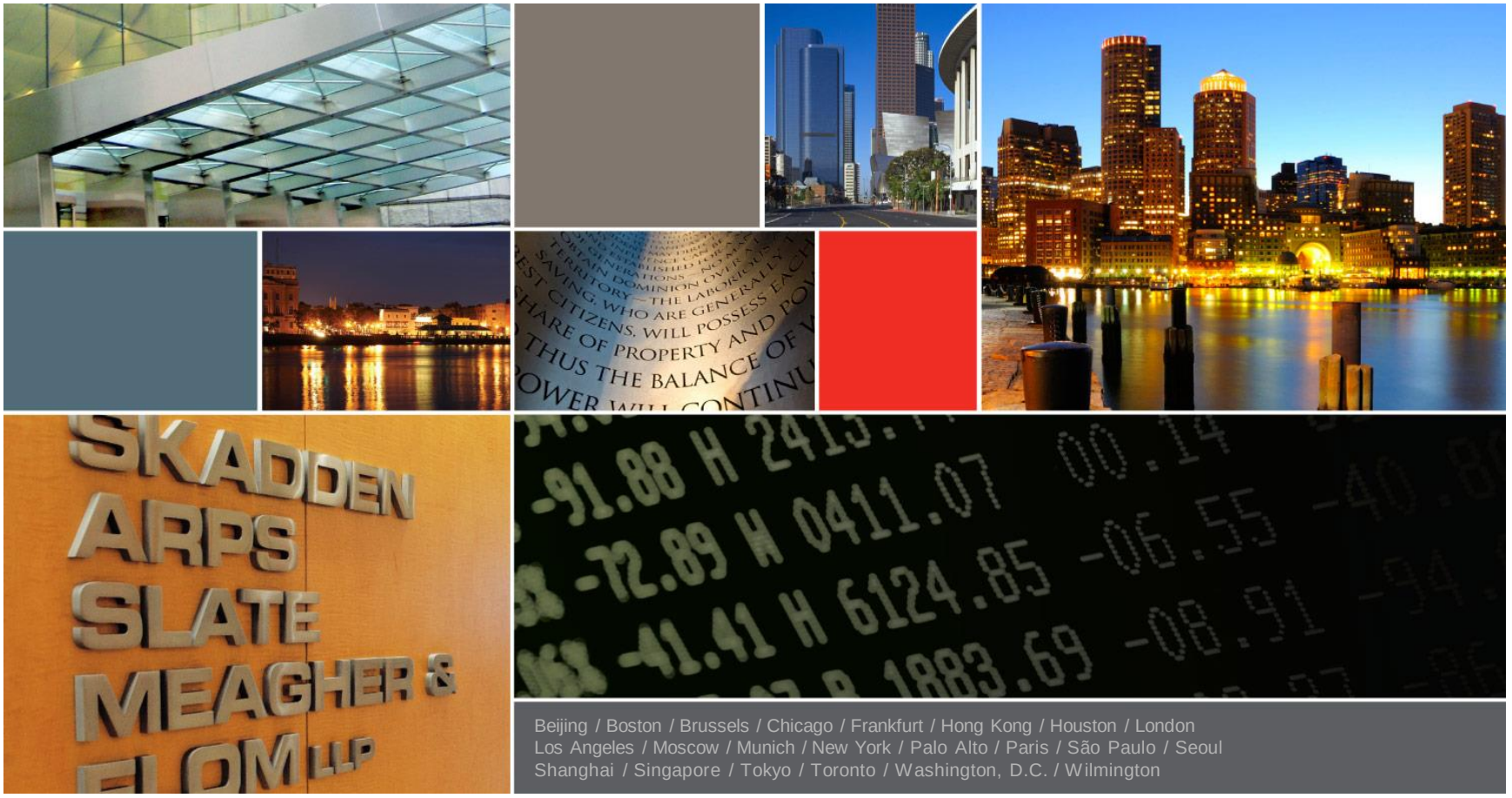
Securities Litigation
Highlights

Skadden

2017



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Our Practice

Skadden, Arps, Slate, Meagher & Flom LLP

The national securities litigation practice at **Skadden** is frequently recognized for handling **some of the most challenging, high-stakes securities litigation matters** — "bet-the-company" cases that demand a full range of skills, in and out of the courtroom. According to *Chambers USA 2016*, which ranked the firm in the top tier for securities litigation, Skadden "enjoys an extremely strong reputation in both securities litigation and regulation." Sources tell *Chambers* that Skadden is a "go-to firm from both a substantive and client service perspective" with a team that "performs at a very high level" and is "sophisticated in the whole securities litigation area." In 2016, for the sixth consecutive time, we were named a member of the "Fearsome Foursome" — the four elite law firm litigation practices — and named as a "powerhouse" in BTI's securities and finance litigation category. Skadden is the only firm named to both of these lists in every edition of the report.

Our attorneys have deep experience with often-overlapping internal investigations, derivative actions and investigations by the U.S. Securities and Exchange Commission and other federal or state regulators. The outcome of these proceedings can be vital to a company's future, and Skadden's approach of assembling collaborative teams of advisers with deep and relevant experience across our worldwide platform and the full range of disciplines is key to our successful track record on behalf of clients.

We have acted as lead defense counsel in some of the most high-profile securities class actions, including representing Anadarko Petroleum Corporation, MacAndrews & Forbes Holdings, Inc. and News Corp. (now known as 21st Century Fox), among others. Most recently, we have represented or are currently representing clients in cutting-edge securities litigation, including Abercrombie & Fitch, Co., American Apparel, BlackBerry Limited, El Pollo Loco, Iconix Brand Group, Inc., Pfizer Inc., the former CEO of Porsche Automobil Holding, Sprint, The Walt Disney Company and all the major financial institutions.

Skadden has successfully represented clients in significant and precedent-setting cases in appellate courts and before the U.S. Supreme Court, including Merrill Lynch in a unanimous win in *Merrill Lynch v. Dabit*, and securing a grant of *certiorari* on behalf of UBS Financial Services Incorporated of Puerto Rico and UBS Trust Company of Puerto Rico to resolve a circuit court split over the standard of appellate review for dismissals of derivative suits pursuant to Rule 23.1. We also represented Merrill Lynch in securing two major victories before the U.S. Court of Appeals for the 2nd Circuit. This includes *Lentell v. Merrill Lynch*, in which the Second Circuit adopted a standard for loss causation that has been cited hundreds of times; and *Wilson v. Merrill Lynch*, which was the first auction rate securities (ARS) class action arising from the market collapse to be decided by an appellate court.

Our Practice (cont'd)

Skadden

Beyond providing a wealth of innovative solutions to U.S.-based companies, our global presence and experience also has made us a firm of choice for clients worldwide. For example, we recently obtained dismissals of two separate securities class actions against Asia-based ChinaCache International Holdings Ltd. and Jumei International Holdings Ltd., each of which were accused of misleading investors. Within two days, we secured the dismissals of both actions in the Central District of California and the Southern District of New York, respectively.

We handle the broad range of issues that arise when a corporation, director or officer faces securities class action or derivative-related claims. Our work includes representing financial institutions in matters related to subprime loans and the credit crisis, such as mortgage-backed securities litigation, securities class and derivative actions, and ERISA-related litigation. We also represent clients in numerous cases related to the foreign exchange/commodities industries, addressing issues pertaining to foreign exchange rates, market manipulation and price-fixing allegations. In addition, we are advising a number of clients in litigation arising from various issues within the energy industry.

Skadden plays an active role in addressing and resolving litigation claims in the M&A context. In the last several years, our attorneys have defeated challenges to hundreds of billions of dollars in deals, in cases filed in Delaware and across the United States.

We advise on a wide variety of securities-related regulatory matters at the federal and state levels, and provide assistance in connection with investigations and proceedings before the SEC, the Commodity Futures Trading Commission, the Department of Justice, the offices of various state attorneys general, the Financial Industry Regulatory Authority and the New York Stock Exchange. We also have advised boards of directors and special committees in investigations of shareholder demands, accounting issues and other corporate governance matters. Many of our attorneys have valuable knowledge and experience from previous government service with the DOJ, SEC and CFTC.

Awards & Accolades

Our group has consistently received many top rankings and recognitions, including:

- for the **sixth consecutive time**, named a member of the **"Fearsome Foursome"** — the four elite law firm litigation practices — and named as a **"powerhouse"** in BTI's securities and finance litigation category in 2016. Skadden is the only firm named to both of these lists in every edition of the report.
- has **more top-tier rankings** (eight) in *U.S. News — Best Lawyers* "Best Law Firms" 2017 for securities litigation than any other law firm.
- **resolved the most federal securities cases** as defense counsel than any other firm in 2016, according to statistics from Lex Machina, a provider of law firm data analytics.
- ranked in the **top tier** in securities litigation in *Chambers USA 2016* and *The Legal 500 United States 2015*.
- named as one of *Law360*'s **Securities Groups of 2014** and ranked in the **top 10** in the "Securities and White Collar Law360 100," which lists the firms that have dedicated the most partners globally to securities litigation, government financial investigations and enforcement, and white collar defense.
- selected by *The American Lawyer* as a finalist in its **2014 Litigation Department of the Year** issue.
- recognized for our defense of UniCredit S.p.A. in Madoff-related litigation in the 2013 *Financial Times* U.S. "Innovative Lawyers" report, which **ranked Skadden first** overall.

