Securities Claims Filings and Settlement Trends

Jo Fricano, AVP Claims Practice Leader
QBE Insurance Company
Securities Class Action Filings

Nearly double the 1997-2007 Average

403

Second largest year on record

Cornerstone Research, Securities Class Actions Filings – 2018 Year in Review
Let’s Break it Down

221
Core Filings

182
M&A Filings
M&A Filings

Second largest filings since 2009

Are we really talking about...
Securities Filings

M&A Filings

Trulia Decided January 22, 2016
Core Filings 182 Highest since the 223 filings in 2008
Emerging Plaintiffs Firms

The Rosen Law Firm

Pomerantz LLP

Glancy Prongay & Murray LLP
Emerging Plaintiffs Firm Core Filing Activity vs. Overall Core Filings
Lead Plaintiff/Counsel
• More individuals being appointed as lead plaintiff in core filings
• Individuals appointed as lead plaintiff in 60% of the core filings in 2017 and 2018
• Typically appointed as lead counsel for smaller cases

Filing Lag
• 11 days in 2018
• Median filing lag for 1997-2017 is 23 days

Dismissal
• Percentage of cases dismissed in the first year for the 2017 cases was the highest on record
• 51% of class action dismissed compared to 43%
Who are the Targets?

• Increased activity in Communications and Consumer Cyclical Sectors
  – Communications = 28 (most since 2007)
  – Consumer Cyclical = 29 (most since 2005)

• Decreased activity in Consumer Non-Cyclical Sector
  – 68 compared to 85 in 2017, yet remain above the historical average of 49 for 1997–2017
What do the Numbers Look Like?

• DDL = $330B (highest on record)
  – 152% increase relative to 2017
  – Mega filings = 17 (64%) of DDL vs. 7 (36%) in 2017
  – 17 Mega filings = $212B of total DDL vs. $47B in 2017

• MDL = $1.3T (3rd largest year on record)
  – 150% increase relative to 2017
  – Mega filings = 27 (73%) of MDL vs. 14 (49%) in 2017
  – 27 Mega filings = $963B of total MDL vs. $253B in 2017

• Median stock price drop decreasing at the end of the class period
  – Lowest levels in 2018
$5B

Cornerstone Research, Securities Class Action Settlement – 2018 Review and Analysis
Securities Settlements

5 Mega Settlements = $110M to $3B

- Petrobas - $3B
- Wells Fargo - $480M
- Allergan, Inc. - $250M
- Wilmington Trust Corporation - $210M
- Lending Club Corporation - $125
Securities Settlement

- 32 settlements between $10M-$49M = 60% increase
- Average Settlement Amount = Tripled to $64.9M
  - $18.7M in 2017
  - 44% higher than 9 year average
- Median Settlement Amount = Doubled to $11.3M
- Settlements less than $5M = Declined nearly 40% from 40 in 2017 to 25
Simplified Tiered Damages

- Median increased 88% from 2017
- Correlated with stock market volatility
  - > 50% of the cases settled were filed in 2015 and 2016
- Correlated with class period
  - 13% longer than 2017
- Higher Simplified Tiered Damages = larger issuer defendants
  - $829M median issuer total assets = 50% higher than 2017
Simplified Tiered Damages

- Larger cases = smaller % of simplified tiered damages
- Median settlement as a percentage of simplified tiered damages
  - Up to 6% from 5.1% in 2017
  - Decreased > 50% from 29% to 14% for the smallest cases
- Smaller cases - settled more quickly
  - < $25M = 2.9 years
  - > $500M = 4.5 years
Securities Settlements

- Accounting Allegations
- Institutional Investors
- SEC Actions
- Derivative Actions
Accounting Allegations

• GAAP Violations = 45%
  – Continues 4 year decline from high of 67% in 2017

• Restatements
  – High settlements as a percentage of simplified tiered damages
  – 11.3% median settlement with restatement
  – 5.1% for cases without
Institutional Investors

• Cases with higher simplified tiered damages
• Median total assets for issuer defendants
  – $1.6B v. $328M in cases without
• Pension plan lead plaintiff
  – Median simplified tiered damages = $689M vs $213M in cases without
  – Proportion of 2018 settlements = lowest in the last decade
Derivative Actions

• Median simplified tiered damages
  – $480M vs. $47M in cases without

• Median settlement amount
  – $18M vs. $5M in cases without

• Public pension plan as lead plaintiffs
  – 88% = highest level in a decade
SEC Actions

• Number of cases settled with corresponding SEC action remains relatively stable

• Larger issuer defendants
  – $946M vs $653M in cases without an SEC action

• Associated with distressed firms
  – 54% = highest in the past decade
Timing of Settlement

