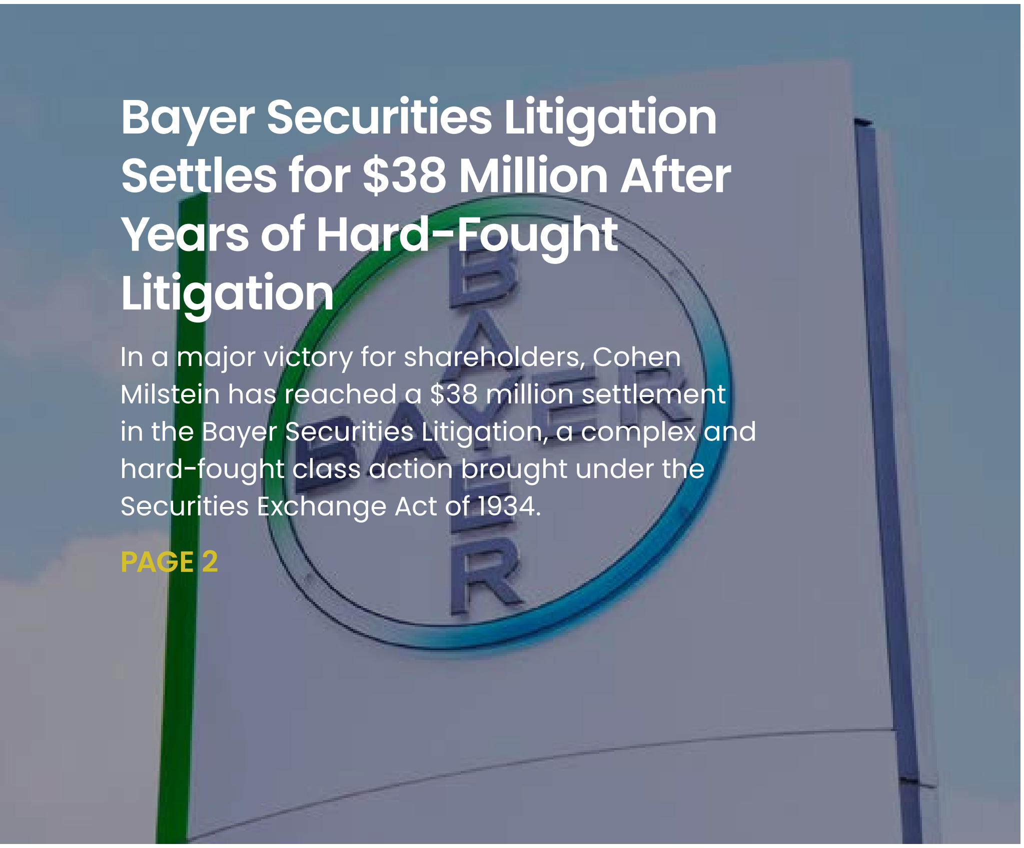
COHENMILSTEIN

Shareholder Advocate

Spring 2025



Bayer Securities Litigation Settles for $38 Million After Years of Hard-Fought Litigation

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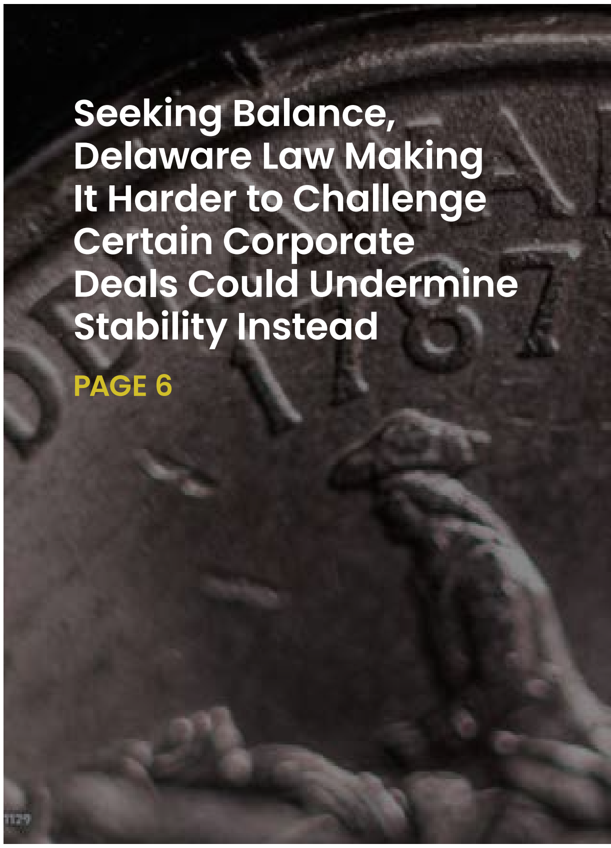

Seeking Balance, Delaware Law Making It Harder to Challenge Certain Corporate Deals Could Undermine Stability Instead

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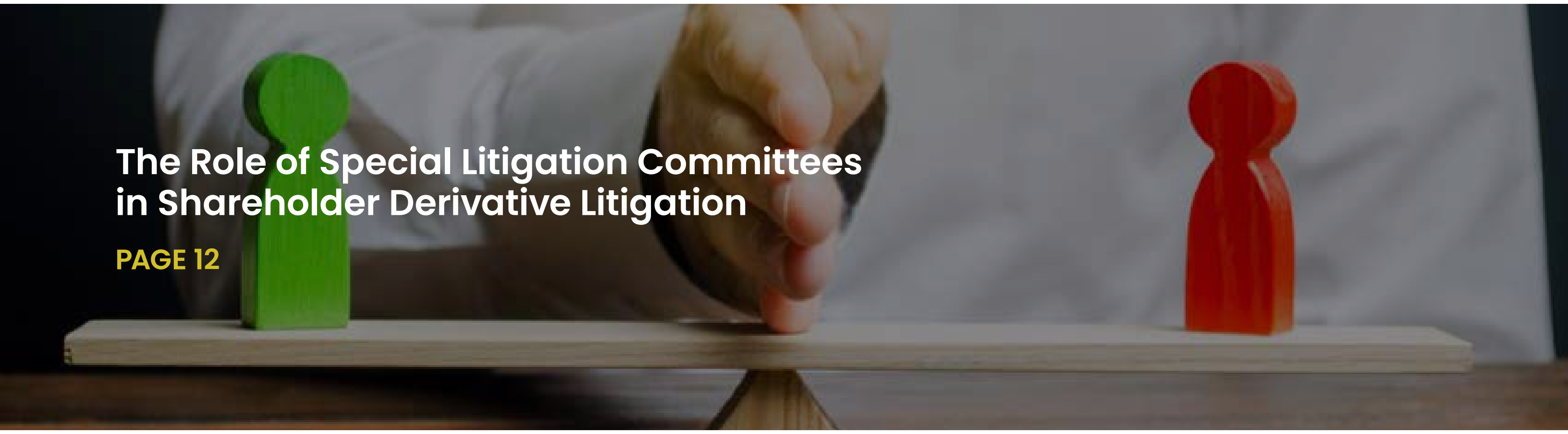

