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New York State

Hon. Loretta A. Preska: Chief Judge Of The "Mother Court"

*The Editor interviews **Hon. Loretta A. Preska**, Chief U.S. District Judge, Southern District of New York.*

Editor: You recently became Chief Judge of the U.S. District Court for the Southern District of New York. What can you tell us about the history and work of the Court in this District?

Preska: It is indeed an honor to be serving as Chief Judge of the Mother Court. As you know, The Judiciary Act of 1789 established the Supreme Court of the United States. The Act also established thirteen judicial districts, which generally followed state lines. Each district court consisted of one district judge to preside over the four annual sessions of the court. The District of New York became the first federal court to organize under the sovereignty of the United States – preceding the Supreme Court by several weeks – when Judge James Duane's commission was read on November 3, 1789. Hence, the Southern District of New York is often referred to as the Mother Court.

The Court's beginnings were slow, with over five months elapsing before Judge Duane heard his first case in April of 1790. Customs cases took up over three-quarters of the young District's activities, with a few minor admiralty suits from the sale of ships rounding out the docket. The Court's activities slowly began to pick up over the next decade, particularly claims from the seizure of ships.

The Southern District as we know it was carved out of the rest of the District of New York in 1814, just as New York City's growing population and role as a key harbor and commercial hub increased the volume and importance of cases before the Court. Over the next hundred years, the Southern District made significant contributions in the field of maritime and admiralty law, spanning issues such as collisions, customs, seamen's wages, marine insurance, engagement in slave trade, naval seizures of enemy property, and other armed conflict issues arising from the War of 1812 and the Civil War. With the enactment of the Bankruptcy Act of 1898 and a surge in bankruptcy cases, the Court was forced to create a second judgeship to deal with its bulging docket. The District's growth has not slowed since.

Today, the Southern District is the busiest and largest federal court in the country. In 2008 alone, 12,124 civil cases were filed. There are currently forty-five district judges, fifteen magistrate judges, and eleven bankruptcy judges, housed in the Daniel Patrick Moynihan United States Courthouse at Foley Square, the Hon. Charles L. Brieant Jr. Federal Building and Courthouse in White Plains, the bankruptcy court in Alexander Hamilton Customs House at One Bowling Green, and the United States Courthouse in Middletown. In addition, the District Executive's Office, led by Clifford Kirsch, and the Clerk's Office, led by J. Michael McMahon, serve approximately 800 employees working to ensure the smooth and efficient operation of the Court on a daily basis. The Court also oversees the operations of the Probation and Pretrial Services offices.

Editor: What types of cases do you regularly see in the Southern District?

Preska: We see them all: contract, antitrust, securities, prisoner petitions, labor, and all other types of matters, both civil and criminal. Contract disputes were our biggest category of suits filed in 2008, representing almost 30 percent of the civil docket. Personal injury and civil rights suits were second and third, representing roughly 18 percent and 13 percent respectively. Some types of cases that occupy a very small percentage of the civil docket still take up a considerable amount of the Court's time and effort. Antitrust and securities cases, for example, account for only 0.49 percent and 3.33 percent of the civil docket, yet often involve complex and challenging issues.

If you look at the 23,230 civil suits pending as of September 9, 2009, you see an even wider array of cases. Aside from the heavy-hitting categories already mentioned, we have foreclosure actions, RICO prosecutions, consumer credit suits, disputes under the Agricultural Acts, Freedom of Information Act actions . . . the list goes on and on. Recently, we have also seen a rise in bankruptcy appeals and in maritime cases where plaintiffs seek to attach funds moving electronically through New York.

