SPRING 2018

The Bulletin **is a quarterly newsletter by Kessler Topaz Meltzer & Check to help institutional investors stay**

FULLY INFORMED

HIGHLIGHTS

KESSLERTOPAZ MELTZERCHECK LLP

KESSLER TOPAZ SECURES RECORD-BREAKING $250 MILLION SETTLEMENT IN INSIDER TRADING CASE

Paul Breucop, Esquire and Rupa Nath Cook, Esquire

After three years of hard fought litigation, Kessler Topaz Meltzer & Check, LLP, along with co-lead counsel, secured a $250 million settlement in a groundbreaking insider trading case against Defendants Valeant Pharmaceutical International, Inc., its former CEO Michael Pearson, billionaire hedge fund manager Bill Ackman, and his firm Pershing Square. This result, if approved by the Court, represents the largest settlement in a private insider trading case, the largest securities recovery in the Ninth Circuit without a parallel government action, and the sixth largest securities class action recovery in the Ninth Circuit overall. The proposed $250 million settlement was reached as the parties prepared for a jury trial scheduled for February 2018.

(continued on page 5)

NON-U.S. INVESTMENT MANAGERS' STANDING TO PURSUE CLAIMS UNDER THE U.S. SECURITIES LAWS IS REAFFIRMED

Melissa L. Troutner, Esquire

Non-U.S. institutional investors have served as Lead Plaintiffs in several historic shareholder actions in the United States. For example, Lead Plaintiffs from Sweden and the Netherlands were appointed in *In re Bank of America Securities, Derivative, and Employee Retirement Income Security Act (ERISA) Litigation*, No. 09-md-2058 (PKC) (S.D.N.Y.), which settled investors' claims for $2.4 billion and included significant corporate governance reforms. There are dozens of other cases where non-U.S. institutional investors have actively led class actions brought under the U.S. securities laws including the securities fraud class action lawsuit

(continued on page 10)

EU COLLECTIVE REDRESS EFFORTS — STATUS REPORT ISSUED

Geoffrey C. Jarvis, Esquire

The European Union's effort to grapple with the benefits and perceived costs of U.S.-style class actions (referred to as collective redress mechanisms) reached an important milestone in 2013, when, on June 11, 2013, the European Commission ("EC") adopted a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States (the "Recommendation"). In the Recommendation, the EC suggested that all EU countries introduce collective redress mechanisms based on certain principles, including:

- Claimants should be able to seek court orders to cease violations of their rights granted by EU law ('injunctive relief') and to claim damages for harm caused by such violations ('compensatory relief')
- Collective redress systems should be based on the 'opt-in' principle
- There should be procedural safeguards to avoid abuse of collective redress systems such as a ban on punitive (*i.e.* excessively high) damages and interest;
- The losing party is required to pay the winning party's legal costs

(continued on page 15)

EPHEMERAL MESSAGING AND THE EXPANDING DIGITAL UNIVERSE

Jennifer L. Joost, Esquire

By 2020, analysts predict the digital universe — the data that is created or copied in a given year — will be more than 40 zettabytes, or 400 trillion gigabytes, a 50-fold increase from the size of the digital universe in 2010.[1] The digital universe's rapid growth is due in part to an increase in unstructured data, including electronic communications. Nearly 80% of data maintained by companies is unstructured and, on the whole, less secure than data contained within an organized database.[2]

In the context of litigation, the amount of unstructured data generated by the use of electronic communications has led to higher costs associated with preserving, producing, and reviewing this information. Moreover, the publicity surrounding the hacks of the Democratic National Committee has given credence to fears that current forms of electronic communications are insufficiently secure to transmit sensitive information. And, as employees grow more mobile and use their own devices to communicate, companies must secure sensitive data over several different devices and platforms over which they have little direct control.

(continued on page 9)

[1] *Data is giving rise to a new economy,* The Economist, May 6, 2017 (citing IDC and Bloomberg data), https://www.economist.com/news/briefing/21721634-how-it-shaping-up-data-giving-rise-new-economy.

[2] Rizkallah, Juliette, *The Big (Unstructured)* Data Problem, Forbes, June 5, 2017, https://www.forbes.com/sites/forbestechcouncil/2017/06/05/the-big-unstructured-data-problem/#36f3a1f0493a.

APPELLATE UPDATE: NINTH CIRCUIT CLARIFIES LOSS CAUSATION STANDARD IN SECURITIES FRAUD CLASS ACTIONS

Eli R. Greenstein, Esquire

On January 31, 2018, the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Mineworkers' Pension Scheme v. First Solar Inc.*, 2018 U.S. App. LEXIS 2450 (9th Cir. 2018) ("*First Solar*"), a securities fraud class action on interlocutory appeal from an August 2015 summary judgment ruling by the United States District Court for the District of Arizona.

As previewed in KTMC's Fall 2017 article entitled "*First Solar Presents Opportunity for Ninth Circuit to Shed Light on Appropriate Loss Causation Standard*," the appeal sought to overturn the district court's order denying in large part defendants' motion for summary judgment challenging plaintiffs' showing of "loss causation" under Section 10(b) of the Securities Exchange Act of 1934. The appeal also sought to resolve a dispute regarding the "correct test" for loss causation under Section 10(b), and to address what the district court deemed "two irreconcilable lines of cases" that had developed in the Ninth Circuit following the Supreme Court's seminal loss causation decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). *See First Solar*, 2018 U.S. App. LEXIS 2450, *2; *Smilovits v. First Solar Inc.*, 119 F. Supp. 3d 978, 986 (D. Ariz. 2015) (lower court opinion) ("*Smilovits*").

According to the district court, although there was no disagreement regarding *Dura*'s requirement that plaintiffs establish a "causal connection" between their loss and defendants' misconduct, "the parties and the Ninth Circuit cases diverge" on the question of "how that connection must be proved." *Smilovits*, 119 F. Supp. 3d at 987.

(continued on page 16)

NEW SECOND CIRCUIT GUIDANCE ON REBUTTING THE PRESUMPTION OF RELIANCE

Joshua E. D'Ancona, Esquire and Margaret E. Mazzeo, Esquire

Recent appellate decisions shed new light on defendants' burdens when attempting to prevent class certification in securities fraud class actions brought under Section 10(b) of the Securities Exchange Act. These decisions out of the Second Circuit Court of Appeals — *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017) and *Arkansas Teachers Retirement System v. Goldman Sachs Group*, 879 F.3d 474 (2d Cir. 2018) — address aspects of a question that has persisted for three decades, and especially in recent years: how can defendants show at the class certification stage that individual issues of reliance (an element of a Section 10(b) claim) predominate over common issues, making certification inappropriate? *Barclays* and *Goldman* offer litigants much in the way of new direction, but also leave several matters for later cases. In any event, these decisions clarify the legal landscape in the Second Circuit, whose courts perennially see many important securities cases, and are also likely to have wider influence on securities fraud jurisprudence, as other courts have long recognized the Second Circuit's deep experience and sophistication in that field. *See, e.g., Pub. Pens. Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012) ("the two circuit courts that traditionally see the most securities cases [are] the Second and Ninth circuits.").

