



# ACC San Diego Chapter Reducing Your Risks of Securities Litigation

April 4, 2024



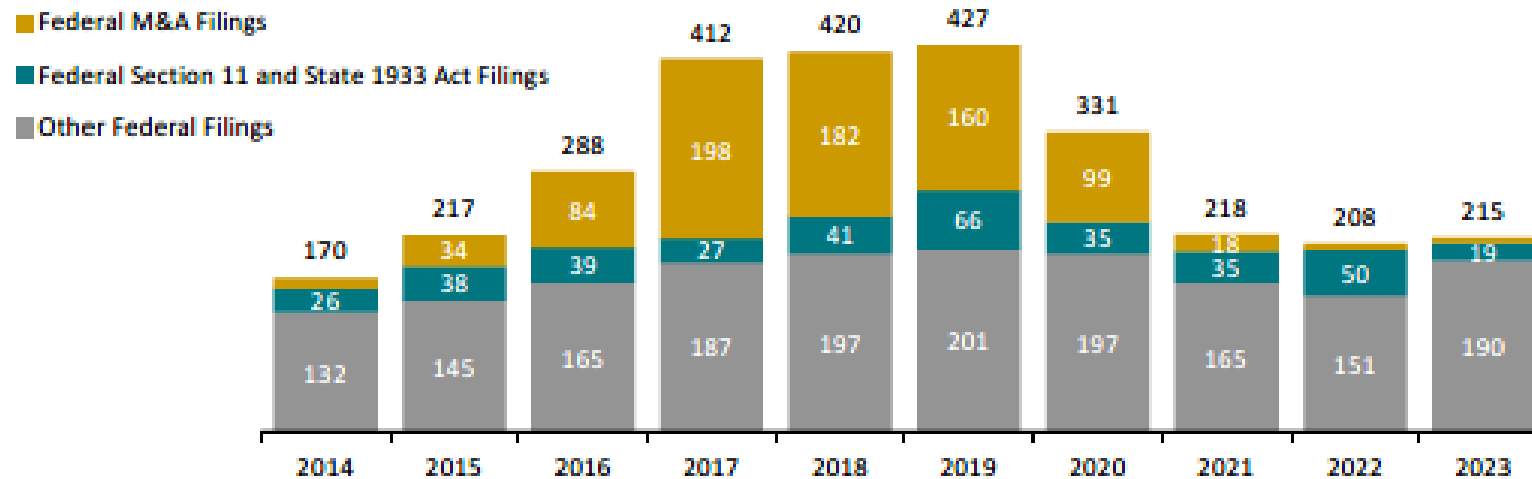
# Overview

- A new or potential securities class action can be a stressful and unexpected event for a company.
- Just an announcement of an investigation into a company can impact a company's financial position and reputation.
- Almost all securities class actions allege that a company's leadership defrauded investors by issuing false or misleading statements about the company.
- These lawsuits seek large potential damages on behalf of alleged aggrieved investors.



