SUMMER 2021

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Saxena White Ranked in Top 5 by ISS

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Saxena White Ranked in Top 5 by Institutional Shareholder Services

Institutional Shareholder Services, the world's leading proxy advisory firm, ranked Saxena White fifth in its list of the top 50 plaintiffs' law firms in 2020, based on the dollar value of final securities class action settlements. The firm recovered over $109 million in total settlement funds for investors in 2020, led by class actions against HD Supply Holdings, Inc. ($50 million settlement) and TrueCar, Inc. ($28.25 million settlement).

"We are particularly pleased that we could achieve such outstanding results for shareholders in the midst of the COVID pandemic," said firm co-founder Maya Saxena. "The recoveries we have seen are a testament to our clients who remained active and engaged in fulfilling their fiduciary obligations as lead plaintiffs. I am also proud of our attorneys who worked diligently and without interruption during one of the most challenging and uncertain times in history."

In addition to the final settlements approved in 2020, Saxena White achieved a number of other victories in courts across the country, including orders granting class certification in cases against Perrigo Company PLC and Patterson Companies, Inc. And 2021 promises to be even more successful, led by the firm's $135 million class action settlement against DaVita Inc.

DaVita Final Settlement

After more than four years of hotly contested litigation, in April 2021 the U.S. District Court for the District of Colorado approved a $135 million settlement against one of the country's largest dialysis providers, DaVita, and three of its top executives.[1] The settlement represented the second largest all-cash federal securities class action settlement ever obtained in the Colorado federal district court and is among the top five such recoveries in Tenth Circuit history. The case involved allegations that defendants made materially false and misleading statements and omissions regarding DaVita's alleged scheme to "steer" all patients eligible for and enrolled in Medicare or Medicaid away from government insurance and into high-cost commercial insurance plans. The alleged scheme allowed DaVita to obtain

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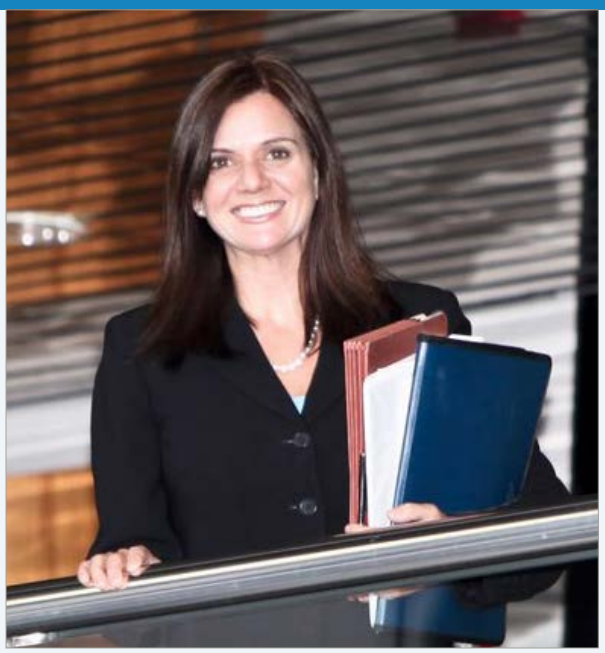
[1] Case No. 1:17-cv-00304-WJM-MJW (D. Col.)



A Note to Our Clients & Friends

It has been wonderful to see so many of our clients in person after this long stretch. As we emerge from our quarantine-cocoons—first with trepidation and now with increasing vigor—we enter a fundamentally changed world. We are now examining whether traditional workspaces are a necessity, as so many embraced the efficiencies of working remotely over the last year or more. We also continue to examine the societal underpinnings of our workplace, including whether our efforts to ensure diversity are making an impact.

In May, I was interviewed by Reuters financial columnist Alison Frankel about diversity in the plaintiffs' securities class action bar. Ms. Frankel's piece noted that a leading guide to best practices for judges in class action and Multidistrict Litigation (MDL) now advises them to "make appointments consistent with the diversity of our society and justice system." And in fact, in recent months judges have appointed diverse plaintiffs' leadership teams in several product liability and data breach MDLs.

But federal securities class actions are a different story, because the Private Securities Litigation Reform Act (PSLRA) created a statutory framework based on the presumption that class actions should be led by investors with the biggest stake in the outcome of the case. Judges then defer to the appointed lead plaintiffs to pick their own lead counsel. While there are many advantages to this system, the statute leaves judges with little room to demand diversity.

Because the PSLRA ensures that shareholder clients are in control of the litigation, it's ultimately going to be up to institutional investors to assure that their chosen counsel include a diverse litigation team. The good news is that many of these institutions are doing just that. With ESG goals becoming a more important consideration for investors, institutions are increasingly likely to question prospective plaintiffs' firms about their diversity practices. As the only federally certified female and minority-owned firm representing institutional investors, Saxena White is committed to employing a diverse team of talented employees.

In fact, in a pending shareholder derivative action involving utility company FirstEnergy (an action that isn't governed by the PSLRA), Judge Algenon Marbley of the U.S. District Court for the Southern District of Ohio recently appointed Saxena White and its co-counsel as co-lead counsel, recognizing the group's "diverse leadership team that is representative of the diversity of the [p]laintiffs." Noting that the lead plaintiffs—including Saxena White's client, the Employees Retirement System of The City of St. Louis—"encompass a broad range of individuals who are diverse in ethnicity, race, and gender," Judge Marbley recognized that the diverse team put forth by counsel "best reflects the plaintiffs' diversity and is best suited to act on their behalf."

As Alison Frankel concluded, "Investors aren't just white men. Their lawyers shouldn't be either."

Maya Saxena

Amid the Explosion of SPACs and Direct Listings, Investor Protections Erode

Written by ***David Kaplan and Hani Farah***

A fundamental shift is occurring in the U.S. capital markets as companies increasingly seek faster and cheaper ways to go public. Over the past two years, the market has seen a surge of IPOs by "blank check" special-purpose acquisition companies—so called "SPACs"—as well as a rise in direct listings, in which private companies offer only their existing shares to investors, with no underwriters involved. Touted as a better way to take companies public, SPACs and direct listings can allow private companies to acquire capital quicker and more cheaply than through a traditional IPO roadshow, the lengthy registration process with the SEC, and a firm commitment, underwritten offering by a syndicate of Wall Street banks. At the same time, investors in SPAC IPOs and direct listings face greater risks and have less legal protections compared to traditional IPOs. As a result, investors may be left holding the bag with fewer opportunities for legal recourse when the SPAC fad ends, the froth in the markets recedes, and the share prices of many of these new companies collapse.

SPACs, which are publicly-traded shell companies that raise money and then seek a business to acquire, are booming. SPACs raised more cash in 2020 than over the entire preceding decade, and the pace is only accelerating. The number of SPAC IPOs soared from 60 in 2019 to nearly 250 in 2020, with SPACs raising over $80 billion, not far from the $98 billion raised in traditional IPOs. This prompted many to dub 2020 "the year of the SPAC." All signs point to an even bigger 2021. SPACs raised over $88 billion in the first quarter of 2021, eclipsing 2020's record total in a single quarter. Investor enthusiasm is so great that multiple ETFs now exclusively track SPACs, and all types of celebrities are jumping on the SPAC bandwagon. For example, former baseball star Alex Rodriguez is the CEO of Slam Corp—a SPAC seeking a target in the sports, media, and entertainment sectors (among others)—which Rodriguez touts as "the Yankees of SPACs." Other celebrities linked to SPACs include former NBA star Shaquille O'Neal, former Speaker of the House Paul Ryan, and Grammy award winning singer-songwriter Ciara.

