



810 Kryptonite for Corporate Counsel: What Are the Limits of Your Liability

Betty Derrick

Sarbanes- Oxley Team Leader

Womble Carlye Sandridge & Rice PLLC

Melinda Haag

Litigation Partner

Orrick, Herrington & Sutcliffe

Jeffrey P. Metzger

Staff Vice President and Associate General Counsel

Unisys Corporation

Richard Simpson

Senior Assistant Chief Litigation Counsel

Securities and Exchange Commission

Faculty Biographies

Betty Derrick

Sarbanes-Oxley Team Leader

Womble Carlye Sandridge & Rice PLLC

Melinda Haag

Melinda Haag is a partner with Orrick, Herrington & Sutcliffe, in San Francisco, California. Ms. Haag specializes in defending clients in white collar criminal cases, including cases involving allegations of securities fraud, healthcare fraud, environmental crimes, and mail and wire fraud. Ms. Haag also assists companies and audit committees in conducting internal investigations when allegations of wrongdoing are made against corporate employees and executives. Ms. Haag recently defended the former CFO of McKesson Corporation in a federal criminal case charging him with violating the federal securities laws. Following a two-month trial, Ms. Haag's client was acquitted on all counts.

Prior to joining Orrick, Ms. Haag served as chief of the white collar crime section for the United States Attorney's Office in the Northern District of California, and as an assistant United States attorney in the Central District of California. During her time with the government, Ms. Haag prosecuted and oversaw cases involving mail and wire fraud, bank fraud, environmental crimes, and civil rights violations, among others.

Ms. Haag received the Lawyer's Committee for Civil Rights Public Service Award in 2003 for accomplishments in the area of civil rights. She was also appointed by Senator Barbara Boxer to the Senator's judicial advisory committee, which was responsible for assisting Senator Boxer select federal judges, U.S. Attorneys, and U.S. Marshals for the Northern District of California. Ms. Haag was named by the Daily Journal as one of "35 California lawyers under the age of 35 who are changing the way law is practiced."

Jeffrey P. Metzger

Jeffrey P. Metzger serves as staff vice president and associate general counsel at Unisys Corporation in Reston, Virginia. He is responsible for the corporation's litigation and counsels the corporation's federal, state, and foreign government businesses. He has served in various positions in the office of the general counsel at Unisys since 1986.

In 1974 he served as legislative assistant to United States Senator Joseph Biden of Delaware. He was later an associate with the law firm Collier, Shannon, Rill and Scott. From 1982 until 1985, he worked in the Civil Division of the United States Justice Department. In 1985 and 1986, he served as counsel to the President's Blue Ribbon Commission on Defense Management ("Packard Commission").

Mr. Metzger graduated from Amherst College and from Georgetown Law School.

Richard Simpson

Senior Assistant Chief Litigation Counsel

Securities and Exchange Commission

HELANE L. MORRISON (Admitted in California)
PAULINE E. CALANDE (Admitted in California)
PATRICK T. MURPHY (Admitted in New York)
ROBERT S. LEACH (Admitted in California)
44 Montgomery Street, Suite 2600
San Francisco, CA 94104-4602
Telephone: 415-705-2500
Facsimile: 415-705-2501

REC'D 04 SEP 23 09:08:16 DC-GRP

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

JOHN E. ISSELMANN, JR.,

Defendant.

CV 04 1350

CONSENT OF DEFENDANT
JOHN E. ISSELMANN, JR. TO
ENTRY OF FINAL JUDGMENT

1. Defendant John E. Isselmann, Jr. ("Defendant") waives service of a summons and the complaint in this action, enters a general appearance, and admits the Court's jurisdiction over Defendant and over the subject matter of this action.

2. Without admitting or denying the allegations of the complaint (except as to personal and subject matter jurisdiction, which Defendant admits), Defendant hereby consents to the entry of the final Judgment in the form attached hereto (the "Final Judgment") and incorporated by reference herein, which, among other things:

DOCS5F1:771005.1
14017-2 JES

- (a) permanently restrains and enjoins Defendant from violation of Rule 13b2-2 [17 C.F.R. § 240.13b2-2] promulgated under the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78a et seq.]; and
- (b) orders Defendant to pay a civil penalty in the amount of \$50,000 pursuant to Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)].

3. Defendant agrees that he shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made pursuant to any insurance policy, with regard to any civil penalty amounts that Defendant pays pursuant to the Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors. Defendant further agrees that he shall not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for any penalty amounts that Defendant pays pursuant to the Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors.