Background

To be certified as a class action, federal securities fraud cases seeking money damages must satisfy, among other things, the requirement of Federal Rule of Civil Procedure 23(b)(3) that "questions of law or fact common to class members predominate over . . . questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The "questions of law or fact" implicated by this so-called "predominance" requirement are, in so many words, what is needed to prove the elements of the underlying claim — for present purposes, a private claim for violation of Section 10(b) and SEC Rule 10b-5. Supreme Court decisions through the years have

(continued on page 12)

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For 13 years in Europe, 9 years in the US, and 3 years in Canada, Institutional Investor has partnered with Kessler Topaz Meltzer & Check LLP (KTMC) to co-host these three events annually. Each meeting's purpose is to address growing interest in corporate governance issues globally and to explore and assess the efficacy of the ways that institutional investors are engaging with the companies they invest in.

In 2018, on May 2-3 at The Landmark Hotel in London, for the first time we are bringing together legal executives and selected, associated investment decision-makers, CEOs and CIOs from global SWFS, selected public pension plans, and asset management firms to discuss how legal and investment teams are re-assessing, re-prioritizing, and focusing their engagement strategies.

With the essential input of an Advisory Board representing the audience who will attend this event, the Institutional Governance and Legal Symposium will offer a thorough overview of the landscape affecting institutional shareholders, with a critical focus on governance, ESG(T), SRI and other interconnected investment issues. Emphasizing real-world examples of how shareholders are engaging with the companies they invest in as well as how their peers are setting their priorities and structuring their teams internally, the Symposium will review the most crucial regulatory actions, investment risks, and developments in M&A, private equity, etc., and offer insights on the approaches successful plans have implemented to meet their legal, compliance, and investment objectives.

Who will attend?

Approximately 30-40 audience members: C-Suite Executives, Legal, compliance, and related investment executives from two of Institutional Investor's exclusive membership groups, the **Legal Forum** and the **Sovereign Investor Institute**, have been enlisted for the purposes of developing an audience for this meeting, bringing to bear their long-standing relationships with decision-makers from key institutions globally.

Institutional Investor

KESSLERTOPAZ MELTZERCHECK LLP

KESSLER TOPAZ SECURES RECORD-BREAKING $250 MILLION SETTLEMENT IN INSIDER TRADING CASE

(continued from page 1)

The Story

The case arose out of Valeant's attempted hostile takeover of Allergan, Inc. and its disclosure of inside information regarding the deal to Pershing and its notorious founder, Mr. Ackman, who traded on the tip prior to the public announcement of Valeant's bid. The attempted Valeant takeover and Pershing's trading in Allergan stock ahead of the news was one of the most extensively covered events of 2014 in the financial press.

By way of background, in January of 2014, Valeant announced its goals to become one of the top five pharmaceutical companies and do at least one "significant deal" in 2014. Valeant quickly settled on Allergan — a larger pharmaceutical company best known for its aesthetics product, Botox — as its prime takeover target. But Valeant and Allergan had a tumultuous past, as Allergan had previously rejected multiple offers from Valeant to merge. Valeant thus anticipated that any proposed offer for Allergan would turn hostile. Moreover, after years of serially acquiring companies, Valeant was cash-strapped and overloaded with debt and unable to finance such a significant transaction on its own.

So Valeant came up with a scheme to help it acquire Allergan. Valeant enlisted Mr. Ackman, a well-known "activist" investor and hedge fund billionaire who had significant capital at his disposal and was under increased pressure to come up with the next big investment idea after a string of bad bets. In exchange for Valeant's confidential disclosure of its next takeover target (Allergan), Ackman and Pershing agreed to secretly accumulate 10% of Allergan's stock from unsuspecting investors and then use that "toehold" stake to support Valeant's hostile bid. Defendants' secret agreements also provided that if a competing bidder or "white knight" ultimately topped Valeant's bid and acquired Allergan, Pershing would kick back 15% of its insider trading proceeds to Valeant.

Beginning in early February 2014, Valeant and Pershing executed their scheme as planned. From February 25 through April 21, 2014, Pershing used covert trading techniques to amass nearly 10% of Allergan common stock from unwitting shareholders. As Defendants anticipated, when Valeant finally announced its hostile bid on April 22, 2014, the price of Allergan common stock skyrocketed nearly $20 per share in a single trading day, reaping massive profits for Ackman and Pershing. After a lengthy hostile takeover battle involving Valeant's launching of a tender offer and a very public campaign to unseat Valeant's board, on November 17, 2014, Allergan announced that it had agreed to be acquired by a competing bidder, Actavis plc, for $219 per share in cash and stock. Following this news, Valeant withdrew its tender offer for Allergan and Pershing sold its Allergan stock, kicking back $400 million of its profits to Valeant.

The Lawsuit

In December 2014, the first of several shareholder actions were filed in the Central District of California before Judge David O. Carter. Following an order appointing Kessler Topaz as co-lead counsel and State Teachers Retirement System of Ohio and the Iowa Public Employees Retirement System as lead plaintiffs, in June 2015, Kessler Topaz and co-counsel filed a consolidated, amended complaint alleging insider trading claims against Defendants on behalf of all persons who sold Allergan common stock between February 25, 2014 and April 21, 2014 and were damaged thereby. Specifically, Plaintiffs alleged violations of Sections 14(e), 20(a) and 20A of the Securities Exchange Act of 1934, and SEC Rule 14e-3 promulgated thereunder.

Rule 14e-3 was intended to prevent the practice of "warehousing," whereby an offering person like Valeant (i.e., the prospective acquirer offering to purchase the tendered shares) intentionally leaks information to a friendly investor like Pershing to buy shares in advance of a hostile bid and tender offer, giving the friendly investor windfall profits at the expense of uninformed sellers of the target company's shares. More specifically, under Rule 14e-3, if an "offering person" like Valeant has taken a "substantial step" towards a tender offer, then any "other person" who possesses material nonpublic information relating to the tender offer (i.e., Pershing and Ackman) must either publicly disclose that information or abstain from trading. The rule also prohibits offering persons from communicating material nonpublic information relating to a tender offer to any other person where it is "reasonably foreseeable" that the other person will trade on that information. Similarly, under Section 20A, a party who purchases a security based on material nonpublic information is liable to anyone who sold securities of the "same class" contemporaneously with Defendants' trading.

Given the unique complexity of the particular statutes and SEC rules at issue, Lead Plaintiffs' private securities class action under Rule 14e-3 was virtually unprecedented. Indeed, at the hearing following settlement in this action, the Court recognized that this

(continued on page 6)

KESSLER TOPAZ SECURES RECORD-BREAKING $250 MILLION SETTLEMENT IN INSIDER TRADING CASEL

(continued from page 5)

"case has many issues of first impression, have never been decided, nor guidance given by the SEC."

The Litigation

Over the next two years, as Judge Carter noted during the settlement hearing, the case was "hard fought on both sides." Kessler Topaz and co-counsel vigorously litigated the case and built a comprehensive discovery record on behalf of class members. For their part, Defendants aggressively attacked the lawsuit at every stage of the case, sparing no effort in trying to escape liability.

