Near-Record Securities Litigation Filings Show No Signs of Slowing

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Plaintiffs filed 300 securities class actions in 2016 — a mark much higher than the annual average of 221 from 2011 to 2015 (as reported by NERA Economic Consulting). Indeed, the number of filings in 2016 was the second-highest filing total in 15 years. The earlier high mark, set in 2001, reflected a series of cases brought in connection with the allocation of shares in high-tech initial public offerings (IPOs). The uptick in filings this year ought to be viewed against the backdrop of an overall decline in the number of public companies compared with 2001. According to a recent *Wall Street Journal* article, the number of U.S.-listed companies has declined by more than 3,000 since peaking at over 9,000 in 1997. Since public companies are often the targets of securities lawsuits, the meteoric rise of filings in 2016 is even more remarkable. On average, and taking into account the decline in the sheer number of public issuers, public companies are today more susceptible to being the target of a securities fraud claim than at any other time.

Rise in Securities Class Actions

Various factors likely account for the increased number of filings. The decline in financial crisis cases, which dominated the landscape since 2008, has freed the resources of the plaintiffs' bar to focus on nonfinancial institutions and to target more traditional corporate stock-drop cases. It appears that the antique model of asserting a securities action virtually every time a stock declines in price (a tactic reminiscent of those employed prior to the enactment of the Private Securities Litigation Reform Act, which heightened the pleading standards required to bring such cases) is back in vogue. The reversion may be financially motivated, as the crowded field of the plaintiffs' bar looks to file more cases, hoping to hit benchmarks. It also is common for securities fraud suits to follow the disclosure of any corporate crisis, including environmental, antitrust, Foreign Corrupt Practices Act (FCPA) or other regulatory issues. The rise in post-crisis disclosure lawsuits (particularly those that follow FCPA investigations) is evident in the increased number of suits brought against foreign issuers, including from Brazil and Asia.

We also have witnessed a rise in accounting and restatement allegations, including actions brought against foreign issuers. And as stock markets (and companies' market capitalizations) have risen, smaller percentage price declines have resulted in larger absolute exposure and thus attracted greater scrutiny from the plaintiffs' bar. The rise in securities cases brought in federal court also may be linked to the reluctance of courts in Delaware to sanction merger settlements following the Delaware Court of Chancery's January 2016 decision in *In re Trulia, Inc. Stockholder Litigation*. (See "Key Developments in Delaware Corporation Law in 2016.") Plaintiffs' counsel appear to be filing disclosure claims under the securities laws in federal court, perhaps as a way of avoiding the traditional path that originally led those litigants to Delaware. Finally, life sciences, technology and other companies that may have highly volatile results depending on the success of certain products remain particularly susceptible to securities actions and were frequently targeted in 2016. These trends, and a continued high number of securities class actions filings, are all expected to persist in 2017.

Significant Decisions

A number of significant decisions in securities litigation are expected in 2017, especially in the area of class certification. In the era of globally offered securities, the U.S. Court of Appeals for the Second Circuit is poised to issue a ruling in the *Petrobras* case on the impact of the extraterritorial application of the securities laws on the ability to certify a class of globally offered, nonexchange-traded notes. (Petrobras issued globally offered securities that were traded throughout the world and were registered in the United States

but not exchange-traded.) The court will determine, among other factors, whether the individualized need to determine if a transaction was "domestic" renders the class unascertainable and not appropriate for class certification. Given the reality of globally connected financial systems, the extraterritorial application of U.S. federal securities laws to nonexchange-traded securities will be a closely watched development.

The Second Circuit also is expected to issue three decisions relating to the determination of market efficiency at the class certification stage. These decisions will touch upon who bears the burden of proof and what level of evidentiary support is necessary at the class certification stage to trigger the rebuttable presumption of reliance based on the fraud-on-the-market theory. This theory is necessary for plaintiffs to achieve class certification to avoid the inherent individual inquiries that arise from allegations of direct reliance.

Other areas and issues that we expect to percolate through the courts in 2017 include further clarification of Item 303 trend disclosure (*i.e.*, known trends and uncertainties that will have a material impact) as the basis for a securities class action, loss causation and the price maintenance theory, and the delineation of statutes of repose and tolling. For example, the U.S. Supreme Court will decide in *CalPERS v. ANZ* whether, pursuant to the *American Pipe* tolling rule, the filing of a putative class action satisfies the three-year time limitation in Section 13 of the Securities Act with respect to the claims of unnamed class members. The outcomes of these cases will impact the arguments defense lawyers can make on motions to dismiss and beyond, as well as on the exposure to such cases. While we anticipate a number of decisions that will benefit public corporations, it is important to analyze each case based on its own allegations, facts and nuances.

The upcoming year is not expected to offer defendants in securities cases a break. While the change in administration is unlikely to have an immediate effect on private securities class actions, if President Donald Trump's policy proposals result in an increase in the number of IPOs, plaintiffs may have the opportunity to bring more actions under the Securities Act of 1933. (See "Volatility and Uncertainty Continues in the US Capital Markets.") In addition, if market volatility increases, securities filings are likely to go up, as plaintiffs will focus their attention on the more significant price declines following disclosure of negative news.