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Saxena White
EXCHANGE

In this Issue

Plaintiffs Defeat Motion to Dismiss in Wells Fargo Shareholder Derivative Action

On May 4, 2017, Judge Jon S. Tigar of the U.S. District Court for the Northern District of California delivered a resounding victory to the plaintiffs in *In re Wells Fargo & Company Shareholder Derivative Litigation*. The court denied the defendants' motion to dismiss with respect to ten out of the eleven counts in the complaint, determining that a majority of Wells Fargo's directors knew about widespread illegal activity occurring at the bank and "consciously disregarded their fiduciary duties to oversee and monitor the company." Saxena White and Lieff Cabraser Heimann & Bernstein are serving as co-lead counsel in the action on behalf of two institutional investors.

The case arose out of Wells Fargo's high pressure sales culture, where bankers were given unreasonably high sales quotas and were threatened with termination if they failed to meet those goals. To avoid being fired, thousands of Wells Fargo employees across the country engaged in a variety of tactics to "game" the system. These tactics were so prevalent at the company that they were given nicknames. "Pinning," for example, involved obtaining a customer's debit card number and setting the PIN without customer authorization, which allowed the banker to enroll the account in online banking and generated a sales credit for the employee.

This high pressure sales culture allowed Wells Fargo to achieve its goal of becoming the industry leader in "cross-selling"—the sale of multiple banking products to the same customer. With its steady quarterly growth in the opening of customer accounts—a key metric in the banking industry—Wells Fargo's share price outperformed its industry peers. The artificially inflated stock price resulted in enormous compensation for the bank's executives. CEO John Stumpf had been the banking industry's highest paid CEO in recent years, and the executive responsible for supervising the company's roughly 6,000 retail branches received total compensation over the past three years exceeding $27 million.

Dubbed "the scandal of the year" by *Wall Street Journal* readers, the resulting fallout has inflicted severe damage on the company and its shareholders. In addition to fines of $185 million assessed by the Consumer Financial Protection Bureau and other agencies, a number of states, including California, Ohio, and Illinois, and the cities of Seattle and Chicago, have suspended doing business with Wells Fargo. A study released last October showed that the bank stands to lose $99 billion in deposits, $4 billion in revenue, and 30% of its customer

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Saxena White Welcomes Steven Singer and Announces Opening of New York Office

In 2017, Steven B. Singer joined Saxena White as the firm's Director of Litigation. Prior to joining the firm, Mr. Singer was employed for more than twenty years at Bernstein Litowitz Berger & Grossmann LLP, a well-known plaintiffs' firm, where he served as a senior partner and member of the firm's management committee. Mr. Singer will work out of Saxena White's new office in White Plains, New York.

During his career, Mr. Singer has been the lead partner responsible for prosecuting many of the most significant and high-profile securities cases in the country, which have collectively recovered billions of dollars for investors. He led the litigation against Bank of America relating to its acquisition of Merrill Lynch, which resulted in a landmark settlement shortly before trial of $2.43 billion, one of the largest recoveries in history. Mr. Singer's work on that case was the subject of extensive media coverage, including numerous articles published in *The New York Times*. He also has substantial trial experience and was one of the lead trial lawyers in *In re WorldCom, Inc. Securities Litigation*, which settled for more than $6 billion after a four-week jury trial.

In addition, Mr. Singer has been lead counsel in numerous other actions that have resulted in substantial settlements, including cases involving Citigroup Inc. ($730 million, representing the second largest recovery in a case brought on behalf of bond purchasers), Lucent Technologies ($675 million), Mills Corp. ($203 million), WellCare Health Plans ($200 million), Satyam Computer Services ($150 million), Biovail Corp. ($138 million), Bank of New York Mellon ($180 million), and JP Morgan Chase ($150 million).

Mr. Singer has been consistently recognized by industry observers for his legal excellence and noteworthy achievements. He has been selected by *Lawdragon* magazine as one of the "500 Leading Lawyers in America," by Benchmark Plaintiff as a "litigation star," and by the Legal 500 U.S. Guide as one of the "Leading Lawyers" in securities litigation—one of only seven plaintiffs' attorneys so recognized.

Mr. Singer graduated cum laude from Duke University in 1988, and from Northwestern University School of Law in 1991. He is an active member of the New York State and American Bar Associations.

A Note to Our Clients & Friends

The last several months have brought about dramatic changes. The election of President Trump has precipitated major shifts in the political and judicial landscape, the full impact of which still remains to be seen. Some of these changes have been decidedly against the interests of public shareholders and public institutions. For example, as originally drafted the Fairness in Class Action Litigation Act of 2017, which is discussed in this newsletter, would have precluded public funds from taking leadership roles in securities litigation and prevented them from using the counsel of their choice. (See "A Perfect Storm?", p.3) Eliminating public plans from this role would clearly not benefit defrauded investors. Last year, U.S. courts approved the highest number of securities class action settlements since 2010. The median settlement amount for cases with institutional investor lead plaintiffs was more than two and a half times that of cases with no institutional investor as lead plaintiff.

In addition to legislative threats on the horizon, the nomination of Judge Neil Gorsuch to the Supreme Court also poses challenges to the viability of securities fraud lawsuits. Judge Gorsuch has been openly skeptical of the benefits afforded by securities litigation. (See "A Perfect Storm?", p.3) Since the Supreme Court is set to hear at least two cases which impact investors' rights in the near future, ensuring that any new Supreme Court Justice gives shareholders fair treatment is crucial.

Closer to home, we are pleased to announce the settlement of the case against Rayonier Inc., the second largest settlement of a securities fraud case in Florida since the passage of the Private Securities Litigation Reform Act. With the addition of Director of Litigation Steven Singer and our New York office, we are more ready than ever to take on Wells Fargo, Wilmington Trust, and other defendants who have engaged in corporate misconduct.

