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Investor Impact: Holding Wells Fargo Accountable for Securities Fraud

On May 16, the United States District Court for the Southern District of New York preliminarily approved a $1 billion settlement in *In re Wells Fargo Securities Litigation* (S.D.N.Y.). If granted approval, following a hearing scheduled for September 8, 2023, it would be among the top securities class action settlements of all time.

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Investor Impact: Holding Wells Fargo Accountable for Securities Fraud

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A Story of Betrayal and Fraud

Wells Fargo Bank is one the largest banks in the United States.

Between May 30, 2018 and March 12, 2020 (the "Class Period"), Wells Fargo and its top executives allegedly made a series of false and misleading statements to not only investors, but the public and Congress. Specifically, Plaintiffs allege that the Bank, which had been fined $3 billion by the U.S. Department of Justice, SEC, and other federal and state authorities for opening an estimated 3.5 million phony bank accounts, misrepresented its compliance with government mandated consent orders.

WELLS FARGO AND ITS TOP EXECUTIVES ALLEGEDLY MADE A SERIES OF FALSE AND MISLEADING STATEMENTS TO NOT ONLY INVESTORS, BUT THE PUBLIC AND CONGRESS.

These orders, mandated by the Federal Reserve Board (FRB), the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau, were created to rectify Wells Fargo's governance and oversight failures, which allowed such consumer fraud to happen in the first place.

To make matters worse for the Bank, the FRB issued an unprecedented asset cap, restricting any future growth until the bank was in compliance with the consent orders.

As senior bank executives continued to allegedly mislead investors that regulators were satisfied with the Bank's progress on fulfilling the consent orders and that the asset cap would be timely removed, Wells Fargo's common stock traded at artificially inflated prices.

The Truth Revealed

The truth regarding Wells Fargo's fraud was revealed over a number of corrective disclosures. Ultimately, in March 2020, a House Committee on Financial Services report revealed that, after a yearlong investigation, Wells Fargo's remediation plans were "materially incomplete" and fell "woefully short" of regulators' expectations.

WELLS FARGO CEO CHARLES SCHARF TESTIFIED THAT "THE COMPANY'S LEADERSHIP FAILED ITS STAKEHOLDERS" AND "WE DID NOT HAVE THE APPROPRIATE CONTROLS IN PLACE ACROSS THE COMPANY."

Congressional hearings revealed even more. Wells Fargo CEO Charles Scharf testified that "the company's leadership failed its stakeholders" and "we did not have the appropriate controls in place across the company." As a result of these revelations, Wells Fargo's stock plummeted.

The Role of Investors

Given the significant losses to their public pension funds, the Public Employees' Retirement System of Mississippi (Mississippi) and the State of Rhode Island, Office of the General Treasurer (ERSI), stepped in and addressed Wells Fargo's fraud head on. In November 2020, shortly after the initial investor suit was filed, both ERSI and Mississippi were appointed co-Lead Plaintiffs, Cohen Milstein was appointed Lead Counsel with co-counsel.

If the court grants final approval, this $1 billion settlement will help compensate the public pension funds and other investors impacted by Wells Fargo's fraud.

Significance of Investor Involvement

Research confirms that when large, sophisticated institutional investors, such as ERSI and Mississippi, serve as lead plaintiffs in securities class actions, the case is more likely to survive defendants' motions to dismiss, settlements are higher in value and are from a higher percentage of recoverable damages. Their involvement in securities class action helps to deter companies from engaging in fraud in the future.

POISED TO BECOME ONE OF THE TOP SECURITIES CLASS ACTION SETTLEMENTS IN HISTORY, THE $1 BILLION RESULT SERVES AS A WARNING TO OTHER BANKS AND COMPANIES: INVESTORS ARE NOT ONLY WATCHING, BUT THEY ARE ALSO READY TO ACT.

Indeed, a $1 billion settlement is also an effective warning to other banks and companies: investors are not only watching, but they are also ready to act.

Investor Impact on Industry

In re Wells Fargo Securities Litigation also highlights the enforcement role private litigation can play when banks fall short of their obligations to ensure proper compliance with regulators and other government entities.

