TABLE OF CONTENTS

Articles »
The Reliance Element in U.S. and Canadian Securities Class Actions
By James K. Goldfarb, Sumon Mazumdar, Usman M. Sheikh, and Sarah Woods
Two countries separated by a common element.

Event Studies Using Contemporaneous Forward-Looking Information
By Aaron Dolgoff and Tiago Duarte-Silva
Learn a novel way to implement this statistical model that more readily incorporates investors' forward-looking views.

Private Placement Securities Litigation
By Peter M. Saparoff, John F. Nucci, and Joel D. Rothman
Be aware of the key rules and regulations governing this area of securities law.

FINRA Update: Public Arbitrator Limitations, Adjournment, Task Force, and More
By Joshua D. Jones
Practitioners should take note of changes to rules and regulations affecting arbitration practice.

Price Impact: The Battle of Experts and Burden of Proof after Halliburton II
By Jessie M. Gabriel
We are now getting our first glimpse at how district courts are resolving the questions left open by the Supreme Court.

News & Developments »
Supreme Court to Consider Scope of Federal Jurisdiction over Securities Claims
The Court grants a petition from Merrill Lynch.

Second Circuit Rules in Cohen v. UBS Financial Services
FINRA rule 13204 does not prohibit firms from enforcing pre-dispute arbitration agreements and class action waivers.
ARTICLES

The Reliance Element in U.S. and Canadian Securities Class Actions
By James K. Goldfarb, Sumon Mazumdar, Usman M. Sheikh, and Sarah Woods

The United States and Canada both provide an aggrieved investor with redress for securities violations. In the United States, an investor may attempt to recover money damages under section 10(b) of the Securities Exchange Act of 1934, the general antifraud provision of the federal securities laws. In Canada, until recently, an investor’s main recourse was tort law, principally common-law negligent misrepresentation and fraud causes of action. Statutory causes of action for securities misrepresentations have only recently been enacted and are still evolving. Despite those differences in the evolution and form of securities remedies in the United States and Canada, the challenge of proving reliance, the element connecting an investor’s decision to buy or sell a security to a defendant’s misstatement or omission, is common to both countries’ securities class action regimes. What an investor must show to prove reliance, how it may show it, and whether it must be shown at all are answered differently in each jurisdiction. Understanding those differences might prove particularly useful as the plaintiffs’ securities bar seeks greener pastures north of the border, while the Canadian courts adapt to recent developments arguably designed to mimic the U.S.-securities-based presumption of reliance in securities class actions.

The Element of Reliance in the United States
Section 10(b), together with U.S. Securities and Exchange Commission Rule 10b-5, prohibits a person from making a material misstatement or omission in connection with the purchase or sale of a security. To prevail on a section 10(b) claim and recover money damages, an investor must prove, at least, that he or she bought or sold a security because of a defendant’s materially false or misleading statement or omission. As noted, the element connecting the investment decision to the statement or omission is called “reliance” or “transaction causation.”

Investors commonly attempt to pursue section 10(b) claims collectively, under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which governs class actions. To qualify for class treatment under that rule, a plaintiff must prove, among other things, that common questions of law or fact predominate over individual questions, thereby meriting class-wide treatment. But until 1988, tension among the reliance element of section 10(b), the predominance element of Rule 23(b)(3), and the realities of the securities markets confounded the federal courts. Specifically, the common-law conception of “reliance” as a personal exchange of information between a buyer and seller seemed ill-suited to the reality of the nature of transactions in the impersonal, modern securities markets. Moreover, if each putative class member had to prove that he or she personally read or heard a material misstatement on which he or she relied to invest in a given security, individualized, not common, questions of fact would predominate, likely making securities fraud class actions extremely difficult to proceed.
Addressing those tensions in 1988, the U.S. Supreme Court held that, rather than having to prove direct reliance, a plaintiff could invoke a rebuttable presumption of reliance. See Basic Inc. v. Levinson, 485 U.S. 224 (1988) (Basic’s rebuttable presumption of reliance applies to affirmative misrepresentations. The Supreme Court fashioned a different presumption of reliance for omissions. See Affiliated Ute Citizens v. United States, 406 U.S. 128, 153–54 (1972)). The Court based the presumption on the “fraud-on-the-market” theory. That theory, itself drawn from the efficient market hypothesis developed by economists in the late 1960s and early 1970s, posits that in an efficient market, the price of a security rapidly reflects all material public information, including material misrepresentations. In other words, a public, material misrepresentation is baked into the market price at which an investor transacts—i.e., the fraud is “on the market.” In application, reliance is presumed if a plaintiff can show that the misstatement was publicly made and material, the security was traded in an efficient market, and the plaintiff transacted in the security between the time the misrepresentation was made and the truth was revealed to the market.

The fraud-on-the-market theory can play out at two different stages of a securities class action. At the merits stage, the parties may dispute whether the misrepresentation was material—materiality being an element of a section 10(b) claim, as well as an essential predicate of the fraud-on-the-market theory. In contrast, market efficiency, as well as publicity and trade timing, may be, and commonly are, adjudicated earlier, at the class certification stage, when the lead plaintiff (and hopeful class representative) attempts to prove by a preponderance of the evidence that the putative class satisfies the Rule 23 requirements.

Typically, a plaintiff attempts to show market efficiency through the existence of a number of the following factors: (1) the average weekly trading volume expressed as a percentage of total outstanding shares; (2) the number of securities analysts following and reporting on the stock; (3) the extent to which market makers and arbitrageurs trade in the stock; (4) the company’s eligibility to file SEC registration Form S-3 (as opposed to Form S-1 or S-2); (5) the existence of empirical facts “showing a cause-and-effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price; (6) the company’s market capitalization; (7) the bid-ask spread for stock sales; and (8) float, the stock’s trading volume without counting insider-owned stock. The first five factors were identified in Cammer v. Bloom, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989); the final three in Krogman v. Sterritt, 202 F.R.D. 467 (N.D. Tex. 2001). No federal appeals court has definitively approved those factors and, aside from the fifth factor (cause and effect), most financial economists question whether the factors are probative of market efficiency. Still, the factors have gained general acceptance in the federal district courts.

