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Securities Litigation Update: Courts of Appeal Address the Exchange Act’s Exclusive-Jurisdiction and Non-Waiver Provisions, the Duty to Disclose and Scienter



By **Jason M. Halper**
Partner | Global Litigation



By **Ellen V. Holloman**
Partner | Global Litigation



By **Jonathan Watkins**
Partner | Global Litigation



By **Adam K. Magid**
Special Counsel | Global Litigation

In the first quarter of 2022, federal appellate courts issued a number of thought-provoking (albeit not monumental) decisions addressing the reach of the federal securities laws and, in some cases, highlighting potentially powerful defenses for litigants. Here we discuss the following developments:

The Exchange Act’s exclusive-jurisdiction and non-waiver provisions. In *Seafarers Pension Plan v. Bradway*, the Seventh Circuit reinstated a derivative claim brought in federal court under Section 14(a) of the Securities Exchange Act, based on allegedly false and misleading statements in proxy solicitation materials. The Court declined to enforce a bylaw that, on its face, would have restricted all derivative claims to the Delaware Court of Chancery.

Limits on issuers’ disclosure obligations under Section 10(b). The Ninth and Second Circuits affirmed dismissal of securities fraud claims in two decisions, *Weston Family Partnership LLLP v. Twitter, Inc.* and *Arkansas Public Employees Retirement System v. Bristol-Myers Squibb Co.*, invoking the principle that, under Section 10(b), issuers do not have a generalized duty to disclose any and all information concerning their business or prospects, even if the information could be deemed material to investors.

Pleading a “strong inference” of scienter. The Second Circuit also issued two decisions, *Malik v. Network 1 Financial Services, Inc.* and *KBC Asset Management NV v. Metlife, Inc.*, affirming the dismissal of securities fraud claims based on plaintiffs’ failure to plead a “strong inference” of “scienter” (an intent to deceive or defraud).

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