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Attorneys at Law

Bulletin

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Kessler Topaz Wins in Rare Securities Fraud Trial

Kimberly A. Justice, Esquire & Michelle M. Newcomer, Esquire

On November 24, 2014, Kessler Topaz secured a rare jury verdict in favor of damaged investors in the *Longtop Financial Technologies Limited Securities Litigation*, against Longtop's former Chief Financial Officer, Derek Palaschuk. This was just the 14th securities fraud case to be tried to a jury verdict in the past 20 years, following the 1995 passage of the Private Securities Litigation Reform Act, the statute under which the case was brought. After hearing all the evidence, it took the eight-member jury, sitting in federal court in New York, less than three hours to find Mr. Palaschuk liable for securities fraud under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") for all eight of his alleged misstatements. Moreover, because the jury found Mr. Palaschuk primarily liable under Section 10(b), it did not need to reach plaintiffs' claims that he was secondarily liable under Section 20(a) for Longtop's fraud, as a control-person of the Company.

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Investors Opposing Fee-Shifting Bylaws

Lee Rudy, Esquire

As we reported in our Fall 2014 newsletter, spurred by the Delaware Supreme Court's May 2014 *ATP* decision,[1] dozens of U.S. public companies have recently adopted bylaws that purport to shift the company's attorneys' fees to an unsuccessful shareholder plaintiff in stockholder litigation. *ATP* held that a fee-shifting bylaw at a non-public company was "facially valid." Public companies nonetheless have seized on *ATP*'s logic, and now more than 50 U.S. public companies have such bylaws. The only clear "fix" for these bylaws would be through the Delaware legislature. Along with several other firms, KTMC has therefore encouraged several of its larger domestic clients to lobby the Delaware legislature directly.

The U.S. Chamber of Commerce argues that these bylaws simply dissuade "pirate investors" who bring "abusive shareholder lawsuit[s] and lose in court."[2] This description is false. First, the prospect of owing millions of dollars in fees would rationally dissuade

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[1] *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).

[2] Lisa A. Rickard, *Delaware Flirts With Encouraging Shareholder Lawsuits*, Wall St. J., Nov. 15, 2014. Ms. Rickard is Executive Vice President of the U.S. Chamber of Commerce.

Kessler Topaz Achieves Substantial Changes to Safeway Merger Terms Valued at Over $230 Million

J. Daniel Albert, Esquire

Kessler Topaz, serving as Co-Lead Counsel for the public stockholders of Safeway, Inc., recently secured a significant settlement in litigation challenging the acquisition of Safeway by the Albertson's grocery chain, which is owned by private equity firm Cerberus Capital Management. In approving the settlement, the Delaware Chancery Court found that the settlement's modification to the terms of the transaction as well as defendants' agreement to withdraw a shareholder rights plan, or "poison pill," provided substantial benefits to Safeway stockholders that it valued at approximately $230 million.

Safeway, the second largest grocery chain in the United States, announced on March 6, 2014, that it had entered into a definitive agreement to be acquired by Cerberus for $32.50 per share in cash and the distribution of two contingent value rights ("CVRs"). These CVRs entitled the holders to the pro rata proceeds from the future sales of certain Safeway assets that Cerberus did not want to acquire. Specifically, the two CVRs related to Safeway's 49% minority interest in Mexican grocery chain Casa Ley and certain real estate assets held by Safeway subsidiary Property Development Centers ("PDC").

However, the CVRs had numerous terms that rendered their value highly questionable. For example, the Casa Ley CVR provided for a four year term to sell Safeway's Casa Ley interest after which time there would be an appraisal of the "fair market value" of the interest, which would then be

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"Targeting Data Breaches": A Win for Financial Institutions Victimized by Data Breaches

Ethan Barlieb, Esquire

Late last year, Judge Paul A. Magnuson of the U.S. District Court for the District of Minnesota, issued a landmark decision in a class action data breach lawsuit against Target Corporation ("Target" or the "Company"), which was filed by banks and other financial institutions that were forced to incur significant losses due to an intrusion by hackers into Target's card payment system. Target's 2013 breach was one of the largest ever and, as detailed in the financial institutions' operative complaint, was preventable had Target acted reasonably.

