INSIGHTS

THE CORPORATE & SECURITIES LAW ADVISOR

ASPEN PUBLISHERS

Volume 21 Number 6, June 2007

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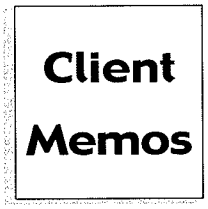

SECURITIES ENFORCEMENT

Big Boy Letters in the Spotlight

"Big boy" letters are big news right now. Two recent developments in as many weeks have suddenly thrown a spotlight on big boy letters and raised anew the longstanding question of their enforceability.

by Randall W. Bodner, Christopher G. Green, and Peter L. Welsh

Widely used in certain institutional markets, so-called big boy letters are agreements between investors that address the frequent reality that, as experienced and sophisticated traders, one party to the transaction (usually the seller) has access to non-public information while the other does not, and yet both parties still want to proceed with the sale. In practice, such agreements take a variety of forms and terms vary. Most involve a representation by the buyer in a securities transaction that (a) the buyer is a sophisticated investor, (b) the buyer understands that the seller may possess material non-public information that will not be disclosed to the buyer, and (c) the buyer effectively waives any claim it may have under the federal securities laws, including Section 10(b) or Rule 10b-5 of the Securities and Exchange Act of 1934 (Exchange Act).

Two recent developments raise anew the long-standing question of whether such "big boy" letters are enforceable.

First, on May 22, 2007, the *New York Times* featured a story about a civil action involving an investment made by hedge fund R2 Investments LDC (R2) in the high yield debt of World Access, Inc. just before World Access commenced its bankruptcy proceeding in 2001.[1] R2 purchased $20 million of World Access bonds from Jeffries & Company,[2] which had moments earlier agreed to purchase the notes from Salomon Smith Barney. In a big boy letter, Jeffries acknowledged it was aware that Salomon had material, non-public information concerning World Access, and Jeffries disclaimed any reliance on such information. When World Access experienced severe financial problems shortly after the R2 investment, R2 sued Salomon and Jeffries for violations of the securities laws and for common law fraud. The case is set to go to trial soon in federal court in New York.

Second, on May 30, 2007, the Division of Enforcement of the Securities and Exchange Commission brought and settled a civil action against Barclays Bank PLC which alleged among other things that Barclays had traded high yield securities pursuant to big boy letters while in possession of material, nonpublic information.[3] The SEC alleged that a Barclays trader sold securities while in possession of material nonpublic information—obtained as a result of the trader's service on unofficial and official creditors committees of distressed and insolvent companies—without disclosing that information to his trading counterparties. Although the Barclays trader had used big boy letters in connection with several of the transactions, the Staff considered these transactions to be in violation of the antifraud provisions of the Exchange Act.

As is discussed below, *R2 Investments* and *Barclays* do not provide a definitive answer as to whether big boy letters are enforceable. To the contrary, these cases, and a survey of the case law addressing similar provisions, further suggest that the enforceability of big boy letters is likely a highly contextual issue. It is unlikely, for example, that any agreement, no matter the form, could insulate a seller when the seller intentionally withheld particularly material information from a buyer. It is also unlikely that such agreements would insulate a seller against liability for conduct that would otherwise violate the insider trading laws. At the same time, big boy letters

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may constitute potentially powerful evidence that a buyer did not, in fact, rely on the alleged misrepresentations or omissions at issue and, therefore, cannot prove all of the elements of a fraud claim under Rule 10b-5. At a minimum, such agreements may serve the valuable purpose of disciplining sophisticated institutional investors, who are repeat players in the institutional securities markets, from too easily suing institutional sellers for fear of harm to their reputation and even potential ostracism from the market.

The Problem: Big Boy Letters and Section 29(a)

By their very nature, big boy letters, such as the ones at issue in *R2 Investments* and *Barclays Bank*, implicate Section 29(a) of the Exchange Act, which prohibits parties from waiving compliance with the substantive provisions of the Exchange Act, including Section 10(b) and Rule 10b-5. Section 29(a) provides:

> Any condition, stipulation or provision binding any person to waive any compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of any exchange required thereby shall be void.

