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ANALYSIS

Plaintiffs Attorneys Expect 2023 to Be Record-Setting Year for Securities Litigation Results

Crypto, Big Tech and the threat of a commercial real estate bubble are some of the areas plaintiffs attorneys are closely watching as targets of potential securities litigation this year.

February 10, 2023 at 06:00 AM

Securities Litigation

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Securities litigation filings may have settled in at a “baseline” of 200 to 225 cases per year after a two-year deviation in 2018-2019 to roughly twice that caseload due to issues emanating from SPACs, but settlement values have skyrocketed

“2022 brought more than $4 billion in settlements, which was double what we saw for 2021,” Labaton Sucharow chairman Christopher Keller told The National Law Journal—an upward trend he and many other plaintiffs lawyers believe will continue. “There will be a significant number of high-value settlements being struck in the next three to five years.”

A recent report by ISS tallies the total settlement amount in securities class actions in 2022 at $4.77 billion, while a recent report by Cornerstone Research shows 69% of the core federal filings were made in the Second and Ninth circuits.

Where to Follow the Money

- **SPAC hangover**: While the number of SPAC-related filings has eased and will continue to slow, “we may see some big SPAC settlements related to cases filed in the last few years,” Keller said.
- **The crypto conundrum**: As the caseload of SPAC filings will drop off, “cryptocurrency may replace it,” Cohen Milstein Sellers & Toll partner Julie Goldsmith Reiser said. However it remains unclear “how it will play out for securities fraud litigation more broadly, since larger institutional clients tend not to hold cryptocurrencies.” The crypto space generally “should lead to enormous settlements, but for the most part the money just doesn’t exist, it simply evaporated,” Keller said.
- **The high-interest trap**: “Particularly private equity sponsored companies are very highly leveraged,” Selendy Gay Elsberg founding partner Jennifer Selendy noted. After years of a low-interest lending environment, credit has been “relatively inexpensive.” The rise in interest rates are pushing some companies in economic distress. “One of the things we are seeing is that private equity sponsored companies would love to do everything to avoid bankruptcy,” Selendy said. “That pressure is really going to continue,” leading to potential litigation driven by creditors. “A rise in interest rates has historically created litigation,” as financing and re-financing becomes more challenging, Reid Collins and Tsai senior founding partner Bill Reid IV told NLJ. The corporate debt default rate could reach 6% by the end of this year, up from 2% in 2022, according to Moody’s Investor Service.
- **Commercial real estate bubble fears**: Talking about the potential fallout of high-interest rates, attorneys are closely eying the commercial real estate market. “People aren’t going to the office and commercial real estate is in real trouble right now,” Reid said. “Nobody wants to buy it,” which could lead to defaults and ultimately litigation. “Demand for office space in New York City is down 25 to 30%,” Pomerantz managing partner Jeremy Lieberman said. The question is: “What will that mean for all of the real estate companies, some of them publicly traded, that own those buildings … and how does that impact the banks.”

- **Big Tech deflated**: Since the slide of tech stocks, Silicon Valley has become the target of an array of securities lawsuits, a trend to likely continue in 2023. “You couldn’t have brought those cases a year or two ago because the markets didn’t allow it,” Lieberman said. His firm is involved in cases against Amazon, Twitter and Netflix. ”I think we are seeing a change now,” given that “a lot of issues have come up” over how technology companies dealt with data privacy and customer data.
- **The “greenwashing” challenge**: Some attorneys anticipate litigation expanding from “event-driven litigation”—such as related to major oil spills or other environmental disasters—to firms taking a closer look at ESG disclosures and “greenwashing” allegations in relation to shareholder interests. A recent lawsuit filed against the wood pellet producer Enviva is “one of the first cases where we’re seeing this ESG twist,” Saxena White co-founder Maya Saxena noted. “We’ll probably see more cases in this area moving forward.” A recent ALM analysis also suggests heightened litigation risks stemming from ESG-related litigation. The United States may be lagging behind Europe when it comes to litigation at the intersection of securities and ESG issues. “All over Europe, as regulators start to require concrete disclosures regarding environmental risk, you’re going to see cases about that,” Lieberman said. So far, in the United States, it will be more challenging to bring these types of litigation. “It’s a big leap,” to get to court and bring cases based on ESG disclosure fraud, “but clients want it.”