Securities Litigation Highlights

Skadden

2017

Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

The Americas
Boston
Chicago
Houston
Los Angeles
New York
Palo Alto
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Toronto
Washington, D.C.
Wilmington

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Frankfurt
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Moscow
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Our Practice

Skadden

The national securities litigation practice at Skadden frequently handles 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. From 2009-16, Skadden served as defense counsel in more federal securities cases in the U.S. than any other law firm, according to statistics from Lex Machina. According to *Chambers USA 2017*, which ranked the firm in the top tier for securities litigation, Skadden "enjoys an extremely strong reputation in both securities litigation and regulation."

We have acted as lead defense counsel in some of the most high-profile securities class actions, including representing Bank of America, Biogen, Citigroup, News Corp. (now known as 21st Century Fox), UBS and Vivint Solar, among others. We have represented or are currently representing diverse clients in securities litigation, including Anadarko Petroleum Corporation, BlackBerry Limited (f/k/a Research in Motion), Booz Allen, El Pollo Loco, Express Scripts, Iconix Brand Group, Inc., Pfizer Inc., Sprint 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 before the U.S. Supreme Court in *Merrill Lynch v. Dabit*.
- **UBS Financial Services Incorporated of Puerto Rico and UBS Trust Company of Puerto Rico** in securing a grant of *certiorari* to resolve a circuit court split over the standard of appellate review for dismissals of derivative suits pursuant to Rule 23.1.
- **Merrill Lynch** in securing two major victories before the U.S. Court of Appeals for the Second 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.
- **Vivint Solar, Inc., several of its officers and directors, and The Blackstone Group** in securing a significant Second Circuit decision in a case of first impression that created a circuit split on the standard for determining the disclosure of interim financial data in a prospectus. The court's decision affirmed the dismissal with prejudice of a putative securities class action complaint stemming from Vivint Solar's Oct. 1, 2014, IPO, rejecting the plaintiff's argument that centered around the "extreme departure" disclosure standard set forth in the First Circuit's ruling in *Shaw v. Digital Equipment Corp.*, and, instead, holding that law of the Second Circuit is the materiality test set forth in *DeMaria v. Andersen*, which we also successfully argued on behalf of the underwriters in 2003.
- **Citigroup and underwriters of Petrobras offerings** in a series of victories, including a Second Circuit judgment that vacated the district court's class certification order and found that the district court failed to consider the need for individualized inquiries regarding whether each class member's securities transaction was "domestic" under the Supreme Court's decision in *Morrison v. National Australia Bank*. A petition for *certiorari* addressing class certification standards is pending before the U.S. Supreme Court.
- **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.

- **Canadian Imperial Bank of Commerce (CIBC)**
  - In numerous securities litigation matters including successfully representing the bank before the New York Court of Appeals.
  - 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.

We handle a broad array of issues that arise when a corporation, director or officer is confronted with a securities class action, derivative-related claims or ERISA-related litigation. Our work includes representing financial institutions in matters related to subprime loans and the credit crisis, such as mortgage-backed securities litigation and securities class actions. We represent clients facing event-driven litigation spurred by investigations or other client developments. 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 successfully litigated challenging issues and appraisal proceedings related to hundreds of billions of dollars in deals, in cases filed in Delaware and across the United States. We also advise clients on tax and accounting-related issues, as well as proxy disclosures related to executive compensation and benefits plans.

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.

Global Reach

Beyond providing a wealth of innovative solutions to U.S.-based companies, our global presence and experience also has made Skadden a firm of choice for clients worldwide. With top litigators based in London, Hong Kong and São Paulo, we have the unique ability to assemble collaborative teams with deep and relevant experience across our worldwide platform, and the full range of disciplines is key to our successful track record. We have been called on to represent issuers and financial institutions from all over the world, including Brazil, Canada, China, Colombia, Germany, Ireland, Israel, Italy, Malaysia, Mexico, Sweden, Switzerland and the United Kingdom, among others. 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 also secured the complete dismissal of a securities class action complaint against China-based AirMedia Group, Inc. and its CFO, in which investors alleged AirMedia engaged in a scheme to artificially inflate the trading price of American depositary receipts.

Accolades

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

- in 2017, for the **seventh consecutive time**, Skadden was named to the BTI Consulting Group's list of top litigation law firms — The BTI Fearsome Five — and named as a Powerhouse for Securities and Finance Litigation in the *BTI Litigation Outlook 2018*. Skadden is the only firm named to both of these lists in every edition of the report.
- **ranked #1** for securities litigation in *Vault's* most recent Law 100 Rankings.
- has **more top-tier rankings** (eight) in *U.S. News — Best Lawyers* "Best Law Firms" 2017 for securities litigation than any other law firm.
- served as defense counsel in **more federal securities cases** in the U.S. from 2009-16 than any other law firm, according to statistics from Lex Machina.
- ranked in the **top tier** in securities litigation in *Chambers USA 2017*.
- named among *Law360's* **Litigation Powerhouses of 2016** and ranked in the top 10 in "**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.

