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Spring 2023

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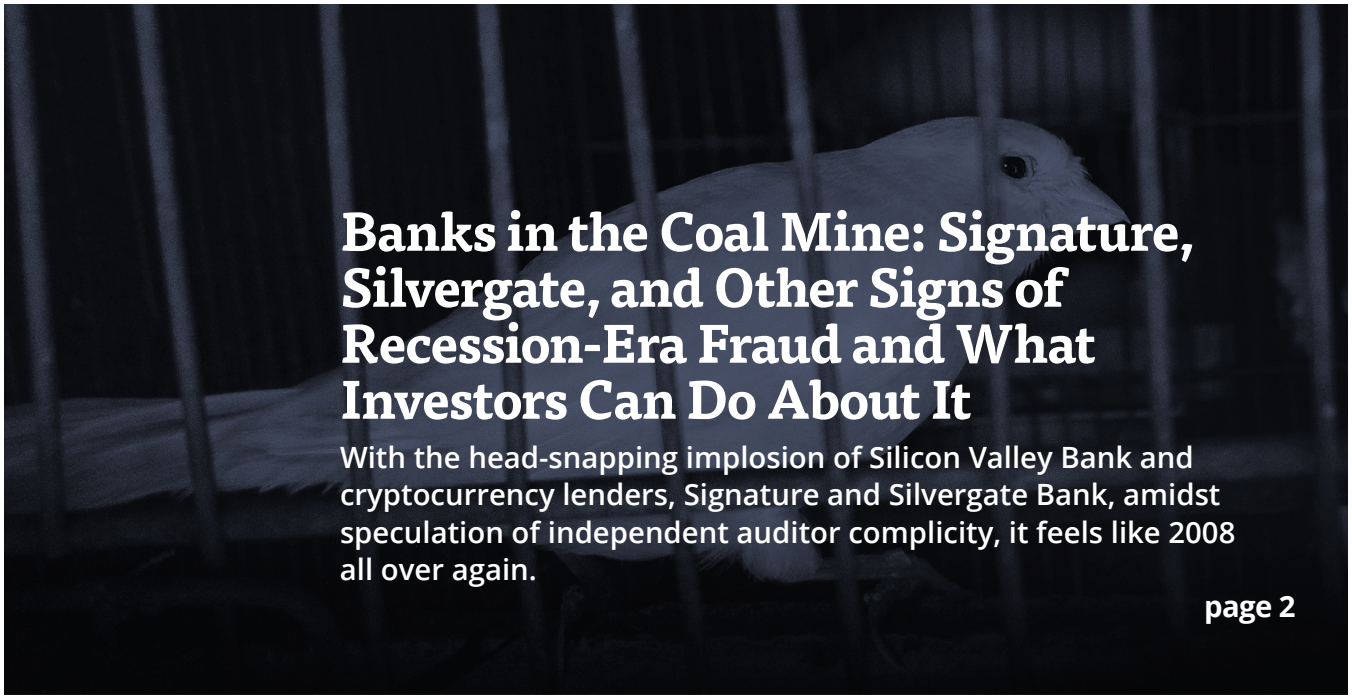

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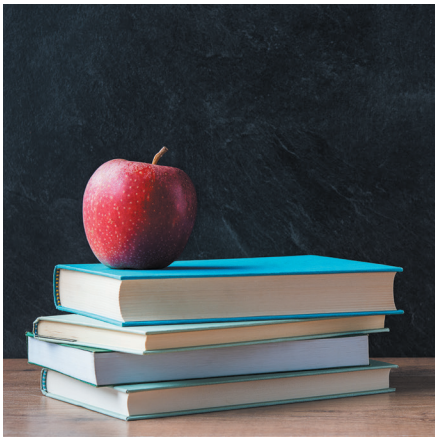

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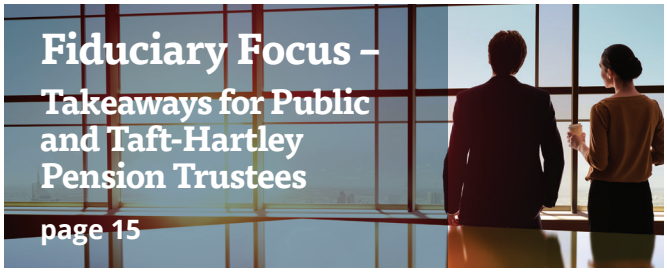