A big boy letter, much like a non-reliance provision in a stock purchase agreement or merger agreement, typically includes an acknowledgement or representation by the buyer that, in making its investment decision, the buyer is not relying on information (whether material or not) that the seller may possess but is not providing to the buyer. In effect, the buyer acknowledges that it is a sophisticated investor who is prepared to rely only on information in its own possession and is not relying on any representation of the seller or on the possibility that the seller has material non-public information that may affect the buyer's decision to invest. In the absence of such a letter, the buyer would potentially have a claim under Rule 10b-5 or Section 20A of the Exchange Act.[4]

The typical big boy letter thus gives rise to enforceability issues under Section 29(a). Indeed, the issue is central to both *R2 Investments* and *Barclays Bank*.

R2 Investments v. Salomon Smith Barney

On April 27, 2001, R2, a Texas-based hedge fund, filed suit under the federal securities laws and state common law fraud against Salomon Smith Barney, various Salomon affiliates and Salmon-managed high yield funds (collectively Salomon) and against Jeffries & Co. R2 alleges that it was defrauded by Salomon and Jeffries into purchasing some $20.5 million of 13.25 percent World Access, Inc. notes (Notes) in violation of Section 10(b) and Rule 10b-5,[5] Section 14(e) and Rule 14e-3[6] and Section 20A[7] of the Exchange Act. R2 also asserted claims for common law fraud and unjust enrichment.[8]

INSIGHTS
THE CORPORATE & SECURITIES LAW ADVISOR

INSIGHTS (ISSN No. 0894-3524) is published monthly by Aspen Publishers, 76 Ninth Avenue, New York, NY 10011. POSTMASTER: Send address changes to **INSIGHTS**, 7201 McKinney Circle, Frederick, MD 21704.

To subscribe, call 1-800-638-8437. For customer service, call 1-800-234-1660.

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Specifically, R2 alleges that, from December 1999 through February 2001, Salomon owned between $30 million and $43.115 million in face amount of the Notes, or approximately 10 percent to 14 percent of the Notes.[9] Under the terms of the indenture, in the event of the receipt of cash proceeds from the sale of certain assets by World Access, the Company was required to commence a tender offer in the same amount as the cash proceeds.[10] By January of 2001, World Access was required to commence a tender offer in the amount of $160 million and, on January 2, 2001, World Access commenced a tender offer for $160 million face value of the Notes.[11]

At some point prior to February 8, 2001, World Access Management allegedly became aware of acute business and financial problems afflicting the Company. Management allegedly became very concerned that World Access might not have sufficient working capital to continue operating the Company and, by that time, about the Company's ability to close the tender offer. R2 alleges that, between February 8, 2001 and February 12, 2001, the Company began a dialogue with an informal group of noteholders, of which Salomon was a member. During the ensuing discussions, on several different occasions, World Access allegedly shared material non-public information with the noteholders on a confidential basis.[12] Salomon allegedly received all of the information provided between February 8, 2001 and February 12, 2001.

According to R2's complaint, a meeting was held on February 12, 2001 between Company representatives and certain noteholders. During the February 12, 2001 meeting, Company representatives allegedly explained that World Access was experiencing significant liquidity problems, that the Company would not be able to complete the tender offer for the full $160 million face amount of notes, that the Company was proposing that the tender offer be restructured so that the Company would pursue only half of the amount of the tender, or $80 million. The Company also allegedly reported that it was considering filing for bankruptcy protection if it was unable to resolve its liquidity problems in the near future. R2 alleges that none of this information had been disclosed to the market or to R2 at that point in time, and that the true financial condition of the Company was not publicly known. Indeed, between November 20, 2000 and February 15, 2001, World Access filed no periodic reports with the SEC.[13]

On February 12, 2001, Salomon allegedly sold its entire $20.5 million position in the Notes to Jeffries without disclosing the material non-public information that it had received between February 8 and February 12, 2001. In connection with the transaction, Salomon and Jeffries executed a big boy letter. The big boy letter in the *R2 Investments* case provided, among other things, that:

> (1) The Sellers have informed the Purchaser that the Sellers have obtained material non-public confidential information concerning World Access, Inc. and the Sellers are precluded from disclosing such information to the Purchaser; (2) such information may be indicative of a value of the Securities that is substantially different than the purchase price reflected in the sale; (3) the Purchaser is experienced, sophisticated and knowledgeable in trading in securities of private and public companies and understands the disadvantage to which the Purchaser is subject on account of the disparity of information as between the Seller and Purchaser; and (4) the Sellers are relying on this letter in engaging in the Purchase and would not engage in the Purchase in the absence of this letter.