Our Clients

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

Banks and Financial Institutions

- **Citigroup and underwriters of Petrobras offerings** in a series of victories, including a Second Circuit judgment that vacated the district court's class certification order and found that the district court failed to consider the need for individualized inquiries regarding whether each class member's securities transaction was "domestic" under the Supreme Court's decision in *Morrison v. National Australia Bank*. A petition for *certiorari* addressing class certification standards is pending before the U.S. Supreme Court.
- **Anchor BanCorp Wisconsin Inc.** in a putative federal class action alleging Section 14(a) and Rule 14a-9 violations regarding certain material information purportedly omitted from the Form S-4 Registration Statement filed with the SEC (including the Anchor proxy statement included therein) following the announcement of a proposed transaction between Anchor and Old National Bancorp.
- **AXA Equitable Life Insurance Company** in securing a dismissal in a series of federal and state class actions alleging AXA Equitable breached its 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.
- **the former CEO of Bear Stearns**, in derivative litigation, securities fraud class actions and ERISA class actions relating to its alleged conduct in relation to the subprime market. The derivative litigation and ERISA class actions were dismissed by the U.S. Court of Appeals for the Second Circuit.
- **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 (CIBC)**
  - In numerous securities litigation matters including successfully representing the bank before the New York Court of Appeals.
  - 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.
- **Centerview Partners** in securing the dismissal of an aiding and abetting claim in connection with its role as financial advisor to the board of directors of Diamond Resorts in its $2.2 billion acquisition by Apollo Global Management.
- **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;
  - as part of 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 part of 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.
- **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 Seventh 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 securing the dismissal of a purported class action in connection with breach of contract, breach of good faith and fair dealing, and other foreign exchange-related claims;
  - as defendant (as part owner of MasterCard Incorporated) in securing the denial of *certiorari* by the U.S. Supreme Court in a lawsuit alleging that MasterCard's initial public offering unfairly affected competition and violated several antitrust regulations, including the Sherman and Clayton Antitrust Acts;
  - in the dismissal of a putative class action in the U.S. District Court for the Southern District of New York alleging that the company 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.
- **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.
- **OceanFirst Financial Corporation** in an action alleging Section 14(a) and Rule 14a-9 violations regarding certain material information purportedly omitted from the Form S-4 Registration Statement filed with the SEC following the announcement of a proposed transaction between OceanFirst and Cape Bancorp.
- **Société Générale**
  - in securing the dismissal with prejudice of a Section 10(b) shareholder class action alleging it knowingly understated its exposure to subprime mortgages through its CDO investments and knowingly misstated the strength of its risk management controls; and
  - in a securities class action in connection with R. Allen Stanford's Ponzi scheme.
- **UBS AG and UBS Real Estate Securities Inc.** in securing favorable decisions in matters related to the residential mortgage-backed securities subprime crisis.
- **UBS Financial Services Incorporated of Puerto Rico** in successfully defeating an attempted interlocutory appeal of an order denying class certification in a putative securities class action.
- **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*.
- **The underwriting syndicates of Bank of America, Barclays, Citigroup, Cobalt, Deutsche Bank, LinnCo and Santander** in securities litigation in connection with their respective sales of securities.

Consulting and Accounting

- **Booz Allen Hamilton Holding Company** in securities class action litigation brought in the U.S. District Court for the Eastern District of Virginia and in a related derivative suit.
- **First NBC Bank Holding Company** in securing the dismissal of a shareholder class action alleging that First NBC deceived investors and used "manipulated accounting techniques" related to its investments in tax credit entities.

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 Ninth 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 and in the defense of a securities class action.
- **Student Loan Corporation (SLC)** and its former officers, as well as Citigroup Inc. and Discover Financial Services in securing the dismissal with prejudice of a shareholder class action brought by the Oklahoma Firefighters Pension & Retirement System in the U.S. District Court for the Southern District of New York alleging SLC failed to maintain adequate loan loss reserves and issued false and misleading financial disclosures.

Energy and Utilities

- **Anadarko Petroleum Corporation**
  - and certain officers in a purported federal securities class action alleging claims related to an event in Colorado; and
  - in reaching a favorable settlement of a federal securities class action arising out of Anadarko's passive, non-operating investment in BP's Macondo well, which was the site of the April 20, 2010, Deepwater Horizon explosion and oil spill in the Gulf of Mexico, and also in derivative litigation.
- **Banco Itau International** in a complex business litigation in the 11th Judicial Circuit Court in Florida involving collapsed oil exploration company OGX.
- **Cheniere Energy Inc.** in the successful defense of a litigation challenging a shareholder vote on Cheniere's incentive plan and related issuance of shares as incentive compensation.
- **Current and former directors of Occidental Petroleum Corporation** in a Delaware Chancery Court shareholder derivative litigation involving claims of breach of fiduciary duty, alleging that the individual defendants breached provisions of the company's Long-Term Inventive Plan and received excessive compensation.
- **Outside directors of Pacific Gas & Electric Company** in securing a favorable ruling (with co-counsel) 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.
- **Current and former members of the board of directors of Sempra Energy** in securing the dismissal of a shareholder derivative suit brought against them alleging breach of fiduciary duty.
- **Southwestern Energy Company** in the defense of a federal class action alleging violations of Sections 11, 12(a) and 15 of the Securities Act of 1933.
- **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.
- **XTO Energy**
  - and its board of directors in a federal shareholder class action alleging Section 14(a) violations; and
  - 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

- **Acorda Therapeutics** and its chief executive officer, principal accounting officer and chief financial officer in a purported federal securities class action regarding the company's public disclosures relating to Tozadenant, a drug that the company obtained worldwide rights to as a result of its acquisition of Biotie Therapies Corp.
- **Amicus Therapeutics Inc.** in connection with a purported securities class action brought in the U.S. District Court for the District of New Jersey alleging violations of the Securities Exchange Act of 1934 in connection with allegedly false and misleading statements made by the company related to the regulatory approval path for the company's pharmacological chaperone therapy for Fabry disease in patients with amenable mutations.
- **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.