By way of background, Target's breach began in late 2013, when hackers first uploaded malware onto Target's computer system after gaining access to the system from a vendor account. After residing on Target's system for several weeks, the malware began collecting card data from Target's customers as cards were swiped at payment terminals. The customer card data was then stored on Target's system for a number of days before being sent to a server in Russia. The collection and extraction of the card data occurred over a period of two weeks in early December 2013. All told, the breach compromised the credit and debit card information of 110 million customers, including even customers who had not swiped their cards during that period. After the breach, a U.S. Senate Committee investigated the matter, uncovering a number of startling details, including:

- Target had voluntarily disabled security functions that would have automatically deleted the malware that carried out the breach;
- Target ignored numerous warnings (both external and internal) regarding the presence of the malware and the breach;
- Target had a practice of improperly retaining customer card data for months after transactions; and
- Target had failed to implement various security measures, pursuant to industry warnings and standards, that could have prevented the breach.

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2014 Year in Review: Significant Legal Developments in Class Action and Shareholder Litigation Outside the United States

Emily N. Christiansen, Esquire

More than four years have passed since the U.S. Supreme Court's decision in *Morrison v. National Australia Bank*. During the course of those four years, there have been significant developments around the globe concerning collective or class action mechanisms as well as shareholder litigation. Each year, new countries debate the merits of implementing new class action or collective action procedures. Additionally, more and more cases are being filed, often in new forums where collective action mechanisms were only recently adopted and where shareholder litigation has never before been filed.

2014 was no exception to the trend of increasing global securities litigation. In 2014, Kessler Topaz's portfolio monitoring service identified over fifty-five shareholder cases[1] in non-US jurisdictions that were open for shareholder participation. Forty of those cases were newly proposed cases, while the remaining fifteen were cases that had been proposed in previous years, but the deadline for shareholders to "opt-in" or register for the claim reopened.

Some of the cases filed or proposed in 2014 concern high profile allegations of fraud and misrepresentations (for example: Tesco in the UK and the Espirito Santo Group in Portugal), while others were much lower profile, but certainly no less significant. Some of the cases proposed in 2014 were in jurisdictions where there has never been litigation concerning securities fraud allegations (for example: Banco Espirito Santo), while others represented

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[1] This figure only accounts for one action proposed or filed against a given corporation where the factual and legal allegations were similar or identical. For example, a number of actions were proposed by different law firms against Portugal's Banco Espirito Santo, but for purposes of arriving at this figure, Banco Espirito Santo was only included as one shareholder case. Kessler Topaz also does not contend that this figure is exhaustive of all non-U.S. shareholder litigation opportunities that were made available in 2014. Although Kessler Topaz's service is thorough and comprehensive, given the decentralized nature of finding and tracking cases in different jurisdictions, it is possible there were also some cases filed or proposed that Kessler Topaz was not aware of.

KTMC Secures $12 Million Settlement for ArthroCare Shareholders

Leah Heifetz, Esquire

On November 6, 2014, Vice Chancellor J. Travis Laster approved the settlement of an action brought by public shareholders of ArthroCare Corporation ("ArthroCare" or the "Company") challenging a proposed merger with Smith & Nephew. The settlement provided for a $12 million payment to be distributed to ArthroCare's public stockholders as of the closing date of the transaction. A monetary recovery of this size is unusual in merger litigation, especially when the merger is an arm's-length transaction between unrelated entities. Here, however, Kessler Topaz and its co-lead counsel presented a novel claim for relief, and were then able to convince the acquirer to settle on favorable terms to the class just before a scheduled trial on the merits of that claim.

ArthroCare was a medical device manufacturer based in Austin, Texas. In 2009, One Equity Partners ("OEP"), the private equity subsidiary of J.P. Morgan Chase & Co. ("JPM"), purchased $75 million of ArthroCare preferred stock, becoming its largest stockholder, with more than 15%

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KTMC Secures $12 Million Settlement for ArthroCare Shareholders *(continued from page 3)*

of the Company's voting power. As part of that transaction, two OEP managing directors joined ArthroCare's Board of Directors (the "Board"). The transaction included several "standstill" restrictions, including a prohibition on OEP (or OEP affiliates possessing confidential information about ArthroCare) assisting with any merger involving ArthroCare without the Board's prior consent.