Notably, the big boy letter disclosed that Salomon "had obtained material non-public information concerning World Access" and that the Purchaser understands that there is a "disparity of information between the Seller and the Purchaser."[14]

On the same day it bought the Notes from Salomon, Jeffries allegedly resold them to R2 for a profit. Jeffries allegedly did not disclose to R2 that Jeffries and Salomon had entered into a big boy letter in connection with Jeffries' purchase of the Notes from Salomon. Jeffries also allegedly did not disclose to R2 that Salomon sold the Notes to Jeffries while in possession of material non-public (presumably adverse) information concerning World Access.

On February 15, 2001, the Company allegedly disclosed publicly, for the first time, that it was seeking an agreement with a majority of the bondholder group to permit the Company to revise the tender offer and tender for only $70 million of the Notes, rather than the previously-disclosed $160 million. The Company also disclosed disappointing earnings and other negative financial information. Following the February 15, 2001 disclosure, the market value of the Notes declined significantly. The Company was eventually forced into an involuntary liquidation proceeding under Chapter 7 of the Bankruptcy Code.

R2 filed its initial complaint on April 27, 2001. A motion to dismiss and a motion for summary judgment filed by the defendants were each denied. The case is scheduled to go to trial soon.

SEC v. Barclays Bank PLC

On May 30, 2007, the SEC's Division of Enforcement brought and settled a civil enforcement action against Barclays Bank PLC and the head of Barclays' Distressed Debt Desk, Steven J. Landzberg, for alleged violations of Section 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) and Rule 10b-5 of the Exchange Act. The SEC's complaint alleged that, during 2002 and 2003, the defendants joined at least six official and unofficial creditors committees of distressed companies. In connection with the defendants' service on those committees, the defendants executed confidentiality agreements and committee by-laws "pursuant to which they received material non-public information concerning, among other things, the financial condition and prospects of the issuers, their most recent business plans, detailed management projections, contemplated financing alternatives, proprietary advisor analyses, and the timing and terms of proposed plans of reorganization."[15] The SEC further alleged that "[o]ver a period of eighteen months, the Defendants purchased and sold millions of dollars of securities while aware of material nonpublic information received through the six creditors committees—all in breach of similar duties of trust or confidence."[16] Notably, with respect to the defendants' service on *official* committees of unsecured creditors, the SEC alleged that "Landzberg and Barclays owed fiduciary duties to all of the bond holders."[17]

The SEC's complaint also alleged that Barclays' reliance on big boy letters was not sufficient to insulate Barclays or Landzberg from liability under the federal securities laws: "In a few instances, Landzberg used purported 'big boy letters' to advise his bond trading counterparties that Barclays may have possessed material nonpublic information. However, in no instance did Defendants disclose the material nonpublic information they received through official creditors committees to their bond trading counterparties."[18]

Pursuant to the terms of the settlement reached between the SEC and Barclays and Landzberg, Barclays agreed to pay $10.94 million in disgorgement, fines and penalties. Landzberg agreed to pay a civil penalty of $750,000.[19] It is unclear whether the SEC permitted Landzberg or the Company to recoup any amounts paid in settlement from any liability insurance policy or, in Landzberg's case, indemnification from Barclays.[20] Landzberg was also banned for life from serving on a creditors' committee in any federal bankruptcy proceeding involving an issuer of securities.[21]

Section 29(a) and Non-Reliance Provisions

R2 Investments and *Barclays Bank* are not the first cases in which courts have been confronted with contractual waivers of Rule 10b-5. Although to date no court has specifically addressed the enforceability of a big boy letter, past cases addressing the enforceability of non-reliance provisions in negotiated purchase and sale agreements are instructive. To be sure, non-reliance provisions are distinguishable from

Coming Attractions

- **Broker-dealer supervision**
- **Go-shop provisions**
- **"Willfulness" in SEC enforcement**

big boy letters in important respects. For one, non-reliance provisions frequently are included as part of heavily negotiated purchase and sale transactions.

Also, non-reliance provisions often merely specify the universe of potentially actionable representations and warranties; they do not purport to disclaim reliance altogether or to bar a particular right of action entirely. Nevertheless, the cases in which courts have applied Section 29(a) to non-reliance provisions are instructive in considering the enforceability of big boy letters.[22] In particular, courts in the Second and Third Circuits have, in the last several years, addressed the enforceability of non-reliance provisions under Section 29(a).

