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SIDLEY UPDATE

Securities and Shareholder Litigation & Class Actions

In this Sidley Update: **Class Action Tolling and Statutes of Repose; Corporate Personal Jurisdiction; Class Action Appeals; Supreme Court Makes More Securities Cases; Disclosure of Interim Financial Information; *Spokeo* Standing; Article III: Standing for Intervenors; Trusts and Diversity Jurisdiction; Jurisdictional Discovery**

Class Action Tolling and Statutes of Repose

The U.S. Supreme Court, in *California Pub. Empl. Ret. Sys. v. ANZ Secs.*, No. 16-373 (U.S. June 26, 2017), held that ***American Pipe* tolling does not extend the statute of repose for claims under the Securities Act of 1933**. The Court's broad reasoning suggests that the *ANZ* rule (building on the Court's prior decision in *CTS Corp. v. Waldburger*) likely applies to all statutes of repose.

ANZ involved a timely class action, filed in the fall of 2008, and an individual opt-out action that was filed outside the 3-year statute of repose for 2007 and 2008 offerings. Slip op. at 3. The Court first concluded that **the 3-year bar from the date of the transaction in Section 13 is a statute of repose**:

> This view is **confirmed by the two-sentence structure of §13**. In addition to the 3-year time bar, §13 contains a 1-year statute of limitations. The limitations statute runs from the time when the plaintiff discovers (or should have discovered) the securities-law violation. The pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits. . . . Statutes applying a discovery rule . . . often couple that rule with an absolute provision for repose. **The two periods work together: The discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability**. . . . The history of the 3-year provision also supports its classification as a statute of repose. It is instructive to note that the statute was not enacted in its current form. The original version of the 1933 Securities Act featured a 2-year discovery period and a 10-year outside limit, but Congress changed this framework just one year after its enactment. The discovery period was changed to one year and the outside limit to three years. . . . **The evident design of the shortened statutory period was to protect defendants' financial security in fastchanging markets by reducing the open period for potential liability**.

Id. at 6-7 (emphasis added; quotations and citations omitted). The Court then concluded, in sweeping terms, that statutes of repose are not subject to equitable rules such as *American Pipe* tolling but are tolled only by conditions set forth in the statute:

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> In light of the purpose of a statute of repose, the provision is in general not subject to tolling. Tolling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances. For example, if the statute of repose itself contains an express exception, this demonstrates the requisite intent to alter the operation of the statutory period. . . . In contrast, where the legislature enacts a general tolling rule in a different part of the code — e.g., a rule that suspends time limits until the plaintiff reaches the age of majority — courts must analyze the nature and relation of the legislative purpose of each provision to determine which controls. . . . The purpose and effect of a statute of repose, by contrast, is to override customary tolling rules arising from the equitable powers of courts. By establishing a fixed limit, a statute of repose implements a legislative decision that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability. . . . The unqualified nature of that determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles. For this reason, the Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling. . . . [T]he object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity. See supra, at 7–8. No feature of §13 provides that deviation from its time limit is permissible in a case such as this one. To the contrary, the text, purpose, structure and history of the statute all disclose the congressional purpose to offer defendants full and final security after three years.

Id. at 7-8, 11 (emphasis added; quotations and citations omitted). As the Court noted, the defendant's interest in knowing the scope of its liability as of the repose date is a significant one:

> If the number and identity of individual suits, where they may be filed, and the litigation strategies they will use are unknown, a defendant cannot calculate its potential liability or set its own plans for litigation with much precision. The initiation of separate individual suits may thus increase a defendant's practical burdens. . . . . The emergence of individual suits, furthermore, may increase a defendant's financial liability; for plaintiffs who opt out have considerable leverage and, as a result, may obtain outsized recoveries. . . . . These uncertainties can put defendants at added risk in conducting business going forward, causing destabilization in markets which react with sensitivity to these matters. By permitting a class action to splinter into individual suits, the application of *American Pipe* tolling would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose. All this is not to suggest how best to further equity under these circumstances but simply to support the recognition that a statute of repose supersedes a court's equitable balancing powers by setting a fixed time period for claims to end.

