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TRENDS IN SECURITIES LAW AND CORPORATE GOVERNANCE

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On August 10, 2015, the U.S. District Court for the Southern District of New York issued a trial decision in *Severstal Wheeling, Inc. Retirement Committee et al v. WPN Corporation*, following a bench trial, entering a judgment of more than $15 million in favor of the Plaintiffs, who were represented by Cohen Milstein.

Supreme Court Asked to Endorse Cynical Defense Tactic that Could Moot Certain Class Actions

This month, the Supreme Court heard oral arguments in a case that could sharply curtail the ability of plaintiffs with modest individual losses to sue corporate wrongdoers collectively. In *Campbell-Ewald Company v. Gomez*, the Justices are being asked to endorse a cynical tactic by which defendant companies offer to pay full compensation to the proposed lead plaintiff for their individual claim, then argue that the offer, whether or not accepted, renders the entire class action moot.

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The Supreme Court holds that ERISA Trustees have a Continuing Duty to Monitor Retirement Plan Investments in *Tibble v. Edison*

In a win for employees and retirees, the Supreme Court issued a unanimous decision in *Tibble v. Edison* on May 18, 2015, holding that under the Employee Retirement Income Security Act ("ERISA"), trustees of a retirement plan have a continuing duty to monitor the plan's investments. This duty is separate and distinct from the trustee's duty to choose prudent investments at the outset, and requires trustees to conduct regular reviews of a plan's investments to ensure the investments remain appropriate. This decision is the second ruling from the Supreme Court in just under a year signaling a shift in the burden of monitoring retirement plans from employees to the employers sponsoring the plans.

Edison was initially filed in 2007, when petitioners, employees of Edison International, alleged that their employer's decision to invest its 401(k) plan (the "Plan") in a series of six mutual funds was a breach of its fiduciary duties because six materially identical lower priced mutual funds were available for investment. Edison's Plan is a defined contribution plan and the cost of expenses, such as administrative and management fees, are deducted from the overall value of the employee's account. In some instances, fees and expenses can significantly reduce an employee's overall account value.

Petitioners in *Edison* filed suit with respect to a series of three mutual funds added to the Plan in 1999 and another series of three mutual funds added to the Plan in 2002. The crux of petitioner's argument was that their employer could not have been acting prudently by choosing to invest in six higher priced mutual funds when it could have offered petitioners effectively the same six mutual funds at lower prices. The District Court agreed with petitioners as to the three funds added to the Plan in 2002. With regards to the claims relating to the funds added in 1999, however, the District Court held that the claims were untimely under ERISA's six year statute of limitations, which provides that "no action may be commenced with respect to a fiduciary's breach [of duty]" after the earlier of "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach of violation." The Ninth Circuit affirmed, holding petitioner's claims untimely because petitioner "had not established a change in circumstances that might trigger an obligation to review and to change investments within the 6-year statutory period."

The Supreme Court reversed, holding that trustees of retirement plans have "a continuing duty to monitor trust investments and remove imprudent ones." The Court explained that "[a] plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. *In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely*." The Supreme Court declined to define the contours of the responsibilities encompassed by the duty to continually monitor, however, stating "[w]e express no view on the scope of respondent's fiduciary duty in this case." Instead, the Court remanded the case to the Ninth Circuit for reconsideration.

We consider the decision a victory for plan participants, as we believe that it will result in more prudently managed retirement plans, as well as investment strategies that will benefit employees (i.e., investing in funds that offer lower fees and expenses). Further, by holding that the duty to monitor is continual in nature, plan fiduciaries cannot hide behind a statute of limitations defense if a claim is asserted more than six years after the fiduciary made the initial plan investment.

The decision may also highlight a shift in how the Court views the roles of employers and employees when it comes to investing in retirement. In our September 2014 issue we highlighted the Court's decision in *Dudenhoeffer v. Fifth Third Bank* which held that employee stock option plan ("ESOP") fiduciaries are not entitled to a presumption of prudence, thereby subjecting them to liability for including risky company stock in defined benefit plans. The Court's decision in *Edison* dovetails nicely with *Dudenhoffer* which ratcheted up the obligations of fiduciaries in defined benefit plans by doing the same to fiduciaries of defined contribution plans.

We note, however, that there is still much to be developed on this point of law given that the *Edison* Court declined to define the scope of the duty of continual oversight. We will monitor the lower courts' application of *Edison* and provide updates as they develop.

For more information about this topic, please contact Elizabeth Aniskevich (eaniskevich@cohenmilstein.com), Julie G. Reiser (jreiser@cohenmilstein.com), or Michael Eisenkraft (meisenkraft@cohenmilstein.com).

