

Talking Shop With the Leaders of Skadden's Securities Litigation Team

A discussion of securities class actions in the first half of the year with Skadden's Jay Kasner, Susan Saltzstein and Scott Musoff.

By Ross Todd
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The reports put out regularly by Cornerstone Research about the volume and type of securities class actions being filed across the country are must-reads for the securities defense bar. By default, that makes them must-reading for us here at the Litigation Daily.

Cornerstone's latest midyear report, compiled with the Stanford Law School Securities Class Action Clearinghouse and published late last month, found 182 new class action securities filings during the first half of the year, a 18% drop from the second half of 2019. That drop was perhaps to be expected given the state of the courts during the COVID-19 pandemic, but surprising all the same given volatility in the markets.

To make sense of it all, the Lit Daily reached out to **Jay Kasner**, the head of the national securities litigation practice at **Skadden, Arps, Slate, Meagher & Flom**, and **Susan Saltzstein** and **Scott Musoff**, the co-deputy heads of the practice, which according to Lex Machina has nabbed more defense-side assignments on cases filed in 2020 than any of its rivals. The following has been edited for length and clarity.

Litigation Daily: What, if anything, surprised you about the volume and types of securities litigation we saw filed in the first half of the year?

Susan Saltzstein: There were 182 filings in the first half of 2020 according to Cornerstone. Actually, that number struck me as high given the fact that we had complete court closures for a time where, for example in New York state court you could not file papers. I thought that was a pretty ambitious number given what we've been through in the last several months.



(l-r) Jay Kasner, Susan Saltzstein, and Scott Musoff with Skadden.

If you look back from a historical perspective, it's pretty robust numbers. [The Cornerstone report] speaks to the fact that filings against S&P 500 firms occurred at an annualized rate of 4.8%, and they say that's the lowest since 2015. But that's pretty high. We've been on a pretty steep trajectory upward in the last five or 10 years. The fact that we are running at that pace is something, I think, notable.

Scott Musoff: When you have a market-wide downturn like we did at the beginning of the COVID crisis, I think it presents difficulties for plaintiffs firms to single out particular companies. That may change depending on how the market performs in the second half.

Lit Daily: One of the key findings of Cornerstone Research's mid-year assessment was that more than 30% of federal filings in non-merger cases were from non-U.S. issuers. Although the filings overall were down 9%, filings against non-US issuers are on a record pace. How does that compare to what you guys are seeing at Skadden?

Musoff: That's consistent with what we're seeing. We represent more Asian-based issues in U.S. securities litiga-

tion that any other firm. We also represent a lot of other foreign entities.

We attribute it to a couple of reasons: One is the number of foreign companies, and in particular Asian companies, that have tapped the U.S. capital markets [giving] rise to suits that follow offerings. These are some big-name Asian companies. If you look back in time when there was a large number of Asian-based securities suits, some were from reverse merger cases and companies that weren't marquee names. These are big, marquee names that have just hit volatile markets, many of which are performing now better than they were at their IPO, but they had a short term downturn that caused them to get sued.

Another point is there is a good number of them that relate to cryptocurrency. Those sometimes tend to be foreign companies with volatile results. And then there are some Canadian companies that are on this list that are cannabis-related and those have to be foreign since that's not legal yet in the United States at the federal level.

Lit Daily: What common themes or legal theories are you seeing the plaintiffs' bar apply in these cases? What sorts of defense challenges are they presenting?

Saltzstein: We are continuing to see Item 303 references in complaints, accounting-based theories presented, and the continuation of event-driven litigation. One of the challenges for the plaintiffs in this market will be establishing loss causation. They have their challenges in this market, I think. That might be a consideration, too, about which companies [are targeted] and where they come from.

Lit Daily: In terms of event-driven litigation, the event of the moment is COVID-19. I'm curious what you make of the wave of COVID-19-related claims you see out there right now and if you expect there will be more tied to the event of COVID-19 in the second half?

Saltzstein: There have been a number of cases against certain industries, as you would expect, including the cruise industry and the pharma industry—those that have been affected by COVID. I think you'll continue to see that. I don't think that the plaintiffs are going to give up on that.

I do think there could be delay, though, in when they bring those types of claims. Is it now? Do they wait a little bit to see how courts are reacting to those sorts of cases? It's a tough type of claim to bring in this market and in this environment. The sympathies are not going to lie with plaintiffs lawyers looking to, perhaps, take advantage of a difficult situation, where folks are in the trenches trying to

make judgments that may perhaps later turn out to be inaccurate. I think that's a tough storyline, particularly if it has a COVID background to it.

Jay Kasner: Unlike in other event-driven circumstances, however you want to define that, that are of widespread application, the number of shareholder class actions or derivative actions relating to COVID have not been as significant as there have been in other circumstances. I think it's a function of a fact that you do have to plead a wrong and it's not simply that the stock price has suffered because of the ramifications of COVID. I think one of the challenges, which is a *real* challenge here, is that nobody anticipated this until quite recently and the uncertainties surrounding it are speculative. The ramifications change day-to-day not only in a commercial sense, but in a health sense, in a magnitude sense. Those sorts of changing landscapes make cases like this very difficult to bring.