Id. at 12-13 (emphasis added; quotations and citations omitted). The Court yet again stressed the need of financial markets, in particular, for certainty in legal rules. *Id.* at 16.

The Court confirmed that "the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions." *Id.* at 10.

> Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars. The Court's holding was instead grounded in the traditional equitable powers of the judiciary.

Id. at 10. Finally, the Court rejected efforts to avoid this rule. It noted that *American Pipe* itself involved a limitations period, not repose. *Id.* at 11-12. It held that no right to opt-out can trump the statutory requirement of timely filing. *Id.* at 13. And it **rejected a statutory argument that a class member's "action" has been "brought" within the meaning of Section 13 when a putative class action is filed, a discussion that could have wider implications for the application of limitations periods in class actions**:

> This argument rests on the premise that an "action" is "brought" when substantive claims are presented to any court, rather than when a particular complaint is filed in a particular court. **The term "action," however, refers to a judicial "proceeding," or perhaps to a "suit" — not to the general content of claims**. . . . Whether or not petitioner's individual complaint alleged the same securities law violations as the class-action complaint, **it defies ordinary understanding to suggest that its filing — in a separate forum, on a separate date, by a separate named party — was the same "action," "proceeding," or "suit."** The limitless nature of petitioner's argument, furthermore, reveals its implausibility. It appears that, in petitioner's view, the bringing of the class action would make any subsequent action raising the same claims timely. Taken to its logical limit, an individual action would be timely even if it were filed decades after the original securities offering — provided a class-action complaint had been filed at some point within the initial 3-year period. Congress would not have intended this result. . . . If the filing of a class action made all subsequent actions by putative class members timely, there would be no need for tolling at all. . . . If the filing of the class action "brought" any included individual actions, it would have sufficed for the [*American Pipe*] Court to note the date on which the class action was filed and deem all subsequent individual actions proper, regardless when filed.

Id. at 15 (emphasis added).

The 5-4 *ANZ* opinion was written by Justice Kennedy, with Justices Ginsburg, Breyer, Sotomayor and Kagan dissenting on the grounds that the Court's decision cut off the right to opt out.

https://www.supremecourt.gov/opinions/16pdf/16-373_pm02.pdf

Corporate Personal Jurisdiction

The U.S. Supreme Court, in *Bristol-Myers Squibb Co. v. Superior Court of Calif.*, No. 16-466 (U.S. June 19, 2017), restricted personal jurisdiction over corporate defendants for the second time this Term, this time **finding no specific jurisdiction** (i.e., jurisdiction arising from the facts of the claim rather than the company's general presence in a state) **over claims by out-of-state plaintiffs against out-of-state defendants over actions taken outside the state**. While the case dealt with mass actions rather than class actions, and **did not decide the limits of federal court jurisdiction**, and while the Court couched its analysis in terms of its "settled principles regarding specific jurisdiction," slip op. at 7, it raises **significant unresolved questions about jurisdiction in national class actions**.

Bristol-Myers Squibb involved a products-liability suit against a pharmaceutical company over a drug; the company's headquarters, incorporation and about half of its employees were located in New York and/or Delaware, although it also had facilities in California. The company was sued in California state court by a group of plaintiffs, 80 percent of whom were out-of-state residents, based on its out-of-state conduct. The Court **decided the jurisdictional question on a motion to dismiss on the basis of the facts alleged**:

> [Defendant] did not develop [the drug] in California, did not create a marketing strategy for [the drug] in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. . . . [Defendant] instead engaged in all of these activities in either New York or New Jersey. . . . But [Defendant] does sell [the drug] in California. Between 2006 and 2012, it sold almost 187 million. . .pills in the State and took in more than $900 million from those sales. . . . This amounts to a little over one percent of the company's nationwide sales revenue. . . . A group of plaintiffs — consisting of 86 California residents and 592 residents from 33 other States — filed eight separate complaints in California Superior Court, alleging that [the drug] had damaged their health. . . . All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. . . . The nonresident plaintiffs did not allege that they obtained [the drug] through California physicians or from any other California source; nor did they claim that they were injured by [the drug] or were treated for their injuries in California.

