



PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

Securities Litigation

Timeline and Views



- Ted (Eleftherios) Stefas is currently the National Directors and Officers (D&O) and Fiduciary Practice Leader at CNA. He was previously a Director at CNA focusing on professional liability insurance, including directors and officers, investment advisors, asset managers, errors and omissions and employment practices liability insurance policies. Prior to that, Ted had worked at several law firms where he managed all phases of complex federal and state litigation involving insurance, reinsurance, commercial and professional liability matters. Ted is a graduate of the Hofstra University School of Law (J.D.) and S.U.N.Y. Geneseo (B.A.).



Speakers – Kevin Patton

Kevin W. Patton is Head of Litigation for Regions Bank. He oversees the Corporate Litigation Group, advises the General Counsel and Deputy General Counsel on corporate governance matters, including shareholder derivative lawsuits and special litigation committees, directs federal and state regulatory investigations and enforcement actions, commercial class actions, civil litigation and arbitration proceedings.

Prior to joining Regions in 2008, Patton was a shareholder at Maynard, Cooper & Gale, PC in Birmingham, Alabama. Patton represented Alabama and national companies in business torts and complex commercial litigation, including winning a \$7.5 million jury verdict in a trial for an Aviation Defense Contractor against an international supplier of flight control cable.

As a carrier-based A-6 Intruder Pilot in the U.S. Navy, Patton flew 42 combat missions in the Gulf War over Iraq. He logged 1250 total flight hours and 275 carrier landings. As Squadron Legal Officer, he managed Non-Judicial Punishment and assisted with Courts Martial.

Patton holds a bachelor's degree from the United States Naval Academy and law degree from the Duke University School of Law. He is a Trustee and former President of the Alabama Chapter of the Naval Academy Alumni Association, and an Elder at the Edgewood Presbyterian Church.

- Regulated at both the federal and state level
- Principal Regulators
 - SEC and FINRA
- Principal Securities Laws
 - Securities Act of 1933
 - Regulates the offer and sale of securities
 - Based on the premise that investors are capable of evaluating the merits of a securities offering if they are provided accurate and complete information regarding the issuer, its securities, and the offering
 - Regulatory oversight is carried about by the SEC
 - Securities Exchange Act of 1934
 - Regulates the registration and public sale of securities and govern the periodic reporting obligations of public companies

- Other Laws
 - Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)
 - Jumpstart Our Business Startups Act (JOBS Act) (2012)
 - Fixing America’s Surface Transportation (FAST Act) Act (12/2015)
- Other Parties
 - National securities exchanges
 - Brokers and dealers
 - Securities Analysts
 - Credit Rating Agencies

- Liability
 - Section 11 and 12
 - Section 11 provides buyers of securities with an express right of action for damages (against persons including the issuer, its officers and directors, underwriters, and experts) if any part of the issuer’s registration statement (when it is declared effective by the SEC) contains an ‘untrue statement of material fact or omit(s) to state a material fact to be stated therein or necessary to make the statements not misleading.
 - Section 12(a)2 covers the prospectus (in addition to oral communications), imposing on any seller potential liability for material misstatements or omissions made by that seller in any prospectus or oral communication in that offer or sale of the issuer’s securities whether or not those securities are exempt from registration.

- Exchange Act – Section 10(b) - Rule 10b-5 - liability for fraud
 - Prohibits
 - an untrue statement
 - of a material fact
 - or omitting to state a material fact, necessary to make the statements made, in light of the circumstances under which they were made, not misleading
 - Also apply to offerings that are exempt from the registration requirements!

- Other Provisions
 - Section 15 – mandates registration of most brokers and dealers
 - Prohibits a broker or dealer from using the means of interstate commerce to effect transactions in securities unless they are registered with the SEC and join a self regulating organization (SRO) and the Securities Investor Protection Corporation
 - Other rules on conduct and financial responsibility
- More Laws
 - Sarbanes-Oxley
 - Requiring certifications on the accuracy and completeness of a company's periodic reports by its principal executive and financial officers, such as the CEO and CFO.
 - Prohibiting personal loans by a company to its executives.
 - Requiring an assessment of a company's internal control procedures for financial reporting.
 - Adopting independence standards for the members of a company's audit committee.
 - Imposing stricter criminal sanctions for fraud.
 - Requiring rotation of audit partners (every five years).
 - Restricting non-audit services by accounting firms that serve as auditors of an issuer.
 - Creating reporting obligations for attorneys in the event of material violations of securities laws.
 - In addition, Sarbanes-Oxley created the Public Company Accounting Oversight Board (PCAOB) to oversee the activities of accounting firms.

