SECURITIES

IN PRIVATE SECURITIES LITIGATION, ALL EYES ARE ON THE U.S. SUPREME COURT HEARING SET FOR March on Halliburton Co.'s appeal challenging the longstanding fraud-on-the-market doctrine, which underlies most securities litigation. Set out in 1988, the doctrine allows most securities cases to proceed as class actions so long as plaintiffs demonstrate that the market is efficient, which has usually been an easy hurdle to overcome. Now, in a case that began in 2002 and already has made one pass through the Court on other arguments, Halliburton is asking the Court to let it rebut the presumption of reliance on that efficiency by proving that misstatements did not affect its stock price. As for law enforcement, Securities and Exchange Commission Chair Mary Jo White continues to make good on promises to be more effective and aggressive. We met for an update with Jordan Eth of Morrison & Foerster; Joy A. Kruse of Lieff Cabraser Heimann & Bernstein; Matthew Larrabee of Dechert; Robert Leach of the U.S. Attorney's Office for the Northern District of California; and Peter M. Stone of Paul Hastings. The discussion was moderated by *California Lawyer* and reported by Cheree Peterson of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: The U.S. Supreme Court granted certiorari in the *Halliburton* case (*Halliburton Co. v. Erica P. John Fund Inc.* 2013 WL 4858670) in November so it's going to review the important precedent set in *Basic Inc. v. Levinson* (485 U.S. 224 (1988)) and could revamp its test for fraud on the market. What impact is that having on your practices? And what do you think the Court's going to do?

JOY KRUSE: One of the things that's happening is defendants are asking courts to stay litigation and wait for the decision in *Halliburton*. I know at least one court, Judge David Campbell in Arizona in the *First Solar* case (*Smilovits v. First Solar, Inc.*, No. 12-CV-00555 (D. Ariz. Nov. 25, 2013) (ECF No. 177)), denied a stay, saying that even if *Basic* is overruled, the institutional investors will carry the case forward and therefore the discovery they're doing is not a waste of resources.

The part that's most troubling about this to me as a plaintiffs attorney is the notion that it's fine if it's only institutional investors who can plead reliance and who have the resources to litigate their claims. If *Basic* is overruled, small investors are being shut out of the courthouse. It would be similar to the antitrust case (*American Express Co. v. Italian Colors Rest.,* 133 S. Ct. 2304 (2013))—pushing small claims into arbitration even if someone does not have, or will not be inclined to spend, the tens, if not hundreds, of thousands of dollars to hire experts to prove their claims.

JORDAN ETH: In terms of stays, all you have to do is look at *Halliburton* itself. The company said, "Look, cert's been granted in our case. Shouldn't discovery be stayed?" And the Court said no. It's a bit of a surprise to practitioners: Why should we be going forward with a case when it may be gutted or at least changed dramatically depending on what happens in *Halliburton*? I am a little surprised that more plaintiffs haven't said, at least in some cases, "Let's hold off because we shouldn't be spending a lot of time and money litigating until *Halliburton* is decided."

In terms of the merits, Joy [Kruse] makes a very interesting point about what you could wind up with. You could wind up with a real two-tiered system where individuals, small retail investors—to the extent those still exist, given that people have mutual funds and pension plans and so on to represent their interests—may be less represented.

At the same time, when you look back at *Basic*, it's pretty much a made-up ruling that's a throwback to a time when courts would reach out and come up with doctrines based on their views of policy. The real issue is who should decide whether there's a presumption of reliance where a market is efficient. Should the Supreme Court read that into the 10(b) implied right of action, or should it be Congress? In some ways, what's most interesting to me isn't *Basic* but what Congress did after *Basic* in the Private Securities Litigation Reform Act (Pub. L. No. 104-67 (1995)) and then in Sarbanes-Oxley (Pub. L. No. 107-204 (2002)) and Dodd-Frank (Pub. L. No. 111-203 (2010)). In some ways, Congress took as a background fact that a fraud-on-the-market doctrine exists, but said nothing about it explicitly. So the Supreme Court ruling may do nothing, or it could

completely change securities litigation. It could resurrect the *Affiliated Ute* presumption (see *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972)) providing an alternative way to achieve class status. In terms of the SEC, maybe the SEC starts outsourcing to private lawyers to bring cases the way the FDIC does. And what would *Halliburton* do to the insurance market? The cost and availability of insurance should certainly track the underlying risk.

