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Investors Are Among Those Closely Watching Midterm Elections

With bipartisan politics virtually nonexistent, the upcoming midterm elections could have an outsized impact on federal policy, not only for the hot-button issues that have dominated the headlines since President Trump took office, but also in areas like investor protection. page 3

Supreme Court Will Revisit 'Scheme Liability' in *Lorenzo v. SEC*

page 6

Ninth Circuit Allows Plaintiffs to Argue That Over-the-Counter Toshiba ADRs Are Subject to U.S. Securities Laws

page 8

Cohen Milstein Helps Investors in Three Cases Obtain Favorable Rulings

page 10

Fiduciary Focus – Social Media

page 12

Investors Are Among Those Closely Watching Midterm Elections

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With bipartisan politics virtually nonexistent, the upcoming midterm elections could have an outsized impact on federal policy, not only for the hot-button issues that have dominated the headlines since President Trump took office, but also in areas like investor protection.

Whether or not that happens depends on whether Republicans maintain control of both the House of Representatives and the Senate, or cede one or both of their majorities to the Democrats. All 435 members of the House are subject to elections, as they are every two years. For the Democrats to take back the House, they would need to add 25 new seats to their current 193. For the 100-member Senate to change hands, the Democrats would have to pick up two of the 35 seats up for election to gain a majority (if they win only one seat, the Senate would be tied 50-50, with Vice President Pence breaking any deadlock). To secure additional seats, Democrats are keenly focused on potential pick-up opportunities in Arizona, Nevada and Tennessee, while the Republicans are looking to flip seats in Florida, Missouri, Montana, North Dakota and Indiana.

As of October 1, the *Realclearpolitics.com* "poll of polls" gives Democrats a 7.4% advantage in the generic Congressional ballot, which along with historical trends would indicate the Democrats have a good chance of winning control of the House. On September 27, Kyle Kondik, Managing Editor of *Larry J. Sabato's Crystal Ball* of the University of Virginia's Center for Politics said, "Our best guess right now is a Democratic House gain of somewhere in the low-to-mid 30s. But there are enough very close races that something like a 30-seat gain could turn into more like a 20-seat gain and leave the Democrats short of a majority. Back in July, we said the Democrats were 'soft favorites' to win the House. Their odds have likely gotten better since then, or at the very least have not gotten worse, but the GOP still has an opportunity to retain the House with some breaks."

> *"What we are dealing with this year is actually very simple: there is a blue wave and a red sea wall. This election all turns on whether the blue wave rises above the Republican sea wall."*

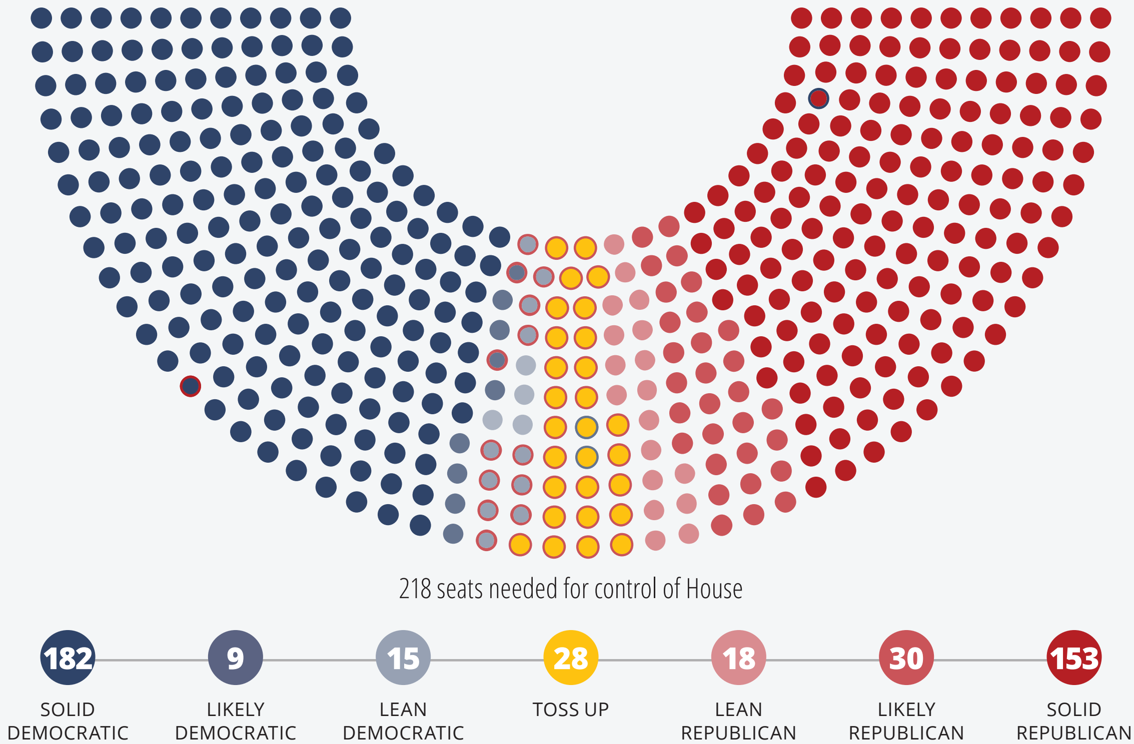
CHARLIE COOK, FOUNDER OF *THE COOK POLITICAL REPORT*