# Number of Filings

Figure 3: Federal Filings and State 1933 Act Filings by Venue  
2014–2023

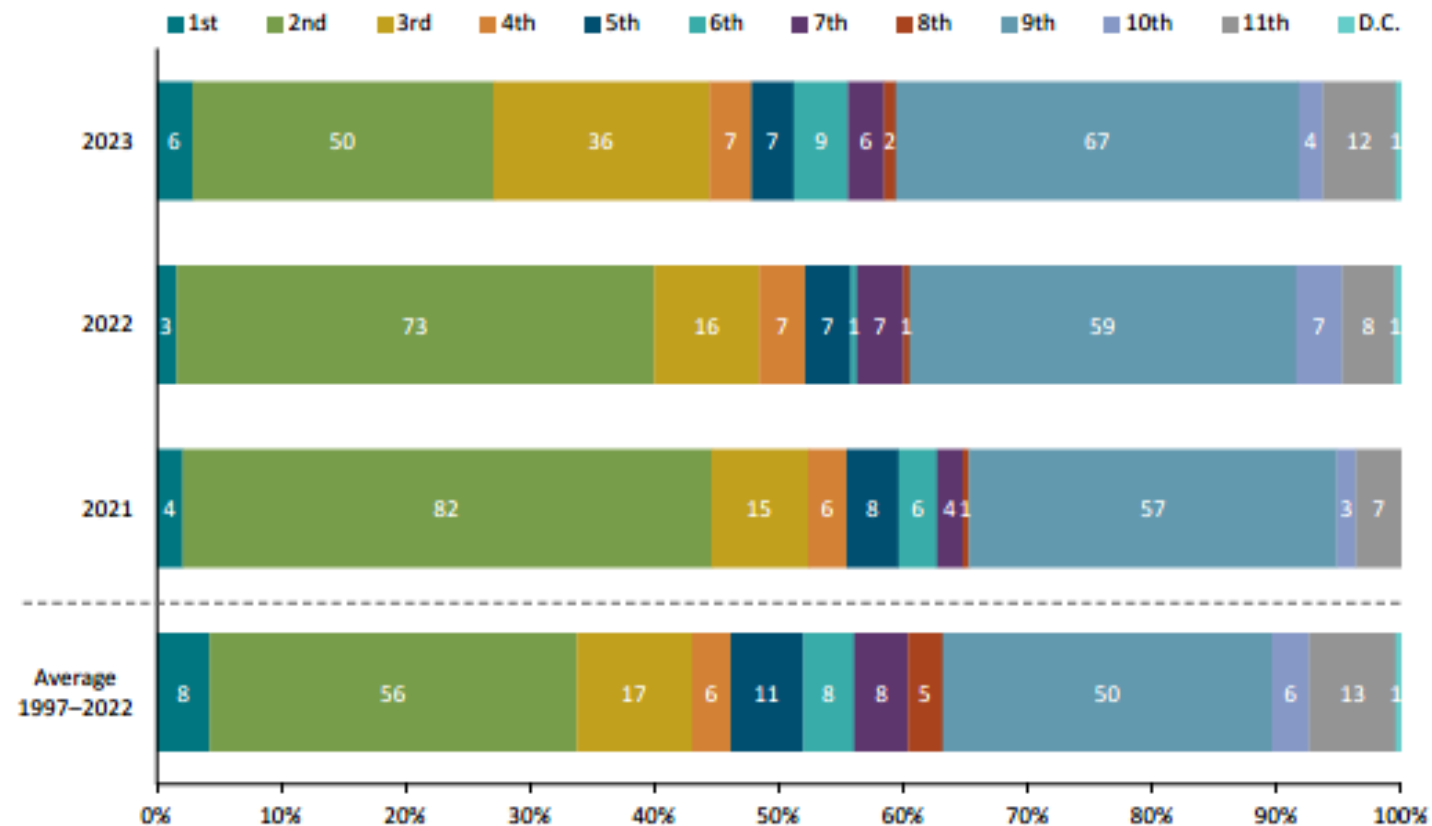


	Federal Section 11 and State 1933 Act Filings									
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Federal Courts Only	21	21	12	11	9	13	13	23	37	16
State Courts Only	2	11	13	3	16	28	14	7	11	2
Parallel Filings	3	6	14	13	16	25	8	5	2	1
<b>Total</b>	<b>26</b>	<b>38</b>	<b>39</b>	<b>27</b>	<b>41</b>	<b>66</b>	<b>35</b>	<b>35</b>	<b>50</b>	<b>19</b>

Source: Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse; Bloomberg Law; Institutional Shareholder Services' Securities Class Action Services (ISS' SCAS)

