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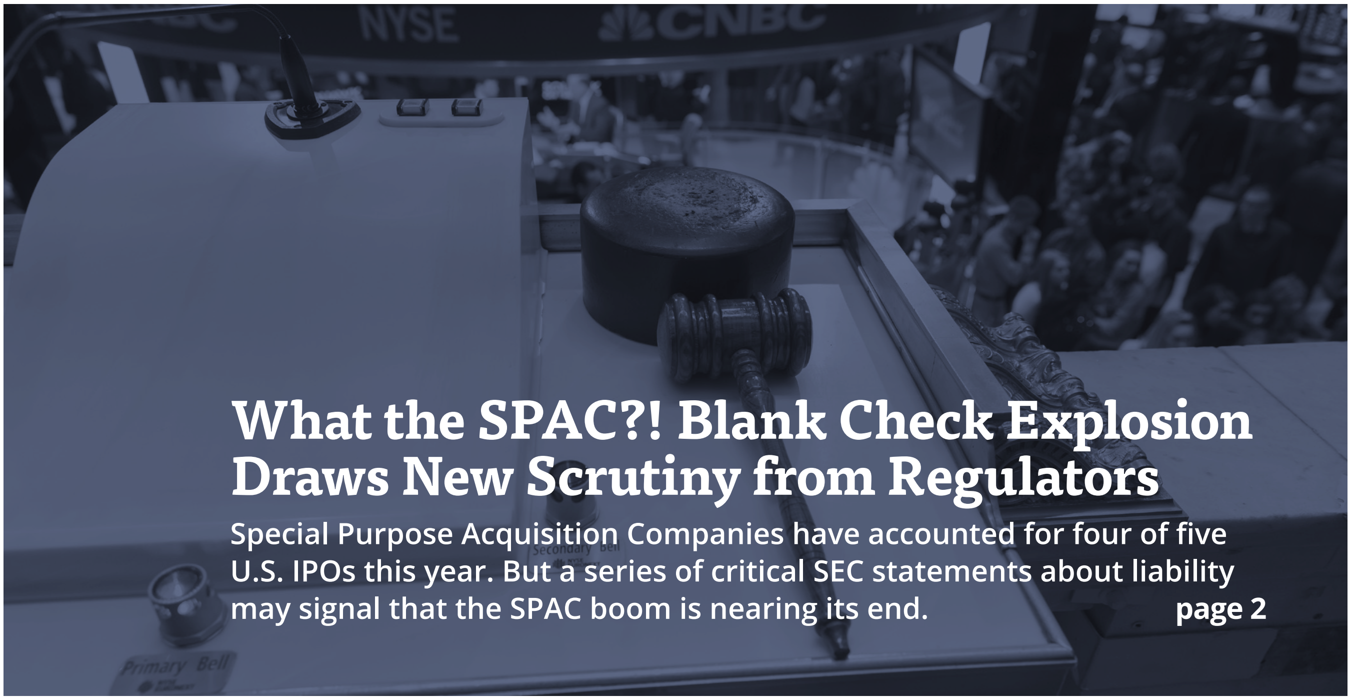


What the SPAC?! Blank Check Explosion Draws New Scrutiny from Regulators

Special Purpose Acquisition Companies have accounted for four of five U.S. IPOs this year. But a series of critical SEC statements about liability may signal that the SPAC boom is nearing its end. page 2

Supreme Court Hears Oral Argument in Financial Crisis-Era Fraud Case

page 6

Despite Warnings, Wave of Pandemic-Related Securities Suits Never Really Materialized

page 7

Recent Statute of Repose Rulings Highlight Obstacles, Potential Paths Forward

page 9

Fiduciary Focus – CalSavers

page 12

Attorney Profile – Suzanne M. Dugan

page 15

What the SPAC?! Blank-Check Explosion Draws New Regulatory Scrutiny

BY RICHARD E. LORANT
202.408.3622
rlorant@cohenmilstein.com
V-CARD

By now even casual followers of financial news have heard of Special Purpose Acquisition Companies, or SPACs, blank-check companies that purportedly provide a smoother path for privately held companies to go public with less exposure to liability.

Initial public offerings of SPACs have exploded over the last several years, driven by market volatility, low interest rates, their own growing popularity, and the lucrative profits they can make for sponsors. But while the SPAC frenzy continues unabated, increased scrutiny from regulators may mean its days are numbered.

SPACs are shell companies that go public, usually priced at $10 a share, with the sole purpose of combining with an as-yet-undetermined private operating company within 18-24 months. Sometimes their barebones prospectuses specify a targeted industry or business, but that's not required. If a deal materializes for the SPAC by the deadline, it merges with the private company to create a new publicly traded corporation in a business combination known as "de-SPACing."

A total of 248 SPACs went public last year, accounting for 55% of U.S. IPOs and raising $83.34 billion—more capital than all previous SPACs combined, according to SPAC Analytics. And this year it took only three months to eclipse last year's astounding total; as of this writing, 303 SPACs have raised nearly $98 billion this year, making up eight of ten U.S. IPOs and a staggering 70% of their proceeds.