As for the Senate, most pundits think it will likely stay within a vote or two on either side, especially given the particular seats up for election, with Democrats needing to defend 26, including some in states where President Trump is very popular, and Republicans defending only nine, all but a handful considered relatively safe. Charlie Cook, Founder of *The Cook Political Report*, said on September 23 that: "What we are dealing with this year is actually very simple: there is a blue wave and a red sea wall. This election all turns on whether the blue wave rises above the Republican sea wall." From Cook's perspective, the sea wall has been created by the Republican institutional advantages from the 2010 redistricting effort and the fact Republican voters are more evenly spread out, whereas Democratic voters are clustered generally on the coasts and specifically in large cities.

Under any scenario, party control will have a decided impact on issues polls indicate are important to Americans such as health

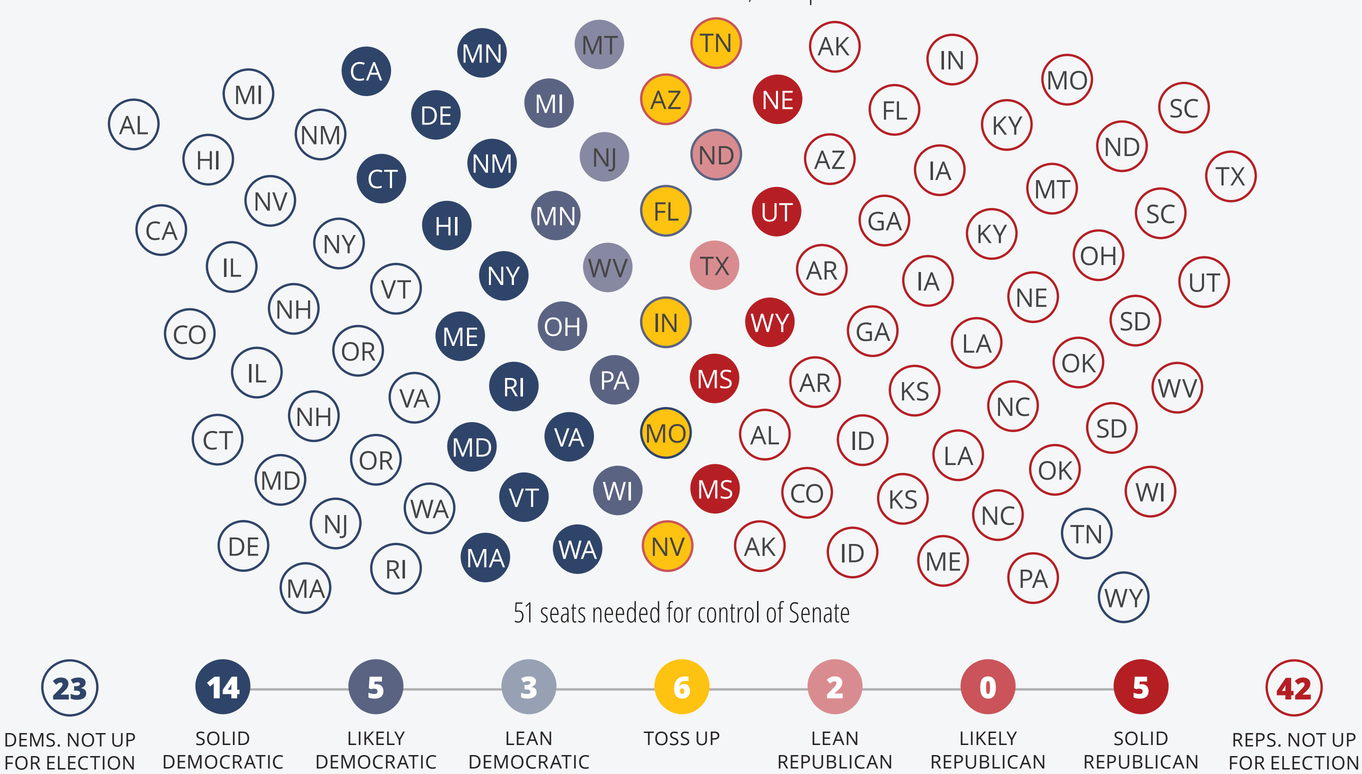
KEY RACES: HOUSE

Current balance: 193 Democrats, 235 Republicans, 7 Vacancies



KEY RACES: SENATE

Current balance: 49 Democrats, 51 Republicans



Cohen Milstein graphics based on CNN's 2018 Race Ratings.

care (including prescription drug pricing, universal/single-payer coverage, Medicare and Medicaid funding), political corruption, immigration, gun policy, the Supreme Court and, of course, the economy and job creation.