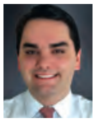
Thank you for your confidence in our firm and in our continued efforts to protect the assets of plan participants from corporate fraud. Your ongoing vigilance and advocacy is more important now than ever.

Maya Saxena

A Perfect STORM?

Potential Changes to Securities Fraud Litigation and the New Regulatory Landscape Under the Trump Administration

Written by ***Maya Saxena, Manuel Miranda & Dianne Anderson***
Saxena White P.A.

"It was the storm of the century, . . . a tempest created by so rare a combination of factors that meteorologists deemed it the perfect storm."[1]

One of the primary causes of the financial meltdown of 2008 and the Great Recession that followed was the decades-long unraveling of the financial regulatory system. Behind the 2008 catastrophe were "gigantic financial institutions embarking on an almost unprecedented binge of risk-taking, recklessness, and at times, illegal conduct."[2] Financial losses to the U.S. economy have been estimated at $20 trillion, with public pensions heavily impacted. Indeed, many plans have been unable to recover.[3]

In the years following the crisis, Congress and the Obama administration enacted a series of reforms which helped curb some of the worst abuses in the financial sector. With the election of President Donald Trump, the country is likely to take a markedly different path in the areas of financial regulation and enforcement. Critics view the new administration's prospective changes as the beginnings of a "perfect storm," creating a self-regulated corporate environment ripe for the next Enron-type debacle. This article explores the potential impact of the Trump administration on securities fraud litigation and investor rights.

The Securities and Exchange Commission: A New Mandate

The passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ushered in a new era of financial regulation. Considered one of the most comprehensive financial reform measures since the Great Depression, Dodd-Frank's primary purpose was to strengthen the U.S. banking system by subjecting financial institutions to stringent regulations and increased government oversight. Dodd-Frank also provided the Securities and Exchange Commission and aggrieved investors with additional tools to combat corporate misconduct.

Throughout the 2016 presidential campaign, Donald Trump accused Dodd-Frank of hindering economic growth and job creation by making it "impossible for bankers to function."[4] In an effort to drastically reduce regulations, President Trump signed a directive aimed at overhauling major provisions of Dodd-Frank.[5]

It seems clear that the SEC is likely to shift course on a number of key issues that directly affect securities litigation.[6] As part of Dodd-Frank, Congress granted the SEC authority to bypass federal courts and impose civil monetary penalties through administrative proceedings, a process that is inherently more efficient. But the use of administrative proceedings has been the subject of much dispute, and Republican lawmakers have already introduced legislation that would give defendants the option of removing an administrative enforcement action to federal court, curtailing the quick-fix of the SEC administrative proceedings.[7]

Dodd-Frank's whistleblower program is also likely to see changes. Under Dodd-Frank, the SEC may grant whistleblower awards to tipsters that were involved in wrongdoing but not subjected to criminal prosecution. But Congressional Republicans seem intent on precluding co-conspirators from receiving whistleblower awards for successful tips, a measure that would discourage individuals who were intricately

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entwined in corporate misconduct from reporting violations to the SEC.[8]

Fairness in Class Action Litigation Act of 2017 and Other Potential Legislation

Recently introduced legislation[9] pending before the U.S. House of Representatives seeks to purportedly "diminish abuses in class action and mass tort litigation that are undermining the integrity of the U.S. legal system."[10] The legislation passed the House on March 9, 2017. Similar legislation narrowly passed the House in 2016 but failed to gain traction in the Senate as President Obama vowed a veto. With President Trump viewed as a likely supporter of the bill, the legislation's fate could be different this time around.

The bill has several provisions which could adversely impact securities fraud litigation, including:

- Mandating that all class members suffer the "same type and scope of injury";
- Requiring the disclosure of relationships between class counsel and class representatives;
- Staying discovery during the pendency of motions to transfer, dismiss, etc.; and
- Allowing immediate appeals from orders granting or denying class certification.

Troublingly, the original version of the bill included provisions which would have been a knock-out blow to public pension funds serving as lead plaintiffs. Former Section 1717(b)(2), sought to bar any federal court from certifying "any class action in which any proposed class representative or named plaintiff . . . is a present or former client of (other than with respect to the class action), or has any contractual relationship with class counsel."[11] As originally drafted, class counsel could not have formerly represented the class representative in any matter nor provided portfolio monitoring services to the class representative, despite the acknowledged utility of these services in aiding plan trustees in the exercise of their fiduciary duties.

Also noteworthy is the likelihood of additional delay to what is often already protracted and complex litigation. As Professor John C. Coffee, Jr., director of the Center on Corporate Governance at Columbia Law School recently opined:

> H.R. 985 will also slow the pace of class actions to a crawl. First, proposed Section 1723 permits appeals of orders granting or denying class certification as a matter of right. Today, such interlocutory appeals are discretionary with the appellate court (and are infrequently granted). The burden on appellate courts will be substantial. Second, discovery is halted if a defendant makes any of a variety of motions (see proposed Section 1721).[12]

Additionally, the provision requiring that all class members must have suffered the same "type and scope" of injury would hamper class certification, since it seeks to limit certification of class actions to only those suits where the court has determined, after a "rigorous analysis of the evidence presented," that each member of the proposed class has suffered the same "type and scope of injury as the named class representative." This would be a departure from the current framework, which permits certification of classes even where there are a variety of injuries across the class.

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Saxena White Announces Proposed $73 Million Settlement of Rayonier Inc. Securities Litigation

Saxena White is pleased to announce that on March 13, 2017, plaintiffs and defendants reached an agreement in principle to settle *In re Rayonier Inc. Securities Litigation*[1] for $73 million.

This securities class action against Rayonier—a multi-billion dollar timber company—arose from alleged misrepresentations concerning the sustainability of Rayonier's harvesting practices. Rayonier had presented itself to investors as a conservative company that harvested its forests on a "sustainable" basis. According to Rayonier, the company preserved the value of its timber by harvesting at a rate 30% below the sustainable rate, allowing unharvested trees to grow and become more valuable over time.