SPACs have a mixed track record for investors. Those who buy in the original IPO get their money back with interest if there's no merger or if they don't approve of the acquisition. Still, they may end up receiving shares worth less than what they paid for their warrants. As for those who buy shares of the de-SPACed company on the secondary market, several studies show performance of de-SPACed companies lagged that of corporations that go through traditional IPOs.

In addition, some lawyers who advise on offerings say that SPACs actually may be a more expensive way to go public than traditional IPOs at the end of the day. *Bloomberg* columnist Matt Levine estimated they typically gobble up 25% of the money raised, "three or four times as much as you'd pay in an IPO, albeit better disguised."

In contrast, SPACs all but guarantee big profits for sponsors—if they meet the de-SPAC deadline. In exchange for their expertise and a nominal investment, sponsors receive warrants worth 20% of the merged company, an outsized payoff that could tempt them to overpay for a target company, bring it public before it is ready, or ignore red flags.

A TOP SEC OFFICIAL SAYS "IT MAY BE TIME TO REVISIT" LIABILITY RULES GIVEN THE "UNPRECEDENTED SURGE" IN THE POPULARITY AND NUMBER OF SPACS.

Lured by the potential rewards, every financier, dealmaker, and industry expert seem to have sponsored a SPAC in the last couple of years. Lately they have been joined by celebrities like Fox Business commentator Larry Kudlow, former House Speaker Paul Ryan, musician Jay-Z, baseball great Alex Rodriguez, and basketball's Shaquille O'Neal, whose venture was quickly dubbed the "Shaq SPAC."

The misaligned incentives, celebrity sponsorship, and sheer number of SPACs have drawn the attention of the Securities and Exchange Commission, which is considering tighter regulations and increased disclosures regarding these blank-check IPOs.

On April 12, 2021, the SEC issued new guidance on the convertible warrants SPACs issue to their early investors, saying that some should be classified as liabilities for accounting purposes instead of equity instruments, as they currently are. The statement is the strongest in a series of what observers see as warnings to both SPAC issuers and target companies and may force some companies to restate their financial results, if the accounting change is deemed material.

The new guidance came just four days after John Coates, acting director of the SEC's Division of Corporate Finance, issued a public statement saying the "unprecedented surge" in the popularity of SPACs was prompting "unprecedented scrutiny" and that it "may be time to revisit" the regulations governing them.

Mr. Coates cited a litany of troubling "concerns," including "risks from fees, conflicts, and sponsor compensation, from celebrity sponsorship and the potential for retail participation drawn by baseless hype, and the sheer amount of capital pouring into the SPACs, each of which is designed to hunt for a private target to take public."

In particular, the statement took issue with claims that SPACs provide "less securities law liability exposure for targets and the public company itself" than traditional IPOs. Mr. Coates questioned the idea, for example, that business projections contained in disclosures filed with de-SPAC transactions are shielded from liability under the "safe harbor" provision of the Private Securities Litigation Reform Act of 1995.

Material misstatements made in the registration statements that must be filed with the SEC as part of the de-SPAC are subject to Section 11 of the Securities Act, he said; material misstatements in connection with proxy statements trigger liability under Section 14(a) of the Exchange Act. Both sections offer plaintiffs an easier path to establish liability than Section 10(b) of the Exchange Act.

"Any simple claim about reduced liability exposure for SPAC participants is overstated at best, and potentially seriously misleading at worst," Mr. Coates said. "Indeed, in some ways, liability risks for those involved are higher, not lower, than in conventional IPOs, due in particular to the potential conflicts of interest in the SPAC structure."

ONE REGULATOR SAID THE IDEA THAT SPACS OFFER LESS LIABILITY THAN TRADITIONAL IPOS IS "OVERSTATED AT BEST" AND "SERIOUSLY MISLEADING AT WORST."

The public statement came two weeks after a March 25 Reuters report that the Commission had begun an inquiry into SPACs, sending letters to Wall Street banks "seeking information on how underwriters are managing the risks involved." Though the letters asked for the information to be provided voluntarily, Reuters reported, they were sent by the SEC's Enforcement Division.

Mr. Coates was the second SEC official to issue a public statement on SPACs. On March 31, Acting Chief Accountant Paul Munter encouraged private companies to "consider the risks, complexities, and challenges related to SPAC mergers, including careful consideration of whether the target company has a clear, comprehensive plan to be prepared to be a public company."

Mr. Munter's statement flagged five areas of concern for target companies: the demands of going public on an accelerated timeline; their ability to comply with increased and heightened financial reporting requirements; the importance of maintaining internal control over financial reporting; the need for corporate board oversight, especially by the audit committee; and the shift to financial statements audited in accordance Public Company Accounting Oversight Board standards.

SO FAR THIS YEAR, SPACS HAVE ACCOUNTED FOR A STAGGERING EIGHT IN 10 INITIAL PUBLIC OFFERINGS IN THE U.S. AND 70% OF THEIR PROCEEDS.

As SPACs have proliferated, so inevitably have shareholder lawsuits involving their offspring. Since 2019, 22 blank-check companies have been subject to securities class actions, according to the Stanford Law School Securities Class Action Clearinghouse.

