SLAUGHTER AND MAY/

SECURITIES LITIGATION

CRISIS MANAGEMENT
Part of the Horizon Scanning series

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Securities litigation, long established in the US, is now an increasing risk for UK listed companies and their boards, driven in particular by a flourishing litigation funding market. The need for corporates to carefully consider the content and timing of their market announcements has never been greater.

The Financial Services and Markets Act 2000 (**FSMA**) gives investors in listed companies a right to seek compensation for losses caused by a company's failure to provide full, accurate and timely disclosure of matters relating to its securities. The regime differentiates between misleading statements and/or material omissions in prospectuses and those in other market announcements.

- Section 90, FSMA imposes liability on companies and their directors for misleading statements and omissions in a prospectus. It is a defence for a company and its directors to show that they were not negligent in the preparation of the prospectus. An investor does not need to show that they relied on the prospectus when acquiring shares. This is the closest UK law comes to the fraud on the market theory which underpins many US securities law actions.
- Section 90A and Schedule 10A, FSMA creates a similar, but significantly less claimant-friendly, regime for other market announcements. It only bites where the relevant misstatement or omission was made knowingly or recklessly by a person discharging management responsibility (i.e. a director) and was relied upon by an investor. Only the company (and not associated persons) can be made liable.

Relatively rare until recently, there are now a growing number of section 90 and 90A claims. Many arise from regulatory settlements entered into by companies with enforcement authorities (in particular the Serious Fraud Office). Examples currently making their way through the courts include G4S (a trial to determine liability is scheduled for Q1 2024; reliance, causation and quantum will be decided later), Glencore and Petrofac. Nearly all are brought by groups of claimants, sometimes very large. It is the resulting prospect of very significant damages awards that makes this kind of litigation attractive to professional litigation funders.

However, there remain significant questions as to the proper meaning and effect of sections 90 and 90A/schedule 10A. No large-scale section 90 case has ever reached trial and there is only one judgment on section 90A: Autonomy v Lynch, handed down in 2022. And that was an unusual case on its facts which has left open critical issues, including on the question of reliance. A judgment on quantum in that case is still awaited.

Procedurally, too, there have been difficulties for would-be claimants. England has no equivalent of the US federal regime for opt-out class actions brought under securities laws. Up to now, claimant law firms and funders have had to build a book of prospective claimants before starting litigation. After proving a misleading statement was made, they have been required (in the case of schedule 10A claims) to show that each claimant relied on the misstatement

in trading in shares and, in all cases, that the relevant statement caused loss to the claimant. The last two stages in particular can be legally and factually challenging, all the more so when the group of claimants is large.

A novel claimant tactic would short-circuit this process by splitting proceedings in two: in the first stage, one investor, as representative of all other investors in the same position, asks the court for a declaration that a misleading statement or omission was made. The class of investors are not active participants in this claim, indeed they need not even be aware of it. All that is required is that they be identifiable as a class. If the court finds there was a misleading statement, members of the class may, if they choose, rely on that finding to bring claims for compensation against the company.

For claimants, the major benefit of this bifurcated approach is that they need only engage with the process once it is clear that there is a factual basis for a claim. Conversely, the burden of resisting proceedings falls immediately upon defendant companies, at a time when the size of any later damages claim may be unclear. Unsurprisingly, defendants have argued this it is unfair and have challenged the use of the representative claimant model in securities law claims. In November 2023, Reckitt Benckiser and Indivior, defendants to related section 90/90A claims, succeeded in having representative claims struck out by the High Court. It remains to be seen whether that decision will be appealed and/or whether it is applied in the other representative claims started over the course of 2023.

In the meantime, funders and claimant firms continue to explore potential securities claims against listed firms, and there is increasing evidence of claims outside the established playbook of piggy-backing off regulatory settlements. Greater emphases on sustainability reporting and ESG will present a rich stream for funders and claimant firms to mine, and there are signs that their attention is already moving away from a sole focus on governance issues towards claims founded on market statements in respect of firms' environment and social credentials, including adherence to human rights and supply chain standards.

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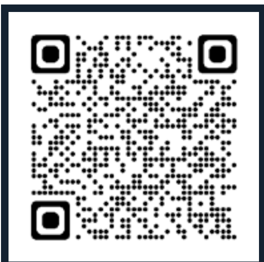

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