JF

# THE MONITOR

A Quarterly Publication by Johnson Fistel, LLP • Fall 2017

## Lawmakers Consider Changes: Equifax Executives Made $1.77 Million From Stock Sales While Your Data Was Stolen

In the wake of the colossal Equifax Inc. data breach, which exposed the sensitive personal information of approximately 145.5 million U.S. consumers, lawmakers and rulemakers alike are calling for prophylactic oversight of the largely unregulated credit-reporting industry. While much of the ire has been directed at Equifax's alleged failure to recognize and report critical technical vulnerabilities, federal probes into insider stock sales before the hack was announced have compounded public concern about the scope and seriousness of the breach.

Specifically, on August 1 and 2, three top Equifax executives—Chief Financial Officer John Gamble, U.S. Information Solutions President Joseph Lougran, and Workforce Solutions President Rodolfo Ploder—sold $946,374, $584,099, and $240,458 worth of the company's shares, respectively. On September 26, at a Senate Banking Hearing, SEC Chairman Jay Clayton announced that he will coordinate efforts with U.S. lawmakers to strengthen insider trading rules in light of the transactions, which would have occurred during the period of time between the company's discovery of the breach on July 29 and the company's public announcement of the breach on September 9.

Sen. Chris Van Hollen (D-Md.) implored Clayton to work with him and Rep. Carolyn Maloney (D-N.Y.) to enable legislation that would more aggressively proscribe executives from

(Continued on Page 2)

## In This Issue

### Attorney Insights



### News & Events



### Firm Information



Contact Us:
contactus@johnsonfistel.com

Visit Us:
http://www.johnsonfistel.com

Follow us:

(Continued from Page 1)

profiting by buying or selling company stock before the public is privy to market-moving news.

"We can definitely work on it," Clayton answered.

While Equifax has publicly represented that its executives had "no knowledge of the intrusion at the time they sold their shares," the developing story illuminates some of the jeopardies attendant to sales of securities by corporate insiders.

But is additional codification of insider trading law really necessary, or should companies combat questionably-timed trades through more robust corporate codes of ethics? On the one hand, the anti-fraud provisions of U.S. securities laws (Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (the "Exchange Act")) already prohibit individuals with material, non-public information from trading in the company's securities on the basis of the information, and from furnishing the information to others who may trade the securities. Directors and officers of publicly traded companies are further bound by the reporting requirements and short-swing trading restrictions of Section 16 of the Exchange Act. On the other hand, and while not commenting on whether Equifax executives violated any laws by selling almost $2 million in company shares days after the breach, Chairman Clayton indicated that a "thoughtful insider trading policy" was an "important part of good corporate hygiene."

Following revelations of the data breach and subsequent insider-trading allegations, Equifax shares traded down by nearly 14%. Whether or not the SEC or Congress undertake the onerous task of codifying more granulated prohibitions against insider trading, the Equifax scandal serves as an important reminder that company insiders' negligence of, or knowing failure to observe, insider-trading rules can result in substantial losses incurred by shareholders.



## Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

| Company | Deadline |
|---|---|
| CenturyLink, Inc. (NYSE: CTL) | Dec. 24, 2017 |
| XBiotech, Inc. (NASDAQ: XBIT) | Dec. 25, 2017 |
| Ford Motor Company (NYSE:F) | Dec. 29, 2017 |
| MannKind Corporation (NASDAQ: MNKD) | Dec. 29, 2017 |
| Trivago, N.V. (NASDAQ: TRVG) | Dec. 29, 2017 |
| Genocea Biosciences, Inc. (NASDAQ: GNCA) | Dec. 30, 2017 |
| General Electric, Inc. (NYSE: GE) | Dec. 31, 2017 |
| Novan, Inc. (NASDAQ: NOVN) | Jan. 2, 2017 |
| Cheetah Mobile Inc. (NYSE: CMCM) | Jan. 7, 2017 |
| Endo International plc (NASDAQ: ENDP) | Jan. 14, 2017 |
| Meridian Bioscience, Inc. (NASDAQ: VIVO) | Jan. 14, 2017 |
| Omega Healthcare Investors, Inc. (NYSE: OHI) | Jan. 15, 2017 |
| Acorda Therapeutics, Inc. (NASDAQ: ACOR) | Jan. 16, 2017 |
| Array BioPharma Inc. (NASDAQ: ARRY) | Jan. 19, 2017 |
| Tivity Health, Inc. (NASDAQ:TVTY) | Jan. 19, 2017 |
| Triangle Capital Corporation (NASDAQ: TCAP) | Jan. 20, 2017 |
| Alkermes plc (NASDAQ: ALKS) | Jan. 21, 2017 |
| OvaScience, Inc. (NASDAQ: OVAS) | Jan. 21, 2017 |

