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The Coming Securities Class Action Storm: Multijurisdictional Litigation After Cyan....1
Building Momentum with Robbie Thompson....10
Medical Professional Liability in 2018: Major Challenges....11
PLUS Conference 2018....15
Judicial Vacancies Under President Trump: The Potential Lasting Effects on Securities Cases....16
PLUS Foundation: 2018 Scholarship Recipients....20
2018 LAMP Cohort Announced....22

The Coming Securities Class Action Storm: Multijurisdictional Litigation After Cyan

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On March 20, 2018, the Supreme Court unanimously held in Cyan, Inc. v. Beaver County Employees Retirement Fund that securities plaintiffs could bring class actions under the Securities Act of 1933 (1933 Act) in state courts.[1]

The Court's unanimous decision contrasts sharply with the rancor the ruling will cause: Cyan portends a paradigm shift in how defense lawyers defend securities class actions and how D&O insurers cover and monitor them. Cyan permits a class action asserting Section 11 or 12(a)(2) claims under the 1933 Act to proceed in state court while a related Section 10(b) class action is proceeding under the Securities Exchange Act of 1934 Act (1934 Act) in federal court.

This bifurcation is highly dysfunctional. 1933 Act claims are often closely related to 1934 Act claims. For instance, plaintiffs alleging false or misleading corporate statements in the context of an initial public offering (IPO) almost invariably challenge these same statements under both Section 11 and Section 10(b). Likewise, the class of purchasers harmed by a stock price drop will comprise the same members in both actions. Questions of causation will be common to both actions as well, since the alleged misrepresentations must be causally related to what made the stock price drop. Yet these related claims can be split apart and litigated in different courts – not just in federal court and a state court, but in multiple state courts – with different pleading burdens, lead-plaintiff rules, discovery practices, and case schedules. Yikes.

We can expect multiple state court claims to take hold and from time to time be fairly fierce, fueled by competition among the new, expanded set of plaintiffs' securities law firms. Although filing patterns will be case-specific, we anticipate that plaintiffs' firms will file in multiple states to attempt to get around the traffic in the state where the company defendant is headquartered, get a leg up on the other plaintiffs' firms, and put pressure on the defendants. In addition to the headquarters state, candidates for state court filings include (i) New York, where the company's stock is listed; (ii) any state with significant operations; (iii) any state where one of the named plaintiffs resides; and, of course, (iv) California, where securities plaintiffs have had unprecedented success litigating pre-Cyan. Multistate litigation of this sort will be a logistical mess to defend. Not only will it increase the burdens of securities litigation defense, it will deprive defendants of the protections set out under the Private Securities Litigation Reform Act of 1995 (Reform Act).

After a review of Cyan's history, we discuss the pre-Cyan difficulty of parallel litigation and preview the post-Cyan world – a world where effective securities litigation defense will require a high thought-to-action ratio and D&O insurance will require new tools and resources.[2] We also discuss the early returns post-Cyan – which do not yet provide enough of a basis to draw conclusions and still leave us braced for a hurricane.

The Reform Act, SLUSA, and Plaintiffs' State Court Stratagem

Cyan disrupts a securities litigation system that Congress and the Supreme Court have developed over the past 85 years. To understand Cyan and the paradigm shift it portends, it is necessary to examine the structure of securities law.

Congress Passes the 1933 Act and the 1934 Act

Congress enacted the 1933 Act and the 1934 Act in response to the stock market crash of 1929 and the resulting Great Depression. The key provisions of the 1933 Act are Section 11, which establishes that any purchaser of a security may bring a private action for damages against the issuer if the registration statement is false or misleading,[3] and Section 12(a)(2), which similarly establishes a private right of action against any person who offers or sells a security through a prospectus or oral communication that is false or misleading.[4]

The key provision of the 1934 Act is Section 10(b), which, along with

Securities and Exchange Commission (SEC) Rule 10b-5 promulgated thereunder, broadly prohibits deception, misrepresentation, and fraud "in connection with the purchase or sale of any security" based on any public corporate statement.[5] Unlike with Section 11 or 12(a)(2) cases under the 1933 Act, the 1934 Act established that federal courts have exclusive jurisdiction over cases brought under Section 10(b).[6]

The Supreme Court Shapes Securities Jurisprudence

Although Section 10(b) does not include private right of action, the Supreme Court held in Blue Chip Stamps v. Manor Drug Stores that Section 10(b) contains an implied right of action.[7] But the Court repeatedly declined to expand the scope of the implied private right of action – which it described as "a judicial oak which has grown from little more than a legislative acorn" – largely due to policy concerns related to the danger that Rule 10b-5 will be used as a vehicle for particularly vexatious litigation.[8] Throughout its securities jurisprudence, the Court has long balanced the goal of preventing corporate fraud with the need to protect against "open-ended litigation [that] would itself be an invitation to fraud."[9]Maintaining this balance is especially important because it is shareholders who "ultimately bear the burden" of meritless litigation.[10]

Congress Passes the Reform Act

By the 1990s, private securities litigation had gotten out of control. The class action mechanism had enabled plaintiffs' lawyers to file abusive "strike suits" targeting deep-pocketed defendants, often on behalf of "professional plaintiffs" with only nominal holdings in the company.[11] Congress found that these abuses resulted in extortionate settlements, chilled discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors, injuring the "investing public and the entire U.S. economy."[12] Shareholders bear the brunt of these abuses; "investors always are the ultimate losers when extortionate 'settlements' are extracted from issuers."[13]

To protect the interests of shareholders and the economy as a whole, and to restore balance to the system to enable it to function fairly and efficiently once again, the Reform Act implemented procedural reforms designed to discourage plaintiffs from filing abusive cases and encourage defendants to fight them. The Reform Act's provisions apply to federal court class actions brought under the 1933 Act and 1934 Act.[14]

Under the Reform Act, lead plaintiffs asserting 1933 Act or 1934 Act claims on behalf of a class are no longer selected based on who wins the "race to the courthouse" – instead, courts must engage in a process to determine which purported class member is "most capable of adequately representing the interests of class members" as the lead plaintiff.[15] This discourages plaintiffs' lawyers from filing class actions on behalf of "professional plaintiffs" who receive a "bounty for their services" and have no real interest in the outcome of the litigation.[16] Congress understood that plaintiffs with more significant holdings – principally institutional investors – would exercise more control over class counsel, thereby improving the quality of the representation to the benefit of all shareholders.[17]

Naturally, Congress intended for the most adequate lead plaintiff to represent the class as to all its related securities claims. The Reform Act accordingly amended both the 1933 Act and the 1934 Act to require courts to make the lead-plaintiff determination after deciding any motions to consolidate, and to appoint a single "most adequate plaintiff" as the lead plaintiff for all consolidated actions.[18]

In addition, the Reform Act imposes heightened pleading standards that make it easier for courts to dismiss unfounded fraud allegations. For example, securities plaintiffs must plead falsity, materiality, and scienter with particularity as to each statement challenged under Section 10(b).[19] Likewise, Congress understood that the heightened pleading standard under Federal Rule of Civil Procedure 9(b), which applies to allegations concerning fraud or mistake, would apply to the element of falsity under all federal securities statutes, including the 1933 Act.[20]

As a complement to the heightened pleading standards, the Reform Act also amended both the 1933 Act and the 1934 Act to establish an automatic stay of discovery while any motion to dismiss is pending.[21] The automatic stay enables defendants to seek dismissal of unsupported claims before having to face "fishing expeditions" or exorbitant discovery costs.[22] Prior to the Reform Act, securities plaintiffs were able to file lawsuits without even knowing the basis for their own claims, and could "search through all of the company's documents and take endless depositions" in an effort to find one.[23] The high costs associated with responding to such invasive discovery often coerce defendants into settling even frivolous lawsuits. By disallowing these abusive discovery practices, the Reform Act's discovery stay essentially requires plaintiffs to have a valid basis for their claims before filing a lawsuit, which discourages strike suits.

Congress Passes SLUSA to Block Plaintiffs' State Court Stratagem

Prior to the Reform Act, state court litigation of class actions involving nationally traded securities had been rare. But because the Reform Act made it more difficult for unmeritorious suits to survive past the pleading stage in federal court, it had the "unintended consequence" of "prompt[ing] at least some members of the plaintiffs' bar to avoid the federal forum altogether" by filing class actions in state court instead.[24] Congress enacted the Securities Litigation Uniform Standards Act (SLUSA) to prevent such circumvention of the Reform Act and to ensure that class actions involving nationally traded securities would be subject to "uniform standards" under a single federal framework. SLUSA accomplishes this goal by eliminating state court jurisdiction over "covered class actions," broadly defined as any damages action on behalf of more than 50 people.

The legislative history of SLUSA makes it abundantly clear that

Congress designed the statute to give federal courts exclusive jurisdiction over virtually all private class actions involving nationally traded securities. The House Conference Report explains that SLUSA "makes Federal court the exclusive venue for most securities class action lawsuits" and that SLUSA's purpose is "to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court."[25] These protections include the substantive and the procedural provisions of the Reform Act, "essentially none" of which apply in state courts.[26]

Taken together, the 1933 and 1934 Acts, the Reform Act, and SLUSA create a system in which related securities class actions are considered at the same time, in the same federal forum, prosecuted by one lead plaintiff, and subject to the same substantive and procedural standards.

Cyan Destroys This System: An Overview of the Decision

In a unanimous decision authored by Justice Kagan, the Supreme Court held that state courts have jurisdiction to adjudicate class actions under the 1933 Act that do not concern covered securities.[27] The Supreme Court ruled that this was the more "straightforward" interpretation of the statutory text of the concurrent jurisdiction provision under the 1933 Act.[28] Specifically, the Supreme Court noted that SLUSA framed its amendments to that provision as creating an exception to the general rule that state courts have concurrent jurisdiction. If Congress truly intended to deprive state courts of jurisdiction altogether, the Supreme Court reasoned, then it would not have created an exception to the concurrent jurisdiction provision – it would have just struck that provision in its entirety.

The Supreme Court acknowledged that it does "not know why Congress declined to require that 1933 Act class actions be brought in federal court," as Congress had with claims under the Exchange Act.[29] But the Supreme Court held that it "will not revise that legislative choice," noting that it "has no license to disregard clear language based on an intuition that Congress must have intended something broader."[30]

What Is Wrong With Parallel State and Federal Securities Class Actions?

It is reasonable to ask why it is unfair to force defendants to defend themselves in state and federal court. The answer is that our system of securities litigation revolves around a carefully constructed set of procedural and substantive rules that parallel state court litigation subverts. This, in turn, imposes inordinate risk of liability and litigation burdens. It is far fairer and more efficient to litigate everything in one court under one set of uniform rules and standards. This is precisely what Congress set out to do when it passed SLUSA. According to the Supreme Court in Cyan, however, Congress failed.