• After MTD but pre decision
  – $7.9M median settlement

• After a ruling on MTD
  – Median assets almost 100% larger

• After Motion for Class Cert file but pre-ruling
  – $12.6M before vs $18M after ruling (2014-2018)

• After Motion for Summary Judgment
  – Median simplified tiered damages = > 4X than cases settled prior to filing
Timing of Settlements

• Within 2 years of filing
  – 21% of cases
  – 12% higher than 5 year average
  – Median simplified tiered damages of $67M vs $319M for cases taking longer than 2 years
  – Higher attorneys fees as a % of settlement fund

• More than 5 years
  – 15% of cases
  – >80% had accompanying derivative actions
  – Median assets of defendant firms = twice as large
### Securities Settlements

#### Volume Business??

<table>
<thead>
<tr>
<th>Rank By No. of Settlements</th>
<th>Rank by Settlement Amount</th>
<th>Law Firm</th>
<th>Total Settlement Amount</th>
<th>Number of Settlements</th>
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<tr>
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<td>1*</td>
<td>Pomerantz</td>
<td>$3,272,250,000</td>
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<td>4</td>
<td>19</td>
<td>The Rosen Law</td>
<td>$58,583,865</td>
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<td>6</td>
<td>Glancy Prongay &amp; Murray</td>
<td>$181,950,000</td>
<td>12</td>
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</tbody>
</table>

* Pomerantz drops to 4 if remove the Petrobas settlement

ISS Securities Class Action Services, *The Top 50 of 2018*
Section 14a/10b Claims

Is This a New Trend?

• Differing liability standards
  – 10b – scienter
  – 14a – negligence or scienter?

• Differing damages models
  – 10b – DDL and MDL
  – 14a – what is the model?

• Which tower should respond?
  – Successor’s tower
  – Run-off tower
  – Both???
The D&O IPO Market: The return of rate?

Kelly A. Dworniczek, Esq.
What could be driving the rate environment in the D&O IPO Market?

- A tightening in available capacity;
- The speculative nature of Tech IPO valuations;
- The different standards of Section 11 of the ’33 Act;
- The *Cyan* decision;
- The irresistibility of huge IPOs to the plaintiffs’ bar.
Tightening in available capacity:

- Challenged rate and high frequency have led to program shifts and refinements.
- IPOs have always been among the most difficult of risks.
- Current IPOs include record numbers of exceptionally large, headline risk accounts.
- In 2018, 42% of all IPOs were Biotech/Pharma companies, 44% of all IPOs disclosed a material weakness and 81% of EGCs take advantage of JOBS Act scaled financial disclosures.
The Strict(ish) Liability Standard of Section 11 of the '33 Act:

- No “scienter” or knowledge requirement as in traditional SCAs.
The speculative nature of Tech IPO valuations

• A lot of the value and products offered by Tech companies are intellectual property or intangible assets.

• The push for “unicorn” status.
The impact of *Cyan* on risk assessment:

- Parallel state and federal litigation tracks.
- State court risks: Non-uniform procedural protections and lower dismissal rates.
- Race to judgement?
- *Forum selection clauses in by-laws.*
Irresistibility to Plaintiffs’ bar

- Huge IPOs = big potential damages subject to a lower standard for liability.

- 2\textsuperscript{nd} Tier Plaintiffs Firms may create an environment where cases that would not usually be brought are being pursued.
Event-Driven Securities Litigation

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What is event-driven securities litigation?

• Generally defined as securities litigation that is based on an adverse event or series of events within a company.
  – Compare with traditional securities litigations that are based on an accounting restatement or financial misrepresentation.

• Examples:
  – Boeing (737 MAX issues)
  – PG&E (wildfires)
  – Cigna (citations for regulatory non-compliance by CMS)
Is this a new phenomenon?

- We’ve seen waves of event-driven claims in the past, some of which are ongoing:
  - Stock options backdating cases
  - Financial crisis litigation (beginning in 2007)
  - Stockholder litigation following events that have occurred or which regularly occur across an industry (e.g., food safety cases; FDIC/CFPB regulation of credit-card add on products; regulatory action involving healthcare/pharma companies)

- And we continue to see waves of claims now:
  - Stockholder litigation related to opioid crisis
  - Recent stockholder litigation following anti-trust industry sweeps (e.g., broiler chicken price-fixing actions; generic drug price-fixing actions)
  - Cryptocurrency-related actions following scrutiny by SEC
If event-driven securities litigation isn’t new, why so much buzz?

• Rapid growth in number of plaintiffs’ firms has resulted in an increase in the sheer volume of claims.

