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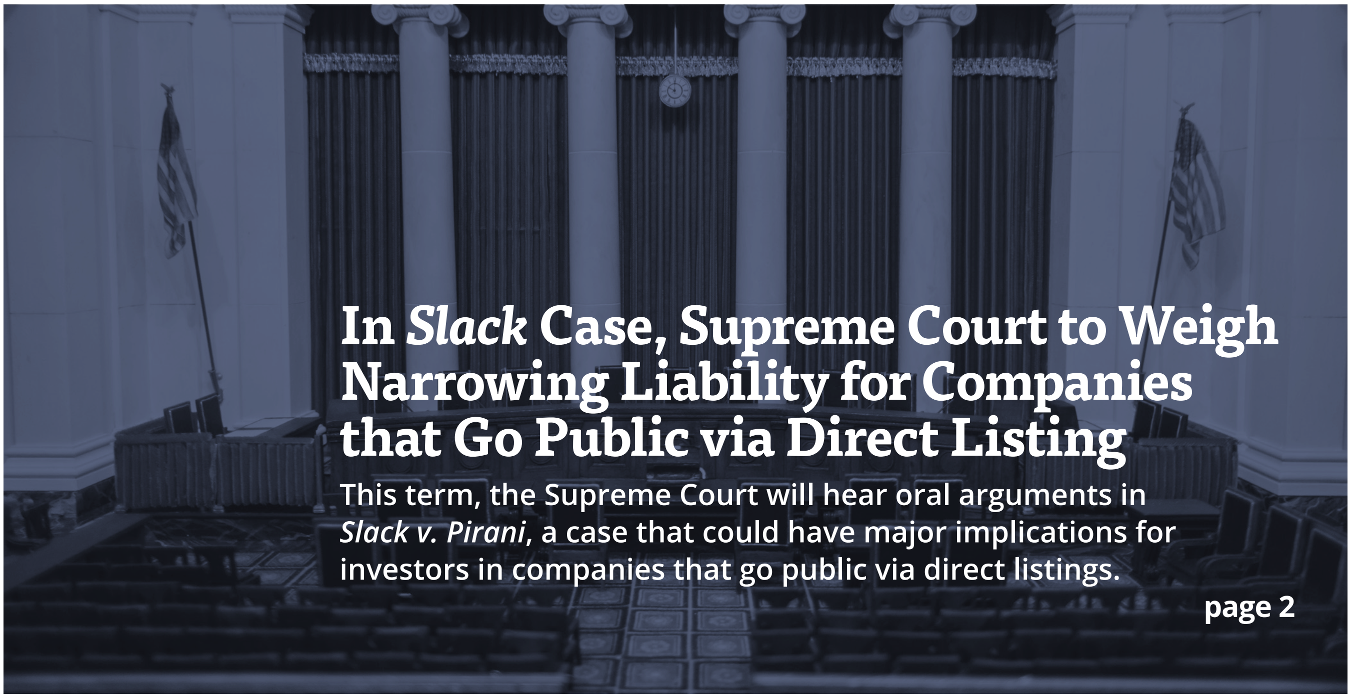

In *Slack* Case, Supreme Court to Weigh Narrowing Liability for Companies that Go Public via Direct Listing

This term, the Supreme Court will hear oral arguments in *Slack v. Pirani*, a case that could have major implications for investors in companies that go public via direct listings.

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In *Slack* Case, Supreme Court to Weigh Narrowing Liability for Companies that Go Public via Direct Listing

This term, the Supreme Court will hear oral arguments in *Slack v. Pirani*, a case that could have major implications for investors in companies that go public via direct listings.

The Supreme Court recently agreed to hear *Slack Technologies v. Fiyyaz Pirani*, a federal securities class action case arising from Slack Technologies' ("Slack") 2019 direct listing on the New York Stock Exchange. The case presents novel questions about standing under the Securities Act of 1933 ("Securities Act") and could have significant ramifications for investors who purchase securities through direct listings and other alternative forms of public offerings by creating a dangerous loophole in the Securities Act.

A SUPREME COURT RULING FOR SLACK IN THIS CASE COULD ESSENTIALLY SHIELD COMPANIES GOING PUBLIC THROUGH A DIRECT LISTING FROM ANY SECTION 11 LIABILITY, OPENING A DANGEROUS LOOPHOLE IN THE SECURITIES ACT.

Unlike companies that go public via initial public offerings, a privately held company that undertakes a direct listing does not issue new shares. Instead, it files a registration statement to allow existing shareholders to sell their shares directly to the public on an exchange. By filing the registration statement, a direct listing also creates a market for existing holders to resell unregistered shares in the company that meet the SEC holding requirements for exempt securities.

