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Pension Funds Bolster Complaint in InnovAge Fraud Lawsuit

Last month, a group of three Cohen Milstein clients—the El Paso Firemen & Policemen's Pension Fund, the San Antonio Fire & Police Pension Fund, and the Indiana Public Retirement System—filed an amended complaint as co-lead plaintiffs in a securities lawsuit against InnovAge and its officers and directors. InnovAge was among the five worst-performing initial public offerings in 2021.

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INNOVAGE WAS AMONG THE FIVE WORST-PERFORMING INITIAL PUBLIC OFFERINGS IN 2021.

The filing describes how InnovAge, a national healthcare company providing medical care to ailing seniors, focused on aggressive enrollment of patients for profit at the expense of the healthcare the company was obligated to provide. On average, during the period at issue, InnovAge received a fixed amount of $95,000 per year *per enrolled patient*, meaning that the fastest and simplest way to grow revenue was to increase enrollment. But unbeknownst to investors, InnovAge's rapid enrollment growth resulted in severe staff shortages, high caseloads, significant delays, and lack of contracts from specialists, leading to systemic deficiencies and substandard care. Nevertheless, InnovAge focused its resources on hiring sales and marketing staff and ignored substandard home and clinical care for its participants.

In May of 2016, InnovAge became the first Program of All-Inclusive Care for the Elderly (PACE) organization to achieve for-profit status. PACE, a joint Medicare and Medicaid program, provides comprehensive, community-based medical and social services to frail and elderly people. For decades, PACE programs were operated almost exclusively by nonprofits. But InnovAge's previous CEO, Maureen Hewitt, who served until January of this year, led the company's aggressive lobbying campaign to transform InnovAge from a regional nonprofit to the first national for-profit PACE provider. To do so, Hewitt secured the partnership of Thomas Scully, the Administrator of the Centers for Medicare and Medicaid Services (CMS) under President George W. Bush and a general partner at the private equity firm Welsh, Carson, Anderson & Stowe (WCAS).

As Hewitt and InnovAge's private equity leadership prioritized growth in enrollment, the goal was to advance InnovAge's vision of rapid growth by providing healthcare to the burgeoning senior population in the United States, a massive market on which InnovAge was poised to capitalize. Shortly after WCAS invested in InnovAge's for-profit conversion in 2016, Scully set a target of taking InnovAge public in as few as four years, citing the growth of the senior population and the market for PACE around the country. As Scully later put it: "I'm saying this lovingly: PACE is like community co-op grocery stores, I'm hoping someday it becomes Whole Foods."

Over the next four years, the company's prioritization of enrollment led to explosive growth in revenue, and by early 2020, WCAS and Scully began to implement their exit strategy by soliciting bids for a full or partial sale of InnovAge through either a strategic acquisition or an initial public offering. In July 2020, Apax Partners agreed to buy a stake in InnovAge from WCAS in a deal that valued the Company at $950 million. Under the deal, Apax and WCAS jointly controlled InnovAge, with each owning 49% stakes. The deal's $950 million valuation of InnovAge represented a 480% increase from WCAS's investment in the company just four years earlier.

On March 4, 2021, InnovAge launched its IPO, with the company boasting to investors that its meteoric growth was due to its provision of comprehensive care for vulnerable seniors, even though InnovAge was consistently failing to provide timely specialist care and adequate home health services. As a result, InnovAge's market value rose to $3.2 billion on March 4 and to a high of $3.5 billion the following week, which was approximately 3.6 times its valuation by WCAS and Apax just months earlier.

In the months that followed, however, InnovAge's systemic problems were slowly revealed. Last September, CMS notified the company that the government agency was suspending enrollment at InnovAge's Sacramento, California center after an audit of the facility found that InnovAge "substantially failed" to "provide to its participants medically necessary items and services that are covered PACE services." InnovAge also revealed last year that CMS and the state of Colorado had decided to suspend enrollment at InnovAge's Colorado facilities, and the company is currently under investigation by the Colorado Attorney General. In just the first six months of 2022, CMS has suspended enrollment in existing centers or canceled agreements for new centers in Florida, Indiana, New Mexico and San Bernadino, California.