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Banks in the Coal Mine: Signature, Silvergate, and Other Signs of Recession-Era Fraud and What Investors Can Do About It

With the head-snapping implosion of Silicon Valley Bank and cryptocurrency lenders, Signature and Silvergate Bank, amidst speculation of independent auditor complicity, it feels like 2008 all over again. Only this time, we're in a post-Dodd-Frank world and Barney Frank is on the board of Signature.

Recession seems all but certain, as the Fed is still expected to push interest rates higher by a 0.25 percentage point later this March, despite the recent run on the banks. In many parts of the country and industry sectors, it's already here—from layoffs in the tech sector, which experienced over 95,000 job losses in 2022, up by a whopping 649% from 2021 according to the Challenger Report, a tumbling housing sector, and stalling retail and manufacturing sectors.

In a shrinking economy a few things are certain, as history seems to repeat itself...recessions generally reveal frauds that were previously concealed by rapid growth and fat profit margins as suggested by Warren Buffet's famous quote, "when the tide goes out, you see who's swimming naked."

Since the 1980s, a recession has occurred on average every six to eight years. In addition to uncovering fraud, recessions have been a catalyst for lawmakers and regulators to re-assess corporate governance reform, the integrity of free markets and investor protections in hopes of protecting investors and the economy from malfeasance.

Notable recessionary reforms to mitigate malfeasance and fraud include Sarbanes Oxley (SOX) and Dodd-Frank. SOX is the direct result of the ending of the "irrational exuberance" in the stock market, as SEC Chair Alan Greenspan coined it in 1996, which foretold the 2001 implosion of the dot.com bubble, as well the revelation that Enron was cooking its books with the help of its auditor, Arthur Andersen. Dodd-Frank was borne from the subprime mortgage crisis, which flowed into the Great Recession of 2008, and the cascade of revelations of malfeasance from insider trading and fraud at Countrywide, one of the largest subprime mortgage issuers at the time, to the downfall of Bear Stearns and Lehman Brothers. Published in July 2010, Dodd-Frank

also addressed the May 2010 flash crash, which erased almost $1 trillion in market value in U.S. stock markets.

One can only speculate that the irrational exuberance in highly unregulated cryptocurrencies and the spectacular collapse of FTX and Alameda Research and technology related frauds like Theranos and Nikola, and the looming government investigations into potential bank-related fraud and improprieties carried out by SVB, Signature, and Silvergate and their auditors, are a preview of schemes that will be hallmarks of the 2023 recession. This may also, again, result in various regulatory reforms—including increasing safeguards on banks the size of SVB and Signature.

DESPITE REFORMS AND REGULATORY PATCHES, CONGRESS AND REGULATORS CAN NEVER SEEM TO KEEP UP WITH THE CONSTANT FLOW OF FRAUD AND MALFEASANCE.

Despite reforms and regulatory patches, Congress and regulators can never seem to keep up with the constant flow of fraud and malfeasance.

This is where investors play a critical role.

Investor Impact

In their efforts to recoup losses, investors can play a key role to hold banks, market makers and other bad actors accountable through civil litigation.

Recessionary fraud has had a staggering impact on investors. The Great Recession, the worst U.S. economic disaster since the Great Depression, wiped out nearly $8 trillion in value in the U.S. stock market between late 2007 and 2009. While the Department of Justice was able to extract $200 billion in civil fines and penalties from culpable financial institutions, little went to investors.

IN THEIR EFFORTS TO RECOUP LOSSES, INVESTORS CAN PLAY A KEY ROLE TO HOLD BANKS, MARKET MAKERS AND OTHER BAD ACTORS ACCOUNTABLE THROUGH CIVIL LITIGATION.

