Commencing a Securities Class Action: Lead Plaintiff and Lead Counsel Appointments

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A Practice Note describing the legal framework for securities class actions filed in federal court. This Note provides an overview of the requirements for lead plaintiffs appointed under the Private Securities Litigation Reform Act (PSLRA). It also identifies procedural considerations for attorneys seeking lead counsel designation in a securities class action.

Plaintiffs in securities class actions must comply with the Private Securities Litigation Reform Act of 1995 (PSLRA), a federal law enacted in response to the perceived profusion of frivolous class actions asserting claims under the Securities Act and the Exchange Act (15 U.S.C. § 78u-4). To eliminate the advantage of being the first plaintiff to file suit, the PSLRA directs courts to apply a rebuttable presumption that the lead plaintiff movant with the greatest economic stake in the outcome, who also satisfies the typicality and adequacy requirements under Rule 23 of the Federal Rules of Civil Procedure (FRCP), should serve as the lead plaintiff (15 U.S.C. § 78u-4(a)(3)(B)(i), (iii)).

The PSLRA's lead plaintiff presumption aims to encourage institutional investors such as pension funds to lead cases. In addition to their large financial interest in the case, institutional investors have the sophistication and experience to remain involved in the litigation and ensure that the interests of absent class members are adequately protected (see, for example, *Reitan v. China Mobile Games & Entm't Grp., Ltd.*, 68 F. Supp. 3d 390, 396 (S.D.N.Y. 2014)).

This Practice Note provides guidance on working with a client to seek lead plaintiff and lead counsel appointment under the PSLRA.

For more on identifying potential class action claims under the federal securities laws, see Practice Note, Commencing a Securities Class Action: Identifying Claims (W-023-7361). For more on other key PSLRA provisions and considerations, see Practice Note, Securities Litigation Involving the Private Securities Litigation Reform Act (PSLRA) (W-010-6738).

LEAD PLAINTIFF SELECTION

Among other things, the PSLRA directs courts to apply a rebuttable presumption that the most adequate plaintiff to represent the class, undertake the selection of lead counsel, and manage the litigation is the person or group of persons who:

- Filed either the complaint or a timely motion with the court to serve as lead plaintiff in response to a notice about the lawsuit (see Timeliness).
- Has the greatest economic stake in the outcome of the litigation, usually with a focus on the movant's approximate losses (see Largest Financial Interest).
- Otherwise satisfies the requirements of Federal Rules of Civil Procedure (FRCP) 23, with a focus on the typicality and adequacy requirements (see Typicality and Adequacy Under FRCP 23).

(15 U.S.C. § 78u-4(a)(3)(B)(i), (iii).)

TIMELINESS

Under the PSLRA, a court may appoint as lead plaintiff either:

- The plaintiff who filed the initial complaint.
- A class member who timely filed a motion for appointment.

The PSLRA requires plaintiffs filing initial complaints to include a certification that, among other things, states that the plaintiff is willing to serve as a representative party on behalf of the class. In addition, it provides that within 20 days of filing the complaint, the filing plaintiff must publish a notice to members of the putative class containing certain information about the action, including:

- The claims asserted.
- The class period.
- A statement that any putative class member can move to serve as lead plaintiff.
- The filing deadline for lead plaintiff motions.

(15 U.S.C. § 78u-4(a)(3)(A).)

The court cannot appoint the lead plaintiff and lead counsel until consolidation of all related cases is complete (15 U.S.C. §§ 77z-1(a)(3)(B)(ii) and 78u-4(a)(3)(B)(ii); see Consolidation).

Putative class members have 60 days after the notice is published to move for appointment as lead plaintiff. All lead plaintiff applicants must move for appointment within this period. Courts generally disqualify any applicant that fails to file a motion before the expiration of this 60-day period, but have forgiven minor tardiness in certain circumstances (see, for example, *Montesano v. Eros Int'l PLC*, 2020 WL 1873015, at *9–10 (D.N.J. Apr. 14, 2020)). Courts typically consider timely filed motions within 90 days of the filing of the notice (15 U.S.C. § 78u-4(a)(3)(A)(i)).

