Alston & Bird’s Securities Litigation Group, with attorneys in Atlanta, Dallas, Los Angeles, New York, and Washington, has a broad range of experience representing and counseling clients in derivative and class actions, proceedings before the Securities and Exchange Commission and other regulatory bodies, internal investigations, D&O, E&O, and other complex commercial and transaction-based litigation. Our present and past clients in such cases include, among others, companies in the following economic sectors: consumer products, telecommunications, hospitality, health care, software, REITs, manufacturing, banking, insurance, information processing, energy, technology, and electronic commerce.

We are pleased to present our second Annual Report on the state of securities litigation. Our goal is to present an overview of the trends we witnessed in 2008 and what we anticipate for the coming year. Additional information about trends in securities litigation can be found on our blog at http://securities.litigation.alston.com.

The Annual Report begins with the Supreme Court’s 2008 landmark opinion in *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.* This decision, in which Alston & Bird represented one of the defendants, was a watershed ruling. We examine the impact the Supreme Court’s opinion has had on so-called “scheme liability” in securities litigation. Next, we look at the auction rate securities market. This investment vehicle has seen significant challenges in 2008. We then move on to an examination of securities litigation involving the subprime mortgage crisis. Specifically, we review the various defenses to those claims that have proven to be most successful over the past year. And finally, we examine recent trends in Delaware M&A litigation, including several important cases where Alston & Bird was counsel of record.

We hope you find the Annual Report to be informative and, as always, we welcome any comments.

John A. Jordak, Jr.
Securities Litigation Group Chair
January 2009

This report is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.
## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Supreme Court’s Decision in <em>Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.</em> — What Difference Has It Made to Defendants?</td>
<td>1</td>
</tr>
<tr>
<td>The Collapse of the Auction Rate Securities Market</td>
<td>12</td>
</tr>
<tr>
<td>The Fallout from the Subprime Debt Market: An Update on Subprime Securities Class Actions</td>
<td>15</td>
</tr>
<tr>
<td>Recent Trends in Delaware Corporate Law</td>
<td>24</td>
</tr>
<tr>
<td>Endnotes</td>
<td>34</td>
</tr>
<tr>
<td>Securities Litigation Group Attorneys</td>
<td>48</td>
</tr>
</tbody>
</table>
On January 15, 2008, the Supreme Court issued its much-anticipated opinion in *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.* In a five-three opinion, the Court affirmed the prior decision of the Eighth Circuit Court of Appeals, holding that so-called “scheme liability” claims under Section 10(b) of the Securities Exchange Act of 1934 (the “1934 Act”) against certain non-speaking defendants were properly dismissed. Specifically, the Court stated that the implied private right of action for shareholders under Section 10(b) could not reach non-speaking defendants where the investors at issue did not rely on any statements made by those defendants.

Since January, several lower courts have had the opportunity to apply *Stoneridge* in a variety of contexts. Not surprisingly, traditional secondary actor defendants, such as banks, law firms, and accounting firms, have benefited significantly from this ruling. Of most interest, however, is the willingness of courts to apply *Stoneridge* outside the context of traditional secondary actor claims. Indeed, the bulk of the decisions to date have applied *Stoneridge* to claims brought against employees of the primary corporate defendant, *i.e.*, the issuer of the stock. Courts have dismissed such claims because the employees did not personally make any statements about the company on which the shareholders could have relied. The emphasis in *Stoneridge* on the reliance requirement for Section 10(b) claims, which acts as a safeguard against abusive litigation, has been invoked repeatedly to the benefit of all defendants, even those who have a much closer relationship to the issuer of the stock than the defendants in *Stoneridge*.

Plaintiffs attempting to bring claims based on allegedly deceptive conduct, as opposed to speech, have fared best under *Stoneridge* outside the class action context. An individual investor suing defendants with whom he or she personally interacted has had an easier time demonstrating direct reliance on the supposedly deceptive conduct of the defendants as required under *Stoneridge*. And, although it is simply too early to tell whether *Stoneridge* will have an effect on how the SEC pursues claims for primary liability, the fact that
the SEC, unlike a private plaintiff, need not show reliance for Section 10(b) claims means that claims that might fail under Stoneridge in private securities litigation could potentially survive motion practice if brought in an enforcement action by the SEC.

The Stoneridge Decision

Stoneridge involved Section 10(b) claims brought against two equipment suppliers that did business with Charter Communications, Inc. The suppliers entered into a business transaction with Charter, which Charter failed to account for properly on its books. The suppliers’ accounting for the transaction was, however, proper and they had no role in Charter’s accounting decisions or the preparation of its financial statements. The suppliers also made no statements to Charter shareholders nor had a duty to speak to those shareholders. Charter alone made the allegedly false and misleading statements that supposedly caused injury to its shareholders.

Justice Kennedy, writing for the majority, began the discussion of the issues on appeal by acknowledging, as a threshold matter, that the express language of Section 10(b) does not provide for a private cause of action for investors, but that such a right has been implied by courts. For this implied right of action, courts have required that a plaintiff must be able to plead and prove reliance on the alleged misrepresentation or omission of the defendant, among other requirements. Indeed, one of the reasons why the Supreme Court rejected private aiding and abetting liability in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A. was that such a claim would “[a]llow[] plaintiffs to circumvent the reliance requirement [and thereby] disregard the careful limits on 10b-5 recovery mandated by [the Supreme Court’s] earlier cases.” Thus, Central Bank, which Justice Kennedy also authored, made clear that a defendant can be primarily liable under Section 10(b) only if each of the elements or preconditions of liability are satisfied as to that defendant.
The Supreme Court similarly held in *Stoneridge* that there could be no liability imposed on the supplier defendants because Charter investors did not rely on any actions or statements of these defendants. The Court reiterated that reliance is an essential element of a Section 10(b) claim because “[i]t ensures that, for liability to arise, the ‘requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury’ exists as a predicate for liability.” The supplier defendants owed the investors no disclosure duty and no alleged actions by them were ever communicated to the public. Thus, “[n]o member of the investing public had knowledge, either actual or presumed, of [defendants’ allegedly] deceptive acts during the relevant times.” Plaintiffs could not show reliance except in an indirect chain that was too remote for liability. The plaintiffs had argued that investors rely not only on public statements regarding a security, but also on the transactions that those statements reflect. The Court rejected this argument, noting that, “[w]ere this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business” and “there is no authority for this rule.”

Indeed, plaintiffs’ theory would have applied Section 10(b) causes of action “beyond the securities markets – the realm of financing business – to purchase and supply contracts – the realm of ordinary business operations.” And, at present, if business operations are used to affect the securities markets, the SEC’s enforcement power is available to reach culpable actors. In the Private Securities Litigation Reform Act of 1995 (the “Reform Act”), Congress specifically granted only to the SEC the authority to pursue aiding and abetting claims under Section 10(b). If a private implied cause of action extended to ordinary business operations, there would be a risk of inviting litigation into areas that are already effectively governed. The Court observed that precedent counseled against such an expansion.
Application of *Stoneridge* to Traditional Secondary Actor Defendants

*Stoneridge* clearly provides district courts with guidance on the scope of potential liability for traditional secondary actor defendants and reinforced the existing safeguards for such defendants found in *Central Bank*. To date, courts applying *Stoneridge* to claims against secondary actors have focused, not surprisingly, on the element of reliance and dismissed claims where, as in *Stoneridge*, the plaintiffs were unable to point to any conduct or statement by the secondary actors on which the investors relied.23

Of particular interest is the post-*Stoneridge* decision in *In re Parmalat Securities Litigation*.24 This decision is an important one in the history of “scheme liability.”25 In an earlier decision in *Parmalat*, the district court had refused to dismiss claims against certain third-party banks and a law firm that were accused of contributing to the collapse of the international dairy conglomerate, Parmalat Finanziaria S.p.A (“Parmalat”).26 The court held that the plaintiffs adequately pled the defendants’ involvement in a fraudulent scheme along with their client, Parmalat, for which a primary liability claim was possible under Section 10(b).27 This earlier decision was cited frequently by the plaintiffs’ bar in support of the scheme theory of liability and, in particular, was relied upon heavily by the plaintiffs in *Stoneridge*.28 In a second decision in 2008, the district court again faced the issue – this time on a motion for summary judgment – as to whether claims for primary liability could exist against these secondary actor defendants. The court ruled that *Stoneridge* required dismissal of these claims.

The plaintiffs in *Parmalat* argued that *Stoneridge* did not apply because two defendants, Bank of America and a foreign law firm, each breached a separate duty of disclosure that they owed to the plaintiffs.29 Bank of America was alleged to have withheld information from investors who purchased Parmalat securities in private placements, and the law firm was alleged to have concealed from investors Parmalat’s conduct with respect to a divestiture of cer-
tain brands and trademarks, purportedly in violation of the Model Rules of Professional Conduct. The court rejected both of these claims.

As to the bank defendant, the court found that the named plaintiffs had failed to show that they actually purchased the securities at issue from Bank of America. Because the named plaintiffs did not purchase their shares from Bank of America, the bank did not owe them a duty of disclosure. And, although certain unnamed members of the putative class may have purchased their securities from the bank, the court noted that “reliance is not presumed merely because named plaintiffs in a purported class action allege that a duty was owed to other members of the proposed class.” Liability also could not be imposed on the law firm for allegedly violating the Model Rules of Professional Conduct. The parties disputed whether the Model Rules actually governed, but the court held that, even if they did apply, the plaintiffs could not demonstrate that the law firm owed them an independent legal duty of disclosure based on the existence of these rules.