This is important to note as banks get bigger through market consolidation. The effect will likely mean less executive and board oversight and less market choice for customers, creating ripe opportunities for customer harm and fraud.

Investor confidence and our economy are dependent upon the integrity of the banking industry, and institutional investors are critical to helping keep banks accountable. ■

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A VICTORY FOR INVESTORS CHALLENGING A DE-SPAC TRANSACTION

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SIGNIFICANTLY, THE COURT FOUND THAT THE DE-SPAC TRANSACTION WAS SUBJECT TO "DELAWARE'S MOST ONEROUS STANDARD OF REVIEW"—ENTIRE FAIRNESS—BECAUSE "THE COMPLAINT SUFFICIENTLY PLEADS IT'S A CONFLICTED CONTROLLER TRANSACTION."

On June 9, 2023, Chancellor Kathaleen St. J. McCormick of the Court of Chancery of the State of Delaware issued a telephonic ruling which largely denied Defendants' motions to dismiss the complaint in the *In re XL Fleet (Pivotal) Stockholder Litigation*, C.A. No. 2021-0808-KSJM, allowing a class of investors to pursue claims related to the fairness of a de-SPAC transaction.

This class action arises from the merger between Legacy XL, a provider of electrification solutions for commercial vehicles in North America, and Pivotal II ("Pivotal"), a Delaware corporation formed as a special purpose acquisition company (SPAC).

Plaintiffs alleged that Defendants, including Pivotal's board of directors, Pivotal Investment Holdings II LLC, and Pivotal's sponsor, used Pivotal to enrich themselves by using funds held in trust for the benefit of the public stockholders to consummate a value-destroying merger with Legacy XL without disclosing information that was material to the stockholders' decision to allow their funds to be invested in the merger. As a result of Defendants' actions in pursuing the merger without disclosing material facts to stockholders, the stockholders sustained substantial financial losses.

The merger closed on December 21, 2020. Just ten weeks later, Muddy Waters Research issued a report revealing that the proxy statement, which Pivotal investors relied on when determining how to vote on the merger, contained false and misleading information, while also omitting material information about Legacy XL's value. That news caused the company's stock's price to begin a steep downward decline from trading at nearly $17 per share to less than $2 per share a year later, when the company disclosed that it was under investigation by the Securities and Exchange Commission.

Significantly, the Court found that the de-SPAC transaction was subject to "Delaware's most

JUST 10 WEEKS AFTER THE MERGER CLOSED, A SHORT-SELLER REPORT REVEALING THAT THE PROXY STATEMENT CONTAINED FALSE AND MISLEADING INFORMATION SENT THE COMPANY'S STOCK PRICE TUMBLING. A YEAR LATER, FOLLOWING MORE DECLINES, THE COMPANY DISCLOSED AN SEC INVESTIGATION.

onerous standard of review"—entire fairness—because "the complaint sufficiently pleads it's a conflicted controller transaction." The Court rejected Defendants' argument that the sponsor of the SPAC, which only held 20% of the company's equity, was not a controlling stockholder. The Court highlighted that the sponsor was conflicted because of its interest in consummating "a bad deal over no deal at all," which would cause the sponsor to lose its entire investment in Pivotal. In contrast, Pivotal investors would receive their $10 per share investment back if they had decided to vote against the merger.

Next, the Court found that Plaintiffs sufficiently pled breach of fiduciary duty claims against the Pivotal board by alleging that the proxy statement omitted material information, which fell into two categories: (1) the cash-per-share investment that Pivotal would make into the newly merged companies; and (2) the valuation of Legacy XL that stockholders would receive in exchange.

Finally, the Court upheld Plaintiffs' claim that Pivotal breached the 80% requirement in its charter because Legacy XL was not worth at least $178.4 million at the time of the merger. As a result, the Court allowed claims to proceed against the Pivotal board for breaching the charter's terms. ■

