merger through November 17, 2000. The class does not include foreign investors.

Judge Farnan appointed Barrack Rodos & Bacine as Co-Lead Counsel for the class and appointed the Lead Plaintiffs as the representatives of the class. The Court expressly found that the four institutional Lead Plaintiffs "have sufficient understanding and knowledge of the legal basis and factual allegations underlying this action such that they are adequate representatives of the class," and that the Lead Plaintiffs' attorneys "are well qualified and highly experienced such that they can adequately conduct this litigation and represent the interests of the class." *In*

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harass existing institutional Lead Plaintiffs into low-ball settlements, or even throwing in the towel.

Recently, the Florida State Board of Administration ("FSBA"), one of the nation's largest public pension funds, was the object of such discovery tactics as the Lead Plaintiff in the Applied Micro Circuits Corporation ("AMCC") Securities Litigation, pending in the United States District Court for the Southern District of California. Barrack, Rodos & Bacine ("BR&B") is FSBA's courtapproved Lead Counsel.

Despite providing abundant documentation of its AMCC securities transactions during the class period in support of its motion to certify the proceedings as a class action and submitting one of its employees to a full day of deposition testimony concerning its AMCC transactions, defendants sought to take a <u>second</u> deposition to obtain testimony by FSBA in the following 10 areas:

- 1. FSBA's knowledge and approval of the allegations in the consolidated complaint;
- 2. FSBA's policies, procedures, and guidelines governing litigation in general and securities class action litigation in particular;
- 3. FSBA's direction and control of the litigation;
- 4. FSBA's experience as a class representative in other securities class actions;
- 5. FSBA's fiduciary duties and obligations with regard to the funds for which



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FSBA is a trustee and with respect to the potential class members FSBA seeks to represent in the litigation;

- 6. The reasons for FSBA's decision to seek to serve as class representative in the litigation;
- 7. Investigations of, or lawsuits brought by or against FSBA or any trustee, officer or senior manager concerning management and/or oversight of the funds for which FSBA is a trustee;
- 8. The reasons for FSBA's selection and retention of its present counsel in the litigation;

- 9. The operation and functionality of FSBA's electronic mail system, including the software, hardware, and back-up methodology used by the fund; and
- 10. The identity, purpose and function of FSBA's computer systems, file servers, and software applications.

In reaction to this blatantly inappropriate fishing expedition, Lead Counsel BR&B, on behalf of the FSBA, timely moved for a protective order from the Court, contending that to allow such burdensome and unnecessary discovery would fly in the face of the intent of Congress in passing the PSLRA. BR&B explained that Congress envisioned that passage of the PSLRA would inspire large institutional investors and public pension funds like FSBA to take a leading role in protecting the integrity of our capital markets. BR&B noted that to encourage institutional investors to step forward, the PSLRA requires courts "to presume that the member of the purported class with the largest financial stake in the relief sought is the 'most adequate plaintiff," (H.R. Conf. Rep. No. 104-369 at 34 (1995)) and contemplates that the lead plaintiff will inevitably fulfill the role of class representative. Because of their governance structures, their sophistication, their independent resources and their experiences as fiduciaries, public pension funds are well-qualified to see that securities class actions are litigated in the best interest of the class. To facilitate appointment of public pension funds as lead plaintiffs and ultimately as class representatives. Congress recognized that those funds will ordinarily meet the adequacy and typicality requirements for class representation.

BR&B also argued that the FSBA had been more than forthcoming with information about its adequacy as a class representative and the typicality of its claims, providing, among other things, a wealth of information about its purchases of AMCC securities during the class period and its securities class action litigation history. For example, FSBA's sworn certification filed with its Motion for Appointment as Lead Plaintiff (as required by the PSLRA), listed each action in which it had served as lead plaintiff and provided a listing of its transactions in the securities of AMCC during the class period. FSBA also provided interrogatory responses identifying all class action securities litigation in which it had been a named plaintiff in the preceding 3 years, all cases in which it had moved for class certification, and all entities that had provided portfolio investment services with regard to AMCC securities in the preceding 3 years, while producing numerous documents detailing its holdings in AMCC securities and providing deposition testimony on AMCC transaction-related subjects.

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Court Protects Institutional Lead Plaintiff

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In granting FSBA's motion for a protective order, Magistrate Judge Anthony J. Battaglia focused on two questions relevant to the determination of a plaintiff's adequacy to represent the interests of a class under the Federal Rules of Civil Procedure: (a) whether the named plaintiff and its counsel have any conflicts of interest with other class members; and (b) whether the named plaintiff and its counsel will vigorously prosecute the action on behalf of the class. Judge Battaglia concluded that the FSBA had already produced ample information addressing the conflict of interest inquiry and that any marginal relevance of the cumulative and duplicative information sought by defendants was outweighed by the burden and expense of reconvening a second deposition. The Court also determined that the Ninth Circuit has neither adopted nor endorsed the extensive inquiry sought by defendants to determine the adequacy of an institutional investor in a securities fraud action to represent the interests of a class. The court found that the "traditional adequacy inquiry" described by the Ninth Circuit in In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454 (9th Cir. 2000), was sufficient and that the wide-ranging discovery sought by the defendants was simply irrelevant to that inquiry.

