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Securities class action filings reach record high

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As expected, securities class action filings reached a high-water mark in 2017. In fact, last year's total of 400-plus filings was the second-highest on record, topped only by 2001, when the number was skewed by more than 300 cases brought in connection with the allocation of shares in high-tech initial public offerings (IPOs).

In the last 18 months, more securities suits have been filed in federal court than in any comparable period since the Private Securities Litigation Reform Act was enacted in 1995. About 8 percent of U.S. exchange-listed companies were hit with a securities suit in 2017, up for the third consecutive year.

RISE IN SECURITIES CLASS ACTIONS

Various factors likely account for the continued trend of increased filings. A high number of merger objection lawsuits continue to be filed in federal court, as opposed to state court, following the Delaware Court of Chancery's decision in *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016) (and its progeny, including in states other than Delaware) limiting the use of disclosure-only settlements.

But securities filings are at a record high even without such lawsuits, in large part because plaintiffs' firms have recalibrated their business strategies to pursue cases with more remote payoffs, often filing actions on any significant stock price decline.

In addition, a greater number of securities class action lawsuits are being filed against non-U.S. companies (61 in 2017, compared to 47 in all of 2016). The health care sector has been hit with a high number of class action lawsuits (100 in 2017, compared to 84 in 2016), perhaps due to some of the uncertainty surrounding health care regulations.

And event-driven securities fraud suits following the disclosure of any corporate crisis — including data breaches and environmental, antitrust, Foreign Corrupt Practices Act or other regulatory issues — continue to rise.

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 continued to be targeted frequently in 2017. We anticipate all of these trends will persist in 2018.

SIGNIFICANT DECISIONS

A number of important decisions in securities litigation are expected this year. The delineation of statutes of repose and tolling will continue to percolate through the courts, including the U.S. Supreme Court.

In 2017, the Court held in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), that statutes of repose, unlike statutes of limitations, are not subject to equitable tolling. Thus, *American Pipe* tolling — the tolling of the statute of limitations for unnamed class members pending class certification in a putative securities class action — does not apply to the three-year statute of repose applicable to claims brought under Sections 11 and 12 of the Securities Act.

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While Justice Anthony Kennedy authored the majority opinion, it perhaps more significantly marked Justice Neil Gorsuch's first securities opinion, in which e joined the majority in the 5-4 outcome.

In the upcoming term, the Court will have another opportunity to opine on the contours of the tolling of statutes of limitations and possibly repose in the securities context, having granted *certiorari* in *China Agritech, Inc. v. Resh*, 138 S. Ct. 543 (2017).

The Court will decide a split in the circuit courts as to whether *American Pipe* tolling can apply to successive class actions as opposed to individual actions. The case also marks the continuation of the Court's trend under Chief Justice John Roberts of taking up an average of two securities cases per term, more than previous courts.

Further interpretation of the bounds of statutes of limitations and repose — including whether the statute of repose can bar class certification after the three-year period expires — is expected in 2018.

Given the reality of globally connected financial systems, the extraterritorial application of U.S. securities laws to nonexchange-traded securities will continue to be a closely watched development in 2018.

Last year, for example, the U.S. Court of Appeals for the Second Circuit found in *In re Petrobras Securities*, 862 F.3d 250 (2d Cir. 2017), that the need to determine if a transaction was "domestic" raised individual issues that had to be addressed before a class was certified.

This area of securities litigation will continue to develop in 2018. Similarly, we will continue to see issues surrounding market efficiency as a battleground on the class certification front.

While 2017 resulted in several defense-oriented decisions, there is no reason to expect the pace of filings to abate. Indeed, as the stock market indices rise, similar percentages of declines in stock prices could result in larger so-called investor losses that attract the plaintiffs' bar.

Further, plaintiffs may have the opportunity to bring more actions under the Securities Act if there is an increase in the number of IPOs. In addition, the trend of event-driven or corporate crisis follow-on securities litigation is expected to continue. As a result, 2018 should be robust in both filings and developments in the law.

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