# Don't Do Nothing: What You Should Do When a Company Whose Stock You Own Announces a Merger

It's 9:31 a.m., time to check the status of your stock portfolio. You check current trading prices, look at news pertaining to the stocks you own (whether on your broker's website or Yahoo! Finance), and notice that one of the companies you own is about to merge with another. You ask yourself, "What should I do about this merger? What *can* I do?" As discussed below, there are various options. But above all, don't do nothing.

When a merger is first announced, it's generally only a proposed transaction—nothing has been completed yet. In order for the deal to go through, there are often regulatory approvals that have to be obtained, and almost every deal requires shareholder approval, whether through a shareholder vote or a tender offer with a majority of shares being tendered.

At the merger announcement stage, your various (and overlapping) options include: (1) support the merger by voting or tendering your shares; (2) oppose the merger by voting against it or not tendering your shares; (3) sell your stock and be done with it; (4) try to stop the merger by filing a lawsuit; (5) wait for the deal to close and then sue for more money; (6) seek "fair value" by exercising your appraisal rights; and (7) try to learn more by pursuing "books and records" through a statutory procedure. And if you're not sure what to do, you can consult an attorney to ascertain what your legal rights might be.

**Support the Merger, Oppose the Merger, or Sell Your Stock:** These three options, while they might have


some legal implication, are purely the shareholder's prerogative. Other options (which are discussed below) can involve highly-nuanced legal issues, issues which Johnson Fistel is adept at handling. Indeed, Johnson Fistel has a distinguished track record litigating merger and acquisition cases, and the firm provides expert legal counsel for shareholders considering their options with respect to a merger or acquisition.

**Try to Stop the Merger:** Shareholders can file a lawsuit before the merger closes and try to block the merger from going through. The most common reason for trying to stop a merger is because the disclosure materials filed with the U.S. Securities and Exchange Commission and circulated to shareholders is either materially misleading or fails to disclose material information. In this situation, generally, either the parties agree for the target company to issue additional disclosures or courts require them to, and the merger can close with slight or no delay. Alternatively, courts sometimes block mergers because the process leading up to the deal was skewed in favor of the buyer and away from other legitimate suitors. Courts have enjoined deals to make sure that all real suitors are given an opportunity to make an offer to buy the target company, but this happens very rarely. In reality, trying to stop the merger normally just means delaying it for a short bit while providing some therapeutic relief. Johnson Fistel's attorneys have been instrumental in obtaining such pre-close relief in numerous cases.

**Pursue More Money Post-Close:** If your number-one goal is more money, the chief avenue for obtaining this is through a lengthy litigation following the completion of the deal. The threshold for obtaining additional compensation through a post-close settlement or judgment is fairly high—the shareholder generally must show some sort of conflict of interest or an egregious case of misconduct. Nonetheless, Johnson Fistel and its attorneys have obtained substantial monetary recoveries in multiple cases, and the firm is actively litigating numerous merger cases post-close.

