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JUSTICES TO McKESSON: REVEAL YOUR SECRETS

*High court sides with
shareholders seeking
fraud investigation info*

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The Georgia Supreme Court on Monday dealt a double blow to health services provider McKesson Corp.

The court unanimously upheld a ruling that allows shareholders suing the company to see the results of an investigation into accounting problems. The court also dismissed a countersuit McKesson had brought against the suing shareholders.

The decision is the latest occur-



FILE PHOTO

H. Lamar Mixson expects the ruling to open doors for other plaintiffs seeking access to investigative reports.

rence in a wide range of legal difficulties surrounding San Francisco-based McKesson and its 1999 merger with Alpharetta-based HBO & Co. According to the decision, McKesson officials discovered a few months after the merger that, because of accounting fraud, HBO & Co.'s stock had been overvalued and, consequently, McKesson paid too much for it.

After announcing that HBO & Co. had overreported its revenue by \$327 million, shares of the merged firm

plunged 47 percent in one day, leaving the company stripped of \$9 billion in value. In the wake of the scandal, more than 90 suits have been filed against the company, its officers and directors, former employees and its outside accountants and investment bankers. Four executives have pleaded guilty to charges including securities fraud and insider trading.

The case decided Monday was

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High Court Tosses McKesson's Countersuit Against Shareholders

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brought in Fulton Superior Court by Atlanta businessman and former HBO & Co. board chairman Holcombe T. Green and two entities to which he is connected, HTG Corp. and Hall Family Investments. All were HBO & Co. shareholders seeking more than \$100 million in damages for the accounting fraud.

Their lawyers sought access to an

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[The Securities and Exchange Commission would] like to have their cake and eat it, too. ”

—H. Lamar Mixson

investigation commissioned by McKesson into the accounting problems at HBO & Co., performed by Skadden, Arps, Slate, Meagher & Flom and PricewaterhouseCoopers.

McKesson refused, even though it had provided the 180-page report and three volumes of related materials to the Securities and Exchange Commission and the Justice Department, which were conducting their own investigations. The company claimed it had a confidentiality agreement with the agencies.

Then-Chief Judge Elizabeth E. Long ruled that McKesson's audit documents were not protected work product, because McKesson voluntarily gave its audit documents to the SEC and the Justice Department.

McKesson also had filed a counterclaim against the shareholders, seeking damages for unjust enrichment. McKesson's reasoning was that, due to the accounting fraud, HBO & Co. shareholders had received more shares of McKesson stock than they should have.

Long denied the shareholders' motion to dismiss the countersuit.

Two Higher Courts, Two Losses

Last October, a panel of the Georgia Court of Appeals—Judges John J. Ellington and Herbert E. Phipps and Presiding Judge G. Alan Blackburn—upheld Long's ruling allowing the shareholders to see the documents.

Writing for the panel, Ellington added that Long was wrong not to have dismissed the countersuit. The panel rejected McKesson's argument that Green was not a “typical” shareholder because, as chairman of the board until February 1998, he “either knew or should have known of the alleged fraudulent conduct that occurred on his watch.”

Ellington wrote that “the unjust enrichment counterclaim in this case is against Green in his capacity as a shareholder, not as a former HBOC official.” *McKesson Corp. v. Green*, 266 Ga. App. 157 (2004).

The high court granted McKesson's petition for certiorari but dispatched the company's arguments in a seven-page decision by Justice Hugh P. Thompson.

The court found “unconvincing” McKesson's argument that sharing work product with government investigators did not amount to a waiver of the protection normally given to work product.

The counterclaim could not stand, Thompson wrote, even though the HBO & Co. shareholders may have received more shares of McKesson as a result of the accounting fraud.

“After all, the shareholders and HBOC are separate and distinct legal entities,” Thompson wrote. He cited a decision by the 9th U.S. Circuit Court of Appeals that allowed a similar case brought against McKesson in California. *McKesson HBOC v. New York State Common Retirement Fund*, 339 F.3d 1087.

A McKesson spokesman, James Larkin, said, “Naturally we're disappointed by the decision,” but he said the company would not comment further.

One of McKesson's lawyers at Morris, Manning & Martin, John H. Williamson, said he could not discuss the case because when he was reached on Monday morning, he had just learned of the decision.

One of Green's lawyers, H. Lamar Mixson of Bondurant, Mixson & Elmore, said seeing the investigation documents will help his clients get information that otherwise may not be available. He said some of the people involved in the case are now citing their Fifth Amendment rights to remain silent when asked to discuss their knowledge of the accounting fraud.

Mixson said he expects the high court decision to open the doors for other Georgia shareholder cases against McKesson in which plaintiffs are seeking investigative reports.

The high court decision did not address arguments brought by the SEC. According to Mixson, the agency backed McKesson's argument that the company's sharing of documents with SEC investigators did not waive work-product protection.

“They'd like to have their cake and eat it, too,” said Mixson.

The SEC's lawyer, Edward C. Schweitzer Jr., could not be reached to discuss the case. *McKesson Corp. v. Green*, Nos. 04G1228 and S04G1229 (Sup. Ct. Ga. March 7, 2005). □