Cahill

March 9, 2021

Securities Litigation Outlook for 2021

Last year was an unprecedented year for securities litigation due, in part, to the COVID-19 pandemic. Although filings of new federal class actions were down 22% in 2020 versus 2019,[1] we saw a spate of new lawsuits related to COVID-19, as well as notable filings related to special purpose acquisition companies ("SPACs") and cryptocurrency. We expect these trends to continue in 2021. We also anticipate a potentially landmark ruling from the Supreme Court of the United States in *Arkansas Teacher Ret. Sys.* v. *Goldman Sachs Group, Inc.*, 955 F.3d 254 (2d Cir. 2020), *cert. granted,* 2020 WL 7296815 (U.S. Dec. 11, 2020) (No. 20-222) ("*Arkansas* v. *Goldman*"), in which the Court is expected to resolve long-standing questions about the standard for rebutting at the class certification stage the presumption of reliance in securities fraud cases established in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988) ("*Basic*").

I. Potential Landmark Ruling

On December 11, 2020, the Supreme Court granted certiorari in Arkansas v. Goldman to address the following questions: (i) whether a defendant in a securities class action may rebut the presumption of classwide reliance recognized in Basic by showing the alleged misstatements were general and did not affect the price of the security, and (ii) whether a defendant seeking to rebut the Basic presumption has a burden of production or the ultimate burden of persuasion.

In *Arkansas* v. *Goldman*, plaintiffs filed a putative class action against Goldman Sachs, alleging that defendants made misrepresentations about conflicts of interest that artificially inflated the company's stock price. Plaintiffs moved for class certification under Rule 23 of the Federal Rules of Civil Procedure which, in a claim for money damages, requires that the "court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Establishing that classwide claims predominate is difficult in securities fraud actions if investor reliance cannot be collectively established for all in the class. Under *Basic*, courts may presume reliance on a classwide basis if plaintiffs demonstrate that defendants' alleged misstatements were publicly known, the shares were traded in an efficient market, and plaintiffs purchased their shares in the period between when the misstatements were made and when more accurate or corrective disclosure came out. *Arkansas* v. *Goldman*, 955 F.3d 254, 260.

The *Basic* presumption, however, can be rebutted. "Any showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance" because "the basis for finding that the fraud had been transmitted through market price would be gone." *Basic*, 485 U.S. at 248; *see also Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) ("*Halliburton II*").[2] In

---

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

[2] In *Halliburton II*, the Supreme Court affirmed that defendants have the right to rebut the presumption of reliance established in *Basic* prior to class certification by showing a lack of price impact. There, the Court held there is "no reason to artificially limit

Arkansas v. *Goldman*, Goldman Sachs attempted to rebut the *Basic* presumption by arguing that its statements regarding conflicts of interest were only "general" and would be incapable of "maintaining inflation in a stock price as a matter of law." *Arkansas* v. *Goldman*, 955 F.3d at 266. Goldman Sachs also argued that defendants should bear only a burden of production to rebut the *Basic* presumption and not the burden of persuasion.[3]

The Court of Appeals for the Second Circuit rejected both of Goldman Sachs' arguments, holding first that "materiality . . . is not an appropriate consideration at the class certification stage." Id. at 267. The court held that even if defendants are not arguing for a materiality requirement under Rule 23, the issue of whether statements are general or specific has nothing to do with the predominance requirement for class certification. As to whether plaintiffs submitted sufficient evidence of price inflation caused by Goldman Sachs' alleged fraud, the court specified that Goldman Sachs, not plaintiffs, bears the burden of persuasion at the class certification stage. The question is not "which side has better evidence, but whether the defendant has rebutted the presumption." Id. at 272 n.19.

Both the Department of Justice and the Securities and Exchange Commission have urged the Court to reverse the Second Circuit's holding affirming the grant of class certification.[4] The Supreme Court's decision is expected to be instrumental in clarifying the standard for defendants to rebut the *Basic* presumption of reliance at the class certification stage.