At the outset of the case, Defendants attempted to dismiss the lawsuit in its entirety, attacking virtually every element of Plaintiffs' claims, including that neither Section 14(e) nor Rule 14e-3 permitted private plaintiffs to sue for damages at all. Defendants also argued that Plaintiffs did not have standing to sue because they had not traded contemporaneously with Defendants, in the same securities as Defendants. In addition, Defendants argued that Valeant never took "substantial steps" towards a tender offer and that Pershing was a partner and co-offering person with Valeant and thus was entitled to trade on nonpublic information obtained from Valeant. Notably, had any one of these arguments succeeded, the case would have been dismissed in full. After Lead Counsel's extensive briefing and oral presentations, however, Judge Carter rejected these and other arguments and sustained Plaintiffs' claims in their entirety. Defendants subsequently filed two additional motions to dismiss, both of which were denied.

Following their victories at the pleading stage, Plaintiffs proceeded to class certification. Class certification was particularly hard fought in this case,

as Defendants took a scorched-earth approach to class certification discovery. Kessler Topaz successfully defended its clients from Defendants' aggressive discovery tactics, including preventing follow-up depositions and prolonged battles over document productions from clients and third party investment advisors.

Defendants' briefing at class certification was equally combative. There, Defendants argued that the proposed class was hopelessly conflicted because class members would be motivated to take inconsistent positions in order to maximize their own damages. Defendants further argued that they had rebutted the presumption of reliance because Valeant's formal tender offer announcement (as opposed to its disclosure of a merger offer) had no impact on the price of Allergan's common stock. They also attacked Plaintiffs' damages methodology on the grounds that it could not be applied on a class-wide basis consistent with Plaintiffs' theory of liability. Following comprehensive briefing and two days of intensive oral argument, Judge Carter agreed with Lead Counsel's arguments and certified the class. Defendants subsequently filed a petition to appeal the Court's decision before the U.S. Court of Appeals for the Ninth Circuit, including briefing penned by former U.S. Solicitor General and frequent Supreme Court advocate, Paul D. Clement. After extensive briefing, the Ninth Circuit denied Defendants' petition in full.

Meanwhile, the discovery phase of the litigation continued in full force. This was no small task as discovery in this case was extensive. Indeed, Lead Counsel participated in over 70 depositions, issued over 30 subpoenas, and reviewed over one million pages of documents, in addition to preparing and reviewing hundreds of pages of Lead Plaintiffs' written discovery. Like everything else in the case, discovery was aggressively litigated. By the end of the case, Lead Counsel had litigated over 40 discovery motions — most of which were brought by Lead Counsel and resolved in Plaintiffs' favor.

After nearly two years of painstakingly developing the factual record, both parties moved for summary judgment, resulting in over one hundred pages of substantive briefing and thousands of pages of evidentiary submissions. Lead Counsel moved for summary judgment as to all of the liability elements of their claims. Defendants filed two separate motions for summary judgment, attacking the offering person, substantial steps, loss causation, and damages elements of Plaintiffs' claims. After issuing a tentative ruling granting in part and denying in part Plaintiffs' motion, the Court held four days of oral argument, during which the parties made exhaustive presentations on numerous issues, including the offering person and substantial steps elements of the case.

Following the summary judgment hearing and tentative ruling, Lead Counsel and counsel for Defendants reopened settlement discussions. At the end of December 2017, after intense negotiations and mediation efforts, the parties reached agreement to settle the case for $250 million in cash. The deal came roughly eight weeks before trial, which was set to begin on February 26, 2018. Indeed, leading up to the summary judgment hearing, Kessler Topaz was deeply immersed in trial preparation. To that end, Lead Counsel had filed several motions to exclude certain evidence and expert testimony as well as prepared an extensive trial exhibit list, jury instructions, evidentiary objections, and witness files for trial.

After the parties informed the Court of the proposed settlement, Judge Carter held a preliminary hearing and acknowledged the tremendous benefit of the settlement in light of the serious risks in proving liability and damages at trial, and overcoming the inevitable appeals on numerous legal issues of "first impression." The Court also commended Lead Counsel's efforts: "And I recognize the hard efforts of your office. You're not getting paid for this, you're taking this on a contingency or addressing the Court concerning attorney's fees. And it's quite a risk and I compliment you for that."

On January 26, 2018, Lead Counsel filed a motion for preliminary approval of the proposed settlement which is currently set for hearing in early March 2018.

Kessler Topaz is proud of its efforts and the substantial victory it achieved on behalf of Lead Plaintiffs and the Class, particularly in light of the unchartered legal territory and aggressive, scorched-earth litigation, including three years of tireless motion practice and development of a voluminous factual record. As the Court recognized, "I don't think there were any better, more prepared counsel for both sides in this long-going saga." ■

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Emphasizing real-world examples of how institutional shareholders are engaging with the companies they invest in, this event will review the most crucial legal decisions, regulatory actions, and developments legal decision-makers should be aware of.

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- Redefining "Fiduciary": Ramifications for the Asset Management Industry and for Engaged Investors
- Cyber-Security Inside and Outside Your Plan: What Controls and Processes Do Your Managers and Co-Parties Need to Have in Place?
- ESG as an Investment Risk Mitigator: A Concept Driven By Supply or By Demand?
- What the Successful Resolution of the Facebook Case Means for Engaged Shareholders
- Have We Begun to Understand the Investment, Legal and Compliance Ramifications of Data-Driven Investing?
- Why Hasn't Tax-Shifting and Other Tax Issues Become a Bigger Governance Concern for US Investing Institutions?
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EPHEMERAL MESSAGING AND THE EXPANDING DIGITAL UNIVERSE

(continued from page 2)

To address these fundamental concerns, companies may choose to communicate via ephemeral messaging applications. Applications like Wickr, Signal, Telegram, Confide, and Snapchat allow for the transfer of multimedia messages that disappear after they have been viewed by the intended recipient. In theory, these applications facilitate secure, confidential communications among employees. The applications encrypt the messages and prevent recipients from duplicating the message without the consent of the sender. Most of these applications offer an enterprise version that allows a company to turn off the ephemeral aspect of the service and securely store one copy of the communications for a set period of time. However, unless this feature is enabled, no copy of the message is maintained and once it is reviewed and deleted, the message can never be recovered.

While these applications ensure security and mitigate the expense of storing unstructured data, they also prevent the creation of a real-time historical record. Memories of events that transpired days, weeks, months, or even years earlier are frequently unreliable and are informed by the passage of time and subconscious biases. The advent of and heavy reliance on electronic communications has created a detailed written record, which allows a number of stakeholders (e.g., prosecutors, regulators, litigants, and the media), to ferret out fraud, harassment, discrimination, and other injustices, which may well have remained hidden, or at least stymied due to lack of hard evidence. Use of ephemeral messaging could hinder an individual's ability to obtain meaningful relief or proactively prevent future injustices through legislation, regulatory actions, or litigation.