Concurrent Jurisdiction Prevents Consolidation of Related Cases

The Reform Act's consolidation and lead-plaintiff appointment process was a centerpiece of the legislation. As noted above, Congress was deeply concerned that "professional plaintiffs" with no real stake in the company "do not adequately represent other shareholders," and have little interest in exercising oversight over class counsel.[31] Congress addressed this problem by mandating that courts "shall appoint the most adequate plaintiff" as lead plaintiff over all consolidated actions.[32] This protects absent class members whose interests are aligned with the lead plaintiff's. For instance, settlements negotiated under the supervision of adequate lead plaintiffs are generally more "'fair and reasonable' than is the case with settlements negotiated by unsupervised plaintiffs' attorneys."[33]

Consolidation is an important step in the lead-plaintiff process, since class members' interests cannot be adequately represented by competing lead plaintiffs in parallel class actions. That is why the Reform Act requires appointment of a lead plaintiff over all consolidated actions following adjudication of any consolidation motions.[34] Further, "consolidation of enforcement control in a single liability regime without the ability to shift fora" is a critical component of a successful system for securities fraud deterrence, which was an animating idea behind SLUSA.[35] After all, a system in which related cases are not consolidated, and which allows for the possibility of "parallel class actions proceeding in state and federal court," gives rise to "wasteful, duplicative litigation" and "squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'"[36]

But, under Cyan, related securities class actions cannot be consolidated in a single forum because state court securities class actions cannot be removed, undermining the intent and policy goals behind the Reform Act's consolidation and lead-plaintiff appointment process. Under Cyan, plaintiffs can file wasteful, duplicative, parallel securities class actions in state courts, where the "uniform standards" established by the Reform Act and reinforced by SLUSA do not apply. Fractured class actions not only waste judicial resources and unduly burden defendants, but can harm absent class members as well. For instance, when cases are not consolidated under the direction of a single lead plaintiff, the lead plaintiffs representing competing classes could end up undermining each other or taking inconsistent positions, to the detriment of class members who lack control over the litigation.

In addition, under Cyan, plaintiffs who file class claims in state court are once again incentivized to "race to the state courthouse" regardless of whether they have a genuine interest in the lawsuit, because the Reform Act's lead-plaintiff provisions do not apply in state courts. The consequences of this are felt not only in the state court 1933 Act case, but also in any simultaneously proceeding federal court Section 10(b) case. Because Section 10(b) claims must

be filed in federal court, the "most adequate plaintiff" will have control over those proceedings – including, for instance, deciding whether to settle the case under certain terms. However, an individual investor with no more than a nominal stake in the company can hijack this process by filing a related Section 11 class action in state court. The individual investor, whose interests may not align with those of the class, can then insert himself into the strategic driver's seat, depriving the "most adequate plaintiff" of the power to agree to a strategic course of action, and, among other things, can undermine a settlement that is in the best interests of the class. Congress surely did not intend to return such power to the hands of "professional plaintiffs."

Concurrent Jurisdiction Disrupts Key Procedural Elements of the Reform Act

Taken together, the Reform Act and SLUSA prescribe that once related cases are consolidated, they will be subject to the Reform Act's automatic discovery stay and heightened pleading standards, and to the Federal Rules of Civil Procedure. But when 1933 Act cases are filed in state court, these important protections are lost. State courts apply their own procedural rules and more-relaxed pleading standards to securities class actions, which is precisely why they are attractive venues for plaintiffs seeking to circumvent federal standards. Moreover, filing 1933 Act claims in state court seriously undermines the Reform Act as to any simultaneously proceeding 1934 Act claims as well.

Lack of a discovery stay. State courts often refuse to stay discovery while a motion to dismiss is pending on the grounds that the Reform Act's automatic discovery stay applies only in federal court. When facing a Section 11 claim in state court where discovery has not been stayed, defendants are much more susceptible to being coerced into settling unmeritorious claims by unbearable discovery costs – just as they were before the Reform Act was passed. Moreover, when a Section 10(b) class action is proceeding in federal court at the same time, there is a risk that the Reform Act's discovery stay will lose its teeth in that case as well. Although discovery is stayed as to the Section 10(b) claim while a motion to dismiss is pending, discovery that is directly related to that claim may move ahead in the state court 1933 Act case. Defendants then face the same onerous discovery costs that the Reform Act was designed to rein in, before they are able to obtain dismissal of a meritless Section 10(b) claim. This is precisely what the Reform Act and SLUSA try to avoid.

While defendants in that scenario could move the federal court to stay discovery in the state action under Section 27(b)(4) of the 1933 Act,[37] that provision is an antique tool that is rarely used and "quite limited," since federal courts invoke it only in aid of their jurisdiction or to protect or effectuate judgments.[38] And at least one court has held that this provision can be used to stay discovery only in state class actions under the 1933 Act, but not in individual state actions under the 1933 Act.[39] In short, defendants should prepare for incongruous discovery rules when fending off parallel securities actions in federal and state court.

Lack of heightened pleading standards. A similar incongruity occurs with respect to the standards for pleading a claim under the securities laws, which differ in state and federal courts. At a minimum, Congress understood when it passed the Reform Act that the Federal Rules of Civil Procedure would apply to claims of misrepresentation under the securities laws, as it assumed these claims would be filed in federal court. But, as discussed below, Cyan permits plaintiffs to avoid the more demanding federal pleading standards by filing in state courts, which often require no more than notice pleading. This is particularly problematic with respect to Section 11 claims that "sound in fraud," because filing such claims in state court – where they can be alleged separately from claims of fraud under Section 10(b) – makes it easier for plaintiffs to disclaim any reliance on a fraud theory.

Today, it is well-established that Section 11 claims that sound in fraud are subject to Rule 9(b). Although Section 11 does not necessarily require proof of fraud, Rule 9(b) refers to "alleging fraud" – not to causes of action in which fraud is an element. Requiring Section 11 claims that sound in fraud to be pleaded with particularity prevents plaintiffs from performing an end run around the pleading requirements by "adding a superficial label of negligence or strict liability."[40] It is often difficult for plaintiffs to plead around their Section 10(b) fraud allegations in framing a Section 11 claim when they are asserting both claims in the same case. After all, the element of loss causation (as well as its companion defense of negative causation under Section 11) requires that the alleged misrepresentations be causally related to what made the stock price drop.[41] This means that the essence of the 1933 Act and 1934 Act claims is necessarily the same. Thus, when Section 11 and Section 10(b) claims are asserted in the same consolidated federal case, as contemplated by the Reform Act, Section 11 claims often sound in fraud and so are subject to Rule 9(b). Yet Cyan enables plaintiffs to plead around the sounds-in-fraud rule simply by permitting plaintiffs to split Section 11 claims from 10(b) claims – a highly unfair and unprincipled result that is contrary to Congress's intent.

This difference is pivotal. In many states, the pleading standard for falsity is far lower than the standard established by Rule 9(b), requiring no more than notice pleading.[42] Worse, as in many other states, California's equivalent of Federal Rule of Civil Procedure 8 does not even incorporate the "plausibility" requirement established by Bell Atlantic Corp. v. Twombly[43] and Ashcroft v. Iqbal.[44] California courts considering demurrers (the California equivalent of a motion to dismiss) consider the facts alleged in the complaint to be true "however improbable they may be."[45] Naturally, this means that significantly fewer Section 11 claims are dismissed

at the pleading stage in state courts than in federal courts.

Pre-Cyan Experience Shows Litigation of Parallel State and Federal Claims Is Disheveled

The dysfunction inherent in a system that permits concurrent state and federal jurisdiction is far from hypothetical. Simultaneous state and federal proceedings are riddled with logistical and substantive problems.

To take an example, in Altayyar v. Etsy, Inc.,[46] plaintiffs filed a securities class action complaint in federal court against e-commerce giant Etsy, Inc., in connection with Etsy's initial public offering. While motions to appoint a lead plaintiff in the federal action were pending, a different plaintiff filed suit in California Superior Court alleging 1933 Act claims only, on behalf of essentially the same class, in connection with the same alleged conduct. The defendants removed the state action to federal court and moved to transfer it to the Eastern District of New York – where Etsy is headquartered, most of the conduct at issue took place, and nearly all documents and witnesses were located – for potential consolidation with the 1934 Act case.[47] But the district court granted the state plaintiff's motion to remand the California action, and the defendants were left litigating essentially the same claims in two different fora, before two different decision-makers, with two different sets of procedural rules.

As one might expect, this created a host of inefficiencies for both the courts and the litigants. For the first few months, discovery in the federal action was stayed under the Reform Act, even as discovery moved forward in the state proceeding. Defendants eventually convinced the California court to stay the state proceedings on forum non conveniens grounds, allowing the federal case to take the lead. This led the state plaintiffs to seek to intervene in the federal action, asking the federal court to stay the federal case in favor of the California action, or, alternatively, relitigate appointment of the lead plaintiff in the federal suit so that the state plaintiff could participate. The federal court denied the motion to intervene, and a few months later granted the defendants' motion to dismiss the federal action in its entirety with prejudice. That decision is now on appeal, while the state court case remains active. Messy, highly inefficient parallel proceedings of this type delay the litigation process, waste judicial resources, subject defendants to inconsistent discovery obligations, and carry a high risk of inconsistent results.

In some cases – particularly where the parallel proceedings move at vastly different speeds –1933 Act cases in state court will drive the results in related 1934 Act cases in federal court. For example, Pacific Biosciences of California was sued in connection with its initial public offering in five different actions at the end of 2011. Three of these were 1933 Act cases consolidated in California Superior Court; the other two, alleging 1933 Act and 1934 Act claims, were filed and consolidated in federal court.[48] The consolidated federal action was subject to the Reform Act's discovery stay for the year and a half it took to complete the motion-to-dismiss process; on April 15, 2013, the court dismissed the federal action in its entirety, giving plaintiffs a month within which to file an amended complaint.

In the meantime, the state court action had advanced through the filing of two amended complaints, a decision on defendants' motions to dismiss, answers to the complaint, some party and third-party discovery, and a mediation resulting in a settlement agreement (though the federal lead plaintiffs were excluded from this process and informed only after the fact). On June 3, 2013, the state court preliminarily approved the settlement and conditionally certified a settlement class that was identical to the class the plaintiffs in the federal suit claimed to represent. One day before the federal amended complaint was due, the defendants moved to stay the federal proceeding – still in the pleadings stage – on the theory that if and when the preliminary state settlement became final, it would extinguish the federal class claims in their entirety. Plaintiffs in the federal action opposed the defendants' motion, arguing that the federal court had an obligation to preside over disposition of the 1934 Act claims, over which it had exclusive jurisdiction. Plaintiffs instead asked the court to enjoin the state proceedings, claiming that the parties in the state court action were improperly circumventing the Reform Act's lead-plaintiff provisions and undermining the statutory scheme by seeking to settle the 1934 Act claims in the state forum. The federal court denied both motions to stay, the state court settlement received final approval and the federal proceeding was voluntarily dismissed a few months later (after a lead plaintiff who had opted out of the state settlement reached his own settlement with defendants).

