THE SEC'S ROLE IN PUBLIC COMPANY BANKRUPTCY CASES WHERE THERE IS A SIGNIFICANT ENFORCEMENT INTEREST

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INTRODUCTION

The United States Securities and Exchange Commission ("SEC") protects investors and maintains the integrity of the securities markets through its role as the protector of the interests of public investors. Courts have long recognized the unique and important role of the SEC in public companies during their bankruptcy proceedings.[1] In addition, Congress has expressly recognized the role of the SEC by providing that it has a right to be heard "on any issue" in a bankruptcy case, although it limited that right by restricting its ability to appeal from adverse decisions.[2] This role has traditionally focused on reviewing disclosure and reorganization plan-related issues and resolving issues surrounding the issuance of public securities by emerging debtors. In cases where the SEC has an enforcement interest, its role is much more heightened, and debtors in such cases frequently find themselves subject to greater scrutiny.

Since 2000, the SEC has become a much more active participant in the bankruptcy courts of America. In "mega-cases" such as Enron and Worldcom, the SEC has emerged as an important party in interest. This article discusses the role of the SEC in various stages of a bankruptcy case, including a discussion of some of the common issues raised by the SEC or other parties related to the SEC's involvement.

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THE SEC'S ROLE IN THE EARLY STAGES OF THE CASE

In the early stages of a bankruptcy case, the SEC staff and its attorneys will assess whether public investors are fairly represented in bankruptcy case. In some cases the SEC will assist the Office of the U.S. Trustee ("UST") in the selection of creditors to sit on the official committee of unsecured creditors to ensure that public bondholders are adequately represented. In all cases of interest to the SEC, the SEC's financial analysts will evaluate the debtor's financial condition to ensure that it is viable on a going forward basis. The SEC staff attorneys will review the composition of the creditors' committee and the likelihood that public investors will have any opportunity to receive a distribution from the estate. If there is some possibility of such a distribution, the SEC will determine whether an equity committee should be formed,[3] and make a recommendation to the UST.

In the initial stages of a bankruptcy case, professionals will be retained by the debtors and creditors' committees. The SEC staff attorneys will review the employment applications of proposed securities counsel and bankruptcy professionals to spot conflicts of interest with victims and or security holders. For example, in *In re First Jersey Securities, Inc.*,[4] the SEC appealed a bankruptcy court decision approving the employment of a law firm as counsel to the debtor. The law firm was potentially subject to an adversary proceeding to recover a preferential transfer because it was paid prepetition for services to the debtor through the transfer of $450,000 worth of restricted securities from the debtor—$250,000 on account of its prepetition bills and $200,000 as a retainer for postpetition services. The law firm sold the stock for $250,000 and then waived the balance of the outstanding bill. The debtor then filed its petition and sought to retain the law firm as general bankruptcy counsel. The Third Circuit held that because the law firm had possibly received a preferential payment, it had an actual conflict of interest and could not be retained as debtor's counsel.[5]

If special committees are appointed, the SEC staff attorneys will evaluate whether there are conflicts of interest with special committees and their counsel and make appropriate recommendations to the UST.

During the bankruptcy case, the SEC continues to respond to investor inquiries, which in large cases can be a daunting task.

SEC ENFORCEMENT ACTIONS, THE IMPOSITION OF PENALTIES AND DISGORGEMENT, AND THE BANKRUPTCY CASE

Throughout the bankruptcy case, the SEC staff will work to ensure that any pending enforcement cases proceed smoothly as SEC enforcement actions are not stayed in bankruptcy. As most bankruptcy attor-

neys know well, the commencement or continuation of an action against the debtor that was or could have been commenced prior to the filing is not stayed if such action is brought by a governmental unit to enforce its police or regulatory powers.[6] Moreover, the enforcement of a judgment, other than money judgment, issued in furtherance of police or regulatory powers is not stayed.[7] A primary purpose of this exception to the automatic stay is "to prevent the proceedings of Bankruptcy Courts from impeding governmental exercise of police and regulatory powers."[8] This exception to the automatic stay applies to the SEC's request for monetary as well as injunctive relief. Accordingly, if the SEC is suing a debtor to prevent or stop violation of securities fraud laws, or exercising similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay. Pursuant to the exception to the automatic stay, the SEC may also freeze a debtor's assets, appoint an equity receiver, and restrain property transfers in furtherance of its regulatory powers.[9]

Throughout a bankruptcy case, SEC staff attorneys will coordinate with the debtor's bankruptcy counsel and securities counsel to ensure that all normal SEC obligations will be fulfilled and that the bankruptcy case progresses in a way viewed as consistent with the public interest. The goal of the SEC staff with regard to its participation in bankruptcy cases is always for the protection of the integrity of the bankruptcy process for victims and for security holders to ensure transparency of the debtors' operations during the bankruptcy case.

In cases where the SEC concludes that it will have a right to payment on behalf of the investors, the SEC will file protective proofs of claim for disgorgement of ill gotten gains, a civil money penalty, or both. These claims must be liquidated in the enforcement action in the district court.[10] The disgorgement remedy is an equitable remedy available only to the SEC that looks at the pecuniary gain to the defendant resulting from the defendant's conduct (it is not a measure of compensatory damages). By contrast, a penalty is calculated as either the amount of the pecuniary gain to the defendant resulting from the defendant's conduct or as a set "per violation" dollar amount multiplied by the number of violations of the federal securities laws (which violations may result from fraud, books and records violations, or violations of other provisions of the federal securities laws which have no connection to the purchase or sale of a security).

Under section 21(d)(3) of the Exchange Act, civil penalties are calculated at a set dollar amount per violation or "the gross amount of pecuniary gain to [the] defendant as a result of the violation."[11] For a corporation, the dollar amount of the "per violation" penalty from can range from $0 to $600,000, depending upon the egregiousness of the conduct.[12] Penalties

under the Securities Act of 1933 are calculated in a similar manner.[13] Furthermore, penalties can be assessed for violations of "any provision of" the federal securities laws and not just for securities fraud.[14] Penalties are not calculated as a measure of compensatory damage.

Disgorgement, by contrast, is an equitable remedy for violations of the federal securities laws.[15] It is measured by the amount of ill-gotten gain obtained by the defendant as a result of the defendant's fraudulent conduct. Like penalties, disgorgement is not calculated as a measure of compensatory damage.[16] As stated by the Second Circuit, the primary purpose of disgorgement is to deter violations of the securities laws, not to compensate investor losses. Indeed, there is no legal requirement that disgorged funds be distributed to injured investors at all.