As a result of these revelations, InnovAge's stock price plummeted to $4.71 by December 27, 2021, an 80% drop from its all-time high in March—just nine months earlier. The case is *El Paso Firemen & Policemen's Pension Fund, San Antonio Fire & Police Pension Fund, and Indiana Public Retirement System v. InnovAge Holding Corp., et al.,* No. 21-cv-02270 (D. Colo.). ■

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THE FILING DESCRIBES HOW INNOVAGE, A NATIONAL HEALTHCARE COMPANY PROVIDING MEDICAL CARE TO AILING SENIORS, FOCUSED ON AGGRESSIVE ENROLLMENT OF PATIENTS FOR PROFIT AT THE EXPENSE OF THE HEALTHCARE THE COMPANY WAS OBLIGATED TO PROVIDE.

INNOVAGE'S STOCK PRICE PLUMMETED TO $4.71 BY DECEMBER 27, 2021, AN 80% DROP FROM ITS ALL-TIME HIGH IN MARCH—JUST NINE MONTHS EARLIER.

CHANCERY COURT ACCEPTS "NOVEL THEORY" OF BOARD'S FAILURE OF OVERSIGHT CLAIM

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Delaware Chancery Court Vice Chancellor Travis Laster broke new ground recently by ruling that a board of directors' failure to address an obvious "red flag" constituted a sufficient breach of fiduciary duty of oversight under the court's *Caremark*[1] standard to overcome a motion to dismiss, even though the board learned about it through a litigation demand.

The alleged misconduct in *Garfield v. Allen*[2] involved a violation of an equity compensation plan approved by the ODP Corporation Board of Directors. Although Vice Chancellor Laster accepted "with trepidation" the "novel theory" of a *Caremark* claim advanced by plaintiff, he found that "the logic of the ... theory is sound." Vice Chancellor Laster noted that "from an analytical perspective ... the source of the directors' knowledge should not make a difference." In short, a litigation demand by itself can now serve as a "red flag" triggering a potential *Caremark* claim. What remains to be seen is whether this new theory of liability becomes a viable approach to challenging a board's breach of its fiduciary duty of oversight beyond the factual circumstances of this case.

The *Garfield* case arose in the context of the grant of equity awards by the directors of ODP under an existing executive compensation plan previously approved by its stockholders. The plan contained a limit on the number of shares that could be awarded to an individual in any given year. Plaintiff challenged the award granted to ODP's CEO, claiming that the board had violated the plan by awarding him an excessive number of shares. Plaintiff made a demand on the ODP board to amend the award to comply with the terms of the plan.

In response to the demand, the board's compensation committee chose to interpret the plan differently and applied another limitation found in the plan—one that was higher and ostensibly permitted the award to stand.

1 *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (Allen, C.)

2 *Garfield v. Allen, et al.*, C.A. No. 2021-0420-JTL (Del. Ch. May 24, 2022).

A LITIGATION DEMAND BY ITSELF CAN NOW SERVE AS A "RED FLAG" TRIGGERING A POTENTIAL CAREMARK CLAIM BUT WHAT REMAINS TO BE SEEN IS WHETHER THIS NEW THEORY OF LIABILITY BECOMES A VIABLE APPROACH TO CHALLENGING A BOARD'S BREACH OF ITS FIDUCIARY DUTY OF OVERSIGHT BEYOND THE FACTUAL CIRCUMSTANCES OF THIS CASE.

RECOGNIZING THAT THIS APPROACH TO CAREMARK CLAIMS WAS NOVEL AND WITHOUT PRECEDENT, VICE CHANCELLOR LASTER CAUTIONED AGAINST HOW THIS DOCTRINE SHOULD BE APPLIED IN FUTURE CASES.

Because the board denied the stockholder's demand without taking any action, plaintiff brought a direct claim for a breach of contract based on the terms of the plan and a derivative claim for breach of fiduciary duties. Defendants moved to dismiss the claims relying on their different interpretation of the plan as the basis for not taking the action plaintiff demanded.

In denying the motion to dismiss, Vice Chancellor Laster ruled that the directors on the compensation committee breached the contractual terms of the plan and their fiduciary duties by approving the award, that the CEO breached his fiduciary duties by accepting the award, and that all the directors breached their fiduciary duty by not fixing the awards after receiving notice of the violation in the demand.