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The Hon. Loretta A. Preska

As befits its place as the center of commerce and finance, the Southern District is also home to significant multi-district litigation ("MDL"), with 42 pending cases as of September 19, 2009. For example, Judge John F. Keenan recently tried one of the 442 cases involving the osteoporosis drug Fosamax (*In Re Fosamax Liability Litigation*). Judge Keenan and Judge Robert W. Sweet are presiding over the 371 cases arising out of the tragic airline crash on November 12, 2001, in Belle Harbor, Queens (*In Re Air Crash at Belle Harbor, NY Litigation*), and Judge Jed S. Rakoff is presiding over the 223 cases arising out of the 2005 bankruptcy of Refco, Inc. (*In Re Refco Inc. Securities Litigation*). In addition, we have cases involving products from pineapples (*In Re Pineapple Antitrust Litigation*), presided over by Judge Richard M. Berman, to methyl tertiary butyl ether (*In Re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*), presided over by Judge Shira A. Scheindlin.

Less fortunately, our District also sees a wide range of criminal cases. In September, for example, Judge P. Kevin Castel began John Gotti Jr.'s trial on racketeering and murder charges. Other high-profile criminal cases from around the world also seem to land in the Southern District. For example, the other week we had a brief appearance by accused Somali pirate Abdiwali Abdiqadir Muse, who was captured after the rescue of captain Richard Phillips of the U.S.-flagged Maersk Alabama off the Somali coast in April. Earlier this year, Judge Denny Chin sentenced Afghan drug trafficker Bashir Noorzai to life in prison for his participation in a conspiracy that distributed millions of dollars worth of heroin around the world.

Comparing the distribution of guideline defendants sentenced by primary offense category in the Southern District to the national distribution, the Southern District tends to see a higher percentage of fraud and other white collar crimes like embezzlement, forgery, and money laundering. We also see a higher percentage of drug cases; within the drug category, the Southern District has a higher percentage of powder cocaine and lower percentages of marijuana and methamphetamine. Immigration offenses are also lower than the

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International Recovery

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I'm going to prevail. I had a recent visit with Dan Yergin at Cambridge Associates about this topic; I think that, given all the other challenges and issues we've got on the agenda, cap and trade legislation will go slower than people thought six months ago, but over the next three or five years there will be movement toward putting a price on carbon. The challenge is how to do it in such a way as to avoid disrupting the economy or dramatically altering people's lives. I might add that I think we're really underselling the potential of nuclear power, because of the debate on nuclear waste. This issue frustrated us when we were in office, and it still does, but I believe nuclear energy needs to be a part of the equation. The French seem to have figured it out pretty well: they rely on nuclear power for a large percentage of their electricity needs.

Editor: Share your thoughts about India and China with us.

McLarty: Well both are big, big emerging markets, and increasingly important actors on the global stage. We're certainly seeing that in the automotive sector, where China is now the world's number one auto market, and India is becoming a real player as well. Tata's mass-market Nano is a good example of that. The McLarty Companies have been particularly bullish on China, where we've recently launched a retail automotive endeavor.

Editor: What's Roger Penske going to do with Saturn?

McLarty: Roger is a friend whom I like and admire. His new Saturn venture is a clear example of how the distribution channel in the United States is changing. I think we're going to see some different paradigms in the years ahead. The Penske Automotive Group's contemplated Saturn venture will probably involve a number of international players from Europe and South Korea, and perhaps Japan.

Editor: That's a fascinating remix of the players isn't it?

McLarty: We're going to have to bring our game up a level in the United States. The tectonic plates of history have shifted, the center of gravity is moving toward Asia, and we're going to have to rethink about how we position ourselves and deal with the rest of the world. President Obama and Secretary Clinton are doing precisely that, and many business leaders are as well.

Editor: It seems there's a bright side to the economic downturn in terms of people having to stop and think about wisdom of thrift and saving.

McLarty: No doubt about that. Consumers have sharply increased their savings rate and pulled back on consumption. We clearly were far too lax on credit. We need responsible, balanced regulation, and we have to do a better job in our oversight of the financial markets. I'm not for intrusive, stifling regulation, but we need balanced, firm oversight. I think that's what the president put forward in his recent speech on Wall Street.

Editor: Are you looking to put the oversight under the Fed ?

