Securities Class Action Filings Show No Signs Of Abating

By **Jay Kasner, Scott Musoff and Susan Saltzstein** (February 11, 2019, 2:30 PM EST)

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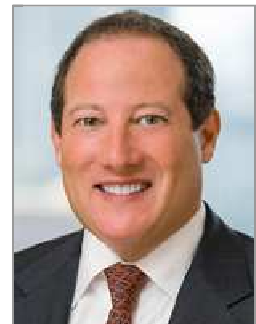
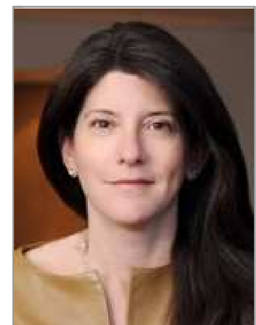

Scott Musoff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As anticipated, the number of securities class action filings remained high in 2018, with more than 400 filings in federal court, and the number is expected to remain high in 2019. While the total number of 2018 filings is slightly less than in 2017, it is still well above historical averages, and the chances of being named as a defendant reached an all-time high (in light of the continued reduction in the number of public companies).

In addition to a significant number of cases brought by those objecting to mergers, which historically had been the province of state courts (most notably the Delaware Court of Chancery), filings in 2018 included a large number of more traditional stock-drop cases. We expect this trend to continue, particularly if the volatility in the markets extends into 2019.

Foreign issuers were far from immune to securities filings in 2018, and the plaintiffs bar continued to target companies from Latin America and Asia. So-called event-driven litigation also is on the rise. These cases typically are filed upon the disclosure of a negative event that was not necessarily tied to financial statements, such as stock declines following a Foreign Corrupt Practices Act or other regulatory investigation, an environmental incident or even a plane crash.

While we anticipate the ever-increasing number of securities filings to continue into 2019, the good news for corporate America is that the number of dismissals also appears to be increasing. From experience, we have noted an increased receptivity to dismissals even beyond New York and California, where the majority of such cases are filed.

State Court Filings

One trend that began in the latter half of 2018 — and that we expect to continue in 2019 — is an increase in the number of state court filings for claims under the Securities Act of 1933 following an initial public offering. In March 2018, the U.S. Supreme Court held in Cyan Inc. v. Beaver County Employees Retirement Fund that the Securities Litigation Uniform Standards Act of 1998 did not authorize the removal of cases brought under the Securities Act, nor did it strip the state courts of jurisdiction. As a result

of Cyan, plaintiffs may be free to assert such cases in state courts throughout the country. And in December 2018, the Delaware Court of Chancery rejected a forum selection clause in the articles of incorporation of a Delaware corporation that attempted to require the filing of such suits in federal courts.

Not surprisingly, we have seen an increase in the number of state court filings as well as an increase in parallel litigation — with dueling cases filed in both state and federal courts. Parallel litigation creates inherent coordination difficulties, because there is no defined procedural mechanism designed for such coordination (such as the Judicial Panel on Multidistrict Litigation in federal court), and unique defense approaches are often required to ensure that both sets of cases do not move forward independently.

The increase in state court cases also has resulted in litigation concerning the applicability of certain provisions of the Private Securities Litigation Reform Act of 1995 to state court actions. Through the PSLRA, Congress afforded defendants various protections that were intended to help weed out meritless cases and prevent the threat of facing a class action to force unwarranted settlements unrelated to the merits.

The plaintiffs bar appears to be targeting New York state courts in particular. Indeed, for the first time since the mid-1990s, the New York state courts are grappling with questions that have arisen in Cyan's wake, including whether the PSLRA's automatic stay of discovery pending a motion to dismiss applies with equal force to state court actions.

We anticipate that these and other related issues will continue to percolate as we continue to experience an increase in state court filings.

Potential Clarification on the Reach of Janus

In 2019, the Supreme Court again will have a chance to put its stamp on the securities litigation arena. In 2011, the court decided in Janus v. First Derivative Traders that only a "maker" of a statement can be liable under SEC Rule 10b-5(b). This term, the court will have an opportunity to clarify the reach of Janus in Lorenzo v. SEC.

In that case, the defendant, an investment banker, purportedly copied and pasted alleged misstatements written by his boss, and emailed those statements to prospective investors at his boss' direction. Because the defendant did not control the contents of the statements, the U.S. Court of Appeals for the District of Columbia Circuit held that he was not the maker of such statements under Rule 10b-5(b). But the court held that this did not prevent liability from attaching under other provisions, such as Rule 10b-5(a) or Rule 10b-5(c), which reference scheme liability.

Justice Brett Kavanaugh issued a strong dissent in the D.C. Circuit, and has recused himself from the Supreme Court deliberations, which could translate into a 4-4 decision. If that happens, the D.C. Circuit decision would stand. Oral argument was held on Dec. 8, 2018, and several justices appeared receptive to the lower court's interpretation. Such a ruling presents a risk of opening a back door of sorts to primary and secondary liability, and marks a change in tenor from prior Supreme Court precedent, which foreclosed aiding-and-abetting liability (Central Bank of Denver NA v. First Interstate Bank of Denver NA) and precluded liability of secondary actors upon which investors did not directly rely (Stoneridge Investment Partners v. Scientific-Atlanta Inc.).

Class Certification

Class certification will continue to be a battlefield in 2019, with issues relating to the domesticity of transactions, the applications of statutes of repose and the contours of what needs to be demonstrated regarding price impact. As more cases are filed relating to globally offered securities, court scrutiny is likely regarding the issue of what constitutes a

domestic transaction — a necessary element for the federal securities laws to apply — and whether that determination creates individualized issues that predominate (and thus preclude class certification).

As noted last year, the U.S. Court of Appeals for the Second Circuit in the In re Petrobras Securities case remanded this issue to the district court, vacating that court's certification of a class. The Petrobras class action was settled before the district court had an opportunity to review the issue directly, although the settlement approval process, which is once again before the Second Circuit, may include rulings on related issues.

The U.S. Court of Appeals for the Fifth Circuit had an opportunity to decide whether the statute of repose under the securities laws precludes the certification of a class after the statute of repose expired, but that case, too, settled before the court could rule. And finally, the Second Circuit will again have an opportunity in 2019 to clarify what defendants need to show on class certification to demonstrate that the revelation of the alleged misstatements did not have a price impact on the security at issue. Among others, these important issues will continue to make the class certification stage a significant area of attack for defendants.

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