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

Securities Litigation Update

PLSRA Filings are Generally down in 2015

Statistics for the number of new securities class actions filings for 2015 are not yet fully available, but as of mid-2015, the number continues to hover at historically low levels. Plaintiffs filed 85 new federal class action securities cases in the first six months of 2015, seven fewer than second half of 2014, but more than the 78 filed in the first half of 2014.[i] Moreover, the Disclosure Dollar Loss ("DDL") and Maximum Dollar Loss ("MDL") remain at low levels. The total DDL was $34 billion in the first half of 2015, 43 percent below the historical semiannual average of $60 billion. The MDL was $105 billion, 65 percent below the historical semiannual average of $304 billion.[ii]

Of the 85 new cases filed, 24% were filed against companies headquartered outside of the United States. And, 50% of these cases were filed against Asian firms. Moreover, the number of filings in the 9th Circuit has increased by 90% over the last six months in 2014, while filings in the 2nd Circuit fell by one-third. These filings are evidence of a trend that cases are being brought in the technology and industrial sectors, rather than against the financial, energy, biotechnology and pharmaceutical sectors.[iii]

Supreme Court Roundup

Pending before the United States Supreme Court in its 2016-2017 term are several cases which could impact investors and the litigation of security class actions.

The Supreme Court is poised to decide a case that may impact federal jurisdiction over state law claims involving securities. In a case involving naked short selling – the failure to borrow securities in time to deliver them to the buyer during the three-day settlement period –defendant financial institutions are challenging the Third Circuit's decision to remand the case to state court, allowing shareholders to pursue claims that the banks engaged in illegal and manipulative short-selling.[iv] Defendant financial institutions had removed plaintiffs' state court complaint to federal court, asserting that the claims were preempted by federal securities laws and, therefore, must be brought in federal court. Defendant financial institutions sought certiorari, asking the Supreme Court to resolve a circuit court split over whether Section 27 of the Securities Exchange Act of 1934 preempts this type of suit. The Securities Industry and Financial Markets Association, SIFMA, was granted leave to file an amicus. The case was argued before the Court on December 1, 2015.

The question of whether an offer to settle with the named plaintiff can moot a class action was argued in October and the questioning characteristically reflected a divided court.[v] A ruling in favor of defendants would effectively eviscerate Federal Rule 23's class certification provisions as defendants would be incentivized to dispose of a suit before class certification. Plaintiffs with smaller claims would be left without a remedy because of the cost of pursuing an individual suit.

The Court also denied certiorari in three cases involving claims of securities fraud.

Shareholders of McGraw-Hill Cos., represented by the Boca Raton Firefighters & Police pension Fund, sued McGraw claiming that the ratings issued by its Standard & Poors ratings agency violated federal securities laws because the investors were misled as to the truthfulness and reliability of the ratings.[vi] This is one of the claims arising from the financial crisis during which the ratings agencies were bombarded with criticism for their optimistic ratings of various mortgage backed securities products. The United States District Court, Southern District of New York dismissed the case finding that public statements regarding S&P's "independent and objective analysis" were "mere commercial puffery". The Second Circuit upheld the lower court decision. Plaintiff filed a petition for writ of certiorari to the United States Supreme Court, seeking review of the Second Circuit's definition "puffery." The petition was denied, leaving in place the Second Circuit's broader construction of what constitutes mere "puffery."

In a rare nod to shareholder plaintiffs, the Supreme Court rejected Defendant Amedisys, Inc.'s petition for certiorari in which the Fifth Circuit had reversed the District Court's dismissal of a case alleging securities fraud by concealment of a Medicare scheme.[vii] Amedysis challenged the Fifth Circuit's plausibility standard for loss causation, alleging that the Court failed to apply the heightened pleading standard.

The Second Circuit's controversial decision finding that prosecutors are required to show insider trade tipsters received a pecuniary or other valuable benefit in order to prove liability for insider trading was upheld by the Supreme Court when it denied the Department of Justice's writ of certiorari on October 2, 2015.[viii] The Second Circuit overturned two hedge fund managers' insider trading convictions in a decision that the DOJ claims upends the Supreme Court's 1983 decision in *Dirks* v *SEC*, which set a minimal bar for interpreting how a tipster can benefit from insider trading.[ix] The Second Circuit's opinion conflicts with holdings in the Seventh and Ninth Circuits.