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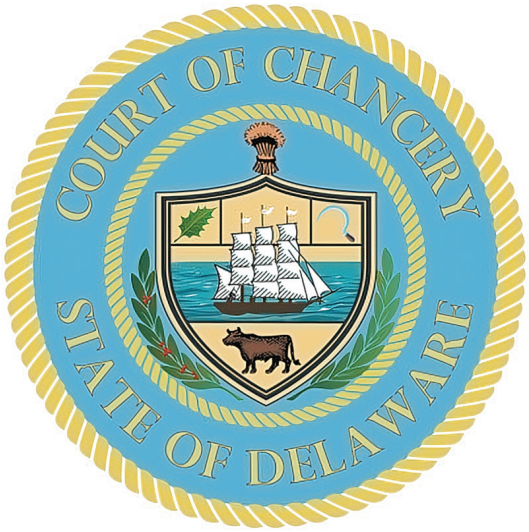

A MAJOR CLASS CERTIFICATION WIN IN SHAREHOLDER CASE AGAINST BAYER

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IN CERTIFYING THE CLASS IN FULL, THE APPEALS COURT REJECTED DEFENDANTS' ARGUMENTS THAT PLAINTIFFS WHO BOUGHT OVER-THE-COUNTER ADRS HAD EFFECTIVELY ACQUIRED THOSE SECURITIES OUTSIDE THE UNITED STATES.

On May 19, 2023, Chief Judge Richard Seeborg of the Northern District of California issued an order certifying the proposed class in *Sheet Metal Workers National Pension Fund v. Bayer Aktiengesellschaft,* Cohen Milstein's securities class action about misrepresentations German pharmaceutical company Bayer made when acquiring agrochemical behemoth Monsanto. The certified class now includes anyone who purchased or acquired Bayer's American Depository Receipts ("ADRs") from May 23, 2016 through July 6, 2020.

The Court certified the class in full and appointed Cohen Milstein as Lead Counsel, Sheet Metal Workers' National Pension Fund and International Brotherhood of Teamsters Local No. 710 Pension Fund as Lead Plaintiffs, and the International Union of Operating Engineers Pension Fund of Eastern Pennsylvania and Delaware as Class Representative. The opinion sets important precedent about class certification in securities class actions concerning ADRs.

The class's claims arise from Bayer's $63 billion acquisition of Monsanto, which closed in 2018. Plaintiffs allege that during the Class Period, Bayer and its officers Werner Baumann, Werner Wenning, Liam Condon, Johannes Dietsch, and Wolfgang Nickl repeatedly made false and misleading statements about their due diligence into the litigation risk Monsanto faced because of evidence suggesting its top-selling herbicide Roundup caused cancer. After the acquisition closed, Bayer faced a barrage of defeats in litigation relating to Roundup and was eventually forced to establish a $10.9 billion settlement fund to address Roundup claims around the world. The acquisition wound up being a financial disaster for Bayer and inflicted significant damages on its investors. Plaintiffs' claims arise under Section 10(b) of the Exchange Act and SEC Rule 10b-5, and under Section 20(a) of the Exchange Act against the individual Defendants because of their ability to control the actions of Bayer.

THE NINTH CIRCUIT'S OPINION ESTABLISHES IMPORTANT PRECEDENT FOR FUTURE SECURITIES FRAUD CASES CONCERNING ADRS, MAKING CLEAR THAT PURCHASES OF OVER-THE-COUNTER ADRS ARE ENTITLED TO THE PROTECTIONS OFFERED BY THE FEDERAL SECURITIES LAWS.

Defendants' arguments against class certification centered on issues relating to extraterritoriality, meaning whether Plaintiffs and other members of the class purchased Bayer ADRs outside the United States. A German corporation, Bayer's common stock is not listed on U.S. securities exchanges like NYSE or Nasdaq. However, American investors are able to purchase and trade ownership interests in Bayer through Bayer ADRs, which are securities issued by Bank of New York Mellon that represent a beneficial interest in Bayer. Bayer ADRs are backed by underlying shares of Bayer foreign common stock that Bank of New York Mellon holds on deposit. Investors who seek to buy Bayer ADRs can acquire them either by buying existing Bayer ADRs on the over-the-counter ("OTC") market or by exchanging Bayer foreign common stock for newly issued ADRs with Bank of New York Mellon.

