Milbank

LITIGATION AND ARBITRATION
2011 YEAR IN REVIEW

Dear Clients and Friends,

It is with a great sense of accomplishment that we present this 2011 Year in Review, highlighting some of the many successes of Milbank's Litigation and Arbitration Group over the past year. From multi-jurisdiction securities litigations to regulatory investigations to complex disputes involving bankruptcy, intellectual property, reinsurance, M&A, competition, trusts and estates, and other commercial litigations and arbitrations, in 2011 we represented clients in "bet the company" cases and served as lead counsel in some of the largest and highest-profile commercial disputes in the world. We also continued our long-standing commitment to public interest work, as highlighted by the pro bono accomplishments summarized on pages 17-18.

Our Litigation and Arbitration Group includes more than 140 lawyers located in our principal office in New York, as well as our offices in Washington, DC, Los Angeles, and London. Our litigators pride themselves on being trial lawyers. As you can see from the case highlights, we frequently try cases involving a broad range of issues in federal and state courts throughout the US, the English Courts, and before domestic and international arbitral tribunals.

To our clients, thank you for the confidence you placed in Milbank and our attorneys when you entrusted us to represent you with your most difficult and complex litigation issues. The dozens of successes described in this Year in Review hopefully demonstrate that your trust was well-placed. And while not every matter we handled last year resulted in a complete victory for our clients, I can say with certainty that the same creativity, talent, experience, and hard work that led to the successful results were applied by Milbank litigators to every matter we handled, whether the final result was a win, loss, or draw. Fortunately, as you can see from the following pages, our clients wound up on the winning side often in 2011.

I hope you enjoy this Year in Review and we look forward to continuing to work with you in 2012 and beyond.

Sincerely,

Alan J. Stone
Litigation and Arbitration Practice Group Leader

Partners

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Practice Group Leader
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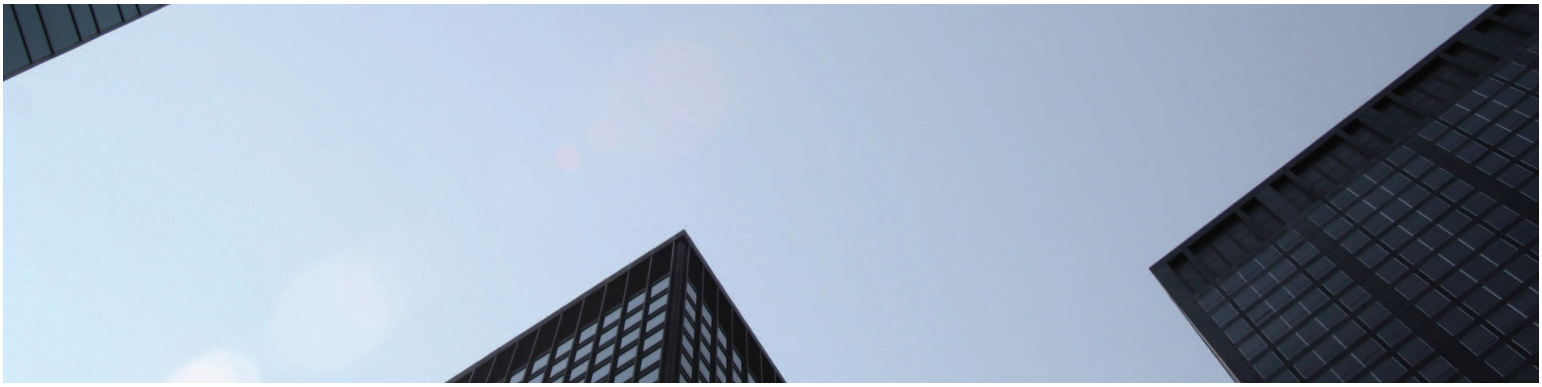


BANKRUPTCY LITIGATION

Milbank secures order quashing key aspects of controversial Bankruptcy Court decision: Related risks to lenders and creditors quelled

In the highly watched TOUSA case now pending in the Eleventh Circuit Court of Appeals, Milbank defended a group of lenders, referred to as the Transeastern Lenders, against unprecedented fraudulent transfer claims totaling more than $400 million. In June 2005, homebuilder TOUSA, Inc. formed a joint venture financed in part with $450 million in senior secured loans from the Transeastern Lenders. The joint venture defaulted on the Transeastern loans and litigation ensued. In May 2007, TOUSA agreed to repay the amount outstanding under the Transeastern loans, roughly $421 million. TOUSA funded this payment with $500 million in new loans, which required certain conveying subsidiaries to convey liens to the lenders on the new loans and to be co-borrowers on the debt. Six months later, in January 2008, TOUSA and its affiliates filed for chapter 11 bankruptcy. The Official Committee of Unsecured Creditors of TOUSA sued the Transeastern Lenders and the new lenders, seeking both to recover TOUSA's repayment of the Transeastern loans and to avoid the liens and obligations granted by the conveying subsidiaries to the new lenders. The Transeastern Lenders retained Milbank to defend them.

The Bankruptcy Court for the Southern District of Florida ruled against the Transeastern Lenders, finding that (1) TOUSA's $421 million payment to the Transeastern Lenders was fraudulent under Section 548 of the Bankruptcy Code and (2) the conveying subsidiaries' transfer of the liens was fraudulent and the Transeastern Lenders were "entities for whose benefit" the lien transfer was made under Section 550 of the Bankruptcy Code. The Bankruptcy Court ordered the Transeastern Lenders to disgorge the repayment and avoided the liens and obligations under the new loans. The Transeastern Lenders appealed.

In February 2011, Milbank secured an order from the District Court quashing the Bankruptcy Court's findings of liability and ordering all remedies against the Transeastern Lenders null and void. This was a dramatic departure from the usual practice of the District Court to remand a case back to the Bankruptcy Court. The District Court found that the conveying subsidiaries received reasonably equivalent value in exchange for the liens in the form of "indirect" economic benefits. The Court also found that even if the conveying subsidiaries did not receive such value, the Transeastern Lenders could not be liable as entities for whose benefit the lien transfers were made. The case is currently on appeal before the Eleventh Circuit.

Milbank in the News

Court Smashes TOUSA $480M Disgorgement Order, *Law360*, Feb. 11, 2011

A bankruptcy even a baseball fan could love: Litigation team ensured the Texas Rangers' lenders weren't left standing, Winning, Successful Litigators, Powerful Strategies, *The National Law Journal*, June 2011

Milbank Views

Advice to Debtors–and Creditors–for Valuation Disputes in Bankruptcy Litigation, *Business Valuation Update*, Feb. 2011, by Daniel Perry and Alisa Schlesinger

In re Enron: Second Circuit Expands "Settlement Payment" Exemption to the Redemption of Commercial Paper (and Beyond?), *Pratt's Journal of Bankruptcy Law*, Vol. 7, No. 7, Oct. 2011, by Andrew M. Leblanc, Sarah A. Sulkowski and Nicole Vasquez Schmitt

Milbank Speaks

The Potential Impact of TOUSA on Fraudulent Transfer Litigation, Hot Topics in Bankruptcy Litigation, New York City Bar Association (Atara Miller)

Milbank employs an aggressive litigation strategy and achieves a successful settlement for the South Edge trustee

Milbank represented the chapter 11 Trustee for the bankruptcy estate of South Edge, LLC, a special-purpose, limited liability Nevada company that was formed in 2004 by eight equity owners to buy land and develop a master-planned community in Henderson, Nevada. In 2010, following a dramatic decline in the real estate market, a South Edge creditor successfully filed an involuntary chapter 11 petition against South Edge in the United States Bankruptcy Court for the District of Nevada, asserting that South Edge defaulted on loan obligations totaling $585 million and obtaining the appointment of the chapter 11 Trustee.

South Edge and certain of its members filed two appeals from the Court's orders granting the involuntary chapter 11 petition and appointing the Trustee. Milbank successfully moved to dismiss the appeals. Each of the appellants then noticed an appeal to the Ninth Circuit, but these appeals were ultimately dismissed as part of a global settlement.