Following a two week trial, Federal Court Enters $15 million judgment in Severstal Wheeling, Inc. Retirement Plan Litigation

On August 10, 2015, the U.S. District Court for the Southern District of New York issued a trial decision in *Severstal Wheeling, Inc. Retirement Committee et al v. WPN Corporation,* following a bench trial which was held from July 8 through July 22, 2014. The Honorable Laura Taylor Swain entered a judgment of more than $15 million in favor of the fiduciaries of the Plans, finding that their former investment managers, Ronald Labow and WPN Corporation, breached their fiduciary duties to the two Severstal Plans while they served as investment manager for those Plans in 2008 and until May 19, 2009. In her decision, Judge Swain concluded based on the evidence presented at trial by Cohen Milstein, on behalf of

its clients had "prove[d] that the Severstal Plans would have earned substantially higher returns had Defendants not breached their fiduciary duties to the Plans."

This trial verdict comes over five years since the complaint was filed in 2010, alleging that WPN and Labow, fiduciaries of the Wheeling Corrugating Company Retirement Security Plan and the Salaried Employees' Pension Plan of Severstal Wheeling, Inc., breached their fiduciary duties with respect to the investment of the Trust's assets by failing to properly diversify the investments of those assets. After initial counsel withdrew from the case, Cohen Milstein took over the litigation on a contingency basis. By molding the facts and developing expert theories, along with presenting numerous witnesses, both friendly and hostile, the trial team led by Cohen Milstein partner, R. Joseph Barton, was able to surmount multiple obstacles in the litigation and achieve a successful result for the Plaintiffs. On numerous occasions, the Supreme Court has recognized that ERISA is one of the most complicated areas of law and ERISA cases are some of the most difficult to litigate, let alone bring to trial and succeed with a verdict in favor of the plaintiff.

The Firm's Employee Benefits group has significant expertise in ERISA cases and the partners in that group are well known among ERISA practitioners across the country and have tried several ERISA cases. Prior to the *Severstal* litigation, the Firm's Employee Practice Group has represented the fiduciaries of retirement plans in other ERISA matters. For example, Cohen Milstein previously represented the trustees of ERISA-covered Taft-Hartley employee benefit plans in the Beacon/Madoff ERISA Litigation and achieved a class action settlement of $219 for the Plaintiffs whose assets were lost through investments made on their behalf by Beacon Associates LLC I & II in the investment schemes of Bernard Madoff. The Firm is and has been retained by fiduciaries of ERISA plans to assist in exploring and negotiating pre-litigation settlement or to advise regarding potential litigation.

If you would like to learn more about Cohen Milstein's Employee Benefits practice, including advice regarding ERISA litigation matters, please contact R. Joseph Barton, Partner, at jbarton@cohenmilstein.com or (202) 408-4600.

Supreme Court Asked to Endorse Cynical Defense Tactic that Could Moot Certain Class Actions

When a company is sued, it can usually be expected to reject the lawsuit's demands outright, attempt to get the lawsuit dismissed, and otherwise defend itself with vigor. If all else fails, and if the risk of trial is too great, the company might try to settle. Even then, the company can be expected to negotiate, and to only offer the plaintiff part of what she asks for—after all, settlement implies compromise.

Yet, in class action cases, companies have been known to do something quite strange: instead of fighting tooth and nail, they roll over relatively early on, by offering to settle the case for the full amount requested. Indeed, that is exactly what one company did in a case recently argued in the Supreme Court.[1] To understand why, let's review the facts of the case.

Campbell-Ewald, a telemarketing firm, had sent the plaintiff, Jose Gomez, an unsolicited marketing text message, which Gomez claimed violated the Telephone Consumer Protection Act ("TCPA"). The maximum amount of damages Gomez could recover under the TCPA was $500, which could be tripled under certain circumstances. Given that court fees alone would likely have exceeded this amount, Gomez brought the case as a class action on behalf of people who had received similar unsolicited text messages.

Before the court could certify the case as a class action, however, Campbell-Ewald made an offer. It would pay Gomez $1503—slightly more than what Gomez could have theoretically recovered—plus costs he'd incurred up to that point. Gomez did not accept the offer, and it expired.

What prompted this offer? Did the company just want to make things right? Sadly, the answer is no. The company's true intentions were revealed shortly after the offer expired, when the company asked the court to dismiss the lawsuit. Its argument was that, as a result of its offer, Gomez personally had no real dispute with the company. In legal terms, Gomez and the company lacked "adversity." Under longstanding legal principles, that made Gomez's case "moot," and federal courts do not have Constitutional authority to hear "moot" cases.

More important than Gomez's individual case, however, was the class action. Because the offer "mooted" Gomez's individual case, the company argued, the class action Gomez hoped to lead had to be dismissed as well. Gomez disagreed, arguing that the unaccepted offer could not end the case.