Enterprise-use of ephemeral messaging applications and the consequences thereof recently took center stage in a trade secret battle between Waymo, Google's self-driving car unit, and Uber. In a lawsuit filed in the United States District Court for the Northern District of California in February 2017, Waymo alleged that its former engineer, Anthony Levandowski, stole 14,000 confidential files before leaving Waymo to start an autonomous truck company, Otto, in January 2016. Uber then acquired Otto in August 2016, paying $680 million for the start-up and appointing Levandowski as the head of its self-driving car division. In May 2017, the judge who presided over the litigation, the Hon. William Alsup, took the highly unusual step of referring the case to the United States Attorney "for investigation of possible theft of trade secrets based on the evidentiary record supplied thus far."[3]

Then, on November 22, 2017, less than two weeks before an expedited trial on the merits of Waymo's claims was set to begin, the Office of the United States Attorney sent Judge Alsup a copy of an explosive 37-page letter written by attorneys representing a former Uber security analyst named Richard Jacobs. In a section titled, "Destruction and Concealment of Records Using Ephemeral Communications," the Jacobs letter stated that certain Uber divisions implemented and ensured "the almost-exclusive use of ephemeral and encrypted communications software, including WickrMe" to communicate, "for the express purpose of destroying evidence of illegal or unethical practices to avoid discovery in actual or potential litigation."[4] After a two-day hearing at which Judge Alsup heard testimony from several witnesses, including Jacobs, the Court postponed the trial date, stating: "I can no longer trust the words of the lawyers for Uber in this case," and "if even half of what is in that letter is true, it would be an injustice for Waymo to go to trial."[5]

Judge Alsup ultimately ruled that Uber's use of ephemeral messaging could be used at trial "to explain gaps in Waymo's proof that Uber misappropriated trade secrets," and to demonstrate "that Uber sought to minimize its 'paper trail' by using ephemeral communications."[6] Judge Alsup further held that if either side utilized the Jacobs letter at trial, he would "inform the jury that Uber withheld the Jacobs letter [from Waymo] and explain that the jury may, but need not, draw some adverse inference against Uber based on that fact," which also is known as a permissive adverse inference jury instruction.[7] The parties settled Waymo's claims for approximately $245 million in Uber shares on February 9, 2018 after one week of trial.

(continued on page 18)

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[3] Order of Referral to United States Attorney, *Waymo v. Uber,* No. 3:17-cv-00939-WHA (N.D. Cal. May 11, 2017), ECF No. 428.

[4] Exhibit A, *Waymo v. Uber*, No. 3:17-cv-00939-WHA (N.D. Cal. Dec. 15, 2017), ECF No. 2401-1 at 6.

[5] Metz, Cade, *Rebuking Uber Lawyers, Judge Delays Trade Secrets Trial*, N.Y. Times, Nov. 28, 2017, https://www.nytimes.com/2017/11/28/technology/uber-waymo-lawsuit.html

[6] Omnibus Order, *Waymo v. Uber*, No. 3:17-cv-00939-WHA (N.D. Cal. Jan. 30, 2018), ECF No. 2585 at 5, 30.

[7] Omnibus Order, *Waymo v. Uber*, No. 3:17-cv-00939-WHA (N.D. Cal. Jan. 30, 2018), ECF No. 2585 at 30.

NON-U.S. INVESTMENT MANAGERS' STANDING TO PURSUE CLAIMS UNDER THE U.S. SECURITIES LAWS IS REAFFIRMED

(continued from page 1)

against JPMorgan for the "London Whale" scandal, which involved a Lead Plaintiff from Sweden. *See In re JPMorgan Chase & Co. Sec. Litig.*, No. 1:12-cv-03852 (GBD) (S.D.N.Y.).

As the influence of Lead Plaintiffs domiciled outside of the United States increases, outdated concerns about the appointment of non-U.S. investors continue to dwindle. A few months ago, the court in *Boynton Beach Firefighters' Pension Fund v. HCP, Inc.,* No. 3:16-cv-01106, 2017 U.S. Dist. LEXIS 195118 (N.D. Ohio Nov. 28, 2017), appointed Société Générale Securities Services GmbH ("SocGen") as a Lead Plaintiff and reaffirmed the right of European investment management companies to assert claims under the U.S. securities laws on behalf of their managed funds (or sub-funds). *Boynton Beach* rejected arguments by a competing movant that SocGen's managed funds (the "Funds") purchased the securities at issue and therefore only the Funds — not SocGen — had standing to assert claims. *Boynton Beach* is an important decision reaffirming the ability of non-U.S. investment managers to pursue legal claims on behalf of their managed funds and sub-funds under the U.S. securities laws, where such funds do not have an independent legal identity or the ability to act in their own name under their home jurisdiction's laws.

European Asset Managers Have Article III Standing

Article III of the United States Constitution limits federal courts' jurisdiction to hear only actual cases or controversies. U.S. Const. art. III, § 2 ("Article III"). In order to establish constitutional standing, a plaintiff typically must show, *inter alia*, that it personally suffered an injury-in-fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). However, courts have long recognized a "prudential exception" to Article III standing whereby one party (e.g., a management company) may assert the rights of another (e.g., the management company's sub-funds) based on "a close relationship with the person who possesses the right" and "a hindrance to the possessor's ability to protect" their interests. *See Boynton Beach*, 2017 U.S. Dist. LEXIS 195118, at *8 (citation omitted). Non-U.S. investment management companies, including many European investment managers, often rely on this exception to assert legal claims on behalf of their managed funds and sub-funds where these funds cannot bring claims in their own name. *See generally In re Vivendi Universal, S.A. Sec. Litig.*, 605 F. Supp. 2d 570, 576 (S.D.N.Y. 2009). In such cases, managed funds and sub-funds must rely exclusively on their investment managers to protect their interests and to represent them in judicial proceedings brought under the U.S. securities laws.

In *Boynton Beach*, SocGen moved with a U.S. pension fund to be appointed Lead Plaintiff under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), asserting that the group had the largest financial interest in the relief sought by the class and satisfied the typicality and adequacy requirements of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). In opposition to SocGen's motion, a competing movant argued that SocGen lacked Article III standing and could not act as a Lead Plaintiff because the losses asserted by SocGen in the litigation were based on purchases of HCP, Inc. ("HCP") securities made on behalf of the Funds. Specifically, the competing movant alleged that there was no evidence that SocGen — as opposed to the Funds — directly purchased any HCP shares, had any interest in the claims asserted by the class, or suffered any injury. Based on these arguments, the competing movant claimed SocGen lacked standing and was inadequate and atypical under Rule 23. The competing movant further argued that SocGen could only serve as a Lead Plaintiff (and bring claims in connection with its Funds' purchases of HCP securities) if SocGen received a valid assignment of claims from the Funds.

SocGen responded with two arguments: (1) it was able to assert claims on its Funds' behalf under the prudential exception to Article III standing; and (2) even if the prudential exception did not apply, it had valid assignments of claims from its Funds. The court accepted both of SocGen's arguments.

First, in determining whether a non-U.S. investment management company has a close relationship with its managed funds and whether the funds are unable to protect their own interests — both of which are required for the prudential exception to apply — U.S. courts look to a number of factors including the structure of the party claiming standing under the prudential exception and the law in the party's home jurisdiction. In connection with its Lead Plaintiff motion, SocGen submitted an analysis of the German Investment Code, German procedural law, and general principles of German law and policy to support its standing argument. This analysis explained that the Funds are joint ownership funds whereby investors own a pro-rata share of the Funds' assets, which are managed by SocGen, but cannot transfer or dispose of those assets. Under German law, the Funds are considered separate estates but are not independent legal entities. Moreover, German law provides investment management companies, like SocGen, the authority to sue in their own name for damages suffered by investors of its funds while investors have no such authority. Based on this analysis of German law, SocGen asserted that the prudential exception to Article III standing should apply to its claims on behalf of the Funds and their investors.