Through private litigation, specifically securities class actions governed by the Private Securities Litigation Reform Act (PSLRA), investors were able to recoup not insignificant losses from banks, mortgage lenders and other complicit financial entities. For instance, of the 113 mortgage backed securities (MBS) settlements achieved by government agencies, insurers, and investors between 2011 and 2017, 24 were securities class actions filed by investors, who in turn, were able to recover more than $3.9 billion.

Congress has endorsed such investor actions. When the PSLRA was enacted, Congress recognized that "[P]rivate lawsuits promote public and global confidence in our capital markets and help…to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs" and are "an indispensable tool" used to "protect investors and to maintain confidence in the securities markets."

The Supreme Court has, in its words, "repeatedly [] emphasized that implied private actions provide 'a most effective weapon in the enforcement' " of the securities laws and are "a necessary supplement to Commission action."[1]

[1] *(Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 310 (1985), citing 3 J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 128 S. Ct. 761, 778 (2008))

The SEC has also been supportive of the efforts of private litigants. For example, in 1995, SEC Chairman Arthur Levitt in his testimony before the Senate on the PSLRA recognized that "[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program."

Indeed, empirical analysis confirms the value of private securities litigation in that they "provide greater deterrence against more serious securities law violations compared with the SEC."

Hindsight is the Best Insight

This reliance on private actions holds true for some of the other biggest frauds in recent history. In actions related to the giant Enron fraud, the SEC recovered $440 million, while private attorneys recovered around $7.3 billion for investors. Similarly, in suits related to the accounting fraud at Worldcom, the SEC recovered $750 million, while private attorneys representing investors recovered $6.1 billion for their clients.

In an even more dramatic example, private attorneys recovered approximately $3.2 billion for investors harmed by the massive fraud at Cendant and the SEC recovered nothing—though the Department of Justice did prosecute, convict, and send to prison Cendant's Chief Executive Officer.

While all of this may sound like ancient history, in the court of law it's not and provides an important roadmap for investors on how to effectively prosecute such cases going forward.

The Next Wave of Litigation

The PSLRA is an important tool for investors. It is also an important tool for the courts, as it raises the burden of proof for cases to be filed. As a result, plaintiffs' firms must undertake extensive pre-trial due diligence to ensure an iron-clad case before a case is filed before the courts.

With that said, securities litigation against the holding companies of SVB, Signature, and Silvergate and their auditors is all but certain. On the other hand, cryptocurrency-related filings which have marginally increased over the past several years, according to Stanford Securities Class Action Clearing House's 2022 Year in Review, have yet to yield meaningful results for investors.

Investors, particularly institutional investors, should also be monitoring the SEC and CFTC's efforts to address high-frequency trading market manipulation schemes, such as spoofing, which takes milliseconds to destabilize a company's stock and/or global financial markets. The record-breaking $920 million settlement against JP Morgan for its admitted

wrongdoing in manipulating metal futures and Treasury securities has been an important win for regulatory enforcers.

So, while lawmakers and regulatory agencies have ripe and ample opportunities to crack down on bad actors, investors can help affect meaningful change by keeping an eye out for signs of fraud and leveraging impactful litigation. ■

