Message from the Chair

William D. Johnston
Chair, Business and Corporate Litigation Committee

Fellow Members of the Business and Corporate Litigation Committee -

Here’s a quick update in connection with the upcoming Spring Meeting of the Business Law Section and six other important matters (webinars in the works; applications to become Business Law Section Fellows, Ambassadors, and Diplomats; new ABA/Section membership referrals; submissions to "Network" newsletter, Business Law Today, and the Business Lawyer; other future meetings; and the new "photo" Leadership Roster).

1. Spring Meeting (Caesars Palace, Las Vegas, March 22-24)

   If you haven’t yet registered for the Spring Meeting, please consider doing so. As always, the Meeting will offer outstanding CLE programs, committee and subcommittee meetings, networking opportunities, and enjoyable time with friends new and old. Please see the Section's webpage at www.americanbar.org/groups/business_law.html for on-line registration and for the master schedule.

   To highlight Section-wide gatherings as well as certain programs and meetings sponsored by our Committee (with some of the inevitable overlaps):

   **Weds., Mar. 21**

   *6:30 p.m. - 8:00 p.m. Diversity Networking Reception

   **Thurs., Mar. 22**

   *8:00 a.m. - 10:00 a.m. CLE "Maps to the Social Media Minefield Part I: Brand Protection, Marketing, Workplace and Litigation Policies to Avoid Explosive Missteps"

   *8:45 a.m. - 4:00 p.m. Young Lawyer Institute Program, including our Committee-presented "Strategic Planning and Case Assessment for the Newer Lawyer" (8:45 a.m. - 10:00 a.m.)

   *10:00 a.m. - noon Meeting of our Committee’s newest subcommittee, the Sports-Related Disputes Subcommittee, featuring a first-ever presentation re the workings of international means to address sport-doping, etc.

   *2:00 p.m. - 5:00 p.m. CLE "The 2012 Annual Review of Developments in Business and Corporate Litigation"

   *6:00 p.m. - 7:30 p.m. Section's Welcome Reception

   *7:00 p.m. Business and Corporate Litigation Committee Reception and Dinner (Aquaknox Restaurant, at The Venetian), with special thanks to the Eckert Seaman firm for its sponsorship of the Reception. (Please contact Toyin Alaka at Toyin.Alaka@americanbar.org, to sign up for the dinner if you haven't already done so.)

   **Fri., Mar. 23**

   *7:30 a.m. - 9:00 a.m. Pro Bono Breakfast

   *8:00 a.m. - 9:00 a.m. "Coffee with the Chair Meet and Greet"
*8:00 a.m. - 10:00 a.m. CLE "A Spoonful of Sugar: Educating Boards of Directors About Class and Derivative Action Exposure, Avoidance, and Procedures"

*10:30 a.m. - 12:30 p.m. CLE "Business Judges Speak: How to Litigate a Case in Business Court"

*12:30 p.m. Section Lunch

*2:30 p.m. - 3:30 p.m. Meeting of the Business and Corporate and Litigation Committee (all members and prospective members welcome)

*4:30 p.m. - 5:00 p.m. Meeting of Business and Corporate Litigation Committee leaders (all members and prospective members welcome)

*5:00 p.m. - 7:00 p.m. Women's Business and Commercial Advocates Subcommittee's Reception and Awards Ceremony, honoring Judge Linda Riegel of the United States Bankruptcy Court for the District of Nevada (with special thanks to Snell and Wilmer for their sponsorship)

*7:00 p.m. Section Dinner

Sat., Mar. 24

*8:00 a.m. - 10:00 a.m. CLE "Strength in Diversity: Empowering All Lawyers to Thrive in the Workplace"

*2:30 p.m. - 4:30 p.m. CLE "Defending Public Companies in High Stakes Criminal Trials: Lessons from U.S. v. Xcel Energy, Inc."

2. Webinars in the Works

Our Committee, through the Meetings and Programs Subcommittee, is working to prepare and present various webinars. Please let us know what would be of particular interest!

3. Applications for the Business Law Section Fellows, Ambassadors, and Diplomat Programs

The BLS Fellows, Ambassadors, and Diplomat programs are designed to involve young lawyers, lawyers of color and lawyers with disabilities in the substantive work of the Section. The Section funds the two-year term of five Fellows, five Ambassadors and one Diplomat, including their participation in three Section meetings each year. Applications are due April 27. For more about the programs, please see the Section's webpage (above).

