

ATTORNEYS

Eva Marie Carney

PRACTICE AREAS

Civil Litigation

Corporate and Business
TransactionsRegulation and
ComplianceSecurities Enforcement,
Internal and
GovernmentInvestigations and
Criminal DefenseSecurities Regulation
Advice and Training

"A Third District Court Has Dismissed SEC Claims Relating to Short Selling and PIPEs" by Eva Marie Carney

January 31, 2008

A third federal district court has now rejected the SEC's contention that using securities obtained in a PIPE transaction to cover short sales in the PIPE issuer's shares is an unlawful distribution of unregistered securities, dismissing with prejudice the SEC's claims under Section 5 of the Securities Act of 1933. *SEC v. Berlacher*, Civ. Action No. 07-3800-ER (E.D. Pa.) (Eduardo, J., Robreno, C.). SEC litigators sought to convince Judge Robreno of the faulty logic of the earlier dismissals, to no avail. Faced with these serial rejections of its Section 5 theory as applied to PIPEs hedging, it appears all the more likely that the SEC will put this matter on its rulemaking agenda.

The *Berlacher* court also dismissed the SEC's insider trading claim, but without prejudice to amend. Some press reports have suggested that hedge fund managers should be encouraged by this dismissal, but the ruling seems responsive to a pleading deficiency, rather than a reflection of judicial doubt about the SEC's insider trading theory as applied to short-selling PIPE participants.

Our partner Eva Marie Carney wrote the memorandum below regarding this new decision. Please see their January 7, 2008 memorandum for information regarding the two earlier federal district court decisions, *SEC v. Lyon* in the Southern District of New York and *SEC v. Mangan* in the Western District of North Carolina.

[Download memorandum](#)