BARRACK BULLETIN

THE INSTITUTIONAL INVESTOR'S GUIDE TO SECURITIES CLASS ACTION LITIGATION

Volume 6, Winter 2002 Barrack, Rodos & Bacine

Barrack Rodos & Bacine Helps Out

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The "Old Newsboys' Day" logo belongs to The Variety Club of Philadelphia

"Give a Buck, Send a Kid to Camp" filled Philadelphia streets on Friday, October 4, 2002, as the 45th annual Old Newsboys' Day brought Philadelphians together to help send kids in need to summer camp. Old Newsboys' Day is sponsored by the Variety Club of Philadelphia, established in 1935, whose sole purpose is to help handicapped and underprivileged children. On Old Newsboys' Day, volunteers sell 'Happiness' editions of the Philadelphia Inquirer, which highlight Variety's children. Philadelphians from all

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Accounting Fraud: An Accountant's View

Daniel E. Bacine
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In October of this year, the Auditing Standards Board of the American Institute of Certified Public Accountants ("AICPA") issued Statement on Auditing Standards No. 99, "Consideration of Fraud in a Financial Statement Audit." The AICPA has identified this new standard as an important element in the organization's drive "to rebuild investor confidence in our capital markets and re-establish audited financial statements as a clear picture window into corporate America." The CPA Letter, Vol. 82, No. 9 (November 2002).

To find out what was "new" about SAS 99, BRB's Dan Bacine spoke to Harris Devor, a founding shareholder of Shechtman, Marks, Devor & Etskovitz, P.C., a Philadelphia accounting firm. Harris, a CPA with 29 years of audit experience, has provided litigation support services, including providing testimony as an accounting and auditing expert, in a variety of securities fraud class actions. Dan and Harris talked about the nature of fraud and what the accounting profession is doing to address the problems that have been in the headlines during the past year:

Dan Bacine: There has been a great deal written about securities fraud of late. Nearly all the companies that have collapsed in recent history as a result of disclosures of financial chicanery had disseminated traditional "audited financial statements." We hear a lot about what the federal government is or may be doing to restore confidence in the markets and to police the accounting profession. What, if anything, is the accounting profession itself doing to combat corporate fraud and restore confidence in the work product of auditors – audited corporate financial statements?

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Harris Devor: Good question. The AICPA's recent adoption of Statement on Auditing Standards No. 99 ("SAS 99"), entitled *Consideration of Fraud in a Financial Statement Audit*, is part of what the accounting profession is doing to improve the reliability of audited corporate financial statements. SAS 99 is much more far-reaching in terms of fraud detection and prevention than its predecessor, Statement on Auditing Standards No. 82, which bore the same title.

DB: Since SAS 99 addresses "fraud" in financial statements, how does SAS 99 define fraud?

HD: Fraud, as defined in SAS 99, is an intentional act that results in a material misstatement in financial statements. If the underlying action that results in a misstatement is unintentional, that act is then called an error and not fraud.

SAS 99 focuses on the auditor's consideration of fraud in an audit of financial statements. However, it does acknowledge that it is management's responsibility to design and implement programs and controls to prevent, deter, and detect fraud.

DB: How does a fraud happen?

HD: There are at least three conditions always present in a business environment when fraud occurs. They are incentive or pressure, opportunity, and attitude: a decline in business can put *pressure* on management to maintain profitability; a business whose accounting function relies heavily on estimates or subjective judgments that are difficult to corroborate provides the *opportunity* to "cook the books"; and a corporate culture and *attitude* that stresses an aggressive, win-at-all-costs mindset encourages management to cross the line.

DB: What guidance does SAS 99 give to auditors to address these problems?

HD: SAS 99 is designed to improve the likelihood of detecting and preventing material fraud and to educate financial statement users about financial statements. The first line of defense against the kinds of fraud we've seen lately is the development and deployment of effective anti-fraud programs and controls to prevent and deter fraud in every business.

DB: Has the auditor's responsibility to detect fraud changed with SAS 99?

HD: No. In fact, that is one thing that has not changed from SAS 82. An auditor has always been and is still responsible for planning and performing an audit to obtain reasonable assurance that the financial statements are free from material misstatements, whether caused by error or fraud.

DB: What are the major changes of SAS 99 from SAS 82?