> The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains. . . . The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits. Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal. Thus, the measure of disgorgement need not be tied to the losses suffered by defrauded investors . . . and a district court may order disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution.[17]

In the case of corporate bad actors, such claims are general unsecured claims that are treated pari-passu with the claims of other general, unsecured creditors. Additionally, section 308(a) of the Sarbanes-Oxley Act[18] provides the SEC authority to pay monies recovered from penalties to the defrauded investors rather than depositing it with U.S. Treasury. Under the Sabanes-Oxley Act, the SEC must first petition the district court presiding over an SEC action for authority to invoke the fair funds provision and the district court must approve the request.[19]

There has been considerable controversy among members of the bankruptcy bar based on a concern that the use of section 308(a) of the Sabanes-Oxley Act arguably is inconsistent with the Bankruptcy Code's priority rules. Some creditors have argued that the Bankruptcy Code does or should prevent the SEC from distributing the proceeds of its bankruptcy claim to defrauded securities holders because that would pay those creditors when senior creditors are not paid in full. However, there is nothing unique about a governmental entity using its recovery to pay out-of-the-money claimants (i.e., criminal restitution claims, claims for abandoned property). The district court in the Worldcom case, faced with the issue of whether Section 308(a) conflicts with the Bankruptcy Code's priority scheme, held that it did not:

> Under the bankruptcy laws, the Commission's penalty claim is treated as simply another claim by one of many unsecured creditors, a group that, under the plan of reorganization presently pending before Judge Gonzalez, will generally recover about one-third of every dollar claimed. . . .
>
> As for section 308(a), while it gives the Commission the opportunity to pay any penalty it recovers to the shareholder victims rather than to the U.S. Treasury, a penalty that was premised primarily on that basis might arguably run afoul of the provisions of the Bankruptcy Code that subordinate shareholder claims below all others. As a general rule, defrauded shareholders cannot expect to recover one penny in bankruptcy; and nothing in section 308(a) suggests that Congress intended to give shareholders a greater priority in bankruptcy than they previously enjoyed.
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> This is not to say, however, that the Commission cannot give its penalty recovery to the shareholders, as section 308(a) so laudably prescribes, or that it cannot take some account of shareholder loss in formulating the size and nature of its penalty: for while the securities laws limit the size of the penalty to the amount that the company has gained from its fraud (an amount here estimated at between ten and seventeen billion dollars), that does not mean that the Commission cannot rationally take account of shareholder loss as a relevant factor in determining the size of the penalty up to that limit. What the Commission may not do, at least in a case in which the company is in bankruptcy, is determine the size of the penalty primarily on the basis of how much shareholder loss will thereby be recompensed, for this would not only be adverse to the priorities established under the bankruptcy laws but also would run contrary to the primary purposes of S.E.C. fraud penalties themselves.[20]

Thus the one published decision on point makes clear that the SEC's goal of returning money to defrauded investors trumps those concerns about bankruptcy priorities.

In the instance of individuals who are bad actors, unlike corporations, the SEC can and frequently does move to have the debts declared non-dischargeable as a debt obtained by fraud pursuant to section 523(a)(2)(A) of the Bankruptcy Code.[21] For example, in the bankruptcy case of Robert E. Brennan, the SEC dealt with a bankruptcy filed by Mr. Brennan and the SEC obtained a $75 million judgment against him for stock fraud. Mr. Brennan then filed bankruptcy to avoid paying the judgment and spent the next few years trying to hide assets from the SEC, state regulators, and the bankruptcy trustee.[22] The SEC ultimately distributed over $20 million to Brennan's victims.

Similarly, in the bankruptcy case of Paul Bilzerian,[23] the SEC sought to enforce a $32 million disgorgement order by having it held nondischargeable in the bankruptcy case. After Mr. Bilzerian was convicted of securities fraud, the SEC brought a civil proceeding to compel him to disgorge his illegal profits. This proceeding resulted in a disgorgement

order in the amount of $32 million. After that judgment was affirmed on appeal, Mr. Bilzerian filed a bankruptcy petition. The SEC commenced an adversary proceeding, arguing that the disgorgement judgment was nondischargeable as a debt for money "obtained by fraud." The SEC then moved for summary judgment arguing that Mr. Bilzerian was collaterally estopped from relitigating the issues resolved by his criminal and civil proceedings. The bankruptcy court found that the SEC had not established that investors relied on Mr. Bilzerian's fraudulent statements, one of the required elements for finding that a debt is nondischargeable, and granted summary judgment in favor of Mr. Bilzerian. On appeal, the district court reversed, holding that the SEC's arguments in the prior federal court proceeding established that the market relied on Mr. Bilzerian's representations and that that reliance was justified. The United States Court of Appeals for the Eleventh Circuit affirmed the district court, holding that all the elements of actual fraud had been established in the prior proceedings.[24]

Although the SEC may have a receiver in place, and designate the receiver to be the recipient of funds obtained through disgorgement proceedings, that does not affect its right to recover disgorgement funds from individuals pursuant to section 532(a)(2)(A). For example, in *In re Cross*,[25] the SEC sought to enforce a $6.6 million disgorgement judgment in bankruptcy. However, the disgorgement order directed the payment to an SEC receiver, rather than to the SEC. The SEC filed an adversary proceeding to have the debt declared nondischargeable, but the bankruptcy court held that the SEC lacked standing because the order directed payment to the receiver rather than the SEC. On appeal, the Bankruptcy Appellate Panel for the Ninth Circuit reversed, holding that "as the chief enforcer of the securities laws, the [SEC] should not have to depend upon the Receiver to enforce its judgments" and that "designating the Receiver as the depository was merely a procedural step done for administrative convenience."[26]

One interesting issue is the reach of section 546(e) of the Bankruptcy Code.[27] Section 546(e) shields "settlement payments" made "by or to" participants in the securities clearance and settlement system, including financial institutions, from liability under fraudulent conveyance laws. Rather, such transfers can only be recovered pursuant to section 548(a)(1) of the Bankruptcy Code,[28] which requires a showing that the transfer to be avoided was made (1) with actual intent to defraud creditors; and (2) within one year prior to filing the bankruptcy petition. The SEC has argued that leveraged buyout payments to shareholders made by a company prior to its entering bankruptcy are not subject to recovery pursuant to section 546(e).[29]

Sometimes parties seek to enjoin the SEC through settlements with third parties. For example, in *In re Home Theater Products International, Inc.*,[30] the debtor moved to approve a settlement between the estate and the debtor's principal, which settlement, among other things, purported to enjoin the SEC, pursuant to section 105 of the Bankruptcy Code[31] from pursuing its claims against the principal, arguing that such a suit would interfere with the administration of the estate. The court agreed with the SEC's position.

