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Beyond Arbitration: The Real Battle in Securities Litigation Is Being Fought at Class Certification

Why evolving class-certification doctrine may pose a more immediate challenge to investors than mandatory arbitration

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October 2026

INTRODUCTION

The Battle Has Shifted

Mandatory arbitration has dominated the debate. But evolving class-certification doctrine may present the more immediate challenge to investors.

In the year since the SEC essentially allowed issuers launching initial public offerings to adopt mandatory arbitration clauses for securities litigation, the topic has dominated the discourse about securities litigation. But so far, the reality has failed to come anywhere near the apocalypse some predicted. Instead, the response from issuers has been tepid and in line with what SCAS forecast in a previous white paper and webinar. The reason is not hard to find. Arbitration may sound attractive in theory, but in practice it asks issuers to accept legal uncertainty, shareholder opposition, and the possibility of confronting large numbers of sophisticated investors on an individual basis.

But while investors have focused on arbitration, defendants have been busy advancing a far more effective strategy elsewhere. That battle has received only a fraction of the attention devoted to arbitration, even though it may ultimately prove far more important. Unlike arbitration, which depends upon a lot of moving parts, attacks on class certification are already changing how securities cases are litigated today, which can be seen in decisions in cases involving *Goldman Sachs Group, Inc.* and the *Boeing Company*. These lines of cases are creating new opportunities for defendants to reduce recoverable damages or, in some cases, eliminate class claims altogether

SCAS continues to believe that mandatory arbitration provisions will see only limited adoption in the foreseeable future. The more important question is whether defendants can use evolving class-certification doctrine to achieve many of the same practical objectives without the legal uncertainty, shareholder backlash, or regulatory scrutiny that arbitration invites. This white paper examines why mandatory arbitration has thus far failed to gain significant traction and why the more serious challenge facing investors may be the evolving law of class certification.

MANDATORY ARBITRATION

Arbitration Has Yet to Be a Game-Changer

Legal uncertainty, shareholder opposition and the prospect of multiple individual claims have limited issuer appetite for mandatory arbitration.

Since the SEC has changed course on arbitration clauses, only one major company, Space Exploration Technologies Corp. ("SpaceX"), has adopted such provisions. A leading defense attorney told SCAS that the interest among issuer clients has been tepid. The muted response to mandatory arbitration should come as no surprise. Any issuer adopting such a provision would immediately become a test case in an unsettled area of law. Delaware, still the dominant jurisdiction for incorporation, appears to prohibit such clauses. It is also far from clear whether corporate charters and bylaws function as enforceable contracts between issuers and investors, particularly with respect to secondary-market purchasers. Even if they do, courts would still have to determine whether such provisions satisfy fundamental requirements of fairness and whether they effectively amount to an impermissible waiver of federal securities-law rights.

Legal uncertainty is only part of the problem. Even assuming arbitration provisions ultimately prove enforceable, issuers would be trading one set of risks for another. Rather than confronting a single class action, they could find themselves facing hundreds, or even thousands, of individual claims. They could energize large institutional investors that otherwise might have remained passive class members, encouraging them to pursue aggressive individual recoveries that materially increase litigation exposure. And they would almost certainly invite opposition from shareholders and governance advocates, whether through litigation challenging adoption of the provisions or votes against directors who support them. While such concerns may be immaterial for founder-controlled companies such as SpaceX, they are highly relevant for most public issuers.

More fundamentally, the case for mandatory arbitration rests on an inherently unstable foundation. Absent congressional action, its viability depends on a series of unresolved judicial questions, any one of which could substantially limit or defeat the use of such clauses. It also depends on the continued acquiescence of the SEC, which could reverse course under a future Commission. States outside Delaware could likewise decide to prohibit or restrict the practice.

MANDATORY ARBITRATION — CONTINUED

For issuers, therefore, mandatory arbitration offers uncertainty rather than certainty. It requires public companies to assume legal, governance, and reputational risks today in exchange for litigation benefits that may never materialize. Unsurprisingly, few have shown any appetite to do so.

SCAS therefore continues to believe that adoption of mandatory arbitration provisions in securities litigation will remain limited for the foreseeable future, but it is nonetheless an area for continued close observation.

CLASS CERTIFICATION

The Real and Emerging Threat

Defendants are already using class certification to make securities cases harder to certify, more expensive to litigate and more vulnerable to defeat.

While the debate over mandatory arbitration has dominated headlines, issuers have been pursuing a far more consequential strategy in the courts. The objective is straightforward: make securities class actions harder to certify, more expensive to litigate, and more vulnerable to defeat.

The battleground is the phase of litigation called class certification. The basic purpose of class certification is to demonstrate that class members' interests are similar and cohesive enough to merit joining claims into a class. For example, certain types of mass torts might be ill-suited as class actions, because plaintiffs may have extremely different types of damages that are hard to assess as part of a group. Conversely, investors in common stock of large, publicly traded companies would seem to be the paradigmatic class, as they all purchased the same security, and it is straightforward to produce a plan of allocation that can compute any class member's losses from the same kind of trading data. As a result, class certification was more of a formality for securities cases once the security in question was shown to be in an efficient market.