I think that what you are likely to see in the future is [plaintiffs will need] a real solid basis for alleging that a company made a false statement in relation to COVID and not something that proved by the passage of time to be false. You're going to need to have the goods to demonstrate that if you're a plaintiffs lawyer in order to bring a case like this.

Lit Daily: What do you make of the dramatic dropoff in the number of state court 1933 Act cases? This could be an easy answer: It could be the courts are closed, the plaintiffs can't file them. What do you think? Is there anything else at play there?

Musoff: I think it also relates to the number of public offerings which is down compared to 2019, as well as the fact that there was probably a delay in some offerings in the first quarter related to COVID-related issues and now that the markets have been performing quite well the capital markets are opening up again, and we're seeing more offerings. If the market continues to perform well, that may also have an impact on the Section 11 cases because they're only brought when the stock price of the company falls below its offering price. So I think those are two factors: market performance and the decrease in offerings.

One trend that we're seeing from some of the more recent Section 11 cases in 2020, as well as the 2019 Section 11 cases, is the tremendous increase in state and federal cases following the Supreme Court's decision in *Cyan*, which as you know prevents defendants from removing securities class actions from the state courts. What you end up seeing is now multiple proceedings in state and federal court, and

having to coordinate those. I think we're handling more of those than any other firm, including in the New York Commercial Division, where there's a large number of them.

That intersects with the foreign companies in the core filings, because again, there's probably a disproportionate number of foreign companies in those offerings, so there's probably a disproportionate number of Section 11 cases against them. So now these foreign companies have to deal with parallel proceedings in state and federal court. And being foreign they don't have a state of incorporation or a principle place of business here in the United States, so it's not even as if you can try to centralize them around a home forum. That may end up creating some advantages to defendants when you get to class certification, but it is one of the difficulties in handling these cases.

Saltzstein: What we're seeing is a battle between the plaintiffs firms jockeying for position. So one will file in federal court, the other will file in state court and it's sort of an intra-plaintiff battle. It's an unfortunate result of the Cyan decision that sort of cleaved off and allowed plaintiffs to try to get an edge by bringing an action in both federal and state court.

Lit Daily: Speaking of coordination, I know that Skadden prides itself on its team approach to everything. How, in this environment, are you maintaining that sort of group practice?

Kasner: We have done, I think, a spectacularly good job of staying in touch. Our practice spans the entire United States with capability up-and-down the East Coast, the West Coast, and major money centers in between. And, of course, on the corporate side with the number of companies incorporated in Delaware law, we have a very significant presence in Wilmington, Delaware, as well. The way that we have kept up together is not only by working together but working at keeping up with one another.

Pre-COVID, our group got together once a month electronically to keep up with another, make sure we talk about developments in the law, and matters in which we're involved. And also, just on a personal side, to give you an example, one of our partners in the Washington office recently retired, and she had been somebody with whom we had worked on a number of securities litigations. We arranged at the meeting we had the week before she was scheduled to retire as a surprise to have a virtual toast to her. We had one of our colleagues who helps us enormously

on the administrative side put together a montage of about three minutes of photographs of her at the firm work-wise, leisure time with people at the firm and scored it. Then we had about a dozen testimonials for her. It's hard to describe and it sounds hackneyed perhaps, but it's just what makes us tick. It was like something you would do with a family. So that's how we stayed in touch.

Yesterday, coincidentally enough, we had the meeting with our group for August, and we gave our summer associates all across the country an opportunity to join virtually and hear about our practice and what we've been doing and the successes we've had. It builds a tremendous esprit de corps amongst people from all over the country that talk about their work experiences. One thing that really struck me yesterday is the extent of collaboration that exists between and among partners and associates in the group all over the country.

Scott and Susan and I and others work together constantly. Scott and I are working on one matter right now where there is litigation in three or four jurisdictions and he and I are working with lawyers from four of the offices here in the United States. That also includes our colleagues overseas as well. In fact, right before this call, Scott and I were on the phone with our partner in Sao Paulo, Brazil, with respect to a potential engagement in this space.

Saltzstein: It's a little hard to put in words. I don't want to make it sound like it's sappy, but the fact is we are in touch with our colleagues in other offices every day, every day, working on matters together: Texas, Delaware, California, D.C. It's all about collaboration, and I think that approach to the practice allows us to talk about the issues, the cases, the developments in each of the circuits, about strategies, about collections. That platform, I think, gives us an incredible opportunity to serve our clients well.

Musoff: This isn't new because of COVID. We work so well together across offices in all of our matters that we're used to coordinating without being in person. We didn't have to start from scratch in terms of working remotely.

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