Sometimes debtors will seek to subordinate the SEC's claim under section 510(b) of the Bankruptcy Code. Section 510(b) mandates subordination of "a claim arising from rescission of a purchase or sale of a security of the debtor . . . [or] for damages arising from the purchase or sale of such a security."[32] However, the SEC regularly argues that section 510(b) cannot apply to an SEC disgorgement claim for two reasons. As discussed above, the SEC disgorgement remedy is equitable in nature. It is not a damages claim and it does not serve a compensatory purpose. Rather, its primary purpose is to deter violations of the federal securities laws by depriving the wrongdoer of its ill-gotten gains. In fact, the SEC's ability to seek disgorgement derives from its statutory authority to seek injunctive, not monetary, relief.[33]

Second, the SEC claim is an independent claim brought by the SEC in its own name and right pursuant to the statutory authority granted it in section 21 of the Exchange Act and Section 20 of the Securities Act to enforce the federal securities laws in the public interest. Although the SEC may exercise its discretion to ask the district court to permit it to distribute the proceeds of its claim to victims of fraud, the SEC is not legally obligated to do so and it does not stand in anyone else's shoes when it is asserting its claim. Thus the SEC argues that the SEC simply cannot be equated with a private plaintiff in a securities fraud action.

The Ninth Circuit has explicitly rejected the argument that an SEC disgorgement award is similar to a private plaintiff's damages award.[34] The court explained the difference between an SEC enforcement action and a private securities action:

> Unlike a private litigant, the Commission does not sue under section 10(b). Rather, the Commission has express authority to enforce section 10(b) and the other provisions of the 1934 Act pursuant to section 21 of that Act[[35]]. . . . Private damages actions focus narrowly on how much the individual lost as a result of the illegal conduct and whether that injury can be reasonably quantified. In contract, the Commission sues as part of its statutory mandate to enforce the federal securities laws. As such, civil enforcement actions promote economic and social policies independent of the claims of individual investors. The fact that disgorgement involves money does not change the nature of the remedy.. . . The theory behind the remedy is deterrence and not compensation. . . . *Indeed, a district court may grant the Com-*

> *mission's request for disgorgement even where no injured investors can be identified.*[36]

The court went on:

> When the Commission sues to enforce the securities laws, it vindicates public rights and furthers the public interest. . . . The entire purpose and thrust of a Commission enforcement action is to expeditiously safeguard the public interest by enjoining securities violations. The claims asserted in such an action stem from, and are colored by, the intense public interest in Commission enforcement of these laws. . . . Disgorgement plays a central role in the enforcement of the securities laws. . . . By deterring violations of the securities laws, disgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets. *Although the Commission at times may use the disgorged proceeds to compensate injured investors, this does not detract from the public nature of Commission enforcement actions: the touchstone remains the fact that public policies are served and the public interest is advanced by the litigation.*[37]

The Ninth Circuit's analysis of the SEC's disgorgement remedy is consistent with that of the Second Circuit and other circuits: An SEC disgorgement claim is not akin to a damages claim and does not depend in any way on victim losses.[38]

THE SEC'S ROLE VIS-À-VIS THE OFFICE OF THE U.S. TRUSTEE

During the bankruptcy case, the SEC will continuously coordinate with UST to evaluate whether appointment of an examiner or trustee is warranted. However, in addition to these traditional bankruptcy remedies for lack of trust in management, the SEC has other options. The SEC will evaluate whether an SEC fiduciary is necessary after bankruptcy filing. These "fiduciaries" can include an SEC receiver, a corporate monitor, or any other fiduciary provided for under federal securities laws. As part of this evaluation for publicly traded companies, the SEC staff attorneys work closely with the UST in determining whether trading procedures are fair and comport with the federal securities laws. In the Federated Department stores case the SEC submitted the seminal brief which outlines the type of information which must be in place for financial institutions to trade securities while a member of an official committee.[39] During the case, the SEC staff will also analyze the debtor's schedules of financial affairs and monthly operating reports in order to determine the extent of financial malfeasance, review creditor lists to determine whether other bad actors are asserting claims against the estate, and require the debtor to disclose in motions all material financial information that impacts creditors and equity holders.

The SEC staff will also determine whether further enforcement action is appropriate if a public company debtor is delinquent in its public filings with the SEC.

THE SEC'S ROLE DURING THE BANKRUPTCY CASE

During the bankruptcy case, the SEC staff will also continuously review the debtor's transactions with its current and former employees. Included in this process is a careful scrutiny of any proposed key employee retention plans, bonuses which purport to be in the ordinary course of business, as well as the normal compensation for those key employees. The fairness of any proposed employee and executive retention plans and bonus payments is of significant concern to the SEC, particularly where potential "bad acts" continue to be employed.

During the course of a bankruptcy case, it is not uncommon for SEC staff attorneys to meet with the debtor's management to try and evaluate whether the debtor's board of directors can fairly represent interests of creditors and security holders. In an effort to identify potential sources of recovery for investors, the SEC staff will review the terms of officers and directors insurance policies and identify covered parties. The SEC staff will also try to determine whether potential "bad actors" received preferences and/or fraudulent conveyances from the debtor, which could be recovered. If such transfers are identified, the SEC will review the cast of debtors and committees to ensure that there is a party to bring preference/fraudulent conveyance actions on behalf of the estate.

In some cases, the SEC may actually have to intervene on behalf of investors against overly aggressive bankruptcy trustees or other parties. For example, in the case of the Churchill Group, an investment firm that filed for bankruptcy in 1997, the SEC dealt with a Ponzi scheme which resulted in losses of more than $20 million to investors. The trustee appointed by the bankruptcy court filed a fraudulent conveyance action against the victims demanding the return of any monies paid to them by the debtor, in an effort to make sure that all victims received a pro-rata distribution of any monies available to reimburse investors. The SEC, in an effort to avoid further hardship for investors, tried to get the trustee to withdraw its lawsuit.[40] Ultimately, the SEC used its regulatory powers to cause a liquidation under the Securities Investor Protection Act of 1970,[41] and victims were able to recover millions of dollars.

