THE MONITOR

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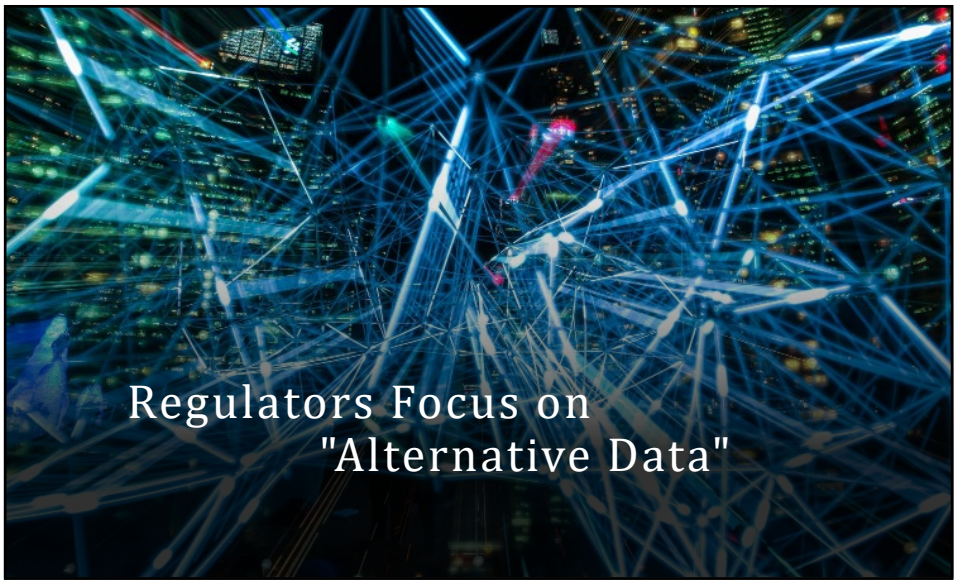

Regulators Focus on "Alternative Data"

Data is king. Companies collect it and analyze it to understand their consumers and to deploy business initiatives. Consumers sometimes want to share data in order to get better service (such as the perfect recommendation from Netflix or an easy repeat-buy from Amazon Prime) and sometimes want to keep it secret (generally out of privacy concerns).

With all this going on, there is another piece of the data puzzle that companies need to be talking about and preparing for: the wave of enforcement activity that has begun to focus on how companies are using the sensitive data they collect in making business decisions – to approve or deny a loan, to target an advertisement, or to pick a neighborhood for offering a new service.

Any business that uses sensitive data as part of its decision making needs to remain focused on more than the rules for how to safeguard sensitive customer data. The business must also stay informed about the enforcement actions being taken by regulators throughout the country about how companies use data to make business decisions. Key areas for businesses to focus on include discrimination and unfairness, accuracy, and security and transparency.

It is well established that companies cannot make business decisions – especially credit decisions – that discriminate on the basis of race, gender, religion, or country of origin. But sometimes criteria companies do not expressly invoke a discriminatory characteristic, but arguably serve as a proxy for one. For instance, the Federal Trade Commission (FTC) has said that using zip codes in a decision can be an unlawful proxy for a race-based decision and could therefore constitute an "unfair" practice. Numerous other seemingly objective and defensible criterion could also be construed as unfair and discriminatory.

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Recognizing both positive and negative potential for using alternative data, the Consumer Financial Protection Bureau (CFPB) noted that "[t]he use of alternative data and modeling techniques may expand access to credit or lower credit cost and, at the same time, present fair lending risks" in it's June 28, 2019, Fair Lending Report.

In short, companies should continually monitor the most up-to-date standards for data use, and consumers should maintain awareness for what types of data are being used, and consider whether any alternative data could result in unfairness.

Regulators have also become increasingly concerned over the accuracy of alternative data that a company acquires, uses, or sells for use in decisions about consumers. Alternative data is most useful where traditional data gives an imperfect or incomplete view of an applicant's creditworthiness. But statistic science dictates that alternative data may be less accurate — smaller sample sizes give rise to greater variance.