In short, because the 1933 Act case proceeded under state court rules and was not subject to the Reform Act's automatic discovery stay, it advanced to a point where the parties needed to mediate and settle before the federal court could even decide the motion to dismiss (which it ultimately granted). In a very real way, allowing parallel proceedings of this type strips federal courts of the exclusive jurisdiction and decision-making authority over Exchange Act claims that the Reform Act and SLUSA sought to establish.

Cyan's Implications

Early Returns

It is still too early to gauge the full scope of Cyan's implications on securities litigation. Since the decision, the securities plaintiffs' bar has been relatively quiet. In the first half of 2018, only six federal IPO-related actions were filed.[49] Five of these were accompanied by at least one related state court action. Notably, although several of these involved multiple state court filings, none has involved filings in more than one state, and all the state court litigation was filed in the issuer's headquarters state. A federal court action filed late last year does involve

related state court actions filed in different states.

Does this mean that the worry about Cyan is a tempest in a teapot? No – far from it.

The relatively low number of IPO-related filings is likely a function of the still-high stock market. Once it tips down, there are many dozens of companies whose IPOs were less than three years ago, and who can still be sued within the 1933 Act's three-year statute of repose.

Cyan permits 1933 Act state court cases challenging secondary offerings as well. Although it is more difficult for plaintiffs' firms to find secondary offering purchasers to serve as plaintiffs, you can expect a surge of secondary offering cases as well. Plaintiffs' firms of all types will no doubt increase their efforts to identify and recruit secondary offering purchasers to serve as plaintiffs.

For both IPO and secondary offering cases, we believe plaintiffs' firms will begin to file 1933 Act cases in multiple states – our friends in the plaintiffs' bar are too smart and entrepreneurial not to maximize the leverage Cyan has given them. They took advantage of state court litigation after the 2011 California state court decision that let them bring 1933 Act cases in that state, resulting in a 1,400 percent spike in 1933 Act filings in California state courts. You can expect a large state court spike post-Cyan, this time across multiple states.

Our best guess is that the plaintiffs' bar has thus far avoided a multistate onslaught to minimize the risk of post-Cyan legislative and judicial backlash. Certainly Congress does not seem likely to act to close the 1933 Act loophole in SLUSA, but a multistate onslaught of state court litigation would increase the odds of congressional action. A barrage of multistate filings would also hurt the plaintiffs' opposition to federal forum bylaws – the so-called Grundfest proposal (which we discuss below) – by creating a record that the litigation burden justifying the bylaws amendment is indeed severe. So, we think the plaintiffs' bar is playing possum.

Whatever the reason, we need to brace ourselves for a hurricane: In any case involving a registered offering, the defendants must expect 1933 Act claims in federal and multiple state courts, and parallel 1934 Act claims in federal court.

Congressional and Contractual Solutions?

We are not optimistic about congressional action, and are a bit more optimistic that Professor Grundfest's bylaws solution will take hold and withstand challenge.[50] He proposed that public companies should adopt a provision in their articles of incorporation or bylaws that provides that any shareholder may bring 1933 Act claims against the company or its officers and directors only in federal court. This proposal is at issue in at least one litigation post-Cyan, where the plaintiff class filed 1933 Act claims against Delaware companies and their directors and officers in Delaware state court.[51] But the company defendants' charters contain the language Grundfest suggested and, so, defendants argue that the 1933 Act claims should fail. The underlying issue in this case and the many that will surely follow is: Can companies and their directors and officers contract around Cyan? The defendants in the aforementioned case believe so, writing in a recent brief that Cyan "does not affect the validity of any forum selection provision under any circumstance." They are not wrong. But courts may still frown upon this type of forum shopping. Stay tuned.

Even if defendants can contract around Cyan, plaintiffs' lawyers will, in the meantime, leave skid marks in front of state courthouses around the country. Just how many skid marks they leave is the key question. Plaintiffs' lawyers have been filing state court cases for several years now, so it is possible the frequency of such cases will not increase dramatically. But we believe Cyan will have a profound impact on the rate of state court filings – plaintiffs' firms can now file in state court without the risk or expense of a jurisdictional battle. Therefore, in our view, Cyan will significantly increase the overall number of unconsolidated securities class actions.

What Is the Path of the Litigation Storm?

There is no ability to consolidate multiple state court and related federal court filings. So, in a post-Cyan world, defense counsel should begin to formulate legal and practical arguments in favor of a stay. Unlike tagalong derivative litigation, we should expect plaintiffs to attempt to push state court 1933 Act claims, to get out in front of other state court plaintiffs for competitive purposes and to get valuable discovery materials for strategic advantage. Since there can be only one 1933 Act plaintiff class regardless of how many separate actions are filed, a plaintiff that gets a fast start may be able to effectively take control of the litigation for settlement or other strategic purposes. We thus should be ready for contested stay motions.

In addition to requesting stays, defense counsel should make an alternative forum non conveniens motion, to minimize the risk of multiple active state court actions. This dual-motion strategy will require us to quickly decide on the most convenient state in which to litigate. Although the headquarters state will often be the most logical forum, other forums might be better – for example, the state in which the federal litigation is pending might be best for the parties and courts. In any event, defense counsel should be prepared to thoughtfully pick an alternative forum. Defense counsel also should be prepared to file motions to transfer venue within a particular state. For example, San Mateo may be an appropriate forum if an issuer is located there, but cases filed there against issuers whose headquarters are located elsewhere are subject to transfer.

Alternatively, it may be in defendants' interest to promptly move to dismiss in the most convenient state court case while they move

for a stay or transfer in the other cases, and if they prevail, to seek dismissal of the other cases. Defendants will want to argue that any decision made by a state court should apply equally to the same claims, between the same parties, in another state. While the named plaintiffs will not be identical, the parties in interest will be the same, as each plaintiff will have the same interest as every other shareholder that has filed suit. In fact, plaintiffs will likely admit this in their pleadings as they attempt to certify a class of purchasers. And even if the other courts do not dismiss on the basis of preclusion, they may well be persuaded by the dismissal, since each case comprises one 1933 Act class asserting the same claims.

Defendants will also want to consider early settlement of one of the state court cases and go through a settlement-approval process that results in a final dismissal with prejudice to the class. Although other individual plaintiffs will undoubtedly object to the settlement, courts should approve the lion's share of such settlements if they are fair and reasonable, and the lion's share of courts in the nonsettling cases will agree to stay their cases during the settlement-approval process. Defendants then will be left to defend only the federal securities class action – just like in the good old days.

Before these decisions are made, it behooves defendants to promptly and prudently select the right defense counsel. Post-Cyan, companies will not have the luxury of a leisurely defense counsel selection process; many key decisions will need to be made in the initial days of the litigation. More important, companies will need to select a full-time securities litigator to lead the litigation – the prompt strategic decision-making outlined above requires decades of experience. The lead lawyer must be from a national firm that can cover the full terrain of the litigation. Yet defense counsel must be able to defend litigation not just effectively but efficiently, as good stewards of their clients' policy proceeds. There is no doubt that Cyan will increase defense costs. The only question is by how much. There is no room within D&O policy limits or most companies' budgets for wasting money on legal frolics.

If defendants maintain the status quo and go with defense counsel with limited state court and trial experience, they will likely regret it. In a post-Cyan world, plaintiffs' firms with diverse practices and strong state court litigation and trial practices will refocus on securities cases. This risks a real mismatch: We could well see savvy state court plaintiffs' trial lawyers going up against white-shoe securities class action defense counsel. Cover your eyes – in some cases, it will be ugly. And since the supply of plaintiffs' lawyers drives the number of cases they file, frequency will increase exponentially.

To be sure, in a post-Cyan world, state court cases will effectively drive related state and federal litigation. In federal court, the Reform Act's procedural protections – the lead-plaintiff, consolidation and motion-to-dismiss procedures – can take more than a year to play out. While that neat-and-tidy process is playing out in federal court, state court cases will be careeningthrough the litigation process toward trial. State court cases will move quickly. There are no lead-plaintiff and no 60-day notice requirements in state court. Also, with notice pleading being the norm, state court securities class actions typically survive pleading-motion challenges. And without a discovery stay, discovery will begin lickety-split, even during challenges to pleading through demurrers or motions to dismiss.

To add insult to injury, with the state court case in the driver's seat, the Reform Act's procedural protections in the related federal court case will be weakened as a practical matter. For instance, the automatic stay of discovery in a securities fraud case under the 1934 Act becomes a weaker shield against abusive lawsuits when discovery can proceed full bore in a closely related state court case. Worse still, the federal case will become even more virulent, because discovery produced in the state court case will inevitably become part of the federal court complaints.

Beyond this ability to construct stronger claims, getting plaintiffs over the scienter hurdle and closer to being able to prove liability, there are a number of reasons plaintiffs and plaintiffs' firms will continue to file cases in federal court. For one, plaintiffs' 1934 Act damages can be higher because the claims are based on secondary-market purchases and thus can involve a larger number of class members.

There is a subtler reason as well: Although the federal lead plaintiff may not be able to control the pace of the litigation, the litigation may still end up in the pole position. State court litigation filed in multiple states can assert only one claim on behalf of the class of purchasers in the registered offering at issue, so that a settlement of one of the state cases will foreclose claims in all of the other state cases. Defendants will seek out the right state plaintiff with which to settle for the lowest possible amount that will obtain settlement approval. Although the other state plaintiffs will object, a good settlement negotiation process and a high enough settlement amount will obtain approval more often than not.

Once the state court litigation is settled, the federal plaintiff will be in charge – but with a case that is more valuable because of the state court discovery, which allows more federal cases to survive motions to dismiss. A key exception to federal dominance after settlement of the state court litigation will be state court litigation filed in only one state – but that will be the exception, not the rule. In any event, we need to construct a new securities litigation system that can withstand the worst securities litigation crashes.

A Call to Action: Defense Counsel and D&O Insurers and Brokers Need to Develop New Tools and Resources

Defense lawyers and D&O insurers and brokers have neither a map nor a compass to navigate this new landscape. For the past 20 years, the blueprint for defending securities class actions has been simple: Move to dismiss the case at the pleading stage, and if unsuccessful, settle the case. But now, the most fundamental fights in the case will take place in state court, which will require a different way of litigating.

Most fundamentally, securities litigation will now require actual litigation. And because securities litigation specialists rarely litigate all the way through summary judgment, much less trial, securities litigation will require sharper litigation skills, and new team members who can assist with litigation strategy that realistically contemplates trial as the litigation's destination. These necessary new lawyers, moreover, will need to be geographically diverse – since state court practice is local, the lead securities litigation partner will need help from colleagues in the states in which 1933 Act cases are filed.