Our next task was to assist the Trustee in marshalling the estate's assets, including assessing and enforcing the estate's rights to approximately $26 million held in a cash account. On behalf of the Trustee, we initiated an adversary proceeding in the Bankruptcy Court, which centered on the turnover of the proceeds of the $26 million cash account as well as an additional $4.5 million, which we determined had been improperly withdrawn from that account in the preceding years. Milbank pursued an aggressive litigation strategy that accelerated settlement discussions on the eve of oral argument and culminated in a successful settlement. The settlement was approved by Bankruptcy Court in October 2011.

Milbank forces an auction of the Texas Rangers that results in maximum recovery for the lenders

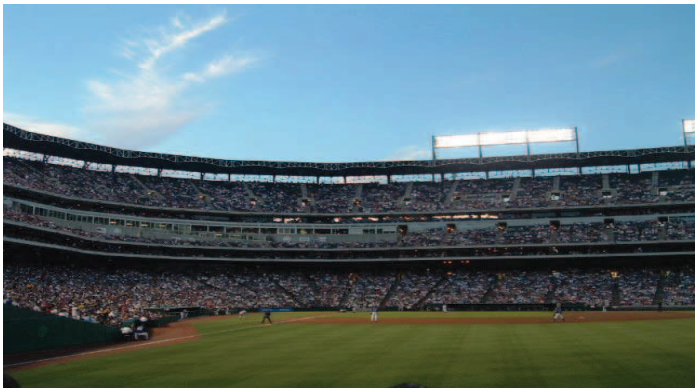
Milbank represented an Ad Hoc Group of First Lien Lenders in connection with the chapter 11 case of Texas Rangers Baseball Partners (TRBP), owner of the Texas Rangers major league baseball team. TRBP filed for bankruptcy protection to facilitate a sale of the Rangers to their selected buyer group through a purported "prepackaged" plan of reorganization. On behalf of the Ad Hoc Group of First Lien Lenders, we objected to the plan and related sale and argued that TRBP's assets should instead be sold at an auction to generate a fair value for the Rangers' franchise and related assets.

After two months of hard-fought litigation in the Bankruptcy Court, including disputes related to issues as varied as whether a debtor has a duty to maximize value for its assets and whether a sports league should be permitted to select its owners notwithstanding a Bankruptcy filing, we succeeded in convincing the Court to require an auction for the Rangers. The auction resulted in a sale of the Rangers to the buyer originally proposed under the prepackaged plan, but at a price that was significantly higher than what was contemplated in the plan. This was a tremendous victory for our clients, as the sale price reflected a 60% increase in the value provided in the original prepackaged plan.

Through a significant class action settlement, Milbank obtains a considerable return for Refco brokerage customers

In October 2005, only months after its IPO, Refco, a financial services company specializing in commodities and futures contracts, collapsed suddenly. Milbank represented the creditors committee in the Refco bankruptcy proceedings. Our litigation team was then retained to represent the Trustee appointed by the Bankruptcy Court to maximize recovery for Refco's creditors. On behalf of the Trustee, we initiated several lawsuits in federal and state courts, including a class action lawsuit asserting claims under the federal securities laws, and individual lawsuits asserting bankruptcy-related claims under the New York Debtor & Creditor Law and the Bankruptcy Code. These lawsuits were asserted against, among others, the private equity company that took control of Refco shortly before it went public.

In February 2011, following intensive litigation and negotiation, Milbank, on behalf of the Trustee, obtained a substantial settlement from the private equity defendants (without any admission of liability) of the Bankruptcy claims and the related class action lawsuit. The settlement brought the total recovery of the brokerage customers to 98%.



Milbank team blocks involuntary chapter 11 petitions filed against its clients

In early 2009, Vitro SAB, a holding company for the largest manufacturer of flat glass and glass containers in Mexico, defaulted on $1.2 billion of notes as a result of the global financial crisis. Certain Petitioning Creditors filed involuntary chapter 11 petitions against 14 U.S.-based guarantors of the notes (the Alleged Debtors). The Alleged Debtors turned to Milbank.

At issue was whether the Petitioning Creditors met the requirements for initiating an involuntary case under Section 303(b) of the Bankruptcy Code. Following expedited discovery, Milbank defended the involuntary chapter 11 cases before the Bankruptcy Court for the Northern District of Texas. At the start of trial, the Court preliminarily found against the Alleged Debtors on several critical issues; most significantly, the Court agreed with the Petitioning Creditors that they had complied with the provisions of the governing indentures for making demand for payment upon the Alleged Debtors. Therefore, the claims against the Alleged Debtors were "not contingent as to liability," as required by 303(b)(1).

Milbank's trial team persuaded the Court to reconsider its preliminary ruling by demonstrating that the Petitioning Creditors' interpretation of the demand provisions in the indentures—the interpretation preliminarily adopted by the Court—was flawed and would render critical language in the indentures meaningless. After two days of evidence and argument, the Court wrote in its opinion "that its initial conclusion was wrong" and that the Petitioning Creditors had failed to satisfy the requirements of the indentures. Thus, the Petitioning Creditors' claims were contingent as to liability, and the Petitioning Creditors did not meet the requirements for an involuntary case. Milbank subsequently defeated a Motion for Reconsideration of the ruling filed by the Petitioning Creditors.

Milbank ranked in Tier 1 for Bankruptcy in *Benchmark Litigation*, 2011

COMPLEX COMMERCIAL LITIGATION

After accelerated discovery and motion practice, Milbank procures a settlement for solar panel manufacturer

Milbank represented REC Solar Grade Silicon LLC, a manufacturer of solar panel materials, in a suit to recover tens of millions of dollars in damages caused by allegedly defective welds on piping the defendants supplied to REC. When prior counsel for REC, which filed the case in June 2009, was disqualified in December 2010, Milbank stepped in.

Much of the time allotted for discovery and pre-trial motion practice had already passed, and a trial date was set for October 2011. As a result, we needed to conduct fact discovery, expert discovery, and summary judgment motion practice simultaneously between March and September 2011. Fact discovery involved millions of pages of documents and more than 40 depositions across the country. At the same time, expert discovery proceeded, which involved the preparation of five affirmative expert reports and eight rebuttal expert reports. In the middle of this extensive fact and expert discovery, we also fought off five separate summary judgment motions filed by the defendants.

In early October 2011, after the summary judgment briefing, and with the critical evidence we adduced through fact and expert discovery, defendants agreed to settle with our client.

In representing songwriters, composers, and publishers in disputes over copyright fees, Milbank wins several significant discovery debates in preparation for trial

Milbank represents Broadcast Music, Inc. (BMI), one of three national performing right organizations, in two rate-setting cases currently pending in the United States District Court for the Southern District of New York. BMI licenses the public performing right in musical compositions for its more than 475,000 affiliated musical composers, writers and publishers. In one proceeding, the owners of approximately 1,200 local television stations petitioned the District Court to set a reasonable rate for licenses that would allow the local television stations to broadcast the musical compositions in the BMI repertoire for the period January 1, 2005 through December 31, 2014. We succeeded in winning several significant discovery disputes, including: requiring the local television stations to produce documents reflecting retransmission consent fees received; requiring third-parties Fox Broadcasting Company and Twentieth Century Fox Television to produce documents; and protecting BMI's highly proprietary music use data from disclosure. Trial is anticipated in June 2012.

In a separate proceeding, the owners of approximately 6,200 commercial radio broadcast stations asked the District Court to set reasonable fees for music performing rights licenses from BMI for the period January 1, 2010 through December 31, 2014. The local radio stations are seeking unprecedented reductions in licensing fees. We are contesting the local radio stations' claims, maintaining that the temporary decline in industry revenues due to the recession does not justify a substantial fee reduction, especially in light of the significant increase in the local radio stations' use of BMI music. Discovery in this case is ongoing; no trial date has been set.

