



# Securities Litigation + Enforcement Highlights From Q2 + Q3 2024

November 7, 2024

Cooley's securities litigation + enforcement group continued to share key insights on key cases and developments in securities litigation throughout the spring and summer. They highlighted important decisions in Delaware courts, precedent-setting cases in the US Supreme Court and appellate courts, and recent developments at the Securities and Exchange Commission (SEC), as well as trends in derivative action settlements. Below is a roundup of key highlights from our team for Q2 and Q3.

## [Recent Trends in Parallel Derivative Action Settlement Outcomes](#)

A report by Cornerstone Research, a top consulting and expert testimony firm, highlights recent trends in settlements of derivative lawsuits brought in parallel to securities class actions. The report noted that nonmonetary derivative settlements are more common than monetary derivative settlements, and that monetary derivative settlements are correlated with larger securities class action settlements. Among the monetary derivative settlements analyzed by Cornerstone, the median settlement amount was \$8.9 million. The report also noted that monetary settlements were correlated with higher plaintiff attorneys' fee awards.

## [Delaware Court of Chancery Finally Dismisses a De-SPAC Complaint](#)

The Delaware Court of Chancery has seen a wave of lawsuits accusing special purpose acquisition companies (SPACs) of breaching their fiduciary duties through material misstatements or omissions in their de-SPAC proxy statements. In *In re Hennessy Capital Acquisition Corp. IV Stockholder Litigation*, the Delaware Chancery Court for the first time granted a motion to dismiss a *MultiPlan* claim in a de-SPAC shareholder lawsuit. The decision confirms that even under entire fairness review, a disclosure-based *MultiPlan* claim requires a well-pleaded disclosure violation to survive a motion to dismiss.

## [Will A Bump-Up Exclusion Bar Coverage of an M&A Settlement? It Depends.](#)

In recent years, directors and officers (D&O) insurance carriers have increasingly invoked the "bump-up" exclusion to exclude from coverage settlements in M&A litigation that, in effect, bump up the consideration paid to the target company's shareholders. Recent decisions from federal and Delaware illustrate that whether a bump-up exclusion in a D&O insurance policy applies to a particular settlement may depend on the wording of the exclusion, the structure of the underlying deal, and the law of the jurisdiction applicable to the insurance contract. Given the variability of these recent decisions, insurance counsel should carefully review D&O policies as they come up for renewal to ensure that clients will have sufficient coverage in the event of any post-close merger litigation.

## [SEC Remains Focused on Disclosure of Cybersecurity Incidents](#)

SEC enforcement actions and statements by Commission officials show that the SEC remains focused on disclosures regarding cybersecurity incidents. For public companies, it may be preferable to voluntarily disclose cybersecurity incidents, even if the materiality of the incidents has not been (or could not be) determined. For key market participants covered under Regulation SCI (Systems Compliance and Integrity), as soon as the entity has a "reasonable basis" to believe that a systems disruption event occurred, the entity must notify the SEC, unless the entity also immediately determines that the event is de minimis.

## [Ninth Circuit Affirms Dismissal of Securities Fraud Claims, Rejects Allegations as Nothing More Than 'Interesting Reading'](#)

The US Court of Appeals for the Ninth Circuit issued an opinion affirming the district court's dismissal of securities fraud claims and highlighting the "heightened and demanding" standard required to plead securities fraud under the Private Securities Litigation Reform Act. The opinion is notable for its meticulous analysis of confidential witness allegations and alleged corrective disclosures. Importantly, the court held that to plead scienter for an omissions-based claim, plaintiffs

cannot merely allege that a defendant had knowledge of the allegedly omitted fact – they must provide “credible allegations of an intent to defraud investors.” The court also held that two short-seller reports did not qualify as corrective disclosures to plead loss causation, building on a series of Ninth Circuit cases addressing short-seller reports in this context.

### [US Supreme Court: Pure Omissions Not Actionable Under Rule 10b-5\(b\)](#)

In April, the Supreme Court resolved a circuit split and held that a pure omission cannot form the basis of a securities fraud claim under Rule 10b-5(b). The Supreme Court made clear that an omission is only actionable under Rule 10b-5(b) if it renders an affirmative statement materially misleading. As such, companies and individuals across the US are protected from Rule 10b-5(b) liability – though not from liability under Section 11 of the Securities Act of 1933 or SEC enforcement actions – where they do not expressly or impliedly speak on a topic. The decision emphasizes the importance of assessing whether statements could be construed as being misleading by omission, which often is a complicated process.

### [Delaware Double Whammy Casts Doubt on M&A Practices](#)

Two cases in the Delaware Court of Chancery serve as a reminder that Delaware grounds its review of corporate actions in statutory requirements and not market practice, no matter how prevalent. In *West Palm Beach Firefighters v. Moelis & Company*, the court invalidated relatively commonplace terms in stockholder agreements that grant a stockholder influence over the company’s actions. The court noted that some of those provisions would have been valid if included in the corporation’s certificate of incorporation instead of the stockholder agreement. In *Sjunde AP-fonden v. Activision Blizzard, Inc.*, the court denied a motion to dismiss a plaintiff’s claims alleging that the company’s board violated multiple provisions of the Delaware corporate law governing board and stockholder approval of merger agreements when it authorized the company’s merger agreement with Microsoft and provided stockholders with notice and request for approval.

## **Awards, recognition and accolades**

- [The American Lawyer’s Litigation Daily Litigator of the Week: Shoutout for Talphera](#)
- [Law360 Rising Star: Cooley’s Brett De Jarnette](#)
- [Cooley Secures Dismissal With Prejudice for Aurinia Pharmaceuticals](#)
- [Cooley Secures Another Win for IonQ in Securities Fraud Class Action](#)
- [Dutch Bros Secures Motion to Dismiss in Securities Class Action](#)

## **Contributors**

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