Amidst this exuberance, however, important legal and structural protections for investors are falling by the wayside. First, the SPAC and direct listing mechanisms completely sidestep the gatekeeper function of underwriters, who are tasked and strongly incentivized under the federal securities laws with undertaking extensive due diligence on the companies they take public and conducting a thorough review of the offering materials provided to investors to ensure their completeness and accuracy. Consequently, the securities filings and other information provided to investors in SPACs and direct listings are not vetted nearly as closely as in traditional IPOs and present the risk of sloppier—or worse, fraudulent—disclosures. Second, SPACs and direct listings carry decreased liability exposure for companies, their executives, and SPAC sponsors—and a diminished ability for shareholders to recover losses for false or materially misleading statements.

The current liability scheme governing the promotion and sale of securities has its roots in the stock market crash of 1929. In the period leading up to the Great Depression, issuers and brokers bullishly promoted companies, promising investors sky-high returns without disclosing company financials and other highly-material information. In many cases, their promises had little basis in fact or were completely fraudulent. After the crash of 1929, the government sought to prevent another speculative market frenzy and collapse by enacting a regulatory framework premised on complete and honest disclosure. At the bedrock of this framework lies Sections 11 and 12 of the Securities Act of 1933, which provide investors with a private right of action against companies, corporate executives, and the underwriters of securities offerings for materially misleading statements or omissions in the registration statements and prospectuses used to launch companies into the public markets. For nearly a century, these laws have provided robust protection to investors and enabled the U.S. public capital markets to become the envy of the world.

SPACs largely bypass this IPO liability regime. Because SPACs originally begin trading as "blank check" companies, there are no substantive disclosures about any underlying company operations or financials when its shares first become publicly traded. It is not until the SPAC fulfills its purpose and merges

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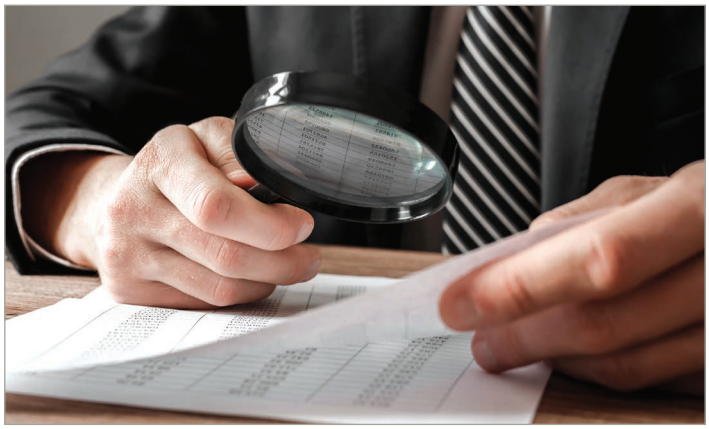
with a target company, the so-called "de-SPAC" transaction, that disclosure is made about the acquired company's business, operations, and financials. This initial disclosure usually takes the form of a proxy statement or "Super 8-K," as opposed to a registration statement or prospectus. Accordingly, powerful claims for recovery of losses under Sections 11 and 12 of the '33 Act are not available to most SPAC investors.



Investors in companies that go public through direct listings are similarly disadvantaged. While a direct listing does involve a registration statement and associated '33 Act liability, investors in direct listings are usually unable to pursue strict liability '33 Act claims because they cannot "trace" their shares to the misleading registration statement. This situation occurs because company insiders, early stage investors, and other pre-IPO shareholders are allowed to sell their personal holdings in the listing, resulting in a commingling of shares issued under different registration statements or none at all.

Without the benefit of claims under Sections 11 and 12 of the '33 Act, which are among the strongest claims available to investors under the federal securities laws, investors defrauded by companies that go public through a SPAC or direct listing are generally forced to rely on general-antifraud claims under Section 10(b) of the Securities and Exchange Act of 1934 and proxy misstatement claims under Section 14(a) of the Act. However, these '34 Act claims offer far less protection to investors. For example, in contrast to '33 Act claims discussed above, which impose virtually absolute liability on issuers for misrepresentations in a registration statement, claims under Sections 10(b) and 14(a) of the '34 Act require that investors prove defendants' culpable state of mind—namely, intent to defraud or extreme recklessness for Section 10(b) claims, and negligence for Section 14 claims. In addition, these '34 claims place the onus on investors, rather than the company and its underwriters, to demonstrate that the material misstatements or omissions were the proximate cause of their losses. Investors must also demonstrate that they relied on the misstatements in purchasing the securities (either directly or through the fraud-on-the-market doctrine) and establish other claim elements.

Early SPAC investors may also be able to pursue claims under state law. In egregious situations, investors may be able to sue the officers, directors, and sponsors of the SPAC for breach of fiduciary duty (or aiding and abetting such breaches) for failing to disclose known defects in the target company or failing to conduct proper due diligence in connection with the acquisition, which misled SPAC shareholders into approving the merger and deprived them from exercising their redemption rights prior to the merger close. Like the '34 Act claims, however, these state law claims are nowhere near as potent as the '33 Act claims available to investors in traditional underwritten IPOs. As with the '34 Act claims, these state law claims present investors with tougher pleading standards and additional proofs.

What's more, in addition to being more difficult to plead and prove, the '34 Act claims cast a narrower net of defendants compared to the '33 Act claims. In particular, the '34 Act claims cannot be brought against underwriters. Indeed, a significant benefit of '33 Act claims is providing investors with the ability to seek recovery from the well-heeled investment banks that acted as underwriters for an IPO. This is critical, as companies often face significant "ability to pay" issues after a fraud or other misconduct emerges, which prevents investors from obtaining a meaningful recovery of their losses.

The erosion of these traditional IPO safeguards is starting to raise concerns in the investment community. A recent study of SPACs by law professors at Stanford and NYU warned that "protection from Section 11 liability could lead to less due diligence and sloppier disclosure," and "[i]f Section 11 is viewed as important in the IPO context, it is difficult to see why it should not be applied in the context of a SPAC merger." Similar concerns were echoed by two of the SEC's five Commissioners in the context of direct listings. In a statement disagreeing with the SEC's approval of a new NYSE direct listing rule, Commissioners Allison Herren Lee and Caroline Crenshaw emphasized that "underwriters provide an important independent check on the quality of the registration statement" and "are incented to do their job well because if they do not, they are subject to strict liability under Section 11 and Section 12(a)(2) of the Securities Act." The dissenting Commissioners emphasized that "[i]f underwriters are removed from the equation, investors will lose a key protection: a gatekeeper incented to ensure that the disclosures around [IPOs] are accurate and not misleading." A federal court in San Francisco recently underscored that alternative IPOs, including direct listings, "completely obviate the remedial penalties of Sections 11."

Given the explosion of SPACs and the surge in direct listings, it is important for investors navigating the rapidly changing landscape of today's public capital markets to understand that investing in these non-traditional IPOs carries far greater risk and fewer protections compared to investments in traditional IPOs.

ESG, Diversity, Enforcement

Turning the Page on Securities Regulation

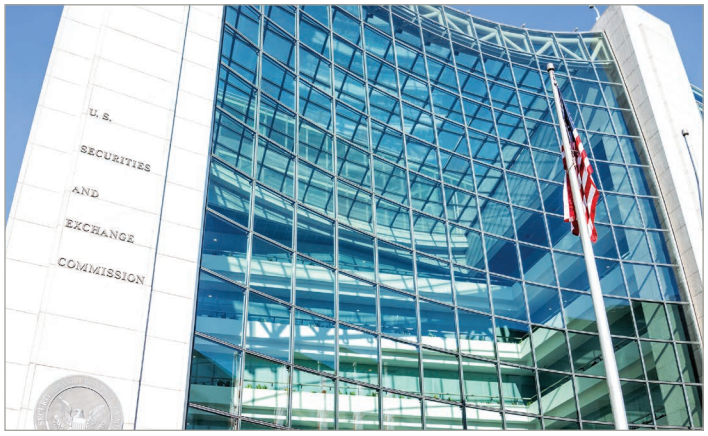
Written by
Mario Alvite

Following yet another loss in a season full of them, former Tampa Bay Buccaneers head coach John McKay was asked about his team's execution, to which he replied, perhaps apocryphally, "I am in favor of it."