Our Practice

Continued

- **Centene Corp.** in defense of a putative securities fraud class action arising out of its $6 billion acquisition of Health Net, Inc.
- **Cytrx Corporation**
  - and certain of its officers in securing the dismissal of a purported federal securities class action alleging fraud after its stock price fell following the July 2016 release of preliminary data from the double-blind pivotal Phase 3 trial of its cancer drug aldoxorubicin; and
  - 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 and certain of its current and former directors and officers** in multiple shareholder derivative lawsuits and securities litigation filed in federal and state courts alleging breaches of fiduciary duty in connection with Express Scripts' contractual dispute with Anthem, Inc.
- **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.
- **Inovalon Holdings Inc.** in a federal securities class action alleging violations of Sections 11, 12(a)(2) and 15 of the 1933 Act in connection with its February 2015 initial public offering.
- **Insys Therapeutics, Inc.** in securing a significant victory against claims arising out of a reverse stock split.
- **Intercept Pharmaceuticals** in connection with a federal securities fraud class action.
- **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

- **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 Holdings, Inc., Trimaran Capital Partners and other individual defendants** in defending securities and derivative litigation in California and Delaware.
- **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.

Technology, Telecommunications 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.
- **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, its directors and officers, and Compuware** in securing a favorable resolution in a federal class action alleging securities violations in connection with Covisint's September 2013 initial public offering.
- **Directors of EMC Corporation** in securing the affirmance of the dismissal of shareholder claims arising out of its 2016 merger with Dell Inc.
- **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.
- **News Corp., NI Group LTD, and Rupert and James Murdoch** in defeating a plaintiffs' motion to reconsider the court's prior dismissals of a securities class action arising out of the highly publicized improper news-gathering practices at *The Sun* and now-defunct *News of the World*.
- **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.
- **Tower Semiconductor Ltd.** in securing a Second Circuit victory in which the shareholders in a class action alleged that Tower Semiconductor issued a proxy statement that was false and misleading in violation of Section 14(a) and Rule 14a-9.
- **Current and former directors and executive officers of The Walt Disney Company** in securing the dismissal with prejudice of a stockholder derivative action accusing them of breach of fiduciary duty and unjust enrichment.
- **Yahoo! Inc.** in securing a Ninth Circuit affirmance of the dismissal of a purported derivative complaint in connection with the proposed $44.6 billion unsolicited acquisition by Microsoft Corporation, alleging breach of fiduciary duty and Section 14(a) claims.

Transportation, Automotive and Industrial

- **Autoliv, Inc.**, in securing a proposed $22.5 million settlement of a federal securities class action pending in the Southern District of New York.
- **Avianca Holdings SA** in a New York state action brought by its second-largest shareholder in an attempt to block, among other things, a contemplated strategic partnership between Avianca, Colombia's largest airline, and United Airlines.
- **Embraer S.A.** in a federal shareholder class action involving claims of alleged violations of federal securities law.
- **Flowserve Corporation** in a federal lawsuit alleging violations of Section 14(a) of the Securities Exchange Act and 162(m) of the Internal Revenue Code in connection with disclosures in Flowserve's 2015 proxy statement and compensation awarded to the company and its executives.
- **Frank Stronach**, retired chairman of Magna International Inc. (Canada), in the dismissal with prejudice of a putative class action lawsuit filed by the City of Taylor General Employees Retirement System in the U.S. District Court for the Southern District of New York alleging claims under Sections 10(b) and 20(a) of the Securities Exchange Act.
- **Gerdau S.A.** in securing a favorable settlement in a putative class action brought by purchasers of Gerdau's American depositary receipts.
- **The former CEO of Porsche Automobil Holding SE** in successfully applying the U.S. Supreme Court's decision in *Morrison v. National Australia Bank* on the extraterritorial reach (or lack thereof) of Section 10(b) of the Securities Exchange Act of 1934, thus securing a Second Circuit affirmance of the dismissal of federal claims brought against him, Porsche and certain other former officers and directors by several dozen hedge funds alleging misrepresentation and market manipulation in connection with Porsche's attempted takeover of Volkswagen AG.
- **Certain officers and directors of Republic Airways** in a putative federal securities action alleging material misstatements and omissions on earnings filings.
- **Major public companies** in manufacturing, energy, technology and other industries in defense of Section 162(m), proxy disclosure and/or other employee compensation claims on a confidential basis.

Select Matters

Second Circuit Delivers Groundbreaking Securities Class Certification Reversal

Skadden

Case Information

Case Name

In re: Petrobras Securities Litigation

Case Number

No. 4-cv-9662 in the U.S. District Court for the Southern District of New York

Lead Partners

Jay B. Kasner / New York

Boris Bershteyn / New York

Scott D. Musoff / New York

Co-Counsel

Cleary Gottlieb Steen & Hamilton LLP

Opposing Counsel

Pomerantz LLP

Dates

6.24.16

Petition for *cert* pending before the U.S. Supreme Court

Significance

In a case of first impression, Skadden secured a Second Circuit Court of Appeals decision vacating class certification sought by plaintiffs against Brazilian oil giant Petrobras and Skadden's clients, **13 underwriters of Petrobras' global bond offerings**. *Petrobras* was the first circuit court to find that individual issues existed as to whether a purchaser of nonexchange-traded securities engaged in a "domestic transaction" in the context of certifying a class.

Case Overview

Following the highly publicized Brazilian "Lavo Jato" corruption investigation of Petrobras, Brazil's state-owned oil company, plaintiffs filed a securities class action in the U.S. District Court of the Southern District of New York alleging violations of U.S. securities laws. In February 2016, U.S. District Court Judge Jed Rakoff of the Southern District of New York certified, among other things, a class of investors who purchased globally offered bonds.

In a rare interlocutory appeal, we argued that pursuant to the U.S. Supreme Court's decision in *Morrison v. National Australia Bank*, whether a purchaser of nonexchange-traded bonds engaged in a "domestic transaction" was an individualized question because "the potential for variation across putative class members — who sold them the relevant securities, how those transactions were effectuated, and what forms of documentation might be offered in support of domesticity — (…) generate[s] a set of individualized inquiries" that prevent class certification.