These lawsuits, typically brought on behalf of investors who own shares in the merged company, asserting claims under the Exchange Act, focused on false statements after the merger, and the Securities Act, relating to the Registration Statement filed at the time of the merger. Few, if any, securities lawsuits are filed in connection with the original IPO, given the vague nature of most SPACs' initial registration statements and investors' ability to cash out.

A SPAC-related lawsuit filed April 2 against electric vehicle company Canoo, Inc. offers a cautionary tale of what can happen when a privately held company is not prepared to go public.

Canoo was formed in December 2020 through the merger of Hennessy Capital Acquisition Corp. and Canoo Holdings Ltd., a transaction that raised $600 in cash and valued the company at $2.5 billion. Electric vehicle and battery companies have been popular targets for blank-check companies over the last year, with at least 22 announcing deals to go public via SPACs, *The Wall Street Journal* reported. They have also drawn a number of securities lawsuits, whether or not they were formed via SPACs.

The August 18, 2020 news release announcing the planned merger said Canoo would rely on a "unique business model" based on three revenue streams: providing engineering services under contract to other vehicle makers; offering vehicles to consumers via a subscription service; and selling "last-mile" delivery vehicles to businesses.

The news release and accompanying presentation, which was filed with the SEC, said the consumer subscription service would be especially important, since it would be "more profitable and resilient" than selling new vehicles. In later public statements, the Canoo team continued to stress the three revenue streams. The company also touted a February 2020 agreement to provide contract engineering services to Hyundai Motor Group as an example of its experience and potential in that area.

But in its first post-merger earnings call on March 29, 2021, Canoo abruptly changed course, announcing the departure of its CFO, saying it would "de-emphasize" the contract engineering services, and casting doubt on the future of the subscription service.

Adding to the confusion, the merged company's CEO, who had co-founded and run Canoo as a privately held company, did not appear on the conference call, which was run by Executive Chairman Anthony Aquila, who had joined the company two months before the merger. As one analyst said, these were "significant surprises." Soon after the call, *The Verge* reported the deal with Hyundai "appeared to be dead."

Asked to explain the shift, Aquila pointed to the inexperience of the prior leadership team, which had been "a little more aggressive" and "presumptuous" than advisable in its public statements about business prospects and didn't meet "our standard of representation to the public markets."

"This comes back to having an experienced public company team," Aquila said, referring to statements about potential engineering contracts with other manufacturers. "You've got to be careful of the statements you make."

Well, yes. Canoo's stock price fell 21% the next day.

With more than 400 SPACs on deadline to find targets, the pressure is only increasing on private companies to join the blank-check party—ready or not. Tighter regulations that gently let the air out of the SPAC bubble offer the best hope for a soft landing. ■

WITH MORE THAN 400 SPACS HUNTING FOR TARGETS TO TAKE PUBLIC, THE PRESSURE IS INCREASING ON PRIVATE COMPANIES TO JOIN THE BLANK-CHECK PARTY—READY OR NOT.

Richard E. Lorant is Director of Institutional Client Relations for the firm.

Supreme Court Hears Oral Argument in Financial Crisis-Era Fraud Case

On March 29, 2021, the U.S. Supreme Court heard oral argument in *Goldman Sachs Group, Inc., et al. v. Arkansas Teacher Retirement System, et al.*, No. 20-222. The closely watched case raises a host of important issues concerning the substantive and procedural requirements for certifying a securities fraud class action, including: (1) whether a defendant can rebut the *Basic* presumption of class-wide reliance by "pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security," and if so, whether a court can use its "intuition" alone or expert evidence in evaluating the price impact of the alleged misstatements; and (2) whether a defendant seeking to rebut the "fraud on the market" presumption of reliance has the burden only of production, or also of persuasion.

In addition to an amicus brief filed on behalf of neither party by the U.S. Solicitor General on behalf of the Securities and Exchange Commission, numerous amicus briefs were submitted on behalf of each party.

Supporting Arkansas Teacher Retirement System were 10 amicus briefs, including ones by 13 former SEC Commissioners and senior staff; the Attorneys General of 16 states; the North American Securities Administrators Association;[1] dozens of securities law professors, evidence law professors, and economists; 19 of the country's largest institutional investors (including, for example, CalPERS, CalSTRS and New York State Common Retirement Fund); the National Association of Securities and Consumer Attorneys; and consumer advocates Public Citizen and Better Markets.

In support of Goldman Sachs, seven amicus briefs were filed, primarily by conservative organizations dedicated to closing courthouse doors to investors (as well as consumers and employees), including the Retail Litigation Center, Inc., Washington Legal Foundation, SIFMA and The Society for Corporate Governance, as well as a random assortment of a few law professors and former SEC officials and financial economists, and AIG and Chubb, two of the largest U.S. providers of directors' and officers' liability insurance.

After considering the parties' briefs, oral argument, and the amicus briefs, the Supreme Court is expected to publish its decision in June. ■

1 Laura H. Posner, a partner in CMST's Securities Litigation & Investor Protection practice group, was counsel to NASAA on its brief.