The court then turned to the issue of whether the defendants’ allegedly deceptive acts were made known to the investing public so as to satisfy the reliance requirement under Stoneridge. The plaintiffs attempted to satisfy this requirement by showing that Parmalat had issued press releases, bond prospectuses, and offering memoranda in which it named Bank of America and some of the other financial institution defendants as lead investors in some of the disputed transactions. In rejecting this argument, the court noted that none of these disclosures revealed any information on the conduct of Bank of America or the other financial institutions, nor did they actually reveal any conduct that could be considered deceptive in any respect. At most, the disclosures described transactions enacted by Parmalat in which these secondary defendants were involved. Absent evidence that the secondary actor defendants engaged in their own deceptive conduct, which was known to the market or that breached a duty specifically owed to the plaintiffs, the most that could be said of the defendants’ conduct was that it was part of “an indirect chain” of events that
the Supreme Court in *Stoneridge* would have considered to be “too remote for liability.”

### Application of *Stoneridge* to Other Types of Defendants

*Stoneridge* has also been cited as requiring dismissal of claims against other types of non-speaking defendants, even where the defendant has a closer relationship to the issuer than the suppliers did in *Stoneridge*. Several district courts have, for example, dismissed under *Stoneridge* claims against employees of the primary corporate defendant where the plaintiffs cannot show that any speech or conduct of those employees ever reached the market. Such cases demonstrate the broad potential impact of *Stoneridge* and should provide comfort to any defendant named in a securities class action, regardless of that defendant’s specific affiliation with the issuer.

Indeed, the first Court of Appeals decision applying *Stoneridge* resulted in a dismissal under these facts. In *Pugh v. Tribune Co.*, the Seventh Circuit dismissed securities fraud claims against the vice president of circulation and Hispanic media for two newspapers owned by the Tribune. The defendant allegedly reported false newspaper circulation numbers to an outside compliance firm, which allowed his newspapers to charge more for advertisements. This situation, in turn, led the Tribune to report in its public filings supposedly inflated advertising revenue for these publications. There were no allegations, however, that the Tribune’s investors were ever informed of the defendant’s false circulation certifications. Nevertheless, the plaintiffs alleged that the defendant could be liable under the federal securities laws because (1) he participated in a scheme to defraud the advertisers, and (2) it was foreseeable that this scheme would result in improper revenue reflected on the Tribune’s financial statements.

Following the logic of *Stoneridge*, the Circuit Court rejected as insufficient allegations of “an indirect chain to the contents of false public statements[,]” which
it deemed “too remote to establish primary liability.” The court reached this conclusion, despite the fact that the defendant “may have foreseen (or even intended) that the advertising scheme would result in improper revenue for [his papers], which would eventually be reflected in the Tribune’s revenues and finally published in its financial statements.” The court also noted that, like the defendants in Stoneridge, this particular defendant “had no role in preparing or disseminating the Tribune’s financial statements or press releases.”

Although the issue has yet to be addressed by the courts, Stoneridge also represents another weapon in the fight against the indiscriminate application of the so-called “group pleading” doctrine. The group pleading doctrine, which is no longer good law in many jurisdictions, allows a plaintiff to attribute statements in “group published” documents like press releases and SEC filings to executives at a company who are directly involved in its day-to-day management. In other words, under this doctrine, a plaintiff may attempt to bring a claim against an officer of the company, even though he or she did not personally “make” the allegedly false or misleading statement at issue. As the above discussion makes clear, the notion that non-speaking defendants may be presumed to be responsible for statements made by others flies in the face of Stoneridge. Many courts across the country have already held that the group pleading doctrine did not survive the heightened pleading requirements established several years ago under the Reform Act. But, in those jurisdictions where the courts have not yet spoken on that issue, Stoneridge should preclude liability for an officer defendant where the reliance element cannot be established separately as to the conduct or speech of that defendant.

**Stoneridge Applied Outside the Class Action Context**

Where a plaintiff purports to bring a Section 10(b) claim based on deceptive conduct as opposed to speech, the plaintiff must nevertheless still show that the investors relied on the alleged conduct at issue. Where such claims have been challenged under Stoneridge and survived, the individual shareholders
were able to plead that they relied directly on the supposedly deceptive conduct of the particular defendant at issue and, thus, they could satisfy the reliance requirement without attempting to invoke a presumption of reliance that would be necessary to pursue class claims.\textsuperscript{46}

For example, in \textit{Burnett v. Rowzee},\textsuperscript{47} the plaintiffs were initial investors in a classic Ponzi scheme who received purported “interest payments” from one defendant, \textit{i.e.}, the “pitch man” for the scheme.\textsuperscript{48} The plaintiffs claimed that these payments misled them into believing that their prior investments were legitimate and yielding the promised returns. In other words, the plaintiffs relied on the “false appearance” created by these interest payments to make additional investments and to encourage others to invest in the scheme.\textsuperscript{49}

The court held that these interest payments constituted a “deceptive act” that could be subject to primary liability under Section 10(b) because they did not reflect legitimate returns on the promised investments, which were in fact never made. Instead, these sums actually came from later payments made by other investors who had been similarly duped into investing in the Ponzi scheme.\textsuperscript{50}

“[The] payment of exceptional returns on initial investments is the defining feature of a Ponzi scheme [because] [i]t allows the scheme[’]s principals to continue to draw investment from other sources by creating the appearance of a viable investment opportunity.”\textsuperscript{51}

The court distinguished these interest payments from the transactions at issue in \textit{Stoneridge}, noting that, in \textit{Stoneridge}, “[the] potential investors had no contact with the companies engaged in the alleged sham transactions or any apparent awareness of such transactions . . . [but instead] relied on financial statements that were based, in part, on such transactions . . . .”\textsuperscript{52} However, in the present case, the relationship between the alleged deceptive act, \textit{i.e.}, the interest payments, and the purchase of securities was sufficiently direct and immediate to find the defendant liable as a primary violator. The same individuals who received the extraordinary returns rolled over their existing
investments to purchase the securities at issue and/or made further investments in the scheme and, in doing so, relied at least in part on the existence of the interest payments.\textsuperscript{53} Thus, the defendant could be primarily liable for the investments that took place in reliance on the interest payments that he paid directly to the plaintiffs.\textsuperscript{54}

The SEC and \textit{Stoneridge}

The Supreme Court acknowledged in \textit{Stoneridge} that the SEC alone was authorized to bring aiding and abetting claims under Section 10(b).\textsuperscript{55} Yet, in the wake of \textit{Stoneridge}, the question remained whether that decision would have an effect on the Commission’s ability to prosecute claims for primary liability under Section 10(b). The SEC, like private litigants, is bound by Supreme Court precedent interpreting the scope of the federal securities laws. Also, the SEC often pursues claims under Section 10(b) in the alternative, \textit{i.e.}, the same defendant will be sued both as a primary violator as well as an aider and abettor. One recent decision from the First Circuit Court of Appeals – \textit{SEC v. Tambone}\textsuperscript{56} – sheds some light on this strategy post-\textit{Stoneridge}.

\textit{Tambone} involved an enforcement action brought by the SEC against two senior executives of a company serving as the primary underwriter for certain mutual funds. The SEC contended that these two individuals were primarily liable under Section 10(b) (in addition to being aiders and abettors) through their use of false and misleading fund prospectuses to sell mutual fund shares.\textsuperscript{57} In assessing whether such primary liability claims were possible under \textit{Stoneridge}, the First Circuit first observed that, unlike private litigants, the SEC “need not allege any of the elements [of a Section 10(b) claim] required to establish a direct link between a defendant’s misrepresentation and an investor’s injury – including reliance by the investor on an explicit misstatement, economic loss, and loss causation.”\textsuperscript{58} Thus, the court held that the failure to plead reliance, which was fatal in \textit{Stoneridge}, would not necessarily preclude the SEC’s claims in \textit{Tambone}. 
Rather, the primary area of dispute between the parties was whether the defendants had “made” an allegedly false or misleading statement for which primary liability may exist under Section 10(b).59 The Court of Appeals held that, by using misleading prospectuses despite an underwriter’s duty to review and confirm the accuracy of their contents, these defendants made implied statements of their own to potential investors that they had a reasonable basis to believe that key statements in the prospectuses were accurate and complete. Because certain statements in the prospectuses allegedly proved to be false, the defendants’ implied statements were also false and, according to the court, presented a sufficient basis for a claim of primary liability, assuming that the other elements of the claim were satisfied.60

The court’s conclusion was apparently influenced by its view that these implied statements derived from the statutory duties of underwriters and their central role in the securities market.61 In assessing whether a defendant has committed a primary violation of the securities laws, the Court of Appeals held that it must examine the defendant’s role in the securities market as well as the specific conduct alleged in the complaint.62 In other words, “a defendant’s general responsibilities and statutory duties with respect to the sale and distribution of securities inform the legal significance of specific conduct under Rule 10b-5(b).”63 The court observed that underwriters play an essential role in the sale and distribution of mutual funds to the investing public “whose role is ‘that of a trail guide – not a mere hiking companion,’ and who are relied upon by investors for their ‘reputation, integrity, independence, and expertise.’”64

Even though there was no public statement expressly attributed to these defendants, the First Circuit determined that its holding was nevertheless consistent with Stoneridge and Central Bank.65 It held that both decisions focused on the reliance requirement for private plaintiffs and were informed by a set of policy considerations that arise exclusively in the context of private securities litigation.66 The lack of attribution, therefore, did not trouble the court because it determined that the attribution requirement follows directly from the element
of reliance required in private Rule 10b-5 actions and, as it noted earlier, that element did not apply to this case.67

