

הכנס השנתי השני לתובענות ייצוגיות

Defending Securities Class Actions in The United States

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SECURITIES CLASS ACTIONS IN USA

- Cases mostly governed by federal law alleging misstatements or omissions in public filings, press releases and/or investor conference calls.
- Cases mostly governed by state law for breaches of fiduciary duty alleging either mismanagement or in connection with major corporate transactions (especially mergers and acquisitions).
- Also related are shareholder derivative cases brought by a shareholder purportedly on behalf of the company.



FEDERAL SECURITIES CLASS ACTIONS

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OVERVIEW OF FEDERAL SECURITIES CLASS ACTIONS

- Securities Act of 1933
 - Misleading statements only in registration statement/prospectus in connection with initial or follow on offerings of securities.
 - Plaintiff must have purchased in offering or can trace the securities purchased to the offering.
 - Strict liability for company and negligence standard for directors and officers.

OVERVIEW OF FEDERAL SECURITIES CLASS ACTIONS

- Securities Exchange Act of 1934
 - Rule 10b-5:
 - It shall be 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, [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading.
 - Misleading public statements.
 - No explicit private right of action.
 - ❖ Implied private right of action first recognized in 1946 by a district court.
 - ❖ Supreme Court acknowledged implied private right of action in 1971 decision in *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*

OVERVIEW OF FEDERAL SECURITIES CLASS ACTIONS

- Securities Exchange Act of 1934 (cont'd).
 - Rule 10b-5 (cont'd).
 - Reliance
 - ❖ Traditional rule was that each plaintiff had to show that he relied on the misrepresentation which effectively limited class actions because individualized questions of reliance would predominate over common questions.
 - ❖ Fraud on the market theory adopted by Supreme Court in *Basic, Inc. v. Levinson* in 1988 (though had been in application in lower courts earlier) overcame this hurdle.
 - The market price of shares traded on a well-developed markets reflects all publicly available information, and, hence, any material misrepresentation.
 - Because the market transmits information to the investor in the processed form of a market price, we can assume that an investor relies on public statements whenever he buys or sells stock at the price set by the market.
 - Rebuttable presumption.

PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

- Background.
- Lead plaintiff provisions to stop race to the courthouse.
 - Encourage large investors to serve as lead plaintiff to ensure that shareholders and not lawyers controlled litigation.
 - Presumptive limit on number of times person could serve as a lead plaintiff (5 times in 3 year period).
- Safe harbor for forward-looking statements so that companies could issue projections with less risk of suit if projections did not come true.
- Higher pleading standards on falsity and scienter (intent) so that some assurance that shareholders have a basis for their claim.
- No discovery until court decided that plaintiffs have some basis for their claim.
- Allocation of damages between defendants based on relative fault.
- Settlements must be filed publicly and notice of settlement (including plaintiffs' attorneys fees) provided to the class.

KEY MERITS DEFENSES DEVELOPED

- Falsity.
 - No duty to disclose.
 - Statement must be false or misleading and not just incomplete.
 - Statement cannot be a vague statement of optimism (“puffery”).
 - Bespeaks caution/risk disclosures.
 - Truth on the market.

KEY MERITS DEFENSES DEVELOPED

- Scienter (Intent).
 - No motive.
 - No stock sales, public offerings, etc. or such sales, offerings are consistent with prior practice.
 - Knowledge of one person cannot be imputed to another person.
 - Knowledge by lower level employee cannot be imputed to company.
 - Complicated accounting issues cannot be understood by persons not trained in accounting.
 - Technical accounting violations generally not the product of fraud.
 - Reliance on experts (lawyers/accountants/others).

KEY MERITS DEFENSES DEVELOPED

- Loss causation.
 - Stock price must have fallen based on disclosure of truth concerning the misrepresentation.
 - Stock fall based on market factors, industry factors or other non-fraud related issues for the company cannot be recovered in lawsuit for securities fraud.
 - ❖ Often requires expert testimony analyzing stock price movements and reasons for such movements.
 - Event studies to isolate company specific stock price movements.

KEY CLASS DEFENSES

- Adequacy/typicality of class representative.
 - Conflicts with other class members.
 - Prior knowledge of misrepresentations not shared by other class members.
 - Lack of knowledge concerning the case.
 - Unique defenses applicable to class representative.
 - Prior bad acts.
 - Professional plaintiff.
- Rebut fraud on the market presumption.
 - Class representative did not rely on the market price.
 - Lack of materiality of alleged misrepresentations.
 - Lack of price impact of the alleged misrepresentations.

OUTCOMES

- Approximately 35% of cases are dismissed.
- Approximately 60% of cases are settled.
 - Median settlement value since 1995 is approximately \$7 million.
 - Median has been going up until 2011 when it has dropped again.
 - Average settlement value since 1995 is much higher (\$54 million) because of certain big settlements.
 - Largest ever \$7.2 billion in Enron.
- Very few securities class actions go to trial.
 - Only 29 since 1995 with 22 reaching some verdict.
 - 10 defendant wins; 7 plaintiff wins; 5 mixed.



