

The Securities Litigation Issues That Matter Most For 2023

By **Todd Cosenza, Charles Cording and Amanda Payne** (January 5, 2023)

2022 turned out to be an eventful year for securities litigation.

Just when it seemed like there might be an end in sight for the Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System saga, the case is now back before the U.S. Court of Appeals for the Second Circuit for a third time.

In March, the court granted Goldman's petition for a Federal Rules of Civil Procedure, Rule 23(f) appeal of the U.S. District Court for the Southern District of New York's decision to once again certify the class, making it only the second case where a federal appeals court has granted interlocutory review of class certification three times.

In December, the U.S. Supreme Court granted certiorari in Slack Technologies LLC v. Pirani, giving the court the chance to review the U.S. Court of Appeals for the Ninth Circuit's decision in the case.

The Ninth Circuit ruling created a circuit split and departed from well-settled precedent by holding that a plaintiff has standing to sue under Section 11 of the Securities Act in a direct listing, regardless of whether the plaintiff could meet Section 11's tracing requirement.

In 2023, we can expect to see rulings in these cases that will likely have a significant impact on securities litigation moving forward. We can also expect to see both the U.S. Securities and Exchange Commission and investors continue to focus heavily on disclosures related to environmental, social and governance issues.

There's been a recent wave of ESG-related securities cases involving allegations of greenwashing, against the backdrop of the SEC's rulemaking on ESG-related disclosures. That wave shows no signs of slowing as shareholders continue to pressure companies to prioritize ESG-related issues.

And on the regulatory front, a decision is likely to be handed down in the SEC's high-profile case against Ripple Labs Inc., which has the potential to reinforce or drastically undermine the SEC's efforts to regulate cryptocurrencies as securities.

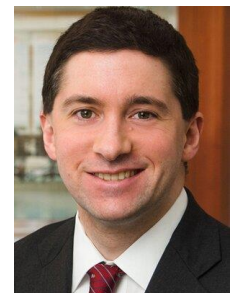
This article highlights the hot cases and trends in securities litigation that will matter most in 2023.

Pirani v. Slack

In 2023, the Supreme Court has the opportunity to review a Ninth Circuit decision that stands at odds with over 50 years' worth of precedent holding that a plaintiff must be able to trace their shares to an allegedly false or misleading registration statement in order to recover under Section 11 of the Securities Act.



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On Sept. 20, 2021, in *Pirani v. Slack*, a divided Ninth Circuit panel issued an unprecedented decision holding that investors have standing to sue under Section 11 based on purchases in a direct listing public offering — a method of raising capital that, in contrast to a traditional initial public offering, involves the issuance of no new securities and no support from underwriters — even though the investors could not trace their shares to a registration statement.[1]

The Slack defendants then petitioned the Supreme Court for a writ of certiorari.[2]

The petition urged the Supreme Court to review the Ninth Circuit's decision, emphasizing that it "gives plaintiffs the best of both worlds — purchasers of any shares may sue, and they need not prove fraud — and threatens a dramatic expansion of liability under the Securities Act." [3]

On Dec. 13, the Supreme Court granted Slack's petition.

If the Supreme Court allows the Ninth Circuit's pro-investor decision to stand, public companies will face significantly greater potential liability when pursuing a direct listing.

Class Certification Issues

Class certification remains a contentious battleground for defendants facing securities class actions. In 2023, many important decisions will be issued on the appropriate standards that should be applied at the class certification stage.

One of the most important cases remains *In re: Goldman Sachs Group Inc. Securities Litigation*, which is now over 12 years old. There, the Second Circuit made the rare decision last March to grant a third Rule 23(f) appeal of an order granting class certification.[4]

As background, following remand from the Supreme Court, the district court was once again faced with the decision of whether the class should be certified.

This time, the Southern District of New York was guided by the Supreme Court's instruction to take into account all record evidence relevant to price impact, including the degree of mismatch between the alleged misstatements and the corrective disclosures in inflation-maintenance cases.[5]

For a third time, the district court certified the class, reasoning that even though there is a discrepancy in "genericness" between the claimed corrective disclosures and Goldman's alleged misstatements, they still matched since they involved the same general subject.[6]

Goldman then filed a Rule 23(f) petition for permission to appeal the class certification order, primarily arguing that the district court misconstrued the Supreme Court's mismatch framework.