The dissent in Tambone, however, strongly disagreed with this result and criticized the majority opinion for “blur[ring] the line” between primary and secondary liability that had been carefully drawn by the Supreme Court.68 The dissent read the majority opinion as conflating the verb “make” with the verb “use” to confer liability on defendants who did not make misstatements, but used prospectuses that contained misstatements crafted by others.69 According to the dissent, this “impermissibly equates a passive omission – failing to correct a false statement made by another – with the affirmative misconduct that the language of the rule targets.”70

Conclusion

The primary impact of the Stoneridge decision to date has been seen in the context of private shareholder class actions, as the Supreme Court intended. However, the number of defendants in such cases who have been able to take advantage of the decision has proven to be greater than some commentators originally predicted. Also, as acknowledged in Stoneridge, the SEC continues to have the ability to bring aiding and abetting claims under Section 10(b), which cannot be the subject of private litigation. The fact that the reliance requirement has not been applied to SEC enforcement actions suggests that the SEC may also be able to bring claims for primary liability under Section 10(b), which would be foreclosed to private plaintiffs under Stoneridge. Stoneridge, however, makes clear that a private plaintiff, whether suing individually or on behalf of a putative class, must fully and completely comply with the reliance requirement to survive a motion to dismiss.
Created by investment bankers in 1984, auction rate securities ("ARS") provided a means by which issuers, typically state or local government agencies or corporations, could obtain long-term financing at short-term interest rates. ARS are typically long-term debt obligations with interest rates that are periodically re-set through auctions every 7, 28, or 35 days.

If there were not enough orders to purchase all of the ARS offered, a “failed” auction would occur, and current ARS holders would be left unable to sell their securities. Consequently, most of the large investment banks that underwrote ARS routinely intervened in auctions at risk of failing. By submitting purchase and sale orders for their own ARS, these firms ensured the auction’s success. Following a 2004 investigation of the ARS market, a number of major firms entered into a consent decree with the SEC, under which they were permitted to continue placing “support” bids for their own ARS, so long as the practice was disclosed to customers.71

For more than 20 years, ARS were marketed as safe, highly liquid investments suitable for short-term investors. In February 2008, however, after suffering huge losses in the subprime mortgage market, the large investment firms stopped placing the supporting bids and numerous auctions failed. The SEC and state regulators began investigating this collapse shortly thereafter. Beginning in August 2008, regulators reached a series of landmark settlements with some of the nation’s largest investment firms.

The first settlement, which became the archetype for later settlements, was negotiated with Citigroup.72 Under the preliminary settlement, Citigroup was to repurchase or use its best efforts to repurchase approximately $19.5 billion worth of ARS held by Citigroup customers. Of that $19.5 billion, Citigroup was to repurchase $7.5 billion from retail customers within three months, and the firm was to use its “best efforts” to liquidate the remaining $12 billion worth of ARS held by institutional investors before 2010. In final form, however, the settlement obligates Citigroup to repurchase only $7 billion worth of ARS from
its retail customers. Furthermore, Citigroup “is under no obligation to offer to purchase ARS from institutional and other customers,” but must “use its best efforts to provide, by December 31, 2009, institutional . . . customers . . . [with] opportunities to liquidate their . . . ARS, including, but not limited to facilitating issuer redemptions, restructurings, and other reasonable means.”

Citigroup also agreed to submit to a special arbitration process administered by the Financial Industry Regulatory Authority (“FINRA”) to resolve its customers’ consequential damages claims. Under this regime, ARS holders claiming consequential damages can opt to have their cases heard by an ARS-specific panel of arbitrators, and firms cannot contest liability stemming from ARS sales or illiquidity. Conversely, investors seeking punitive or other damages must seek relief via FINRA’s standard arbitration process or the court system.

Shortly after the preliminary settlement with Citigroup was announced, a number of other financial institutions settled with regulators. Each of these institutions agreed to submit to the FINRA arbitration process for the limited purpose of resolving customers’ consequential damages claims. As of November 30, 2008, 275 ARS proceedings had been filed under FINRA’s standard arbitration procedures. FINRA has offered to convert these proceedings into ARS-specific arbitrations, provided investors are willing to limit claims against settling firms to consequential damages. Regulators have also reached similar settlements with a handful of regional firms. There are, however, approximately 25 firms that are still being actively investigated by regulators for ARS-related conduct.

The existence of these early settlements has called into question the continued viability of several pending securities class action lawsuits, at least insofar as retail investors are concerned. Damages are an essential element of a viable securities fraud claim and, by agreeing to repurchase retail investors’ ARS and arbitrate any consequential damages claims, the settling firms have already taken significant steps towards making these customers whole.
In contrast, many of the settlements to date do not address institutional investors, and those that do often require only that the firm, at some future date, use its “best efforts” to repurchase ARS held by institutional customers. A recently filed case, *Hutchinson Tech., Inc. v. UBS AG*, highlights the different circumstances potentially facing institutional investors. Following a settlement between UBS and regulators, Hutchinson Technology, an institutional investor, filed suit against UBS under Sections 10(b) and 20(a) of the 1934 Act and state blue sky laws, alleging (1) “it is uncertain whether UBS will have the means to satisfy its obligations [to repurchase ARS under the settlement] or indeed survive as a firm”; and (2) plaintiff “has needs for liquidity well in advance of” June 30, 2010 – the date on which UBS has agreed to begin using its best efforts to repurchase ARS held by institutional investors.

The story does not end there, however. Beginning in August 2008, investors also began filing a different type of lawsuit – shareholder derivative suits. Whereas the aforementioned class actions seek to recover damages for harms suffered by ARS investors, derivative suits are filed to recover damages for harms allegedly suffered by the firms that marketed and sold ARS. The derivative suits allege that investment firm employees falsely represented ARS as safe, liquid investments to customers in order to increase their firms’ ARS sales and enhance their own individual compensation. Plaintiffs claim that, as a result of this alleged deception, the firms have been targeted by regulators, leading to costly settlements and fines for which the firm is entitled to compensation. As of the date of publication, these suits were still in their preliminary stages.
Introduction

The collapse of the subprime debt market has dominated financial news for almost two years now. Beginning in 2007, economic conditions triggered fears of widespread defaults in subprime mortgages that had carried the day during the years of the housing boom. Losses, often in the billions of dollars, were announced as companies were forced to come to grips with subprime mortgage vulnerability. In the wake of these announcements, securities lawsuits predictably followed.

Because the subprime mortgage and mortgage-backed securities businesses involve multiple players at various stages, many potential targets for litigation exist. Lenders, investment banks, fund managers, underwriters, credit rating agencies, home builders, and other professionals, such as independent auditors, have all faced litigation arising from these issues. According to a recent report, a total of 742 subprime-related cases were filed in federal court over the 21-month period ending on September 30, 2008, with securities cases accounting for 31 percent of those filings. Of the 228 securities cases filed in 2007 through the third quarter of 2008, securities fraud class actions accounted for 40 percent of those filings.

The first shareholder class action on subprime issues was filed in February 2007. The vast majority of these actions are, however, still in their infancy. Indeed, only 23 percent of all subprime-related cases filed in 2007 have received a ruling on the motion to dismiss. And only a small number of dismissal decisions have been issued in subprime securities class actions due, in part, to the various procedural requirements that apply to such cases under the Reform Act, such as the need to appoint a lead plaintiff and lead counsel for all related cases pending against the same corporate defendant.

Based on the early returns, however, certain trends can be discerned. Defendants in securities class actions have been most successful in arguing that
plaintiffs have failed to establish the required “strong inference” of fraudulent intent or “scienter” on the part of the defendants, which is required to state a claim under Section 10(b).87 Specifically, defendants in subprime cases have been able to take advantage of the Supreme Court’s decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,88 which requires that “a [district] court must consider plausible nonculpable explanations for the defendant’s conduct, as well as inferences favoring the plaintiff.”89 Thus, to qualify as strong, “an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.”90

In addition, many courts have criticized complaints filed in subprime cases for utilizing discredited “puzzle pleading” techniques. “Puzzle pleading” occurs where the complaint recites numerous public statements about a company, but fails to identify the specific statements alleged to be false or misleading or to explain how or why such statements were false or misleading. The Reform Act specifically requires that this information be provided in detail in order to survive a motion to dismiss.91 As discussed below, courts have shown no hesitation in dismissing subprime complaints that employ this technique and have required plaintiffs to re-plead in an attempt to cure these deficiencies.

One other possible defense in subprime cases is also worth mentioning, although it has not figured prominently in the initial decisions. Under the Reform Act, a plaintiff bears “the burden of proving that the act or omission of the defendant alleged to violate [the federal securities laws] caused the loss for which the plaintiff seeks to recover damages.”92 This is known as the “loss causation” requirement. Given the adverse market conditions that developed over time, plaintiffs in subprime cases may face significant challenges in pleading that their losses were caused by undisclosed information *specific to the corporate defendant* and not by general market factors that necessarily affected all players in the industry. Loss causation is an important defense
often asserted at the motion to dismiss stage, and we would expect courts in future subprime decisions to assess these loss causation issues.

Finally, as explained below, we have seen an increase in filings in state as opposed to federal court for these subprime class actions. As a result, several decisions issued to date have dealt with the defendants’ ability to remove such claims to federal court. Through the Class Action Fairness Act of 2005 and other recent federal laws, Congress has evidenced a clear preference for class actions to be litigated in federal court. Courts, however, have not reached a consensus on whether these laws may be used to remove certain types of subprime claims to federal court. At present, the Circuit Courts are split on this issue, with the Ninth Circuit rejecting attempts to remove certain claims to federal court and the Seventh Circuit taking the opposite view.