• Substantial plaintiffs’-style damages in some cases, even where it is difficult to identify a false and misleading statement or an actionable omission.

• Publicity around the underlying phenomena (such as #MeToo) has resulted in greater industry sensitivity to and wariness of litigation risks.
Event-Driven Securities Litigation

How much of a threat do these matters pose?

• Although some types of event-driven claims have gotten a lot of attention, the number of claims within those categories remains relatively small:
  – Cyber claims
  – #MeToo litigation

• Moreover, many of the most severe claims have been driven by something very specific to the company itself. Examples:
  – Yahoo! data breach litigation ($80 million securities class action settlement; $29 million derivative action settlement)
  – 21st Century Fox hostile work environment litigation ($90 million settlement of derivative action)
How do you underwrite for these claims?

• Impossible to anticipate every risk that a company may face.
• But there are some ascertainable trends:
  – Industries with regulatory risk (pharma, cryptocurrencies)
  – Section 11 cases in the wake of Cyan
  – Acquisition-related litigation (post-merger integration risks and compliance risks)
• Although securities class actions have gotten a lot of attention, don’t forget about derivative litigation risk!
  – Look at composition of board, governance culture, and attention to compliance.
I. Introductory remarks (Joel Vander Vliet) 5 minutes

II. Claims and Settlement Trends (Johanna Fricano) 35 minutes

A. Cornerstone 2018 Year in Review
   1. Overview of Findings
      a. Total number of filings
         i. Core Filings v. M&A
      b. Where are the cases filed?
         i. 2nd & 9th Circuit
         ii. M&A – 2nd and 3rd Circuits
      c. When are the cases filed?
         i. 11 day filing lag
      d. MDL &DDL & Mega Filings
         i. DDL – dollar value change in the defendant’s firm’s market capitalization between the trading day immediate proceeding the end of the class period and the trading day immediately following the end of the class period
            1. $330B – 174% above the 1997-2017 average
         ii. MDL – dollar value change from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period
            1. $1.3T
            2. Increase of 152% relative to 2017
   2. Who is Being Sued?
      a. Percent of US exchanged listed companies
         i. Increased for the 6th consecutive year
         ii. 1 in 22 subject to a core filing
         iii. 8.4% including M&A filings
      b. Industry
i. Increase in technology and communications
ii. Consumer non-cyclical sector
   1. Doug Green article regarding dismissal rates

3. 33 Act Claims
   a. Cyan brief overview
   b. State court filings
   c. Parallel filings
   d. Dismissal rates

4. Looking Behind the Numbers
   a. Are the numbers really climbing?
   b. Move from state to federal court

5. Let’s Talk About the Plaintiffs Firms
   a. Filings by lead Plaintiff
   b. Appointment of Plaintiff Lead Counsel
   c. Emerging Plaintiffs Firms
   d. Dismissal and settlement rates based on Plaintiffs firms

B. Cornerstone 2018 Settlement Review
   1. Overview of 2018 Settlements
      a. 78 settlements approved in 2018
      b. Total settlement dollars up
      c. 5 mega settlements (> $100M)
         i. Ranged from $110M to $3B
      d. Average settlement amount tripled
         i. $65M compared to $18.7M in 2017
         ii. Up 44% over the past 9 years
      e. Simplified Tiered Damages
         i. Median settlements as a percentage of simplified tiered damages
         ii. Correlation with timing of settlement

2. Settlement Characteristics
   a. Continued decline in GAAP case
   b. Restatement cases settled for higher amounts
   c. Settlements higher for cases with companion derivative cases
   d. Institutional investors
   e. Impact of SEC actions

3. Timing of Settlements
   a. Lower settlements pre MTD ruling
   b. After MTD filed but pre-ruling
   c. After class cert filed but pre-filing
   d. After filing of MSJ
   e. Cases settling within 2 years of filing
      i. 21% of cases (12% increase)
      ii. Lower simplified tiered damages ($67M)
      iii. High attorney fees as a percentage of the settlement fund
f. 15% of case took more than 5 years to settle
   i. 80% had derivative actions
   ii. Median assets were more than twice as large as other cases
C. New Trend? Post-Merger 14a/10b Actions
   1. Over of Suits
      a. Post-merger litigation
      b. Plaintiffs bring claims relating to pre-merger proxy and post-merger representations
   2. Issues
      a. Two classes of plaintiffs firms
      b. Two class reps/counsel?
      c. 14a v. 10b liability issues
         i. 14a arguably easier to prove as compared to 10b scienter
   3. Underwriting/Coverage Considerations
      a. Prior Acts
      b. Successor entity coverage
      c. Run-off
      d. Capacity

