

## Securities Fraud/ Service of Process

### Judge: Use Email, Not Past Counsel, to Serve Chinese Ex-CEO In Securities Suit

A federal judge in Delaware has ruled that attorneys who once represented a China-based company's former CEO in state court actions cannot be forced to help notify the officer about proceedings in a related shareholder securities fraud suit in federal court — but they can be compelled to give up the client's last known address.

*In re Heckmann Corp. Securities Litigation, No. 10-378 (D. Del. Nov. 22, 2011).*

Ruling on a first-impression issue, U.S. Magistrate Judge Mary Pat Thyng of the District of Delaware said the former attorneys must disclose their most recent contact information on China Water & Drinks Inc. ex-CEO Xu Hong Bin so that he can be served in China by email.



*"This latest decision from federal court will make it harder ... for non-U.S. residents to abuse the privileges afforded by the use of Delaware entities and Delaware corporate law," Francis G.X. Pileggi of Eckert & Seamans predicted.*

#### DELAWARE'S LONG ARM

**Francis G.X. Pileggi** of **Eckert & Seamans**, who edits the renowned Delaware Corporate and Commercial Litigation blog, said the ruling shows the courts will stretch the long arm of Delaware law across oceans to reach defendants.

"This latest decision from federal court will make it harder ... for non-U.S. residents to abuse the privileges afforded by the use of Delaware entities and Delaware corporate law," he predicted.

With this ruling, "Delaware entities and those who serve as officers or directors of Delaware entities know that they will not be able to hide from Delaware lawsuits," he said.

Pileggi said the decision is a logical extension of Delaware statutes and rules that already impose jurisdiction and allow service on those who serve as officers or directors of corporations.

**Westlaw Journal  
Delaware Corporate**

Published since November 1986

**Publisher:** Mary Ellen Fox

**Production Coordinator:** Tricia Gorman

**Senior Editor:** Frank Reynolds  
Frank.Reynolds@thomsonreuters.com

**Westlaw Journal Delaware  
Corporate**

(ISSN 2155-5869) is published biweekly by Thomson Reuters.

**Thomson Reuters**

175 Strafford Avenue  
Building 4, Suite 140  
Wayne, PA 19087  
877-595-0449  
Fax: 800-220-1640  
www.andrewsonline.com  
Customer service: 800-328-4880

For more information,  
or to subscribe, please call  
800-328-9352 or visit  
west.thomson.com.

**Reproduction Authorization**

Authorization to photocopy items for internal or personal use, or the internal or personal use by specific clients, is granted by Thomson Reuters for libraries or other users registered with the Copyright Clearance Center (CCC) for a fee to be paid directly to the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923; 978-750-8400; www.copyright.com.

**How to Find Documents  
on Westlaw**

The Westlaw number of any opinion or trial filing is listed at the bottom of each article available. The numbers are configured like this: 2009 WL 000000. Sign in to Westlaw and on the "Welcome to Westlaw" page, type the Westlaw number into the box at the top left that says "Find this document by citation" and click on "Go."

**THE MAGISTRATE'S RULING**

Judge Thyng found that neither Delaware nor federal law allows shareholder plaintiffs who are suing China Water's American parent company, Heckmann Corp., to use those attorneys as go-betweens because they have not been in contact with Xu in the four months since the state court suits ended.

Magistrate judges often decide secondary issues, such as this one, that are holding up the resolution of litigation.

Federal judge Leonard Stark had assigned Judge Thyng to resolve a dispute over how a Chinese national could be served in the securities fraud suit he was overseeing.

The plaintiffs' attorney said there was no other way to serve the former CEO who allegedly caused the collapse of China Water, but the attorneys who had represented Xu in a related matter in the Delaware Chancery Court objected.

The attorneys, Kenneth J. Nachbar and Israel Dahan, said they have had no contact with him since the Chancery Court actions ended and do not represent him in any litigation, according to Judge Thyng's opinion.

They claimed that there is no case law to support the contention that an attorney who has had no contact with a former client can be used as an alternate service of process.

In her ruling, Judge Thyng agreed, finding that Delaware and federal law prohibit the court from drafting former counsel as alternative service of process for a foreign resident if they have had no contact with him for several months.

However, they can be compelled to disclose their most recent contact information, and that could be used to confirm the accuracy of an email address that could be an alternate form of service, she said.

**REVERSE MERGERS**

The service ruling and how it plays out in the federal securities suit will be closely examined by the many attorneys, corporations and investors with ties to China-based firms that have gained a place on the U.S. stock markets through reverse mergers with American shell companies.

By stepping into hollow U.S. corporations — mostly chartered in Delaware — foreign-based firms provide ease of access to American investors attracted to the booming Chinese economy.

But when problems arise and investors allege wrongdoing by officers and directors of those companies, shareholders who sued in Delaware courts have often found it difficult to access officers, assets and information located on the other side of the globe.

Judge Thyng's ruling involves a suit over a China-based firm that is further complicated by the fact that the disgruntled stockholders actually invested in it via its U.S. parent company.

The shareholders in this case are suing Pennsylvania-based Heckmann Corp. and its executives for allegedly making false public statements about the fiscal health of bottling company China Water, which Heckmann acquired in 2008.

The plaintiffs' complaint said they invested because Heckmann's board of directors included trusted figures such as former U.S. Vice President Dan Quayle, ex-college

football coach and ESPN football analyst Lou Holtz, and mergers and acquisitions legend Richard Heckmann, the firm's founder.

### **TAINTED WATER COMPANY**

The federal lawsuit alleges the Heckmann directors and officers lauded the China Water acquisition as a solid business opportunity with vast potential, but the bottler and Heckmann lost money from the beginning.

The plaintiffs' suit contends they later learned that China Water CEO Xu had significantly inflated the company's assets and revenues — and his own credentials.

The federal suit says Xu and Heckmann had earlier traded lawsuits in the Chancery Court, with Heckmann claiming Xu defrauded it with false fiscal forecasts and Xu charging that Heckmann cheated him out of promised stock in the new company.

According to Chancery Court records, Xu and Heckmann settled those actions. Meanwhile, Heckmann shareholders filed the current suit in federal court, claiming that Heckmann's stock price unexpectedly tanked when the market learned that its main asset, China Water, was an empty bottle.

As discovery moved forward in federal court, the plaintiffs found it impossible to contact Xu and sought the court's approval of an alternative process of serving the papers on his previous counsel or having them supply contact information for Xu, according to the opinion.

**Attorneys:**

*Plaintiffs:* Norman Monhait, Rosenthal, Monhait & Goddess, Wilmington, Del.

*Defendant:* (Heckmann) Daniel Dreisbach, Richards, Layton & Finger, Wilmington

*Ex-counsel:* Kenneth Nachbar, Morris Nichols Arshat & Tunnell, Wilmington

*Ex-counsel:* Israel Dahan, Cadwalader, Wickersham & Taft, Wilmington

©2010 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit [www.West.Thomson.com](http://www.West.Thomson.com).