Likewise, which party controls Congress will have an impact on investor protections. If Republicans keep control of both the House and Senate, they will likely push hard to further limit future securities litigation through legislation, and to appoint as many conservative judges as possible to the federal bench. H.R. 5037, also known as "The Securities Fraud Act of 2018," for example, seeks to provide exclusive federal jurisdiction over civil securities fraud actions. Republicans in the House would likely reintroduce H.R. 5037. This time around it would gain momentum, unlike during the last Congress when this bill was sidelined while the Republican controlled House focused on repealing Obamacare and tax cuts. Pro-investor organizations like the North American Securities Administrators Association are sounding the alarm about their opposition to the bill to the U.S. House Committee on Financial Services. The passage of this bill alone would have a tremendous impact on securities litigation going forward because it would bar states from regulating securities fraud and would remove an additional layer of protection currently available to investors by prohibiting them from bringing certain federal securities claims in state court.

EVERY VOTE AND EVERY ELECTION WILL MATTER.

The next possibility is if the Republicans keep the Senate but lose the House. Under this scenario, there would likely be no meaningful change to current securities litigation through legislation. A Democratic House would be able to keep any meaningful restrictions to securities litigation from emerging from committee, let alone coming to the floor for a vote. There would, however, still be more conservative judges appointed, who could then in turn push the judiciary further against securities ligation in general.

The final scenario, under which the Democrats take both chambers of Congress, would likely keep the current state of affairs in place through the 2020 presidential elections. It would also likely slow, if not stop, the appointment of conservative federal judges.

The next few weeks will determine whether we change course, or maintain the status quo. Every vote and every election will matter. ■

David M. Maser is Of Counsel to the firm and a member of the Securities Litigation & Investor Protection practice group. Mr. Maser interviewed Mr. Kondik and Mr. Cook for this article.

"Our best guess right now is a Democratic House gain of somewhere in the low-to-mid 30s. But there are enough very close races that something like a 30-seat gain could turn into more like a 20-seat gain and leave the Democrats short of a majority. Back in July, we said the Democrats were 'soft favorites' to win the House. Their odds have likely gotten better since then, or at the very least have not gotten worse, but the GOP still has an opportunity to retain the House with some breaks."

KYLE KONDIK, MANAGING EDITOR OF *LARRY J. SABATO'S CRYSTAL BALL* OF THE UNIVERSITY OF VIRGINIA'S CENTER FOR POLITICS

SUPREME COURT WILL REVISIT ‘SCHEME LIABILITY’ IN *LORENZO V. SEC*

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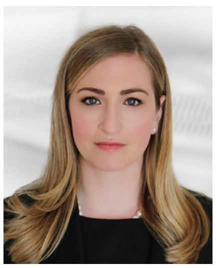

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In June 2018, the Supreme Court agreed to hear *Lorenzo v. SEC*, a case in which the Securities and Exchange Commission (“SEC”) found Francis Lorenzo liable for emailing false and misleading statements to investors that were originally drafted by his boss. The SEC asserted claims under the scheme liability provisions of Rule 10b-5(a) and (c), as well as the false-and-misleading statements provision of Rule 10b-5(b). A divided panel of the U.S. Circuit Court of Appeals for the District of Columbia held that, under the Supreme Court’s precedent in *Janus Capital Group, Inc. v. First Derivative Traders*, Lorenzo did not “make” a false and misleading statement as required for liability under Rule 10b-5(b), because he did not have “ultimate authority” over the statements. The D.C. Circuit held, however, that Lorenzo was liable under the scheme liability provisions. Before his confirmation to the Supreme Court, Judge—now Justice—Kavanaugh wrote a dissenting opinion arguing Lorenzo is not liable under any provision of the federal securities laws. Lorenzo appealed the D.C. Circuit’s decision, arguing that an individual cannot be liable for false and misleading statements under the scheme liability provisions where the same individual did not “make” the statements under Rule10b-5(b). Lorenzo’s appeal raises complicated issues regarding, among other things, the line between Rule 10b-5(b) and the scheme liability provisions, the line between primary and secondary liability in SEC enforcement actions, and the scope of the scheme liability provisions.

In an *amicus curiae* (*i.e.*, friend of the court) brief filed in the Supreme Court, Cohen Milstein recently argued that the Court need not decide these thorny issues. It can uphold the D.C. Circuit’s ruling simply by applying *Janus* to find that Lorenzo was a “maker” of the statements at issue, and thus find he is liable under Rule10b-5(b).