On this point, the *Boynton Beach* court, consistent with a majority of courts to consider this issue, found that SocGen — like other European investment managers previously appointed as Lead Plaintiffs — had standing under the prudential exception and could serve as Lead Plaintiff on behalf of its Funds without an assignment of claims. In reaching this conclusion, the court relied on *Vivendi*, in which the Southern District of New York found that the prudential exception applies to investment management companies where investors in the managed funds or sub-funds lack: (1) control over fund assets; (2) authority to fire the funds' investment management companies; and (3) authority to sue on behalf of the funds. *See Boynton Beach*, 2017 U.S. Dist. LEXIS 195118, at *12 (citing *Vivendi*, 605 F. Supp. 2d at 577-78). Similarly, the *Boynton Beach* court determined that, under German law, the Funds "are not considered legal entities" and "cannot bring suit on their own behalf." *Id.* The court further concluded that investors in the Funds lack the ability to bring suits on behalf of the Funds. *See id.* Instead, under German law, SocGen was responsible for managing the Funds' assets and had the authority to sue in its own name for damages suffered by investors of its Funds. As such, the court found that SocGen could bring "claims on behalf of its funds and investors" because it shared a "close relationship with its funds and investors" and there was a "barrier to the funds and investors bringing suit." *Id.* at *12-13. Moreover, the court rejected the assertion that SocGen was inadequate and atypical under Rule 23 and appointed SocGen as a Lead Plaintiff in the action. *See id.* at *30, 40. *Boynton Beach* is consistent with other courts addressing European investment manager's standing. *See, e.g., United Union of Roofers, Waterproofers & Allied Workers Local Union No. 8 v. Ocwen Fin. Corp.*, No. 14-81064-CIV-81507-WPD, *et al.*, 2014 U.S. Dist. LEXIS 177467, at *8 (S.D. Fla. Nov. 7, 2014) ("Other courts have found that Swedish managers, like AP7, have standing under the prudential exception.").

Assignments Can Confer Standing on European Asset Managers

Second, the *Boynton Beach* court found, even if the prudential exception did not apply, that SocGen had standing because it obtained valid assignments of the Funds' claims. *See* 2017 U.S. Dist. LEXIS 195118, at *23. In general, an assignee, such as an investment manager that receives an assignment from its managed funds, has standing to assert the injury-in-fact suffered by the assignor fund even where the proceeds of the litigation will be remitted to the fund. *See id.* at *13-14. In *Boynton Beach*, the competing movant argued that SocGen did not have standing because the assignments it received from the Funds were invalid. Specifically, the competing movant claimed the assignments were: (1) lacking consideration or notarization; (2) untimely; (3) inappropriately styled as declarations; and (4) executed by questionable signatories. *See id.* at *18-19. Applying German law, which had the most significant relationship to the assignments, the court found the assignments were valid to confer standing on SocGen. *See id.* at *15-17, 23. Notably, the court found the assignments timely where they were submitted with briefing four weeks after SocGen's initial Lead Plaintiff motion and where SocGen swore in its initial PSLRA certification that it was authorized to bring claims on the Funds' behalf. *See id.* at *20-21.

Boynton Beach continues U.S. courts' acceptance of European asset managers as Lead Plaintiffs and reaffirms standing rules that recognize the legal realities of the relationships between European managers and their sub-funds. ■

NEW SECOND CIRCUIT GUIDANCE ON REBUTTING THE PRESUMPTION OF RELIANCE

(continued from page 3)

established that some elements of a Section 10(b) claim will necessarily turn on common questions of law or fact. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) ("*Halliburton I*") (Section 10(b) element of loss causation involves common questions of law or fact for Rule 23(b)(3) purposes); *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013) (Section 10(b) element of materiality implicates common questions of law or fact and need not be demonstrated at class certification stage).

But, others will not. In *Basic v. Levinson*, 485 U.S. 224 (1988), the Supreme Court noted that in many cases, establishing predominance with respect to Section 10(b)'s reliance element — in which, essentially, plaintiffs contend they purchased securities based on a fraudulent misrepresentation — may be difficult, if not impossible, since most investments are made on exchanges in large impersonal securities markets, not through face-to-face trades. *Id.* at 245. In light of this practical reality, and the growing economic consensus that public information about a stock is in many cases impounded rapidly into the stock price by the market, the *Basic* court established a presumption that "the price of stock traded in an efficient market reflects all public, material information — including misrepresentations — and that investors rely on the integrity of the market price" when they buy stock. *Goldman*, 879 F.3d at 478 (citing *Basic*). After *Basic*, by establishing the existence of an efficient market for the stock, the materiality of the misrepresented information, and the other noted prerequisites, a plaintiff can invoke a legal presumption of reliance on the part of investors who bought stock during the relevant period, and through this presumption satisfy the predominance requirement of Rule 23(b)(3). *Id.* at 483.

The *Basic* presumption is rebuttable, however. As the Supreme Court explained in *Basic*, and reiterated four years ago in *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), 134 S. Ct. 2398 (2014), defendants may rebut it through "evidence that the misrepresentation" giving rise to the fraud claim "did not in fact affect the stock price." *Id.* at 2414. Such a showing of a lack of price impact would defeat the presumption of reliance because that presumption rests on a premise that all purchasers relied on — i.e., paid — a market price that had been distorted by fraud. But if a defendant proves that the misrepresentation did not affect the stock price, "the basis for finding that the fraud had been transmitted through the market price would be gone," and there would be no justification for applying the presumption. *Basic,* 485 U.S. at 248; *see also Halliburton II*, 134 S. Ct. at 2416. Predominance could not be shown, and class certification would likely fail. *Id.*

A critical question, then, was: how, exactly, can defendants rebut the *Basic* presumption? More specifically, what type of evidentiary showing must they make to establish that the alleged misrepresentation had no price impact, and how should a court weigh whether a defendant's evidence of "no price impact" is sufficient? *Basic* and *Halliburton II* left it to subsequent cases to develop answers. In response to creative litigation by plaintiffs and defendants, federal district courts have issued rulings that address these questions in broadly similar, albeit somewhat uneven, ways. In particular, most courts have placed the primary evidentiary burdens on defendants, while insisting that their showing be something different than proof of lack of materiality or loss causation, which, under *Amgen* and *Halliburton I*, are definitively not elements that must be shown at the certification stage. *See, e.g., Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69 (S.D.N.Y. 2015) (analyzing defendants' evidence purporting to show no price impact and discussing defendant's burden); *Thorpe v. Walter Inv. Mgmt. Corp.*, 2016 WL 4006661, at *13 (S.D. Fla. Mar. 16, 2016) (holding defendant must prove that fraud played "no part" in stock price decline, and characterizing this burden as "a tall order"). In *Barclays* and *Goldman*, the Second Circuit provided significant new guidance in this area.