Slack, a technology company that offers a popular instant messaging platform for businesses and organizations, opted to go public through a direct listing on the New York Stock Exchange in June 2019. By going public through a direct listing, Slack simultaneously offered a mix of registered and unregistered securities to the public on the New York Stock Exchange. Plaintiff Fiyyaz Pirani bought shares in Slack through the direct listing on the day it went public and throughout the next few months. Pirani alleges that Slack's registration statement was misleading because it failed to disclose important information about its service disruption policy. In a motion to dismiss, Slack argued that Pirani lacked standing to sue under Section 11 of the Securities Act because he could not "trace" the shares he purchased back to the shares offered through the misleading registration statement—and further, because the registered and unregistered shares were identical, Pirani could not definitively prove that the shares he purchased were registered shares subject to liability under Section 11.

The district court found that Pirani had standing, and the Ninth Circuit affirmed. The Ninth Circuit concluded that because the unregistered shares could not have been publicly sold without the registration statement for the registered shares to create the market, the "traceability" rule was inapplicable, and both the unregistered and registered shares were "such securities" subject to Section 11 of the Securities Act. In support of this finding, the Ninth Circuit looked to the Securities Act's legislative history and the federal securities laws' underlying purpose of protecting investors and preventing fraud.

In their petition to the Supreme Court for a *writ of certiorari*, Slack argued that the Ninth Circuit opinion is not supported by the text of the Securities Act or precedent and significantly expands Securities Act liability for unregistered shares. They argue that allowing investors to sue on this type of direct listing for shares that may not have been registered could extend liability to almost any sale of an unregistered security, such as a sale made by a corporate insider after an IPO "lockup" period, which would disincentivize companies from going public.

THE CASE COULD HAVE POTENTIAL RAMIFICATIONS BEYOND THE DIRECT LISTING CONTEXT, SINCE THE SUPREME COURT COULD USE THIS CASE TO CHANGE STANDING REQUIREMENTS UNDER THE SECURITIES ACT IN WAYS THAT COULD AFFECT SHAREHOLDERS IN MORE TRADITIONAL PUBLIC OFFERINGS, SUCH AS IPOs AND SPACs.

Slack v. Pirani could have significant ramifications for investors. While fewer than 20 companies have gone public through a direct listing since they were authorized in 2018, a December 2022 SEC rule change relaxing opening auction price restrictions is expected to increase their popularity. In addition, a Supreme Court ruling for Slack in this case could essentially shield companies going public through a direct listing from any Section 11 liability, as many shareholders would not be able to prove that the shares they purchased were registered. This would create a dangerous loophole in the Securities Act that could further incentivize companies to go public through direct listings and skirt Section 11 liability.

The case could also have potential ramifications beyond the direct listing context. The Supreme Court hears relatively few securities cases and has not heard any cases arising from the Securities Act since the confirmation of Justice Amy Coney Barrett cemented a 6-3 conservative majority on the Court. The Court could use this case to change standing requirements under the Securities Act in other ways that could affect shareholders in more traditional public offerings like IPOs and Special Purpose Acquisition Companies, or SPACs.

The Supreme Court will hear oral arguments in *Slack v. Pirani* sometime later this year. Since the case could disrupt federal securities law in a variety of ways, investors are urged to follow the briefing and arguments in the coming months. ■

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HEEDING INVESTOR ADVOCATES, SEC TIGHTENS RULES FOR INSIDER STOCK TRADING PLANS

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THE SEC AGREED WITH CRITICS WHO SAID EXISTING PLANS WERE TOO EASILY MANIPULATED AND ADOPTED THE CHANGES UNANIMOUSLY—AN ACCOMPLISHMENT OF NOTE IN THESE POLITICALLY CHARGED TIMES.

After a long gestation period, the SEC issued its final rules to address insider trading on December 14, 2022.[1] Investors have been clamoring for reforms of Rule 10b5-1, which provides an affirmative defense against insider trading claims to corporate executives who use prearranged plans to buy and sell their company's stock. The SEC agreed with critics who said existing plans were too easily manipulated and adopted the changes unanimously—an accomplishment of note in these politically charged times. While less ambitious than proposed rules announced last year (see discussion in the Winter 2022 *Shareholder Advocate*), the changes are significant, nonetheless.

The major changes include:

- A "cooling off" period before a Rule 10b5-1 plan can be executed
- Restrictions on multiple Rule 10b5 plans
- Restrictions on single-trade plans
- New disclosure requirements
- Enhanced "good faith" certification requirements

Rule 10b5-1, which was adopted over 20 years ago, provides corporate insiders protection from insider trading claims if their trades were exercised according to a written pre-arranged plan that was devised before the executive was aware of any material non-public information ("MNPI"). In its December 14, 2022 final rule, the SEC explained, "We are concerned that some corporate insiders use Rule 10b5-1 plans in ways that are not consistent with the objectives of the rule, and that harm investors and undermine the integrity of the securities markets."