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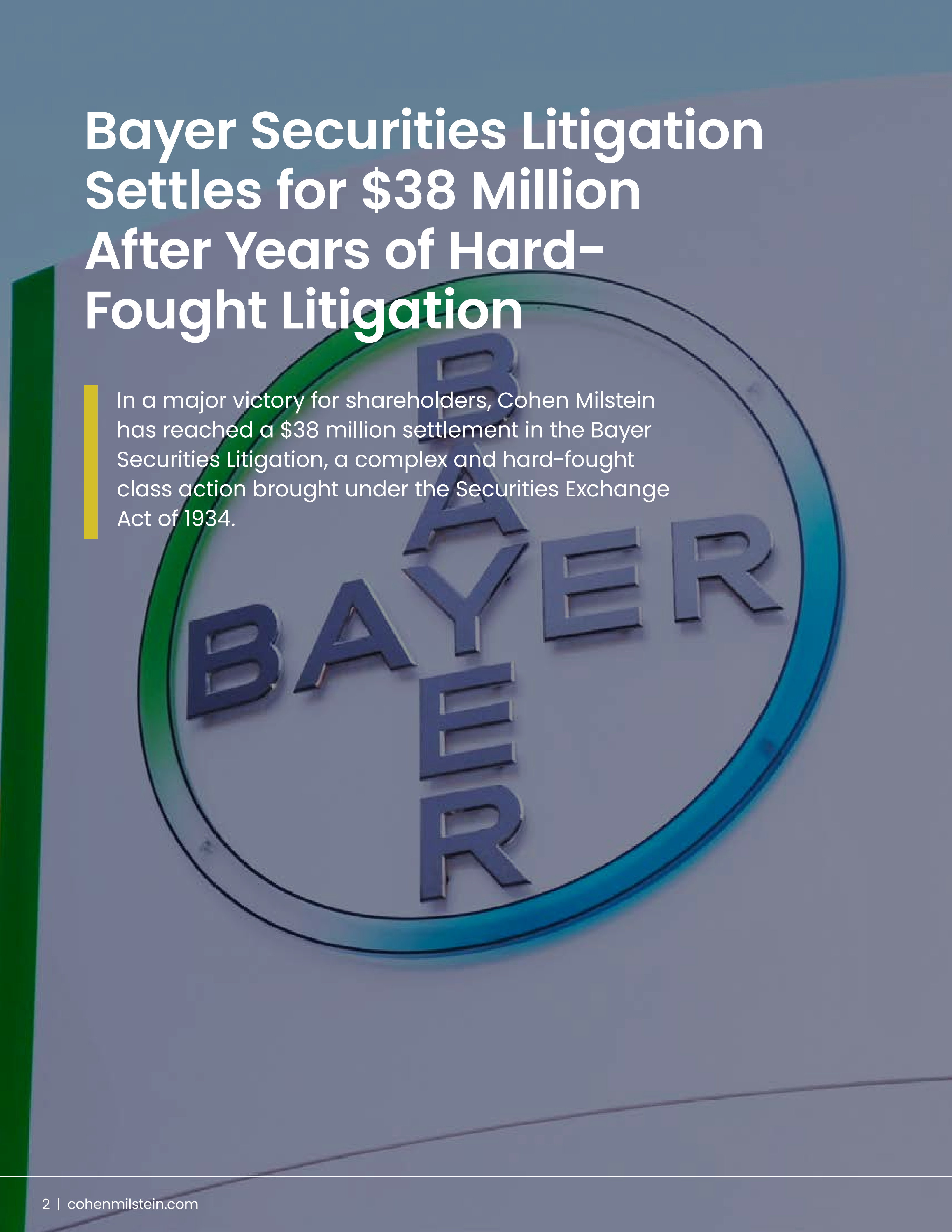

The settlement, which is currently awaiting court approval, will provide a financial recovery for damaged investors who purchased Bayer American Depositary Receipts (ADRs) between May 23, 2016, and March 19, 2019.

The settlement follows nearly five years of intensive litigation and reflects the tireless efforts of Cohen Milstein's team to hold Bayer accountable on behalf of a class of Bayer ADR investors. The firm is proud to have achieved this meaningful recovery in a case marked by challenging legal and factual issues.

Background and Allegations

This case, filed on July 15, 2020, in the U.S. District Court for the Northern District of California, stems from Bayer's high-profile and controversial acquisition of Monsanto. In their Amended Complaint, plaintiffs allege that Bayer, along with its CEO, the chairman of its Supervisory Board, and several other senior executives, made false and misleading statements concerning the company's due diligence on Monsanto—particularly regarding the risks associated with mass tort litigation alleging that Roundup, Monsanto's flagship glyphosate-based herbicide, causes non Hodgkin's lymphoma.