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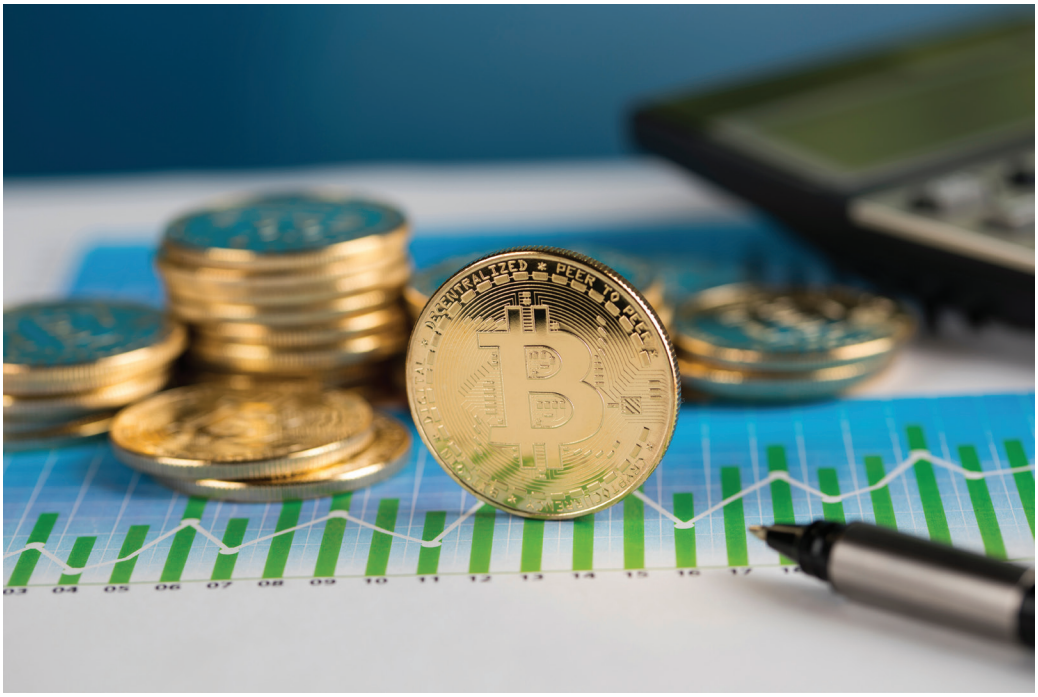

COHEN MILSTEIN REPRESENTS INVESTORS IN STOCK-FRAUD SUIT IN COMPANY AT NEXUS OF CRYPTO AND BANKING

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PLAINTIFFS ALLEGE THAT SILVERGATE BANK MISLED INVESTORS ABOUT THE COMPANY'S COMPLIANCE FRAMEWORK, ANTI-MONEY-LAUNDERING SAFEGUARDS, AND CUSTOMER IDENTIFICATION PROGRAMS.

In a securities fraud lawsuit straddling the volatile U.S. banking and crypto sectors, Cohen Milstein represents shareholders of Silvergate Capital Corporation, the holding company for Silvergate Bank, a federally registered depository and lender to major cryptocurrency platforms, including FTX.

On February 28, Judge Cathy Ann Bencivengo of the U.S. District Court for the Southern District of California appointed Cohen Milstein co-lead counsel in the case, *In re Silvergate Capital Corporation Securities Litigation*. Cohen Milstein client Wespath Funds Trust was among the institutional investors collectively appointed lead plaintiff in the same order.

Plaintiffs allege that Silvergate Bank made materially false and misleading statements and omissions about the company's compliance framework, as well as its anti-money laundering and customer identification programs. Silvergate investors claim they incurred significant losses starting November 7, 2022, when they learned that Silvergate's compliance practices were lax and had exposed it to potential money laundering and criminal activity.

Then, on January 5, 2023, Silvergate disclosed that the collapse of its client, FTX, had led to a run on Silvergate Bank, causing its deposits to decline by $8.1 billion, or over 68%, over the three months ending in December 2022. This led to an acute liquidity crunch, which forced Silvergate to sell off illiquid securities for a loss of over $700 million and to borrow $4.3 billion in short-term advances from Federal Home Loan Banks.

Originally filed on January 19, 2023, the complaint alleges violations of the Securities Exchange Act of 1934, U.S. Securities and Exchange Commission Rule 10b-5, and other federal statutes. The class period covers those damaged investors who acquired shares

of Silvergate Capital Corporation Class A common stock between November 11, 2020 and January 5, 2023 and those who acquired shares traceable to secondary public offerings in January and December 2021.

As a federally regulated banking institution, Silvergate is subject to a wide variety of federal regulations, such as anti-terrorism and anti-money laundering regulation by the Office of Foreign Assets Control and the Financial Crimes Enforcement Network, including the Bank Secrecy Act and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

WHEN SILVERGATE DISCLOSED THAT FTX'S COLLAPSE HAD CAUSED A DISASTROUS RUN ON THE BANK, ITS SHARE PRICE PLUMMETED 42.7% IN A DAY, ACCORDING TO THE COMPLAINT.

