

Symbol lawsuits tap Sarbanes-Oxley vein

A dozen-plus suits since August reflects a new trend in corporate litigation.

By **KEN SCHACHTER**

HOLTSVILLE – More than a dozen shareholder actions filed against Symbol Technologies since mid-August are at the edge of a new wave of lawsuits based on Sarbanes-Oxley compliance, experts say.

“This is different from previous shareholder lawsuits,” said Kevin Starke, an analyst at Weeden & Co. “Previous suits against Symbol were based on actual fraud.”

Symbol did not respond to requests for comment by deadline.

The latest cases raise the question, “Does Sarbanes-Oxley provide the basis for suing a company?” Starke said.

Legal pundits had predicted that the Sarbanes-Oxley Act of 2002, designed to reform corporate excesses after the implosions of Enron and accountancy Arthur Andersen, would trigger a groundswell of litigation.

“When Sarbanes-Oxley was passed into law in 2002, everybody thought that this was going to generate all kinds of new lawsuits,” said Alon Kapen, a securities lawyer at Farrell Fritz. “The empirical evidence hasn’t borne that out. There haven’t been more class-actions since Sarbanes-Oxley was enacted.”

Kapen said other factors may have stemmed the expected flood of lawsuits related to Sarbanes-Oxley.

For instance, the Class Action Fairness Act of 2005 makes it more difficult to bring class-action lawsuits in state court. The law gained support because trial lawyers were thought to be “shopping” their cases to states that had laws making it easier to get class certification. Getting class certification, Kapen said, gave lawyers leverage that prompted many companies to offer settlements.

“Sometimes that’s what the lawyers are seeking,” he added.

Still, the Symbol lawsuits are not the first class-action. Still, the Symbol lawsuits are not the first class-action suits filed that

hinge in part on disclosures required by Sarbanes-Oxley.

Two Seattle companies, Cray Inc. and WatchGuard Technologies Inc., have been peppered with lawsuits using Sarbanes-Oxley disclosures to help make their case.

Starke said the complaints against Symbol center on ensuring internal controls that provide a reasonable assurance of the reliability of financial reporting and financial statements.

“The question that will have to come up in a lawsuit is whether the company disclosed material weaknesses to auditors and investors in a timely fashion,” Starke said. “You can imagine Symbol’s defense is that all the disclosures were made in a timely manner.”

In fact, Starke added, Symbol could



Ianuzzi: More reform needed at Symbol.

argue that its failure to provide accurate financial forecasts was precisely because its internal controls were not up to snuff.

A lawsuit filed by Manhattan-based Milberg Weiss Bershad & Schulman LLP said that Symbol had maintained it “had completed an overhaul of its internal control systems and processes” to prevent a recurrence of an accounting fraud scandal that forced it to restate results from 1998 through 2003.

In fact, the complaint says, Symbol’s financial reports were “materially false and misleading” and its financial guidance “lacked any reasonable basis and presented a falsely positive picture.”

The lawsuit, one of many filed in the U.S. District Court for the Eastern District of New York, said that on Nov. 8, 2004, Symbol said it would delay filing its report for the third quarter of 2004 because revenue was improperly recognized in the first and second quarters. On May 3, 2005, the company announced first-quarter results that fell short of revenue and earnings guidance, buckling the stock.

In July 14, Symbol announced that Chief Financial Officer Mark Greenquist was exiting the company and Salvatore Iannuzzi was taking over as chief financial officer. In a press release, Iannuzzi acknowledged that the company still had work to do in reforming its financial controls. Two weeks later, the company announced CEO Bill Nuti was resigning to lead Dayton, Ohio-based NCR Corp. and Iannuzzi was taking over as interim CEO as well.

New complaints against Symbol Technologies center on ensuring the bar-code maker’s internal controls.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DINA HOROWITZ, Individually and On
Behalf Of All Others Similarly Situated,
Plaintiff,
vs.
SYMBOL TECHNOLOGIES, INC., WILLIAM R.
NUTI and MARK T. GREENQUIST
Defendants.

Civil Action No.
Judge: **J. ORENSTEIN, M.**

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF FEDERAL
SECURITIES LAWS**
JURY TRIAL DEMANDED

Plaintiff, Dina Horowitz ("Plaintiff"), individually and on behalf of all other persons similarly situated, by her undersigned attorneys, for her complaint against defendants, alleges the following based upon personal knowledge as to herself and her own acts, and information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through her attorneys, which included, among other things, a review of the defendants' public documents, conference calls and announcements made by defendants, United States Securities and Exchange Commission ("SEC") filings, wire and press releases published by and regarding Symbol Technologies ("Symbol" or the "Company") securities analysts' reports and advisories about the Company, and information readily obtainable on the Internet. Plaintiff believes that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.