Derivative Watch

The Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") recently published the results of their review of 1,663 merger transactions that occurred in 2014.[x] The requests for merger approval jumped by 25%, bringing the number nearly back to where it was before the 2008 financial crisis – just 63 below 2008's numbers. *Id.* at 1. In addition, the number of megamergers – those valued at $500 million or more – continued to increase in 2014 from 26% in 2012 to nearly a third in 2014. *Id.*

The majority of the merger applications came from companies involved in consumer goods and services, which represented 30% of the filings. *Id.* at 6. The other major sources of transactions included manufacturing, banking and insurance, high-tech, energy, and healthcare and pharmaceuticals. *Id.*

During 2014, the FTC brought 17 merger challenges, though most were resolved through consent agreements. Only four deals were either abandoned or restructured in the face of antitrust concerns. The DOJ challenged 16 deals, seven of which were initially filed with settlements. *Id.* at 2.

Cornerstone Research reported that investors contested 93% of the Merger and Acquisition transitions in 2014.[xi]

Investment Watch

PIMCO Total Return Active Exchange- Traded Fund – The SEC has issued a Wells Notice advising that it is recommending civil action against the fund. Since at least 2014, the SEC has been investigating how PIMCO values certain holdings in mortgage-backed securities as well as the adequacy of disclosures and compliance procedures. Allegedly, PIMCO bought the assets at a discount and then valued them higher for purposes of inflating the return.

Treasury Instruments Antitrust Litigation – In September, the Department of Justice opened up an investigation into the Treasury Instruments market and is conducting an inquiry of three banks regarding anticompetitive conduct in a number of financial product markets and benchmarks. It is believed that several defendants, their parents or affiliates have paid fines or pleaded guilty to criminal charges in the investigations, including Barclays, Citigroup, Deutsche Bank, HSBC, RBS, UBS and JP Morgan. The pleas are pending fuller public disclosure. Civil antitrust lawsuits have been filed as well. It is claimed that the banks illegally manipulated the treasuries market, causing the prices of "when-issued" securities to be artificially high, while the price of securities at auction were made artificially low – maximizing defendants' profits at the expense of their customers.

Interest Rate SWAPS Antitrust Litigation - A recent antitrust complaint alleged that banks colluded to prevent the trading of Interest Rate Swaps on electronic exchanges (like the ones on which stocks are traded); and as a result, parties, such as pension funds, university endowment funds, corporations, insurance companies and municipalities (the "customers") overpaid for those swaps from January 1, 2008 through the present. The banks that have been identified thus far are: Goldman Sachs, Bank of America, Merrill Lynch, JPMorgan Chase, Citigroup, Credit Suisse Group, Barclays, BNP Paribas, UBS, Deutsche Bank, and the Royal Bank of Scotland. Banks traded on these electronic exchange-like platforms which allegedly enabled them to buy interest rate swaps at a lower price and then to sell them higher than would have been possible in a competitive market. The banks' customers are limited to the less efficient over the counter market which does not allow for competitive price shopping through real-time streaming.

A Class Action Verdict Survives Individualized Reliance Issues

Individualized issues are the bane of securities class action attorneys representing investors as savvy defense counsel seek to erode the fraud on the market presumption and individualized damage issues to defeat class certification and obtain dismissals.

One of the rare securities cases to be tried to jury verdict is still meandering through the Southern District of New York five years post-verdict as Judge Shira Scheindlin navigates untrod ground to address post-verdict issues involving the rebuttable "presumption of reliance on an individual basis" and the necessity for " separate inquiries into the individual circumstances of the class members."[xii]

In 2002, Plaintiffs filed an action under the Private Litigation Securities Reform Act (PSLRA) alleging that Vivendi had recklessly issued statements misstating or omitting Vivendi's true liquidity risk. The case was tried to verdict in January 2010 in favor of Plaintiffs on class-wide issues. The United States Supreme Court's subsequent decision in *Morrison* v *National Australia Bank Ltd.*, limited the reach of Section 10(b) to "the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[xiii] Post-verdict application of *Morrison* wiped out the claims for securities not traded on U.S. exchanges, leaving only claims for U.S. traded American depositary receipts.[xiv]

At trial, the jury rejected Vivendi's "truth on the market" defense and found that the class had justifiably relied on Vivendi's misstatements under a "fraud on the market theory." However, in post-judgment motions, the court held that "Vivendi is entitled to rebut the presumption of reliance on the market price of Vivendi's stock with respect to particular class members."[xv] Thereafter, the court instituted a multi-step procedure to address this issue, including notice to class members, special interrogatories for selected class members and the appointment of a special master to determine triable issues of material fact. [xvi] Vivendi also informed the Court of its intention to limit its challenge to "the reliance of sophisticated persons and entities, such as large institutional investors."[xvii]

