# Securities Litigation 2021

Contributing editor
**Jason M Halper**
*Cadwalader, Wickersham & Taft LLP*

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Contributing editor

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Securities Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor Jason M Halper of Cadwalader, Wickersham & Taft LLP, for their continued assistance with this volume.

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# Global overview

**Jason M Halper, Jared Stanisci, Gillian Burns, Sara Bussiere and Victor Bieger***

Cadwalader, Wickersham & Taft LLP

In a year dominated by the COVID-19 pandemic, the rise in new securities class action filings slowed only slightly during 2020. After a record-setting year in 2019, the United States saw a 22 per cent decline in new federal securities filings in 2020, but even with that drop, the number of filings in 2020 was still 49 per cent higher than the annual average between 1997 and 2019. As the number of new cases continues to climb, so do the size of the monetary settlements. In 2020, settlement amounts in the United States soared with an average settlement value of $44 million – more than 50 per cent higher than the 2019 average. The median settlement value also reflected a record high of $13 million.

The United States is not the only jurisdiction witnessing a spike in securities litigation filings relative to historical trends. For example, China, Germany and the Netherlands have seen or expect an uptick in securities litigation following changes in their laws that likely will favour securities plaintiffs. With the launch of China's class-action lawsuit system on 1 March 2020, which we discuss in more detail below, Chinese courts can expect an influx of new cases. In Germany, a number of factors, including the increased presence of US-based plaintiffs' attorneys in the country, are leading to an increase in the number of securities claims filed each year over the past two decades. And the Netherlands will likely see an increase in filings, in light of the new Act on Collective Settlement of Mass Damages Claims (WAMCA), which went into effect 1 January 2020 that permits litigants to seek monetary damages for mass claims, and the 2019 launches of the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal, which were created to hear international commercial disputes in English. The largest non-US securities litigation settlement was obtained in the Netherlands only a few years ago, and even before these recent developments, the jurisdiction was developing a reputation as a destination for international class actions.

### COVID-19 developments

A genre of pandemic-driven litigation is emerging, but the volume of cases stemming from COVID-19 losses has so far been relatively restrained. Only 33 of the 334 federal securities class-action filings in the United States in 2020 were related to COVID-19 – a relatively low level of activity compared to other major international events, such as the 2008 financial crisis. Approximately 25 per cent of those suits were filed against defendants in the health technology or health services sectors, while 21 per cent were filed against defendants in the financial sector.

The relatively low volume of pandemic-related cases may be due, in part, to pre-emptive guidance issued by the United States' Securities and Exchange Commission (SEC) during the early months of the pandemic. Because of the pandemic and related market turmoil, the SEC urged companies to provide 'as much information as is practicable regarding their current financial and operating status' and their future planning. The SEC also cautioned companies to rely less on historical performance as an indicator of future results and to emphasise their current financial and operational status, response to the pandemic and the future changes they expected to implement in their financial or operational profiles to weather the pandemic. Late in 2020, the SEC announced that it had settled claims against a major US restaurant chain for falsely representing it was 'operating sustainability' when in fact the opposite was true and the company had less than six months remaining of cash on hand. Some commentators viewed the timing of the SEC's announcement of that settlement – just before the season when most companies prepare their annual reports – as a warning to provide robust and accurate pandemic-related disclosures.

As with that SEC enforcement action, pandemic-related securities cases filed by investors have targeted issuers in the financial, technology, and energy sectors for providing generic disclosures that failed to identify specific risks posed by the pandemic. For example, one suit targeted a company's failure to disclose that it was considering withdrawing from a merger agreement, while another asserted claims against a cruise line for allegedly failing to disclose the extent of the company's drop in bookings and failure to institute effective policies to safeguard passengers from the virus.

Investors have also pursued claims against healthcare companies involved in COVID-19 testing, treatment and vaccination. Overly-optimistic statements about vaccine candidates have drawn shareholder suits, with investors claiming to have been misled by statements suggesting that potential vaccines were further along in staged trials than was in fact the case. Other suits have asserted that COVID-19 testing providers falsely proclaimed the accuracy of their tests that were not borne out by the data or boasted of demand for test kits that did not exist.