Despite this restriction, in the course of its role as an advisor to Smith & Nephew, a British-based multinational medical equipment manufacturer, J.P. Morgan Securities LLC ("J.P. Morgan Securities"), another JPM subsidiary, recommended that Smith & Nephew consider acquiring ArthroCare. This advice directly benefited JPM. In addition to receiving advisory and financing fees from the proposed transaction, the deal would help facilitate JPM's plan to either sell OEP or spin it out as an independent company. OEP was struggling to raise money for new investments and JPM had trouble finding a buyer at its asking price, but the liquidation of OEP's investment in ArthroCare would help to finance a spin-out.

This was particularly important because OEP's Arthrocare investment was about to become significantly less liquid. On December 31, 2013, after extensive negotiations, ArthroCare entered into a deferred prosecution agreement with the U.S. Department of Justice, agreeing to pay a $30 million fine to end an investigation into its past accounting practices. As a result of the agreement, OEP's preferred stock in ArthroCare was automatically converted into common stock, which meant that OEP would no longer receive pay-in-kind dividends and could not liquidate its stake in the Company without incurring substantial costs. JPM knew throughout the negotiation of the deferred prosecution agreement that this would be a likely component of any deal with the Department of Justice. An acquisition would give OEP an opportunity to liquidate its ArthroCare investment despite this new issue.

In October 2013, Smith & Nephew approached ArthroCare about a possible merger. On December 10, 2013, that became a formal offer to acquire ArthroCare for $43.00 per share, and on December 26, the Board granted Smith & Nephew exclusive negotiations through January 21 at a price of $46.00 per share, a 16% premium to ArthroCare's share price at the time.

However, after ArthroCare announced its entry into the deferred prosecution agreement on December 31, its stock jumped more than 10%, to $46.57. But rather than using the jump as an opportunity to shop the Company to other potential acquirers and potentially obtain a better price, the Board continued to negotiate exclusively with Smith & Nephew. On February 1, 2014, Smith & Nephew increased its offer to $48.25 per share, which ArthroCare accepted. The next day, the companies entered into an agreement and plan of merger (the "Merger Agreement"), and Smith & Nephew entered into voting agreements with OEP as well as the members of the Board.

Kessler Topaz and its Delaware co-counsel brought suit in the Delaware Court of Chancery (the "Court") on behalf of two ArthroCare stockholders. The complaint alleged that the sale process was flawed, that the price was inadequate, and that ArthroCare's preliminary proxy statement soliciting support for the transaction contained inadequate and misleading disclosures.

The complaint also alleged that J.P. Morgan Securities' role made its client, Smith & Nephew, an "interested stockholder" within the meaning of Section 203 of Title 8 of the Delaware Code. Section 203 prohibits corporations from engaging in business combinations with an interested stockholder (defined as the owner of 15% of a company's voting stock, or an "affiliate" that is controlled by or controls the owner or is under the common control of a third party as the owner) for a period of 3 years from the time that the stockholder becomes an interested stockholder without the prior approval of the corporation's board unless 2/3 of holders of unaffiliated stock vote for the transaction. Kessler Topaz argued that OEP's affiliation with J.P. Morgan Securities subjected J.P. Morgan Securities to Section 203, and, likewise, J.P. Morgan Securities' relationship with Smith & Nephew meant that the law would also cover Smith & Nephew. Since the ArthroCare Board did not approve a merger with an interested stockholder in advance and the Merger Agreement did not provide for an unaffiliated stockholder vote, the deal would violate Section 203. Kessler Topaz also alleged that JPM violated the standstill provisions of OEP's 2009 investment in ArthroCare by having one of its subsidiaries finance the transaction while another entered into a voting agreement with Smith & Nephew.

On March 21, the Court ordered a two-day trial on the merits of the Section 203 claim, as well as a hearing on a preliminary injunction based on plaintiffs' other claims, to be held on April 28 and 29. Kessler Topaz then engaged in expedited discovery as well as extensive preparation for the preliminary injunction brief and trial, including working with financial experts to properly analyze the transaction.

The question of whether Smith & Nephew's relationship with J.P. Morgan Securities would make it an "interested stockholder" of ArthroCare and therefore subject to Section 203 was a novel one in the Delaware Court of Chancery. Plaintiffs' counsel recognized that while a favorable ruling from the Court could provide additional protection for shareholders, it could also effectively prevent ArthroCare's Board from consummating any deal, including one more favorable to the stockholders. There was also a risk that the Court would rule in the defendants' favor. In recognition of these risks, in late March 2014, plaintiffs' counsel began settlement negotiations to obtain a financial recovery that would fairly compensate ArthroCare's unaffiliated shareholders for their stock. After several weeks of intense negotiations and nineteen days before the scheduled trial, on April 9, 2014, the parties agreed to a settlement that required defendants to pay $12 million into a fund solely for the benefit of the class.