In the Ninth Circuit, to determine where a transaction took place, courts look to where the buyer or seller incurred "irrevocable liability" to take and pay for or deliver the securities at issue. Courts also look to where title to the security passed in connection with the transactions at issue. Defendants argued that Plaintiffs could not show that all their purchases of Bayer ADRs occurred within the United States, which meant Plaintiffs could not show they were typical of the proposed class, as is required for class certification under Federal Rule of Civil Procedure 23. In Defendants' telling, some of Plaintiffs' transactions were of newly issued ADRs and were effectively extraterritorial because they were immediately preceded by purchases of Bayer foreign common stock in Germany. Defendants also argued that individualized inquiries over whether each class member's transactions were extraterritorial would predominate over the common inquiries in the case, which would also make class certification inappropriate.

The Court rejected these arguments, ruling for Plaintiffs and certifying the class in full. The Court explained that "a plaintiff can establish domesticity by showing that the buyer or seller incurred irrevocable liability within the United States, or by showing that title to a security passed within the United States. Only one of these prongs needs to be established to allay extraterritoriality concerns." As to Plaintiffs' purchases of newly issued ADRs, the Court found that Plaintiffs' transactions occurred in the US because the seller, Bank of New York Mellon, incurred irrevocable liability to deliver the ADRs after the broker-dealers deposited the Bayer shares they had previously

acquired in Germany. The fact that title to the ADRs passed in the US also demonstrated that the transactions at issue were domestic. Importantly, the Court found that the precedent governing whether a transaction should be viewed as extraterritorial should "be understood as a test of inclusion," with an "intent to ensure that Exchange Act and Rule 10b-5 claims can encompass domestic transactions of any kind," even where a "corresponding overseas transaction" was necessary. Additionally, the Court found that common issues predominated over individualized inquiries because, *inter alia*, Plaintiffs had shown the overwhelming majority of the class's Bayer ADR transactions concerned existing ADRs and thus did not raise extraterritoriality concerns.

The Court's opinion establishes important precedent for future securities fraud cases concerning ADRs and makes clear that purchases of OTC ADRs are entitled to the protections offered by the federal securities laws. ■

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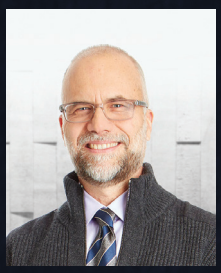
SECURITIES LITIGATION 101:

SOME CRITERIA FOR ACTIVE INVOLVEMENT IN SECURITIES FRAUD LAWSUITS



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CONSIDERATION OF WHETHER TO ACTIVELY PURSUE A CASE BEGINS WITH A LOSS CALCULATION. BUT IT INCLUDES NUMEROUS OTHER FACTORS BEYOND A STRICT FINANCIAL ANALYSIS.

In prior articles, we have mentioned the importance of enacting a policy to govern a pension fund's approach to tracking and managing its securities litigation assets. Today we will focus on a key section of that policy: the criteria for active involvement in a securities lawsuit.

How Private Enforcement by Institutional Investors Promotes Fair and Free Markets

First, some background on what makes the federal securities class action mechanism such a vital tool to enforce transparency and accountability for publicly traded companies in U.S. markets and why active involvement by institutional investors is important to making class actions effective.

Private enforcement of U.S. securities laws through civil litigation provides an important complement to government prosecution by the Securities and Exchange Commission through its civil enforcement and administrative actions, and the Department of Justice, which is responsible for criminal enforcement. Chronically underfunded and understaffed, federal enforcement agencies necessarily focus on the largest, most egregious cases. Moreover, the SEC typically retains money it collects through civil penalties rather than returning money to shareholders. When the SEC does reimburse defrauded investors directly through its Fair Fund, its disgorgements are dwarfed by the amounts recovered through private securities class action settlements; the top 50 Fair Fund disgorgements totaled $11.5 billion, about a fifth of the $56.8 billion recovered by the 50 largest securities class action settlements.

Likewise, a class action mechanism that allows parties with similar claims to pursue damages collectively is essential because the vast bulk of individual securities losses are "negative claims" too small to pursue alone: the cost of hiring an attorney exceeds the value of the potential award or settlement. This is true even for most institutional investors, which explains why only a small number of frauds generate the kind of massive losses required for big pension funds to opt out of class actions to seek their own settlements. Without class actions—and the contingency fees that make them economically feasible for plaintiffs' lawyers—most frauds would simply go unpunished; all but the very largest shareholders damaged by the very largest frauds would absorb their losses as part of the cost of investing in public markets. It's noteworthy that, while most countries outside the U.S. have prioritized

sending corporate fraudsters to prison above compensating investors, that is changing. The European Union, for example, is instituting rules to facilitate collective actions in all member nations.