If the plaintiff carries its burden to show reliance (through the fraud-on-the-market theory), the defendant may rebut the presumption of reliance by, among other things, “[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff.” Basic, 485 U.S. at 248. For years, the lower courts disagreed about when and how a defendant could avail itself of the Basic rebuttal. The Supreme Court resolved the disagreement.
last year. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014). The Court held that a defendant may rebut the presumption of reliance at the class-certification stage by showing a lack of price impact; that is, by showing that the alleged misrepresentations did not affect the security’s price. Absent price impact, the “basis for finding that the fraud had been transmitted through market price would be gone,” and individual questions of reliance would overwhelm common questions. Accordingly, the Court concluded that considering price impact at the class-certification stage was appropriate. Exactly how price impact will play out in different factual scenarios remains to be seen.

**Reliance in Canada**

Securities law in Canada has developed differently than in the United States. Investors proceeding under Canadian law only recently gained a statutory cause of action for securities misrepresentations. Up to that point, in Canada’s common-law jurisdictions, an investor’s principal remedy was to assert common-law causes of action and, in Québec, claims based on the *Civil Code of Québec* (The province of Québec is the only jurisdiction in Canada that retains a civil law system and is governed by a civil code. All other Canadian provinces and territories are governed by the common law.) In each case, reliance posed a substantial obstacle for investor classes. For example, to prove the tort of negligent misrepresentation in common-law jurisdictions, a putative class of investors had to prove that each investor reasonably relied to his or her detriment on the impugned misstatement or omission (see *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87,110 (S.C.C.)), a difficult task. A class of investors suing under the Québec’s Civil Code had a similarly heavy burden, also having to prove that each investor had relied on the misinformation in making his or her respective trades (see Civil Code of Québec arts. 1457 & 1607).

The fraud-on-the-market theory, as applied in the United States, has received an unkind reception in Canada. Despite several invitations to do so, Canadian courts have repeatedly resisted its application (see, e.g., *Carom v. Bre-X Minerals Ltd.*, (1998) 40 O.R. 3d 780 (Can. Ont. Gen. Div.)). Courts in several Canadian provinces have yet to expressly decide the matter. In one recent case in Québec, for example, the issue was deferred to a later stage. See *Comité syndical national de retraite Bâtirente inc v. Société financière Manuvie*, 2011 QCCS 3446 (*Manulife*). Several reasons explain the resistance. First, courts have reasoned that the theory would improperly require the redefinition of the well-established common-law torts of negligent and fraudulent misrepresentation, which have long required proof of actual reliance as an essential component (see *Bre-X* ¶ 40 (noting that “to import such a presumption would amount to a redefinition of the torts themselves”)). Second, courts have perceived that the theory was developed in the United States in response to a unique statutory context involving claims under Rule 10b-5 and to have been “almost unanimously rejected” in the United States when advanced in the context of common-law claims, such as those at issue in Canada (see *Bre-X* ¶ 36). As a result of those rulings and other perceived impediments for investors seeking redress, secondary market class actions in Canada languished.
Despite the resistance to American-style claims, and partly because of it, that tide has now somewhat changed. Specifically, Canada has seen two recent developments that have assisted investor classes in overcoming the requirement to prove individualized, actual reliance. First, as of 2005, provincial and territorial legislatures began enacting statutory causes of action for secondary market liability to facilitate investor recovery. The legislation featured provisions designed to relieve investors from having to prove actual reliance (see, e.g., Ontario Securities Act § 138.3; Quebec Securities Act art. 225.12). But the statutes also included safeguards to ensure Canadian courts would not be flooded with the “strike suits” that plague U.S. courts. (“Strike suits” are a plaintiffs’ bar practice of filing a section 10(b) action immediately upon any material share price drop—a sort of “shoot first, ask questions later” strategy. The U.S. Congress passed the Private Securities Litigation Reform Act of 1995 in part in an effort to curb strike suits.) Thus, investors attempting to rely on those statutes are subject to strict damages caps, special limitation periods, and a “leave” requirement. Under the “leave” requirement, in order to commence a claim, a claimant must satisfy a court that its proposed action is brought in good faith and that the reasonable possibility exists that the action will be resolved at trial in favor of the claimant. As the Supreme Court of Canada made clear this year, the “leave” requirement serves as a “robust deterrent screening mechanism” that requires claimants to offer “some credible evidence in support of [their] claim” in order to proceed (see Theratechnologies Inc. v. 121851 Canada Inc., 2015 SCC 18 (Can.)).

Second, in an effort to withstand motions to strike and overcome the hurdles posed by the certification test for common-law negligent misrepresentation claims, secondary market claimants have taken an alternate route to establishing reliance for common-law claims. They have asserted that reliance can be inferred from the specific facts and circumstances of the case, one of the central circumstances being that the security in question traded on an efficient market (see, e.g., CC&L Dedicated Enter. Fund (Tr. of) v. Fisherman, [2001] O.J. No. 4620, 18 BLR 3d 260 (S.C.J.). As Justice Cumming explained in Fisherman,

> [h]ad the plaintiffs simply pleaded the ‘fraud on the market theory’ I would have foreclosed that consideration. Given, however, that the case law recognizes that a person’s reliance upon a representation may be inferred from all the circumstances, in my view it would be premature to foreclose the consideration of this issue in the case at hand beyond the pleading stage.

Fisherman, para. 69.

A similar approach was taken at the securities class action authorization (“certification”) in Comité syndical national de retraite Bâtirente inc v. Société financière Manuvie, 2011 QCCS 3446 (Can.), in which Justice Soldevila of the Superior Court of Québec stated that, in certain circumstances, a presumption of reliance could be inferred by the trial judge, if the requisite conditions are demonstrated (per article 2849 of Québec’s Civil Code, for example).
The inferred reliance theory has had mixed success when challenged on motions to strike and on certification/authorization motions. However, the theory has yet to be tested at trial and, therefore, it remains to be determined whether the court will be prepared to draw an inference of reliance, whether an inference of reliance will fulfill the plaintiff’s burden of proof, and how the individual issues associated with rebutting the inference will be addressed.

Conclusion
While there have clearly been significant developments on both sides of the border in recent years on the issue of reliance in securities cases, it is still too early to assess their impact. In the United States, all eyes will be watching the treatment by the courts of the rebuttable presumption at the certification stage following the recent *Halliburton* decision. Will the courts be receptive to defense challenges at certification on the basis of a lack of price impact, making the United States less favorable to investor claims?

