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Does the PSLRA's Notice Requirement Apply Solely to PSLRA Claims?

Poptech v. Stewardship Investment Advisors– A Case of First Impression in the Second Circuit

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In 1995, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA) to address perceived abuses in securities class action litigation. As a consequence, Congress sought to ensure that control over securities litigation remained with investors rather than their lawyers.[1]

To achieve this goal, Congress established the lead plaintiff provisions of the PSLRA. Under these provisions, the court must appoint the plaintiff or group of plaintiffs with the largest financial interest in the relief sought by the action to lead the litigation.

To attract investors with the largest financial interest, Congress imposed a requirement on the plaintiff or group of plaintiffs filing the first complaint to publish a notice that presents "a fair recital of the subject matter of the suit'" and informs "'all class members of their opportunity to be heard."[2] Among other things, this notice must advise putative class members about the action and "the claims asserted therein."[3]

In *Poptech, LP v. Stewardship Investment Advisors, LLC*,[4] District Court Judge Mark R. Kravitz was asked to determine the scope of the requirement in the PSLRA to advise putative class members of "the claims asserted" in the action. Judge Kravitz held that plaintiffs need only advise investors of the PSLRA claims alleged in a complaint, not the non-PSLRA claims.

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Since Poptech, LP (Poptech) had given notice of its claims under the Securities Exchange Act of 1934 (the Exchange Act), Judge Kravitz found that Poptech's notice satisfied the PSLRA.

Poptech arose from investment in a hedge fund that invested in a Ponzi scheme operated by Thomas Petters. Among other claims, Poptech alleged that the defendants "violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, by misrepresenting that the Fund would follow certain investment objectives, strategies and methods, when, in fact, contrary to those representations, the Fund invested the bulk of its assets in" Petters' Ponzi scheme.[5]

Poptech sought appointment as a colead plaintiff along with two other class members.[6] No class member opposed Poptech's motion; however, defendants Stewardship Investment Advisors, LLC (Stewardship Advisors) and Marlon Quan opposed the motion by challenging the sufficiency of the notice that Poptech published.[7] In so doing, however, the defendants did not dispute that "Poptech's notice met the [PSLRA's] requirement of being published in a widely circulated national business-oriented wire service."[8] Nor did they dispute that "the notice satisfactorily informed members of the proposed class about the pendency of the action and about the purported class period" as required by the statute.[9] Instead, the defendants argued, among other things, that "Poptech's notice did not fully and adequately advise members of the proposed class of *all* the claims asserted in the [c]omplaint…" because Poptech did not mention the state law claims alleged in the complaint.[10]

Noting that "[n]either the Supreme Court nor the Second Circuit has ever considered whether the PSLRA requires a plaintiff's notice to provide a detailed account of *all* of the claims in the complaint, including state law claims," the court concluded that the PSLRA requires the plaintiff "to list all federal securities law claims" in the notice (which Poptech had done in its notice), "but does not require notice of every state law claim."[11]

Although the issue was one of first impression in the Second Circuit, at least one other court directly considered the issue. In *Thomas v. Metropolitan Life Insurance Co.*,[12] the defendants contended, among other things, that the initial notice was deficient because "it did not expressly reference the non-PSLRA claims included in the original complaint… ." The *Thomas* court rejected the challenge (on a statutory ground similar to that expressed by Judge Kravitz, concluding that "the original notice's failure to expressly identify the originally alleged non-PSLRA claims does not render the original notice insufficient."[13]

The *Poptech* court began its analysis by noting that "the PSLRA does not specifically distinguish between federal securities law claims and other claims such as state law claims."[14] However, "because the PSLRA applies only to class actions that arise under the *federal securities law*,"[15] the court found that a PSLRA notice need only inform potential class members of the federal securities law claims in the complaint.[16] In this regard, the court observed: "The plain text of the PSLRA does not explicitly require a plaintiff to list *every* claim asserted in a private securities class action. Instead, it requires only that a plaintiff publish a 'notice' of 'the claims asserted' in a pending securities class action."[17]

To the court, if Congress had intended a different result, it would have used language requiring the plaintiff to exhaustively detail every claim—including claims brought both under the federal securities laws and the state and common laws—and every legal theory outlined in the complaint.[18]

The court further observed that a PSLRA notice should be neither technical nor uninformative nor misleading. Instead, the notice should "give members *adequate information for them to make informed decisions* without overwhelming them with so much information that they do not see the most important information or do not even read the notice because of its length."[19]

Applying its legal analysis to the notice before it, Judge Kravitz found that Poptech's notice "provided members of the proposed class with a reasonably detailed summary of all of the claims asserted in the [c]omplaint"—that is, "in addition to informing members of the proposed class about Poptech's [Exchange Act claims], it also noted that there were 'other claims'" alleged against the defendants in the complaint.[20]

The court also found that Poptech's notice "set forth in some detail the factual allegations common to *all* of the claims in the complaint—that is, that Stewardship Advisors invested money in a Ponzi scheme and in loans secured by jewelry and antiques, rather than in more conservative investments as described to investors."[21]

Though the analysis in *Poptech* will provide guidance to future courts asked to consider the scope of the early notice requirement of the PSLRA, it is hard to escape the usage of the word "action" and the usage of the word "claims" in the statute. The PSLRA applies to "each action" brought as a class action pursuant to the Federal Rules of Civil Procedure.[22] The use of the word "action," rather than the word "claim," suggests that Congress intended the PSLRA to apply to all claims asserted in a securities action, not just those arising under the Exchange Act. The language used in the early notice provision supports this reading—it requires, in pertinent part, notice to class members of "the pendency of the action, [and] the claims asserted therein… ."[23] The clause "the claims asserted therein" can only refer to the action for which notice is to be given.

