

Trending in securities class actions: Section 10(b) claims predominate, Ninth Circuit sees uptick, according to Cornerstone Report

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Cornerstone Research (a top consulting and expert testimony firm) issued its [2023 Year in Review report](#), examining recent trends in securities class action filings. According to the report, in 2023 there was a slight uptick in securities class action filings, which had been seeing a downward trend in years prior. Though Cornerstone's findings indicate a shift away from Section 11 and state 1933 Securities Act (1933 Act) filings, the increase in federal filings without Section 11 allegations – including cases asserting only Section 10(b) claims under the 1934 Exchange Act – more than made up for that decline. The technology and communications industries remained targets of securities class action filings, while cases involving cryptocurrency, COVID-19 and special purpose acquisition company (SPAC) all have fallen.

Key case law from late 2023 reflected the limits on the presumption of reliance in seeking class certification. Looking ahead, this year the US Supreme Court is poised to resolve a circuit split over whether investors can bring a Section 10(b) claim based on an alleged failure to make a disclosure required under Item 303 of Regulation S-K – a decision that could potentially rein in liability in the US Court of Appeals for the Second Circuit or expand it nationwide.

Section 10(b) filings up; Section 11, state 1933 Act filings decline

Overall, federal and state securities class actions rose from 208 filings in 2022 to 215 filings in 2023. Section 10(b)-only filings rose significantly – increasing 26% as compared to 2022 – while Section 11 and state 1933 Act claims plummeted by 62%. Of those Section 11 and state 1933 Act claims, only two were filed exclusively in state court (down from 11 in 2022), and 84% were filed exclusively in federal court – the highest federal share in 10 years. Plaintiffs also were especially slow to file Section 11 complaints, waiting an average of nearly a year and a half after an issuer's registration statement became effective – a 19% increase over 2022 and the longest lag since at least 2010.

Securities actions climb, especially in Ninth Circuit

Filings in the Third, Sixth and Ninth Circuits increased in 2023, while filings in the Second Circuit declined for the second year in a row. The Ninth Circuit saw the greatest number of filings for securities class actions (67), which accounted for **32%** of all federal filings. Cases in the Ninth Circuit also included some heavy hitters, representing **56%** of the total federal maximum dollar loss (MDL), which estimates the impact of all the information revealed during the class period by measuring the dollar-value change in the defendant corporation's market capitalization.

'Banking Turbulence' cases emerge as crypto, COVID-19, SPAC cases drop

Filings indicated a trend away from cases related to cryptocurrency, COVID-19 and SPACs. While the filing of 11 new cases in the first half of 2023 suggested a steep rise in cryptocurrency-related filings, crypto cases leveled out at 14 for the entire year, resulting in a 39% drop compared to the 2022 peak. Of those filed, half involved allegations against a cryptocurrency exchange.

COVID-19-related filings peaked in 2022 and fell by 50% in 2023, which represented the lowest number of COVID-19 filings since 2020.

SPAC and operating company initial public offerings were limited in 2023, which also led to a decline in related filings. 2022 already represented a steep 86% decline in SPAC IPOs from their 2021 peak. In 2023, SPAC IPOs declined a further 64% compared to 2022. While operating company IPOs increased 42% in 2023 as compared to 2022, activity was still down substantially (less than half) from the annual average from 2002 to 2022. As IPO activity is typically accompanied by federal Section 11 and state 1933 Act claims, this drop in IPO activity corresponded with the sharp drop in those cases.

For cases filed prior to 2023, settlement and dismissal outcomes varied among these case types. In 2020 and 2021, crypto filings had a higher dismissal rate compared with other federal filings, while crypto filings in 2022 were dismissed at

only one-sixth the rate of all other federal filings. COVID-19 filings since 2020 largely have had the same resolution rates as other federal filings but, for cases filed in 2022, early data indicates a higher dismissal rate. SPAC cases in 2022 were dismissed at a lower rate than other federal filings. However, SPAC cases settled at a higher rate.

Finally, in a new trend, claims related to what Cornerstone calls the “2023 Banking Turbulence” emerged, and filings in the financial sector more than doubled compared with 2022.

Decline in references to short-seller reports

Last year, there was a 17% drop in the number of complaints referring to stock price drops related to short-seller reports. These cases represented about 9% of all federal complaints. Just three plaintiffs’ firms – The Rosen Law Firm, Pomerantz, and Glancy Prongay & Murray – filed 74% of cases referencing short-seller reports, which “greatly exceeded” those firms’ share of federal filings in 2023 (54%).

Tech sector increasingly subject to filings, including ‘mega MDL filings’

In 2023, technology companies were increasingly likely to be subject to securities class action filings. Companies in the communication services, telecommunications and information technology sector had an 11.6% likelihood of being subjected to a federal securities filing – the highest since 2018 (12.7%). Healthcare companies were close behind at a 10.9% likelihood.

Across all industries, the 2023 MDL Index reached \$3.2 trillion, the second-highest amount on record, and 44 filings had an MDL of at least \$10 billion. More than half of the filings with an MDL of at least \$10 billion – which Cornerstone calls “mega MDL filings” – were against companies in telecommunications, internet and media, while 20% of mega MDL filings were against companies in software and computer technology.

Rebutting reliance in class certification, plus a pending resolution at Supreme Court

Cornerstone also highlighted three important securities class action decisions:

- The Second Circuit’s decision to decertify the investor class in *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.* – discussed at length in this [September 2023 Cooley blog post](#). In short, the court determined that the defendant had successfully rebutted the presumption of reliance by showing that the alleged misrepresentation and the later corrective disclosure were not sufficiently related.
- The US District Court for the Southern District of Florida also declined to certify the proposed class in *In re: January 2021 Short Squeeze Trading Litigation*. The court staunchly rejected the plaintiffs’ attempt to extend the presumption of reliance when the market for a security was **generally** efficient but was “unquestionably” inefficient during the putative class period.
- The U.S. Supreme Court’s potential resolution of a circuit split over whether the failure to make a required disclosure under Item 303 of Regulation S-K is enough to support a claim of securities fraud in the absence of an otherwise misleading statement. Argument was heard in January 2024 and the Supreme Court’s decision is expected later this year.

Cornerstone Research analyzes S&P 500 companies across sectors based on the Global Industry Classification Standard (GICS) to determine the percentage these companies are subject to new securities class actions in federal court during each calendar year. The “Communication Services/Telecommunications/Information Technology” category includes companies in television broadcasting, streaming, internet service providers, digital communications and storage, and social media, among others.

For purposes of assessing mega filings, Cornerstone bases sector classifications on the Bloomberg Industry Classification System, which differs from GICS. The “Communications” sector includes “Telecommunications, Internet, and Media,” while the “Technology” sector includes “Software and Computers.”

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