4. New Member Referrals

Please continue to encourage your practice/judicial colleagues to join the Business and Corporate Litigation Committee if already members of the ABA and the Business Law Section. And, as a lawyer or associate member, you can recruit new ABA members by offering a free trial ABA and Business Law Section membership and having a chance to win an iPad® or iPodtouch®. The campaign runs through May 31. Please see the Section's webpage (above).

5. Submissions to our "Network" Newsletter, to Business Law Today, and to the Business Lawyer

With thanks to fellow Committee members Peter Valori and Gary Zhao, and to BLS staff member Frank Hillis, we have the benefit of this issue of the "Network" newsletter. As always, please consider submitting an article of interest - no footnotes required! Peter can be reached at pvalori@dvlp.com, and Gary can be reached at GZhao@salawus.com.

Please also consider submissions to Business Law Today and to the Business Lawyer. Thanks to the authors from the forthcoming, two-volume Annual Review of Developments in Business and Corporate Litigation who participated in the BLT "mini-theme"!
6. Other Future Meetings

Please be sure to have on your calendar the 2012 Annual Meeting (August 3-6, in Chicago) and the 2012 Fall Meeting (November 15-17, in Washington, D.C.)

7. New "Photo" Leadership Roster

Many thanks to fellow Committee member Mac McCoy for our first-ever "photo" Leadership Roster. Please check it out (as part of this newsletter, and on the Committee's webpage). We hope that the roster literally will help Committee members "attach a face to a name" in communicating with leaders of our subcommittees, working groups, and task forces. And we hope to expand the effort to create a Committee-wide photo directory.

* * *

As always, please let me know if you have any questions, concerns or suggestions, or if I can be of assistance in any way. Hoping to see you in Las Vegas!

Bill Johnston is a partner in the Wilmington, Delaware-based law firm of Young Conaway Stargatt & Taylor, LLP. He is a past chair of the firm's Corporate Counseling and Litigation practice group.

Case Summary

BlackRock Financial: Jurisdictional Standing of a Class Action Suit Challenging an Administrator of a Trust
By Jesse A. Oppenheim

Any first-year law student worth his or her weight in caffeinated beverages can recite that a federal district court has subject matter jurisdiction over any case where there is diverse citizen ship of parties and the amount-in-controversy exceeds $75,000. Many will also know that class actions receive special treatment that "get them around" the diversity requirement. The U.S. Court of Appeals for the Second Circuit, however, recently highlighted an exception to this well-known rule.

In BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp., 11-5309-CV L, 2012 WL 611401 (2d Cir. Feb. 27, 2012), the Second Circuit addressed the exception to federal subject matter jurisdiction contained in 28 U.S.C. §§ 1332(d)(9)(C) and 1453(d)(3), which state that a district court lacks original jurisdiction in class action cases where the amount in controversy exceeds $5,000,000 and the case "relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933)." 28 U.S.C. § 1332(d)(9)(C).

More...
Richter is Chair) with plans to put together a program on legal isolation under FASB and trends in true sale opinions for the Spring 2013 meeting in Washington DC. Coordination with other committees is being solicited.

Members of our Subcommittee have also drafted the Bankruptcy Litigation chapter for the Annual Review, which is currently in the editing stages, for release later this year.

Class and Derivative Actions
Joseph Ianno Jr, Mac Richard McCoy, Co-Chairs

The Class and Derivative Actions Subcommittee is pleased to present a CLE program entitled "A Spoonful of Sugar: Educating Directors of Boards About Class and Derivative Action Exposure, Avoidance and Procedure," during the Spring Meeting in Las Vegas. The program will take place from 8:00-10:00 AM on Friday, March 23 in Milano VII, Promenade Level, Caesars Palace. The program will explore the ways in which lawyers who regularly counsel boards can proactively educate directors about potential corporate exposure to class and derivative actions, with an eye toward prevention. Please join us for this very practical and engaging program. If you are unable to attend our CLE program, please consider joining us for the Subcommittee's administrative meeting on Friday, March 23 from 2:30-3:30 PM in the Verona Room, Promenade Level.

The Subcommittee was pleased to contribute an article to the January 2012 issue of Business Law Today, "Taming the Kraken: The Supreme Court Weighs in on Class Actions in 2011." The article describes the Supreme Court's seminal holdings in Wal-Mart v. Dukes, AT&T Mobility LLC v. Concepcion, and Smith v. Bayer Corp. in 2011.