HD: The major changes include required discussions among audit team members about the risks of fraud at the particular audit client in question, an increased emphasis on professional skepticism, expanded guidance on identifying and assessing fraud risks and responding to risks, and procedures addressing management override of controls.

DB: Would you please give us some more detail about each of these changes?

HD: Sure...

Daniel E. Bacine

First, SAS 99 requires audit team members to participate in brainstorming sessions, discussing how fraud could occur at this particular audit client. The focus in these sessions is on the risks that may occur through financial statement fraud or misappropriation of assets. It is important that these brainstorming sessions not be dominated by any one person – especially the engagement partner, who presumably has close ties to the audit client.

Next, the new standard reminds auditors to place a heavy emphasis on professional skepticism. For an accountant, the phrase "professional skepticism" means to have a "questioning mind" when approaching the information provided by a client during an audit. As you know, as part of an audit, the auditor gathers information so he or she can express an opinion about the fairness of the financial statements being audited. This new SAS emphasizes that the auditor should maintain a "questioning mind" when approaching the evidence provided by the audit client – especially representations by management – even when

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there is no reason to suspect fraud. SAS 99 explicitly states that "the auditor should not be satisfied with less-than-persuasive evidence because of a belief that management is honest."

Harris L. Devor

SAS 99 also provides auditors with new guidance for identifying fraud risks. Auditors are instructed to apply their professional judgment to determine the types of fraud that could occur at a company, the likelihood such a risk could occur at the company and whether there are any unusual or unexpected relationships that might increase the risk of a fraud. As you can see, identifying risk of material misstatements due to fraud is closely tied to the three conditions present when fraud occurs.

The next step for the auditor is to evaluate whether the audit client has designed and implemented programs and controls that address identified risks of material misstatement due to fraud. The goal of these programs is to create a culture of honesty and ethical behavior at a company that will help to prevent, deter and detect fraud. SAS 99 then requires the auditor to assess the risk of fraud in light of those programs.

When the auditor has assessed the risks of fraud, SAS 99 provides expanded guidance on how the auditor should respond to the overall risk of material misstatement, to insure that the audit is conducted with the degree of professional skepticism needed to conduct a reliable audit. The auditor's responses should include assigning personnel, applying accounting principles, and using auditing procedures that will permit the audit team to gather the most reliable and accurate information for the audit. SAS 99 also offers suggestions on changing the nature, timing, and extent of tests to improve the reliability of the information.

SAS 99 also introduces mandatory procedures for evaluating the risk of management directly or indirectly manipulating accounting records by overriding controls established to prevent fraud from occurring. Because management override of controls can occur in unpredictable ways, these procedures include examining journal entries and other adjustments that have been at the heart of many of the big frauds revealed recently; reviewing accounting estimates for biases; and evaluating the business rationale for significant unusual transactions.

In sum, SAS 99 emphasizes greater reliance on professional skepticism and critical thinking in the audit process to detect and deter fraud.

DB: What happens if fraud is identified or suspected?

HD: If an auditor thinks something is suspicious, he or she should pursue any suspicious information and obtain additional evidence of a fraud if possible. Once identified, however, a fraud must be brought to the attention of the appropriate level of management at the company – even the audit committee or board, if the fraud has occurred at senior management level. The auditor may even suggest that the client consult with legal counsel.

DB: Does this SAS address management's responsibility?

HD: SAS 99 focuses on the auditor's consideration of fraud in an audit of financial statements. However, it does acknowledge that it is management's responsibility to design and implement programs and controls to prevent, deter, and detect fraud. In fact, there is new language that management must incorporate into their representation letters to their auditors that includes, among other things, that management acknowledges its responsibility for the design and implementation of programs and controls to prevent and detect fraud, and that they have no knowledge of any fraud or suspected fraud affecting the entity involving management employees who have significant roles in internal control.

Additionally, SAS 99 includes, as an exhibit, "Management Antifraud Programs and Controls: Guidance to Help Prevent, Deter, and Detect Fraud," which is designed to assist management in developing and implementing programs and controls to help prevent, deter, and detect fraud.

I think the industry is very interested in redeeming itself and is taking these measures very seriously.

DB: Have any other professional organizations endorsed the exhibit dealing with management anti-fraud controls?