AES Corp. v. Dow Chemical Co.

The most recent federal appellate court ruling on the enforceability of non-reliance provisions is the Third Circuit's decision, in *AES Corp.* v. *Dow Chemical Co.*[23] This case involved the purchase by AES of an indirect subsidiary of Dow Chemical (Dow), Destec Engineering, Inc. (DEI), pursuant to a stock purchase agreement. DEI was in the business of designing and constructing power plant facilities.

In agreements executed during due diligence for the deal, prospective buyers represented that neither Destec nor its advisors or affiliates,

> nor [any of their] other Representatives, nor any of [their] respective officers, directors, employees, agents or controlling persons within the meaning of section 20 of the Securities Exchange Act of 1934, as amended, make any express or implied representation or warranty as to the accuracy or completeness of the Information, and [the buyers] *agree that no such person will have any liability relating to the Information or for any errors therein or omissions therefrom.* [Buyers] further agree that [they] are not entitled to rely on the accuracy or completeness of the Information and that [they] will be entitled to rely solely on any representations and warranties as may be made to [buyers] in any definitive agreement with respect to the Transaction, subject to such limitations and restrictions as may be contained therein.[24]

The Merger Agreement that was subsequently executed contained the following representation: "Except for the representations and warranties contained in this Article IV, neither Dow nor any other person makes any other express or implied representations or warranty on behalf of Dow."[25]

After the deal closed, AES brought suit against Dow under Section 10(b) and Rule 10b-5 of the Exchange Act, alleging material misstatements and omissions during due diligence for the transaction. Dow defended by invoking the non-reliance provision in the due diligence waiver and in the merger agreement; AES invoked Section 29(a) of the Exchange Act and argued that such non-reliance provisions are invalid.

The Third Circuit's analysis began with the recognition that reliance is a necessary element of a Rule 10b-5 claim. "It necessarily follows," the Third Circuit reasoned, "that if a party commits itself never to claim that it relied on representations of the other party to its contract, it purports anticipatorily to waive any future claim based on the fraudulent misrepresentations of that party."[26] As to Dow's argument that the waiver in this case was limited, and therefore did not constitute a waiver of all potential claims under Rule 10b-5, the Third Circuit was unmoved: "The scope of the anticipatory waiver is more limited, but it is nevertheless an anticipatory waiver of potential future claims under Rule 10b-5."[27] The Third Circuit concluded accordingly, that "to hold that a buyer is barred from relief under Rule 10b-5 solely by virtue of his contractual commitment not to rely would be fundamentally inconsistent with Section 29(a)."[28]

The Third Circuit's opinion did not, however, undermine entirely the utility and effect of non-reliance clauses. To the contrary, the Court was careful to note that "non-reliance clauses are factual evidence of an absence of reliance."[29] Indeed, the Court went so far as to suggest that a non-reliance clause could form the basis for summary judgment in favor of the

seller[30] and that buyers seeking to escape from non-reliance clauses under Section 29(a) would be fighting "uphill battles" in doing so.[31] As the Court noted:

> Clearly, a buyer in a non-reliance clause case will have to show more to justify its reliance than would a buyer in the absence of such a contractual provision. For this reason, cases involving a non-reliance clause in a negotiated contract between sophisticated parties will often be appropriate candidates for resolution at the summary judgment stage.[32]

Thus, while the non-reliance clause in *AES* did not provide a basis for early dismissal of the complaint as a matter of law, the ultimate utility of such clauses in civil litigation was arguably not substantially undercut, and certainly was not eliminated, by *AES*.

Chase Manhattan Mortgage Corp. v. Advanta Corp.

Shortly after the Third Circuit's ruling in *AES*, the District Court for the District of Delaware was presented with another case in which a seller sought to invoke a non-reliance provision to preclude a buyer from bringing a Rule 10b-5 claim. In *Chase Manhattan Mortgage Corp v. Advanta Corp*,[33] Advanta sold certain mortgage assets to Chase, including mortgage-backed securities consisting of residual interests in securitized mortgage pools, for a cash price in excess of $1 billion.[34] The purchase and sale agreement, which was heavily negotiated, contained a non-reliance provision by which Chase acknowledged that Advanta made no "representation or warranty whatsoever, express or implied, as to the Assets of the Business."[35] Following the closing, Chase received Advanta's mortgage assets and claimed that they were worth much less than had been represented by Advanta, and Chase suffered millions of dollars of damages as a result. Chase brought a 10b-5 claim, as well as state law fraud and breach of contract.