Investors were shocked when, in November 2014, Rayonier's new CEO disclosed that for over a decade, the company had been systematically overharvesting its timberlands by nearly 50%. As a result, the company would have to dramatically reduce its timber production for the next ten years or more. In reaction to this announcement, Rayonier's stock dropped 20%, wiping out more than $900 million in market capitalization and forcing the company to slash its dividend in half. Lead counsel conducted an in-depth investigation of the company which revealed that Rayonier's practice of overharvesting, while undisclosed to investors, was well known within the highest ranks of the company. The top officers of Rayonier regularly discussed the overharvesting problem, and company insiders reported the overharvesting was so egregious that everyone, "right down to the truck drivers," was aware of the issue.

After vigorously litigating this action for over two and a half years, the plaintiffs negotiated an outstanding $73 million settlement for Rayonier shareholders. The proposed settlement is subject to completion of formal documentation, notice to all class members, and final approval by the U.S. District Court for the Middle District of Florida.

[1] Case No. 14-cv-1395 (M.D. Fla.).

Pension Fund Reforms in the Wake of the Great Recession

Written by
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In 2016, U.S. stocks posted their best gains since 2013, with the Dow Jones Industrial Average up 13.4% for the year. While a strong stock market is good news for pension funds, which rely on investment earnings for the majority of their revenue, storm clouds are on the horizon for many retirement systems.

Pension plans are still recovering from the enormous losses suffered in the wake of the Great Recession. According to the Federal Reserve, state and local pension fund asset values fell from $3.2 trillion at the end of 2007 to $2.1 trillion in March 2009, increasing pension costs at a time when state and local governments faced severe losses in revenue. More recently, the California Public Employees Retirement System (Calpers), the country's largest public pension fund, announced in December 2016 that it was lowering expectations for future investment returns.

Calpers lowered its target rate of return from 7.5% to 7% by 2020, which will force the State of California to contribute an additional $2 billion a year for state workers. Given Calpers' size and influence in the investment industry, the move will likely encourage other pension funds throughout the U.S. to lower their targets.

Adding to these pressures is the fact that the Baby Boomer generation has entered their retirement years, and many retirees are living longer. Virtually all public pension funds are now operating in a "cash flow negative state," meaning that each year the funds pay more in benefits to retirees than they receive in contributions. Recognizing that these economics were unsustainable, nearly every state has passed meaningful reforms to one or more of its pension plans in the years following the Great Recession. In June 2016, the National Association of State Retirement Administrators (NASRA) published a report[1] detailing the reforms undertaken in each state. The most common reforms include the following:

- **Employees are required to pay more.** Nearly every state requires that employees contribute a portion of their earnings toward the cost of retirement, and most of those states increased their member contribution rates. For states where the retirement plan provides a benefit in addition to Social Security, the median employee contribution rate has risen from 5% to 6% of salary. In states that provide a public benefit instead of Social Security, the median employee contribution rate is 8%.
- **Benefits lowered.** Pension benefits are typically paid based on a formula that provides a percentage of salary for every year worked for the employer. For example, a worker that retired after 25 years of service with a final average salary of $50,000 in a plan that provides 1.5% of salary for each year worked would earn an annual benefit as follows:

  25 x $50,000 x 1.5% = $18,750 per year in retirement

  Benefit reductions have included the following adjustments: 1) an increase in the period used to calculate average salary (usually resulting in a lower average salary upon which the benefit is based; 2) a reduction in the retirement multiplier (i.e. a smaller percentage of income per year worked); and 3) reducing or eliminating cost-of-living adjustments. A recent study by NASRA found that benefit reforms could reduce

  the retirement benefit of new employees by between 1% and 20% compared to pre-reform benefits.
- **Employees are required to work longer.** The vesting period (the number of years for an employee to become eligible to receive retirement benefits) for new employees was increased for many plans, with nine states increasing the vesting period from five years to ten. To begin drawing a benefit, an employee must reach a second level of eligibility, generally expressed as a number of years of employment, a certain age, or both. Twenty-nine states increased retirement eligibility, with a median increase to the retirement age of two years, and a median increase to required service of five years.
- **Most states retained traditional pension plans, but not all.** While most states retained traditional pension plans,

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some have created hybrid plans that have combined a defined benefit (typically with a more modest benefit level) with participation in an individual account plan. In most cases, changes in plan design applied only to newly hired workers. Two states—Arizona and Oklahoma—closed their traditional pension plans and placed new employees into individual account plans.

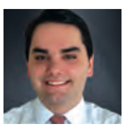
In this era of chronic funding deficits, low interest rates, and increasing numbers of retirees, it's a brave new world for pension fund administrators. Fortunately, many pension funds have taken proactive steps which will help ensure the long-term solvency of their plans, and in turn, the financial security of their members. Will there be more changes to come? You can bet on it.

But with investment earnings accounting for over 60% of public pension revenues, a strong stock market will always be a major factor in a pension plan's economic health. And when a retirement system suffers losses which may be attributable to securities fraud, securities litigation can be an effective tool in recovering assets for the fund. To paraphrase Benjamin Franklin, a penny saved through securities litigation is a penny earned for retirees.

[1] "Spotlight on Significant Reforms to State Retirement Systems," by Keith Brainard and Alex Brown, NASRA, June 2016, http://www.nasra.org/files/Spotlight/Significant%20Reforms.pdf.

Troubling Trend Emerging as Premature Filings Are on the Rise

Written by
Manuel Miranda,
Saxena White P.A.



In 2016, 300 securities class actions were filed in federal court, a whopping 32% increase from 2015 filings and 36% higher than the average filing rate over the last five years.[1] A record 149 securities class actions were dismissed in 2016, with half of the dismissals occurring less than 11 months after the filing of the complaint—the fastest pace since the passage of The Private Securities Litigation Reform Act ("PSLRA"). One of the main factors driving this troubling trend is the filing of premature cases with the hope that unconfirmed speculation will later materialize into fraud. But when it comes to securities class actions, the old adage of "where there's smoke, there's fire" is not always correct.