Our Clients

Skadden

We handle securities, derivative and deal-related litigation matters for clients in a wide range of industries. Recent representations include:

Banks and Financial Institutions

- **AXA Equitable Life Insurance Company** in securing the dismissal of federal and state putative class actions brought by an AXA policyholder in connection with AXA's contractual obligations to variable annuity holders.
- **Bank of America/Merrill Lynch; UBS; Royal Bank of Scotland; Société Générale; CIBC; Crédit Agricole and BNP Paribas, among others**, in residential mortgage-backed securities (RMBS) and other securities cases brought in state and federal courts and FINRA arbitrations throughout the country arising out of the credit crisis.
- **Bank of America and certain of its current and former directors** in the dismissal of a shareholder derivative action for alleged breaches of fiduciary duty related to purportedly improper residential mortgage-backed securitization practices and alleged manipulation of LIBOR;
- **Barclays Bank** in a FERC investigation regarding alleged market manipulation involving power trading in the western United States from late 2006 through 2008 and related federal court litigation.
- **BNP Paribas** in securing the dismissal of federal fraud and negligent misrepresentation claims arising from BNP's marketing and underwriting of notes issued by Schmolz + Bickenbach, a global steel manufacturer.
- **Canadian Imperial Bank of Commerce** in breach of contract litigation brought by an affiliate fund of Cerberus Capital Management alleging that CIBC failed to make required payments under two separate agreements that reference a portfolio of CIBC's structured assets, including certain synthetic assets.
- **Citigroup**
  - **Citigroup Global Markets Inc.** in a series of putative class actions alleging that numerous primary dealer defendants colluded to manipulate the U.S. Treasury securities markets in violation of federal antitrust laws and the Commodity Exchange Act;
  - **Citibank N.A. and affiliates** in a putative class action alleging that numerous defendants conspired to fix prices in the secondary market for supranational, sub-sovereign and agency (SSA) bonds in violation of federal antitrust laws;
  - **and 13 other underwriters of three Petrobras offerings** from 2012 through 2014 in securing a partial dismissal of a putative securities class action alleging violations of the federal securities laws;
  - as the underwriting syndicate of various debt and equity offerings by Cobalt International Energy in a securities litigation asserting Section 11 and 12 claims involving allegations that Cobalt misrepresented and omitted material facts concerning its oil exploration prospects and compliance with the FCPA; and
  - as the 17-member underwriting syndicate of Santander Consumer USA Holdings Inc.'s IPO in connection with two securities class actions (S.D.N.Y.) alleging that the offering materials for the company's IPO were false and misleading and violated Sections 11 and 15.

Our Clients (cont'd)

- **Fidelity Investments**
  - **Fidelity Investments and certain of its officers** in a putative class action in connection with allegations that Fidelity offers products to plan sponsors that violate ERISA's fiduciary duty and prohibited transaction provisions; and
  - **FMR LLC and Fidelity Brokerage Services, LLC** in securities class action litigation brought in the U.S. District Court in the Southern District of New York regarding high-frequency trading.
- **HSBC**
  - **HSBC Finance Corp.** in securing a 7th Circuit opinion reversing and remanding for retrial an appeal from a $2.5 billion jury verdict following a trial in which a jury found the company and three of its former executives liable for making false and misleading statements to the market; and
  - **HSBC Holdings PLC's subsidiary Household Finance** in securing the settlement of a federal securities class action over alleged misrepresentations about whether the company engaged in predatory lending, re-aging of delinquent loans and certain accounting practices by its subsidiary Household International (now HSBC Finance).
- **JPMorgan Chase**
  - in the dismissal of a putative class action in the U.S. District Court for the Southern District of New York alleging that JP Morgan Chase failed to provide the "prevailing" rate on foreign exchange transactions executed through their AutoFX program; and
  - In securing the favorable settlement of a federal antitrust litigation brought by a proposed class of investors alleging manipulation of foreign exchange rates, such as the WM/Reuters Closing Spot Rates.
- **MacAndrews & Forbes Holdings Inc. and certain directors** in securing the affirmance of a dismissal in a Delaware shareholder class action relating to controlling stockholder squeeze-out transactions. This opinion was the first to dismiss a lawsuit challenging a controlling stockholder merger conditioned on both procedural protections.
- **New Residential Investment Corp. and its directors** in securing the dismissal in large part of a stockholder lawsuit challenging the company's acquisition of the assets of Home Loan Servicing Solutions Ltd. for approximately $1.4 billion.
- **Stilwell Value LLC and Joseph Stilwell** in securing the favorable settlement of an SEC investigation alleging that Stilwell entities failed to adequately disclose conflicts of interest presented by approximately 20 interfund loans made over a 10-year period between certain pooled investment vehicles that they managed.
- **UBS**
  - **UBS AG** in securing summary judgment in a federal securities lawsuit that significantly reduced the amount of prejudgment interest entitled to the plaintiff trusts on their residential mortgage-backed securities claims;
  - **UBS Financial Services Incorporated of Puerto Rico**, **UBS Trust Company of Puerto Rico and Carlos Ortiz** in successfully opposing class certification in a putative securities class action; and
  - **UBS Real Estate Securities Inc.** (UBS RESI) in securing the dismissal of a New York state breach-of-contract action brought on behalf of a residential mortgage-backed securities (RMBS) trust, alleging that UBS RESI breached certain representations and warranties relating to the mortgage loans underlying the trust.

Our Clients (cont'd)

Skadden

- **UniCredit**, **Pioneer Alternative Investments**, **Tremont Group Holdings and others** in more than 25 actions stemming from the Bernard Madoff scandal, including litigation in federal trial and appellate courts in New York; securing a Second Circuit affirmance of the dismissal of federal claims brought against Tremont by an investor alleging fraud; state court actions in New York, California, Delaware, Massachusetts, Florida, Colorado, New Mexico and Washington; and, most notably, securing the dismissal of $60 billion in trebled RICO claims and common law claims brought against UniCredit by Irving Picard, the trustee for the Securities Investor Protection Act liquidation of Bernard L. Madoff Investment Securities, for which the U.S. Supreme Court denied *certiorari*.

Education

- **Officers and directors of Apollo Education Group, Inc.** in securing a settlement of a securities class action following dismissal with prejudice, judgment in favor of defendants and briefing of an appeal before the 9th Circuit.
- **New Oriental Education & Technology Group Inc.** in securing a partial dismissal and successful settlement of a putative securities class action filed following an SEC inquiry and short-seller attack.

Energy

- **Cheniere Energy, Inc.** in securing the settlement of a Delaware Chancery Court litigation challenging a stockholder vote on Cheniere's incentive plan and the related issuance of shares as incentive compensation.
- **Current and former directors of Pacific Gas & Electric Company** in securing a favorable ruling in a California shareholder derivative lawsuit in connection with the September 2010 explosion of a gas transmission line in San Bruno, California, alleging breach of fiduciary duty by violating pipeline safety laws and regulations and failure to oversee adequate internal controls.
- **Seadrill Limited and North Atlantic Drilling Limited** in securing the dismissal of a federal class action alleging that the companies had failed to disclose the possible impact of an evolving global sanctions regime on contracts with Rosneft, the Russian oil company.
- **TCP International Holdings, Ltd.** in obtaining the dismissal of a consolidated securities class action in which the plaintiff claimed that TCP's IPO registration statement and prospectus contained material misstatements or omissions.
- **Vivint Solar, Inc., several of its officers and directors, and The Blackstone Group L.P.** in a dismissal with prejudice of a putative securities class action complaint stemming from Vivint Solar's Oct. 1, 2014, initial public offering
- **XTO Energy**, the settlor of a publicly traded royalty trust, in a derivative action where the unitholder claimed the ability to sue XTO despite the refusal of the trustee to initiate litigation against XTO.

Health Care, Life Sciences and Pharmaceuticals

- **Baxter International Inc.** in securing an order under recently enacted Section 205 of the Delaware General Corporation Law validating a charter amendment destaggering the board of directors of Baxter International Inc.; and in securing the settlement of a consolidated federal class action brought following its announcement of financial results for the first quarter of 2010 and a Food and Drug Administration order regarding Baxter's Colleague infusion pump.
- **Biogen Inc. and certain of its current and former officers** in securing the dismissal of a putative federal class action alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5 thereunder, asserting that the defendants intentionally misled the market regarding revenue projections for the company's multiple sclerosis drug Tecfidera. We also secured the denial of the plaintiffs' motion to vacate the dismissal.
- **Centene Corp.** in defense of a putative securities fraud class action arising out of its $6 billion acquisition of Health Net, Inc.