**The Failure to Plead Scienter and Plaintiffs’ Heavy Use of Confidential Informants**

As noted above, the most successful argument in favor of dismissal in subprime cases has been the plaintiffs’ inability to plead a strong inference of scienter under the *Tellabs* standard. Indeed, it was the failure to satisfy *Tellabs* that led to dismissal in one of the first decisions issued in a subprime case: *Tripp v. IndyMac Financial, Inc.* In *Tripp*, the plaintiffs attempted to plead scienter based on the opinions and beliefs of certain confidential witnesses who were supposedly former employees of IndyMac. The prevalence of confidential informant allegations in subprime cases is hardly surprising, given that many of the companies hit hard by the current economic climate have ceased ongoing operations or have been forced to make reductions in their workforce.

Numerous courts have, however, called into question the continued viability of pleading in reliance on confidential witnesses in the wake of *Tellabs*. The court in *Tripp* followed suit, observing that the plaintiffs had failed to allege that the individual defendants shared the beliefs of these informants or that they were even aware of those beliefs.
Further, the court determined that allegations regarding certain statements made in press releases suggested, at best, that the defendants had made mistakes, but fell short of evidencing fraud. In other words, these allegations failed the *Tellabs* directive that the available fraudulent inferences must be at least as compelling as any opposing non-fraudulent inferences. Plaintiffs’ allegations on loan loss provisions, charge-offs, and increasing reserves were all susceptible to plausible non-culpable explanations. Although the plaintiffs presented these allegations as supposed evidence of internal control problems and the defendants’ knowledge that the subprime loans they sold were troubled, the court reasoned that “an even stronger inference [was] that Defendants were simply unable to shield themselves as effectively as they anticipated from the drastic change in the housing and mortgage markets and, once that inability became evident, [the company’s] financials were changed accordingly.”

The rejection of allegations supposedly based on confidential informants also figured prominently in the decision to dismiss subprime claims in *Patel v. Parnes*. *Patel* involved Section 10(b) claims filed against two Standard Pacific executives accused of misrepresenting the company’s ability to open new residential communities, the demand for new homes, and the likelihood that the company could continue its historically strong earnings growth. In support of their allegations, the plaintiffs in *Patel* relied on three confidential witnesses, one of whom described weekly reports she purportedly prepared while employed with the company that contained data on sales and land acquisitions, as well as sales forecasts. The confidential informant claimed that these reports were provided to the Standard Pacific executives.

Defendants moved to dismiss the complaint, arguing that it failed to satisfy the heightened scienter pleading requirement of the Reform Act. The court agreed and held that plaintiffs failed to plead scienter based on the weekly sales report allegations or on any other basis. Although the court observed that these reports created an inference that defendants acted with “deliberate
or conscious recklessness in basing their public statements . . . on the reports," the court weighed this inference against various plausible non-culpable explanations, as required under *Tellabs*, and determined that plaintiffs’ allegations did not give rise to a strong inference of scienter. The court concluded that “the crux of plaintiffs’ fraud claim is not that defendants flatly misrepresented the company’s performance, but that they were deliberately reckless because they failed to lower their projections *enough* . . . “ This type of fraud by hindsight pleading did not give rise to a strong inference of scienter.

Similarly, the Southern District of Florida recently dismissed a subprime complaint that relied heavily on confidential informant allegations. In *Hubbard v. BankAtlantic Bancorp, Inc.*, the plaintiff brought Section 10(b) claims against BankAtlantic Bancorp and various of its officers and directors based on information supposedly gleaned from seven confidential informants. The defendants moved to dismiss, arguing that the plaintiff’s reliance on confidential informants was inconsistent with *Tellabs* because the plaintiff had pled no specific information about the informants on which its complaint was based.

Without information about the confidential informants’ positions in the company, employment duties, basis for their knowledge, or time frame during which they were employed, the court declined to give any significant weight to the allegations based on statements made by these informants. Because the plaintiff’s complaint relied heavily on statements made by these confidential witnesses and vague, conclusory allegations regarding the individual defendants’ positions in the company, the court held that the plaintiff had failed to plead a strong inference of scienter. Further, because scienter had not been pled as to any of the individual defendants, the court held that scienter could not be established as to the corporate defendant, requiring dismissal of the entire complaint.
Rejection of Puzzle Pleading

Numerous courts have expressed frustration over the years with so-called “puzzle pleading” in securities class actions, which places “the burden . . . on the reader to sort out the [defendants’] statements and match them with the corresponding adverse facts to solve the ‘puzzle’ of interpreting [p]laintiffs’ claims.” As one court explained in a recent subprime case, plaintiffs’ counsel have a duty to state the essentials of their claims in short, plain, and non-redundant allegations. “[N]either the Court nor opposing counsel should be required to expend time and effort searching through large masses of conclusory, argumentative, evidentiary and other extraneous allegations in order to discover whether the essentials of claims asserted can be found in such a mélange.”

Several subprime complaints this past year have been rejected as examples of puzzle pleading. For example, in Gold v. Morrice, the court dismissed securities fraud claims, emphasizing the recent Supreme Court decision, Bell Atlantic v. Twombly, in which the Court held that “‘a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and [thus] a [mere] formulaic recitation of the elements of a cause of action will not do.’” The Gold Court explained that the complaint did not “clearly identify the allegedly false statements or which of the factual allegations support an inference that particular statements are false or misleading.” Thus, the complaint “either lacks facts to support that the statements are false or misleading or provides those facts in a different paragraph without guidance for cross-reference.” The court instructed the plaintiffs to attach a chart to their amended complaint setting forth each alleged misstatement, the source of the statement, the supporting factual allegations, and the ultimate conclusion.

The plaintiff in In re 2007 Novastar Financial, Inc. Securities Litigation faced similar difficulties. Rather than comply with the Reform Act, the plaintiff had
filled nearly 35 pages of the complaint with general allegations and financial data and merely referred back to those paragraphs as purportedly being sufficient for pleading purposes.\textsuperscript{127} In addition, the court determined that, although the corporate defendant may have incorrectly believed that it had adequate reserves for loan losses, the fact that those reserves eventually proved to be inadequate does not mean that a prior false statement was made.\textsuperscript{128} At heart, the plaintiff’s allegations appeared to challenge management’s failure to plan sufficiently for future events, rather than alleging fraud, \textit{i.e.}, classic fraud by hindsight pleading, and dismissal was therefore required.\textsuperscript{129} In so ruling, the court observed that

Plaintiff’s Complaint reads more like a cautionary tale from a treatise on business management than a charge of knowing misstatements and concealments. Plaintiff has not stated a claim because companies (and their management) are not expected to be clairvoyant, and bad decisions do not constitute securities fraud. They may constitute negligence; they may constitute breach of fiduciary duty; they may constitute a claim for mismanagement—but they do not constitute fraud.\textsuperscript{130}

**Filings in State vs. Federal Court and Related Removal Issues**

One final development in this area is worth noting. As compared to other types of securities class actions, a higher percentage of subprime cases involve claims under the Securities Act of 1933 (the “1933 Act”).\textsuperscript{131} Plaintiffs have also shown more interest in filing subprime cases that assert 1933 Act claims in state court, as opposed to federal court.\textsuperscript{132} Although Congress has made an effort in recent years to concentrate class action litigation in federal court – through the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”)\textsuperscript{133} and the Class Action Fairness Act of 2005 (“CAFA”)\textsuperscript{134} – plaintiffs in subprime cases have argued that their 1933 Act claims must remain in state court pursuant to Section 22(a), the concurrent jurisdiction provision of the 1933 Act.\textsuperscript{135}
For example, in *Luther v. Countrywide Home Loans Servicing LP*, the plaintiffs filed suit against Countrywide in state court alleging violations of the 1933 Act for purported misrepresentations concerning the value of mortgage-backed securities. The defendants removed the action to the United States District Court for the Central District of California under CAFA. The plaintiffs successfully argued before the district court that the action should be remanded to state court, and the Ninth Circuit affirmed, holding that, “by virtue of [Section] 22(a) of the Securities Act of 1933, Luther’s state court class action alleging only violations of the Securities Act of 1933 was not removable.”

Other plaintiffs have not been successful in avoiding federal court. In *New Jersey Carpenters Vacation Fund v. HarborView Mortgage Loan Trust 2006-4*, the defendants similarly removed 1933 Act claims to the District Court for the Southern District of New York under CAFA. Plaintiffs predictably moved to remand, arguing that they had the right to bring their action in state court under Section 22(a). Although the 1933 Act does provide for jurisdiction in either state or federal court for securities cases arising under the Act, the court held that CAFA provides for the removal of all class actions that meet the requirements of minimal diversity, have an amount in controversy exceeding $5 million, and do not otherwise fall within one of CAFA's limited exceptions.