In 1995, Congress passed the PSLRA in an attempt to limit the filing of frivolous securities lawsuits. Before the PSLRA, investors could proceed against public corporations with minimal evidence of fraud, thereby encouraging the filing of weak or frivolous lawsuits in order to strike a quick settlement. To combat this trend, the PSLRA imposed heightened pleading requirements, a stay of all discovery pending the resolution of the motion to dismiss, and a mandatory review for sanctions for abusive litigation.[2]

The PSLRA also altered the lead plaintiff selection process. Under the PSLRA, courts must appoint as lead plaintiff the member of the purported class that is "most capable of adequately representing the interest of class members."[3] The most adequate lead plaintiff is typically the movant with the largest financial interest in the case.

When followed properly, the PSLRA functions to protect the interests of institutional investors by favoring their role in the lead plaintiff appointment process. This process is designed to promote the type of meritorious, well-pled allegations needed to surmount the high pleading standards. It is no coincidence that properly investigated, well-pled claims brought by institutional investors often produce the most favorable outcomes.

In recent months, a troubling trend has emerged whereby securities class actions are being filed prematurely in an attempt to sidestep the stated purposes of the PSLRA. These premature filings are designed to set in motion a lead plaintiff deadline that does not allow for proper investigation, and consequently forecloses upon the involvement of institutional investors. Simply put, certain law firms are filing securities

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class actions that are either frivolous or premature in order to dissuade institutional investors with large financial interests from seeking an active role in the litigation.

For instance, on November 3, 2016, *Bloomberg* published an article, titled "U.S. Charges in Generic-Drug Probe to Be Filed by Year End," disclosing an alleged two-year investigation by the U.S. Department of Justice (DOJ) and the Connecticut Attorney General into suspected price collusion by several pharmaceutical companies.[4] Citing confidential sources, the article concluded that the DOJ was likely to file criminal charges against several pharmaceuticals before the end of the year.

Within a matter of days—hours, in some instances—a bevy of federal securities class actions were filed against several of the pharmaceutical companies implicated in the article.[5] The complaints essentially derived from unconfirmed reports that the DOJ was on the verge of indicting a number of generic drug manufacturers and their senior executives for conspiring to fix the price of approximately two dozen generic drugs. At the time, it was unclear whether any of the pharmaceutical companies had made any actionable misrepresentations, as neither the DOJ nor the Connecticut Attorney General had formally accused any of them of engaging in anticompetitive behavior.

This type of unconfirmed speculation is generally insufficient to establish the particularized facts necessary to support a securities fraud claim, and filing a case that hinges on further action borders on speculation.[6] Indeed, a number of U.S. Circuit Courts of Appeal have concluded that the announcement of an investigation, without more, does not constitute a corrective disclosure for purposes of establishing loss causation.[7] The rationale is that the announcement of an investigation simply reveals an added risk of future corrective action, not that a company's prior statements were false or fraudulent. In this instance, the added risk of future corrective action has only come to fruition for six of the companies identified in the *Bloomberg* article.[8]

Premature filings are likely to continue unabated, to the detriment of institutional investors. Filing cases prematurely not only reduces the likelihood of success but also limits the active participation of institutional investors. However, in instances where premature filings later materialize into strong securities fraud claims, institutional investors are not left without recourse, as they have the option of opting-out of the class action and pursuing direct individual actions against the company and its executives.

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[1] http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf.

[2] 15 U.S.C. § 78u-4.

[3] 15 U.S.C. § 78u-4(a)(3).

[4] http://www.bloomberg.com/news/articles/2016-11-03/u-s-charges-in-generic-drug-probe-said-to-be-filed-by-year-end.

[5] *See e.g., Arslanian v. Allergan PLC, et al.*, Case No. 16-cv-08254 (C.D. Cal.); *Nunez, Jr. v. Impax Laboratories, Inc., et al.*, Case No. 16-cv-8420 (D.N.J.); *Utesch v. Lannett Company, Inc. et al.*, Case No. 16-cv-5932 (E.D. Pa.); *Shasha v. Endo International PLC, et al.*, Case No. 16-cv-08645 (S.D.N.Y).

[6] *See Janbay v. Canadian Solar, Inc.*, No. 10 CIV. 4430 RWS, 2012 WL 1080306, at *5 (S.D.N.Y. Mar. 30, 2012) ("Speculative and conclusory pleading is legally insufficient.").

[7] *Meyer v. Greene*, 710 F.3d 1189, 1201 (11th Cir. 2013); *Loos v. Immersion Corp.*, 762 F.3d 880 (9th Cir. 2014), *as amended* (Sept. 11, 2014).

[8] On December 15, 2016, 20 state attorneys general accused six generic drug pharmaceuticals of engaging in price-fixing. Allergan PLC, Impax Laboratories, Inc., Lannett Company, Inc. and Endo International PLC, all of which have securities fraud claims pending against them as a result of the *Bloomberg* article, were not amongst the companies named in the complaint.

Plaintiffs Defeat Motion to Dismiss... *continued from page 1*

base as a result of the scandal. In Congressional hearings, Stumpf was harshly criticized by a number of Senators. In one memorable exchange, Senator Elizabeth Warren accused the CEO of "gutless leadership" and said he should be criminally investigated. Stumpf resigned as CEO shortly thereafter.

In its order denying defendants' motion to dismiss, the court stated that the allegations in the complaint "create a reasonable doubt as to whether a majority of the Director Defendants face a substantial likelihood of liability as to Plaintiffs claims." The court emphasized that Wells Fargo's directors consciously disregarded their fiduciary obligations because "Wells Fargo's success was dependent upon cross-selling, which was in turn dependent upon the same strict sales quotas that drove employees to create fake accounts."

