



August 2011

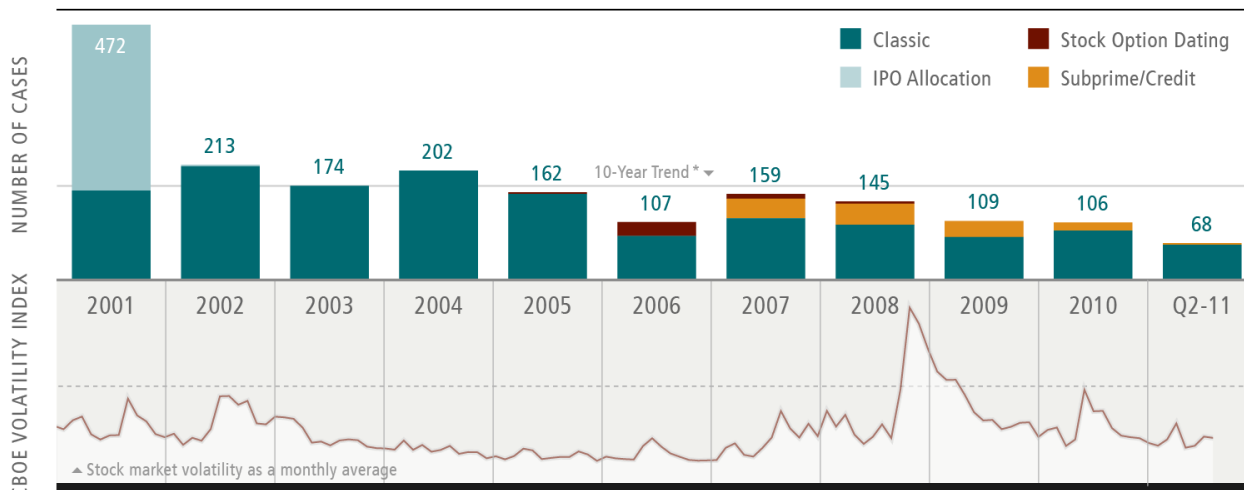
## D&O DATABOX – SECURITIES CLASS ACTION MID-YEAR REPORT

(AS OF JUNE 30, 2011)

Woodruff-Sawyer & Co. is pleased to present the latest information concerning securities litigation filed against public companies in the United States. The information below comes from the D&O Databox as of June 30, 2011 <sup>1</sup>. The D&O Databox tracks securities class action litigation filed against public company issuers and their directors and officers. Settlement figures include amounts paid by issuers, their directors and officers, and their insurance carriers. Settlement figures exclude amounts paid in settlement by third party defendants.

### NEW CASES

#### Federal Securities Class Action Lawsuits



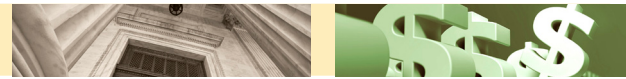
NOTE: DATA CURRENT AS OF JUNE 30, 2011. \*EXCLUDES IPO ALLOCATION CASES

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#### Chinese reverse merger companies – the theme that dominated securities class action lawsuits in the first half of 2011:

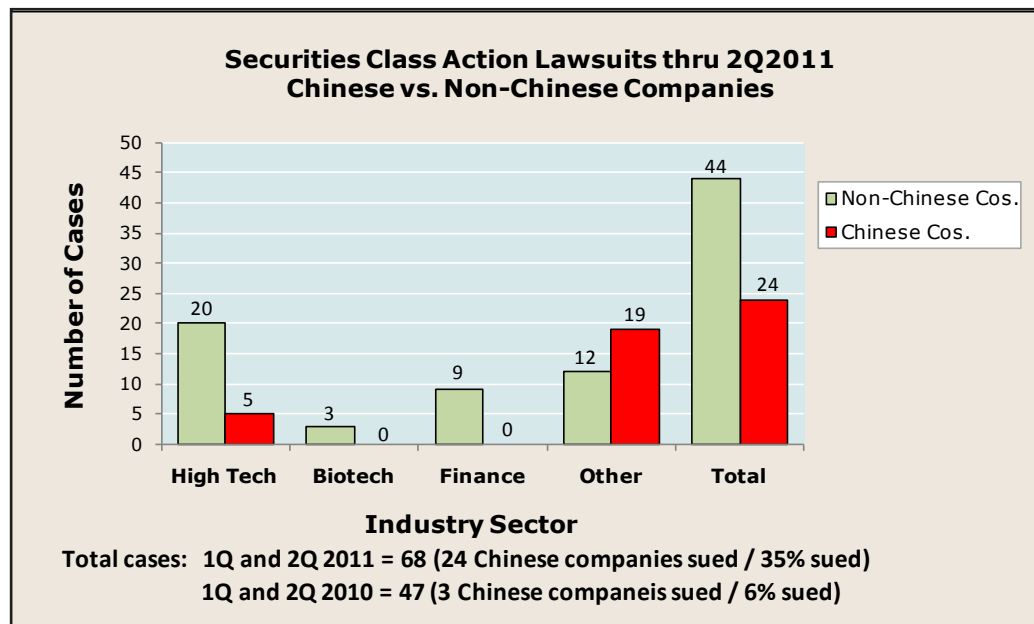
Of the 68 cases filed thru June 2011, 24 cases were filed against public companies incorporated in the U.S. and headquartered in China (35% of all 2011 cases). These China-based companies have entered the U.S. stock market by acquiring dormant U.S. public companies and subsequently raising millions of dollars via public offerings. As we have reported in previous issues, the plaintiffs' bar has focused its attention on these companies since the summer of 2010 whereas various news reports and on-line analysts started to question the veracity or accuracy of these companies' business dealings and financials as reported in their SEC filings. Subsequent revelations have led to suspension of trading in a number of these companies. The SEC went so far as to issue a bulletin on June 9, 2011 advising investors to proceed with caution when considering whether to invest in a reverse merger company. The SEC continues to scrutinize these reverse merger companies, and has focused their attention on the auditors of these companies as well. Although there have been a surge of lawsuits against reverse merger companies, we

<sup>1</sup> For purposes of tracking issuer-related securities litigation, the D&O Databox focuses exclusively on securities class action lawsuits filed in federal courts against public companies by holders of common or preferred stock.



anticipate that the pace will slow down. At this point, we think it likely that most of the problem companies have been identified via the analysts, plaintiffs' bar and various regulatory agencies.

Setting aside the lawsuits against China-based companies, the numbers reveal a decline of about 16% in filings as compared to the first half of 2010 ( i.e. 37 cases thru June 2011 vs. 44 cases thru June 2010). Industry breakdown of Chinese companies and non-Chinese companies in the first half of 2011 is as follows:

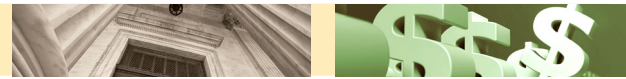


#### More China-related class action news:

China's fast growing economy has attracted billions in foreign direct investment in the last decade. A recent case filed against Yahoo! Inc. involves a large investment made by the company into Alibaba, China's largest e-commerce company, and reveals the challenges of managing such an investment. In 2005, Yahoo invested \$1.0 billion for a 43% interest in Alibaba and a seat on their board. In May 2011, Yahoo disclosed that they recently learned of the transfer in March of an Alibaba subsidiary (Alipay, an online payment service similar to PayPal), to Alibaba's chief executive, and noted that the transfer occurred without getting approval from Alibaba's board. Alibaba disputed this assertion by arguing that Yahoo had known for some time that a transfer was necessary in order to comply with Chinese laws that require local ownership. According to the complaint, industry experts considered this investment to be Yahoo's most valuable corporate asset, accounting for as much as two-thirds of Yahoo's entire \$21B market capitalization. This surprise shift in ownership caused investors to fear that Yahoo's stake in Alibaba had eroded. Unsurprisingly, the market reacted negatively to the news. A securities class action suit against Yahoo swiftly followed. Recently, on July 29, 2011, the press reported that an agreement had been reached to end the dispute, but as one analyst summed it up: "the Alipay agreement: better than nothing, but not that great." Certainly, the fact that negotiations took place after the transfer occurred was an unusual aspect of this transaction.