In Canada, for its part, while recent developments have suggested a more welcoming environment to investors seeking redress for securities law violations, several substantial challenges appear to remain. More specifically, the statutory safeguards and limitations imposed by provincial and territorial legislatures, the recent dicta from *Theratechnologies*, and the lack of general acceptance of the inferred reliance argument leave no doubt that neither common-law nor statutory claims will be a “walk in the park” for the investor-plaintiff in Canada.

One thing seems certain: This is an area to watch, as parties and courts on both sides of the border continue to develop the contours of the fraud-on-the-market and inferred reliance theories as well as the statutory causes of action to assist aggrieved investors with their claims.

**Keywords:** litigation, securities, investor reliance, negligent misrepresentation, fraud

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Event Studies Using Contemporaneous Forward-Looking Information
By Aaron Dolgoff and Tiago Duarte-Silva

Parties to securities litigation often rely on analysis of the price impact of particular news through an event study in connection with class certification and arguments on loss causation and damages. In an event study, the economic expert typically uses a statistical model to assess the portion of the stock price reaction due to such news and not due to market factors or noise. In this article, we describe a novel way to implement this statistical model that more readily incorporates investors’ forward-looking views, while maintaining a solid basis in economic theory.

Traditional Approaches
The usual statistical model used in an event study relies on the premise that observed price changes result from news in the marketplace and random variability commonly known as “noise.” See A. Craig MacKinlay, “Event Studies in Economics and Finance,” 35 J. Econ. Literature 13, Mar. 1997. This model (also known as the market model) describes and estimates how investors expect a stock price to react to changes in market, industry, and selected company-specific factors. Such a model produces an estimate of a stock’s expected return. The remainder of any observed price change is known as excess return and may be attributed to known company-specific news or to noise.

If the excess return for the event analyzed exceeds a threshold based on typical return fluctuations, it is considered statistically significant. When this is the case, the economic expert is likely to opine that the excess return is due to potentially identifiable news rather than to noise. If the excess return does not exceed that threshold, the expert cannot determine that the price changed for a reason other than noise.

Traditional approaches estimate the market model using a sample of stock returns. Traditional approaches derive estimates based on historical data for a period prior to the events being studied or, alternatively, based on data surrounding the event. The reliability of these traditional approaches, however, can be affected by changes in investors’ perceptions of future conditions. For example, a market model estimated with historical data might incorrectly assess an excess return as statistically significant because it is high relative to its historical threshold level, although it is not actually significant because volatility had recently and substantially increased.

A Forward-Looking Approach
Investors constantly revise their views on companies, industries, and the market. They change their views on risk, measured as the variability of returns. A market model that could incorporate the most up-to-date information will reflect these contemporaneous investor views more precisely than a model based on a sample from past or future time periods. Stock option data can provide such up-to-date information about investor expectations. In fact, option data can be used
to calibrate a market model for an event study using forward looking information, with limited or no use of historical or in-sample data.

A forward-looking methodology can produce results that diverge from the results of traditional approaches in two ways. See Aaron Dolgoff & Tiago Duarte-Silva, “Event Studies Using Forward-Looking Information” (Charles River Assocs. Working Paper May 1, 2013). First, the statistical significance of excess returns may change if forward-looking estimates of return volatility differ from historical or other sample-based estimates. Second, the measured excess returns may be materially affected if, for example, the forward-looking market model incorporates a different relationship between stock and market returns. The following two examples illustrate these effects.

Example: Statistical Significance of Excess Return
April 17, 2006, was the first alleged disclosure date in a class action lawsuit against UnitedHealth (In re UnitedHealth Group Inc. PSLRA Litigation). See Charles Forelle, “Probe of UnitedHealth Options Grants Deepens,” Wall St. J. (Apr. 17, 2006). An examination of the variability of returns around this date shows that returns had been more volatile nearer this date than during the previous year. For example, the standard deviation of UnitedHealth’s excess returns of 1.10 percent during the whole prior year is substantially lower than the standard deviation based on the prior 10 trading days: 1.45 percent. The standard deviation had been increasing from below that level in the prior month, to well above it before the first alleged disclosure date. As a result, establishing the statistical significance of this date’s return based on the previous year of returns tends more toward accepting it as abnormal than based on a more contemporaneous assessment of variability.

This intuition is corroborated by a comparison of the p-values of the excess returns on April 17 under different approaches. As a side note, a p-value below 5 percent indicates statistical significance at the commonly accepted 95 percent confidence level. UnitedHealth’s excess return on that day looks statistically significant under traditional approaches, with p-values of 0.9 percent under the historical approach and 2.5 percent under the in-sample approach. However, the market’s view that UnitedHealth’s volatility increased was reflected in option prices in the prior weeks. Taking this forward-looking information into account, the excess return on April 17 is not statistically significant at the 95 percent confidence level, as evidenced by its 7.8 percent p-value.

Example: Estimate of Excess Return
Another example illustrates a situation where a forward-looking approach leads to a considerably different estimate of the magnitude of the price impact of the analyzed event. On September 29, 2008, Morgan Stanley announced it was selling a 21 percent stake in the firm to Mitsubishi UFJ for $9 billion. See Allison Tudor & Aaron Lucchetti, “Mitsubishi UFJ to Buy Morgan Stanley Stake,” Wall St. J. (Sept. 29, 2008). This announcement coincided with other news affecting the financial services industry and the overall market. For example, on that date, the U.S. House of Representatives rejected the Troubled Asset Relief Program legislation, Citigroup purchased
Wachovia, and the Federal Reserve doubled swap lines with the European Central Bank. We measured Morgan Stanley’s estimated excess return on that day under the three aforementioned approaches. Under the historical approach, the excess return was 1.1 percent. Under the in-sample approach, it was 5.2 percent. However, under the forward-looking approach, the excess return was quite higher, at 24.9 percent.

While all measure a positive excess return, the forward-looking approach produces a substantially higher excess return because the market’s forward-looking views reflected that Morgan Stanley’s value was more correlated with the market and its industry at that time compared with historical periods. Because the market and industry benchmarks declined on September 29, 2008, this higher sensitivity results in a larger portion of loss-inducing returns attributable to market and industry factors and, correspondingly, a larger firm-specific excess return.