DESPITE WARNINGS, WAVE OF PANDEMIC-RELATED SECURITIES SUITS NEVER REALLY MATERIALIZED

DAVID MASER
267.479.5700
dmaser@cohenmilstein.com
V-CARD

BECAUSE THE IMPACT OF THE PANDEMIC WASN'T KNOWN WHEN IT FIRST HIT, COHEN MILSTEIN'S STEVEN J. TOLL TOLD THE *SHAREHOLDER ADVOCATE*, "IT WOULD HAVE BEEN VERY HARD TO ALLEGE A COMPANY HAD THE REQUISITE INTENT UNDER THE SECURITIES LAWS TO COMMIT FRAUD—THAT IT WAS INTENTIONALLY OR RECKLESSLY MISLEADING THE INVESTING PUBLIC ABOUT THE IMPACT OF THE PANDEMIC ON ITS FUTURE EARNINGS OR PROFITABILITY."

In March of 2020 the COVID-19 coronavirus was declared a pandemic, and two COVID-related securities class action lawsuits were quickly filed. The filing of these cases led to a heated debate of whether plaintiffs' attorneys would leverage the effects of the pandemic to file an increased amount of securities class actions.

A year ago, in April 2020, Kent Schmidt, a California attorney who specializes in defending businesses in litigation, said a "tsunami" of class-action lawsuits in three areas—consumer, employment, and shareholder cases—was already sweeping ashore. "These early filings can be indicative of the liabilities that companies should take into consideration and inform their practices now to avoid getting hit with one of these costly lawsuits," he told *Newsweek*. "I think we're going to see these cases play out for years."

Mr. Schmidt's view was not unique. Many in the defense bar quickly assumed that there would be an increase in the filing of securities fraud class actions, along with insurance, consumer, and other types of cases.

Perhaps not surprisingly, most lawyers who represent plaintiffs in shareholder lawsuits had a different opinion of whether the pandemic would lead to a wave of frivolous securities filings. "Trying to take advantage of a worldwide tragic epidemic disaster? I just hope those suits aren't brought," Steven J. Toll, Cohen Milstein's Managing Partner and the Co-Chair of its Securities Litigation & Investor Protection practice, said to Reuters in March 2020.

To this point, the plaintiffs' bar appears to have done a better job of forecasting—at least with respect to shareholder lawsuits. As of March 2021, a total of 28 coronavirus outbreak-related securities class action lawsuits have been filed. While 28 securities lawsuits over 12 months is not a small number, it hardly constitutes a flood of litigation, given the 300 to 400 securities class action filed each year.

Cohen Milstein Partner Laura Posner was recently quoted by

COHEN MILSTEIN'S LAURA POSNER WAS RECENTLY QUOTED BY *LAW360* AS SAYING THAT THE HUGE NUMBERS OF COVID-19 SECURITIES LAWSUITS PREDICTED BY THE DEFENSE BAR HAD "LARGELY NOT COME TO FRUITION" AND THAT SHE EXPECTED A RETURN TO NORMAL LEVELS SOON.

Law360 as saying that the huge numbers of COVID-19 filings predicted by the defense bar had "largely not come to fruition." In fact, Ms. Posner told *Law360*, she expected to soon see a return to normal filing levels of lawsuits, even against the pharmaceutical industry, "given where the country is in drug development relating to COVID-19."

"There may be a few more cases involving allegations that a company's projections or revenue and income representations were false and misleading, but assuming that the economy picks up as expected and we begin to return to a more 'normal' lifestyle, I think those cases will grow even less common as well," she said.

Mr. Toll said the "tsunami" never came to pass in part because the unpredictable nature of the pandemic made it hard for plaintiffs to meet the heightened pleading standards required for securities fraud lawsuits to succeed.

"It would have been extremely difficult to show a direct link of any subsequent stock price decline to an earlier fraudulent statement about the pandemic—in other words, to connect the dots to satisfy the element of loss causation," he told the *Shareholder Advocate*.

MANY DEFENSE LAWYERS QUICKLY ASSUMED THAT THERE WOULD BE AN INCREASE IN THE FILING OF SECURITIES FRAUD CLASS ACTIONS AS THE PANDEMIC WIDENED, ALONG WITH INSURANCE, CONSUMER, AND OTHER TYPES OF CASES.

"When the pandemic hit and started to change the nature of how society functioned, it really wasn't known what the impact would be," Mr. Toll said. "Thus, it would be very hard to allege a company had the requisite intent under the securities laws to commit fraud—that it was intentionally or recklessly misleading the investing public about the impact of the pandemic on its future earnings or profitability."

Finally, Mr. Toll said, U.S. stock markets' broad and sharp decline in early 2020 followed by an equally broad upswing helped keep the number of shareholder lawsuits in check. "When most or all stocks in a particular segment decline, it makes it almost impossible to claim an alleged fraud caused this loss when similar stocks all declined in the same manner," he said. When stocks across the board rise, he added, it erases any shareholder losses.

Meanwhile, it is also true that litigation in general increased during the pandemic. *Law360* reports that restaurants, bars and businesses filed more than 6,900 lawsuits related to the pandemic in 2020 with nearly 1,400 filed over insurance coverage alone and are making their way both state and federal courts. For the most part, these lawsuits reflect the enormous economic and physical damages wrought by the COVID-19 pandemic on individuals and businesses across the country, who have turned to the courts for help when other remedies fail them. ■

David Maser is Of Counsel at Cohen Milstein in the Securities Litigation & Investor Protection practice group.