On August 11, 2015, the court issued an opinion in favor of Vivendi's challenge to the $53M claim of class member Southern Asset Management, finding that "[A] sophisticated institutional investor whose own specialized knowledge and advanced research rendered it completely indifferent to the fraud" is not entitled to the presumption. [xviii] Noting the fact specific nature of the ruling, the court emphasized that "[T]his holding does not give blanket protection to securities fraud defendants against sophisticated investors. It is easy to imagine a situation in which an institutional investor is legitimately duped by a fraud and loses a substantial amount of money as a result. These simply are not the facts here."[xix] It remains to be seen whether this ruling engenders even more challenges to individual class member claims or, alternatively, encourages courts to find that there are viable procedures to address individualized issues.

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[i] http://securities.stanford.edu/research-reports/1996-2015/Cornerstone-Research-Securities-Class-Action-Filings-2015-MYA.pdf.
[ii] *Id.*
[iii] *Id.*
[iv] *Merrill Lynch Pierce Fenner & Smith, et. al.* v *Manning*, C.A. 14-1132 in the Supreme Court of the United States, 2012 WL 7783142, (D.N.J. Dec. 31, 2012), 2013 1164838 (D.N.J. Mar. 20, 2013), 2013 WL 2285955 (D.N.J. May 23, 2013), 772 F.3d 158 (3d Cir. 2014), 2015 WL 586495 (D. N.J. Feb. 10, 2015), 135 S.Ct. 2938, *cert. granted* (June 30, 2015) .

[v] *Campbell-Ewald v. Gomez*, 2013 WL 655237 (C.D. Cal. Feb. 22, 2013), 768 F.3d 871 (9th Cir. 2014), 135 S.Ct. 2311 (May 18, 2015), cert. granted. (U.S. C.A. 14-857).
[vi] *Boca Raton Firefighters and Police Pension Fund* v *Robert J. Barash, The McGraw-Hill Companies, Inc., et. al.*, 136 S.Ct. 402, *cert den.*, 2012 WL 9119573 (S.D.N.Y. Mar. 30, 2012), *aff.* 506 Fed.Appx. (2d Cir. 2012), 293 F.R.D. 617 (S.D.N.Y. Sep. 24, 2013), 574 Fed.Appx. 21 (2d Cir. 2014), 136 S.Ct. 402, *cert.den.* (Nov. 2, 2015)
[vii] *Amedisys , Inc. et. al.* v *Public Employees Retirement System of Mississippi, et. al*., 2012 WL 6947008 (M.D. La. June 28, 2012), 2012 WL 6947009 (M.D. La. June 28, 2012), 769 F.3d 313 (5th Cir. 2014), 135 S.Ct. 2892 (June 29, 2015), *cert.denied.*
[viii] *U.S.* v. *Newman*, 136 S.Ct. 242 (Oct. 5, 2015), C.A. No. 15-137, 2015 *cert. denied*, WL 1954058 (2d Cir. Apr. 3, 2015), 773 F.3d 438 (2d Cir. 2014).
[ix] *Dirks* v. *SEC*, 463 U.S. 646, 103 S.Ct. 3255 (1983).
[x]https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/150813hsr_report.pdf
[xi] Cornerstone Research, *Shareholder Litigation Involving Mergers and Acquisitions—Review of 2014 M&A Litigation.*
[xii] *In re Vivendi Universal SA Securities Litigation*, 02-cv-5571 (SAS), 2015 U.S. Dist. LEXIS 106307 (S.D.N.Y. Aug. 11, 2015), 284 F.R.D. 144 (S.D.N.Y. 2012), 765 F. Supp. 2d 512 (S.D.N.Y. 2011).
[xiii] *Morrison* v *National Australia Bank, Ltd.*, 561 U.S. 247, 273 (2010)
[xiv] *In re Vivendi Universal SA Securities Litigation*, 765 F.Supp.2d 512 (S.D.N.Y. 2011)
[xv] *In re Vivendi Universal SA Securities Litigation*, 284 F.R.D. at 152.
[xvi] *Id.* at 155.
[xvii] *Id.*
[xviii] *In re Vivendi Universal SA Securities Litigation*, 2015 U.S. Dist. Lexis 106370 (S.D.N.Y. Aug. 11, 2015) at *35.
[xix] *Id.* at *35-36