On July 7, 2017, the Second Circuit agreed with our argument, vacating class certification and remanding the case for further proceedings. In doing so, we established Second Circuit precedent with wide-reaching implications for securities litigation involving globally offered securities. A petition for *certiorari* addressing class certification standards is pending before the U.S. Supreme Court.

Vivint Solar Raises Issue of First Impression in Second Circuit Victory

Case Information

Case Name

Stadnick v. Vivint Solar, Inc. et al.

Case Number

No. 6-65-cv in the U.S. Court of Appeals for the Second Circuit

Lead Partners

Jay B. Kasner / New York

Scott D. Musoff / New York

Opposing Counsel

Levi & Korsinsky LLP

Date

6.21.17

Significance

In a case of first impression in favor of Skadden clients **Vivint Solar, Inc. and Blackstone Group L.P.**, the U.S. Court of Appeals for the Second Circuit issued a decision that sets the standard for determining whether to disclose interim financial documents in an initial public offering.

Case Overview

On October 1, 2014, Vivint completed an IPO, on the last day of a quarter, with a registration statement that disclosed certain "key operating metrics." The prospectus did not disclose the interim results for the quarter, which had just closed. On November 10, 2014, the company released its third-quarter financial results for the period ending September 30, 2014 (the day before the IPO), which showed a net loss.

The plaintiff shareholder sued Vivint and Blackstone, alleging violations of Sections 11, 12(a)(2) and 15 of the Securities Act. Relying on the First Circuit's 1996 decision in *Shaw v. Digital Equipment Corp.*, the plaintiff argued that Vivint should have released its third-quarter results at the time of the IPO because they were an "extreme departure" from the performance reflected in the registration statement. However, the district court disagreed, calling the plaintiff's basic premise "fundamentally flawed."

On appeal to the Second Circuit, the plaintiff again relied upon the *Shaw* extreme departure standard. Skadden challenged the assertion and advocated for a holistic evaluation of the available information within the broader framework of Vivint's disclosures and business model.

In its June 21, 2017, ruling, the Second Circuit declared *Shaw*'s "extreme departure" standard "unsound," adhering instead to a more holistic materiality test to consider "the 'total mix' of information made available" as articulated in *DeMaria v. Andersen*. The court concluded that Vivint's third-quarter results were consistent with past performance when viewed in the context of the registration statement's extensive disclosures from six previous quarters and Vivint's unique business model.

Skadden Scores Biggest Appraisal Defense Victory in History

Skadden

Case Information

Case Names

ACP Master Ltd., et al. v. Sprint Corp., et al.

ACP Master Ltd., et al. v. Clearwire Corp.

Case Numbers

No. 8508 in the Court of Chancery of the State of Delaware

No. 9042 in the Court of Chancery of the State of Delaware

Lead Partners

Robert S. Saunders / Wilmington

Jennifer C. Voss / Wilmington

Opposing Counsel

Robbins Russell Englert Orseck Untereiner & Sauber LLP

Ashby & Geddes P.A.

Date

7.21.17

Significance

In the biggest appraisal defense victory to date, Skadden successfully defended **Sprint Nextel Corp**'s $3.6 billion buyout of **Clearwire Corp.** After a 10-day trial in which hedge fund Aurelius Capital Management argued that Clearwire was worth $16.08 per share, the court ruled that Aurelius will receive $2.13 per share: a determination that represents the most dramatic decrease from a deal price in the history of the Court of Chancery.

Case Overview

In 2013, Sprint Corp. acquired the outstanding shares of Clearwire Corp. at the same time that SoftBank Corp. was acquiring a super-majority interest in Sprint. Aurelius brought a coordinated appraisal and breach of fiduciary duty suit against Sprint, Softbank and others in 2016, alleging that Clearwire directors and Sprint breached their fiduciary duties to Clearwire's non-Sprint stockholders by agreeing to an unfairly low price per share, and that SoftBank aided and abetted Sprint's breach of fiduciary duty.

Aurelius argued that Sprint's use of the telecommunications operator dramatically dictated Clearwire's financial results and that Sprint, aided by SoftBank, had a "secret plan" to use vast amounts of Clearwire's spectrum assets regardless of whether Sprint owned Clearwire. While Sprint and Clearwire had agreed on a $5.00 per share merger price, Aurelius argued that Clearwire's intrinsic value was materially higher: $16.08 per share. We countered that the discounted cash flow value of Clearwire's management projections and the additional value for non-operating Clearwire assets resulted in a fair price of $2.13 per share. We also argued that it would be unreasonable for the court to assume that Sprint would use the exact same amount of Clearwire's assets regardless of whether it owned or rented the capacity from Clearwire.

In a 97-page, post-trial opinion, Vice Chancellor Laster concluded that Sprint proved the entire fairness of the transaction and did not breach its fiduciary duties. The ruling clarified that the merger negotiations occurred in two stages: prior to and through the initial agreement between Sprint and Clearwire at $2.97 per share, and the subsequent negotiations that occurred after DISH Network Corp. launched a tender offer for part of Clearwire. The case is currently on appeal.

Skadden Litigates First-Ever Trial Involving a Repurchase Action Brought by RMBS Trustee

Case Information

Case Name

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

Case Number

No. 12-cv-7322 (PKC) in the U.S. District Court for the Southern District of New York

Lead Partners

Jay B. Kasner / New York

Scott D. Musoff / New York

Robert A. Fumerton / New York

Charles F. Smith / Chicago

Opposing Counsel

Quinn Emanuel Urquhart & Sullivan LLP

Date

9.6.16

Significance

Skadden defended **UBS Real Estate Securities, Inc. (UBS)** in a three-week federal bench trial — the first-ever repurchase action brought by a residential mortgage backed securities (RMBS) trustee to go to trial — in which plaintiffs sought $2 billion in RMBS breach-of-contract claims. Prior to trial, we secured a first-of-its-kind summary judgment victory that forced the plaintiff to try its case loan-by-loan and prove each of the tens of thousands of breaches alleged.