MATTHEW LARRABEE: It's not at all clear to me that, even if *Basic* is overruled, that's going to simplify life for defendants—or defense counsel. We defense counsel have long complained about the fact that classes get certified in cases that don't have any merit and settlements are effectively coerced by the size of the exposure and the cost of trial. But if that argument ends up leading to the defeat of the fraud-on-the-market presumption in *Basic*, and if any of these other manifestations that people are talking about actually come forward, in a lot of ways, defending will become more difficult.

You cannot settle a claim against 5 or 10 or 15 or 20 institutional investors and foreclose anybody but those same investors from pursuing new claims. And heaven knows what would happen if Congress increased the budget for the SEC for this purpose by 30 or 40 percent. Why is that better for defendants? I think the state courts would also see more cases. It will also be interesting to see what happens to SLUSA (the Securities Litigation Uniform Standards Act of 1998 (15 U.S.C. §§78bb)), because that's one of those statutes Jordan [Eth] was talking about, premised on the assumption that we're preserving a clear path for federal securities class actions.

If federal securities class actions don't exist in meaningful numbers, the raison d'etre for SLUSA is very hard to identify. And if SLUSA were repealed, which would be a plausible response by Congress, then you're back to class actions in state courts as well.

PETER STONE: So I'll go out on a limb. To me it's clear that five justices now on the Court would not have decided *Basic* the way it was decided. Jordan [Eth] correctly points out that it was decided in an era of a kind of judicial lawmaking that does not exist anymore. Four of the justices in *Amgen*, Scalia, Kennedy, Alito, and Thomas (see *Amgen, Inc. v. Connecticut Ret. Plans and Trust Funds*, 133 S.Ct. 1184 (2013)) clearly signaled that they would strongly consider reversing *Basic*.

Chief Justice John Roberts will be the key to the *Halliburton* decision. There's no question he wouldn't have decided *Basic* the way it was decided. But he will have to judge the impact of the major

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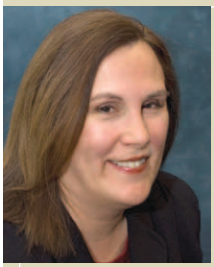

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statutes passed since 1988, all of which seem to assume *Basic*; his level of respect for stare decisis in the face of all of this will be tested. Ultimately, I think Chief Justice Roberts will vote to reverse *Basic*, and you'll have at least a 5-4 decision reversing.

What happens next, if I'm right? I don't think it's necessarily good for defendants. There's a pretty strong possibility Congress will step in, and what Congress eventually does could be worse for defendants or for plaintiffs; no one can say. Assuming *Basic* is reversed and Congress doesn't step in, you'll still have derivative suits. That would be the most logical place for the plaintiffs to go and file state court derivative actions.

As to a point Joy [Kruse] and Matt [Larrabee] made, I think most defense counsel in the run-of-the-mill securities case won't be afraid of institutional investors bringing two or three suits that are for a few million dollars in damages where you have sufficient insurance coverage. We would expect to defend many of those cases through trial if need be. So you could end up with more securities trials. In short, I think the Supreme Court will rule that the presumption of reliance won't be available in securities class actions any more. But I also think Congress will step into the mix.

ROBERT LEACH: Before I give my views on this, I need to emphasize that they are my views and not the views of the Department of Justice or the U.S. Attorney's Office or anyone else from my office.

It is very important, in my view, to have some type of supplement to both criminal actions by the Department of Justice and civil actions by the Securities and Exchange Commission. The government can't be everywhere at every time. We don't want it to be everywhere at every time. Having robust private enforcement is significant. The outcome in this case won't directly affect our criminal actions—or civil actions by the SEC—but it will put renewed focus on the amount of resources both of those agencies have to fill out their mandates.