As further context when considering involvement, it is also important to remember that the emergence of institutional investors as lead plaintiffs following passage of the Private Securities Litigation Reform Act of 1995 (PSLRA) has benefited all shareholders. Numerous academic studies show that cases led by sophisticated institutional investors have better outcomes, bigger recoveries, and lower attorneys' fees than those led by individual investors on average, even when controlling for case size. In fact, at least one study found that the involvement of institutional lead plaintiffs has lowered attorney fees for *all* shareholder lawsuits, since judges often look at similar-sized cases when deciding on fee awards. These improved results argue for pension funds to continue to selectively pursue meritorious litigation for their own benefit—and for the greater good.

Case-by-Case Factors to Consider for Active Participation as Lead Plaintiff

So, what factors do funds consider when deciding whether to file a lead plaintiff motion? As in all fiduciary and policy-related practices, one size doesn't fit all. But what follows are some general concepts.

SELECTIVELY SERVING AS LEAD PLAINTIFF HELPS ENSURE THAT THE U.S. CLASS ACTION SYSTEM CONTINUES TO FUNCTION EFFICIENTLY AS AN ENFORCEMENT MECHANISM.

An analysis of whether to actively pursue a case begins with the size of a fund's initial loss and potential damages, both as an absolute number and relative to other potential lead plaintiff movants.

Funds who have a securities litigation policy often identify a minimum dollar loss (i.e., "loss threshold") to consider active involvement in meritorious litigation. This loss threshold, whether firm or flexible, will help fund staff determine if its loss is large enough to warrant spending time on the litigation, since class actions allow absent class members to wait until there is a recovery to file a settlement claim. Consulting with monitoring counsel will also give the fund an idea whether its loss is outsized compared to other funds that are likely movants.

The PSLRA directs judges to select the movant with the largest loss as lead plaintiff, so long as it is a typical and adequate class representative, so calculating the initial loss amount is relatively straightforward. The initial complaint will identify a purported class period based on corrective disclosures—moments the stock price was materially affected because defendants allegedly misled investors or failed to publicly disclose information they should have under the law. Movants then sum up their losses during the class period, typically using the last-in-last-out (LIFO) or first-in-first-out (FIFO) method relied on by most courts.

It's impossible to determine, at the outset, how much the involvement of any one fund as lead plaintiff will increase the recovery. Finally, while many judges reimburse lead plaintiffs for time spent on their litigation duties, such awards are not guaranteed. Unfortunately, it's also

impossible to predict the final recovery amount, or even the recoverable damages, at this stage of the litigation; those issues are subject to judicial rulings, expert testimony, and the evidence produced in discovery. But the initial case analysis may provide an inkling of potential settlement size based on the overall damages, the legal strength of each corrective disclosure, and the timing of the investor's class period purchases and sales. It also may identify a legal claim that wasn't included in the initial complaint, such as a purchase in a particular stock offering, or an additional alleged corrective disclosure. If appointed Lead Plaintiff, the fund could assert these additional claims in an amended complaint, thus increasing the value of the case.

Securities litigation policies also identify non-financial factors to consider when deciding whether to act as lead plaintiff. Those factors include:

- The value of ensuring that the litigation is well managed and efficiently handled, especially if the fund has large potential damages.
- The ability to negotiate the settlement amount.
- The opportunity to incorporate governance improvements at the settlement stage.
- The desire to police egregiously unlawful behavior, deter future fraud, and protect market transparency.
- The ability to negotiate attorneys' fees.
- The chance to serve as a positive example of shareholder involvement for institutional investors, which the PSLRA has charged with leading such actions.
- The interest in sharing the responsibility of serving as lead plaintiff among like-minded institutional investors to ensure that the U.S. class action system continues to function efficiently as an enforcement mechanism.

