60. Consol. C.A. No. 6084-VCL (Dec. 9, 2011).
61. Consol. C.A. No. 6084-VCL, slip op. at 54-54 & n.12.
62. C.A. No. 4526-VCS (June 1, 2010).
63. C.A. No. 5873-VCS (Feb. 21, 2011).
64. Consol. C.A. No. 5162-VCL, slip op. at 35 (Apr. 29, 2011).
65. *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *12 (Del. Ch. Oct. 28, 2010) ("[T]he amount of the award should incentivize stockholders (and their attorneys) to file meritorious lawsuits and prosecute such lawsuits efficiently without generating any unnecessary windfall.")
66. *Sugarland Indus., Inc. v. Thomas*. See also *In re Anderson Clayton Shareholders Litigation*, 1988 WL 97480, at *3 (Del. Ch. Sept. 19, 1988) (Allen, C.) ("This court has traditionally placed greatest weight upon the benefits achieved by the litigation.")

The Future of Control Person Liability after *Janus*

BY DARRYL P. RAINS

Darryl P. Rains is a partner in the Palo Alto, California office of Morrison & Foerster LLP. He is a nationally recognized trial lawyer who specializes in defending cases involving the securities laws, including class actions, derivative actions, SEC enforcement proceedings, and internal investigations. Contact: drains@mofo.com.

Control person claims often seem an afterthought—tacked on at the end of a complaint without explanation. Courts dismiss them, or sustain them, without much discussion. Their fate usually is tied to the primary violation claims that give them life.

But, following the U.S. Supreme Court's June 2011 decision in *Janus Capital Group, Inc. v. First Derivative Traders*,[1] control person claims may finally come out of the shadows. A dozen years ago, in *Central Bank of Denver v. First Interstate*,[2] the Supreme Court ended corporate directors' and officers' exposure to aiding and abetting claims in private securities cases. Now, with *Janus*, the Supreme Court has significantly limited directors' and officers' exposure to primary liability under Rule 10b-5.[3]

That leaves control person liability, under § 20(a) of the Securities Exchange Act of 1934 (the '34 Act), as the main remaining fraud theory against corporate officers and directors. But *Janus* also raises new questions about control person claims. This article addresses three of those questions.

Background: *Central Bank* and *Janus*

Plaintiffs had little need for control person claims before *Central Bank*. Back then, courts allowed the widespread use of aiding and abetting theories against corporate directors and officers who allegedly "participated" in the process of issuing a misleading statement or otherwise provided "substantial assistance" to a primary violation of Rule 10b-5. Courts even allowed aiding and abetting claims against directors and officers who had done nothing—that is, committed "inaction"—so long as the alleged inaction was known to be in furtherance of a primary violation.[4]

Central Bank ended aiding and abetting as a viable theory under § 10(b) and Rule 10b-5 in private litigation. Holding that "the statutory text controls the definition of conduct covered by § 10(b)," the Supreme Court reached "the uncontroversial decision… that the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation."[5]

Then, in *Janus*, the Supreme Court reemphasized the role of the regulatory text in narrowing the scope of primary liability under Rule 10b-5. The Supreme Court held that the term "make" in Rule 10b-5 limits primary liability to "the entity with authority over the content of the statement and whether and how to communicate it."[6] The Supreme Court said: "[o]ne 'makes' a statement by stating it." Thus, Rule 10b-5 does not reach individuals who might "substantially assist" in the making of a misleading statement, including persons who "suggest what to say," "create," "prepare," or "draft" the statement, or "provide" the information contained in the statement.[7] Any broader rule, the Court held, "would substantially undermine" *Central Bank*:

> **If persons or entities without control over the content of a statement could be considered primary violators who 'made' the statement, then aiders and abettors would be almost nonexistent.[8]**

Janus may well have ended primary Rule 10b-5 liability for corporate officers and directors in most contexts. Usually, a corporation will be the "maker" of a statement. No individual will be exposed to primary liability under Rule 10b-5, because no individual will have had ultimate authority over its content or mode of communication.