> **Central to the case were novel and complex questions about whether plaintiffs' and the Class's purchases of Bayer American Depositary Receipts (ADRs) were essentially foreign transactions outside the scope of U.S. securities laws.**

A Long and Hard-Fought Case

This litigation was exceptionally contentious. It began with two full rounds of motion to dismiss briefing. In response to the Amended Complaint, defendants sought to dismiss all claims, challenging the adequacy of plaintiffs' allegations under the heightened pleading standards of the Private Securities Litigation Reform Act (PSLRA). On October 19, 2021, the Court denied defendants' motion in part, finding that plaintiffs had

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stated a claim with respect to Bayer's statements about its merger due diligence—but dismissed claims relating to alleged misstatements about Roundup's safety and Bayer's financial disclosures.

Plaintiffs then, with the Court's permission, filed a Second Amended Complaint, and defendants again moved to dismiss. On May 18, 2022, the Court reaffirmed its prior ruling by upholding the sufficiency of the due diligence-related claims.

Class Certification and Discovery

The litigation advanced into a vigorously contested class certification and discovery phase. Central to this stage were novel and complex questions about whether plaintiffs' and the Class's purchases were essentially foreign transactions outside the scope of U.S. securities laws. To address these issues, plaintiffs issued dozens of subpoenas to financial institutions and market participants, seeking evidence that transactions in Bayer's ADRs occurred domestically. Plaintiffs also worked closely with Professor Joshua Mitts, PhD, of Columbia Law School, who provided valuable expert analysis and insights into the mechanics and structure of the ADR transactions at issue.

In May 2023, the Court granted class certification, appointing the lead plaintiffs as class representatives and Cohen Milstein as Class Counsel. Notably, the Court ruled in plaintiffs' favor on the extraterritoriality issue. Plaintiffs successfully refuted defendants' arguments that jurisdictional concerns undermined class typicality or predominance, securing a landmark decision affirming the rights of ADR purchasers on the over-the-counter market—and particularly those of sponsored ADRs like Bayer's.

Merits discovery was expansive and complex, spanning multiple continents and legal systems. It included international depositions, voluminous document production, and expert analysis from eight experts who addressed far-ranging issues of ADR market mechanics, merger due diligence practices, economic and behavioral incentives under the merger agreement, loss causation, and damages. The process also entailed court resolution of several privilege and evidentiary disputes. Further, plaintiffs were required to initiate proceedings under the Hague Convention to obtain the testimony of Bayer's former general counsel in Germany—a process that demanded significant coordination with German counsel and judicial oversight from both U.S. and German courts.

> **The Bayer settlement brings closure to an important case that addressed critical questions about the adequacy and transparency of disclosures concerning due diligence in high-profile corporate mergers.**

Settlement Process and Outcome

Settlement discussions began in the second half of 2024, when the parties agreed to engage in private mediation to resolve the case. After a brief pause during which the parties unsuccessfully attempted to resolve the case, litigation and expert discovery resumed. Ultimately, after two full-day mediation sessions held months apart, the parties reached an agreement to settle the case for $38 million in cash.

This substantial settlement represents a strong outcome for investors, offering a meaningful recovery while avoiding the additional time, risk, and expense associated with continued litigation, trial, and potential appeals. After years of contested motion practice, extensive international discovery, and complex legal challenges—including novel questions about the rights of ADR holders and merger-related disclosures—this resolution ensures accountability and provides closure for investors harmed by Bayer's alleged misleading statements.

Looking Ahead

The Bayer settlement brings closure to an important case that addressed critical questions about the adequacy and transparency of disclosures concerning due diligence in high-profile corporate mergers. The litigation also reaffirms that investors who purchase ADRs on the over-the-counter market have enforceable rights under U.S. securities laws.

Carol V. Gilden and Benjamin F. Jackson are partners in the Securities Litigation & Investor Protection practice group.

Seeking Balance, Delaware Law Making It Harder to Challenge Certain Corporate Deals Could Undermine Stability Instead

As home to 2.2 million legal entities, including two-thirds of all Fortune 500 companies, Delaware earns more than a third of its annual state budget from corporate fees, some $2.2 billion a year.

In that context, it's unsurprising that high-profile corporate departures would prompt attention among lawmakers. When those same elected officials hurriedly amended the state's foundational business law to address corporate complaints, however, it was anything but business as usual.

The rush to rewrite portions of Delaware General Corporation Law (DGCL) broke longstanding precedent and undermined a legal feature essential to the state's historic appeal to businesses—its reliance on the venerable and experienced Delaware Court of Chancery to interpret the DGCL gradually over time. To add drama, Senate Bill 21 (SB21) was written, in part, by the law firm that represented Elon Musk before the Delaware Chancellor who invalidated his $56 million pay package at Tesla, triggering the company's reincorporation in Texas. Tesla is perhaps the highest-profile company to leave Delaware. The departing companies, primarily majority shareholder-controlled companies, claim that a series of recent decisions in favor of minority shareholders has made Delaware less friendly to business and will encourage more litigation.

> **The rush to rewrite portions of Delaware General Corporation Law broke longstanding precedent and undermined a legal feature essential to the state's historic appeal to businesses—its reliance on the venerable and experienced Delaware Court of Chancery to interpret the DGCL gradually over time.**

Gov. Matt Meyer signed SB21 into law March 25 after it sailed through both houses of the state legislature with bipartisan approval despite a vigorous campaign by shareholder advocates, institutional investors, academics, consumer groups, and plaintiffs' attorneys to stop its passage. The new law narrows the DGCL's definition of a "controlling stockholder," makes it easier to avoid shareholder examination of potentially conflicted transactions, and makes it harder to show that directors are beholden to controlling stockholders or management.

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These changes significantly weaken minority shareholders' ability to challenge mergers, acquisitions, and other corporate deals they believe unduly benefit controlling stockholders, like Musk and Meta's Mark Zuckerberg, who exercise effective control over corporate votes due to the sheer size of their holdings, coupled with dual class voting structures that give their shares more weight.