Actual litigation in securities litigation would tend to drive down settlement values and deter frivolous lawsuits. Yet for many years now, the skyrocketing cost of defending securities class actions has made it uneconomical to defend most cases through summary judgment, much less to trial. Although state court litigation is not the ideal way for litigation to return to securities cases, we might be better off for it – if defense counsel and D&O insurers and brokers can dial up a well-run defense system.

Such a system must contain several elements:

- A lead partner who is a securities litigation specialist is critical. He or she needs to be able to oversee potentially dozens of cases brought by the entire universe of plaintiffs' lawyers. Only a lawyer who is well-known to the plaintiffs' bar will be able to understand the intra-plaintiff dynamics and the often-subtle strategies the plaintiffs are trying to execute. The lead lawyer also needs to manage the settlement dynamics among large groups of plaintiffs' lawyers and the tower of D&O insurers, among the fairly small number of repeat securities class action mediators.
- Law firms must police the partners in their firms who compete for securities cases. There is a growing number of general litigators who compete for securities cases or who are put in front of corporate clients because of their relationship with the corporate partner. This is simply a product of internal law firm politics and/or marketing and does not serve clients well. Firms need to feature their full-time securities litigators only. And, whether or not a firm has one, a firm needs to advise its corporate client defendants to audition multiple full-time securities litigation lawyers. It is a best practice in all cases for companies to audition several firms, including firms that have not done the corporate work that may be at issue.
- Defense firms need to defend parallel state and federal litigation with a sky-high thought-to-action ratio. To state the obvious, defense firms will be tempted to rev up their litigation engines and defend the myriad cases as though each case were the only one. But each individual case is not the only one – each is really part of one large litigation, and each needs to be handled that way. Defense firms have an obligation to their clients to be careful stewards of their clients' insurance policy proceeds. The totality of the litigation needs to be handled carefully to avoid self-dealing. Here, too, the lead partner's securities litigation expertise, along with tight case management, is critical.
- Last but certainly not least: It is incumbent upon D&O insurers and brokers to steer defendants toward the right lead lawyer and insist on an audition process, and to then exercise greater strategic oversight than in non-Cyan situations. We are not insurance lawyers, but we believe the defense counsel consent and cooperation clauses in current policies allow insurers to exercise this type of muscle. And if that is not the case, insurers could easily include a provision imposing greater control of defense counsel selection and strategic oversight for companies conducting an IPO. Insurers and brokers must carefully oversee defense counsel's strategic decisions. We believe the cooperation clause gives insurers the right to be more than a backseat driver on litigation management as well as defense counsel selection, but here too, a simple policy modification would work.

If we as a D&O liability defense community can impose a system approaching this ideal, we will not only survive Cyan, but we may well end up with better outcomes. State court cases present many challenges, but our firm and others have excellent commercial litigators around the country who know how to defend complex cases. (Dear fellow full-time securities litigators: Let's make a pact to have our trial lawyer partners try securities cases and not get beyond our depth.) Some state court securities litigation cases will go to trial, and with the right lawyers in place and good decision-making and collegiality among defendants, defense counsel and D&O insurers about which ones to take to trial, they can be defended to a defense verdict.

State court 1933 Act cases are difficult cases – in part because the 1933 Act does not contain a scienter requirement. But the individual defendants have a due diligence defense, and the Supreme Court's decision in Omnicare, Inc. v. Laborers District Council Construction

Industry Pension Fund[52] protects the company's statements of opinion – a key type of challenged statement in 1933 Act cases. We build our defense on our clients' lack of false statements even in 1934 Act cases, so the foundation of our defense is the same in 1933 Act cases. And the lack of a scienter element means that a judgment against the defendants will not trigger the fraud exclusion, which removes one reason securities cases do not go to trial.

If select state court cases go to trial, the federal plaintiffs will face greater pressure to settle earlier, rather than wait out resolution of the state court cases and hold out for larger settlements of their relatively more virulent cases. And the more state court cases go to trial, the more some plaintiffs and plaintiffs' firms will hesitate before filing cases. This could be Cyan's silver lining.

But without the right lead partner, and greater insurer and broker involvement in defense counsel selection and strategy, Cyan will become the disaster so many fear.

Conclusion

There is no doubt about it: Cyan significantly disrupts a carefully balanced system of securities litigation that Congress and the Supreme Court have developed over the 85 years since Congress passed the 1933 Act. But if – and only if – we as a D&O liability defense community develop the right post-Cyan strategies, not only will we survive this change, we'll be able to achieve better outcomes.

Endnotes

1. --- S.Ct. ----, 2018 WL 1384564 (2018).

2. Rob Yellen of Willis Towers Watson provided excellent insights in the development of this article.

3. 15 U.S.C. § 77k.

4. 15 U.S.C. § 77l.

5. 15 U.S.C. § 78j; 17 C.F.R. 240.10b-5.

6. 15 U.S.C. § 78aa(a).

7. 421 U.S. 723, 730 (1975).

8. Id. at 737.

9. Id. at 760-61 (Powell J., concurring).

10. Id. at 761 n.5.

11. S. Rep. No. 104-98, at 4 (1995); H.R. Rep. No. 104-369, at 31–32 (1995) (Conf. Rep.).

12. H.R. Rep. No. 104-369, at 31–32 (1995) (Conf. Rep.).

13. Id. at 32.

14. 15 U.S.C. § 77z-1(a)(1);

15. U.S.C. § 78u-4(a)(1). 15 15 U.S.C. § 78u-4(a)(3); 15 U.S.C. § 77z-1(a)(3); see H.R. Rep. No. 104-369, at 33 (1995) (Conf. Rep.).

16. H.R. Rep. No. 104-369, at 33 (1995) (Conf. Rep.).

17. Id. at 34.

18. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii).

19. 15 U.S.C. § 78u-4(b)(1)–(2).

20. At the time the Reform Act was passed, the application of Rule 9(b) to securities claims was well-established and has since become nearly uniform. Indeed, the Reform Act's pleading requirements for 1934 Act cases arguably codified the standard for pleading falsity adopted by the Ninth Circuit in In re GlenFed Securities Litigation, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), superseded by statute on other grounds as stated in SEC v. Todd, 642 F.3d 1207, 1216 (9th Cir. 2011). See William S. Lerach & Eric Alan Isaacson, Pleading Scienter under Section 21D(b)(2) of the Securities 1934 Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995, 33 SAN DIEGO L. REV. 893, 894–95 (1996). Since the element of falsity is common to claims under both the 1933 Act and the 1934 Act, Congress understood that Rule 9(b) applied to the falsity element of 1933 Act claims.

21. 15 U.S.C. § 78u-4(b)(3)(B); 15 U.S.C. § 77z-1(b).

22. H.R. Rep. No. 104-369, at 37 (1995) (Conf. Rep.).

23. Id.

24. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 82 (2006).

25. H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.).

26. Id. at 15.

27. BakerHostetler partner Doug Greene authored an amicus brief for Washington Legal Foundation in support of Cyan.

28. Cyan, 2018 WL 1384564, at *8.

29. Id. at *11.

30. Id.

31. H.R. Rep. No. 104-369, at 32–35 (1995) (Conf. Rep.).

32. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii).

33. H.R. Conf. Rep. No. 104-369, at 35 (1995) (Conf. Rep.).

34. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii).

35. Benjamin P. Edwards, Disaggregated Classes, 9 VA. L. & BUS. REV. 305, 362 (2015). 36. Dabit, 547 U.S. at 86–87 (quoting SLUSA § 2(5), 112 Stat. 3227).

37. 15 U.S.C. § 77z-1(b)(4).

38. Tobias Holdings, Inc. v. Bank United Corp., 177 F. Supp. 2d 162, 168-69 (S.D.N.Y. 2001).

39. In re Transcrypt Intern. Sec. Litig., 57 F. Supp. 2d 836, 842-47 (D. Neb. 1999).

40. Cozzarelli v. Inspire Pharm. Inc., 549 F.3d 618, 629 (4th Cir. 2008).

41. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 346 (2005); In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35–37 (2d Cir. 2009).

42. See, e.g., In re Mobileiron, Inc. S'holder Litig., Santa Clara Cty. No. 2015-1-CV-284001, 2016 WL 9137540, at *4 (Oct. 4, 2016) (finding that plaintiffs' Section 11 claim did not sound in fraud and therefore was "subject to the general pleading standard in California").

43. 550 U.S. 544 (2007).

44. 556 U.S. 662 (2009).

45. See, e.g., Berg & Berg Enters., LLC v. Boyle, 178 Cal. App. 4th 1020, 1034 (2009) (citation omitted).

46. No. 15-cv-2785 (E.D.N.Y., filed May 13, 2015).

47. See Cervantes v. Dickerson et al., Case No. 15-cv-3825 (N.D. Cal., filed Aug. 20, 2015).

48. See In re Pacific Biosciences of Cal. Inc. Sec. Litig., Case No. CIV 509210 (San Mateo Cty. Sup. Ct., filed Oct. 21, 2011); Primo v. Pacific Biosciences of Cal., Inc., Case No. 11-cv-6599 (N.D. Cal., filed Dec. 21, 2011).

49. Kevin LaCroix, "Torrid Securities Suit Filing Pace Continues in Year's First Half," THE D&O DIARY, July 2, 2018, available at https://www.dandodiary.com/2018/07/articles/securities-litigation/torrid-securities-suit-filing-pace-continues-years-first-half/.

50. For more on Professor Grundfest's proposed federal forum bylaws, see B. Feldman & I. Salceda, "After Cyan: Some Prognostications," available at https://www.dandodiary.com/2018/03/articles/securities-litigation/guest-post-cyan-prognostications/.

51. Defs. Br. in Supp. of Summ. Judg., Sciabcucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 2322331 (Del. Ch. May 16, 2018).

52. 135 S. Ct. 1318 (2015).

Building Momentum

with Robbie Thompson

Robbie Thompson
PLUS executive director

Recently I was reading a study conducted by the American Society of Association Executives (ASAE) – Yes there is an association for everything, even an association for associations. Using a systematic environmental-scanning process, researchers conducting this study identified drivers of change as the key trends that are particularly relevant to the work of associations. The study identified 41 drivers of change and put them into six topical sets.

These drivers of change could be external or internal factors and may affect members or the association itself. While I think many of the drivers of change are relevant and have the potential to impact PLUS - an organization whose primary mission is professional and career development of its members - the topical areas of Content, Learning, Knowledge; Data & Technology; Demographics and Membership; and Workplace and Workforce likely are the most relevant. Many aspects of these drivers of change PLUS has already identified and is currently considering the potential impact and adjusting accordingly.

The study identified a number of drivers of change in learning and knowledge. According to this study "workers will need to continually learn, but may want small, specific, burst of information tied to immediate job demands available at the time of their choosing." Additionally, while new technologies such as virtual reality and ubiquitous broadband can and likely will broaden participation and create new opportunities for distance learning, "the social and experimental benefits of "real life" may prove challenging to replicate."