Streamlining Discovery:
Best Practices for Institutional Investors

Written by
Lester Hooker,
Saxena White P.A.

Saxena White attorneys have collectively recovered billions of dollars on behalf of aggrieved shareholders in complex securities litigations across the country. These ground-breaking achievements could not have been possible without the commendable efforts of the directors and trustees of our institutional investor clients, including state and municipal retirement systems, police & firefighters' pension plans, Taft-Hartley funds, and private and foreign funds.

Our clients provide important fiduciary services to their members, and the everyday demands that are placed on them are significant. One of the main logistical questions that our clients often ask regarding their service as a lead plaintiff or class representative is the amount of time that they and their staff may have to devote to discovery. Saxena White is always mindful of our clients' resources, and we address this legitimate concern by providing comprehensive support to streamline discovery as efficiently as possible.

Reimbursement For Time and Expenses

At the outset of litigation, we remind our clients that the Private Securities Litigation Reform Act of 1995 ("PSLRA") reflects a Congressional preference, echoed repeatedly by the courts, to empower institutional investors to lead securities class actions, acknowledging that these cases serve an important function in maintaining the integrity of our financial markets.

In order to encourage this participation, the PSLRA contemplates "the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."[1] Saxena White suggests that our clients maintain a running log of any time and expenses incurred throughout the litigation to ensure that they are compensated appropriately and completely once a settlement or judgment is achieved.

Minimizing Interruptions: Efficient Discovery Practices

An additional practice that we remind our clients to adopt at the beginning of an action is to inform their administrative staff, trustees and/or directors to preserve any and all documents that are relevant to the litigation, including emails or letters relating to the action, minutes of Board meetings in which the case is discussed, and trading confirmations for the transactions covering the stock at issue in the litigation. This will enable our clients to fully respond to the typical requests for documents and information that are requested of them.

Once the litigation has progressed into the discovery phase, the parties submit requests asking for documents and information that are relevant to the action. Saxena White works diligently to assist our clients in efficiently responding to any discovery requests, while greatly minimizing any possible disruptions to the clients' staff.

As a practical matter, many of the documents relevant to an action are in the possession of investment managers and consultants that are provided the authority and discretion to coordinate and conduct investment decisions on behalf of institutional investors. For those documents that are in the possession of our clients themselves, some of our clients prefer that their administrative staff identify and collect responsive documents with Saxena White's assistance.

In order to reduce or completely avoid any business-day interruptions, many of our clients prefer that Saxena White directly coordinate the search and collection of responsive documents. Saxena White can even conduct this process after-hours or during the weekend. Depending on the scope of the collection and the client's IT infrastructure, some clients request that Saxena White – at no expense to the client – engage a leading third-party technology firm that specializes in e-discovery to quickly and efficiently search, identify, collect and categorize only those documents that are relevant to the litigation, with no interruptions to the client's administrative staff.

Once documents have been produced, a client representative may have to participate in a deposition. Although Saxena White's litigations take place in courts across the country, Saxena White can confer with the defendants' counsel to conduct the client's deposition in the city in which the representative resides. In this manner,

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Will He Make Arbitration Great Again?

The Fate of the CFPB's Proposed Arbitration Rule Hangs in the Balance

Written by
Dianne Anderson,
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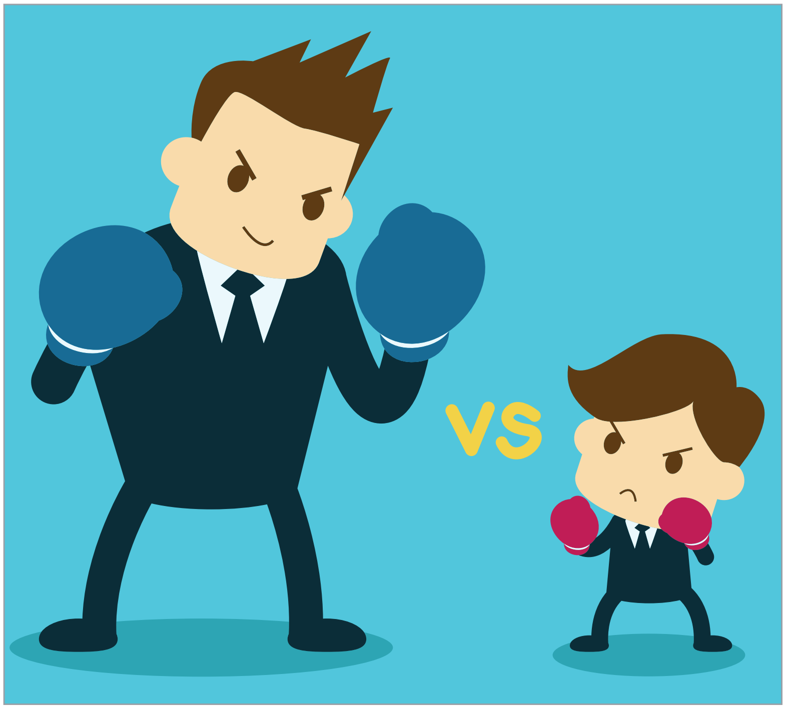
Established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Consumer Financial Protection Bureau (CFPB) is charged with overseeing the federal financial laws that protect consumers. Created after the 2008 financial crisis, the CFPB "helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives."[1] From testifying in front of Congress more than 62 times to handling over a million complaints from consumers about financial products and services, the Bureau has an impressive record of activism and achievement. In its short history, the CFPB has already returned nearly $12 billion to 29 million harmed consumers through enforcement actions.[2] But the fate of one of the Bureau's most ambitious proposals—a set of rules banning mandatory arbitration provisions which prohibit consumer class actions (the "Arbitration Rule")—is in jeopardy.