**Exercise Your Appraisal Rights:** Depending on the type of merger or acquisition, shareholders can often exercise their "dissenters' rights" or "appraisal rights" to get what courts call "fair value" for their shares. The concept of "fair value," however is an evolving one. Historically, this was a number arrived at through a series of highly-technical financial analyses. Recently, courts have found that "fair value" was the merger price when the merger resulted from a fair and open sales process. In any event, given the time and expense involved, the appraisal process is one that is economically viable for only the largest stockholders. Johnson Fistel has worked with counsel who regularly pursue

(Continued from Page 3)

appraisal actions and would be happy to discuss whether that option makes sense for you.

**Seek "Books and Records":** Numerous states' corporate laws provide shareholders with the option of seeking certain "books and records" of the target company. This is a streamlined process that allows shareholders to limited, but sometimes useful, non-public information bearing on the merger. By gaining this information, shareholders and their attorneys can determine with more certainty whether (a) the merger appears fair, and (b) whether there is any misconduct that would give rise to a lawsuit.

**Doing Nothing:** You are not required to do anything upon learning that a company is about to be acquired. However, by doing nothing, you will lose your opportunity to challenge deals that are designed to reward company insiders at your expense. You will lose your opportunity to ensure that you get to vote on a deal with all the facts you need to know. More abstractly, you will also lose your ability to ensure that directors and officers are fulfilling their fiduciary duties to act in the best interest of shareholders.

**What You Should Do:** Given all these options, which ones are the best for you? That answer will depend on your personal and financial circumstances, your interest in pursuing justice, your knowledge of, and familiarity with, the company, and your desire to fight for what's right and against what's wrong. If you are unsure, you should always consult an attorney to advise you on what to do. Johnson Fistel is available anytime to provide a no-cost consultation on whether your rights will be affected by a given transaction and what your legal options might be. Regardless of what option you take, please don't do nothing when a company you own enters into a merger agreement.



## We're Paying Too Much Because of Lack of Competition

Broadly speaking, antitrust law exists to promote fair competition and to protect businesses and consumers from anticompetitive activity. In a recent episode of HBO's Last Week Tonight, John Oliver scrutinized corporate consolidation, citing the airline and cable industries as examples. Following heavy consolidation in the airline industry into four major airlines, Oliver noted consumers were soon subjected to bag fees and other charges. In the cable industry, Oliver highlighted languishing cable set-top box technology as another byproduct of a lack of competition in that market.

Beyond restricting mergers and acquisitions of organizations that could substantially lessen competition, antitrust law also provides remedies to private businesses and consumers that overpay for products and services because of anticompetitive activity. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained[.]" In antitrust cases brought by private parties, such as businesses or consumers,

(Continued from Page 4)

an important question is often whether the private plaintiff is a "direct" or "indirect" purchaser of a product. Although there are exceptions, the general rule is that only the overcharged direct purchaser, and not others in the chain of manufacture or distribution, have standing to sue.

For example, several antitrust lawsuits were filed against Apple, Inc. alleging Apple conspired with certain publishers to raise prices across the ebook market. After an appeal was filed in the case, the Second Circuit affirmed the district court's findings that Apple orchestrated a conspiracy among certain publishers to raise ebook prices, and that the agreement unreasonably restrained trade in violation of federal antitrust laws. In another case involving Apple, the U.S. Supreme Court is presently considering whether to grant Apple's petition for certiorari challenging the Ninth Circuit's holding that a class of purchasers had standing in a case alleging Apple monopolized and attempted to monopolize the market for iPhone apps. In finding standing, the Ninth Circuit held that Apple is a distributor of the iPhone apps and sells apps directly to purchasers through its App Store. Because Apple is a distributor, according to the Ninth Circuit, the plaintiffs have standing to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps. On October 10, the Supreme Court invited the U.S. Solicitor General to file a brief expressing the views of the U.S. government regarding Apple's appeal.

If you are a business or consumer and you believe you may have been the victim of anticompetitive activity, contact Johnson Fistel for a free consultation and case evaluation. You may telephone us at 619.230.0063 or email us at contactus@johnsonfistel.com.

