

Securities, Financial and Directors & Officers Litigation

Practice Overview





Seyfarth Shaw LLP

Capabilities

Our Securities, Financial and Directors & Officers Litigation Practice Group attorneys help companies and individuals faced with claims involving complex liability, damages and disclosure issues in securities and financial disputes. Attorneys in the group have represented companies and their officers and directors in private class actions alleging violations of state and federal securities laws, defended accounting and securities firms charged with securities fraud, represented individuals in connection with allegations of insider trading and defended officers and directors in derivative and class actions alleging breaches of fiduciary duty. The services we provide focus both on avoiding litigation and aggressively responding when litigation ensues.

The majority of civil suits are brought by plaintiffs' firms that rely upon a stable of "go-to" stockholders to serve as "class representatives."

Industry Issues

The Sarbanes-Oxley Act of 2002, rapid changes in technology, and an increasingly aggressive and sophisticated Securities and Exchange Commission (SEC), state regulators, and plaintiffs' bar have reshaped the rules and risks facing public companies and their officers and directors. Since then, the Madoff scandal and other market crises have led directly to a dramatic increase in the resources available to the SEC and other securities enforcement agencies and a concurrent higher cost to companies attempting to comply with the new regulations. These new risks include significant criminal and civil penalties for violations of highly complex disclosure, governance and compliance rules. While these changes have not dramatically increased the overall number of cases being brought, they have increased the cost and risk associated with disposing of or trying a given case.

Electronic access to information enables the SEC, other regulators, and private parties to rapidly gather and inspect public company filings and monitor analyst calls and reports. Specific regulatory and litigation risks are quickly elevated when certain triggering events occur, such as:

- Issuance of a restatement of earnings
- Trading by insiders
- Failure to meet previously announced projections
- Evidence of market timing
- Inadequate disclosure
- Failure to comply with the technical aspects of Sarbanes-Oxley
- "Whistle-blower" claims or other allegations of misconduct

Accounting improprieties, and even simple inadvertent errors, are under special scrutiny, particularly when the overall financial or earnings results are less than projected. The majority of civil suits are brought by plaintiffs' firms that rely upon a stable of "go-to" stockholders—increasingly, institutional holders—to serve as "class" representatives. In this post-Enron/WorldCom environment, it has become much more

SUCCESS FOR OUR CLIENTS

A defendant director was the subject of a shareholder derivative litigation, alleging breach of fiduciary duty and corporate waste against all directors in connection with a transaction that plaintiffs contended was grossly unfair to shareholders. The minority shareholders sought in excess of \$60 million in damages. Our Securities and Financial Litigation attorneys:

- ▶ Negotiated early agreements for indemnification for the client
- ▶ Advised the client on recusal from certain board proceedings
- ▶ Narrowed the scope of discovery for purposes of framing issues for summary judgment

Result: We successfully obtained summary judgment, which dismissed the client after limited discovery. The decision was affirmed by the California Court of Appeal following the plaintiff's appeal.

We represented a pharmaceutical company in a multi-year SEC investigation involving alleged disclosure issues in connection with a secondary offering. Our Securities and Financial Litigation team:

- ▶ Worked cooperatively with the SEC in providing documents and testimony
- ▶ Met and negotiated extensively with the staff to demonstrate why the voluminous record did not support any finding of wrongdoing

Result: We successfully persuaded the SEC to close the investigation with no further action and to confirm the closure of the matter in writing.

difficult to dismiss these cases as “frivolous” because plaintiffs are more diligent in choosing their cases, and the level of available information leads to more specific allegations, thus allowing plaintiffs to often move beyond the initial dismissal stage, and into discovery.

Avoiding Litigation

Formulate appropriate response and strategy during investigations. We help clients gather and frame responsive material when they receive investigatory notices from the SEC, FINRA, DOJ, state Attorneys General or other investigatory agencies. We advocate and negotiate for no-sanction or reduced-sanction recommendations from the SEC and other regulatory agencies whenever possible.

Audit and compliance protocols. To reduce liability risk, we help ensure that the internal policies of our clients are in place and up-to-date. We draft and review internal procedures and protocols to ensure compliance with Sarbanes-Oxley, the “adequate supervision” provisions of the ‘34 Act, corporate controls, insider trading rules, and any other regulatory guidelines. We advise officers and directors regarding fiduciary duty and other corporate governance issues. We assist in risk assessments, audits and the development of liability avoidance programs.

Minimize exposure. When a disclosable investigation does occur, we work with our clients to draft press releases and create talking points for the analysts’ call to maintain a consistent message. Our practice group includes former members of both the enforcement division of the SEC and federal and state prosecutors’ offices, whose combined experience in handling securities and financial fraud investigations, insider trading, and other securities issues has led us to develop practical strategies to avoid or minimize a client’s exposure once a problem develops, and in navigating the bureaucratic agencies involved.

Work with our clients. We meet our clients’ needs regarding negotiation strategies, cost-benefit analyses and development of the right solution under their respective business environment.

When Litigation Ensues

Move to dismiss or significantly truncate the cases at the outset. Typically, securities cases involve broad allegations of wrongdoing by the corporation, its officers, and/or its board. The allegations are often groundless, inapplicable to all named parties, or unable to meet the heightened pleading requirements of the Private Securities Litigation Reform Act. We have been

RESPONDING TO SEC INVESTIGATIONS AND CLASS ACTION LITIGATION

A business integration software manufacturer and certain of its directors and officers were sued in over 12 class action lawsuits filed by shareholders and were subject to an SEC investigation in the wake of a restatement of earnings over multiple quarters. Our attorneys worked diligently to respond to the client’s needs by:

- ▶ Conducting a full internal investigation over a seven-day period and providing recommended corrective action to the board
- ▶ Voluntarily submitting materials to the SEC and cooperating in full with the SEC’s investigation
- ▶ Filing aggressive motions to dismiss the private class actions, which led to early successful settlement negotiations

Result: The resolution of the class action lawsuit did not require any financial contribution from the company or individual defendants. The SEC investigation resulted in a books and records administrative cease-and-desist order against the company, which was the lowest sanction available.