The underlying theory on the board's failure to amend the award after receiving notice of the violation was premised on a *Caremark* type claim and rests on the notion that directors can be held liable for consciously not addressing "red flags" brought to their attention. Vice Chancellor Laster ruled that just because a "red flag" is raised in a litigation demand, it does not absolve directors from potential liability. Thus, the ODP directors who approved an improper award in the face of a "plain and unambiguous" contractual restriction in the plan face liability both for approving the improper award and for failing to address the issue once they were advised of the problem by a stockholder demand. Significantly, here all directors breached their fiduciary duties by failing to amend the award after being put on notice of the violation when they received plaintiff's demand. As Vice Chancellor Laster noted: "[w]hen directors grant awards that exceed an express limitation in an equity compensation plan, the allegations support an inference that the directors acted knowingly and intentionally," supporting a claim for breach of "fiduciary duty of loyalty by failing to act in good faith."

Recognizing that this approach to *Caremark* claims was novel and without precedent, Vice Chancellor Laster cautioned against how this doctrine should be applied in future cases. His concern centered on other plaintiffs who might attempt to manufacture whistleblower-type claims as a basis for a demand and then sue directors who failed to act "because the directors did not respond to the whistle." While this might be a concern, however, there now appears to be a pathway for stockholders to assert a *Caremark* claim where directors are advised of an otherwise unknown serious problem or "red flag" and fail to address the issue when given notice through a litigation demand. ■

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SEEKING TO PROTECT INVESTORS, SEC BEARS DOWN ON CRYPTO MARKETS

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ON MAY 3, 2022, THE SEC'S DIVISION OF ENFORCEMENT ANNOUNCED THE EXPANSION OF ITS CRYPTO GROUP FROM 30 TO 50 PEOPLE AND RENAMED IT THE CRYPTO ASSETS AND CYBER UNIT.

To say that federal securities regulators are expanding oversight of cryptocurrencies at an opportune time would be an understatement. In fact, some industry experts say the increased attention is overdue.

Crypto assets have gone mainstream. Over the last year, several large pension funds have announced allocations to crypto or its underlying blockchain technology, while asset managers like Fidelity Investments have enabled 401(k) retirement savings plan participants to invest directly in Bitcoin[1] and celebrities like Tom Brady and Larry David pitch crypto on TV to retail investors. Meanwhile, cryptocurrencies have been hit particularly hard during Wall Street's recent downturn, losing two-thirds of their value since their November 2021 peak market capitalization of $3 trillion.[2]

Enter the U.S. Securities and Exchange Commission's (SEC). On May 3, 2022, the SEC's Division of Enforcement announced the expansion of its crypto group from 30 to 50 people and renamed it the Crypto Assets and Cyber Unit. "By nearly doubling the size of this key unit, the SEC will be better equipped to police wrongdoing in the crypto markets," SEC Chair Gary Gensler said in a statement accompanying the announcement. The SEC said the Crypto Assets and Cyber Unit would focus on investigating securities fraud violations related to crypto asset offerings, crypto asset exchanges, crypto asset lending and staking products, decentralized finance (DeFi) platforms, non-fungible tokens (NFTs), and stablecoins. Division of Enforcement Director Gurbir S. Grewal added that the unit "will be at the forefront of protecting investors and ensuring fair and orderly markets in the face of these critical challenges."

1 *See* https://www.nasdaq.com/articles/us-public-pension-fund-invests-in-bitcoin-for-the-first-time-2021-10-21; https://www.theblock.co/linked/120803/australia-fifth-largest-pension-fund-qic-open-to-crypto; https://insidebitcoins.com/news/public-pension-fund-calpers-acquires-more-shares-in-riot; https://www.nytimes.com/2022/04/26/business/crypto-401k-fidelity.html; https://cryptoslate.com/fidelity-investments-to-offer-bitcoin-for-pension-funds/.

2 https://www.nytimes.com/2022/07/11/opinion/cryptocurrency-federal-reserve.html; https://coinmarketcap.com/charts/

Formerly known as the Cyber Unit, the group began investigating crypto in 2017, around the time Bitcoin reached $10,000 per coin and several new cryptocurrencies launched Initial Coin Offerings (ICOs)[3]. At the time, the SEC warned investors that, due to the limited oversight, "ICOs could easily be scams or ponzi [sic] schemes disguised as legitimate investments."[4] In the past five years, the unit has brought more than 80 enforcement actions related to fraudulent and unregistered crypto asset offerings and platforms, leading the SEC to recover more than $2 billion for swindled investors.