On its cross-motion for summary judgment, Advanta invoked the non-reliance provision in arguing that Chase had waived its recovery under 10b-5. The district court quoted at length the Third Circuit's opinion in *AES*, holding that "Advanta is not entitled to summary judgment on Chase's federal securities claim simply because Chase is a sophisticated investor and the Agreement contains a non-reliance clause."[36] At the same time, however, the district court, consistent with the Third Circuit's holding in *AES*, held that Advanta may be able to establish non-reliance as factual matter and that "judgment for Advanta may be appropriate at some point[.]"[37]

Harsco Corp v. Segui

Not all courts have refused to give controlling and dispositive weight to non-reliance provisions at the motion to dismiss stage. Indeed, in reaching its conclusion in *AES*, the Third Circuit explicitly declined to follow a Second Circuit decision, *Harsco Corp. v. Segui*,[38] which had reached the opposite conclusion.[39]

In *Harsco*, the Second Circuit affirmed the district court's dismissal of a complaint for failure to state a claim where the buyer brought claims for securities fraud, common law fraud, and breach of contract, among other claims, in the face of the buyer's assent to a non-reliance provision in the governing agreement.[40] Unlike in *AES* and *Chase*, the Second Circuit enforced the non-reliance provision and ruled that Harsco had waived its right to bring the claim of fraud raised in the complaint.[41] Critical to the Court's analysis was the fact that Harsco's theory of fraud was not predicated on a breach of any of the representations specifically made in the agreement. In this regard, the Court noted that Harsco bargained for fourteen pages of representations:

> Unlike a contractual [non-reliance] provision which prohibits a party from suing at all, the contract here reflects in detail the reasons why Harsco bought MultiServ—in essence, Harsco bought the representations and, according to Section 2.05 [*i.e.*, the non-reliance provision] and 7.02 [*i.e.*, the integration provision], nothing else. This means that there are fourteen pages of representations, any of which, if fraudulent, can be the basis of a fraud action

against the sellers. But Harsco specifically agreed that representations not made in those fourteen pages were not made.[42]

In short, the Second Circuit held that because Harsco had merely limited the universe of potentially actionable representations, and had not waived its right to bring certain fraud claims, enforcement of the non-reliance provision did not run afoul of Section 29(a).

At the same time, the Second Circuit was careful not to hold that non-reliance provisions are enforceable in every circumstance. As the Second Circuit noted, enforceability of such provisions "becomes a question of degree and context. . . . In different circumstances (*e.g.*, if there were but one vague seller's representation) a 'no other representations' clause might be toothless and run afoul of Section 29(a). But not here."[43]

To the extent these cases are applicable to big boy letters, the leading decisions suggest that sellers should not expect that such provisions will immunize them from liability. At best, sellers can hope to use non-reliance clauses or big boy representations as evidence of a buyer's non-reliance at summary judgment or trial.

Big Boy Letters and SEC Enforcement Actions

Whether or not big boy letters are enforceable against a private litigant, they will not provide an effective defense in an SEC enforcement action. First, several courts have held that, although reliance is an important element of private right of action under Section 10(b) and Rule 10b-5, reliance is not an element in an enforcement action brought by the SEC.[44] And, as the *Barclays Bank* case demonstrates, the SEC will, in circumstances it deems appropriate, bring an enforcement action in spite of a big boy letter. The alleged facts of the *R2 Investments* case illustrate why. Even if one could accept, as a matter of public policy, that the direct buyer of securities that are sold based on material nonpublic information in breach of a duty should have no cause of action if it signs a big boy letter, what about downstream buyers? How are such buyers to protect themselves from fraudulent transactions? While it may be possible in many circumstances to do so, presumably the SEC is rightly concerned about the effects of big boy letters on downstream transactions and on the overall integrity of the market for privately placed securities.