Janus held that “[o]ne ‘makes’ a statement by stating it.” *Janus*, 564 U.S. at 142. “For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.” *Id.* Similar to Lorenzo’s argument here, after *Janus*, corporate officers who signed documents containing untrue statements attempted to avoid liability by arguing that their company or board of directors had “ultimate authority” over the statements. *See, e.g.*, *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 163-64 (S.D.N.Y 2012). But this strategy was roundly rejected. *See id.*

Thus, in our amicus curiae brief, we argue that the fact that Lorenzo signed the emails is decisive. Just like a corporate officer who puts her signature on a corporate statement written by others, Lorenzo adopted the emails as his own by signing them.

In dismissing the import of Lorenzo's signature, the D.C. Circuit reasoned only that this "sort of signature line ... can often exist when one person sends an email that 'publishes a statement on behalf of another,' with the latter person retaining 'ultimate authority over the statement.'" *Lorenzo*, 872 F.3d at 588. We argue that this reasoning is flawed for three reasons. First, there is no evidence in the record upon which the D.C. Circuit based its observation regarding the nature of Lorenzo's signature line, or what the signature line signifies. Second, the D.C. Circuit's reasoning relies on language from *Janus* divorced from its context. The Court's decision in *Janus* was based on the fact that the defendant was a "legally independent entity." 564 U.S. at 146-47. Here, by contrast, there is no legally independent entity at issue; Lorenzo was a registered broker with his own independent duties to his company and its investors, and the power to make statements that legally bound his company. And finally, the D.C. Circuit's reasoning also appears to assume that only one individual within an organization can "make" a statement. But both SEC enforcement actions and private suits under Rule 10b-5(b) routinely seek to hold accountable multiple senior executives who, for instance, all sign a statement. Unlike in *Janus*, which dealt with a separate corporate entity, "*within an organization*, more than one person will have ultimate authority over a statement ... ." *In re Barrick Gold Sec. Litig.*, 2015 WL 3486045, at *2 (S.D.N.Y. June 2, 2015).

IN AN *AMICUS CURIAE* BRIEF FILED IN THE SUPREME COURT, COHEN MILSTEIN RECENTLY ARGUED THAT THE COURT CAN UPHOLD THE D.C. CIRCUIT'S RULING SIMPLY BY APPLYING *JANUS* TO FIND THAT LORENZO WAS A "MAKER" OF THE STATEMENTS AT ISSUE, AND THUS FIND HE IS LIABLE UNDER RULE10B-5(B).

In sum, Cohen Milstein argues that, just as a corporate executive is a "maker" of an untrue statement in a filing she signs, Lorenzo is a "maker" of the email he chose to sign and send from his email account. It is thus appropriate to hold him liable under Rule 10b-5(b).

The Supreme Court is scheduled to hear oral arguments December 3 and should issue its opinion in the first quarter of next year. ■

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NINTH CIRCUIT ALLOWS PLAINTIFFS TO ARGUE THAT OVER-THE-COUNTER TOSHIBA ADRs ARE SUBJECT TO U.S. SECURITIES LAWS

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THE DECISION IS PARTICULARLY SIGNIFICANT BECAUSE IT DEALS WITH SO-CALLED "UNSPONSORED" ADRS, ALL OF WHICH TRADE ONLY ON OTC MARKETS.

Eight years after the U.S. Supreme Court ruled that the federal securities laws only applied to securities acquired domestically, courts continue to differ over how to apply that "transactional test" to American Depositary Receipts ("ADRs"), tradeable certificates issued by U.S. banks that correspond to shares of foreign stock.

In the latest example, *Stoyas, et al. v. Toshiba Corp.*, the Ninth U.S. Circuit Court of Appeals has ordered a lower court to give purchasers of Toshiba ADRs the opportunity to pursue a case against the Japanese company under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). The district judge had dismissed the lawsuit, which involves ADRs acquired on an over-the-counter ("OTC") market, not ones listed on a stock exchange.

In its July 17 ruling to reverse and remand, the Ninth Circuit said plaintiffs could successfully argue that their ADR purchases met the conditions established by the Supreme Court in its 2010 decision in *Morrison v. National Australia Bank Ltd.*, which found the Exchange Act could only apply to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." The three-judge panel cited plaintiffs' claims that the Toshiba ADRs were purchased in the United States by U.S. entities from depositary banks based in New York and stated, "Accordingly, an amended complaint could almost certainly allege sufficient facts to establish that [the plaintiffs] purchased [their] Toshiba ADRs in a domestic transaction."

The Ninth Circuit opinion explicitly rejected the Second Circuit Appeals Court's reasoning in *Parkcentral Global Hub v. Porsche Automobile Holdings*, and in so doing effectively created a different set of standards in the two federal jurisdictions where most traditional securities lawsuits are brought—the Ninth Circuit, which includes California, and the Second Circuit, based in New York. The Ninth Circuit panel put the *Stoyas* case on hold after Toshiba said it planned to ask the Supreme Court to resolve the split.