Plaintiffs cited the Ninth Circuit's decision in *Luther* in support of their argument that CAFA could not override Section 22(a), but the *HarborView* Court disagreed with that conclusion, holding that CAFA trumps Section 22(a). The court looked to the statutory text of CAFA and compared the sweeping removal power under CAFA to that of the federal bankruptcy removal provisions for “related to” federal court jurisdiction. The court explained that, just like the bankruptcy removal provisions, CAFA does not provide an exception for cases that have been explicitly excluded by prior Acts of Congress. Relying on prior Second Circuit case law, the court also looked to the purpose of CAFA, which confirmed “an overall design to assure that the federal courts are available for all securities cases that have national impact . . . , without
impairing the ability of state courts to decide cases of chiefly local import.”¹⁴⁶ Accordingly, the court determined that it was Congress’ intent “to include within the reach of CAFA all securities class actions except for those set forth in the [statute’s specified] exceptions.”¹⁴⁷ The Seventh Circuit Court of Appeals recently embraced this same view and ruled that subprime claims under the 1933 Act may be removed to federal court under CAFA.¹⁴⁸

Defendants in other subprime cases have also been successful in removing 1933 Act actions to federal court based on the existence of “related to” jurisdiction under the federal bankruptcy removal provisions.¹⁴⁹ For example, in City of Ann Arbor Employees’ Ret. Sys. v. Citigroup Mortgage Loan Trust, Inc., the defendants successfully removed certain 1933 Act claims on that basis to the United States District Court for the Eastern District of New York. The defendants argued that the bankruptcy filing of one of the various mortgage lenders whose loans supported the pass-through certificates at issue in the case justified the removal of the case under the “related to” jurisdiction provisions of the federal bankruptcy code.¹⁵⁰ The court agreed and denied the motion to remand.¹⁵¹

Conclusion

Because many subprime cases are still at the beginning stages, we do not know how many of these cases will actually proceed beyond motion practice. Despite the dramatic nature of the losses alleged, plaintiffs nevertheless face significant challenges as outlined above at the motion to dismiss stage. There has been, however, no shortage of subprime-related class actions filed to date, and undoubtedly these issues will be litigated for some time to come. Indeed, the total number of subprime cases has well surpassed the 559 savings-and-loan cases of the early 1990s.¹⁵² A recent report also estimated that insurance losses of approximately $9.6 billion will be incurred as a result of subprime-related litigation.¹⁵³
M&A Case Activity

In recent years, the announcement of an impending merger is often followed by the filing of an action seeking to enjoin the proposed transaction. Decisions in 2008 underscored the heavy burden that plaintiffs face under Delaware law when they seek to delay a shareholder vote based on allegations that additional disclosures are required.

For example, Alston & Bird recently represented Getinge AB (“Getinge”) in a case filed in New Jersey Superior Court in connection with Getinge’s proposed $865 million all-cash tender offer to acquire all ofDatascope Corporation’s outstanding shares of stock at a 26 percent premium. Certain shareholders ofDatascope had filed suit on behalf of a putative investor class, alleging thatDatascope’s board breached its fiduciary duties by agreeing to an inadequate tender offer price and by failing to disclose sufficient detail in its public filings about the fairness opinion rendered by its investment banker. Plaintiffs also alleged that Getinge, as the acquiring corporation, aided and abetted these breaches of fiduciary duty. Plaintiffs sought to enjoin the tender offer and requested that they be entitled to expedited discovery from bothDatascope and Getinge.

Relying on Delaware law, the New Jersey Superior Court held that the plaintiffs had failed to satisfy their burden of demonstrating any of the requirements for obtaining a preliminary injunction. Important to the decision was the court’s recognition of the practical realities of enjoining a lucrative transaction in the current global financial crisis. The court specifically rejected the argument that shareholders would be harmed by the proposed transaction and concluded that, “to the extent irreparable harm is at play, it is, on the record before me, more likely to flow from issuance of a preliminary injunction, than from denial.” The court also reasoned that, under Delaware law, the plaintiffs were entitled only to a “fair summary” of the substantive work performed by the investment banker, which had been afforded toDatascope’s sharehold-
ers. Accordingly, the court denied the plaintiffs’ request for a preliminary injunction of the transaction.

A shareholder who votes against or, in some situations, abstains from voting for a proposed merger may also opt for filing an action for expedited discovery rather than move for a preliminary injunction to halt the transaction. In one such recent case, Alston & Bird represented Energy South, Inc. and its board of directors in a putative class action challenging a $775 million merger between Energy South and Sempra Energy. The merger consideration represented a 22.6 percent premium for each share over the last reported price on the day before the merger was announced. Nevertheless, the plaintiff, a holder of only 10 shares, alleged that the Energy South board had breached their fiduciary duties in approving the merger (i) by accepting an inadequate price, despite the fact that it was the highest final bid offered by any of the 25 potential buyers involved; (ii) by agreeing to an alleged termination fee of 4.9 percent of the cash value of the deal; (iii) by purportedly having conflicts of interest; and (iv) by failing to disclose, among other things, management’s projections that were relied upon by an investment banker that provided a fairness opinion. The plaintiff also alleged that Sempra Energy aided and abetted the director defendants’ purported breaches.

In ruling on the plaintiff’s motion for expedited discovery, the court looked to Delaware law and conducted “a truncated determination of the merits of the underlying claims alleged and an examination of the necessity for prompt adjudication sufficient to impose the increased burdens that an expedited proceeding entails.” The court held that it was “not satisfied the Plaintiff met [its] burden of demonstrating a colorable claim and the sufficient possibility of a threatened irreparable injury without an adequate remedy at law.” The closing of the merger took place shortly thereafter and the plaintiff voluntarily dismissed its claims.
Not surprisingly, much of the merger litigation in 2008 arose because of deals designed to assist businesses adversely affected by the mortgage/credit crisis. The fact that, in the present climate, many boards were forced to react quickly to preserve shareholder value led to claims by shareholders attempting to second-guess the appropriateness and speed of the proposed transactions.

For example, in *Kahn v. McCarthy*, the plaintiff moved for a temporary restraining order to block a merger involving a company with a portfolio of residential mortgages that had declined significantly in value. While the board was considering various strategic alternatives to protect the institution’s assets, the Secretary of the Treasury announced a relief program under which the federal government would purchase certain mortgage assets held by financial entities. The board had, however, already distributed the proxy materials for the proposed merger and the plaintiff sought to enjoin the transaction on the grounds that these materials failed to discuss the relief program and the impact it might have on the company.

In refusing to enjoin the merger, the court focused on the fact that the relief program was “incomplete and Congress ha[d] not yet approved the plan or decided on its contents.” The record was also clear that the board had discussed the program internally and decided that the merger was still in the best interest of the company. Given the uncertainty surrounding the federal initiative, the court concluded that “it would be impossible to impose upon the Board an obligation to predict the outcome of Congressional deliberations and then to apply, *ex ante*, such speculation into their valuation models.”

A similar debate ensued when the merger of Bear Stearns and JPMorgan Chase & Co. was announced. That deal was prompted by significant liquidity problems experienced by Bear Stearns as a result of its exposure to the mortgage-backed debt market. A putative shareholder class action was filed challenging the proposed merger on grounds that the board of Bear Stearns breached their fiduciary duties in agreeing to inadequate consideration for the
transaction, and that JPMorgan had engaged in tortious conduct in consummating the deal.\textsuperscript{173}

The court’s decision to dismiss the suit turned on the application of the business judgment rule. There is “a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”\textsuperscript{174} This rule stems from the principle that the business and affairs of a corporation are best managed by the board of directors, and a court is precluded from “imposing itself unreasonably on the business and affairs” of the entity.\textsuperscript{175}

There was no evidence that the board acted out of self interest or in bad faith, or that any member had an affiliation with JPMorgan or stood to gain from the merger in a manner other than as a shareholder of the company.\textsuperscript{176} Given the pressing need for funding to solve the extreme liquidity crisis, the court held that the board acted responsibly and in a timely manner to prevent the company from having to declare bankruptcy.\textsuperscript{177} Because there was a “rational business purpose” for the board’s decision, the court “should not, and [would] not, second guess” it.\textsuperscript{178}

The \textit{Ryan v. Lyondell} Decision

\textit{Ryan v. Lyondell Chemical Company}\textsuperscript{179} was perhaps the most talked about decision from Delaware this past year and also arose in the merger context. Driven by the case’s “novel factual scenario,”\textsuperscript{180} Vice Chancellor Noble of the Delaware Court of Chancery denied in part a motion for summary judgment brought by the directors of the Lyondell Chemical Company, who had approved that company’s sale to Basell AF. Vice Chancellor Noble rejected most of the pending claims regarding the sale,\textsuperscript{181} but nevertheless concluded that issues of material fact existed as to (1) whether the directors had fulfilled their duties concerning the sale under \textit{Revlon, Inc. v. MacAndrews & Forbes Holdings},
In re. and (2) whether the remaining claims fell outside the protections of the exculpatory provision in the company's charter under Section 102(b)(7) of the Delaware Code. Section 102(b)(7) permits a corporation to include in its certificate of incorporation a provision limiting, or even eliminating, the personal liability of a director for monetary damages for breach of fiduciary duty, but no limitation can be made for a breach of the duty of loyalty, bad faith acts, intentional misconduct, or a knowing violation of the law.

Many commentators criticized Ryan as an unjustified intrusion on the protections directors are afforded under Section 102(b)(7) exculpatory provisions. As discussed in more detail below, the Ryan decision is, however, limited to the unique circumstances of that case. Moreover, subsequent Delaware decisions have confirmed that there has been no problematic development in the law that blurs the line between the duty of care on the one hand and the duty of loyalty and good faith on the other.

Overview of the First Ryan Decision

The Ryan Court began its analysis by acknowledging that there was “no single blueprint” for how a board may fulfill its duties under Revlon, although in most instances this involves some active involvement by the board in the sale process. It was clear, however, that Revlon stands for the proposition that, when a board undertakes a sale, it must “set its singular focus on seeking and attaining the highest value reasonably available to the stockholders.” The defendant directors in Ryan argued that they had discharged their Revlon duties based on the “blowout” price Basell offered and the fact that no competing offers were received once it became known that the company was “in play.” They also received a fairness opinion from an investment bank advising the company, and the shareholders of Lyondell ultimately ratified their decision by voting overwhelmingly to approve the sale.
The court, however, found that, under the standards it was required to apply on a summary judgment motion, the record failed to show that the board was so knowledgeable about the value of the company that no further effort on their part was necessary. The court observed that the board “did very little, if anything, to ‘seek’ the best transaction available” and essentially “acted as a passive conduit to the stockholders for an unsolicited, attractive bid for the Company.” Also, the deal was negotiated primarily without board involvement and was fully negotiated, considered, and agreed to in less than seven days, which gave the court pause “as to how hard the Board really thought about this transaction and how carefully it sifted through the available market evidence.”