The proposed regulation, 12 CFR Part 1040, would apply to agreements between consumers and providers of certain consumer financial products and services (e.g. banks, credit card companies, education lenders, and auto lenders).[3] In many cases, those agreements contain mandatory arbitration provisions, which require that the parties to a dispute submit to private, binding arbitration rather than litigate the matter in a court of law. Where mandatory arbitration provisions exist, the Arbitration Rule would prohibit all such agreements from banning consumers from filing or participating in a class action with respect to the covered financial product or service.

By blocking groups of consumers from participating in class actions, companies are effectively insulating themselves from litigation and denying consumers their day in court. As stated by CFPB Director Richard Cordray, "Signing up for a credit card or opening a bank account can often mean signing away your right to take the company to court if things go wrong." Cordray added, "Many banks and financial companies avoid accountability by putting arbitration clauses in their contracts that block groups of their customers from suing them," which "effectively denies groups of consumers the right to seek justice and relief for wrongdoing."[4]

As required by Dodd-Frank, the Bureau studied the use of mandatory arbitration clauses in consumer financial markets and in March 2015 submitted an empirical study to Congress showing that very few consumers bring individual actions against their financial service providers, either in court or in arbitration.[5] Because individual damages are often relatively low in typical consumer cases, high litigation costs make it unlikely that an attorney will represent a single plaintiff against a deep-pocketed corporation. The study found that class actions provide a more effective means for consumers to dispute questionable practices by such providers. According to the CFPB's study, every year class actions succeed in bringing hundreds of millions of dollars in relief to millions of consumers and cause companies to alter their problematic conduct. The study showed that, from 2008 through 2012, at least 160 million class members were eligible for relief in connection

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with consumer class action settlements, totaling $2.7 billion in cash, in-kind relief (where the settlement provided class members with free or discounted access to a service), and fees and other expenses. In addition to monetary relief, many class actions force companies to alter their business practices and adopt more consumer-friendly policies. But where mandatory arbitration clauses are in place, companies can use those clauses to block class actions.

The proposed Arbitration Rule—published in May 2016 with its public comment period ending on August 22, 2016—received widespread support. As reported by Citizenvox, more than 100,000 consumers across the country supported the Arbitration Rule; 38 United States Senators commended the Bureau for its arbitration proposal; 65 members of the United States House of Representatives praised the proposal to restore class action rights; and a number of media outlets endorsed the fact that consumers would finally have a fighting chance against banks and lenders.[6]

But the fate of the Arbitration Rule, and even the CFPB itself, is in question. Congress could invoke the Congressional Review Act, a rule established in 1996 which allows legislators to rescind a rule adopted by a federal agency.[7] The House of Representatives may also pass a bill —the Financial CHOICE Act—that would reform the CFPB.[8] A revised version of the Financial CHOICE Act, introduced last year by House Financial Services Chairman Jeb Hensarling, would limit the powers of the CFPB and restructure the Bureau as a civil law enforcement agency with additional restrictions on its authority.[9]

The CFPB could also drastically change via Trump administration action, especially if Trump says "You're fired!" to CFPB Director Cordray. As stated by Thomas B. Pahl, former managing counsel at the CFPB during the Obama administration, a new director "would wield immense authority in setting the agency's agenda and could narrow its mission overnight. A new director could also begin to implement some of the ideas contained within the Financial CHOICE Act while that legislation is pending in Congress."[10]

Regardless of the uncertainty lingering at the Bureau, Cordray remains focused on the Arbitration Rule. On January 30, 2017, in a letter to Senator Jeff Flake, Cordray defended the Arbitration Rule and class actions, stating that arbitration clauses "cannot be used to stop consumers from being part of a class action in court." Only time will tell, but hope remains that consumers will be allowed their proper day in court.

[1] https://www.consumerfinance.gov/about-us/the-bureau/.

[2] "Why We Need A Strong CFPB, In 5 Numbers," Joe Valenti, Center for American Progress January 18, 2017, https://www.americanprogress.org/issues/economy/news/2017/01/18/296539/why-we-need-a-strong-cfpb-in-5-numbers/.

[3] "CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court," May 5, 2016, https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/.

[4] *Id.*

[5] "Arbitration Study – Report to Congress, pursuant to Dodd Frank Wall Street Reform and Consumer Protection Act § 1028 (a)," CFPB, March 2015, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[6] Amanda Werner, "CFPB Arbitration Rule Receives Strong and Widespread Support," September 1, 2016, http://www.citizenvox.org/2016/09/01/cfpb-arbitration-rule-receives-strong-and-widespread-support/.

[7] 5 USC §801 et seq. (1996); https://www.epa.gov/laws-regulations/summary-congressional-review-act.

[8] "How Washington will decide the consumer watchdog's fate," Thomas Pahl, January 26, 2017, http://thehill.com/blogs/pundits-blog/finance/316178-how-washington-will-decide-the-consumer-watchdogs-fate.

[9] "Cheat sheet: Hensarling's plans to gut CFPB, revamp stress tests," Ian Mckendry, et al., February 9, 2017, https://www.americanbanker.com/news/cheat-sheet-hensarlings-plans-to-gut-cfpb-revamp-stress-tests; "CHOICE Act 2.0, Insurance Regulation Take Center Stage; DoL Fiduciary Rule May Be Delayed as Other Regulators Review Regs," National Law Review, February 13, 2017, http://www.natlawreview.com/article/choice-act-20-insurance-regulation-take-center-stage-dol-fiduciary-rule-may-be. A leaked February 6, 2017 memorandum highlights several of the changes that have been made to the legislation since last Congress, though at the time of writing the revised bill had not yet been introduced.

[10] Thomas Pahl, "How Washington will decide the consumer watchdog's fate," January 26, 2017, http://thehill.com/blogs/pundits-blog/finance/316178-how-washington-will-decide-the-consumer-watchdogs-fate.