Who was right? Despite the facts being relatively straightforward, the legal issues are anything but. Indeed, the question has divided the federal courts. The Ninth Circuit, for example, rejected Campbell-Ewald's theory, while other circuits have reached opposite conclusions in similar cases.[2] Suffice it to say,

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[1] *Campbell-Ewald Company v. Gomez*, No. 14-857 (U.S.), certiorari granted May 18, 2015, oral argument held October 14, 2015. The transcript is available here: **http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-857_2d8f.pdf**.

[2] The Third, Fourth, or Sixth Circuits have previously accepted versions of the company's theory, while the First, Fifth, and Seventh Circuits have sided with plaintiffs in similar cases. Indeed, in recent months, the First, Fifth, and Seventh Circuits have issued rulings to explicitly make their position that unaccepted offers do not "moot" cases clear in advance of the Supreme Court decision. *See Chapman v. First Index, Inc.*, No. 14-2775, 2015 WL 4652878 (7th Cir. Ill. Aug. 6, 2015); *Bais Yaakov of*

the core issue—what happens to a lawsuit when a defendant makes an offer like Campbell-Ewald's—does not have a definitive legal answer.[3]

This brings us to the Supreme Court case, which will resolve the disagreement among the circuits, and the recent oral arguments. There, the discussion ranged from arcane debates over the nature and scope of a federal court's jurisdiction under Article III of the Constitution, to the different types of legal theories under which a court could dismiss a case, to hypotheticals such as what should happen if Campbell-Ewald's lawyer were to hand Gomez's lawyer a briefcase of cash right then and there. Ultimately, however, the debate seemed to boil down to two areas of practical, and opposing, concerns: (1) why should a plaintiff be allowed to continue a case despite a defendant's offer of complete surrender, versus (2) how can a defendant unilaterally end a case merely by making an offer that was not only unaccepted, but not binding or enforceable?

The Court, and the parties, grappled with these two concerns. Predictably, the more liberal justices generally expressed skepticism over Campbell-Ewald's theory, pointing out that in addition to damages, Gomez had also asked for other relief, such as attorneys' fees, not to mention the right to pursue the case as a class action, none of which had been part of Campbell-Ewald's offer. The more conservative justices, for their part, demanded to know why the plaintiff "wouldn't take 'yes' for an answer," and hinted at their skepticism over class actions and plaintiffs' lawyers generally.[4] If there was a middle ground, it was reached by Justice Breyer, who expressed support for the view, advanced by the AFL-CIO in an *amicus* brief, that although a defendant should be able to end a case by offering to settle in full, the

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Spring Valley v. Act, Inc., No. 14-1789, 2015 U.S. App. LEXIS 14718 (1st Cir. Mass. Aug. 21, 2015); *Hooks v. Landmark Indus.*, 2015 U.S. App. LEXIS 14116 (5th Cir. Tex. Aug. 12, 2015).

[3] It is worth pausing to consider why that might be. Given the straightforward facts, one would think there is an accepted way of dealing with offers such as Campbell-Ewald's offer. But of course, rarely do defendants display such generosity in ordinary litigation, which likely explains the lack of precedent. In class actions, however, such settlement offers might result in a defendant losing the battle against the named plaintiff, but winning the far more important war: defeating the class action.

[4] All in all, however, the realpolitik aspect of the case as a battle over class actions did not figure prominently in the justices' questioning. Indeed, in response to Campbell-Ewald's argument that Congress could address via legislation any negative impact its theory would have on class actions, Justice Kagan explicitly noted that "both sides have these class action policy arguments, but it's important not to let those drive this pretty technical mootness question. So if we could just take the class action arguments out of it." These comments might fairly be interpreted as an attempt to neutralize any attempt to paint her as being motivated by a perceived ideological preference for class actions. Nevertheless, it would be naïve to conclude that the justices' views on class actions aren't relevant.

proper procedure for doing so was for the defendant to actually deposit the money with the court, as opposed to simply making an offer.[5]

How the Court will ultimately rule, however, remains unclear. Certain votes can reasonably be predicted. In a 2013 case involving similar issues, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, authored a blistering and widely-cited dissent castigating the notion that an unaccepted offer could "moot" a case.[6] Her reasoning was simple: under Supreme Court precedent, so long as it is possible for a court to award a plaintiff relief—which is the case when a plaintiff doesn't accept a defendant's offer, however generous—a case is not "moot." It seems reasonably safe to predict that those justices, except for perhaps Justice Breyer, will reject Campbell-Ewald's theory completely.