LARGEST FINANCIAL INTEREST

In determining which movant is the presumptive lead plaintiff, courts must first identify the person or group of persons that has the largest financial interest in the relief sought by the class (15 U.S.C. § 78u-4(a)(3)(B)(iii); *Kemp v. Universal Am. Fin. Corp.*, 2006 WL 1190691, at *2 (S.D.N.Y. May 1, 2006)). In practice, this requirement is satisfied by the lead plaintiff movant claiming the largest financial loss during the class period.

Although the PSLRA offers no guidance for calculating financial interest, courts generally consider:

- The total number of securities purchased during the class period.
- The net number of securities purchased during the class period.
- The total net funds expended during the class period.
- The approximate losses suffered.

(*In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 296 (E.D.N.Y. 1998); *Lax v. First Merchs. Acceptance Corp.*, 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997).)

Courts generally treat the plaintiff's approximate losses suffered as the most important factor, and as dispositive in calculating financial interest (see, for example, *Kux–Kardos v. VimpelCom, Ltd.*, 151 F. Supp. 3d 471, 476 (S.D.N.Y. 2016); see also Rebutting the Lead Plaintiff Presumption).

Calculating Approximate Losses Under Exchange Act Section 10(b)

Because approximate losses suffered are the most important factor in a lead plaintiff motion, counsel should take great care in accurately calculating their client's class period losses.

Approximate losses are routinely calculated on a "last-in, first-out" (LIFO) accounting basis. In the context of securities claims, the LIFO technique calculates the plaintiff's damages by matching the plaintiff's last purchases during the damage period with its first sales during the period. (*McGee v. Am. Oriental Bioengineering, Inc.*, 2012 WL 12895668, at *3 (C.D. Cal. Oct. 16, 2012).) The main advantage of LIFO is that, unlike the "first-in, first-out" (FIFO) technique, it takes into account gains that might have accrued to the plaintiffs during the relevant period due to the inflation of the stock price (*W. Palm Beach Police Pension Fund v. DFC Glob. Corp.*, 2014 WL 1395059, at *6 (E.D. Pa. Apr. 10, 2014)).

Under LIFO, only transactions occurring within the class period are considered in determining financial loss. In other words, pre-class period holdings are not used in calculating LIFO losses. In contrast, FIFO, unlike LIFO, first matches class period sales to pre-class period holdings, and can therefore "zero out" gains.

For example, an institutional investor begins the class period with 100 shares of X Corp may engage in the following transactions during the class period:

- Sale of 100 shares at $20 per share for proceeds of $2000.
- Purchase of 100 shares at $15 per share for a cost of $1500.
- Sale of 100 shares at $10 per share for proceeds of $1000.

Under LIFO, the institutional investor would have a net gain of $1500 (sale proceeds of $3000 less purchase of $1500). Under FIFO, however, the investors pre-class period holdings of 100 shares would be netted against its first sales, generating a loss of $500 (purchase of $1500 less sale proceeds of $1000). Because FIFO can fail to account for gains that accrued to plaintiffs during the class period due to the inflation of the stock price, most courts decline its use (*In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 101 (S.D.N.Y. 2005)).

Statutory Damages

In addition to determining whether their client has suffered losses under the LIFO methodology, counsel should also ensure their client suffered statutory damages. To demonstrate that it suffered statutory damages, a plaintiff must show a causal nexus between the harm suffered and the alleged violation (*Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343 (2005)). In other words, a plaintiff suffered statutory, and therefore actionable damages, when the plaintiff held shares during a disclosure of fraud and suffered harm resulting from a related stock drop (see, for example, *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864-65 (7th Cir. 2014) (finding that class members who sold their shares before the first corrective price decline did not suffer economic loss caused by the alleged fraud)).

A plaintiff may have a large financial interest generally, yet lack any recoverable damages under the federal securities laws. A plaintiff that did not suffer statutory damages cannot serve as lead plaintiff, even if that plaintiff has a large financial interest (see, for example, *Chandler v. Ulta Beauty, Inc.*, 2018 WL 3141763 (N.D. Ill. June 26, 2018); see also Practice Note, Commencing a Securities Class Action: Identifying Claims: Analyzing Whether The Client Has Standing to Sue (W-023-7361)).