Id. at 2 (emphasis added; citations omitted).

The Court began by noting that personal jurisdiction is not only a matter of inconvenience for the defendant, but also a substantive issue of federalism and the limitations of state power over conduct and parties outside its borders: "at times, this federalism interest may be decisive." *Id.* at 6-7. The lower California courts had upheld general jurisdiction, but following the Court's decision in *Daimler AG v. Bauman*, vacated that finding but affirmed on specific jurisdiction instead. Nonetheless, the California Supreme Court found specific jurisdiction based on a "sliding scale" that considered the company's general contacts with the state, thus blurring the line between general and specific jurisdiction that the *Daimler* Court had drawn clearly. *Id.* at 3. The Court rejected this effort:

> [T]he California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. . .
>
> The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed [the drug] in California, did not purchase [the drug] in California, did not ingest [the drug] in California, and were not injured by [the drug] in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California — and allegedly sustained the same injuries as did the nonresidents — does not allow the State to assert specific jurisdiction over the nonresidents' claims. . . . This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient — or even relevant — that [Defendant] conducted research in California on matters unrelated to [the drug]. What is needed — and what is missing here — is a connection between the forum and the specific claims at issue.

Id. at 7-8 (bold added; italics in original; citations omitted). Notably, the Court cited for support its 2014 decision in *Walden v. Fiore*, which involved an individual Georgia defendant sued in Nevada *by Nevada residents* for conduct occurring entirely in Georgia, **suggesting that today's decision may not be limited**

solely to claims by out-of-state plaintiffs. *Id.* at 8-9. However, that likely depends on the nature of the claim asserted; here, the court observed without deciding that "the plaintiffs who are residents of a particular State. . . could probably sue together in their home States." *Id.* at 12. The court **distinguished a libel case involving a national publication that caused harm in states where the magazine circulated**. *Id.* at 9-10.

Of more direct interest to class action practitioners, the Court distinguished its decision in *Phillips Petroleum v. Shutts* as being irrelevant to personal jurisdiction over class action defendants:

> [T]he Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. . . . **Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here**. . . . Phillips did not assert that Kansas improperly exercised personal jurisdiction over it, and the Court did not address that issue. Indeed, the Court stated specifically that its "discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class."

Id. at 10-11 (bold added; italics in original; citations omitted). The Court did, however, explicitly reserve for another day decision on the application of today's decision to suits in federal court: "our decision concerns the due process limits on the exercise of specific jurisdiction by a State, **we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court**." *Id.* at 12 (emphasis added).

Finally, the Court rejected the plaintiffs' argument that the defendant's use of a California company as national distributor for the drug was a sufficient basis for jurisdiction, noting:

> [I]t is not alleged that [Defendant] engaged in relevant acts together with [the distributor] in California. Nor is it alleged that [Defendant] is derivatively liable for [the distributor]'s conduct in California. And the nonresidents have adduced no evidence to show how or by whom [the drug] they took was distributed to the pharmacies that dispensed it to them. . . . See Tr. of Oral Arg. 33 ("It is impossible to trace a particular pill to a particular person . . . . It's not possible for us to track particularly to [the distributor]").

Id. at 11-12 (emphasis added; citations omitted). The court emphasized, however, that "[o]ur decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over" the defendant, thus providing plaintiffs who wish to bring nationwide litigation in a single jurisdiction to sue defendants in their own home courts, rather than in the most plaintiff-friendly jurisdiction. *Id.* at 12.

Justice Sotomayor again dissented alone, as she has done in the Court's other recent decisions on personal jurisdiction.