HD: Yes. Seven professional organizations, including the AICPA, jointly developed this guide. The other organizations that developed and endorsed this guidance are the

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Association of Certified Fraud Examiners, Financial Executives International, the Information Systems Audit and Control Association, the Institute of Internal Auditors, the Institute of Management Accountants, and the Society for Human Resource Management. Three other organizations, including the National Association of Corporate Directors, also provided input.

DB: What is the purpose of this guide?

HD: The guide provides specific recommendations to help boards of directors, audit committees and management prevent and deter fraud. The guide's premise is that anti-fraud programs and controls evolve from three fundamental actions: 1) creating a culture of honesty and high ethics; 2) evaluating anti-fraud processes and controls; and 3) developing an appropriate oversight process. All simple ideas – the difficulty, as you can imagine, is in implementing them.

[T]he bottom line is that regardless of professional standards, there will always be those who violate them. In the end, it remains the responsibility of investors, particularly the sophisticated institutional investors, and their lawyers to root out those failures in performance that amount to securities fraud.

DB: What is the profession doing to assist companies in actually developing and implementing those concepts?

HD: The AICPA has embarked on a series of initiatives to assist in the implementation of anti-fraud controls. First, it is convening an anti-fraud summit with corporate leaders, executives, accountants and market professionals, including analysts and representatives from stock exchanges. It is also sponsoring academic research into fraud and effective fraud controls. The industry is establishing an Institute for Fraud Studies in conjunction with the University of Texas and the Association of Certified Fraud Examiners. The AICPA is also launching more training programs for CPA's on fraud and is urging stock exchanges to mandate effective fraud education for corporate managers and directors.

DB: How effective do you think SAS 99 and the other initiatives of the AICPA and related professional organizations will be in rooting out fraud?

HD: Well, it certainly is a step in the right direction. I think the industry is very interested in redeeming itself and is taking these measures very seriously. However, as the newly installed AICPA Chairman of the Board, William Ezzell, recently said, "As we look back over the abuses that have been uncovered over the past year, we need to assess whether the problems arose from the standards themselves, or from the failure to appropriately apply those standards in difficult and complex situations. *The evidence so far indicates to me that the failure was more related to the performance.*" Clearly, accountants, in general, understand that a number of people in the industry shirked their responsibilities and allowed these massive frauds to occur.

Of course, in the end, those accountants who do not take these new standards seriously can be brought to task by you, the attorneys. The good news is that not only do responsible accountants and corporate managers now have clearer guidance on fraud issues and controls, but the public now has a better picture of what corporations and their accountants should be doing.

DB: What are the implications for an auditor who does not follow SAS 99?

HD: Although I defer to your opinion on legal matters, as an accountant who frequently testifies in securities litigation and fraud cases, I can safely say that an accounting firm that does not adequately follow SAS 99 in the future would be opening itself up to increased liability as a defendant in securities litigation.

DB: I guess the bottom line is that regardless of professional standards, there will always be those who violate them. In the end, it remains the responsibility of investors, particularly the sophisticated institutional investors, and their lawyers to root out those failures in performance that amount to securities fraud.❖

COMING SOON
To A Computer Near You!

The newly redesigned Barrack, Rodos & Bacine website, your source for information about all aspects of securities litigation.
Visit **www.barrack.com** on
January 15, 2003, to see what BRB can do for you.

Securities Fraud Class Actions: More Than Just The Numbers

Robert A. Hoffman
Managing Attorney, New Jersey Office
Barrack, Rodos & Bacine

WorldCom, Enron, Cendant, Sunbeam. The names read like a rogues gallery of accounting fraud that have been at the heart of recent securities class action litigation. With revelations of corporate accounting scandals seeming to appear almost daily, it is easy to think of securities fraud class actions as simply the "stuff of numbers." However, what a corporation says (or does not say) about itself can often be just as important as its financial results. A case in point involves Schering-Plough Corporation, the pharmaceutical company best known as the maker of the allergy medicine, Claritin. The Florida State Board of Administration ("FSBA"), represented by Barrack, Rodos & Bacine, currently serves as the Lead Plaintiff in a securities fraud class action against the Company pending in the federal district court of New Jersey. Unlike many recent cases that are based on financial misconduct, the case against Schering-Plough is based on the Company's alleged failure to disclose important, or "material," information in public statements it made about its manufacturing operations and its regulation by the Food and Drug Administration. The court recently rejected defendants' motion to dismiss the class action complaint, demonstrating that the heightened requirements for pleading securities fraud imposed by Congress in the Private Securities Litigation Reform Act of 1995 ("PSLRA") can be satisfied by allegations of misconduct unrelated to accounting fraud.