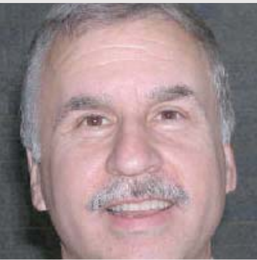
PLUS has already begun to adopt to changes in learning styles and embrace new delivery methods by offering more distance education through webinars, as well as varying the length of the webinars to allow for expedited leaning. In addition, PLUS is currently converting all of its book-based curriculum modules to a fully on-line and on-demand learning environment that will allow people to learn when they want, no matter where they are, on any device and be able to complete the RPLU curriculum without leaving their desk or their couch. Also, PLUS is continuing to look for ways to repurpose, repackage, and make available content developed at in-person events to deliver it to people that are unable to attend.

The most difficult part of all this change in learning for an organization like PLUS, and an industry like ours that is built so much so on building relationships, is how to reconcile the need to adopt to evolving learning styles and utilize new delivery channels, while still providing in-person networking and educational opportunities. Despite all this change it is still very important to be part of the PLUS community; to attend PLUS events such as Symposia, the Annual Conference, and Chapter events. Your association will continue look for ways to incorporate technology and vary education delivery methods at in-person events while still providing the benefits of being in person. So if you have not already registered for the 2018 PLUS Conference in San Diego I encourage you to do so. At this year's Conference there will be some new things; some tried and true things; various types of education sessions; and perhaps most importantly the opportunity to build on and create new relationships. The type of opportunity only possible by being there, in-person. I'll see you there.

Note – In future issues of this column or blog posts I will address other key drivers of change mentioned in the ASAE study and the impact they could have on PLUS.

Medical Professional Liability in 2018: Major Challenges

by: Susan Forray, Paul Greve & Richard Henderson



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Susan's area of expertise is property and casualty insurance, particularly ratemaking, loss reserving, and financial planning. She has extensive experience in commercial lines of business, including various segments of professional liability (physicians, hospitals, lawyers, and contractors, among others) and workers' compensation.

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The MPL insurance industry has experienced its most extended period of profitability over the last decade. But the last two years have seen the industry's combined ratio creep up to 100% and over.1 Many positive factors remain in play but there are a growing number of negative factors that must be considered as we move into the future. Industry conferences this year have had many presenters comment on whether a firming of the MPL insurance market may be beginning.

This article will provide an overview of the state of the MPL insurance industry through the first half of 2018. We will focus on:

- Key MPL environmental factors
- MPL litigation trends
- MPL industry financials

MPL: Key Environmental Factors

Perhaps the two most important and daunting environmental factors are the shrinkage of industry premium and rising loss severity. The shrinkage of premium is due to a marked decrease in the numbers of buyers in what historically have been the two largest segments within MPL: physicians and surgeons; hospitals.

This has been driven by the move from the physician private practice model to either hospital employment or into large multispecialty groups as well as mergers and acquisitions in the hospital industry, which have not slowed.2,3 There has been a deceleration in the movement of physicians into hospital employment and any continued movement into employment by hospitals and multi-specialty groups will not occur as rapidly in the future.4 But hospital mergers and acquisitions have not slowed and thereby have reduced the number of buyers in that segment. These two factors plus price competition for the shrinking numbers of buyers in these segments have driven down MPL industry premium. Price competition across all segments has affected industry profitability as well.

The issue of rising loss severity will be discussed in more detail within. But it is one of the most critical environmental factors facing the MPL insurance industry. The numbers of large verdicts and settlements has increased markedly in recent years

MPL: Is 2018 a Pivotal Year?

The industry combined ratio has moved to over 100 in the two most recent years. But buyers and brokers continue to have many choices in an industry that is strongly capitalized. The excess capital in the MPL insurance industry combined with fewer buyers has exerted downward pressure on rates. But there has been more of a firming of MPL rates in the last eighteen months than in many years.

There are some definite signs that rate levels have bottomed out and are headed back up in most industry segments, with miscellaneous facilities and allied health professionals as the notable exceptions. However, accounts with good loss experience in good venues typically are experiencing flat renewals and occasional slight decreases, especially in the physicians segment. The firming of rates is most notable in the long term care and hospital segments due to high severity. Some carriers are exercising limits management in poor venues. Accounts with poor loss experience and in poor venues may see marked increases at renewal.

There are a number of positive environmental factors in play in 2018. These include continued low claim frequency, the strong capitalization of almost all MPL insurers, and a favorable legal environment in most states, especially the maintenance of tort reform laws.

Overview and Analysis of MPL Verdicts

Recent MPL verdict trends have been cause for concern. The number of very large verdicts is increasing.

Why pay so much attention to MPL verdicts, given that the verdict amount rarely equals the ultimate indemnity payment? And what value lies in verdicts, given the overwhelming majority are for the defense?

Verdicts are the truest barometer the plaintiff and defense have with respect to whether their respective theories of liability, causation and damages successfully resonate with a jury or judge. Analysis of jury verdicts can shape not only the plaintiff's claim selection process, but also impact their tactical approach, including the choice of experts and alleged damages. Verdicts can also be an indication of whether tort reforms will ultimately be found unconstitutional, with Florida being just one recent example.

Verdicts are the pulse of jury perception across the country. MPL jury verdicts remain a source of media attention but can also impact the fluidity of claim management and legal defense strategies, regardless of the technical legal standard of care in a given jurisdiction. To ignore the lessons that can be learned from such verdicts, regardless of the eventual outcome or settlement amount, could be an opportunity wasted, especially in light of recent MPL verdict trends.

To make an assessment of MPL verdicts, multiple data sources are required. Some states keep excellent detailed records of MPL verdicts. Various publications track such data on a broader basis, occasionally identifying claims that state-specific resources do not capture. MPL

insurers track verdicts as well, at least for their insureds and perhaps others. The analysis of verdicts discussed here is based on an aggregation of these sources maintained by TransRe. Certainly, we make no representation that our verdict roster is all-encompassing for the totality of verdicts within the entire the med mal universe.

MPL Verdicts: Analysis of Recent Trends

Recent years have shown an uptick in large verdicts, culminating in “record” large verdicts in 2017. This includes not only verdicts at $10 million or

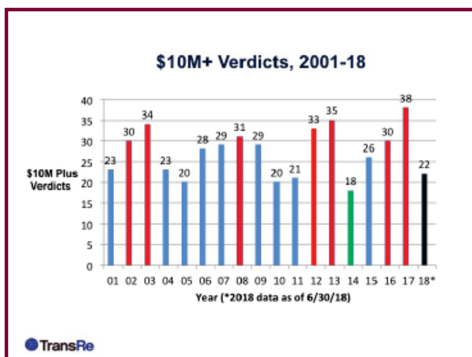


Figure 1

greater (Figure 1) , which by our count were 38 in 2017–the highest figure for such verdicts since TransRe began tracking in 2001–but also verdicts at $25 million or greater (Figure 2), which were 13, tying the high for that

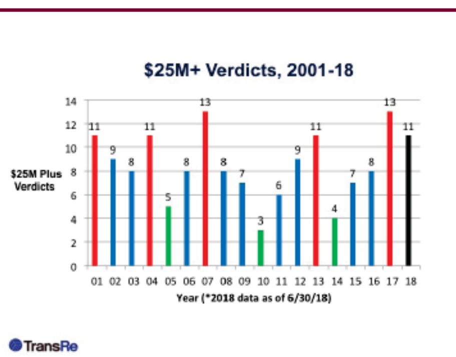


Figure 2

same period. Beyond that, for 2017 we saw 7 verdicts at $40 million or more whereas the prior three years combined we counted 8 such verdicts.

Drilling down further, we analyze the 10th, 25th and 50th largest verdicts in each year (Figure 3). In this fashion, we are able to look more closely at the

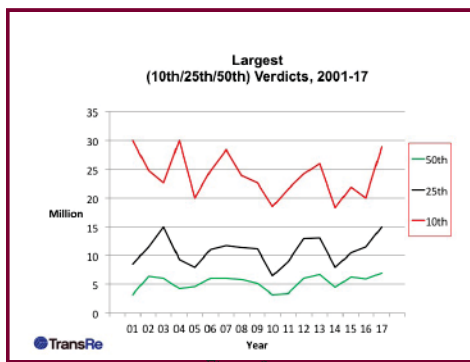


Figure 3

“frequency of severity” of such verdicts and account for what may be only an inordinate number of large verdicts at the very top of the roster. 2017 again shows record or near record results at all three data points. In short, the adverse verdict results of 2017 were not confined to a handful of very large verdicts by themselves; there were ample additional adverse verdicts as well. Further, MPL claim frequency has dropped to record lows at the same time. Thus, even with a reduced claim inventory, the frequency of mega-verdicts remains at or above past levels.

The first 6 months of 2018 are on pace to exceed the MPL verdicts of 2017, itself a record-setting year (Figure 1). We have already seen more verdicts at both $10M or greater and $25M or greater through 6/30/18 compared to prior years–and this does not include a $135 million Michigan verdict rendered July 2nd. Even excluding this most recent verdict, we have seen 7 MPL verdicts at $40M or more in the first half of this year–this compares to 7 during 2017 and 8 in total for the preceding three years.

We also see an upward trend in the 10th and 25th largest verdicts for the first six 6 months of each year (Figure 4). The consistency of this upward pattern suggests it is not a handful of aberrational verdicts at the top of the heap but, rather, an increasing frequency of large verdicts.

MPL Verdicts: Where are we Headed?

Is the uptick in adverse MPL verdicts is tied to a “millennial effect”? Some jury research professionals, tasked with organizing extensive focus group and mock trial studies, believe different approaches must be

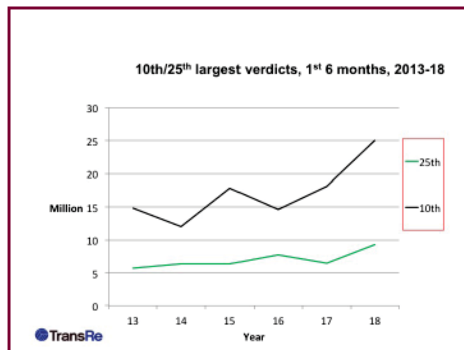


Figure 4

implemented when there is significant millennial participation on a jury. These consultants believe strategies yielding defense verdicts in the past do not resonate as effectively with millennials. Others argue against such blanket statements and that, in the end, the talents of the respective trial counsel and effectiveness of the key witnesses will carry the day. Regardless, we are seeing no shortage of utilization of focus group professionals, particularly in claims of significant verdict potential.

One consistent theme in mega-verdicts is plaintiff demands for life care plans (LCPs) of $50 million or even in excess of $100 million in present value. These LCPs are the driving force behind corresponding demands in the mid-to-high eight-figures, if not more. Such demands often trigger attention from the higher reaches of an insurance coverage tower and, in some instances, trigger friction between different participants with respect to claim valuation or strategy. This can lead to excess insurers “hammering” an underlying insurer to settle within underlying limits, even if that underlying insurer does not believe this is warranted.