The day after news broke that Meta was considering its own "DExit," Gov. Meyer held a meeting with legislators and lawyers who represented Meta, Tesla, and others in Delaware court to discuss the "corporate franchise"—a discussion that led to SB21, which Gov. Meyer called a "course correction" that would balance power between stockholders and corporate boards. By having a group of corporate lawyers and legislators draft SB21 behind the scenes, lawmakers bypassed Delaware's normal process for amending the DGCL, which involves recommendation by the Council of the Corporate Law Section of the Delaware Bar Association. The departure from precedent, perhaps as much as the contents of the law itself, raises concerns that Delaware's corporate law has become politicized in a way that may undermine stability, rather than backers' state goal of promoting it.

> **"The way this all happened has been extremely unsettling in terms of our expectations … for the development of the law in Delaware. It remains to be seen whether there will be new interventions like this from the legislature every time there is a major judicial opinion or trend that is not favored by the major corporations headquartered in Delaware. The process piece, in other words, is a big deal."**

In the conversation that follows, Cohen Milstein Partner Molly J. Bowen discusses the implications of SB21's passage for institutional investors with the *Shareholder Advocate*'s Richard Lorant.

Richard Lorant
If you followed the coverage over SB21 closely and accepted the arguments of investor groups and plaintiffs' law firms, you'd be forgiven for thinking passage of this bill signals the end of the world as we know it in terms of shareholder rights in Delaware. Now that it has become law, how important are the changes and how much will they weaken shareholder oversight of companies?

Molly Bowen
It's essential to separate the question of how SB21 came to be, from how it changes the DGCL. The reason SB21 is so significant is because it represented a major departure from the usual process by which Delaware law is made, which traditionally has allowed the Delaware judiciary, the national experts in corporate law, to slowly elaborate the law—to decide what it means and to respond to changing dynamics in the stock market and corporate governance. For decades, this process of corporate law developing through judicial review process has fostered stability and predictability and is an important part of what makes the state attractive to so many corporations and shareholders.

In the case of SB21, the legislature, responding to advocacy from some large corporations, made a very quick intervention to overturn decades of Delaware Supreme Court and Chancery Court precedent, principally related to controlling shareholder transactions. Academics have identified dozens of cases that they believe will no longer be good law after SB21.

So, the way this all happened has been extremely unsettling in terms of our expectations going forward for the development of the law in Delaware. It remains to be seen whether there will be new interventions like this from the legislature every time there is a major judicial opinion or trend that is not favored by the major corporations headquartered in Delaware. The process piece, in other words, is a big deal.

In terms of the impact of the law itself, remember that SB21 largely focuses on the rules governing corporate transactions—mergers, acquisitions, going-private deals, things like that. In that area, it has dramatically scaled back the checks on corporate transactions and the safeguards in place to prevent undue influence from a controlling shareholder. That is very significant for investors because those are deals that change the future of the company for better or worse. So, giving more deference to a board that is not independent and making these huge decisions is concerning.

But SB21 did not touch a major area of the law that is important to our firm and many of the funds that we work with, which is the whole area of corporate law devoted to directors' fiduciary duties of care, loyalty, and oversight and their obligation to ensure that their company follows the law and doesn't do things that bring disrepute to the company. Consequently, the bulk of shareholder derivative litigation that our firm has been involved in over the past decade—cases like Nikola, Alphabet, FirstEnergy, and Abbott—the major issues in those cases are unaffected by SB21.

SB21 did impose some limited restrictions on investors' rights to access a company's books and records, which are obviously important building blocks when you investigate cases. But candidly, the reality is that process has always been somewhat limited. And one of the ways in which our firm, I think, has really distinguished itself is in the strength of our investigations: our ability to develop cases by speaking to former employees, working with experts, doing intense factual research beyond the corporate books and records. So, we'll continue to do that and build impactful cases regardless of what happens with Delaware law.

> **"In terms of the impact of the law itself, … SB21 largely focuses on the rules governing corporate transactions—mergers, acquisitions, going-private deals, things like that. In that area, it has dramatically scaled back the checks on corporate transactions and the safeguards in place to prevent undue influence from a controlling shareholder."**

Richard
Returning to the process, the way the legislature acted, you're saying there's a risk that Delaware will effectively abandon the evolutionary approach that has served the state so well and have the legislature step in every time Delaware-based corporations feel the pendulum has swung too far in favor of shareholders.

Molly
Yes, absolutely. I don't think it's controversial to say that that is what happened in this case. There are documents showing meetings between the governor and large corporations that had left or threatened to leave Delaware, which led directly to this legislation being written and proposed. In that context, it's fair to ask whether this process will repeat itself or was this event so cataclysmic that the legislature will take a step back.

Another late-breaking twist is that shareholders have recently filed a case attacking SB21's constitutionality. Obviously, that will take time to resolve while the law remains in effect which adds another layer of uncertainty to the state of Delaware corporate law.

Richard
Is it true that while the forces behind SB21 were driven by a perceived need to stop corporations from de-incorporating and cutting into the $2 billion a year the state collects in franchise fees, the law's fast-tracked passage could conceivably have the opposite effect?

> **“SB21 did impose some limited restrictions on investors’ rights to access a company’s books and records, which are obviously important building blocks when you investigate cases. But candidly, the reality is that process has always been somewhat limited.”**

Molly
Yes, that is a possible consequence. The publicly stated motivation behind SB21 was to keep corporations in Delaware, to preserve Delaware as the leading state for incorporation, and to protect the franchise as the economic driver of the state. But because SB21 deviated from a time-honored process for making law and how far it went to favor controlling stockholders, it may lead some corporations to look elsewhere for a stable legal home.

But before we get ahead of ourselves, where do they reincorporate? Texas is making huge investments in business courts to woo companies. Same with Nevada. It remains to be seen whether there is a somewhat more balanced jurisdiction that emerges to provide a new option or if any company will want to go there, but the landscape for that kind of analysis has certainly changed because of SB21.

Finally, with Delaware now revealing the influence politics can have in the development of corporate law, investors may be more supportive of companies that want to reincorporate elsewhere. Indeed, the head of the International Corporate Governance Network said weakened protections for minority shareholders could “undermine the attractiveness of Delaware incorporated companies for investors.”

Richard
That seems like as good a place as any to stop. Thanks, Molly.

Molly
You’re welcome.