DEFENDING DIRECTORS IN SHAREHOLDER SUITS

A company and its directors were sued in an action brought by former shareholders alleging breach of fiduciary duty and unfair price in connection with the company's acquisition. We were able to act swiftly and file:

- ▶ Aggressive motions to dismiss the company on Rule 23.1 grounds
- ▶ Aggressive motions to dismiss the directors on personal jurisdiction/venue grounds

Result: We obtained dismissal, prior to discovery, of the company and several defendants, including a successful writ petition to the California Court of Appeal. We also obtained a stipulation of voluntary dismissal of the balance of defendants, with prejudice, with no payment of any kind to the plaintiffs.

A company and certain directors were sued in an action brought by a class of shareholders alleging breach of fiduciary duty in connection with a "going private" transaction and the price agreed upon with the buyout group. We were able to:

- ▶ File fast motions to dismiss on Rule 12 (b)(6) grounds
- ▶ Take a fast and aggressive settlement position to enable the deal to close

Result: We negotiated an early settlement of the dispute, with no money of any kind paid to the proposed class, by showing the class counsel that the record overwhelmingly established that the deal price was fair.





successful in many instances in obtaining the dismissal of claims filed against our clients.

Attack class certification. Courts have become increasingly focused on class certification and the merits of the class representatives who are being proposed by the plaintiffs' bar in securities cases. We look for any and all angles to challenge the adequacy of the proposed class representative(s) and/or the appropriateness of the proposed class. We have succeeded in defeating class certification or significantly narrowing the scope of the class.

Experienced advocates in the courtroom. We have a long track record of resolving securities litigation prior to trial. When necessary, however, we can and do try cases to successful conclusion for our clients. Our goal is to seek the best result for our clients, and if that involves trying a case, we are fully prepared to move forward with seasoned, deeply talented securities litigators.

SECTION 10(B) LITIGATION

A leading drug manufacturer and certain of its directors and officers were sued in a consolidated class action, alleging violations of Section 10(b) of the '34 Act and Rule 10b-5 arising out of the announced recall and alleged resulting deaths related to two of the company's products. Members of our Securities and Financial Litigation Practice Group:

- ▶ Coordinated with separate counsel on the product liability cases around the country and counsel handling a grand jury investigation
- ▶ Filed aggressive, early motions to dismiss

Result: We obtained dismissal of 28 out of the 29 alleged misstatements. The remainder of the case settled for a small fraction of the potential exposure, solely with insurance proceeds, and early in discovery.

Benefit to You

Our Securities and Financial Litigation Practice Group provides the comprehensive legal advice and service that companies and individuals need to minimize risk, reduce negative exposure and cut down costs associated with securities litigation. Seyfarth Shaw professionals also provide clients with:

- **Personal Attention:** Each client receives extraordinary response from every member of the litigation team. The engagement partner stays

actively involved in the case from start to finish and beyond as the client relationship develops.

- **Reduced Risk:** Uncovering the problems and pitfalls that can trigger or exacerbate investigations or class action lawsuits and provide practical strategies for avoiding exposure.
- **Mitigated Damages:** Reduce or eliminate potential sanctions imposed by regulatory agencies and maximize the chances of a case being dismissed.
- **Efficiency and Value:** Fair fee structures and proven effective case management techniques to drive the right result without exorbitant fees. ■

About Seyfarth Shaw

Seyfarth Shaw LLP (“Seyfarth”) was founded in 1945 by three lawyers and has grown to more than 850 lawyers across 13 markets in the U.S. and abroad. We handle issues for our clients in all key areas including labor and employment, litigation, construction, corporate, employee benefits, environmental, government contracts, intellectual property, commercial litigation, real estate, securities litigation, trade secrets, trusts and estates, and workouts and bankruptcy, among others.

Our success is the result of a constant, unrelenting focus on the needs of our clients. Our commitment to excellence and our belief in the strength of a team-based approach to the delivery of our services offers an atmosphere of creative and innovative thinking.

Our clients are our partners in business and we are committed to listening to their needs and to aligning the skills and abilities of our people to respond to those needs. Our clients range from *Fortune* 100 to midsize companies, and include publicly traded and privately held companies and various types of funds. We represent clients of all sizes across all industries and we are diligent in providing the same level of commitment to each client.



Atlanta

Boston

Chicago

Hong Kong

Houston

London

Los Angeles

Melbourne

New York

Sacramento

San Francisco

Shanghai

Sydney

Washington, D.C.

"Seyfarth Shaw" refers to Seyfarth Shaw LLP. Our London office operates as Seyfarth Shaw (UK) LLP, an affiliate of Seyfarth Shaw LLP. Seyfarth Shaw (UK) LLP is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with registered number 556927. Legal services provided by our Australian practice are provided by the Australian legal practitioner partners and employees of Seyfarth Shaw Australia, an Australian partnership. Our Hong Kong office "Seyfarth Shaw," a registered foreign law firm, is a Hong Kong sole proprietorship and is legally distinct and independent from Seyfarth Shaw LLP, an Illinois limited liability partnership, and its other offices.