#### Class action news on other fronts:

Our review of non-China related cases filed in the second quarter found that seven of the seventeen cases were due to companies encountering problems with weakened demand in their products and the market reacting to their missed earnings targets and adjustment in guidance (such as Axiom, Logitech International S.A., Research in Motion Limited, Smith Micro Software, Inc. and The Timberland Company). In light of the current volatility in the U.S. and international economies, we



anticipate that the plaintiffs' bar will file many more suits of this kind in the near future. The remaining 10 cases involved allegations of improper or inadequate accounting, fraud, and credit-crises issues.

### M&A Suits:

In 2011, the number of M&A lawsuits continues to grow, and shows no signs of letting up. This year's filings are on track to match last year's. One hundred fifty-three (153) cases have been filed through June 2011. Securities Class Action Services reports that there were three hundred forty-one (341) M&A lawsuits filed in 2010. Cases per month are averaging at 25 cases in 2011 as opposed to 28 cases per month in 2010.

This type of filing is perceived to be a source of revenue for plaintiffs' bar, and, indeed, many companies and defense attorneys now view the settling of these M&A lawsuits as part of the cost of an M&A transaction. However, as these cases work their way through the courts, there has been some pushback by the Delaware Chancery Court, particularly on cases the Court has found to be clearly without merit. A Wall Street Journal article published on July 19, 2011 has noted that the typical fee range for plaintiffs' attorneys in M&A cases range from \$400,000 to \$500,000, but that there have been several cases in which Delaware judges have significantly reduced fees (all the way down to \$75,000 in one example).

### SETTLEMENTS

- Average and median settlement for January thru June 2011: \$18.9M and \$9.5M
- Prior 10-year average and median settlement: \$26.8M and \$6.9M

Eighteen companies executed settlements agreements through 2Q2011 for an aggregate amount of approximately \$663.7M (excluding third party defendants). As we had discussed in our previous quarterly Flash Report, the two largest settlements this year are by Satyam Computer Services Limited for \$125.0M and Credit Suisse Group for \$70.0M. (In previous reports, we have also noted the impact that the Supreme Court's decision on "Morrison v. National Australia Bank" had on these settlements.)

The top 10 settlements for this year to date are as follows:

Issuer	Suit Date	Settlement Amount*	Comments
Satyam Computer Services Ltd.	1/7/09	\$125.0M	Fraudulent accounting
Credit Suisse Group	4/21/08	\$70.0M	Subprime mortgage problems
Huron Consulting Group Inc.	8/4/09	\$27.0M	Restatement of financials
Semtech Corporation	8/10/07	\$20.0M	Stock option backdating
DVI, Inc.	7/25/03	\$14.3M	Fraudulent accounting
Accuray Incorporated	7/22/09	\$13.5M	Accounting issues
Navistar International Corp.	12/13/07	\$13.0M	Restatement of financials
GT Solar International Inc.	8/1/08	\$10.5M	IPO disclosure issues
Corus Bankshares, Inc.	3/11/09	\$10.0M	Subprime mortgage problems
Nuvelo, Inc.	2/9/07	\$8.9M	Clinical trial failures

\*Executed settlement agreements in place – does not include tentative settlements.