FOR PLAINTIFFS ALLEGING LONG-RUNNING SECURITIES FRAUDS, RECENT STATUTE OF REPOSE RULINGS HIGHLIGHT OBSTACLES, POTENTIAL PATHS FORWARD

BY CAROL V. GILDEN
312.629.3737
cgilden@cohenmilstein.com
V-CARD

JAN E. MESSERSCHMIDT
202.408.3644
jmesserschmidt@cohenmilstein.com
V-CARD

Securities fraud claims brought under Section 10(b) of the Exchange Act are subject to two separate timeliness provisions: a two-year statute of limitations and a five-year statute of repose. These two provisions begin running on different dates. For the two-year limitations period, the clock starts running when the plaintiff discovers the "facts constituting the violation." The five-year repose period, on the other hand, begins from the defendant's last culpable act, regardless of whether the plaintiff knows about it or not. By pairing a shorter statute of limitations with a longer statute of repose, the Supreme Court has explained, the two provisions work in tandem to give "leeway to a plaintiff who has not yet learned of a violation," while protecting "the defendant from an interminable threat of liability."[1]

Earlier this year, two district court decisions in the Second Circuit—*Abu Dhabi Investment Authority v. Mylan N.V. et al. and In re Teva Securities Litigation*[2]—illustrated the significant challenges that the statute of repose can present for plaintiffs alleging securities frauds that last longer than five years. Stemming from Mylan's and Teva's involvement in multi-year schemes to fix the prices of generic drugs, investors in the two cases alleged that the companies engaged in anticompetitive conduct to inflate the prices of their generic drugs and made a series of false and misleading statements over the course of more than five years as to the reasons underlying their purported business success. In each case, the defendants filed partial motions to dismiss, seeking dismissal of any claims to the extent they were based on allegedly false and misleading statements made more than five years before the complaints were filed.

Both courts granted the motions. Framing the relevant question to

1 *California Pub. Employees' Ret. System v. ANZ Securities, Inc.*, 137 S. Ct. 2042, 2049 (2017).

2 Cohen Milstein is counsel to one of the direct action plaintiffs in *In re Teva Securities Litigation*.

BY PAIRING A SHORTER STATUTE OF LIMITATIONS WITH A LONGER STATUTE OF REPOSE, THE SUPREME COURT HAS EXPLAINED, THE TWO PROVISIONS WORK IN TANDEM TO GIVE "LEEWAY TO A PLAINTIFF WHO HAS NOT YET LEARNED OF A VIOLATION," WHILE PROTECTING "THE DEFENDANT FROM AN INTERMINABLE THREAT OF LIABILITY."

be what constitutes a "violation" under the Exchange Act, the two courts rejected the plaintiffs' arguments that the repose period should be measured from the last misrepresentation or omission that the defendants made. Because a single misstatement can alone constitute a violation of the Exchange Act, the courts reasoned that the repose period runs from the date that *each* misstatement or omission was made. As a result, the courts dismissed claims based on misstatements or omissions made more than five years before the complaint was filed. The two decisions are the latest in a recent trend within the Second Circuit, with courts departing from some earlier decisions that had measured the repose period from the last misrepresentation. In so doing, these courts rejected that approach as tantamount to a "continuing violations" or "equitable tolling" theory, which the Supreme Court has repeatedly held to be inconsistent with statutes of repose.

BECAUSE A SINGLE MISSTATEMENT CAN ALONE CONSTITUTE A VIOLATION OF THE EXCHANGE ACT, COURTS RECENTLY REASONED THAT THE REPOSE PERIOD RUNS FROM THE DATE THAT EACH MISSTATEMENT OR OMISSION WAS MADE.

Due to this trend in the case law, plaintiffs should be particularly mindful in cases involving long-running frauds to file complaints as early as possible to avoid application of the statute of repose to bar parts of their claims, that is, to bar recovery on misrepresentations or omissions occurring early on in the fraud. In many cases, doing so will not be particularly difficult. After learning about a securities violation, plaintiffs have little reason to delay filing their complaint, whether it be in connection with a class action or an individual, direct action; after all, the sooner they can file their complaint, the sooner they can recover the money they lost as a result of the fraud. And while a fraud is necessarily secret at the beginning, it usually does not take longer than five years for the truth to come out. But that is not always the case.