# Can Your Company Force You Into Arbitration? The Supreme Court Hears Arguments

On October 2, the United States Supreme Court heard oral argument in a series of consolidated cases that will impact the ability of millions of employees to come together and bring class action lawsuits to enforce their workplace rights.

These cases, known collectively as *Epic Systems Corp. v. L*ewis, present the important question of whether employment agreements that require employees to resolve employment-related disputes through individual arbitration (and thus waive their right to bring class action lawsuits) violate federal labor standards. Workers-rights advocates contend that such arbitration agreements and "class action waivers" are contrary to the protections afforded under the National Labor Relations Act (NLRA), a New Deal-era law that has long enabled employees to engage in "concerted activity." On the other side, corporate advocates argue that the Federal Arbitration Act, another longstanding federal statute, endorses the use and enforceability of arbitration agreements and class-action waivers in the employment context. The Supreme Court's ultimate decision in *Epic Systems* will have far-reaching implications, as it will determine whether employees who have signed such agreements can be forced into arbitration and forego their rights to bring class-action lawsuits for a variety of work-related disputes, including unpaid overtime and wage claims, employment claims involving race, age, or gender discrimination, "meal and rest break" claims, and other workplace

(Continued from Page 5)

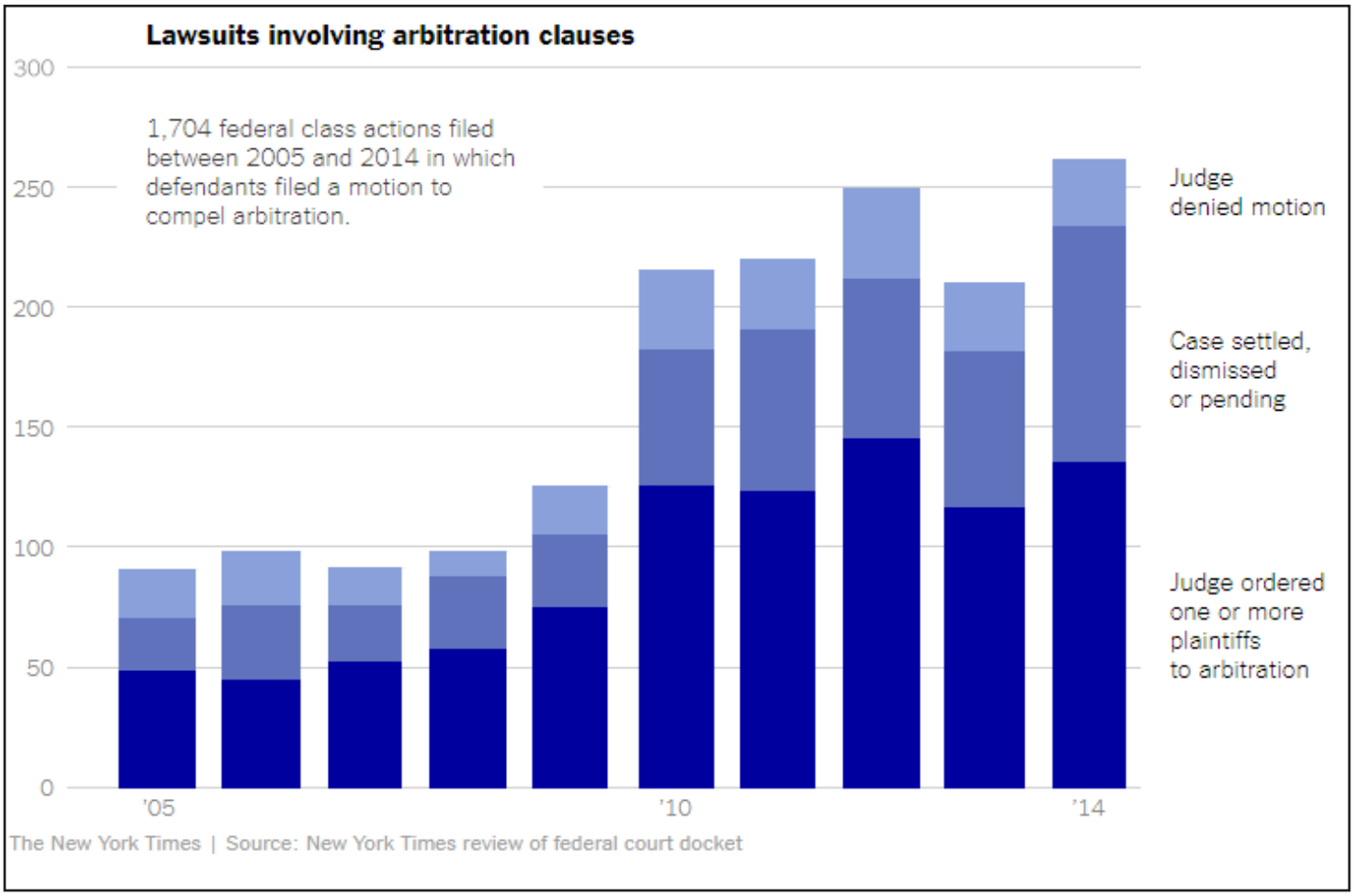
grievances.