CLASS CERTIFICATION

Why Predominance Matters

Challenges to predominance can reduce the class period, remove corrective disclosures or, in some cases, defeat certification altogether.

In the past few years, defendant issuers have taken stronger stands at class certification, often contesting such motions tooth and nail. Moreover, the challenges have focused increasingly on what is known as the "predominance" prong of class certification, because attacks on prongs such as typicality and adequacy are centered on the lead plaintiffs themselves and can result in the appointment of new lead plaintiffs, allowing the action to proceed.

Arguments related to the predominance prong, in contrast, can either result in permanent denial of class certification, though still somewhat rare, or in a reduction in the length of the class period and/or the number of operative corrective disclosures. In accomplishing the latter, defendants are unable to end the case but can meaningfully reduce the amount of actionable damages, sometimes even eliminating the bulk of the claim.

And finally, by fighting class certification, even if ultimately unsuccessful, defendants can slow the pace of the case to trial and can significantly raise the cost to lead counsel of litigating cases, which might pressure plaintiffs to settle for less.

While some readers may be aware of the many intricacies and details of class certification, SCAS assumes that such a discussion might be too "inside baseball" for other readers. So, we will explain at a high level the two specific ways issuers are pushing back on the predominance prong at class certification. These two challenges involve the presumption of reliance and models proposed to calculate damages.

PRACTICAL EFFECT

Even an unsuccessful challenge can increase costs, delay proceedings, and improve defendants' settlement leverage.

PRESUMPTION OF RELIANCE

Challenging the Presumption of Reliance

If reliance cannot be presumed, each investor must establish it individually, undermining the basis for proceeding as a class.

Courts have agreed since the 1970s with the concept of fraud on the market to prove the key element of reliance (i.e., investors relied on alleged false statements in their decisions to trade). The theory is that an efficient market incorporates all public information into the stock price. Material false statements therefore inflate (or deflate) the price of securities until a public disclosure reveals the truth, causing the inflation to dissipate. So, if a plaintiff can prove that the market is efficient, reliance can be presumed. If, for whatever reason, reliance cannot be presumed, each investor would have to establish proof of reliance, and that in turn would render a class action a poor vehicle for adjudicating these claims, because individualized issues (here showing reliance) would predominate.

Currently, the law is at a point where plaintiffs are entitled to a presumption of reliance in an efficient market, but defendants can rebut this presumption by demonstrating a lack of price impact. Price impact is the concept that alleged misstatements either caused the price of the security to increase or prevented the price from decreasing. In some cases, it is simple to show price impact. For example, the alleged false statement is the only one made on a given day, and the stock price increases at a significant level beyond the peer market basket of stocks; that is price impact. Similarly, if the company makes one announcement directly related to a false statement (e.g., a company says that its revenues were not $1 billion as previously reported but $500 million) and the stock price drops at a significant level, price impact is again demonstrated.

Goldman Changes the Inquiry

The principal case involving price impact is *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113 (2021) ("*Goldman*"), in which the U.S. Supreme Court made essentially three rulings. First, the Supreme Court took the plaintiff-friendly view that defendants bear the burden of proving a lack of price impact. But it also decided that courts must consider the generic nature of a statement in determining whether the link to the alleged disclosure is severed. For example, a boilerplate statement that the company complies with ethics may be too generic to be sufficiently linked to a disclosure about a specific ethical lapse. Most importantly, the Court found that, in deciding class certification, lower courts "must take into account all record evidence relevant to price impact."

PRICE IMPACT — CONTINUED

The *Goldman* decision emboldened securities class action defendants to argue, with some success, that certain disclosures did not demonstrate price impact and should be removed from cases. But more impactful is that defendants have seized on taking "into account all record evidence" to increasingly demand full-blown evidentiary hearings in court and voluminous supplemental briefing. Not only does this significantly increase the cost and length of class certification, but defendants now have a means of skirmishing on merits issues like loss causation well before summary judgment and trial.

> "Courts must take into account all record evidence relevant to price impact."
>
> U.S. SUPREME COURT, GOLDMAN

DAMAGES METHODOLOGY

Boeing Revives the Damages Debate

A Fourth Circuit decision may reopen challenges to the damages models used to support class certification in securities cases.

But using *Goldman* to contest price impact is only going to work in select cases where loss causation is effectively weak for one or multiple alleged disclosures. Many cases do not have such challenges, especially for the entire class period and every single alleged disclosure. A 2026 decision by the Fourth Circuit Court of Appeals in a putative securities class action, *State of Rhode Island Office of the General Treasurer v. The Boeing Company*, 2026 WL 2083048 (4th Cir. July 20, 2026) ("*Boeing*"), has rejuvenated arguments made by defendants related to the Supreme Court decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) ("*Comcast*"). This decision could expand challenges to more disclosures or even entire cases.

DAMAGES METHODOLOGY

What Boeing Requires

The court found that a broadly described damages methodology was insufficient to demonstrate that damages could be measured on a class-wide basis.