For example, during the class period, Y Corp., a construction firm, posted favorable financial results while also attesting to the accuracy of its project-based accounting. At the end of the class period, however, Y Corp. took $100 million in accounting charges and disclosed that it was under investigation by the SEC, causing substantial declines in the value of its stock. A court must consider the losses of potential lead plaintiffs, including:

- Fund A, which purchased 100 shares during the class period for $10 per share and sold those shares during the class period for $8 per share before the Y Corp.'s disclosure and corrective price decline.
- Fund B, which purchased 100 shares during the class period for $10 per share, and sold those shares for $2 per share after Y Corp.'s disclosure and corrective price decline.

In this example, Fund A and Fund B each have LIFO losses of $200 and $800, respectively. Because Fund A's LIFO losses were not caused by the share price declines attributable to Y Corp.'s disclosure, however, none of its $200 in losses are actionable damages. Conversely, because Fund B's losses were directly caused by Y Corp.'s disclosure, all of its $800 in losses are actionable.

Damages Limitation for Retained Securities

If a potential plaintiff does not sell off its holdings shortly after the corrective price decline, and instead retains the securities at issue, the PSLRA imposes a cap on Exchange Act damages. Specifically, a plaintiff cannot claim damages that exceed the difference between the original purchase or sale price and the 90-day trading average of the security following the corrective price decline (15 U.S.C. § 78u-4(e)).

Calculating Approximate Losses Under Section 11 of the Securities Act

Damage calculations under Section 11 of the Securities Act have the benefit of statutory guidance. Specifically, Section 11(e) of the Securities Act limits the damages available to a Section 11 plaintiff to the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and either:

- The value of the security when the suit was brought.
- The price at which the security was disposed of in the market before suit.
- The price at which the security was disposed of after suit but before judgment, if it is less than the difference between the purchase price and the value of the security when the suit was brought.

(15 U.S.C. § 77k(e).)

Additionally, the prospective lead plaintiff must have purchased its securities on, or traceable to, a public offering of securities. Generally, movants may challenge traceability if:

- The purchase occurred after the company filed an annual report with the SEC.
- In the context of a secondary offering, the same class of security was already publicly traded, but the investor did not purchase directly on the offering.
- The existence of a substantial number of unregistered shares concurrently trading on the market.

AGGREGATION OF LOSSES FOR LEAD PLAINTIFF GROUPS

Disputes during the lead plaintiff appointment process often arise over whether a group of movants may aggregate their losses for the purposes of lead plaintiff appointment. Courts deciding whether to allow for lead plaintiff groups typically do so on a case by case basis, often with vastly different outcomes. Therefore, when considering whether to advise clients to seek joint appointment as lead plaintiff, counsel should carefully consider whether the aggregation of multiple investors would best serve the interests of the class by ensuring the lead plaintiffs are best situated to maximize recovery.

Although the PSLRA does not specifically address the aggregation of losses, courts considering the appointment of a proposed lead plaintiff group may focus on:

- The existence of a pre-litigation relationship between group members.
- The involvement of the group members in the litigation to date.
- The group's plans for cooperation.
- The sophistication of group members.
- Whether the members chose outside counsel.

(See *Varghese v. China Shenghuo Pharm. Holdings, Inc*., 589 F. Supp. 2d 388, 392 (S.D.N.Y. 2008).)

A court may also appoint a group consisting of persons with no pre-litigation relationship so long as the group is relatively small and, therefore, presumptively cohesive (see, for example, *Janbay v. Canadian Solar, Inc*., 272 F.R.D. 112, 119 (S.D.N.Y. 2010)). Most courts agree that a group with five or less members is considered small for the purposes of cohesion. Additionally, courts have been more inclined to appoint a group where one of its members claims the largest individual loss out of all lead plaintiff movants (see, for example, *McCracken v. Edwards Lifesciences Corp*., 2014 WL 12694135, at *3 (C.D. Cal. Jan. 8, 2014)).