The plaintiff also criticized the deal protection measures to which the Lyondell board had agreed. Delaware case law acknowledges that deal protection measures are not improper and can often serve an important purpose, but they may not be preclusive or coercive and must be reasonable in light of the circumstances. The director defendants argued that the deal protections to which they had agreed (e.g., a no-shop provision, a $385 million break up fee, matching rights, etc.) were reasonable and necessary to secure Basell’s offer. The court, however, seemed troubled by the fact that it appeared that the board had done “nothing (or virtually nothing) to confirm the superiority of the price, but, nonetheless . . . provided Basell a full complement of deal protections.” Accordingly, there was not sufficient support in the current record on summary judgment for the conclusion that the deal protection measures were reasonable and proportionate to the risks that the deal would not materialize otherwise. For these reasons, the court denied the defendants’ motion for summary judgment with respect to the claims concerning their Revlon duties and the deal protection measures.

The portion of the opinion that generated the most commentary was the conclusion that questions of fact also existed regarding the application of the exculpation provision in Lyondell’s charter. The defendants had argued that,
even if the court should find for summary judgment purposes that the board’s efforts under *Revlon* were insufficient, they were nevertheless entitled to summary judgment because those perceived shortcomings amounted to nothing more than a breach of the duty of care, and the existence of the exculpatory charter provision precludes any award of damages for breach of such a duty.\(^{197}\)

The court, however, held that “the Board’s apparent failure to make any effort to comply with the teachings of *Revlon* and its progeny implicates the directors’ good faith and, thus, their duty of loyalty, thereby, at least for the moment, depriving them of the benefit of the exculpatory charter provision.”\(^{198}\) In other words, “the Board’s failure to engage in a more proactive sale process may constitute a breach of the good faith component of the duty of loyalty,”\(^{199}\) which prohibited them from seeking shelter under the exculpatory provision and presented issues that could not be resolved on summary judgment.\(^{200}\)

**The Second *Ryan* Decision**

The director defendants filed a motion seeking permission to appeal that portion of the Chancery Court’s decision denying them, at least for the present, the protection of Lyondell’s exculpatory charter provision for potential breaches of their fiduciary duty of care in connection with the sale to Basell. The defendants argued that the court had committed reversible error because, in their view, the court improperly conflated possible violations of only the duty of care (i.e., gross negligence) with a violation of the good faith component of the duty of loyalty (i.e., intentional dereliction or conscious disregard of fiduciary duties). Vice Chancellor Noble denied the requested appeal, but in a second opinion took the opportunity to clarify any confusion surrounding his earlier ruling.\(^{201}\)

The court explained that summary judgment had been denied previously because, on the record presented, which it described as “rudimentary” and “sparse,” the facts suggested an inference that the Lyondell directors may have exhibited a conscious “inaction in the face of a known duty to act.”\(^{202}\)
Thus, the court had “questioned whether, on a more fully developed record, that failure to act might rise to the level of ‘something more’ than a mere violation of the board’s fiduciary duty of care” and had denied summary judgment “in order to clarify and develop the record further in that regard.” The court emphasized that the potential liability for director misconduct discussed in the prior opinion was “not predicated upon the breach of the fiduciary duty of care; rather, liability results from the breach of the separate and distinct duty of good faith.”

The court further stressed that a “liability crisis” of the kind that led the Delaware legislature to create Section 102(b)(7) in the first place would not ensue as a result of its prior opinion. Rather, the decision “in no way impede[s] a properly motivated and unconflicted corporate director who attempts to discharge his fiduciary obligations in good faith from successfully asserting a Section 102(b)(7) defense on a fully developed summary judgment record (or at any other proper procedural stage, for that matter).” In other words, “the reports of the death of Section 102(b)(7) . . . are greatly exaggerated both with regard to the application of Lyondell’s exculpatory charter provision in this case, and certainly with regard to the application of a Section 102(b)(7) provision defense in any other case.”

**Other Delaware Decisions Post-**

Further confirmation that there has been no “sea change” in Delaware jurisprudence can be found in two recent decisions regarding Section 102(b)(7) exculpatory provisions issued after *Ryan*. The Chancery Court in *McPadden v. Sidhu* dismissed claims regarding board approval of a management buyout of a wholly-owned subsidiary based on the existence of a Section 102(b)(7) exculpatory provision. The court determined that the allegations at issue amounted to, at the most, gross negligence on the part of the directors, not bad faith, which required dismissal of the complaint. In so ruling, the court reiterated that exculpatory provisions protect directors for grossly negligent
conduct, which is defined as conduct that constitutes reckless indifference or actions outside the bounds of reason, and do not protect them for activities undertaken in bad faith. Perhaps in reference to the criticism surrounding the first Ryan opinion, the court noted that “[t]here is no basis in policy, precedent or common sense that would justify dismantling the distinction between gross negligence and bad faith.” The court added that “a board of directors may act ‘badly’ without acting in bad faith.”

In re Lear Corporation Shareholder Litigation is similar. That case involved a proposed merger recommended by the board that ultimately failed to secure shareholder approval. The Court of Chancery dismissed the complaint because the company’s charter contained an exculpatory provision. The court explained that, to survive the motion to dismiss, the plaintiffs had to plead a non-exculpated claim – namely, they had to show that the board members breached their duty of loyalty to the company by acting in bad faith and for reasons inimical to the best interests of the shareholders. The plaintiffs could not do so, as the Court of Chancery explained:

Where, as here, the complaint itself indicates that an independent board majority used an adequate process, employed reputable financial, legal, and proxy solicitation experts, and had a substantial basis to conclude a merger was financially fair, the directors cannot be faulted for being disloyal simply because the stockholders ultimately did not agree with their recommendation.

The court also rejected the plaintiffs’ ancillary argument that, even if the board believed that the merger agreement was beneficial to the stockholders, the board nevertheless breached its duty of loyalty by entering into the transaction knowing that stockholder approval was unlikely. The court noted that the plaintiffs’ theory was at odds with the business judgment rule and that whether the stockholders would ultimately reject the merger could not be predicted. “This sort of speculative second-guessing may be good fun for sports talk
shows or political pundits, but it is not the stuff of which duty of loyalty case law is made.”219 In a possible reference to Ryan, the court added that “a very extreme set of facts would seem to be required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties.”220

In these uncertain times, as the court in Lear noted, boards often do not have the luxury of months or even weeks to deliberate over a specific business opportunity.221 They often must act quickly, sometimes with a large premium offer, or risk losing the opportunity altogether.222 “Courts should therefore be extremely chary about labeling what they perceive as deficiencies in the deliberation of an independent board majority over a discrete transaction as not merely negligence or even gross negligence, but as involving bad faith.”223 From the post-Ryan track record, it appears that courts applying Delaware law continue to subscribe to this view.
1 128 S. Ct. 761 (2008). Alston & Bird was counsel of record for one of the defendants in the *Stoneridge* case.

2 *Id.* at 766.

3 *Id.* at 766-67.

4 *Id.* at 767.

5 *Id.*

6 Justices Roberts, Scalia, Thomas, and Alito joined in the majority opinion. Justices Stevens, Souter, and Ginsberg dissented, and Justice Breyer did not participate in the decision.

7 *Stoneridge*, 128 S. Ct. at 768.

8 *Id.*


10 *Id.* at 180.

11 *Id.* at 191.

12 *Stoneridge*, 128 S. Ct. at 769.

13 *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)).

14 *Id.*

15 *Id.*

16 *Id.* at 769-71.

17 *Id.* at 770.

18 *Id.*

19 *Id.*

20 *Id.*


22 *Stoneridge*, 128 S. Ct. at 770-71, 773. Moreover, it is well established that the federal securities laws are not designed to “reach all commercial transactions that are [alleged to be] fraudulent and affect the price of a security in some attenuated way.” *Id.* at 771. Thus, there was no basis in *Stoneridge* for interpreting the securities laws “to provide
a private cause of action against the entire marketplace in which the issuing company operates.” *Id.*

23 *See, e.g.*, Batwin v. Occam Networks, Inc., No. CV 07-2750 CAS (SHx), 2008 WL 2676364, at *15-*16 (C.D. Cal. July 1, 2008) (dismissing claims against two venture capital firms that did business with the primary corporate defendant because “plaintiff points to no deceptive act – either a misstatement, omission, or some other form of deceptive conduct – engaged in by them, much less one that was communicated to the public”); In re DVI Inc. Sec. Litig., 249 F.R.D. 196, 218 (E.D. Pa. 2008) (refusing to certify class of Section 10(b) claims against law firm accused of conspiring with public company client because “the fact remains that none of the alleged conduct was publicly disclosed such that it affected the market for [the client]’s securities.”); TCS Capital Mgmt., LLC v. Apax Partners, L.P., No. 06-CV-13447, 2008 WL 650385, at *24-*25 (S.D.N.Y. Mar. 7, 2008) (dismissing claims against an Italian company where plaintiffs alleged that this secondary actor conspired with other defendants to induce the sale of plaintiffs’ shares in a Greek telecommunications company at an artificially low price).


