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New York Law Journal

Four Decades in Securities Litigation: What's Changed and Why It Matters

By Tracy Nichols
September 8, 2025

When I began practicing securities litigation nearly 40 years ago, the landscape was vastly different. Accounting fraud dominated the headlines, plaintiffs' firms were relatively few and far between, repeat plaintiffs were common, class actions were quickly filed with little pre-suit investigation and derivative actions were generally manageable and often resolved swiftly.

Securities Litigation

Today, the practice is more crowded, more sophisticated and shaped by forces few anticipated when the Private Securities Litigation Reform Act (PSLRA) was passed. Below are some of the shifts I've witnessed over the years—each with implications for investors, companies and their directors and insurers alike.

1. The PSLRA was meant to discourage repeat plaintiffs and encourage institutional investors to take charge. It mostly did that

Passed in 1995, the PSLRA was designed as a chokehold on frivolous suits. It introduced heightened pleading standards, an automatic discovery stay, and a lead plaintiff requirement intended to deter nuisance filings.

The implementation of the lead plaintiff structure has succeeded in encouraging institutional investors to oversee class actions. Before the PSLRA, institutions rarely served as plaintiffs, but today they lead most of the large cases.

The cases with institutional investors typically result in much higher settlements than those brought by individual plaintiffs. These sophisticated investors have also been effective at negotiating lower attorney fees, thereby increasing the per share investor recoveries.

So from that standpoint, the PSLRA has achieved the objective of encouraging sophisticated institutions to lead the charge.

The result of this increased participation, however, has not resulted in fewer filings and lower costs. The average number of filings in the years since the PSLRA has remained largely the same

even though the number of public companies in the U.S. has contracted by more than 35 percent.

While the overall number of securities class actions has not diminished in the past 30 years, the improved investigations by lead counsel and increased oversight by sophisticated plaintiffs has resulted in fewer dismissals and larger settlements.

Moreover, the lead plaintiff structure has led to more frequent collaborations among sophisticated plaintiff firms and a more orderly process with defense counsel fighting fire on one front, not multiple ones.

The benefits of this structure are evident when compared to the absence of such a structure in derivative actions where suits are filed in multiple states and federal courts. There is no orderly process for consolidating the actions or narrowing the number of plaintiffs and their counsel.

While frequent filers have largely been replaced by institutional plaintiffs in the securities class action context, it remains a problem in the mergers and acquisitions suits filed in federal court. A study in 2022 found that nine individual plaintiffs filed 123 of 127 M&A litigation suits and not a single case ended with any recovery to the putative class.

Paul Parshall—the ultimate serial frequent filer—has filed more than 120 cases since 2014. The vast majority of cases he has filed resulted in settlements of corporate therapeutics with no monetary benefit to the company or its shareholders.

2. The PSLRA was meant to rein in plaintiffs' firms and decrease the cost of settlements. It has not done that

And yet, nearly three decades later, the plaintiffs' bar is more active and aggressive than ever.

Why? For one, the PSLRA spurred the rise of large, well-funded institutional plaintiffs' firms with the resources and expertise to navigate these new hurdles.

Simultaneously, smaller firms have proliferated—many jumping into derivative actions and making it harder to reach resolution. Courts are more likely to dismiss weak cases early, but the median settlement size for meritorious cases remains high, reflecting the risks and costs of defending these actions.

Insurers remain as wary as ever of securities claims. And the large settlements attract more lawyers into the plaintiff's bar.

3. Event-driven litigation has replaced accounting fraud as the primary trigger for lawsuits

While classic accounting principal violations once dominated the docket, today's claims are often event-driven. A data breach, a food safety recall, missed forecasts about AI, cryptocurrency or SPAC-issues can now serve as the basis for a securities suit.

Plaintiffs have also become adept at reframing these operational missteps as breaches of fiduciary duty. Such breach of fiduciary duty claims, which are not subject to the PSLRA's strict pleading requirements, are often harder to dismiss.

This shift isn't merely academic. It has broadened the risk profile for public companies and made it difficult to predict what will trigger litigation or anticipate the costs of defending or settling such litigation.

In the past, derivative claims were generally resolved with the securities class action plaintiffs' counsel sharing a small portion of their fees with derivative counsel. No longer. Now, derivative counsel are seeking significantly higher fees even in non-monetary settlements and have also received significant monetary settlements in more serious cases.

4. Litigation funding and insurance pressures are reshaping the game

Litigation finance has enabled some smaller firms to punch above their weight and its presence

can complicate negotiations or prolong disputes. Meanwhile, carriers remain in a bind. Despite their desire to mitigate risk, there has been limited ability to change policy language or manage exposure through traditional means.

The result is an ecosystem where insurers are stuck pricing for risk that increasingly stems from often unanticipated operational failures rather than knowing financial misstatements. Towers remain a concern, and with more complex claims, the demand for coordinated, sophisticated mediation is higher than ever.

5. Civility and integrity are generally more present in this practice area

Despite the polarization in the political arena, civility in the securities litigation arena has been consistently better than in other areas of law. Securities lawyers recognize that the bar is small, lawyers are likely to meet again, and their word is their bond.

Aggressive and rude behavior in one case will undoubtedly lead to distrust or pay-back actions in the next case.

On the other hand, when lawyers treat their opposing counsel with civility and respect, their current and future clients benefit. Since most securities cases settle, it's imperative plaintiff and defense counsel avoid any personal grudges or agendas that could drive up costs or delay resolution.

6. The participation of women and minorities has risen… somewhat

When I first began practicing in this area, there were only a handful of women securities litigators in the entire country. Attending an insurance conference of securities panel counsel some 30 years ago, I was one of two women joining the 100 other male lawyers. The giveaway was a men's golf jacket starting at size medium.

Fast forward to the same conference 15 years later, I was pleased to take advantage of the massage option gift and chat with the insurance company's female general counsel poolside at the spa.

Women have made significant inroads to increase participation both in numbers and seniority as judges, litigators, insurance personnel and in-house counsel.

However, the same level of progress has not been made for minority lawyers. More work is needed to increase the diversity of race, gender, background and viewpoints in this field.

Conclusion

Despite these 40 years of changes, one thing remains constant: securities litigation is a high-stakes, high-impact practice. The tools and skills of those in the trenches have evolved, and the stakes are still just as high.

Understanding these shifts isn't just academic—it's essential for anyone looking to manage risk, resolve disputes, and navigate today's turbulent legal landscape.

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