Justice Stephen Breyer acknowledged this point in his *Janus* dissent. He complained that, "depending upon the circumstances, board members, senior firm officials, officials tasked to develop a marketing document, large investors, or others" all might play some role in the preparation of a materially misleading statement without being subjected to primary liability.[9] His criticism indicates the dissent understood *Janus*' "ultimate authority" test largely to exclude corporate directors and officers from the scope of primary liability under Rule 10b-5.

Of course, *Janus* also states that "attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed."[10] It could be argued that some corporate statements are attributable, expressly or implicitly, to corporate directors or executives. For example, chief executives and chief financial officers sign Sarbanes-Oxley certifications, chief executives and chief accounting officers sign periodic reports, directors sign registration statements, and executives make oral statements to investors or the public. But a signature on a disclosure document rarely means the signer had ultimate control over the document or the power to change its contents, and suggestions that any one signer might have veto power are often overblown. Courts are only beginning to consider whether these fact patterns can give rise to primary Rule 10b-5 liability after *Janus*.[11]

In the absence of attribution, or some other indicia of "ultimate authority" over a statement, however, directors and executives should no longer face exposure to primary liability under Rule 10b-5. Control person liability under § 20(a) should be the main remaining option for private litigants seeking to blame directors and officers for alleged violations of Rule 10b-5.

Control Person Liability under Section 20(a)

Courts do not agree on precisely what must be proved to establish control person liability under § 20(a). The statutory language does not offer much help:

> **Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable… unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.[12]**

Courts generally have agreed that, at a minimum, a plaintiff must prove that the "controlled" person committed a primary violation, and that the "control" person, in some fashion, had "control" over the "controlled" person. Courts also acknowledge the "good faith" affirmative defense.[13]

Precisely what constitutes "control," however, has been the subject of significant disagreement. And *Janus* injects new possibilities for disagreement into the mix. It raises new questions about how a primary violation can be established, what "control" means, and how § 20(a)'s "good faith" affirmative defense can be established.

How Is A Primary Violation Established?

A primary violation of Rule 10b-5 by the "controlled person" is the first element of any control person claim. For a corporate director or officer, the "controlled" person usually will be the corporation itself. *Janus*, however, may make it harder to establish that a corporation violated Rule 10b-5.

Take, for example, the need to prove scienter. Scienter, of course, is an essential element of any Rule 10b-5 claim. A corporation's scienter must, of necessity, derive from the mental state of one or more of its directors, officers, or employees. But from whom?

Some courts have held that corporate scienter can be inferred only from the mental state of the person who makes the misleading statement. The U.S. Court of Appeals for the Fifth Circuit, for example, has held it must "look to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment."[14]

Other courts have permitted a so-called "collective scienter" theory. The U.S. Court of Appeals for the Second Circuit has indicated that, while "the most straightforward way to raise [an inference of scienter] for a corporate defendant will be to plead it for an individual defendant," "it is possible to raise the required inference with regard to a corporate defendant without doing so with regard to a specific individual defendant."[15] These courts analogize to common law agency theory:

> **the scienter of the senior controlling officers of a corporation may be attributed to the corporation itself to establish liability as a primary violator of § 10(b) and Rule 10b-5 when those senior officials were acting within the scope of their apparent authority.[16]**

The Ninth Circuit, while not adopting the collective scienter theory, has suggested that, at least as regards a company's "core operations," guilty knowledge "may be attributed to the company and its key officers" "where the nature of the relevant fact is of such prominence that it would be absurd to suggest that management was without knowledge of the matter."[17]

At least in those courts where corporate scienter must be based on the mental state of the maker of the statement, the circle of persons from whom corporate scienter may be inferred just got smaller. *Janus* held that only "the person or entity with ultimate authority over the statement" is "the maker of a statement."[18] Few, if any, corporate officials will have sufficient authority over the contents of a statement to be considered the statement's "maker" for purposes of supplying corporate scienter.