On March 9, 2022, the Second Circuit granted Goldman's Rule 23(f) petition.[7] Briefing and oral argument concluded in September, and a decision is expected this year.

If the Second Circuit affirms the district court's ruling, plaintiffs will have a much easier time arguing that there is a "match" based on generic statements and subsequent alleged corrective disclosures.

Cryptocurrency

Despite reaching new heights in 2021, the cryptocurrency market faced a reckoning in 2022. As the market crashed and experienced high-profile scandals amid growing public scrutiny, crypto-related securities actions remained front and center.

With Chairman Gary Gensler at its helm, the SEC has continued to closely monitor players in the cryptocurrency arena, focusing not only on cryptocurrency issuers and promoters, but also on market intermediaries like cryptocurrency exchanges.

The SEC has also expanded its cryptocurrency enforcement focus to other areas of the securities laws, including a recent action alleging insider trading.[8]

More notably, however, is the SEC's recent willingness to litigate rather than settle when it comes to important crypto-related issues, including the question of whether a particular cryptocurrency is a security under federal securities laws. In fact, this issue was recently litigated in SEC v. LBRY Inc.[9]

In that case, the SEC filed a complaint in the U.S. District Court for the District of New Hampshire, alleging that LBRY offered and sold millions of dollars' worth of unregistered securities to investors in the form of a digital asset called LBRY Credits, or LBC, which was supposed to be used to fund LBRY's business and build its digital content marketplace.[10]

On Nov. 7, 2022, the district court ruled on the parties' cross motions for summary judgment, finding that LBC is a security under the federal securities laws.[11] The ruling is significant because it's the first time a district court has held that a cryptocurrency is a security outside the context of an initial coin offering.

Given the court's ruling in the SEC's favor, it will be interesting to see how the SEC fares in its hard-fought case against Ripple, the creator and issuer of the XRP token, one of the most popular cryptocurrencies in the crypto market.

The SEC has been battling this case since filing its complaint in the Southern District of New York in December 2020, arguing that Ripple offered and sold XRP, an unregistered security, in violation of the federal securities law.[12]

The case has gained widespread attention, especially given Ripple's vigorous defense and victories along the way, including winning a discovery dispute that gave Ripple access to internal SEC documents relating to a 2018 speech on digital assets given by then-director of the SEC's Division of Corporation Finance, William Hinman.

The parties recently filed competing motions for summary judgment, and a decision is expected this year.

ESG Issues

One thing made clear in 2022 is that ESG-related securities litigation is on the rise.

This is especially true with respect to greenwashing claims, which occur when a company is accused of making false or misleading statements about their ESG policies, products, or practices to seem to be more environmentally friendly or sustainable.

On May 21, 2022, the SEC released its proposed rules regarding ESG disclosures.[13] As SEC Commissioner Hester Peirce explained, the key impetus for the rules

is a legitimate concern about the practice of greenwashing by investment advisers and investment companies [that] ... can mint money by calling their products and services "green" without doing anything special to justify that label.[14]

Recent SEC enforcement actions provide prime examples of the types of greenwashing claims we will likely see this year.

For example, on May 23, 2022, the SEC settled charges against BNY Mellon Investment Adviser Inc. for representing or implying in various statements that all investments in its funds had undergone an ESG quality review, even though that was not always the case.[15]

Not only is the SEC scrutinizing ESG disclosures and policies for greenwashing, so too are shareholders and consumers. This is evident from the recent securities class action filed against Danimer Scientific Inc. in the U.S. District Court for the Eastern District of New York.[16]

The complaint alleges that investors were misled into investing hundreds of millions of dollars into a company that purportedly developed a biodegradable plastic alternative product, including by greatly exaggerating the product's actual biodegradability in oceans and landfills.

Although it remains to be seen whether Danimer will prevail, two recent decisions in cases against The Coca-Cola Co. — *Swartz v. Coca-Cola* in the U.S. District Court for the Northern District of California[17] and *Earth Island Institute v. Coca-Cola* in the U.S. District Court for the District of Columbia,[18] both in November — shed light on how federal judges may view greenwashing claims.

On a motion to dismiss in both cases, Coca-Cola defeated claims alleging that it made false and misleading statements regarding its sustainability and environmental friendliness.

While greenwashing is nothing new, the ever-increasing focus on ESG-related disclosures by both the SEC and investors makes clear that greenwashing presents real and substantial legal risks for public companies.