In a nutshell, the appeal involved whether plaintiffs' expert, used to support the lower court's granting of class certification, had submitted a workable model with which to calculate damages at later stages of the case that complied with the standards set forth in *Comcast*. While it was not uncommon in the years since *Comcast* for defendants in securities class actions to challenge the damages model, such arguments most often failed, as courts routinely accepted brief outlines of the "out-of-pocket method" as sufficient under *Comcast* because class members were transacting in the same securities and developing a common damages methodology was straightforward.

The *Boeing* panel found the expert's proposed methodology, the standard fare of out-of-pocket method reports routinely approved in past cases, did not meet the standards required by *Comcast*. As the methodology was so general that it could apply in any securities fraud case[1] and the plaintiffs' expert had not committed to any method for measuring artificial inflation, the analysis fell short of *Comcast* because the district court would have "no way to rigorously evaluate whether damages are measurable on a class-wide basis, whether the damages methodology is consistent with the plaintiff's liability theory, or whether the proposed methodology for measuring damages is reasonable."[2]

THE COURT'S CONCERN

A damages model must do more than identify a commonly used method. It must explain how damages will be measured consistently with the plaintiffs' theory of liability.

POTENTIAL IMPLICATIONS

What Boeing Could Change

The decision could make class certification more intensive, more expensive and more consequential to the ultimate economics of a securities case.

The *Boeing* decision raises a number of implications and questions. The plaintiffs have the right to refile their motion for class certification and have a number of further options for potential appeal. But at the moment, it is possible that this has caused a circuit split, depending on whether the decision will be cabined to the unique facts of the case. It may give defendants a further opportunity not merely to reduce the class period, but to quash a case at class certification.

It is also possible that class certification becomes a much more intense exercise, with much more comprehensive reports required earlier in the process. This in turn makes litigating a case much more expensive, as intense expert fights can result in potentially millions of dollars in expert fees, deposition expenses, and legal expenses.

If so, the net effect would likely be that smaller cases settle faster and for less, since the size of damages would not merit an intense certification process, while larger cases would drag on much longer. While the defense may succeed in substantially, or even completely, reducing damages in some cases, plaintiffs who successfully navigate a long war of attrition may demand higher settlements in these larger cases. Certainly, such a world would favor larger, better-financed plaintiffs' firms.

POSSIBLE MARKET EFFECT

Smaller cases may settle sooner and for less, while larger cases could become longer, more expensive and more dependent on well-financed plaintiffs' firms.

CONCLUSION

The More Immediate Challenge

Arbitration remains largely theoretical. Challenges at class certification are already reshaping the economics of active securities litigation.

The significance of *Boeing* and *Goldman* extends well beyond the specifics of those decisions. Together, they reflect a broader trend: defendants are increasingly attempting to transform class certification from a procedural checkpoint into a major battleground capable of reshaping the economics of securities litigation.

That development presents a more immediate challenge to shareholders than the much-discussed debate over mandatory arbitration. Arbitration remains largely theoretical. Its adoption depends on issuers voluntarily embracing controversial provisions, surviving inevitable legal challenges, and navigating shareholder opposition. Class-certification challenges, by contrast, require none of those things. They are already being deployed in active litigation across the country.

Just as importantly, the incentives favor continued escalation. For an issuer facing billions of dollars in potential exposure, spending a few million dollars on experts, motion practice, and appeals to reduce damages or defeat certification altogether can be a rational investment. Even unsuccessful challenges can increase costs, delay proceedings, and improve settlement leverage. Over time, those dynamics may make securities cases more expensive to prosecute, less predictable to litigate, and ultimately less likely to be filed.

If courts continue moving in this direction, investors are unlikely to remain passive. Larger institutions may increasingly pursue opt-out litigation. Plaintiffs may seek broader discovery at the certification stage and rely on more detailed expert analyses much earlier in a case. In short, an escalating arms race over class certification may be emerging.

THE QUESTION INVESTORS SHOULD WATCH

The future of securities litigation may therefore be determined less by whether companies can force investors into arbitration, and more by whether courts continue to raise the hurdles for certifying a class in the first place. That is a debate that has received far less attention than arbitration. It is also the debate that investors should be watching most closely.

REFERENCES

Notes

1 That the methodology could be used in many securities cases may be a testament to how straightforward it is to calculate damages on a class-wide basis for efficiently traded stocks. It may therefore provide strong evidence that class-wide issues will predominate, a point that seems lost on the Court.

2 Uniquely, litigation at the district court had moved so fast that the expert had already provided a full merits report on damages before the Circuit Court had reached its decision. For this reason, the panel took the somewhat odd extra step of finding that the merits report itself was insufficient to support class certification. The Court found that it was *"inappropriate to let a class-certification decision stand based on a report which the district court didn't even consider in certifying a class in the first place."* Moreover, the Court found that the merits report itself was not enough to achieve class certification. The panel asserted that, as there were over 40 alleged misstatements, claiming that all these statements of different kinds across different points of time would maintain the alleged fraud by an exact percentage was "speculation."

About the Author



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