A team of Sidley lawyers, including Mark Haddad, Alycia Degen, Charlie Sarosy in Los Angeles, Naomi Igra in San Francisco and Carter Phillips and Rebecca Wood in Washington, D.C., filed an amicus brief supporting the defendant.

https://www.supremecourt.gov/opinions/16pdf/16-466_1qm1.pdf

Class Action Appeals

The U.S. Supreme Court, in *Microsoft Corp. v. Baker*, No. 15-457 (U.S. June 12, 2017), held that plaintiffs may not dismiss their claims with prejudice and then appeal the denial of class certification once a Rule 23(f) appeal has been denied. The Court concluded that the tactic of dismissing with prejudice (subject to renewing them if the denial class certification was reversed on appeal) to obtain a final judgment, rather than litigating their individual claims on the merits, stripped the appeals courts of jurisdiction under 28 U.S.C. § 1291. Justice Ginsburg's opinion concluded that this "tactic would undermine §1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." Slip op. at 2. Among other things, the Court offered its first extended review of Rule 23(f) of the Federal Rules of Civil Procedure, now the primary vehicle for appellate review of decisions granting or denying class certification, and offered some thoughts in dicta that may influence future readings of Rule 23(f).

The Court first reviewed the death of its old "death knell" doctrine for interlocutory appeals, which it had abolished in 1978 as unworkable and unduly favorable to plaintiffs, and the background of the 1998 adoption of Rule 23(f), noting that the competing policy considerations embodied by the Rule would be undermined by a return to something like the pre-1978 practice:

> This resolution [by Rule 23(f)] was the product of careful calibration. By removing the power of the district court to defeat any opportunity to appeal, **the drafters of Rule 23(f) sought to provide significantly greater protection against improvident certification decisions than §1292(b) alone offered**. . . . But the drafters declined to go further and provide for appeal as a matter of right. A right to appeal would lead to abuse on the part of plaintiffs and defendants alike, the drafters apprehended, increasing delay and expense over routine class certification decisions unworthy of immediate appeal. . . . Rule 23(f) therefore commits the decision whether to permit interlocutory appeal from an adverse certification decision to the sole discretion of the court of appeals.
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> . . . Repeatedly we have resisted efforts to stretch §1291 to permit appeals of right that would erode the finality principle and disserve its objectives. . . . Attempts to secure appeal as of right from adverse class-certification orders fit that bill. . . . Because respondents' dismissal device subverts the final-judgment rule and the process Congress has established for refining that rule and for determining when nonfinal orders may be immediately appealed. . . the tactic does not give rise to a "final decisio[n]" under §1291.
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> Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff had adequate incentive to continue despite the denial of class certification. . . . Appellate courts lack even that authority under respondents' theory. Instead, **the decision whether an immediate appeal will lie resides exclusively with the plaintiff**; she need only dismiss her claims with prejudice, whereupon she may appeal the district court's order denying class certification. And, as under the death-knell doctrine, **she may exercise that option more than once, stopping and starting the district court proceedings with repeated interlocutory appeals**.
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> . . . Respondents' theory permits plaintiffs only, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the "class issue" may be just as important to defendants.

Id. at 7, 12-13, 17 (emphasis added; quotations and citations omitted). The Court stressed that innovations in procedure should come from the rulemaking process, which is entitled to some degree of judicial deference:

> **These changes are to come from rulemaking...not judicial decisions in particular controversies or inventive litigation ploys**. . . . In this case, the rulemaking process has dealt with the matter, yielding a measured, practical solution to the questions whether and when adverse certification orders may be immediately appealed. . . . Over years the Advisory Committee on the Federal Rules of Civil Procedure studied the data on class-certification rulings and appeals, weighed various proposals, received public comment, and refined the draft rule and Committee Note...Rule 23(f) reflects the rulemakers' informed assessment, permitting. . . interlocutory appeals of adverse certification orders, whether sought by plaintiffs or defendants, solely in the discretion of the courts of appeals. **That assessment warrants the Judiciary's full respect.**

Id. at 15 (emphasis added; quotations and citations omitted).