III. Emerging Trends in Underwriting: Event Based, Derivative, Cyber (Kelly Dworniczek) 35 minutes

A. Financial Underwriting v. Emerging Claim Trends
   1. What is financial underwriting, what was it pretended to detect and how has that practice endured in the current claim environment?
   2. What is driving claims now? Does frequency tell the whole story? Where are the accounting cases? How does dismissal rates, sector and types of claim shift those net numbers?
B. Cyber cases and D&O exposure
   1. How have data breach claims expanded the scope of D&O coverage? (Hint: It hasn’t)
   2. Have data breach claim been the significant D&O event we have all feared? Will it be?
      a. Target
      b. Equifax
      c. Marriott
      d. Google
   3. Is the minimal level of standard of care changing in the C-Suite relative to data breach representations and required security?
   4. Can and will the regulators get involved?
C. Event based?
   1. What is it for underwriters? Things you cannot underwrite to.
   2. Vulnerabilities and exacerbations
   3. How can we try to mitigate risk?
D. Derivative Litigation
   1. What is it?
a. Who is plaintiff, what are the damages?
b. Who actually gets the money?
c. The above categories represent the headline grabbing poster children.
2. How has it changed from the good old days of tag-alongs?
3. Wells Fargo, 21st Century Fox (Boeing? Facebook?)
4. A-Side ain’t free money anymore, especially in mega caps with headline risk.

IV. Event-driven Securities Litigation (Nilofer Umar) 35 minutes

A. What is it?
   1. Securities litigation that is filed based on an adverse event or series of events within the company – as opposed to an accounting restatement or financial misrepresentation.
   2. Examples:
      a. Boeing
      b. PG&E (wildfires)
B. Why has it increased?
   1. Fewer restatements/financial misrepresentation cases.
   2. Rapid growth in the number of plaintiffs’ firms and willingness of plaintiffs’ bar to file claims where none were previously filed.
   3. Substantial plaintiffs’-style damages in some cases, even where it is difficult to identify a false and misleading statement or an actionable omission.
C. Issues to note from an underwriting standpoint
   1. Difficult to predict these cases
   2. But several trends have emerged:
      a. Cyber cases (Kelly to discuss)
      b. “Me too”/sexual harassment cases.
         (i) Wynn
         (ii) Signet
      c. Cases piggybacking on consumer class actions or adverse regulatory action.
      d. Allegedly false or misleading statements regarding the status/success of post-acquisition integrations.
      e. Rise in Section 11 cases in the wake of Cyan
D. How susceptible are these claims to a motion to dismiss?
   1. While some of these cases are a stretch, many have gotten traction. (Examples)
   2. These claims can also give rise to derivative lawsuits with substantial settlements.
      a. Twenty-first Century Fox

V. Break (20 minutes)

VI. Panel Discussion between Johanna Fricano, Kelly Dworniczek, Nilofer Umar, Randall Baron, and broker (moderated by Joel Vander Vliet) 55 minutes

A. Questions from the audience (on paper or by microphone)
B. Prepared questions for panelists with particular emphasis on perspectives of broker and plaintiffs’ counsel
PLUS MIDWEST CHAPTER AND THE ASSOCIATION OF LLOYD’S BROKERS PRESENT...

THE CHANGING LANDSCAPE OF PUBLIC COMPANY D&O RISK: UNDERWRITING CHALLENGESPOSED BY EVOLVING EXPOSURES

Tuesday, May 14, 2019 | 9-12PM

Chicago Cultural Center
78 East Washington Street, Chicago | Illinois

Speakers

Randall J. Baron, Partner, Robins Gellar Rudman & Dowd LLP | Kelly A. Dworniczek, VP, D&O/Fiduciary Product Manager, AXIS Insurance | Johanna Fricano, AVP, Claims Practice Leader - Public Company & Management Liability, QBE America | Kristin Kraeger, Managing Director, Aon | Nilofer Umar, Partner, Sidley Austin LLP | W. Joel Vander Vliet, Partner, Skarzynski Marick & Black LLP

Our panel of experts will explore the changing landscape of public company D&O risk and the underwriting challenges posed by evolving exposures. Not too long ago, public company D&O underwriting was largely a financial exercise, but the emergence of new exposures presents significant challenges for underwriters, forcing them to think and underwrite differently. Industry experts will present the current state of this ever-changing exposure landscape followed by an engaging panel discussion sharing the underwriting, claims, and broker perspectives, as well as leading plaintiffs’ and defense counsel. 3 hrs of CE have been approved in Illinois; CLE pending approval.

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