CASES LED BY INSTITUTIONAL INVESTORS HAVE BETTER OUTCOMES, BIGGER RECOVERIES, AND LOWER ATTORNEYS' FEES ON AVERAGE THAN THOSE WITH INDIVIDUAL LEAD PLAINTIFFS, STUDIES HAVE SHOWN.

In addition, it is important to remember that certain lawsuits, such as shareholder derivative class actions, do not directly return money to investors. These lawsuits primarily address breaches of fiduciary duty by corporate leaders who have exposed systemic, harmful governance and cultural practices that harm long-term shareholder value.

As fiduciaries, pension fund trustees should consider some or all these policy issues when deciding whether active participation in litigation is warranted. ■

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WHEN A TRUSTEE GOES ROGUE: STRATEGIES FOR BOARDS TO AVOID AND ADDRESS INAPPROPRIATE BEHAVIOR

There is no doubt that boards of trustees perform an essential and critically important function in the oversight of pension plans in the United States. There is also no doubt that the quality of governance matters, as research has shown that a high-functioning board leads to better outcomes. So, how should a board react when a single trustee seems to be operating at cross-purposes to the rest of the board and behaving inappropriately?

A bedrock of an effectively functioning board is for *all trustees to demonstrate respect for the board's collective decision-making process.* To be effective, the board must speak with one voice. This does *not* mean that there isn't a full and frank airing of views and that there aren't disagreements—indeed, there can, should, and inevitably *will* be disagreements at some point in the operation of a board. Trustees need to encourage and engage in open discussions and respect differences of opinion while weighing decisions. But once the board has voted in favor of a decision, the board should speak with a single voice and give direction as a whole—no matter whether that direction is to staff, members and beneficiaries, legislators, the public, or other stakeholders.

This leads to the question of how to rein in a rogue board member. One potential action is for the board to censure the offending trustee. The U.S. Supreme Court considered this topic in 2022 in a case, *Houston Community College System v. Wilson*, that did not involve a pension board but is nonetheless illustrative. After years of acrimony, the Board of Trustees of the Houston Community College System ("HCC") censured one of its members, Mr. Wilson, who responded by filing a lawsuit challenging the Board's action. The issue before the Supreme Court was: Did the Board's censure offend Mr. Wilson's First Amendment right to free speech?

Mr. Wilson's tenure was marked by controversy from the start. He often disagreed with the Board about the best interests of HCC, brought multiple lawsuits challenging the Board's actions, and assisted others in filing lawsuits. Four years into his tenure, he had filed four lawsuits costing HCC more than $300,000 in legal fees. He also was accused of leaking confidential information, publicly denigrating parts of the College's anti-discrimination policy, and drawing media attention in a variety of ways. For example, after the Board voted to fund an overseas campus over Mr. Wilson's opposition, Mr. Wilson orchestrated a wave of negative robocalls targeting other board members' constituents. He gave local radio interviews accusing Board members of illegal and unethical

HOW SHOULD A BOARD REACT WHEN A SINGLE TRUSTEE SEEMS TO BE OPERATING AT CROSS-PURPOSES TO THE REST OF THE BOARD AND BEHAVING INAPPROPRIATELY?

conduct and stated that they were not representing the public. He also hired private agents to investigate a fellow Board member and HCC itself, and maintained a private website that used HCC's name in violation of Board policy.

These escalating disagreements led the Board to reprimand Mr. Wilson publicly. After Mr. Wilson continued to charge the Board—in media outlets as well as in state court actions—with violating its ethical rules and bylaws, the Board adopted another public resolution, this one censuring Mr. Wilson and stating that Mr. Wilson's conduct was "not consistent with the best interests of the College" and "not only inappropriate, but reprehensible."

The Supreme Court, in a unanimous decision, held that Mr. Wilson did not possess an actionable First Amendment claim arising from the Board's purely verbal censure. The Court noted that bodies in this country have long exercised the power to censure their members, as far back as colonial times. The Court stated, "[t]he censure at issue before us was a form of speech by elected representatives concerning the public conduct of another elected representative. Everyone involved was an equal member of the same deliberative body."

A BEDROCK OF AN EFFECTIVELY FUNCTIONING BOARD IS FOR ALL TRUSTEES TO DEMONSTRATE RESPECT FOR THE BOARD'S COLLECTIVE DECISION-MAKING PROCESS.