Barclays and Goldman

In *Barclays*, the Second Circuit held that defendants bear a burden of persuasion, not simply a burden of production, when seeking to rebut the *Basic* presumption. 875 F.3d 99, 102-03. That is, a defendant does not meet its burden by simply putting forward some evidence of no price impact; instead, it must put forth enough evidence to persuade the court that it has proven a lack of impact. *Id.* Further, to prove a lack of price impact, a defendant's evidence must meet the "preponderance of the evidence" standard — it must outweigh the plaintiff's evidence on this point. *Id.*

The *Barclays* defendants had argued that to rebut the *Basic* presumption, they needed only to put forward some evidence of a lack of price impact, i.e., that their burden was one of production, not persuasion. The burden of persuasion on price impact, they contended, rested with the plaintiff. *Id.* at 101-03. The defendants pointed out that, under Federal Rule of Evidence 301 ("Rule 301"), the burden of persuasion remains with the party that had the burden originally, unless a federal statute shifts it, and that the plaintiff bears the overall burden of persuasion as to all aspects of the class certification inquiry. No statute has ever changed that allocation. Thus, the defendants contended, their burden on rebuttal was merely to put forward some evidence of a lack of price impact, but it was always the plaintiff's burden to show that the subject stock price was in fact distorted by the alleged fraud. *Id.*

The Second Circuit disagreed. In response to the defendants' Rule 301 argument, the court held that the *Basic* presumption is a substantive doctrine of federal law, which, like a statute, altered the default rule and placed the burden of persuasion on defendants who would try to rebut it. *Id.* The *Barclays* court went on to clarify that the standard of proof a defendant confronts when seeking to rebut the presumption is the familiar preponderance of the evidence standard that applies generally in civil suits. In sum, it held that a defendant who elects to attempt to rebut the *Basic* presumption must "demonstrate a lack of price impact by a preponderance of the evidence at the class certification stage rather than merely meet a burden of production." *Id.* at 101.

Goldman followed soon after *Barclays* and elaborated further on the defendants' burdens and the reviewing court's obligations in evaluating price impact evidence. In granting the plaintiffs' motion for class certification, the district court had found that the defendants had failed to rebut the *Basic* presumption, because they had not "conclusively" proven "a complete absence of price impact." *Goldman*, 879 F.3d at 485. The lower court

(continued on page 14)

NEW SECOND CIRCUIT GUIDANCE ON REBUTTING THE PRESUMPTION OF RELIANCE

(continued from page 13)

also noted the correct preponderance of the evidence standard in a footnote of its opinion. The defendants' appeal complained that the reference to "conclusive" proof suggested that the district court had required a higher standard than a preponderance of the evidence, and the Second Circuit agreed. Pointing to this uncertainty, it vacated the certification order and remanded for review under the proper standard.

The *Goldman* court also held that the district court had erred in declining to consider certain evidence of no price impact that the defendants had put forward. *Id.* at 485-86. The defendants had submitted expert evidence purporting to show that the claimed fraud had actually been revealed at several points prior to the alleged corrective disclosure date, but Goldman Sachs' stock price had not been affected, which proved, according to the defendants, a lack of price impact. The district court had declined to weigh this evidence, finding that it constituted "an inappropriate truth on the market defense" or impermissible evidence that the alleged misrepresentations were not material — neither of which it could entertain at class certification under prior precedent. *Id.* & n.6. The Second Circuit ruled that this was an error, that such evidence properly went to questions of price impact, and that the district court was required to consider the defendants' evidence on remand when considering the price impact issue. *Id.* at 486. It also "encourage[d] the court to hold any evidentiary hearing or oral argument it deems appropriate" in so doing. *Id.*

The Upshot: More Litigation Around Class Certification

Barclays would seem, on balance, to be positive for plaintiffs. In confirming that the burden of persuasion about price impact sits with defendants, it solidifies the broadly similar prior case law that district courts had been developing. As a practical matter, it prevents plaintiffs from having to attempt to anticipate and rebut defense arguments about price impact, sight unseen, in their opening class certification motions, which is often a wasteful and inefficient exercise. *Barclays* thus reflects the simple fact that in some cases, the defendants will forego arguments that the alleged fraud did not have a price impact, and instead contest class certification on other grounds.

Goldman, on the other hand, may prove helpful to defendants in opposing class certification, and will, in any event, tend to make litigation around class certification lengthier and more complex. By disagreeing with the district court's determination that defendants' evidence primarily addressed materiality, which is "common to the class and does not bear upon the predominance requirement of Rule 23(b)(3)," *Goldman*, 879 F.3d 474 n.6, but instead holding such evidence should be considered, and even tested in an evidentiary hearing, the *Goldman* court indicated a viable path for challenging certification that more defendants should be expected to attempt. It may justify new levels of investment by defendants in expert opinions concerning price impact that will accompany briefs in opposition to plaintiffs' class motions. Plaintiffs, in turn, will be constrained to engage in-kind in their reply papers. Defendants will seek "the last word" in requested sur-replies, and rebuttal expert reports, far more often than they do now. Procedural skirmishes will ensue. Also, both sides can anticipate an increased frequency of evidentiary hearings requiring expert testimony. Such hearings are demanding and carry risks for both sides. The courts will have more opportunities than ever to find that the *Basic* presumption has been rebutted. Whether any of this leads to a substantive shift in outcomes, where courts grant fewer seemingly meritorious motions for class certification than before, will likely take some years to determine. But what seems clear is that the certification stage in Section 10(b) cases involves a new area of risk for plaintiffs and will require more time and resources than ever before. ■

EU COLLECTIVE REDRESS EFFORTS — STATUS REPORT ISSUED

(continued from page 2)

During 2017, the EC undertook procedures to assess the EU members' progress in implementing the Recommendation. On January 25, 2018, the EC issued a report analyzing the overall status of laws regarding collective redress in the EU.[1] The report generally finds that the Recommendation has resulted in some progress regarding the implementation of collective redress mechanisms, but that the progress was not as great as anticipated.

The EC's View Of Member State Progress In Implementing The Collective Redress Recommendation

The EC's overall conclusion was that collective redress mechanisms across the EU have by no means been universally adopted, stating that *"in some few Member States the affected persons or entities were able to bring their claims to justice jointly whereas in the majority of Member States they were left to insufficient devices or even helpless"*. For example, only seven EU countries have adopted reforms of their laws on collective redress since the adoption of the Recommendation, while nine EU countries (Croatia, Cyprus, Czech Republic, Estonia, Ireland, Latvia, Luxembourg, Slovakia and Slovenia) have no collective redress measure related to potential damages claims whatsoever. Further, the progress that has been made is largely in the areas of competition (antitrust in the US) law and consumer cases. According to the report:

- Compensatory collective redress is available in 19 EU Member States (Austria, Belgium, Bulgaria, Germany, Denmark, Finland, France, Greece, Hungary, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Spain, Sweden, and the United Kingdom) but in over half of them it is limited to specific sectors, mainly to consumer claims or competition claims (UK for example).
- Of the 19 states that have collective redress for damages, there are 13 (Austria, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Malta, Poland, Romania, Spain, and Sweden) that exclusively apply the "opt-in" principle in their national collective redress schemes.
- There are 4 EU countries (Belgium, Bulgaria, Denmark, and the United Kingdom) that apply both the "opt-in" and the "opt-out" principle, depending on the type of action or the specifics of the case, while 2 countries (the Netherlands and Portugal) apply only the "opt-out" principle.

Even those countries that have a collective damages mechanism have limitations on the ability to utilize that mechanism to seek damages in securities type actions. In the Netherlands, for example, a representative organization, which includes a Foundation that is set up solely for the purpose of pursuing a collective action or settlement, can file a collective action for liability, but the action only allows the Foundation to seek declaratory relief. Individual Foundation members must then take the judgment from the liability action and file their own individual damages action or seek to negotiate a global settlement with the Company under the Dutch Act on Collective Settlement of Mass Claims (the "WCAM" proceeding). Similarly, while Germany allows a representative plaintiff to effectively represent all plaintiffs in a number of affiliated actions (the "KapMuG" proceeding), individual plaintiffs must still bring their own actions in the first instance.