But the pandemic is by no means a free ticket to a successful securities claim. An issuer that experienced an 80 per cent drop in share price following its initial public offering earlier this year successfully defeated a shareholder suit, arguing that the company could not have anticipated, at the time of its offering in early January 2020, the severity of the pandemic or its impact on the company.

Globally, other countries have attempted to take proactive approaches to manage the risks the pandemic presents to their regulatory systems. China's Council for the Promotion of International Trade (CCPIT) – a semi-governmental organisation – has issued thousands of 'force majeure event certificates' to Chinese companies, affecting nearly $97 billion in international contracts. These certificates are not legally dispositive but provide evidence supporting a company's ability to invoke a force majeure defence. The People's Supreme Court of China has issued a series of 'guiding opinions' to inform counterparties how the pandemic may impact contract performance. The Netherlands, as part of its government relief programmes, has permitted companies to file annual financial statements five months later than normal. In contrast, in some other countries, such as Germany, the pandemic has spurred a variety of legislative actions and government relief programmes to mitigate pandemic-related hardships, but those actions have not directly targeted securities litigation or regulation.

### US developments

In the United States, 2020 was marked less by landmark Supreme Court decisions and more by lower court decisions that fleshed out the Supreme Court's recent guidance. Over the last several years, the Supreme Court has issued decisions with the potential to shift the securities litigation landscape, but gauging the full impact of those decisions was not possible until the lower courts had an opportunity to begin interpreting and applying them.

Prior to 2019, a view had been taking hold in the United States – based on earlier Supreme Court guidance – that liability for fraud connected with a false statement was largely limited to the person who had ultimate authority to control the statement (the true 'maker' of the statement), sparing those who merely contributed to the statement or participated in its dissemination. But that earlier guidance pertained only to claims for making a false or misleading statement, which left open the possibility that other antifraud rules could be used to target a person who, with the intent to defraud, passes along a false statement made by someone else. The Supreme Court in 2019 blessed the latter theory, holding, in Lorenzo v SEC, that while liability for making a false statement usually is reserved for the statement's 'maker', other antifraud provisions that prohibit employing fraudulent 'schemes' or 'artifices' are broad enough to reach that type of conduct.

That decision had the potential to significantly expand the scope of securities liability, but much depended on how the lower courts interpreted the Supreme Court's guidance. Lower court decisions from 2020 suggest that the US courts are reading the Supreme Court's decision broadly. One federal trial court held that the Court's decision in Lorenzo 'effectively abrogated' certain decisions that had taken an overly formalistic view of the distinction between 'scheme' liability of the type at issue in Lorenzo and liability for making a false or misleading statement. Another district court, in refusing to dismiss a securities fraud suit, emphasised the Supreme Court's suggestion in Lorenzo that the lesser-used scheme-based antifraud rules should be understood to cover a 'wide range of conduct.' Also during 2020, the Supreme Court declined to hear an appeal from a federal appellate court that held, on the basis of Lorenzo, that a defendant could be liable for merely failing to correct another's misstatement – another potentially broad theory of liability.

2020 also saw the lower courts exploring the boundaries of liability for statements of opinion – a topic the Supreme Court sought to clarify with its 2015 decision in Omnicare, Inc v Laborers District Council Construction Industry Pension Fund. As one court observed, prior to Omnicare, some lower courts had 'paid little attention' to the possibility that a statement of opinion could give rise to liability and had 'recognised sparingly few circumstances in which a statement of opinion would be actionable.' In Omnicare, the Supreme Court highlighted two ways that a statement of opinion could violate the antifraud rules: the opinion could include an embedded statement of fact that was not true, or the opinion could imply, to a reasonable investor, a fact that was not true.

The potential impact of Omnicare is illustrated by a recent opinion by the Second Circuit. There, the court observed that, prior to Omnicare, it had been so sceptical of liability for statements of opinion that the 'characterisation of a statement as one of opinion rather than one of fact was all but fatal' to liability. But because Omnicare had 'increas[ed] the ability of plaintiffs' to seek liability for statements of opinion, that correspondingly 'reduced the significance' of the sometimes-difficult exercise of categorising a statement as one of fact or opinion. In the case before the Second Circuit, the court concluded that, as to one of the misstatements at issue, the plaintiffs' ability to pursue liability for that misstatement 'would not differ' regardless of whether the statement was categorised as one of fact or opinion – a marked change in tone from the disfavour the court had previously shown to statements of opinion as a basis for securities liability.