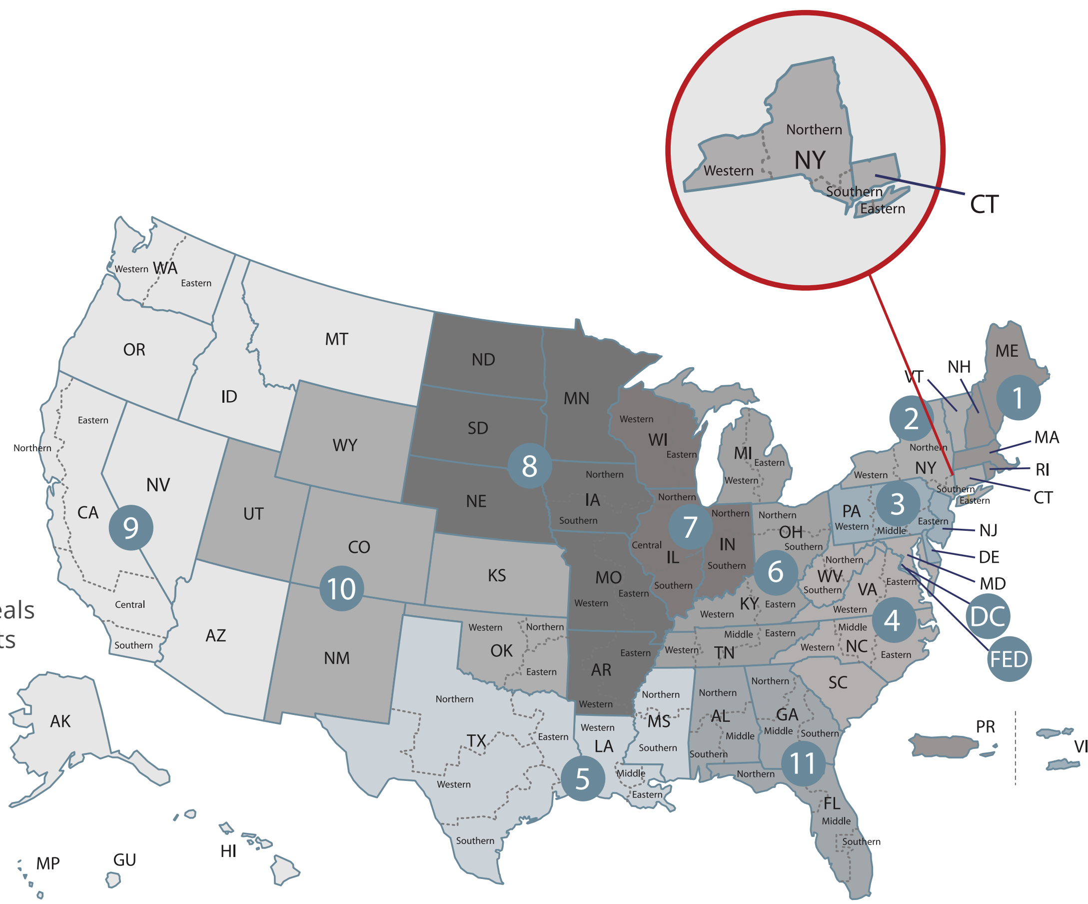
So, what happens when a defendant successfully keeps a fraud under wraps for more than five years? Or, more egregiously, what happens when a defendant is continuing to deceive investors, even as the truth of a long-running fraud is slowly leaking out? The decision in *In re Teva Securities Litigation* suggests one possible approach. In that case, class action plaintiffs argued at oral argument that while a single misrepresentation or omission can constitute a violation of subsection (b) of Rule 10b-5, the other two provisions of Rule 10b-5—subsections (a) and (c)—applied in that case. Commonly considered together as the "scheme liability" provisions, subsections (a) and (c) make it unlawful to "employ any device, scheme, or artifice to defraud" or to "engage in any act, practice, or course of business" to defraud investors. Plaintiffs argued that because those provisions make a scheme to defraud a violation of Rule 10b-5, the statute of repose for such fraudulent schemes should run from the end of the scheme, rather than each misstatement made in furtherance of the scheme. While the court ultimately held that the plaintiffs did not sufficiently allege scheme liability, the court indicated that if adequately alleged, scheme liability allegations could protect plaintiffs from statute of repose defenses. Such arguments are particularly promising in the wake of the Supreme Court's decision in *Lorenzo v. SEC*, which indicated that scheme liability claims can potentially be based on misrepresentations or omissions, an approach which had been foreclosed by prior case law in many circuits, including the Second Circuit.

While further development of the law in this area is necessary, plaintiffs exploring this approach should take care to include allegations that sufficiently allege scheme liability in a manner that incorporates any misrepresentation allegations as part of the alleged scheme. ■

Carol V. Gilden is a Partner in Cohen Milstein's Securities Litigation & Investor Protection practice group. Jan E. Messerschmidt is an Associate at Cohen Milstein and a member of the firm's Securities Litigation & Investor Protection practice group.

WHILE THE COURT ULTIMATELY HELD THAT THE PLAINTIFFS DID NOT SUFFICIENTLY ALLEGE SCHEME LIABILITY, THE COURT INDICATED THAT IF ADEQUATELY ALLEGED, SCHEME LIABILITY ALLEGATIONS COULD PROTECT PLAINTIFFS FROM STATUTE OF REPOSE DEFENSES.

GEOGRAPHIC BOUNDARIES
of United States Courts of Appeals
and United States District Courts



JAY CHAUDHURI
OF COUNSEL
919.890.0560
jchaudhuri@cohenmilstein.com

FIDUCIARY FOCUS

BIDEN'S DOL DROPS COURT FILING AGAINST CALSAVERS

On February 8, less than three weeks after President Biden's inauguration, the U.S. Department of Labor (DOL) withdrew its support for a lawsuit challenging the CalSavers Retirement Savings Program (CalSavers). "After the change in administration, the Acting Secretary of Labor has reconsidered the matter and hereby notifies the court that he no longer wishes to participate as amicus in this case and that he does not support either side," the DOL said in its court filing. The DOL's decision to end support is significant because it may potentially offer insight into how the Biden Administration will work with state-run automatic individual retirement accounts, known as auto-IRAs, which provide retirement savings programs to private-sector employees whose employers do not offer them.

