



**The ERISA and Securities Law Issues That Will
Hit Your Balance Sheet in 2008: What Every
General Counsel Needs to Know**

**ADDITIONAL ISSUES FOR
DERIVATIVE CASES, CORPORATE
GOVERNANCE, AND DISCLOSURE**

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Explosion of Derivative Litigation in Connection With Stock Options Backdating

- Derivative actions brought in the name of more than 100 issuers in connection stock with options “backdating.”
- In comparison, approximately 25 issuers have been sued in class actions.
- Possible reasons for filing derivative litigation instead of or in addition to class actions?
 - Statutes of limitation?
 - Avoid PSLRA pleading requirements and problems establishing loss causation?
 - Access to state courts?

Explosion of Derivative Litigation in Connection With Stock Options Backdating (con't)

- Interesting decisions:
 - *Ryan v. Gifford*, 918 A.2d 341 (Del. Ch. 2007). The Chancery Court held that demand futility requirements were satisfied because “it was difficult to understand how plaintiff can allege that directors backdated options without simultaneously alleging that such directors knew that the options were backdated.”
 - *In re CNET Networks, Inc. Shareholder Derivative Litigation*, 2007 WL 1089690 (N.D. Cal. Apr. 11, 2007). Plaintiff failed to plead particular facts sufficient to establish pattern of backdating.

Possible Trends to Watch

- The PSLRA, SLUSA, *Tellabs*, *Twombly*, *Dabit* (and possibly *Stoneridge*) have made it harder for plaintiffs to prosecute class actions in federal court. We therefore anticipate the plaintiffs' bar will file derivative actions either in place of or alongside class actions.

Possible Trends to Watch (con't)

- Plaintiffs are demanding corporate governance reforms to resolve derivative litigation.
 - Changes to board composition including the right to nominate a board member, the election of a non-executive chair, and restrictions on board membership.
 - Case-specific issues such as, in the options cases, changes to the way in which options are granted or the required disclosures associated with grants.

Possible Trends to Watch (con't)

- We are following whether courts outside of New York and Delaware will apply the *Zapata* or *Auerbach* approach when reviewing the work of special committees.
- As the law of SLUSA develops further, will federal courts issue SLUSA stays of parallel derivative actions?

Possible Trends to Watch (con't)

- Merger and acquisition litigation—breach of fiduciary duty claims against officers and directors for failing to satisfy *Revlon* duties.
 - Anecdotally, we are seeing a rise in “bump up” litigation in connection with announcements of acquisitions of public companies by both private equity, and other public companies.
 - Some of the litigation is being filed as hybrid class action/derivative. For example, derivative and class action suits filed against BEA in connection with Oracle’s hostile takeover play.
 - Private equity firms can be on both sides of this litigation, either as the potential acquirer or as a potential shareholder plaintiff.

Possible Trends to Watch (con't)

- Three recent decisions out of Delaware Chancery Court concerning the ability of plaintiffs to enjoin a transaction pending additional disclosures.
 - *In re Netsmart Technologies, Inc. Shareholder Litigation*
 - *In re The Topps Company Shareholder Litigation*
 - *In re Lear Corporation Shareholder Litigation*