"Milbank is a sophisticated firm with an immensely broad and very deep litigation team."
—Chambers USA 2011

Milbank in the News

Draft Expert Reports No Longer Discoverable in Federal Court, *Business Valuation Update*, Jan. 2011 (Linda Dakin-Grimm)

Shaw, Solar Co. Settle $107M Suit Over Faulty Pipelines, *Law360*, Nov. 4, 2011

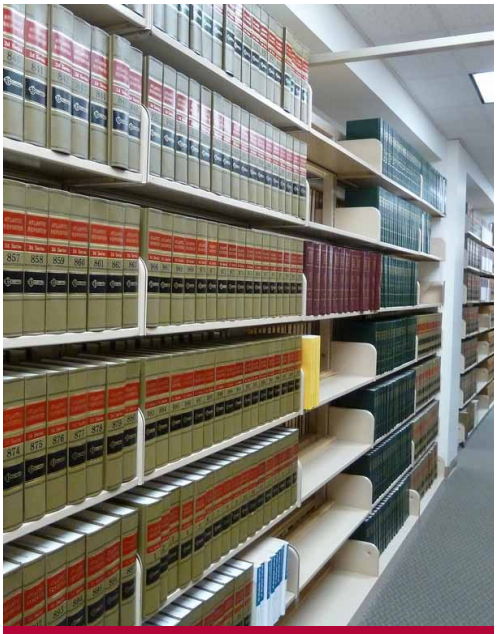
Milbank Views

In-House Counsel and Attorney Client Privilege, *Directors & Boards: Reader Profile*, Jan. 2011, by Stacey Rappaport and LaTonya Brooks

DC and Seventh Circuits Split from Second Circuit: Allow for Corporate Liability Under Alien Tort Statute, *Financial Fraud Law Report*, Oct. 1, 2011, by Sander Bak

Milbank Speaks

Pretrial Practice 2011, Practicing Law Institute Seminar, May 23, 2011 (Sander Bak)



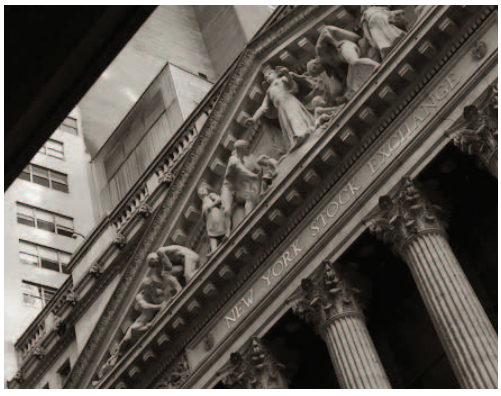
Milbank wins dismissal of shareholder claims brought against Israel satellite operator in federal and state courts

Milbank continues to successfully defend ImageSat International, N.V., a surveillance satellite operator based in Israel, and a number of its current and former directors and officers, in a series of lawsuits filed against the company by minority shareholders in federal and state courts. Plaintiffs first brought suit against ImageSat, several of its major shareholders, and the directors and officers in 2007 in the United States District Court for the Southern District of New York. Damages sought totaled several billion dollars for claims including breach of fiduciary duty, RICO violations, self-dealing, disgorgement of compensation, misappropriation of corporate assets, corporate waste, and unjust enrichment. We successfully obtained dismissal of the entire lawsuit on the grounds of forum non conveniens, with the Court holding that a United States Court was not the appropriate forum for the lawsuit. A different group of minority shareholders then filed another lawsuit against ImageSat in federal court with similar allegations, and we again secured dismissal on behalf of ImageSat on the grounds of forum non conveniens. Finally, a third lawsuit was filed against ImageSat and its major shareholders, this suit brought by a different minority shareholder in New York state court. We were successful in obtaining the dismissal of all but one of the claims raised in that lawsuit at the motion to dismiss stage.

Through successful motion practice at the early stages of litigation, Milbank achieves dismissal of class action claims against the NYSE

Milbank successfully represented NYSE Group, Inc. in a putative class action that challenged the consolidation of certain regulatory functions of NYSE Regulation and the National Association of Security Dealers, Inc. (which resulted in the formation of the Financial Industry Regulatory Authority). Plaintiff, Standard Investment Chartered, Inc., alleged that misrepresentations were made in a proxy statement that NASD distributed to its members in seeking approval of by-law changes required to effectuate the consolidation. The allegations against NYSE included claims for negligent misrepresentation, unjust enrichment, and aiding and abetting breach of fiduciary duty.

On behalf of the NYSE, we successfully convinced the District Court to dismiss the complaint for lack of subject matter jurisdiction. The Second Circuit subsequently dismissed Standard's appeal as moot but did not vacate the dismissal order. When the plaintiff filed another amended complaint, we successfully got that complaint dismissed with prejudice by the District Court because defendants —as self-regulatory organizations and their officers—were entitled to absolute immunity in connection with the allegations in the complaint. The Second Circuit affirmed that dismissal on appeal. The plaintiff recently filed a petition for a writ of certiorari seeking review of the dismissal of its claims against the NASD defendants, but waived the right to seek review of the dismissal of its claims against the NYSE.



FINANCIAL INSTITUTIONS REGULATION

Milbank guides global market participants through regulatory framework

During 2011, a period punctuated by an uncertain and evolving regulatory and economic environment, Milbank's financial services regulatory practice counseled broker-dealers, investment advisers, hedge funds, and other entities on a wide variety of regulatory issues. From trading issues affecting all types of asset classes to new products and new regulations; from research concerns to investment banking practices; from outsourcing practices to supervisory systems; and from novel issues arising under the Dodd-Frank Act to updated concerns over market manipulation and insider trading, we counseled the most sophisticated global market participants on their regulatory obligations and liabilities. Throughout the past year, we have continued to discern market practice and examination, as well as other priorities of the various regulatory agencies and self-regulatory organizations.

Milbank leads major financial institution through complex regulatory investigations

In late 2010 into 2011, as a result of a 2008 Wall Street Journal article, numerous regulators began investigating the process by which the London Interbank Offered Rate (LIBOR) is determined. The British Bankers Association publishes LIBOR for ten currencies across fifteen maturities. The BBA reports that instruments with an approximate $360 trillion value are indexed to LIBOR. The WSJ article and other media reports suggested that in the face of market turmoil and the liquidity crunch in 2007 and 2008, the cost of funds should have increased and LIBOR, in turn, generally should have increased. LIBOR, however, did not follow other market indicators and observers questioned its accuracy. Regulators around the world began investigating the LIBOR submission process. In addition, numerous putative class actions were filed nationwide alleging manipulation and conspiracy related to the LIBOR submission process. Milbank represents a major financial institution in connection with these matters.

Milbank Views

Keeping Broker Records in the Cloud, *Securities Technology Monitor*, Jan. 20, 2011, by Michael Kurzer

SEC Whistleblower Rules Encourage Internal Investigations, *Milbank Litigation Client Alert*, June 3, 2011, by Wayne Aaron, Dorothy Heyl and David Schwartz

Does FINRA Regulate Cloud Computing?, *Securities Technology Monitor*, Oct. 31, 2011, by Richard Sharp and Michael Kurzer

Milbank Speaks

Equity Institutional Trading Panel, 2011 SIFMA Compliance & Legal Society Annual Seminar, Mar. 23, 2011 (Richard Sharp)

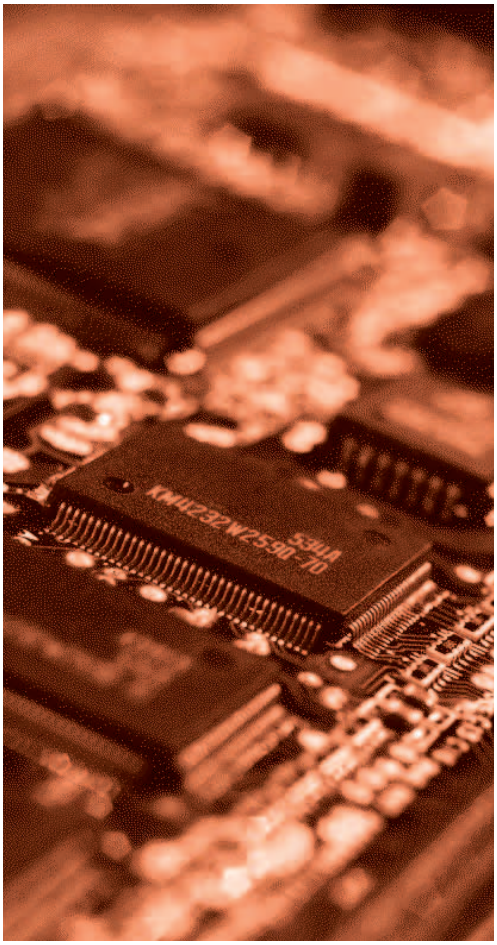
Preventing SEC, State and SRO Enforcement Actions and Navigating the Inspection and Examination Process, American Conference Institute's Broker/Dealers & Investment Advisers, Apr. 1, 2011 (Wayne Aaron)