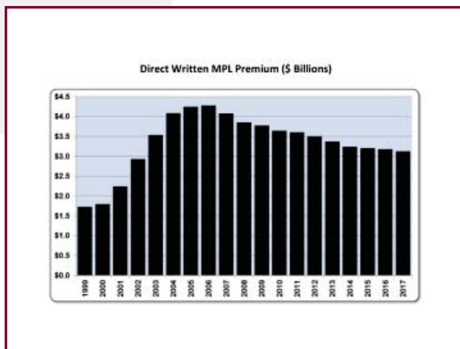
There are also reports of a perceived increase in third party funding sources, which could fuel additional claim frequency but also embolden plaintiff firms to hold out for larger settlements. The scope of such third party funding remains difficult to quantify, and efforts to uncover such sources via traditional legal discovery have been met with uneven rulings. As well, use of the Reptile Theory by many plaintiff firms continues to be a widely recognized concern and remains a highly publicized topic.

Specialty counsel either enter a claim on a pro hac basis or associate with local trial counsel in formulating the most effective trial strategy.

This can also include enhanced efforts to challenge damages in a non-traditional manner. For example, instead of avoiding discussion of damages before a jury for fear of setting a floor or signaling inability to defend a claim, many hold that a jury wants to hear an alternative damages figure from the defense and evaluate this figure against the plaintiff's. This is a marked departure for many senior defense attorneys and claim professionals, but those who espouse this strategy feel confident it will yield more favorable results–even defense verdicts–but only if done in a careful manner.

MPL Insurance Industry Financials

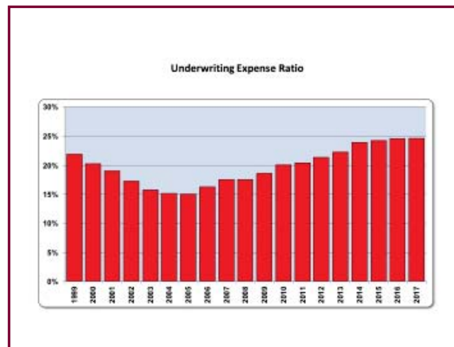
Beyond the effect of large verdicts, the most notable aspect of change in the industry's financial picture is its dramatic decline in premium. Figure 5 provides an almost-twenty-year history



of direct written premium for the MPL industry, as represented by a composite of 35 of the largest MPL specialty writers. Premium for the MPL industry has now been in decline each year since 2006. Cumulatively, premium has decreased by over $1.1 billion since this time—more than 25% of the premium written in that year.

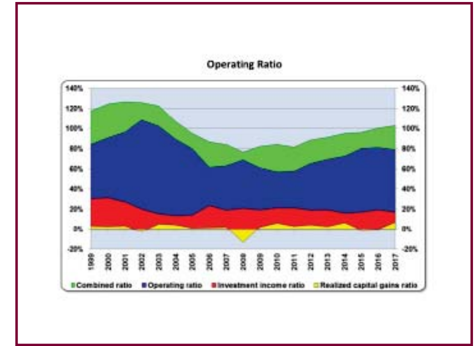
There have been two primary drivers of premium decreases for the industry during this time–rate decreases and the loss of business to self-insurance mechanisms. Throughout this timeframe, companies have been losing business due to health care system acquisitions of both hospitals and physician practices. In earlier years—through about 2008—companies also frequently lost business due to the formation of new captives. Rate decreases have been a more significant driver in the later years of this timeframe and have taken the form of both manual rate decreases as well as increases in schedule credits.

Declining premium has, in turn, been a significant contributor to the rise of the MPL industry's underwriting expense ratio during the same timeframe (Figure 6). It is no



coincidence the industry's expense ratio has risen almost every year since 2005—approximately the same time the decline in premium began. However, given the magnitude of the decline in premium discussed above, at most half of the increase in expense ratio can be explained by a decreasing denominator—and likely less than this. Given declining premium, MPL writers have in many cases been forced to increase commissions to retain business from their agents—an example of the premium decline hitting MPL writers twice over.

The operating ratio for the industry remains at about 80% (Figure 7),

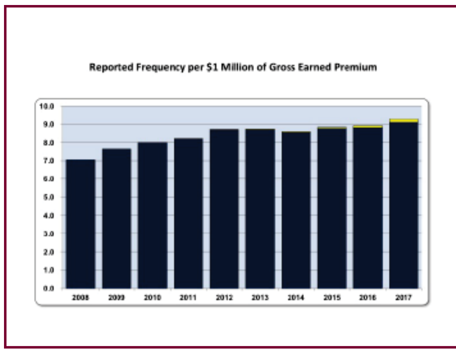


although a significant contributor to the pattern of favorable operating ratios has been reserve releases. Reserve releases have contributed on average over 25% to the industry's operating ratio each year for the past decade, although this has dropped to about 17% over the past two years. Hence the industry would remain profitable absent these reserve releases, but just barely.

Increases in claim severity naturally continue. Trends in defense costs remain in the range of 4% to 6% per annum. Indemnity severity trends remain manageable for smaller-dollar claims, but an increased frequency of larger claims has fueled overall increases in indemnity costs.

Several years ago, the industry's premium decreases were more manageable as they were accompanied by a decrease in claim frequency in addition to a decrease in claim exposure. However, the industry's one-time pattern of declining frequency has since ended. Claims counts have stabilized for most companies with some volatility evidenced for certain writers and increases seen in certain markets.

Figure 8 provides a ten-year history of the industry's frequency as measured per million dollars of gross earned premium (the yellow portion of these bars represents estimated future development on these report-year frequencies, stemming from incident conversions). As shown by this pattern, for every claim reported within the



MPL industry today, there are 25% fewer premium dollars available to pay that claim than there were ten years ago. If one also considers that the rising expense ratio eats up more of these dollars than was the case a decade ago, the decline in available premium dollars per claim is even greater.

Relative to underlying exposure—whether quantified by physicians insured or another measure—the increase in claim frequency has, of course, been less than when measured relative to premium. As noted above, increases in "true" claim frequency has been seen in certain markets. The industry's future profitability will largely be a function of megaverdicts—possibly driving smaller claim values higher—and claim frequency, for which further increases would be a primary contributor to possible future deterioration in the industry's operating ratio.

Conclusion

For the MPL insurance industry in 2018, there are several positive environmental factors but some very concerning negative factors. On the positive side, claim frequency remains low and stable, the tort environment in most states is favorable and the industry as a whole is well-capitalized. But the numbers of very large verdicts and shrinking industry premiums are major challenges.

The industry's future profitability could very well be affected by megaverdicts—possibly driving smaller claim values higher—and claim frequency, for which further increases would be a primary contributor to possible future deterioration in the industry's operating ratio. However, given current capitalization levels in the industry, it is possible that such increases may have little impact on rates. To trigger the next hard market, a period of extended underwriting losses sufficient to result in the decline of capitalization levels would likely be necessary. But MPL premiums are firming and headed upward for the first time in many years. 2018 appears to be a pivotal year.

Endnotes

1 *Burns, William. "MPL Market Update", presentation, PLUS MPL Symposium, March 20, 2018.*

2 *https://revcycleintelligence.com/news/healthcare-mergers-acquisitions-activity-strong-in-q1-of-2018*Div. 2001)

3 *https://wire.ama-assn.org/practice-management/first-time-physician-practice-owners-are-not-majorit*

4 *https://wire.ama-assn.org/practice-management/private-practice-really-giving-way-hospital-ownershi*

2018 PLUS CONFERENCE

The PLUS Conference is a pivotal event for the industry, and professional liability insurance professionals from a wide variety of disciplines make it a priority to be there.

Opening Keynote Wednesday

John Kerry

Secretary of State (2013-17)

Diplomacy and Leadership: An Optomistic Path For The Future

As a leader on the world stage and the face of U.S. diplomacy as the 68th Secretary of State, John Kerry shares first-hand accounts from his tenure as Secretary and draws from a distinguished career as a veteran, public servant, and diplomat, to share his thoughts on pressing issues such as national security, terrorism, and the current state of the financial markets. A relentless defender of diplomacy and one of the most effective statesmen in U.S. history, Kerry addresses the importance of leadership and global affairs in a rapidly changing world.

Luncheon Keynote Thursday

Vernice"FlyGirl" Armour

America's first African American female combat pilot

Diplomacy and Leadership: An Optomistic Path For The Future

Leveraging her "Breakthrough Mentality" and "Get Gutsy" mindset, Vernice "FlyGirl" Armour propelled herself from beat cop to combat pilot in a record-breaking three years and became America's First African American Female Combat Pilot. FlyGirl's fresh, edgy style, high, contagious energy and unique, gutsy essence jump off the stage, and moves people to action. Since 2007, she has inspired countless organizations and individuals to make gutsy moves and create breakthrough results.

Breakfast Keynote Friday

Gloria Allred

Founding partner of the law firm of Allred, Maroko & Goldberg

"Fight Back And Win"

Over the course of her 42-year legal career, Gloria Allred has won countless honors for her pioneering legal work on behalf of women's rights and rights for minorities. Her inspiring true stories serve to remind us that winning justice depends on the righteousness of the cause and an individual's willingness to stand up, speak out, and fight back. Gloria will offer examples of self-empowerment from her personal and professional life. Ms. Allred has also fought alongside countless brave individuals to win justice in the civil rights arena. She will address some of the EPL issues of our day, including the powerful #MeToo movement and the growing influence of Social Media and how that may impact you as an employer.

http://plusweb.org/conference18

Judicial Vacancies Under President Trump: The Potential Lasting Effects on Securities Cases

By: Jason Cronic, Jessica Gallinaro, and Justin Kudler

Jason Cronic
is a partner at Wiley Rein LLP who represents directors and officers liability insurers and other professional liability insurers in coverage matters before federal and state courts across the country, as well as internationally.

Jessica Gallinaro
is an associate at Wiley Rein who represents insurers in connection with coverage issues and disputes arising under various types of general liability and professional liability insurance policies.

Justin Kudler
is an Assistant Vice President, Claims at XL Catlin in Hartford.

Upon entering office on January 20, 2017, President Donald Trump was confronted with a total of 112 judicial vacancies in the federal courts. The number of vacancies open at the commencement of President Trump's term was more than double the 53 federal judicial vacancies that were open when President Barrack Obama first took office eight years prior. While President Trump has filled some of these vacancies, the overall number of vacancies has only grown in the past year. As of July 27, 2018, there are 156 total vacancies in the federal judiciary, with only 90 nominations pending. Indeed, reports indicate that the current number of judicial vacancies is almost three times as large as the number of vacancies that were open just three years ago. These vacancies have forced federal courts to juggle increasing caseloads amongst the few judges that remain in certain districts. As such, the staggeringly high number of vacancies has hindered the efficiency and general productivity of many federal courts, particularly those that play important roles in addressing federal securities law.