[1] The rules were announced on December 14, 2022 but will not become effective until February 27, 2023.

ONE OF THE MOST IMPORTANT CHANGES THE SEC HAS ISSUED IN ITS FINAL RULE IS THE CREATION OF A "COOLING OFF" PERIOD.

AS FOR THE NEW DISCLOSURE REQUIREMENTS, THE SEC NOW REQUIRES THAT THE CREATION, MODIFICATION, OR TERMINATION OF ANY DIRECTORS' OR OFFICERS' RULE 10B5-1 PLANS BE DISCLOSED IN QUARTERLY REPORTS (FORM 10-Q OR FORM 10-K AS APPLICABLE) STARTING WITH THE FINANCIAL REPORTS COVERING THE FIRST QUARTER OF 2023.

In fact, courts have also raised concerns over these plans. For instance, before issuing an important ruling for investors limiting the use of Rule 10b5-1 plans, the Tenth U.S. Circuit Court of Appeals recently recognized such abuses in *Indiana Public Retirement System, et. al. v. Pluralsight, Inc.*, where Cohen Milstein serves as lead counsel. Finding that the "text and history of Rule 10b5-1 shows that such plans can be manipulated easily for personal financial gain," the court reversed the district court and stripped defendants of their purported "get out of jail free card," finding that the Rule 10b5-1 trading plan did not rebut an inference of *scienter per se* (see discussion in the Fall 2022 *Shareholder Advocate*).

One of the most important changes the SEC has issued in its final rule is the creation of a "cooling off" period. Under the old rules, insiders could make and use a trading plan the very same day, which practically eviscerated its purpose to prevent insider trading. Under the SEC's new rules, anyone other than an issuer, i.e., the company itself, must wait a certain period of time before executing a trade under a Rule 10b5-1 plan. Directors or officers must wait between 90 and 120 days, depending on the circumstances.[2] All other persons other than issuers must wait 30 days.

Another change places restrictions on overlapping plans. Previously, traders could create multiple plans and decide later to cancel one that became disadvantageous. Now, the SEC prohibits the use of a Rule 10b5-1 affirmative defense if persons (other than issuers) have multiple overlapping plans.

The SEC amendments also impose new restrictions on "single-trade plans," which are designed to execute a single trade on one occasion rather than multiple trades over time. Before the change, traders could create multiple single-trade plans; under the new rules, the SEC limits their use to just one plan per 12-month period.

As for the new disclosure requirements, the SEC now requires that the creation, modification, or termination of any directors' or officers' Rule 10b5-1 plans be disclosed in quarterly reports (Form 10-Q or Form 10-K as applicable) starting with the financial reports covering the first quarter of 2023. Under the old rules, Rule 10b5-1 plans did not need to be

[2] The SEC now requires directors or officers to wait "until the later of (1) 90 days after the adoption of the Rule 10b5-1 plan or (2) two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for the fiscal quarter in which the plan was adopted or, for foreign private issuers, in a Form 20-F or Form 6-K that discloses the issuer's financial results (but in any event, the required cooling-off period is subject to a maximum of 120 days after adoption of the plan)."

disclosed, which kept investors from knowing whether suspicious trades by officers or directors were made pursuant to a plan or not.

In addition, the SEC now requires companies to disclose whether they have an insider trading policy and to provide it annually as an exhibit. The SEC explained that seeing the details of such policies and whether they are merely perfunctory declarations or ones with effective controls will give investors important information.[3]

Finally, the SEC heightened the "good faith" certification requirements. While the SEC currently requires that plans be *entered* in good faith, the new rule requires a certification that the plans have been *exercised and operated* in good faith. The SEC now requires traders to certify that they both entered in *and* "acted in good faith with respect to" the plan.

Although the changes are not as robust as originally contemplated in the proposed rules issued last year, they are still welcome restrictions that will tighten investor protections. The Council for Institutional Investors, which has been advocating for many of these reforms for more than a decade, has praised the SEC for instituting them. We now look forward to utilizing them in practice to protect our clients' interests and strengthen investor protections. ■

THE COUNCIL FOR INSTITUTIONAL INVESTORS, WHICH HAS BEEN ADVOCATING FOR MANY OF THESE REFORMS FOR MORE THAN A DECADE, HAS PRAISED THE SEC FOR INSTITUTING THEM.

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3 "The thoroughness and precision of such policies and procedures may help investors to understand whether they will be successfully implemented...An investor might reasonably conclude that an issuer adopting a policy generally prohibiting insider trading, but without disclosing how it prevents the unlawful communication of and trading on material nonpublic information, provides fewer such assurances to investors than an issuer that has developed and disclosed more particular and thorough policies and procedures."