LARRABEE: I'd be interested in everybody's views about how strong class counsel could respond to the loss of *Basic* by building cases almost entirely on omissions, meaning *Affiliated Ute* omissions. It is intellectually possible to turn almost any factual representations into misrepresentations, and I have no doubt that plaintiffs will test that. I'd be interested to see how successful we think they're going to be.

KRUSE: In the Merck litigation where there's a motion to stay based on Halliburton, defense attorneys went through the exercise of counting up the number of affirmative misrepresentations and the number of omissions, and the misrepresentations far outweighed the omissions. (Letter Brief for Defendants, *In re Merck & Co., Inc.* Sec., Deriv. and ERISA Litigation, Civil Action No. 05-CY-2367 (D.N.J. 2013) (ECF No. 576)). That's not to say, Matt [Larrabee]—I take your point—that you can't re-craft a representation to be an omission. But I think it would be an interesting result if we end up with some kind of test of what predominates in the complaint and what that would require. A pure omissions case is comparatively rare so I'm not sure how useful *Affiliated Ute* is going to be in the long run.

ETH: *Affiliated Ute* is such an odd decision. And I've never really understood the difference between omissions and misrepresentations. They are interchangeable at some point. Are we really going to have arguments and different appellate tests on what's an omission and what's a mixed omission and what's a misrepresentation? It would just be degrading to go through that exercise.

KRUSE: And unworkable.

ETH: Yes, unworkable. I want to get back to the issue of Roberts. I think everyone does agree he holds the key to this, as he did on the Affordable Care Act, where he came out in favor based on his own reasoning. In *Amgen*, he could have joined the four who signaled some questioning of *Basic*, but he went with the majority. So I don't know.

They say Roberts plays the long game, and there are lots of important issues, obviously; they've got lots of other cases. For a Chief Justice to say, "We're going to take a decision by our court and reverse it," would take a lot because that puts other decisions up for grabs. And what does stare decisis mean then? So I could really see it going either way or, maybe even more likely, winding up with some kind of middle-ground test so you can do more at the class certification stage.

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>
> –JOY A. KRUSE

MODERATOR: Would you see a compromise modifying the *Basic* test? What would be a workable solution?

KRUSE: In terms of the long trend, I don't see this Court overruling *Basic* in its entirety. The Court ought to be influenced by the backdrop of the financial crisis and other things that certainly seem to cry out for buttressing what the government can do in terms of redressing wrongs for investors.

ETH: What are your thoughts about whether the plaintiff in *Halliburton* should resolve the case now? That might make strategic sense because the composition of the Court may be more favorable to plaintiffs a year or two or three from now.

KRUSE: I've certainly heard that discussion among plaintiffs attorneys, the option of withdrawing the case. I don't think that's likely because of who's involved: I don't think David Boies is going to walk away from this case. What I found interesting in the plaintiffs' opposition to the cert petition is Boies's contention that the chal-

lenge to *Basic* wasn't raised until the rehearing en banc in the Fifth Circuit. I realize that was a result of the Court's receptivity after *Amgen*, but in terms of the procedural history of the case, and whether that argument was waived, I don't know how this Court is going to handle that. The argument was made very forcefully by Boies that this was the wrong vehicle because of the procedural history of the case.

MODERATOR: There are a lot of new investment vehicles popping up. Could you lay out the underlying Delaware law that sets the groundwork for appraisal actions and interest awards and then talk about what you see happening now?

STONE: The Delaware code has long allowed shareholders who are squeezed out in a merger to bring an appraisal action to seek the fair value of their shares. Those actions have been somewhat uncommon and typically have not involved large dollars. But in the last couple years several hedge funds have been created to raise money for the purpose of investing in appraisal actions, particularly, so far, in going-private transactions.

Right now, there are two cases in Delaware, the *BMC Software* case (*In re BMC Software, Inc. Stockholder Litig.,* No. 8544-VCG) and the *Dole Foods* case (*In re Dole Foods Co., Inc. Stockholder Litig.*, No. 8703-VCL (Del.Ch.Ct.)), where I'm counsel for the aquirer, where hundreds of millions of dollars were raised and invested in shares of those issuers for purposes of bringing appraisal actions after the merger closed. In both those cases, there are post-closing appraisal claims for hundreds of millions of dollars. It's a brand new development. And it may have a lot of consequences for the way we litigate and try to resolve merger cases.

