The Massachusetts Chapter of The Federal Bar Association

Matthew C. Baltay - Editor

NEWSLETTER • MAY 2010

President's Column

Greetings!

Our chapter is still basking in the glow of the fun and successful FBA Judicial Reception we held at the Seaport Hotel on April 14th. We were fortunate to have Mayor Menino and Alan Bersin, Commissioner of U.S. Customs and Border Protection for Homeland Security, as our keynote speakers. Both speakers extolled the virtues and achievements of our honoree, Judge Richard G. Stearns. Judge Stearns told me afterward that he enjoyed the event immensely and greatly appreciates the FBA chair we presented to him at the reception.

We had the pleasure of welcoming Carmen Ortiz as the new United States Attorney for the District of Massachusetts, at a reception on March 1, 2010. Many thanks to our sister bar associations who co-sponsored the event. They include The Hispanic National Bar Association, The Massachusetts Academy of Trial Attorneys, The Massachusetts Association of Hispanic Attorneys, The Massachusetts Bar Association, The Massachusetts Defense Lawyers Association, The South Asian Bar Association of Greater Boston and The Women's Bar Association.

The FBA's Breakfast Lecture Series has been active, interesting and well received this year. Our CLE chair, Mary Jo Harris, has arranged three engaging presentations by members of the district court. They have included:

1. A program entitled, "Court awarded attorneys' fees: Practical Considerations" by Judge Woodlock,
2. A discussion about Class Action Litigation presented by Judge Young and Judge Saris, and
3. A discussion of Rule 11, both as a sword and a shield, by Judge Stearns.

We are lucky to practice in a judicial district where the judges, clerks and court personnel actively collaborate with and support the FBA. Chief Judge Wolf and his colleagues have supported the FBA's CLE, community service and social events throughout the year. I know I

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Photos from the April 14, 2010 Judicial Reception Honoring Judge Richard G. Stearns

Judge Lynch and Judge Stearns

Chris Kenney and Judge Stearns

Scott Lopez, David Milton, Howard Friedman

speak for all FBA members when I say we greatly appreciate their generous devotion of time and talent to the bar. Please take the time to read the instructive and interesting articles in this edition of the newsletter. Our editor, Matthew Baltay, deserves great credit for producing such a high quality periodical for our members.

We are in the process of upgrading our chapter's website, in junction with an overhaul of the FBA's National website. This coordinated effort will help us to communicate better and in a more interactive fashion with our members. Please check the website for news, coming events and chapter activities. I promise that if you get involved you will get more out of your FBA membership than you put into it!

Best regards,

Chris Kenney
FBA President, Massachusetts Chapter

Another Successful "Breakfast with the Federal Bench"

Lisa M. Tittemore, Partner, Sunstein Kann Murphy & Timbers LLP

As part of our Breakfast with the Federal Bench Series, on May 5, 2010, the Massachusetts Chapter of the FBA welcomed the Honorable Richard G. Stearns as our speaker at a breakfast meeting held in the Judicial Dining Room at the Moakley Federal Courthouse. While the topic of the program was the "Availability and Practicality of Rule 11 Sanctions," the format of the meeting, which allows members of the bar to literally sit around the table with the federal judiciary, once again lent itself to a fascinating and open dialogue between bench and bar. In addition to Rule 11, the discussion also included Rule 37 as an option for sanctions, the increased potential for Rule 12 to "knock out" frivolous cases in light of the U.S. Supreme Court's rulings in the *Iqbal and Twombly* cases, the impact increased economic pressures may have on these issues, and more! The FBA is extremely appreciative of the participation of the federal judiciary in these programs, and extends its thanks to Judge Sterns for this excellent discussion.

Young Lawyers Division Update

The Executive Board of the YLD is excited to report that its efforts to recruit and encourage young lawyers (those under 36 years of age or admitted to the practice of law for less than three years) to increase their participation is taking a successful path. We have seen an increase in membership, and hope to continue to increase this number as well as participation. So please, if you are eligible to join us, do so. We are a fun bunch and really want to become an organization which serves you and your needs. Here are some examples.

Recent Activities
March 4, 2010 – Seminar:

State v. Federal Practice – Distinctions of Practice in Federal Court. Interactive discussion with the Honorable William Young, Ginny Hurley (U.S.D.C. Training Coordinator), ACC Elizabeth Bostwick (City of Boston), and AUSA John Wortmann, where the differences in state and federal practice both in the civil and criminal contexts were discussed. We also had the privilege of getting a tour of the Judge's chambers We had a really good showing of present FBA and YLD members, as well as some outside invitees who will hopefully join the FBA/YLD soon.