Importantly, the issue before the Court was a narrow one that did not, for example, involve expulsion or exclusion. The censure neither prevented Mr. Wilson from doing his job nor denied him any privilege of office, and Mr. Wilson did not allege it was defamatory. As such, the Court found that the censure was not a "materially adverse action" capable of deterring Mr. Wilson from exercising his own right to speak. Left for another day was the question of how the Court would treat the board's imposition of other punishment—such as limiting his eligibility for officer positions—that might be a "materially adverse action" deterring the trustee from exercising his own right to speak.

This case involves many of the very same issues that are regularly discussed in this column. Short of formal censure, what other tools in the pension board tool kit can be used to address the rogue trustee situation?

- **Education:** A regular and ongoing program of fiduciary education can help trustees understand the fiduciary principles that govern the exercise of their duties and how to apply those principles in real world situations.
- **Board governance manual:** A roadmap to guide board operations, the governance manual may include charters for the board and the committees of the board. It should be a living document. Rather than "set it and forget it," you should regularly review and revisit the board governance manual to determine if it reflects the system's values, is a tool for board accountability, and is meeting your needs—especially as times change and the operating environment evolves.

- **Policies and procedures:** These may be free-standing or contained in the board governance manual. As an example, the Supreme Court case cited above highlights the importance of having a solid Communications Policy that addresses when trustees may speak to the media on behalf of the board. Another important policy that could address the situation of a rogue trustee is a code of ethics for the board. Other policies may address such topics as board delegation; board training, reimbursement for travel and other expenses; service provider selection; succession planning; and periodic reviews of the executive director and any other direct reports to the board. Just as pension systems are not all alike, policies and procedures should be customized and tailored to fit the particular needs of a pension system.
- **Consulting services:** An independent outside source can prove invaluable in reviewing governance structure and suggesting ways to enable boards and executives to become more effective. Other ways in which boards may benefit from the use of a consultant includes strategic planning, messaging, and stakeholder relations.
- **Self-evaluation:** Does your board conduct annual board self-evaluations? These can confirm strengths and reveal areas for improvement to help the board fulfill its responsibilities and fiduciary duties.

Implementing some of all of these strategies may help a pension system board avoid and address a fellow trustee's inappropriate behavior. ■

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IN A 2022 DECISION, THE SUPREME COURT UNANIMOUSLY HELD IN FAVOR OF A COMMUNITY COLLEGE BOARD'S CENSURE OF ONE OF ITS MEMBERS, RULING THAT THE BOARD'S VERBAL CENSURE DID NOT VIOLATE THE MEMBER'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

RECENT HIGHLIGHTS

COHENMILSTEIN IN THE NEWS

- "Abbott Shareholders, including a Powerful Union Pension, Take Aim at Leadership," *Crain's Chicago Business* – July 10
- "Del. Chancellor Denies XL Fleet Class SPAC Suit Dismissal," *Law360* – June 12
- "Laura Posner Is Leading the Way in Investor Protection," *Lawdragon* – June 7
- "Bayer Investors Get Class Status in Monsanto Deal Risk Suit," *Bloomberg Law* – May 23
- "This Week's Litigator of the Week Runners-Up and Shout Outs," featuring Steven Toll, Laura Posner, and Molly Bowen, *The AmLaw Litigation Daily* – May 19
- "Wells Fargo to Pay $1 Billion to Settle Lawsuit by Shareholders," *The New York Times* – May 16