McLarty: I had the privilege of serving as a governor of the St. Louis Federal Reserve Bank for several years before I went to Washington. St. Louis has always had a reputation for independence and a strong history of fighting inflation. Some of the oversight does need to be rationalized and I think the Fed is a logical place to put it, but I wouldn't hollow out the other agencies. The SEC needs to be much more effective.

Editor: Are you at all encouraged about the prospects for the Doha Round?

McLarty: India and Brazil will be key players. I would characterize my position as hopeful, stopping short of optimistic. I've known Ron Kirk for a number of years and think highly of him. I'll have the opportunity to be with him soon, and I'm looking forward to hearing his views on Doha and other matters, including the Panama and Colombia FTAs. The delay in passing those trade agreements is frustrating and disappointing. There may not be huge trade flows at stake, but our failure to follow through sends such a negative signal to our Latin American partners, particularly to President Uribe, who has been so courageous in his leadership of Colombia, and to Panama, which has had a period of sustained economic growth, reflecting, in part, that country's professional management of the Panama Canal.

Editor: Talk a bit more on Latin America, touching on a country that we haven't talked much about over the years, Honduras.

McLarty: It's come to the forefront now. The Honduras situation is a conundrum. The Hondurans took most of the right steps but just stopped short of impeachment or going through a formal senatorial or congressional process to remove Zelaya, or at least limit his powers and change the election cycle. So it puts the United States in a difficult position.

Editor: It's a challenging time and it's always good to talk to somebody who is an inveterate, but realistic optimist.

McLarty: Today's world presents us with a host of global challenges, but also an exciting array of global opportunities – and we are going to need to work with friends and partners in order to meet them effectively. With technology, communications, capital flows, terrorism, pandemic disease and so forth, we're all in this planet together. That doesn't mean the United States won't protect our vital interests, it doesn't mean we won't have tensions, it doesn't mean we won't have conflicts, but I think there's a much better hope for win-win cooperation.

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national average, constituting only 7.9 percent of primary offense sentencing (compared with 28 percent nationally).

Editor: Tell us about some of the Southern District's other big cases from the last few years.

Preska: Major developments on Wall Street and throughout the financial sector, including the recent economic downturn, have brought several high-profile cases to the Southern District. Martha Stewart's securities fraud trial, before Judge Miriam Goldman Cedarbaum, spanned five weeks in 2004 and ended in Stewart's conviction for obstruction of justice. This June, Judge Chin sentenced Bernard Madoff to 150 years in prison for his massive Ponzi scheme. In 2006, the Securities and Exchange Commission ("SEC") filed a complaint against American International Group ("AIG") alleging securities fraud, resulting in a settlement totaling $800 million. That same year, Judge Lewis A. Kaplan dismissed charges against thirteen defendants in a tax evasion case against the accounting firm KPMG after finding that the Department of Justice had interfered with KPMG's payment of the defendants' legal fees; three of the remaining defendants were subsequently convicted for their roles in the scheme. AIG was also involved in a recent trial against former CEO Maurice "Hank" Greenberg, in which Judge Rakoff ruled that Greenberg's closely held firm, Starr International Co., did not violate a duty to AIG by selling $4.3 billion of AIG stock. These cases illustrate the magnitude of the interests, both public and private, that are often at stake in our courtrooms.

The ceremony to observe the eighth anniversary of the September 11th attacks recently took place at the World Trade Center, less than a mile from our courthouse in downtown Manhattan. In the wake of the unspeakable acts of that day, our District has been involved in a large part of the resulting litigation, both criminal and civil, including the consolidated proceedings of *In Re September 11 Litigation* before Judge Alvin K. Hellerstein.