Nonetheless, as a practical matter, because of the access to information that modern technology allows, this issue has diminished importance to investors seeking information about a pending class action. Investors can easily obtain a complaint on PACER, a law firm's Web site, or other Web sites on the Internet, such as the Securities Class Action Clearinghouse. Consequently, putative class members can learn of all the claims asserted in an action and make an informed decision as to whether to move for appointment as lead plaintiff in an action. For this reason, only defendants seeking delay or lead plaintiff movants seeking appointment will find the issue of any concern.

NOTES

1. *See* Statement of Managers, H.R. REP. NO. 104-369 (1995) (CONF. REP.); *see also* S. REP. NO. 104-98 (1995).
2. *See Wenderhold v. Cylink Corp*., 188 F.R.D. 577, 583, Fed. Sec. L. Rep. (CCH) P 90662 (N.D. Cal. 1999) (referencing *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125, 1978-1 Trade Cas. (CCH) ¶ 61825, 24 Fed. R. Serv. 2d 1123 (9th Cir. 1977)).
3. 15 U.S.C.A. § 78u-4(a)(3)(A)(i)(I) (1998); *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 58, Fed. Sec. L. Rep. (CCH) P 99329 (D. Mass. 1996).
4. *Poptech, LP v. Stewardship Inv. Advisors*, LLC, Fed. Sec. L. Rep. (CCH) P 95947, 2010 WL 4365669, at *1 (D. Conn. 2010).
5. *Poptech*, 2010 WL 4365669, at *2.
6. The other movants, William A. Meyer and Dr. Terrence Isakov, did not oppose Poptech's motion; rather, they sought appointment as co-lead plaintiffs in a group with Poptech. *Poptech*, 2010 WL 4365669, at **1, 5. Appointing Poptech as lead plaintiff, *Poptech*, 2010 WL 4365669, at *5, the court deferred ruling on the request to create a lead plaintiff group until after Poptech filed its amended complaint. *Poptech*, 2010 WL 4365669, at *6.
7. *Poptech*, 2010 WL 4365669, at *1.
8. *Poptech*, 2010 WL 4365669, at *2.
9. *Poptech*, 2010 WL 4365669.
10. *Poptech*, 2010 WL 4365669. The defendants also challenged the sufficiency of the notice on the grounds that Poptech did not (i) sufficiently detail the misrepresentations alleged to have been made by the defendants, (ii) disclose the existence of purported interclass conflicts, and (iii) "adequately facilitate further inquiry and action by potential class members." *Poptech*, 2010 WL 4365669, at **2, 4.
11. *Poptech*, 2010 WL 4365669, at *3.
12. *Thomas v. Metropolitan Life Ins. Co.*, 2007 WL 2909352, at *1 (W.D. Okla. 2007).
13. *Thomas*, 2007 WL 2909352, at *2. The court found additional support in the PSLRA, 15 U.S.C.A. § 78u4(a)(3)(A)(ii), which requires publication of the notice only by the plaintiff in the first-filed action when more than one action asserting the same or similar PSLRA claims is filed. "Thus, clause (ii) suggests that non-PSLRA claims are immaterial to determining whether adequate notice was given under clause (i)… ." *Thomas*, 2007 WL 2909352, at *2. "[E]ven if non-PSLRA claims are not always completely immaterial to notice requirements," the court concluded that "they should not be given overriding weight when it comes to determining whether more than one notice of the same PSLRA claims is required." *Thomas*, 2007 WL 2909352.
14. *Poptech*, 2010 WL 4365669, at *3.
15. *Poptech*, 2010 WL 4365669 (citing 15 U.S.C.A. § 78u-4(a)(1)). Courts have held that the PSLRA applies only to actions "aris[ing] under" the

federal statute to which it is an amendment—in this case, the Exchange Act. *See In re CFS-Related Securities Fraud Litigation*, 179 F. Supp. 2d 1260, 1263 (N.D. Okla. 2001) (interpreting PSLRA's automatic stay provision and holding the text of the statute "makes clear" that the PSLRA applies only to private actions "which aris[e] under Chapter 2B of the 1934 Securities Act").

16. *Poptech*, 2010 WL 4365669, at *3.
17. *Poptech*, 2010 WL 4365669 (citing 15 U.S.C.A. § 78u-4(a)(3)(A)(i)(I)).
18. *Poptech*, 2010 WL 4365669, at *4.
19. *Poptech*, 2010 WL 4365669 (quoting *Lane v. Page*, 250 F.R.D. 634, 645 (D.N.M. 2007)).
20. *Poptech*, 2010 WL 4365669. In addition to rejecting the defendants' challenges to Poptech's notice on the grounds discussed in this article, the court was also satisfied that Poptech's notice sufficiently informed class members of how to contact the court and file their own lead plaintiff's motion, disposing of the defendants' remaining challenges to the notice. *Poptech*, 2010 WL 4365669, at *5.
21. *Poptech*, 2010 WL 4365669, at *4.
22. *See* 15 U.S.C.A. § 78u-4(a)(1).
23. 15 U.S.C.A. § 78u-4(a)(3)(A)(i)(I).