Moving for lead plaintiff appointment as a group injects a certain risk that, if the court disqualifies one movant, the entire group fails, therefore underscoring the importance of counsel's analysis. When declining to aggregate the losses of the lead plaintiff group, some courts may then review the lead plaintiff candidacy of the members on an individual basis, especially if requested by movants in their motion papers (see, for example, *In re Level 3 Commc'ns, Inc. Sec. Litig*., 2009 WL 10684924, at *5-6 (D. Colo. May 4, 2009); *In re Surebeam Corp. Sec. Litig.*, 2004 WL 5159061, at *7-8 (S.D. Cal. Jan. 5, 2004)). Other courts, however, have ruled that a proposed group rises and falls together, finding subsequent, post-motion requests for segmentation untimely (see, for example, *Marcus v. J.C. Penney Co.*, 2014 WL 11394911, at *6 (E.D. Tex. Feb. 28, 2014)).

TYPICALITY AND ADEQUACY UNDER FRCP 23

When selecting a lead plaintiff, courts require that the movant make only a preliminary showing that its claims satisfy FRCP 23's typicality and adequacy requirements, meaning that:

- The claims or defenses of the proposed lead plaintiff are typical of the class (FRCP 23(a)(3); see Typicality).
- The movant fairly and adequately protects the interests of the class (FRCP 23(a)(4); see Adequacy).

Typicality

A plaintiff satisfies Rule 23(a)'s typicality requirement when that plaintiff's claims:

- Arise from the same event, practice, or course of conduct that gives rise to other class members' claims.
- Are based on the same legal theory.

(*Sgalambo v. McKenzie*, 268 F.R.D. 170, 173–74 (S.D.N.Y. 2010); see also *In re Flag Telcom Holdings, Ltd., Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009); *In re SLM Corp. Sec. Litig.*, 258 F.R.D. 112, 116 (S.D.N.Y. 2009).)

Courts do not apply a demanding test for typicality. The lead plaintiff movant does not need to be identically situated to all members of the putative class, nor do courts require a complete identity of claims.

If unique defenses against a named plaintiff exist, the court must consider whether those unique defenses threaten to prejudice the class later on in the litigation (*In re Dynegy, Inc. Sec. Litig*., 226 F.R.D. 263, 269 (S.D. Tex. 2005) (collecting cases); see also *Galmi v. Teva Pharm. Indus. Ltd*., 302 F. Supp. 3d 485, 505 (D. Conn. 2017); *Janbay*, 272 F.R.D. at 120).

Typicality may be rebutted by opposing movants for myriad reasons, including, for example, if the movants engaged in exceptionally uncommon trading strategies, making them susceptible to unique defenses, such as a lack of reliance (*Seamans v. Aid Auto Stores, Inc*., 2000 WL 33769023, at *4 (E.D.N.Y. Feb. 15, 2000)).

Adequacy

The lead plaintiff movant satisfies the adequacy requirement if that plaintiff:

- Does not have interests antagonistic to the class.
- Has sufficient experience and resources to vigorously represent the class and oversee counsel.
- Has selected qualified counsel as proposed class counsel.

(See, for example, *In re Elan Corp. Sec. Litig*., 2009 WL 1321167, at *2 (S.D.N.Y. May 11, 2009); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc*., 2012 WL 78780 (N.D. Cal. Jan. 9, 2012).)

As with typicality, opposing movants may rebut adequacy for a variety of reasons. For example, the court may deny a lead plaintiff application from a movant failing to provide the information needed for the court to determine that it has the necessary sophistication and resources to effectively oversee counsel (see *Perez v. HEXO Corp*., at *3 (S.D.N.Y. Feb. 25, 2020)).