The settlement was approved on November 6, 2014. The Court described the novel Section 203 claim as particularly strong and recognized that Kessler Topaz and its co-counsel's creativity in pressing the theory had managed to create significant additional value for stockholders.

Investors Opposing Fee-Shifting Bylaws *(continued from page 1)*

shareholders from bringing not only marginal cases, but highly meritorious ones. No matter how confident one might be in the outcome of a case, it would be foolhardy for any investor to initiate litigation if the investor's upside is a *pro rata* portion of a class recovery, while the investor's downside is potential financial ruin.

Second, the way the bylaws are written, stockholders are liable for fees even if they "win." These bylaws generally state that the stockholder is liable for fees unless he or she "substantially achieves, in substance and amount, the full remedy sought." A plain reading of this language would mean that a stockholder who seeks $100 million at trial but recovers ("only") $40 million would not have "substantially achieve[d] . . . the full remedy sought" and would therefore be liable for the defendants' fees.

As we predicted, the new bylaws being adopted by public companies are not solely limited to "fee shifting." If directors believe, based on ATP and other decisions,[3] that they are free to write the rules for stockholder litigation, then they will continue to draft more and more restrictive bylaws until such bylaws are struck down or forbidden by statute.

For example, one company included a "surety" bylaw, allowing the company to require stockholders to post a bond for the company's litigation expenses while the litigation proceeded. Four companies passed bylaws decreeing that only stockholders owning or controlling more than 3% of the company's stock are allowed to sue. More and more aggressive provisions are likely to be included in these anti-litigation bylaws, especially since many of the bylaws have "severability" provisions, which state that even if one provision is struck down, the remaining terms still survive.

Fee-shifting bylaws have drawn the ire of institutional investors and the proxy advisory services. Both ISS and Glass Lewis have stated that they may recommend "AGAINST" votes for directors of public companies that propose or adopt such provisions. With the assistance of KTMC and other law firms, 19 institutional investors, on behalf of funds controlling nearly $2 trillion in assets, wrote a joint letter to the Delaware General Assembly asking that such bylaws be struck down. KTMC helped coordinate a second letter, on behalf of 33 additional investors managing another $587 billion in assets, in January 2015.

The Delaware General Assembly first considered a legislative fix to ATP in June of 2014. This proposed legislation would have banned fee shifting at Delaware public corporations, on the grounds that forcing stockholders to pay a debt of the corporation would violate the fundamental "limited liability" nature of a stockholder's investment. Deliberation on this legislation was adjourned to 2015, after significant lobbying from the U.S. Chamber of Commerce, and other corporate interests.

The Delaware General Assembly is expected to consider new proposed legislation in the first few months of 2015. We hope that legislators are moved by the institutional investors' unanimous opposition to such provisions. Courts, not corporate directors, should be making and enforcing the rules for stockholder litigation.

[3] The other main decision approving directors' ability to adopt litigation-related bylaws is *Boilermakers Local 154 Retirement Fund, et. al. v. Chevron Corp., et. al.*, 73 A.3d 934 (Del. Ch. 2013), in which the Delaware Court of Chancery upheld a "forum selection" bylaw that required stockholders to bring specified claims in the Chancery Court.

Kessler Topaz Achieves Substantial Changes to Safeway Merger Terms Valued at Over $230 Million *(continued from page 2)*

distributed to holders of the CVR. By definition "fair market value" would incorporate substantial discounts because of Safeway's minority interest in Casa Ley, which was majority owned by a single family in Mexico. Additionally, the PDC CVR carried only a two-year sales term after which time any properties that had not been sold would revert back to Safeway and Cerberus, and PDC CVR holders would receive nothing for those assets.

Also, in connection with the transaction, Safeway purported to engage in a post-announcement shopping process in an attempt to generate a higher acquisition offer for the Company. However, the Safeway Board of Directors (the "Board") continued to maintain a shareholder rights plan that they had adopted in 2013 in response to agitation by an activist investor. The shareholder rights plan had the effect of diluting any stockholder that acquired more than 10% of the Company by permitting all other stockholders to acquire Safeway shares of stock at a discounted value. Cerberus was exempted from the poison pill, but any competing bidder had to secure permission from the Board to make an offer to acquire the Company rather than being able to make an acquisition offer directly to Safeway stockholders. The poison pill would therefore discourage competing bidders from making a superior offer to acquire the Company.