THE SEC'S ROLE VIS-À-VIS EXAMINERS

In many cases of recent vintage, including Enron and Metropolitan Mortgage and Securities, the SEC has moved pursuant to its statutory authority under section 1109 of the Bankruptcy Code to have an examiner appointed by the UST. If the decision is made that an examiner is

appropriate, the SEC staff attorneys will coordinate with the appropriate UST and other interested parties in describing the scope of the examiners' powers. This is especially important with regard to avoiding duplication if there is a special committee and/or an SEC receiver extant. The SEC will also assist the UST in selecting appropriate candidates to serve as an examiner. This frequently involves the SEC interviewing prospective candidates, providing information on securities law experience, and other relevant factors to the UST. After the examiner is appointed, the SEC will coordinate with the examiner and/or his or her counsel and accountants to ensure that the work is appropriate and efficient. One important decision for the SEC is determining the extent to which access to SEC files or documents should be granted to the examiner and his or her professionals. The factors considered by the SEC in this determination can include: the communality of interest shared by the examiner and the SEC, confidentiality concerns, and the goal of expediting law enforcement. If SEC documents or information is provided to the examiner, the SEC may request the examiner enter into a confidentiality agreement, the scope of which can vary from case to case. The SEC will likely seek to provide input to the examiner and the bankruptcy court into the timing of the examiner's reports, to ensure the SEC has appropriate access to examiner's findings. Finally, if practicable, the SEC staff will coordinate with the examiner so that release of the report does not jeopardize the SEC's filing of any enforcement cases.

SEC PENALTIES AND OTHER REMEDIES

During the bankruptcy case, an important decision for the SEC is whether penalties and disgorgement are appropriate against the company. The SEC staff has consistently taken the position that its claims for penalties and disgorgement should not be subordinated in a chapter 11 reorganization case. However, many factors must be considered in making a decision to pursue disgorgement and penalties. For example, the SEC staff must decide whether the company's conduct justifies a punitive remedy, i.e., a penalty, and whether the company was unjustly enriched as a result of the securities fraud, which would suggest the need for a disgorgement order. If the SEC concludes the response to either of these questions is yes, then the SEC will conduct an analysis to decide the scope of those remedies, considering the following factors:

- Does the company's financial condition allow any recovery for equity holders and victims on a straight line (absolute priority) basis?
- Are bad actors recovering as creditors in the case?
- What are the relative recoveries of creditor classes if a penalty or disgorgement is imposed?

- What is the composition of the creditor body and the timing of claims?
- Would a class action or other litigation against third parties yield a favorable recovery to victims?
- Were insurance proceeds available for victims?
- What other risks, such as the debtor's inability to confirm a plan of reorganization, the company's failure to meet business projections, etc. . . are extant?

THE SEC'S ROLE IN THE PLAN CONFIRMATION PROCESS

In every case, the SEC staff attorney will review the proposed plan of reorganization and disclosure statement to ensure that the general disclosure of material information is adequate. If necessary, the SEC will object to any illegal plan provisions such as third party releases and issuance of securities that violate federal securities laws and/or the Bankruptcy Code. For example, in many cases the SEC has objected to reorganization plans that attempted to obtain a release from liability for certain of the debtors' officers, directors, and other related persons arguing that the release of nondebtor third parties was beyond the discharge of liability provided for debtors in section 524(e) of the Bankruptcy Code.

The release of third parties from liability is significant to investors and therefore to the SEC because in many cases debtors seek to use the chapter 11 process to protect officers and directors from personal liability for various kinds of claims, including liability under the federal securities laws.[42]

Another issue raised by the SEC is whether a debtor's plan proposes to offer notes for sale to the public that were not covered by the exemptions from registration in sections 364(f) or 1145(a) of the Bankruptcy Code. Section 364 of the Bankruptcy Code provides (1) statutory authority for a trustee or debtor-in-possession to obtain credit during the case, and (2) an exemption from registration for certain debt securities issued pursuant to section 364(f). Section 1145(a) of the Bankruptcy Code allows a limited exemption from registration for offerings made by a debtor pursuant to a plan of reorganization for securities that are issued in exchange for prepetition claims and interests or in satisfaction of a postpetition administrative claim. This exemption was intended to facilitate the reorganization process by allowing debtors to raise working capital funds during the chapter 11 case or to settle claims of creditors at plan confirmation.

An example of a case where the SEC raised this argument is *In re Trade Tech American, Inc.*,[43] where the debtor proposed to fund its postpetition operations through the issuance and sale to the public of up to $5.5 million in unsecured certificates of indebtedness. Although the certificates stated

that they were not convertible, supporting document showed that, as an administrative claim, they might have been convertible into new common stock of the reorganized entity. The SEC took the position that the offering did not qualify for an exemption from registration under sections 364(f) or 1145(a) of the Bankruptcy Code because (1) the notes were, in effect, convertible into common stock of the reorganized entity; and (2) the primary purpose of the note offering was to provide funding for the reorganized entity's operations after plan confirmation.

The SEC argued that (1) section 364, which is limited to debt securities, was not applicable because the certificates were to be marketed as equity securities; and (2) section 364, which provides for obtaining credit for administrative expenses of the estate during reorganization, was not applicable to financing for operations after the plan has been confirmed. In this case, substantially all of the offering proceeds were to be used by the reorganized debtor after confirmation of the plan. The SEC also argued that the section 1145(a) exemption cannot be used to raise new capital to fund a reorganization plan because this provision only allows a limited exemption from registration for offerings made by a debtor pursuant to a plan of reorganization for securities that are issued in exchange for prepetition claims and interests or in satisfaction of a postpetition administrative claim. The debtor subsequently withdrew its reorganization plan before the court ruled on the matter.

In some cases, the SEC objects to a debtor's reorganization plan because it provides for trafficking in a public company corporate shell.[44] Plans to which the SEC will object typically provide for the sale of all the company's assets, including the residual public shell corporation, in order to fund limited cash payments to creditors in release and discharge of their claims. In objecting to these plans of reorganization, the SEC argues that they violate section 1141(d)(3) of the Bankruptcy Code, which provides that a corporate debtor cannot obtain a discharge if it has liquidated all or substantially all of its assets and does not engage in business after confirmation. The SEC argues that the purpose of this provision is to avoid trafficking in publicly traded corporate shells as an abuse of the chapter 11 process.

In some cases, the SEC objects to a provision of the debtors' plans that proposed the issuance of new unregistered securities to raise capital to fund the plans, unless the proponents make a substantial showing that the value of the interests being exchanged exceeds the value of the fresh capital being raised.[45] Typically, debtors rely on the exemption from registration in section 1145 of the Bankruptcy Code, which provides an exemption from the registration requirements of the federal securities laws for securities issued principally in exchange for a claim against, or interest in, the debtor, and partly for cash or property. The SEC argues

that debtors should only use section 1145 as an exemption from registration for a transaction aimed at satisfying existing obligations and interests and not as a means for avoiding the registration requirements when raising fresh capital. Thus the SEC argues that in order for the rights offerings to fall within the section 1145 exemption, the value of the interests tendered must be greater than the amount required to be contributed by interest holders receiving postreorganization common stock under the plans.

