s.90 and s.90A FSMA: Factors Driving Growth of Claims

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Introduction

We have written previously about the availability to investors and elements of claims under s.90 and s.90A Financial Services and Markets Act 2000 ("FSMA").[1] Our previous article (which can be found here) provided an overview of s.90 and s.90A FSMA claims and discussed notable cases dealing with those provisions.

In this article, we explore the factors driving the growth of s.90 and s.90A FSMA claims and how we see these types of claims developing in future.

These articles form part of a series, in which we will also cover trends in claims made under s.90 and s.90A FSMA, difficulties for claimants in pursuing these types of claims and practical tips corporate entities can take to minimise their risk of liability.

Context

Before looking at the factors driving the growth of future claims, it is helpful to look back at what has come before.

Liability for untrue statements in prospectuses, akin to liability under s.90 FSMA, has been around since the 1890s. Although liability under s.90A FSMA is much more recent, it has now been in place for more than 15 years. However, uptake and use of these provisions has been relatively slow.

At least part of the reason for the slow uptake of this type of claim lies in the complementary actions available to shareholders for public statements made by companies through common law actions for deceit or negligent misstatement.

[1] We refer to s.90A throughout for convenience, noting that much of the substance of s.90A now appears in Schedule 10A to FSMA.

However, given the difficulties encountered in some of these cases in recent years—particularly the well-known Lloyds/HBOS case and the HP/Autonomy litigation—common-law claims have lost some of their appeal.

It is in this context of past difficulty in succeeding in what might be considered more "traditional" shareholder claims that we expect to see a growth in s.90 and s.90A FSMA claims—they provide an alternative route for claimants which, when combined with the driving factors of growth we discuss in more detail below, suggest that we will see many more of these claims in the future.

Drivers of Growth

We expect several key factors to contribute to the expected growth of s.90 and s.90A FSMA claims:

- The United Kingdom's increasingly sophisticated approach to group litigation;
- The rapid growth of litigation funding in the United Kingdom;
- Scope to develop the law further; and
- The growth in the United Kingdom of shareholder activism.

Group Litigation

The United Kingdom has recently seen a surge in high-profile group litigation proceedings (for example, the *Merricks v Mastercard* litigation and the Volkswagen emissions litigation). The growing familiarity of claimant lawyers with the Group Litigation Order ("GLO") procedure in Part 19 of the Civil Procedure Rules has created a favourable environment for large-scale s.90 and s.90A FSMA claims.

The nature of s.90 and s.90A FSMA claims is such that they are likely to involve a large group of claimants who have all suffered loss stemming from the same cause—the public company's misstatement or omission in a prospectus or in published information (see our first article for a discussion of what constitutes "published information").

Courts are inclined to order a GLO to combine separate individual (groups of) claims where this would avoid multiplicity of proceedings and allow a single forum to make a final and binding determination on similar issues (*John Greenwood v Goodwin* [2013] EWHC 2785 (Ch) (relating to the RBS rights issue litigation).

This rationale would likely apply to s.90 and s.90A FSMA claims; the separate individual claims relating to a misstatement or omission by the listed company in a prospectus or other published information are likely to throw up similar issues of fact and law in respect of all claimants.

As such, mirroring the trend in the United States, we expect that s.90 and s.90A FSMA claims will increasingly manifest as group litigation suits brought on behalf of a group of retail or institutional investors. Indeed, there are already a number of claims which fall into this category (against Tesco, Glencore and Petrofac, for example).

However, a factor that might limit this growth is the English "opt-in" model for collective action, which makes it procedurally more cumbersome for claimants to join a group action. In a GLO, claimants will have to affirmatively "opt-in" to the action by filing a claim form and becoming a party. In contrast, in the United States, subject to certification by the court, a claimant can bring a class action on behalf of a defined class, and class members then choose to "opt-out" if they wish to not be bound by the judgment.

Litigation Funding

The increasing sophistication of group litigation in the English courts makes the jurisdiction more appealing to litigation funders due to the large (combined) value of group claims. Litigation funders and the claimant law firms they typically partner with have identified such group actions in the context of securities litigation as a potential area for investment.

Over the past decade there has been a rapid expansion of litigation funding in the United Kingdom market, with some estimates showing an increase in the funds on the balance sheets of the top 15 litigation funders in London from £198 million in 2011/12 to £2.2 billion in 2020/21.[2] We expect that the capital available to fund litigation will increase over time as the litigation funding market in England continues to develop and with the ongoing entry of new participants to the market.

The likely subject matter of s.90 and s.90A FSMA claims is also key to attracting litigation funding investment. Environmental, social and governance reporting is an area in which listed companies are facing increased scrutiny. Litigation funders have historically been involved in large-scale group litigation relating to environmental disasters (such as, for example, Gramercy's funding of claims on behalf of approximately 700,000 Brazilian claimants against BHP and Vale in relation to the collapse of the Fundão tailings dam at the Samarco Mariana mine complex). The existing expertise of

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[2] Source: https://www.rpc.co.uk/press-and-media/litigation-funders-backing-class-action-lawsuits-as-they-put-22bn-war-chests-to-work/.

funders in assessing environmental claims provides a natural synergy with ESG-related securities litigation.

If claimants are able to rely on litigation funders to mitigate the financial risk of bringing s.90 and 90A FSMA claims, this will no doubt encourage the growth of such claims.

Scope to Develop the Law

We have previously discussed the elements of s.90 and s.90A FSMA claims in an earlier article.

While recent cases like *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) ("Autonomy") have shed some light on the application of s.90A provisions, the law around s.90 and s.90A FSMA remain nascent. There has not yet been a full case at trial which has analysed the substantive provisions of s.90 FSMA. As for s.90A FSMA, while Autonomy helpfully discussed elements such as the meaning of "published information" and "reasonable reliance", there are still big questions to be answered on the meaning of dishonesty (especially in the context of omissions), causation, limitation period and issues around quantum (to be addressed in a separate judgement to be handed down by Hildyard J). Moreover, concepts such as "reasonable reliance" are clearly fact sensitive and will depend on the circumstances of each case.

The untested areas in the law—both in terms of legal considerations and evidentiary thresholds—provides fertile ground for claims to be brought by claimants who see an opportunity to test the boundaries of these provisions.

The Growth of Shareholder Activism

Recent research has demonstrated that after a period of quite subdued shareholder activism during the Covid-19 pandemic, there has been an increase in activity levels by shareholder activists during 2021 and 2022.[3] According to the same research, M&A activity has been a key driver of growth in shareholder activism.

Shareholder activism often takes the form of an acquisition of shares by activists, with a view to obtaining rights to vote in and ask questions at general meetings. However, it could also allow the same activist shareholders to pursue claims against the entities in which they have invested for misleading or untrue public statements. In essence, those shareholders could police the public statements made by or on behalf of the company and pursue claims to suit their agendas.

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[3] Source: Lazard's Review of Shareholder Activism 2022.

Although not directly a form of shareholder activism, the London market is also seeing a more proactive approach by institutional investors to challenging the companies in which they have invested. The best examples are the claims made in 2023 by groups of institutional investors of claims pursuant to s.90 and s.90A against Glencore and Petrofac, respectively.

Conclusion

Given the potential to test new areas of the law, and the entry of institutional investors into the claimant role traditionally inhabited by retail investors, we expect that these types of claims are not going away any time soon. Watch this space.

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