SECURITIES CLASS ACTIONS CHALLENGING M&A TRANSACTIONS

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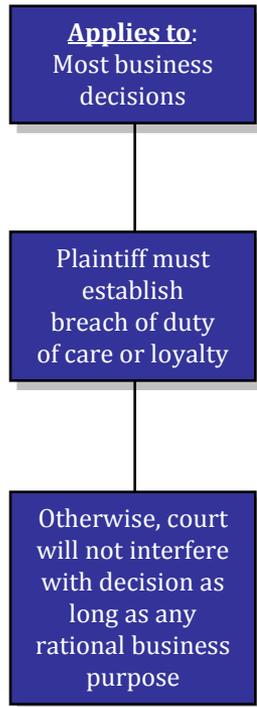
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OVERVIEW OF SECURITIES CLASS ACTIONS CHALLENGING TRANSACTIONS

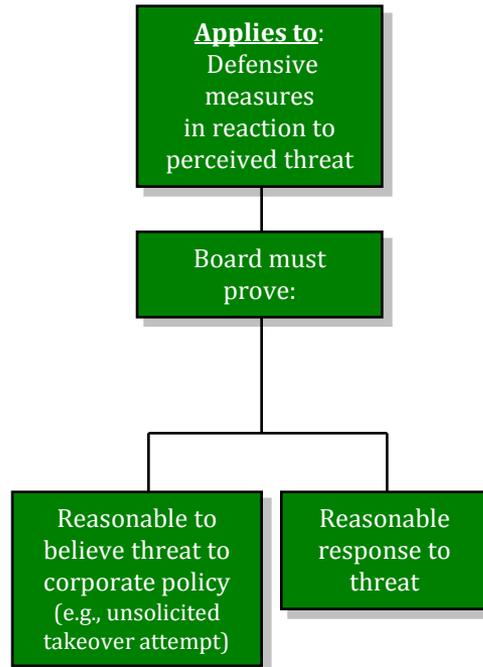
- Governed by law of state where target is incorporated.
 - Usually Delaware.
- Increasing frequency of these cases in U.S.
 - Nearly every merger involving a public target becomes subject to litigation.
 - Many times lawsuits are brought in multiple jurisdictions (Delaware and the state where company has principal place of business).
- Shareholders challenge the price, process and disclosures.

OVERVIEW OF LAW GOVERNING MERGER LITIGATION

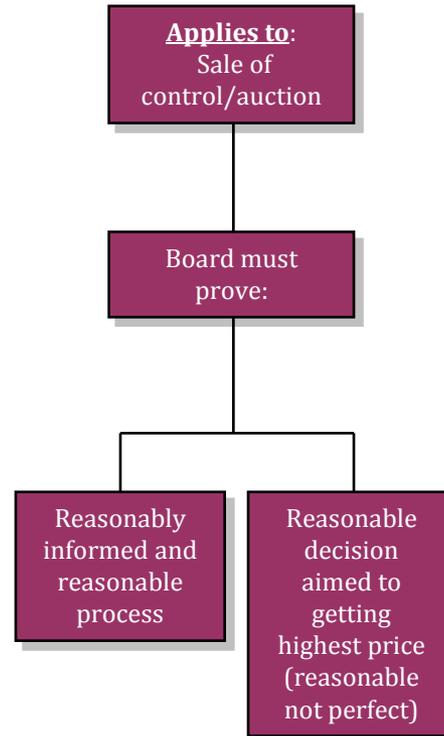
Business Judgment Rule



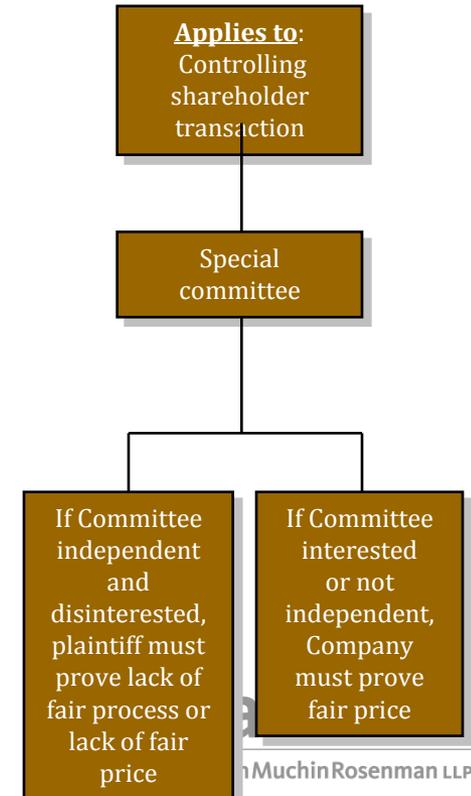
Unocal



Revlon



Entire Fairness



OUTCOMES

- Most cases settle with some additional insignificant disclosures and agreement by defendants not to oppose plaintiffs request for attorney fee.
 - Median fee is approximately \$400,000.
- Delaware courts efforts to put an end to these kinds of settlements has increased frequency of cases being filed outside Delaware.



SHAREHOLDER DERIVATIVE CASES

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OVERVIEW OF SHAREHOLDER DERIVATIVE CASES

- Case brought by stockholder purportedly on company's behalf.
 - Claims belong to the company.
 - Claims governed by the law of the state where company incorporated.
 - Usually Delaware.
- Stockholder supposed to make demand on company before initiating lawsuit except under very limited circumstances.

KEY DEFENSE IN MOST CASES: PLAINTIFFS' FAILURE TO MAKE DEMAND

- Plaintiff must either make demand on board or allege that demand would have been futile.
 - If plaintiff challenges a particular board action, plaintiff must allege facts creating a reasonable doubt that majority of the board is disinterested and independent or that the particular board action challenged was not the product of a valid exercise of business judgment.
 - If plaintiff challenges board lack of action on something, plaintiff must allege particularized facts creating a reasonable doubt that the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.
 - Basically plaintiff must allege that a majority of the board was interested in decision whether to pursue claims or not independent from directors who are interested.

KEY DEFENSE IN MOST CASES: PLAINTIFFS' FAILURE TO MAKE DEMAND

- Disinterested.
 - Directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.
- Independent.
 - Director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences.

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