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# Litigation of Investor Claims: State v. Federal Court

Posted by David A. Katz, Wachtell, Lipton, Rosen & Katz, on Tuesday February 12, 2013

**Editor's Note:** David A. Katz is a partner at Wachtell, Lipton, Rosen & Katz specializing in the areas of mergers and acquisitions and complex securities transactions. This post is based on an article by Mr. Katz, Eric M. Roth, William Savitt, and Warren R. Stern.

The Stanford Law School Securities Class Action Clearinghouse and Cornerstone Research recently released their analysis of securities class action filings in 2012. They report that 152 new securities class actions were filed last year, a 19 percent decline from the 188 new filings in 2011.

Of particular interest is the observation that only thirteen cases arising from merger and acquisition transactions were filed in federal courts in 2012, as compared to 43 in 2011 and 40 in 2010. "Evidence indicates," the report states, that merger and acquisition litigation is "now being pursued almost exclusively in state courts after the unusual jump in federal M&A filings in 2010 and 2011." Though such litigation typically arises under state law, plaintiffs often have the option to frame their claims as violations of the federal securities laws or bring them in federal court by invoking diversity jurisdiction.

The report does not attempt to explain these developments, but our experience suggests several reasons why the plaintiffs' bar may have come to prefer to pursue certain securities claims in state courts. The reasons include the heightened pleading requirements and the automatic discovery stay pending a motion to dismiss imposed by the Private Securities Litigation Reform Act, and the perception that federal courts impose a more rigorous settlement approval process and are less generous in awarding attorneys' fees. In addition, a series of U.S. Supreme Court decisions has sharply limited the availability of the federal securities laws (and, therefore, the federal courts) to private plaintiffs seeking to assert claims against defendants who allegedly aided and abetted the alleged fraud or did not themselves make any false or misleading statements. Moreover, in cases arising out of merger and acquisition transactions, some federal courts are seen by plaintiffs' lawyers as more likely than non-Delaware state courts to adhere to Delaware precedent deferring to a target board's business judgment.

The option to choose the forum in which to bring litigation can be significant in shareholder litigation generally. The Supreme Court recently granted *certiorari* to determine whether investors in CDs issued by an affiliate of R. Allen Stanford can bring their "Ponzi scheme" class action claims in state court. In a decision at odds with holdings in other Circuits, the Fifth Circuit held that such claims were not precluded by the Securities Litigation Uniform Standards Act. *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012), *cert. granted*, Jan. 18, 2013. *Roland* is not a merger case, but, like the movement of merger litigation away from federal courts, it illustrates how federal procedural rules and statutory law may channel securities litigation into state courts. The case will be closely watched by potential defendants who may find themselves facing state-court class claims that could not proceed in a federal court.