Considering the speculative terms of the CVRs and the prohibitive effects of the poison pill on a third-party bidder making an acquisition offer, Kessler Topaz filed class action litigation on behalf of Oklahoma Firefighters' Pension and Retirement System as a representative for the class of all Safeway stockholders.

Kessler Topaz was appointed as Co-Lead Counsel by the Court, and immediately thereafter engaged in expedited document and deposition discovery. During this discovery, Kessler Topaz uncovered certain conflicts of interest between the Company's financial advisor Goldman Sachs & Co. and Cerberus, and that Safeway's CEO had been promised early on in negotiations that he would be CEO of the combined company, as well as information concerning the Company's shopping process and the Company's negotiations with Cerberus and other potential acquirers.

Kessler Topaz then moved to enjoin the transaction, and an injunction hearing was scheduled before the Court for July 11, 2014. However, in the midst of briefing the motion for preliminary injunction, the parties entered into hard-fought negotiations concerning a possible settlement of the litigation. Kessler Topaz refused to settle the litigation without substantive modifications to the CVRs that would create real value for Safeway stockholders and the elimination of the poison pill to give a third-party the opportunity to make an acquisition offer for the Company.

In the end, after weeks of negotiations, the defendants agreed to withdraw the poison pill and to make substantial modifications to the CVRs. Specifically, the settlement provided for a reduction in the sales period of the Casa Ley CVR from four years to three years after which an appraisal of the "fair value" rather than "fair market value" would occur. This change ensured that substantial discounts for Safeway's minority interest in Casa Ley and the marketability of that interest would not be applied, increasing the appraisal value by tens of millions of dollars. The settlement also required that Safeway undertake a similar appraisal process for any real estate assets not sold during the two year sales period for PDC, so that no assets would revert to Safeway and Cerberus if they were not sold during the sales period.

At a hearing on September 17, 2014, the Court approved the settlement, stating that it provided "meaningful" and "material" improvements to the CVRs that "together add up to north of $160 million" in value to Safeway stockholders. The Court also praised the settlement for terminating the poison pill, noting that: "The removal of the stockholder rights plan, in a transaction like this with an $8 billion transaction value, although it is contingent value represented by a potential for a topping bid, it still comes up to a meaningful number, in the vicinity of $70 million" in value to Safeway stockholders.

Kessler Topaz is very proud of this settlement, because it eliminated the defendants' ability to manipulate the process and ensured that Safeway stockholders will get real value for their CVRs.

"Targeting Data Breaches": A Win for Financial Institutions Victimized by Data Breaches

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Indeed, Target purported to learn about the breach only after federal authorities informed the Company that data from cards used at its stores were being sold on the black market. The cost of the breach to financial institutions has been significant. Financial institutions were forced not to only absorb fraudulent charges but they also incurred costs to, *inter alia*, reissue cards, increase monitoring activity, and communicate with customers about compromised accounts.

As a result of the breach, suits were filed by both affected consumers and financial institutions that issued the stolen cards. The financial institution plaintiffs, represented by a panel of attorneys including Kessler Topaz Meltzer & Check, LLP, asserted four claims in their complaint against Target: (I) Negligence; (II) Violation of Minnesota's Plastic Card Security Act;[1] (III) Negligence Per Se; and (IV) Negligent Misrepresentation by Omission. Target, in response, filed a Motion to Dismiss, and on December 2, 2014, Judge Magnuson issued an Opinion that served as a victory for the plaintiffs, denying the Motion as to Counts I–III. The Opinion is noteworthy for several reasons.

With respect to the negligence claim, the Court unequivocally found that the plaintiffs had sufficiently alleged that Target, as a merchant, owed a duty of care to protect card issuing banks from security breaches.[2] The Court focused its attention on the allegations of wrongdoing by Target, which enabled the hackers to breach their computer system. In particular, the Court noted allegations that "Target purposely disabled one of the security features that would have prevented the harm" and "fail[ed] to heed the warning signs as the hackers' attack began[.]" According to the Court, these allegations of wrongdoing by Target created a foreseeable risk of harm, thus imposing a general negligence duty of care upon Target. The Court was further swayed by Target's unique position to prevent or stop the breach — as Target "was solely able and solely responsible to safeguard its and Plaintiffs' customers' data[.]" Also of note was the Court's rejection of Target's argument that to establish a duty of care, there must be a "special relationship" between Target and the financial institution plaintiffs.