We have also housed related terrorism prosecutions, such as Judge Barbara S. Jones's 2008 sentencing of Mohammed Jabarah to life in prison for his participation in a plot to bomb U.S. embassies in Singapore and the Philippines. Recently, Guantanamo Detainee Ahmed Khalfan Ghailani pleaded not guilty to charges alleging that he was involved in the 1998 bombings of the United States Embassies in Kenya and Tanzania. The military had previously alleged that Ghailani served as a bodyguard and cook for Osama bin Laden in Afghanistan. These recent prosecutions follow other successful terrorism trials in the Southern District, such as the 1995 prosecution of Sheik Omar Abdel Rahman and 11 co-defendants, who were charged with conspiring to blow up numerous sites in New York. Following the Sheik's conviction by a jury, Judge Michael B. Mukasey, now former Chief Judge of the Southern District and former Attorney General of the United States, sentenced him to life in prison.

Editor: What does the Chief Judge do?

Preska: In a word, everything. All complaints stop at the Chief's door. If the elevators don't work, it is my job to worry about it and get them fixed. Recently, when a judge was five weeks into a criminal trial and because of illness could not continue, it was my job to find a judge willing and able not only to read the more than 2,000 pages of transcript and to certify his familiarity with it (see FED. R. CRIM. P. 25(a)), but to take up the trial and preside through to completion. Judge Robert P. Patterson graciously agreed to undertake that monumental task.

Various Acts of Congress, Federal Rules of Procedure, Regulations, Judicial Conference Policies, and delegations of statutory authority from the Director of the Administrative Office of the United States Courts vest certain powers either in the Chief Judge or the Court generally. In exercising those powers, our Court, and thus the Chief Judge, acts through various committees of the Court.

Editor: That's a lot of different sources to consider. I don't think many individuals outside of the court system are familiar with the role that committees play in the operation of the court. What can you tell us about them?

Preska: The Court acts through the Board of Judges, and the Board acts through its committees. Each district judge and magistrate judge serves on one or more committees, which make recommendations to the Board of Judges and to the Chief Judge. In the Southern District, we currently have twenty-two committees: Assignment, Bankruptcy Liaison, Bar Liaison, Clerk's Office, Collegiality, Criminal Law and Probation, Defender Services, District Executive's Office, Equal Opportunity, Grievances, House and Space, Judicial Improvements, Libraries, Magistrate Judges, Media Access, Mediation Services, Pro Se Litigation, Rules of Practice and Procedure, Security, Technology, Ad Hoc Committee on Cellphones, and Ad Hoc Committee on Cameras in the Courtroom (Narrowcasts & Webcasts).

The committees are a vital part of our existence, allowing all judges to have input into the administration of the Court. It is only through the collective work of the individual judges on the committees, in conjunction with the District Executive's Office, that the Southern District is able to address effectively the countless issues that arise in the daily operation of the Court.

Editor: Speaking of cellphones and webcasts, has the increased use of technology in the workplace created any new challenges for your court?

Preska: Currently, the last two Committees I mentioned are considering whether to revise the present policy prohibiting cellphones, laptops, and other

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Washington Efforts

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November. While some have challenged the authority of the SEC to engage in this rulemaking, the Shareholder Bill of Rights would give the SEC such authority. Therefore, there may be a possibility that the SEC will try to time its actions around potential legislative action on the Shareholder Bill of Rights.

This is the third time in six years that the SEC is considering implementing shareholder access. While previous efforts have failed, this comment period has proven to be no less controversial. Proponents of shareholder access are quietly confident that the third time is the charm, however, history and potential legal challenges may prove them wrong.

Shareholder Bill Of Rights (S.1074)

Last spring, Senators Charles Schumer (D-NY) and Maria Cantwell (D-WA) proposed a Shareholder Bill of Rights. This legislation would mandate shareholder access, say on pay votes, majority voting for directors, separating the CEO and chairman positions, ending staggered boards and the establishment of risk management committees. Representative Gary Peters (D-MI) has introduced similar legislation (The Shareholder Empowerment Act, H.R. 2161) in the House of Representatives.

The Senate Banking Committee, before the August recess, held a hearing on the Shareholder Bill of Rights. Senator Schumer has reiterated that he plans to push forward with passage of the bill, possibly by including it in a broader financial regulatory reform legislative package. Business groups, including the U.S. Chamber of Commerce and the Business Roundtable, have lobbied against the bill. However, most proponents of the legislation have concentrated their efforts on other pressing issues such as healthcare reform, or the SEC's proposal on shareholder access.