Investors and market observers in favor of robust securities regulation from the new Biden administration will surely have much more cause for hope than McKay had for his team, as every indication suggests the White House and its Democratic allies in Congress intend to effectuate a shift from the deregulatory bent of the Trump era to a more aggressive oversight posture. From its choice of nominees at crucial posts to its ambitious agenda intended to be executed across many agencies of the executive branch, the incoming administration has put corporations on notice of increased reporting requirements backed by a renewed commitment to enforcement.

Most significantly, President Biden's nomination and Congress' confirmation of Gary Gensler (former head of the Commodity Futures Trading Commission (CFTC)) for SEC Chairman, has been met with broad approval among investor and regulatory advocates. At the CFTC, Gensler earned a reputation as a formidable watchdog following the 2008 financial crisis by creating new rules governing the $400 trillion swaps market, policing the over-the-counter derivatives market, and launching enforcement actions against top financial institutions manipulating LIBOR, turning an almost dormant regulator into a financial oversight heavyweight during his five-year tenure. As one former CFTC chief trial attorney put it, Gensler is a "no-nonsense force of nature."[1]

This was not how anyone would describe the former SEC Chair, Jay Clayton, who generally avoided high-stakes conflict with financial institutions and eased rules binding the financial industry and public companies, consistent with the Trump Administration's business-friendly policy of loosening financial restrictions to stimulate growth. To be sure, the Clayton SEC saw major enforcement actions, including a $50 million penalty levied against KPMG for allegedly altering past audit work and a $100 million settlement with Facebook for misusing user data. In 2019 alone, the SEC ordered rule violators to pay a combined $4.3 billion.[2]



Still, overall the Clayton-led SEC "reduced corporate disclosures to investors, weakened auditor independence, [and] made it harder for shareholders to push for corporate votes on issues such as climate change and racial justice."[3] One observer concluded that Clayton "did nothing to … require mandatory and uniform environmental, social and governance ["ESG"] disclosures."[4]

Increased ESG disclosures, generally disfavored by Clayton and Republicans on the SEC Commission as well as in Congress, are widely seen by investors as an important consideration in corporate governance and regulation, addressing areas such as climate change, political contributions, and social issues such as diversity in the boardroom. Institutional investors have led the way on these issues by supporting ESG reporting and initiatives, and demanding action and transparency from companies.

The ESG initiative receiving the most urgent call to action from Democrats is disclosure of climate change-related matters, such as a company's carbon footprint. President Biden's climate plan calls for "[r]equiring public companies to disclose climate risks and the greenhouse gas emissions in their operations and supply chains,"[5] and Senator Elizabeth

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[1] Al Barbarino, "How Compliance Departments Can Prepare For Biden," Law360, Jan. 28, 2021, https://www.law360.com/articles/1349269

[2] Alicia McElhaney, "The SEC Brought More Charges This Year. Here's Who They Targeted," Institutional Investor, Nov. 6, 2019, https://www.institutionalinvestor.com/article/b1hxj3dmtctvz3/The-SEC-Brought-More-Charges-This-Year-Here-s-Who-They-Targeted; SEC Division of Enforcement Annual Report 2019, https://www.sec.gov/files/enforcement-annual-report-2019.pdf

[3] Svea Herbst-Bayliss, Katanga Johnson, Jarrett Renshaw, "Biden to name Gary Gensler as U.S. SEC chair, sources say," Reuters, Jan. 12, 2021, https://www.reuters.com/article/us-usa-biden-sec-exclusive/biden-to-name-gary-gensler-as-u-s-sec-chair-sources-say-idUSKBN29H2PQ

[4] Laura Posner, "SEC Must Reprioritize Investor Protection To Foster Recovery," Jan. 29, 2021, https://www.law360.com/articles/1349571

[5] The Biden Plan for a Clean Energy Revolution and Environmental Justice, https://joebiden.com/climate-plan/1

Investors Defeat Motion to Dismiss in FirstEnergy Derivative Action

On May 11, 2021, the Honorable Algenon L. Marbley of the United States District Court for the Southern District of Ohio denied the defendants' motion to dismiss in *Employees Retirement System of the City of St. Louis v. Charles E. Jones, et al.*,[1] a shareholder derivative action against the board of directors and top executives of electric utility company FirstEnergy Corp. Saxena White is serving as co-lead counsel for plaintiffs, and Employees Retirement System of St. Louis is serving as co-lead plaintiff.

The complaint alleges that between 2017 and 2020, Ohio-based FirstEnergy paid more than $60 million in illegal contributions to Ohio's Speaker of the House, Larry Householder, and other Ohio public officials, in exchange for favorable legislation designed to bail out the company's failing nuclear power plants. In 2016, FirstEnergy's costly nuclear power plants, which had become less profitable as demand for nuclear power diminished, began inflicting major losses on the company, including a $1.26 billion loss reported in July 2016. Meanwhile, Larry Householder, who had previously resigned as Ohio Speaker of the House in 2004 as a result of corruption allegations, sought to regain his position. A few days after he assumed office on January 3, 2017, FirstEnergy flew Householder to Washington, D.C. on its private jet so that he could attend the presidential inauguration. Soon after taking Householder to Washington, FirstEnergy informed investors that it was seeking "legislative solutions" to help its aging nuclear power business.

Within two months of this trip, Householder established a secret 501(c)(4) entity called "Generation Now," and FirstEnergy and its subsidiaries began making clandestine quarterly payments of $250,000 to the entity. According to Householder co-conspirator Neil Clark, Generation Now was structured to be opaque so that donors could "give as much or more to the (c)(4) and nobody would ever know." By July 2020, FirstEnergy and its subsidiaries had paid more than $60 million to various entities controlled by Householder, including Generation Now, under the guise of donations. In return, Householder pledged to create a standing subcommittee on energy generation, which he later admitted was created to pass House Bill 6—a bill that, according to the FBI, "essentially was created to prevent the shutdown of [FirstEnergy's] nuclear plants." The bill, which was criticized as "the worst energy bill of the 21st century," eventually passed, though it faced heated opposition from consumers and watchdog groups.

The bribery scheme was exposed on July 21, 2020, when formal criminal charges were brought against Householder and others, and reports of FirstEnergy's involvement surfaced soon after. Commenting on the charges, the U.S. Attorney for the Southern District of Ohio stated, "This is likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio…bribery, pure and simple. This was a quid pro quo." The company's stock value fell 45% in the aftermath, eliminating approximately $12 billion of stock value, and the company is currently the subject of ongoing investigations by the U.S. Department of Justice, the SEC, the Ohio Public Utilities Commission, and the Ohio State Attorney General.

In denying defendants' motion to dismiss, Judge Marbley stated, "This Court finds Plaintiffs have alleged by clear and convincing evidence that Defendants' 'knew or recklessly disregarded reports and "red flags" that FirstEnergy was paying massive amounts of illicit bribes to Householder and other public officials to ensure passage of legislation' and took affirmative steps to conceal the scheme."

For more information on the FirstEnergy case, please contact Tom Curry at tcurry@saxenawhite.com.