Our Clients (cont'd)

- **Cytrx Corporation** in securing a dismissal upholding a Delaware forum-selection bylaw in a shareholder derivative suit.
- **Current and former directors of E. I. du Pont de Nemours and Co.** in securing federal and Delaware state appellate victories in the dismissal of two shareholder derivative lawsuits alleging breaches of fiduciary duty in connection with litigation against Monsanto Co.
- **Express Scripts** in a series of related lawsuits alleging securities fraud and derivative claims filed in multiple state and federal courts in connection with Express Scripts' multi-billion dollar contractual dispute with Anthem.
- **Gentium S.p.A.** in securing a dismissal with prejudice in a putative securities class action lawsuit arising out of the company's auction and sale to Jazz Pharmaceuticals.
- **Insys Therapeutics, Inc.** in securing a significant victory against claims arising out of a reverse stock split.
- **Pfizer Inc.** in defeating a stockholder's demand for Pfizer's books and records pursuant to 8 Del. C. § 220 in the Delaware Court of Chancery; and in securing a complete dismissal of a shareholder derivative suit brought against certain former and current officers and directors arising out of its settlements with the government concerning alleged FCPA violations.
- **Questcor Pharmaceuticals, Inc.** in securing the favorable settlement of a federal securities class action in connection with claims involving its principal drug, Acthar.
- **11 former directors and officers of Savient Pharmaceuticals** in securing the dismissal of a securities class action concerning statements it made prior to its filing of Chapter 11 bankruptcy petitions.

Retail

- **Abercrombie & Fitch, Co.** in securing a settlement of a federal stockholder derivative action following a demand to inspect the company's books and records pursuant to Section 220 of the Delaware Code for the purpose of investigating alleged wrongdoing.
- **American Apparel** in securing the dismissal of shareholder derivative claims in federal court concerning breach of fiduciary duty claims and alleged misconduct by their former CEO, securing a TRO against the former CEO from further breaching the terms of a standstill agreement, defeating a motion for preliminary injunction to enjoin the 2015 shareholder meeting and force a revote on the 2014 annual shareholder meeting, and securing summary judgment in a subsequent matter involving a demand for advancement of expenses incurred in defending against the company's breach-of-contract claims.
- **Caribou Coffee** in securing a favorable post-trial opinion in a federal appraisal action stemming from Joh. A. Benckiser Company's acquisition of Caribou Coffee in January 2013.
- **Jumei International Holding Limited**, a Chinese online retailer, in securing the dismissal of a putative federal securities class action alleging that it made false and misleading statements regarding its financial performance.
- **El Pollo Loco Inc.** in a putative federal shareholder class action alleging violations of the federal securities laws involving disclosures by the company relating to same store sales figures.
- **Members of the special committee of the board of directors of Steinway Musical Instruments Inc.** in securing the settlement of a shareholder class action lawsuit that challenged the company's go-private sale to Paulson & Co.
- **Vipshop Holdings Limited** in securing the dismissal of a federal securities class action alleging that it made false and misleading statements regarding its financial performance.

Our Clients (cont'd)

Skadden

Technology and Media

- **21Vianet**, a Chinese internet data center service provider, in a federal securities class action alleging that it made false and misleading statements regarding its financial performance.
- **Activision Blizzard, Inc.** in a Delaware Chancery derivative and class action litigation challenging its $5.8 billion buyback of its shares from Vivendi, S.A. and related transactions.
- **ChinaCache International Holdings Ltd.** in securing the dismissal without prejudice of a federal securities class action alleging it made false and misleading statements about its financial performance.
- **Covisint Corporation** in a federal securities class action alleging that Covisint purportedly issued a misleading registration statement leading up to its September 2013 initial public offering.
- **Freescale Semiconductor, Ltd., its directors and Freescale Holdings, L.P.** in defeating a putative federal class action brought by a shareholder seeking to enjoin Freescale Semiconductor, Ltd.'s proposed $40 billion merger with NXP Semiconductors, N.V.
- **iDreamSky Technology Limited** in a federal SLUSA securities class action alleging claims in connection with its August 2014 initial public offering.
- **The individual directors of IntraLinks** in securing the dismissal with prejudice of a New York derivative action in connection with the FDIC's termination of its relationship with the company, resolving the last of several related lawsuits.
- **MOL Global, Inc.**, a Malaysian data processing company, in putative securities class actions involving allegations of failing to disclose material information in connection with the listing of the company's American Depositary Shares during its IPO.
- **NQ Mobile Inc.** in a federal securities class action alleging, based on a short seller attack, that the company's financial statements and disclosures were false and misleading.
- **Schawk Inc. and five of its directors** in securing the dismissal of a Delaware Chancery Court litigation in connection with its approximately $575 million merger with Matthews International.
- **Sprint-Nextel Corporation** in securing the settlement of a securities class action alleging that Sprint issued false and misleading statements in connection with Sprint's merger with Nextel Communications.

Transportation and Automotive

- **Embraer S.A.** in a federal shareholder class action involving claims of alleged violations of federal securities law.

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U.S. Bank, National Association v. UBS Real Estate Securities Inc.

A first-of-its-kind, closely watched trial in which Skadden significantly reduced the plaintiffs' potential recovery

Significance

In May 2016, Skadden defended **UBS Real Estate Securities Inc.** (UBS) in a three-week bench trial where the plaintiffs sought more than $2 billion for alleged breaches of representations and warranties in connection with residential mortgage-backed securities (RMBS). Through the first-of-its-kind, closely watched trial, Skadden persuaded the court to reject several of the plaintiffs' experts in their entirety and secured dismissal of thousands of the plaintiffs' breach allegations, likely reducing the plaintiffs' potential recovery by more than half.

Case Overview

In 2012, three RMBS trusts — acting through their trustee — filed suit against UBS, alleging that the bank had breached certain representations and warranties and thus obligated UBS to repurchase all 17,000 mortgage loans underlying the trusts. Following discovery, Skadden secured a critical summary judgment victory in which the court rejected the so-called "pervasive breach" theory regularly invoked by plaintiffs in RMBS litigation, resulting in dismissal of thousands of the trusts' breach allegations. In May 2016, Skadden defended UBS in a three-week bench trial in the Southern District of New York, during which the trusts sought $2 billion for the remaining alleged breaches.

Although RMBS and other financial crisis litigation has occurred for nearly a decade, this is the first case of its kind to go to trial. The closely watched trial often unfolded before a standing-room-only crowd and featured no shortage of fireworks, such as when Skadden exposed on cross examination that the trusts' lead reunderwriting expert, Ira Holt, had lied about his credentials. Mr. Holt, who was on the stand for three days, had been a favorite expert of RMBS plaintiffs, submitting expert reports in more than a dozen such cases.

Skadden also discredited several of the trusts' other experts, leading the trusts to withdraw some of their proffered opinions and the court to reject others. For example, the court completely rejected the trusts' attempt to prove hundreds of alleged breaches of the maximum loan-to-value ratio through *ad hoc* automated valuation models or AVMs. The court similarly rejected the opinions of the trusts' statistical sampling expert in their entirety. Skadden also forced the trusts to withdraw the analysis of their summary damages expert, leaving the court no clear way to determine damages across the thousands of loans and prompting the court to turn the loan-by-loan calculations over to a special master.

Case Details

Client(s)

UBS Real Estate Securities Inc.

Case Name(s)

U.S. Bank, National Association v. UBS Real Estate Securities Inc., Case No. 12-cv-7322 (PKC) (JCF) (S.D.N.Y.)

Venue(s)

U.S. District Court for the Southern District of New York

Lead Attorneys

Jay B. Kasner / New York

Scott D. Musoff / New York

Robert A. Fumerton / New York

Thomas J. Nolan / Los Angeles

Charles F. Smith / Chicago

Glickenhaus Institutional Group v. Household International, Inc.

Secured a rare appellate order reversing and remanding for retrial, and on remand, settled for more than $2 billion less than the exposure under the original jury verdict

Significance

Following an unfavorable jury verdict in a securities class action, **HSBC** sought new counsel and engaged Skadden to handle its critical post-trial issues in the district court and subsequent appeal. Skadden, along with co-counsel, asserted the plaintiffs failed to prove loss causation and the jury received incorrect instructions. The appellate court agreed, issuing a rare order reversing and remanding for retrial. Subsequently, on remand, Skadden teamed with co-counsel for purposes of the retrial and secured a settlement of more than $2 billion less than the exposure under the original jury verdict.

Case Overview

In 2002, a securities class action was filed against Household International Inc. (now HSBC). In May 2009, following a trial in which Household and the individual defendants were represented by another firm, a jury found Household and three of its former executives liable for making false and misleading statements to the market relating to (i) predatory lending, (ii) the delinquency rate of Household's loans and (iii) revenue from particular credit card agreements. During the course of disputed claims determinations arising from the liability verdict, the district court issued a partial judgment as to a subset of the class for $2.5 billion.