Additionally, the Subcommittee has finalized its updates to the chapter on Class Action Law for the forthcoming 2012 edition of the Annual Review of Developments in Business and Corporate Litigation, which includes new sections relating to Canadian class action law and U.S.-Canadian cross-border class actions.

Lastly, the Subcommittee will have two open Vice Chair positions beginning after the 2012 ABA Annual Meeting in Chicago. If you or anyone you know would like to be considered for one of these appointments, please contact Subcommittee Chair Mac McCoy (mmccoy@carltonfields.com) for more information.

Corporate Counseling & Litigation
Denise Seastone Kraft, Chair

The Corporate Counseling and Litigation Subcommittee (the "Subcommittee") is pleased to report on recent developments and important upcoming events.

The Subcommittee's Chairperson, Denise Seastone Kraft, Esq, will head from Wilmington, Delaware to Las Vegas, Nevada for the upcoming Business and Corporate Litigation Committee Spring Meeting. Ms. Kraft will lead a panel discussion of important corporate law decisions from 2011. Other panelists will include Delaware Supreme Court Justice Henry duPont Ridgely and Mark Frietas, Esq., who is Corporate Counsel for Axia, Ltd., a global consulting firm. The panel discussion, which is expected to last approximately 30 minutes, will be part of the Annual Review of Developments in Business and Corporate Litigation presentation, scheduled for 2:00 p.m. to 5:00 p.m. on Thursday, March 22. The presentation materials will include brief summaries of significant 2011 corporate law decisions as well as an article by Paul D. Brown, Esq. and K. Tyler O'Connell, Esq., recently published in Business Law Today, regarding 2011’s notable stockholder victories in the Delaware courts. Messrs. Brown and O’Connell are Subcommittee members, and Mr. O'Connell currently serves as a Co-Vice Chairperson.
Pro Bono and Public Service

Kristin Gore and Victoria Newman, Co-Chairs

On Wednesday, March 21st, prior to the kickoff of the Business Law Section’s Spring Meeting, the Pro Bono and Public Service Subcommittee, along with the Business Law Section’s Young Lawyer Committee, will partner with Junior Achievement of Southern Nevada, Inc. for an afternoon of financial literacy, business ethics, or similar instruction. The volunteer team will meet with local high school students and teach a scheduled Junior Achievement lesson from prepared materials. The experience will be patterned after the volunteer effort that took place during the Section’s 2011 Spring Meeting in Boston. We are seeking twelve volunteers for this effort. If you have any questions about this year’s JA volunteer experience, the plans for 2012 or would like to volunteer, contact Kristin Gore at kgore@carltonfields.com or Victoria Newman at victoria.newman@hklaw.com.

Sports-Related Disputes

Michael Bernasconi, Chair

A new Subcommittee is born

The Subcommittee SPORTS-RELATED DISPUTES started its operation at the Fall 2011 Meeting in Washington DC, with Michael A.R. Bernasconi as Chair and Hon. J. Allen S. Goldberg, as Vice-chair of the Subcommittee.

New members (membership can be entered online), as well as any person interested in getting involved in the preparation of future programs as well as additional officers are more than welcome. Any questions, please contact either the Chair (m.bernasconi@baekarrer.ch) or the Vice-chair (goldie90@sbcglobal.net).

Session at the Spring Meeting in Las Vegas, March 2012

The Subcommittee will hold its first meeting at the Spring Meeting of the ABA Business Law Section in Las Vegas on Thursday, March 22, 10:00 a.m.-12:00 p.m. The meeting will focus on doping disputes.

During this meeting, the Subcommittee will host a program entitled: Star Athletes and Players before the Judge - New Challenges for Lawyers: How to Litigate a Doping Case before the Court of Arbitration for Sport.

The meeting will be chaired by Michael A.R. Bernasconi and by Hon. J. Allen S. Goldberg.

The speakers for this meeting will be John W. Ruger, Athlete Ombudsman of the United States Olympic Committee, Colorado Springs, Colorado, and Howard L. Jacobs, Attorney-at-law in Westlake Village, California.

In his role as Athlete Ombudsman of the US Olympic Committee, John W. Ruger has gained a unique experience in counseling and assisting athletes in connection with disputes at several levels. His main function is in fact to provide independent advice to elite athletes and national governing bodies, to assist in mediating disputes and to develop and implement USOC policies aiming at securing the rights and interests of athletes. He will report on some of the cases of US athletes he has had direct involvement.

