

OCTOBER 29, 2009

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DIRECTORS & OFFICERS

First Circuit – Maine – October 8, 2009. No D & O Coverage if Claims Fail to Seek Relief from Directors and Officers. A corporation cannot recover under a director and officer's liability insurance policy for losses stemming from judicial and administrative complaints filed against the company even though they allege wrongful conduct on the part of its directors and officers. Construing typical D & O policy language limiting coverage to losses resulting from claims made against the directors and officers themselves, the court could not extend allegations focused on the directors and officers to actual claims for relief against them.

Medical Mut. Ins. Co. Of Maine v. Indian Harbor Ins. Co., --- F.3d ----, 2009 WL 3210599 (C.A.1 (Me.))

Massachusetts – October 5, 2009. Former Astra CEO Forced to Disgorge Millions in Wages During Period of Disloyalty. Vacillating between claims subject to New York law and those governed by Massachusetts law, the state high court required an ex-CEO with a penchant for sexual harassment to refund over \$7 million in wages for the time he was disloyal to the company. During his tenure, the CEO had paid off or settled multiple sexual harassment claims and then apparently lied to the company when the media began investigating the allegations. Despite his significant contributions to the success of the company, the court would not allow the use of equitable principles to avoid complete disgorgement.

Astra USA, Inc. v. Bildman, 455 Mass. 116, 914 N.E.2d 36, 107 Fair Empl.Prac.Cas. (BNA) 682 (2009).

Utah – October 2, 2009. In Most States Shareholders in Closely-Held Corporations Owe Each Other Utmost Duty of Good Faith. In the context of close corporations, are shareholders like corporate officers and directors who owe the corporation and the shareholders collectively a duty to act in good faith and in the best interest of the corporation? Or are they like partners who owe each other individually a duty to act with the utmost good faith? The Utah Supreme Court recently weighed the majority view and the minority approach taken by business-friendly Delaware and Texas. As a matter of first impression, the court found with the majority that shareholders in closely-held corporations owe their co-shareholders the same duty of utmost good faith shared by partners. This broader fiduciary obligation for close corporation shareholders gives oppressed shareholders alternate remedies such as an equitable claim for dissolution or a claim for breach of fiduciary duty.

McLaughlin v. Schenk, --- P.3d ----, 2009 WL 3151201, 2009 UT 64 (Utah 2009).

FIDUCIARY/PENSIONS

New York – October 16, 2009. Enron Challenges Safe Harbor for Alleged Settlement Payments to Creditors. Brokerage firms Alfa and ING claimed safe harbor under the Bankruptcy Act for their transfer of commercial paper under which Enron was the debtor to J.P. Morgan on the eve of maturity. The court concluded that extraneous facts (notably whether JP Morgan was acting as an agent or a principal) affect the construction of the bankruptcy provision. The court has certified for appeal the question, hotly contested by the SEC, of whether safe harbor extends to transactions in which commercial paper is redeemed by the issuer prior to maturity using the customary Depository Trust Co. mechanism for trading in commercial paper, without regard to extrinsic facts about the nature of the

Redemption, the motive behind the Redemption, or the circumstances under which the payments were made. The SEC contends that the safe harbor applies to the settlement of any transaction in a security effected through a broker or financial institution. To be continued. .

In re Enron Creditors Recovery Corp., 2009 WL 3349471 (S.D.N.Y.)

EPL- LABOR & EMPLOYMENT

Ninth Circuit – California – October 22, 2009. Pay Change After Shift Change Does Not An FLSA Violation Make. An employer prevailed in an action alleging that its use of different base hourly rates violated the Fair Labor Standards Act by denying unionized employees overtime pay. The court found that when an employer changes its shift schedule to accommodate its employees' scheduling desires, the mere fact that pay rates changed between the old and new scheduling schemes in an attempt to keep overall pay revenue-neutral, does not establish a violation of the FLSA's overtime pay requirements.

Parth v. Pomona Hosp. Med. Center, 08-55022 (Cal.).

California – October 19, 2009. Supervisors Subject to Emotional Distress Claims Arising Out of Wrongful Termination. Allegations that supervisors knew that an employee was susceptible to injury through mental distress because of the economic hardship resulting from their involvement in his wrongful termination are enough to support a claim against supervisors individually. The supervisors were accused of disregarding the employee's concerns about safety violations, then falsely charging him with violating work rules, conducting a bogus investigation, and drafting and signing his letter of termination.

Gonero v. Union Pacific R. Co., 2009 WL 3378987 (E.D. Cal.)

Tennessee – October 14, 2009 – Non-Employers May be Liable for FLSA Violations. Following their employees' complaints about pay, an employer allegedly had the employees arrested and ultimately reported to immigration authorities. The employees brought an action against both the employer and the county law enforcement for violations of the Fair Labor Standards Act as well as civil rights violations. The court refused to dismiss all claims finding the plaintiffs sufficiently alleged that the county defendants were working in concert with the employer when they arranged to have the plaintiffs arrested and then reported them to immigration because of complaints about pay.

Montano-Perez v. Durrett Cheese Sales, Inc., 2009 WL 3295021 (M.D. Tenn.)

COVERAGE/BAD FAITH

Wisconsin – October 20, 2009 – Insured's Failure to Report Acrimony Amongst Officers Does Not Void Coverage. Even though the officers of a family-owned company were at each other's throats for years, this did not trigger their duty to disclose a potential claim arising from their relationship in applying for D & O insurance. Further acknowledging tension amongst state and federal courts, the court played it safe sticking to precedent that when an insurer wrongfully refuses to defend on the grounds that a claim against its insured is not within the coverage of the policy, the insurer cannot later contest coverage, but is liable to the insured. However, some courts worry that this allows the insured to prevail "even if he could not have established coverage had he had the world's best lawyer."

Link Snacks, Inc. v. Federal Ins. Co., --- F.Supp.2d ----, 2009 WL 3380383 (W.D. Wis.)