Finally, the SEC will review the plan to confirm that payment of the SEC's claims is provided for in the plan.

SIGNIFICANT RECENT CASES DEMONSTRATING SEC'S ROLE

Enron Corporation[46]

In the Enron case, the SEC was a very active party in interest.

The SEC appeared early in the case and objected to the continued retention of various officers. For example, the SEC objected to the employment of a Chief Executive Officer, who the debtor proposed to retain postpetition, as an independent contractor, without any fiduciary duty to estate, with the promise of a $5 million success fee approved up front, and who was given the ability to negotiate a plan with current and or former clients and or investors.[47] The SEC's position was that the purported retention provided no accountability by the executive. Ultimately, the contract was restructured to make certain that appropriate fiduciary duties were assumed.

The SEC also objected to a proposed key employee retention program which enabled unnamed key employees to keep large bonuses and waived preference claims against them.[48] The proposed retention plan would have provided more than $130 million in incentive payments to more than 1,200 "key" employees. The SEC objected on the basis that the names and exact amounts to be paid to each person were not disclosed and that the public interest required that parties to any fraud should not be included.

The SEC joined in the motion filed by some creditors for the appointment of an examiner[49] and played an integral role in crafting the order appointing the examiner and describing the scope of his duties, as well as participating in the exhaustive search for a suitable examiner.[50] Inherent in this was the SEC's evaluation that a trustee would not be necessary in the case if the examiner's role was adequately defined. Once the order regarding the appointment of an examiner was settled, the SEC assisted with selection of the examiner and, after his selection, coordinated closely throughout the examination with the examiner and his professionals.

During this case, the SEC moved to protect an $8 million settlement payment from Michael Kopper from litigation by creditors' committee.[51] Here the SEC obtained a judgment from Kopper, a former Enron executive, as part of a plea bargain. The creditors' committee filed a suit, asking that the disposition of the money be decided by the bankruptcy court hearing Enron's bankruptcy case. The creditors argued that the money, which was allegedly stolen from Enron, should be repaid to the estate and distributed along with all the other assets according to the Bankruptcy Code. The SEC argued that the matter should have been heard in the appropriate court where the matter was pending, rather than the bankruptcy court. The matter was settled and Enron's defrauded bondholders were permitted to make claims against the Kopper monies.

Also during the case, the SEC continuously evaluated the structure of proposed third party settlements, always giving adequate consideration to the bankruptcy process. For example, two members of the original creditors' committee settled SEC actions against them for their role in structuring illegal Enron transactions.

Finally, during this bankruptcy case, the SEC filed a proof of claim which it ultimately withdrew because Enron was liquidated and the SEC had collected hundreds of millions of dollars in its enforcement cases against financial institutions that were, allegedly, part of Enron's fraud.

WorldCom[52]

The Worldcom bankruptcy case involved one of the largest accounting fraud cases in American history. The amounts realized by Worldcom because of its fraud were estimated at between $10 and $17 billion. Losses to shareholders were estimated at more than $200 billion. In addition to the bankruptcy case, there were class action cases filed by investors, criminal cases brought against former officers and directors,[53] and an enforcement action brought by the SEC.

In the enforcement action, the SEC moved for the appointment of a corporate monitor. Worldcom's management was receptive to the appointment and worked closely with Richard Breeden, after he was selected. The role of the corporate monitor, who is still in place, is to work with management. As part of his mandate from the district court, the corporate monitor had veto power over all extraordinary corporate expenditures including the professional fees of Worldcom's bankruptcy attorneys, investment bankers, and restructuring experts.

The SEC staff continuously reviewed Worldcom's financial condition throughout the case, including evaluating creditor recoveries with or without an SEC penalty, assessing potential recoveries from third par-

ties, analyzing Worldcom's business plan for ongoing operations, and reviewing sources of available funding to pay for an SEC claim.

The SEC filed an unliquidated claim in the Worldcom case. In the end, the SEC entered into a settlement which called for a penalty of $2.25 billion, which resulted in the SEC obtaining $500 million in cash plus $250 million in stock in the reorganized debtor (known as MCI) as a penalty settlement. The SEC was also able to structure a plan for victim compensation. This settlement was approved by both the bankruptcy and district courts.[54]

In determining the penalty to be paid by Worldcom, the SEC carefully considered the government's power to compel the liquidation of the company. Worldcom's competitors, including Verizon and AT&T, urged that the SEC do so, arguing that Worldcom should not benefit from its malfeasance. However, the SEC decided that Worldcom had made enough progress in its efforts to change its corporate culture and dismiss wrongdoers and that causing the liquidation of the company, with the impact on more than 50,000 employees and thousands of investors, was inappropriate and unnecessary and it decided not to block the reorganization sales.

The SEC was also an active participant in Worldcom's plan process. SEC staff attorneys reviewed objections by creditors to consolidation of the various debtors' assets and liabilities for the purpose of assessing the impact on the SEC settlement. In the end, the SEC was able to ensure that Worldcom's plan provided adequate funding for the SEC settlement and left Worldcom money to reorganize.

Peregrine Systems, Inc.[55]

In the Peregrine case, the SEC immediately reviewed the debtor's operations and then met with the debtors' new management, creditors' committee, and the debtor's financial advisors.

The SEC filed an unliquidated proof of claim for disgorgement and penalties to recover the proceeds of fraudulent securities offerings.

During the plan confirmation process, the SEC evaluated recoveries to victims of securities fraud under various financial projections and assessed whether the debtor's financial projections were realistic. During the course of a highly contentious dispute between the debtors and the creditors' committee, the SEC provided input in mediation, participated in valuation hearings dealing with competing reorganization plans, and assessed the likely recoveries on third party claims under the two plans.[56]

A review of the debtor's internal controls was conducted during the case to ensure that ongoing securities fraud was not occurring, and the SEC ultimately determined that because the proposed plan provided

substantial value to the victims of securities fraud, who were primarily bondholders, imposition of a penalty and/or disgorgement was not warranted. However, as a condition to not opposing the confirmation of the plan, the SEC required the debtor to retain an accounting consultant to ensure that the fraud would not be repeated.[57]

CONCLUSION

The SEC has a statutory role to represent and defend the rights of defrauded investors in bankruptcy cases. In recent cases such as Enron and Worldcom, the SEC has shown that it will be an active participant in the chapter 11 process. This role is certainly likely to increase in the future as the SEC pursues its goal of protecting public investors.

