

Skadden Securities Team Sees ‘Event-Driven’ Class Actions as Continuing Trend for 2019

The firm's litigators see class-action increases and the fallout from the U.S. Supreme Court's 'Cyan' decision continuing to have an impact in 2019.

BY COLBY HAMILTON

EVENT-driven securities litigation led to another big year for class actions in 2018—a trend that will likely continue to develop in unique ways in 2019, according to a trio of top securities litigators at Skadden, Arps, Slate, Meagher & Flom.

Head of the group, Jay Kasner, and co-deputy heads, Scott Musoff and Susan Saltzstein, pointed to a number of key trends in the securities litigation space that made 2018 a year of note, while 2019 could see the maturation of some big issues for litigators in the space. Event-driven class actions is one case in point, as Kasner noted.

“Even though the credit-crisis litigation has slowed, over the course of 2018 there has been an increase of what is loosely defined as event-driven litigation, which has become a very significant predicate for securities class actions and derivatives suits,” Kasner told the New York Law Journal.



Skadden partners Jay Kasner, Scott Musoff and Susan Saltzstein

These event-driven cases have been brought following a variety of corporate events, such as becoming enmeshed in a government investigation or allegations of more general unlawful conduct, according to Kasner. Suits against foreign companies whose securities are traded on U.S.-based exchanges have been a significant component of this trend, he added.

This overall upward trend comes without the kinds of “across-the-

board stock drops” such as the bursting of the internet bubble or the collapse of the housing market.

“You are seeing these increases in securities litigation in the face of unprecedentedly strong financial markets,” Kasner said. “You can imagine a scenario where—crystal-balling into the future—the stock market were to weaken a significant amount, driving additional securities litigation, then really you could be looking at dramatically more

filings than you have now by the end of the year, were that to occur.”

One of the areas of interest heading into 2019 will be the continued development of securities litigation in the wake of the U.S. Supreme Court’s March 2018 decision in *Cyan v. Beaver County Employees Retirement Fund*. As was predicted by some during the course of the litigation, securities actions that previously were limited to the federal courts are now seeing a wave of parallel or substitute filings in the state courts, particularly in New York.

The effect, according to the Skadden team, is a whole new way of handling securities cases, in courts that have yet to develop the same level of sophistication to deal with them.

“Plaintiffs’ lawyers are attempting to litigate those cases as if the [Private Securities Litigation Reform Act] had never been passed,” Saltzstein said.

The flood of ’33 Act class actions in the state system is forcing litigators to address new issues that will only continue to develop in the coming year, she said.

“That poses a number of issues that are being grappled with by New York state courts for the first time addressing what are otherwise federal securities law issues that would typically be decided by the federal rather than the state courts,” Kasner said.

The divergent paths in state versus federal courts also set up possible future conflicts between the two that litigators will have to navigate going forward, Saltzstein noted.

“We could have a situation where the New York Court of Appeals could come out with a ruling that diverges from what the Second Circuit has to say,” she said. “It’s an odd setup, and it’s real world—we’re seeing an increase in state court filings and litigating them.”

Another issue worth being on securities litigators’ radars remains actions in the cryptocurrency and cybersecurity space, Musoff said. Quickly becoming a perennial issue, hacking and other cybersecurity issues will continue to require monitoring for potential litigation, while federal regulators are continuing to step up their involvement in this area in the hopes of heading off issues before they arise, according to Musoff.

On the crypto front, he anticipated suits that dig into the substantive issue of whether cryptocurrencies are currencies or securities will percolate up through the system soon.

The Me Too movement’s social impact may extend into the courts in 2019 as a source for securities litigation, according to Saltzstein. She pointed to a recent Southern District of New York decision *In re Signet Jewelers Limited Securities Litigation*, which denied a motion

to dismiss a suit that included sexual harassment claims as part of a securities fraud lawsuit.

The decision, by U.S. District Chief Judge Colleen McMahon, appeared to diverge from rulings in other jurisdictions, as well as within the Southern District itself, where allegations relying on alleged statements in corporate policies were found not to give rise to an actionable securities claim. In *Signet*, the court found that statements within the company’s corporate code at issue were “directly contravened” by allegations the company conditioned employment decisions “on whether female employees acceded to sexual demands,” the court found.

These types of suits are worth keeping an eye on for a potential change in how some federal courts are addressing the issue, Saltzstein said.

B. Colby Hamilton is a litigation reporter for the New York Law Journal and Law.com.