Case Overview

On September 6, 2016, in a 239-page decision, Judge Kevin Castel of the Southern District of New York found that the plaintiff trustee had not shown UBS was willfully blind towards deficiencies in the loans, and directed the hiring of a "lead master" to review thousands of loans underlying the securities, before determining the extent to which damages might be warranted.

One of the greatest challenges we overcame was the sheer scope of the plaintiff's unprecedented attempt to recover alleged damages for more than 17,000 loans on a single breach of contract claim. The trial spanned three weeks and included more than 20,000 exhibits, many of which were more than 1,000 pages individually. Indeed, the trial's central exhibit — a spreadsheet listing each alleged misrepresentation and each defense thereto — would exceed 200,000 pages if printed.

We recently won a major post-trial victory in convincing the court to strike thousands of loan files from the trial record, which the plaintiff had claimed were digitized at the time of origination. The court rejected the plaintiff's claim and struck the loans and any expert opinions based on them. The admissibility of the loan files has been fiercely contested throughout the litigation.

Biogen Secures Dismissal With Prejudice of Securities Class Action

Skadden

Case Information

Case Name

In re Biogen Inc. Securities Litigation

Case Number

No. 15-13189-FDS in the U.S. Court of Appeals for the First Circuit

Lead Partners

James R. Carroll / Boston

Michael S. Hines / Boston

Opposing Counsel

Labaton Sucharow LLP

Date

5.12.17

Significance

Skadden secured affirmance of a dismissal of a putative class action alleging securities fraud against **Biogen Inc.** The action was filed after the company released revised revenue guidance and the company's share price fell 22 percent, representing an approximately $20 billion market cap decline and potentially exposing Biogen to the largest damages claim in a securities fraud case ever litigated in Massachusetts.

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 the company's multiple sclerosis drug, Tecfidera. Specifically, the 216-paragraph complaint, citing 10 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.

The U.S. District Court for the District of Massachusetts dismissed the complaint with prejudice for failure to meet the heightened pleading requirements of the Private Securities Litigation Reform Act (PSLRA). The U.S. Court of Appeals for the First Circuit affirmed the dismissal on the grounds that the complaint failed to plead the requisite strong inference of scienter under the PSLRA. Among other things, the First Circuit observed that the confidential witness statements "are so lacking in connecting detail that they cannot give rise to a strong inference of scienter" and "are consistent with the defendants' public disclosures," which "repeatedly returned to the PML incident as one factor impacting Tecfidera's performance."

PG&E Clarifies Unsettled Questions of California Corporate Law

Case Information

Case Name

PG&E San Bruno Fire Derivative Cases

Case Number

No. JCCP 4648-C in the California Court of Appeal

Lead Partners

Jay B. Kasner / New York

Jack P. DiCanio / Palo Alto

Amy S. Park / Palo Alto

Opposing Counsel

Cotchett Pitre & McCarthy

Hagens Berman Sobol Shapiro

Date

7.18.17

Significance

Following two significant victories that clarified unsettled questions of California law, Skadden secured a settlement for the current and former directors of **PG&E Corporation and its subsidiary Pacific Gas and Electric Company** (the utility) of shareholder derivative litigation.

Case Overview

The litigation arose out of the September 2010 rupture of a natural gas transmission pipeline in San Bruno, California.

During the litigation, Skadden achieved important victories, answering two unsettled questions of California law. First, Skadden secured a ruling by the California Superior Court that the issue of demand futility should have been assessed at the time the current plaintiffs filed their consolidated complaint, not when the original shareholder plaintiff filed his complaint, since the original plaintiff abandoned his action by selling his PG&E shares. Second, following an adverse ruling by the superior court, Skadden secured an emergency writ of mandate by the California Court of Appeal, compelling a stay of the derivative litigation pending resolution of the criminal proceedings. Addressing an issue of first impression under California law, the Court of Appeal agreed with Skadden's argument 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. In July 2017, Skadden secured final approval for the global settlement of multiple shareholder derivative actions filed against the utility, ending years of litigation.

Dismissals in Accounting-Related Securities Class Actions

Skadden

Case Information

Case Name *Kinzler v. First NBC Bank Holding Company, Ashton J. Ryan, Jr., Mary Beth Verdigets and Ernst & Young LLP*

Case Number No. 2:16-cv-04243-KDE-JVM in the U.S. District Court for the Eastern District of Louisiana

Lead Partners **Jay B. Kasner** / New York; **Scott D. Musoff** / New York; **Robert A. Fumerton** / New York

Opposing Counsel Barrack Rodos & Bacine

Date 4.26.17

Case Name *In re: Express Scripts Holding Co. Securities Litigation*

Case Number No. 1:16-cv-03338 in the U.S. District Court for the Southern District of New York

Lead Partners **Jay B. Kasner** / New York; **Scott D. Musoff** / New York; **Paul J. Lockwood** / Wilmington

Opposing Counsel Bernstein Litowitz Berger & Grossmann LLP

Date 8.1.17

Case Name *In re: Iconix Brand Group Inc. et al.*

Case Number No. 1:15-cv-04860 in the U.S. District Court for the Southern District of New York