As background, in 2011, the University of California, Berkeley's Center for Labor Research and Education released a seminal study that found "middle class families in California are at significant risk of not having enough retirement income to meet even basic expenses, as nearly 50 percent of middle-income California workers will retire at or near poverty." The study also said that Californians' retirement security would worsen as future workers retire without employer-sponsored benefits. In 2012, California passed legislation to address this concern. Specifically, the legislature enacted the country's first state-sponsored defined contribution program for private sector employees who do not have access to a retirement plan. The program is estimated to cover 7.5 million Californians. In 2018, CalSavers launched a pilot program; it will expand to all eligible employers by 2022.

In 2018, the Howard Jarvis Taxpayers Association (HJTA), a nonprofit lobbying and policy organization, filed a lawsuit seeking to block the CalSavers program. HJTA contended the federal Employment Retirement Income Security Act (ERISA) preempted the CalSavers program and no taxpayer money should be spent on the program. In March 2019, a federal district court dismissed the case, but allowed HJTA to amend its complaint. The court held that ERISA does not preempt the California statute establishing the CalSavers program because the key test for ERISA preemption is whether the CalSavers program "governs … a central matter of plan administration or interferes with nationally uniform plan administration." The court concluded that because the CalSavers program neither "governs" nor "interferes with" any ERISA plan there is no "connection" between ERISA and CalSavers.

In March 2020, the same federal district court dismissed the lawsuit for a second time. In its second opinion, the court again confirmed that ERISA does not preempt the CalSavers program. The court said CalSavers does not create an "employee benefit plan" under ERISA because an "employer" does not establish or maintain the program. Specifically, the court said, "Actual employers have no discretion in the administration of CalSavers and do not make any promises to employees; employers simply remit payroll deducted payments to [CalSavers] and otherwise have no discretion regarding the funds."

In June 2020, HJTA appealed the decision to the United States Court of Appeals for the Ninth Circuit. That same month, the Trump Administration's DOL filed an amicus brief supporting HJTA's appeal. In its brief, the DOL argued that CalSavers "takes away the freedom of choice that lies at the core of ERISA by forcing employers either to establish their own ERISA plans or to maintain an equivalent plan under [CalSavers]." The brief further claimed that CalSavers is preempted by ERISA because it "disregards and runs afoul of ERISA's statutory scheme by effectively requiring employers to maintain such plans …"

THE DOL'S DECISION TO END SUPPORT [OF THE LAWSUIT CHALLENGING CALSAVERS] IS SIGNIFICANT BECAUSE IT MAY POTENTIALLY OFFER INSIGHT INTO HOW THE BIDEN ADMINISTRATION WILL WORK WITH STATE-RUN AUTOMATIC INDIVIDUAL RETIREMENT ACCOUNTS, KNOWN AS AUTO-IRAS, WHICH PROVIDE RETIREMENT SAVINGS PROGRAMS TO PRIVATE-SECTOR EMPLOYEES WHOSE EMPLOYERS DO NOT OFFER THEM.

Although the Ninth Circuit Court of Appeals has yet to decide the case, the DOL's decision to withdraw its amicus brief remains significant for a few reasons.

First, the withdrawal may indicate that, under President Biden, the DOL may be willing to return to an Obama-era interpretation of ERISA preemption that is less restrictive. Under Obama, the DOL in 2016 had issued a final rule that eliminated the federal barrier to states that seek to implement programs like CalSavers.

Second, the withdrawal may reflect Biden's campaign promise to allow workers without a pension to have access to an automatic 401(k). That promise could be met by enabling state-run auto-IRA programs for private sector employees. To date, California, Illinois, and Oregon are running programs. Connecticut, Colorado, and Maryland will start programs this year. According to Georgetown University's Retirement Initiative, another 20 states and cities have introduced legislation to create programs or establish a study group.

Finally, the withdrawal is consistent with President Biden's nomination of Julie Su for Deputy Secretary of Labor. Currently, Ms. Su serves as secretary of California's Labor and Workforce Development Agency, where she worked on the CalSavers program. During her recent U.S. Senate confirmation, Ms. Su said she would focus not only on protecting workers but on helping people with retirement security. ■

Jay Chaudhuri is Of Counsel at Cohen Milstein in the Securities Litigation & Investor Protection practice group.