As a result of the substantial limitations on collective redress in the EU, investors who have been harmed as the result of misrepresentations/malfeasance by issuers of securities still are required in most cases to bring individual actions (generally in conjunction with numbers of investors) to obtain damages in the EU. The recent mass action in Germany against Volkswagen related to its diesel emissions scandal, which involves over a thousand individual investors, is one such action. The recently revealed Steinhoff scandal is another case in which there likely will be a number of actions on behalf of individual investors brought in the Netherlands and/or Germany. ■

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[1] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), which can be found at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847, held that "a plaintiff seeking to demonstrate market efficiency need not always present direct evidence of price impact through event studies," particularly, as in the case of Barclays ADS, where indirect evidence overwhelmingly supports a finding of market efficiency. *Id*. at *13.

APPELLATE UPDATE: NINTH CIRCUIT CLARIFIES LOSS CAUSATION STANDARD IN SECURITIES FRAUD CLASS ACTIONS

(continued from page 3)

As the district court explained, the first line of "conflicting" cases — *In re Daou Systems, Inc.*, 411 F.3d 1006 (9th Cir. 2005), *Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982 (9th Cir. 2008) and *Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111 (9th Cir. 2013) — adopted a standard permitting a plaintiff to establish loss causation based on a stock price decline following a "corrective disclosure" that revealed a company's "true financial condition" or "true financial health" — irrespective of whether there was a disclosure of the fraudulent conduct itself. *See Smilovits*, 119 F. Supp. 3d at 988. This "financial impact" test, however, appeared to conflict with a second line of Ninth Circuit authority following *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049 (9th Cir. 2008) and *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376 (9th Cir. 2010), which held that loss causation is not adequately pled unless a plaintiff alleges that the market "learned of and reacted to the practices the plaintiff contends are fraudulent, as opposed to merely reports of defendant's poor financial health generally." *Id.* (quoting *Oracle*, 627 F.3d 376); *see also Metzler*, 540 F.3d 1063 ("the complaint must allege that the practices that the plaintiff contends are fraudulent were revealed to the market and caused the resulting losses."); *Loos v. Immersion Corp.*, 762 F.3d 880 (9th Cir. 2014) (following the *Metzler/Oracle* formulation); *Oregon Public Employees Retirement Fund v. Apollo Group, Inc.*, 774 F.3d 598 (9th Cir. 2014) (same).

Following a scholarly analysis of both the "history of loss causation" and policy considerations underlying the loss causation requirement, the district court ultimately found that the *Daou* "financial impact" test "stat[ed] the better rule" and denied summary judgment for all but one of the alleged loss causation disclosures. *Smilovits*, 119 F. Supp. 3d at 992. The opinion expressly noted, however, that under the *Metzler/Oracle* "revelation-of-the-fraud" test, "Defendants' motion would be granted in full because Plaintiffs have not presented evidence from which a reasonable jury could find that Defendants' alleged fraudulent practices became known to the market during the class period." *Id.* Accordingly, the district court took the "unusual step" of immediately certifying the following question for interlocutory appeal under 28 U.S.C. 1292(b): "[W]hat is the correct test for loss causation in the Ninth Circuit? Can a plaintiff prove loss causation by showing that the very facts misrepresented or omitted by the defendant were a substantial factor in causing the plaintiff's economic loss, even if the fraud itself was not revealed to the market (*Nuveen*, 730 F.3d at 1120), or must the market actually learn that the defendant engaged in fraud and react to the fraud itself (*Oracle*, 627 F.3d at 392)?" *Id.*

The Decision

In a concise *per curium* opinion, the Ninth Circuit affirmed the district court's holding and held that the "proper test" for loss causation is the "test ultimately applied by the district court" — i.e., the standard articulated in *Daou*, *Berson* and *Nuveen*. *See First Solar*, 2018 U.S. App. LEXIS 2450, *4. In reaching this result, the panel reaffirmed the overarching principle that the loss causation inquiry "requires no more than the familiar test for proximate cause." *Id.* Citing its prior decisions in *Daou* and *Nuveen*, the Ninth Circuit explained that "[t]o prove loss causation, plaintiffs need only show a 'causal connection' between the fraud and the loss, by tracing the loss back to 'the *very facts* about which the defendant lied." *Id.* at *5. The Court also reiterated that "[d]isclosure of the fraud is not a *sine qua non* of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss." *Id.* (citing *Nuveen*, 730 F.3d at 1120).

Next, the Ninth Circuit pointed out that its more recent opinion in *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016), issued after *First Solar* was certified for appeal, "clarifies the applicable rule" and "explain[s] that loss causation is a context-dependent inquiry as there are an infinite variety of ways for a tort to cause a loss." *Id.* at *5-6. The Court also

acknowledged that while the plaintiffs in *Lloyd* "pleaded that the market understood the [corrective disclosure] to be a revelation of fraud, we did not suggest that this path is the only way to satisfy loss causation." *Id.* at *6 (citing *Lloyd*, 811 F.3d at 1210). Indeed, "[a] plaintiff may also prove loss causation by showing that the stock price fell upon the *revelation of an earnings miss*, even if the market was *unaware* at the time that fraud had concealed the miss." *Id.* at *7 (citing *Berson*, 527 F.3d at 989-90; *Daou*, 411 F.3d at 1026) (emphasis added). As the Court explained, "the rule makes sense because it is the underlying facts concealed by fraud that affect the stock price" and "fraud simply causes a delay in the revelation of those facts." *Id.*

In addition to reaffirming the "financial impact" standard set forth in *Daou* and its progeny, the Ninth Circuit rejected the proposition that the *Metzler* line of cases created a "more restrictive test." *Id.* at *6. The Court clarified that those decisions "should be understood as fact-specific variants of the basic proximate cause test, as clarified by *Lloyd*" and "revelation of fraud in the marketplace is simply one of the 'infinite variety' of causation theories a plaintiff might allege to satisfy proximate cause." *Id.* (citing *Lloyd*, 811 F.3d at 1210). The Court also noted that "our approval of one theory should not imply our rejection of others" and "that a stock price drop comes immediately after the revelation of fraud can help to rule out alternative causes" but "that sequence is *not a condition* of loss causation." *Id.* (citing *Nuveen*, 730 F.3d at 1120) (emphasis added). Accordingly, the Ninth Circuit affirmed the district court's decision denying summary judgment on virtually all of plaintiffs' loss causation disclosures.

Future Implications

The impact of *First Solar* will likely be significant in several respects. First, the opinion suggests that defendants will no longer be able to credibly argue that to adequately establish loss causation, plaintiffs are required to prove that a corrective disclosure event triggering a stock price decline specifically revealed the fraudulent practices at issue or admitted that misconduct occurred. *Id.* at *7; *accord Mauss v. NuVasive, Inc.*, 2018 U.S. Dist. LEXIS 16941, at *12 (S.D. Cal. Feb. 1, 2018) (relying on *First Solar* in denying summary judgment on loss causation grounds because "the Ninth Circuit does not require that fraud be affirmatively revealed to the market to prove loss causation."). Nor are plaintiffs required to demonstrate that the market specifically "understood" that the corrective disclosure — whether an earnings miss or some other adverse news regarding the company's financial condition or true state of affairs — was the direct result of fraudulent conduct. *Id.* at *6. As the Ninth Circuit explained, although a revelation of misconduct or fraudulent practices is *one* way to establish loss causation, it is not the only way, and a plaintiff may establish loss causation by showing that the stock price fell upon the "revelation of an earnings miss [or some other negative news], even if the market was *unaware* at the time that fraud had concealed the miss." *Id.* at *7 (emphasis added).