HUMAN RIGHTS PRACTICE READIES FOR TRIAL AGAINST EXXONMOBIL FOR ALLEGED ABUSES IN INDONESIA

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DESPITE YEARS OF AGGRESSIVE DEFENSE, DURING WHICH EXXONMOBIL MOVED TO STAY THE CASE AT LEAST SEVEN TIMES AT THE DISTRICT COURT, COURT OF APPEALS, AND SUPREME COURT LEVELS, PLAINTIFFS PERSEVERED.

Holding large, formidable corporations accountable to achieve economic and social justice for our client—even if it takes decades—is a hallmark of our work at Cohen Milstein.

No better example is our representation of 11 Indonesian citizens in *Doe, Aceh, Indonesia v. ExxonMobil Corporation* (D.D.C.). For more than 21 years, the plaintiffs in this high-profile cross-border lawsuit have sought justice from ExxonMobil Corporation for human rights abuses they allegedly suffered at the hands of ExxonMobil's security personnel in Aceh, Indonesia.

On March 24, 2023, they will finally get their day in court, when a U.S. federal jury trial is set to start.

Originally filed in 2001, the lawsuit alleges that ExxonMobil used Indonesian soldiers to provide security at the company's sprawling natural gas operation in the largely rural Aceh province. The lawsuit also alleges that these same soldiers physically abused, sexually assaulted, tortured, or murdered plaintiffs or family members who lived in the surrounding villages.

The federal lawsuit addresses many novel issues of law and jurisdiction. The D.C. Circuit Court of Appeals reviewed the case twice, in 2007 and 2011, ultimately concluding that plaintiffs could move forward to prove that ExxonMobil bore liability for these atrocities under Indonesian law. In 2007, the Supreme Court invited the U.S. Solicitor General to file a brief expressing the views of the executive branch on ExxonMobil's petition for *certiorari*, which subsequently led the Court to deny the petition.

Despite years of aggressive defense, during which ExxonMobil moved to stay the case at least seven times at the district court, court of appeals, and Supreme Court levels, plaintiffs persevered. All the while, the litigants grew older.

Then, as the world quarantined against COVID-19, the district court, seemingly inspired by technological innovations widely adopted during the pandemic, agreed that plaintiffs and their eyewitnesses could provide testimony from the other side of the world via videoconference. At summary judgment, plaintiffs submitted these long-distance depositions, along with close to 400 exhibits, to support their claims.

On August 2, 2022, the district court issued a detailed and pointed 86-page opinion denying ExxonMobil Corporation's motion for summary judgment, stating that "with only limited exceptions, defendants remaining arguments—about causation, quantifiable loss, ExxonMobil's liability, and due process—are entirely meritless." The court repeatedly found that ExxonMobil's characterizations of the evidence was "wrong" or "simply wrong." Furthermore, the court published for the first time the testimony of the victims and witnesses about the horror. After almost every account, the court stated, a reasonable jury could conclude the "connection between the soldier's wrongdoing and his employment relationship with defendants."

Agnieszka Fryszman, co-chair of Cohen Milstein's Human Rights practice, and her small but dedicated legal team have tenaciously pursued this hard-fought litigation against a deep-pocketed defense, handling discovery, trial court briefing, appellate briefing, appeals court argument, and Supreme Court practice. ■

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AGNIESZKA FRYSZMAN, CO-CHAIR OF COHEN MILSTEIN'S HUMAN RIGHTS PRACTICE, AND HER SMALL BUT DEDICATED LEGAL TEAM HAVE TENACIOUSLY PURSUED THIS HARD-FOUGHT LITIGATION AGAINST A DEEP-POCKETED DEFENSE.

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SECURITIES LITIGATION 101:

THE ROLE OF THE LEAD PLAINTIFF

In previous articles, we wrote about factors a fund may consider when deciding whether to file a motion for lead plaintiff in a securities class action and the criteria a judge uses to select among competing movants. In this installment, we discuss what is required and expected of the court-appointed lead plaintiff during the litigation, with institutional investors in mind.

In general, the lead plaintiff selects and retains lead counsel, negotiates attorneys' fees, oversees the litigation, participates in settlement negotiations, and makes major decisions on advice of counsel—such as whether to participate in mediation, accept a settlement offer, proceed with trial, or appeal. The lead plaintiff must act in the best interests of the class members throughout the litigation.

Federal securities litigation is largely brought under two laws enacted after the Wall Street Crash of 1929: the Securities Act of 1933, which covers newly issued securities, and the Securities Exchange Act of 1934, which covers existing securities traded on exchanges. Six decades later, the Private Securities Litigation Reform Act of 1995 (PSLRA) added lead plaintiff provisions to both laws.