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1. In re Commonwealth Oil Refining Co., Inc., 461 F. Supp. 284, 286, 5 Bankr. Ct. Dec. (CRR) 93, 19 C.B.C. 525, 27 Fed. R. Serv. 2d 1042 (W.D. Tex. 1978) ("The Commission thus has an interest in the [bankruptcy] proceedings through its role as protector of public investor interests. . .To deny the Commission the right to intervene generally in a corporate [bankruptcy proceeding] would deny representation to the public security holders of the corporation and preclude protection of their interests.").

2. Section 1109(a) of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (the "Bankruptcy Code") provides that: "The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case." 11 U.S.C.A. § 1109(a).

3. See, e.g., In re Hamburger Hamlet Restaurants, Inc., Case No. SV 95-19653 et al. (Bankr. C.D. Ca.).

4. In re First Jersey Securities, Inc., 180 F.3d 504, 509, 34 Bankr. Ct. Dec. (CRR) 638, Bankr. L. Rep. (CCH) P 77940 (3d Cir. 1999).

5. In re Bressman, 214 B.R. 131 (Bankr. D. N.J. 1997) (sustaining SEC's position that a debtor could not transfer the majority of his assets to his bankruptcy attorney as an "earned on receipt" retainer).

6. 11 USC § 362(b)(4); S.E.C. v. Brennan, 230 F.3d 65, 71, 36 Bankr. Ct. Dec. (CRR) 248, Bankr. L. Rep. (CCH) P 78298 (2d Cir. 2000). Section 362(b)(4) of the Bankruptcy Code provides in relevant part as follows: "(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay . . . (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . police or regulatory power." 11 U.S.C.A. §362(b)(4).

7. 11 U.S.C.A. §362(b)(5).

8. Donovan v. Porter, 584 F. Supp. 202, 206 (D. Md. 1984),. See also Securities and Exchange Commission v. First Financial Group of Texas, 645 F.2d 429, 439 n.16, 7 Bankr. Ct. Dec. (CRR) 913, 4 Collier Bankr. Cas. 2d (MB) 601, Bankr. L. Rep. (CCH) P 68003, Fed. Sec. L. Rep. (CCH) P 98001 (5th Cir. 1981) (appointment of receiver in SEC action against bankrupt company "is consistent with the purpose served by the governmental unit exemptions: to permit the pursuit of actions to protect the public health and safety, and thereby avoid making the bankruptcy court a haven for wrongdoers.").

9. S.E.C. v. Brennan, 230 F.3d 65, 71, 36 Bankr. Ct. Dec. (CRR) 248, Bankr. L. Rep. (CCH) P 78298 (2d Cir. 2000) ("It is well established that the governmental unit exception of § 362(b)(4) permits the entry of a money judgment against a debtor so long as the proceeding in which such a judgment is entered is one to enforce the governmental unit's police or regulatory power.") (emphasis added). See also Securities and Exchange Commission v. First Financial Group of Texas, 645 F.2d 429, 437-40, 7 Bankr. Ct. Dec. (CRR) 913, 4 Collier Bankr. Cas. 2d (MB) 601, Bankr. L. Rep. (CCH) P 68003, Fed. Sec. L. Rep. (CCH) P 98001 (5th Cir. 1981) (SEC's continuing civil fraud action, including motion for preliminary injunction and for appointment of receiver to take control over corporate defendant's assets, was excepted from automatic stay); S.E.C. v. Wolfson, 309 B.R. 612, 619 (D. Utah 2004) (section 362(b)(4) excepts from the automatic stay SEC actions that seek to obtain money judgments for disgorgement of ill-gotten gains); S.E.C. v. Bilzerian, 131 F. Supp. 2d 10, 14, Fed. Sec. L. Rep. (CCH) P 91310 (D.D.C. 2001), aff'd, 75 Fed. Appx. 3 (D.C. Cir. 2003) (section 362(b)(4) permits a court to "go so far as to enter a money judgment"); S.E.C. v. Towers Financial Corp., 205 B.R. 27, 30-31, Fed. Sec. L. Rep. (CCH) P 99418 (S.D. N.Y. 1997) (SEC's civil action seeking disgorgement and injunctive relief excepted from automatic stay); In re Bilzerian, 146 B.R. 871, 873, 23 Bankr. Ct. Dec. (CRR) 965, Bankr. L. Rep. (CCH) P 74993, Fed. Sec. L. Rep. (CCH) P 97043 (Bankr. M.D. Fla. 1992) ("While there is no question that the automatic stay provisions prevent the SEC from attempting to enforce any disgorgement award, this Court is satisfied that the mere fixing of the award is well within the provisions of 11 U.S.C.A. §362(b)(4).").

10. Pursuant to section 27 of the Securities Exchange Act of 1934 ("Exchange Act"), the United States district courts have exclusive jurisdiction over violations of the Exchange Act and the rules and regulations promulgated under the Exchange Act. 15 U.S.C.A. §78aa.

11. 15 U.S.C.A. §78u(d)(3)(B).

12. 15 U.S.C.A. §78u(d)(3)(B).

13. 15 U.S.C.A. §77t(d)(2). The maximum statutory penalty is adjusted for inflation from time to time. Although the statute states the maximum penalty as $500,000, it is currently set at $600,000. See 17 C.F.R. §§ 201.1001 and 1002.

14. 15 U.S.C.A. §78u(d)(3)(A); 15 U.S.C.A. §77t(d)(1).

15. S.E.C. v. Fischbach Corp., 133 F.3d 170, 175, Fed. Sec. L. Rep. (CCH) P 90101 (2d Cir. 1997). See also Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103-04, Fed. Sec. L. Rep. (CCH) P 93344, 28 A.L.R. Fed. 781 (2d Cir. 1972) (disgorgement of ill-gotten gains is equitable remedy for violation of federal securities laws). The SEC also obtains injunctions against violations of the federal securities laws. Violations of these injunctions can subject a defendant to additional fines and penalties, and contempt citations.

16. S.E.C. v. Fischbach Corp., 133 F.3d 170, 175, Fed. Sec. L. Rep. (CCH) P 90101 (2d Cir. 1997); S.E.C. v. First Jersey Securities, Inc., 101 F.3d 1450, 1475, Fed. Sec. L. Rep. (CCH) P 99367 (2d Cir. 1996) ("Since disgorgement is a method of forcing a defendant to give up the amount by which he was unjustly enriched, it is unlike an award of damages. . . .").