This case, and the instant decision, is truly set apart from other data breach litigation by the inclusion of the Plastic Card Security Act claim. Not only does Judge Magnuson's Opinion mark the first time that any court has interpreted the Act, but to date, no other data breach case has included a similar statutory claim. In short, the Act prohibits merchants conducting business in Minnesota to retain credit and debit card information, and where merchants retain such information and suffer a security breach, the merchants are liable to card issuing banks for the costs associated with responding to the breach. In its Motion, Target challenged plaintiffs' claim under the Act, arguing that it applies only to transactions that occur in Minnesota — a limitation which would severely limit its application in this case, given Target's nationwide presence. The Court, however, rejected Target's argument, finding that "[t]he Act does not apply only to business transactions that take place in Minnesota[,]" rather "it applies only to Minnesota companies' data security practices[.]" Because Target is a Minnesota company that conducts business in Minnesota, the Court held that the Act applies to Target's data retention practices with respect to both in-state and out-of-state transactions. Thus, the claim was allowed to proceed.

The parties are now engaged in discovery, with class certification and dispositive motions to follow. Nevertheless, the wider implications of Judge Magnuson's Opinion cannot be understated and may help pave the way for future litigation on behalf of card issuing banks and other financial institutions that have incurred losses as a result of data breaches where the defendants' conduct contributed to the damages.

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[1] Minnesota's Plastic Card Act, Minn. Stat. § 325E.64, subd. 2 and 3, states that:

> No person or entity conducting business in Minnesota that accepts [a credit or debit card] in connection with a transaction shall retain the card security code data, the PIN verification code number, or the full contents of any track of magnetic stripe data, subsequent to the authorization of the transaction or in the case of a PIN debit transaction, subsequent to 48 hours after authorization of the transaction . . .
>
> Whenever there is a breach of the security of the system of a person or entity that has violated this section . . . that person or entity shall reimburse the financial institution that issued any [credit or debit cards] affected by the breach for the costs of reasonable actions undertaken by the financial institution as a result of the breach in order to protect the information of its cardholders or to continue to provide services to cardholders . . .

[2] *See generally*, *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14–2522 (PAM/JJK), 2014 WL 6775314 (D. Minn. Dec. 2, 2014).

2014 Year in Review: Significant Legal Developments in Class Action and Shareholder Litigation outside the United States *(continued from page 3)*

a growing trend in jurisdictions that are readily becoming the biggest shareholder litigation forums outside the U.S. (for example: the many cases filed in Australia and Canada). Overall, the number of cases filed or proposed in 2014 lends further credence to estimates by organizations like the GOAL Group which have reported that settlements stemming from securities actions outside the United States are expected to total $8.3 billion by the year 2020.

2014 was also a significant year in terms of legal developments around the world. Following is an overview of some of 2014's most significant developments and cases filed and proposed in various jurisdictions.

Austria

A class action was filed against Facebook Ireland, the subsidiary of the US based Facebook, on behalf of more than 25,000 non-North American claimants. The action alleges a variety of claims stemming from concerns over Facebook's use of consumer data as well as its alleged tracking and surveillance activities. Although this class action is not related to shareholder litigation, it illustrates a growing acceptance of class actions as an effective tool to promote access to justice around the world.

Australia

Securities fraud litigation has continued to grow, and Australia is now the number one jurisdiction, outside of the United States, where a company is likely to face litigation for violation of securities regulations. In 2014, sixteen of the announced non-US cases, representing nearly 30% of the total number of cases tracked by Kessler Topaz, were in Australia.

Australia also saw some significant legal developments regarding the structuring of its shareholder litigation. Currently, although Australia is technically an opt-out jurisdiction, the Australian prohibition on attorneys working on a contingent fee basis often means that third-party litigation funding is used, and the class is defined in a way so as to include only those investors who have registered in advance or "opted-in." Australia has continuously grappled with the creation of regulations and parameters (such as the handling of a conflict of interest) to apply to third-party litigation funders. In 2014, Australian courts determined that Australian attorneys who have a financial interest in a litigation funder may not act as lawyers in the claims. Furthermore, 2014 also saw a court petition by an Australian law firm to create a common fund in a given securities fraud action in order allow a class action to proceed on an "opt-out" basis (where investors would automatically be included in an action and eligible to file a claim for a portion of any recovery) but still guarantee a litigation funder a payment in exchange for their funding the upfront costs and legal fees. That petition is still pending.