State blue sky laws may also be impacted by the Trump administration, which has indicated that it may target New York's Martin Act and other similar state laws by drafting legislation that would make state laws secondary to less stringent federal statutes.[13] The Martin Act, which dates back to 1921, gives extraordinary powers to the state's attorney general when fighting financial fraud and has been used to prosecute fraud when federal prosecutors have been unwilling or unable to act. Indeed, New York Attorney General Eric Schneiderman has openly expressed concern that the incoming administration will undermine state securities laws nationwide, laws that he characterized as "investors' first line of defense against exploitation."[14]

The Supreme Court: Will The Tide Turn Against Shareholder Litigation?

The past ten years have seen considerable changes in securities fraud litigation, with the U.S. Supreme Court playing a vital role. President Trump's nomination of Judge Neil M. Gorsuch of the Tenth U.S. Circuit Court of Appeals to the Supreme Court has raised a host of questions with respect to the future of securities class actions.[15]

As a lawyer in private practice for a decade, Judge Gorsuch focused on securities, antitrust and class action litigation, largely representing corporate interests.[16] In 2004, Gorsuch wrote an amicus brief for the United States Chamber of Commerce in *Dura Pharmaceuticals v. Broudo*, advocating for a heightened loss causation requirement as a "key safeguard" against meritless suits.[17]

In 2005, Judge Gorsuch co-authored a working paper, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, where he harshly criticized securities class actions and how corporate defendants "pay dearly to settle such claims." Gorsuch stated in the paper that "with such pressure to settle meritless suits comes, unsurprisingly, a concomitant incentive to bring them."[18] When securities fraud suits are filed, Gorsuch added, "new corporate investments are deferred, the efficiency of the capital markets is reduced, and the competiveness of the American economy declines."[19] Gorsuch proposed several reforms, many of which have been implemented, including enforcing the loss causation requirement and increasing the use of the lodestar method for calculating fees.[20]

During his Tenth Circuit tenure, Judge Gorsuch analyzed Section 11 of the Securities Act of 1933 in *MHC Mutual Conversion Fund, L.P. v. Sandler O'Neill & Partners L.P.*[21] In *MHC Mutual*, Judge Gorsuch addressed exactly what was required under Section 11 to establish liability for statements of opinion, exploring several possible readings of the statute. Ultimately, Judge Gorsuch came to the conclusion that "a plaintiff must show both that the defendant expressed an opinion that wasn't his real opinion (sometimes called "subjective disbelief") and that the opinion didn't prove out in the end (sometimes called "objective falsity")."[22] a position later referenced by the Supreme Court in *Omnicare Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*.[23]

Judge Gorsuch's text-based approach and narrow view of securities fraud liability demonstrates a decidedly censorious mindset against securities litigation in general. If appointed, Gorsuch's presence on the bench could significantly tip the scales toward a more corporate friendly environment in at least two relevant areas. First, in *California Public Employees' Retirement System v. ANZ Securities, Inc.*,[24] the Court will decide whether *American Pipe* tolling[25] applies to class action claims subject to the three-year time limitation in Section 13 of the Securities Act of 1933. A finding that *American Pipe* tolling does not apply would frustrate the principal function of class action lawsuits, as potential class members would be induced to file protective motions to intervene or separate actions before a case is preliminarily settled.

Second, Gorsuch may have the opportunity to rule on class certification and damage issues. The applicability of the price maintenance theory, often critical to establishing class-wide damages, also seems destined for Supreme Court review. The Second, Seventh and Eleventh Circuits have concluded that alleged misstatements need not correlate with simultaneous stock price increases to have price impact, a position rejected by the Eighth Circuit.[26] If the issue constitutes a true circuit split, the Supreme Court may address it. Requiring a stock price increase with each materially false statement would forgive long-lasting frauds by excusing lies which predate a class period but which nonetheless maintain the levels of artificial inflation.

Conclusion

Protecting the retirements of public plan participants is an issue which should cross all party lines. As George W. Bush stated after the collapse of Enron:

> Through stricter accounting standards and tougher disclosure requirements, corporate America must be made more accountable to employees and shareholders

continued on next page

and held to the highest standards of conduct.[27]

Private securities fraud and SEC enforcement actions result in billions of dollars of recovery every year. But storm clouds are gathering across the securities fraud landscape. Given what may be the relaxing of financial oversight under a new regime, investors must remain vigilant in monitoring relevant pending legislation.

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[1] Sebastian Junger, *The Perfect Storm* (W.W. Norton 1997).

[2] "The Cost of the Crisis," Better Markets, July 2015, https://www.bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

[3] Liz Farmer, "Even With Stock Market's Rise, Many Pensions Haven't Recovered From Recession," *Governing the States and Localities,* Dec. 17, 2014.

[4] Emily Flitter and Steve Holland, "Trump Preparing Plan to Dismantle Obama's Wall Street Reform Law," Reuters, May 18, 2016, http://www.reuters.com/article/us-usa-election-trump-banks-idUSKCN0Y900J.

[5] Ben Protess and Julie Hirschfeld David, "Trump Moves to Roll Back Obama-Era Financial Regulations," *The New York Times*, Feb. 3, 2017.

[6] Carmen Germaine, "SEC's Belt to Tighten Under New Administration," Law360, Feb. 28, 2017, https://www.law360.com/articles/896600/sec-s-belt-to-tighten-under-new-administration.

[7] Peter J. Henning, "How Trump's Presidency Will Change the Justice Dept. and S.E.C," *The New York Times*, Nov. 9, 2016.

[8] Carmen Germaine, "House GOP Taking Aim At SEC Whistleblower Program," Law360, Feb. 10, 2017, https://www.law360.com/articles/891068/house-gop-taking-aim-at-sec-whistleblower-program.

[9] Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017).

[10] Joel Rothman, "Proposed Class Action Fairness Act Could Negatively Affect Institutions' Securities Class Action Recovery," *National Law Review*, March 2, 2017. The text of the bill can be found at https://www.congress.gov/bill/115th-congress/house-bill/985.

