OCBJ.COM

ORANGE COUNTY BUSINESS JOURNAL

Vol. 40, No. 42 — THE COMMUNITY OF BUSINESS™ — October 16-22, 2017 • $1.50

KA
Keller/Anderle LLP
BUSINESS TRIAL LAWYERS

The Waning Days of Sunshine in the Securities Class Action Plaintiffs' Paradise

by Jennifer Keller, Founding Partner & Jesse Gessin, Senior Counsel, Keller/Anderle

Every public company's general counsel should know that California courts, rather than their federal brethren, are paradise for securities class action plaintiffs. The number of securities class actions alleging violations of the Securities Act of 1933 ("the '33 Act") filed in California state courts has skyrocketed in the last four years – an astronomical increase of fourteen hundred percent.

Federal Legislation Aimed to Curb Abusive Securities Class Actions
For a time, abusive state court class action filings were stymied by two federal statutes: the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). While the PSLRA implemented substantive changes related to pleading, discovery, liability, class representation and fee awards, the goal of the SLUSA was to preclude '33 Act cases with fewer than fifty class members from being filed in state courts. These cases are called "covered" class actions. After the SLUSA, removal of covered class action securities cases to federal court became the norm. Yet once in federal court, parties continued to fight over remand to state court. The rub is that the federal courts have ruled unevenly on whether the state courts had subject matter jurisdiction in the first place.

After a Decade-Long Decline, California State '33 Act Class Actions Have Returned
Then came the California Court of Appeal decision in Luther v. Countrywide Financial Corp., 195 Cal. App. 4th 789 (2011). Luther was a game-changing decision for securities-focused plaintiff attorneys. Luther held that state courts have concurrent jurisdiction over some covered class action claims filed under the '33 Act. The California Supreme Court and the United States Supreme Court declined to review Luther, which opened the floodgates. The numbers are telling. In the twelve years before Luther, class action claims alleging a violation of the '33 Act were filed in California state court an average of once every two years. After Luther, the average number of filings increased to more than seven cases annually, including eighteen filed in 2016 alone.

The United States Supreme Court May End '33 Act Class Actions in State Court
This fall the United States Supreme Court will hear Cyan, Inc. v. Beaver County Employees Retirement Fund, Case No. 15-1439 (May 24, 2016). Cyan could be the state court "sunset" for the plaintiff securities bar. In Cyan, the Supreme Court will squarely address whether state courts lack subject matter jurisdiction over covered class actions. The case was brought after Cyan, a networking hardware company, issued an IPO in May 2013. After weaker-than-expected financial results, shareholders filed a class action in California state court alleging Cyan made misrepresentations in violation of the '33 Act. Instead of removing the case to federal court, Cyan defended on the basis the state court lacked subject matter jurisdiction - and lost every step of the way, including its interlocutory appeal to the California Supreme Court. Given the United States Supreme Court's denial of review in Luther a mere six years ago, it was a surprise when that court granted certiorari on the interlocutory appeal. Perhaps the Supreme Court was swayed by the nearly dozen amici curiae briefs filed in support of Cyan.

Why Cyan Should Matter to General Counsel
Every general counsel in a securities-issuing company should pay close attention to Cyan. The increased litigation of federal securities laws in state courts has raised serious problems for general counsel. First, companies are forced to defend class actions simultaneously in state and federal courts, exponentially increasing litigation costs far above what would be incurred in a consolidated federal case. General counsel have to retain state-by-state specialists who can defend actions in each jurisdiction, as opposed to hiring a seasoned federal practitioner to defend one action nationally. In Cyan, a group of law professors filed an amicus brief highlighting a series of California decisions that reached different conclusions than federal courts on the same allegedly misleading statements, which is a frightening scenario for any general counsel. The law professors also recognize how the piecemeal litigation and conflicting rulings among state and federal courts breed forum shopping. General counsel must continuously monitor case law developments across 50 jurisdictions, and hire outside counsel in states where courts are more permissive, as in California. Fractured securities litigation is not just a nightmare for general counsel; it also defies congressional intent to create a predictable, uniform securities class action landscape.

Second, this lack of uniformity in the law makes it difficult to accurately assess settlement value in these actions. An amicus brief filed in Cyan by the former Commissioners of the U.S. Securities and Exchange Commission spotlights this problem, arguing that a lack of certainty and predictability in the application of securities laws leads to speculative claims, protracted litigation, and resolutions of little predictive value. The plaintiffs' bar is well aware of this issue. According to the law professors, simultaneous actions have resulted in California state court settlements that are nearly twice as large as those in federal courts.

Third, if the class action abuse continues, general counsel may have to confront larger economic problems. The New York Stock Exchange, LLC filed an amicus brief contending that the serious litigation risks presented by the current situation will harm U.S. equity markets and the economy as a whole. General counsel for start-ups may face these looming issues as their companies hesitate to seek new financing through public offerings, for fear of later IPO class action litigation on multiple fronts.

Our Prediction Is a Sunset for '33 Act Class Actions
We foresee the Supreme Court's putting a stop to concurrent jurisdiction on significant '33 Act cases. The current make-up of the Supreme Court is friendlier to business than any court since the 1940s. The grant of certiorari on an interlocutory appeal, a rare event, foreshadows a pro-business result. But perhaps the strongest indicator of Supreme Court intent is the fact that Luther was denied certiorari only six years ago. While oral arguments are not yet scheduled, by next summer, general counsel should be welcoming good news in the Golden State and beyond.

Jennifer L. Keller

Jennifer L. Keller, one of Keller/Anderle's founding partners, is among California's premier trial attorneys. Her practice focuses on high-stakes commercial, intellectual property, white collar criminal and securities litigation. She has received innumerable awards for excellence as a trial lawyer, including: "The Best Lawyers in America®;" The Lawdragon 500 Leading Lawyers in America; Benchmark Litigation's "Top 100 Trial Lawyers;" and 10 times on the Los Angeles Daily Journal's "California's Top 100 Lawyers." Ms. Keller is fellow of the invitation-only American College of Trial Lawyers, widely considered the most significant honor a trial attorney in North America can receive. Contact her at 949.476.8700 or jkeller@kelleranderle.com.

Jesse Gessin

Jesse Gessin, senior counsel, is a highly accomplished trial lawyer. He has tried 25 federal jury trials to verdict as lead or co-lead counsel. His areas of practice include complex commercial litigation, appellate litigation and white collar criminal defense. As a deputy federal public defender, Jesse won fourteen jury trials through acquittal, dismissal, hung jury or reversal on appeal. Jesse's appellate experience has included drafting and arguing over 15 cases to the Court of Appeals, with impressive results. Jesse also teaches trial advocacy at the University of California Irvine School of Law, and has lectured on trial strategy and techniques throughout the United States. Contact him at 949.476.8700 or jgessin@kelleranderle.com.