[1] No. 2:20-cv-04813 (S.D. Ohio)

RECENT TRENDS IN SECURITIES LITIGATION

Written by
Don Grunewald

It goes without saying that the signature event of 2020 was the COVID-19 pandemic. Nearly every corner of our society was affected by the pandemic, and securities litigation was no exception, as the pandemic ushered in profound changes in filing rates, settlement rates, and types of cases. It was a year of far fewer filings and a lower rate of settlements, along with a new emphasis on coronavirus-related cases. Observers also noted several unrelated developments: (i) a continued trend of securities class actions involving data breaches, cannabis, and cryptocurrency; (ii) lead plaintiff appointments reflected the growing interest of European investors in U.S. securities cases, a heightened judicial interest in the diversity of leadership groups, and stricter standards on lead plaintiff appointments generally; and (iii) a surge in initial public offerings and challenges presented by direct listings and "blank check" special purpose acquisition companies ("SPACs").

Number of Filings

According to NERA Economic Consulting, filings of securities class actions in 2020 were down 22% from 2019, with a total of 326 filings in 2020 compared to 420 in 2019.[1] While much of this decline reflected a substantial drop in the number of merger objection cases (from 162 to 106), there was a pronounced lull in the second quarter of 2020, due largely to logistical constraints at law firms and a challenging environment for proving loss causation amidst a broad and deep market pullback.

Notably, the geographic distribution of filings changed dramatically. Filings in the Ninth Circuit increased from 56 to 79, while filings in the Second and Third Circuits (historically the two other most common jurisdictions for securities filings) were down from 105 and 32, to 69 and 25 respectively. This shift reflects the increasing number of cases filed against technology companies, with fewer cases against financial companies (typically headquartered in the Northeast).

COVID Litigation

Unsurprisingly, a large number of new cases filed in 2020 involved COVID-related claims. Through December 2020, 33 filed cases made at least one pandemic-related claim. One such case was filed against Royal Caribbean Cruise Lines, Inc. in the Southern District of Florida for a class period of February 4, 2020 through March 17, 2020. The initial complaint alleged that the company failed to disclose material adverse facts about its decrease in bookings outside China, with additional allegations related to the company's alleged inadequate policies and procedures to prevent the spread of the virus on its ships. Similar cases have been filed against other cruise ship operators, while other COVID-related cases have involved vaccine developers and other pharmaceutical companies, testing companies, financial firms, and even Zoom Video Communications.

Data Breach, Cryptocurrency, and Cannabis Cases

Perhaps more surprising was the continuing trend of cases filed involving data breaches, cryptocurrencies, and cannabis companies. Data breach cases are classic examples of event-driven securities litigation, and the increasing prevalence of cloud-based data storage and hacking will undoubtedly lead to future data breaches and related litigation. Notably, in 2020 Equifax agreed to a $149 million settlement in a securities class action related to its 2017 data breach, which has perhaps been overshadowed by the $575 million settlement (and the potential for individual payments to class members of up to $125) in the consumer class action for the same breach.

Cryptocurrencies have also gone from esoteric curiosities to a serious alternative class of financial instrument, with the price of one Bitcoin rocketing from $315 in 2015 to over $60,000 at one point, in early 2021. Public companies have sprung up seeking to cash in on the cryptocurrency craze by issuing their own currencies, by "mining" (new Bitcoin is created or "mined" through computers solving various mathematical equations critical to the stability of Bitcoin), by launching trading or storage platforms, or by simply speculating in cryptocurrencies. Even Tesla, a large public company, announced that it had acquired over $1.5 billion worth of Bitcoin.

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[1] Janeen McIntosh and Svetlana Starykh, "Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review" (NERA Jan. 25, 2021) at 2, 5; https://www.nera.com/publications/archive/2021/recent-trends-in-securities-class-action-litigation--2020-full-y.html ("NERA Report").

Litigation involving cryptocurrencies has been growing and shows no signs of subsiding. On April 3, 2020, eleven class actions were filed in the Southern District of New York against various cryptocurrency issuers and exchanges, principally under Section 5 of the Securities Act of 1933, alleging that the companies had engaged in sales of unregistered securities without an exemption. In essence, a key legal principle implicated here is to what extent cryptocurrencies are securities, an intriguing point given that the Supreme Court famously held in 1946 that even interests in orange groves could be securities.

In a marked societal shift, more and more states have been legalizing or decriminalizing marijuana. The pace of securities class actions against cannabis companies has been building since 2018, with another six cases filed in 2020. One such case, filed against Trulieve Cannabis Corp. in February 2020, alleged, among other things, that while Truelieve claimed "to produce a safe and high quality medical product using state of the art growing facilities," in reality it grew "most of its product in low quality, non-client controlled" facilities that failed to protect the product from "dangerous mold."[2] With the confused state of the criminal law (marijuana is still illegal at the federal level) and a nascent state-by-state regulatory framework, this protean industry will likely be the subject of many more securities class actions in the future.

Lead Plaintiff Trends

In 2020, there were several noteworthy lead plaintiff appointment trends. First, European institutional investors, in particular Scandinavian funds, flexed their muscles and sought (and often gained) class leadership positions. Some large and preeminent cases in which European funds were appointed, either individually or as part of a group, were those against: (i) Luckin Coffee, where a Swedish pension fund, Sjunde-Fonden (also referred to as "AP7"), that manages $60 billion was paired with a U.S. fund; (ii) Wells Fargo, where Swedish bank Handelsbanken Fonder AB was part of a group with U.S. funds; (iii) Intel, where SEB Investment Management, a Swedish investment manager with over $100 billion in investments, and KBC Asset Management, a Belgian bank and insurer with hundreds of billions of dollars in assets, were paired together; and (iv) Becton Dickinson, where Industriens Pensionsforsikring AS, a multi-billion dollar Danish pension fund, is sole lead plaintiff.[3]

Moreover, courts displayed a strong commitment to providing adequate representation of the highly diverse investor community by ensuring that appointed lead counsel foster inclusive environments and employ representative groups of attorneys. For example, in a shareholder derivative action on behalf of shareholders of utility company First Energy Corp., the court, in appointing lead counsel, was "impressed" that "its proposed leadership team of five lawyers includes one woman and at least two minority lawyers" and highlighted lead counsel's overall diverse composition. The court reasoned that the class of shareholders "encompass[es] a broad range of individuals who are diverse in ethnicity, race, and gender," and therefore a diverse team of attorneys running the case would be "well-suited to represent the plaintiffs' diversity and to act on their behalf."[4]

Courts also began to focus less on shareholder losses as the decisive factor in appointing a lead plaintiff. In *In re Allergan PLC Securities Litigation*,[5] the court had declined to certify a class on the basis that the lead plaintiff was an inadequate class representative and reopened the lead plaintiff appointment process. Interestingly, the court declined to entertain applications from investors who had originally failed to move for appointment as lead plaintiff on the basis that one investor (already found presumptively adequate) who had moved initially had again sought appointment, while "none of the three new applications has offered any explanation—let alone a satisfactory one—for why it did not make a timely application to be lead plaintiff."

In Borteanu v. Nikola Corporation,[6] *("Nikola")* six different movants, all individuals or groups of individuals, sought appointment as lead plaintiff. The court declined to appoint two different groups—one with an overwhelming loss—because the court had "misgivings about [their] cohesion" and "ability to control the litigation without undue influence from counsel," where the investors came from different states and seemed to have no pre-existing relationships. (Indeed, in *Luckin Coffee*, another court similarly declined to appoint the movant with the largest loss on similar grounds.) But in *Nikola,* the court also declined to appoint the movant with the second largest loss—on the grounds that the movant's high-frequency trading and post disclosure purchases "seems to show that he did not rely on Nikola's fraudulent statements while making his trades" and therefore was atypical due to a potential unique defense. Thus, the court appointed the movant with the fourth largest loss, or only slightly more than 10% of the losses incurred by the top movant. This should give comfort to prospective lead plaintiffs with losses below those

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[2] *In re Trulieve Cannabis Corp. Securities Litigatio*n, Case No. 4:20-cv-00168, at Dkt. No. 27 (N.D. Fla. July 13, 2020). The court dismissed this complaint on March 19, 2021 (Dkt. No. 37), but litigation continues.