This situation may change. If the Obama administration's efforts to jumpstart regulatory reform and to resolve the Senate Banking Committee's chairmanship prove successful, it may renew its efforts to pass the Shareholder Bill of Rights. It appears that the fight for now will be concentrated on the Senate side. House Financial Services Committee Chairman Barney Frank (D-MA) has said that he intends to move some form of corporate governance legislation after financial regulatory reform passes. Such a timetable would kick a House corporate governance bill into 2010. It is also unclear if Chairman Frank will use the Schumer Bill, the Peters Bill or his own bill as the vehicle for changes in governance.

Say On Pay Bill (H.R. 3261)

One of the patterns of legislative activity this year has prompted the quick consideration of legislation regarding corporate governance or executive compensation if other legislative priorities get bogged down. In July, the House was unable to bring healthcare reform legislation or a proposed Consumer Financial Protection Agency bill to the floor for a vote. The House leadership and Representative Frank quickly rushed the Say on Pay bill through the Financial Services Committee and to the floor before the August recess.

A version of the Say on Pay bill passed the House in 2007 by a vote of 269-134, but died in the Senate. This year's version of the Say on Pay bill, formally known as the Corporate and Financial Institution Compensation Fairness Act, was a different animal. While advisory say on pay votes for public companies are still the central piece of the legislation, other items were added on: independent compensation committees, requirements and revelations of potential conflicts of interest regarding compensation consultants and the regulation of all incentive-based compensation throughout the financial services sector. Representative Scott Garrett (R-NJ) offered an alternative bill that provided a triennial vote on Say on Pay with an opt-out and provided a nonfederal preemption clause if state corporate law allowed a mechanism for independent compensation committees. Chairman Frank amended the bill in committee to allow the SEC to draft rules exempting small and midsize companies from annual say on pay votes.

The Say on Pay bill passed the House of Representatives on July 31, 2009 by a vote of 237 to 185. It is unclear at this time if the Senate will consider this legislation, take up its own legislation or, as it had in 2007, let the bill die. It should also be noted that the Obama administration supports annual say on pay votes and independent compensation committees. However, the administration has been silent on the financial services compensation regulation portion of the bill, and it is unclear what position the administration would take if H.R. 3269 were to pass both the House and the Senate.

SEC Proxy Disclosure And Solicitation Enhancements

At its July 1, 2009 opening meeting, the SEC proposed new rules regarding increased disclosure regarding proxy disclosures and solicitation enhancements. This proposal increased the disclosure surrounding directors' or nominees' biographical information and qualifications. Other areas of increased disclosure include compensation policies, more disclosures regarding compensation consultants and disclosure regarding leadership structures and risk management. Other parts of the proposal include improvements to the solicitation process, quicker voting tabulation and disclosure, while allowing the rounding out of non-management nominee slates.

The SEC's comment period ended on September 15, 2009, and while a number of comments were filed, the volume was not comparable to the Shareholder Access proposals. It is unclear when the SEC will meet to try and finalize these proposals, though it is assumed that an attempt will be made to have the new rules ready for the 2010 proxy season. However, because the Proxy Disclosure Enhancements are closely linked to the Shareholder Access proposals, it would seem logical that these proposals will be dealt with at the same time.

Legal Entity Transparency And Law Enforcement Assistance Act (S.569)

Senator Carl Levin (D-MI) has reintroduced a bill that would require the public disclosure of all beneficial owners of a non-public corporation and limited liability corporations. The rationale behind Senator Levin's bill is that these entities have been used for money laundering purposes and such disclosure would help prevent such activities. Under this legislation, no such disclosure requirements would exist for partnerships or sole-proprietorships, and a failure by corporations to keep information current would be subject to criminal prosecution. Groups such as the Chamber of Commerce, the National Association of Manufacturers and the National Association of Secretaries of State have opposed this bill because it could create a chilling effect on legitimate business activities, while federalizing corporate law.