Molly J. Bowen is a partner in the Securities Litigation & Investor Protection practice group. Richard E. Lorant is the firm’s Director of Institutional Client Relations.

The Role of Special Litigation Committees in Shareholder Derivative Litigation

For shareholders seeking to police corporate misconduct, the right to assert derivative claims—to sue on behalf of a corporation against officers, directors, and third parties whose actions have harmed the company—is a critical corporate governance tool.

Derivative litigation empowers shareholders to enforce compliance with fiduciary duties and ensure managerial accountability. A stockholder can assert such derivative claims either by filing a derivative complaint on the company's behalf or by making a demand that the Board of Directors (Board) investigate and, if warranted, initiate a derivative action against the alleged wrongdoers. In either situation, the Board may appoint a Special Litigation Committee (SLC) which often becomes a central player in the investigation, any pending derivative litigation, and possible resolution of these claims.

To properly function, the SLC must be comprised of independent Board members. Once formed, the SLC should conduct a thorough investigation involving a review of internal documents, witness interviews, and consultations with independent counsel or experts, then produce a report of its findings and recommendations. The SLC's ultimate recommendation may provide grounds for rejecting the claims, settling the action, or continuing to prosecute the lawsuit. If the SLC report recommends dismissal, shareholder plaintiffs have the right to obtain discovery as to the independence of the SLC and the basis for its findings.

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> **Appointed by the board of directors facing accusations of corporate misconduct, a Special Litigation Committee often becomes a central player in the investigation and the resolution of any shareholder derivative action.**

Recently, Cohen Milstein has represented shareholder plaintiffs in several proceedings that illustrate the interplay between an SLC and a shareholder derivative litigation. In a pending stockholder derivative action involving Abbott Laboratories, plaintiffs allege a breach of fiduciary duties concerning the contamination of infant formula. An SLC appointed by Abbott's Board to investigate plaintiffs' claims moved to stay the case until it had finished its investigation. In partially denying the SLC's motion, the Court held that plaintiffs were entitled to discovery of the same documents provided to the SLC to prepare its report. The Court noted that "[T]his discovery is necessary

to prevent a special litigation committee from cherry-picking the facts highlighted in their report." Armed with the discovery they obtain through the ruling, shareholders will have the right to challenge the SLC's independence and conclusions if the SLC report seeks dismissal of the pending derivative litigation.

Similarly, Cohen Milstein recently filed a derivative action against officers and directors of Pegasystems Inc. related to a $2 billion judgment against the company for violating a competitor's trade secrets. After several shareholders made demands on the company to investigate the board and management, it appointed an SLC, which rejected bringing claims against the alleged wrongdoers. In response, shareholders filed derivative litigation challenging the SLC's report and independence.

> **Shareholder plaintiffs have the right to obtain discovery to challenge the Special Litigation Committee's independence from the board and challenge the basis for any conclusions the SLC reaches.**

In a different context, Cohen Milstein, on behalf of a shareholder client, recently sent a demand to a company's board to investigate and commence derivative litigation against a third party who was culpable for participating with the company's CFO in securities fraud. After an SLC investigation into potential claims, the board agreed to accept the demand and initiated litigation against the third party, which eventually settled for a substantial amount.

In sum, SLCs are a significant aspect of shareholder derivative litigation. They must be genuinely independent, procedurally thorough, and substantively fair. Shareholders, through the courts, must rigorously evaluate these attributes to ensure the integrity of the process and the protection of the corporation's and shareholders' interests.

Richard A. Speirs is Of Counsel in the firm's Securities Litigation & Investor Protection practice group.

The PSLRA at 30: How Investors and Securities Class Actions Have Been Impacted

An Interview with Daniel S. Sommers

Daniel S. Sommers, a Cohen Milstein partner and former co-chair of the firm's Securities Litigation & Investor Protection practice, is a highly regarded thought leader in securities class actions and investor rights. He is a member of the National Association of Public Pension Attorneys' Securities Litigation Committee and former chair of the Council of Institutional Investors' Markets Advisory Council, as well as a past chair of the District of Columbia Bar's Investor Rights Committee of the Corporation for the Finance & Securities Law Section. His nearly 40 years of experience gives him special perspectives having litigated securities class actions—both before and after the enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA".)

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Kate Fitzgerald: Tell us a little about the PSLRA and why it was enacted?

Daniel Sommers: The PSLRA had its genesis in the mid-1990s. It was drafted to address concerns about the utility and costs of securities class actions.

For example, there was a perception that securities class actions were generated by and for the benefit of plaintiffs' lawyers, that plaintiffs were often retail investors with relatively small investment losses who had little incentive to supervise the litigation and often were "repeat" or "professional" plaintiffs, and that many cases were filed too quickly, were poorly investigated, or simply lacked merit.

> **"The PSLRA has dramatically changed the landscape of securities class action litigation—especially from the investor perspective. As to the success or failure of the statute, the results have been mixed."**

There was also the perception that these cases imposed undue costs on issuers—especially the costs of discovery, which can be significant in securities class action cases.

In general, the intent of the PSLRA's proponents was to enact legislation that would eliminate or at least reduce what they perceived to be "meritless" cases; to establish procedures to slow down the speed with which cases can be filed; to replace so-called "lawyer driven" litigation with litigation led by larger, sophisticated institutional investors that have the capability and incentive to supervise litigation due to their a large financial interest in the case; and to reduce the agency costs of these cases—especially those related to the discovery process.

KF: Who advocated for and against passing the PSLRA?

DS: The PSLRA was advocated for by business groups, such as the U.S. Chamber of Commerce and Business Roundtable, as well public companies, especially high-tech companies, which saw themselves as frequent targets at the time. In opposition to the PSLRA were plaintiffs' lawyers, investor rights groups, and some academics who advocated for the importance of these cases to protect the rights of investors and argued that the proposed statute would preclude meritorious cases from proceeding.

Notably, this view was shared by President Clinton, who expressed his concerns about the proposed legislation and issued a veto. But that veto was overridden by Congress.

KF: Could you outline some of the more significant PSLRA provisions?