4. Defendant waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

5. Defendant waives the right, if any, to appeal from the entry of the Final Judgment.

6. Defendant enters into this Consent voluntarily and represents that no offers, promises, or inducements of any kind have been made by the Commission or any member, officer, employee, agent, or representative of the Commission to induce Defendant to enter into this Consent.

7. Defendant agrees that this Consent shall be incorporated into the Final Judgment with the same force and effect as if fully set forth therein.

8. Defendant will not oppose the enforcement of the Final Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

9. Defendant waives service of the Final Judgment and agrees that entry of the Final Judgment by the Court and filing with the Clerk of the Court will constitute notice to Defendant of its terms and conditions. Defendant further agrees to provide counsel for the Commission, within thirty days after the Final Judgment is filed with the Clerk of the Court, with an affidavit or declaration stating that Defendant has received and read a copy of the Final Judgment.

10. Consistent with 17 C.F.R. § 202.5(f), this Consent resolves only the claims asserted against Defendant in this civil proceeding. Defendant acknowledges that no promise or representation has been made by the Commission or any member, officer, employee, agent, or representative of the Commission with regard to any criminal liability that may have arisen or may arise from the facts underlying this action or immunity from any such criminal liability. Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. Defendant further acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an administrative proceeding. In addition, in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Defendant understands that he shall not be permitted to contest the factual allegations of the complaint in this action.

11. Defendant understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings." 17 C.F.R. § 202.5. In compliance with this policy, Defendant agrees: (i) not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or

creating the impression that the complaint is without factual basis; and (ii) that upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint. If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party.

12. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to pursue reimbursement of attorney's fees or other fees, expenses, or costs expended by Defendant to defend against this action. For these purposes, Defendant agrees that Defendant is not the prevailing party in this action since the parties have reached a good faith settlement.

13. In connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, Defendant (i) agrees to appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice; (ii) will accept service by mail or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) appoints Defendant's undersigned attorney as agent to receive service of such notices and subpoenas; (iv) with respect to such notices and subpoenas, waives the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Defendant's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (v) consents to personal jurisdiction over Defendant in any United States District Court for purposes of enforcing any such subpoena.

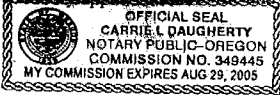
14. Defendant agrees that the Commission may present the Final Judgment to the Court for signature and entry without further notice.

15. Defendant agrees that this Court shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Final Judgment.

Dated: 9-16-04

John E. Isselmann, Jr.
Defendant John E. Isselmann, Jr.

On September 16, 2004, John E. Isselmann, Jr., a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.



Carrie L. Laugherty
Notary Public
Commission expires:

Approved as to form:

Daniel H. Skerritt

Daniel H. Skerritt, Esq.
TONKIN TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
Phone: (503) 221-1440
Fax: (503) 274-8779

Melinda Haag, Esq.
ORRICK, HERRINGTON & SUTCLIFFE LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-3143
Phone: (415) 773-5610
Fax: (415) 773-5759

Attorney for Defendant JOHN E. ISSELMANN, JR.

14. Defendant agrees that the Commission may present the Final Judgment to the Court for signature and entry without further notice.

15. Defendant agrees that this Court shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Final Judgment.

Dated: _____

Defendant John E. Isselmann, Jr.

On _____, 2004, _____, a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.

Notary Public
Commission expires:

Approved as to form:

Daniel H. Skerritt, Esq.
TONKIN TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
Phone: (503) 221-1440
Fax: (503) 274-8779

Melinda Haag

Melinda Haag, Esq.
ORRICK, HERRINGTON & SUTCLIFFE LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-3143
Phone: (415) 773-5610
Fax: (415) 773-5759

Attorney for Defendant JOHN E. ISSELMANN, JR.

HELANE L. MORRISON (Admitted in California)
PAULINE E. CALANDE (Admitted in California)
PATRICK T. MURPHY (Admitted in New York)
ROBERT S. LEACH (Admitted in California)
44 Montgomery Street, Suite 1100
San Francisco, CA 94104-4602
Telephone: 415-705-2500
Facsimile: 415-705-2501

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

FILED 04 NOV 01 17 08 JSDC ORP
RECV 04 SEP 23 09 08 JSDC ORP

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

JOHN E. ISSELMANN, JR.,

Defendant.

CV 04 1350

FINAL JUDGMENT

The Securities and Exchange Commission having filed a complaint and Defendant John E. Isselmann, Jr. ("Defendant") having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Rule 13b2-2 [17 C.F.R. § 240.13b2-2] promulgated under the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78a et seq.], by making or causing to be made a materially false or misleading statement, or omitting to state, or causing another person to omit to state, any material fact necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading to an accountant in connection with any audit or examination of the financial statements of an issuer required to be made or the preparation or filing of any document or report to be filed with the Commission.