Skadden was retained following the 2009 jury verdict to breathe new life into HSBC's case and handle post-trial issues in the district court and represent the company on appeal. Skadden teamed with co-counsel (Bancroft) for the appeal, which was argued before the 7th Circuit by Paul Clement. The defendants argued that the plaintiff failed to prove loss causation, in part because the plaintiff's expert used a "leakage model" for damages, yielding an inflation ribbon that incorporated both fraud and firm-specific, non fraud price declines. The 7th Circuit agreed with the defendants that the expert's failure to fully address firm-specific, non fraud factors was problematic. The court held that in order for a leakage model to be admissible in a securities class action, the model must adequately account for firm-specific, non fraud–related information. The court established a pretrial procedure to determine admissibility whereby an expert who contends that no firm-specific, non-fraud related information caused the stock price declines at issue must first explain in "nonconclusory terms the basis for the opinion." If the expert does so, the defendants then have a burden of production to identify "significant, firm-specific, non-fraud related information that could have affected the stock price." If the defendants make the required showing, the burden shifts back to the plaintiff to account for the identified information. The court ordered a new trial on this loss causation issue.

The defendants also argued that the jury was incorrectly instructed on what it means to "make" a false statement under the Supreme Court's ruling in *Janus.* The district court instructed the jury that the plaintiff needed to prove that the "defendant made, approved, or furnished information to be included in a false statement of fact." The 7th Circuit agreed with the defendants and held that the "approved or furnished information" was in error under *Janus*. In a rare decision, the 7th Circuit ordered a new trial for the three individual defendants on this issue.

On the eve of the retrial on the loss causation and damages issues, Skadden and co-counsel (Williams & Connolly) secured a $1.58 billion settlement, which was substantially less than the $2.5 billion partial judgment and less than half of Household's potential exposure of $3.6 billion for the limited retrial in which the material misstatements would be required to be taken as given by the jury.

Case Details

Client(s)

HSBC

Case Name(s)

Glickenhaus Institutional Group v. Household International, Inc., Case No. 787 F.3d 408; *Lawrence E. Jaffe Pension Plan et al. v. Household International Inc. et al.*, Case No. 1:02-cv-05893

Venue(s)

U.S. Court of Appeal for the Seventh Circuit

U.S. District Court for the Northern District of Illinois

Lead Attorneys

R. Ryan Stoll / Chicago

Patrick Fitzgerald / Chicago

Bou-Salman, et al. v. Darbee, et al.

Scored two significant victories that addressed two unsettled questions of California law

Significance

Skadden secured two significant victories for the **current and former directors of PG&E Corporation and its subsidiary Pacific Gas and Electric Company** (the Utility) in shareholder derivative litigation that addressed two unsettled questions of California law. The litigation arose from the September 2010 rupture of a natural gas transmission pipeline in San Bruno, California.

First, Skadden secured a ruling from the Superior Court of California, holding that the time to assess the futility of a demand on the board to commence derivative litigation is when the first of the current plaintiffs commenced an action, not when a former plaintiff – who abandoned his action – filed suit. Second, we secured a ruling from the California Court of Appeal on an emergency appeal directing the Superior Court to stay the derivative litigation pending resolution of the federal criminal proceedings against the corporation's subsidiary.

Case Overview

The derivative litigation arose from the Sept. 9, 2010 rupture of a natural gas transmission pipeline in San Bruno, California. Shareholder plaintiffs in the derivative litigation filed complaints in 2010, 2013 and 2014, claiming that certain current and former directors and officers of PG&E and the Utility breached their fiduciary duties, allegedly resulting in the San Bruno accident. In 2014, federal prosecutors charged the Utility with multiple criminal violations relating to the accident.

Skadden secured victories on two unsettled questions of California law: (1) should the court assess whether demand on the board would be futile when the original shareholder plaintiff filed his complaint in October 2010, even though he subsequently abandoned his action by selling his shares, or when the current plaintiffs filed their consolidated complaint in November 2013; and (2) should the trial court stay derivative litigation pending resolution of the criminal proceedings if because pursuit of the derivative litigation while the criminal matter is pending would not be in the corporation's best interests?

With respect to the first question, while California law applied, the Superior Court looked to Delaware law for guidance. The Superior Court recognized that the Delaware Supreme Court's decision in *Braddock v. Zimmerman*, 906 A.2d 776 (Del. 2006), governs the time to assess demand in light of successive amended complaints filed by the *same* plaintiff. The Superior Court agreed with Skadden that the *Braddock* test did not apply here because the original shareholder abandoned his action., holding that the question of whether demand was excused as futile had to be assessed as of November 2013, when the first of the current plaintiffs commenced his action., and that consolidation of the 2010 and 2013 complaints in 2013 did not resurrect the original shareholder's action.

For the second question, Skadden argued that the standard for determining whether to stay a derivative action pending resolution of a parallel criminal proceeding against the corporation is whether a stay would be in the best interests of the corporation. The Superior Court rejected these arguments, but on an emergency appeal, the Court of Appeal held that the Superior Court applied an incorrect legal standard. Accordingly, on December 8, 2015, the Court of Appeal granted Skadden's petition for a writ of mandate, commanding the Superior Court to enter an order staying the derivative litigation pending resolution of the federal criminal proceedings.

Case Details

Client(s)

Current and former directors of PG&E and its subsidiary, Pacific Gas and Electric Company

Case Name(s)

Bou-Salman, et al. v. Darbee, et al., Case No. JCCP 4648-C (San Mateo Cty. Sup. Ct. 2010)

Venue(s)

Superior Court of California San Mateo

California Court of Appeal

Lead Attorneys

Jay B. Kasner / New York

Amy S. Park / Palo Alto

Jack P. DiCanio / Palo Alto

In re Petrobras Securities Litigation

A case of first impression with broad-reaching implications for U.S.-based litigation involving the extraterritorial application of U.S. securities laws

Significance

In a case of first impression, Skadden represented **the underwriters of two multibillion-dollar global note offerings for the Brazilian oil company Petrobras** in successfully obtaining a district court dismissal of certain plaintiffs' claims, stemming from the highly publicized corruption and bribery allegations relating to Petrobras' operations, based on the failure to plead a domestic transaction. The decision makes it more difficult for those purchasing securities abroad to sue in the U.S. when the securities are not traded on a national stock exchange — an issue that is highly prevalent in the U.S. and around the world, given an increase in cross-border activity in recent years.

Subsequent to the dismissal, Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York certified a class of those who purchased the note offerings in a domestic transaction. Skadden successfully persuaded the 2nd Circuit to grant an interlocutory appeal of this order, then argued on behalf of the underwriters that a class should not have been certified under principles identified in *Morrison*.

The outcome of the decision will have broad-reaching implications for U.S.-based litigation involving the extraterritorial application of U.S. securities laws.

Case Overview

The plaintiffs initially alleged claims under Section 11 of the Securities Act against the underwriters of three Petrobras note offerings from 2012 through 2014 based on the highly publicized corruption and bribery allegations against the company. On July 9, 2015, Judge Jed Rakoff of the U.S. District Court for the Southern District of New York dismissed all claims based on the Petrobras 2012 debt offering, all claims for plaintiffs who failed to allege purchases of the securities in a domestic transaction, and certain claims based on the 2013 note offering for failure to plead reliance. The plaintiffs then filed two amended complaints in an attempt to plead purchases of the securities in domestic transactions. However, on Dec. 20, 2015, Judge Rakoff dismissed the claims of the lead plaintiff and one named with prejudice, and, in a matter of first impression, rejected the plaintiffs' argument that because the trades were settled through the Depository Trust Company, the purchases were automatically deemed domestic transactions.

Subsequent to this opinion, Judge Rakoff issued an order certifying a class consisting of those who purchased debt securities issued by Petrobras in the note offerings in domestic transactions. Skadden successfully persuaded the United States Court of Appeals for the 2nd Circuit to grant the defendants' petition for leave to file an interlocutory appeal of that order. The underwriters argued that a class should not have been certified because the global offered notes were not exchange-traded, and thus, individualized inquiries exist as to whether each plaintiff incurred irrevocable liability in the U.S. under *Morrison*. Skadden argued the 23(f) appeal before the 2nd Circuit on Nov. 3, 2016.

Case Details

Client(s)

BB Securities Ltd., Citigroup Global Markets Inc., J.P. Morgan Securities LLC, Itau BBA USA Securities Inc., Morgan Stanley & Co. LLC, HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA), Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Standard Chartered Bank, Bank of China (Hong Kong) Limited, Banco Bradesco BBI S.A., Banca IMI S.p.A., Scotia Capital (USA) Inc.

