

Commercial Litigation Briefs

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EDITORS-IN-CHIEF

Michael L. Rich, Esq.
973.889.4329
mrich@pbnlaw.com

Charles J. Stoia, Esq.
973.889.4106
cjstoia@pbnlaw.com

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3rd Circuit Rules Madoff Victims Cannot Sue SEC

The 3rd Circuit in *Stanley Baer, et al. v. United States*, No. 12-1319 (Decided July 1, 2013), affirmed the District Court's dismissal of an action brought by victims of the well-known Ponzi scheme operated by Bernard Madoff against the United States under the Federal Tort Claims Act (FTCA) to recover damages for injuries resulting from failure of the Securities and Exchange Commission (SEC) to uncover and terminate Madoff's Ponzi scheme in a timely manner. The Court upheld the ruling that such claims are barred by the discretionary function exception of the FTCA codified at 28 U.S.C. §2680(a), noting that Appellants failed to identify any violation of a mandatory policy or guideline by an SEC employee.

Appellate Court Rules in Long-Standing Oppressed Shareholder Suit on Application of Marketability Discount Where Oppressor is Bought Out

The NJ Appellate Division affirmed in part and remanded in part a Chancery Judge's decision, following a lengthy trial, in a protracted dispute among shareholders in a close corporation equally owned by three siblings. In *Wisniewski v. Walsh*, Docket No. A-0825/26-10T4 (Decided April 2, 2013), the Court affirmed the finding that one of the siblings (Norbert) was the oppressing shareholder and that his actions harmed the other shareholders but not the company. Norbert was ordered to sell his one-third interest back to the company or to the other two shareholders at fair value. The Appellate Division held that the Chancery Judge erred in not applying a marketability discount to the valuation of the oppressor's interest. A marketability discount adjusts the value of an interest in a closely-held corporation on the assumption that there is a small pool of potential buyers and that disposal will be more difficult. The Court noted that in forced buy-out circumstances, as well as when determining fair value of a dissenter's shares in an appraisal action, such a discount is not applicable except under extraordinary circumstances. Otherwise, a minority shareholder potentially is deprived of the full proportional value of his shares while the majority is enriched by allowing a buy-out of his minority interest at a bargain price. However, here, faced with the exceptional instance where the oppressor is being bought out,

the Court held that fairness dictates that the oppressor should not be rewarded when his conduct not only harmed the other shareholders but necessitated the forced buyout. Accordingly, it found that the Chancery Judge's failure to apply an appropriate marketability discount in these extraordinary circumstances was erroneous.

NJ Appellate Division Lays Out Guidelines for Claims Under Revised Uniform Partnership Act

The NJ Appellate Division recently clarified the manner and timing of claims seeking to hold partners personally liable for partnership debts under the revised Uniform Partnership Act (UPA), holding in *American Imaging of Jersey City, et al. v. Baldonado, M.D.*, Docket No. A-0788-11T2 (decided July 19, 2013), that:

- Partners are jointly and severally liable for obligations of the partnership.
- When both the partnership and partners are sued on a partnership obligation, judgment can be entered against the partnership in the amount due and against the partners as to liability only.
- A court may then amend the judgment against the partners to "a final judgment for a sum certain" if the partnership is ultimately unable to satisfy the judgment.
- Under N.J.S.A. 42:1A-19(B) of the UPA, a party bringing suit may elect to sue the partners in either the same or separate action as the suit against the partnership inasmuch as a cause of action against the partners on their personal liability for the partnership's obligation accrues, at the earliest, upon entry of judgment against the partnership.
- The Entire Controversy Doctrine does not require partners to be joined in the same action as that against the partnership since claims against the individual partners do not accrue until the partnership is found liable and unable to satisfy the judgment.
- Generally, a partner joined as a party defendant in an action against the partnership would be wise to assert a claim for contribution against the other partners in that same action to avoid contention later by the other partners that any successive action should be precluded.
- If a partner joined as a party defendant in an action against the partnership fails to join the other partners on a claim for contribution in that same action, it generally will not bar him from bringing a successive action against those partners, despite N.J. Rule 4:5-1 (b)(2)'s requirement of certification regarding whether any non-parties should be joined in the action based on their potential liability arising from the same transactional facts, unless such failure was inexcusable and the right of the excluded party to defend the successive action has been substantially prejudiced by not having been included in the prior action.