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COMMENTARY

Securities Class Actions in the COVID-19 Era: Multiple Waves and No Sign of Receding

BY MICHAEL BONGIORNO, SUSAN MUCK, JESSICA LEWIS, MIKE BROWN AND MARGAUX JOSELOW

The coronavirus pandemic has brought three largely distinct waves of securities fraud class action lawsuits, expanding in scope and now spanning a broad range of products, business sectors, and official statements—each wave posing an even greater threat to companies and their operations.

Three Waves of Shareholder Litigation

The first two "waves" of cases took place in the spring and summer of 2020 and were relatively limited in the nature of their allegations. In the first wave, which covered cases filed in March and April 2020, plaintiffs targeted industries whose products or services were directly involved in responding to the virus, such as pharmaceutical companies, or industries that the virus immediately affected, such as the videoconferencing technology industry. In these initial cases, plaintiffs alleged that public companies misled the market about the direct, often significant, impact COVID-19 was having on their businesses.

In the second wave—filed between May and September 2020—plaintiffs sued similar types of companies as those in the first wave: those directly involved in, or immediately affected by, the pandemic.

However, plaintiffs appeared to broaden the scope of their allegations to include challenges to companies' representations about how COVID-19 impacted projections of future economic performance. Many of the cases filed in the second wave criticized statements reflecting companies' uncertainty surrounding the future impact of the pandemic.

(Courtesy photos)

(l-r) Michael Bongiorno, Susan Muck, Jessica Lewis, Mike Brown and Margaux Joselow of WilmerHale.

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In the third and most recent wave—filed between November 2020 and December 2021—plaintiffs filed similar suits to those in the second wave but began targeting companies in a wider set of industries.

In addition, toward the end of the third wave, plaintiffs began to expand the bases for their claims. Instead of challenging statements about companies' varying levels of uncertainty amidst the ongoing pandemic, plaintiffs have now begun challenging companies' specific predictions about post-pandemic consumer behavior.

The pace of COVID-19 related securities fraud litigation also appears to have significantly increased with nine cases filed in November 2021 alone (compared to the average of four cases a month over the last 20 months). Prior to November 2021, the highest month for COVID-19 Section 10(b) filings had been September 2020—with eight total cases.

Although the cases are still too few—less than 100 in total—to make any conclusory findings, a high-level look at the first, second and third waves of COVID-19-related securities fraud litigation reveals several trends.

Timing

The first two waves of COVID-19 related securities fraud filings approximated brief surges in the very early months of the pandemic and occurred in March through April 2020 and May through September 2020 with six and 23 filings, respectively.

Many of the actions filed in August and September 2020 contained substantive allegations regarding companies' earnings releases or Form 10-Q quarterly reports that "corrected" prior statements about the impact of COVID-19 on companies' operations. During the third wave, cases dramatically increased again in the fall of 2021, reaching a peak in November 2021.

Industry

In the early waves, the industries most affected by COVID-19 related securities fraud litigation were, perhaps not surprisingly, those involved in manufacturing pandemic-related products, such as personal protective equipment and travel companies.

Across all waves, technology companies—named as defendants in 22 suits—were the biggest area of focus. Pharmaceuticals was the second-most-targeted industry, with 21 pharmaceutical companies named as defendants. Other industries impacted included, but were not limited to, finance, utility and social media.

Geography

To date, plaintiffs have filed cases in various district courts across 17 states. A total of 30 cases have been filed in New York's district courts, followed by California with the second most at 19 cases.

This concentration of cases in New York and California is not necessarily surprising as it largely tracks the prevalence of general securities fraud litigation cases filed across the nation. Notably, Florida and New Jersey—home to a number of travel and pharmaceutical companies, respectively—also saw filings, with six filed in each state across the three waves.

Conversely, there were relatively few filings—just two—in Massachusetts, which is home to many biotech and other innovative science companies. No other states appeared to receive a disproportionate share of COVID-19 related securities fraud litigation.

Legal Defenses in the First And Second Waves

As the first and second wave cases have progressed through the initial stages of litigation, defendants have routinely moved to dismiss them under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. To date, across the 29 first-and second-wave cases, defendants have filed a collective 22 motions to dismiss.

Although not all have been adjudicated, the first round of decisions suggests a relatively high success rate for defendants. To date, there have been 10 rulings on motions to dismiss. Out of those, eight have been granted in full or in part.

In addition, eight cases have been voluntarily dismissed and one case has been preliminarily approved for settlement.

Broadening Allegations During the Third Wave

In the most recent wave, plaintiffs have brought suits against defendants across a wide range of industries and broadened the types of statements they allege to be misleading. Plaintiffs have more recently taken issue with companies' predictions regarding how COVID-19 will affect their businesses. They now allege that defendants' overly concrete predictions have misled investors in the face of the pandemic's uncertainty.

For example, plaintiffs claimed that Zillow misled investors when it predicted consumers would continue to buy homes at the same forecastable rate and instead the company ended up with a backlog of inventory and had to suspend the signing of new contracts.

In a similar case, Peloton faces a lawsuit over its statements made in February 2021 that demand would remain high for the company's at-home exercise equipment. The company claimed its growth levels were sustainable and not simply inflated by pandemic-driven sales, but as the lawsuit alleges—and recent reports suggest—demand has fallen dramatically.

These more-recent cases, brought in November 2021, represent a change from the general uncertainty-type claims seen in the second wave in that they focus on companies' allegedly misleading projections regarding consumer and market behavior.

What's Next?

Based on the distinctions between the first, second and third waves, it is likely that, as the pandemic continues or eases, companies will be expected to predict how they will fare in a post-pandemic economy. And similar to the third wave cases, we are likely to see more lawsuits attacking specific statements.

So far, the orders dismissing actions in second-wave cases suggest courts will be skeptical of lawsuits filed based only on statements about a company's uncertainty in light of the pandemic. But now as companies seek dismissal of third-wave cases—which were filed based on their concrete predictions around the pandemic—they may face a higher bar to secure a quick victory in court.

MICHAEL BONGIORNO *is a partner in WilmerHale's New York office and co-chair of the securities litigation and enforcement practice;* SUSAN MUCK *is partner and* JESSICA LEWIS *is counsel in WilmerHale's San Francisco office; and* MIKE BROWN *is a senior associate and* MARGAUX JOSELOW *is an associate in WilmerHale's Boston office.*