

Q&A With McDermott Will's Steven S. Scholes

Monday, Oct 08, 2007 --- **Q. What's the most challenging white-collar case you've worked on, and why?**

A. The most challenging case was the representation of a New York Stock Exchange company that became enmeshed in an accounting crisis. The representation was complex and included not only parallel SEC and DOJ investigations, but bankruptcy proceedings as well. The bankruptcy proceedings greatly complicated the defense of the SEC and DOJ investigations because there were objections to a Chapter 11 plan that required evidentiary hearings in bankruptcy court on many of the fundamental accounting issues in which the SEC and DOJ were interested. We succeeded in the trials before the bankruptcy court and the company's plan of reorganization was confirmed. Additionally, neither the SEC nor the DOJ took any action against the company.

Q. Which aspects of securities law do you think are in need of reform, and why?

A. Our current securities regulatory system is a highly complex patchwork of competing agencies, including, in addition to the SEC, self-regulatory agencies, such as the stock, options and futures exchanges and FINRA, as well as state securities regulatory agencies. This patchwork is a function of historical quirk. In addition to civil agencies there are numerous state and federal criminal agencies. Many view this system as inefficient and detrimental to the competitive position of U.S. capital markets relative to other capital markets in the world. Although a very politically charged issue, streamlining this system would be much more efficient for investors, taxpayers, U.S. businesses and foreign businesses seeking access to our capital markets.

Q. If you were in charge of the Securities and Exchange Commission, what changes would you make?

A. The first issue I would address is the new policy which requires the SEC staff to obtain authority from the SEC before negotiating a settlement, which includes a civil money penalty. While the rationale behind this policy is sound, i.e., imposing some degree of agency-wide consistency and reason with respect to civil money penalties, the policy itself is causing confusion among the staff and defense bar with respect to the interplay between this process and the Wells process. It also causes substantial delay in the negotiation of settlements. There is a great need for a comprehensive approach to this issue which takes the Wells process into account and which allows the staff to negotiate settlements in a timely way.

Q. How do you think the problems associated with options backdating will play out over the long term?

A. The options backdating problem is relatively well-contained at this point in time. Most of the problems have been identified, many have been resolved, and due to the tremendous amount of publicity the issue received, the underlying conduct has ceased. As a result, the current investigations are working their way through the system. I do not expect many new problems.

Q. Where do you see the next wave of white-collar and securities cases coming from?

A. The next wave will be generated in two areas in which the SEC has established task forces: the subprime real estate industry and hedge funds. With respect to the subprime industry, I understand there are approximately 12 to 15 SEC investigations currently. This number will increase as problems with respect to the collateral underlying many of the securitizations begin to impact the securities issued based on that collateral. This could, in turn, lead to various problems, including defaults by the issuers of the securities. In addition, various enterprises, such as hedge funds and other financial institutions, that carry such securities on their books, may have significant problems if they have to mark those securities to market or take impairment charges with respect to them.

The hedge fund industry is enormous, and the government is very interested in it. This interest has been manifest, for example, in the SEC's rulemaking efforts. Given the vast sums of money hedge funds control, I expect significant SEC investigations in a wide variety of areas, ranging from insider trading cases to Regulation M cases, such as those involving short selling in anticipation of a public offering.

Q. Outside your own firm, can you name one securities lawyer who's impressed you and tell us why?

A. David Bayless is a highly talented securities defense lawyer. David is the former director of the San Francisco office of the SEC, and through his experience on staff, David gained a deep understanding of the manner in which the agency functions. This understanding enables David to develop an effective strategy for dealing with any SEC investigation. When the strategy requires diplomacy and compromise, David is highly effective in dealing with the staff. When the strategy requires standing and fighting, David is very well-suited to do so. I have tried jury cases to verdict with him, and his courtroom skills are superb.

Q. What advice would you give to a young lawyer who's interested in getting into securities law?

A. I would offer two pieces of advice. First, get as much experience in handling SEC cases as soon as possible. Young lawyers can gain invaluable

experience by working for the SEC or a self-regulatory organization. They can also obtain great experience by working for a private law firm with a robust and vibrant SEC defense practice that will allow them to focus on securities. Second, get as much trial experience as soon as possible, even if that experience is in cases outside the securities area. There is no better weapon in a securities defense lawyer's arsenal than to have the ability and willingness to try a case.

Q.I'm a General Counsel with a Fortune 500 company facing a major SEC investigation. Why should I hire your firm?

A. There are four primary reasons you should hire McDermott: knowledge of the SEC, a history of success, resources and service.

McDermott has a first-hand knowledge of the SEC. The firm has partners across the country who are former SEC staff lawyers from its home and regional offices. This is a tremendous advantage to clients because the firm is familiar with the manner in which SEC investigations and prosecutions are shepherded internally through the SEC. In fact, the agency has, at McDermott's request, filed amicus curiae briefs supporting the firm's clients' positions in private litigation. The SEC has also called upon members of McDermott's group to act as receivers in SEC civil enforcement proceedings.

Second, the firm has a very strong track record of successfully representing clients before the agency. McDermott has persuaded regulators to close many investigations without instituting any enforcement proceedings against firm clients. McDermott has also achieved a high degree of success in post-investigation enforcement proceedings, including successfully trying cases against the SEC.

Third, McDermott has tremendous resources in numerous industries throughout the United States and internationally. This depth of resources is crucial to successful representation of clients because SEC investigations often portend litigation to come, such as shareholder class or derivative suits, insurance coverage disputes or even criminal actions.

Finally, the firm is a very service oriented law firm. McDermott is proactive in devising solutions to SEC problems, prompt in responding to problems and highly efficient.

Steven S. Scholes is a partner, head of the Chicago trial department and chairman of the SEC defense group at McDermott Will & Emery LLP.