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay a civil penalty in the amount of \$50,000 pursuant to Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)]. Defendant shall pay \$25,000 of the penalty within ten (10) business days after entry of this Final Judgment by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission. Defendant shall pay the remaining \$25,000 in 12 equal monthly installments within one year after entry of this Final Judgment by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission. The payments shall be delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312, and shall be accompanied by a

letter identifying John E. Isselmann, Jr. as a defendant in this action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. Defendant shall simultaneously transmit photocopies of such payment and letter to the attention of Helane Morrison, District Administrator, at the Commission's San Francisco District Office, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104.

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Defendant John E. Isselmann, Jr. to Entry of Final Judgment ("Consent") is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

IV.

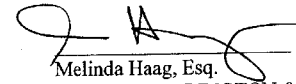
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

Dated: 9 Nov, 2004


UNITED STATES DISTRICT JUDGE

Approved as to form:


Daniel H. Skerritt, Esq.
TONKIN TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
Phone: (503) 221-1440
Fax: (503) 274-8779



Melinda Haag, Esq.
ORRICK, HERRINGTON & SUTCLIFFE LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-3143
Phone: (415) 773-5610
Fax: (415) 773-5759

Attorney for Defendant JOHN E. ISSELMANN, JR.

Spotlight



New York state AG Eliot Spitzer defends his Wall Street probes and other investigations.
page 24

Setting an Example

THE SECURITIES AND EXCHANGE Commission has a harsh message for in-house lawyers: Fulfill your gatekeeper duties, or suffer the consequences. John Isselmann, Jr., learned this lesson last fall when he became the first GC in the post-SOX era to be penalized for gatekeeper violations. The SEC's civil case against Isselmann,

The SEC accuses a former GC of failing in his gatekeeper role by doing too little, too late.

the former general counsel of Electro Scientific Industries, Inc., is a cautionary tale for corporate counsel everywhere. SEC enforcement chief Stephen Cutler first put in-house lawyers on notice about the agency's emphasis on gatekeepers in a September 20, 2004, speech. Cutler defined gatekeepers as "the sentries of the marketplace"—auditors, directors, and "the lawyers who advise companies on disclosure standards and other securities law requirements." The agency, he added, was "considering actions against lawyers... who assisted their companies or clients in covering up evidence of fraud, or prepared, or signed off on, misleading disclosures regarding the company's condition."

Four days after Cutler's speech, the SEC announced that it had settled its allegations against Isselmann. While the agency has gone after a number of lawyers for their alleged role in a financial fraud, Isselmann's case is unique. The SEC doesn't claim that he participated in the

scheme to fraudulently boost the quarterly financials at ESI, a semiconductor manufacturer based in Portland, Oregon. The agency doesn't even allege that Isselmann knew about the fraud at the company, which reported revenues of \$207 million in fiscal year 2004. The SEC says only that the ex-GC failed to communicate material information to ESI's audit committee and outside auditors—information that would have stopped the accounting fraud.

In his settlement with the SEC, Isselmann neither admitted nor denied the agency's allegations. The 37-year-old lawyer agreed to pay a \$50,000 civil penalty, and consented to a cease-and-desist order. He left ESI in 2003—he says that the company asked him to stay on—and currently does consulting work in Portland. (ESI officials did not respond to requests for comment for this article.)

"Mr. Isselmann failed in his gatekeeper role," says Patrick Murphy, an enforcement lawyer in the SEC's San Francisco office, who supervised the ESI probe. "He had information that he should have passed on to the board and the company's external independent auditor. If that information had been provided, it would have prevented the financial fraud."

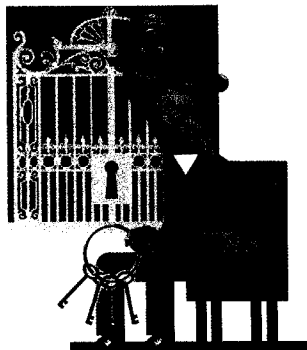
Isselmann has a different take on the government's case against him: "Cutler was out there putting the fear of God into lawyers, and he needed an exclamation point. I was that exclamation point."

Whether the SEC was looking to make an example of Isselmann or not,

IN THE NEWS

INSIDE • FEBRUARY 2005

- JAMS is in a jam over class action arbitrations.
- Will higher patent fees fund improvements?
- Law firm billing rates continue to rise.



his case shows how treacherous the GC job can be these days. The agency alleges that former CFO James Dooley and ex-controller James Lorenz III committed several instances of fraud at ESI. But the SEC doesn't claim that Isselmann was involved in any of the wrongdoing—only that he failed to report a specific incident.