Selecting an Appropriate Method
A forward-looking approach has the potential to incorporate information that is contemporaneous and thus more relevant to evaluating investors’ reactions to news. This method offers another tool in the expert’s toolbox: It does not replace the traditional event study methods; instead, it provides additional analytical options. The forward-looking approach should be considered

- when the events being studied occur on or around periods of significant changes in firm, industry, or market risk,
- when the results under traditional methods are particularly sensitive to the market model’s estimation period, or
- as a robustness test and confirmatory evidence for results obtained through traditional methods.

Keywords: litigation, securities, event study, forward-looking, investor reaction, excess return

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Private Placement Securities Litigation
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The Securities Act of 1933, 15 U.S.C. §§ 77a et seq. (the Securities Act), defines a “security” as “any note, stock, treasury stock, security finance, security-based swap, bond, debenture . . . investment contract . . . or warrant or right to subscribe to or purchase, any of the foregoing.” Put more simply, a security is a certificate attesting to the right of ownership, in some way. Perhaps most relevant here is the term “investment contract.” In SEC v. W.J. Howey Co., 328 U.S. 293 (1946), the Supreme Court defined an investment contract as, essentially, an investment in a common enterprise, where the investor is led to expect a return of profits solely from the efforts of others.

Typically, securities are sold or otherwise offered in accordance with the Securities Act, which regulates the public offering of securities. In general, securities offerings must be registered with the Securities and Exchange Commission (SEC) in accordance with the provisions of section 5 of the Securities Act. Section 5 states that, among other things, it is unlawful for any person to sell or deliver unregistered securities or to fail to file a registration statement along with a sale of securities. These provisions generally exist to protect unaccredited, ordinary investors from being taken advantage of in the offering of securities by more sophisticated entities (i.e., the issuers and underwriters offering securities to the public). Notwithstanding the general rule requiring registration, the Securities Act contains a few notable exemptions (chief among them are section 4(a)(2), Regulation D, and Rules 504, 505, and 506). It is important to note that unregistered private offerings can be risky for ordinary, unsophisticated investors because unregistered offerings typically lack certain of the explicit protections that are required by section 5 through an SEC registration statement.

This article explains some of the key rules and regulations governing private placement offerings, as well as some areas where securities lawyers can find themselves in danger of running afoul of the securities laws when they are involved in private placements.

Pertinent Rules, Regulations, and Enforcement Tools

Section 12(a)(1) of the Securities Act. While private placement offerings are unregistered, they are not immune from the federal securities laws.

Section 12(a)(1) of the Securities Act, 15 U.S.C. § 77l(a)(1), provides for a private cause of action to persons who have been aggrieved by an unregistered offering of securities, private or otherwise, by placing a general prohibition on the sale of unregistered securities. It states that “any person who . . . offers or sells a security in violation of section 77e of this title . . . shall be liable . . . to the person purchasing such security from him.” Section 77e (which is the same as section 5, discussed above) makes it unlawful to sell unregistered securities through interstate commerce (unless an exception applies).
other words, section 12(a)(1) provides that any person or entity that offers or sells unregistered securities by means of interstate commerce is liable to the purchaser of that security.

Section 12(a)(1) is a very buyer-friendly statute. Barring proof of an applicable exemption, section 12(a)(1) provides for strict liability against one who offers or sells a security in violation of section 77e. Thus, an aggrieved buyer is not required to prove scienter or negligence on the part of the issuer or seller. In fact, the seller’s knowledge of the violation does not even need to be proven. A plaintiff simply needs to prove that a seller used the interstate commerce system, the mails, or even an interstate phone call, to offer or sell unregistered securities. In addition, in *Pinter v. Dahl*, 486 U.S. 622 (1988), the Supreme Court expanded the meaning of “seller” under the statute to include not only the owner who passes title to the securities but also a person who solicits the purchaser if the solicitor did so in service of the solicitor’s or the buyer’s financial interest.

However, while this is a relatively easy standard to meet, the plaintiff must show that the seller used the modes of interstate commerce with respect to a specific plaintiff, not just in general. In addition, the statute of limitations for a claim under section 12(a)(1) is fairly rigid as set forth in section 13 of the Securities Act, 15 U.S.C. § 77m, which states that an action is prohibited “unless brought within one year after the violation upon which it is based.” Section 13 also provides that a claim may not be brought, under any circumstances, “more than three years after the security was bona fide offered to the public.” In addition, in *Police & Fire Retirement System v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), the Second Circuit held that while *American Pipe* tolling applies to the one-year statute of limitation, it does not apply to the three-year statute of repose. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974) (holding that filing of class action lawsuit suspends running of filing deadline for all class members).

Despite these limitations, a properly plead claim under section 12(a)(1), filed within the statutory period, stands a good chance of success. In the event of a judgment in favor of the plaintiff, a court may order either monetary damages or rescission of the sale. However, section 12(a)(1) also requires a victorious plaintiff to tender back the securities in question if he or she still holds them. Failure to do so is a viable defense.

Section 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2), does not apply to unregistered private placement offerings. However, as discussed below, some substantially equivalent state blue-sky statutes may apply.

**Section 10(b) of the Exchange Act, Rule 10b-5, and section 17(a) of the Securities Act.** In the event that either a plaintiff or the government is aggrieved by a fraudulent sale of securities, several options are available to them. Perhaps chief among them is a claim under Rule 10b-5, 17 C.F.R. § 240.10b-5, and section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act), 15 U.S.C. § 78j. Rule 10b-5 makes it unlawful
for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange:

- To employ any device, scheme, or artifice to defraud;
- To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

In other words, Rule 10b-5 prohibits the use of interstate commerce to perpetrate a fraud on any person in connection with the sale of securities, registered or otherwise.

Somewhat similar to Rule 10b-5 is section 17(a) of the Securities Act, 15 U.S.C. § 77q(a). Section 17(a) makes it unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

- to employ any device, scheme, or artifice to defraud, or
- to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Although it appears facially similar to Rule 10b-5, there are a number of differences between the two statutes. As an initial matter, under Rule 10b-5 there is a private cause of action for a private plaintiff. On the other hand, according to a majority of courts, section 17(a) does not allow a private cause of action. Compare Pfeffer v. Cressaty, 223 F. Supp. 756 (S.D.N.Y. 1963) (private cause of action allowed), and Frischling v. Priest Oil & Gas Corp., 524 F. Supp. 1107 (N.D. Ill. 1981) (same), with Crookham v. Crookham, 914 F.2d 1027 (8th Cir. 1990) (no private cause of action), and Currie v. Cayman Res. Corp., 835 F.2d 780 (11th Cir. 1988) (same). In addition, Rule 10b-5 requires proof of scienter for all three subsections. Section 17(a), on the other hand, only requires proof of scienter under section 17(a)(1); proof of negligence suffices under subsections (a)(2) and (a)(3). See Aaron v. SEC, 446 U.S. 680, 695–96 (1980).

