

SECOND CIRCUIT ISSUES TRIO OF HELPFUL RULINGS

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In the last year, the U.S. Court of Appeals for the Second Circuit issued three important decisions in securities fraud actions that provide investors with greater clarity in satisfying the standards for class certification in the Second Circuit.

In July 2017, the Second Circuit considered the standards for class certification in securities fraud cases involving over-the-counter securities traded in a global market in *In re Petrobras Securities*. Defendant Petrobras is a Brazilian company that lists its securities on both foreign and domestic exchanges, so class certification required consideration of the precedent set by the U.S. Supreme Court in *Morrison v. Australian National Bank* ("*Morrison*"). In *Morrison*, the Supreme Court held that U.S. securities laws apply only "to transactions in securities listed on domestic exchanges and domestic transactions in other securities." In *Petrobras*, the defendants argued that it would be very difficult to identify which trades in Petrobras's debt were domestic, and that a class consisting of "domestic transactions" thus could not be ascertained and, therefore, that the case should not be permitted to proceed as a class action. The Second Circuit's opinion rejected defendants' argument and clarifies that the Circuit's ascertainability requirement is met where the class is "defined using objective criteria that establish a membership with definite boundaries," and that the criteria considered by the district court—subject matter, timing, and location—were "clearly objective" and it was thus

"objectively possible" to ascertain which transactions were domestic. The Court noted that ascertainability does not require "a showing of administrative feasibility at the class certification stage," and acknowledged that its holding on this point conflicts with the standard applied by the Third Circuit. The Second Circuit now joins the Ninth Circuit in rejecting the Third Circuit's heightened standard. This is significant because a majority of securities fraud class actions are filed in the Second Circuit and Ninth Circuit. The circuit split signals that the Supreme Court may be inclined to address this matter in due course.

Next, in November 2017, the Second Circuit in *Waggoner v. Barclays PLC* upheld a district court's decision to certify a class of investors who sued Barclays for losses stemming from alleged misrepresentations it made regarding oversight of its so-called "dark pool" market. As is often the case, certification of the class turned on whether the plaintiffs had established that they relied on these alleged misrepresentations and omissions in buying the stock. The Supreme Court, in a rule known as the *Basic* presumption of reliance, permits reliance to be presumed in cases based upon fraudulent misrepresentations so long as the plaintiff satisfies certain requirements. At issue in *Waggoner* was the *Basic* presumption requirement that the stock at issue traded in an "efficient market," that is, that the stock reacted to important publicly announced information about the company as reflected in stock price movement.

THE SECOND CIRCUIT NOW JOINS THE NINTH CIRCUIT IN REJECTING THE THIRD CIRCUIT'S HEIGHTENED STANDARD.

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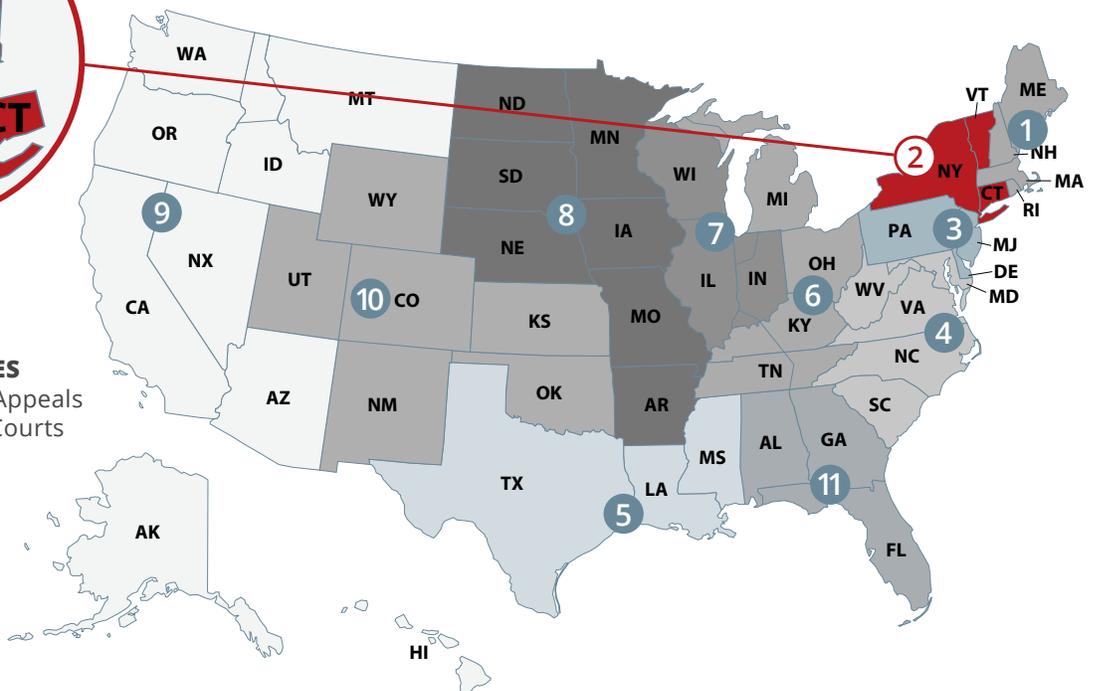
On appeal, the Second Circuit affirmed the district court’s certification of the class based on the *Basic* presumption. First, the Court rejected Barclays’ argument that the plaintiffs were required to present direct evidence of price impact through event studies, noting that Barclays’ stock is traded frequently on a national exchange. Next, after reviewing the history of the *Basic* presumption and the Supreme Court’s subsequent opinions, the Second Circuit concluded that, to rebut the *Basic* presumption at the class certification stage, defendants cannot merely produce some evidence to show a lack of price impact, instead defendants must demonstrate a lack of price impact by a preponderance of the evidence. This means that the evidence must show it is more likely than not that there was no price impact attributable to a defendant’s alleged misrepresentations. The Second Circuit concluded that the district court did not abuse its discretion in finding that Barclays failed to rebut the *Basic* presumption.

Finally, in January of this year, the Second Circuit again addressed the issue of price impact in its opinion in *In re Goldman Sachs Grp., Inc.* The Court reversed a district court’s certification of a class of investors, finding that the district court incorrectly

applied a heightened standard of proof by requiring Goldman to “conclusively” show “a complete absence of price impact.” Relying on *Waggoner*, the Second Circuit reaffirmed that a defendant is only required to rebut the *Basic* presumption by “a preponderance of the evidence.” The Second Circuit also found that the district court erred in rejecting Goldman’s evidence of a lack of price impact, requiring the district court on remand to consider this evidence in determining “whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock.”

Taken together, *Petrobras*, *Waggoner* and *Goldman Sachs* clarify certain standards investors and defendants must meet on class certification, standards that ease the path for certification of investor classes. *Petrobras* rejects the Third Circuit’s heightened “administrative feasibility” showing for domestic transactions, and *Waggoner* and *Goldman Sachs* require defendants to rebut the *Basic* presumption by a preponderance of the evidence. ■

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GEOGRAPHIC BOUNDARIES of United States Courts of Appeals and United States District Courts