DS: Yes, the PSLRA contains many provisions that changed the way securities class actions were litigated. For example, the statute radically changed the process by which both the lead plaintiff and its counsel are appointed by the court.

Before the PSLRA, courts often gave control of cases to the investor that filed the initial case—regardless of the size of their investment or their loss, and regardless of the quality of their complaint or the capabilities of their counsel. In other cases, courts sometimes made judgments about which investor was best or had filed the best complaint or allowed various plaintiffs privately to agree on leading cases with groups of investors.

> **"While most initial cases are still filed by retail investors, the PSLRA clearly achieved one of its goals, as it has led to a surge in institutional investor participation."**

In response, the PSLRA created a very specific structure, methodology, and timeline that district courts must follow when appointing the lead plaintiff. This process remains unique to securities class action litigation.

For instance, the PSLRA directs courts to select as lead plaintiff the investor or group of investors with the greatest financial interest in the case, provided they also satisfy the class action adequacy and commonality requirements of Rule 23. This was a significant change from prior practice, where courts had significant discretion to appoint lead plaintiffs, and this change gave institutional investors a significant preference to be appointed as the lead plaintiff.

The PSLRA also established a 60-day window for investors to file lead plaintiff motions. This provision was intended to eliminate the race to the courthouse and to encourage sophisticated investors an opportunity to investigate the claims and to decide whether to lead these cases. Again, this was another mechanism that was intended to induce institutional investors to participate in these cases.

This was a significant change from prior practice where courts had significant discretion to appoint lead plaintiffs.

KF: That is a dramatic shift in procedure. How did the PSLRA impact discovery?

DS: The changes to the discovery process were also dramatic. The PSLRA imposed a mandatory stay of all formal discovery until defendants' motion to dismiss is denied. There are very limited exceptions to the discovery stay.

Previously, district court judges had discretion to permit discovery to proceed while a motion to dismiss was pending and investors could use information learned in discovery to support the claims alleged in the complaint. The PSLRA almost entirely eliminated this option from investors' arsenal. Now, investors and their counsel must marshal facts to support the claims in their complaint without any of the powerful discovery tools provided for by the Federal Rules of Civil Procedure.

KF: What else changed under the PSLRA?

DS: Another important change included in the PSLRA was the adoption of a heightened pleading standard that requires plaintiffs to plead their complaint with specific facts that give rise to a “strong inference” that each defendant acted with scienter—an intentional or reckless intent to deceive investors. This standard is to my knowledge higher than the standard in any other type of federal civil litigation and has resulted in investors’ counsel undertaking in-depth investigations to assemble very strong facts to support their claims. This change, along with the discovery stay provision, has presented a significant challenge to investors.

KF: And what about forward-looking statements?

DS: In general, the PSLRA immunized issuers from liability for forward looking types of statements, such as projections and forecasts about business plans or economic performance, if they were accompanied by “meaningful cautionary” language or if the information was “immaterial” to investors; or where the plaintiff fails to prove that the speaker made the statement with “actual knowledge” of its falsity.

> **“While both sides would still like to see material changes to the statute, there does not appear to be any public momentum for legislative change—although in our current political environment it is hard to predict what issues might take hold …”**

KF: Any other material changes?

DS: Yes, there are several other important provisions. For instance, the PSLRA clarified that investors had the burden to prove that false statements made by defendants caused investor losses. It also created a 90-day lookback cap on recoverable damages to prevent a perceived windfall for investors in situations where a corrective disclosure causes a drop in the stock price, but the stock price rebounds in the 90 days following the class period.

The PSLRA also changed prior practice by limiting the instances when joint and several liability would be available to plaintiffs only to situations in which there is a finding that the defendant knowingly violated federal securities laws.

The PSLRA further required that courts make findings at the conclusion of a case as to whether any party or their counsel filed documents that contained baseless arguments and whether, as a result, sanctions are appropriate.

Finally, the statute set requirements for settlement notices, including disclosures about potential recoveries had the case gone to trial and attorneys' fees.

KF: What has been the overall impact of the PSLRA on the role of institutional investors?

DS: As you can see, the PSLRA has dramatically changed the landscape of securities class action litigation—especially from the investor perspective. As to the success or failure of the statute, the results have been mixed, with some provisions being problematic for investors and others benefiting them.

Perhaps the greatest positive from the investor perspective has been caused by the lead plaintiff provision.

The PSLRA's lead plaintiff process has unquestionably resulted in sophisticated investors, including institutional investors, becoming more engaged in securities class actions. These investors include public pension funds (including public safety funds), Taft-Hartley funds, and large, non-U.S. funds.

While most initial cases are still filed by retail investors, the PSLRA clearly achieved one of its goals, as it has led to a surge in institutional investor participation. One study indicates that between 1995 and 2002 institutional leadership in these cases increased from virtually zero to about 27% of all cases. And between 2010 and 2012 institutional investors were appointed lead plaintiff in 40% of all cases. Our own internal analysis of 2024 filings confirms this data.

KF: What have been the implications of this increased participation by institutional investors?

DS: There have been significant beneficial consequences of this trend. The data shows that the increased participation of institutional investors is associated with lower dismissal rates and larger recoveries for investors. In fact, institutional investors have served as lead plaintiffs in virtually all the largest securities class action recoveries post-PSLRA. By this measurement, the PSLRA did achieve one of its most important objectives – encouraging large, meritorious cases to proceed.

In addition, there is evidence that more sophisticated investors are better able to negotiate attorney fee caps, lowering attorney fees and increasing per share investor recoveries.

By these measurements, the PSLRA has achieved its objective to control costs and fees and increase net investor recoveries—all of which benefits investors.

KF: What about the race to the courthouse issue?

DS: Eliminating the so-called "race to courthouse" has not been achieved. I think this is largely because the drafters of the PSLRA did not fully understand the dynamics of securities class actions. So, we still have a system where initial cases are filed shortly after the disclosure of an adverse event—

typically by a small retail investor. However, the initial filing does trigger the 60-day lead plaintiff filing window for other investors, including institutional investors, to step forward, which as I mentioned is a benefit to all investors.

