

Second and Ninth Circuits Weigh in on Securities Litigation Standards

February 8, 2018 | Client Update | 2-minute read

On January 31, 2018, the United States Court of Appeals for the Ninth Circuit issued an opinion in [*Mineworker' Pension Scheme v. First Solar Inc.*](#), No. 15-17282 (9th Cir. Jan. 31, 2018). In its Per Curiam opinion, the court considered a question certified by the district court on interlocutory appeal as to the correct test for establishing loss causation under the Securities Exchange Act of 1934. The court concluded that the appropriate test is whether a defendant's misstatement (or omission), as opposed to some other fact, is responsible for causing the plaintiffs' loss. The court clarified that a plaintiff "may prove loss causation by showing that the stock price fell upon the revelation of an earnings miss, even if the market was unaware at the time that fraud had concealed the miss." *Id.* at 8.

On January 12, 2018, the United States Court of Appeals for the Second Circuit issued an opinion in [*Arkansas Teachers Retirement System v. Goldman Sachs Group, Inc.*](#), No. 16-250 (2d Cir. Jan. 12, 2018), vacating a district court order certifying a federal securities class. The plaintiffs claimed that Goldman Sachs had, during the class period, made material misstatements about its efforts to avoid conflicts of interest, and that eventual public disclosure of such conflicts caused the company's shares to decline in value. *Id.* at 6, 9. The case involved the question whether the plaintiffs were entitled to the so-called fraud on the market presumption announced in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). This question arose because at the class certification stage, the defendants had come forward with affirmative evidence that the market had not reacted to the disclosure of information that allegedly was hidden during the class period. The Second Circuit found that, at class certification, the defendant bears the burden of establishing, by a preponderance of the evidence, that the fraud on the market presumption should not apply. *Id.* at 21.

Although *Mineworkers Pension Scheme* focuses on loss causation at the motion to dismiss stage whereas *Arkansas Teachers* considers the fraud on the market presumption at the class certification stage, the decisions both clarify how courts consider the impact of alleged misstatements—and the subsequent disclosure of the "truth"—in federal securities class actions. While the decisions make clear that plaintiffs have multiple avenues for alleging that they suffered a compensable loss, they can also provide a path for defendants and their experts to challenge certification.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Michael S. Flynn

+1 212 450 4766
michael.flynn@davispolk.com

Edmund Polubinski

+1 212 450 4695
edmund.polubinski@davispolk.com

Neal Potischman

+1 650 752 2021
neal.potischman@davispolk.com

Dana M. Seshens

+1 212 450 4855
dana.seshens@davispolk.com

Amelia T.R. Starr

+1 212 450 4516
amelia.starr@davispolk.com

Brian S. Weinstein

+1 212 450 4972
brian.weinstein@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

Related materials

[Read the full update](#)