## DISMISSALS

21 cases were dismissed by the courts in the period of January through June 2011. They break down as follows:

By Year Filed	By Industry
<ul style="list-style-type: none"> <li>• 10% cases - 2010 lawsuits</li> <li>• 45% cases - 2009 lawsuits</li> <li>• 15% cases - 2008 lawsuits</li> <li>• 20% cases - 2007 lawsuits</li> <li>• 10% cases – 2006 and 2003 lawsuits</li> </ul>	<ul style="list-style-type: none"> <li>• 45% - All Other Industries</li> <li>• 25% - High Technology</li> <li>• 25% - Finance</li> <li>• 5% - Biotechnology</li> </ul>

## RECENT SUPREME COURT DECISION: Janus Capital Group, Inc. v. First Derivative Traders

The Janus Capital decision is a clear win for the defense bar. Although this ruling involved the mutual fund industry, the ramifications of this decision goes far beyond this industry and reaffirms prior Supreme Court decisions made in the cases of *Central Bank v. First Interstate Bank* and *Stoneridge v. Scientific Atlanta*. The *Central Bank* and *Stoneridge* decisions held that Rule 10b-5's private right of action did not create secondary liability against "aiders and abettors" that provided "substantial assistance" to an alleged fraud because any link between their undisclosed conduct and plaintiff's losses was too remote to be causal. (As a reminder, Rule 10b-5 is the SEC's rule that bars fraud in connection with the purchase or sale of securities.)

In the recent Janus case, the Court decision held that an investment advisor is not liable for fraud in the prospectus of a sponsored mutual fund because the investment fund is not the "maker" of these statements. The Court concluded that:

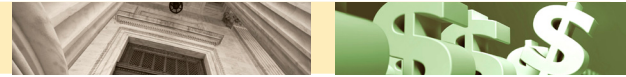
For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker.

This decision should limit the scope of Rule 10b-5 by limiting the universe of individuals who may be held liable.

## THE SEC ADOPTS WHISTLEBLOWER RULES

On May 25, 2011, the SEC adopted rules to implement the new whistleblower program required by Section 922 of the Dodd-Frank Act. Dodd-Frank's whistleblower program is intended to encourage whistleblowing by rewarding individuals who act early to expose violations of the federal securities laws and who provide evidence that helps the SEC bring successful prosecutions. Previously, the agency's bounty program was limited to insider trading cases and the amount of the award was capped at 10 percent of the penalties collected. This new program may award between 10 to 30 percent as determined by the SEC (so long as the penalty amount exceeds \$1.0M). A condition of eligibility for payment under the program is that original information be provided to the SEC on a voluntary basis.

Not surprisingly, reactions were mixed and varied widely. A slew of comment letters sent to the SEC prior to the adoption of this program urged the agency to establish the program with the caveat that it would require employees to report problems through a company's internal compliance program in order to qualify for a reward. The program does not make this a requirement but does provide a grace period after first reporting internally from 90 to 120 days. This means that if the whistleblower reported internally and the SEC subsequently acquired the information from another source, the whistleblower would get credit with the SEC as if he or she had reported the information to the SEC on the date that the whistleblower reported the information



internally. The SEC has also stated that it would give favorable consideration to whistleblowers who first attempt to use a company's internal reporting program when assessing the amount of the reward.

Critics believe that the SEC will be inundated and overburdened by the volume of complaints and whistleblower reports, that it undercuts the purpose of internal compliance programs, and that companies will have the additional concern of dealing with the government on complaints that could have been effectively dealt with internally. Proponents of the new program assert that whistleblowers will be advised by counsel as to the viability of pursuing a complaint and that wasteful, unsubstantiated complaints will be weeded out. Only time will tell if these rules will help or hinder the internal processes that companies put into place following Sarbanes-Oxley. However, the plaintiffs' bar is said to be preparing a broad range of whistleblower suits that will be filed immediately upon the formal implementation of the rules.

### **ABOUT THE D&O DATABOX**

D&O Databox is Woodruff-Sawyer & Co.'s proprietary director and officer litigation database. Included within the D&O Databox is information concerning every securities class action lawsuit filed against public company directors and officers since 1988. Woodruff-Sawyer uses the D&O Databox to help its client model their D&O litigation-related risk. For questions about the D&O Databox, please contact Donna Moser (dmoser@wsandco.com or 415.402.6526).

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