# Location of Filings

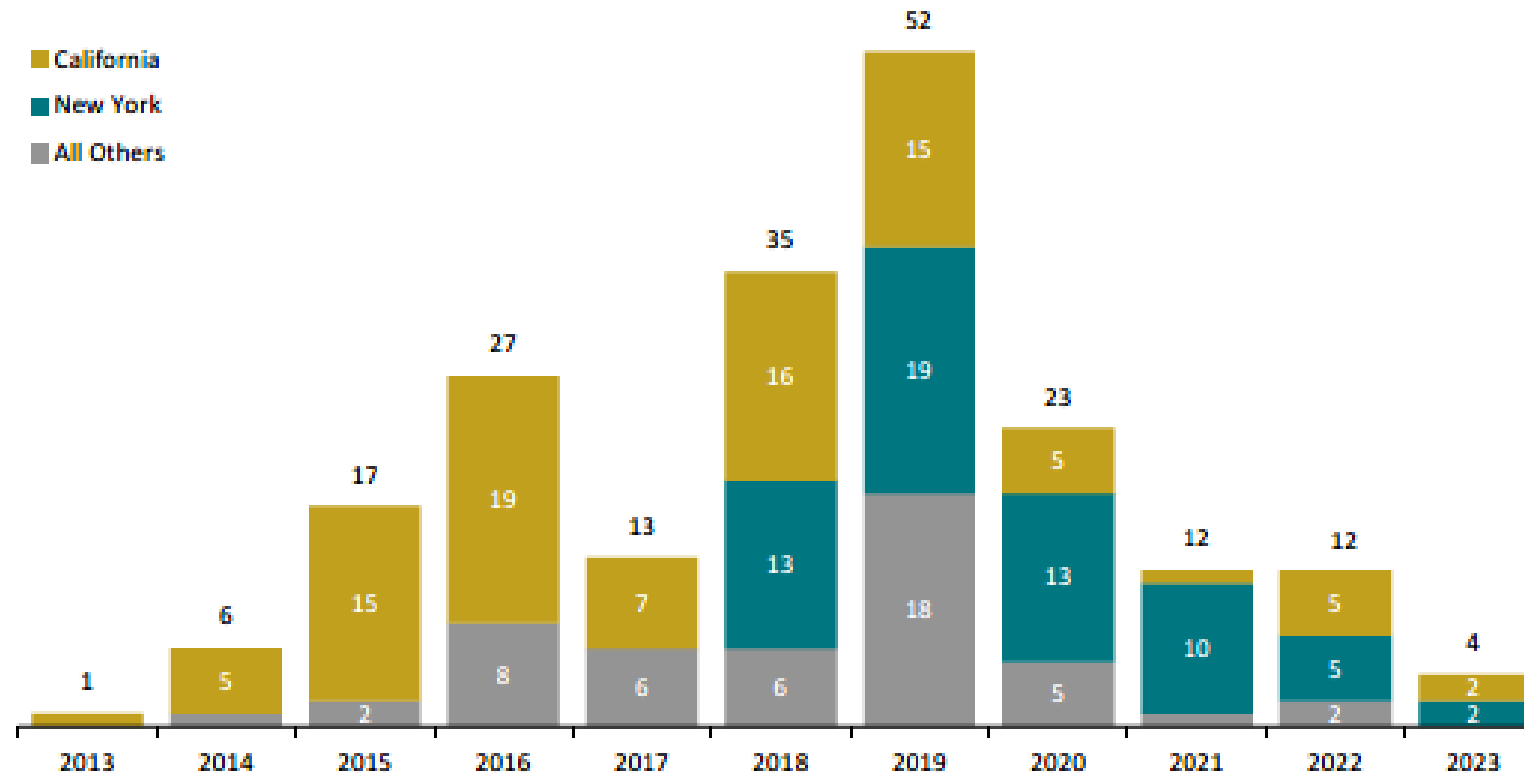
Figure 26: Filings by Circuit—Core Federal Filings



Note: This analysis only considers federal filings. It does not present M&A lawsuits or combined federal and state data, and lawsuits are not identified as parallel. This is different from other figures in this report that account for filings in federal courts that also have parallel lawsuits identified in state courts. In those analyses, when parallel lawsuits are filed in different years, only the earlier filing is reflected in the analysis. As a result, this figure's filing counts may not match Figures 1-3, 10-13, 15, and 22, or Appendices 1 and 5. Similarly, MDL and DDL figures discussed on this page will not match Figures 1-3, 10-13, and 25, or Appendices 1 and 5. See Additional Notes to Figures for Counts and Totals Methodology.

# 1933 Act State Court Filings

Figure 19: State 1933 Act Filings by State  
2013–2023



Source: Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse; Bloomberg Law; ISS' SCAS

Note: This analysis counts all filings in state courts. It does not present data on a combined federal and state basis, nor does it identify or account for lawsuits that have parallel filings in both state and federal courts. As a result, totals in this analysis may not match Figures 3, 22, or 23. See Additional Notes to Figures for more detailed information and for Counts and Totals Methodology.

# Cost of Settlement

## Appendix 1: Settlement Percentiles

(Dollars in millions)

Year	Average	10th	25th	Median	75th	90th
2014	\$23.5	\$2.2	\$3.7	\$7.7	\$17.0	\$64.4
2015	\$50.6	\$1.7	\$2.8	\$8.4	\$20.9	\$120.9
2016	\$89.6	\$2.4	\$5.3	\$10.9	\$41.9	\$185.4
2017	\$22.9	\$1.9	\$3.2	\$6.5	\$19.0	\$44.0
2018	\$78.7	\$1.8	\$4.4	\$13.7	\$30.0	\$59.6
2019	\$33.6	\$1.7	\$6.7	\$13.1	\$23.8	\$59.6
2020	\$64.9	\$1.6	\$3.8	\$11.5	\$23.8	\$62.8
2021	\$23.1	\$1.9	\$3.5	\$9.3	\$20.1	\$65.9
2022	\$37.9	\$2.1	\$5.2	\$13.5	\$36.4	\$74.8
2023	\$47.3	\$3.0	\$5.0	\$15.0	\$33.3	\$101.0

Note: Settlement dollars are adjusted for inflation; 2023 dollar equivalent figures are presented.