25 In Stoneridge, the plaintiffs argued that the product suppliers could be liable for Charter’s alleged misstatements or omissions because they participated with Charter in a “scheme” to inflate Charter’s stock price. This theory, based on subparts (a) and (c) of Rule 10b-5, was often referred to as “scheme liability.” The Parmalat case involved similar claims.


27 *Id.* at 509.

28 Stoneridge, 128 S. Ct. at 770 (citing Parmalat I, 376 F. Supp. 2d at 509).

29 Parmalat II, 570 F. Supp. 2d at 524.

30 See id.

31 *Id.* at 525.

32 *Id.*

33 See id.

34 *Id.*

35 *Id.* at 526.

36 *Id.*

37 *Id.* (citing Stoneridge, 128 S. Ct. at 769).
38 See, e.g., In re Nature’s Sunshine Prods. Sec. Litig., No. 2:06-CV-267 TS, 2008 WL 4442150, at *4 (D. Utah Sept. 23, 2008) (claims dismissed as to employee who allegedly submitted false management representation letter to outside auditor because, inter alia, the contents of the false letter were never made public and, as a result, reliance on this defendant’s statements could not be established); In re Int’l Rectifier Corp. Sec. Litig., No. CV 07-02544-JFW (VBKx), 2008 WL 4555794, at *10-*12 (C.D. Cal. May 23, 2008) (dismissing claims against three vice presidents of corporate defendant under Stoneridge where no misstatements or omissions were attributed to these individuals and any alleged deceptive acts by these defendants were never communicated to the public); Katz v. Image Innovations Holdings, Inc., 542 F. Supp. 2d 269 (S.D.N.Y. 2008) (holding that employee defendants could not be liable under Stoneridge because they personally made no alleged misrepresentations or omissions and the complaint failed to allege that their actions were relied upon by purchasers of stock during the class period); In re Dura Pharm., Inc. Sec. Litig., 548 F. Supp. 2d 1126, 1141 (S.D. Cal. 2008) (holding that plaintiffs’ allegations of scheme liability against senior vice president of sales and marketing failed on the basis of Stoneridge because employee “did not make any of the statements in the press releases or to analysts”); In re Nat’l Century Fin. Enters., Inc. Fin. Inv. Litig., 553 F. Supp. 2d 902, 907-08 (S.D. Ohio 2008) (dismissing securities fraud claims against employee defendants where “none of the moving Defendants are alleged to have authored, reviewed, approved, assisted with, or given direction to any of the [allegedly misleading] releases or filings”); In re Bausch & Lomb, Inc. Sec. Litig., No. 06-CV-6294, 2008 WL 4911796, at *16 (W.D.N.Y. Nov. 13, 2008) (dismissing under Stoneridge claims against certain foreign subsidiaries of Bausch & Lomb and their employees because complaint did not allege that these defendants made any public statements about the parent company’s financial results or internal controls or drafted any of its SEC filings or press releases).

39 521 F.3d 686, 697 (7th Cir. 2008).

40 Id.

41 Id.

42 Id.

43 Id.

44 See, e.g., Southland Sec. Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 363-65 (5th Cir. 2004) (holding that the group pleading doctrine failed to survive the Reform Act); Makor Issues & Rights, Ltd. v. Tellabs, 437 F.3d 588, 602-03 (7th Cir. 2006) (same), rev’d on other grounds, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007); Winer Family Trust v. Queen, 503 F.3d 319, 337 (3d Cir. 2007) (same).

45 See Stoneridge, 128 S. Ct. at 769-71.

46 A presumption of reliance is essential to class certification in securities fraud class actions because plaintiffs must demonstrate that issues common to the class predominate. See Fed. R. Civ. P. 23(b)(3). If plaintiffs are unable to invoke a presumption of
reliance that would apply to the class as a whole, the required element of reliance must be shown separately as to each class member, which would mean that individualized issues predominate, precluding class certification. See, e.g., *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).


47 *Id.* at 1123.

48 *Id.* at 1127.

49 *Id.* at 1127-28.

50 *Id.* at 1127.

51 *Id.* at 1127.

52 *Id.* at 1128.

53 *Id.*

54 *Id.* Regrettably, the court in *Burnett* continued to cite to “scheme liability” cases that pre-date *Stoneridge* and are no longer good law in light of *Stoneridge*. For example, the court cited to the “principal purpose and effect test” adopted by the Ninth Circuit in *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040 (9th Cir. 2006). See *Burnett*, 561 F. Supp. 2d at 1125 (citing *Simpson*, 452 F.3d at 1048). This test was specifically considered and rejected by the Supreme Court in *Stoneridge*. See *Stoneridge*, 128 S. Ct. at 769-70. And, the *Simpson* decision was also vacated by the Supreme Court in light of *Stoneridge*. See *Avis Budget Group, Inc. v. Cal. State Teachers’ Ret. Sys.*, 128 S. Ct. 1119 (2008).

55 *Stoneridge*, 128 S. Ct. at 769.


57 *Id.* at *1.

58 *Id.* at *17.

59 *Id.*

60 *Id.* at *18.

61 *Id.*

62 *Id.* at *19.

63 *Id.*

64 *Id.* at *21 (quoting *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 640-41 (D.C. Cir. 2008)).
65 Id. at *21-*25.

66 Id.

67 Id. SEC v. Simpson Capital Management, Inc., No. 07 Civ. 6072, 2008 WL 4093046 (S.D.N.Y. Sept. 3, 2008), another post-Stoneridge opinion, is similar. See 2008 WL 4093046, at *8, *10 n.4. In that case, the court found that investment advisors, who were allegedly the “architects” of a mutual fund late trading scheme, could be primarily liable under Section 10(b) because, inter alia, the SEC did not have to show that any investors relied on the specific conduct of these defendants. Id. at *11.

68 Tambone, 2008 WL 5076554, at *37 (Selya, J., concurring in part and dissenting in part).

69 Id. at *36.

70 Id. at *39 (emphasis in original).


Nonetheless, more than 20 securities class action lawsuits remain pending in various district courts across the country. On October 9, 2008, the United States Judicial Panel on Multidistrict Litigation denied a motion seeking the consolidation of a number of ARS suits and returned the cases to their districts of origin. The originating courts have yet to address the issue of how the aforementioned settlements may affect the pending claims.

No. 08-cv-06038-JNE-FLN (D. Minn. Filed Nov. 14, 2008).


For example, more than 29 percent of all home loans in 2006 were subprime loans. Rick Brooks and Constance Mitchell Ford, The United States of Subprime, Wall St. J., Oct. 11, 2007, at A1.


Nielsen, Third Quarter 2008 Update, supra note 83, at 3.

89 Id. at 2510.
90 Id. at 2504-05.
94 Id. at *3-*4.
95 In a widely cited opinion, the Seventh Circuit Court of Appeals held that Tellabs requires a court to “discount” allegations purportedly derived from confidential informants and that this discount will usually be “steep.” Higginbotham v. Baxter Int’l, Inc., 495 F.3d 753, 757 (7th Cir. 2007). Indeed, the Court of Appeals observed that it is “hard to see how information from anonymous sources could be deemed ‘compelling’ or how [a court] could take account of plausible opposing inferences” as required under Tellabs. Id. This is so because confidential sources could have axes to grind, be lying, or perhaps do not even exist. See id.
96 Tripp, 2007 WL 4591930, at *3.
97 Id. at *4; see also In re Impac Mortgage Holdings, Inc. Sec. Litig., 554 F. Supp. 2d 1083, 1094 (C.D. Cal. 2008) (“Presuming these allegations are true, they establish that Impac’s management team exhibited poor judgment, stubbornness, arrogance, and perhaps even incompetence . . . [but] because these allegations do not show any deceit on the part of Defendants . . . , they cannot support a fraud claim.”).
98 Tripp, 2007 WL 4591930, at *3-*4.
99 Id.
100 Id. at *4.
102 Standard Pacific builds and sells single-family attached and detached homes in the United States and provides mortgage financing and title services to its home buyers through subsidiaries and joint ventures. See id. at 532.
103 Id.
104 Id. at 536-37, 557.
105 Id. at 532.
In reaching its decision, the court considered the fact that (1) as sales fell short of forecasts, the company repeatedly lowered its guidance throughout the period; (2) the company advised investors that the reductions in guidance were due to deteriorating market conditions; and (3) the defendants warned investors that actual results might still fall short of projections despite the lowered expectations. Id.


BankAtlantic Bancorp is a holding company that offers consumer and commercial banking and lending services through its subsidiary, BankAtlantic. Id. at *1.


Id. at *1-*3, *13.

Id. at *11 n.8.

Id. at *13.

Id. at *13-*16.


Id. at *16; see also Pittelman v. Impac Mortgage Holdings, Inc., No. 07-0970, 2008 WL 4809962, at *2 (C.D. Cal. Oct. 6, 2008) (rejecting former employees’ vague allegations of internal spreadsheets and reports as too generic to meet the heightened pleadings standards and discounting similar statements by anonymous bloggers as “nothing more than idle Internet speculation.”).


Id.

Id. at 552.

No. 07-00931, 2008 WL 467619 (C.D. Cal. Jan. 31, 2008). Gold involved federal securities law claims brought against New Century Financial Corporation, a mortgage finance company that focused on subprime lending, certain of its officers and directors, the company’s outside auditor, and certain investment banks that underwrote the company’s preferred stock offerings. Id. at *1.


123 Id. at *2.

124 Id.

125 Id.; see also Patel, 253 F.R.D. at 551 (holding that “[t]his style of [puzzle] pleading ‘renders it exceedingly difficult to discern precisely which statements are alleged to be misleading,’” and, for that reason, fails to satisfy the Reform Act’s pleading requirements) (internal citations omitted).