March 11, 2010 – Social Reception

The event allowed the attendees to meet the YLD Board, and provide them ideas for future programs. The crowd consisted of mostly new recruits. The firm of Robins, Kaplan, Miller & Ciresi, LLP, provided a beautiful space, lots of good food and a great selection of spirits.

In the works:

1. Co-Sponsored Event with the Massachusetts Association of Criminal Defense Lawyers (late spring/early summer).
2. Evidence Seminar – "crash course" on evidence and how to introduce it at trial.
3. Meet & Greet with the First Circuit Court of Appeals.
4. Reception for the new Magistrate Judge, Jennifer Boal.
5. Social for Summer Interns/Associates (mid/late summer).

If anyone (law students included) is interested in joining the YLD, please contact a board member:

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Note: *Raquel Ruano, our treasurer, is out on maternity leave and hence the reason we are not listing her as a contact. Congratulations to Raquel and family!*

Rwanda Then/Now Photographic Exhibit in the Moakley Courthouse

There is now an excellent photographic exhibit in the Moakley Courthouse titled "Rwanda Then/Now." Chief Judge Wolf is in the process of planning a program and reception around this exhibit for June 15, 2010 from 6 - 8pm. The Federal Bar Association is a co-sponsor of this program. The program will involve a panel discussion of the genocides in Rwanda and Darfur, and their meaning for Boston today, particularly for the gang violence here. Our goal is to attract a large and diverse audience of lawyers and members of the community. Please join us for this important and interesting program.

Supreme Court Adopts "Nerve Center" Test for Citizenship of Corporation for Diversity Jurisdiction Purposes

Andrew J. Palid, Foley Hoag LLP

In a unanimous decision, the U.S. Supreme Court held that a corporation's "principal place of business" for purposes of federal diversity jurisdiction is the "nerve center" from which its officers direct, control, and coordinate corporate activities. According to the Court, the "nerve center" will typically be the corporate headquarters.

Petitioner, the Hertz Corporation, was sued by Melinda Friend and John Nhieu, on behalf of a potential class of California citizens, in California state court for alleged violations of California wage and hour laws. Hertz filed a notice of removal to federal court based on diversity of citizenship. The company asserted that it is not a citizen of California because its leadership and corporate headquarters are located in Park City, New Jersey.

Applying Ninth Circuit precedent, the Northern District of California ruled that California is Hertz's "principal place of business" because the company conducts significantly more business in California than in any other state. Accordingly, the District Court remanded the case to the state courts. The Ninth Circuit affirmed the remand order, and Hertz filed a petition for certiorari.

The Supreme Court granted certiorari to resolve the different interpretations that the circuits had given to the phrase "principal place of business" in the federal diversity jurisdiction statute, 28 U.S.C. §1332(c)(1).

In an opinion by Justice Breyer, the Court reviewed the history of federal diversity jurisdiction and discussed the various tests developed by the circuits to determine a company's "principal place of business." "Not surprisingly," the Court remarked, "different circuits (and sometimes different courts within a single circuit) have applied these highly general multifactored tests in different ways." Speculating that the wide divergence between the circuits may have resulted from judicial efforts to find the state where a corporation is least likely to suffer out-of-state prejudice, the Court noted "that task seems doomed to failure" and "at war with administrative simplicity."

Recognizing there is no perfect test, the Court held that a corporation's "principal place of business" for purposes of federal diversity jurisdiction is the "nerve center" from which its officers direct, control, and coordinate corporate activities. Three sets of considerations supported the Court's decision. First, the language of 28 U.S.C. §1332(c)(1) – "the State where [a corporation] has its principal place of business" – indicates that the principal place of business must be a single, prominent location within a State, as opposed to the State itself. Second, "administrative simplicity is a major virtue in a jurisdictional statute," and the "nerve center" test is comparatively easy to apply because the "nerve center" will normally be the corporate headquarters. Third, the legislative history suggests that the determination of a company's "principal place of business" was intended to be simple, not overly complex or impractical.

The Court concluded by acknowledging that there will still be hard cases (e.g., a corporation with no apparent "nerve center" in which the officers telecommute) as well as cases with seemingly anomalous results (e.g., a corporation that does the bulk of its business in New Jersey while directing operations from New York will have its "principal place of business" in New York). Nonetheless, the Court said that such results must be accepted "in view of the necessity of having a clearer rule."