Howard L. Jacobs has been identified by the Los Angeles Times and other national publications as one of the leading sports lawyers in the United States. Mr. Jacobs is not a sports agent. His law practice focuses on the representation of athletes in all types of disputes, with a particular focus on the defense of athletes charged with doping offenses. He has represented professional athletes, Olympic athletes and amateur athletes in disputes involving doping, endorsements, unauthorized use of name and likeness, salary issues, team selection issues, and other matters.

Michael A. R. Bernasconi, Chair of the Subcommittee, attorney-at-law in Zurich, Switzerland, and member of the CAS, the Court of Arbitration for Sport, will give an introduction to the history and the function of this arbitral institution which is considered to be, worldwide, the most important arbitral court for sport matters. Particular attention will be given to the resolution
system of the ad-hoc chamber that CAS will have at the 2012 Summer Olympic games in London.

Committee Leadership

William D. Johnston, Committee Chair

Heidi McNeil Staudenmaier, Committee Co-Chair

Patrick Thomas Clendenen, Committee Co-Chair

Peter J. Walsh, Jr., Immediate Past-Chair

Complete Committee Photo Roster...
BlackRock Financial: Jurisdictional Standing of a Class Action Suit Challenging an Administrator of a Trust
Written by:

Jesse A. Oppenheim
Brooklyn Law School, Class of 2013
jesse.oppenheim@brooklaw.edu

Any first-year law student worth his or her weight in caffeinated beverages can recite that a federal district court has subject matter jurisdiction over any case where there is diverse citizenship of parties and the amount-in-controversy exceeds $75,000. Many will also know that class actions receive special treatment that “get them around” the diversity requirement. The U.S. Court of Appeals for the Second Circuit, however, recently highlighted an exception to this well-known rule.

In BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp., 11-5309-CV L, 2012 WL 611401 (2d Cir. Feb. 27, 2012), the Second Circuit addressed the exception to federal subject matter jurisdiction contained in 28 U.S.C. §§ 1332(d)(9)(C) and 1453(d)(3), which state that a district court lacks original jurisdiction in class action cases where the amount in controversy exceeds $5,000,000 and the case “relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933).” 28 U.S.C. § 1332(d)(9)(C).

The Class Action Fairness Act of 2005 (“CAFA”) expanded federal jurisdiction in securities class action suits to include cases that might not otherwise satisfy the basic requirements of federal jurisdiction (e.g. complete diversity of citizenship), but excepted from that expanded jurisdiction certain claims, such as those under 1332(d)(9)(C) and 1453(d)(3), that relate to the rights, duties including fiduciary duties, and obligations relating to or created by or pursuant to a security.

In Blackrock, which is summarized below, the court clarified the scope of the securities exception that was conferred by CAFA: that the exception to federal jurisdiction included a case in state court initiated by a trustee seeking a judicial determination that a settlement, in a case otherwise covered by CAFA, was within the trustee’s authority.

I. Facts of BlackRock Financial

The Bank of New York Mellon (“Mellon”) served as the indenture trustee of 530 trusts which held mortgage-backed securities. The terms of the trusts, among other things, were set forth in Pooling and Servicing Agreements (“PSAs”). Each PSA provided that a breach of representation regarding the quality, property value, title, or lien priority would require the seller — in this case, Countrywide Home Loans, Inc. — to cure any breach, repurchase, or substitute any affected mortgage loan. As with many other mortgage-backed securities, the relevant mortgages defaulted, leading to claims for breaches of representations and warranty.
On June 29, 2011, after extensive negotiations, Mellon filed a petition in New York Supreme Court under N.Y. C.P.L.R. 7701 seeking a judgment that, as trustee, Mellon had the authority to enter into a settlement agreement on behalf of its trusts and trust beneficiaries. Of the trusts in question, two major factions had formed: the “Institutional Investors” and “Walnut Place.” The Institutional Investors group is comprised of, among others, BlackRock Financial Management Inc., Goldman Sachs Asset Management L.P., Maiden Lane LLC, and associated entities formed by the Federal Reserve Bank of New York. Walnut Place is comprised of similarly sophisticated investors.

Under the settlement proposed by Mellon, a series of trusts would be created to hold a total of $8.5 billion in equity. The trust would be funded by Countrywide and its acquirer, Bank of America, both of which would be indemnified under the settlement.