There also were developments in 2020 regarding whether certain securities claims can be litigated in state courts. While most US securities law claims are required to be heard in (or a plaintiff chooses to sue in) federal courts, the US Supreme Court held in 2018, in Cyan, Inc v Beaver County Employees Retirement Fund, that plaintiffs may elect to bring claims under the Securities Act of 1933, one of the two major US securities laws, in state courts, and defendants may not force those claims into federal court. (In contrast, federal courts have exclusive jurisdiction over claims asserted under the Securities Exchange Act of 1934, but only concurrent jurisdiction over 1933 Act claims.) Cyan sparked a boom in state-court securities litigation, with the number of cases filed in state courts under the 1933 Act more than tripling in the year after the Supreme Court's decision. The decision also led to an increase in parallel filings – the filing of separate cases in both federal and state courts targeting the same events. Issuers attempted to tamp down the increase of state-court filings by relying on clauses in the companies' governing documents that required shareholders to bring all securities claims to the federal courts. In 2018, the Court of Chancery of the State of Delaware – where many major US corporations are incorporated and therefore whose law applies to intra-corporate issues – held that those clauses were unlawful, but in early 2020, the Delaware Supreme Court overturned that decision and upheld the legality of federal forum-selection clauses. The remainder of 2020 saw a significant drop in state-court filings, suggesting that US issuers had succeeded in leveraging the ability to restrict securities claims to federal court.

This year also marked the transition in the United States from the Trump Administration to the Biden Administration. On his first full day in office, President Biden named a new acting chair of the SEC, who emphasised in her remarks that a focus on climate and sustainability will be a 'priority'. Shortly thereafter, the acting chair announced the creation of a new position at the SEC for a senior policy advisor for climate and environmental, social and governance (ESG) issues, who will advance new initiatives in this area across the agency. Another early test for the Biden Administration will be its response to the rise of social- media-driven investing, as small investors recently flocked to easy-to-use, app-based trading platforms like Robinhood to participate in a rally of stocks touted on popular social media sites such as Reddit. The SEC emphasised that it would take action if necessary to protect these retail investors, and the US Congress has already convened hearings.

### Non-US developments

There were a number of important developments in 2020 globally in foreign class-action statutes that are expected to have significant effects on collective securities claims. The European Union, for example, recently issued a directive that will allow certain qualified entities to bring representative actions on behalf of consumers across Europe. While the directive, described as a 'new deal for consumers', does not specifically address securities claims, there is speculation that it will enable shareholder groups to advance claims stemming from faulty disclosures in offering documents. The EU member states are required to implement the directive by the end of 2022, with the new statutes going into effect in each state by June 2023.

In the Netherlands, the newly enacted Act on Collective Settlement of Mass Damages Claims (WAMCA) went into effect in 2020, allowing claimants in class actions to pursue money damages in securities actions – a significant departure from the country's previous limitation in class actions to injunctive relief. WAMCA also provides an opt-out mechanism for Dutch residents to pursue claims and damages on their own and an opt-in mechanism for foreign plaintiffs to participate in the class. While the act places more stringent requirements on the types of collective actions that may be brought – including somewhat strict jurisdictional requirements – it is expected that it will lead to an increase in securities filings in the coming years.

In early 2020, China's amended Securities Law went into effect, enacting significant changes to the class action system in the country by introducing a new representative action mechanism and provisions regarding investor protection and civil litigation. Notably, the revised Securities Law includes a new provision that provides for its extraterritorial application, suggesting that foreign defendants may be liable in Chinese courts for securities violations. Prior to the amendment, collective actions asserting securities claims were disfavoured by Chinese courts, despite formally being available under the country's Civil Procedure Law. Indeed, the Supreme People's Court had expressly discouraged the use of collective actions in securities cases related to false statements. As a result, most security claims were brought individually, although collective actions were permissible in limited scenarios, such as when there were a finite number of parties. Under the revised Securities Law, collective actions are more broadly available to Chinese plaintiffs for securities claims.

* *The authors would like to express their appreciation for the assistance provided by Victor Celis and Eden Sung*

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