The *Stoyas* opinion, if it stands, amounts to a small dose of good news for investors, who since *Morrison* have largely been unable to use the U.S. securities laws as protection against foreign stock issuers who defraud them. The decision is particularly significant because it deals with so-called "unsponsored" ADRs, all of which trade only on OTC markets. Some "sponsored" ADRs, in contrast, can trade on U.S. exchanges. According to Deutsche Bank there were 1,642 unsponsored ADRs from 40 countries available at the end of 2017. Institutional investors had publicly reported investments of $11.9 billion in unsponsored ADRs at the end of September 2017, up from $7.9 billion a year earlier. That makes up a large portion of the overall ADR offering, which the SEC estimates at over 2,000.

> *"The three-judge panel cited plaintiffs' claims that the Toshiba ADRs were purchased in the United States by U.S. entities from depositary banks based in New York and stated, 'Accordingly, an amended complaint could almost certainly allege sufficient facts to establish that [the plaintiffs] purchased [their] Toshiba ADRs in a domestic transaction.'"*

In its ruling, the Ninth Circuit soundly rejected the district court's reasoning that plaintiffs who made OTC purchases of Toshiba ADRs could not assert violations of the Exchange Act arising out of Toshiba's admitted fraudulent accounting practices in Japan. In doing so, the Ninth Circuit followed a three-step process. First, it found that Toshiba's ADRs "fit comfortably within the Exchange Act's definition of 'security'" because they "share many of the five significant characteristics typically associated with common stock." Next, the panel found that the OTC market where the unsponsored ADRs were purchased did not fall within the Exchange Act's definition of an "exchange." Finally, the Ninth Circuit applied the Supreme Court's reasoning in *Morrison* to find that purchases in ADRs may be "domestic transactions" if certain facts are pled.

In *Morrison*, the Supreme Court emphasized that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." Where the transaction took place, therefore, is the threshold inquiry. *Morrison* instructs courts to apply a two-prong transactional test to determine location—whether the purchase or sale (1) involves a security listed on a domestic exchange or (2) takes place in the United States.

In *Stoyas*, the Ninth Circuit concluded that the OTC market on which the plaintiffs acquired the Toshiba ADRs is not an exchange. The appeals court then "adopted" the Second and Third Circuits' "irrevocable liability" test to determine whether the Toshiba ADR transactions on the OTC took place in the United States, i.e., were "domestic transactions." This test looks to "where purchasers incurred liability to take and pay for securities, and where sellers incurred the liability to deliver securities." But *Stoyas* rejected defendants' argument that, under the Second Circuit's 2014 *Parkcentral* opinion, plaintiffs must plead a link between Toshiba and the transactions themselves to survive a motion to dismiss. "For the Exchange Act to apply, there must be a domestic transaction; that Toshiba may ultimately be found not liable for causing the loss in value to the ADRs does not mean that the Act is inapplicable to the transactions," the Ninth Circuit reasoned. In addition, the court said, *Parkcentral* "relies heavily on the foreign location of the allegedly deceptive conduct" and imposes exactly the type of "vague and unpredictable" test the Supreme Court criticized in *Morrison*.

Even if *Stoyas* stands, the plaintiffs suing Toshiba still face challenges. The appellate court cautioned that to properly plead an Exchange Act claim, they must eventually demonstrate Toshiba's connection to the ADRs themselves, providing documentation to show that the company was involved in establishing the U.S. securities when they were issued. But the Ninth Circuit provides plaintiffs with a road map for amending their complaint against Toshiba which, if followed, should enable plaintiffs to survive a motion to dismiss and litigate the merits of the case—and other plaintiffs in its jurisdiction to properly plead similar claims.

In addition to the U.S. lawsuit, common stock purchasers are suing Toshiba in Japan over allegations that the company used improper accounting to inflate its profits by more than $2 billion over a six-year period before a 2015 financial restatement sent its stock plummeting. (Disclosure: Cohen Milstein is working with pension fund clients who have filed claims in Japan.)

If you would like further information about how this ruling affects your legal rights as an investor, please contact the attorneys of Cohen Milstein's Securities Litigation & Investor Protection Practice at information@cohenmilstein.com or 202.408.4600. ■

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COHEN MILSTEIN HELPS INVESTORS IN THREE CASES OBTAIN FAVORABLE RULINGS

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Investors in one of the world's largest gaming companies, a bankrupt energy producer and a drug manufacturer have recently won significant procedural victories in matters in which Cohen Milstein holds court-appointed leadership positions. Here are brief summaries of the cases at issue.

