

AUGUST 10, 2009

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- Fiduciary / ERISA
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FINANCIAL INSTITUTIONS

Eleventh Circuit – Florida – July 21, 2009. No Vicarious Liability for Corporate Officers and Employees Under Commodities Regulations. The Commodity Futures Trading Commission (CFTC), the independent federal regulatory agency that administers and enforces the Commodity Exchange Act (CEA) and its regulations, sued a Florida corporation and three of its officers and employees which solicited members of the public to invest and trade in foreign currency options and advised those members on trading. Also named was the world's largest non-bank futures commission merchant (FCM). Finding that the FCM was not vicariously liable for the actions of the corporation and its officers and employees, the court held that under either the CEA or CFTC rules/regulations, the test for vicarious liability was common law agency which required consent to the agency by both the principal and agent and control of the agent by the principal.

Commodity Futures Trading Com'n v. Gibraltar Monetary Corp., Inc., --- F.3d ----, 2009 WL 2150900 (C.A.11 (Fla.)).

Delaware – July 24, 2009. Influential Delaware Chancery Court Gives Insight On Duties of Loyalty Regarding Right of First Refusal Agreement Between Corporation and Its Shareholders. Following the sale of a company, a stockholder filed an action against the company, certain of its directors and officers, and two private equity investors who bought shares. The stockholder claimed that in deciding whether or not to exercise the right of first refusal and in requesting that extra shares be made available for purchase, the corporate insiders should have, but did not, disclose the asset sale. The court held that performance of a stockholder agreement giving corporations or corporate insiders rights of first refusal over other stockholders' shares is not governed by any generalized fiduciary duty of disclosure like that known to exist when a corporation asks its stockholders to engage in some discretionary action (such as granting a proxy, voting, or tendering shares). Likewise, such performance is not governed by any generalized application of the duty of loyalty. Rather, the contours of such an insider's duty to the selling stockholder is defined by the terms of the agreement itself and the normal prohibitions against fraud. In transactions made outside the confines of such an agreement, insiders should expect to observe the normal obligations of fiduciaries not to engage in transactions with stockholders while in the possession of material information known to be unavailable to the sellers.

Latesco, L.P. v. Wayport, Inc., Not Reported in A.2d, 2009 WL 2246793 (Del.Ch.)

EPL – LABOR & EMPLOYMENT

Massachusetts – August 4, 2009. Service Charges Go to Workers Under Interpretation of State Wage Law. In a decision favoring service employees, the Supreme Judicial Court of Massachusetts has ruled that workers must be able to keep their tips even if they technically work for a contractor that a company hires for service work. This ruling supports a challenged 2008 jury verdict of \$325,000 in a class action brought by nine Boston skycaps (who technically worked for an American Airlines subcontractor) claiming that American Airlines' \$2 per bag curbside check-in fee at Logan Airport violated the state's tips laws.

DiFiore v. American Airlines, SJC-10313, 2009 WL 2357944 (Mass.).

Fifth Circuit – Louisiana – July 21, 2009. Guest Workers Not Entitled to Expense Reimbursement Under FLSA. Guest workers for a hotel operator brought a collective action under the Fair Labor Standards Act (FLSA) seeking reimbursement of costs and expenses associated with traveling to U.S. and obtaining visas. Considering this issue for the first time, the court found that an FLSA provision allowing an employer a credit toward its minimum wage obligations in the form of the reasonable cost of furnishing employees with board, lodging or other facilities did not require the employer to reimburse guest workers for claimed expenses. Also, the FLSA and its regulations did not require an employer to reimburse guest workers for expenses of obtaining visas or for their inbound transportation expenses. As to the

fees the workers paid to foreign recruitment companies, they were not considered “kick-backs”.

Castellanos-Contreras v. Decatur Hotels, LLC, 2009 WL 2152622 (C.A.5 (La.)).

Ninth Circuit -- Nevada – July 27, 2009. Managers Not Liable for Unpaid Wages Under State Labor Law. In a claim brought by employees and their union, the court considered an individual manager’s obligation to pay unpaid wages under state law. Answering this novel question in the negative under state law, the court did find that the individuals who were part owners and/or responsible for handling labor and employment matters for the employer, the chairman and chief executive officer, and the chief financial officer who had responsibility for supervision and oversight of cash management could be on the hook for unpaid wages under the FLSA despite the firm’s filing for liquidation in bankruptcy.

Boucher v. Shaw, 2009 WL 2217517 (C.A.9 (Nev.))