US Regulatory Update, The European Compliance Conference, Apr. 13-15, 2011 (Richard Sharp)

Final SEC Whistleblower Rules, ALI–ABA Topical Courses, June 15, 2011 (Wayne Aaron and Dorothy Heyl)

Compliance and the Cloud: Understanding and Easing Regulatory Burdens, FinCLOUD 2011, Second Annual Conference: Cloud Computing in the Financial Services Industry, Nov. 3, 2011 (Michael Kurzer)

Hedge Fund Enforcement & Regulatory Developments 2011, Practicing Law Institute Conference & Webcast, Nov. 21, 2011 (Wayne Aaron)



"[Milbank] ... boasts a 'terrific patent litigation practice, with high quality individuals producing some outstanding work.'"
— *IAM Patent Litigation 250*

INTELLECTUAL PROPERTY LITIGATION

After oral argument in federal appellate court, Milbank secures victory for AstraZeneca

Milbank represented AstraZeneca in several Sherman Act antitrust claims brought by generic-pharmaceutical manufacturer Mylan Laboratories. Mylan and other plaintiffs alleged that AstraZeneca conspired with marketing partner Merck to monopolize the market for omeprazole-containing products by: (1) bringing sham patent litigation against generic manufacturers; (2) improperly listing patents in the FDA's Orange Book; and (3) offering Nexium as a replacement for Prilosec. In March 2011, we convinced the United States Court of Appeals for the Federal Circuit to affirm the trial court's dismissal of these claims against AstraZeneca. The Federal Circuit's decision was a summary affirmance without opinion. It was issued less than a day after our oral argument on the matter. The decision brings to a successful conclusion the last of a series of antitrust claims against AstraZeneca by various manufacturers of generic substitutes for AstraZeneca's blockbuster drug, Prilosec.

Milbank successfully defends NYSE from patent infringement claim

Milbank represented the New York Stock Exchange in a patent infringement suit brought by Papyrus Technology Corp. Papyrus had asserted five patents relating to wireless, hand-held communications systems, data structures for storing trading data, and methods for managing brokers on the floor of an exchange. Two patents were withdrawn after discovery and Papyrus stipulated to NYSE's lack of infringement of a third patent. In 2009, the United States District Court for the Southern District of New York granted our motion for summary judgment, holding that patents asserted against NYSE are invalid. In 2010, the Federal Circuit Court of Appeals affirmed the win for the NYSE. This decision of the appellate court affirmed the invalidity of the final two patents and brought to an end Papyrus's claims against NYSE. In 2011, the parties resolved NYSE's remaining claims for certain costs and fees incurred in its defense. The settlement, including Papyrus's transfer of its portfolio to NYSE, capped off a successful defense of the NYSE in the litigation.

Through determined litigation in court and the US patent and trademark office, Milbank secures cancellation of patent infringement claims against Apple

Milbank represents Apple, Inc. in *MedioStream, Inc. v. Microsoft Corp. et al.*, currently pending in the United States District Court, Northern District of California. MedioStream first sued Apple and several other companies in the United States District Court, Eastern District of Texas in 2007, alleging that the defendants infringed a MedioStream patent related to DVD technology. On behalf of Apple, we quickly moved to transfer the litigation from Texas to the Northern District of California, but the Court denied the motion. Undeterred, we moved three additional times to transfer venue or for reconsideration of the venue transfer decision before filing a writ of mandamus before the United States Court of Appeals for the Federal Circuit. In December 2010, less than a month before trial, the Federal Circuit granted the writ and ordered the case transferred to the Northern District of California. MedioStream filed a writ of certiorari before the United States Supreme Court, which we opposed and the Court denied.

While the litigation was pending, Apple also filed a Request for Inter Partes Reexamination with the United States Patent and Trademark Office (the PTO). In United States patent law, a reexamination is a process whereby a third party or inventor can have a patent reexamined by a patent examiner to verify that the subject matter it claims is patentable. To have a patent reexamined, an interested party must submit prior art that raises a "substantial new question of patentability." In light of prior art that Milbank identified in the litigation, the PTO cancelled all claims of the patents-in-suit, subject only to appeal. MedioStream is now appealing that decision. Because of these cancellations, the District Court has practically stayed the case during MedioStream's appeal of these patents before the PTO.

Milbank wins several important motions leading to a favorable settlement in patent infringement lawsuit

Milbank defended Dai Nippon Printing Co., Ltd. (DNP) in a patent infringement suit involving an inkjet method for manufacturing color filters used in liquid crystal display televisions. We obtained an advantageous claim construction order and won an important motion for summary judgment holding the broadest asserted patent claim invalid based on improper new matter. Immediately after DNP filed its validity expert reports, the plaintiff withdrew half of its patent claims. We also successfully excluded the plaintiff's expert testimony on an inequitable conduct defense and prevailed on several important motions in limine in advance of trial. In 2011, on the eve of trial, the parties settled the lawsuit on terms favorable to DNP.

Milbank Views

Supreme Court Poised to Make Fundamental Change to the Nature of Patents, *Inside Counsel*, Apr. 26, 2011, by Mark C. Scarsi

Prosecution Laches: Defining an Equitable Doctrine of Patent Unenforceability, *Bloomberg Law Reports: Intellectual Property*, June 6, 2011, by Christopher E. Chalsen and James R. Klaiber

Resolving Decades-Old Questions on Induced Patent Infringement, *New York Law Journal*, Vol. 245, No. 123, June 28, 2011, by Christopher J. Gaspar

Reconsidering Akamai's Rehearing (Akamai Technologies, Inc. and The Massachusetts Institute of Technology v. Limelight Networks, Inc.), *Intellectual Property Magazine*, Sept. 2011, by Miguel Ruiz and Ashlee Lin

Focusing Only on Active Ingredient Patents Ignores Case Law Success Rates: Formulation & Method of Use Patents Provide Significant Protection for Medicines, *Pharmaceutical Law & Industry Report*, Oct. 21, 2011, by Errol B. Taylor, Fredrick M. Zullow and Anna Brook

Reaffirming the Inventor's Role in Patent Ownership, *Intellectual Property Westlaw Journal*, Oct. 26, 2011, by Fredrick M. Zullow, James R. Klaiber and Ethan Lee

Taking the Intellectual Out of Intellectual Property Licenses Under Section 365 of the Bankruptcy Code, *Norton Journal of Bankruptcy Law and Practice*, Dec. 2011, by Bradley Scott Friedman

Milbank Speaks

Intellectual Property Law & Policy, Fordham Intellectual Property Law Institute's 19th Annual Conference, Apr. 28, 2011 (Christopher J. Gaspar)

Compulsory Licensing in the U.S., Intellectual Property Owners Association's 2011 Annual Meeting, Sept. 14, 2011 (Christopher E. Chalsen)

INTERNATIONAL ARBITRATION

In one of the top international arbitration wins of the past two years, Milbank achieves dismissal of billion dollar claim against Mongolia

Milbank represented Mongolia in a $1 billion investment arbitration brought by Russian claimants who ran the second-largest gold mining operation in Mongolia. The arbitration involved several claims, the most notable of which related to a 68% windfall profits tax on gold sales over $500 per ounce. (The tax has since been repealed.) The Claimants challenged this tax, asking arbitrators to determine whether it breaches the Mongolia–Russia bilateral investment treaty. A central question in the case was whether the windfall scheme breached a generic investment treaty—as the Russian claimants have never obtained any specific tax stability guarantees from the Mongolian authorities. We successfully convinced the tribunal to dismiss the claims against Mongolia on the merits. This decision was listed by American Lawyer as one of the top ten defense wins of the last two years in international arbitration.

Milbank recovers substantial judgment for the Bank of Mongolia

Milbank represented the Bank of Mongolia, the country's central bank, in a series of disputes involving the issuance of various financial instruments in 2006. A group of fraudsters in Florida, Canada, Switzerland, and Iran had convinced the Bank of Mongolia to issue the financial instruments as a way to finance a government-sponsored affordable housing project in Ulaanbaatar. We prevailed on a $69 million RICO claim against the Canadian and Florida based fraudsters at the summary judgment stage. We then brought actions to enforce this judgment internationally, which are now pending.