Indeed, in some situations, it may be impossible to attribute any individual's scienter to the corporation. The *Janus* dissent foresaw this exact scenario. It pointed out that "guilty management" could prepare a false statement and fool "both board and public," but "no one could be found to have 'made' a materially false statement."[19] The dissent explained: "the managers, not having 'made' the statement, would not be liable as principals and there would be no other primary violator." The corporation itself could not be primarily liable because the directors—the persons with "ultimate authority" over the statement—"knew nothing about the falsity of the" statement.[20]

This is not a farfetched example. Look at the facts in *United States v. Goyal*.[21] *Goyal* involved revenue recognition fraud. The vice president of finance and corporate controller apparently knew of the fraud.[22] But the government was unable to show the chief financial officer knowingly or willfully made any false statements (and neither the chief executive officer nor any director was charged). *Janus* suggests that, on these facts, the company could not have been held primarily liable for false financial statements under Rule 10b-5 because no corporate director or senior executive was aware of the fraud.

It is also hard to see how the "collective scienter" theory survives after *Janus*. *Janus* says corporate directors and officers cannot be liable for misleading corporate statements over which they did not have "ultimate authority." It would be inconsistent with *Janus*' focus on "ultimate authority" to conclude that corporate scienter could be inferred from the mental states of an aggregation of officers and employees who had no control over the statement's contents. *Janus*' holding that "persons or entities without control over the content of a statement" cannot be primarily liable under Rule 10b-5 would lose much of its meaning if a corporation could be primarily liable for that statement—even when the directors or officers who ultimately authorized the statement lacked scienter.[23]

What Does "Control" Mean After *Janus*?

Janus, on occasion, uses the term "control" as a synonym for "ultimate authority."[24] What does "control" mean for purposes of § 20(a), and how does it differ from "ultimate authority" or "control" as those words are used in *Janus*?

Even before *Janus*, there was disagreement about the meaning of "control" for purposes of § 20(a). Many courts had looked, for guidance, to the U.S. Securities and Exchange Commission's (SEC's) definitions of "control":

> **The term 'control'… means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.[25]**

This definition, of course, does not seem to capture corporate directors or officers. Typically, directors and officers do not have sufficient voting securities to control a company's management and policies, and they typically do not have voting agreements or other contracts giving them that power. Moreover, basic corporate governance principles hold that the power to direct the policies and management of a corporation lies with its board of directors (acting as a board). It stretches the ordinary meaning of "control" to suggest that any one individual officer or director could direct the management and policies of a large modern corporation.

That hasn't stopped the courts from expanding the definition of "control" to reach directors and officers. But the definitions used by the courts differ in important respects. There are at least three variants. One version hews closely to the language of the SEC's rules, and focuses on the "ability" or "power" to control the general affairs of a corporation.[26] That power need not have been exercised. In some courts, the "power" must extend to the ability "to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability."[27] A second version requires the actual exercise of "power or control" over a corporation's actions.[28] And a third version uses a two-pronged test: (i) the actual exercise of control over the affairs of a corporation generally, and (ii) power to control the specific transaction upon which the primary violation is predicted, whether or not that power was exercised.[29]

None of these variants seems to line up squarely with *Janus*. *Janus* expressly rejected an argument that a mutual fund's investment advisor "made" the fund's statements because it had a "uniquely close relationship" with the fund and exercised "significant influence" over it, "like a playwright whose lines are delivered by an actor."[30] The Supreme Court said this "theory of liability based on a relationship of influence resembles," but is "broader in application," than control person liability under § 20(a).[31] *Janus* thus indicates that "significant influence" is not enough to constitute "control" under § 20(a). We can also infer that "control" must be broader than "ultimate authority," or the "clean line" drawn by *Janus* between "those who can be primarily liable" (those with "ultimate authority" over a statement) and "those who are secondarily liable" would have no one on the other side of the line.[32] Yet *Janus*' use of "control" and "ultimate authority" synonymously makes it hard to discern just where the "clean line" is between primary liability under Rule 10b-5 and secondary liability under § 20(a).

Too often, at least for pleading purposes, the analysis has come down to corporate titles—the most senior officers are deemed to have "control," while directors and more junior officers are not.[33] But why should a senior executive be secondarily liable for a false statement if he did not have power "to direct or cause the direction of the management and policies" that led to the false statement?[34] Titles are a poor substitute for determining whether an executive possessed control over the management and policies that led to a violation of Rule 10b-5.

How Can The "Good Faith" Affirmative Defense Be Established?