I. Reasons for the High Vacancy Levels

Explanations as to why the number of judicial vacancies has sky-rocketed in the past few years vary along party lines. However, at least two reasons appear to transcend partisan politics.

First, the practice of issuing "blue slips" has played a prominent role in the large number of vacancies. Historically, whenever a president has nominated an individual to the federal bench, the chairman of the Senate Judiciary Committee has issued "blue slips" to that nominee's home-state senators. These blue slips provide the nominee's home-state senators with an opportunity to provide their insights and opinions on the nominee. Senators generally signal their approval for a nominee by returning the blue slips; by contrast, a withheld blue slip indicates a senator's opposition to the appointment. Since this practice began in the early twentieth century it has proven extremely difficult for nominees to be confirmed unless their home-state senators have submitted positive blue slips.

The current Chairman of the Judiciary Committee, Chuck Grassley (R-IA), has condemned the use of the blue slip as "a tool of obstruction" that gives "a single senator unilateral veto power over nominees for political or ideological reasons."1 In keeping with this view, Senator Grassley has held hearings for nominees despite the lack of two positive blue slips from each of the nominees' home-state senators. However, the practice of rejecting blue slips has sparked its own debate that has diverted attention from the actual appointment and confirmation of judicial nominees.

Second, cloture votes have been held for 28 of President Trump's judicial nominees. Under this process, a simple majority of senators may vote to require up to 30 hours of debate on a nominee. Senate Republicans contend that Senate Democrats have unjustly used this procedural mechanism as a tactic to obstruct the confirmation process. Senate Democrats conversely argue that these additional hours of debate are necessary due to the large number of unqualified nominees. Regardless of the motive for the cloture vote, the result has been both a delay in scheduling hearings for nominees and, in turn, a delay in filling vacancies.

II. Vacancies in Key Districts for Securities Litigation

Given the high number of vacancies, it is unsurprising that jurisdictions that shape securities law jurisprudence and hear the majority of securities cases in the country are understaffed.

A. Southern District of New York

The Southern District of New York is one of the most influential courts in securities law primarily because it has jurisdiction over Manhattan, home to Wall Street and a number of the world's prominent banks, financial entities, and stock-offerings underwriters. A study from March 2017 has revealed that this court has handled one of every four federal securities cases filed since the end of the financial crisis.2 Indeed, a total of 2,214 securities cases were filed in this district between 2009 and 2016, representing 25% of all securities litigation cases filed in that period. The number of cases filed in the Southern District of New York in that period was more than the next four largest districts combined.

Moreover, nine of the ten judges with the largest securities litigation caseload from 2009 to 2016 sat in the Southern District of New York. According to the March 2017 study, the judge who heard the most securities cases of any federal district court judge in that time, with a total of 110, is from this district. Other judges from the Southern District of New York were not far behind. In fact, another judge heard 103 securities cases in that same period. Two other judges from the Southern District of New York secured the fourth- and fifth-highest securities caseloads during this time, with 91 and 88 cases, respectively.

There is no indication that the Southern District of New York will lose its position as the primary jurisdiction for securities cases any time in the near future. Of the 1,708 securities cases filed in the federal district courts in 2017, the most were filed in the Southern District of New York. In fact, 16.2% of all federal securities cases were filed in this district.

However, the steady rise in the number of securities cases filed before this court may create staffing issues given the number of judicial vacancies in this district. Out of the 28 judicial seats in this district, four are currently vacant due to the judges obtaining senior status. One of these vacancies has been classified as a "judicial emergency" by the Administrative Office of the U.S. Courts, a designation only given to particularly extensive vacancies in overburdened districts. President Trump has nominated only two candidates for these vacancies, including one for the seat deemed a judicial emergency.

B. Central District of California

The United States District Court for the Central District of California similarly holds great sway on the jurisprudence of securities law given that it houses an impressive number of tech companies, as well as the nation's second-largest economy. This jurisdiction heard a total of 7% of the 1,708 securities cases filed in federal district courts in 2017

Despite these facts, President Trump has yet to nominate any candidate to fill the vacancies in the Central District of California. This district has a total of six vacancies out of the 28 authorized seats. Five of those six vacancies have been deemed judicial emergencies. The length of time these seats have been left vacant is startling—the oldest of which has been open since August 1, 2014 when Judge Audrey Collins retired.

C. Northern District of Illinois

A series of vacancies opened up in this district court beginning in October 2016 after Judge James Zagel took senior status. Shortly thereafter, Judge John Darrah left the court when he obtained senior status in March 2017. Judge Samuel Der-Yeghiayan then retired in February 2018, while Judge Amy St. Eve was elevated to the United States Court of Appeals for the Seventh Circuit in May 2018. There are thus four current vacancies in the Northern District of Illinois out of 22 available seats, with one additional vacancy anticipated in 2019 when Judge Frederick Kapala is expected to take senior status.

In apparent recognition of the critical need to fill the vacancies in the Northern District of Illinois, President Trump announced three nominees on June 7, 2018. These nominations have been sent to the Senate, but the Senate Judiciary Committee has yet to schedule hearings for these candidates. Their appointments thus remain pending, meaning that the Northern District of Illinois remains in a state of crisis.

D. Second Circuit Court of Appeals

Perhaps no other federal court is more well known for its role as a powerhouse in securities litigation than the United States Court of Appeals for the Second Circuit. This is due in main part to the sheer number of securities cases that are filed in this circuit (which includes New York). According to a recent study by NERA Economics Consulting, the Second Circuit had the largest number of securities cases filed in 2017, more than any other circuit court of appeals, at 97. This total represents an increase over the number of securities cases filed in 2016, in which a total of 71 securities cases were filed in the Second Circuit.

Additionally, and even more importantly, the Second Circuit is a bellwether in securities law.

Recently, the Second Circuit Court of Appeals created a circuit split on one of the more pressing securities-related issues pertaining to the scope of Item 303 liability. This issue is one of several that the court has teed up for the United States Supreme Court to decide. In Indiana Public Retirement System v. SAIC, Inc., 818 F.3d 85 (2d Cir. 2016), the Second Circuit ruled that an omission under Item 303 can give rise to liability under Section 10(b) and Rule 10b-5 of the Securities Act of 1934. This ruling directly conflicts with earlier decisions issued by both United States Court of Appeals for the Ninth and Third Circuits, in which the courts expressly held that violations of Item 303 are not actionable under Section 10(b) and Rule 10b-5. The U.S. Supreme Court granted certiorari to hear the case in March 2017, and scheduled oral argument for November 2017. The case was ultimately dismissed in October 2017 after the parties filed and the Court granted a joint motion advising the Court that they had reached a settlement agreement.

The circuit split over the scope of Item 303 liability thus remains active and unresolved. Yet, this split will have severe implications on the docket of what is already a considerably strained court. Plaintiffs will likely inundate the already-flooded courts in the Second Circuit—including the Southern District of New York—with securities fraud claims premised on Item 303 deficiencies. The Second Circuit has already received an appeal of a claim involving a company's Item 303 obligations. See Plumbers and Steamfitters Local 137 Pension Fund v. Am. Express Co., No. 15 Civ. 5999, 2017 WL 4403314 (S.D.N.Y. Sept. 30, 2017).

There is little indication that the courts within the purview of the Second Circuit's jurisdiction, let alone the Second Circuit itself, have the capacity to staff a potential flood of additional securities cases. Out of the 22 seats in this court, half of them are held by judges that are eligible for senior status. The two vacancies on this court, each dating back to August 2016 and September 2016, have both been designated as judicial emergencies by the Administrative Office of the U.S. Courts. Further, despite this state of affairs, there has only been a single nomination to fill the vacancies on this vital appellate court.

E. Ninth Circuit Court of Appeals

After the Second Circuit, the United States Court of Appeals for the Ninth Circuit is the second most popular circuit in which to file a securities class action. Largely due in part to the fact that such a considerable portion of the securities lawsuits in this country are filed in this circuit, the Ninth Circuit Court of Appeals is routinely grappling with important issues in securities law.

Recently, the Ninth Circuit's decision in City of Dearborn Heights Act 345 Policy & Fire Retirement System v. Align Technology, Inc., 856 F.3d 605 (9th Cir. 2017), provided the first circuit court opinion to explicitly state that the Omnicare holding from the Supreme Court of the United States applies to claims under Section 10(b) of the Securities Act. In Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, 135 S. Ct. 1318 (2015), the Supreme Court addressed the scope of liability for false opinion statements under Section 11 of the Securities Act. The Court held that "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong." Such an opinion is only actionable when the speaker does not "actually hold[] the stated belief" or when the opinion contains "embedded statements of fact" that are untrue. In May 2017, the Ninth Circuit in Dearborn Heights took the Omnicare holding one step further by applying it to Section 10(b) claims for falsity of opinions. Yet, by expanding Omnicare, the Ninth Circuit Court of Appeals opened up both the kinds of statements that may give rise to liability and the kinds of claims plaintiffs may bring, which thereby increases the likelihood that such claims may be filed in the Ninth Circuit.

Like the other key jurisdictions for securities law discussed above, the Ninth Circuit may not have the staff to effectively or efficiently handle such an increase.

Of the 29 available judgeships in this court, six are currently vacant due in large part to judges obtaining senior status. All six of these vacancies have been categorized by the Administrative Office of the U.S. Courts as judicial emergencies. Indeed, one of these vacancies has been open since December 11, 2015. The Trump administration, however, has only nominated one candidate to fill these vacancies. An additional opening on this court is expected once Judge N. Randy Smith obtains senior status on August 11, 2018. President Trump has already announced his intent to nominate a candidate for Judge Smith's seat, and that nomination was sent to the Senate on May 15, 2018.

F. Third Circuit Court of Appeals

The Third Circuit has likewise seen a rise in the number of securities cases filed. Between 2016 and 2017, the number of such cases filed in this circuit more than doubled, increasing from 36 to 85. This rapid growth has been attributed to the increased number of merger-objection cases in the District of Delaware. In fact, the number of merger-objection filings in the Third Circuit quadrupled in the period of a single year. However, there was also a 60% jump in non-merger-objection securities cases filed in this circuit.

The general uptick of securities cases alone in this circuit renders the vacancies on this court disconcerting. There are currently two judicial vacancies out of the 21 seats in this court, both of which are due to judges obtaining senior status. Although there are currently two pending nominations, these nominees still have many hurdles to face before they are confirmed. These are fairly new appointments that were sent to the Senate as recently as April 12, 2018. Only one of these nominees has received a hearing before the Senate Judiciary Committee, which was held on June 6, 2018.

III. The Trump Administration's Appointees and their Effects on the Judicial Landscape

Although there are still a large number of judicial vacancies, President Trump has made a number of nominations since taking office and many of them have been confirmed. In fact, the Senate confirmed twelve judges to the various circuit courts of appeal in 2017, setting a record for the first year of any presidency.