Lead Partners **Jay B. Kasner** / New York; **Scott D. Musoff** / New York

Opposing Counsel Robbins Geller Rudman & Dowd LLP; Sexena White PA

Date 10.25.17

Significance

Skadden has significant experience advising clients in securities cases relating to financial restatements, alleged generally accepted accounting principles (GAAP) violations, asset impairment and other accounting issues. This year alone, we secured several high-profile dismissals on behalf of clients in accounting-related securities class action litigation, including, among others, **First NBC Bank Holding Company, Express Scripts Holding Company and Iconix Brand Group, Inc.**

Case Overviews

On behalf of **First NBC Bank Holding Company**, well-known for its involvement in rebuilding New Orleans post-Katrina, we secured the full dismissal of a securities class action complaint in which investors alleged that First NBC had engaged in fraud stemming from its restatement of financials. The restatement was attributable to First NBC's need to correct accounting for its investment in tax credit entities, a significant part of its portfolio arising from the rebuilding efforts. In the face of challenging admissions from our client — including the need to restate earnings for its entire public history — we successfully argued that the plaintiffs did not meet PLSRA standards.

Skadden secured the dismissal of a putative securities fraud class action filed against **Express Scripts Holding Company**, which alleged that it misrepresented its relationship with its largest client, Anthem Inc., and failed to properly account for that contract. On August 1, 2017, Judge Edgardo Ramos of the U.S. District Court for the Southern District of New York dismissed all of the plaintiffs' claims, holding, among other things, that the plaintiffs failed to allege any defendant had acted with an intent to defraud.

Skadden represented **Iconix Brand Group, Inc.** in securing a motion to dismiss a purported securities class action filed in the Southern District of New York. Following two restatements by the company and the resignation of four senior executives, the plaintiffs brought claims under Sections 10(b) and 20(a) of the Securities Exchange Act, alleging that the defendants made materially false and misleading statements and omissions regarding certain of the company's accounting decisions that led to the restatements. On October 25, 2017, Judge Gardephe dismissed the complaint in its entirety, concluding that the plaintiffs failed to plead facts showing fraudulent intent.

JPMorgan Significantly Narrows Putative Class Action on Motion to Dismiss

Case Information

Case Name

Merryman v. J.P. Morgan Chase Bank, N.A.

Case Number

No. 15-cv-9188 (VEC) in the U.S. District Court for the Southern District of New York

Lead Partners

Susan L. Saltzstein / New York

Opposing Counsel

Kessler Topaz Meltzer Check LLP

Dates

9.29.16

Significance

On behalf of **JPMorgan Chase Bank, N.A. (JPM)**, Skadden achieved a significant narrowing of a putative class action on a motion to dismiss in which the court accepted JPM's argument that the named plaintiffs lacked standing to assert claims pursuant to securities they did not own, notwithstanding their efforts to invoke the concept of "class standing." The court also dismissed a portion of the plaintiffs' claims as barred by the statute of limitations, rejecting the plaintiffs' efforts to invoke the doctrine of fraudulent concealment.

Case Overview

In this putative class action, the plaintiffs originally sought to assert claims over a more than 10-year period relating to more than 100 American Depositary Receipts (ADRs) for which JPM served as depositary, notwithstanding that plaintiffs owned just 12 of the ADRs. The plaintiffs alleged that under the relevant deposit agreements, JPM was obligated to perform foreign exchange transactions for free, or at a nominal markup. The plaintiffs asserted claims for breach of contract, conversion and breach of good faith and fair dealing. The plaintiffs originally filed the action in the Western District of Arkansas, where it was dismissed for lack of personal jurisdiction.

After the plaintiffs refiled the action in the Southern District of New York, JPM moved to dismiss on a variety of grounds, including that the plaintiffs lacked standing to assert claims pursuant to ADRs they did not own, that portions of the plaintiffs' claims were barred by the applicable statute of limitations and that the plaintiffs had failed to state a claim. The court granted significant portions of the motion, concluding that the plaintiffs did not have class standing because "[p]laintiffs have not explained how they have a personal and concrete stake in proving this case relative to ADRs that they did not own beyond the notion that introducing such evidence might augment the evidence supporting their own claims."

The practical import of this ruling was to narrow the putative class substantially. Applying the New York borrowing statute and Arkansas' statute of limitations, the court also agreed that portions of the plaintiffs' claims were barred by the applicable statute of limitations, thereby cutting the time period at issue by more than half. Together, these rulings significantly narrowed the putative class at the motion to dismiss stage. The court also concluded that the plaintiffs' conversion and good faith and fair dealing claims were defective as a matter of law.

News Corp. Wins Multiple Dismissals in Securities Class Action

Skadden

Case Information

Case Name

Wilder v. News Corp. et al.

Case Number

No. 11 Civ. 4947 (PGG) in the U.S. District Court for the Southern District of New York

Lead Partners

Jay B. Kasner / New York

Scott D. Musoff / New York

Opposing Counsel

Robbins Gellar Rudman & Doud LLP

Dates

9.21.16

Significance

Skadden has an impressive track record in securing dismissals of putative securities fraud claims, including on behalf of **News Corp.**, its British subsidiary **NI Group Ltd., Rupert Murdoch and James Murdoch** in putative class action securities fraud complaints arising out of news-gathering practices at *News of the World* and *The Sun*.

Case Overview

Stockholders of News Corp. brought claims alleging hundreds of millions of damages under Section 10(b) and Section 20(a) of the Securities Exchange Act following a precipitous drop in News Corp. stock following worldwide publicity regarding illegal news-gathering practices at two British newspapers, now-defunct *News of the World* and *The Sun*. The complaint alleged that for years defendants deliberately concealed the nature and extent of their illegal news gathering — which included phone hacking — through false statements that they failed to correct long after learning of the illegal practices.