Further, in Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011), the Supreme Court interpreted Rule 10b-5(b)’s prohibition against “mak[ing] any untrue
statement of a material fact” as extending only to those with “ultimate authority” over an alleged false statement. In contrast, some argue that liability under section 17(a)(2) may not be contingent on whether one has “made” a false statement. Instead, it may turn on whether one has obtained money or property “by means of” an untrue statement. The SEC has taken the position that section 17(a)(2) allows a defendant to be held primarily liable if he or she uses a misstatement to obtain money or property, even if the defendant personally has not made a false statement in connection with the offer or sale of a security. See Matter of John P. Flannery, Securities Act Release No. 33-9689 (Dec. 15, 2014), appeal docketed, No. 15-10820 (1st Cir. Jan. 16, 2015).

SEC enforcement and penalties. The SEC has a broad arsenal of tools available to it to combat fraudulent or unregistered offerings of securities. Under section 10(b), it can bring claims of aiding and abetting or conspiring to make such offerings, unlike private plaintiffs. Section 17(a) is also an important part of the SEC’s toolbox, largely for the reasons given above.

The SEC also has the power to impose substantial penalties for securities violations. Pursuant to section 8A of the Securities Act, 15 U.S.C. § 77h-1, it can enter a cease and desist order against any person it finds has violated, is violating, or is about to violate its rules. It may also impose a civil penalty if doing so would serve the public interest. See 15 U.S.C. §§ 77h-1(g) & 78u(d)(3).

State common laws and “blue sky” laws. In addition to the federal securities laws, every state has its own set of securities laws—commonly referred to as “blue sky laws”—that are designed to protect investors against fraudulent or misleading sales practices and activities in the offer and sale of securities to, from, or within their borders.

In Massachusetts, for example, the blue-sky law provision, Mass. Gen. Laws ch. 110A, § 410(a)(2), prohibits the offering or sale of securities through either a false statement or omission of information needed to prevent the offering from being misleading, where the buyer is unaware of the false statement or omission. The Massachusetts Supreme Judicial Court has drawn several plaintiff-friendly conclusions from General Laws Chapter 110A, section 410(a)(2). First, a plaintiff need not establish—or even plead—the elements of scienter or negligence in order to sustain a claim under section 410(a)(2). A plaintiff also does not need to prove that he or she relied on the alleged misrepresentation in deciding to purchase securities, and his or her status as a sophisticated investor (or lack thereof) is wholly irrelevant. See Marram v. Kobrick Offshore Fund, Ltd., 809 N.E.2d 1017 (Mass. 2004). To sustain a claim under the statute, a plaintiff need only establish a lack of knowledge of the misleading statement or omission. Of course, a plaintiff also must show that the statement or omission concerned a material fact, whether or not it was relied on. In general, the statement or omission must concern a fact—not an opinion or belief of the issuer—unless that opinion or belief is inconsistent with the facts surrounding the offering. Omnicare Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, No. 13-
435, 135 S. Ct. 1318 (2015). In addition, Chapter 110A, section 410(g) of the Massachusetts General Laws prohibits any waiver of compliance with any provision of the act. This limitation on the basic right to contract freely is consistent with the blue-sky laws in a number of other jurisdictions.

Beyond any applicable blue-sky laws, a number of other remedies may exist for aggrieved plaintiffs at the state level. For instance, a plaintiff can potentially bring a claim for the common-law torts of fraud or negligent misrepresentation, as well as for breach of fiduciary duty and breach of contract. A consumer protection claim may also be possible. For example, the Massachusetts consumer protection statute, Mass. Gen. Laws ch. 93A, § 2, prohibits unfair or deceptive practices in “trade or commerce.” Section 1 of Chapter 93A defines “trade” and “commerce” as including securities, giving rise to a state cause of action for relief from deceptive actions by a seller in the offering of securities.

Suits Against Attorneys
In addition to sellers and issuers, attorneys can be sued under many of the above-referenced statutes, especially by the SEC. Attorneys typically draft materials relating to all offerings of securities, including private placement offerings. Thus, if those materials are materially misleading, the preparing attorney can be sued under section 12(a)(1) or Rule 10b-5.

For example, the SEC instituted an administrative proceeding seeking a permanent bar against an attorney from practicing before the commission. Matter of Carl N. Duncan, Securities Exchange Act Release No. 34-68501 (Dec. 20, 2012). The SEC had also instituted a suit against the attorney in federal district court in which the SEC had alleged that the defendant attorney prepared and issued false legal opinions and letters in connection with a scheme to inflate trading volume in the common shares of a company’s stock, in violation of sections 5(a), 5(c), and 17(a)(2) of the Securities Act. The U.S. District Court for the Southern District of New York had entered a final judgment by consent against the attorney, permanently enjoining him from future violations of the 1933 Act. The court also

- prohibited the attorney from participating in the preparation or issuance of any opinion letter in connection with the offer or sale of securities pursuant to the Securities Act,
- permanently barred him from participating in an offering of penny stock, and
- required him to pay disgorgement and prejudgment interest thereon in the amount of $16,094.98 and a civil money penalty in the amount of $25,000.00.

Attorneys are also open to so-called gatekeeper exposure. See, e.g., Complaint, SEC v. Treaty Energy et al., No. 4:14-cv-812 (E.D. Tex. filed Dec. 15, 2014) (alleging violations of sections 5(a) and 5(c) of the Securities Act by the outside counsel for the defendant company for registration violations and aiding and abetting such violations; seeking a permanent injunction barring him from providing legal services to any person or entity in connection with the offer or
sale of securities exempt from registration or with filing Form S-8 with the SEC; also seeking civil penalties and disgorgement)

**Conclusion**
While private placement offerings are unregistered, certain aspects of both federal securities laws and state laws apply. Further, lawyers must be aware of potential personal exposure relating to their involvement in private placement offerings. Thus, when representing a potential plaintiff in connection with a claim arising out of an unregistered private placement investment, one should be aware of not only the possible claims that can be asserted but also the restrictions that some of these claims may encounter.