For the first time in nearly twenty years, the World Bank annuls an arbitral award based on Milbank's sound arbitration strategy

Milbank represented the German airport operator, Fraport AG, in a successful annulment of an arbitral award before the World Bank. The decision concluded that Fraport was subjected to a "serious departure from a fundamental rule of procedure" and ruled on that basis that "the Award must be annulled in its entirety." This is the first time in nearly 20 years that a World Bank award has been annulled on the basis of the tribunal's denial of a party's right to be heard and the first time that a committee annulled an award in its entirety on that basis. We have brought new proceedings on behalf of Fraport against the Philippines following this successful annulment.

Milbank Views

Recent Trends in Public Political Risk Insurance Coverage, *Corporate Finance Review*, May/June 2011, by Michael D. Nolan, Frédéric G. Sourgens and Christina Totino

Upgrade Your Security: International Investment Agreements Can Provide Protection from Risks of Investing Abroad. But Make Sure to Review the Applicability Requirement and the Substantive Provisions, *International Financial Law Review*, Sept. 2011, by Michael D. Nolan, Frédéric G. Sourgens and Monica R. DiFonzo

The U.S. and E.U. Debt Crisis in International Law – A Preliminary Review, *Wall Street Lawyer*, Oct. 2011, by Michael D. Nolan and Frédéric G. Sourgens

Milbank Speaks

Current Trends of Investment Arbitration in Latin America and Annulment Proceedings, Center on International Commercial Arbitration and Club Español del Arbitraje, Apr. 26, 2011 (Michael D. Nolan)

Investment Panel: International Investment Law in the Age of Sovereign Wealth Funds, Financial Regulation in a Global Market: Moving Beyond the State, British Institute of International and Comparative Law, June 10, 2011 (Michael D. Nolan)

Early Case Assessment: How Corporations Decide What Dispute Resolution Mechanism is Right for Them, International Institute for Conflict Prevention and Resolution, June 28, 2011 (Michael D. Nolan)

LONDON LITIGATION AND ARBITRATION

Milbank plays a key role in one of the most closely watched appeals in the UK courts

Milbank has been representing Top Up TV Europe Limited in relation to six sets of appeal proceedings before the UK's Competition Appeal Tribunal. Those appeal proceedings arise out of the high-profile investigation into the pay TV market by the Office of Communication (Ofcom), the independent regulator and competition authority for the UK communications industries. That investigation focused on whether British Sky Broadcasting Limited (Sky) has market power in the wholesale provision of certain premium pay TV channels. Ofcom concluded that (1) Sky does exploit its market power by restricting the distribution of its premium channels to rival pay TV providers such as Top Up TV; and (2) this exploitation prevents fair and effective competition, reduces consumer choice and holds back innovation and investment by Sky's rivals. In order to ensure fair and effective competition, Ofcom decided that Sky must offer to supply certain of its premium channels (namely Sky Sports 1 and 2) to other retailers at a wholesale price set by Ofcom.

Sky launched an appeal against Ofcom's decision on June 1, 2010 and was subsequently joined in its appeal by the Football Association Premier League. Cross-appeals were launched by Virgin Media Inc. and British Telecommunications plc in relation to the methodology applied by Ofcom in setting the wholesale price. Two further appeals by Sky were launched in October 2010 and February 2011 against subsequent, but closely related, decisions of Ofcom. Top Up TV intervened in all six appeals. The hearing of the appeals, which lasted for 3 months, commenced on May 9, 2011 and a decision from the Competition Appeal Tribunal is expected soon.

The appeals are likely to have a defining impact on the shape of the competitive landscape for the provision of pay TV services in the UK. The case was listed in *The Lawyer* magazine as one of the Top 20 Cases of 2011.

Milbank in the News

Top 20 Cases of 2011, The Lawyer, Jan. 3, 2011 (describing Milbank's representation of Top Up TV Europe Limited in *British Sky Broadcasting (BSkyB) & Others v. Ofcom & Others)*

Milbank Views

Dispute Resolution in Project Finance Transactions, *International Project Finance, Law and Practice*, Apr. 2011, co-authored by Julian Stait

Milbank Speaks

International Litigation and Arbitration: Maximizing Foreign Investment Opportunities and Minimizing Risk, Japan Bank for International Cooperation, a Milbank sponsored seminar, May 24, 2011 (Tom Canning and Michael D. Nolan)

Acting on behalf of investment fund Monarch Master Funding Ltd., Milbank pursues claims against the Dubai World Group of Companies

Milbank is acting on behalf of Monarch Master Funding Ltd., an investment fund, in relation to proceedings before the Commercial Court in London for the recovery of approximately $50 million due under a syndicated loan facility. The Third Defendant (the parent company of the First and Second Defendants) is a member of the state-owned Dubai World Group of Companies. It borrowed approximately $1.7 billion in 2008 from a syndicate of banks, of which Monarch is a member. Monarch now claims for sums due under that financing arrangement.

Dubai World's debt problems have been well publicized, as has the establishment in 2009 of a bespoke insolvency regime and tribunal, in Dubai, in respect of claims against Dubai World entities. Monarch's proceedings in the English High Court, in relation to which it has sought summary judgment, are being widely observed by other Dubai World creditors as well as financial and legal commentators.

MERGERS, ACQUISITIONS AND CONTROL CONTESTS

Milbank convinces the Delaware Chancery Court to reject shareholder valuation lawsuit

In *In re John Q. Hammons Hotels*, Milbank defended the purchaser of a hotel company against a shareholder suit seeking over $90 million in damages. In September 2005, John Q. Hammons Hotels, Inc. merged into an acquisition vehicle owned by the purchaser, a third-party individual who conducted extensive negotiations with the company's principal and special committee. Pursuant to the merger, holders of the company's publicly held Class A common stock received $24 per share in cash. The plaintiffs alleged, among other things, that the shares were worth $49 per share at the time of the merger—more than twice the purchase price—and sought damages equal to the difference between the purchase price and the alleged "fair price" for the shares.

The plaintiffs tried to prove their $49 price with three different valuation methods—a discounted cash flow analysis, a comparable companies analysis, and a comparable transactions analysis. Our expert performed a discounted cash flow analysis showing that the fair value of the shares was $24 per share at the time of the merger, and further showed how all three of the plaintiffs' expert analyses were fundamentally flawed.

Applying the "entire fairness" standard of review—a more stringent level of scrutiny than the often applied business judgment standard—the Delaware Court of Chancery found that the fair value of the shares at the time of the merger was exactly the price that we had argued, $24 per share. The Court rejected the plaintiffs' expert analysis, finding that our evidence of fair value "was more convincing, more persuasive and more thorough," and that the outcome of the case was "not in doubt."

Milbank Views

Delaware Supreme Court Rejects Narrow Reading of Brophy, *Milbank Corporate Governance Client Alert*, July 27, 2011, by Alan J. Stone, David Schwartz and Julie Constantinides

Delaware Court of Chancery Dismisses Derivative Action Brought Against Goldman Sachs, *Milbank Corporate Governance Client Alert*, Nov. 15, 2011, by Alan J. Stone, David Schwartz and Kevin Lee

Delaware Supreme Court Re-Visits Meaning of "Funds Legally Available" for Preferred Stock Redemptions, *Milbank Corporate Governance Client Alert*, Dec. 6, 2011, by Alan J. Stone, David Schwartz and Meghan Gabriel

Milbank Speaks

Insights and Observations on Earnouts and Related Post-Acquisition Disputes, Securities Docket Webcast, Apr. 26, 2011 (Alan J. Stone)

News Corp., KKR, Morgan Stanley & More: The Revival of the Special Litigation Committee, Bloomberg Law Seminar, Dec. 14, 2011 (Alan J. Stone)

MUTUAL FUND LITIGATION

Milbank's win in one of the largest securities cases ever tried is upheld by the Court of Appeals

Milbank represented one of the world's largest mutual fund advisers, Capital Research & Management Company (CRMC) and its affiliates, in a securities class action and derivative suit entitled *In re American Mutual Funds Fee Litigation*. The action was originally brought in July 2004 in the United States District Court for the Central District of California on behalf of over 30 million shareholders in 29 American Funds mutual funds, with combined assets in excess of $750 billion. At the time, potential damages exceeded $25 billion, making it the largest action ever brought in the mutual fund industry.