In an interesting wrinkle, the lawyers who argued the opposing sides of the case before the Supreme Court were both government attorneys, representing the interests of different federal agencies. Arguing on the employees' side was Richard Griffin, Jr., general counsel for the National Labor Relations Board ("NLRB"), and on the other side was Jeffrey Wall, Acting Solicitor General of the U.S. Department of Justice ("DOJ"). Notably, the DOJ had previously filed a brief in support of the NLRB's position in September of last year, but after the Trump administration took office this January, the DOJ switched sides and adopted a pro-employer position in favor of arbitration.

Although it is too early to tell how the Supreme Court will ultimately rule, the October 2 oral argument offered some revealing clues on how certain individual Justices view the case and will be inclined to vote. Through their questioning and comments during the argument, the Justices appeared to be divided along historical "left-right" ideological lines, as some of the conservative members of the Court, including Chief Justice Roberts, Justice Kennedy, and Justice Alito, expressed a favorable view toward the DOJ's position that employment-arbitration agreements do not violate the NLRA. Chief Justice Roberts, in particular, noted that a ruling against the use of arbitration provisions and class-action waivers would be a massive disruption of the status quo and effectively invalidate employment agreements covering approximately 25 million employees. Justice Thomas and Justice Gorsuch—the newest addition to the Court—remained silent during the argument, but given their established conservative-judicial leanings on corporate issues, they are likely to side with the DOJ's pro-employer position.

The Court's more liberal wing, particularly Justices Ginsburg, Breyer, Sotomayor, and Kagan, appeared to be supportive of the NRLB's position that arbitration provisions and class-action waivers violate the NLRA's statutory right of employees to pursue collective action. Justice Ginsberg went as far as characterizing arbitration agreements as "yellow dog" contracts, referring to the outdated and illegal practice of requiring workers to give up union membership. Justice Kagan also commented that, under the NLRA, "employers can't demand as conditions of employment the waivers of concerted rights."

The Supreme Court is expected to hand down a decision in *Epic Systems* by June 2018. But if the divisive nature of the oral argument provides any signal, the Supreme Court's decision will very likely be split.



# Recent Accomplishments


**Court Grants Final Approval of Shareholder Derivative Settlement in *In re World Acceptance Corporation Derivative Litigation,* Lead Case No. 6:15-cv-02796-MGL (D.S.C.):** Johnson Fistel, as co-lead counsel in this shareholder derivative action filed against current and former officers and directors of World Acceptance, recently obtained final approval of a settlement which was reached while the case was being appealed to the U.S. Court of Appeals for the Fourth Circuit. The action alleged that the Individual Defendants breached their fiduciary duties by allowing the Company to operate in violation of federal consumer protection laws, unlawfully selling World Acceptance stock while in possession of non-public information, and wasting corporate assets through an improper stock repurchase program. Even though the District Court granted defendants' motions to dismiss the case, Johnson Fistel, its co-counsel, and their clients never gave up, and fought to achieve a significant settlement despite significant obstacles. The settlement, among other things, preserved corporate resources by ensuring that the related securities class action was resolved within insurance policy limits and without monetary contribution from the company, and caused significant corporate governance reforms designed to increase shareholder control and provide for improved operational oversight at the company. The settlement will have a lasting, positive impact on the Company and its shareholders for years to come.