II. COVID-19 Securities Litigation

The first COVID-19 securities lawsuit was filed on March 12, 2020 in federal court in the Southern District of Florida before most states had even issued work-from-home orders or other pandemic restrictions.[5] During the remainder of 2020, at least 32 securities lawsuits involving COVID-19 were filed.[6] Although the lawsuits have affected a number of sectors, nearly 25% of the lawsuits were filed against defendants in the healthcare sector and 21% against those in financial services.[7]

Cases against healthcare defendants have involved allegations that defendants falsely touted the efficacy of COVID-19 diagnostic tools and drugs or vaccinations used to combat COVID-19.[8] For example, in Gelt Trading, Ltd. v. Co-Diagnostics, Inc. et al., 20-cv-00368 (D. Utah June 15, 2020), plaintiffs filed a putative class action alleging that Co-Diagnostics had made willful misstatements about its COVID-19 diagnostic test to raise the company's stock price. The officers and directors of Co-Diagnostics are then alleged to have exercised low-priced options to dump their stock into the market.

---

the inquiry. . .by excluding direct evidence of price impact." 573 U.S. 258, 283. Such evidence may be considered "even though such proof is also highly relevant at the merits stage." *Id.*

[3] There is currently a split among the circuit courts as to the second argument. *Compare Waggoner* v. *Barclays PLC*, 875 F.3d 79, 99-103 (2d Cir. 2017) and *In re Allstate Corp. Securities Litigation*, 966 F.3d 595 (7th Cir. 2020) *with IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016).

[4] Brief for the United States as Amicus Curiae Supporting Neither Party, *Goldman Sachs Group.* v. *Arkansas Teacher Ret. Sys.*, No. 20-222 (U.S. Dec. 11, 2020).

[5] *Eric Douglas, et al.* v. *Norwegian Cruise Lines, et al.*, 20-cv-21107 (S.D. Fl. Mar. 12, 2020).

[6] For a breakdown of COVID-19 related lawsuits, *see* Stanford Law School, Securities Class Action Clearinghouse, *Current Topics in Securities Class Action Filings*, *available at* http://securities.stanford.edu/current-topics.html#collapse1.

[7] NERA Report, at 3.

[8] *See*, *e.g.*, *Anthony Sanchez, et al.* v. *Decision Diagnostics Corp., et al.*, 21-cv-00418 (C.D. Cal. Jan. 15, 2021) (complaint alleges, among other things, that defendants made false and/or misleading statements and failed to disclose to investors that the company had not developed any viable COVID-19 test, much less one that could detect COVID-19 in less than a minute); *Kirk Himmelberg, et al.* v. *Vaxart, Inc., et al.*, 20-cv-05949 (N.D. Cal. Aug. 24, 2020) (complaint alleges that defendants participated in a fraudulent scheme to profit from artificially inflating Vaxart's stock price by announcing false and misleading information concerning the company's oral COVID-19 vaccine candidate).

Cases against financial services defendants have included a variety of disclosure claims. For example, in *Robert Lucas, et al.* v. *United States Oil Fund, LP, et al.*, 20-cv-04740 (S.D.N.Y. June 19, 2020), plaintiffs filed a putative class action against a crude oil exchange traded fund, alleging that its registration statement failed to provide any information about specific risks concerning the pandemic's impact on the demand for crude oil. Plaintiffs claimed that such omissions artificially increased demand for the fund's shares and caused plaintiffs to purchase shares at an artificially high price.

As the pandemic continues, the surge in COVID-19 securities litigation undoubtedly will continue in 2021. Like the claims filed in 2020, the lawsuits likely will include allegations of (i) misrepresentations and/or failure to disclose risks associated with COVID-19; (ii) false statements about COVID-19's impact on a company's finances or operations; and (iii) statements made in connection with federal loan and other relief programs.