NO NEED FOR STANDING ON EVERY CLAIM ASSERTED ON BEHALF OF THE CLASS

Courts generally hold that lead plaintiffs appointed under the PSLRA need not have individual standing on every claim asserted in a securities class action, as long as their litigation incentives are sufficiently aligned with those of the absent class members. Courts have observed that nothing in the PSLRA indicates that district courts must choose a lead plaintiff with standing to sue on every available cause of action and recognize that there are cases where the party best situated to lead the class does not have standing to sue on every claim (see, for example, *Hevesi v. Citigroup Inc*., 366 F.3d 70, 82 (2d Cir. 2004); *In re Enron Corp. Sec. Litig*., 206 F.R.D. 427, 446-47, 451 (S.D. Tex. 2002); see also *Galmi*, 302 F. Supp. 3d at 505; *In re Initial Pub. Offering Sec. Litig*., 214 F.R.D. 117, 122 (S.D.N.Y. 2002)).

Courts have reasoned that the only responsibility that the PSLRA explicitly gives to lead plaintiffs is the power to select and direct class counsel, with the goal of ensuring that investors, and not lawyers, control securities litigation. Courts may therefore deem FRCP 23 satisfied even if there are factual dissimilarities or variations between the claims of the lead plaintiffs and those of other class members, including distinctions in the qualifications of the class members. For example, presumptive lead plaintiffs possibly lacking standing on certain claims may still satisfy:

- The typicality requirement, if they show that, like other class members, they purchased the relevant stock during the class period in reliance on the alleged representations and suffered damages as a result.
- The adequacy requirement, if they show that, among other things, they have a sufficient financial interest in the outcome of action to adequately protect the interests of the class, and have no antagonistic interests to those of other class members.

(See, for example, *Mariconda v. Farmland Partners Inc*., 2018 WL 6307868, at *2, *6 (D. Colo. Dec. 3, 2018); see also *Initial Pub. Offering*, 214 F.R.D. at 121-23; *Varghese*, 589 F. Supp. 2d at 397; see Lead Counsel Selection.)

Courts reason that, if the lead plaintiffs lack standing on certain claims, they can:

- Identify and include other named plaintiffs with standing to serve as class representatives and satisfy FRCP 23 for claims that the lead plaintiff does not have standing to assert.
- Seek subclass designation at a later stage in the litigation.

(See *Galmi*, 302 F. Supp. 3d at 505; *In re Countrywide Fin. Corp. Sec. Litig*., 588 F. Supp. 2d 1132, 1157 (C.D. Cal. 2008); *Weinberg v. Atlas Worldwide Holdings, Inc*., 216 F.R.D. 248, 254 (S.D.N.Y. 2003).)

REBUTTING THE LEAD PLAINTIFF PRESUMPTION

Although courts must presume that the class member with the greatest financial interest who has also made a prima facie showing of typicality and adequacy is the most adequate lead plaintiff, other members from the putative class can rebut that presumption if they show that the presumptively most adequate plaintiff either:

- Does not fairly and adequately protect the interests of the class.
- Is subject to unique defenses that render the plaintiff incapable of adequately representing the class.

(15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); see also *In re Cendant Corp. Litig*., 264 F.3d 201, 268 (3d Cir. 2001); *R.I. Laborers' Pension Fund v. FedEx Corp*., 2019 WL 5287997, at *1 (S.D.N.Y. Oct. 18, 2019); *Labul v. XPO Logistics, Inc*., 2019 WL 1450271, at *7-8 (D. Conn. Apr. 2, 2019).)

If the presumption is rebutted, the court must begin the process anew until it selects a lead plaintiff, by:

- Identifying which of the remaining lead plaintiff movants has the highest financial interest in the class's recovery.
- Assessing whether that movant satisfies the threshold typicality and adequacy requirements.

(See *Cendant Corp*., 264 F.3d at 268; see also *In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002); *In re WorldCom, Inc. Sec. Litig*., 294 F. Supp. 2d 392, 421 (S.D.N.Y. 2003).)

The PSLRA does not expressly address whether a defendant may challenge a party's motion for appointment as lead plaintiff. Most courts hold that only class members may seek to challenge the presumption and that the court should not permit or consider arguments from defendants. These courts note that the statute on its face provides that the presumption "may be rebutted *only* upon proof *by a member of the purported class*" (*Cendant Corp*., 264 F.3d at 268 (emphasis in original and quoting 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)); see also *Bell v. Ascendant Sols., Inc*., 2002 WL 638571, at *2 (N.D. Tex. Apr. 17, 2002); *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 550 (N.D. Tex. 1997)).