# What is a securities class action?

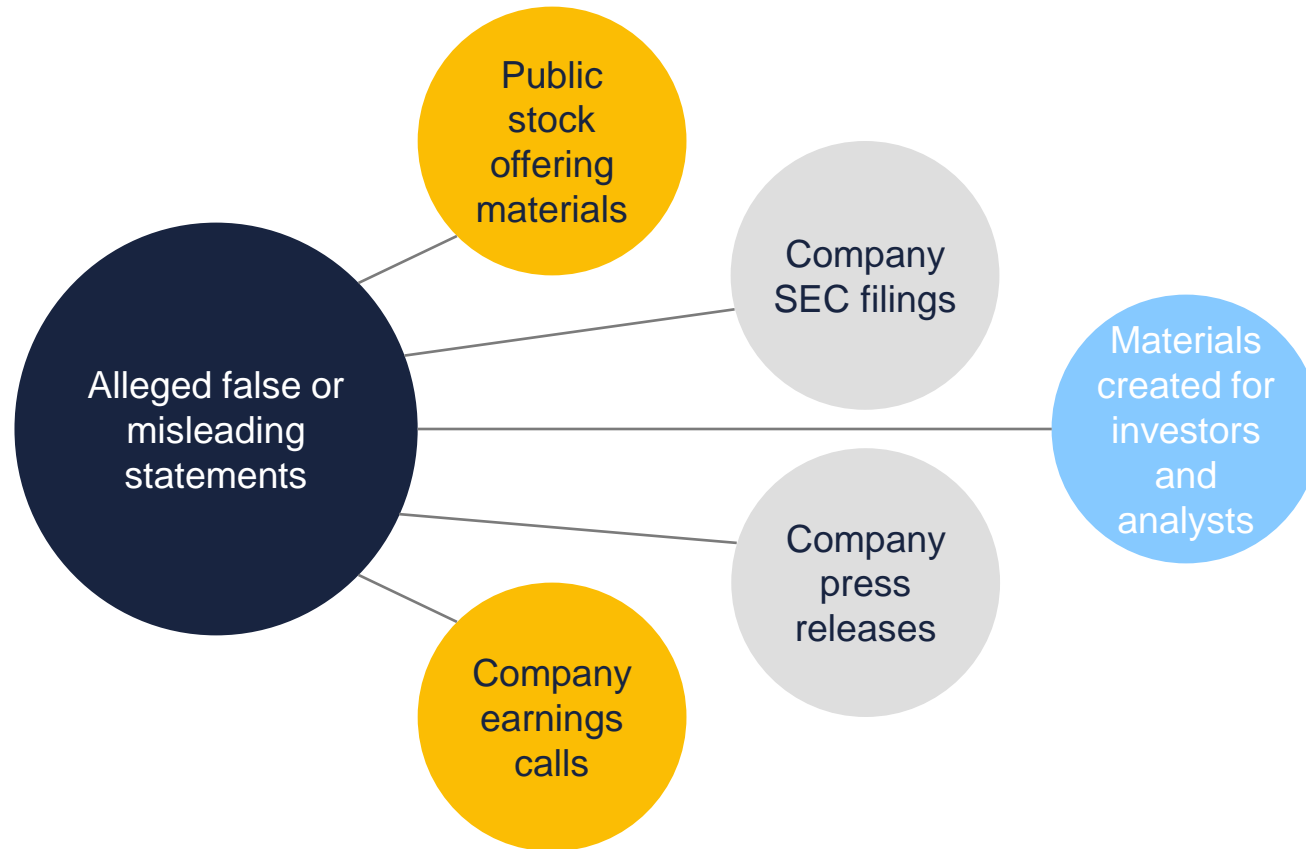
# What is a securities class action?

- A securities class action is a lawsuit brought on behalf of a class of stockholders against a company and its officers and directors.
- The foundational claim of a securities class action is that company defendants made false or misleading statements that inflated the company stock price and hid the true value of the company's stock from investors.
- When the “truth emerges” about the stock's actual value and the stock price falls (often after an “investigation” by a plaintiff's law firm, market researcher, or the press) a stockholder files suit as a putative class action and claims damages for alleged losses.



On what kinds of statements can plaintiffs base their claims?

# Alleged Misstatement Sources



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Stockholder plaintiffs can base their claims on statements taken from a variety of sources.

# What types of claims are most common?

# Securities Class Action Claims

Securities class actions most often allege claims under the Securities Act of 1933 and the Securities Exchange Act of 1934.