The SEC's enforcement expansion comes amid other proposed SEC initiatives to regulate the crypto markets and legislative activity in the U.S. Congress focusing on the best way to regulate issuers of stablecoins, which are cryptocurrencies pegged to a fiat currency like the U.S. dollar.[5] The SEC's regulatory initiatives to broaden investor protections in the crypto markets, announced on April 4, 2022 by Chair Gensler, included registering and regulating crypto exchanges, potentially separating out asset custody to minimize investor risk, and partnering with the Commodity Futures Trading Commission (CFTC) to address trading platforms for crypto-based security tokens and commodity tokens.[6] The SEC's proposed initiatives are in line with President Biden's March 2022 Executive Order, which directed federal agencies to implement a strategy for policies and regulations on digital assets, including cryptocurrencies.[7] Although Biden's Executive Order was well received by crypto market experts —they described it as "extremely positive," "long overdue," and an "acknowledgment that cryptocurrency is here to stay" —it did nothing to quell the uncertainty as to which federal agency will serve as the primary regulatory of the crypto markets.[8]

Judging from its expansion of the Crypto Assets and Cyber Unit and proposed regulatory initiatives, the SEC views itself as the primary regulator of the crypto markets. But a bipartisan bill introduced on June 7, 2022 by U.S. Senators Cynthia Lummis (R-Wyoming) and Kirsten Gillibrand (D-New York) allocates primary oversight to the CFTC, reasoning that crypto products operate more like commodities than securities.[9] Senators Lummis and Gillibrand's bill has received a fair amount of criticism from investor protection and consumer advocacy groups,

THE SEC'S REGULATORY INITIATIVES TO BROADEN INVESTOR PROTECTIONS IN THE CRYPTO MARKETS, ANNOUNCED ON APRIL 4, 2022 BY CHAIR GENSLER, INCLUDED REGISTERING AND REGULATING CRYPTO EXCHANGES, POTENTIALLY SEPARATING OUT ASSET CUSTODY TO MINIMIZE INVESTOR RISK, AND PARTNERING WITH THE COMMODITY FUTURES TRADING COMMISSION TO ADDRESS TRADING PLATFORMS FOR CRYPTO-BASED SECURITY TOKENS AND COMMODITY TOKENS.

3 https://www.forbes.com/sites/bernardmarr/2017/12/06/a-short-history-of-bitcoin-and-crypto-currency-everyone-should-read/?sh=1d34e9363f27

4 *Id.*

5 https://finance.yahoo.com/news/stablecoin-regulation-banks-biden-administration-194925029.html

6 https://www.cnbc.com/2022/04/04/sec-chairman-proposes-expanded-protections-for-crypto-investors.html; https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422

7 https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/

8 https://time.com/nextadvisor/investing/cryptocurrency/biden-executive-order-crypto-expert-reaction/

9 https://www.reuters.com/markets/us/us-senators-unveil-bill-regulate-cryptocurrency-2022-06-07/

> *We already have robust ways to protect investors trading on platforms. And we have robust ways to protect investors when entrepreneurs want to raise money from the public. We ought to apply these same protections in the crypto markets. Let's not risk undermining 90 years of securities laws and create some regulatory arbitrage or loopholes.*
>
> GARY GENSLER, SEC CHAIR

who say it indulges crypto-industry-led efforts to marginalize the SEC.[10] That criticism aside, U.S. Senators Debbie Stabenow (D-Michigan) and John Boozman (R-Arkansas) are in the process of drafting crypto legislation that also designates the CFTC as the primary regulator of the crypto markets.[11]

Congress will likely not act until after the midterm elections and there is no indication whether it will agree with Chair Gensler that the SEC already has the tools to properly and effectively police crypto markets. "We already have robust ways to protect investors trading on platforms. And we have robust ways to protect investors when entrepreneurs want to raise money from the public. We ought to apply these same protections in the crypto markets," Chair Gensler said. "Let's not risk undermining 90 years of securities laws and create some regulatory arbitrage or loopholes."

On July 8, 2022, Federal Reserve Vice Chair Lael Brainard echoed Gensler's comments while reflecting on the recent crypto turbulence and massive losses. "It is important that the foundations for sound regulation of the crypto financial system be established now before the crypto ecosystem becomes so large or interconnected that it might pose risks to the stability of the broader financial system," she said.[12] ■

10 *Id.*

11 https://www.politico.com/newsletters/morning-money/2022/06/10/the-battle-over-crypto-oversight-00038699

12 https://www.federalreserve.gov/newsevents/speech/brainard20220708a.htm

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SECURITIES CLASS ACTIONS ARE SUBJECT TO THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 (THE PSLRA), A LAW THAT CREATED A PROCESS TO SELECT THE LEAD PLAINTIFFS BASED ON OBJECTIVE CRITERIA INCLUDING THE SIZE OF THEIR FINANCIAL INTEREST IN THE CASE.

