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Underwriters of D & O and Professional Liability Insurance

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In this issue … *we revisit stories from previous newsletters for an update.*

1. THE U.S. SUPREME COURT DECIDES *HALLIBURTON*

Our March 2014 newsletter set out the background for the U.S. Supreme Court's review of *Halliburton Co. v. Erica P. John Fund, Inc*. Oral arguments had been heard by the Court on March 5, and the comments of each justice were closely scrutinized for hints as to the outcome. As many readers will know, there were few surprises when the decision was handed down on June 4. The Court's oral hearing had indicated a reluctance to overturn the precedent the Court had set twenty-six years earlier in the *Basic* case, and this reluctance proved a harbinger for the Court's ultimate position.

In the opinion delivered by Chief Justice Roberts, the "presumption of reliance" principle articulated in *Basic* was upheld; securities class action plaintiffs could proceed towards class action certification by simply demonstrating ownership of a company's shares during a period of alleged misrepresentation by the company. Because such alleged misrepresentation had defrauded the market, merely owning the shares is enough to qualify the owners as victims of the "fraud on the market."

Not only was the "presumption of reliance" maintained, Chief Justice Roberts emphasized that plaintiffs seeking class certification still need not demonstrate that any misrepresentation had caused an impact on the share price. This was a refutation of Halliburton's position, but Chief Justice Roberts had not finished: "However," continued the Chief Justice in his written opinion, "the Court agrees with Halliburton that defendants must be afforded an opportunity to rebut the presumption of reliance before class certification with evidence of *a lack* of price impact." [Emphasis in original.] Defendants, in other words, need not have to wait until after class certification to show that any alleged misrepresentation had not affected the stock price.

So what was sauce for the goose was sauce for the gander: Plaintiffs did not have to prove price impact —but defendants at the same time were given a chance to show there hadn't actually been any.

In a three-sentence concurring comment, Justice Ginsburg (supported by Justices Breyer and Sotermayer) acknowledged that quid pro quo: "The Court recognizes it is incumbent upon the defendants to show the absence of price impact." And implicitly conceding the "no harm, no foul" platform of Halliburton, Justice Ginsburg allowed that "The Court's judgment, therefore, should impose no heavy toll on securities fraud plaintiffs with *tenable* claims." [Emphasis added.] Bringers of frivolous or groundless lawsuits should take note.

TRIA: EXPIRY DRAWS NEARER

The May 2013 edition of the newsletter discussed the December 31, 2014 termination date for the latest extension of the Terrorism Risk Insurance Act (TRIA), which was originally passed in 2002.

Prospects for a further extension looked a little brighter on July 17 as the U.S. Senate approved a bi-partisan bill to extend the federal backstop for seven more years, with some adjustments to carrier co-payment levels and recoupment by the government. The Senate vote of 93-4 reflects the aggressive support for TRIA that has been voiced by both the domestic insurance market and American business. Without this federal backup for insurers that are currently mandated to offer terrorism insurance on certain lines, continued provision of this coverage would be in serious doubt if it became optional.

But while the Senate vote was a fillip for TRIA supporters, the near-unanimity displayed by the upper chamber is notably absent from the House of Representatives. The House Financial Services committee voted for a 5-year extension for TRIA on June 20, but only by a margin of 32-27. There is among some House members a belief that TRIA is a taxpayer subsidy for large insurance companies that don't need it. Subscribers to this belief include the influential Chairman of the House Financial Services Committee, Rep. Jeb Hensarling (R-Texas), who offered this comment in response to passage of the Senate's TRIA measure:

> *While I appreciate the fact that the Senate has acted on TRIA, what's most important is to get this done right for hardworking taxpayers. Unfortunately, the Senate's bill is essentially a* status quo *bill that uses a phony Washington budget gimmick as a pay-for, meaning it can't even come to the House floor as written.*

That appears not to bode well for a smooth TRIA extension before Congress begins its five-week summer recess in August.

THE JOBS ACT: NOW IN ITS THIRD YEAR

The Jump Start Our Business Startups Act ("JOBS Act") became law on April 5, 2012, and was discussed in this newsletter in March 2013. The act was intended to stimulate the languishing Initial Public Offering (IPO) market by loosening some of the regulatory restrictions on new issuers. After more than two full years, how does the report card look?

According to a recent report by the law firm of Latham & Watkins, during the first year of JOBS some 75 percent of new issuers identified themselves as Emerging Growth Companies (EGCs) as defined under the act, and so eligible for its benefits; during the second year of JOBS that number increased to 85 percent. Clearly an overwhelming majority of new issuers saw at least some advantages in the measure.

An analysis of 2014 IPO activity by the law firm of WilmerHale noted that the actual number of IPOs soared from 102 in 2012 to 178 in 2013, and the last three quarters of 2013 each resulted in 50 or more: "a level of consistently high activity not seen since 2000."

Not every EGC utilized every element available under JOBS. According to WilmerHale, for both 2012 and 2013 every one of the EGCs in the life sciences adopted the limited compensation disclosure rules permitted by the act. Conversely, only twelve percent of those life science companies took advantage of the accounting and auditing relief provisions.

At first glance it would seem that JOBS has been a success. But while the data are clearly encouraging, causation should not necessarily be conflated with association. IPO activity is influenced by many factors, not least of which is the health of the stock markets. This newsletter noted the twenty percent jump in the NASDAQ Composite Index between April 2012 and April 2013. A year later in April 2014, that Index had reached a level forty percent higher than two years earlier. But if it were hard to say with certainty that JOBS has unequivocally succeeded, it would be hard to deem it a failure. Maybe it doesn't much matter: What is important are the extra employment opportunities created by the IPO boom, and their contribution to the country's economy. If JOBS helped achieve that, then so much the better.

While IPOs sizzle, the hapless Whistleblowing Program set up by the Dodd-Frank Wall Street Reform Act and administered by the Securities and Exchange Commission (SEC) remains mired in the doldrums. The SEC web site lists twenty-one applications received for Whistleblowing awards since the program's inception in late 2011; of those, only seven have resulted in a successful award. It is worth recalling that when proposing the rules for implementation, the SEC predicted 117 applications for awards *each year.* Maybe the rich seam of corporate misbehavior that the program was designed to expose never really existed, or perhaps it once did, but now is much diminished —or maybe the perpetrators are just better at concealment. ❖

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