After Judge Paul Gardephe granted the defendants' first motion to dismiss on the grounds that the gravamen of the alleged misstatements occurred prior to the proposed class period, the plaintiffs amended the complaint by expanding the class period backward in order to end-run the court's prior ruling. Judge Gardephe granted the defendants' second motion to dismiss, finding that the plaintiffs' failure to allege that the expanded class was not a "mistake" as required by Second Circuit precedent and the plaintiffs could not benefit from the relation back doctrine. The plaintiff then moved for reconsideration, but on September 20, 2016, Judge Gardephe denied the plaintiffs' motion for reconsideration and rejected their argument that a mistake of law, as opposed to a mistake of fact, justified expansion of a class period in a securities fraud suit under a relation back theory. Finally, the court rejected as unsupported the plaintiffs' novel argument that they could expand the class period without actually including any new class members so as to permit the original class members (who purchased after the alleged material misstatements) to pursue their claims.

Notable Results in Asia-Based Issuer Securities Class Actions

Case Information

Case Name *Guangyi Xu v. ChinaCache International Holdings Ltd et al.*

Case Number No. 2:15-cv-07952 in the U.S. District Court for the Central District of California

Lead Partners **Peter B. Morrison /** Los Angeles; **Bradley A. Klein** / Hong Kong

Opposing Counsel The Rosen Law Firm; Levi and Korsinsky LLP

Date 1.9.17

Case Name *In re Jumei International Holding Limited Securities Litigation*

Case Number No. 14-cv-09826 in the U.S. District Court for the Southern District of New York

Lead Partners **Scott D. Musoff** / New York; **Robert A. Fumerton** / New York; **Bradley A. Klein** / Hong Kong

Opposing Counsel Pomerantz LLP; Glancy Prongay & Murray LLP

Date 1.10.17

Case Name *Huang v. Airmedia Group Inc. et al.*

Case Number No. 14 Civ. 9642 in the U.S. District Court for the Southern District of New York

Lead Partners **Scott D. Musoff** / New York; **Robert A. Fumerton** / New York; **Bradley A. Klein** / Hong Kong; **Steve Kwok** / Hong Kong

Opposing Counsel Robbins Geller Rudman & Dowd LLP

Date

3.27.17

Significance

Skadden has a standout track record representing Asia-based companies in U.S. securities class actions, and has represented more Asia-based companies in this type of litigation than any other firm. In the past year, we have obtained dismissals of securities class actions for **ChinaCache International Holdings Ltd., Jumei International Holdings Ltd. and AirMedia Group, Inc. and its CFO**, among others.

Case Overviews

Skadden obtained the dismissal of the second amended complaint in a shareholder suit brought against **ChinaCache International Holdings, Ltd.**, China's leading provider of internet content and content delivery services, in the Central District of California, in which plaintiffs alleged that ChinaCache misled investors about the progress and functionality of its High Performance Cache Cloud project. ChinaCache brought a motion to dismiss, contending that: (1) there were no false statements made; and (2) even if a statement was false, it was not made with the requisite knowledge or intent. The court agreed, ruling that the plaintiff did not allege "any false, actionable statements by ChinaCache," and dismissed the case.

Skadden, on behalf of **Jumei International Holding Ltd.**, secured the complete dismissal of a consolidated class action complaint in which investors alleged Jumei's May 2014 IPO registration statement and August 2014 earnings report contained false and misleading statements because they failed to disclose Jumei's plan to exit one of its business lines in September 2014. On January 10, 2017, Judge William Pauley of the U.S. District Court for the Southern District of New York agreed with Skadden's arguments that the plaintiffs' securities claims failed to meet the notice pleading standards of Rule 8, much less the heightened pleading standards applicable to certain of their securities claims.

On behalf of China-based **AirMedia Group, Inc. and its CFO, Richard Wu**, Skadden secured the complete dismissal of a securities class action complaint in which investors alleged AirMedia engaged in a scheme to artificially inflate the trading price of its American depositary receipts between April 7, 2015, and June 15, 2015, by issuing false and misleading statements in various press releases concerning two potential acquisitions by one of AirMedia's affiliated companies. In his dismissal on March 27, 2017, Judge Andrew L. Carter Jr. of the U.S. District Court for the Southern District of New York agreed with Skadden's arguments that the plaintiffs' securities claims failed because the complaint did not allege any actionable misstatement or omission by AirMedia.

Polaris Secures Dismissal Following Product Recall of Certain Off-Road Vehicles

Skadden

Case Information

Case Name

In re Polaris Industries, Inc. Securities Litigation

Case Number

No. 16-3108 in the U.S. District Court for the District Of Minnesota

Lead Partner

Matthew R. Kipp / Chicago

Opposing Counsel

Robbins Geller

Date

10.13.17

Significance

Skadden secured the dismissal of a putative securities class action against **Polaris Industries Inc.** This decision stands for the important principle that a risk factor set forth in a company's 10-K disclosing that product recalls could have a material adverse effect on financial results does not need to be updated with specific recall risks facing the company.

Case Overview

The plaintiff alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5, asserting that Polaris Industries Inc. and six of its current and former executives made false and misleading statements about defects in certain models of Polaris' off-road vehicles. These defects related to highly publicized incidents of serious injuries from a number of these vehicles catching fire, leading to multiple recalls and eventually a downward adjustment in the company's earnings forecast. Specifically, the plaintiff alleged that Polaris knew these vehicles posed a significant risk of catching fire but concealed this risk from shareholders.

Judge Paul Magnuson granted Skadden's motion to dismiss, agreeing that Polaris' risk factor about product recalls could not form the basis for a securities claim. The court concluded that Polaris' risk factor did not warn that "Polaris faced no new risks, but that there were no new risk factors. Polaris had disclosed risks posed by recalls and warranty repairs; what eventually came to pass with Polaris ORVs is one of those risks."