We successfully dismissed plaintiffs' original consolidated complaint that contained claims under the Investment Company Act of 1940, the Investment Advisers Act of 1940, and state law. Plaintiffs then amended their complaint to assert a derivative claim under Section 36(b) of the 1940 Act seeking to recover over $15 billion in allegedly excessive fees paid by eight American Funds to CRMC. After several years of discovery, the case was tried to judgment in a two-week bench trial in July–August, 2009.

On December 28, 2009, the United States District Court for the Central District of California issued its post-trial Findings of Fact and Conclusions of Law, rejecting each of plaintiffs' principal theories of liability and ruling for our clients on all of the major substantive issues presented (including the standard for liability under Section 36(b) and each of the so-called Gartenberg factors examined in connection with that standard). Plaintiffs then appealed to the Ninth Circuit. On August 24, 2011, the Ninth Circuit unanimously affirmed the District Court's findings in favor of our clients. The Ninth Circuit found that the Appellants failed to prove that our clients breached their fiduciary duties under Section 36(b) and affirmed in large part for the reasons stated in the District Court's opinion. The Ninth Circuit also found that the District Court correctly applied the Gartenberg factors.

This case was one of the largest (if not the largest) securities cases ever to go to trial, and was the first excessive fee action to go to trial in the mutual fund industry in more than twenty years. It is expected to have a widespread impact on the standards used by mutual fund directors in annual contract approvals required under the federal securities laws.

"Well regarded for highly technical bet-the-company disputes, the firm regularly represents issuers, underwriters, broker-dealers, accounting firms, and individual officers and directors."
– Legal 500 US, 2011

Milbank obtains complete dismissal of claims against Citigroup in securities fraud and excessive fee litigation

Milbank successfully represented Citigroup Global Markets Inc. and related defendants in a securities class action brought under various sections of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and common law. In their original complaint, the plaintiffs asserted that the defendants omitted material information from mutual fund prospectuses and charged excessive fees to the mutual funds at issue. We successfully moved to dismiss the complaint, arguing that a Section 36(b) claim may only be asserted derivatively on behalf of the funds rather than directly by fund shareholders and that the allegations in the complaint were insufficient to state a claim under the 1933, 1934 and 1940 Acts.

Plaintiffs then filed a Second Consolidated Amended Complaint on behalf of nine individual Salomon Smith Barney mutual funds, alleging claims for excessive fees under Section 36(b) of the Investment Company Act of 1940. On behalf of the defendants, we filed a renewed motion to dismiss, which was granted. The Court dismissed the complaint with prejudice finding that the plaintiffs failed to allege facts sufficient to support any of the Gartenberg factors.

Plaintiffs appealed to the Second Circuit. On June 9, 2011, the Second Circuit affirmed dismissal of the securities fraud claims brought under the 1933 and 1934 Acts, and affirmed dismissal of all but one of the excessive fee claims brought under Section 36(b) of the 1940 Act. The Second Circuit held that the plaintiffs' allegations regarding fees for transfer agent services stated a claim under Section 36(b) of the Investment Company Act of 1940, and remanded to the District Court for reconsideration of the plaintiffs' Section 36(b) claim regarding transfer agent fees. On October 20, 2011, the plaintiffs voluntarily walked away from the case and dismissed the matter with prejudice, before the case even entered discovery. Through our successful representation, the defendants were not required to make any payments to the plaintiffs.

Milbank in the News

Courts Won't Help Investors on Mutual-Fund Fees: Is your mutual fund overpriced? A lawsuit probably won't change that, MarketWatch, *The Wall Street Journal*, Sept. 4, 2011

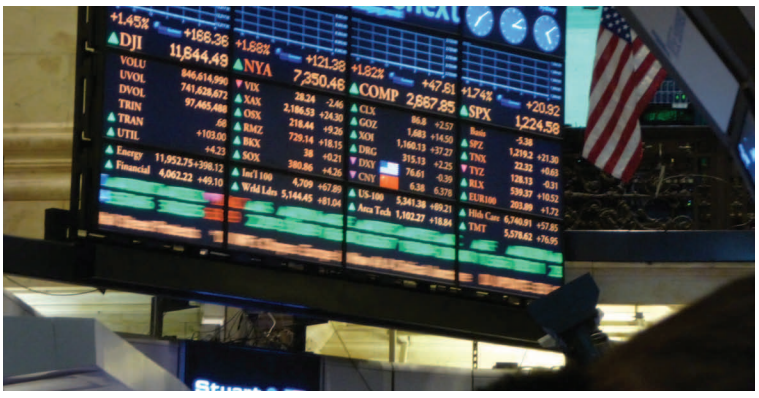
Court Decision Reminds Investors: Buyer Beware, *The News Tribune*, Sept. 9, 2011

Milbank Views

The SEC's Mutual Fund Fee Initiative: What to Expect, *Westlaw Journal, Securities Litigation & Regulation*, by James G. Cavoli, James N. Benedict, Sean M. Murphy and Mia Korot

Milbank Speaks

Litigation and Enforcement: Jones v. Harris: the aftermath, other cases of note and current enforcement themes, Practising Law Institute's Investment Management Institute 2011, Feb. 10-11, 2011 (James N. Benedict)



PRO BONO LITIGATION

Milbank changes the lives of immigrant children by securing them green cards

In 2010, Milbank worked on the first appellate decision involving a key 2008 amendment to New York's Family Court Act. Milbank's successful appeal reversed a judgment denying a 20-year old woman from Jamaica Special Immigrant Juvenile Status (SIJS). Since then, Milbank attorneys have changed the lives of several immigrant youths who were brought to this country at a young age and later found themselves without the ability to work legally or attend college. By assisting them in meeting the criteria for SIJS eligibility, guiding the preparation of their immigration applications, and advocating on their behalf before the US Citizenship and Immigration Services, several clients have completed this process successfully and have obtained permanent resident status—a "green card."

One recent example involved an individual who grew up in an abusive household in Bangladesh. Nearly a decade ago, when he was 12, his parents sent him to the United States. He eventually made his way to Florida, lived with a friend for six years, attended high school and graduated in 2007. However, when he applied to college, he learned he could not enroll without legal status in the US. In 2008, he moved to Queens and in July 2009, his adult caregiver filed a petition in Queens County Family Court to be appointed his guardian, and he also applied for SIJS. After a hearing, including testimony, the petition and request were denied based on the Court's unfounded belief that Florida was the proper venue. The Court also held that the potential guardian failed to demonstrate "extraordinary circumstances," a standard not required in a guardianship proceeding. The written decision and order made no mention of the youth's best interests, and did not address whether he had established the requested special findings. Since the "child" was now 20, his opportunity for a legal life in the US could close forever if he could not apply for SIJS before his 21st birthday. With his status in the United States hanging in the balance, Milbank attorneys prepared the written appeal and argued to a panel of the Second Department, who reversed the Family Court on both the law and the facts. Our client has since realized his dream of becoming a lawful permanent resident and is currently attending college.

Milbank in the News

Milbank was ranked sixth for pro bono on *The American Lawyer's* elite 2011 A-List

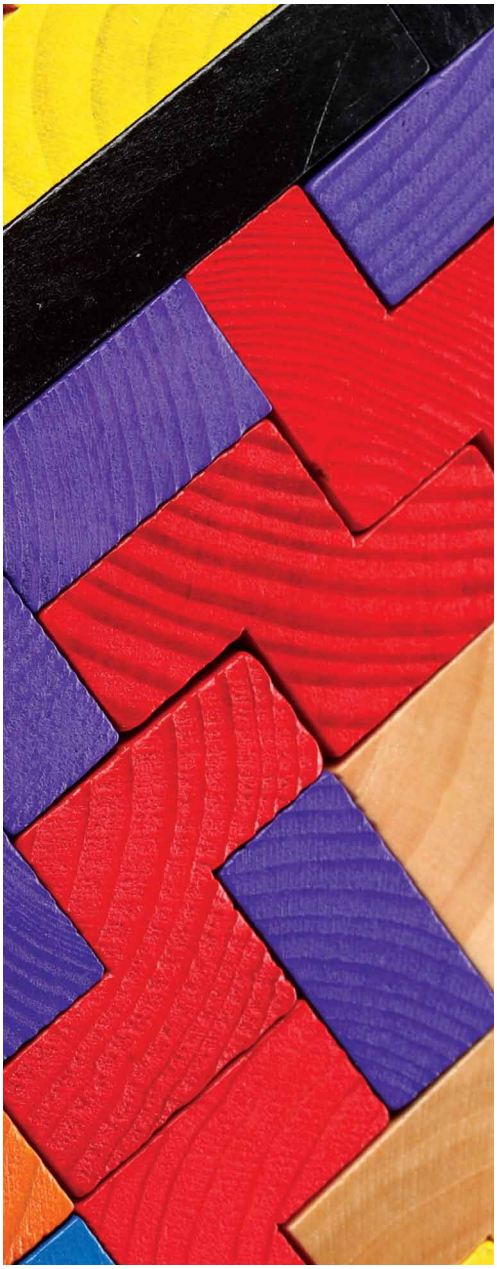
Milbank Honored at The Legal Aid Society's 2011 Pro Bono Publico Awards