Public companies must be cognizant of these risks and take steps to ensure that they are not overstating the positive ESG-related aspects of their policies or products.

Aside from greenwashing, companies must also continue to be cautious when it comes to making statements about their boardroom diversity goals and policies.

Indeed, one board diversity suit — *Lee v. Fisher* — is currently on appeal to the Ninth Circuit following the Northern District of California's dismissal of the plaintiff's complaint, which alleged that Gap Inc. lacks board diversity and made false statements about its diversity, on the grounds that Gap's forum selection clause requires derivative claims brought on Gap's behalf to be filed in the Delaware Court of Chancery.

The issue on appeal is whether companies like Gap can use a forum selection clause to avoid federal jurisdiction. [19]

Although defendants continue to fare well against shareholder derivative cases alleging misrepresentations about a company's commitment to diversity and inclusion,[20] we expect that shareholders will continue to closely focus on diversity-related disclosures.

Conclusion

In light of these notable cases and trends, 2023 promises to be yet another significant year for securities litigation.

Securities law practitioners and public companies should continue to closely monitor cases currently pending in the federal courts, especially those relating to class certification issues and standing requirements.

Moreover, we may see a substantial impact to the trajectory of the SEC's cryptocurrency enforcement actions once the Southern District of New York hands down its ruling in the SEC's case against Ripple.

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Disclosure: Willkie represents a group of former SEC officials and law professors who filed an amicus brief in support of Goldman Sachs' petition for a Rule 23(f) appeal.

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[1] Pirani v. Slack Techs., Inc., 13 F.4th 940 (9th Cir. 2021).

[2] Petition for a Writ of Certiorari, Slack Techs., Inc. v. Pirani, No. 22-200, 2022 WL 4080632 (Aug. 31, 2022).

[3] Petition for a Writ of Certiorari at *5, Slack Techs., Inc. v. Pirani, No. 22-200, 2022 WL 4080632 (Aug. 31, 2022).

[4] In re Goldman Sachs Grp., Inc. Sec. Litig., No. 22-484 (2d Cir. Mar. 9, 2022).

[5] Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951 (2021).

[6] In re Goldman Sachs Grp., Inc. Sec. Litig., 579 F. Supp. 3d 520 (S.D.N.Y. 2021).

[7] In re Goldman Sachs Grp., Inc. Sec. Litig., No. 22-484 (2d Cir. Mar. 9, 2022).

[8] SEC v. Wahi, No. 22 Civ. 1009 (W.D. Wash. July 21, 2022).

[9] SEC v. LBRY, Inc., No. 21-CV-260-PB, 2022 WL 16744741 (D.N.H. Nov. 7, 2022).

[10] Complaint at 1, SEC v. LBRY, Inc., No. 21-CV-260-PB (D.N.H. Mar. 29, 2021).

- [11] SEC v. LBRY, Inc., No. 21-CV-260-PB, 2022 WL 16744741 (D.N.H. Nov. 7, 2022).
- [12] Complaint, SEC v. Ripple Labs, Inc., No. 1:20-cv-10832 (S.D.N.Y. Dec. 12, 2020).
- [13] See Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices (May 25, 2022), <https://www.sec.gov/rules/proposed/2022/33-11068.pdf>.
- [14] See Hester M. Peirce, Comm'r, SEC, Statement on Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies (May 25, 2022), <https://www.sec.gov/news/statement/peirce-statement-esg-052522>.
- [15] See Press Release, SEC, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), <https://www.sec.gov/news/press-release/2022-86>.
- [16] Complaint, In re Danimer Scientific, Inc. Sec. Litig., 1:21-cv-02708 (E.D.N.Y. May 14, 2021).
- [17] Swartz v. Coca-Cola Co., No. 21-CV-04643-JD, 2022 WL 17881771 (N.D. Cal. Nov. 18, 2022).
- [18] Earth Island Inst. v. Coca-Cola Co., No. 2021 CA 001846 B (D.C. Super. Ct. Nov. 10, 2022).
- [19] Lee v. Fisher, No. 21-15923 (9th Cir. argued Dec. 12, 2022).
- [20] See, e.g., City of Pontiac Gen. Emps.' Ret. Sys. v. Bush, No. 4:20-cv-06651 (N.D. Cal. Mar. 1, 2022) (dismissing shareholder derivative action alleging that Cisco's board misrepresented Cisco's commitment to and promotion of diversity).