First Circuit Weighs in on Test for Primary Liability Under Rule 10b-5(b) in SEC v. Tambone, 597 F.3d 436 (2010)

Andrew J. Palid, Foley Hoag LLP

On March 10, 2010, the United States Court of Appeals for the First Circuit, sitting en banc, ruled in a civil case brought by the Securities and Exchange Commission (the "SEC") that securities professionals do not "make any untrue statement," as prohibited by Rule 10b-5(b), by either (1) disseminating mutual fund prospectuses prepared by others or (2) directing the offering and sale of securities and thereby impliedly representing that the prospectuses disseminated are truthful and complete.

Defendants, James Tambone and Robert Hussey, were senior executives of a registered broker-dealer, Columbia Funds Distributor, Inc. ("Columbia Distributor"), which acted as the principal underwriter and distributor of over 140 mutual funds. The mutual fund prospectuses disseminated by Columbia Distributor contained language to the effect that market timing was strictly prohibited. In its action against Tambone and Hussey, the SEC alleged that, despite the language barring market timing transactions, the defendants knowingly permitted and/or approved of arrangements allowing certain preferred customers to engage in market timing in at least sixteen of the mutual funds.

The SEC specifically alleged that the defendants had violated section 17(a) of the Securities Act of 1933 ("Securities Act"), which allows the SEC to bring actions for , section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder. Additionally, the SEC alleged that the defendants had aided and abetted primary violations of section 10(b) and Rule 10b-5, section 15(c) of the Exchange Act, and section 206 of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-6.

In 2006, the district court (Gorton, J.) granted the defendants' motions to dismiss. The court ruled that to be liable under Section 17(a) or Rule 10b-5, pursuant to the "attribution test," the offending statements must have been made by or attributed to the defendants. Because the SEC's complaint failed to allege that the specific defendants made the misstatements themselves, or that they were attributed to the defendants, dismissal of the Section 17(a) and 10b-5 counts was required. The court also explained that to be held liable for aiding and abetting, the defendants must have actual knowledge of the underlying wrong and must have "thrown in their lot with the primary violator," Columbia Distributor. Because the complaint had not so alleged, the court also dismissed the aiding and abetting counts, and the SEC's case. SEC v. Tambone, 417 F. Supp. 2d. 127 (D. Mass. 2006) and 473 F. Supp. 2d. 162 (D. Mass. 2006).

The SEC appealed, and a divided panel of the First Circuit reversed and reinstated all counts. SEC v. Tambone, 550 F.3d 106 (1st Cir. 2008) (partially withdrawn). Judge Lipez, writing for the majority, gave a broad reading to Section 17(a) of the Securities Act of 1933, which empowers the SEC (but not private litigants) to bring actions for misstatements in the securities marketplace. The court ruled that SEC states a claim under Section 17(a)(2) by alleging that a misstatement was made, even if made by those other than defendants and that the defendants benefited therefrom. The court also ruled that Section 17(a) requires the SEC to plead defendants' negligence, not actual scienter. The court held that the SEC met its pleading burden with respect to its Section 17(a) claim and reinstated it. The court also found that the SEC's aiding and abetting claims (which are available to the SEC, but not private litigants) were adequately pleaded because the SEC alleged that Columbia Distributors issued misleading prospectuses, that the defendants themselves knew or should have known that the statements contained therein regarding the absence of market timing practices were false and defendants assisted in the wrongdoing by circulating the false prospectuses and not correcting the misstatements contained therein. Turning to the Section 10(b) and Rule 10b-5(b) claims, the court found that the SEC had properly pleaded primary violations by defendants because the defendants had a duty to confirm the accuracy of the prospectuses and by circulating them, the defendants impliedly adopted them even if the misstatements themselves were not attributed to the defendants. Judge Selya concurred in the reinstatement of the Section 17(a) claim and the aiding and abetting claim, but strenuously objected with respect to the majority's ruling on the Section 10(b) and Rule 10b-5(b) claims, characterizing the court's opinion to constitute a "radical departure" from existing law and a usurpation of legislative authority.

The defendants then filed petitions for *en banc* review, and the full court withdrew the panel opinion but ordered rehearing *en banc* only on the Rule 10b-5(b) issues. Thus, the initial First Circuit decision stands with respect to SEC actions under Section 17(a) and SEC claims for aiding and abetting liability.