126 No. 07-0139, 2008 WL 2354367 (W.D. Mo. June 4, 2008). In Novastar, the plaintiff brought a securities fraud class action against Novastar, a subprime lender, and its executive officers, alleging that the company (1) lacked internal controls, rendering its projections inaccurate, (2) failed to properly account for its loan loss allowance, (3) should have revised underwriting guidelines based on the downturn in the subprime mortgage market, (4) had no basis on which to predict that it could maintain its status as a real estate investment trust, and (5) was at a higher risk of default based on deviations from the company’s underwriting standards. Defendants moved to dismiss the complaint, and the court granted the motion, without leave to amend, holding that the plaintiff “has not-and cannot-satisfy the [Reform Act’s] pleading requirements.” Id. at *1.

127 Id. at *2.

128 Id. at *3. This has been a common problem encountered by plaintiffs in subprime cases. See, e.g., In re Countrywide Fin. Corp. Derivative Litig., 554 F. Supp. 2d 1044, 1070 (C.D. Cal. 2008) (“[G]iven the discretion inherent in the setting of loan loss reserves, and the use of independent auditors, Plaintiffs have not adequately pled particularized facts that show that the loan loss levels were, in fact, so low that they were false and misleading.”).

129 Novastar, 2008 WL 2354367, at *3.

130 Id. at *4 (internal citations omitted); see also N.Y. State Teachers’ Ret. Sys. v. Fremont Gen. Corp., No. 2:07-cv-05756, 2008 WL 4812021, at *5 (C.D. Cal. Oct. 28, 2008) (dismissing complaint where the court “scoured the 175 pages of the [complaint] in an effort to link Lead Plaintiff’s allegations of specific statements with the alleged reason(s) those statements [were] misleading” and the internal cross-references in the complaint failed to support the plaintiff’s conclusory allegations).


See 15 U.S.C. § 77v(a); see LaCroix, Section 11 Lawsuits, supra note 132.

533 F.3d 1031 (9th Cir. 2008).

See id. at 1032-33.

Id.

Id. at 1034.


Id. at 582.

Id. at 584; see also 28 U.S.C. §§ 1332(d), 1453(b).

HarborView, 581 F. Supp. 2d at 590.

Id.

See id. The court noted that the general removal provision under 28 U.S.C. § 1441(a) contains such a provision in that it provides for removal “except as otherwise expressly provided by Act of Congress.” Id. (citing 28 U.S.C. § 1441(a)).

Id. at 587 (quoting Estate of Pew v. Cardarelli, 527 F.3d 25 (2d Cir. 2008)).

The plaintiffs’ argument that the action fell within the CAFA exception precluding removal of class actions relating to the rights, duties, and obligations arising out of a security also failed. See HarborView, 581 F. Supp. 2d at 587. The court explained that the Second Circuit has already analyzed this CAFA exception in Estate of Pew v. Cardarelli, 527 F.3d 25 (2d Cir. 2008). See id. The plaintiffs in Pew had argued that this exception covered any claim that involved securities, but the Second Circuit expressly rejected that interpretation, holding that such an interpretation would render meaningless the limiting terms included in that provision and would also render another securities related exception in CAFA “completely superfluous.” See id.


Id. at 317-18. United States Code Section 1452(a) provides that a civil action is removable “to the district court for the district where such civil action is pending, if such district court has jurisdiction” (see 28 U.S.C. § 1452(a)) of cases “arising under, in, or ‘related
to a case [filed] under Title 11 of the Bankruptcy Code." *Id.* at 317. The company whose bankruptcy filing permitted removal under “related to” jurisdiction had not been named as a defendant to the *Citigroup* action. *Citigroup*, 572 F. Supp. 2d at 317-18. The court, however, held that the plaintiff’s failure to name the bankrupt company as a defendant was not dispositive. *Id.* Rather, plaintiff’s claims would still have the required conceivable effect on that company’s bankruptcy estate, given the defendants’ assertion that they were entitled to indemnification from the bankrupt company in the event they were found liable. *Id.*

151 *Id.* at 318.


155 *Id.* at 14-15.

156 *Id.* at 6.

157 *Id.* at 4 n.2. Plaintiffs eventually withdrew their motion for expedited discovery, and Getinge was not required to produce any documents in the case.

158 *Id.* at 18-19.

159 *Id.* at 23; see also *In re BEA Sys., Inc. Shareholder Litig.*, Civ. Action No. 3298-VCL, slip op. at 87-89 (Del. Ch. Mar. 26, 2008) (refusing to enjoin “the only available transaction” where “disruptions in the marketplace” made it risky for court to interfere and these risks would give any judge “great[] pause . . . unless very substantial grounds existed” in favor of restraining the transaction); *Wayne County Employee’s Ret. Sys. v. Corti*, 954 A.2d 319, 331 (Del. Ch. 2008) (noting that the video gaming market was unstable and refusing to grant injunction based on dubious evidence that would potentially disrupt a value-maximizing opportunity for the company).

160 *Datascope*, slip op. at 23.


162 *Id.*


166 Id. at *3.

167 Id. at *4.

168 Id. at *5.

169 Id. at *6.

170 Id. at *4.

171 Id. at *6.


173 Id.

174 Id. at 19.

175 Id.

176 Id. at 24.

177 Id.

178 Id. at 25.


180 Id. at *47.

181 For example, the court rejected claims that the director defendants were motivated by self-interest to approve the merger. Id. at *40. The court also rejected certain disclosure claims as barred by Lyondell’s exculpatory provision because they would amount, at most, to a breach of the duty of care. Id. at *48. In addition, the court rejected claims against Basell and its affiliate for aiding and abetting the alleged breaches of fiduciary duty by the Lyondell board. Id. at *112.

182 506 A.2d 173 (Del. 1986).
In the wake of the Delaware Supreme Court’s ruling in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), which held that directors can be personally liable for breaching their fiduciary duties to a company in approving a merger agreement, the Delaware legislature became concerned that many qualified individuals would think twice about becoming a director if they faced potential liability for the board’s decisions. In response to these concerns, the legislature enacted Section 102(b)(7) to allow corporations to exculpate their directors from liability arising from a breach of the duty of care, but not from a breach of the duty of loyalty or for conduct taken in bad faith.

8 Del. C. § 102(b)(7).


Id. at *8.

Id. at *7-*8.

Id. at *6.

Id. at *48.

Id. at *47.

Id. at *64.

Id. at *9.

Id.

Id.

Id. at *87-*88.

Id. at *84.

Id. at *10 n.11.

Id. at *48.

Id. at *87-*88.

202 Ryan II, 2008 Del. Ch. LEXIS 125, at *10. This observation about the state of the record was entirely consistent with comments made by the court in Ryan I. See Ryan I, 2008 Del. Ch. LEXIS 105, at *83 (“After trial, or perhaps on a more complete summary judgment record, the Court may be satisfied that the Board in fact secured the ‘best’ deal available to the shareholders, or, at the very least, that it undertook to discharge its Revlon duties in good faith under the circumstances.”)

203 Ryan II, 2008 Del. Ch. LEXIS 125, at *2-*3.

204 Id. at *16.

205 Id. at *11, n.17.

206 Id.

207 Id. at *34.


209 Id. at *32-*33.

210 Id. at *32.

211 Id. at *1.


213 Id. at *2.

214 Id. at *22.

215 Id.

216 Id. at *3.

217 Id. at *45.

218 Id. at *46.

219 Id.

220 Id. at *42.

221 Id. at *41.

222 Id.

223 Id. at *41-*42.
Partners

Peter Q. Bassett  
404-881-7343  
peter.bassett@alston.com

Teresa T. Bonder  
404-881-7369  
teresa.bonder@alston.com

Nelson A. Boxer  
212-210-9470  
nelson.boxer@alston.com

Steven M. Collins  
404-881-7149  
steve.collins@alston.com

Jessica Perry Corley  
404-881-7374  
jessica.corley@alston.com

John R. Crews  
214-922-3408  
john.crews@alston.com

Todd R. David  
404-881-7357  
todd.david@alston.com

Patrick C. DiCarlo  
404-881-4512  
pat.dicarlo@alston.com

Dennis O. Garris  
202-756-3452  
dennis.garris@alston.com

Andrew M. Gilford  
213-576-1138  
andy.gilford@alston.com

Mary C. Gill  
404-881-7276  
mary.gill@alston.com

Michael J. Hartley  
213-576-1004  
michael.hartley@alston.com

Scott P. Hilsen  
404-881-4517  
scott.hilsen@alston.com

H. Douglas Hinson  
404-881-7590  
doug.hinson@alston.com

Susan E. Hurd  
404-881-7572  
susan.hurd@alston.com

John A. Jordak, Jr.  
404-881-7868  
john.jordak@alston.com

John L. Latham  
404-881-7915  
john.latham@alston.com

Robert R. Long  
404-881-4760  
robert.long@alston.com

Darren L. McCarty  
214-922-3414  
darren.mccarty@alston.com

C. Glen Morris  
214-922-3415  
glen.morris@alston.com

John Mark Rochefort  
213-576-1101  
mark.rochefort@alston.com

Theodore J. Sawicki  
404-881-7639  
tod.sawicki@alston.com

Jon G. Shepherd  
214-922-3418  
jon.shepherd@alston.com

Kelly C. Wilcove  
404-881-7955  
kelly.wilcove@alston.com

Counsel

Craig Carpenito  
212-210-9582  
craig.carpenito@alston.com

Associates

Lisa Bugni  
404-881-4959  
lisa.bugni@alston.com

Tiffany A. Buxton  
212-210-9448  
tiffany.buxton@alston.com