The Justices' Securities Rulings, Dismissals That Defined '24

By **Susan Saltzstein, Mark Foster and Tansy Woan** (December 20, 2024)

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In 2024, securities litigation remained active with filing trends in line with historic averages. What made this year somewhat different was the U.S. Supreme Court had four securities cases on its docket. What was even more unusual is that the Supreme Court then dropped two of those cases from its docket after oral argument.

The Supreme Court's rulings in securities litigation can have a significant impact on developments and trends as illustrated by the increasing success that defendants had in 2024 with price impact arguments based on recent Supreme Court precedent. The justices' decision not to weigh in on recurring and important issues relating to the pleading requirements of the Private Securities Litigation Reform Act may be just as impactful, if not more so, as discussed below.

Securities litigation in 2024 was on pace with historic averages.

Since the PSLRA was enacted nearly 30 years ago, just over 200 securities class actions have been filed each year on average.[1] Based on midyear estimates from Cornerstone Research, filings in 2024 were trending close to that historical average.[2]

Of the suits filed to date, so-called core filings — those defined as not involving allegations challenging merger transactions — were up slightly year-over-year. The likelihood of a company traded on a U.S. exchange being sued this year is approximately 3.9%, slightly above the historic average.[3]

Securities class actions predicated on issues relating to COVID-19 increased significantly, with seven filed in the first half of 2024.[4] The number of suits against companies involving artificial intelligence also increased this year,[5] which likely tracks with an increase in the number of public companies involved in the AI space.

Securities class actions involving special-purpose acquisition companies continued a downward trend, as with actions challenging merger transactions.[6] These declines may be attributable to a decline in SPAC and de-SPAC transactions, as well as general malaise in the capital markets during 2024.

The Supreme Court considered four securities cases in 2024.

In calendar year 2024, the Supreme Court had four securities cases on its docket, an unusually high number when compared to prior years. That activity underscores that what happens at the Supreme Court inevitably affects filing activity and how lower courts adjudicate securities class actions.

What the Supreme Court refrains from doing may be equally impactful. After oral arguments, the Supreme Court issued orders dismissing two of those cases from its docket,

letting purported circuit splits persist. A brief description of each case follows.

Half-Truths And Known Trends

On April 12, the Supreme Court unanimously reversed and vacated the U.S. Court of Appeals for the Second Circuit's decision in Macquarie Infrastructure Corp. v. Moab Partners LP.[7]

In Macquarie, the Supreme Court was asked to determine whether an alleged failure to make a disclosure pursuant to Item 303 of U.S. Securities and Exchange Commission Regulation S-K can serve as the basis for a securities fraud claim under Section 10(b) of the Exchange Act, even in the absence of an otherwise misleading statement.

Item 303 requires an issuer to disclose "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact" on the issuer's "financial condition or results of operation[s]."[8] The plaintiffs alleged that Macquarie had made material misstatements and omissions concerning the potential impact of new international fuel regulations on the company's fuel storage business.

The Supreme Court held that "[p]ure omissions are not actionable under Rule 10b-5(b)." The court explained that its decision "confirms that the failure to disclose information required by Item 303 can support a Rule 10b-5(b) claim only if the omission renders affirmative statements made misleading."[9]

Pure omissions, including omissions of information required to be disclosed by Item 303, are not actionable. Rather, Rule 10b-5(b) only "requires disclosure of information necessary to ensure that statements already made are clear and complete." This rule, therefore, proscribes so-called half-truths.[10]

The Supreme Court's decision in Macquarie resolved a circuit split in favor of the rule that had been followed by the U.S. Courts of Appeals for the Third, Ninth and Eleventh Circuits, which had held that Item 303 does not create an independent duty to disclose under Section 10(b). The Second Circuit rule that was reversed had allowed lawsuits premised on mere alleged violations of Item 303.

Pursuing Civil Claims in Federal Courts Rather Than SEC's Administrative Courts

On June 27, the Supreme Court issued a landmark ruling in SEC v. Jarkesy, holding that the commission can no longer seek civil penalties in the SEC's administrative courts: "[T]he Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud."[11]

The Jarkesy decision does not bear directly on the scope of private securities litigation, but is nevertheless relevant to the subject given the Supreme Court's long-standing view that private litigation is a necessary supplement to action by the SEC.[12]

In a 6-3 opinion, the justices explained that the Seventh Amendment guarantees "the right of trial by jury" in suits for common law. As applied to statutory claims like those asserted by the SEC, a right to a jury trial exists so long as the claim is not based in "equity or admiralty jurisdiction."