The PSLRA directs judges to "appoint as lead plaintiff the member or members of the purported plaintiff class who the court determines to be most capable of adequately representing the interests of class members" and who "in the determination of the court, has the largest

NOTICE OF FIRST COMPLAINT

- Under the PSLRA, anyone filing a federal securities class action must issue a public notice about the lawsuit, opening a 60-day window for any investor or group interested in overseeing the litigation to file a lead plaintiff motion with the presiding judge

LEAD PLAINTIFF DEADLINE

- Investors interested in controlling the litigation file lead plaintiff motions
- Investors who don't step forward at this time retain their rights to participate in or opt out of any eventual monetary recovery

LEAD PLAINTIFF SELECTION

- The judge selects one or more lead plaintiffs based largely on the size of their potential loss
- The judge approves lead plaintiff's selection of counsel

THE LEAD PLAINTIFF SELECTS AND RETAINS LEAD COUNSEL, NEGOTIATES ATTORNEYS' FEES, OVERSEES THE LITIGATION, PARTICIPATES IN SETTLEMENT NEGOTIATIONS, AND MAKES MAJOR DECISIONS ON ADVICE OF COUNSEL.

financial interest in the relief sought by the class," unless someone can show they are not "typical" and "adequate" under Rule 23 of the Federal Rules of Civil Procedure. A "typical" plaintiff is one whose legal claim arises from the same events and is based on the same legal theory as those of the class; an "adequate" one does not have interests that are opposed to the class and has sufficient resources and experience to represent the class and oversee counsel.

Selecting Counsel and Negotiating Fees

Under the law, the lead plaintiff selects and retains counsel to represent the class, subject to court approval. Because the courts typically evaluate a proposed lead counsel's experience in shareholder class actions and its ability to litigate the case at hand, the lead plaintiff is advised to choose a firm that has a history of successful representations and is free of conflicts of interest.

Negotiating a reasonable fee with a proposed counsel is an important duty for lead plaintiff, since attorneys' fees and expenses are normally subtracted from any monetary recovery before it is distributed to the class members. An unreasonably high fee, therefore, reduces the portion of the settlement that goes to shareholders. At the same time, lead counsel typically litigates securities class action on contingency, only recouping the cost of attorney time and expenses if the case succeeds, so its fee agreements price in that risk. Because shareholder lawsuits are complex and often take years to resolve, lead counsel may spend hundreds of thousands and even millions of dollars on out-of-pocket expenses such as outside damage experts, massive document reviews, and mediators; that doesn't count the salaries lead counsel must pay, win or lose, to the lawyers, paralegals and staff who work on the case.

CASE IS ARGUED

- Dispositive Motions
- Discovery
- Class Certification
- Summary Judgment

SETTLEMENT IS ANNOUNCED

- After the judge grants preliminary approval, a claims administrator identifies and notifies class members about the settlement
- Class members can opt out and file individual actions
- Class members can object to settlement or attorneys' fees

SETTLEMENT RECIEVES FINAL APPROVAL

- The judge approves the settlement and "reasonable" attorneys' fees
- Proofs of claim must be filed by a deadline set by the judge
- The claims administrator reviews and approves claims
- The settlement fund is distributed to approved claimants on a pro-rata basis according to the plan of allocation

Happily, there are plenty of blueprints available for would-be lead plaintiffs looking to structure a retention agreement. Organizations such as the National Association of Public Pension Attorneys and the Council of Institutional Investors have published primers on securities litigation that offer sample agreements, including fee percentages.

In addition, like the selection of lead counsel itself, attorneys' fees and expenses are subject to court approval in federal securities litigation. The PSLRA requires attorney fees and expenses to be a "reasonable percentage" of the damages paid to the class, leaving it up to the judge to determine what that means. Federal courts conduct a review of attorney time sheets and expense reports to measure the proposed fee against the work performed. Federal courts also consider the fee percentages to other settlements of a comparable size or in the corresponding circuit to maintain consistency in fee awards.

Overseeing the Litigation

The PSLRA's requirement that the court appoint as the lead plaintiff the party or parties most capable of adequately representing the class, combined with subsequent decades of jurisprudence, establish clear expectations that the lead plaintiff oversee the litigation and monitor counsel.

While the law and the courts do not require intimate knowledge with the day-to-day details of the litigation, the lead plaintiff should understand the basics, including the important allegations in the complaint and the case's procedural status. It should be familiar with its responsibilities and understand its duties, especially the need to respond to defendants' discovery requests by providing relevant documents and deposition testimony related to its investment in the company. The lead plaintiff must be willing and able to perform these duties since defendants may challenge its adequacy of oversight during depositions or at the class certification stage. Within these broad parameters, however, institutional investors have considerable leeway to seek a level of involvement that is appropriate for their staffing resources while maintaining a hand in major strategic decisions that affect the outcome of the case.

The lead plaintiff should require the lead counsel to provide regular updates about the litigation, give them an opportunity to review key pleadings, and advise them of upcoming deadlines and decision points. The lead counsel should provide clear analysis, guidance, and recommendations on any decisions required of the lead plaintiff. During the discovery phase, the lead plaintiff should expect the lead counsel to help produce required documents and, after proper preparation, represent the lead plaintiff in depositions.