Thus, companies selling or using third-party data in relevant consumer decisions should consider whether they have sufficient processes in place to permit user feedback for data, and that they engage in periodic data reviews to assess the completeness and accuracy of their data.

As data use becomes increasingly key to businesses – and regulators – companies must continue to ensure their compliance with regulatory mandates and best practice norms. In addition, as businesses increasingly rely on alternative data, consumers should seek and maintain awareness of such data to ensure that they are not subjected to any unfair decisions and also that the trove of available data accurately reflects their true identities.

High Court Declines Review of 9th Circuit Test for Loss Causation Under the Securities Exchange Act

On June 24, 2019, the Supreme Court rejected defendants' petition for writ of certiorari to consider a securities fraud class action that sought a determination as to whether, for loss causation purposes, a plaintiff must link a company's stock drop to a disclosure of an alleged fraud. The case is *First Solar Inc. et al. v. Mineworkers' Pension Scheme, et al.,* Case No. 2:12-cv-00555-DGC (D. Ariz. 2012). This class action was filed on March 15, 2012 and alleged that certain fraudulent misrepresentations concerning First Solar, Inc.'s ("First Solar") expenses caused investor losses, including a decline in the solar panel company's stock price from $300 in 2008 to less than $50 in 2012.

U.S. District Judge David G. Campbell certified the investor class on October 8, 2013, and later denied most of First Solar's motion for summary judgment on August 11, 2015. However, conflicting loss causation law caused Judge Campbell to request guidance from the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). The conflicting lines of case law were generated from two Ninth Circuit decisions: *In re Daou Systems Inc.,* 411 F.3d 1006 (9th Cir. 2005) (loss causation adequately plead where the disclosure of the company's financial problems which were caused by fraudulent accounting practices – not the fraud itself – led to the stock loss) and *Metzler Investment GMBH v. Corinthian Colleges, Inc.,* 540 F.3d 1049 (9th Cir. 2008) (for loss causation, plaintiff must establish that the alleged fraud was revealed to the market and caused the stock losses, not just that the market reacted to a company's poor financial condition). Judge Campbell followed Daou, noting it was decided first and that the decision stated the better rule in line with traditional notions of proximate causation.

On January 31, 2018, the Ninth Circuit held that the plaintiffs could

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connect loss causation in their class action to First Solar's alleged misrepresentations, as opposed to public disclosure of the alleged fraudulent conduct. See *Mineworkers' Pension Scheme v. First Solar Inc.,* 881 F.3d 750 (9th Cir. 2018). That decision upheld the loss causation test established in *Lloyd v. CVB Fin. Corp.,* 811 F.3d 1200 (9th Cir. 2016) in which the Ninth Circuit affirmed that investors had adequately pled a causal connection between the alleged misrepresentations and their loss. First Solar then appealed to the U.S. Supreme Court asserting loss causation can only be proven when the market learns of alleged fraud and reacts to it, but the high court denied the petition on June 24, 2019.

Accordingly, in the Ninth Circuit, the correct test for loss causation under the Securities Exchange Act of 1934 remains the general proximate cause test applied by Judge Campbell: "[a] plaintiff can satisfy loss causation by showing that the defendant misrepresented or omitted the very facts that were a substantial factor in causing the plaintiff's economic loss."