For example, often a part of either a settlement or these days a structured arrangement seeking to take advantage of the new *MFW* decision (*In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013)) is to agree to a majority-of-the-minority requirement, whereby unaffiliated shareholders have to approve the merger by a majority vote. When you have $100 million worth of shares bought by a hedge fund for purposes of bringing an appraisal action and yet, in order to bring the appraisal action, they can't vote in favor of the merger, getting a majority of the minority to pass the merger becomes much more difficult. Of course, it would actually be a terrible consequence for the funds to stop the deal because then the stock would drop significantly and the funds would lose a lot of money.

Some of this new development is driven by the statutory provision for an award of interest. It permits an award of interest for shareholders who bring an appraisal action of 5 percent over the Federal Reserve rate, which is probably triple what anyone could earn on a CD or something like that today. So even if plaintiffs, for example, "tie" in an appraisal action, they could get 6 percent interest for the entire time they've been out their money. And on $100 million or $200 million, that's a lot.

KRUSE: Are there any studies of how appraisal actions fare in terms of whether you do get more than the share price?

STONE: Yes, historically in about 80 percent of appraisal actions the shareholders come out ahead, although often only slightly. Now, they have mostly been small cases or cases where there was a very strong reason to believe the price wasn't fair. So I don't know whether that statistic will hold.

LARRABEE: It's still a very sophisticated, inside-baseball kind of claim. Yes, they're on the rise, and there are some real dollars and some very expensive cases going on. But the standing requirements are rigid. It has to be the right kind of transaction. You still have to be able to come up with the capital to invest in what is likely to be a very expensive fight for both sides. And I don't think you can reasonably extrapolate directly from 80/20 success ratios under the old claims to these kinds of claims. They'll be treated differently by participants going into a deal, who are going to structure everything—from pricing to deal terms to timing—knowing that these claims are on the rise. It's fascinating to see all the various incentives come together, some of which are unintended, but it's not clear that this is going to become the norm, in the way "strike suits" get filed in almost every public M&A case.

STONE: One thing you might see in merger deals is a provision that allows the acquirer to walk away if enough people seek appraisals. That could be quite an interesting development. Normally, acquirers want the company, so they're willing to take the post-closing risks, but not in all deals.

MODERATOR: What other ways do you see developments in Delaware affecting deals?

LARRABEE: The biggest thing we've seen lately is around forum selection clauses because the Delaware courts—with respect to the typical disclosure-based complaints about a public M&A deal—have continued to be very, very tough on weak claims. They are weeding out cases at a rate that approaches 100 percent. That's not literally true, but they've been tough on weak cases and tough on disclosure-only settlements and fees. The natural response to this environment is to file in a different forum. And the natural response to that is to prevent filing in a different forum. And that really is what the fight is right now.

MODERATOR: Is it that simple? Is it in Delaware's interest to be so clearly pro-defendant, if that's really how people are starting to see it? How does this relate to recent developments regarding forum selection clauses?

ETH: You're right that Delaware has to play a balancing act. If they're too pro-defendant, they lose business. If they're too pro-plaintiff, they lose business. And you can find some Delaware decisions granting plaintiffs big awards.

But the forum selection issue, at least from my point of view, is so clear-cut. You shouldn't have multiple cases in multiple jurisdictions. It doesn't make any sense that a company in California that's incorporated in Delaware should face lawsuits in Delaware plus

whatever California county they're in, as well as in the Northern District of California. The idea is that a company should be allowed to say, "If you're going to sue me for these kinds of claims, sue me in one place. How about where I'm incorporated?"

It's not like sending them off to some crazy forum. It seems like such an obvious thing for them to do that I think forum selection clauses ultimately will be upheld.

There are only a couple of decisions on point. There's one in the Northern District by Judge Richard Seeborg involving Oracle, where the court rejected a forum selection bylaw adopted after the alleged wrongdoing took place—implying, but not ruling, that if a clause is enacted before the wrongdoing takes place, it would be upheld.