**Keywords:** litigation, securities, private placement offering, unregistered security, blue sky law, Securities and Exchange Commission, SEC

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FINRA Update: Public Arbitrator Limitations, Adjournment, Task Force, and More
By Joshua D. Jones

In the past year, the Financial Industry Regulatory Authority (FINRA) has been active in working to fulfill its mission to provide investor protection and promote market integrity. Practitioners will note a number of recent developments in the FINRA Codes of Arbitration Procedure as well as other updates and changes to rules and regulations affecting arbitration practice.

Limitations as to Who Can Serve as a Public Arbitrator

The revised definitions of a “non-public arbitrator” and a “public arbitrator” are to be set forth in amended Rules 12101(p)/13101(p) and 12101(u)/13101(u), respectively. No person can be classified as a public arbitrator who has ever worked for, or been associated with, or registered through (a) a broker or a dealer; (b) the Commodity Exchange Act or the Commodities Futures Trading Commission or a member of the National Futures Association or the Municipal Securities Rulemaking Board; (c) an entity that is organized under or registered pursuant to the Securities Exchange Act of 1934, Investment Company Act of 1940, or the Investment Advisers Act of 1940; (d) a mutual fund or a hedge fund; or (e) an investment adviser. The former rules allowed individuals who have been out of the industry for at least 5 years, but who may have worked in it as long as 20 years, to serve as public arbitrators.

In addition, professionals who have devoted 20 percent or more of their professional time to the representation of investors or the financial industry in any single calendar year during the last five years are to be classified as non-public arbitrators. Such professionals may be attorneys, accountants, and expert witnesses, among others. Previously, professionals whose firms had not derived 10 percent or more of their income over the past two years from the financial industry could serve as public arbitrators. Unlike those who worked directly in the industry, the professionals above are eligible to serve as public arbitrators after the 5-year “cooling off period” unless they have provided at least 15 calendar years of service to financial industry entities or to representing parties in disputes with such entities, in which case they can never serve as a public arbitrator.

The new rules also provide that individuals may not be deemed to be public arbitrators who have been employed by banks or financial institutions within the last five years and (a) effected transactions in securities, or (b) supervised or monitored employees’ compliance with securities

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and commodities laws. As with professionals, these bank employees may serve as public arbitrators after the passing of 5 years unless their employment totals 15 years or more.

The revised rules also prohibit a professional from serving as a public arbitrator if his or her firm has derived $50,000 or more, or at least 10 percent of its annual revenue, in any single calendar year during the last two years, from a broker-dealer, the other entities listed above in subsections (b) through (e), or from a financial institution that effects transactions in securities. This prohibition expires two years after the termination of the employment.

Finally, individuals whose immediate family member cannot serve as a public arbitrator are not to be classified as public arbitrators. This prohibition includes a two-year sunset provision.

As noted above, the SEC has approved the amendments, which await implementation by FINRA.

**Late Adjournment Fees**

On May 22, 2015, the SEC approved a proposed rule change (SEC Release No. 34-75036) to amend Rules 12214 and 12601 of the Customer Code and Rules 13214 and 13601 of the Industry Code to require that parties give additional notice before adjourning an arbitration hearing or risk being assessed a higher late cancellation fee if they fail to provide such notice. FINRA recommended the proposed rule changes in an effort to address arbitrator complaints regarding issues surrounding the late cancellation of scheduled hearings.

The amendments to Rule 12601(b)(2) and 13601(b)(2) increase from 3 business days to 10 calendar days the deadline by which parties should request adjournment of hearings to avoid a late cancellation fee. The amended rules also change the amount of honoraria paid to arbitrators for late cancellation of a hearing to equal that of a two-session hearing day, increasing the amount from $100 to $600 per arbitrator. In addition, the amendments make clear that the arbitrators have the authority (1) to allocate all or a portion of the cancellation fee to the non-requesting party if the arbitrators determine that the non-requesting party caused or contributed to the cancellation, or (2) waive the cancellation fee when appropriate.

**Updated Expungement Guidance**

FINRA provided expanded guidance on expungement to parties and arbitrators in December 2014 to specifically address cases in which the only relief requested is expungement. FINRA, Notice to Arbitrators and Parties on Expanded Expungement Guidance (updated Dec. 2014). In such cases, where the associated person has named the firm as a party but not the complaining customer, FINRA directed arbitrators to order the associated person to provide a copy of the statement of claim to the customer. FINRA did so in an effort to give customers the opportunity to state their position on the expungement request to both the panel and the parties.

This guidance follows a pronouncement in late 2013 in which FINRA described expungement of a complaint as “an extraordinary remedy that should only be recommended under appropriate circumstances” and further stressed the importance of the Central Registration Depository.
disclosures and noted that expungement is appropriate “only when [the information] has no meaningful investor protection or regulatory value.” In recognition of these issues, FINRA directed arbitrators to review a current copy of the registered representative’s BrokerCheck report when considering expungement, further explained the importance of providing a written explanation for the recommendation of expungement, and ordered arbitrators to determine and consider whether a settlement between the parties had been conditioned on an agreement not to oppose an expungement request. The later adoption of Rule 2081 flatly prohibited firms from conditioning settlement of a claim filed by a customer on an agreement by the customer to consent to, or not to oppose, an expungement request.

**Rule Additions Require Redaction of Confidential Information**

FINRA has amended the Codes of Arbitration Procedure for both customer and industry disputes in an effort to protect parties’ confidential information. Specifically, it added subsections (g)(1)–(3) to Rules 12300 and 13300 to require the redaction of an individual’s Social Security number, taxpayer identification number, or financial account number from any document that a party files with FINRA. Moving forward, documents filed with FINRA must be redacted to include only the last four digits of these numbers. The redactions are not required of documents exchanged by the parties or entered into the record during an arbitration hearing, nor do the amendments apply to simplified cases. Any filing received by FINRA containing a full Social Security, taxpayer identification, or financial account number will be found deficient under Rule 12307 or, depending upon the type of pleading filed, otherwise improper, and the offending party given 30 days to refile the document.