Case Name(s)

In re Petrobras Securities Litigation, Case No. 14-cv-9662 (JSR)

Venue(s)

U.S. Court of Appeals for the 2nd Circuit

U.S. District Court for the Southern District of New York

Lead Attorneys

Jay B. Kasner / New York

Boris Bershteyn / New York

Scott D. Musoff / New York

Julie Bédard / São Paulo

Zomolosky v. Kullman, et al.

Obtained a major 3rd Circuit appellate victory which affirmed a lower court victory achieved by Skadden

Significance

Skadden secured a major 3rd Circuit appellate victory for **E.I. du Pont de Nemours and Company**, affirming a lower court Skadden victory. The shareholder derivative action followed patent infringement litigation between Monsanto and DuPont concerning herbicide-resistant soybeans.

In the underlying litigation in Missouri (not handled by Skadden) that led to the derivative litigation, DuPont lost a $1 billion jury verdict and was sanctioned for asserting claims of contract reformation that were held to be contrary to written documents revealed through discovery. The Missouri lawsuit ultimately settled between Monsanto and DuPont as part of a broader agreement, but the sanctions order was affirmed by the U.S. Court of Appeals for the Federal Circuit. Following the Missouri trial verdict, shareholder derivative activity ensued. One shareholder filed suit in the Delaware federal court, without first making a demand on the board of directors to pursue the litigation on behalf of the company. The 3rd Circuit then affirmed the district court's dismissal of the shareholder suit, finally putting the lawsuit to rest.

Case Overview

The plaintiff/appellant filed a derivative complaint in the U.S. District Court for the District of Delaware, naming as defendants certain present and former DuPont directors. The plaintiff alleged the directors breached their fiduciary duties and caused DuPont significant monetary damages flowing from a $1 billion adverse verdict in a 2012 jury patent infringement trial brought by Monsanto. The derivative plaintiff alleged that between 2008 and 2011, the directors were aware that DuPont was developing a soybean product that unlawfully infringed on Monsanto's patented technology for an herbicide-resistant trait (Roundup Ready), that the directors consciously permitted DuPont to infringe the Roundup Ready patent, and that their conscious inaction gave rise to Monsanto's successful lawsuit against DuPont.

The district court held that the plaintiff failed to plead demand futility as required by Fed. R. Civ. P. 23.1. The 3rd Circuit affirmed. Accepting Skadden's arguments, the 3rd Circuit noted that the complaint alleged board inaction, not action, and refused the plaintiff's request to apply the *Aronson* demand futility test for challenging a specific business decision made by the board, as opposed to the more challenging *Rales* test that applies when the board's oversight is at issue. The 3rd Circuit then affirmed that the district court correctly applied the *Rales* test to the allegations in the complaint.

Case Details

Client(s)

E.I. du Pont de Nemours and Company

Case Name(s)

Zomolosky v. Kullman et al.,
Case No. 14-4006

Venue(s)

U.S. Court of Appeals for the 3rd Circuit

Lead Attorneys

Thomas J. Nolan / Los Angeles

Allen L. Lanstra / Los Angeles

Edward P. Welch / Wilmington

Wilder v. News Corp., et al.

Won two consecutive dismissals of a putative class action securities fraud complaint arising out of news-gathering practices at *News of the World* and *The Sun*

Significance

Skadden has an unstoppable track record representing **News Corp., its British subsidiary NI Group Ltd., Rupert Murdoch and James Murdock** in securing dismissals of putative securities fraud claims arising from the highly publicized news-gathering practices at British newspapers *News of the World* and *The Sun*.

The Skadden team has quarterbacked numerous attempts by the plaintiffs to keep their actions in play. In an effort to end-run a dismissal issued by Judge Paul G. Gardephe of the Southern District of New York, the plaintiffs amended their complaint to expand the class period. Then, after Judge Gardephe dismissed the amended complaint, the plaintiffs filed a motion for reconsideration. On Sept. 21, 2016, Judge Gardephe affirmed his dismissal, finally putting the case to rest by agreeing with Skadden that the plaintiffs improperly sought to raise a new legal argument, which is not proper on a motion for reconsideration.

Case Overview

The plaintiffs alleged putative securities fraud claims against, among others, News Corp., its subsidiary NI Group Ltd., and Rupert and James Murdoch alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act. The court first examined NI Group's motion to dismiss for lack of personal jurisdiction, holding that the plaintiffs' allegations were insufficient to establish personal jurisdiction over NI Group because it was not "at home" in New York and News Corp.'s control over NI Group was not alleged to be so pervasive as to warrant disregarding the corporate form.

The court then determined that claims by the plaintiffs in the expanded portion of the class period were time barred. The plaintiffs argued that such claims "related back" to the first complaint and were therefore timely. Judge Gardephe adopted Skadden's application of 2nd Circuit precedent requiring that the omission of the newly added plaintiffs from the original pleading be the result of "mistake." Because the plaintiffs strategically chose the original class period and did not plead mistake, they argued that the "mistake" requirement was not applicable. Judge Gardephe determined that claims made by any putative class members for the part of the alleged class period beginning prior to the date of the original class period were time barred. In reaching such a holding, the court concluded that claims by the original putative class members could not reach back to a time period in which they did not have claims.

The plaintiffs moved for reconsideration of dismissal on the grounds that they had in fact met the "mistake" requirement, reversing course from their original argument that the "mistake" requirement did not apply. Judge Gardephe denied reconsideration, agreeing with Skadden that the plaintiffs could not raise this new argument for the first time in a motion for reconsideration. Judge Gardephe also agreed that, in any event, the plaintiffs did not cite any law supporting their new arguments.

Case Details

Client(s)

News Corporation, NI Group Ltd., Rupert Murdoch and James Murdoch

Case Name(s)

Wilder v. News Corp. et al., Case No. 11 Civ. 4947 (PGG)

Venue(s)

U.S. District Court for the Southern District of New York

Lead Attorneys

Jay B. Kasner / New York

Scott D. Musoff / New York

In re Biogen Inc. Securities Litigation

A win that underscores that a company's warning to investors about downside risks weakens an inference of scienter, and that a company's failure to predict the future does not amount to securities fraud

Significance

Skadden secured dismissal of a putative securities fraud class action against **Biogen Inc.** and three of its current and former officers alleging that the defendants intentionally misled the market regarding revenue projections for the company's multiple sclerosis drug Tecfidera. The action was filed shortly after the company released revised revenue guidance and the company's share price fell 22 percent, representing an approximately $20 billion market cap decline. The court adopted Skadden's argument that allegations attributed to 10 "confidential witnesses" were not sufficiently particular to plead a strong inference of scienter, and that such allegations were critical in this case because the defendants repeatedly warned investors about moderating Tecfidera sales. The decision underscores that a company's attempt to warn investors about downside risks weakens an inference of scienter, and that a company's failure to predict the future does not amount to securities fraud.

Case Overview

The plaintiffs alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5 thereunder, asserting that the defendants intentionally misled the market regarding revenue projections for Tecfidera. Specifically, the complaint, citing ten anonymous "confidential witnesses," alleged that the defendants knew — but misrepresented or concealed — the impact on Tecfidera sales resulting from the first confirmed case of a rare neurological disease, progressive multifocal leukoencephalopathy (PML), in a patient treated with Tecfidera.

In a 72-page opinion, Judge Dennis Saylor dismissed the complaint with prejudice. The court concluded that the plaintiffs' scienter allegations supported, at most, an inference that the defendants were "unduly optimistic in attempting to predict the PML death's effect on revenues," but that the "defendants' failure to predict the future does not support a claim for securities fraud." In so holding, the court observed that the "defendants were cautious in projecting Tecfidera's growth, and they repeatedly warned investors about the downside risks, including moderating [Tecfidera] growth" following the PML announcement. The court also held that nearly all of the alleged misstatements were not actionable, either because they were forward-looking statements protected by the Private Securities Litigation Reform Act's safe harbor provisions, or because they were "quintessential expressions of corporate optimism and subjective opinion" that were immaterial as a matter of law.

Case Details

Client(s)

Biogen Inc.

Case Name(s)

In re Biogen Inc. Securities Litigation, Civil Action, Case No. 15-13189-FDS

Venue(s)

U.S. District Court for the District of Massachusetts

Lead Attorneys

James R. Carroll / Boston

Michael S. Hines / Boston

Hubner v. Mayer and *American Apparel, Inc. v. Charney*

Scored two victories on the same day — on opposite sides of the country — that effectively halted the company's embattled former CEO from regaining control of the company

Significance

When **American Apparel Inc.**'s controversial founder and former CEO Dov Charney sought to regain control of the company after being terminated for cause, Skadden litigators raced to court on opposite sides of the country. In Delaware, they secured a same-day TRO preventing his actions, and, later in the day in Los Angeles, won a denial of a preliminary injunction to disallow a re-vote of the 2014 director elections and a postponement of the company's 2015 shareholder meeting. Skadden's swift jump to action kept the company out of the hands of the ousted former CEO. Our ongoing work on behalf of American Apparel continues to play out in the headlines, as the company plows forward in this bet-the-company litigation.