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- Cohen Milstein's Theodore J. Leopold Recognized as a 2021 "Distinguished Leader" by the *Daily Business Review* – March 26, 2021
- Cohen Milstein Recognized as One of "America's Most Influential Law Firms" by *Trial Magazine* and *The National Law Journal* – March 10, 2021
- Cohen Milstein's Betsy A. Miller and Steven J. Toll Listed Among "America's 50 Most Influential Lawyers" by *Trial Magazine* and *The National Law Journal* – March 10, 2021
- Cohen Milstein's Agnieszka Fryszman Recognized Among the 2021 "Lawdragon Global Litigation 500" – February 22, 2021
- Twelve Cohen Milstein Lawyers, Including Julie Goldsmith Reiser of the Securities Litigation & Investor Protection Practice, Recognized Among the 2021 "Lawdragon 500 Leading Lawyers in America;" Steven J. Toll Inducted into the "Lawdragon 500 Hall of Fame"– January 27, 2021

SPEAKING ENGAGEMENTS

- **December 8, 2020** | Carol V. Gilden spoke at Skadden's 13th Annual Securities Litigation and Enforcement Series: "Developments and Trends in Securities Litigation – A Year-End Update for 2020 and a Look Ahead to 2021."
- **January 29, 2021** | Carol V. Gilden moderated an esteemed panel of academics at the Institute for Law & Economic Policy's 2021 Annual Symposium: "Governance Wars – Contesting Power and Purpose in the 21st Century Corporation."
- **February 26, 2021** | Laura H. Posner chaired the New York City Bar's 9th Annual Securities Litigation & Enforcement Institute and participated in a panel discussion titled, "Securities Litigation."
- **April 14, 2021** | Julie Goldsmith Reiser participated in a panel discussion titled, "Put Your Money Where Your Mouth Is: The Ascension of ESG" at the Minority Corporate Counsel Association's 2021 Virtual Global Tec Forum.
- **June 9, 2021** | Suzanne M. Dugan has been invited to speak at NCPERS's 2021 Trustee Educational Seminar (TEDS). Ms. Dugan's session is titled, "A Fiduciary Checklist to Help Trustees (and their Lawyers!) Sleep at Night."

ATTORNEY PROFILE

SUZANNE M. DUGAN
SPECIAL COUNSEL
202.408.4600
sdugan@cohenmilstein.com
V-CARD

"One of the biggest challenges in my practice is conveying to trustees on a public pension board that although they may come from a particular constituency of the pension plan, their sole fiduciary duty is to the members and beneficiaries of the pension plan."

Suzanne Dugan is Special Counsel to Cohen Milstein and leads the firm's Ethics & Fiduciary Counseling practice, which she established within the Securities Litigation & Investor Protection practice group. Prior to joining the firm in 2011, Suzanne had more than 20 years of service in government, including as Special Counsel for Ethics to the Office of the New York State Comptroller and as counsel to and acting director of the New York State Ethics Commission. Suzanne brings to bear her deep experience as both a regulator and in-house counsel for a large state agency in providing ethics and fiduciary counseling to the firm's pension fund clients. For this issue of the **Shareholder Advocate*****, Suzanne talked with Editor Christina Saler.***

I grew up in … Saranac Lake, N.Y. which is in the Adirondacks, an area in upstate New York known for its big, beautiful lakes and cold winters—and springs. For example, "ice-out" is defined as when you can boat to the deepest part of the lake from a shore point, and ice-out in 2018 was on May 2. Just 10 miles from Lake Placid, Saranac Lake housed many Olympic visitors during the 1980 Olympics. It was an exciting time and meaningful for my mother, who remembered from her childhood the 1932 Lake Placid Winter Olympics.

I have wanted to be a lawyer … for as long as I can remember. My father, who was born in 1919, got his law degree after World War II on the G.I. Bill. He was a general practitioner and in later years moved into civil rights work and served as a public defender, which was his true calling. I loved spending time with him in his office and learning about the important work he did. I was the only one of his five children to follow in his footsteps and went to Albany Law School, which was where he studied law, so it meant a lot to him.

One of the biggest challenges in my practice … is conveying to trustees on a public pension board that although they may come from a particular constituency of the pension plan, their sole fiduciary duty is to the members and beneficiaries of the pension plan. Trustees of public pension systems are not fiduciaries for their appointing authorities, employers who pay into the systems, constituencies, taxpayers or the public. Fiduciary duties have been called the highest known to the law, and oblige the trustees to put the interests of the members and beneficiaries above all others.

I'm currently reading … *Palaces for the People: How Social Infrastructure Can Help Fight Inequality, Polarization, and the Decline of Civic Life* by Eric Klinenberg. As an elected board member for my local library, this book is especially relevant to the issues public libraries face in the time of COVID-19 because they are essential centers that serve their communities on many educational and social levels. ■

CHICAGO, IL

190 South LaSalle Street
Suite 1705
Chicago, IL 60603
t: 312.357.0370

NEW YORK, NY

88 Pine Street
14th Floor
New York, NY 10005
t: 212.838.7797

PALM BEACH GARDENS, FL

11780 U.S. Highway One
Suite N500
Palm Beach Gardens, FL 33408
t: 561.515.1400

PHILADELPHIA, PA

Three Logan Square
1717 Arch Street, Suite 3610
Philadelphia, PA 19103
t: 267.479.5700

RALEIGH, NC

150 Fayetteville Street
Suite 980
Raleigh, NC 27601
t: 919.890.0560

WASHINGTON, DC

1100 New York Ave. NW
Fifth Floor
Washington, DC 20005
t: 202.408.4600

Editor: Christina D. Saler
Editorial Team: Michael E. Gleeson, Richard E. Lorant and Samuel P. Waite

Please contact us with questions or comments at (202) 408-4600.

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