In the other case, Delaware Chancellor Leo Strine, obviously very influential, ruled that a facial challenge to a forum selection clause provision failed. But that doesn't mean every forum selection clause would be upheld, and his decision wasn't appealed to the Delaware Supreme Court. So you have no appellate decisions anywhere in the country.

I don't know why a company would not adopt a forum selection clause and at least have the option of invoking it. I'd actually be curious about Joy [Kruse]'s point of view because the current situation leads to plaintiff-versus-plaintiff battles where you've got three cases—two in Delaware and one here in the Northern District—and then you get in a room with nine different plaintiffs firms and they divvy things up. I don't know that that's such a great thing for plaintiffs.

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> –MATTHEW LARRABEE

KRUSE: We don't have a lot of cases in Delaware. But from the company's point of view, I certainly understand the rationale of a forum selection clause. With that said, I agree with Matt [Larrabee] that Delaware is generally not a plaintiff-friendly forum. In the mass torts world and also in securities where you have MDLs and other devices to coordinate federal actions, it would not be unusual to have some centralization.

STONE: The die is not cast on this yet. There's a lot of law yet to be decided in California on whether California judges will enforce a Delaware forum selection clause. There are recent cases in Delaware and elsewhere about how forum selection clauses interact with the first-filed rule and also how clear the forum selection clause has to be. If someone files first and then six months later the defendant seeks to invoke the forum selection clause, probably that's not going to work. So it's a useful tool for companies; they should consider adopting a clause. And, they probably should do it with a charter amendment, not a bylaw. Certainly, companies that are going public should consider including a forum selection clause for their state of incorporation.

By the way, I would not necessarily agree that Delaware is at all a pro-defense jurisdiction. It may be on some issues; on other issues, it is not very friendly to defendants. There has been a significant rise in post-closing cases. There have been some large verdicts, there have been some significant judgments against banks. Perhaps in a run-of-the-mill merger case, it is a more friendly place for a defendant, but that's riddled with exceptions.

LARRABEE: I agree with that. Overall, Delaware is a good place to be a defendant, unless you've got a serious problem. The judges are as bright and dedicated and as hard-working as they can be, and they know the law as well as any judges in the country, and they do have high expectations for corporate governance. They just like to weed out claims that they don't find meritorious at the earliest possible moment. If that's not your case, if you do have a meritorious claim, it's not a bad place to be a plaintiff.

KRUSE: How would you compare Delaware to California on derivative actions?

ETH: If you have a run-of-the-mill case that you could call a "strike suit," Delaware would throw it out in a minute, and it could take two or three years to throw it out here in California. It may not even get thrown out, or at least the odds aren't quite as high.

MODERATOR: How are courts dealing with the issue of cases being brought in multiple jurisdictions?

ETH: Joy [Kruse] mentioned that there are other kinds of cases brought in multiple jurisdictions and there are ways of coordinating. One typical approach in deal cases and derivative cases is filing a motion that says, "We don't care where this case goes forward, but it should only be in one place." Or the judges and vice chancellors in Delaware will get on the phone with a judge in California or New York and say, "Look, we've both got this case, how should we handle it?" If you're all in the federal system, you can have motions to transfer. It's tougher state-to-state, but there are ways to do it.

STONE: The Chancery Court in Delaware has sometimes deferred in favor of other states when it was right to do so. And they have taken cases where California or other judges have deferred. The key in forum motions is to say that, as a defendant, you don't care where you litigate, and that the judges should talk to each other. I'm not aware of any judicial canon that prevents judges from talking to each other about their workload or where cases ought to be litigated. And I think that's essentially what happens: They talk to each other. I don't know if Joy [Kruse] has had the experience of judges talking to each other about cases across jurisdictions.

KRUSE: Usually when Elizabeth Cabraser is involved—she seems

to be the great facilitator for that—but yes, I've seen that happen on cases.

MODERATOR: Are there repercussions from Dodd-Frank, like the pay-to-play restrictions? I'd also be interested to hear what people have to say about the whistleblower provisions and whether they're leading to lots of tips and suits?