# Section 10(b) Claims

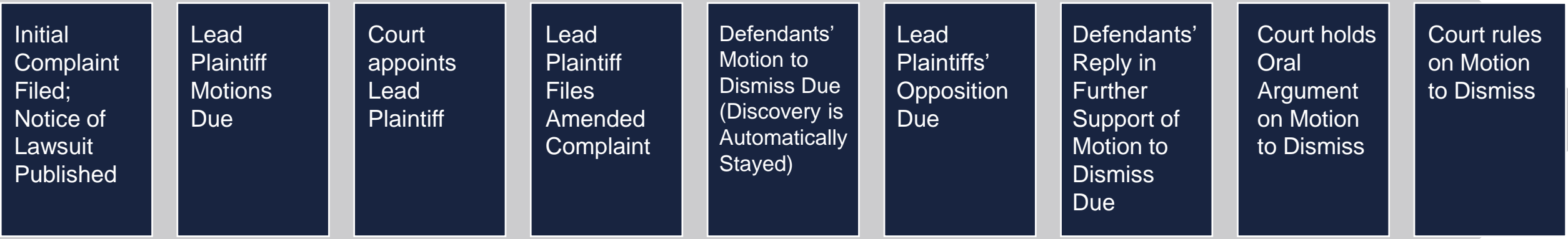
- Section 10(b) claims arise out of the Securities Exchange Act of 1934 and SEC Rule 10b-5.
- Plaintiffs typically bring claims based on statements made in SEC filings, press releases, and analyst calls.
- These claims are subject to a strict pleading standard derived from the Private Securities Litigation Reform Act of 1995:
  - Must plead with particularity that the statement at issue was false or misleading.
  - Must plead with particularity a strong inference that defendants intended the statement at issue to deceive, or that they made the statement with sufficient recklessness (called “scienter”).
  - Must demonstrate that the allegedly false statement caused plaintiff’s loss.

# Section 11 and Section 12 Claims

- Section 11 and Section 12 claims arise out of the Securities Act of 1933.
- Plaintiffs typically bring claims based on statements made in registration statements and prospectuses for public stock offerings.
- These **strict liability** claims are subject to a lower pleading standard than Section 10(b) claims and do not require a plaintiff to show scienter.
  - However, plaintiff must show it bought shares in or traceable to the offering.
  - Plaintiff must identify either a misleading statement or omission that defendants were legally required to disclose.
  - Defendants (other than company) have an affirmative due diligence defense.

# Sample Timeline

T0                      T+60 days                      ~T+90 days                      ~T+135 days                      ~T+180 days                      ~T+210 days                      ~T+240 days                      ~T+270 days                      ~T+300 days



# Private Securities Litigation Reform Act of 1995

- Congress passed the Reform Act to protect companies from the cost and burden of defending frivolous class action lawsuits.
- The Reform Act has had a significant impact on the way securities class actions are litigated and has provided defendants with meaningful protections:
  - Imposed strict pleading standards for falsity and scienter.
  - Created a safe harbor for forward-looking statements.
  - Imposed an automatic discovery stay until after a court has determined that the plaintiffs have stated a claim.
  - Attempted to eliminate race to the courthouse and lawyer-driven litigation.



What other types of securities litigation can a stockholder bring?

# Derivative Lawsuits

- Companies often face “copycat” or “tag-along” derivative actions in which a shareholder plaintiff alleges claims on behalf of the company against a company’s officers and directors for their failure to prevent the harm caused to the company by the conduct alleged in a related class action.
- These lawsuits require the shareholder to first make a demand on the board to initiate litigation on its own accord, or to demonstrate that this demand would be futile.
- Companies can achieve early dismissal of these cases by arguing that a plaintiff failed to meet demand requirements.
  - If a stockholder does send a demand that board bring claims against alleged wrongdoers, defense counsel can assist with the company’s response and pursue other defenses on its behalf.

# Books and Records Demands

- Many state laws have provisions that allow stockholders to obtain books and records of the company under certain conditions.
  - See, e.g., 8 Del. C. § 220.
    - Form and manner requirements.
    - Stockholder bears the burden of proving that they have a purpose “reasonably related to such person’s interest as a stockholder.”
    - Stockholder must further show that each category of information requested is “essential” to the stated purpose for the inspection.
- Precursor to potential more detailed stockholder derivative lawsuit.

# SEC Investigations and Enforcement

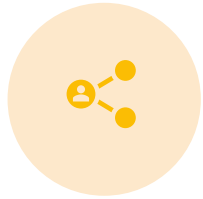
- A securities class action may lead to (or result from) an investigation by the Securities and Exchange Commission (“SEC”) into the company’s activities.
  - Can also spur an investigation by the Department of Justice.
- The SEC may commence an informal or formal investigation, and can pursue enforcement actions in administrative proceedings or in federal court.



How to prepare for the law firms that represent stockholders as plaintiffs in securities lawsuits?