Judge Battaglia's decision protecting FSBA from burdensome, cumulative and irrelevant discovery signals a judicial appreciation for the important role that Congress has established for institutional investors by encouraging an assertive role in the control of meritorious securities class actions. As proponents of PSLRA-type reforms have recognized, we are hopeful that a rising tide of federal judges will similarly recognize that it is necessary to reduce the discovery burden placed on institutional investors who participate as lead plaintiffs concerning class certification and representation issues. To protect the salutary roles that institutional investor lead plaintiffs have played and will continue to play in these important cases, BR&B will continue to advocate restrictions on burdensome discovery served upon its clients.

Claims Filing Deadlines

Barrack Rodos & Bacine now provides up to date claims filing information online.

Visit the Investor Resources Center at www.barrack.com for detailed claims filing deadline information.

Court Approves "Exceptional" Safeskin Settlement: Institutional Lead Plaintiff Commended

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By Order and Opinion dated April 2, 2003, the Honorable Barry Ted Moskowitz, Judge of the United States District Court for the Southern District of California, approved a settlement in the amount of \$55 million in the *Safeskin Securities Litigation* in which the Public School Teachers' Pension & Retirement Fund of the City of Chicago ("Chicago Teachers' Fund") served as a Co-Lead Plaintiff. Barrack, Rodos & Bacine, retained by the Chicago Teachers' Fund, served as Co-Lead Counsel. The



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Court characterized the settlement as "exceptional," particularly in view of the considerable risk and expense in proceeding to trial, the existence of serious disputed questions of law and fact, and concerns regarding Safeskin's ability to satisfy a large judgment.

The Court commended the active involvement of the Chicago Teachers' Fund and found it particularly important in determining the reasonableness of the settlement:

[T]he Fund's board of trustees met to extensively review, analyze and evaluate the merits of the action and determine whether the proposed \$55 million settlement should be approved as fair, reasonable and in the best interests of the Class. *The Court finds the Fund's support of the settlement extremely persuasive as to its reasonableness.*

(Jason Stanley et al. v. Safeskin Corporation, et al., Case No. 99CV454 BTM (LSP) (S.D.Cal., April 3, 2003), slip op. at 5.) The Court also noted the important role the Fund played in determining a reasonable attorneys' fee for procuring such an "exceptional" result:

As an experienced and sophisticated institutional investor, the Fund had the wherewithal to evaluate the appropriateness of the fees in this case, a pecuniary interest in the result, and a fiduciary duty to its investors to ensure that it recovered the maximum amount from the common fund.

(*Id.*, slip op. at 7.)

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re: DaimlerChrysler AG Securities Litigation, 216 F.R.D. 291, 300 (D.Del. 2003).

The Court also rejected defendants' challenge to the FSBA based on its participation as lead plaintiff in numerous securities actions. The Court specifically held that the "professional plaintiff" restriction included in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which imposes a "five cases in three years" limit on the number of securities class actions in which an investor may act as lead plaintiff, does not apply to institutional investors, noting that the "FSBA has been quite attentive to this litigation since its inception, thereby dispelling any concern that FSBA is distracted by its role in other cases." *Id.*, at *7. Judge Farnan thus joined an ever-increasing number of courts favoring institutional leadership of securities class actions.

Statute of Limitations

Less than two weeks later, on June 25, 2003, Judge Farnan denied a portion of defendants' motions for summary judgment, holding that the statute of limitations did not bar plaintiffs' claims in this action. Defendants claimed that plaintiffs were barred from



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bringing the action because the first complaint was filed on November 27, 2000, even though plaintiffs were on "inquiry notice" of their claims as early as mid-November 1998. The Court described "inquiry notice" as the point when plaintiffs discover, or in the exercise of reasonable diligence should have discovered, the basis for their claim(s) against defendants. *In re: DaimlerChrysler AG Securities Litigation*, 269 F.Supp.2d 508, 513 (D.Del. 2003). In other words, plaintiffs are on inquiry notice when, through the exercise of reasonable diligence, they have enough information to discover the existence of possible wrongdoing, or to recognize "storm warnings" of culpable activity. *Id*.