WHILE THE LAW DOES NOT REQUIRE INTIMATE KNOWLEDGE WITH LITIGATION DETAILS, THE LEAD PLAINTIFF SHOULD UNDERSTAND THE BASICS, INCLUDING THE IMPORTANT ALLEGATIONS IN THE COMPLAINT.

Participating in Settlement Talks

One of the most important responsibilities of the lead plaintiff is to participate in any settlement discussions or mediations. An active lead plaintiff can greatly impact the size of the settlement, the makeup of the settlement considerations (e.g., cash only or cash and stock) and the decision to include corporate governance elements in the settlement agreement. In addition, the lead plaintiff is required to approve any settlement prior to court review. If no settlement is reached, the lead plaintiff will need to attend the trial. If the case is lost at trial, lead plaintiff must evaluate with lead counsel and decide whether to appeal.

UNDERSTANDING THE EXPECTATIONS AND RESPONSIBILITIES OF THE LEAD PLAINTIFF CREATES CLEAR EXPECTATIONS ABOUT THE TIME AND STAFF RESOURCES AN INSTITUTIONAL INVESTOR NEEDS TO COMMIT TO THE PROCESS.

Conclusion

Understanding the expectations and responsibilities of the lead plaintiff before facing a decision to file a lead plaintiff motion creates clear expectations about the time and staff resources an institutional investor needs to commit to the process. It also highlights the importance of establishing relationships with experienced plaintiffs' counsel. Perhaps most importantly, it illustrates why sophisticated institutional investors are better able to adequately represent class members than small individual investors, especially in large-scale litigation. ■

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FIDUCIARY FOCUS

TOP OF MIND ISSUES FOR 2023

With 2022 in the rearview mirror, public pension plans might be inclined to breathe a big sigh of relief. In a year when *Pensions & Investments'* top story was the impact of inflation and interest rate hikes on market returns, public pension plans suffered along with other investors, ending a string of positive investment results that had propelled valuations and funding ratios.

Time then to turn the page and think about some of the pressing issues pension fund leaders will face in 2023. To guide us, we asked executive directors and general counsel to identify the top challenges from a fiduciary perspective for their public pension systems in the new year.

People and Culture

The pandemic changed the work environment in the U.S. and pension plans were not excepted. Many systems faced hiring difficulties, struggling to fill vacancies ranging from call center positions to associate attorneys. *The New York Times* reports that while the labor market remains tight, many economists expect more layoffs and fewer job openings in the private sector in the coming months as corporations restructure their operations. This could prove beneficial to public pension plans as they seek to meet their hiring needs.

Post-pandemic, the phenomenon of remote work has become the "new normal." Job applicants surveyed by the employment search site ZipRecruiter reported that, on average, they would take a 14% pay cut to work remotely. Some pension plans have responded by allowing entire call center operations to be conducted remotely as a way of boosting staff recruitment and retention. Others have allowed many departments to operate in a hybrid fashion, with staff in the office two to three days a week. Finally, there are certain departments for which leaders believe an ethical culture with a proper focus on fiduciary duty can best be maintained by the return of staff full-time in the office.

Issues articulated regarding people and culture were not limited to staffing. Some funds in 2023 will be transitioning to newly appointed or elected trustees, and the integration of these new trustees to the existing board is a chief concern. While new trustees may bring experience, skills and energy to a board, they may not be well versed in trust principles governing the operations of public pension plan and, as such, may not understand the critical importance of fiduciary duty. Appropriate onboarding and a thorough orientation program with a rigorous commitment to fiduciary education can go a long way in acclimating new trustees so that they may understand and be properly integrated into the public pension plan culture.

TIME THEN TO TURN THE PAGE AND THINK ABOUT SOME OF THE PRESSING ISSUES PENSION FUND LEADERS WILL FACE IN 2023.

Cybersecurity

Cybersecurity continues to be a major concern for retirement plans and managing cybersecurity risk is at the forefront for executives and counsel. Cybersecurity risks are rising on both the benefits and investment sides of pension operations. Under benefits operations, plan participants' financial and personally identifiable information maintained by pension systems are at risk from cyber attack. Investment operations also face risks from attack in their various processes, from capital calls to other aspects of investment transactions.

SOME FUNDS IN 2023 WILL BE TRANSITIONING TO NEWLY APPOINTED OR ELECTED TRUSTEES, AND THE INTEGRATION OF THESE NEW TRUSTEES TO THE EXISTING BOARD IS A CHIEF CONCERN.

In 2021, the U.S. Department of Labor's Employee Benefits Security Administration issued much-anticipated cybersecurity guidance for private sector employee retirement plans, indicating that responsible plan fiduciaries have an obligation to ensure proper mitigation of cybersecurity risks. And public pension systems may be at even more risk than their private plan peers. Bad actors may take advantage of data that is publicly available by virtue of participants' government employment to further their attempts at identity theft. Public records and FOIA requests have already been used fraudulently. Some public pension plans offer more tempting targets due to antiquated IT systems and limited resources.