[3] *In re Luckin Coffee Inc. Securities Litigation, ("Luckin Coffee")* Case No. 1:20-cv-01293, at Dkt. No. 118 (S.D.N.Y. June 12, 2020); *In re Wells Fargo & Company Securities Litigation*, Case No. 1:20-cv-04494, at Dkt. No. 59 (S.D.N.Y. Aug. 29, 2020); *In re Intel Corp. Securities Litigatio*n, Case No. 5:20-cv-05194, at Dkt. No. 29 (N.D. Cal. Oct. 20, 2020); *Kabak v. Becton, Dickinson and Company, et. al.*, Case No. 2:20-cv-02155, at Dkt. No. 24 (D.N.J. June 9, 2020).

[4] *Bloom v. Anderson*, Case No. 2:20-cv-04534, 2020 WL 6710429, at * 9 (S.D. Ohio Nov. 16, 2020). Saxena White was appointed as co-lead counsel in this case.

[5] *In re Allergan PLC Securities Litigation,* Case No, 18-cv-12089, 2020 WL 5796763 (S.D.N.Y. Sept. 29, 2020).

[6] *Borteanu v. Nikola Corporation,* Case No. 2:20-cv-01797, 2020 WL 7392795 (D. Ariz. Dec. 15, 2020).

EVOLENT HEALTH SECURITIES LITIGATION:

Plaintiffs Overcome Defendants' Motion to Dismiss

On March 24, 2021, a federal court in Virginia denied in part the defendants' motion to dismiss in *Plymouth County Retirement System, et al. v. Evolent Health, Inc., et al.*,[1] a securities fraud class action against Evolent Health, Inc. and certain of its top executives. Saxena White is serving as lead counsel for the plaintiffs, Plymouth County Retirement System and Oklahoma Police Pension and Retirement System.

Evolent is a service provider that is attempting to capitalize on the shift towards "value-based" healthcare implemented by the Affordable Care Act by offering Medicare and Medicaid healthcare plans a suite of end-to-end technology-based services purportedly designed to reduce the plans' operating costs. Throughout the class period, Evolent created an illusion of explosive growth predicated on promises to "lower clinical and administrative costs" for its clients, "drive greater efficiency," and enable them to "manage patient health in a more cost-effective manner."

In particular, Evolent touted its partnership with a Kentucky-based Medicaid plan known as Passport Health Plan that was by far Evolent's largest and most important client, accounting for 20% of the company's revenue. Evolent held out Passport as the paragon of its cost-cutting strategy by boasting, for instance, that it "helped to generate over $100 million in savings" for Passport and promising it could do the same for other clients. As a result, Evolent's stock price soared from $11 in November 2017 to a high of $28.75 in September 2018. The truth, however, was that Evolent's highly touted cost-cutting services were far from the success story that defendants triumphantly portrayed. In reality, Evolent financially cannibalized Passport, drove it to the brink of insolvency, and ultimately caused Passport to lose its Medicaid contract with the state of Kentucky—meaning Passport is now effectively out of business.

As multiple former senior employees of both Passport and Evolent confirmed, Evolent grossly overcharged Passport hundreds of millions of dollars of management fees; fee amounts which, unbeknownst to investors, dwarfed any operational costs savings Evolent claimed its suite of services had generated for Passport. Indeed, from 2016 through 2018, the total management fees Evolent reaped from Passport increased from $55.5 million in 2016, to $88.2 million in 2017, and to $114.5 million in 2018 – effectively costing Passport twice as much as the purported $100 million of savings Evolent claims it had achieved for Passport over the same three-year period. Additionally, rather than cutting administrative expenses, Evolent's administrative services did exactly the opposite by causing Passport to breach the terms of its contract with Kentucky and incur massive penalties. These staggering expenses—nearly half a billion dollars in penalties during the class period—were undisclosed to investors but were documented in detailed monthly letters that Kentucky sent to Passport's most senior executives, and which defendants admit that they received and reviewed. As a result, Passport's administrative expenses spiked from $107.5 million per year pre-Evolent to $194 million per year in 2018. Additionally, Passport went from reporting a net operating gain of $33.3 million pre-Evolent to a net operating loss of $130.7 million in 2018, leaving Passport teetering on the brink of insolvency.

Investors began to learn the truth about Evolent when, on February 15, 2019, Passport filed a complaint against Kentucky revealing, for the first time, that a Passport bankruptcy was an imminent threat. In response, Evolent's stock price fell by 10.8%. As Evolent management would later admit, by January 2019 Passport's financial situation was so bad that Evolent realized the "writing was on the wall" that it would likely need to bailout Passport. Nevertheless, defendants disclosed none of this to investors, instead repeatedly assuring the market that Evolent had no intention of bailing out or purchasing the ailing health plan. Accordingly, the market was stunned when, on May 29, 2019, Evolent completely reversed course, announcing that Passport's financial condition was so dire that Evolent had no choice but to acquire a 70% stake in Passport in a last-ditch effort to save its largest and most important customer. In response to the news of this emergency bailout, Evolent's stock price collapsed, losing nearly 30% of its value in a day, with analysts excoriating Evolent management for their lack of candor.

In addition to damaging shareholders, Evolent's excessively expensive services also caused Passport to lose its Medicaid contract with Kentucky. On November 26, 2019, Kentucky announced it was terminating its contract with Passport because, among other reasons, Passport was unable to establish how it could provide Medicaid services "in a cost-effective manner"—which purportedly was the entire justification for the Evolent/Passport partnership.

With the denial of defendants' motion to dismiss, the case is now in the discovery phase.

For more information on the *Evolent* case, please contact Brandon Grzandziel at bgrzandziel@saxenawhite.com.

[1] No. 1:19-cv-1031 (E.D. Va.)

Supreme Court Considers Important Class Certification Issues in *Goldman Sachs* Case

Written by
Joshua Saltzman

On June 21, the Supreme Court issued its decision in *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*,[1] a case that could have had major ramifications for securities' plaintiffs' ability to certify a class. However, while the decision was much anticipated, the end result was underwhelming, and appears likely to have little significant import to securities class actions.

The case was closely followed, as it could have had major implications for plaintiffs' ability to certify a class action in an "inflation maintenance" case (i.e. a case where a false and misleading statement did not cause a measurable increase in a company's stock price). Relatedly, the Supreme Court could also have potentially limited plaintiffs' ability to maintain class actions based on so-called "generic" false statements—statements that concern a general state of affairs, policy, or trend, rather than specific events, facts, or financial figures.

But the final opinion, delivered by Justice Barrett, and joined by Justices Roberts, Breyer, Kagan, and Kavanaugh (placing three conservatives and two liberals in the majority) was hardly a knockout blow to either inflation maintenance cases or generic statements cases—in fact, it was barely a feigned slap. The opinion left plaintiffs' ability to certify inflation maintenance cases wholly intact and reaffirmed that it is a defendant's burden to prove that false statements did not impact the stock price during the class period. The Supreme Court did, however, rule that evidence concerning the "generic" nature of a statement should at least be taken into consideration at the class certification stage, a subtle change in the law that could occasionally make a difference in a close case, especially before a judge already predisposed against plaintiffs.