**Referral to FINRA Enforcement During Pendency of Case**

In December 2014, FINRA’s extended odyssey to amend Rule 12104 of the Customer Code and Rule 13104 of the Industry Code finally concluded with the adoption of modified amendments first proposed in July 2010 (SEC Release No. 34-62930 (Sept. 17, 2010)). The amendments allow arbitrators to refer matters to enforcement at any time during the pendency of a case. Once such a referral is made, the director of arbitration is then required to notify all parties to the arbitration of that fact. A party then has three days from such notification to request the recusal of the arbitrator or arbitrators who made the referral. The amendments are silent as to whether a party may move for removal of the arbitrator or arbitrators by the director if the recusal motion be denied.

Under the prior rules, an arbitrator was not authorized to refer a matter to enforcement until the case had concluded. The amendments were proposed by FINRA in an effort to address its concerns that delaying arbitrators’ ability to make referrals hampered FINRA’s ability to take action against problematic brokers and that such delays could result in additional harm to the investing public and limit the enforcement division’s ability to collect evidence. The adopted amendments differ from the original 2010 proposal in that the original proposal would have required the recusal of all arbitrators appointed to hear the case if any of the arbitrators made a mid-case referral. Objections were lodged as to the initial proposal based on concerns that the
withdrawal of the entire panel would prejudice the parties who would be required to re-litigate their case.

**FINRA Dispute Resolution Task Force**
Concluding a FINRA update with a brief discussion of the [FINRA Dispute Resolution Task Force](http://www.finra.org) seems appropriate. FINRA Dispute Resolution states on its website that it formed the “task force to consider possible enhancements to its arbitration and mediation forum” in furtherance of its commitment “to providing a fair, efficient, and economical forum to resolve disputes among investors, securities firms, and individual brokers.” The individuals who comprise the task force represent a broad spectrum of interests in securities dispute resolution and include ABA Securities Arbitration Subcommittee cochair [Sandra D. Grannum](http://www.finra.org) of Davidson & Grannum, LLP.

The task force has met in-person three times since its formation in July 2014 and has plans to meet again in October 2015. It has stated that it is open to examining “any issues that may affect the face of arbitration and mediation in the next 20 years and that no issue was off the table for discussion[,]” and has identified 11 broad topics for review and established numerous subcommittees to address them.

The task force seeks input from any interested party on any and all aspects of FINRA’s dispute resolution forum and related processes. FINRA staff maintains an email inbox ([DRTaskForce@finra.org](mailto:DRTaskForce@finra.org)) on its behalf. All correspondence with the task force via the mailbox on FINRA’s website will be kept confidential.

**Conclusion**
FINRA continues to work to provide a fair and efficient forum for dispute resolution to the investing public and its member firms. The changes discussed above reflect its efforts to adapt to constantly evolving litigation needs and to address concerns raised by members, investors and their counsel, and arbitrators. Next year’s update will likely be of great interest given the forthcoming recommendations of the task force. One can only assume that more changes are in store.

**Keywords:** litigation, securities, FINRA, Codes of Arbitration Procedure, public arbitrator, late adjournment, enforcement referral, task force

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Price Impact: The Battle of Experts and Burden of Proof after 
*Halliburton II*

By Jessie M. Gabriel

When the Supreme Court issued its decision in *Halliburton II* last December, it answered the question of whether a defendant may present evidence at the class certification stage that alleged misstatements did not impact the company’s stock price. The Court answered this question in the affirmative, but left open other questions regarding how lower courts should implement its holding. We are now getting our first glimpse at how district courts are resolving the questions left open by the Supreme Court. On remand, the Halliburton district court issued its first ruling in response to *Halliburton II*. The Erica P. John Fund, Inc. v. Halliburton Co., No. 3:02-CV-1152-M, 2015 WL 4522863 (N.D. Tex. July 25, 2015).

After considering detailed testimony by both parties’ experts, and placing the burden on Halliburton to prove a lack of price impact, the district court certified a class as to one of the six misstatements alleged by the plaintiff.

A Fraud-on-the-Market Refresher

Before reviewing the specific questions addressed by the *Halliburton* district court, it is important to recall the doctrine that underlies this issue: the fraud-on-the-market presumption. One required element of a securities fraud claim under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 is that a plaintiff must show that she relied on the statement by the company that she claims was incorrect or misleading when she made her decision to buy or sell the company’s stock. If that same plaintiff wishes to represent a class of investors, she must show that the reliance determination can be made on a class-wide basis.

Enter the Supreme Court’s holding in *Basic v. Levinson*, 485 U.S. 224 (1988), that reliance could be presumed as long as the company’s stock traded in an efficient market. In an efficient market, the Court reasoned, all material and public information is incorporated into the stock price. Thus, when an investor decides to buy or sell, he does so in reliance on the integrity of the stock price and the information incorporated therein. In this way, reliance can be determined on a class-wide basis rather than by requiring each individual plaintiff to prove how he or she specifically relied on the misstatements when making investment decisions. Without the fraud-on-the-market presumption, securities fraud claims could not be brought as class actions because the reliance inquiry would always require an individualized determination.

Halliburton argued before the Supreme Court that *Basic* should overturned. But only three justices—Chief Justice Roberts and Justices Scalia and Thomas—voted to overrule the 26-year-old precedent. The practical impact of *Halliburton II* lay instead in its second holding regarding whether the fraud-on-the-market presumption can be rebutted at the class certification stage. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).
Rebutting the Presumption before a Class Is Certified

The fraud-on-the-market doctrine is only a presumption. If certain requirements are met, class-wide reliance can be presumed. That presumption is, however, rebuttable. In Basic, the Court acknowledged that if the link between the statement and the stock price is severed, the presumption is no longer valid. But in the securities class action context, there is always a second question: should an issue be addressed during the class certification phase or on the merits? Rebutting the presumption is a much more powerful tool for defendants if they can raise it at the class certification stage rather than having to wait until summary judgment. This was the question in Halliburton II.

The Supreme Court held that securities class action defendants could rebut the fraud-on-the-market presumption of reliance in opposition to class certification. If defendants could sever the link by showing that the statement did not impact the stock price, the presumption would not apply, reliance would be individualized, and a class could not be certified. On this point, the Court was clear. What the Court did not explain was who had the burden: the plaintiff to prove the price was impacted or the defendant to disprove price impact? Without addressing this issue, the Court remanded the case to the district court.