KF: What about the case quality issue?

DS: Anecdotally, I have observed over the last 30 years that the quality of work from plaintiff lawyers has generally improved. In particular, we see this reflected in the factual specificity in operative complaints, especially those filed by institutional investors. This is another important argument for institutional investors to serve as lead plaintiffs.

KF: What about the impact of the automatic discovery stay?

DS: In terms of the automatic discovery stay provision, it met its stated objective: for plaintiffs, unfortunately, it has effectively thwarted their ability to obtain any formal discovery until resolution of the motion to dismiss.

Interestingly, however, it has encouraged plaintiffs' counsel to sharpen their pre-filing investigation skills. So, we are seeing more robust pre-filing investigations, such as obtaining information from witnesses—including former employees of the issuer—and other important information that is used to bolster the complaint's allegations. Unfortunately, the automatic discovery stay along with the statutory lead plaintiff process has increased the duration of these cases. For instance, the lead plaintiff process followed by the filing and litigation over an amended complaint can often take 6 months to a year before any formal discovery can proceed.

KF: Has there been a material drop in the number of filed cases?

DS: Simply put, no. There is no evidence that fewer cases have been filed post-PSLRA. On average around 225 securities class actions are filed per year, though obviously those numbers are higher in some years and lower in others.

KF: Are there any recent PSLRA changes or trends you anticipate?

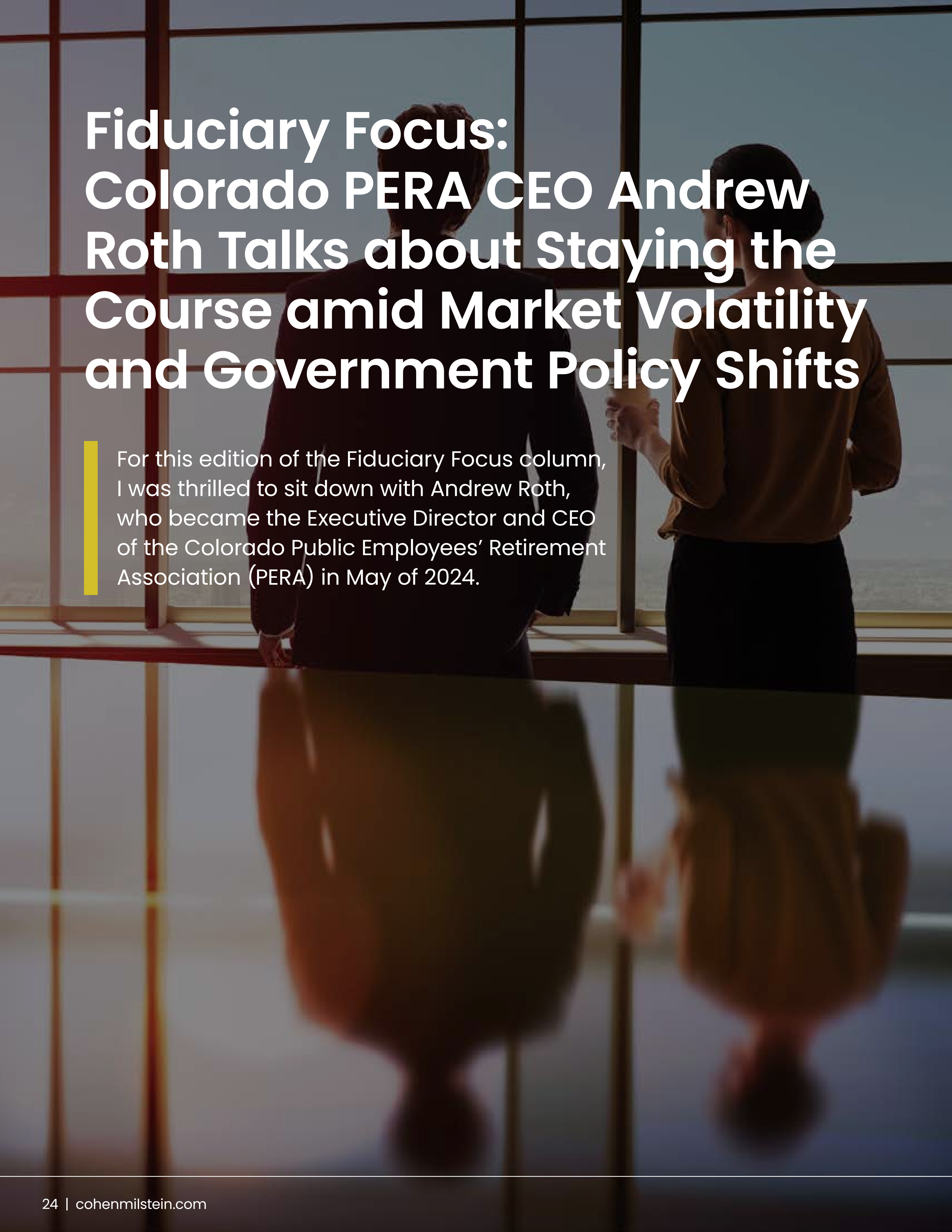
DS: I see nothing on the horizon. After 30 years, the PSLRA is well established and deeply engrained in securities law jurisprudence. Indeed, most lawyers and judges have never experienced securities class action litigation without the PSLRA.

While both sides would still like to see material changes to the statute, there does not appear to be any public momentum for legislative change—although in our current political environment it is hard to predict what issues might take hold in Congress and elsewhere.

So, it appears that the PSLRA, in its current form, is here to stay.

With that said, I anticipate that institutional investors will continue take on leadership positions—especially in cases involving serious allegations of misconduct and significant investor losses. From the investor protection point of view, this is certainly the most important and positive long-term consequence of the PSLRA. ■

Daniel S. Sommers is a partner in the Securities Litigation & Investor Protection practice group. Kate Fitzgerald is a Senior Manager Marketing Communications at Cohen Milstein.