# Plaintiff Lawyers Have a Playbook

A few skilled firms play a superficially complex game that largely reduces to a predictable game of checkers



Partner with short-sellers and file regulatory complaints



Monitor stock price charts for declines



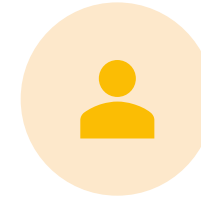
Announce an “investigation” as a thinly veiled attempt to locate plaintiffs



Scour all sources of public disclosure for any statements related to reason for price decline



File claims under federal or state securities laws



Contact former employees with promises of anonymity



Stockholder derivative suits and demand letters

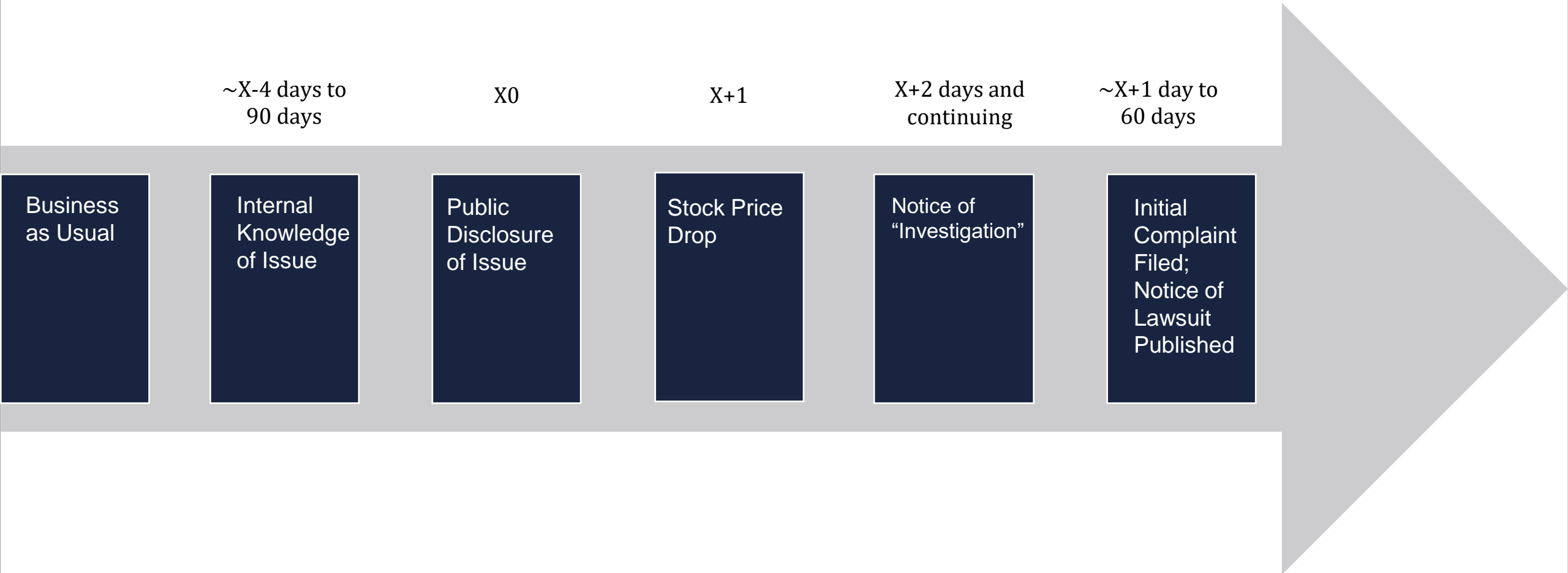


Send “books and records” demand to company



Extract settlement value

# “Before” Timeline



What should a company do before it faces any issues that might result in a stock price drop?



# Corporate Documents

(Articles/Certificate of Incorporation and Bylaws)

- Steps to reduce likelihood of a multiplicity of lawsuits.
  - Forum selection provision designating place of incorporation for issues concerning corporate internal affairs.
  - Forum selection provision designating federal court for claims under the 1933 Act.
- Steps to protect directors and officers from good faith mistakes.
  - No money damages for alleged breaches of duty of care for both directors and officers.
    - See, e.g., 8 Del. C. § 102(b)(7).



*“Before anything else,  
preparation is the key to  
success.”*

ALEXANDER GRAHAM BELL

# Policy Documents



- Document retention policy.
  - Volume of data can otherwise become overwhelming and expensive to review.
- Insider trading policy.
- 10b5-1 plans.
  - Potentially helps to establish lack of scienter.
- Employee training on written communications.
  - Words can be taken out of context.
- Social media policy.
  - Section 10(b) liability can exist for social media posts.

# Executive Protection

- Indemnification and advancement – articles, bylaws, and agreements.
  - Key to recruit and retain qualified talent.
- D&O Insurance provides further protection.
  - Review every year as change in market capitalization changes amount of appropriate insurance.
  - Endorsements.
    - Standard policy form is usually not sufficient.
  - Retention and sublimits.
  - Layers.
    - Size and number of layers of insurance.
    - Side A DIC.