SECURITIES LITIGATION 101:

SELECTING A LEAD PLAINTIFF: HOW COURTS DECIDE WHICH PARTY SHOULD REPRESENT THE PROPOSED CLASS

When it comes time to determine which plaintiffs will act as representatives for all class members, lawsuits brought under the U.S. federal securities laws are unlike any others. That's because securities class actions are subject to the Private Securities Litigation Reform Act of 1995 (the PSLRA), a law that created a process to select the lead plaintiffs based on objective criteria including the size of their financial interest in the case.

Under the law, the lead plaintiff is a key player in a securities class action, acting as a fiduciary on behalf of the entire class and responsible for selecting lead counsel, signing off on litigation strategy and tactics, approving proposed settlements, and negotiating attorneys' fees.

Prior to the PSLRA's enactment in 1996, judges often assigned the role of lead plaintiff to the first party to file a securities lawsuit in their court or based on their knowledge of the law firm representing the plaintiff. This created a perceived "race to the courthouse," in which specialized attorneys filed complaints soon after stock drops, sometimes relying on a stable of clients with small stock holdings in many publicly traded companies. These practices also raised criticisms that too many shareholder lawsuits were "lawyer driven," since plaintiffs' attorneys usually had far larger stakes in the outcome than the small investors who often brought the lawsuits.

To remove any advantage for early filers, the PSLRA[1] directs judges to apply a rebuttable presumption to appoint the movant with the largest financial interest in the litigation, if the movant is also "typical" and "adequate" as defined in Rule 23 of the Federal Rules of Civil Procedure.[2] When naming the lead plaintiff, the court also approves lead plaintiffs' choice of lead counsel.

1 The PSLRA has provisions dealing with many aspects of securities litigation, notably creating an automatic stay of discovery designed to protect defendant companies from documentary "fishing expeditions" until a judge decides whether the case is properly pled; raising pleading standards to require plaintiffs to show a strong inference that defendants had knowingly acted wrongly; and providing defendants with a "safe harbor" against liability for forward-looking statements. We will leave those for a future installment of Securities Litigation 101.

2 Rule 23 requires that the lead plaintiff's legal claims are typical of the class, broadly meaning that they arise from the same event and are based on the same legal theory, and that the movant is adequate, meaning its interests do not conflict with those of the class and it has enough experience and resources to vigorously represent the class and oversee counsel.

To help potentially harmed investors learn about new lawsuits and give them time to step forward, the law requires plaintiffs who filed the shareholder lawsuit to publish within 20 days a public notice containing certain information, including the claims asserted, the purported class period, the court where it was filed, the fact that any class member can serve as lead plaintiff, and the deadline for filing lead plaintiff motions. With the growth of the internet, these "PSLRA notices" have evolved from newspaper advertisements to online news releases beamed instantly around the world. Purported class members have 60 days from the first PSLRA notice to file a lead plaintiff motion with the court.

Though the PSLRA is mute on how to calculate financial interest, courts generally have looked at total class period purchases, net class period purchases, net class period expenditures, and most importantly losses, as calculated on a last-in-first-out (LIFO) or first-in-first-out (FIFO) basis. Since movants sometimes group together to file joint lead plaintiff petitions, the courts often consider whether to allow such a group to aggregate its losses in a single motion. The courts typically decide whether to permit such aggregations on a case-by-case basis. While the PSLRA does not provide any guidance about groups, the courts have considered factors such as the group's size, whether group members knew each other before filing the motion, whether they have discussed how they plan to work together on the case, their experience as lead plaintiffs, and their choice of counsel.

WHEN CONGRESS ENACTED THE PSLRA, IT SOUGHT TO EMPOWER INSTITUTIONAL INVESTORS, REASONING THAT THEY WOULD HAVE LARGER LOSSES–MORE "SKIN IN THE GAME"–AND THAT THEIR SIZE, STAFFING, LEVELS, AND SOPHISTICATION WOULD GIVE THEM BETTER TOOLS TO FULFILL THEIR FIDUCIARY DUTIES TO ABSENT CLASS MEMBERS, INCLUDING OVERSIGHT OF THE ATTORNEYS.