Case Overview

In July 2014, American Apparel suspended Mr. Charney as its CEO and terminated him as chairman of the board. Thereafter, Charney signed a nomination, standstill and support agreement (standstill agreement) in which he agreed to, among other things, step down as the company's CEO and director, and not seek the removal of any member of the board or make disparaging statements against the company. After Charney's termination for cause in December 2014, and despite the standstill agreement, Charney publicly sought to regain control of the company and reinstate himself as CEO.

American Apparel turned to Skadden to file suit against Charney in the Delaware Court of Chancery in May 2015 for breach of the standstill agreement by making disparaging comments about the company, inciting labor unrest, disrupting the company's operations and participating in various stockholder lawsuits seeking to invalidate the director elections at the company's 2014 annual stockholder meeting. On June 1, our Delaware litigators quickly secured a TRO and preliminary injunction in Chancery Court enjoining Charney from breaching the standstill agreement pending completion of the company's upcoming annual shareholder meeting scheduled for July 2015.

Later that afternoon, our Los Angeles litigators fought a second set of charges in which Charney's supporters sued the company for proxy solicitation fraud at the company's 2014 annual shareholder meeting on the theory that the board of directors should have disclosed their "plan" to suspend Charney. On June 8, the court ruled in our favor, blocking the plaintiffs' attempt to stop the 2015 annual meeting and hold a revote on the 2014 director elections (the plaintiffs later voluntarily dismissed their remaining claims with prejudice).

That same day, the Delaware Court of Chancery granted a stipulation and order extending the temporary restraining order through the 2014 annual meeting in lieu of a preliminary injunction hearing. The parties are proceeding with discovery and preparing for trial on American Apparel's breach of contract claims.

On Dec. 7, 2015, the 9th Circuit stayed the case pending American Apparel's bankruptcy proceedings. As a result of American Apparel's bankruptcy and the cancellation of their outstanding stock, the plaintiffs' claims were discharged. The plaintiffs then moved to voluntarily dismiss the case, which the 9th Circuit granted on June 1, 2016.

Case Details

Client(s)

American Apparel, Inc.

Case Name(s)

Hubner v. Mayer, Case No. CV-15-02965 (C.D. Cal.); *American Apparel, Inc. v. Charney,* Case No. 11033-CB (Del. Ch.)

Venue(s)

U.S. District Court for the Central District of California

Court of Chancery of the State of Delaware

Lead Attorneys

Peter B. Morrison / Los Angeles

Edward B. Micheletti / Wilmington

AXA Equitable Life Insurance Company Litigation

Achieved several dismissals highlighting that the Securities Litigation Uniform Standards Act remains a viable defense in state court despite the defense being rejected in federal court

Significance

Skadden secured several dismissals on behalf of **AXA Equitable Life Insurance Company** (AXA Equitable) in a series of putative class actions filed in multiple jurisdictions stemming from the company's settlement with the New York Department of Financial Services (NYDFS) over alleged omissions in regulatory filings concerning certain investment portfolios in variable annuities.

Following the successful dismissal of one of the actions in New York, we secured a rare dismissal in New Jersey state court of a nearly-identical putative class action commenced on behalf of variable life insurance policyholders. After a New Jersey federal court remanded the action on the basis that the Securities Litigation Uniform Standards Act did not preclude the action, Skadden renewed that argument in state court, asking that the state court use its independent judgment to reconsider whether SLUSA applied. The New Jersey state court adopted Skadden's argument and dismissed the action as precluded by SLUSA.

This decision highlights that SLUSA remains a viable defense in state court despite the defense being rejected in federal court.

Case Overview

In 2014, AXA Equitable entered into a consent order with the NYDFS, relating to the effect of a new investment strategy on AXA Equitable variable annuity contracts.

Following the settlement announcement, a group of law firms filed a series of putative class actions against AXA Equitable in New York, Connecticut and New Jersey state and federal courts, alleging that AXA Equitable's purported omissions in regulatory filings breached terms of the policyholders' insurance contracts requiring compliance with New York law.

Skadden first successfully secured the dismissal of the New York action before Judge Vernon S. Broderick of the Southern District of New York. The court denied a motion to remand, rejecting the plaintiff's attempt at artful pleading and finding that "when viewed realistically" the complaint alleged a securities fraud action precluded by SLUSA. The putative class of annuity holders filed an appeal with the 2nd Circuit but later voluntarily withdrew that appeal.

Around the same time, the plaintiff in the New Jersey action, Arlene Shuster, brought a similar action, which AXA Equitable successfully removed from New Jersey state court to federal court under SLUSA. Upon remand to state court, AXA Equitable moved to dismiss the action on SLUSA and state law grounds. In a decision issued from the bench on Feb. 5, 2016, Judge Louis R. Meloni of the Superior Court of New Jersey, Camden County agreed with Skadden and dismissed the complaint with prejudice. The plaintiff has appealed the judgment and that appeal is pending.

Skadden also successfully sought transfer of the Connecticut action to New York and thereafter filed a motion to dismiss that action on the grounds of SLUSA preclusion. That motion is pending.

Case Details

Client(s)

AXA Equitable Life Insurance Company

Case Name(s)

Cabral v. AXA Equitable Life Ins. Co., Case No. 14-cv-03715; *O'Donnell v. AXA Equitable Life Ins. Co.*, Case No. 15-cv-9488; *Shuster v. AXA Equitable Life Ins. Co.*, Case No. CAM-L-4485-14; *Swallow v. AXA Equitable Life Ins. Co.*, Case No. 14-cv-3505; *Zweiman v. AXA Equitable Life Ins. Co.*, Case No. 14-cv-5012

Venue(s)

Supreme Court of the State of New York, Commercial Division

Superior Court of New Jersey

Connecticut Superior Court

U.S. District Court of the Southern District of New York

U.S. District Court of the District of Connecticut

U.S. District Court of the District of New Jersey

U.S. Court of Appeals for the Second Circuit

Lead Attorneys

Jay B. Kasner / New York

Kurt Wm. Hemr / Boston

Turocy v. El Pollo Loco Holdings Inc., et al.

Won a dismissal of a putative securities class action, finding that the plaintiffs had failed to plead a materially false or misleading statement and failed to plead scienter

Significance

Skadden obtained a dismissal of a putative securities class action brought against **El Pollo Loco Holdings, Inc.** (EPL), Trimaran Capital Partners, Freeman Spogli & Co. and other individual defendants alleging the defendants misled the market concerning the reasons and scope of slowed growth trends EPL experienced in early fiscal year 2015. The court accepted all of Skadden's arguments, holding that it was "not persuaded" by the plaintiffs' theory of fraud and, therefore, was "not convinced Defendants omitted any information or warnings to investors that would be misleading."

Case Overview

Skadden won a motion to dismiss a putative securities class action brought against El Pollo Loco Holdings, Inc., (EPL) Trimaran Capital Partners, Freeman Spogli & Co. and other individual defendants alleging that EPL misled investors regarding its ability to meet its comparable store sales projections and the causes of lighter-than-expected comparable store sales growth. Specifically, the plaintiffs alleged that the defendants gave pre textual explanations for the slowed growth trends while hiding the fact that the alleged true cause of the issues was EPL's alleged decision to remove popular combo items from the menu that negatively impacted value-conscious customers.

Judge David O. Carter of the U.S. District Court for the Central District of California rejected the plaintiffs' claims and dismissed the complaint, finding that the plaintiffs had failed to plead a materially false or misleading statement because (i) certain allegedly misleading statements regarding EPL's comparable store sales projections were covered by the Private Securities Litigation Reform Act safe harbor for forward-looking statements and there was sufficient cautionary language; (ii) additional statements were mere puffery, which cannot constitute actionable misrepresentations of material fact; and (iii) the plaintiffs failed to plead facts showing that EPL's statements regarding the cause of the lighter-than-expected comparable store sales growth were false when made.

Judge Carter also found that the plaintiffs failed to plead scienter because — while they relied on alleged insider trades to support scienter — the plaintiffs (i) failed to allege facts regarding the sales as a percentage of each individual's total holdings; (ii) did not address the context surrounding the sales; and (iii) failed to provide any information as to whether there were any restrictions on the insider's ability to trade.

The plaintiffs filed a second amended complaint, and the defendants' motion to dismiss the second amended complaint is pending.

Case Details

Client(s)

El Pollo Loco Holdings, Inc.

Case Name(s)

Turocy v. El Pollo Loco Holdings Inc. et al., Case No. 15-cv-1343

Venue(s)

U.S. District Court for the Central District of California

Lead Attorneys

Jason D. Russell / Los Angeles

Jay B. Kasner / New York

Ricardo Roman, et al. v. UBS Financial Services Incorporated of Puerto Rico, et al.