Belgium

In March 2014, the Belgian parliament enacted a law allowing for class actions in Belgium. The law is restricted to violations of specific laws.

France

France's first class action was filed on October 1st, the same day that the class action mechanism the legislature had enacted in March 2014 came into force. The class action was filed by the consumer association UFC — Que Choisir against a real estate broker and property manager on behalf of 318,000 tenants who were illegally charged $2.90 a month for rental receipts and reminders between 2009 and 2014.

Latin America

Most Latin American countries have some form of class action procedure in place. As of 2014, there was new legislation to either modify or adopt a new procedure pending in Argentina, Brazil, Costa Rica, Ecuador, and Mexico.

The legislation pending in Brazil provides a good example of what these proposed reforms hope to accomplish. The system currently in place in Brazil (which also serves as a model for many other Latin American countries) does not have a class certification mechanism. Instead, the process involves two steps: the first step is to establish liability on a class-wide basis; and the second step involves establishing damages, but damages must be established in a series of individual cases. Right now there is no means to settle cases collectively. The Brazilian reform bill and other pending measures would make modifications and allow for nationwide class actions, grant political parties standing to pursue cases, and provide the judge with authority to shift the burden of proof. The proposed reforms would also provide groups with legal fees equal to no less than 20% of any recovery.

Portugal

Actions by a Portuguese company are likely to lead to the first securities fraud litigation filings in Portugal. The well-publicized collapse of Banco Espirito Santo, Portugal's second-largest commercial bank, and the discovery of widespread fraud and accounting irregularities within Banco Espirito Santo, its parent company Espirito Santo Financial Group, and other Espirito Santo Group entities, has led to numerous cases (both pending and proposed) on behalf of hedge funds, bondholders, and shareholders. In 2014, various hedge funds and other investors filed actions against the Bank of Portugal concerning its August 2014 decision to split Banco Espirito Santo into a good bank and a bad bank and to make no provision for shareholder compensation. Other litigation, directly pursuing Banco Espirito Santo, its executives, board members and its auditors, is likely to be filed over the next few years following the completion of a Portuguese government investigation.

United Kingdom

Tesco, the large UK retailer, announced in 2014 that it had overstated its profits for the first half of 2014 by £250 million. It also admitted that it had improperly accelerated the recognition of income while at the same time delaying the accrual of certain costs. In October 2014, the UK Financial Conduct Authority announced an investigation. That investigation was subsequently taken over by the UK Serious Fraud Office. In response to the disclosures and related plummeting stock prices, a few law firms have now proposed shareholder litigation against Tesco. No case has yet to be filed, and given the lengthy six year statute of limitations available to pursue these types of claims and the ongoing government investigation, a case may not be filed for a few years.

Kessler Topaz Wins in Rare Securities Fraud Trial *(continued from page 1)*

The case concerned a massive accounting fraud perpetrated by the Company to manipulate its 2010 and 2011 financial results, which were the penultimate responsibility of its CFO, Mr. Palaschuk. Lead Plaintiffs Pension Fund of Local One I.A.T.S.E. and Danske Invest Management A/S represented the Class, which consisted of all persons who purchased or otherwise acquired American Depositary Shares ("ADSs") of Longtop between February 10, 2010 and May 17, 2011 (the "Class Period"). Kimberly Justice and Gregory Castaldo led the trial team for Kessler Topaz, assisted by Michelle Newcomer and Margaret Onasch.

At trial, plaintiffs presented evidence showing that the Company had been a fraud since 2004 and, contrary to its reported financial results, had never really made a profit. Plaintiffs also introduced evidence demonstrating that Mr. Palaschuk had been confronted with numerous red flags throughout his tenure as CFO that should have suggested to him a "culture of fraud" existed at Longtop and that the Company's financial results might be misstated. Despite numerous warning signs, Mr. Palaschuk publicly signed and certified fraudulent financial results quarter after quarter, financial results that were built on a "foundation of lies," Ms. Justice told the jury in her opening statement. Upon discovering this massive fraud, Longtop's auditor publicly resigned, citing the "recently identified falsity" of Longtop's financial records, and the New York Stock Exchange suspended trading of the Company's ADSs. The stock never resumed trading and investors lost hundreds of millions of dollars.