Milbank Honored for its Work with Bedford-Stuyvesant Community Legal Services

Working with Bet Tzedek, Milbank saves the home of indigent clients

In an urgent case that was referred to Milbank by Bet Tzedek, we represented a monolingual, Spanish-speaking couple who was caring for their grandchildren. Concerned about what might happen to their house if anything were to happen to them, the couple attempted to add one of their daughters to the deed. This daughter, who was ostensibly helping the couple with the partial transfer, instead ended up owning the house in full. When the relationship with the daughter fell apart, the couple learned what had happened and asked for the house back, but the daughter refused.

The couple went to Bet Tzedek for help. After Bet Tzedek sent a demand letter and received no response, Bet Tzedek came to Milbank. By that time, it was only a week and half before the statute of limitations was to lapse on rescinding the deed. The Milbank team immediately went to work interviewing the clients and drafting a complaint, which we filed the last day before the statute of limitations lapsed. The adversaries denied the allegations and claimed that this was a scam on the part of the couple. Milbank then went into discovery, in which the team interviewed many of the family members, noticed depositions, and served interrogatories and document requests. With Bet Tzedek at our side, we began to explore the possibility of a settlement and held multiple rounds of negotiations. In the end, we were able to convince our adversaries to sign the house back over to our clients.



Milbank advocates for voting rights of naturalized citizens

Earlier this year, Milbank represented the Asian American Legal Defense and Education Fund (AALDEF) on a voting rights issue addressing the constitutionality of the Arizona law Proposition 200. Proposition 200 requires Arizona's local elections officials to reject new voter applications unless, in addition to completing the federal form, applicants provide documentary proof of citizenship. Last October, the Ninth Circuit struck down Proposition 200, finding that it violated the National Voter Registration Act (NVRA). But, on April 27, 2011, the Circuit granted a re-hearing en banc.

Desiring to file an amicus curiae brief, AALDEF turned to Milbank for help. Working under intense time pressure, the Milbank team filed a motion for leave to file the amicus curiae brief simultaneously with the brief on the merits. The brief on the merits argued that Proposition 200 violates the NVRA because, among other things, it is impossible for naturalized citizens to prove citizenship through some of the methods prescribed by the proposition. This results in a disproportionately negative impact on naturalized citizens, many of whom are minorities. Milbank therefore argued that Proposition 200 has the very type of direct and damaging effect on voter participation that the NVRA was designed to prevent. The Ninth Circuit granted the motion for leave to file the brief and the en banc panel heard oral argument on June 21, 2011. We are awaiting the Court's ruling.

REINSURANCE AND INSURANCE LITIGATION

Milbank Views

Have Courts Declared Open Season on Reinsurance Arbitrators? Four Recent Court Decisions Present a Case for Reinsurance Arbitration Reform, *ARIAS-U.S. Quarterly*, by Daniel M. Perry and Aluyah I. Imoisili

Milbank Speaks

Reinsurance Case Law Update, ARIAS U.S. Fall Conference and Annual Meeting, Nov. 2011 (Linda Dakin-Grimm)

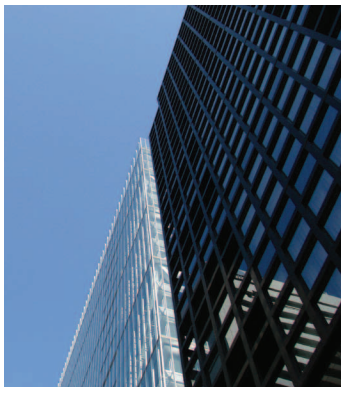
Milbank successfully represents reinsurance provider before an arbitration panel in New York

Milbank represented Alea Group Holdings, a property and casualty reinsurance and insurance provider, in an action involving complex contract and tort issues surrounding a quota share reinsurance treaty in which Alea acted as the reinsurer. After a two-week evidentiary hearing before a three-member arbitration panel in New York in February 2011, we obtained a partial rescission of the treaty on behalf of Alea. The panel found that the insurer "failed to honor its duty of utmost faith owed to Alea in connection with the placement of" the treaty by, among other things, "failing to disclose" certain key facts to Alea before Alea entered into the treaty, and "failing to exercise any diligence" relating to certain key data.

Milbank delivers favorable resolutions for bond reinsurers in two complex insurance arbitrations

Milbank represented a Bermuda-based bond reinsurer in arbitration proceedings against MBIA Insurance Corporation to rescind the parties' 2006 and 2007 Automatic Reinsurance Treaties, or alternatively, to require the bond insurer to reassume certain structured-finance risks ceded under the Treaties. The case involved improper cessions of policies covering collateralized debt obligations to our client on a delayed basis. We assisted our client in negotiating a favorable resolution of this matter.

Milbank also represented a bond reinsurer in arbitration against FGIC Insurance Corporation arising out of FGIC's cession of municipal finance policies to MBIA (a portion of which were also ceded to our client) and to transfer risk management, surveillance, and claims-handling responsibilities for those policies to MBIA. This FGIC-MBIA transaction breached the Treaties' (1) retention requirements, which require that FGIC retain for its own account at least 40 percent, or in some cases 25 percent, of all obligations of an issuer insured by FGIC; (2) risk management, surveillance, and claims-handling requirements; and (3) prohibitions on the creation of third-party beneficiaries. We assisted our client in negotiating a favorable resolution of this matter as well.



SECURITIES AND COMMODITIES LITIGATION

Representing the lead underwriters in a $135 million offering, Milbank achieves dismissal of securities class action

Milbank represented the lead underwriters—Credit Suisse Securities (USA) LLC, Oppenheimer & Co., Inc., Thomas Weisel Partners LLC, and Jefferies & Co., Inc.—in a February 2008 secondary offering of Rigel Pharmaceuticals, Inc., that raised approximately $135 million. In a securities class action, the plaintiffs alleged that our underwriter clients violated Sections 11 and 12 of the Securities Act of 1933 by making false and misleading disclosures concerning Rigel's clinical study into R788, a drug designed to treat rheumatoid arthritis. After multiple successful motions to dismiss, the Court recently dismissed plaintiffs' third amended complaint for failure to state a claim. Plaintiffs have filed an appeal with the Ninth Circuit Court of Appeals. The appeal has been fully briefed and is awaiting an oral argument date.

Milbank convinces Second Circuit Court of Appeals to affirm dismissal of Section 11 and 12 claims against underwriters

Milbank represented underwriters UBS Securities LLC; Citigroup Global Markets Inc.; Merrill Lynch, Pierce, Fenner & Smith Inc.; Wachovia Capital Markets, LLC; Morgan Stanley & Co. LLC f/k/a Morgan Stanley & Co., Inc.; and Morgan Keegan & Company, Inc. in a securities class action against Regions Financial Corporation. Plaintiff asserted that Regions had issued false and misleading disclosures, including in connection with a 2008 offering. In 2009, after the offering, Regions reported that it was significantly writing down goodwill and increasing loan loss reserves. The complaint alleged that the 2009 adjustment evidenced that Regions' prior disclosures were false and misleading when issued. Plaintiff argued that the severe market turmoil in 2007 and 2008 should have instructed Regions to adjust goodwill and loan loss reserves much earlier. The lawsuit involved claims under Sections 11, 12 and 15 of the Securities Act of 1933 against Regions, the underwriters for the 2008 offering, and Ernst & Young LLP, which audited the 2007 Form 10-K financial statements.