- State Securities Regulation
 - Blue Sky Laws
 - When an offering is required at the state level
- Foreign Issuers
 - *Morrison*
 - Becoming a foreign private issuer (FPI)

- PSLRA and FRCP 9(b)
 - Stringent pleading standards
 - Identify each specific statement
 - State particular facts giving rise to a ‘strong inference’
 - Allege and prove the information is false and was the cause of the actual loss suffered
 - Limit damages
 - Sanctions on frivolous lawsuits
 - Stays of discovery pending a ruling on the Motion to Dismiss
 - Adequate Lead Plaintiff
 - Numerous restrictions affecting conduct of class actions
 - ½ of complaints survive the MOD

- Initial Considerations
 - Adequacy of Service
 - Timeliness
 - Particularity
 - Does it fall within the securities laws
 - Subject Matter Jurisdiction
 - Primary Defendants
 - Secondary actors/aiding and abetting
 - Accountants, investment advisers, auditors, underwriters, issuers and broker dealers

- Venue
 - Selection – Section 27 of the Exchange Act Challenge
 - Inhabitant, transacts business, or any act that was a violation
 - Co conspirators
 - Move or transfer
 - Two Year SOL
 - Relation back
 - *American Pipe* – tolling for class action
- Five Year Statute of Repose

- FRCP
 - Short and plain statement stating entitlement to relief
 - Particularity

PLUS Elements and Common Defenses

- Federal Claim
 - A material misrepresentation or omission
 - A connection with the purchase or sale
 - Scienter
 - *Omnicare*
 - Reliance
 - Economic Loss
 - Loss Causation
- State law claims often include
 - State law
 - Common law fraud
 - Aiding and abetting common law fraud
 - Equitable fraud
 - Negligent misrepresentation



PLUS Elements and Common Defenses

- Joint Defense Agreements
- Consolidation of Related Actions
- Coordinating individual defendants
- Class Certification
 - Commonality
 - Predominance
 - Typicality
 - Adequacy
- Class Certification Challenges
 - Proposed lead plaintiff
 - Fraud on the market presumption (stock impact)
 - Showing of Economic Loss

- Pre answer motions
 - Motion to dismiss
 - Motion to strike
 - Motion for a more definitive statement
 - Affirmative defenses
 - Generally require discovery

- ESI and Protective Orders
- Privilege
 - Attorney client privilege
- Confidential Witnesses
- Third Party Subpoenas
- Experts
- Motion for Summary Judgment?

- Courts and Judges
- Preferred Legal Fee Structures
- Funding
 - Insurance
- TRO or Injunction?
- Evidence and privilege
- Trial
- Appeal

- Regulatory Interviews and Investigation
- Disclosure Only Settlements
- Finding of Fault by the SEC
- Actors
 - DOJ
 - SEC
 - FINRA (NASD)
 - IRS
 - OFAC
 - Department of Commerce
 - Commodity Futures Trading Commission
 - Federal Trade Commission (FTC)

- 2016 Topics and Review
 - *Omnicare* and *Sanofi*
 - Small public companies vs. large public companies
 - End of disclosure only settlements for mergers
 - Mega Settlements but nuisance cases down and total settlement dollars are down
 - Higher ‘estimated damages’
 - Record number of case filings
 - Less than 3 years to settle



Shareholder Derivative Suits

- Fiduciary Duties
- By laws Exculpation
- Demand Futility
- Special Litigation Committee

- Breach of Fiduciary Duties
- Inadequate Consideration
- Exposure
- Post closing case
- Majority vs. Minority

- Insured vs. Uninsured amounts
- Timing of payment (Advancement)
- Moving Forward

- In House
- Underwriting
- Brokers



Questions?