A control person may avoid liability for a company's misleading statements by showing he "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."[35]

Good faith consists of the absence of "bad faith," and courts have concluded it means the absence of either "recklessness" or "scienter."[36] What "induce" means is less clear. Some courts have imposed a sort of "internal controls" requirement. According to these courts, the control person must show he "did enough to prevent the violation"; that is, that he did not recklessly (or intentionally) fail to implement or enforce a system of supervision or internal controls to minimize the risks of a violation.[37] But given the Supreme Court's instructions to focus on the statutory text, there is no good basis for converting "induce" into "failed to prevent." After all, § 20(a)'s legislative history shows it was originally intended to "catch the man who stands behind the scenes and controls the man who is in a nominal position of authority," and to "prevent evasion of the provisions of the section by organizing dummies who will undertake the actual things forbidden by the section."[38]

While *Janus* does not address the "good faith" defense, its underlying rationale will be an obstacle to any broad reading of "induce" for purposes of § 20(a). *Janus* held that any effort to impose secondary liability on persons who provide "substantial assistance" to a Rule 10b-5 violation must fail under *Central Bank*.[39] Accordingly, "induce" must mean something more than "substantial assistance." *Janus* also noted that the phrase "directly or indirectly" must be read narrowly to cover only those situations where the control person's instructions are "communicated directly or indirectly to" the controlled entity.[40] The best way to interpret "induce"—the way that is most consistent with dictionary definitions and § 20(a)'s original intent—is to read "induce" to mean something like "cause," "persuade," or "bring about."

Going forward, courts should to hold that § 20(a)'s "good faith" affirmative defense can be established whenever a control person does not induce (or cause or persuade) a company to issue a misleading statement with either the "intent to deceive" investors or a "conscious disregard" of the statement's falsity.[41]

Conclusion

Control person liability under § 20(a) of the '34 Act is ready to come to the forefront as the main remaining fraud theory against corporate officers and directors. *Janus*, however, will make it harder to prevail on a control person claim. The decision creats new limitations on the ways a primary violation can be established, restricts the meaning of "control," and makes it easier for defendants to establish § 20(a)'s "good faith" affirmative defense.

NOTES

1. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296, 180 L.Ed.2d 166, Fed. Sec. L. Rep. (CCH) P 96327 (2011).
2. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119, Fed. Sec. L. Rep. (CCH) P 98178 (1994).
3. See *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 694 n.8, Fed. Sec. L. Rep. (CCH) P 96344 (9th Cir. 2011) (*Janus* "sets the pleading bar even higher in private securities fraud actions seeking to hold defendants primarily liable for the misstatements of others").
4. For example, *National Union First Ins. Co. of Pittsburgh, Pa. v. Turtur*, 892 F.2d 199, Fed. Sec. L. Rep. (CCH) P 94847 (2nd Cir. 1989); *Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731 (10th Cir. 1974).
5. *Central Bank*, 511 U.S. at 175, 177.
6. *Janus*, 131 S.Ct. at 2303.
7. *Janus*, 131 S.Ct. at 2302-04.
8. *Janus*, 131 S.Ct. at 2302.
9. *Janus*, 131 S.Ct. at 2308.
10. *Janus*, 131 S.Ct. at 2302.
11. Compare *In re Merck & Co., Inc. Securities, Derivative, & ERISA Litigation*, 2011 WL 3444199 (D.N.J. 2011) (corporate executive