We successfully moved to dismiss the complaint. On appeal, the Second Circuit Court of Appeals determined that the District Court correctly held that plaintiff's allegations that Regions had misstated goodwill and loan loss reserves were not allegations that Regions had misstated material fact, but merely opinion. Although claims under Sections 11 and 12 of the Securities Act of 1933 do not require any allegations of scienter, when a plaintiff asserts a claim under Sections 11 or 12 based on a belief or opinion included in a disclosure, the defendant will only be liable if the statement of belief or opinion was both objectively false and disbelieved by the defendant at the time it was made. Plaintiff never alleged that Regions' management did not believe the statements made regarding goodwill or loan loss reserves. Accordingly, plaintiff failed to allege any actionable misstatement.

Milbank in the News

Second Circuit Affirms Dismissal of Regions Financial Subprime-Related Trust Preferred Securities Suit, *The D&O Diary*, Aug. 24, 2011

Milbank Views

Future Battlegrounds for Securities Class Actions, *Inside the Minds: New Developments in Securities Litigation, 2011 ed., Leading Lawyers on Working with Federal Agencies, Complying with New Legislation, and Monitoring Compliance,* by Douglas Henkin

Talking Point: Securities Class Actions in the United States, *Financier Worldwide*, Apr. 2011, by Douglas Henkin, Elaine S. Kusel and Peter B. Morrison

Second Circuit Holds that Statements of Opinion Are Not Actionable Under Strict Liability Provisions of the Securities Laws Unless Plaintiffs Allege that the Speaker Did Not Believe Those Opinions, *Milbank Litigation Client Alert*, Aug. 29, 2011, by Douglas W. Henkin and Melanie Westover

New York Court of Appeals Holds that the Martin Act Does Not Preempt Similar Common Law Claims, *Milbank Litigation Client Alert*, Dec. 22, 2011, by Sander Bak, Jed Schwartz and Elise Kent Bernanke

Milbank wins dismissal of securities fraud claims against mutual fund client

Milbank represented The Capital Group Companies, Inc. and its affiliates in a securities class action brought in the United States District Court for the Central District of California. Capital Group is one of the world's largest mutual fund advisers and manages the American Funds family of mutual funds, the largest fund family in the world with more than $1 trillion in assets under management. The plaintiffs, seeking to represent a purported class of shareholders in eight American Funds, alleged that our clients violated the Securities Act of 1933 and the Securities Exchange Act of 1934 by failing to disclose that the company made revenue sharing payments or directed fund brokerage payments to broker-dealers that sold the funds' shares.

We moved to dismiss the complaint. The District Court granted our motion and dismissed the case with prejudice, holding that plaintiffs' claims were barred by the statute of limitations.

Plaintiffs appealed to the Ninth Circuit. After full briefing and oral argument, but prior to rendering a decision, the Ninth Circuit remanded to the District Court for further consideration in light of an intervening decision from the Supreme Court. In *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010), the Supreme Court construed the statute of limitations under Section 10(b) of the Exchange Act.

On remand, after accepting briefing on the impact of *Merck*, if any, on the District Court's original decision, the District Court concluded that it had analyzed the claims in a manner consistent with *Merck* and that "a reasonably diligent plaintiff should have known the facts giving rise to the pending complaints more than two years before these complaints were filed." Therefore, the District Court concluded that it had applied the appropriate standard in its initial decision, and again dismissed the claims against our clients with prejudice.

Plaintiffs have appealed the District Court's decision and the case is currently pending before the Ninth Circuit.

"This firm has a long-standing reputation in securities litigation and maintains strong relationships with major institutional clients."
– Chambers USA 2011

Milbank in the News

Taxes Questioned, Accountant Quits on Heiress's Estate, *New York Times*, Dec. 21, 2011

Milbank Views

Proposed Limitations on GRAT; Tax Issues for Married Same-Sex Couples in New York; SEC Guidance on Family Offices, *Milbank Client Alert*, Aug. 8, 2011

TRUSTS AND ESTATES LITIGATION

Milbank acts for the Public Administrator in high profile estate litigation

Milbank litigators frequently are involved in high stakes and high profile trusts and estates matters in New York, Delaware and throughout the United States, including will contests and trust disputes. A current example of such litigation involves the Estate of Huguette Clark. We are co-counsel to the Public Administrator for New York County, who is acting as Temporary Administrator of the Estate of Huguette M. Clark. Mrs. Clark was the daughter of former U.S. Senator and industrialist, William H. Clark, one of the wealthiest Americans in the early 20th century. She died in May 2011, at the age of 104, leaving a vast estate including homes in New York, Connecticut and California, and masterpiece works of art. In the few years before her death, MSNBC published a series of investigative articles discussing Mrs. Clark's mysterious lifestyle and questioning the roles of her longtime attorney and accountant. Mrs. Clark had spent the last 20 years of her life living in New York City hospitals, having little contact with anyone other than her nurses, doctors, attorney, and accountant. Mrs. Clark's last will, which was prepared by her attorney, named her attorney and accountant as executors and granted them, along with Mrs. Clark's private nurse, significant bequests while leaving nothing to Mrs. Clark's relatives. Upon Mrs. Clark's death, the Surrogate's Court, acting on concerns raised by the N.Y. Attorney General's Office, appointed the Public Administrator to act as Temporary Administrator in conjunction with the Preliminary Executors.

On December 20, 2011, the Public Administrator successfully filed an order to show cause and petition seeking the revocation of the Preliminary Letters Testamentary issued to the Preliminary Executors. On December 23, 2011, the Surrogate's Court granted the petition, stating, "it appears from the allegations, supported by substantial documentary evidence, that the preliminary executors are unfit for the execution of their office as fiduciaries by reason of dishonesty and improvidence, and for wasting assets, among other improper conduct . . . ." Accounting and probate proceedings are pending, in which the Court will review the payments that Mrs. Clark's attorney and accountant made in their purported capacities as attorneys-in-fact. Additional litigation is anticipated.

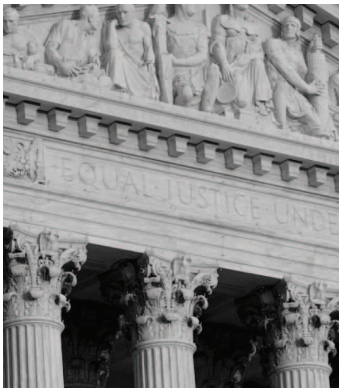
WHITE-COLLAR CRIMINAL DEFENSE

Milbank consistently achieves successful results in white-collar criminal defense

During the past year, Milbank represented several broker-dealers and individuals in confidential examinations, investigations, and proceedings by the SEC, CFTC, FINRA, the United States Department of Justice, the Certified Financial Planner Board, and foreign financial regulators. These matters have resulted in favorable settlements or other dispositions on behalf of those clients, including the negotiation of favorable language in settlement documents, the limitation or dismissal of alleged charges, and the reduction of penalties or other sanctions. In certain instances, the regulators have declined to take any action against our clients. In one notable instance, the regulator determined to close the investigation with respect to a senior individual at the company, notwithstanding an ongoing and significant investigation of the company and others with respect to the same subject matter and the involvement of numerous other regulators.

Milbank Views

SDNY District Court Holds that Madoff Trustee Lacks Standing to Assert Common Law Claims Against Third Parties on Behalf of Madoff Customers, *Milbank Client Alert*, Aug. 9, 2011



NEW PARTNERS

In January 2011, Christopher J. Gaspar was elected a partner in the Intellectual Property Litigation Group. Mr. Gaspar's practice includes intellectual property litigation, counseling, and patent prosecution involving a wide range of technologies and products, including the semiconductor, computer software, computer hardware, financial services, pharmaceutical, medical device, electrical, and mechanical fields. He also counsels clients on a wide array of intellectual property issues arising in M&A and financial restructuring transactions.

In January 2012, Atara Miller was elected a partner in the Litigation & Arbitration Group. Ms. Miller's practice focuses on federal and state court litigation of complex commercial matters, in addition to bankruptcy-related litigation. She has represented individual and corporate clients in a wide range of matters involving international law, securities law, and corporate governance. In the financial restructuring sphere, Ms. Miller has defended individual lenders and lender groups against fraudulent transfer claims and has prosecuted fraudulent misrepresentation claims on behalf of secured lenders.

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