ETH: I would definitely like to hear how the government views that, since there's been one big award so far—$14 million—and the others average something like $50,000.

LEACH: Well, one observation I take from SEC Chair Mary Jo White's speeches is that there's a renewed emphasis on whistleblowers. She has highlighted the $14 million award. And in October, the SEC announced a $150,000 award for the sixth whistleblower to be awarded through the program. Anecdotally, on the criminal side, I've seen what seems like an increase in the number of people claiming to be SEC whistleblowers, and when they do, it can impact how the witness is viewed and raise discovery issues.

Whether it's going to provide work for particular firms I can't predict, but it's a significant development for civil and criminal prosecutors because the way to build these cases is to have people from the inside who were there, who know what happened. And to the extent we can encourage them to come forward, that's very important.

LARRABEE: I wonder how much real help the whistleblower program is going to be because in my view it materially decreases incentives for internal corporate compliance reporting.

LEACH: I think the jury is still out on that. That was a worry expressed when the program was being set up. But one of the things Chair White noted recently was that most in-house whistleblowers that go to the SEC went the internal route first. There's no desire to frustrate genuine internal controls and internal whistleblower programs. Regulators are very sensitive to encouraging internal compliance programs and making sure those work.

ETH: The problem is that there's no exhaustion requirement. You don't have to report internally first to be a whistleblower. And there are a lot of incentives not to report internally at all—and just to be the first filer with the SEC.

LARRABEE: 14 million incentives.

MODERATOR: What do you see as the future of the SEC under Chair White? What's going to change?

LEACH: Well, three things I've observed from some of the public comments from Chair White: a renewed emphasis on requiring admissions in certain cases, which has been done a couple of times, mostly by entities but at least once with an individual, and the admissions have been remarkably fulsome from my perspective. The other thing I take away from some of her comments is that the SEC is ready and able to go to trial when it needs to. Finally she also has spoken about taking a "broken windows" approach to enforcement, much like Mayor Rudolph Giuliani's administration did in New York City. So you may see that what could be perceived as minor infractions become the subject of enforcement actions, with the idea being that you should fix the broken window now, otherwise there will be a perception of a lax enforcement environment, where minor violations won't be dealt with, and that can lead to bigger problems.

KRUSE: In a recent speech she gave at the D.C. Court of Appeals [the Fifth Annual Thomas A. Flannery Lecture], she made a point of saying that in the last three years the SEC's success at trial is approximately 80 percent. I think she was trying to send a signal that—contrary to some of the bad press the SEC was getting on some credit crisis cases—its record is good. And she expressed a great willingness to have more trials.

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>
> –ROBERT LEACH

LARRABEE: They're going to have to have more trials because our experience with the SEC in the last 12 or 24 months is they are decidedly more aggressive. In addition to the trends we were talking about, in every matter we have now, there's a discussion about what individual, in addition to the company or fund or whatever, will be targeted to pay some penalty.

That focus on individual liability is a pronounced philosophical shift that I see as permanent. We also see much more coordination between exam staff and enforcement staff. It used to be the exam staff came in and conducted an SEC examination, things went pretty well, absent them uncovering something quite meaningful. Now, the compliance examiners and enforcement not only coordinate, they look at things at the same time. When it comes time to deal with deficiency letters from the SEC, the enforcement staff can be involved. They're using the exam staff essentially as an investigative arm for enforcement.

They've also been very successful in their specialized units. They've now focused on particular industries and hired high-quality people who know the industries that are targeted. The asset management business is one, maybe the largest now from the SEC perspective. Chair White gave a speech recently about what keeps her up at night. She said, "Well, we were only able to examine 8 percent of the registered investment advisers with our resources." Being on her list of what keeps her up at night is not very comforting if you're a registered investment adviser.

ETH: To some extent, this is what happens when there's a new administration at the SEC. You can go back into the '80s and at the beginning of someone's term the heat is on. The test will be whether the SEC's new approach lasts for just the first six months, or if there is follow-through.

Regarding the broken-windows idea, what defense lawyers really worry about is "stop-and-frisk"—that the SEC could say, "There may be a problem with this company, so turn over all your documents and all your forensic images, and I want the head of your audit committee here next week."