This legislation has fallen under the jurisdiction of the Homeland Security and Governmental Affairs Committee and Chairman Joseph Lieberman (D-CT), who indicated that the bill may be marked up this fall. Traditionally, legislation of this type has been considered by the Banking Committee. Efforts may be made to send this legislation back to the Banking Committee, which may have a different view of the legislation.

Summing Up

Governance proposals currently being considered by Congress and the SEC are far-reaching in their scope and breadth. If these proposals pass, the federal government will assume the role, which it has never had, as the main arbiter of corporate governance in the United States. For the first time in the history of corporations in the United States, federal laws and regulations will begin to supplant state law, which has traditionally governed organic corporate activities. This fall represents a potential sea change in corporate law, and the impacts, whether these proposals pass or fail, will be felt for years to come.

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electronic devices in the courthouse. Security is certainly a concern, and the Committees have received views from the United States Marshals Service, private security experts, and the like. Written and oral comments were also received from the Bar, and, indeed, Federal Bar Council President Robert J. Giuffra, Jr., made a detailed proposal for the use of such devices by attorneys who present a New York State Unified Court System Pass. We hope that the Board of Judges will resolve the issue by this fall.

Editor: What are some other issues that the Court has dealt with recently?

Preska: Under former Chief Judge Kimba M. Wood's leadership, the Court has increased public access to its proceedings through, for example, changes to the Case Management and Electronic Case Files ("CM/ECF") system to provide more transparency. Working with United States Marshal Joseph R. Guccione and Joel Blum, the Court's audio visual expert, press and public access to events of interest to the public has been increased; events such as the sentencing of Bernard Madoff have been orderly, with overflow rooms set up where proceedings could be viewed on large video screens.

Judge Wood also focused on ensuring smooth succession in the Court's various units. In pursuit of this objective, several units have made high-level hires that will benefit the administration of our Court: Michael Fitzpatrick as Chief U.S. Probation Officer, Arthur Penny in Pretrial Services, Ruby Krajick as Chief Deputy Clerk, and Edward Friedland as Deputy District Executive. Under Judge Wood's leadership, the Court also made great strides in improving our efficiency in case management.

Editor: What can you tell us about the role, if any, of mediation in the federal courts?

Preska: Here in the Southern District, we are proud of our Mediation Services Office, which provides free mediation opportunities for all parties who litigate before the Court. Since its inception in 1992, the program has had a success rate of 86.5 percent across all causes of action; the success rate for the past eight years is 91 percent. We are particularly proud of our pro se program, which provides pro se plaintiffs in employment discrimination suits with an attorney, free of charge, to assist during the mediation process.

Editor: Many of our readers are interested in the cost of litigation. Is this an issue that the Southern District has taken up?

Preska: The District is certainly cognizant of the increasing cost of litigation for parties and is constantly looking for ways to achieve our goal of serving the public as efficiently as possible. In 2004 we adopted the CM/ECF system, which has decreased litigation expenses by reducing copying, courier, and noticing fees. At the same time, the system has increased public access by allowing for 24-hour viewing of public documents through the Internet. Our judges frequently hold telephone and video conferences, decreasing enormously the cost of a court conference to parties while still permitting judicial attention to the matter. Also, judges are holding certain nonjury hearings by video to decrease costs. This is particularly useful with litigants who are incarcerated hundreds of miles from the courthouse. Video simulcasts also allowed 9/11 victims here in the Southern District to view the trial of convicted terrorist Zacarias Moussaoui, which occurred in the Eastern District of Virginia.

Electronic discovery is often pointed to as a costly element in modern litigation. As befits the complexity of the cases we see and our Court's leadership on technology issues, several of our judges, such as District Judge Scheindlin and Magistrate Judges James C. Francis, Frank Maas, and Andrew J. Peck have developed expertise and frequently lecture on e-discovery issues, including cost containment. We hope that these steps will prove beneficial for both litigants and the public at large as the Southern District continues to strive for "the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.