AWARDS & ACCOLADES

- Joe Sellers Receives *National Law Journal* "Elite Trial Lawyers" Lifetime Achievement Award Winner – July 13
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- Five Cohen Milstein Attorneys Recognized as Super Lawyers & Rising Stars in Florida – June 26
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- Chambers USA Ranks Cohen Milstein "Leading Firm" in Antitrust, ERISA Litigation, Product Liability & Mass Torts, and Securities Litigation – June 2
- Twenty-Three Cohen Milstein Attorneys Named to the 2023 Lawdragon 500 Leading Plaintiff Financial Lawyers List – June 2
- Sharon K. Robertson Top Ranked by Chambers USA for Antitrust: Plaintiff – June 2
- Kit A. Pierson Ranked by Chambers USA for Antitrust: Plaintiff – June 2
- Michelle C. Yau Top Ranked by Chambers USA for ERISA Litigation: Plaintiff – June 2
- Daniel R. Sutter Named Associate to Watch by Chambers USA for ERISA Litigation: Plaintiff – June 2
- Cohen Milstein's Christine E. Webber and Kai Richter Ranked Top Plaintiff Litigators by Chambers USA – June 1
- Ali Deich & Dan Sutter Named *National Law Journal* Rising Stars – May 23
- Law360's Legal Lions Of The Week – *Law360* – May 19
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- Christine E. Webber Appointed to Law360's 2023 Wage & Hour Editorial Advisory Board – April 20
- Michelle C. Yau Appointed to Law360's 2023 Benefits Editorial Advisory Board – April 10

UPCOMING EVENTS

- **August 5-9** | National Association of State Retirement Administrators Annual Conference, Omni Interlocken Hotel, Broomfield, CO – Richard Lorant
- **August 6-9** | County Commissioners Association of Pennsylvania Annual Conference and Trade Show, Erie Bayfront Convention Center, Erie County, PA – David Maser
- **August 13-15** | Texas Association of Public Employee Retirement Summer Educational Forum, Woodlands Resort Curio by Hilton, The Woodlands, TX – John Dominguez
- **September 10-12** | Michigan Association of Public Employee Retirement Systems Fall Conference, Shanty Creek Resort, Bellaire, MI – Richard Lorant and Christina Saler
- **September 11-13** | National Coordinating Committee for Multiemployer Plans 2023 Annual Conference, Chicago Fairmont Hotel – Arthur Coia and Christopher Lometti
- **October 1-4** | National Association of State Treasurers Annual Conference, The Flamingo, Las Vegas, NV – Jay Chaudhuri
- **October 1-4** | International Foundation of Employee Benefits Plans Annual Employee Benefits Conference, Boston Convention & Exhibition Center – Arthur Coia, Christopher Lometti, and Richard Lorant
- **October 22-25** | National Conference on Employee Retirement Systems Financial, Actuarial, Legislative and Legal Conference – Richard Lorant and Christina Saler

ATTORNEY PROFILE

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Lawdragon *recently ran a profile of Laura H. Posner, a partner in the firm's Securities Litigation & Investor Protection practice and former Bureau Chief for the New Jersey Bureau of Securities. Here is an excerpt of the profile, which was published June 7.*

LD: Why securities litigation?

LP: I strongly believe that fair and open financial markets lead to a more just society that can transform people's economic lives. The ability of Americans to become upwardly mobile, save for a home and college, survive health scares, and ultimately retire securely is largely dependent on being able to participate in a fair market. So, it's incredibly gratifying to me to help ensure markets are fair, honest and safe—and hopefully open to more investors.

...

LD: Tell us about your role as New Jersey's top securities regulator.

LP: For me, it was an opportunity to fulfill my lifelong desire to work for the government. When a former colleague suggested I meet with the New Jersey Attorney General about the recently vacated state Securities Regulator role, I jumped at the opportunity. I'm glad I did. It was a transformative experience.

The Bureau of Securities does everything that the Securities Exchange Commission does, only on a statewide scale—which, particularly in the case of New Jersey, isn't so small, including examinations, registration, investor education, enforcement, legislation and policy work. On the enforcement side, I had a lot of latitude and was able to push the office to take on more and bigger cases, resulting in hundreds of millions of dollars in recoveries for New Jersey residents and more than 20 criminal convictions during my time in office.

...

LD: What's professionally satisfying about your work?

LP: At the end of the day, for me it's still about wanting to help those in need. My shareholder derivative cases have helped investors transform companies into safer environments for their employees. My securities fraud class action cases have helped investors—teachers, firemen, police, union workers and other state employees—recover the essential retirement money they lost due to a company's fraud.

I went into law with an interest in civil rights work, and I think my work in securities class actions and shareholder derivative litigation tracks closely to my initial goal. My team and I are fighting for the underdog. We are helping people protect their investments and helping keep the marketplace fair. ■

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