Other courts have found that they may, sua sponte, address any issues that defendants raise, even if the defendants lack formal grounds to contest an appointment (see, for example, *Enron Corp.*, 206 F.R.D. at 439; *In re The First Union Corp. Sec. Litig.*, 157 F. Supp. 2d 638, 641 (W.D.N.C. 2000)).

In most cases, however, defendants do not have an opportunity to challenge the appointment of a lead plaintiff until the class certification stage. For this reason, courts generally find that a prospective lead plaintiff need only make a preliminary, prima facie showing that the claims asserted satisfy the requirements of FRCP 23 (see, for example, *In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 439 (S.D.N.Y. 2008) (finding that a presumptive lead plaintiff's allegation that the lead plaintiff had standing to assert Securities Act sufficed to satisfy the typicality and adequacy requirements and support the lead plaintiff application); see also *WorldCom*, 294 F. Supp. 2d at 421; *In re Waste Mgmt., Inc. Sec. Litig.*, 128 F. Supp. 2d 401, 409 (S.D. Tex. 2000)).

CONSOLIDATION

After a triggering event occurs, multiple putative class actions may be filed setting out substantively similar allegations. Consolidation is heavily favored in the context of securities class actions, even where the actions allege differing facts and legal issues (*Lowinger v. Global Cash Access Holdings, Inc*., 2008 WL 2566558, at *1 (S.D.N.Y. June 26, 2008); *In re Orion Sec. Litig*., 2008 WL 2811358, at *3 (S.D.N.Y. July 8, 2008)).

Under FRCP 42(a), a court may consolidate actions "involving common questions of law or fact." In the securities class action context, consolidation is appropriate for complaints based on the same public statements and reports. (*Mitchell v. Complete Mgmt., Inc*., 1999 WL 728678, at *1 (S.D.N.Y. Sept. 17, 1999)). FRCP 42 also allows lead plaintiff movants to seek to consolidate any related actions in connection with their motions. In practice, lead plaintiffs movants generally file a single motion for consolidation as well as lead plaintiff and lead counsel appointment.

When plaintiffs file multiple related actions:

- The initial notice period governs for the purposes of the lead plaintiff motion deadline.
- Courts must render a decision on consolidation before the appointment of a lead plaintiff.

(15 U.S.C. § 78u-4(a)(3)(B)(ii).)

If the consolidated actions have class periods of varying length, courts generally adopt the longest and therefore most inclusive class period to govern the lead plaintiff selection stage (*Ali v. Intel Corp*., 2018 WL 2412111, at *2 (N.D. Cal. May 29, 2018)). The specific time period applied impacts the financial interest calculation for Section 10(b) claims, because differing class periods frequently capture or exclude certain investor transactions, which may increase or reduce the lead plaintiff applicant's financial interest.

To consolidate cases filed in different federal district courts, the parties may make a motion to the Judicial Panel on Multidistrict Litigation (JPML) to transfer all the cases to a single court for consolidation. The JPML has the authority to transfer multiple similar cases to one district court for consolidated and coordinated pretrial proceedings if the transfer will:

- Be more convenient for the parties and witnesses.
- Promote the just and efficient conduct of the actions.

(28 U.S.C. § 1407(a).)

Once they are transferred to the same court, that court can then consolidate the cases. For more on the JPML, see Seeking a Multidistrict Litigation (MDL) Transfer Checklist (W-004-4513) and Practice Note, Class Actions: Overview: When Multiple Class Action Complaints Are Filed (2-529-7368).

Although there is no obligation to amend the complaint, lead plaintiffs, once appointed, often decide to do so because they have increased incentive to invest in the case and ensure that the pleading is comprehensive. FRCP 15 permits a plaintiff to amend the complaint once as a matter of course without seeking leave from the court. The lead plaintiff has 40 days from the time of its appointment to file a consolidated complaint.