The case stems from facts now more than ten years old—specifically, the widely publicized Abacus CDO controversy, in which Goldman Sachs allegedly packaged securities it knew would fail and sold them to a client, and then bet against those securities. The plaintiffs alleged that Goldman Sachs made false and misleading statements about its ethics and conflict of interest policies and controls, such as "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest," and "[o]ur clients always come first"—statements that were alleged to be false due to Goldman Sachs's blatant conflicts of interest with respect to Abacus.

The defendants argued that a class should not have been certified because their statements were too "generic" for investors to rely upon and because Goldman Sachs's stock price did not increase on the days the statements were made. But both the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit rejected that argument on multiple appeals and remands. Most recently prior to the Supreme Court decision, the Second Circuit had reaffirmed the "inflation maintenance theory"—the idea that a false statement may maintain an inflated price, rather than increase a stock price—and further, that the materiality of particular statements to investors is not appropriate to determine at the class certification stage.[2] But Goldman Sachs petitioned for certiorari, and the Supreme Court agreed to hear the case in December, with oral argument in March.

By way of background, in order to certify a class action in U.S. federal courts, a plaintiff has to prove that common issues "predominate" over individualized issues. One of the elements plaintiffs must prove in a securities fraud action is reliance, i.e. that they relied on the alleged false statement in making their investment. Because it would be nearly impossible to manage a class action in which hundreds or thousands of investors

continued on next page

[1] https://www.supremecourt.gov/opinions/20pdf/20-222_2c83.pdf

[2] *Arkansas Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 266 (2d Cir.).

each had to prove their own reliance on a false statement, the Supreme Court developed a "presumption of reliance" in a case titled *Basic v. Levinson*.[3] The "*Basic* presumption" dictates that, in an efficient market, any fraudulent statement should be reflected in a stock's price, and therefore anyone who purchased at a price inflated by fraud can be "presumed" to have relied on the fraud whether or not they individually read and directly relied on the false statement in making their investment.

Unsurprisingly, corporate defendants have long been looking for a way to escape the *Basic* presumption, since it simplifies the certification of a securities class action, and once a class is certified, plaintiffs have substantial settlement leverage over defendants. One argument favored by defendants is that they should be able to rebut the *Basic* presumption by demonstrating a lack of "price impact" through showing that an alleged false statement never actually caused any inflation in the company's stock in the first place. However, what "price impact" actually means and how it can be proven, or disproven, has remained a thorny issue.

Further complicating things is that many frauds maintain a company's stock price rather than causing it to measurably rise. For example, if a company were to announce fraudulently inflated earnings that beat market expectations by 20%, one might expect to see the company's stock price rise on the announcement. However, if the same company fraudulently inflated earnings only to meet market expectations (when, in reality, their true earnings were far below expectations), the company's stock price might not rise at all on the earnings announcement. Yet both examples are fraud, and the lack of a price increase in the second example does not mean that the fraud did not "impact" the price—rather, the fraud maintained the stock price at what were inflated levels. The latter type of price impact is evidenced when the truth comes out—e.g., the company restates its earnings—and the stock price finally falls, releasing the inflation.

The Supreme Court has already examined this issue three other times in the past ten years, but this hasn't stopped corporate defendants from continuing to try to narrow the *Basic* presumption. First, in *Erica P. John Fund, Inc. v. Halliburton Co. ("Halliburton I")*,[4] the Supreme Court affirmed that plaintiffs had to prove only three things in order to invoke the *Basic* presumption: (1) that the stock traded in an efficient market; (2) that the false statements were publicly known; and (3) that purchases took place while the stock was inflated. Then, in *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*,[5] the Supreme Court reaffirmed that plaintiffs did not have to prove that a statement was material to investors in order to certify a class, since materiality is a question common to all investors. Finally, in *Halliburton Co. v. Erica P. John Fund, Inc., ("Halliburton II")*,[6] the Supreme Court reaffirmed the *Basic* presumption, but held that defendants must be "afforded an opportunity. . . to rebut the presumption at the class certification stage, by showing a lack of price impact."

Since *Halliburton II*, securities defendants have repeatedly attempted to "show a lack of price impact" at the class certification stage, but most attempts have failed—so long as the market for the stock is efficient and the company's stock price experienced a statistically significant drop on the revelation of information correcting the alleged fraud.

The recent Supreme Court decision hardly changes the landscape, but it does place one additional bit of ammunition in defendants' arsenals in certain cases—particularly, cases where (1) there was no stock price increase in response to a false statement, and (2) the disclosure that "revealed the truth" does not exactly match up with the alleged false statement—creating a "mismatch between the contents of the misrepresentation and the corrective disclosure."[7] As Justice Barrett reasoned, such a mismatch "may occur when the earlier misrepresentation is generic (e.g., "we have faith in our business model") and the later corrective disclosure is specific (e.g., "our fourth quarter earnings did not meet expectations")." In those situations, Justice Barrett said, "it is less likely that the specific disclosure actually corrected the generic misrepresentation, which means that there is less reason to infer front-end price inflation—that is, price impact—from the back-end price drop."[8]

Of course, the most "generic" false statements are already often dismissed at the pleading stage as being immaterial to investors, and the Supreme Court merely required lower courts to "consider" the generic nature of statements, so the vast majority of securities class actions are unlikely to be impacted by the new decision. Still, securities plaintiffs and their attorneys should be prepared to confront class certification stage arguments that defendants' "generic" statements had no price impact, which arguments now undoubtedly will be emboldened by the Supreme Court's *Goldman Sachs* decision.

[3] 485 U.S. 224 (1988).
[4] 563 U.S. 804 (2011).
[5] 568 U.S. 455 (2013).
[6] 573 U.S. 258 (2014).
[7] Opinion, p. 8.
[8] *Id.* at 8-9.

dialysis reimbursement rates that were up to ten times higher than the rates that government plans paid for the same dialysis treatments. The complaint further alleged that the scheme was facilitated though DaVita's relationship with the American Kidney Fund ("AKF")—a 501(c)(3) charitable organization to which DaVita purportedly "donated" over $100 million in annual charitable contributions, which the AKF would in turn use to pay the insurance premiums for the patients plaintiffs allege had been steered.

HD Supply Final Settlement

In July 2020, the U.S. District Court for the Northern District of Georgia approved a $50 million settlement against the Home Depot spin-off HD Supply and its CEO and CFO.[2] The settlement was the fourth largest securities class action ever achieved in the district. The complaint alleged that HD Supply was continuously experiencing significant supply chain failures after relocating its headquarters across the country and laying off nearly all of its supply chain employees, yet the company maintained to investors that these issues had been rectified. These problems made HD Supply's 2017 growth targets unattainable, leading to a steep share price decline. Before the truth was disclosed to the market, the company's CEO quietly exited his holdings in company stock, selling nearly all of his shares for a total of $53 million over the course of one week. The HD Supply litigation was led by a trio of Florida institutional investors—Lead Plaintiffs City Pension Fund for Firefighters & Police Officers in the City of Miami Beach, Pembroke Pines Pension Fund for Firefighters and Police Officers, and City of Hollywood Police Officers' Retirement System.

TrueCar Final Settlement

The U.S. District Court for the Central District of California approved Lead Plaintiff Oklahoma Police Pension and Retirement Fund's $28.25 million class action settlement against automotive pricing website TrueCar and three of its officers in May 2020.[3] The case involved allegations that the defendants failed to disclose material information related to the company's relationship with United Services Automobile Association (USAA), TrueCar's largest source of revenue. The amended complaint alleged that Truecar knew but failed to disclose to investors that USAA had been planning, and then made, significant changes to its website that would have a material adverse effect on the volume of purchases generated by USAA. When the truth was disclosed in a November 2017 earnings release, which revealed a decline in sales attributable to USAA, TrueCar's shares plummeted 35%.

