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Nico Krisch

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CORRECTIONS
"B-Turn" by Susan Beck (March) contained several errors. It incorrectly stated that BP tried to decertify the class of plaintiffs covered by the settlement of economic and property damages claims. Rather, the company has argued that if the district court continues to reject BP's position on the settlement terms, then the class must be decertified. Also, Michael Jannou, special counsel to the Deepwater Horizon Court Supervised Settlement Program, is the son of Patrick Jannou, not his brother. The letter from Kirkland & Ellis' Richard Godfrey to Judge Carl Barbier that was referenced on page 72 was dated Dec. 7, 2012, not Dec. 17. BP can 'call page acts in various newspapers, though not in USA Today. BP CEO Robert Dudley appeared on Mad Money on July 18, 2013, not July 10. The BP managing attorney who responded to Jannou's Sept. 26, 2012, email was Mark Holstein, not Michael Holstein.

In Canadian Big Deals (March), the name of Elkeep associate Joseph Zed was misspelled. Because of an editing error, the final sentence of the Dicta column in the March issue was garbled. It should read: "For lawyers, these may be the good old days."
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A N T I T R U S T
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A textualist interpretation of the implied private right of action under section 10(b) of the Exchange Act concludes that the right to recover money damages in an aftermarket fraud can be no broader than the express right of recovery under section 18(a) of the Exchange Act. The Act's original legislative history and recent Supreme Court doctrine are consistent with this conclusion, as is the Act's subsequent legislative history.

Section 18(a), however, requires that plaintiffs affirmatively demonstrate actual “eyeball or eardrum” reliance as a precondition to recovery and does not permit a rebuttable presumption of reliance. Accordingly, if the Exchange Act is to be interpreted as a “harmonious whole,” with the scope of recovery under the implied section 10(b) private right being no greater than the recovery available under the most analogous express remedy, section 18(a), then section 10(b) plaintiffs must either demonstrate actual reliance as a precondition to recovery of damages, or the U.S. Supreme Court should revisit Basic, as suggested by four Justices in Amgen, and overturn Basic's rebuttable presumption of reliance. A textualist approach thus provides a rationale for either distinguishing or reversing Basic that avoids the complex debate over the validity of the efficient market hypothesis, an academic dispute that the Court is not optimally situated to referee.

Experience also demonstrates that Basic's presumption of reliance, which is nominally rebuttable, is effectively irrebuttable once it attaches. Most particularly in the context of class action litigation, because a de facto irrebuttable presumption of reliance effectively eliminates the reliance requirement, and because every Justice that has ever addressed the question, whether in majority, concurrence, or dissent, agrees that reliance is an element of the section 10(b) private right of action, the continued application of the de facto irrebuttable presumption of reliance creates an irreconcilable conflict between the law as applied in fact and the law as described by the Supreme Court's doctrine. This observation provides a further basis upon which to challenge Basic's continuing vitality.

The implications of this analysis are potentially profound. If plaintiffs must affirmatively demonstrate actual reliance, then many section 10(b) securities fraud class actions become uncertifiable because individual questions will predominate. Private securities fraud litigation would then
likely be dominated by class actions asserting violations of section 11 of the Securities Act as well as by a scrum of individual actions brought by larger investors with significant damage claims in major cases. The battle would then likely move to Congress, which could legislate a rebuttable presumption of reliance, or otherwise amend the statute to reform the securities litigation process.

393 Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts
C. Stephen Bigler and John Mark Zeberkiewicz
In 2008, this journal published an article noting the difficulty under Delaware law in determining whether defects in stock issuances would render the stock void, and thus incapable of being validated or ratified, or merely voidable, and thus susceptible to cure by ratification. The Delaware legislature has adopted amendments to the General Corporation Law of the State of Delaware, which amendments will become effective on April 1, 2014, that are designed to overrule the existing precedents requiring that defective stock and acts be found void. The amendments expressly provide that defects in stock issuances and other acts render such stock and acts voidable and not void, if ratified or validated in accordance with the new ratification statutes. The amendments provide Delaware corporations with two alternative paths—one involving remedial action taken at the corporation’s initiative, the other involving a court proceeding—to ratify or validate stock and other corporate acts that, due to a defect in authorization, might under prior law have been void and incapable of ratification. In this article, we summarize the reasons why the ratification statutes were necessary, provide an overview of the new Delaware ratification statutes, and discuss examples of circumstances where the ratification statutes could be utilized, specific types of defects that could be validated, which alternative path (self-help or court-assisted) might be appropriate in various circumstances, and the effect of validation.

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S. Michael Sirkin
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of the acquiror as of the time a merger is announced should be deemed contemporaneous owners of claims acquired in the merger for purposes of derivative standing. Following these rules would restore order to the Delaware law of standing in the merger context and would advance the important public policies served by stockholder litigation in the Delaware courts.

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1. **A "PRINCIPLED" APPROACH TO COVERAGE? THE AMERICAN LAW INSTITUTE AND ITS PRINCIPLES OF THE LAW OF LIABILITY INSURANCE**
   By: Michael F. Aylward and Lorelie S. Masters
   Providing an overview of the ALI's Principles of the Law of Liability Insurance project and highlighting potential areas of controversy arising from the Principles.

2. **CANADIAN PRODUCT LIABILITY LAW - 2013 IN REVIEW.**
   By: Robert L. Love
   Reviewing notable common law developments in Canada in 2013 applicable to defending product liability claims and summarizing recent industry guidance provided by Health Canada's Consumer Product Safety Program.

3. **PREJUDGMENT INTEREST IN CONSTRUCTION DEFECT LITIGATION - FLORIDA'S LOSS THEORY ON LIQUIDATION DAMAGES POST-BOSEM AND WHY EVERY CONSTRUCTION LAWYER SHOULD BE FAMILIAR WITH IT.**
   By: Maritza Peña
   Discussing the treatment of prejudgment interest in Florida construction law disputes and contending that the trends arising in Florida provide a template for arguments to be raised across the country.

4. **CHOICE OF LAW AND MULTIPLE CHOICE - ALL OF THE ABOVE?**
   By: Wen-Shin Cheng
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