In the ***In re Wynn Resorts, Ltd. Derivative Litigation***, lead plaintiffs scored an important ruling against the Wynn Resorts Board of Directors ("Board") and certain of its senior executives when the District Court of Clark County, Nevada, denied defendants' motion to dismiss the case, allowing lead plaintiffs to pursue claims against the Board and executives for failing to prevent founder and director Steve Wynn's pattern of sexual harassment when the Board had knowledge of his improper conduct, but decided to the look the other way.

Cohen Milstein is representing lead plaintiffs Thomas P. DiNapoli, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement System Fund and Trustee of the New York State Common Retirement Fund, and a group of nine New York City public pension funds.

In denying the motion, the court found that it would have been futile for lead plaintiffs to make a pre-suit demand on the Board to pursue their claims because lead plaintiffs' allegations raised a reasonable doubt as to whether a majority of the Board faced a substantial likelihood of liability for breaching their duty of loyalty to Wynn Resorts for "knowingly failing to take action in the face of credible and corroborated reports that Steve Wynn sexually harassed and abused Wynn Resorts employees" while they "profit[ed] on this information through insider trading that came at the Company's and shareholders' expense."

This ruling is significant in that it is the first time a derivative suit has survived a motion to dismiss on futility grounds by challenging a board of directors' role in failing to combat sexual harassment.

In another case, ***Cosby v. Miller et al.***, a federal judge in Tennessee has allowed plaintiffs to proceed with claims that auditor KPMG violated federal securities laws when it signed off on years of financial statements in which its client, now-bankrupt Miller Energy Resources, fraudulently overvalued oil and gas properties by hundreds of millions of dollars.

In an August 2 order on defendants' motion to dismiss, Chief District Judge Thomas A. Varlan said investors had properly pleaded that the auditor "deliberately ignored 'highly suspicious facts'" about the inflated assets,

IN *COSBY V. MILLER*, CHIEF DISTRICT JUDGE THOMAS A. VARLAN SAID INVESTORS HAD PROPERLY PLEADED THAT THE AUDITOR KPMG "DELIBERATELY IGNORED 'HIGHLY SUSPICIOUS FACTS'" ABOUT THE INFLATED ASSETS, INCLUDING TWO SEC INQUIRY LETTERS, WHEN IT GAVE "CLEAN" AUDITS FOR MILLER ENERGY'S FY2011-2015 FINANCIALS.

IN *MYLAN*, THE SOUTHERN DISTRICT COURT OF NEW YORK ADDRESSED THE "DISAGREEMENT" AMONG COURTS IN THE SECOND CIRCUIT OVER WHETHER CAUTIONARY STATEMENTS CAN GIVE RISE TO LIABILITY WHEN THE STATEMENTS DISCLOSE THE FUTURE RISK OF A PRESENT FACT. THE COURT CLARIFIED THAT THE APPROPRIATE INQUIRY IS "NOT WHETHER A STATEMENT OF RISK IS *PER SE* ACTIONABLE, BUT RATHER WHETHER MYLAN'S STATEMENT OF RISK COULD HAVE MISLED A REASONABLE INVESTOR."

including two SEC inquiry letters, when it gave "clean" audits for Miller Energy's FY2011-2015 financials. The judge also rejected defendants' arguments that the claims were filed outside the statutes of limitations and that plaintiffs had failed to link shareholders' losses to the alleged wrongdoing.

In subsequent settlements with the Securities and Exchange Commission, both Miller Energy, by then in bankruptcy, and KPMG admitted to securities law violations relating to the falsified financial statements.

By prevailing on the motion to dismiss, investors cleared a major hurdle in their effort to recover some of their losses. The Sixth Circuit, where the Eastern District of Tennessee is located, has a particularly high bar for successfully pleading auditor accountability.

Attorneys at Cohen Milstein are now undertaking discovery to further bolster the case, which was filed on behalf of purchasers of Miller Energy common and preferred shares from August 29, 2011 through October 1, 2015, and investors who bought preferred shares in various preferred stock offerings.

Finally, in the ***In re Mylan N.V. Securities Litigation***, lead plaintiffs overcame a motion to dismiss the case when the Southern District Court of New York ruled they sufficiently pleaded that drug manufacturer Mylan and certain of its officers knowingly or at least recklessly made misleading statements to investors concerning their knowledge of the misclassification of the EpiPen as a generic drug for purposes of the Medicaid Drug Rebate Program, the regulatory risks associated with the misclassification, and their anticompetitive activities in the market for generic drugs.