These nominations have allowed legal commentators to identify certain trends, all of which suggest that President Trump is attempting to shape the federal courts and to return them to the more conservative state they were in following the presidencies of Ronald Reagan and George H.W. Bush. This is unsurprising, as President Trump promised to nominate judges that were approved by or members of the Federalist Society and the Heritage Foundation during his presidential campaign. Both organizations are known for their ties to primarily conservative lawyers that champion an originalist and textualist view of the Constitution. His nominations to the United States Supreme Court —that of Justice Neil M. Gorsuch and Judge Brett Kavanaugh—have fulfilled that promise in many commentator's eyes.

However, analysts have noted that President Trump has been slow to name many nominees at the circuit court level that actually replace the seats that were previously filled by his Democrat or liberal counterparts. Rather, many of his circuit court appointments merely fill seats that were named by previous Republican presidents. So, while twelve judges were confirmed to the circuit courts of appeal in his first year, President Trump only obtained a net gain of 2 Republican-appointed circuit court judges compared with the day he took office.

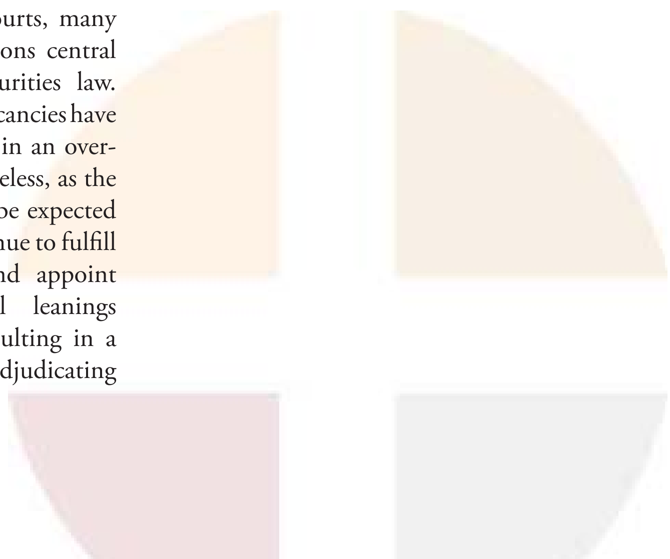
Some pundits point out that the Republican appointees have left more vacancies than those by Democrats. Yet, others highlight that President Trump's nominations have also been concentrated primarily on courts that already leaned towards or were solidly conservative. For example, the Trump administration has concentrated its efforts on those vacancies in the Fifth, Sixth, Seventh, and Eighth circuits—the four courts where Republican appointees already held a majority when he took office. Of the 23 circuit court judges that have been confirmed to date, 16 were appointed

to one of those four courts. Although his nominations have succeeded in further entrenching typically conservative views in these particular courts, thus far President Trump has not dramatically expanded the actual scope of Republican influence. As such, these commentators predict that, even if President Trump were to fill all of the vacancies on courts with Democratic-appointed majorities, the judicial map would remain stagnant with the Republican majority concentrated in the center of the country.

Yet, of all of the federal circuit courts of appeal, the Third Circuit may be the most likely to see a change in the political make-up of its bench. Of the 14 available seats, seven are held by Democrat appointees. Only five of the judges on the bench were appointed by Republicans. As noted above, there are two current judicial vacancies and President Trump has already named two nominees to fill each of those seats. However, four more judges will be eligible for senior status in 2018. Three of those judges are Democrat appointees, while only one is a Republican appointee. If just one of these Democrat-appointees steps down from active duty, the Trump administration may have an opportunity very soon to create a Republican-appointee majority in the Third Circuit.

Conclusion

At its inception, the Trump administration faced a daunting task stemming from the number of judicial vacancies in the courts, many of which were in jurisdictions central to articulating federal securities law. Difficulties in filling these vacancies have and will continue to result in an over-burdened judiciary. Nonetheless, as the vacancies are filled, it is to be expected that the President will continue to fulfill his campaign promises and appoint judges whose ideological leanings skew right, presumably resulting in a more conservative bench adjudicating securities law.



2018 Financial Aid College Scholarships Awarded

PLUS FOUNDATION

Consistent with our mission of philanthropy and the advancement of education, the PLUS Foundation aims to help families and students afford higher education. This step expands on our record of service to and on behalf of the professional liability community.

- The success of the PL industry relies on many employees who may be of varied financial means who move our business forward.
- With the cost of education rising dramatically, many deserving students struggle to attend the college of their choice…or any college at all.
- Most of the Foundation's giving goes to highly worthy charitable organizations. This scholarship directs resources to the colleagues and families of our members, creating more personal and closer connections within our PLUS community.

The PLUS Foundation is pleased to announce these Financial Aid Scholarships, made possible by the personal donations of leaders in our industry:

- Constantine "Dinos" Iordanou Scholarship
- H. Seymour Weinstein Scholarship
- Elizabeth Everson Seyler and Mary Quayle Bradley Scholarship
- James E. Price, Jr. Memorial Scholarship

Five Financial Aid Scholarships have been awarded for 2018:

Isaac Hoeschen - Constantine "Dinos" Iordanou Scholarship

From Milwaukee, WI, Isaac was a member of the National Honor Society and an English teaching assistant. He worked extensively over four years with the City of Milwaukee Youth Council, a legislative board dedicated to addressing issues concerning youth. Mr. Hoeschen will attend Tulane University and study economics.

Yasheel Pandya - H. Seymour Weinstein Scholarship

From Manalapan, NJ, Yasheel was a National AP Scholar and a National Merit Scholarship Commended Student. He worked extensively with the Junior State of America organization and as well as several other academic and science organizations, holding numerous leadership positions. Mr. Pandya will attend Johns Hopkins University to study medicine and economics.

Andrew Puzone - James E. Price Memorial Scholarship

From North Haven, CT, Andrew was a member of the National Honor Society, served four years on the student council and received two Scholar Athlete Awards. He volunteered as a youth athletic coach, camp counselor and reading counselor. Mr. Puzone will attend Fairfield University and study finance.

Josephine Smith - Elizabeth Everson Seyler and Mary Quayle Bradley Scholarship

From Fairfield, OH, Josephine was a member National Honor Society and a Scholastic Art and Writing Silver Key winner. She also volunteered extensively as a coach with Therapeutic Recreation for the Disabled and as a mentor with the Cincinnati Zoo. Ms. Smith will attend the University of Alabama and study biology.

Leonardo Hernandez - Scholarship made possible by an anonymous donor

From Orland Park, IL, Leonardo was an honor roll student and an All Star with Reign Athletics, participating in many competitions across the country. He supported other athletes at his school as a Co-Captain of the cheerleading squad. Mr. Hernandez will attend Loyola University Chicago and study bioengineering.

Each of these students represents the strong level of academic and community achievement that the Foundation looks for when awarding these scholarships. We wish them the best in their future endeavors.

PLUS FOUNDATION

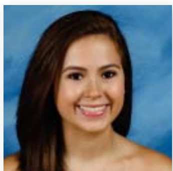
PLUS Foundation 2018 Gilmartin Scholarships Awarded

The Leo Gilmartin Scholarship is an important part of the PLUS Foundation's commitment to education and serving the Society's membership. Since 1996 PLUS and the Foundation have awarded four-year college scholarships to children of PLUS members and sponsor company employees. This competitive scholarship recognizes excellence in academics, extracurricular activities and community service with awards of $12,000 each. Ninety scholarships have been awarded since the program's inception.

2018 Gilmartin Winners:

Matthew Early

of Chicago, was a National AP Scholar, member of the National Honors Society and winner of the President's Award for Educational Excellence. He was a violinist with the Chicago Youth Philharmonic Orchestra and also studied piano and composition. Mr. Early will attend Stanford University and study computer science and linguistics.



Mary Frances Kitchens

of Atlanta, GA, was a National AP Scholar with Distinction and winner of the President's Gold Volunteer Service Award. She made service trips to Honduras and Mexico. She is also the founder, lead guitarist and singer for the rock band Array. Ms. Kitchens will attend Vanderbilt University and study business linguistics.

Saira Somnay

of Nutley, NJ, was an AP Scholar with Distinction and a National Merit Commended Scholar. She served on the Student Council, was a founder of the Science Club and Vice President of the National Honor Society. She also designed and built the Autism Math Trainer web app. Ms. Somnay will attend Brown University and study mathematics.

Grace Wang

of Scarsdale, NY, was an Albert Eienstein College of Medicine Research Intern, Regeneron Science Talent Search Scholar and member of the Cum Laude Society. She was founder and President of the BildOn Club that tutored underprivileged students. Ms. Wang will attend Washington University in St. Louis and study engineering.

PLUS FOUNDATION: *WOMEN'S LEADERSHIP NETWORK*

"Pivot: Small Steps to Double-Down on Your Strengths at Work"

Wednesday, Oct. 3, 2018 | New York, NY

PLUS FOUNDATION | WOMEN'S LEADERSHIP NETWORK

Jenny Blake *Author, career and business strategist and international speaker*

2019
COHORT

PLUS Announces the 2019 LAMP Cohort

The Professional Liability Underwriting Society (PLUS) has selected 10 members for the 2019 Diversity Leadership & Mentoring Program (LAMP) cohort.

LAMP is a one-year leadership development training program for PLUS members from diverse and traditionally under-represented groups within the professional liability insurance industry. The curriculum focuses on leadership coaching but also includes matching participants with senior-level PLUS members who have agreed to serve as mentors throughout the program.

PLUS sponsors the cohort's involvement in signature PLUS events including the PLUS Conference and national Symposia as well PLUS educational offerings and RPLU designation exams. The 2019 cohort will begin their program experience at the PLUS Conference November 7-9, 2018, in San Diego.

"Today's competitive environment requires organizations to develop leaders who bring a wide variety of experience to the marketplace, and PLUS's answer to that is LAMP. This year's impressive cohort will only add to the program's legacy," said PLUS Executive Director Robbie Thompson.

This year's class includes:

Samantha Butisingh
Financial Institutions Underwriter, North America Financial Lines. Chubb – New York, NY

Helena Fan
RPLU, Senior Underwriter, E&O, Royal & Sun Alliance Insurance Company of Canada – Toronto, Ontario

Candice Germain
Senior Broker, Segal Select Insurance – New York, NY

Aneisha Goldsmith
RPLU Financial Lines Underwriting Consultant, Chubb – Phoenix, AZ

Abbas Hassan
Senior Underwriter – Healthcare, StarStone Insurance – Jersey City, NJ

Vanessa Poma
Senior Underwriter, NAS Insurance Services – Encino, CA

Odalys Rodríguez
Matta, Esq., Legal Examiner, QBE Seguros Puerto Rico – San Juan, Puerto Rico

Avani Shah
Senior Counsel, QBE – New York, NY

Brandon Tate
Associate Account Executive, Travelers – Greenwood Village, CO

Janeen Thomas
Attorney at Law, Wilson Elser Moskowitz Edelman & Dicker, LLP – White Plains, NY