To win, however, Gomez needs five justices on his side, which none of the more conservative justices seemed particularly inclined to join. And yet, it also did not seem like the justices most likely to "cross over," particularly Justice Kennedy, were certain to vote for Campbell-Ewald either. Nevertheless, given the nature of the conservative justices' questioning, and the fact that Justice Breyer—one of the more liberal justices—seemed to embrace a middle-ground approach, it seems more likely than not that Campbell-Ewald will eke out a slight victory.

As for what result investors, consumers, and those concerned with corporate wrongdoing should prefer, the answer is clear: we should be cheering for Gomez.

To see why, consider the impact on the legal landscape if Campbell-Ewald wins. Indeed, consider the impact it would have on litigation arising out of the corporate scandal du jour: Volkswagen's installation of fraudulent emissions control technology on millions of its diesel cars, which were marketed as being more environmentally friendly, but which contained technology designed to cheat on emissions tests.

In the weeks after the EPA revealed Volkswagen's massive fraud, Volkswagen owners filed a variety of class actions, including consumer cases claiming that the company's deception decreased the value of their cars and securities cases claiming that it caused their investments in Volkswagen to plummet.

Now, imagine the Supreme Court rules for Campbell-Ewald. Under that theory, Volkswagen could end all of these cases by offering to pay the named plaintiffs' claimed damages. Those individuals might be

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[5] For a full discussion of the proceedings, see Ronald Mann, *Argument analysis: Justices struggle over procedures for forcing settlement of class actions,* SCOTUSblog, **http://www.scotusblog.com/2015/10/argument-analysis-justices-struggle-over-procedures-for-forcing-settlement-of-class-actions/**.

[6] *Genesis HealthCare Corp. v. Symczyk* , 133 S. Ct. 1523 (2013) (Kagan, J., dissenting). The issue had not been decided by the majority in that case, which assumed the plaintiff's individual case was moot because the plaintiff had not adequately argued otherwise in the lower courts.

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Now, imagine the Supreme Court rules for Campbell-Ewald. Under that theory, Volkswagen could end all of these cases by offering to pay the named plaintiffs' claimed damages. Those individuals might be compensated for their injuries, but what of the class of victims they sought to represent? Other Volkswagen owners or investors might hope that additional class actions will be filed, but those would just as easily be snuffed out by an offer from Volkswagen.

The end result is that few, if any, class actions would be filed, meaning that the only way a Volkswagen owner or investor could ensure it was compensated for its losses would be to bring their own lawsuit. But that is a time consuming and expensive process, and many will reasonably conclude it would not be worth it, even they had suffered hundreds or even thousands of dollars in damages. The overall net effect, then, would be that Volkswagen would be let off the hook for tens or even hundreds of millions of dollars in damages.

Needless to say, that would be a fantastic result for the wrongdoers at Volkswagen, and a terrible result for consumers or investors. Here's hoping the Supreme Court won't let that happen.

For more information about this topic, please contact Times Wang (twang@cohenmilstein.com), Julie G. Reiser (jreiser@cohenmilstein.com), or Michael Eisenkraft (meisenkraft@cohenmilstein.com).

Richard E. Lorant joins Cohen Milstein as the Firm's Director of Institutional Client Relations

Richard E. Lorant recently joined Cohen Milstein as the firm's Director of Institutional Client Relations. In this role Mr. Lorant coordinates Cohen Milstein's outreach to institutional investors, especially public pension funds. He serves as one of the firm's representatives in the institutional investor community and also as a liaison to ensure that Cohen Milstein's attorneys deliver outstanding and timely service to its clients.

A former journalist and public relations professional, Mr. Lorant is a longtime member of organizations devoted to investor education and

advocacy. From 2009 to 2011, he served on the National Association of State Treasurers Corporate Affiliate Advisory Board. He also makes presentations to pension fund boards and investor groups, most recently moderating panels at meetings of the National Council on Teacher Retirement and the International Financial Litigation Network, which advocates for better transparency and remedies in financial markets worldwide.

Prior to joining Cohen Milstein, Mr. Lorant served as the Director of Marketing and Client Relations at a Boston-based law firm with a nationally recognized securities litigation practice. While there he helped shape and execute the business development program, building relationships with dozens of pension funds throughout the country.

Mr. Lorant can be contacted via email at **rlorant@cohenmilstein.com**.

Cohen Milstein named a "Most Feared Plaintiffs Firm" by Law360 for the third year in a row

Law360 has named Cohen Milstein Sellers & Toll PLLC among its "**Most Feared Plaintiffs Firms**" for the third year in a row. This feature profiles the handful of plaintiffs firms that have won some of the largest and most impactful judgments and settlements over the past year, including Cohen Milstein's landmark $500 million settlement with JPMorgan Chase over its sale of mortgage-backed securities.

Law360's "Most Feared" profile of Cohen Milstein can be read **here**.