who signed SEC filings held to have "made" corporate statements; *Janus* "cannot be read to restrict liability for Rule 10b-5 claims against corporate officers to instances in which a plaintiff can plead, and ultimately prove, that those officers—as opposed to the corporation itself—had 'ultimate authority' over the statement"); *Local 703 v. Regions Financial Corp.*, Case No. 10-02847. (N.D. Ala. Aug. 23, 2011) (signatures on Sarbanes-Oxley certifications can be basis for primary liability); *S.E.C. v. Das*, Fed. Sec. L. Rep. (CCH) P 96546, 2011 WL 4375787 (D. Neb. 2011) (chief financial officers who "signed and certified the statements" "were the persons with ultimate authority and control" and "were the 'makers' of such statements"); *In re Textron, Inc.*, 2011 WL 4079085 (D.R.I. 2011) (chief executive officer is maker of oral statements; other directors were not be primarily liable for his statements), with *Hawaii Ironworkers Annuity Trust Fund v. Cole*, 2011 WL 3862206 (N.D. Ohio 2011), as amended, (Sept. 7, 2011) (corporate executives did not have ultimate authority over company's SEC filings); *In re Coinstar Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 96564, 2011 WL 4712206 (W.D. Wash. 2011) (corporate executives not primarily liable for statements made by co-defendants); *S.E.C. v. Mercury Interactive, LLC*, Fed. Sec. L. Rep. (CCH) P 96604, 2011 WL 5871020 (N.D. Cal. Nov. 22, 2011) (court declined to resolve, on motion to dismiss, whether general counsel's signature on "proxy documents would be sufficient, standing alone, to state a viable misstatements claim under Rule 10b-5").

12. 15 U.S.C.A. § 78t(a).

13. Some courts have also required plaintiffs to plead that the control person was "in some meaningful sense a culpable participant" in the primary violation. For example, *Rochez Bros. v. Rhoades*, 527 F.2d 880, 885 (3rd Cir. 1975); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472 (2nd Cir. 1996). Other jurisdictions, by contrast, have rejected the "culpable participation" requirement. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1575 (9th Cir. 1990) (*en banc*). Those courts hold, instead, that "culpable participation" is better captured by the "good faith" affirmative defense afforded by § 20(a).

14. *Southland Securities Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366, Fed. Sec. L. Rep. (CCH) P 92803 (5th Cir. 2004). After *Janus*, it is questionable whether, in the Fifth Circuit, corporate scienter can still be inferred from the mental state of someone who merely "furnish[es] information or language" for inclusion in the corporation's SEC filings. *Southland*'s logic seems to limit the state of mind inference to the corporate officials who "make" a statement within the meaning of *Janus*.

15. *Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 195, Fed. Sec. L. Rep. (CCH) P 94763 (2nd Cir. 2008).

16. *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 387 F.3d 468, 506, 2004 FED App. 0360P (6th Cir. 2004), quoting *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1107 (10th Cir. 2003).

17. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, at 1000-01, Fed. Sec. L. Rep. (CCH) P 95038 (9th Cir. 2009), as amended, (Feb. 10, 2009); *Glazer Cap. Mgmt. v. Magistri*, 549 F.3d 736, 743-47, Fed. Sec. L. Rep. (CCH) P 95008 (9th Cir. 2008). But see *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1056-57, Fed. Sec. L. Rep. (CCH) P 96519 (9th Cir. 2011) (corporation is distinct from its founders, whose "motivation to commit fraud cannot be automatically ascribed to the Company").

18. *Janus*, 131 S.Ct. at 2302.

19. *Janus*, 131 S.Ct. at 2310.

20. *Janus*, 131 S.Ct. at 2310.

21. *United States v. Goyal*, 629 F.3d 912, Fed. Sec. L. Rep. (CCH) P 95976 (9th Cir. 2010).

22. *Goyal*, 629 F.3d at 919-20.

23. *Janus* raises another scienter-related question: Can a corporation's scienter be imputed from the same person charged as a control person under § 20(a)? In other words, must two different individuals have the requisite scienter—one to supply the corporate scienter for a primary Rule 10b-5 claim, and a second to be the alleged control person under § 20(a)?

24. *Janus*, 131 S.Ct. at 2302, 2305 n.12.

25. 17 C.F.R. § 230.405, § 240.12b-2.

26. For example, *G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 957-58, Fed. Sec. L. Rep. (CCH) P 97862, 30 Fed. R. Serv. 2d 1605 (5th Cir. 1981); *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, Fed. Sec. L. Rep. (CCH) P 99367 (2nd Cir. 1996).

27. *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396. Fed. Sec. L. Rep. (CCH) P 99234, 183 A.L.R. Fed. 765 (11th Cir. 1996).