District Court Considers Dueling Experts and Places the Burden of Proof on Defendants

On remand, the district court considered experts from both parties on the question of whether the alleged misstatements impacted the price of Halliburton’s stock. Halliburton’s expert, Lucy Allen, conducted event studies on the 35 dates on which there were either alleged misstatements or corrective disclosures. She found no price impact as to any of the alleged misstatements. The plaintiff fund relied on two experts—Jane Nettesheim and Chad Coffman—who concluded that six alleged misstatements impacted the stock price. The court conducted a detailed analysis of the experts’ reports and testimony, including their respective positions as to the correct control group and the application of the “multiple comparison adjustment.” Following this review, the court concluded that only one of the six misstatements alleged by the fund impacted price, and so it certified a class as to that statement only. While the court closely considered each expert’s opinion, the court’s decision ultimately depended on who had the burden.

Before addressing the merits of the experts’ opinions, Judge Lynn had to determine who had the burden of proving or disproving price impact. After acknowledging that the Supreme Court had not expressly decided the issue, Judge Lynn looked to the concurrence of Justices Ginsburg, Sotomayor, and Breyer. The concurrence indicated that the Supreme Court’s holding in Halliburton II would not have a dramatic impact on securities fraud plaintiffs because “it is incumbent upon the defendant to show the absence of price impact.” Relying on this language, and on a concern that placing the burden on plaintiffs would make it too easy for defendants to defeat class certification, the district court held that both the burden of production and the burden of persuasion resided with Halliburton. This placed Judge Lynn’s decision in line with three decisions from two other districts on the same issue. See Aranaz v. Catalyst Pharm. Partners, Inc., 302 F.R.D. 657, 673 (S.D. Fla. 2014); McIntire v. China MediaExpress Holdings, Inc., 38
Are We Headed to Halliburton III?
While the holding in Halliburton II regarding price impact was initially heralded as a win for securities class action defendants, placing the burden on the defendants to disprove price impact significantly limits that advantage. While defendants will have the opportunity to present expert testimony at the class certification phase, the benefit of the doubt will go to plaintiffs. Where a court is considering dueling expert opinions on highly technical matters—event studies, control groups, and multiple comparison adjustments—that benefit is considerable. While the district courts have so far been consistent in their holdings, there is not yet any binding authority on the subject. Soon enough the issue will make its way up to the court of appeals and, eventually, the Supreme Court may have to decide whether it is interested in issuing a third Halliburton decision.

**Keywords:** litigation, securities, Halliburton, price impact, burden of proof

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Supreme Court to Consider Scope of Federal Jurisdiction over Securities Claims

On June 30, 2015, the U.S. Supreme Court granted a petition for a writ of certiorari filed by Merrill Lynch and other financial institutions seeking to appeal a Third Circuit decision that held a shareholder lawsuit asserting state-law claims regarding alleged short selling should be remanded to state court.

The question presented by the certiorari petition is whether section 27 of the Securities and Exchange Act of 1934, which grants federal courts "exclusive jurisdiction" over violations of the Act or its regulations and all suits "brought to enforce any liability or duty created by" the Act or its regulations, "provides federal jurisdiction over state-law claims seeking to establish liability based on violations of the Act or its regulations or seeking to enforce duties created by the Act or its regulations." The petition highlighted a split between the Fifth and Ninth Circuits, which have held that section 27 creates such jurisdiction, and the Second and Third Circuits, which have held that section 27 merely strips state courts of jurisdiction where there is an independent basis for federal jurisdiction.

The case was brought by shareholders of Escala Group, Inc. who allege that defendants engaged in short selling of Escala stock in violation of SEC Regulation SHO, which governs short sales of equity securities. Plaintiffs assert various state law causes of action, including common law claims and claims under New Jersey's RICO statute based on predicate acts of state law securities fraud and theft. The case was filed in New Jersey Superior Court, but was removed to the District of New Jersey. The district court denied plaintiffs’ motion to remand and certified the question of whether remand was appropriate to the Third Circuit.

The Third Circuit was squarely presented with the question of whether section 27 provided an independent basis for federal question jurisdiction because it first held that plaintiffs’ claims did not fall under section 1331, which gives district courts original jurisdiction over disputes "arising under" federal law. Recognizing that other circuits had reached disparate conclusions, the Third Circuit reversed the district court and held that "§ 27 is coextensive with § 1331 for purposes of establishing subject-matter jurisdiction."

—Mollie Kornreich, Skadden Arps, New York, NY
Second Circuit Rules in **Cohen v. UBS Financial Services**

On June 30, 2015, the United States Court of Appeals for the Second Circuit held that rule 13204 of the FINRA Code of Arbitration Procedures does not prevent member firms from enforcing otherwise sound arbitration agreements and class/collective action waivers. In **Cohen v. UBS Financial Services, Inc., (Docket No. 14-781-cv)**, the plaintiff, a UBS financial advisor, filed a putative collective action under the Fair Labor Standards Act (FLSA) in federal court, seeking unpaid overtime compensation on behalf of himself and other UBS brokers. UBS moved to stay the federal court litigation and compel arbitration of Cohen’s individual claims based on Cohen’s pre-dispute employment agreement that (1) required him to arbitrate any FLSA claims and (2) waived his right to file or participate in any actual or putative class or collective actions relating to his employment. The district court granted UBS’s motion and ordered Cohen to arbitrate his individual claims.

On appeal, Cohen acknowledged that he signed his employment agreement containing these arbitration and class waiver provisions, but argued that FINRA’s rule 13204 prohibited arbitration of his claims. Rule 13204 provides that "a member or associated person may not enforce an agreement to arbitrate in [FINRA] against a member of a certified or putative collective action with respect to any claim that is subject to the certified or putative collective action until the collective action certification is denied or the collective action has been certified." In essence, Cohen argued that by filing a putative collective action in federal court (a right he waived in his employment agreement), rule 13204 barred arbitration of his claims while his putative collective action remained viable (i.e., the court had not denied a motion for conditional certification and had not decertified any conditionally certified collective group).

The Second Circuit rejected Cohen’s argument, finding that rule 13204 "says nothing about class action waivers, and cannot be read to bar enforcement of them." The court further held that Cohen could not use the collective action he filed in federal court (in direct contravention to his employment agreement) as a shield to bar the arbitration of his individual claims. Accordingly, the appellate court affirmed the district court’s order requiring Cohen to arbitrate his individual claims.

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