The determination of whether a claim is legal or equitable requires looking at the type of remedy sought. The opinion reasoned that money damages are a legal remedy implicating

the Seventh Amendment jury right whenever they are meant to punish or deter a defendant, as contrasted from money damages that only seek to "restore the status quo," an equitable remedy.

Jarkesy stripped the SEC of one of its most powerful and frequently used tools to enforce federal securities laws. Going forward, the SEC will no longer be able to use its own in-house courts to pursue civil penalties for securities fraud violations.

Instead, the SEC will need to bring cases in federal courts. Alternatively, the SEC may need to be more selective regarding what claims to pursue in federal court, while continuing to prosecute claims seeking equitable remedies — such as injunctive relief — in its administrative courts.

Expert Opinions and Internal Reports

In Nvidia Corp. v. E. Ohman J:or Fonder AB, the Supreme Court was asked to resolve two related questions: (1) whether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with particularity the contents of those documents; and (2) whether plaintiffs can satisfy the PSLRA's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact.

In the case under review, a divided U.S. Court of Appeals for the Ninth Circuit panel ruled that plaintiffs can satisfy the PSLRA's heightened pleading standard by relying on an expert report and without having to plead the details of internal reports cited in a complaint.[13] The expert report at issue in the Nvidia case relied on generic market data and made a series of estimates that the Ninth Circuit credited for the purposes of finding falsity and scienter sufficiently pled.[14]

Nvidia and a host of amici urged the Supreme Court to reverse, arguing that the Ninth Circuit's approach provides the plaintiffs bar a road map to circumvent the PSLRA's demanding standards for pleading falsity and scienter.

The Ninth Circuit's endorsement of expert reports at the pleading stage conflicts with the approach taken by the U.S. Courts of Appeal for the Second and Fifth Circuits. Expert opinions "cannot substitute for facts under the PSLRA" unless the opinion "was based on particularized facts sufficient to state a claim for fraud," according to the Second Circuit's 2022 decision in Arkansas Public Employees Retirement System v. Bristol-Myers Squibb Co.[15]

During oral argument, the justices expressed reservations about adopting any bright-line rules, and even voiced doubts about their decision to review the case. Several justices noted that it appeared that Nvidia was seeking some form of "error correction," an apparent retreat from arguments in its briefing advocating for a categorical rule that prohibits the use of experts where they offer opinions rather than the type of particularized facts of fraud required by the PSLRA.

Not surprisingly, then, the Supreme Court issued an order on Dec. 11 dismissing the appeal as improvidently granted.

The Supreme Court's decision not to decide Nvidia on the merits will leave a purported circuit split in place. It is likely that plaintiffs will feel emboldened to rely on more expert reports, and that there will be increased litigation over whether, when and how expert reports can be used to satisfy the PSLRA's pleading standards.

The Recurring Risk Of Risk Factor Disclosures

Just as in NVIDIA, the Supreme Court issued an order following oral argument in Facebook Inc. v. Amalgamated Bank determining that the court had improvidently agreed to review a decision from the Ninth Circuit.

In Facebook, the Supreme Court was asked to decide whether risk disclosures are false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no currently known risk of ongoing or future business harm.

The Ninth Circuit held in October 2023 that liability can arise where a company describes a risk in "purely hypothetical" language "when that exact risk had already transpired."[16]

The Ninth Circuit's rule conflicts with the rule in the U.S. Courts of Appeals for the First, Second and Tenth Circuits, which have adopted the so-called virtual certainty test. Under that test, risk disclosures only implicitly certify that the company is unaware of any previous occurrence of a triggering event if it is almost certain to cause the warned-of harm to the company's business.[17]

In light of the Supreme Court's decision not to rule in the Facebook case, this purported circuit split will persist, leaving companies with heightened risk relating to potential claims in the risk disclosure sections of their annual reports and other periodic filings.

Supreme Court precedent has an increasing impact at class certification.

The justices' decision not to decide Nvidia and Facebook on the merits means that litigants and courts will not have the type of clarity that helps resolve securities cases, as illustrated by the impact of Supreme Court precedent on other securities issues. During 2024, for example, there was a marked uptick in class certification denials based on the application of the Supreme Court's 2021 decision in Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System,[18] and the decisions issued on remand in its wake.

Goldman gives defendants an opportunity to defeat class certification by showing that an alleged misrepresentation had no price impact — that is, an impact on an issuer's stock price. That can be done by showing there is a mismatch between the challenged statement and a purported corrective disclosure. A successful price impact challenge rebuts the presumption of classwide investor reliance that is a prerequisite to class certification.

Decisions issued this year showed the importance of Supreme Court rulings in securities cases, and that defendants' opportunities to defeat class certification are increasing.