28. *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065, Fed. Sec. L. Rep. (CCH) P 91217 (9th Cir. 2000), citing *Kaplan v. Rose*, 49 F.3d 1363, 1382, Fed. Sec. L. Rep. (CCH) P 98,422 (9th Cir. 1994); *see also In re Pfizer Sec. Litig.*, 584 F. Supp. 2d 621 (S.D. N.Y. 2008).

29. *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, Fed. Sec. L. Rep. (CCH) P 96993, 23 Fed. R. Serv. 3d 898 (7th Cir. 1992); *Farley v. Henson*, 11 F.3d 827, Fed. Sec. L. Rep. (CCH) P 98005 (8th Cir. 1993).

30. *Janus*, 131 S.Ct. at 2304.

31. *Janus*, 131 S.Ct. at 2304.
32. *Janus*, 131 S.Ct. at 2302 n.6.
33. For example, *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065-67, Fed. Sec. L. Rep. (CCH) P 91217 (9th Cir. 2000) (chief executive officer liable under § 20(a) "through his participation in the day-to-day management of Everex and his review and signature of the financial statements"; director not liable under § 20(a) because, although he "reviewed and approved" false financial statements, he was not "active in the day-to-day affairs" of the company and did not exercise "any specific control over the preparation and release of the financial statements").
34. 17 C.F.R. § 230.405, § 240.12b-2.
35. 15 U.S.C.A. § 78t(a).
36. *G.A. Thompson*, 636 F.2d at 945, 960 (recklessness); *Donohoe v. Consolidated Operating & Product Corp.*, 30 F.3d 907, 912, Fed. Sec. L. Rep. (CCH) P 98349, 130 O.G.R. 77 (7th Cir. 1994) (recklessness); *Kaplan v. Rose*, 49 F.3d 1363, 1383, Fed. Sec. L. Rep. (CCH) P 98,422 (9th Cir. 1994) (scienter).
37. For example, *G.A. Thompson*, 636 F.2d at 945, 960.
38. See Lowenfels & Bromberg, *Controlling Person Liability Under Section 20(a) of the Securities Exchange Act and Section 15 of the Securities Act*, 53 The Business Lawyer 1, 7 (1997).
39. *Janus*, 131 S.Ct. at 2302.
40. *Janus*, 131 S.Ct. at 2305 n.11.
41. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12, 96 S.Ct. 1375, 47 L.Ed.2d. 668, Fed. Sec. L. Rep. (CCH) P 95479 (1976); *In re Silicon Graphics Securities Litigation*, 183 F.3d 970, 977, Fed. Sec. L. Rep. (CCH) P 90610, 44 Fed. R. Serv. 3d 1311 (9th Cir. 1999), as amended, (Aug. 4, 1999).

Recent Trends in Securities Class Action Litigation: 2011 Year-End Review

BY DR. JORDAN MILEV, ROBERT PATTON, SVETLANA STARYKH & DR. JOHN MONTGOMERY

Dr. Jordan Milev, Robert Patton and Svetlana Starykh are Senior Consultants with NERA Economic Consulting. Dr. John Montgomery is Senior Vice President at the firm. NERA Economic Consulting is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. This article is an abbreviated version of the section covering filings in NERA's recent publication, Recent Trends in Securities Class Action Litigation: 2011 Year-End Review. The full publication, including more detailed information about filings and other dispositions, can be found on NERA's website at http://www.nera.com/67_7557.htm. The opinions expressed herein do not necessarily represent the views of NERA or any other NERA consultant. Contact: jordan.milev@nera.com, robert.patton@nera.com, svetlana.starykh@nera.com and john.montgomery@nera.com.

The pace of filings of class actions under federal securities and commodity laws held relatively steady in 2011 as compared to the past three years.[1] Behind this apparently steady number, however, was a substantial shift in the composition of cases filed. Two types of suits have primarily accounted for this compositional shift: M&A objection suits and suits involving Chinese companies listed in the United States.

The brisk rate of filings of shareholder class actions against Chinese companies in 2011 has drawn much attention. It represents the most notable development in the composition of filings in 2011.

Cases alleging breach of fiduciary duty in connection with a merger or an acquisition continue to be filed in large numbers. The number through the end of November 2011 was 61 and has declined only slightly from the 2010 total of 68 such