In reaching its ruling, the court made several findings that will be helpful to investors pursuing these types of claims in the future. Specifically, the court addressed the "disagreement" among courts in the Second Circuit over whether cautionary statements can give rise to liability when the statements disclose the future risk of a present fact. The court clarified that the appropriate inquiry is "not whether a statement of risk is *per se* actionable, but rather whether Mylan's statement of risk could have misled a reasonable investor." The court sided with lead plaintiffs in finding that Mylan's risk disclosures concerning governmental authority taking a contrary position to Mylan's classification of the EpiPen as a generic drug and the potential for Mylan to be subject to an investigation as misleading because a reasonable investor "could have concluded from Mylan's statement that although the government 'may' disagree with Mylan, and 'could' open an investigation, such unfavorable events had not yet occurred" when, in fact, governmental entities *had already notified* Mylan that the EpiPen was misclassified and the Department of Justice *had already begun an investigation*. ■

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> *The use of social media presents risks and, as is the case with any type of risk, these risks should be identified, assessed, managed and mitigated.*

SOCIAL MEDIA

These days, you don't have to look beyond the daily headlines to find ethical and fiduciary issues involving social media. Nowhere is this more evident than on Twitter, where a wide variety of users post and share hundreds of millions of messages a day. Today's scandals on social media are not limited to social gaffes but may include ethical breaches and even cross into the realm of civil or criminal liability.

For example, in August, a tweet by Tesla CEO Elon Musk that he had secured funding to potentially take Tesla private at $420 per share led to lawsuits against Musk claiming that he drove up the value of Tesla shares and materially misled investors. These lawsuits were followed in September by the Securities and Exchange Commission charging Musk with securities fraud and seeking to prohibit him from serving as an officer or director of a public company, and also charging Tesla with failure to have appropriate controls and procedures in place relating to Musk's tweets. Two days later, Musk and Tesla settled with the SEC; in addition to $40 million in penalties, Musk agreed to step down as Chairman of the board for three years, and Tesla agreed to appoint independent directors to its board and implement additional controls and procedures to oversee Musk's communications.

Lessons Learned

First, it is important to note that social media, when used correctly, can help public pension plans meet their fiduciary and ethical obligations. For example, when part of a comprehensive communication strategy, social media can be used as an effective means to communicate with members of the retirement system, resulting in greater transparency on the part of the system and greater understanding by members. In fact, at least one court has held that a public pension board of trustees has a fiduciary duty to provide clear and accurate information to prospective retirees under the common law duties of loyalty and care.

In addition to assisting trustees in meeting their fiduciary duty of communicating understandable information, social media may also be a valuable tool for pension systems looking to build relationships with members and encourage active engagement on the part of employees, thus helping to create a strong ethical culture throughout the organization.

Despite these benefits, social media used incorrectly can lead to the kind of scandals that not only harm the culture of an organization and lead to reputational damage, but can also result in a breach of fiduciary duty and unethical or even illegal behavior.

Key Take-Away

> *Today's scandals on social media are not limited to social gaffes but may include ethical breaches and even cross into the realm of civil or criminal liability.*

The use of social media presents risks and, as is the case with any type of risk, these risks should be identified, assessed, managed and mitigated. Begin your risk assessment process with a broad examination of ways in which social media could potentially be misused, whether inadvertently or deliberately. Engaging in a comprehensive brainstorming session often is a useful first exercise in identifying risks and assessing those risks. For example, does an individual trustee use social media in a way that could lead to the impression that he or she is speaking on behalf of the entire board? Is there a risk that trustees' communications with each other could implicate a jurisdiction's open meetings law, or are subject to the applicable freedom of information law? Does the content of those communications pose a legal, reputational or other risk? Are trustees trained to exercise the utmost caution to ensure that they do not reveal confidential information in their communications, such as discussing upcoming investment information in advance of public announcements or revealing personal information regarding a member that was obtained in a benefits hearing—risks that can lead to civil or criminal liability?

After identifying and assessing the risks, the next step is to draft policies and procedures to manage and mitigate those risks. Remember that, as is often stated, fiduciaries are judged by their adherence to a process. Finally, as with any process, those policies and procedures should be revisited regularly to ensure that they are adequately meeting the risks presented, particularly in a rapidly-evolving field such as social media. ■

Suzanne Dugan heads Cohen Milstein's Ethics & Fiduciary Counseling practice, which assists pension systems in creating and updating policies and procedures designed to address these and other fiduciary issues.

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- "Two Lidoderm Class Action Deals Worth $271M Get Final OK," *Law360* – September 12, 2018
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- "$115M Anthem Data Breach Deal Gets Final Nod," *Law360* – August 16, 2018
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- "KPMG Can't Escape Investors' Suit over Miller Energy Audit," *Law360* – August 2, 2018
- "How One Hedge Fund Has Pursued $360M Financial Fraud Claim Against Big Bank," *Insurance Journal* – July 12, 2018
- "Credit Suisse Nears $360 Million Deadline in Fraud Suit Built on a Hunch," *Reuters* – July 11, 2018