# Risk Disclosures

- Risk disclosures must be tailored to the company (and should be changed as risks change)
  - What keeps executives up at night?
  - Bottoms-up.
  - Review competitor risk disclosures.
  - Do not include mitigating factors in risk disclosures.
  - Make sure risk disclosures reflect risks disclosed in other parts of document/filing/call.
  - Include disclaimer that identification of risk is not intended to indicate that risk has not already materialized in whole or in part.
    - Trend of plaintiffs asserting that risk factor disclosed as a hypothetical is misleading because risk has already occurred.

# Public Statements



- Back up for statements and opinions that is retained and organized.
- Forward looking statement disclaimers before all public statements (not just SEC filings and earnings calls).
- Script earnings calls including Q&A.
  - Do not make absolute statements; use caveats (based on what we currently know).
  - Disclose opinions as opinions using appropriate language (believe; think; in my opinion).

# Protect Company Information

- Onboard with NDAs and appropriate training.
- NDAs with departing employees.





# Engage/Monitor Stakeholders

- Develop a communication strategy to build credibility with large stockholders and analysts.
- Track stock ownership.
- Monitor short interest.
- Follow posts about company on social media.

# Protocols/Table Top Exercises

- Negative report from short seller or press source.
  - Short sellers do not tend to provide opportunity for comment.
  - Short sellers tend to publish during quiet periods.
- Negative development requiring disclosure either in next periodic filing or more urgently (Form 8-K or voluntarily).

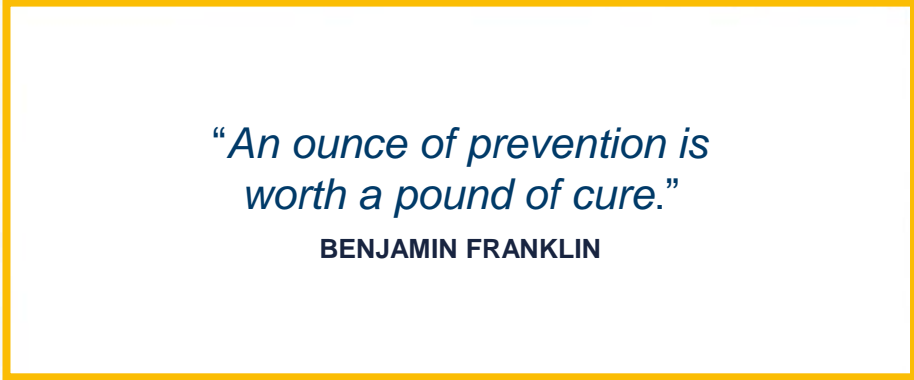




What should a company do once it learns of an issue that might result in a stock price drop (but before any public disclosure)?

# Between Event and Disclosure

- Try to understand the issue as much as possible so that can communicate effectively and accurately with relevant stakeholders.
  - Acknowledge tentative conclusions if that is accurate.
- Litigator review of public disclosure
- Disclose early?



*“An ounce of prevention is worth a pound of cure.”*

BENJAMIN FRANKLIN

If my company becomes the target of securities litigation, what should I do first?

# Connect with D&O Insurance Partners

- Key strategic relationship: D&O insurance carriers' experience with and economic stake in securities litigation actions can shape a company's defense strategy.
- Impact defense counsel selection: Insurance team can advise on defense counsel options that might be best suited to a company's unique situation.

*"Every battle is won  
before it's ever fought."*

SUN TZU

# Communicate with Board and Auditors

- Company's board can oversee and aid in selection of defense counsel that will serve company's best interests.
  - Board members might also be named as defendants in the lawsuit or in other securities litigation related thereto.
- Outside auditors will need to be kept apprised of the pending litigation in order to evaluate its ongoing impact on the company.



# Implement a Litigation Document Hold



- When a company learns of potential litigation it might face, it must immediately take efforts to preserve relevant evidence, including documents, among its leadership and employees.
  - IT department must be involved.
- Even a few days of delay can result in the destruction of relevant evidence and expose the company to costly discovery sanctions.

# Employee Morale and “Confidential Witnesses”

- Inform and assure current employees.
- Consider impact on former employees.



What should happen between time “placeholder”  
complaint filed and consolidated complaint?