Credit Suisse Final Settlement

In December 2020, Judge Lorna Schofield of the Southern District of New York approved a $15.5 million settlement against international investment bank Credit Suisse Group AG and three of its executives.[4] In this case, plaintiffs alleged that Credit Suisse made false statements related to the company's risk controls and risk limits, which were revealed to be false when the company disclosed losses of over $1 billion in 2016 related to its portfolio of risky and illiquid fixed income investments. Notably, the settlement amount represented up to 63% of the class's maximum estimated aggregate damages—a rate 30 times greater than the median recovery for securities class actions in 2019.

GTT Final Settlement

In April 2021, a $25 million settlement was approved in *Plymouth County Retirement System v. GTT Communications, Inc. et al*., a securities class action filed against a cloud networking company and four of its executives in the U.S. District for the Eastern District of Virginia.[5] The case involved allegations that GTT failed to disclose key operational problems related to its acquisition of Interoute Communications Holdings S.A., Europe's largest cloud services platform, in a transformational $2.3 billion acquisition that essentially doubled GTT's size. In reaction to the series of negative announcements related to the integration of Interoute, GTT's stock price declined by more than 65%.

Perrigo Company Class Certification

Lead Plaintiffs' motion for class certification in *In re Perrigo Company PLC Securities Litigation* was granted by Judge Denise Cote of the U.S. District Court for the Southern District of New York in September 2020.[6] The *Perrigo* case involved allegations that the defendant pharmaceutical company, headquartered in Michigan but domiciled in Ireland for tax reasons, misrepresented its potential tax liability in connection with the sale of its sole remaining core asset—a 50% stake in its multiple sclerosis flagship drug—for $3.25 billion plus contingent royalty payments. Following the class certification order, Judge Cote issued another excellent order in favor of the Lead Plaintiffs, ordering the defendants to produce over 2,100 documents that were improperly withheld for privilege.

Patterson Companies Class Certification

In September 2020, the United States District Court for the District of Minnesota granted the Lead Plaintiffs' motion for class certification in *Plymouth County Retirement System v. Patterson Companies, Inc*.[7] The complaint in Patterson alleged that the defendant, a dental product distributor, was engaged in an illegal price-fixing conspiracy with its main competitors, which was designed to boycott Group Purchasing Organizations (representing small and independent dental practices) from the dental supply industry. The class certification order denied the defendants' request to shorten the class period, thus allowing the inclusion of stock drops connected to the FTC's announcement of a complaint filed against Patterson and its competitors for violations of U.S. antitrust laws.

[2] Case No. 17-CV-02587-ELR (N.D. Ga.)
[3] Case No. 2:18-cv-02612-SVW-AGR (C.D. Cal.)
[4] Case No. 1:17-cv-10014-LGS (S.D.N.Y.)
[5] Case No. 1:19-cv-00982-CMH-MSN (E.D.N.Y.)
[6] Case No. 1:19-cv-00070-DLC (S.D.N.Y.)
[7] Case No. 0:18-cv-00871-MJD-HB (D. Minn.)

Warren previously sponsored a bill directing the SEC to require related disclosures annually.[6] Since investors also increasingly seek such disclosures, it is expected that the SEC under Gensler will develop climate change disclosure standards, as recommended last year by the regulator's Investor Advisory Committee.

Recently, SEC Commissioner and former Acting Chair Allison Herren Lee directed the agency to review public companies' current climate-related disclosures in an effort to inform its further guidance on what she called the "grave" risk of climate change that can "render assets and even business models obsolete in a very short timeframe."[7] Additionally, at his nomination hearing before the Senate Banking Committee, Gensler addressed skepticism of new climate disclosures by noting that they would be based on materiality to investors, and "can be pro-issuer, pro-corporation and pro-investor." The day after the hearing, the SEC Division of Examinations announced its 2021 priorities, including an "enhanced focus on climate-related risks."[8] Already the SEC has created a 22 member ESG Task Force tasked with identifying "material gaps or misstatements in issuers' disclosure of climate risks under existing rules."[9]

In his testimony, Gensler also signaled other ESG areas that companies can expect the SEC to focus on under his leadership, including boardroom diversity, which he said "benefits decision making." Again citing his interest in "what information investors want," Gensler indicated that the SEC will review a "broad arena about human capital, including diversity."[10] One possible model for future action is Nasdaq's recent request to the SEC to require more director diversity from the companies listed on its exchange, including seating at least one woman and one minority or LGBTQ director.[11] It is possible that the SEC could pursue similar requirements more broadly, including public and private companies under its purview, though such an effort would likely be met with resistance by Republicans who do not consider the issue an appropriate exercise of its authority and are concerned with overreach.

Another likely area of SEC interest under ESG is transparency on corporate political spending,[12] an issue that will surely be heavily contentious politically, given Republicans' views on the free speech rights of corporations. Senate Majority Leader Chuck Schumer and other Democrats have long advocated for requirements that companies disclose political donations, with the House introducing HR 1053 in 2019, which would require issuers of securities to annually disclose political activity expenditures during the previous year.[13] While Gensler demurred at his nomination hearing on the question of whether political contributions represented material information, he again pointed to "strong investor interest" as a reason for further consideration by the SEC.

With Democratic majorities in Congress and on the SEC Commission, these and other Biden Administration initiatives in securities regulation are certain to progress more in the coming months than in the last four years. It will not take a turnaround effort as dramatic as the now Super Bowl Champion Tampa Bay Buccaneers, but the potential for increasing disclosure requirements meaningfully and using rulemaking to protect investors is giving longtime shareholder advocates reason to cheer.

[6] S.2075 - Climate Risk Disclosure Act of 2019, https://www.congress.gov/bill/116th-congress/senate-bill/2075/text

[7] Commissioner Allison Herren Lee, "Playing the Long Game: The Intersection of Climate Change Risk and Financial Regulation," Nov. 5, 2020, https://www.sec.gov/news/speech/lee-playing-long-game-110520

[8] Dean Seal, "GameStop, Diversity Policies Dominate Gensler's SEC Hearing," Law360, Mar. 2, 2021, https://www.law360.com/securities/articles/1357940/gamestop-diversity-policies-dominate-gensler-s-sec-hearing

[9] "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues," Mar. 4, 2021, https://www.sec.gov/news/press-release/2021-42

[10] *Id.*

[11] "Nasdaq to Advance Diversity through New Proposed Listing Requirements," Dec. 1, 2020, https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01

[12] Paul Kiernan and Scott Patterson, "An Old Foe of Banks Could Be Wall Street's New Top Cop," The Wall Street Journal, Jan. 16, 2021, https://www.wsj.com/articles/an-old-foe-of-banks-could-be-wall-streets-new-top-cop-11610773211

[13] H.R.1053 - Corporate Political Disclosure Act of 2019, https://www.congress.gov/bill/116th-congress/house-bill/1053/text

Saxena White Welcomes New Attorneys

Marisa N. DeMato

Marisa DeMato, Director, has more than 16 years of experience advising and representing leading pension funds and other institutional investors on issues related to corporate fraud in U.S. securities markets. Her work focuses on monitoring the well-being of institutional investments and counseling clients on best practices in corporate governance of publicly traded companies.

Prior to joining Saxena White, Ms. DeMato was a partner with a nationally recognized securities litigation firm where she represented institutional investors in shareholder litigation, achieving significant settlements on behalf of clients. She represented Seattle City Employees' Retirement System in a $90 million derivative settlement that achieved historic corporate governance reforms from Twenty-First Century Fox, Inc., following allegations of workplace harassment incidents at Fox News. Ms. DeMato also successfully represented investors in high-profile cases against LifeLock, Camping World, Rent-A-Center, and Castlight Health. In addition, Ms. DeMato was an integral member of legal teams that secured multimillion dollar securities and consumer fraud settlements, including *In re Managed Care Litigation* ($135 million recovery); *Cornwell v. Credit Suisse Group* ($70 million recovery); and *Michael v. SFBC International, Inc.* ($28.5 million recovery).