The resulting First Circuit en banc decision (*SEC v. Tambone*, 597 F.3d 436 (1st Cir. Mar. 10, 2010), authored by Judge Selya and joined by Chief Judge Lynch and Judge Boudin, affirmed the district court's dismissal of the SEC's 10b-5(b) claim and rejected the SEC's expansive interpretation of Rule 10b-5(b) as inconsistent with the text of the rule and the ordinary meaning of the phrase "to make a statement," inconsistent with the structure of the rule and relevant statutes, and in tension with Supreme Court precedent.

The majority quoted Rule 10b-5(b)'s prohibition making it unlawful "for any person, directly or indirectly, . . . [t]o make any untrue statement of a material fact . . . in connection with the purchase or sale of any security." The SEC had argued that the defendants made untrue statements by disseminating mutual fund prospectuses which contained language stating that market timing was prohibited, when defendants knew that

certain preferred customers were in fact allowed to engage in market timing transactions. Although the defendants did not draft the prospectuses, the SEC argued that the defendants made misrepresentations by using the prospectuses to sell the mutual funds. The SEC also argued that the defendants impliedly represented that the prospectuses were truthful and complete because, as securities professionals, they had a "special duty" to investigate the accuracy of the prospectuses they disseminated.

The en banc majority began its analysis by reviewing the accepted dictionary definitions of "make," which include "create," "compose," and "cause." As these definitions indicate something more than mere "use" and as the words "use" and "employ" appear elsewhere in section 10(b) of the Exchange Act and Rule 10b-5, the court rejected the SEC's argument that the defendants' use of prospectuses to sell mutual funds amounted to the making of false statements for purposes of Rule 10b-5(b). Moreover, "[a]llowing courts to imply that 'X' has made a false statement with only a factual allegation that he passed along what someone else wrote would flout a core principle that underpins the *Central Bank* decision" and "blur[] the line between primary and secondary violations" of Rule 10b-5. Finally, while the majority opinion agreed that securities professionals working for underwriters have a duty to investigate the nature and circumstances of an offering, the majority nonetheless rejected the SEC's implied representation argument because it "would be tantamount to imposing a free-standing and unconditional duty to disclose." Citing *Chiarella v. United States*, 445 U.S. 222 (1980), the court noted that nondisclosure of information is only actionable under Rule 10b-5(b) when there is an independent duty to disclose arising from a fiduciary relationship between the parties.

The *en banc* majority concluded by affirming the dismissal of the SEC's Rule 10b-5(b) claim and reinstating those portions of the vacated panel judgment that reversed the dismissal of the SEC's section 17(a)(2) and aiding and abetting claims. Judge Lipez, joined by Judge Tourella dissented.

Recent Amendments to D. Mass. Local Rules

Amrish V. Wadhera, Foley Hoag LLP

Pursuant to the Statutory Time Period Technical Amendments Act of 2009 (Pub. L. No. 111-016) and after a period of notice and comment, the Judges of the United States District Court for the District of Massachusetts have approved and adopted amendments to the Local Rules. Primarily, these amendments provide for time periods in multiples of seven days. The amendments affect time computations in 34 different Local Rule subsections. The amended Local Rules became effective on December 1, 2009.

Amendments of particular importance to federal practitioners include:

- LR 16.1(c): Plaintiff now must present settlement proposal to Defendant no later than 14 [previously 10] days before the initial scheduling conference.
- LR 16.1(d): Parties to file joint discovery plan 7 [previously 5] days before the initial scheduling conference.
- LR 43.1(b)(2): Not later than 7 [previous 2] days before a party seeks to use the testimony of any witness, a party shall advise the judicial officer and opposing parties of its intent to use the testimony of a witness on a specified day.
- LR 56.1: A summary judgment opposition brief is now due 21 [previously 14] days after the summary judgment motion is filed. Furthermore, the movant may now file a reply brief as a matter of right [previously only with leave of court] within 14 days of the opposition.

The amendments also affect time computations in six Magistrate Judge Local Rule subsections, shifting all 10-day deadlines to 14-day deadlines and all 20-day deadlines to 21-day deadlines.

These Local Rules were amended to be consistent with the aforementioned federal statute which amended the Federal Rules of Civil Procedure. Note that the District of Massachusetts did not amend Local Rule 5.4(D) to be consistent with amended Fed. R. Civ. P. 6(a)(4)(A) -- all electronic filings still must be completed by 6:00 p.m. to be considered timely filed that day. A complete list of the Local Rules affected by the recent amendments, and a redline of the pre-amendment Local Rules, are available on the Court's website.

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