When Congress enacted the PSLRA, it sought to empower institutional investors, reasoning that they would have larger losses—more "skin in the game"—and that their size, staffing, levels, and sophistication would give them better tools to fulfill their fiduciary duties to absent class members, including oversight of the attorneys. In that respect, the law certainly worked. Institutional investors, rarely involved in shareholder lawsuits prior to 1996, now are appointed lead plaintiffs in roughly half of all newly filed federal securities class actions; even in smaller cases where individual investors act as lead plaintiffs, the PSLRA's lead plaintiff mechanism ensures an orderly, fact-based selection process. The increased involvement of institutional investors has in turn benefited all shareholders. Numerous academic studies have shown that shareholder class actions led by institutional investors are more likely to succeed than those led by individuals. Cases with institutional lead plaintiffs settle for more money and pay lower attorneys' fees than other cases, even when controlling for the fact that institutions tend to file larger cases.

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UNDERSTANDING DIVERSITY, EQUITY AND INCLUSION

I recently had the pleasure of moderating a session at the legal education conference of the National Association of Public Pension Attorneys (NAPPA) entitled "The ABC's of DE&I: Public Pension Plans Spell It Out". The program was specifically designed to assist public pension attorneys in thinking about how to advise their clients regarding diversity, equity and inclusion (DE&I) consistent with the exercise of their fiduciary duties, including the exclusive benefit rule and the duties of loyalty and prudence.

In brief, as readers of this column know, fiduciaries must carry out their functions acting solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses incurred in performing such duties. They must act with the care, skill, prudence and diligence in light of the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

The discussion began by noting that there certainly is no shortage of attention to issues of diversity, equity and inclusion these days. For example, lawyers may have noticed that the topic of DE&I recently graced the covers of both the *New York State Bar Journal* and the *Washington Lawyer* publication of the DC Bar Association. Similarly, investment professionals are likely aware that the CFA Institute recently issued a Diversity, Equity & Inclusion Code—a voluntary code developed with the recognition, as articulated by the CFA Institute, that a diversity of perspectives leads to better investor outcomes, that an inclusive investment industry better serves our diverse society, and that an organization with an inclusive culture and effective working relationships is a better place to work.

NAPPA conference attendees were very fortunate to have panelist Kellie Sauls, Director of Diversity, Equity, and Inclusion for the Teacher Retirement System of Texas, to help them think about how to address DE&I in their work advising fiduciaries. Ms. Sauls displayed a wealth of knowledge, gained through not only many years of experience in the DE&I field but also practical, concrete experience in advising a public pension plan. She presented important information and tips relevant for a range of pension plans, from those organizations with established programs to those just beginning to focus on DE&I. Here are some of my key takeaways from her presentation.

WHAT DIVERSITY LOOKS LIKE IN ONE AREA OF THE COUNTRY IS NOT NECESSARILY THE SAME AS WHAT DIVERSITY IS IN ANOTHER PART OF THE COUNTRY.

One Size Doesn't Fit All

What diversity looks like in one area of the country is not necessarily the same as what diversity is in another part of the country. For example, certain groups that may be underrepresented in a large California city may not be people who are members of an underrepresented group in one industry—nursing, for example—may not be underrepresented in another industry, such as information technology. This requires clarity in understanding existing circumstances and developing approaches in strategic planning around DE&I.

RECOGNIZING THAT COMMITMENT TO DE&I IS CONSISTENT WITH THE STRATEGIC OBJECTIVES OF THE ORGANIZATION MEANS THAT EVERY DE&I PROGRAM MUST EMANATE FROM LEADERSHIP AS PART OF THE INSTITUTIONAL PLAN.

Take this quote about diversity: "The inability to envision a certain kind of person doing a certain kind of thing because you've never seen someone who looks like him do it before is not just a vice. It's a luxury. What begins as a failure of imagination ends as a market inefficiency; when you rule out an entire class of people from doing a job simply by their appearance, you are less likely to find the best person for the job." While a reader might think this was a 2022 quote talking about racial or gender diversity, equity and inclusion, it actually comes from "Moneyball," the 2003 book by business writer Michael Lewis and concerns Oakland Athletics executive Billy Beane's recruitment of baseball players.

It's About Risk Mitigation and Compliance

DE&I belongs in the risk management and legal compliance program. In a 2021 survey, over 50% of employers reported lack of DE&I as an enterprise risk.