Upcoming Lead Plaintiff Deadlines

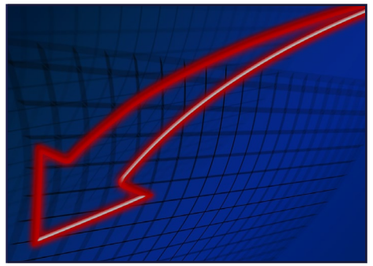
Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
Verb Technology Company Inc. (NASDAQ: VERB)	Sept. 08, 2019
CannTrust Holdings Inc. (NASDAQ: CTST)	Sept. 08, 2019
Realogy Holdings Corp. (NYSE: RLGY)	Sept. 09, 2019
Reckitt Benckiser Group PLC (NYSE: ARLO)	Sept. 13, 2019
Omnicell, Inc. (NASDAQ: OMCL)	Sept. 16, 2019
Ideanomics, Inc. (NYSE: IDEX)	Sept. 17, 2019
Netflix, Inc. (NASDAQ: NFLX)	Sept. 20, 2019
L Brands (NYSE: LB)	Sept. 21, 2019
Karyopharm Therapeutics Inc. (NASDAQ: KPTI)	Sept. 21, 2019
Eagle Bancorp, Inc. (NASDAQ: EGBN)	Sept. 22, 2019
National General Holdings Corp. (NASDAQ: NGHC)	Sept. 23, 2019
Mallinckrodt PLC (NYSE: MNK)	Sept. 24, 2019
Oasmia Pharmaceutical AB (NASDAQ: OASM)	Sept. 27, 2019
3M Company (NYSE: MMM)	Sept. 27, 2019
GTT Communications, Inc. (NYSE: GTT)	Sept. 28, 2019
Aclaris Therapeutics, Inc. (NASDAQ: ACRS)	Sept. 28, 2019
Venator Materials PLC (NYSE: VNTR)	Sept. 29, 2019
Just Energy Group Inc. (NYSE: JE)	Sept. 29, 2019

9th Circuit Revives Securities Class Action Against LifeLock, Inc.

Recently, a Ninth Circuit three-judge panel overturned most of an Arizona district court's dismissal of a securities fraud class action brought by two Oklahoma public pension funds against Defendants-Appellees Todd Davis (founder and CEO), Hilary Schneider (former President), and LifeLock, Inc. ("LifeLock"). The case is *Oklahoma Police Pension and Retirement System, et al., v. LifeLock, Inc., et al.,* No. 17-16895 (9th Cir. July 10, 2019). The pension funds alleged the defendants covered up weeklong delays with the Company's credit check alerts, which LifeLock advertised as being sent in "real time." In response, defendants claimed that the risk factors discussed in LifeLock's financial filings were enough to warn investors despite the company speaking positively about the alerts. The Ninth Circuit disagreed, finding that the Oklahoma funds adequately alleged falsity: "LifeLock's risk disclosures only discussed the possibility of future problems. They did not warn investors that any of the Credit Check Alerts were stale, let alone close to 70% of them. Consequently, they did not negate LifeLock's earlier misstatements."

The three-judge panel also concluded that defendants Davis, Schneider, and LifeLock acted with the requisite scienter necessary under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(2)(A). Citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 324 (2007), the judges conducted an "inherently comparative" analysis "considering



the allegations in the complaint holistically." The judges found that the inference that Schneider intentionally or recklessly misled investors was at least as compelling as any competing inference: "[t]aken together, those allegations undercut the only plausible nonculpable explanation for Schneider's conduct – that she did not discover the full extent of the problems affecting the Credit Check Alerts – because they suggest that Schneider both paid attention to the stale alerts and received detailed information about them." With respect to CEO Davis, the Ninth Circuit found that "his involvement with the promotion of LifeLock's identity theft products, the 2010 consent decree with the FTC concerning LifeLock's misrepresentations of its alert-based products, the complaints filed by former employees identifying problems with LifeLock's real-time alerts, and the overall importance of real-time Credit Check Alerts to LifeLock's business model" supported a finding that the inference that the CEO recklessly failed to discover that a high percentage of Credit Check Alerts were stale was at least as compelling as any competing inference.

Accordingly, this securities fraud suit will get another day in district court after the Ninth Circuit panel found that the investors properly argued LifeLock, Davis, and Schneider, recklessly or on purpose made false representations concerning its product.

The PSLRA in State Court: How Much Does Federal Law Control State Court Procedure?

In 2018, the U.S. Supreme Court held in *Cyan, Inc. v. Beaver County Employees Retirement Fund* that certain types of cases brought under the federal securities laws could be brought in state court, not only in federal court. This decision has solidified litigants' right to choose their litigation forum, but it has also raised the issue of how much federal procedural law can dictate state court procedure.

