

# \$3B Petrobras Accord To Fuel More Shareholder Class Actions

By **Ed Beeson**

Law360, New York (January 5, 2018, 7:33 PM EST) -- Brazilian oil giant Petrobras went for the record books when it said it would pay nearly \$3 billion to settle a shareholder class action over its corruption scandal, and that stunning sum combined with a key legal ruling in the case will add gas to the booming market for securities class actions, lawyers say.

The \$2.95 billion sum that Petrobras **announced Jan. 3**, to end investor claims against it and its underwriters, will amount to the fifth-largest securities class action settlement in the U.S. and the largest in about a decade, according to data kept by Stanford Law School.

At a period when new securities suit filings are nearing all-time highs, such a blockbuster payday will likely encourage other would-be filers.

"I would assume it will spawn more securities suits," said Jonah Knobler, a partner at Patterson Belknap Webb & Tyler LLP. "A number that big always does."

And a Second Circuit ruling that Petrobras had asked the U.S. Supreme Court to review and overturn will remain the law of the land in New York, a worry to defense lawyers who say the ruling has made it incrementally easier for plaintiffs to secure class certification in shareholder suits.

That will likely add to the enticement of bringing shareholder claims against public companies, particularly in the Second Circuit, legal experts say. Last year, investors brought 394 new lawsuits, the most since 2001, according to data kept by Stanford. Eighty-two of these were filed in the Second Circuit.

"Securities class actions are going to become more widely available" as a result of the settlement, said Adam Pritchard, a University of Michigan law professor who co-wrote an amicus brief encouraging the Supreme Court to take up Petrobras' certiorari petition.

That petition is now on hold and likely moot if U.S. District Judge Jed S. Rakoff signs off on the settlement.

The class action against Petrobras dates to 2014 and 2015, when investors accused the Brazilian energy company of concealing kickbacks that top officials and their political patrons received in exchange for directing Petrobras to buy and build production facilities at inflated prices. After the scandal emerged as part of a sweeping corruption investigation in Brazil, the price of Petrobras' American depository receipts plunged.

In agreeing to settle the case right as the justices were slated to consider its petition, Petrobras said it wasn't admitting any wrongdoing or liability, but said it had weighed the costs and risks associated with the ongoing litigation. The company also said it was a victim of the corruption

uncovered by Brazilian authorities.

The 10-figure settlement will likely have reverberations beyond Petrobras' coffers.

For example, it could apply pressure to shareholder claims against other South American companies entangled in investigations like the one that ensnared Petrobras, said Kevin LaCroix, executive vice president of RT ProExec, an insurance intermediary that specializes in management liability issues. Among other companies, Brazilian electricity conglomerate Eletrobras and meatpacker JBS SA are currently facing shareholder suits over stock drops that occurred in the wake of their corruption scandals.

"It clearly doesn't help those defendants that Petrobras has paid this huge settlement," said LaCroix, who's also the publisher of D&O Diary, a blog that covers securities litigation matters.

The settlement could also make shareholder suits tied to corruption claims a more attractive target than they have been, LaCroix said.

Each year, about a dozen or so shareholder or derivative actions are filed in the U.S. in the wake of government actions to enforce the Foreign Corrupt Practices Act, LaCroix noted. But these follow-on suits haven't typically fared well for plaintiffs, he said. For example, shareholders last summer lost a derivative action brought against directors of Qualcomm Inc. following a U.S. Securities and Exchange Commission action against the computer chipmaker over alleged FCPA violations in China.

Now with the Petrobras settlement, plaintiffs lawyers might say, "Maybe this is a better angle than we've appreciated in the past," LaCroix said.

Plaintiffs lawyers said they found other things to like about the Petrobras settlement beyond the anticipated \$3 billion price tag.

Daniel Sommers, a partner at Cohen Milstein Sellers & Toll PLLC, said the outcome "certainly shows in a very big way that investors can surmount the limitations of the Morrison decision." This 2010 Supreme Court decision, *Morrison v. National Australia Bank*, held that U.S. securities laws don't allow foreign investors to sue foreign and domestic defendants over shares they bought on foreign exchanges, but the Petrobras case managed to survive even though its lead plaintiff was an overseas investor and the defendant was a foreign issuer.

Another consequence of the settlement is that the Supreme Court won't have a chance to take up the issues that Petrobras raised in its petition, which dealt with technical questions on what evidence needs to be presented to certify classes of shareholders.

While the Second Circuit decertified two classes of investors, it declined to go further as defendants requested and require that class members be ascertainable, or identifiable, in an "administratively feasible" way. It also rejected the defendants' arguments that investors should be required to submit direct evidence, such as a study, that a security's price moved in response to new information in order to be entitled to the so-called fraud-on-the-market presumption of reliance, the backbone of all securities class actions.

Jeremy Lieberman, co-managing partner of lead plaintiffs counsel Pomerantz LLP, said these rulings were an important piece of the overall win the plaintiffs achieved. "These precedents will form the bedrock of class action jurisprudence in the Second Circuit for decades to come," he said.

While Petrobras' latest petition hoped to challenge those findings, several lawyers acknowledged it was a long shot for the high court to accept cert in this instance. The University of Michigan's Pritchard put its chances of being taken up as "extremely low."

"That's probably the calculation that their lawyers made," he said.

Still, defense lawyers were hoping the court would see Petrobras as a vehicle to provide more clarity, and a stricter standard, on what it takes to certify class actions.

“Now that the Petrobras suit is settled, that’s not going to be teed up before the Supreme Court,” said Todd Cosenza, partner with Willkie Farr & Gallagher LLP. “That’s somewhat disappointing.”

The case is *Petroleo Brasileiro SA - Petrobras et al. v. Universities Superannuation Scheme Ltd.*, case number 17-664, in the Supreme Court of the United States.

--Editing by Mark Lebetkin and Aaron Pelc.