Robert A. Hoffman

Although the case against Schering-Plough was brought on behalf of purchasers of the Company's stock from May 9, 2000 through February 15, 2001 (the "Class Period"), the detailed allegations in the case concern problems faced by the Company for at least two years before the start of the Class Period. In 1998, the FDA commenced a series of inspections of Schering-Plough's manufacturing facilities in New Jersey and Puerto Rico, where the Company manufactures virtually every significant prescription and over-the-counter product it sells. The inspections were intended to gauge compliance with FDA regulations known as Good Manufacturing Practices ("GMPs") applicable to the manufacture of all pharmaceutical products. The inspections revealed pervasive and wide-ranging violations of the FDA's GMP requirements, including Schering-Plough's failure to adequately test drug products to assure that they met required specifications, its release of numerous "out-of specification" products to the public and its failure to adequately investigate consumer complaints.

After each inspection, the FDA notified Schering-Plough of the significant violations and gave the Company an opportunity to correct the deficiencies. When violations remained uncorrected, the FDA followed with a "Warning Letter" to the Company. Between 1998 and 2000, the FDA sent Schering-Plough four such Warning Letters. In each letter, the FDA cautioned Schering-Plough that it could be subject to regulatory action if the violations continued.

The gravity of the Schering-Plough's deficiencies was underscored by the problems the Company experienced with certain of its aerosol inhalation products intended for use by asthma patients. The FDA found that the Company had manufactured some inhalers without any active ingredient. As a result, in the fall of 1999 and spring of 2000, the FDA required Schering-Plough to undertake a massive, nationwide recall of more than 60 million units of the medication.

The [consultant's] report bluntly warned Schering-Plough that "the facilities and corporation are at a serious risk of significant FDA regulatory action."

Against this backdrop of failed inspections, Warning Letters and product recalls, Schering-Plough engaged an outside consultant to conduct an audit of one of the Company's manufacturing facilities in New Jersey. On April 27, 2000, the consulting firm delivered its audit report to Schering-Plough, in which the consultant described "serious GMP systems failures and compliance lapses," "out of control situations," and "'systems' which are 'broken' that are the cause for many of the deviations discovered during the audit." The report bluntly warned Schering-Plough that "the facilities and corporation are at a serious risk of significant FDA regulatory action."

At the same time Schering-Plough was experiencing rampant manufacturing deficiencies, it was facing the looming expiration of its patent for Claritin, its best-selling product, which generated annual sales of $3 billion, or 30% of the Company's revenues. In 1999, in an effort to stave off generic competition for Claritin that was expected upon

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expiration of the patent, the Company sought FDA approval for a new patented drug to be marketed under the trade name of Clarinex. Schering-Plough hoped to gain FDA approval for Clarinex by early 2000 so that it would have two full allergy seasons to convert users of Claritin to Clarinex before the onslaught of generic competition. The Company reasoned that if Claritin users were converted to Clarinex before generic competition, and Clarinex was demonstrated to be more effective than Claritin, then allergy patients would be less likely to switch to generic versions of Claritin once its patent protection expired. Before gaining approval for Clarinex, however, the FDA conducted a series of "pre-approval inspections" of the facilities where Schering-Plough planned to manufacture Clarinex. These were the very facilities in New Jersey and Puerto Rico that had been the subject of both the FDA's earlier inspections and a blistering report from Schering-Plough's own consultant.

The [PSLRA's] requirements have generally been easier to satisfy in cases involving accounting fraud. After all... [a financial] restatement constitutes an acknowledgement that its previously published financial results were wrong...and the "books do not cook themselves."