Second, *First Solar* appears to significantly dilute the force of the Ninth Circuit's prior decisions in *Metzler*, *Oracle* and their progeny — cases that defendants have repeatedly used to argue that a corrective disclosure event must explicitly reveal or acknowledge that fraud occurred. As the Ninth Circuit explained, those cases should not be read as adopting a "more restrictive" loss causation test, but rather must be "understood" as "fact-specific variants" of a broad "proximate cause" standard. *Id.* at *6.

Third, the opinion appears to recalibrate and realign the Ninth Circuit's loss causation jurisprudence with more traditional principles of proximate cause, as framed by the Supreme Court's decision in *Dura*. As the Ninth Circuit explained, there is no rigid formula for establishing loss causation and there are an "infinite variety of causation theories a plaintiff might allege to satisfy proximate cause." *Id.* This holding comports with the Supreme Court's prior directive that the loss causation standard "should not prove burdensome" and plaintiffs need only allege "*some* indication of the loss and the causal connection that the plaintiff has in mind." *Dura*, 544 U.S. at 347 (emphasis added). *First Solar* thus brings the Ninth Circuit full circle to the basic proximate cause and loss causation principles espoused by the Supreme Court in *Dura* and reiterated by the Ninth Circuit in *Daou*. Although it is always difficult to predict the long-term impact of a single decision given the ever-changing nature of securities fraud jurisprudence and the creativity of well-capitalized corporate defendants, there is little doubt that *First Solar* will benefit shareholders in sustaining future Ninth Circuit cases alleging violations of the federal securities laws. ■

EPHEMERAL MESSAGING AND THE EXPANDING DIGITAL UNIVERSE

(continued from page 9)

During the recent LegalTech conference in New York City, a panel of federal judges weighed in on the propriety of utilizing these types of applications to communicate in the context of the *Waymo v. Uber* litigation. The panel, which included U.S. District Judge Xavier Rodriguez, U.S. Magistrate Judge Andrew Peck, U.S. Magistrate Judge Lisa M. Smith, and U.S. Magistrate Judge James C. Francis, did not think that the mere use of ephemeral messaging by a litigant warranted sanctions. Instead, the judges were inclined to evaluate the use of such applications on a case-by-case basis, including whether the party that relied on ephemeral communications took steps to suspend the auto-destruction feature after the imposition of litigation.

Furthermore, while the judges were unwilling to speak to the propriety of litigants using ephemeral messaging, they did concede that parties should carefully consider the litigation risks associated with that form of communication. There are many federal and state laws and regulations that require companies to retain records or, in the case of the civil procedure rules, put in place a litigation hold that prevents the further destruction of records until the conclusion of the litigation. In the U.S., destroying records in violation of the civil procedure rules applicable in state and federal courts can lead to sanctions, including fines, adverse jury instructions, or the inability to maintain a particular claim or defense (or an entire lawsuit).

There also could be significant reputational risks for companies that utilize these applications, particularly in the context of presenting a case to a jury. Indeed, Judge Alsup allowed Waymo to present evidence to the jury in support of its trade secret theft claims regarding Uber's use of ephemeral messaging applications to communicate. And while Judge Alsup stopped short of telling the jury how it should view that evidence, the fact that Uber used applications that obliterated any trace of the messages in order to avoid detection, may have been more than sufficient to inflict the necessary damage to the merits of Uber's defenses in the eyes of the jury. Other judges also may be less inclined to give the party utilizing ephemeral messaging an opportunity to spin the impact of such evidence in front of a jury, preferring instead to award mandatory adverse inference instructions or claim/defense terminating sanctions in order to deter similar conduct by parties in that jurisdiction.

Ultimately, entities are faced with a stark choice: find a way to securely store massive amounts of unstructured data generated by more traditional forms of electronic communication or shift to using some form of encrypted or ephemeral communications, the use of which may violate any number of laws, regulations, and procedural rules. Litigants in U.S. courts have to be prepared to address the use of ephemeral messaging head-on, including at the outset of discovery, to mitigate the impact of its use on the historical record applicable for that particular action. And U.S. courts will have to determine what, if anything, should happen to litigants that utilize ephemeral messaging applications, whether for laudable or nefarious reasons, if the use of those applications leads to the destruction of valuable evidence in a litigation. ■

EVENTS

WHAT'S TO COME

APRIL 2018

Texas Association of Public Employee Retirement Systems (TEXPERS) — 29th Annual Conference

April 15 – 18

South Padre Island Convention Centre
South Padre Island, TX

North America's Building Trades Unions (NABTU) 2018 Legislative Conference

April 15 – 18

Washington Hilton and Towers ■ Washington, D.C.

MAY 2018

National Conference on Public Employee Retirement Systems (NCPERS) — Annual Conference & Exhibition

May 13 – 16

Sheraton New York ■ New York, NY

State Association of County Retirement Systems (SACRS) — Spring Conference

May 15 – 18

Anaheim Marriott ■ Anaheim, CA

Pennsylvania Association of Public Employee Retirement Systems (PAPERS) — 14th PAPERS Forum

May 22 – 23

Hilton Hotel ■ Harrisburg, PA

JUNE 2018

County Treasurer's Association of Pennsylvania 70th Annual Conference

June 19 – 22

Harrisburg/Hershey Holiday Inn ■ Grantville, PA

Florida Public Pensions Trustees Association (FPPTA) — 34th Annual Conference

June 24 – 27

Rosen Shingle Creek ■ Orlando, FL

Evolving Fiduciary Obligations of Institutional Investors (EFOII) — 9th Annual Conference

June 25 – 26

Savannah Hyatt Regency ■ Savannah, GA

National Association of Public Pension Attorneys (NAPPA) — Legal Education Conference

June 26 – 29

Savannah Hyatt Regency ■ Savannah, GA

JULY 2018

Pennsylvania State Association of County Controllers (PSACC) — Annual Conference

July 22 – 26

Greensburg, PA

Missouri Association of Public Employee Retirement Systems (MAPERS) Annual Conference

July 25 – 27

Tan-Tar-A Resort ■ Osage Beach, MO

AUGUST 2018

County Commissioners Association of Pennsylvania (CCAP) — Annual Conference and Trade Show

August 5 – 8

Wyndham Gettysburg ■ Gettysburg, PA

Texas Association of Public Employee Retirement Systems (TEXPERS) — Summer Educational Forum

August 12 – 14

Grand Hyatt ■ San Antonio, TX

SEPTEMBER 2018

Georgia Association of Public Pension Trustees (GAPPT) — 9th Annual Conference

September 17 – 20

Savannah Hyatt Regency ■ Savannah, GA

Florida Public Pensions Trustees Association (FPPTA) — Fall Trustee School

September 30 – October 3

Hyatt Regency Coconut Point Resort ■ Bonita Springs, FL

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