Amendments can substantially change or expand on the initial complaint. Defense counsel should keep this in mind when assessing the relative strength of the case and considering possible strategies based on the initial complaint. However, if the lead plaintiff substantially alters the countours of the litigation in a consolidated complaint, such as dramatically increasing the length of the class period or adding new claims, this runs the risk of rendering the initial notice insufficient. In this instance, the judge may order the republication of notice and the reopening of the lead plaintiff appointment process (see, for example, *Kaplan v. S.A.C. Capital Advisors, L.P*., 947 F. Supp. 2d 366, 367-68 (S.D.N.Y. 2013) (requiring republication of notice where the consolidated complaint significantly increased the class period and added new claims because the changes made "it likely that individuals who could now be considered potential lead plaintiffs would have disregarded earlier notice")).

For more on events that may trigger a securities class action, see Practice Note, Commencing a Securities Class Action: Identifying Claims: Triggering Event (W-023-7361).

LEAD COUNSEL SELECTION

Under the PSLRA, the court-appointed lead plaintiff selects lead counsel, subject to court approval (15 U.S.C. § 78u-4(a)(3)(B)(v); *Cendant Corp.*, 264 F.3d at 276 (stating that the PSLRA "evidences a strong presumption in favor of approving a properly-selected lead plaintiff's decisions as to counsel selection and counsel retention")).

The selection of lead counsel is often considered the most important of the lead plaintiff's core statutory responsibilities, and should be preceded by due diligence (see, for example, *Felix v. Symantec Corp.*, 2018 WL 4029053, at *4 (N.D. Cal. Aug. 23, 2018)).

Courts honor a lead plaintiff's decision, unless the court must reject proposed lead counsel to protect the interests of the plaintiff class (see H.R. Conf. Rep. No. 104-369, at 35 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 734).

DEVELOPING RELATIONSHIPS WITH INSTITUTIONAL INVESTORS

Counsel bringing claims under the federal securities laws tend to do so on behalf of private and public institutional investors in class actions, individual actions, and derivative cases in state and federal courts.

Developing and maintaining client relationships is typically done on a per-client basis specifically tailored to said client's needs. For example, existing or potential clients may request that counsel provide analysis regarding their exposure to certain market events and provide a recommendation about whether or not they have a potential claim.

Securities litigation firms also frequently employ dedicated personnel to evaluate market movement to identify potential claims. Plaintiffs' firms focusing on complex securities litigation typically have monitoring and case evaluation practice groups, composed of attorneys who work with financial analysts and in-house private investigators to identify and evaluate potential claims and pending litigation. That team may monitor and evaluate market news and other information that might result in a material loss or other negative impact to their clients' investment portfolios. This includes scrutinizing and determining the impact of:

- All class action notices filed under the PSLRA.
- Other pending court proceedings, such as antitrust actions or bankruptcy proceedings.
- All corporate transactions, such as mergers, executive compensation agreements, and stock option grants.

COURT APPROVAL PROCESS

Courts considering whether to approve the lead plaintiff's selected counsel, may focus on:

- The lead plaintiff's sophistication and experience.
- The selection process that the lead plaintiff used to choose counsel.
- Counsel's proposed fee structure.
- Whether counsel has adequate resources.
- The extent of the firm's and lead attorney's experience in securities class action.

(*In re Cendant Corp. Sec. Litig*., 404 F.3d 173, 195 (3d Cir. 2005); see also *In re Quintus Sec. Litig.*, 201 F.R.D. 475, 486-87 (N.D. Cal. 2001).)

Although the court can reject the lead plaintiff's choice of counsel, it cannot then select lead counsel of its choosing because the PSLRA assigns this authority to the lead plaintiff. Therefore, if the district court determines that the lead plaintiff has not made a reasonable choice of counsel, the court should articulate its reason for disappoving the plaintiff's choice and provide an opportunity for the lead plaintiff to select acceptable counsel. (*Cohen v. U.S. Dist. Ct. for N.D. Cal.*, 586 F.3d 703 (9th Cir. 2009) (vacating the court's lead counsel appointment).)

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