On May 9, 2000, less than two weeks after receiving the report of its consultant, Schering-Plough filed its Form 10-Q for the first quarter of 2000 with the Securities and Exchange Commission. The Complaint alleges that this filing was false and misleading because it failed to disclose the serious and widespread nature of the deficiencies Schering-Plough was experiencing at its manufacturing facilities. The Form 10-Q told investors little more than that the Company was required to manufacture drug products in accordance with GMP regulations established by the FDA; that failure to comply with GMP regulations could result in delays in the release of products; that "from time to time" the Company had received Warning Letters relating to "various manufacturing issues"; and that one such letter related to the Company's manufacture of asthma inhaler products in New Jersey. The Complaint alleges that, taken together, Schering-Plough's statements conveyed a false impression that the only "live" issues relating to the Company's manufacturing were those pertaining to the asthma aerosol drugs. These issues, of course, had already been disclosed to the public as a result of the previously-announced nationwide recalls. Missing from the Form 10-Q were any disclosures that the Company's manufacturing deficiencies involved not just asthma aerosol products, but extended across a wide range of products, including most of the Company's top-selling drugs; that such deficiencies were not confined to the Company's facilities in New Jersey, but were also endemic to its plants in Puerto Rico; that many of the Company's products were manufactured in violation of GMP regulations; and that such violations gave rise to a serious risk of significant regulatory action by the FDA. The allegedly misleading statements in Schering-Plough's first quarter 2000 Form 10-Q were repeated verbatim in subsequent SEC filings for the second and third quarters of 2000.

The Complaint also alleged that the Company issued false and misleading statements concerning its application to the FDA for approval of Clarinex. For example, on November 28, 2000, Schering-Plough management met with securities analysts and, according to the analysts, expressed "confidence that [Clarinex] would be on the market in ample time for the spring [2001] allergy season." On the same day, the Company issued a press release that, while avoiding any prediction as to the timing of FDA approval of Clarinex, nevertheless stated that Schering-Plough "is making preparations for the potential availability of [Clarinex] for the spring 2001 allergy season." The Complaint alleges that these statements failed to disclose the existence of serious impediments to the FDA's approval of Clarinex as a result of the Company's manufacturing deficiencies. Indeed, on January 19, 2001, Schering-Plough received a letter from the FDA that expressly conditioned final approval of Clarinex on a satisfactory resolution of the Company's GMP issues. Although Schering-Plough disclosed its receipt of the FDA's letter on January 25, 2001, it nevertheless failed to mention the strenuous conditions the agency had imposed for Clarinex's approval.

On February 15, 2001, Schering-Plough finally revealed the true extent of the Company's manufacturing deficiencies, disclosing that the FDA had cited the Company for failure to comply with GMP's, and that, as a result, some production lines had been temporarily interrupted and first quarter earnings per share could be as much as 15 percent lower than the previous year. The Company stated that it had committed to spend $50 million on "new equipment, process and system improvements" and that it had "initiated major organizational changes in its manufacturing and quality control operations," including the hiring of substantial additional personnel "dedicated to quality control and

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compliance." Finally, Schering-Plough also publicly disclosed the contents of the letter that it had received from the FDA several weeks earlier, acknowledging that the FDA had withheld approval of Clarinex until the GMP deficiencies were resolved.

Schering-Plough stock suffered an immediate 15 percent decline as a result of this announcement, representing a loss in market capitalization of more than $10 billion. Many analysts cut their rating of the Company, citing a loss of management credibility based on the failure to disclose the delay in approval of Clarinex and previous assurances that any manufacturing deficiencies of significance were limited to those associated with the Company's asthma inhaler products and were being adequately addressed. Although Schering-Plough ultimately received FDA approval for Clarinex in December 2001, the Company's troubles were far from over. In March 2002, Schering-Plough agreed to a $500 million penalty imposed by the FDA, a fine that is reportedly five times more than the largest penalty ever levied by the FDA for violations of a similar nature.

Numerous investors sued Schering-Plough in the wake of its February 15, 2001, disclosures. Following its appointment as Lead Plaintiff in the consolidated litigation, the FSBA filed an extensive complaint, providing numerous details of the information alleged to have been known by defendants during the Class Period by virtue of the Company's receipt of inspection reports and Warning Letters from the FDA, as well as the confidential report of its own consultant, but not revealed to the investing public. Defendants sought to use the heightened pleading requirements of the PSLRA to obtain a dismissal of the Complaint.

The Court's decision demonstrates that securities class action litigation led by institutions can and should encompass more than just claims of accounting fraud.