III. Cryptocurrency and Digital Assets

The rise of cryptocurrency and digital assets in recent years has been met with increased attention and scrutiny by the plaintiffs' securities bar. To date, there have been over 35 cryptocurrency-related lawsuits filed in federal court against cryptocurrency sponsors, issuers, and exchanges, including 11 actions filed in the Southern District of New York in 2020.[9] One such lawsuit was filed against Binance, one of the largest cryptocurrency exchanges in the world by trading volume.[10] In this case, investors alleged that Binance sold digital assets through its exchanges without first registering them under applicable federal and state securities laws that apply to exchanges and broker-dealers. The digital assets were also allegedly sold without a registration statement.

As Bitcoin and digital currency continue to grow in popularity, efforts to seek recovery for cryptocurrency losses under the securities laws are likely to increase. Plaintiffs and counsel will continue to adapt and refine claims, including alleged failures to register "tokens" or "coins" under the securities laws and alleged misleading statements about benefits or future value of certain digital assets, especially if such digital assets drop in value from their recent highs.

IV. SPAC Litigation

SPACs exploded in popularity in 2020, with a record $83 billion raised across 248 SPAC initial public offerings ("IPOs"), representing a 320% increase in number and a 511% increase in dollars raised as compared to the year prior.[11] SPACs are a seemingly easier and more efficient alternative for private companies to become publicly traded, as compared to the traditional IPO process. SPACs initially have no commercial operations but are formed to raise money through an IPO with the purpose of acquiring a private company. The ultimate acquisition (referred to as a "de-SPAC transaction") results in the combination of the SPAC and the target company into a publicly-traded company.

---

[9] For an overview of cryptocurrency litigation, *see* Stanford Law School, Securities Class Action Clearinghouse, *Current Topics in Securities Class Action Filings*, *available at* http://securities.stanford.edu/current-topics.html.

[10] *Eric Lee, et al.* v. *Binance, et al.*, 20-cv-02803 (S.D.N.Y. April 3, 2020).

[11] SpacInsider, *SPAC IPO Transactions: Summary by Year*, *available at* https://spacinsider.com/stats/.

Until recently, civil litigation involving SPACs was uncommon. However, in the last quarter of 2020, three shareholder lawsuits were filed, with five additional lawsuits already filed this year.[12] Common SPAC-related claims include alleged material misstatements or omissions in violation of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, and SPAC sponsors may be liable under Section 11 of the Securities Act of 1933. The SPAC and its sponsors may also be held liable for misstatements regarding the operational or financial health of the target. Claims of this sort may dominate the coming year depending on financial successes or failures encountered in the on-going wave of SPACs.

* * *

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Bradley J. Bondi (partner) at 212.701.3710 or bbondi@cahill.com; Joel Kurtzberg (partner) at 212.701.3120 or jkurtzberg@cahill.com; Adam Mintz (counsel) at 212.701.3981 or amintz@cahill.com; or Grace McAllister (associate) at 212.701.3343 or gmcallister@cahill.com; or email publications@cahill.com.

---

[12] *See*, *e.g.*, *Raffaele Ferraiori, et al.* v. *Triterras, Inc., et al.*, 20-cv-10795 (S.D.N.Y. Dec. 21, 2020); *Joseph Malriat, et al.* v. *QuantumScape Corporation, et al.*, 21-cv-00058 (N.D. Cal. Jan. 5, 2021); *Timothy Bond, et al.* v. *Clover Health Investments, Corp., et al.*, 21-cv-00096 (M.D. Tenn. Feb. 5, 2021); *John Ryan, et al.* v. *GigCapital3, Inc., et al.*, 21-cv-00969 (N.D. Cal. Feb. 8, 2021); *Theresa Pitman, et al.* v. *Immunovant, Inc., et al.*, 21-cv-00918 (E.D.N.Y. Feb. 19, 2021); and *Jennifer M. Srock, et al.* v. *MultiPlan Corporation, et al.*, 21-cv-01640 (S.D.N.Y. Feb. 24, 2021).

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.