In Shupe v. Rocket Cos. Inc. in the U.S. District Court for the Eastern District of Michigan,[19] U.S. District Judge Judge Thomas L. Ludington on Oct. 1 denied class certification holding that the defendants' showing of a lack of price impact rebutted the presumption of reliance. He reasoned that "a considerable mismatch exists between the generic nature of the alleged misrepresentations and the specific revelation" of the alleged fraud at the end of the proposed class period.[20]

Similarly, U.S. District Judge J. Paul Oetken ruled against class certification in In re: Kirkland Lake Gold Ltd. Securities Litigation.[21] In a case challenging statements about merger activity in the U.S. District Court for the Southern District of New York, he concluded on March 29 that, "a truthful, but equally generic, substitute for the M&A Statements would

not have impacted Kirkland's share price."[22] The court was persuaded that another public statement about merger and acquisition activity was even more specific than the challenged statement, and that it was undisputed that it "did not cause a statistically significant decline in Kirkland's share price."[23]

In the U.S. District Court for the Northern District of California, U.S. District Judge Edward Chen on March 11 denied class certification in part with respect to the last four months of a proposed 30-month class period in In re: FibroGen Securities Litigation.[24] He ruled that certification for the last part of the class period was not proper "due to a lack of predominance because Plaintiffs in this period would need to individually allege reliance and not Fraud on the Market."[25]

The Ninth Circuit recently granted an interlocutory appeal in Jaeger v. Zillow Group Inc. to decide how district courts within the circuit should apply the Goldman case.[26] The forthcoming opinion in the Ninth Circuit in a matter of first impression should provide meaningful guidance for courts and litigants on class certification challenges in securities litigation.

Conclusion

The PSLRA was enacted to create uniform, heightened pleading standards. The Supreme Court's decision not to decide Nvidia and Facebook on the merits followed several justices expressing hesitation during oral argument about the Supreme Court involving itself in determining what type of pleading allegations pass muster under the PSLRA. The justices eschewed the adoption of any bright-line rules.

In light of the Supreme Court's decision not to rule in Nvidia and Facebook, it is likely that defendants will seek future opportunities to raise the undecided questions in cases that are better vehicles for the justices to articulate clear, uniform rules. Until then, purported circuit splits may persist, leading to potential forum shopping and vigorous litigation about when risk factor disclosures give rise to liability, and whether and when expert reports can be used to satisfy the PSLRA's pleading standards.

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Disclosure: Skadden is counsel to Zillow in Jaeger v. Zillow Group Inc.

[1] See Cornerstone Research Cornerstone Research, Securities Class Action Filings 2024 Mid-Year Assessment (July 31, 2024) at 7, available at https://www.cornerstone.com/wp-content/uploads/2024/07/Securities-Class-Action-Filings-2024-Midyear-

Assessment.pdf ("Cornerstone Mid-Year Assessment").

[2] Cornerstone Mid-Year Assessment.

[3] Id. at 5.

[4] Id.

[5] Id.

[6] Id.

[7] 601 U.S. 257 (2024).

[8] Id. at 260.

[9] Id.at 265.

[10] Id.

[11] 144 S. Ct. 2117, 2127 (2024).

[12] Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 324 (2007).

[13] 81 F.4th 918 (9th Cir. 2023).

[14] Id. at 940.

[15] Arkansas Pub. Emps. Ret. Sys. v. Bristol-Myers Squib Co., 28 F. 4th 343, 354 (2d Cir. 2022); accord Fin. Acquisition Partners LP v. Blackwell, 440 F.3d 278, 285-86 (5th Cir. 2006).

[16] 84 F.4th 844, 859–60.

[17] See, e.g., Indiana Pub. Ret. Sys. v. Pluralsight, Inc., 45 F4th 1236 (10th Cir. 2022); Karth v. Keryx Biopharmaceuticals, Inc., 6 F.4th 123, 137 (1st Cir. 2021); Wilson v. Merrill Lynch & Co., 671 F.3d 120, 133-34 (2d Cir. 2011).

[18] 594 U.S. 113 (2021).

[19] 2024 WL 4349172, at *24 (E.D. Mich. Sept. 30, 2024).

[20] Id. at *26.

[21] 2024 WL 1342800, at *9 (S.D.N.Y. Mar. 29, 2024).

[22] Id.

[23] Id.

[24] 2024 WL 1064665, at *15 (N.D. Cal. Mar. 11, 2024).

[25] Id.

[26] See Jaeger v. Zillow Grp., Inc., 2024 WL 3924557 (W.D. Wash. Aug. 23, 2024), petition for interlocutory appeal granted, Case No. 24-6605 (9th Cir. 2024).