The last point I wanted to make is—Matt [Larrabee] was talking a little bit about focus and task forces—and recently Andrew Ceresney, co-director of the SEC's Division of Enforcement, was very candid and said that the SEC let accounting fraud sit out there for a while. Enforcement was more focused on mortgage-backed securities and CDOs and Wall Street and Ponzi schemes. Good old-fashioned accounting fraud by issuers wasn't a real priority. Apparently there's now a new task force focused on accounting fraud. So Main Street companies shouldn't think the SEC is only concerned with Wall Street and the credit crisis.

LEACH: I think the observation about accounting fraud being a priority is a fair one. Co-director Ceresney recently gave an entire speech devoted to financial reporting and accounting fraud, where he highlighted the SEC's Financial Reporting and Audit Task Force, which they call the FRAud Task Force. It has 12 lawyers and accountants, who are using analytical tools to identify companies that are likely to have revenue recognition and other accounting issues.

LARRABEE: Congress will have a lot to say about whether this regime is tough only in the beginning and then goes back to what you might call business as usual. The budget request for 2014 is not small; they're asking for a $250 million increase, which would add something like 325 exam staff and 125 or 30 enforcement staff.

LEACH: Just to go back to the new financial reporting and audit task force at the SEC, it seems like it is designed at least in part to complement the specialized units the SEC created to focus on asset management, market abuses, structured products, municipal securities, and the Foreign Corrupt Practices Act, which Matt [Larrabee] mentioned earlier and which have been quite successful in leveraging the SEC's resources.

MODERATOR: Are there other recent developments, particularly those touching California practice, that deserve more of our attention?

ETH: Under Section 220 of Delaware's code and Section 1601 of California's Corporation's Code, which have been around a long time, shareholders can demand that companies provide them with certain documents. All they have to do is write a letter, and you can't bring a motion to dismiss, you can't transfer to a different forum, you can't stay it pending something else, there's no filing fee associated with it, and the letter says you have five business days to give us all your minutes and all your documents. And a public company can't say, "Well, we'll deal with one and only one of these." You can get 20—and they could be from different people, and each could send you more.

This can turn into a major annoyance, certainly for inside counsel who now have to worry about high-level documents and board-level materials that they don't want to ship out to people who write letters to them. I would be curious to hear about others' experiences with these.

> ***"I've had ... California judges [in tech cases say] shareholders have every right to see many items of information almost for any purpose the shareholders can articulate."***
>
> –PETER M. STONE

KRUSE: I mentioned to Jordan [Eth] in the break that in the *Wal-Mart* derivative case premised on the allegations about bribes, the chancellor criticized plaintiffs lawyers for not doing a Section 220 request for documents before filing (Chancellor Strine in *In re Wal-Mart Stores Inc.*, Del. Deriv. Litig., C.A. No. 17455-CS (Del. Ch. July 24, 2012)). In his mind at least, it was a very useful tool, an essential tool, for investigating your case and making your allegations as strong as possible.

STONE: We have seen more of those requests, and I think it stems in part from what Delaware courts are saying that shareholders and their counsel ought to do. I'm surprised we don't see more, even in parallel with the filing of complaints. Even after suing a company, a plaintiff has shareholder rights to seek information. I imagine defendants would resist it pretty strongly, but it's a solid tool for shareholders. I've had experience with California judges in cases involving technology companies where they think shareholders have every right to see many items of information almost for any purpose the shareholders can articulate.

LEACH: From a law enforcement perspective, I've seen a number of instances where members of LLCs, limited partners, or shareholders would invoke statutory rights or rights in bylaws and incorporation documents to try to get materials that eventually form the basis of a complaint to the SEC or U.S. Attorneys Office or FBI. More often, I see it in cases where the concern is not who's going to be the first to file, but more is this a Ponzi scheme or some other fraud. It can be a very valuable tool, and I'm surprised it isn't used a lot more.

LARRABEE: It is shocking to most general counsels and CEOs and boards how much information they might actually be required to turn over if someone asked. ■