[11] https://www.congress.gov/bill/115th-congress/house-bill/985/amendments.

[12] John C., Coffee, Jr., "How Not to Write A Class Action "Reform" Bill," The CLS Blue Sky Blog, Feb. 21, 2017, http://clsbluesky.law.columbia.edu/2017/02/21/how-not-to-write-a-class-action-reform-bill/.

[13] http://www.jonesday.com/what-impact-will-the-new-trump-administration-have-on-state-attorney-general-activity-01-10-2017/.

[14] Suzanne Barlyn and Tim McLaughlin, "New York Attorney General Concerned Trump May Gut Anti-Fraud Law," Reuters, Nov. 17, 2016, http://www.reuters.com/article/usa-trump-securities-idUSL1N1DI1ZZ.

[15] Carmen Germaine, "Gorsuch Likely No Friend to Securities Suits," Law360, Feb. 1, 2017, https://www.law360.com/classaction/articles/887199/gorsuch-likely-no-friend-to-securities-suits?nl_pk=5f5424a0-ca9e-457d-aeef-ffb03398e744&utm_source=newsletter&utm_medium=email&utm_campaign=classaction.

[16] Lawrence Hurley, "As Private Lawyer, Trump High Court Pick Was Friend to Business," Reuters, Feb. 1, 2017, http://www.reuters.com/article/us-usa-court-gorsuch-business-idUSKBN15G5PZ.

[17] Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioners, *Dura Pharm., Inc. v. Broudo*, No. 03-932, 2004 WL 2069560, at *2 (Sept. 13, 2004).

[18] Neil M. Gorsuch and Paul B. Matey, "Settlements in Securities Fraud Class Actions: Improving Investor Protection," Washington Legal Foundation, April 2005.

[19] *Id.*

[20] *Id.*

[21] 761 F.3d 1109 (10th Cir. 2014).

[22] *Id.* at 1114.

[23] 135 S. Ct. 1318, 1328-31 (2015)..

[24] *In re Lehman Bros. Sec. & Erisa Litig. (CalPERS),* 655 F.App'x 13 (2d Cir. 2016), *cert. granted sub mon. Cal Pub Emps.' Ret. Sys v. ANZ Sec. Inc.,* No 16-373, 2017 WL 125670 (U.S. Jan. 13, 2017).

[25] *American Pipe & Construction v. Utah*, 414 U.S. 538 (1974).

[26] Kevin LaCroix, "Vivendi: A Victory for Plaintiffs on the Price Maintenance Theory and on Loss Causation," The D&O Diary, Oct. 4, 2016, http://www.dandodiary.com/2016/10/articles/uncategorized/vivendi-victory-plaintiffs-price-maintenance-theory-loss-causation/.

[27] President George W. Bush, State of the Union Address (Jan. 29, 2002).

Streamlining Discovery

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travel-related disruptions are kept to a minimum. In advance of the deposition, Saxena White attorneys can meet at the representative's home or office to discuss the topics that are routinely raised and aspects of the action that will likely arise, thus ensuring that the representative is adequately prepared and feels comfortable with the questions that will be asked.

Serving in a representative capacity in securities class actions is beneficial for institutional investors and the financial markets as a whole, and discovery does not have to be a major burden for lead plaintiffs given proper planning and execution. The practices outlined above help ensure that institutional investors lead successful securities litigation while minimizing, to the greatest extent possible, any business interruptions during the course of discovery.

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[1] 15 U.S. Code § 78u–4(a)(4).

Saxena White in the Community

As a certified woman-owned business, Saxena White strongly believes in empowering women in the workplace. Last year, the Saxena White Diversity Committee launched our women's initiative by partnering with Dress for Success of the Palm Beaches, a local chapter of the national non-profit organization. Dress For Success provides professional and personal development services to disadvantaged women to help them achieve financial independence, economic equality, and break the cycle of poverty.

In December 2016, we hosted the "Check Your Purse" charity drive. Members of our firm collected new and used purses and filled them with donated personal items and monetary gifts. Pictured above are Kathryn Weidner (right) and Melanie Totten (left), happily delivering the firm's contributions to Executive Director Mary Hart at the intimate professional suiting facility in Lake Worth, Florida.

Continuing our support for Dress For Success, Saxena White sponsored a table at their Fourth Annual "Style for Hope" Luncheon in March at the Kravis Center in West Palm Beach, Florida. Philanthropy was never so en vogue as guests perused the jewelry trunk show and silent auction. The lunch was filled with inspiring speeches and success stories from Dress for Success clients and organizers. Members of our Diversity Committee attended the event with local women attorneys and clients. Pictured above are Melanie Totten, Stefanie Leverette, Bonni Jensen, and Kathryn Weidner.

For questions regarding this publication, please contact Adam Warden at awarden@saxenawhite.com.

Upcoming Events

NATIONAL CONFERENCE
ON PUBLIC EMPLOYEES
RETIREMENT SYSTEMS
2017 ANNUAL CONFERENCE
Hollywood, Florida
May 21-24, 2017

FLORIDA PUBLIC PENSION
TRUSTEES ASSOCIATION
33RD ANNUAL CONFERENCE
Orlando, Florida
June 25-28, 2017

NATIONAL ASSOCIATION
OF PUBLIC PENSION FUND
ATTORNEYS
2017 LEGAL EDUCATION
CONFERENCE
Monterey, California
June 27-30, 2017

MISSOURI ASSOCIATION
OF PUBLIC EMPLOYEE
RETIREMENT SYSTEMS
2017 ANNUAL CONFERENCE
Osage Beach, Missouri
July 12-14, 2017

OPAL GROUP PUBLIC FUNDS
SUMMIT EAST 2017
Newport, Rhode Island
July 24-16, 2017

GEORGIA ASSOCIATION
OF PUBLIC PENSION TRUSTEES
8TH ANNUAL CONFERENCE
St. Simons, Georgia
September 11-14, 2017

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