For example, Ms. Sauls noted that, for many employers, the so-called "Great Resignation" resulted in female employees leaving in greater numbers than men. The business risk created when talented individuals are leaving the workforce in large numbers is something every employer must pay attention to. DE&I can mitigate risk by helping an employer recruit and retain talent critical to the effective operation of the organization. DE&I, as an integral part of onboarding, employee development, performance management, career development, and succession planning, supports an organization in acquiring and retaining talent, as well as avoiding equal opportunity challenges, thus mitigating business risk, reputational risk, and legal compliance risk.

Reiterate the Business Case

Recognizing that commitment to DE&I is consistent with the strategic objectives of the organization means that every DE&I program must emanate from leadership as part of the institutional plan. Support from the top means communication to, from, and among the board and that senior staff leadership must reiterate the business case each and every time DE&I is discussed. Identifying and communicating appropriate metrics and benchmarks are crucial to developing a culture of continuous improvement, and support from the top cannot be overstated.

Everyone Has a Role to Play

Experience shows that about 10% of employees may be characterized as overly enthusiastic or energetic, passionate, and zealous with regard to DE&I. Another 10% or so likely will not be on board and may even try to sabotage

DE&I efforts. The remaining 80% or so of the workforce is the so-called "sweet spot" open to growth and learning. But it is critical to note that everyone in an organization plays a part in DE&I and it is important that people see themselves as participants. Input should and can be obtained from all. It is important to invite people with contrary viewpoints into the discussion; even (and perhaps especially) individuals who are not "on board" can provide valuable feedback. Challenges are to be expected and addressing them can assist in formulating the role of DE&I in organizational culture and how it factors into the organization's core values.

It is important that employees see themselves as a part of the DE&I work, and one tool for consideration is the creation of affinity or employee resource groups. Some organizations have a wide range of such groups, such as Black and Latinx, LBGTQA, women in investment, caregivers, and military families. It was also noted that many affinity and resource groups include allies within the group's membership—for example, a women in investment group may include men who support DE&I efforts in this area.

IT IS IMPORTANT THAT EMPLOYEES SEE THEMSELVES AS A PART OF THE DE&I WORK, AND ONE TOOL FOR CONSIDERATION IS THE CREATION OF AFFINITY OR EMPLOYEE RESOURCE GROUPS.

Practical Applications Appreciated

Attendees reported that the panel was a relatable conversation, with a discussion of trends in the area as well as risk mitigation and the interplay with legal and compliance systems and processes. They appreciated the discussion of practical applications, quickly attainable successes, expected challenges, and motivating imperatives for those engaged in DE&I work, and they left the program better able to advise their clients regarding DE&I and the exercise of fiduciary duties. ■

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RECENT HIGHLIGHTS

COHENMILSTEIN IN THE NEWS

- "Stock-Loan Case Against Goldman, Other Banks Takes Step Toward Class Certification," *Reuters* – July 1, 2022
- "Sterling Jewelers to Pay $175M to Settle Huge Pay Bias Case," *Law360 Employment Authority* – June 9, 2022
- "SafeRent Accused of Unfairly Labeling Black, Hispanic Applicants High-Risk," *The Real Deal* – June 1, 2022
- "Chicken Buyers Get Class Cert. in Sprawling Price-Fixing Suit," *Law360* – May 27, 2022
- "Not 'Fake Equal Pay': Soccer CBA Hailed as Game-Changer," *Law360* – May 18, 2022
- "After Years, Pharmacy-Middleman Suit Might Finally Come to Trial," *Ohio Capital Journal* – May 16, 2022
- "Pa. Home Care Workers Get Class Cert. in OT Pay Suit," *Law360* – May 13, 2022
- "Federal Judge Gives Initial Approval to FirstEnergy Paying $180 Million to Settle House Bill 6 Lawsuit," *Cleveland.com* – May 10, 2022
- "Marriott Guests Get Partial Class Certification in Breach Suit," *Bloomberg Law* – May 4, 2022
- "Ex-Scientologists Sue Church Claiming Forced Labor, Abuse," *Law360* – May 2, 2022
- "Is a Backlash Against ESG Investing Taking Shape?," *Law360* – April 7, 2022