Two comments by the Court are noteworthy for class action practitioners. The Court quoted the Advisory Committee's Note on the reasons for allowing Rule 23(f) appeals, and rather than endorse any particular rule, the Court emphasized that "the Rule allows courts of appeals to grant or deny review on the basis of *any* consideration." *Id.* at 8 (italics in original; quotation omitted). **This suggests, without deciding, that the Court sees the standards adopted by various Circuits for reviewing Rule 23(f) petitions as merely advisory guidelines**. Second, the district court in *Baker* had struck the class certification allegations on the grounds that the case (a consumer fraud suit) was effectively the same as a prior case in which certification had been denied. The Court endorsed, in a footnote, the view that "**[a]n order striking class allegations is functionally equivalent to an order denying class certification and therefore appealable under Rule 23(f)**." *Id.* at 9 n. 7 (emphasis added; quotation omitted).

The Court noted that its decision held the plaintiffs to the consequence of their procedural choices:

> Respondents then had several options. They could have settled their individual claims like their. . . predecessors or petitioned the District Court, pursuant to §1292(b), to certify the interlocutory order for appeal. . . . They could also have proceeded to litigate their case, mindful that the District Court could later reverse course and certify the proposed class. See Fed. Rule Civ. Proc. 23(c)(1)(C). . . . Or, in the event the District Court did not change course, respondents could have litigated the case to final judgment and then appealed. . . . Instead of taking one of those routes, respondents moved to dismiss their case with prejudice.
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> . . . Plaintiffs in putative class actions cannot transform a tentative interlocutory order. . . into a final judgment within the meaning of §1291 simply by dismissing their claims with prejudice — subject, no less, to the right to "revive" those claims if the denial of class certification is reversed on appeal.

Id. at 9-10, 16 (emphasis added; citations omitted).

Justice Thomas, joined by Chief Justice Roberts and Justice Alito, concurred on the grounds that the dismissal with prejudice had eliminated the appeals court's Article III jurisdiction, an issue not addressed by the 5-Justice majority opinion.

https://www.supremecourt.gov/opinions/16pdf/15-457_6j37.pdf

<u>Supreme Court Takes More Securities Cases</u>

Concluding its October 2016 Term, the U.S. Supreme Court took two cases of note for securities practitioners for next fall's docket. First, the Court granted certiorari in No. 15-1439, *Cyan, Inc. v. Beaver County Ret. Sys.*, regarding whether **SLUSA's amendments to the 1933 Act's anti-removal provisions** either eliminated state-court jurisdiction over 1933 Act claims or allowed such claims to be removed. The Solicitor General (SG) had filed a brief, at the invitation of the Court, in early June arguing for a grant to resolve this issue, which has divided lower courts and would otherwise tend to evade review. The SG argued that the SLUSA amendments did not strip state courts of jurisdiction over 1933 Act cases, but did allow defendants to remove covered class actions that include 1933 Act claims:

> Section 77p(c) is best understood to permit removal of "any covered class action brought in any State court involving a covered security" and alleging the type of misconduct that is described in Section 77p(b) — i.e., "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b) and (c). With respect to the state-law suits that are precluded altogether by Section 77p(b), Congress authorized removal under Section 77p(c) in order to ensure that the preclusion determination could be made by a federal court if the defendant so requested. **Because Congress was unwilling to leave those preclusion determinations to state courts alone, it would not likely have denied defendants access to a federal forum for adjudication of the merits of analogous 1933 Act claims.**

Brief for the United States as Amicus Curiae, at 14 (emphasis added). In light of the time-sensitive nature of removal decisions, defendants currently facing such claims in state court should consider carefully the impact of the grant of certiorari.

http://www.scotusblog.com/wp-content/uploads/2017/05/15-1439-CVSG-Cyan-Inc-Ac-Pet.pdf

The Court also granted certiorari in *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, to **resolve a Circuit split over whether Dodd-Frank's whistleblower protections** apply to alleged whistleblowers who **do not report their concerns to the SEC**.

<u>Disclosure of Interim Financial Information</u>

The Second Circuit, in *Stadnick v. Lima*, No. 16-65-cv (2d Cir. June 21, 2017), sharpened a Circuit split with the First Circuit by holding that the failure to disclose interim financial information is governed by the *TSC* "significantly altering the total mix of information" test and not by the First Circuit's "extreme departure" from prior results test. Slip op. at 12-13 (citations and quotations omitted).