Defendants bear the initial burden of showing that storm warnings existed, and plaintiffs must then establish that they were unable to discover their injuries despite their exercise of reasonable diligence. *Id.* The defendants offered three types of storm warnings: (1) newspaper articles and press releases doubting that the merger would be a merger of equals; (2) shareholders' concerns

voiced at the merger vote that Schrempp would be the dominant figure within DaimlerChrysler; and (3) monthly reports from DaimlerChrysler referring to Chrysler as a "division." *Id.*, at 514-15, 516-17. Plaintiffs argued that these "storm warnings" were not sufficient to put them on inquiry notice because there was a mix of information in the public domain that offset comments that the transaction was not a merger of equals.

Judge Farnan admonished defendants by noting that they were "basically seeking to punish Plaintiffs for trusting their word, a position which I find to be at odds with their role as corporate insiders."

The Court concluded that the defendants had not established that the information available was sufficient to alert a reasonable investor to the possibility of fraud. "Where there is a mix of information available to the plaintiffs such that any negative statements are tempered by positive statements from a company's management and others, courts have been reluctant to find that the plaintiffs had inquiry notice of their claims." Id., at 514. Judge Farnan admonished defendants by noting that they were "basically seeking to punish Plaintiffs for trusting their word, a position which I find to be at odds with their role as corporate insiders." *Id.*, at *515. The Court continued: "[i]n my view, one would be hard pressed to find a case where management took more substantial steps to dissipate storm warnings than in this case. Defendants mounted an aggressive, all-out campaign to counter any assertions that the merger was not a merger of equals." Id. Judge Farnan concluded:

Defendants' analogy to meteorology is particularly appropriate. Defendants contend that the storm warnings in this case were Category V, hurricanetype warnings. However, Defendants neglect to point out that they were the weathermen with all the technology and expertise to render the forecast. They assured Plaintiffs and the public that the partly cloudy skies and mild winds were not the precursors of any storm. Rather, the clouds would surely break and the wind would surely die down, giving way to an overall calm and sunny day for DaimlerChrysler. Given this forecast, I cannot fault Plaintiffs for being caught without their umbrellas.

Id., at 518. Judge Farnan concluded that the statute of limitations did not bar plaintiffs' claims against defendants. ❖

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Shed a Tier for Me: Strategic Tiering of D&O Insurance Harms Victims of Securities Fraud

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When a securities fraud class action is settled for cash, the source of the cash is often "D&O insurance." But what is D&O insurance, who is it designed to protect and why does the coverage seem woefully inadequate when it comes time to settle a securities fraud class action? D&O insurance, or directors and officers liability insurance, is purchased by a company to cover the costs of lawsuits arising from the conduct of its officers and directors on behalf of the company. A company will purchase D&O insurance to avoid having to use its own funds to defend against – and settle – a challenge to the actions of its corporate managers. Thus, D&O insurance should protect the interests of both the corporation and its shareholders against the misdeeds of corporate officers. But that is often not the case.

In recent years, many corporations have structured their D&O insurance to impede access to a substantial portion of the insurance coverage by victims of a securities fraud. By reducing the insurance available for this purpose, it has become harder for securities fraud victims to be compensated for their losses.

"Strategic tiering" of D&O insurance – the purchase of smaller policies, or layers, of insurance instead of a single larger policy – has become "a useful consideration in designing an effective risk management program" for corporations. *See* Feldman, Boris, "The Veil of Tiers: Shareholder Lawsuits and Strategic Insurance Layers" (1997).



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As originally conceived, D&O insurance permits a corporation to indemnify its corporate officials sued for their actions on behalf of the corporation. According to one insurance expert, the public policy behind D&O insurance rests on the premise that corporations conduct business in an honest, good-faith manner, and that insurance is needed in the unfortunate case where a rogue officer or director puts his or her own self-interest above those protected by fiduciary duty – the corporation's shareholders. Borgeest, Wayne E., "Directors and Officers Liability Insurance: A Primer," 629 PLI/LIT 135

(April 2000). In contrast, the premise of tiered D&O insurance is that this type of insurance exists to protect and insulate corporations, officers, and directors in cases of deceit or fraud by corporate insiders. Often, these policies are "self-liquidating," with the cost of defense paid from the policy proceeds. Parker, David B. and Hulse Vitlin, Linda, "The Role of Liability Insurance in Securities Litigation," 491 PLI/Corp 373, 410 (August 1, 1985).

The goal of both the insurance companies and of the insured company is to preserve — not pay out — as much of the insurance coverage as possible, either in defense costs or in settlement.