Successfully opposed class certification by arguing that individualized issues of reliance predominated over common issues and that the plaintiffs had failed to show uniform misrepresentations to the putative class were made

Significance

Several individuals brought a putative class action against **UBS** on behalf of themselves and thousands of other investors in a series of Puerto Rico closed-end mutual funds that were managed and marketed by UBS and that were primarily invested in Puerto Rico securities. The investors alleged that UBS Puerto Rico brokers systematically misled their customers about the liquidity of the funds' shares and purportedly misrepresented the funds as safe investments. Skadden successfully opposed class certification, arguing that individualized issues of reliance predominated over common issues and that the plaintiffs had failed to show that the UBS Puerto Rico brokers made uniform misrepresentations to the putative class.

Case Overview

In May 2012, UBS Financial Services Incorporated of Puerto Rico entered a settlement with the Securities and Exchange Commission regarding the marketing of certain Puerto Rico closed-end mutual funds that were managed by its affiliate UBS Trust Company of Puerto Rico. Immediately following the settlement, several individual investors in the funds filed a putative class action against both UBS entities and two of their officers, asserting claims under the Securities Exchange Act and Puerto Rico securities law. Specifically, the plaintiffs alleged that the defendants misled investors about the liquidity of the secondary market for the funds' shares and the risks of purchasing mutual funds that were primarily invested in Puerto Rico government debt. The funds experienced significant losses when the market for Puerto Rico government bonds collapsed in 2013.

The plaintiffs sought to certify a class of all investors in the funds between Jan. 1, 2008, and Sept. 18, 2013. Skadden argued that certification was inappropriate because individualized issues would predominate.

In a March 2016 report and recommendation, Magistrate Judge Bruce J. McGiverin agreed with Skadden and recommended that class certification be denied because the facts did not support a finding of uniform representations to all class members. The funds were marketed to investors through individualized discussions with their personal UBS Puerto Rico brokers, which varied based on each investor's situation, needs and objectives. Magistrate Judge McGiverin also held that individualized issues of reliance would predominate because no presumption reliance applied in that the funds were not traded in an efficient market and the plaintiffs' allegations that UBS had manipulated the market for the funds' shares could not be characterized as being primarily based on omissions.

Judge Carmen C. Cerezo adopted the magistrate's report and recommendation on Sept. 30, 2016, and denied class certification.

Case Details

Client(s)

UBS Financial Services Incorporated of Puerto Rico

UBS Trust Company of Puerto Rico

Case Name(s)

Ricardo Roman, et al. v. UBS Financial Services Incorporated of Puerto Rico, et al., Case No. 12-cv-1663-CCC

Venue(s)

U.S. District Court for the District of Puerto Rico

Lead Attorneys

Paul J. Lockwood / Wilmington

In re Kingate Management Ltd. Litigation

Obtained, for the second time, the dismissal of a putative class action stemming from the Bernard Madoff Ponzi scheme

Significance

Skadden obtained, for the second time, the dismissal of a putative class action against **Tremont Group Holdings, Inc., and its subsidiaries Tremont Partners, Inc. and Tremont (Bermuda) Limited** stemming from the Bernard Madoff Ponzi scheme. On remand from the U.S. Court of Appeals for the 2nd Circuit, Judge Deborah Batts of the U.S. District Court for the Southern District of New York granted Tremont's motion to dismiss a second amended complaint filed on behalf of a putative class of hedge fund investors, asserting claims arising out of Tremont's management of two offshore hedge funds that lost over $1 billion to the fraud. Judge Batts ruled that the plaintiffs' claims either were precluded by the Securities Litigation Uniform Standards Act or failed to state a claim under applicable Bermuda and British Virgin Islands (BVI) law. The plaintiffs have again appealed the dismissal of their complaint to the 2nd Circuit.

Case Overview

In their first amended complaint, the plaintiffs asserted a host of common law claims against defendants, who were managers, consultants, administrators and auditors of the two offshore Madoff feeder funds. Judge Batts dismissed that complaint with prejudice on the ground-that all of plaintiffs' claims were precluded by SLUSA. The plaintiffs appealed that decision. On appeal, the 2nd Circuit found that a number of the claims were barred by SLUSA, but disagreed with the analysis applied by the district court for determining whether certain other claims fell outside the scope of SLUSA and therefore could be maintained on behalf of a putative class. In its opinion, the Second Circuit established a new framework for determining when common law claims survive SLUSA and remanded the action to Judge Batts to determine the extent to which SLUSA precluded the plaintiffs' claims under that framework.

The plaintiffs filed a second amended complaint asserting common law claims of negligence, gross negligence, negligent misrepresentation, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, mutual mistake, third-party breach of contract, constructive trust and unjust enrichment. Applying the 2nd Circuit's new framework, Judge Batts found that a number of the claims were precluded by SLUSA. In dismissing those claims, the court rejected the plaintiffs' argument, made for the first time, that because SLUSA bars only U.S. common law claims, it could not bar any of the Kingate plaintiffs' claims because the defendants had insisted they were governed by the laws of Bermuda and the British Virgin Islands. Judge Batts ruled that the plaintiffs had waived that argument by failing to raise it when opposing the defendants initial motion to dismiss the original complaint. The court further indicated that even if the argument had not been waived, the court still would have rejected it because plaintiffs had alleged in their second amended complaint that all of their claims arose under New York common law.

While the court found that a number of the other amended claims were not barred by SLUSA, the court nevertheless dismissed them on the ground they failed to state a claim for relief under applicable Bermuda and BVI law.

Case Details

Client(s)

Tremont Group Holdings, Inc., Tremont Partners, Inc. and Tremont (Bermuda) Limited

Case Name(s)

In re Kingate Management Ltd. Litig., Case No. 9 Civ. 5386 (DAB)

Venue(s)

U.S. District Court for the Southern District of New York

U.S. Court of Appeals for the 2nd Circuit

Lead Attorneys

Seth M. Schwartz / New York

City of Lakeland Employees Pension Plan v. Baxter International Inc., et al.

With $2 billion in alleged damages on the line, secured a highly favorable resolution by developing novel arguments in opposition to class certification

Significance

In a securities fraud class action with $2 billion in alleged damages on the line, Skadden secured a highly favorable resolution for Illinois-based health care giant **Baxter International Inc.** by developing novel arguments in opposition to class certification. Immediately after the Supreme Court issued its decision in *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), Skadden supplemented its class certification opposition briefs, demonstrating that the alleged financial misrepresentations did not actually affect the stock price and therefore the plaintiff was not entitled to the benefit of the fraud-on-the-market presumption. This was a game-changer in the case, setting in motion an expedited schedule for expert discovery and briefing on the issue. While the motion for class certification was still pending, Skadden's novel argument led to a very favorable settlement for Baxter.

Case Overview

This putative securities fraud class action was precipitated by two unrelated declines in Baxter's stock price in April and May of 2010. The first decline occurred when Baxter, a long-time Skadden client, announced a downward revision to its 2010 financial guidance to reflect the impact of recent health care reform legislation in the U.S. and Baxter's outlook for continued plasma market pressures. The second stock price decline occurred after Baxter announced that the FDA had ordered it to recall and destroy all Colleague Infusion Pumps in the U.S. and pay refunds.

On April 15, 2011, the plaintiff filed a consolidated amended complaint alleging that, from June 10, 2009, through May 3, 2010, Baxter made materially false and misleading statements about the prospects for its plasma products business and its commitment to remediating the Colleague Infusion Pumps. Estimated damages were approximately $2 billion.

On Jan. 23, 2012, the court issued an opinion granting in part and denying in part Baxter's motion to dismiss the complaint.

On Jan. 28, 2013, the plaintiff filed its class certification motion. Skadden argued that class certification should be denied principally because the lead plaintiff's claims were not typical of those of other members of the purported class. The motion for class certification remained pending on June 23, 2014, when the Supreme Court issued its decision in *Halliburton II*, which held that defendants must be afforded an opportunity, before class certification, to defeat the presumption of reliance "through evidence that an alleged misrepresentation did not actually affect the market price of the stock." Skadden supplemented its class certification briefing within weeks of the ruling, arguing that, under the opinion, the plaintiff was not entitled to the benefit of the fraud-on-the-market presumption because the alleged misrepresentations did not actually affect the market price of the stock. Following Skadden's immediate and creative application of *Halliburton II,* the court ordered expedited expert discovery on this issue, ultimately resulting in the parties settling for $42.5 million, substantially less than comparable settlements in cases of this size and complexity

Case Details

Client(s)

Baxter International Inc., Robert L. Parkinson, Jr. (CEO), Robert M. Davis (former CFO) and Mary Kay Ladone (VP of Investor Relations)

Case Name(s)

City of Lakeland Employees Pension Plan v. Baxter International Inc. et al., Case No. 10-cv-6016

Venue(s)

U.S. District Court for the Northern District of Illinois

Lead Attorney(s)

Matthew R. Kipp / Chicago

David Shaev Profit Sharing Plan v. Bank of America Corporation, et al. and *Chaile Steinberg v. Angelo Mozilo, et al.*

Scored the dismissal of two shareholder derivative suits stemming from mortgage-backed securitization and loan origination practices

Significance

Two purported shareholders of **Bank of America Corporation** (BAC) brought separate shareholder derivative suits arising out of BAC and Countrywide's mortgage-backed securitization and loan origination practices. Both actions were dismissed because neither plaintiff , David Shaev Profit Sharing Plan nor Chaile Steinberg, had standing to sue on BAC's behalf. The Supreme Court of the State of New York rejected Shaev's argument that New York law should apply to the question of demand futility, and held that he had failed to allege that demand was excused under Delaware law. Although Steinberg made a demand on the BAC board, she filed suit before the board had responded. The Southern District of New York rejected her allegations that the board had ignored her demand, determined that the board's actions were protected by the business judgment rule and that Steinberg failed to adequately allege bad faith to overcome that presumption.