"Substantive" law refers to legal rights, obligations, and remedies. For instance, a corporation that lies to its shareholders may be liable for securities fraud and can be forced to compensate shareholders for any harm caused by the company's misconduct. "Procedural" law, on the other hand, refers to how lawsuits are conducted and covers matters such as timing and sequencing of certain parts of the litigation, page limitations on briefs, whether documents need to be filed in person or electronically, and similar matters.

Although federal courts have the general authority to adjudicate substantive state law claims and state courts have the authority to adjudicate federal claims in certain instances, procedural matters are generally defined by the court where the case is pending. In other words, the Federal Rules of Civil Procedure governs procedure and federal courts, and state procedural law governs cases in state courts.

Post-*Cyan*, however, courts and litigants have grappled over whether the section of the Private Securities Litigation Reform Act of 1995 (PSLRA) that stays discovery until after a motion to dismiss has been decided applies to cases brought in federal courts. In New York, for example, a plaintiff is generally free to seek discovery shortly after filing suit and does not have to wait for a favorable opinion on any motion to dismiss. However, given the PSLRA automatic discovery stay, defendants have argued that no discovery should proceed until after the plaintiff's complaint survives a motion to dismiss.

As part of its securities litigation practice, Johnson Fistel is actively involved in numerous matters where this issue has arisen.

Courts deciding this issue is split. A Connecticut judge recently held that the PSLRA automatic discovery stay does apply. Shortly thereafter, a New York judge held twice that the discovery does not apply and that the plaintiffs could seek discovery immediately. One week later, a different New York judge held that the discovery does apply and that discovery would not begin until after the plaintiffs' complaint survived a motion to dismiss.

None of the decisions in these cases has been tested by an appellate court, and the parties in those cases have declined to take the issue up on appeal. As a result, whether a plaintiff can get discovery pre-motion to dismiss remains an open issue and will likely continue to be debated in the coming months.

As a practical matter, speedy courts will often render a decision before the parties have even reached an agreement on discovery, thus mooting the need for faster discovery. On the other hand, a setup where state courts selectively apply federal procedural approaches suggests an arbitrary approach to resolving core issues: a plaintiff's right to the facts and defendants' interest in not facing a huge burden before a court passes muster on the strengths of a case.

In any event, finality and clarity would serve the interests of justice so parties can focus on pursuing their cases and not be distracted by issues that resulted from unclear language in the PSLRA.

JF JOHNSON FISTEL

Johnson Fistel was founded on the following five core values: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients — their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.

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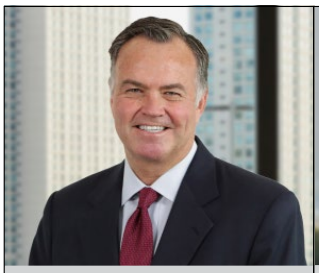
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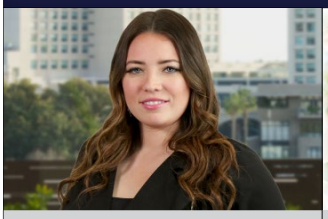
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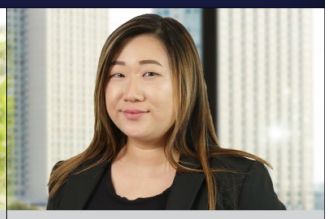
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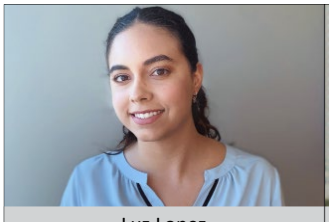
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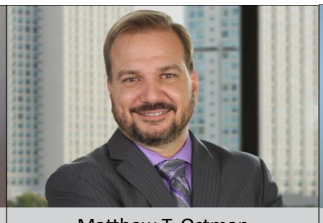
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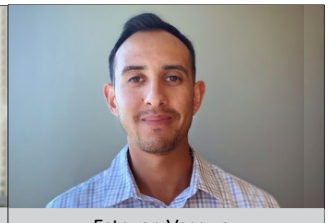
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