The jury found Mr. Palaschuk reckless in making these statements and awarded the Class the full amount of damages sought at trial — ranging from $11.89 to $19.27 per share throughout the Class Period. As required under the Exchange Act, the jury also was asked to apportion liability amongst the three named defendants: Longtop, its former Chief Executive Officer, Lian Weizhou ("Lian") and Derek Palaschuk. While the jury found Mr. Palaschuk responsible for just one percent of its damage award, prior to trial, Kessler Topaz already had obtained a default judgment of $882 million plus interest against Longtop and Lian, each of whom failed to appear and defend in the action. Efforts to collect that judgment are underway and papers are presently being prepared for the court's approval to allow Kessler Topaz to provide notice to the Class regarding the jury's verdict and instructions for submitting claims. Once all claims have been processed, the aggregate amount of damages for which Mr. Palaschuk is liable will be determinable.

Calendar of Upcoming Events

California Association of Public Retirement Systems (CALAPRS) General Assembly

March 7 – 10, 2015

Monterey Marriott — Monterey, CA

CALAPRS sponsors educational forums for sharing information and exchanging ideas among trustees and staff of California public retirement systems to enhance their ability to administer public pension plan benefits and manage investments consistent with their fiduciary responsibility. CALAPRS carries out its mission in part through an annual conference called the General Assembly.

Rights and Responsibilities of Institutional Investors (RRII)

March 19, 2015

Amsterdam, The Netherlands

The day-long meeting, hosted in Amsterdam, will bring together leading investment, legal, and compliance officers from European public pension, insurance fund and mutual fund companies. Through panels, workshops and case studies, participants will engage with industry peers and thought leaders on the question of shifting corporate governance structures and as such, their fiduciary duties and rights as active shareholders.

Georgia Association of Public Pension Trustees (GAPPT) 2nd Annual Trustee School

March 23 – 25, 2015

Macon Marriott City Center — Macon, GA

Council of Institutional Investors (CII) Spring Conference & 30th Anniversary Celebration

March 30 – April 1, 2015

Mandarin Oriental Hotel — Washington, DC

CII's Spring Conference will feature three days of high-level speakers addressing issues faced by all institutional investors.

National Conference on Public Employee Retirement Systems (NCPERS) Annual Conference & Exhibition

May 3 – May 7, 2015

Hilton New Orleans Riverside — New Orleans, LA

More than 1,000 trustees, administrators, state and local officials, investment, financial and union officers, pension staff and regulators attend each year, making this the largest pension conference in the country. This year's conference theme will focus on the idea of *"Banding Together for Retirement Security."*

State Association of County Retirement Systems Spring Conference

May 12 – 15, 2015

Anaheim Marriott — Anaheim, CA

SACRS is an association of 20 California county retirement systems, enacted under the County Employees Retirement Law of 1937. SACRS now meets as an organization twice a year, including the Spring Conference, with all 20 counties participating through attendance by Trustees, Administrators, Treasurers and staff. Education and legislation are the principal focus of these meetings, particularly education in the investment and fiduciary responsibility area.

Pennsylvania Association of Public Employee Retirement Systems 11th Annual Spring Forum

May 21 – 22, 2015

Hilton Hotel — Harrisburg, PA

Since 2005, PAPERS has been dedicated to encouraging and facilitating the education of its membership in all matters related to their duties as fiduciaries overseeing the assets of the pension funds with which they have been entrusted. PAPERS is proud to host its 11th Annual Spring Forum, as well as other training opportunities throughout the year, to provide the basis for improved financial and operational performance of the public employee retirement systems in Pennsylvania.

National Association of Public Pension Attorneys (NAPPA) Legal Education Conference

June 23 – 26, 2015

Hilton Austin Hotel — Austin, TX

Florida Public Pension Trustees Association 31st Annual Conference

June 28 – July 1, 2015

Boca Raton Resort & Club — Boca Raton, FL

FPPTA's Annual Conference will once again bring together hundreds of trustees and staff for three days of education with dynamic speakers and panelists to discuss the most pressing issues facing Florida public pension funds.

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