Fiduciaries should develop and document their due diligence in implementing cyber-risk-management strategies, including risk assessment and incident response plans and tools to manage cyber situations and crises.

Member Communication and Managing Expectations

Effective communication with plan members is critical to the successful operation of pension plans. One of the biggest challenges cited by one Executive Director is managing the expectations of active and retired system members. For example, retirees may expect or seek cost of living adjustments each year, without understanding that the plan may not be designed or authorized to accommodate such adjustments. Active members, who may have an unreasonable expectation that their pension alone will be sufficient to support them in retirement, need sufficient retirement education to plan adequately for their retirements well in advance.

Front and center in 2023 will be the continuing focus of pension systems on how to efficiently interact with their members. We anticipate continuing to see redesigned websites created with members in mind and user-friendly portals that allow members to find information more easily. The best examples include navigation tools designed to offer members, retirees, and employers easy access to information, forms, and publications. Members report that videos and information on benefits planning are helpful tools, as are searchable forms and publications and websites that automatically adjust for use of a smartphone, tablet, or computer. While websites and portals are now the norm, a number of retirees remain committed to receiving print information, thus requiring plans to continue to send mail to members who request it.

ACTIVE MEMBERS, WHO MAY HAVE AN UNREASONABLE EXPECTATION THAT THEIR PENSION ALONE WILL BE SUFFICIENT TO SUPPORT THEM IN RETIREMENT, NEED SUFFICIENT RETIREMENT EDUCATION TO PLAN ADEQUATELY FOR THEIR RETIREMENTS WELL IN ADVANCE.

Legislative and Regulatory Landscape

Finally, pension plan executives and counsel report being extremely concerned about the growing politicization of their operating environment. For example, the issue of so-called environmental, social, and governance investing seems to be the latest to divide “red” and “blue” states. But prudent fiduciaries know that there are no “red” or “blue” considerations in fiduciary duty. In 2023, trustees, executives, and counsel will need to remain laser-focused on their fiduciary duty to act for the exclusive benefit of members and beneficiaries without regard to the interests of other parties.

Conclusion

As we close the books on a year in which the investing environment was incredibly challenging, investors expect 2023 to be a turbulent year as well. This should not surprise anyone, as we are all aware of the ongoing difficulties in working in the public pension sector. ■

Suzanne M. Dugan is Special Counsel at Cohen Milstein and leads the firm's Ethics & Fiduciary Counseling practice.

RECENT HIGHLIGHTS

COHENMILSTEIN IN THE NEWS

- "Feds Say Tenant Screener Is Subject to Fair Housing Act," *Law360* – January 10, 2023
- "Challenging the Grip of Big Tech: Victoria Nugent," *Lawdragon* Lawyer Limelight – January 3, 2023
- "Consumer Protection Policy and Cases to Watch in 2023," *Law360* – January 2, 2023
- "Tenant Group Asks to Keep Third-Party Screening Suit Alive," *Law360* – December 21, 2022
- "Janssen Thwarting Docs Order in Kickback Suit, Court Told," *Law360* – December 16, 2022
- "Chiquita Trims Terror-Funding MDL, Must Face Some Claims," *Law360* – December 15, 2022
- "Perdue Settles Plant Workers' Wage-Fixing Claims," *Law360* – December 8, 2022
- "Argent Can't Arbitrate Suit Over $99M ESOP Buy," *Law360* – December 7, 2022
- "Uber Agrees to Pay $10 Million for Listing Chicago Restaurants Without Their Consent, Charging More Than Allowed," *MarketWatch* – December 5, 2022
- "Ex-Palm Coast Doctor Doesn't Contest Civil Suit Alleging Grave Claims; Judge Sets Trial for Damages," *FlaglerLive* – December 2, 2022
- "Biotech Company Says Citadel, Other Big Traders Manipulated Its Stock Price," *The Wall Street Journal* – December 1, 2022
- "Scientology Workers Signed Contracts Under Duress, Their Lawyers Say," *Tampa Bay Times* – November 17, 2022
- "Beef, Pork Producers Accused of Wage-Fixing Conspiracy," *Law360* – November 15, 2022
- "Sick Profit: Investigating Private Equity's Stealthy Takeover of Health Care Across Cities and Specialties," *Kaiser Health News* – November 14, 2022
- "Cert Petition Raises Personal Jurisdiction Question in Context of the TVPRA," Transnational Litigation Blog – November 14, 2022
- "MassMutual Sued Over In-House Funds, Services in Worker 401(k)," *Bloomberg Law* – November 10, 2022
- "Lawyers Go for Class Certification in Shareholder Case Against Bayer Over Roundup Liability," *Legal Newsline* – November 7, 2022
- "Late Bed Bath & Beyond CFO Dropped from Shareholder Suit," *The Wall Street Journal* – November 3, 2022
- "Health Care Giant Confirms $15M Settlement — Two Days After Denying It," *ABC News* – October 31, 2022
- "Initiating Recovery Mode," *Denver Business Journal* – October 10, 2022