17. S.E.C. v. Fischbach Corp., 133 F.3d 170, 175-76, Fed. Sec. L. Rep. (CCH) P 90101 (2d Cir. 1997) (Second Circuit upheld decision by district court to pay disgorged funds to treasury) (citations omitted).

18. 15 U.S.C.A. §§7246 et. seq.

19. 15 U.S.C.A. § 7246(a).

20. S.E.C. v. Worldcom, Inc., 273 F. Supp. 2d 431, 434, Fed. Sec. L. Rep. (CCH) P 92456 (S.D. N.Y. 2003).

21. 11 U.S.C.A. §523(a)(2)(A).

22. Raymond Fazzi, *SEC Seeks Millions of Dollars Hidden Overseas Illegally by New Jersey Man, Asbury Park Press* (May 2, 2000); 2000 WL 20717445.

23. See In re Bilzerian, Bankr. L. Rep. (CCH) P 77427, 1996 WL 885850 (M.D. Fla. 1996), aff'd, 153 F.3d 1278, 33 Bankr. Ct. Dec. (CRR) 226, 40 Collier Bankr. Cas. 2d (MB) 1312, Bankr. L. Rep. (CCH) P 77842, Fed. Sec. L. Rep. (CCH) P 90308 (11th Cir. 1998).

24. In re Bilzerian, 153 F.3d 1278, 33 Bankr. Ct. Dec. (CRR) 226, 40 Collier Bankr. Cas. 2d (MB) 1312, Bankr. L. Rep. (CCH) P 77842, Fed. Sec. L. Rep. (CCH) P 90308 (11th Cir. 1998).

25. In re Cross, 218 B.R. 76, 32 Bankr. Ct. Dec. (CRR) 274, Fed. Sec. L. Rep. (CCH) P 90209 (B.A.P. 9th Cir. 1998).

26. In re Cross, 218 B.R. 76, 79, 32 Bankr. Ct. Dec. (CRR) 274, Fed. Sec. L. Rep. (CCH) P 90209 (B.A.P. 9th Cir. 1998).

27. 11 U.S.C.A. §546(e).

28. 11 U.S.C.A. §548(a)(1).

29. In re Kaiser Steel Corp., 105 B.R. 639, 21 Collier Bankr. Cas. 2d (MB) 1203, Bankr. L. Rep. (CCH) P 73072 (Bankr. D. Colo. 1989), rev'd, 110 B.R. 514 (D. Colo. 1990), judgment aff'd, 913 F.2d 846, 20 Bankr. Ct. Dec. (CRR) 1650, 23 Collier Bankr. Cas. 2d (MB) 1403, Bankr. L. Rep. (CCH) P 73620 (10th Cir. 1990).

30. In re DAK Industries, Inc., 195 B.R. 117 (Bankr. C.D. Cal. 1996), subsequently aff'd, 170 F.3d 1197, 34 Bankr. Ct. Dec. (CRR) 74, Bankr. L. Rep. (CCH) P 77910 (9th Cir. 1999).

31. 11 U.S.C.A. §105(a).

32. 11 U.S.C.A. § 510(b).

33. S.E.C. v. Rind, 991 F.2d 1486, 1493, Fed. Sec. L. Rep. (CCH) P 97421 (9th Cir. 1993) ("[D]isgorgement of profits is one part of the Commission's power to obtain injunctive relief. . . . [T]he fact that disgorgement involves a claim for money does not detract from its equitable nature: in such an action, the court is not awarding damages to which plaintiff is legally entitled but is exercising the [court's] discretion to prevent unjust enrichment.") (citations omitted).

34. S.E.C. v. Rind, 991 F.2d 1486, 1489, Fed. Sec. L. Rep. (CCH) P 97421 (9th Cir. 1993) (affirming district court's holding that SEC disgorgement action was not subject to statute of limitations applicable to private securities actions and rejecting argument that "when the Commission sues for disgorgement it is seeking money damages in the same manner as any private plaintiff").

35. Section 20 of the Securities Act of 1933 grants the SEC authority to enforce the provisions of that Act.

36. S.E.C. v. Rind, 991 F.2d 1486, 1490, Fed. Sec. L. Rep. (CCH) P 97421 (9th Cir. 1993) (emphasis added).

37. S.E.C. v. Rind, 991 F.2d 1486, 1491-92, Fed. Sec. L. Rep. (CCH) P 97421 (9th Cir. 1993) (emphasis added).

38. S.E.C. v. AbsoluteFuture.com, 393 F.3d 94, 96, Fed. Sec. L. Rep. (CCH) P 93065 (2d Cir. 2004), opinion supplemented, 115 Fed. Appx. 105 (2d Cir. 2004), ("the primary purpose of disgorgement is to correct unjust enrichment, rather than to compensate investors"); S.E.C. v. Diversified Corporate Consulting Group, 378 F.3d 1219, 1224 (11th Cir. 2004) ("When the SEC sues to enforce the securities laws, it is vindicating public rights and furthering public interests, and therefore is acting in the United States' sovereign capacity. This is so even though the SEC seeks disgorgement as a remedy of the violation and even though the disgorged proceeds may be used to compensate the defendant's victims."); S.E.C. v. Calvo, 378 F.3d 1211, 1218, Fed. Sec. L. Rep. (CCH) P 92879 (11th Cir. 2004) (because SEC seeks disgorgement to vindicate public rights and further public interest in the United States' sovereign capacity, and not to vindicate any private interest, no statute

of limitations applies to SEC's enforcement action seeking disgorgement even though SEC may use proceeds to compensate injured victims); S.E.C. v. First Jersey Securities, Inc., 101 F.3d 1450, 1475, Fed. Sec. L. Rep. (CCH) P 99367 (2d Cir. 1996), ("Since disgorgement is a method of forcing a defendant to give up the amount by which he was unjustly enriched, it is unlike an award of damages . . ., and is neither foreclosed nor confined by an amount for which injured parties were willing to settle."); S.E.C. v. AMX, Intern., Inc., 7 F.3d 71, 74, Fed. Sec. L. Rep. (CCH) P 97817 (5th Cir. 1993), ("court ordered disgorgement payments [are] in essence an injunction in the public interest rather than a mere money judgment or debt.") (citations omitted); S.E.C. v. Wang, 944 F.2d 80, 81, 88, Fed. Sec. L. Rep. (CCH) P 96240 (2d Cir. 1991) ("Because the SEC is charged with enforcing the securities laws, it acts as a law enforcement agency when its seeks to enjoin their violation. When it succeeds . . . in obtaining both an injunction against continuing violations and an order compelling disgorgement, that order is not focused on those who have been duped out of their money. Rather, the primary purpose of the equitable remedy of disgorgement in these circumstances is to ensure that those guilty of securities fraud do not profit from their ill-gotten gains."); S.E.C. v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985) ("Once the Commission has established that a defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [the] fraud.").