The existence and amount of D&O insurance coverage carried by a company come to the forefront when settlement discussions begin. In many cases, the insurer or its counsel will participate in the negotiations. Id. at 410. Each party to the negotiations has its own objectives. Id. at 413. The objective of claimants and their counsel is to obtain a maximum recovery at a minimum of expense to redress the wrongs suffered. Id. Defendants (including officers, directors, the corporate entity, and co-defendants) generally have three goals: (1) to minimize the ultimate loss; (2) to avoid future claims; and (3) to minimize the damage to their reputation and future business prospects that a big settlement would cause. *Id.* The insurer has its own objectives: (1) to resolve the claim cheaply; (2) to avoid future claims on the coverage; and (3) to avoid bad faith exposure. Id. at 414. To achieve these goals, corporations and their insurers use tiering, or layering, of several separate policies from separate insurers to maximize the apparent D&O insurance protection without actually increasing the likely recovery by defrauded shareholders.

How does it work? A corporation establishes its first tier of D&O insurance through an agreement with a primary carrier. Subsequent policies, provided by excess coverage carriers, are then stacked like building blocks on the base of the first tier. The hallmark of this structure requires one tier to be completely exhausted – whether through payment of defense costs or settlement with the plaintiffs – before funds from the next tier can be reached. Corporations pay lower premiums for the excess coverage, reflecting the reduced risk to the excess carrier.

Corporations can design a structure for primary and excess insurance policies to withstand an "attack" by plaintiffs' lawyers — which is really only the attempt to obtain adequate compensation for plaintiff class members

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Shed A Tier

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for the fraud committed by a company and its insiders. The goal of both the insurance companies and of the insured company is to preserve – not pay out – as much of the insurance coverage as possible, either in defense costs or in settlement.

The issue of defense costs is an important one in light of recent revelations about sky-high legal billings by defense firms in some high profile cases. For example, Qwest Communications has reported spending \$75 million over the past year — more than \$7 million a month — on outside legal fees despite Qwest's own executives complaining about the hefty legal expenses, and the fact that the company still had not been able to reach a settlement with the Securities and Exchange Commission, notwithstanding the powerful legal help. (See, "Qwest is Spending Top Dollar to Defend Accounting Practices," Wall Street Journal, Monday, March 10, 2003; "Qwest Legal Bill: \$7M a Month," RockyMountainBusinessNews.com., March 11, 2003.) Quest acknowledged that it hoped its D&O insurance would cover the legal bills. Id.

Qwest is not alone. The Wall Street Journal also reported that Tyco International, Inc. spent \$50 million in 2002 to investigate and defend its own accounting practices; Rite Aid Corp. spent \$82 million in 2001 to investigate charges that its executives were inflating revenues; and Drexel Burnham Lambert, Inc. spent \$75 million in 1989 to defend against securities fraud charges, to name just a few. *Id.*

These reports demonstrate that companies rarely question the wisdom of spending large amounts of money – including insurance dollars – to defend themselves against accusations of fraud. The tiering of D&O coverage also shows that these same companies are not interested in compensating shareholders for the losses they suffer as a direct result of the misdeeds of the corporation and its officers. Institutional investors who champion stockholder rights would be well served to question management's willingness to structure a company's D&O coverage in such a way as to prevent recoveries by injured shareholders while at the same time allowing defense lawyers –who are often paid by the same insurance policies – to run up exorbitant legal bills defending clearly fraudulent behavior by company management. Without such a challenge, corporations will continue to choose to spend their resources on questionable defenses rather than compensating the investors for the fraudulent conduct of its management. *

Exceptional Settlement

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Judge Moskowitz acknowledged the Fund's recognition of lead counsels' "superlative performance," and awarded a fee of 26% of the gross recovery, 1% above the "benchmark" established by the Ninth Circuit in common fund cases such as this. Judge Moskowitz specifically endorsed the Fund's active review of the request for attorneys' fees at two separate board meetings, and its decision to recommend the 1% increase over the benchmark "as recognition of [Plaintiffs' attorneys] superlative performance." (*Id.*)

The Chicago Teachers' Fund's involvement in the prosecution of the *Safeskin* case epitomizes the type of participation and control that Congress hoped institutional Lead Plaintiffs would exercise when it enacted the Private Securities Litigation Reform Act of 1995. The result that was achieved in *Safeskin* stands as a testament to the fact that participation by large pension funds and institutional investors in the prosecution of securities class actions can and does have a major beneficial impact on maximizing recoveries for all class members, while also helping to enforce federal securities laws designed to strengthen the integrity of our capital markets. ••

About the Publisher...



Barrack, Rodos & Bacine is a boutique law firm that has been extensively involved in class and derivative actions alleging violations of securities laws since 1976. The firm, with attorneys in offices located in Philadelphia, San Diego, New York, and New Jersey, has been appointed by federal judges throughout the country as lead counsel in over 30 cases since the passage of the PSLRA and represents a number of institutional investors in securities class actions. The Barrack Bulletin is edited by Leslie Bornstein Molder, Esquire.

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