Conclusion

For institutional investors and their advisers, *Barclays* and *R2 Investments* raise more questions than they answer. Above all, the two cases do not provide a yes or no answer as to whether big boy letters are enforceable. To the contrary, these two cases and the existing case law bearing on the issue confirm that the question is highly contextual and largely driven by the particular circumstances of each case. Relevant circumstances may include: (1) the sophistication of the parties; (2) the character of the transaction/trade; (3) the scope and terms of the big boy letter; (4) the materiality of the information in question; (5) the source of the information; (6) the intent of the seller; (7) the reliance of the buyer; (8) whether there are downstream transactions/trades; (9) the effect on other market participants; and (10) the effect on the market in general.

While the analysis is, to be sure, highly contextual, market participants are not left without any guidance in anticipating how big boy letters will be viewed by courts and regulators. Indeed, several guiding principles emerge from federal securities statutes and existing case law:

- Big boy letters may not operate to bar a securities fraud action as a matter of law.
- Big boy letters may, however, constitute powerful evidence that a buyer did not rely on alleged misrepresentations or omissions.
- Big boy letters are not likely a defense to an SEC enforcement action.
- Egregious fraud is egregious fraud and insider trading is insider trading.

In view of the questionable enforceability of big boy letters in a private action and the risks of an SEC enforcement action, market participants and those who advise them may wonder what is the point of

such agreements. Yet, obtaining such a letter from a sophisticated institutional investor may well serve valuable practical purposes. Big boy letters may help avoid misunderstandings between the parties as to the information possessed, and the representations made, by one or the other parties to the transaction. The also can constitute powerful *factual* evidence that undercuts an *ex poste* fraud claim based on any such misunderstanding.

Perhaps most importantly, big boy letters are a potentially powerful form of market discipline, restraining buyers from bringing fraud claims for fear of market ostracism. To the extent that institutional investors are sensitive to reputation and relationship concerns (as most institutional investors are) a well-drafted big boy letter may effectively deter a buyer from suing in the first place. Indeed, the paucity of reported decisions, in contrast to the prevalence of big boy letters, suggests that market forces may well be giving effect to such letters.

NOTES

1. Jenny Anderson, "Side Deals in a Gray Area," *N.Y. Times*, May 22, 2007.

2. Amended Complaint, *R2 Investments* v. *Salomon Smith Barney, Inc.*, No. 01 Civ. 3598 (JES) (SDNY filed Mar. 31, 2003) ("R2 Am. Compl.") (available from US District Court for the District of New York clerks office; copy on file with the authors).

3. *S.E.C.* v. *Barclays Bank PLC*, Litigation Release No. 20132 (May 30, 2007).

4. Both *R2 Investments* and *Barclays Bank* are based on the misappropriation theory of insider trading. Unlike the classic theory of insider trading, in which an insider trades securities of a public issuer (or tips another who trades) in violation of the insider's duty to that public issuer, under the misappropriation theory, one need not have a duty directly to the public issuer to violate the insider trading laws—instead, one can be liable if he trades public securities in violation of a duty owed to the source of the information on which the individual trades, even if the source of the information has no privity with, or connection to, the public issuer. *See U.S. v. O'Hagan*, 521 U.S. 642, 655 (1997); *Carpenter v. U.S.*, 484 U.S. 19 (1987). That so-called duty of trust or confidence is often memorialized in confidentiality agreements entered into by the provider of the information concerning the public issuer or its securities and the recipient who ultimately trades the public securities. *See* 17 C.F.R. §240.10b5-2 (prohibiting "the purchase or sale of securities on the basis of, or the communication of, material nonpublic information misappropriated in breach of a duty of trust or confidence."). Assuming that a trade would otherwise fit within the rubric of the misappropriation theory, as alleged in *R2 Investments* and *Barclays Bank*, reliance on a big boy letter is highly questionable.

5. Section 10(b) and Rule 10b-5 prohibit "(a) any . . . scheme, or artifice to defraud, (b) . . . [the making of] any untrue statement of a material or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) . . . any act, practice, or course of dealing which operates or would operate as a fraud or deceit upon any person."

6. Section 14(e) and Rule 14e-3 prohibit certain transactions by persons "in possession of material information relating to [a] tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from: (1) the offering person, (2) [t]he issuer of the securities sought or to be sought by such tender offer, or (3) [a]ny officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer."

7. Section 20A provides that "[a]ny person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (when such violation is based on a sale of securities) or sold (when such violation is based on a purchase of securities) securities of the same class."

