

## Weil's Polkes Looks for Financial Litigation Trends to Continue in 2018

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FROM the years-long Archstone case getting dismissed, to the U.S. Court of Appeals for the Second Circuit's ruling in the Veleron insider trading case, Weil, Gotshal & Manges counted numerous wins at the federal and the state level in 2017, said partner Jonathan Polkes, who co-chairs the firm's global litigation department.

With an eventful year behind him, Polkes looks ahead to what 2018 holds for financial litigators and their clients. Since the election of Donald Trump as president in 2016, attorneys and their clients have watched eagerly for signs of shifts in how regulators and prosecutors intend to operate. A full year in, Polkes says those looking for change are likely to see more of the same.

**Q: This past year felt like such a waiting game—what changes would the Securities and Exchange Commission, Department of Justice and others make now that Trump was in office? What have you seen—if anything—actually happen?**

**A:** There were certainly a lot of people wondering, What is Trump going to do? You've got a new administration, people from Wall Street law firms now at the SEC. So far, my sense—and I think this is the sense of my peers—is that nothing's really changed, in terms of the aggression and the unrelenting nature of the enforcement efforts.

I think the SEC, like other bureaucracies, is slow to change. There are a lot

of people there who've grown up since 2008 under this regime. And there's a lot of tools they have at their disposal. We'll see if people decide there's going to be a fight to pick somewhere along the line.

I still think enforcement is as aggressive as ever, as difficult as ever. We'll see if that changes, but so far it's nothing you would notice, and it continues to be extremely aggressive, or extremely robust, depending on your perspective.

**Q: So has everything been status quo with the SEC then?**

**A:** We've been seeing regulators there rolling out a couple of tools in connection with the Investment Company Act of 1940, as opposed to the '33 or '34 Act, that are kind of low-hanging fruit. There's a concept under the '40 Act called "negligent fraud"—so you can charge a fraud, it's called a fraud in connection with advisory services, but it does not require scienter. It's really a negligence claim but it's called fraud so it sounds bad and it's hard to defend. It can include any unintentional conduct.

There's a lot of effort being put in by the staff into building those kinds of cases. They're building out that whole area. And they like to wrack-'em-up, so they'll figure out an area where they can claim there have been a series of errors at one money manager—even if it's just things you'd call mistakes—and they get it at one place, and then they go on to the next and the next after that. After they've run up a couple of settlements it becomes just a cookie-cutter



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investigation, and they just expect it in the next one.

**Q: Have things been the same at the Department of Justice?**

**A:** I think you're seeing the same thing on the DOJ side. You have a strong tradition at the department and at the U.S. attorney's office of two things. One, just professionalism. They see administrations come and go, and a lot of these people are just there anyway.

Two, is ambition—and I mean that in a good way. I'm a former prosecutor, and you see a lot of people particularly that go to Southern or Eastern districts of New York, and some of the other offices, and they want to go and make a name for themselves. They're fully incentivized to be as aggressive as they've ever been.

Those cases—white-collar, criminal cases, and regulatory cases—are still ones that, for obvious reasons, clients care deeply about, including institutional clients, and this is where there's going to be significant legal spend. This is just still as hot an area that it's ever been. There's no reason to think it's going to stop.

Generally, the whole area of white-collar, criminal investigations, and securities regulatory investigations and other regulatory investigations—these are just facts of life in the legal world that does not look like it's changing any time soon. Law firms are continuing to beef up their practice areas—we are—in response to it.

**Q: Let's talk about that legal spend—if we're seeing a continuation of aggressive regulation and enforcement, how are firms responding to the legal needs that grow out of this reality?**

**A:** Legal departments, especially bigger ones, are continuing to exert more control over their legal spend. More and more clients continue to rely on RFP processes, lists of preferred providers that come with baked-in significant discounts, rules about how much can be billed for associates in certain years, express limits on the use of contract attorneys and temp attorneys, and all those other cost-containment measures that have sort of been gaining steam. That also is continuing.

Notwithstanding the fact there's increased litigation being brought, increased regulatory and government actions being brought. All of that growth in market is this continuing relentless demand for discounts, pressure being put on margins, and so forth.

That leads firms, especially firms that are designed to live off of premium dollar legal spend, fighting for the smaller number of matters and cases where clients are going to be less concerned about the fees, or where they can still have enough leverage and other tools

that, notwithstanding the cost containment measures, there's still going to be significant billing.

**Q: Are there any specific areas worth noting that you've seen drive some of this legal spend, and that may continue into 2018?**

**A:** Securities class actions are way up in 2017, and that is an under-observed and interesting fact. For a while they had really declined. There had been a series of decisions both in Delaware and at the U.S. Supreme Court level that went against the interest of plaintiffs' lawyers. There were a few years where filings were trending down. There was a lot of talk about the whole area of securities practice, and in particular class-action defense, as a shrinking market. But we've seen more filings in 2017 than we've seen in many years.

It appears to be more of a fact of life than people realize, it's just not going anywhere. There've been a lot of IPO-related cases that have been brought. Regular class-action securities fraud practices are back in a big way.

There's also a lot of reports that legal spend overall in the securities area, white-collar enforcement and I believe product liability is expected to grow by several billion dollars, based on reviews that have been done and conversations with GCs. Depending on your perspective, you can call it good news or bad news, it looks like next year we're in another growth phase for the litigation market as a whole.

**Q: OK, just generally, what are the places to watch for trends in financial litigation going forward into 2018?**

**A:** Overall, you continue to see a trend of securities cases getting to the Supreme Court—there's usually a couple a year—that add glosses to existing areas of law, but generally speaking they're all containments; they're all decisions in one way or another limit the ability for plaintiffs to bring these cases, or prove these cases, or get through to a trial.

I think there is still a lot of FCPA enforcement going on out there. There's obviously a lot of products liability and mass tort actions going on. I think this growth in the market is going to be consistent kind of across the board.

Another trend you see is the continued decline of trials. That's been something that's gone on for awhile, but I think it's becoming really acute. The number of trials that take place now in civil matters or criminal, it used to be that a judge could get over a dozen a year. They now sometimes get one or two.

Those lawyers that like to do trial practice, it's becoming ever-more of a specialty. Some could say it's a dying art, because it's hard to see how people are going to make a living just doing that with the odd case here or there that's just going to trial.

Look, I'm a trial lawyer. A lot of the cases I see are ones that get brought and settled, and ones that, purely in a vacuum, some of them are very triable cases. Some of them are cases that I think the government would have a hard time winning. That's the only ultimate check on the system, because otherwise it's all a matter of process. It's all a matter of making your best pitch, and seeing if you can get some of the charges shaved around the edges.

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