Ms. DeMato is one of the industry's leading advocates for institutional investing in women and minority-owned firms. She previously served as co-chair of an annual Women's Initiative Forum, which has been recognized by *Euromoney and Chambers USA* as one of the best gender diversity initiatives. Ms. DeMato is also a member of the DAGA Women's Initiative, which is committed to electing more women to the office of Attorney General.

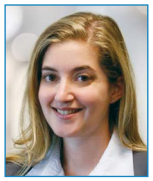
Ms. DeMato earned her Juris Doctor from the University of Baltimore School of Law. She received her Bachelor of Arts from Florida Atlantic University.

Tayler D. Bolton

Tayler Bolton has extensive litigation experience, focusing on corporate governance and fiduciary duty litigation in the courts of Delaware. She also has significant experience in corporate bankruptcy and commercial litigation.

Ms. Bolton earned a Bachelor of Music (Voice) and a Bachelor of Arts (Communication) from the University of Oklahoma. She received her Juris Doctor from Emory University School of Law where she served as an editor of the Emory Corporate Governance and Accountability Review, served as the elected Conduct Court Justice of the Student Bar Association, received the Emory Woman of Excellence Award, and was inducted into the Order of Barristers. Following graduation from law school, Ms. Bolton served as a foreign law clerk to the Honorable Hanan Melcer in the Supreme Court of the State of Israel and served as a law clerk to the Honorable Diane Clarke-Streett in the Superior Court of Delaware.

Ms. Bolton is currently active in the Delaware Barristers Association, the Richard S. Rodney Inn of Court, and the Multicultural Judges and Lawyers Section, where she received the Haile L. Alford Excellence Award.



Rachel A. Avan

Rachel A. Avan has more than a decade of experience in securities litigation. She focuses on investigating and developing U.S. and non-U.S. securities fraud class, group, and individual actions, as well as advising institutional investors regarding alternatives for recovery for fraud-related investment losses.

Ms. Avan's analysis of new and potential matters is informed by her extensive experience as a securities litigator. Prior to joining Saxena White, Ms. Avan was of counsel at a nationally recognized securities litigation firm, where she assisted in prosecuting numerous high-profile securities class actions and corporate governance matters. She also served as a key member of the firm's case evaluation team and managed the firm's non-U.S. securities litigation practice for several years.

Ms. Avan has significant expertise analyzing the merits, risks, and benefits of potential claims outside the United States. She has played an essential role in ensuring that institutional investors receive substantial recoveries through non-U.S. securities litigation.

Ms. Avan earned her Juris Doctor from Benjamin N. Cardozo School of Law in 2006. She received her master's degree in English and American Literature from Boston University in 2002 and her bachelor's degree, *cum laude*, in Philosophy and English from Brandeis University in 2000.

Patrick Wooding

Patrick Wooding is an Attorney in Saxena White's California office. He represents investors in class actions, direct "opt-out" actions, and shareholder derivative litigation.

Prior to joining Saxena White, Mr. Wooding was an associate at a law firm in Wilmington, Delaware, where he represented investors in significant and high-profile corporate governance matters. He has successfully represented investors in a wide variety of derivative, class, and appraisal matters challenging conflicted transactions in the Delaware Court of Chancery and other jurisdictions around the U.S. Mr. Wooding also has significant experience advising U.S.-based investors seeking to protect their interests in connection with merger and acquisition activity subject to the law of foreign jurisdictions.

Mr. Wooding earned a Juris Doctor from the University of San Diego School of Law and a Bachelor of Science from Rowan University.

Recent Trends... *continued from page 8*

of other movants, as courts have shown an increased willingness to look beyond the size of their losses to other factors.

Direct Listings and SPACs

As direct listings and SPACs (discussed in greater detail elsewhere in this newsletter) have grown exponentially in recent years, securities litigation involving these alternative stock offerings will present novel issues. In particular, cases involving direct listings pose a unique legal question related to damages. Normally, in cases involving public offerings, securities attorneys plead claims under Section 11 of the Securities Act of 1933. Subsection (e) measures the damages for Section 11 claims and states that investors may "recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security *was offered* to the public)." But it is an open question as to what price the directly listed security was offered, and by extension, whether these claims are even possible. Courts will no doubt attempt to address this legal question in 2021.

Settlements and Dismissals

In terms of case resolutions, dismissals were at a ten-year high in 2020 and settlements were at a ten-year low. Courts dismissed 121 non-merger cases in 2020, compared to 96 in 2019 and the ten-year average of 91. Meanwhile, just 73 cases were settled last year, compared to 122 on average between 2016 and 2018.[7] Even excluding merger-related cases, the number of settlements was down by approximately 15%. Despite this, the median settlement size, excluding merger cases and outlier billion-dollar-plus or zero-dollar settlements, was relatively unchanged at $13 million, compared to $12 million in 2019 and $13 million in 2018.[8] The explanation for this disparity is the relatively large number of "mega-settlements." Only two settlements in 2019 exceeded $250 million, whereas four settlements in 2020 exceeded that figure, including two settlements, *In re Valeant Pharmaceuticals International, Inc. Securities Litigation* and *In re American Realty Capital Properties, Inc. Litigation* (Vereit),[9] which exceeded one billion dollars.

According to Institutional Shareholder Services, the aggregate value of U.S. settlements totaled approximately $5.5 billion in 2020, an increase of 61% over the $3.62 billion in settlements during 2019. In contrast, there were just ten settlements in Canada and six in Australia (and none in Europe), totaling less than $300 million. Thus, securities litigation remains an overwhelmingly American industry.

In short, 2020 was an epic year for securities litigation and capital markets generally. To what extent these trends will continue through 2021 is not clear, but it is likely that 2020 will have momentous implications well into the future.

[7] NERA Report at 12.

[8] NERA Report at 17.

[9] *In re Valeant Pharmaceutical International, Inc. Securities Litigation,* Case No. 3:15-cv-07658 (D.N.J.); *In re American Realty Capital Properties, Inc. Litigation,* Case No. 1:15-mc-00040 (S.D.N.Y.).

Upcoming Events

TEXAS ASSOCIATION OF PUBLIC EMPLOYEE RETIREMENT SYSTEM SUMMER FORUM
August 29th – 31st
San Antonio, TX

GEORGIA ASSOCIATION OF PUBLIC PENSION TRUSTEES ANNUAL CONFERENCE
September 19th - 22nd
Callaway Gardens, GA

THE ANNUAL BETTY CHEEVERS GOLF TOURNAMENT
September 20th
The Ridge Club, Sandwich, MA

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS ANNUAL CONFERENCE
September 25th – 29th
Hollywood, FL

NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS 2021 FALL CONFERENCE
September 26th – 28th
Scottsdale, AZ

FLORIDA PUBLIC PENSION TRUSTEES ASSOCIATION TRUSTEE SCHOOL
October 3rd – 6th
Sawgrass, FL

NATIONAL ASSOCIATION OF PUBLIC PENSION ATTORNEYS 2021 WINTER SEMINAR
October 5th - 7th
Tempe, AZ

INTERNATIONAL FOUNDATION OF EMPLOYEE BENEFITS PLAN 67TH ANNUAL EMPLOYEE BENEFITS CONFERENCE
October 17th – 20th
Denver, CO

STATE ASSOCIATION OF COUNTY RETIREMENT SYSTEMS 2021 FALL CONFERENCE
November 9th – 12th
Hollywood, CA

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