8. Am. Compl. ¶ 52.

9. *Id.* ¶ 58.

10. *Id.*

11. *Id.* ¶¶ 67–69.

12. At least one of the meetings during which material non-public information concerning World Access was discussed, a February 9, 2001 conference call among the noteholders, was allegedly held on a "restricted basis" according to which the participants were informed, in advance, that they would be receiving material non-public information and could elect not to participate in the conversion if they did not want to become restricted from trading in the Company's securities. Salomon allegedly participated in the February 9, 2001 conference call.

13. *Id.* ¶¶ 65–66.

14. *Id.*

15. Complaint at 1-2 *S.E.C.* v. *Barclays Bank* et al., No. 07CV-4427 at 1-2 (S.D.N.Y. filed May 30, 2007).

16. *Id.* at 2.

17. *Id.* at 4.

18. *Id.*

19. Litigation Release No. 20132 at 1.

20. The Staff has, in past, taken the position that it will not permit certain parties to use director and officer insurance to pay fines or penalties in negotiated settlements with the SEC. In addition, many director and officer insurance policies include exclusions of coverage for disgorgement of profits, fines and penalties, as well as for fraudulent conduct.

21. Litigation Release No. 20132 at 1.

22. Indeed, to the extent that courts have declined to enforce non-reliance provisions as an impermissible waiver of the securities laws under Section 29(a), it is difficult to imagine that they would enforce the typically more sweeping waiver effected by the typical big boy letter.

23. *AES Corp. v. Dow Chem. Co.*, 325 F.3d 174 (3d Cir. 2003).

24. *Id.* at 176 (emphasis added).

25. *Id.* at 177.

26. *Id.* at 180.

27. *Id.*

28. *Id.* at 182.

29. *Id.* at 180.

30. *Id.* (non-reliance clause, "alone or in conjunction with other evidence of non-reliance, may establish an absence of reliance and, when unrebutted, may even provide a basis for summary judgment in the defendant's favor").

31. *Id.* at 182. In a one-page dissenting opinion, Senior Circuit Judge Clifford went even further calling such claims "essentially hopeless" and asking rhetorically, "[i]magine the mountains of evidence the 10b-5 plaintiff will need to compete with the evidence of the stipulation [of non-reliance]. Realistically, how will a plaintiff convince a reasonable juror that he reasonably relied on a representation when he signed a provision that stated otherwise?"

32. *Id.* at 181.

33. *Chase Manhattan Mortg. Corp. v. Advanta Corp.*, No. Civ. A 01-507, 2004 WL 422681 (D. Del. Mar. 4, 2004).

34. *Id.* at *1.

35. *Id.* at *2.

36. *Id.* at *6. In applying state common law to disputes between sophisticated commercial parties, the Delaware Chancery Court has walked a middle course between enforcing non-reliance clauses and prohibiting parties from waiving fraud claims by contract. In the recent case of *ABRY Partners V, L.P.* v. *F&W Acquisition LLC*, 891 A.2d 1032, the Delaware Chancery Court considered the enforceability of a non-reliance clause and a contractual cap on damages contained in a negotiated stock purchase agreement in a transaction between two sophisticated private equity sponsors. The Chancery Court held, on the one hand, that contractual provisions that define the universe of actionable representations and warranties are enforceable. *Id.* at 1056. On the other hand, the Chancery Court refused to enforce a contractual term that purported to limit the buyer's remedy for fraud in the inducement to the capped indemnity under the contract. *Id.* at 1064.

37. *Chase,* at *6.

38. *Harsco Corp. v. Segui,* 91 F.3d 337 (2d Cir. 1996).

39. *See AES*, 325 F.3d at 183; *see also Petro-Ventures, Inc.* v. *Takessian*, 967 F.2d 1337 (9th Cir. 1992)

40. *Harsco Corp.*, 91 F.3d 337.

41. *Id.*

42. *Id.* at 344.

43. *Id.*

44. *Gamen* v. *S.E.C.*, 334 F.3d 1183, 1191 (10th Cir. 2003); *S.E.C.* v. *Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993); *S.E.C.* v. *Alliance Leasing Corp.*, 28 Fed. Appx. 648, 652 (9th Cir. 2002); *S.E.C.* v. *N. Am. Research & Dev. Co.*, 424 F.2d 63, 84 (2d Cir. 1970).