Case Overview

In 2011, BAC was sued by several investors in connection with its mortgage-backed securities, asserting that BAC had misrepresented the quality of loans underlying the securities. David Shaev Profit Sharing Plan filed a derivative action against BAC's current and former directors, arguing that they had encouraged BAC to violate its own underwriting standards and should be required to indemnify BAC for any damages it suffered as a result. In an amended complaint, Shaev added allegations that the directors had authorized BAC to collude with other financial institutions to manipulate LIBOR.

In 2013, several former Countrywide officers and BAC, as Countrywide's successor, were found liable for violating the Financial Institutions Reform, Recovery and Enforcement Act in connection with Countrywide's High Speed Swim Lane loan origination program. Shortly thereafter, plaintiff Chaile Steinberg sent a letter to the BAC board demanding that they seek indemnification from the Countrywide officers for the judgment against BAC. Without waiting for the board's response, Steinberg filed a derivative action on behalf of BAC, alleging that the board had ignored her demand.

Skadden secured dismissal of both cases, arguing that neither plaintiff had standing to sue on BAC's behalf.

In *Shaev*, Judge Melvin Schweitzer declined to apply New York law and accepted Skadden's argument that, although BAC had significant contacts in New York, Delaware had a superior interest to all other states in deciding issues about the internal affairs of the corporation. The court went on to hold that the plaintiff failed to plead demand futility because it failed to identify which directors were on the board at the time it filed its claims.

In *Steinberg*, Judge Andrew L. Carter Jr. agreed with Skadden that the board had not effectively ignored the demand simply because it took six months to respond to it. The board had taken some action in response to the demand before Steinberg filed suit, so its actions were entitled to the protection of the business judgment rule. The court dismissed the case because Steinberg had failed to allege that the board actions were in bad faith.

Case Details

Client(s)

Bank of America Corporation

Case Name(s)

David Shaev Profit Sharing Plan v. Bank of America Corporation, et al., Index No. 652580/2011; *Chaile Steinberg v. Angelo Mozilo, et al.*, Case No. 14-cv-2023-ALC-GWG

Venue(s)

Supreme Court of the State of New York

U.S. District Court for the Southern District of New York

Lead Attorneys

Jay B. Kasner / New York

Scott D. Musoff / New York

Paul J. Lockwood / Wilmington

Stadnick v. Vivint Solar, Inc., et al.

Obtained the dismissal of a putative securities class action involving the disclosure of current quarterly results in an IPO, and raised an issue of first impression for the 2nd Circuit on appeal

Significance

Skadden obtained the dismissal of a putative securities class action against **Vivint Solar, Inc., certain of its officers and directors, The Blackstone Group L.P., and various underwriters of Vivint Solar's initial public offering** alleging misleading statements relating to their third quarter 2014 results and failure to disclose certain trends related to the company's accounting method, regulatory hurdles and certain consumer preferences. In granting the defendants' motion to dismiss the plaintiff's second amended complaint, Judge Katherine B. Forrest called the plaintiff's premise "fundamentally flawed," among other things, and also concluded that Blackstone was not a proper Section 11 defendant.

The case, now on appeal, raises an issue of first impression : Is the 1st Circuit's "extreme departure" standard, which requires an issuer to pre-disclose financial data that are an "extreme departure" from the range of results that could be anticipated, applicable in the 2nd Circuit? Although the 2nd Circuit summarily affirmed a prior case that applied the "extreme departure" standard, the 2nd Circuit has the opportunity here to explicitly adopt this standard or to articulate a different rule.

Case Overview

The plaintiff alleged putative securities claims against, among others, Vivint Solar and the Blackstone Group L.P. alleging violations of Sections 11, 12(a)(2) and 15 of the Securities Act. The court determined that the plaintiff failed to provide sufficient evidence to state a viable claim for Securities Act violations.

The plaintiff argued that Vivint Solar's registration statement failed to predisclose the company's third quarter results and also omitted material information regarding purported trends that the plaintiff claimed would limit the company's growth. Because Vivint Solar's third quarter results were not an "extreme departure" from the company's typical pattern of operations and Vivint Solar had extensively warned of relevant risks to its businesses, Judge Forrest concluded that the registration statement's disclosures had been sufficient. The judge dismissed the suit with prejudice because she had already given the plaintiff an opportunity to amend the complaint and his amended pleading was unavailing.

The plaintiff appealed two of the district court's determinations but abandoned the majority of his claims on appeal. Specifically, the plaintiff contested Judge Forrest's determinations that Vivint Solar was not required to predisclose its third quarter results and that the plaintiff failed to allege a violation of Item 303 related to the regulatory environment in one of Vivint Solar's primary markets. The 2nd Circuit held oral argument on these issues in August.

Case Details

Client(s)

Vivint Solar, Inc., certain of its officers and directors and The Blackstone Group L.P.

Case Name(s)

Stadnick v. Vivint Solar, Inc. et al., Case No. 16-0065-cv; *Stadnick v. Vivint Solar, Inc. et al.*, Case No. 14 Civ. 9283 (KBF)

Venue(s)

U.S. Court of Appeals for the 2nd Circuit

U.S. District Court for the Southern District of New York

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Towers v. Iger, et al.

Secured a significant victory in the dismissal of a derivative complaint alleging breach of fiduciary duties

Significance

On May 26, 2016, Skadden secured a significant victory on behalf of **The Walt Disney Company and certain of its current and former directors and officers** when the Northern District of California dismissed a derivative complaint filed by a shareholder of Disney alleging the individual defendants breached their fiduciary duties by allowing Disney to enter into a number of anti-competitive "no poach" hiring agreements with several animation studios. In granting the motion to dismiss, the District Court noted the 9th Circuit's recent decision in *Rosenbloom v. Pyott*, 765 F. 3d 1137 (9th Cir. 2014). The District Court went on to hold that the plaintiff failed to allege that a pre-litigation demand would have been futile because the "Plaintiff has failed to plead sufficient facts regarding the Board's knowledge of the purported conspiracy."

Case Overview

The plaintiff's argument stems from allegations that, commencing in the mid-1980s, employees of certain companies in the animation industry, including Pixar Animation Studios and Lucasfilm Ltd. LLC, attempted to reduce labor competition and depress employee compensation by entering into "gentleman's agreements" not to recruit each other's employees by "cold calling" them and by sharing employee compensation information, in violation of federal law. In 2009, the Department of Justice began investigating the recruiting practices of companies in the high-tech industry, including Pixar, Lucasfilm and other Silicon Valley companies. On Sept. 24, 2010, the DOJ publicly filed a civil antitrust complaint in the United States District Court for the District of Columbia, along with a final consent judgment resolving the lawsuit, and issued a competitive impact statement and press release. The named defendants were Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar. On Dec. 21, 2010, the DOJ issued another press release and publicly filed a nearly identical civil antitrust complaint, competitive impact statement and final consent judgment related to Lucasfilm.

After the conclusion of the DOJ's investigation, class actions were then filed on behalf of high-tech employees against Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar in September 2011. On Sept. 8, 2014, former animation industry employees filed a class action complaint against Disney, Pixar, Lucasfilm, Blue Sky Studios, Inc., DreamWorks Animation SKG, Inc., Two Pic MC LLC f/k/a ImageMovers Digital LLC, Sony Pictures Animation, Inc. and Sony Pictures Imageworks, Inc. In the derivative litigation brought on behalf of Disney and against its current and former directors and officers, the plaintiff alleged that those directors and officers breached their fiduciary duties by failing to prevent the alleged "gentleman's agreements" and attendant recruiting practices. The District Court, however, accepted Skadden's arguments on the motion to dismiss that the plaintiff failed to plead facts that demand on the Disney board of directors would have been futile, as the complaint lacked any particularized facts showing that a majority of the board faced a substantial likelihood of liability for being aware of, and failing to prevent, the alleged recruiting practices. The District Court thereafter granted the motion to dismiss with leave to amend.

Case Details

Client(s)

The Walt Disney Company and certain of its current and former directors and officers

Case Name(s)

Towers v. Iger, et al., Case No. 5:15-cv-4609-BLF

Venue(s)

U.S. District Court for the Northern District of California

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