Fiduciary Focus: Colorado PERA CEO Andrew Roth Talks about Staying the Course amid Market Volatility and Government Policy Shifts

For this edition of the Fiduciary Focus column, I was thrilled to sit down with Andrew Roth, who became the Executive Director and CEO of the Colorado Public Employees' Retirement Association (PERA) in May of 2024.

Andrew has deep experience in public pensions, having arrived in Denver from Austin, where he was the Deputy Director of the Teacher Retirement System of Texas (TRS). Prior to that, he served as the Benefits and Services Executive Officer at the California State Teachers' Retirement System (CalSTRS). Further evidencing his leadership role in the world of institutional investors, Andrew was recently elected to the Board of Directors of the Council of Institutional Investors (CII).

As you approach your first anniversary, how are you finding the transition to PERA, which is a bit smaller than TRS, but no less focused on the members and beneficiaries?

The transition from TRS to PERA has been greatly facilitated by a terrific executive team, supportive Board, and welcoming stakeholders. While PERA is a smaller organization than either CalSTRS or TRS in terms of assets under management and the number of both members and beneficiaries, what strikes me as unique is the complexity of the plan. Five divisions within the plan means five sets of distinct stakeholders, each with their own set of concerns. Complexity aside, PERA, like CalSTRS and TRS, is hyper-focused on its members, beneficiaries, and mission, which drives a strong collaborative culture that makes working here a rewarding experience.

> **"The biggest challenge we're facing in 2025 is the volatility in the market. When there's a lot of noise generated by relatively short-term market events, that cacophony can distract and disrupt focus on PERA's 30-year horizon and working toward the full funding of the plan."**

What would you say are the biggest challenges you are facing in 2025 as you assist the PERA Board in fulfilling their fiduciary responsibilities?

The biggest challenge we're facing in 2025 is the volatility in the market. PERA's funded status is below the median of US Public Pension funds, which amplifies market uncertainties and swiftly captures the attention of the plan sponsor (the Colorado General Assembly) and our stakeholders. A big part of my job involves supporting PERA's Board of Trustees with helpful information and

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guidance on complex investment, actuarial, and fiduciary concepts; when there's a lot of noise generated by relatively short-term market events, that cacophony can distract and disrupt focus on PERA's 30-year horizon and working toward the full funding of the plan.

Direction from Washington reflects very different approaches from those of the recent past, especially with changes in regulatory and economic priorities. How is PERA accommodating these adjustments in its planning?

Great question. PERA has historically, and continues to be, focused on generating the best risk-adjusted returns possible. We pay close attention to regulatory changes and economic priorities in both our state as well as in Washington. Shifts in priorities from either place result in the executive team and Board of Trustees making policy decisions as appropriate to accommodate the policy requirements generated either by our plan sponsor in the Colorado Legislature or by the federal government. PERA's talented investment team's focus on investing in what we know has served us well regardless of which direction the political winds blow.

There's no doubt that the focus on ESG & DEI priorities has changed significantly in the current political climate. In what way should institutional investors focus on developments in this area?

A timely question, and one that is on the minds of many people in the financial world. After years of focusing on making improvements in the DEI-related space, new direction from the federal government raises significant questions and debate, and related activities may now result in serious consequences. Many corporate entities and institutional investors have responded by dropping or repurposing DEI-related initiatives to avoid triggering penalties or negative interest from the federal government. ESG is a little more complicated as due diligence requires investors to consider risk, including risks that may be related to environmental, social, or governance factors. Sound investment principles and fiduciary duties require institutional investors (and really any serious investor) to comprehensively consider all risks that may impact returns. Poor governance, unsound practices, and disregard for rules and regulations will negatively impact investment returns, which in my opinion means institutional investors will continue to evaluate risk and make decisions accordingly.

> **"Sound investment principles and fiduciary duties require institutional investors … to comprehensively consider all risks that may impact returns. Poor governance, unsound practices, and disregard for rules and regulations will negatively impact investment returns, which in my opinion means institutional investors will continue to evaluate risk and make decisions accordingly."**

Artificial Intelligence (AI) is altering the way we think about accomplishing various tasks. Do you see this trend coming into play at PERA?

Yes, like most industries, public pension funds are considering AI technology and the use cases that can support and enhance our administration of the retirement plan benefits that are of crucial importance to our members and beneficiaries. While it undoubtedly has useful applications, AI requires scrutiny as its limitations and drawbacks are well documented and serious in nature. At PERA, we've established an AI policy and an AI council to evaluate the tools rapidly coming online in this space and assess how appropriate they are for our internal use. I'd describe PERA's utilization of AI-related tools as somewhat limited in scope but useful in terms of facilitating production-related tasks.

> **"At PERA, we've established an AI policy and an AI council to evaluate the tools rapidly coming online in this space and assess how appropriate they are for our internal use."**

You were recently elected to the Board of CII. How do you see this role as complimenting your role at PERA and assisting you in fulfilling your fiduciary duties?

As CEO, I am accountable for oversight of the entire organization, including the investment function. My previous roles in the public pension space were primarily focused on plan design, pension benefits, information technology, human resources, finance, shared services, and large-scale enterprise projects. Upon stepping into the CEO role at PERA, I wanted to lean in and deepen my investment knowledge. We are incredibly fortunate at PERA to have a talented and tenured investment team that has helped expedite this continued learning and development for me. Participating on the CII board provides me with an additional opportunity to expand my knowledge at an appropriate level about issues impacting institutional investors. This all helps me refine and calibrate the fiduciary lens through which I evaluate related issues affecting PERA and our important mission and purpose.

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

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UPCOMING EVENTS

May 17-20 | Michigan Association of Public Employee Retirement Systems Spring Conference

Detroit, MI – Richard Lorant

May 18-21 | National Conference on Public Employee Retirement Systems Annual Conference & Exhibition

Denver, CO – J.D. Davis and Richard Lorant

June 24-27 | National Association of Public Pension Attorneys Legal Education Conference

Denver, CO – Luke Bierman, Suzanne Dugan, Carol Gilden and Julie Reiser

June 25 | Oklahoma State Firefighters Association Annual Convention

Oklahoma City, OK – Richard Lorant

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