**Johnson Fistel Appointed Co-Lead Counsel in *In re HD Supply Holdings, Inc. Derivative Litigation*, Lead Case No.: 1:17-cv-02977-ELR (N.D. Ga.):** Johnson Fistel was recently appointed co-lead counsel in a stockholder derivative action brought on behalf of HD Supply alleging, among other things, that certain executives and directors of HD Supply violated federal and state law by making false and misleading statements to investors, thereby artificially inflating the stock price. The complaint filed in the action also alleges that while the price of HD Supply stock was artificially inflated, certain corporate insiders engaged in unlawful insider trading of their personally-held HD Supply stock holdings. Plaintiffs seek damages and disgorgement from the alleged wrongdoers on the company's behalf, as well as corporate governance reforms to prevent the recurrence of similar misconduct in the future.


**Johnson Fistel Appointed Lead Counsel in *Whitten v. Clarke, et al.*, Lead Case No.: 1:17-cv-02585-LMM (N.D. Ga.):** Johnson Fistel was recently appointed lead counsel in a stockholder derivative action brought on behalf of FleetCor Technologies, Inc. alleging, among other things, that certain executives and directors of FleetCor violated federal and state law by making false and misleading statements to investors, thereby artificially inflating the stock price. The complaint filed in the action also alleges that while the price of FleetCor stock was artificially inflated, certain corporate insiders engaged in unlawful insider trading, unloading approximately $108.0 million worth of their personally-held FleetCor stock holdings. Plaintiff seeks damages and disgorgement from the alleged wrongdoers on the Company's behalf, as well as corporate governance reforms to prevent the recurrence of similar misconduct in the future.


**Settlement Approval Upheld in *In re Pacer International, Inc.,* No. 1439IV (Tenn. Dist. Ct. Jan. 27, 2015), *aff'd,* No. M2015-00356-COA-R3-CV (Tenn. Ct. App. June 30, 2017):** In a case arising out of the acquisition of logistics company Pacer International, Inc., Johnson Fistel helped to secure significant results for Pacer stockholders through a settlement that addressed the claim that Pacer's proxy materials were materially inadequate and misleading by providing for numerous additional disclosures. In 2015, the trial court approved the settlement, holding that it conferred a substantial benefit to Pacer's former stockholders. One shareholder objected, and the Tennessee Court of Appeals affirmed the trial court's decision, holding that the trial court was correct in finding that the settlement produced a substantial benefit for stockholders.




California Office

600 West Broadway, Suite 1540
San Diego, California 92101
*T: 619.230.0063*
*F: 619.255.1856*

New York Office

99 Madison Avenue, 5th Floor
New York, New York 10016
*T: 212.802.1486*
*F: 212.602.1592*

Georgia Office

40 Powder Springs Street
Marietta, Georgia 30064
*T: 470.632.6000*
*F: 770.200.3101*


## Partners


Frank J. Johnson


Michael I. Fistel

## Associates & Counsel


W. Scott Holleman


Richard A. Nerving


Kristen L. O'Connor

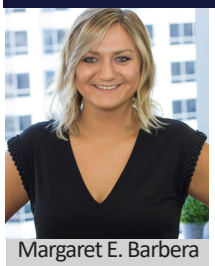

Cecilia E. Rutherford


William W. Stone


Phong L. Tran


David A. Weisz

## Staff


Margaret E. Barbera


Chrystal E. Fortt


Matthew T. Ostman


David E. Michael

# About the Firm

Johnson Fistel is a firm built on the following five core values that every member embraces: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients. Their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.