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- Cohen Milstein's Kalpana Kotagal Named a Harvard Law School Wasserstein Fellow – July 31, 2018
- Cohen Milstein's Michael B. Eisenkraft and Sharon K. Robertson Recognized as "Rising Stars" by *Law360* – July 30, 2018
- Cohen Milstein Named an "Elite Trial Lawyer" Finalist in Nine Practice Areas by *The National Law Journal* – July 26, 2018
- Cohen Milstein's Kalpana Kotagal, Betsy Miller, and Julie Reiser Named "Elite Women of the Plaintiffs Bar" Finalists by *The National Law Journal* – July 26, 2018
- Cohen Milstein Named to *Vault.com's* List of the Top 20 "Best Litigation Boutiques" – July 20, 2018

UPCOMING EVENTS

- **October 14-17** | International Foundation of Employee Benefit Plans (IFEBP) 2018 Annual Employee Benefits Conference, New Orleans, LA – Carol Gilden, Richard Lorant and David Maser
- **October 23-25** | Council of Institutional Investors (CII) Fall Meeting, Grand Hyatt New York, New York, NY – Jay Chaudhuri, Carol Gilden and Daniel Sommers
- **October 28-31** | National Conference on Public Employee Retirement Systems (NCPERS) Public Safety Employee Pension & Benefits Conference, Caesars Palace, Las Vegas, NV – Richard Lorant and Christina Saler
- **November 13-16** | State Association of County Retirement Systems (SACRS) Fall Meeting, Renaissance Esmeralda Resort & Spa, Indian Wells, CA – Richard Lorant and Christina Saler
- **November 18-20** | County Commissioners Association of Pennsylvania (CCAP) Fall Conference, The Hotel Hershey, Hershey, PA – David Maser

ATTORNEY PROFILE

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> *I am motivated by being able to hold companies accountable for unfair business practices.*

Julie Goldsmith Reiser joined Cohen Milstein in 1999 and is a Partner in the firm's Securities Litigation & Investor Protection and Employee Benefits/ERISA Practice Groups. Julie's ability to develop cases and obtain extraordinary results has repeatedly earned her recognition as one of the most talented litigators in the country. Just this year she was named a finalist in the *National Law Journal's* 2018 "Elite Women of the Plaintiffs Bar" and was designated one of the *2018 Lawdragon 500 Leading Lawyers in America*. For this issue of the *Shareholder Advocate*, Julie talked with Editor Christina Saler.

I grew up in … Seattle, which is obvious to those who know of my fondness for coffee and of my impatience for people who slow down when they drive in the rain. I was raised to be a fan of the Seattle Seahawks and had one day hoped to grow up to be just like wide receiver Steve Largent. Although one of my first soccer coaches was also an assistant coach for the Seattle Sounders (his daughter played on the team), my only claim to fame in soccer is having my team featured on *Good Morning America* in a segment about "moms who play soccer" as a twist on the popular term "soccer mom."

I am motivated by … being able to hold companies accountable for unfair business practices. I've been at Cohen Milstein for nearly 20 years and have worked in a number of practice groups with the good fortune to learn from many nationally recognized attorneys at the firm. I spent a few years working on employment discrimination class actions to help reform employment practices for pay and promotion for women and minorities. In the securities fraud practice group, I have spent the last several years litigating mortgage-backed securities cases that affected so many public pension funds who thought they were purchasing AAA-quality securities but instead learned that the credit quality of the home loans had been misrepresented. And, in many respects, I have come full circle. I'm now litigating a shareholder derivative lawsuit against the board of Wynn Resorts for failing to act when informed of the CEO's pervasive pattern of sexually harassing Wynn Resorts' employees.

A major accomplishment was when … we recently prevailed in Nevada State court on the argument that making a demand against the Wynn Resorts' board of directors would have been futile. The ruling is significant because Nevada law is known for being far more protective of fiduciaries than other states' laws. It also is significant because the only other case to address the issue, *White v. Panic*, held that it was a valid exercise of business judgment for a board to use company money to settle eight sexual harassment lawsuits pending against the CEO, all the while doing nothing to prevent further incidents. That case was decided 15 years ago, and it shows.

One of the hardest things I have had to learn as a litigator is that … judges can make or break a case. The "luck of the draw" so to speak has infused me with a far greater sense of humility about winning in court. Of course, it is tough not to take the losses personally, even keeping that principle in mind.

On my bookshelf … are a string of non-fiction books about financial frauds. *Bad Blood* (about the downfall of Theranos and its founder Elizabeth Holmes), like the *Big Short* (how lax underwriting standards led to massive downgrading of mortgage-backed securities) and *Black Edge* (insider trading at SAC Capital) before that. Even though it is what I do for a living, I can't help myself when a good fraud story comes along. Currently, I'm reading *The Personality Brokers*. It describes another fraud, of sorts: how the Myers-Briggs personality inventory has no scientific backing, yet continues to be relied upon so widely as a way of putting together teams in the corporate world and even matching roommates in colleges. ■

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