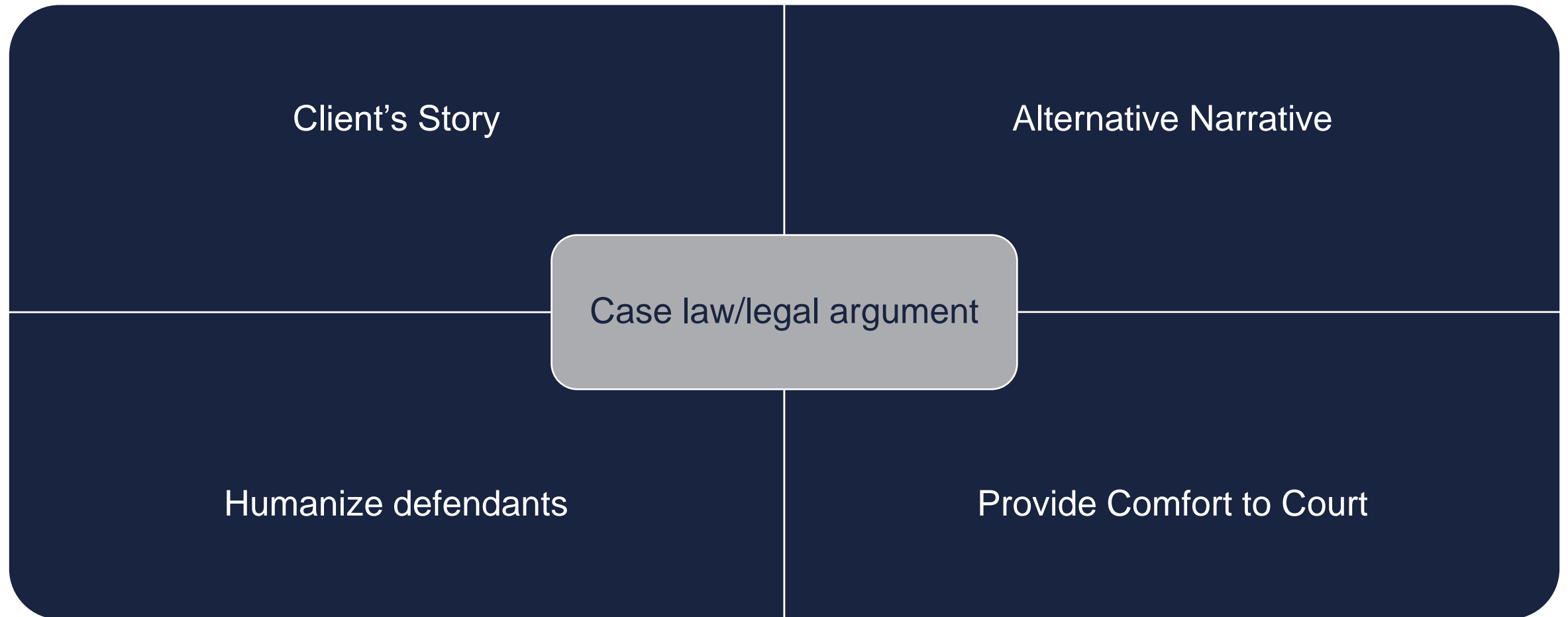
# Learn the Client's Story (aka the “truth”)

- Interviews of key officers/employees.
- Collect and review core documents.

# Support the Client's Story

- Liberal use of judicial notice.
- Push the envelope on incorporation by reference.

# Tell the Client's Story





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## Contact

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## Education

J.D., Columbia Law School  
James Kent Scholar (one year);  
Harlan Fisk Stone Scholar (two  
years)

B.A., Yale University  
*cum laude* with Distinction in  
Economics

## Admissions

California

Richard Zelichov has 25 years of experience handling complex commercial litigation matters with a focus on defending public companies and their directors and officers in securities class action and derivative litigation in both state and federal courts throughout the US. He also advises on matters before the SEC, conducts internal investigations, and provides corporate governance, disclosure, and other advice to public companies and their boards with the goal of avoiding litigation or improving the chances of succeeding in litigation that does arise.

Richard has deep experience defending companies in the technology and life sciences sectors, although he has also represented companies in wide variety of other industries. He has handled lawsuits arising from accounting restatements, failure to meet public projections, product recalls, executive compensation, option grants, and mergers and acquisitions.

He quickly and efficiently digs in to learn the details of a client's business and the issues that it is facing. This approach allows him to formulate creative arguments unique to a client's specific case. It also enables him to present the decisions/disclosures under attack to courts, regulators, and others in a manner that is clear and understandable such that they do not jump to the conclusion – pushed by plaintiff's lawyers and others – that bad news means that somebody lied or did something wrong.

Richard also prides himself on being dedicated to his clients and responsive to their requests. He understands that his clients or client contacts often have persons to whom they need to report and provide information or find themselves in the uncomfortable position as named defendants in a litigation for the first time. He also explains the pros and cons of strategic options to clients so that they can make informed decisions as to what is in their best interests.

Additionally, Richard writes and speaks extensively on topics related to securities law.

Richard is ranked Band 4 in *Chambers USA*, Litigation: Securities, 2022–2023 with clients stating that:

- “Richard is one of the most talented lawyers available for securities [litigation]. His dedication to the client is unmatched.”
- “Richard is a master strategist, weighing both the legal and commercial imperatives.”

He has also been recognized in the field of securities litigation by Best Lawyers in America and The Legal 500 United States.

Thank you