SECURITIES SENTINEL
Presented by the Miller Law Firm P.C.

Securities Litigation Update

Cornerstone Research reports that the aggregate number of all securities class action settlements during 2014 declined to the lowest level in years and there also was a significant decrease in the total and average settlement amount. The number of settlements during 2014 (63) was just about the same as the number in 2013 (66). However the total dollar amount of all securities class action lawsuit settlements during the year was $1.1 billion, compared to $4.8 billion in 2013.[i] This decrease in settlements reflects in part that the majority of cases related to the financial crisis were previously resolved.

Investors contested 93% of M&A transactions in 2014, a typically high percentage, but brought a smaller number of cases per deal and in fewer jurisdictions with fewer cases in deals valued below $1 billion. The one M&A case which was tried in 2014 resulted in a $76 million damages award.[ii]

One area of securities litigation appears to be on the rise. In 2014, investors launched 69 accounting class action suits against companies, a 47 percent increase from the year prior. More than one of four of these new complaints cited an SEC probe or enforcement action about the defendant company's financial reports, the highest level since they began tracking this data in 2010.[iii]

Accounting restatements have been cited as a reason for the filings. Forty-two percent of filings last year were over errors concerning revenue recognition, the highest such rate in seven years. This spike may be due in part to increasing market sensitivity to restatements. Whereas restated earnings produced an average stock drop of 1 percent in 2010, these grew to an average of 5 percent last year, matching the highest rate over the past decade.[iv]

Notably, accounting cases comprised about 85 percent of all class action settlements in 2014. Also, in instances where civil suits are filed in conjunction with the disclosure of an SEC probe, by the time such a probe results in an enforcement action, the parallel class action also could be winding down into a settlement. When this happens, Cornerstone research found that civil settlements end up being nearly 30 percent higher than they would have been had the SEC not been involved.[v]

Supreme Court Roundup

The Supreme Court ends its 2014-2015 term on June 30th. This term the most significant securities case sought to differentiate between an opinion statement that was not actionable versus an untrue statement actionable under Section 11 of the Securities Act of 1933. In *Omnicare v Laborers District Council Construction Industry*, the Court resolved a split in the circuit courts about whether there is liability for opinions under Section 11 and defined the standard for investors to prove that an opinion was misleading or omitted necessary facts. [vi] Opinion statements are not wholly immune from liability under §11's first clause. Every such statement explicitly affirms one fact: that the speaker actually holds the stated belief. Executives' statements of opinion cannot be actionably untrue simply because they are incorrect, but they can be subject to liability based on the expectations of a "reasonable" investor. Issuers can be

liable for omissions if the Section 11 registration statements omit material facts about the knowledge about the opinion and if those facts conflict with the opinion.

Earlier in the term, in a surprising move, the Court dismissed its prior order granting certiorari on a case involving the tolling of the statute of limitations in securities class actions, *In*dyMac.[vii] Under a rule adopted by the Supreme Court in *American Pipe*[viii], the filing of a class action usually tolls the statute of limitations for potential class members – leaving them the option to wait and see what happens with the class before deciding to file a separate lawsuit. However, federal courts have been split whether that rule applies to the Section 13 Securities Act's statute of limitation because that statute is what is called a statute of repose. Statutes of repose establish outer limits for filing an action that are not subject to tolling. The Second Circuit held that the filing of a class action does not toll the statute of repose under Section 13. The Supreme Court planned to hear the case on certiorari, but a subsequent settlement of the case resulted in the dismissal of the petition. So there remains a split in the federal courts on this issue. What *Indy Mac* means is that class members in the Second Circuit cannot lie in wait for a case to be litigated and then opt out during a settlement and invoke the benefits of the tolling of the statute of limitations – unless, of course, you are in a different circuit court that holds a conflicting view.

Investment Watch

Private equity is finding itself in the crosshairs of the SEC. Recently, the SEC announced that it had charged BlackRock Advisors with failing to disclose conflicts of interest to clients and fund boards. The firm agreed to censure and consented to entry of the SEC's order finding that the "firm willfully violated" the Investment Advisers Act of 1940.[ix] Private equity has been under fire over the past year for allegedly imposing fees which create conflicts of interest between investors and the private equity firms. For example, the private equity firm negotiates a discount for services to the fund that is not shared with its investors and generally not disclosed.