Under the PSLRA's pleading requirements, a complaint must: (1) specify the allegedly misleading statements and the particular facts that supporting a belief that the statements are misleading; and (2) plead facts giving rise to a "strong inference" that defendants' statements were made with knowledge of the true facts or in reckless disregard of them. While the proper application of these pleading requirements has been intensely litigated since the statute's enactment, the requirements have generally been easier to satisfy in cases involving accounting fraud. After all, when, for example, a company restates its financial statements due to improper revenue recognition, the restatement constitutes an acknowledgement that its previously published financial results were wrong. Moreover, since the "books do not cook themselves," knowing misconduct is easier to allege.

In a case involving allegations of false and misleading narrative disclosures, however, the court must determine whether the complaint has the requisite information to allow the Court to infer that defendants made statements with knowledge or reckless disregard of the truth. In the case against Schering-Plough, defendants argued that the Complaint neither provided sufficient factual allegations of fraud nor raised a strong inference that defendants acted knowingly or recklessly. They contended that the Complaint's allegations of fraud were based on "hindsight" rather than on facts showing defendants' knowledge at the time that they were making allegedly false and misleading statements.

U.S. District Judge Katherine S. Hayden squarely rejected defendants' arguments. Judge Hayden's decision, delivered from the bench earlier this year, emphasized that the Court was not ruling on the merits of plaintiffs' claims, but was merely assessing the sufficiency of the Complaint's allegations under the PSLRA and other relevant pleading standards. The Court held that the requirements of the PSLRA were satisfied because the Complaint alleged that "when [defendants] made the statements [at issue] they had information which rendered from the plaintiffs' theory the information misleading because of what was omitted and yet known, i.e., the big problems and huge deficiencies that weren't disclosed." The Court found that the Complaint pled a "developing accretion of information" that was in defendants' possession before the start of the Class Period — including the FDA Warning Letters and the report of Schering-Plough's consultant — that belied defendants' contention that the allegations were based on hindsight.

The Court's decision demonstrates that securities class action litigation led by institutions can and should encompass more than just claims of accounting fraud. With a proper pre-complaint investigation, a complaint relating to a company's narrative disclosures can include sufficient information to satisfy the PSLRA's stringent pleading requirements.❖

Barrack, Rodos & Bacine Helps Out

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walks of life, including local politicians and celebrities, fan out across the city, selling these Happiness newspapers to raise money to support Variety's programs for special needs children. This four page mini-newspaper typically raises more than $60,000 a year and helps fund programs at the Variety Club Camp and Developmental Center.

Maxine S. Goldman
Old Newsboys' Day

Several years ago, the Variety Club enlisted the Philadelphia legal community to actively participate in this fundraiser. As with most people, friendly competition often garners better results and the Variety Club knows that lawyers love to compete, especially when there is an incentive. This year, the law firm that sold the most copies of the "Happiness" newspaper – and raised the most money – was to be honored at an appreciation luncheon and presented with the Chancellor's Cup.

Jennifer Edwards
Old Newsboys' Day

Barrack, Rodos & Bacine was there in full force on Old Newsboys' Day. Even though BRB was not the largest firm out "hawking" the Happiness Edition, we sold the most newspapers and raised more money than any other firm. The Variety Club presented BRB with the Chancellor's Cup at a wonderful luncheon held in the offices of the Chancellor of the Philadelphia Bar Association. The event even made the 5:00 p.m. news!

The Chancellor's Cup, engraved with our name, sits proudly in our reception area. BRB is already busy planning new ways to sell even more newspapers and raise more money for Variety's kids – not to mention maintain our first place prize – when we participate again next year. After all, it's a marvelous feeling when you know you have helped needy children go to summer camp. And winning the trophy doesn't hurt either.❖

Adele Bumble & Patti Hamer
Old Newsboys' Day

About the Publisher…

Barrack, Rodos & Bacine is a boutique law firm that has been extensively involved in class and derivative actions alleging violations of securities laws for more than twenty-five years. The firm, with attorneys in offices located in Philadelphia, San Diego, New York, and New Jersey, has been appointed by federal judges throughout the country as lead counsel in over 30 cases since the passage of the PSLRA and represents a number of institutional investors in securities class actions. The Barrack Bulletin, edited by Leslie Bornstein Molder, Esquire, is published four times a year.

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