Walnut Place objected to the settlement agreement and moved to intervene in the Article 77 proceeding. The state court granted the motion to intervene and, one week later, Walnut Place removed the Article 77 proceeding to the United States District Court for the Southern District of New York. The district court denied a motion to remand brought by Mellon and others. Bank of New York Mellon v. Walnut Place LLC, 11 CIV. 5988 WHP, 2011 WL 4953907 (S.D.N.Y. Oct. 19, 2011). The U.S. Court of Appeals for the Second Circuit granted Mellon and the Institutional Investor’s interlocutory appeal to consider whether the case fell within CAFA’s exceptions to federal jurisdiction under 28 U.S.C. §§1332 and 1453.

II. Ruling on Jurisdiction

Judges Dennis Jacobs, Peter Hall, and Raymond Lohier found that the matter fell within the CAFA’s securities exception, dismissed the appeal for lack of subject matter jurisdiction, reversed the decision of the district court, and instructed the district court to vacate its decision and remand the matter to the New York Supreme Court.

The court began its analysis by comparing its two previous cases addressing the CAFA exceptions under 28 U.S.C. §§1332(d)(9)(C) and 1453(d)(3): Greenwich Fin. Services Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp., 603 F.3d 23 (2d Cir. 2010), and Estate of Pew v. Cardarelli, 527 F.3d 25 (2d Cir. 2008). The court distinguished the two cases, explaining that, while Cardarelli stood for the proposition that a suit brought by a purchaser of a security did not fit within the CAFA exceptions, Greenwich Financial held that a suit brought by a security holder did fit within the CAFA exception. BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp., 11-5309-CV L, 2012 WL 611401 at *4 (2d Cir. Feb. 27, 2012).

1 The settlement agreement was contingent upon court approval through an Article 77 hearing. Article 77 of the New York Civil Practice Law and Rules authorizes a special proceeding “to determine a matter relating to any express trust....” N.Y. C.P.L.R. 7701. “Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper, and by trustees (and beneficiaries) to obtain interpretations of the meaning of trust documents.” BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp., 11-5309-CV L, 2012 WL 611401 at *2 (2d Cir. Feb. 27, 2012)
Thus, a determinative factor is the classification of the rights the state court plaintiff is seeking to enforce, either as a securities holder or a purchaser.

Applying this rationale, the court found the present matter fell within CAFA’s exceptions because Mellon’s status as administrator of the securities rendered it a securities holder. *Id.* at *6. (“The sole claim presented in the Article 77 proceeding fits within § 1453(d)(3) because it concerns the relationship between the entity which administers the securities.”). According to the court, the very nature of the removed case was premised on the fact that Mellon was a securities holder. *Id.* at *6 (“Because the Bank of New York Mellon seeks a construction of its rights under the PSA and an instruction from the court as to whether it has complied with its “duties ... and obligations” arising from the PSA and its “fiduciary duties” superimposed by state law, [the §1453(d)(3) exception applies].”)

Accordingly, following this finding of fact, the court held that it lacked jurisdiction to hear the interlocutory appeal from the district court’s denial of the motion to remand the Article 77 proceeding. *Id.* Despite the lack of jurisdiction, the court stated that it still retained the authority to reverse the district court’s order and instruct it to vacate its decision and order, causing the proceeding to be remanded to New York State Supreme Court. *Id.* (“There is no doubt, however, that where the federal courts no longer have jurisdiction over a case, courts of appeal retain the authority to properly dispose of it.”).

III. Conclusion

The holding of *BlackRock Financial* stands for the proposition that a trustee’s proceeding to determine the correctness of its conduct in a case comes within the exception to federal court jurisdiction, even if the jurisdiction is under CAFA for the underlying case. The holding comports with the recent jurisprudential trend of reimagining the scope of class action suits. See Mac R. McCoy & D. Matthew Allen, *TAMING THE KRAKEN: THE SUPREME COURT WEIGHS IN ON CLASS ACTIONS IN 2011*, 2012-JAN BUSINESS LAW TODAY 1, Jan. 2012 (providing an overview of major 2011 U.S. Supreme Court cases about class action lawsuits). While the impact of *BlackRock Financial* on future cases remains to be seen, it is likely that, upon remand, the New York Supreme Court will affirm the $8.5 billion settlement between Bank of America, Melon and the Institutional Investors. See Mark Hamblett, *Circuit Sends $8.5 Billion BofA Settlement Back to State Court*, NEW YORK LAW JOURNAL, Feb. 28, 2012 at 1.