39. In re Federated Dept. Stores, Inc., 191 Bankr. Lexis 288 (Bankr. D. Ohio 1991). The SEC advised the court that for financial institutions to trade, certain safeguards must be in place. They include: (1) the entity must be engaged in trading of public securities as a regular course of business and (2) the entity must have implemented procedures reasonably designed to prevent the transmission to its trading personnel of information obtained through service on an official committee. The SEC further observed that the entities traditionally able to trade under these restrictions included investment advisors, broker-dealers, pension funds, banks or insurance companies who operate as multi-service financial institutions, all of whom are likely to have skills and expertise that would be valuable to an official committee in a chapter 11 case.

40. Leslie Eaton, *U.S. Helping Fraud Victims Sued by Bankruptcy Trustee, N.Y. Times*, Aug. 4, 1999, at B6.

41. 15 U.S.C.A. §78aaa et. seq.

42. For example, the following cases are among the cases in which the SEC objected to provisions in a plan that purported to release third parties: In re Hibbard Brown & Co., Inc., 217 B.R. 41, 31 Bankr. Ct. Dec. (CRR) 1320, 39 Fed. R. Serv. 3d 1166 (Bankr. S.D. N.Y. 1998); In re Reddi Brake Supply Co., Inc., Case No. 97-11349-RR (Bankr. C.D. Cal.); In re Phoenix Information Systems, Inc., Case No. 97-2498 through 97-2500 (RRM) (Bankr. D. Del.); In re Solv-Ex Corp., Case No. 11-97-14361-MA (Bankr. N.M.); In re Substance Abuse Technologies, Inc., Case No. 97-25669-BKC-RBrR (Bankr. S.D. Fla.); and In re United States Leather, Inc., Case No. 98-24997 (Bankr. E.D. Wis). In Hibbard Brown, the court limited the releases to those persons whose contributions were found by the court to be fair. In U.S. Leather, the court allowed the releases, relying on the creditors' acceptance of the plan to justify its decision. In all of the other cases, the third-party release provisions were either deleted or modified so as to comply with section 524(e) of the Bankruptcy Code.

43. No. 98-21105 (N.D. Ill.).

44. See, e.g., In re Global Environmental, Inc., Case No. 95-12487Fm (Bankr. W.D. Tex.); In re Gulfstar Industries, Inc., Case No. 97-12044-8B1 (Bankr. M.D. Fla.); and In re Reddi Brake Supply Co., Inc., Case No. 97-11349-RR (Bankr. C.D. Cal.). Except for the Reddi Brake case, the plan provisions for the sale of the corporate shell were either deleted or the case was dismissed. In *Reddi Brake*, the bankruptcy court confirmed the SEC's plan. In overruling the debtor's objections the court recognized that, because the debtor had nego-

tiated a merger to be completed following confirmation, there was little risk of subsequent trafficking.

45. In re Marvel Entertainment Group, Inc., Case Nos. 96-2069 through 96-2077 (Bankr. D. Del.) and In re Sled Dogs Company No. 97-4-7641 RJK (Bankr. D. Minn). In Marvel, the proposed plan included an offering to existing equity security holders, expected to raise $38.5 million. In Sled Dogs, the debtor proposed to raise about $1 million by offering shareholders the right to purchase new shares. In both cases the plan canceled shareholder interests and required that the rights be exercised and payments made within 30 days after the effective date of the plan. The rights offerings in both cases were withdrawn after the SEC objected.

46. The Enron cases were styled as In re Enron Corp., et al., Jointly Administered under Case No. 01-16034 (AJG), 2005 WL 1847292 (Bankr. S.D.N.Y.). Enron was an energy transmission company that made markets in natural resources. Virtually all of Enron's senior management were indicted for massive financial fraud involving off-balance sheet entities.

47. Nancy Rivera Brooks and Thomas S. Mulligan, *Enron CEO's Contract Is Challenged, Mar. 9, 2002, L.A. Times*, at C1; 2002 WL 2459585.

48. Thomas S. Mulligan, *SEC Challenges Enron's Retention Bonus, Severance Plan, L.A. Times*, Apr. 13, 2002; 2002 WL 2468032; Terry Brennan, *Enron executive grilled on retention bonuses, The Daily Deal*, Apr. 17, 2002; 2002 WL 6789496.

49. Robert O'Harrow, Jr., *SEC Backs Outside Examiner on Enron, The Washington Post*, Apr. 4, 2002.

50. Terry Brennan, *Does a suitable Enron examiner exist?*, The Daily Deal, Apr. 12, 2002; 2002 WL 6789319.

51. Eric Berger, *Securities Commission Says Enron Lawsuit Belongs In Texas*, *Houston Chronicle*, Sept. 7, 2002; 2002 WL 26639585.

52. The district court case involving Worldcom was styled as SEC v. WorldCom, Inc., No. 02 Civ. 4963 (JSR) (S.D.N.Y.); Worldcom's bankruptcy court case was styled as In re WorldCom, Inc., Jointly Administered under Case No. 02-13533(AJG) (Bankr. S.D.N.Y.). Worldcom (now known as MCI) is one of the largest telecommunications providers in the United States.

53. Claudia H. Deutch, *My Big Fat C.E.O. Paycheck, N.Y. Times*, Apr. 3, 2005.

54. The district court order approving the settlement, which fully describes it, is reported at S.E.C. v. Worldcom, Inc., 273 F. Supp. 2d 431, Fed. Sec. L. Rep. (CCH) P 92456 (S.D. N.Y. 2003) (District Court approved $750 million settlement between SEC and Worldcom).

55. In re Peregrine Systems, Inc., et al., Jointly Administered under Case No. 02-12740 (JKF) (Bankr. D. Del.). Peregrine designs and services electronic business systems.

56. Bruce V. Bigelow, *SEC plays peacekeeper in Peregrine hostilities, San Diego Union Tribune*, Feb. 27, 2003, available at http://www.signonsandiego.com/news/business/20030227-9999_1b27peregrin.html.

57. Bruce V. Bigelow, Peregrine may be closing in on deal with SEC, San Diego Union Tribune, June 11, 2003; 2003 WL 6589403; Bruce V. Bigelow, *Peregrine close to Chapter 11 deal, San Diego Union Tribune*, July 9, 2003; 2003 WL 6595343.