Review of Class Certification Denied in UBS Puerto Rico Case

Case Information

Case Name

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

Case Number

No. 12-cv-1663-CCC in the U.S. District Court for the District of Puerto Rico

Lead Partner

Paul J. Lockwood / Wilmington

Opposing Counsel

Scott + Scott Attorneys at Law LLP

Date

3.7.17

Significance

Several individuals brought a putative class action against **UBS Financial Services Incorporated of Puerto Rico** on behalf of thousands of investors in Puerto Rico closed-end mutual funds managed and marketed by UBS that were primarily invested in Puerto Rico government securities. Skadden successfully opposed class certification, arguing that individualized issues predominated over common issues.

Case Overview

In May 2012, UBS Financial Services Incorporated of Puerto Rico entered a settlement with the Securities and Exchange Commission regarding Puerto Rico closed-end mutual funds 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 federal and Puerto Rico securities law, alleging that the defendants misled investors about the secondary market for the funds' shares and the risks of purchasing funds 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 January 1, 2008, and September 18, 2013. Skadden argued that certification was inappropriate because individualized issues would predominate.

In March 2016, Magistrate Judge Bruce J. McGiverin agreed with Skadden and recommended that class certification be denied because there was no presumption of reliance since the funds did not trade in an efficient market, and the representations to each class member were based on individualized discussions with their personal brokers, which varied based on each investor's individual situation.

Judge Carmen C. Cerezo adopted the magistrate's report and recommendation on Sept. 30, 2016. On March 7, 2017, the U.S. Court of Appeals for the First Circuit denied the plaintiffs' petition for interlocutory review, finding that Judge Cerezo's order was not sufficiently questionable to warrant immediate review.

Former CFO Secures Dismissal of Securities Class Action Claims

Skadden

Case Information

Case Name

Dave Carlton, et al. v. Fred Cannon, et al.

Case Number

No. 4:15-cv-00012 in the U.S. District Court for the Southern District of Texas (Houston Division)

Lead Partner

Noelle M. Reed / Houston

Opposing Counsel

The Rosen Law Firm P.A.

Date

7.22.16

Significance

On behalf of **the former CFO of KiOR**, an alternative energy company, Skadden secured the dismissal of a 10b-5 class action lawsuit in which the shareholder plaintiffs alleged that KiOR and its executive management had misrepresented the technical and commercial prospects of its proprietary technology. The court granted the motion to dismiss, holding that the plaintiffs had failed to plead a strong inference of scienter against the CFO.

Case Overview

KiOR had developed a proprietary technology to convert woodchips into oil and other fuels, but was not able to do so in commercial quantities at its start-up facility. The company eventually suspended operations at this facility. Shareholders filed a putative class action lawsuit against KiOR, its CEO and its CFO, asserting claims under Section 10(b) of the Securities Exchange Act and Rule 10b-5. They broadly alleged that the company had misrepresented its business operations to investors before its initial public offering and in later statements about its ability to succeed commercially. Among other things, the plaintiffs alleged that the company had misrepresented the amount of oil it could produce from wood, how much it would cost to produce the oil and how much oil it would be able to produce at its commercial facility.

Skadden argued the case on the CFO's behalf, and in May 2016, Judge Lee Rosenthal dismissed all claims against the CFO with prejudice, concluding that the plaintiffs had not pleaded a strong inference that he acted with scienter. The court concluded that there was no support for a plausible — much less strong — inference that the CFO was severely reckless in disregarding known or obvious facts about the state of KiOR's technology. The court also held that the CFO truthfully disclosed KiOR's debt, costs and losses during earnings calls. After concluding that the plaintiffs already had received ample opportunity to plead claims against the CFO, the court denied their request for leave to amend their claims against him.

Court Dismisses Shareholder Suit Against Sempra CEO

Case Information

Case Names

Fischman v. Reed
Plumley v. Sempra Energy

Case Numbers

No. 16cv1006-WQH-AGS in the U.S. District Court for the Southern District of California

No. 3:16-cv-00512-BEN-AGS in the U.S. District Court for the Southern District of California

Lead Partner

Jack P. DiCanio / Palo Alto

Opposing Counsel

Bottini & Bottini

Levi & Korsinsky and Pomerantz

Dates

3.24.17

6.21.17

Significance

Skadden secured dismissals on behalf of the **CEO and current and former directors of Sempra Energy** in parallel shareholder litigation arising out of the October 2015 Aliso Canyon accident.

Case Overview

Skadden secured back-to-back dismissals of two shareholder actions relating to an October 2015 natural gas leak at a well located within Sempra Energy subsidiary SoCalGas's Aliso Canyon underground storage facility.

First, in March 2017, on behalf of the current and former directors of Sempra Energy, we secured the dismissal of a derivative shareholder action alleging claims for breach of fiduciary duty. Judge William Q. Hayes found that the complaint failed to allege particularized facts establishing that the Sempra board could not consider a pre-suit demand. In so holding, the court found the complaint's allegations did not permit a reasonable inference that the Sempra board knew either of safety risks at the well before the leak or of any allegedly inadequate response to the leak. To the contrary, the court found that the complaint's allegations permitted the reasonable inference that the Sempra board was pursuing its oversight duties.

Subsequently, in June, on behalf of Sempra's CEO, we secured the dismissal of a federal securities complaint alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5. Judge Roger Benitez found that the complaint failed to allege particularized facts establishing a strong inference defendants acted with scienter or that the CEO and the other defendants made false, misleading or material statements related to Sempra and SoCalGas's "commitment to safety," the ability of Sempra and SoCalGas to control the gas leak, or the scope of the health risks posed by the leak.

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