According to the SEC's complaint against Isselmann, Dooley and Lorenz decided late on September 12, 2002, to eliminate \$1 million in vested retirement and severance benefits for ESI's employees in Asia. Dooley and Lorenz then fraudulently applied the savings to ESI's bottom line by an accounting move called "reversing the accrual," the SEC claims.

Isselmann was not present or consulted when Dooley and Lorenz made their middle-of-the-night decision, according to the SEC's complaint. But Dooley subsequently asked Isselmann to get a written opinion from the company's outside counsel in Japan on whether

IN THE NEWS

Japanese law permitted eliminating the benefits. Dooley didn't tell Isselmann that ESI's books had already been altered, the SEC says.

Morrison & Foerster, ESI's Japanese counsel, e-mailed an opinion to Isselmann, stating that the company could not unilaterally terminate the benefits. According to the SEC's complaint, Isselmann tried to raise this point at a disclosure meeting right before the company filed its financial statement, but Dooley objected and cut him off. After the meeting, Isselmann provided Dooley with a copy of the written legal advice. Nevertheless, ESI went ahead and filed a fraudulent statement overstating its quarterly income by 28 percent, the SEC says.

Five months later, according to the agency's complaint, ESI's new CFO told Isselmann how Dooley and Lorenz had decided to eliminate the benefits and reverse the accrual during their September 12 meeting. (Dooley had since been promoted from CFO to CEO.) Isselmann immediately told ESI's audit committee and outside counsel what had happened, the SEC's complaint says. But that wasn't enough for the agency.

The SEC faulted Isselmann for failing to stand up to then-CFO Dooley at the disclosure meeting, and for failing to provide the audit committee with Morrison & Foerster's advice. These failures allowed Dooley and Lorenz to conceal their fraud, the SEC says.

The agency didn't bring a case against ESI, citing the company's "extraordinary cooperation in the commission's investigation." But Dooley and Lorenz didn't get off so lightly. In September the U.S. attorney's office filed a 17-count indictment against the two men, who were fired from ESI in 2003. Prosecutors allege that Dooley and Lorenz made a series of accounting reversals and reclassifications that falsely boosted ESI's earnings by nearly \$7 million, allowing the company to hit its financial targets for the first two quarters of its 2003 fiscal year.

Dooley's lawyer, Steven Ungar of Lane Powell Spears Lubersky in Portland, said in a statement that the government's

claims against his client "are false, distorted, and unfairly present only one side of the story... When the facts are fairly and accurately presented, we are confident that [Dooley] will be fully exonerated." Lorenz, who has also pled not guilty, could not be reached for comment.

Isselmann says his case was the "exclamation point" to a speech by the SEC's Stephen Cutler.

For his part, Isselmann says he didn't even realize he'd done anything wrong. "I didn't fully understand the accounting issues," says Isselmann. He explains that at the time, he was just eight years out of law school and had no accounting experience and only a limited securities law background. "Like many general counsel, I was a generalist—my job was a mile wide and an inch deep. I relied heavily on accounting people like Dooley and outside auditors to flag those issues for me."

Isselmann says he thought of the

Japanese benefits matter as an employment, not an accounting, issue. He adds that as ESI's only in-house lawyer, "I didn't have the luxury of focusing on a single e-mail and thinking about it for weeks and weeks." He says he probably spent an hour and a half in total on the benefits matter.

Ultimately, the SEC charged Isselmann under rule 13b2-2 of the Securities Exchange Act of 1934 with failing to provide a material fact to accountants in connection with an SEC filing. According to Isselmann's lawyer, Melinda Haag, a partner in the San Francisco office of Orrick, Herrington & Sutcliffe, it's essentially a strict liability offense. "No intent or even negligence needs to be shown," she says. "They're saying that [he] should have somehow figured out what was going on." Haag adds, "It's a frightening prospect for anyone who holds that gatekeeper position."

William Baker, a former SEC enforcement chief now in the Washington, D.C., office of Latham & Watkins, agrees: "The SEC is saying, 'Too little, too late.'" Baker adds, "Whatever message they're sending, it's a scary one for in-house lawyers."

—TAMARA LOOMIS

QUOTE

“ [Former Disney president Michael Ovitz] was not guilty of gross negligence. He was not guilty of malfeasance. He was guilty of not being able to do the job. ”



—Sanford Litvack, ex-GC of The Walt Disney Company
In November, Litvack testified in the shareholder suit over the \$10 million severance that Disney paid to Ovitz.