Stadnick involved an IPO for a solar energy business with a complex financial structure involving both public shareholders and "non-controlling interests" (NCIs) who invested for purposes of generating certain loss-creating tax credits; "[d]ue to [the issuer's] business model and [accounting] method, the allocation of income (a net loss in each quarter during the relevant period) between shareholders and NCIs may vary substantially from one quarter to the next." *Id.* at 7. The complaint alleged that the quarter ending the day before the IPO had featured a sharp drop in shareholder income, from 7 cents per share to negative 45 cents per share, "resulting in [the issuer] missing analyst projections by 143%" and a stock drop of more than 20% when the quarterly results were disclosed. *Id.* at 7, 9-10.

The Second Circuit affirmed the dismissal, on materiality grounds, of Section 11 and 12 claims on a Rule 12(b)(6) motion under Rule 8, finding it unnecessary to determine whether Rule 9(b) applied. *Id.* at 10-11 & n. 2. The court noted that the issuer's failure to disclose the interim results did not violate Regulation S-X, and thus the only issue was whether the omission rendered the existing statements misleading. *Id.* at 12.

The Second Circuit adhered to its prior *DeMaria v. Anderson* standard, and explicitly rejected the competing standard from *Shaw v. Digital* on the grounds that it failed to place variations in some company metrics in their proper context:

> There is good reason not to adopt the "extreme departure" test when assessing the materiality of a registration statement's omissions. First, *DeMaria* rests upon the classic materiality standard in the omission context, with which we and most other courts are familiar. Second, upon close examination, *Shaw's* "extreme departure" test leaves too many open questions, such as: the degree of change necessary for an "extreme departure"; which metrics courts should look to in assessing whether such a departure has occurred; and the precise role of the familiar "objectively reasonable investor" in assessing whether a departure is extreme. And third, in some situations the "extreme departure" test can be analytically counterproductive.
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> This very case illustrates the unsoundness of the "extreme departure" test. [Plaintiff] argues that changes in two metrics — income available to shareholders and earnings-per-share — over just three quarters represent an "extreme departure." To be sure, these traditional metrics, standing alone, lend support to [Plaintiff]'s claim. **But the two metrics identified by [Plaintiff] are not fair indicators of [the issuer]'s performance**. Their fluctuation is attributable to the normal operation of the company's business model, in which the allocation of income. . . is subject to the vagaries of the timing of transactions between [the issuer] and the NCI funds. **The "extreme departure" test makes little sense in this context and confuses the analysis**. . .
>
> . . . A more accurate indicator of the company's performance, however, is [the issuer's] *total* revenue and *total* income (available to both shareholders and NCIs). . . .

Id. at 16-18 (bold added; italics in original). Significantly, the court found that the drop in net income to shareholders in the interim financial results was not material "even according to the variables identified by [plaintiff] if we examine them over the entire period for which [the company] disclosed information" because it was "**consistent with a pattern of fluctuation**":

> Not only was the fluctuation substantial but, prior to the third quarter of 2014. . . neither variable fluctuated in the same direction for two successive quarters; in other words there was never a trend of the shareholders' income increasing or decreasing. A reasonable investor, therefore, would not have harbored any solid expectations based on prior performance as to [the issuer]'s third quarter 2014 performance as measured by the two metrics identified by [Plaintiff].

Id. at 18-19 (emphasis added).

https://perma.cc/2LJN-T4SA

In *Raymond J. Lucia Cos. v. SEC*, No. 15-1345 (D.C. Cir. June 26, 2017), the D.C. Circuit, by summary order, divided evenly on whether the SEC's Administrative Law Judges are unconstitutionally appointed:

https://perma.cc/FSL4-8EBH prior opinion
https://www.cadc.uscourts.gov/internet/opinions.nsf/734145190388E52D8525800A004F00CF/$file/15-1345-1629279.pdf

In February, the D.C. Circuit had agreed to hear this case along with *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177, which is still pending and challenges the CFPB's structure.