AWARDS & ACCOLADES

- Joseph M. Sellers Named to Lawdragon's 2023 Hall of Fame – January 11, 2023
- Cohen Milstein Named AAI's 2022 "Outstanding Antitrust Litigation Achievement in Private Law Practice" – January 13, 2023
- *Law360* Names Cohen Milstein 2022 Practice Group of the Year in Benefits, Competition, and Securities – January 13, 2023

UPCOMING EVENTS

- **January 22-24** | National Conference on Public Employee Retirement Systems Legislative Conference, Renaissance Downtown Hotel, Washington, DC – Richard Lorant
- **February 12-14** | National Association of State Treasurers Legislative Conference, The Watergate Hotel, Washington, DC – Jay Chaudhuri and Julie Reiser
- **February 16-21** | National Labor & Management Conference Annual Conference, The Diplomat Beach Resort, Hollywood, FL – Arthur Coia and Christopher Lometti
- **February 22-24** | National Association of Public Pension Attorneys Winter Seminar, Loews Ventana Canyon, Tucson, AZ – Luke Bierman, Suzanne Dugan, and Carol Gilden
- **February 25-27** | National Association of State Retirement Administrators Winter Meeting, Washington, DC – Richard Lorant and Julie Reiser
- **March 6-8** | Council of Institutional Investors Spring Conference, Mandarin Oriental Hotel, Washington, DC – Jay Chaudhuri and Carol Gilden
- **March 19-21** | County Commissioners Association of Pennsylvania Spring Conference, Hilton Harrisburg, Dauphin County, PA – David Maser
- **March—April 5** | Texas Association of Public Employee Retirement Systems Annual Conference, Downtown Marriott, Austin, TX – John Dominguez and Richard Lorant

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Lyzette Wallace is Discovery Counsel in the Securities Litigation & Investor Protection practice group. In this role, Lyzette assists in litigation teams' discovery efforts by overseeing document production, managing review teams, drafting and responding to discovery requests, and drafting Electronically Stored Information ("ESI") protocols. Lyzette joined the firm in 2019 after practicing on both the plaintiff and defense sides from which she gained invaluable experience litigating securities, antitrust, class actions, qui tam, regulatory, and intellectual property cases involving private entities and governmental agencies. Lyzette is also a certified professional coach and accomplished facilitator and speaker. For this issue of the Shareholder Advocate*, Lyzette spoke with Editor Christina Saler.*

I grew up in … Los Angeles County, California. We lived in an urban community that was just 20 minutes from the beach. There are so many beautiful beaches but Huntington Beach is probably my favorite. I was camping with my parents from as earlier as I can remember and can still remember traveling down PCH (what us Southern Californians call Pacific Coast Highway) in our VW camper, listening to Elton John's *Daniel* as my family and I were returning from a camping trip where a bear ransacked our campsite. My early camping experience was quite helpful when I was old enough to become a Girl Scout, so the camping badge was no problem! I stayed in California through college and relocated to Washington, DC for law school and never left. I will always consider Southern California home and try to get back there a few times a year.

I knew I wanted to become a lawyer … by my freshman year at Stanford University. At Stanford, you aren't required to declare your major until the end of your second year. So although I was taking essentially pre-med classes, I knew my interests were turning toward political science and the law. I really enjoyed public speaking and debates. Interestingly, one of my roommates was the daughter of former Associate Justice of the Supreme Court of the United States Anthony Kennedy. At the time, Justice Kennedy was a federal district court judge but I really just knew him as my roommate's really interesting and funny dad. We had an answering machine that had a rhyming outgoing message which asked callers to leave a rhyme in their message. Justice Kennedy was the only one who ever left a rhyme!

My varied experiences … have honed my skills as discovery counsel because I've litigated on both sides of the "v" and understand the strategies that both plaintiffs and defense counsel use in propounding and responding to discovery. Plus, my years at Microsoft as a recruiter for technical engineers and senior marketing professionals developed my technology skills which has served me well as I have learned to master the discovery software tools we use to conduct large scale document reviews of millions of pages of documents—all of which need to be analyzed and coded for their particular utility in building our cases.

I recently watched … the second season of HBO Max's White Lotus. It is terrific, and I'm ready to watch it again! I liked it more than the first season. Tanya remains my favorite flawed character and I truly enjoyed seeing her character developed more fully this season. It is must-see TV, not to mention the Sicilian scenery is gorgeous. ■

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