BNA, Inc.

Securities Regulation & Law REPORT

Volume 33 Number 4
Monday, January 29, 2001
ISSN 1522-8797

Anti fraud
Investment Banker Wins Dismissal Of Claims Over Alleged Takeover Scheme

Investors in NAL Financial Group Jan. 4 struck out for 3 second time as the U.S. District Court for the Southern District of New York dismissed their would-be class securities fraud claims against investment banking and brokerage firm Sands Brothers & Co. Ltd. (*Vogel v. Sands Brothers & Co. Ltd., S.D.N.Y., 98 Civ. 2527 (BDP), 114101).*

Judge Barrington D. Parker Jr. explained that the claims arose from an alleged elaborate scheme to take control of NAL Financial Group Inc. at the expense of public investors.

Original Complaint

Last March, the court dismissed the original complaint filed on behalf of a purported class of public investors in NALF (31 SRLR 494, 4/16/99). The original complaint alleged violations of the Racketeer Influenced and Corrupt Organizations Act against Conseco Inc. and violations of 1934 Securities Exchange Act Section 10(b) against sands.

The RICO claim against Conseco was dismissed with prejudice because the plaintiff failed adequately to allege a scheme defraud, a pattern of racketeering activity, or causation_

Tire Section 10(b) claims against Sands were dismissed without prejudice, the court explained, because the complaint failed to satisfy the heightened pleading standards set forth under the Private securities Litigation Reform Act for alleging misreprecentations and omissions, and because it failed adequately to allege scienter.

The court here considered an amended complaint against Sands.

Takeover Plot

The court related the following factual allegations, construing them in the plaintiffs' favor.

Conseco is an Indiana-based financial services holding company. Sands is an investment banking and brokerage concern.

"Conseco is alleged to be Sands' most valued client, and certain executive officers of Conseco are claimed to share a long-lasting relationship with Sands' co-founders, Martin and Steven Sands, spanning over fourteen years," the court said.

NALF, the court continued, is engaged in the purchase and servicing of automobile loan and lease contracts. In March 199 , NALF filed for bankruptcy protection. "No claims are asserted in this action against NALF," the court advised.

'The gravamen of the Amended Complaint revolves around plaintiffs' theory that Conseco

BNA, Inc.

Securities Regulation & Law

REPORT

Volume 33 Number 4
Monday, January 29, 2001
ISSN 1522-8797

Federal News

Anti fraud

**Investment Banker Wins Dismissal
Of Claims Over Alleged Takeover Scheme**

devised and successfully implemented a scheme to take control over NALF at the expense of its public investors," according to the court. Conseco affected the alleged scheme through an investment in NALF convertible debentures.

Sands allegedly furthered Conseco's scheme by making material misrepresentations and omissions about NALF's business. and by using Its market-making ability to manipulate NALF's stock prices in ways favorable to Conseco's purported scheme. The court went on to recount in more detail Sands' alleged misrepresentations, including the dissemination of various positive statements on NALF's prospects.

In these statements, the plaintiffs claimed, Sands omitted mention of the market conversion features of the convertible bonds and Conseco's plan to take control of NALF at depressed prices.

Conclusory Aliegations

The court ultimately determined that Sands' motion to dismiss must be granted. The allegations In the amended complaint "share a variety of deficiencies," the court observed. For example, "certain of the alleged misrepresentations were not made by– nor were they all ributed to– Sands."

"Most importantly, however, the Amended Complaint fails to set forth sufficient reasons explalning] why the statements were fraudulent,'" the court said.

"The Amended Complaint does not state the reasons why any of the statements were false; rather, it couples each statement with a conclusory allegation that it was, false. In addition, plaintiffs attempt to bootstrap these conclusions by relying upon the very theory they are trying to assert-namely, that because Sands must have known of Conseco's alleged plot to take control of NALF at a low market price, any statement made by Sands stating that NALF had a positive future must have been false."

These kinds of "circular, speculators and conclusory allegations are inadequate to satisfy PSLRA's and Rule 9(b)'s requirement of particularized pleading," the court declared.

Scienter

Moreover, the court determined, the complaint "must be dismissed as it fails to adequately allege scienter."

"As was the case with the original Complaint, ... the Amended Complaint fails to adequately plead Sands' motive to commit the alleged securities fraud with regard to NALF's stock and its alleged takeover. ... Sands' alleged desire to realize greater transaction fees and its close relationship with Conseco are insufficient to show an improper motive," the court wrote.

The court further rejected the plaintiffs' contention that the amended complaint alleges facts that constitute strong circumstantial evidence of Sands' actual knowledge of fraud.

Thus, the court concluded, the amended complaint must be dismissed. "As plaintiffs have been provided opportunities to correct the deficiencies of the original Complaint, but have tailed to do so, the dismissal is with prejudice, " the court said

The attorneys for the plain tiffs are Jill Hooch, Thomas M. Skelton, Lowey Damenberg Bempored & Selinger, White Plains, N. Y.

The attorneys for Conseco are Walter C. Carlson, R. Rere Pengra, Sidley & Austin, Chicago.

The attorneys for Sands Brothers are Richard A. Roth, Ira Meyerwitz, Littman Krooks Roth &