Spokeo Standing

The Second Circuit, in *Crupar-Weinmann v. Paris Baguette America, Inc.*, No. 14-3709 (2d Cir. June 26, 2017), **dismissed a putative class action for lack of injury under *Spokeo***. The decision breaks little doctrinal ground and joins a Seventh Circuit opinion under the same statute (the Fair and Accurate Credit Transactions Act (FACTA)), but illustrates the continuing force of the *Spokeo* rule in disposing of class actions, especially in the privacy area. The Second Circuit held "that a receipt with a credit card expiration date does not raise a material risk of identity theft, and finding that the bare procedural violation alleged by the plaintiff does not present a material risk of harm." Slip op. at 3.

https://perma.cc/DC4Y-GAX5

Article III Standing for Intervenors

The U.S. Supreme Court, in *Town of Chester v. Laroe Estates, Inc.*, No. 16-605 (U.S. June 5, 2017), held that **intervenors as of right under Fed. R. Civ. P. 24(a)(2) must have Article III standing for each independent claim for relief**. The unanimous decision continues the Court's stringent application of Article III standing on a party-by-party and claim-by-claim basis:

At least one plaintiff must have standing to seek each form of relief requested in the complaint. . . . For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.

Slip op. at 5-6 (emphasis added). This conclusion raises tensions with the Second Circuit's "class standing" rule, which the Court has thus far not taken a case to resolve.

https://www.supremecourt.gov/opinions/16pdf/16-605_kjfl.pdf

Trusts and Diversity Jurisdiction

The Second Circuit, in *Raymond Loubier Irrevocable Trust v. Loubier*, No. 15-802-cv (2d Cir. June 1, 2017), held that — even after the Supreme Court's *Americold* decision — the citizenship of a trust for diversity purposes is determined by the trustee, not the beneficiaries, when such trusts are "traditional trusts establishing only fiduciary relationships and having no legal identity distinct from their trustees" rather than legal business entities like REITs. Slip op. at 5.

[T]he rule reiterated by the Supreme Court. . . — ascribing to an unincorporated entity the citizenship of all its members — may apply to any number of trusts recognized in law as distinct juridical entities. But it does not apply to a traditional trust that establishes only a fiduciary relationship and that cannot sue or be sued in its own right. . . . In cases involving traditional trusts, and absent anything to the contrary in either the trust instruments or state law, a party does not really have the option of suing either the trust in its own name or its trustee. The action can be maintained only against the trustee. We do not understand *Americold* to hold that where a

traditional trust is mistakenly identified as a party even though, by its nature, it can only sue or be sued in the name of its trustee, diversity jurisdiction is properly identified by reference to persons other than the trustee. It is precisely because traditional trusts cannot sue or be sued except through their trustees that the named party trusts must be deemed only proxies for their trustees and, thus, it is the trustees' citizenship that must inform any diversity determination.

Id. at 23, 29.

https://perma.cc/864K-2LAJ

Jurisdictional Discovery

The Second Circuit, in *Funk v. Belneftekhim*, 15-3372-cv (2d Cir. June 29, 2017), held that sanctions for failure to respond to jurisdictional discovery under the Foreign Sovereign Immunities Act may not include striking the sovereign immunity defense, because immunity is jurisdictional, and a court may not assert subject matter jurisdiction as a sanction.

https://perma.cc/YMS6-DHSH

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

James Heyworth
Partner
jheyworth@sidley.com
+1 212 839 6785

Alex J. Kaplan
Partner
ajkaplan@sidley.com
+1 212 839 5839

Daniel A. McLaughlin
Counsel
dmclaughlin@sidley.com
+1 212 839 5823

Tom A. Paskowitz
Partner
tpaskowitz@sidley.com
+1 212 839 5832

A. Robert Pietrzak
Partner
rpietrzak@sidley.com
+1 212 839 5537

Dorothy J. Spenner
Partner
dspenner@sidley.com
+1 212 839 7375

Andrew W. Stern
Partner
astern@sidley.com
+1 212 839 5397

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