Bond Market rules violations in the $3.7 trillion municipal bond market have resulted in the SEC assessing civil penalties ranging from $40,000 to $500,000 against 36 firms. The SEC alleged that those firms sold municipal bonds which contained materially false statements about the bond issuer's compliance with disclosure rules and failed to conduct adequate due diligence to identify the misstatements. These cases were brought under the Municipalities Continuing Disclosure Cooperation (MCDC) Initiative, which is a voluntary self-reporting program for misstatements and omissions in municipal bond offerings. The maximum fine was assessed against ten firms, including Citigroup Global Markets, Inc.; Goldman, Sachs & Co; J.P. Morgan Securities; and Bank of America/Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley & Co.[x]

Investors Sue Big Banks for Foreign Exchange Rigging. A class action lawsuit on behalf of investors is pending in New York against six major banks alleging violations of the Commodity Exchange Act for their roles in a scheme to manipulate the foreign exchange market. The suit involves Bank of America Corp., Barclays PLC,

Citigroup Inc., HSBC Holdings PLC, JPMorgan Chase & Co, the Royal Bank of Scotland Group PLC and UBS AG. Barclays, Citigroup, JPMorgan and RBS have all plead guilty to criminal antitrust violations over their collusion in rigging the benchmark for foreign exchange rates. The Department of Justice alleged that the audacious scheme included using private, online chat rooms and coded language to rig the market – operating under the name "The Cartel." The DOJ imposed fines totaling more than $2.5 billion for the antitrust violations.

Pension News

In a unanimous decision, the Supreme Court held that ERISA's statute of limitations did not bar an action for an alleged breach of the duty to monitor a plan's 401K investments. While the case has been highly touted as providing more protections to plan participants, essentially, the Court reaffirmed the long-standing rule of trusts that a fiduciary has a "continuing duty to monitor trust investments and remove imprudent ones." The Court remanded the case to the 9th Circuit to answer what the duty to monitor specifically entailed. *Tibble v Edison*[xi]

Derivative Watch

The Delaware Governor inked legislation that amends Delaware General Corporation Law to include a ban on fee-shifting or "loser pays" bylaws for shareholder litigation. This could even the playing field for shareholder derivative suits.

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[i] Cornerstone Research, *Securities Class Action Settlements 2014 Review and Analysis*
[ii] Id., *Shareholder Litigation Involving Mergers and Acquisitions—Review of 2014 M&A Litigation*
[iii] Id., *Accounting Class Action Filings and Settlements 2014 Review and Analysis*
[iv] Id.
[v] Id.
[vi] *Omnicare, Inc. et. al.*, v *Laborers District Council Construction Industry Pension Fund*, 135 S.Ct. 1318 (2015), 719 F.3d 498, (6th Cir. 2013), *rehearing & rehearing en banc den. (July 2013)*, 2012 WL 462551 (ED Ky 2012).
[vii] *In re IndyMac Mortgage-Backed Securities, Inc.*, (2d Cir 2013), 135 S.Ct. 41, 42 (Sept. 2014) *dismissal of certiorari*, 134 S.Ct. 1515 (Mar 2014), certiorari; 721 F.3d 95, (2d 2013), 793 F.Supp.2d 637 (SDNY 2011), 2015 WL 1315147 (SDNY 2015) (settlement).
[viii] *American Pipe and Construction Co., et. al. v State of Utah*, 94 S.Ct. 756 (1974)
[ix] US Securities and Exchange Commission, Press release, "SEC Charges BlackRock Advisors with Failing to Disclose Conflict of Interest to Clients and to Fund Boards," (April 20, 2015)
[x] US Securities and Exchange Commission, Press Release "SEC Charges 36 Firms for Fraudulent Municipal Bond Offerings," (June 18, 2015)
[xi] *Tibble v Edison International*, 135 S.Ct. 1823 (2015)