AWARDS & ACCOLADES

- Twenty-Two Cohen Milstein Attorneys Named to the 2022 Lawdragon 500 Leading Plaintiff Financial Lawyers List " – July 8, 2022
- Legal500 Recognizes Cohen Milstein Securities Litigation Attorneys as 2022 "Leading Lawyers" and "Next Generation Partners" – June 10, 2022
- Legal500 Recognizes Cohen Milstein Product Liability, Mass Tort & Class Action Attorneys as 2022 "Leading Lawyers" " – June 10, 2022
- Legal500 Names Cohen Milstein "Leading Firm" for Plaintiffs in Antitrust; Labor and Employment Disputes; Products Liability, Mass Torts & Class Action; and Securities Litigation – June 9, 2022
- Cohen Milstein Named a 2022 "Elite Trial Lawyer Award" Finalist in Eight Practice Areas by The National Law Journal – May 11, 2022
- Jan E. Messerschmidt and Daniel H. Silverman Named 2022 "Rising Stars of the Plaintiffs Bar" by The National Law Journal – May 11, 2022
- Cohen Milstein Named Finalist for the National Law Journal's 2022 "Diversity Initiative Award" – May 11, 2022
- Carol Gilden Named a 2022 American Lawyer Trailblazer – Midwest – May 9, 2022

UPCOMING EVENTS

- **August 6-10** | National Association of State Retirement Administrators (NASRA) Annual Conference, The Westin Long Beach Hotel, Long Beach, CA – Richard E. Lorant
- **August 7-10** | County Commissioners Association of Pennsylvania (CCAP) Annual Conference and Trade Show, Lancaster Marriott at Penn Square and Lancaster County Convention Center, Lancaster, PA – David M. Maser
- **August 21-23** | Texas Association of Public Employee Retirement Systems (TEXPERS) Summer Educational Forum, Hotel Paso del Norte, El Paso, TX – John Dominguez and Richard E. Lorant
- **September 14** | Oklahoma State Firefighters Association (OSFA) Fallen and Living Firefighters Memorial Golf Tournament, Oklahoma City, OK – Richard E. Lorant
- **September 17-21, 2022** | National Coordinating Committee for Multiemployer Plans (NCCMP) Annual Conference, Diplomat Resort & Spa, Hollywood, FL – Arthur E. Coia, Christopher Lometti
- **September 18-21** | National Association of State Treasurers (NAST) Annual Conference, Loews Philadelphia Hotel, Philadelphia, PA – Jay Chaudhuri, Richard E. Lorant, Julie G. Reiser
- **September 20-22** | Council of Institutional Investors (CII) Fall Conference, Westin Copley Place, Boston, MA

TEAM PROFILE

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Andrew Twigg is a systems analyst with the Securities Litigation & Investor Protection practice group. Andy joined Cohen Milstein following his graduation from Virginia Tech in 2012. He plays an integral role in analyzing clients' securities fraud losses for lead plaintiff filings under the Private Securities Litigation Reform Act of 1995 (PSLRA) and educating our clients on how PSLRA losses are calculated. For this issue of the **Shareholder Advocate,** ***Andy spoke with Editor Christina Saler.***

I grew up … outside of Washington, DC in Falls Church, Virginia about 10 minutes from where I live today with my wife and our two-year old son (and another on the way!). Fortunately, both my parents and in-laws are close by so there are always a lot of willing, happy babysitters when we manage to get out.

I'm intrigued by … automation and data processes, which is what ultimately led me to becoming an analyst in the Securities Litigation & Investor Protection practice group.

As an analyst … I'm responsible for accurately calculating the PSLRA losses of our clients from alleged securities fraud. PSLRA losses are different from market losses, as the caselaw provides a framework for calculating losses resulting from the fraud. For determining financial interest, PSLRA losses are calculated using the last-in-first-out (LIFO) accounting method. To accurately ascertain our clients' losses related to the fraud, I need to focus closely on the alleged fraud, class period, the timing of the alleged curative disclosures, and also consider whether a company's corporate actions would affect the loss calculation. For example, if there was a merger or acquisition during the alleged class period, I need to determine which entities' shares were affected by the fraud so that we accurately represent a client's standing and scope of losses. Often, working through these issues requires consultation with my colleagues litigating the case. Our ongoing, collaborative approach makes our loss calculations more accurate and makes me better at doing my job going forward. Because it's a complicated process, I sometimes have walked our clients through the nuances of a loss calculation, which I always enjoy doing.

I'm currently watching … *Severance* on Apple TV. Adam Scott is the lead, and if you have the stomach for dark, psychological thrillers, this show is for you. It's spectacular, and I'm looking forward to the second season. In contrast, my son enjoys watching "Songs for Littles" on YouTube, which I inevitably watch with him. ■

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