A critical component of Silvergate's cryptocurrency business was its one-of-a kind service called the Silvergate Exchange Network ("SEN"). The SEN was the cryptocurrency world's closest approximation to the SWIFT banking system, which allowed Silvergate customers to send U.S. dollars and euros between eligible counterparty SEN accounts at any time of day using the company's application.

Throughout the Class Period, Plaintiffs allege that Silvergate repeatedly touted its "strong regulatory compliance program" as a foundation for its growth—including its anti-money laundering policies and Know Your Customer procedures.

The truth began to emerge on November 7, 2022, after the market closed, when Silvergate announced the sudden and unexplained demotion of Chief Risk Officer Tyler Pearson, who is the son-in-law of CEO Alan J. Lane. Social media commenters noted Silvergate's exposure to FTX and Alameda Research LLC and questioned whether Pearson's demotion indicated a lack of adequate oversight of Silvergate's regulatory compliance. In response to this news, the price of Silvergate stock declined by $11.54 per share, or 22.6%, from a closing price of $50.96 per share on November 7, 2022, to a closing price of $39.42 per share on November 8, 2022, on unusually high trading volume.

Over the following months, additional disclosures regarding the company's lax compliance practices reached investors, further impacting the price of Silvergate stock. Then, on January 5, 2023, the company disclosed that the collapse of FTX had led to a run on Silvergate Bank and its disastrous liquidity crunch, selloff, and borrowing spree. In response to this news, Silvergate shares plummeted $9.38, or 42.7%, in a single day on unusually high trading volume, from a closing price of $21.95 on January 4 to a closing price of $12.57 on January 5.

The bad news has continued for Silvergate as the year progresses. In February, news emerged that the U.S. Justice Department had opened a criminal fraud investigation into Silvergate over accounts it hosted for FTX and Alameda Research, both founded

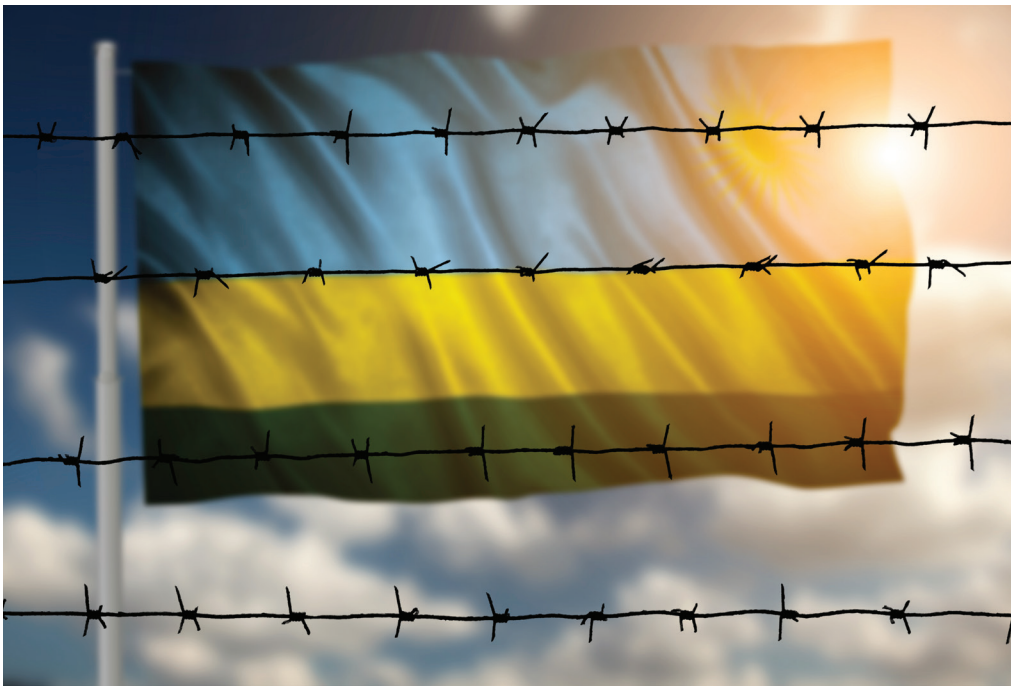
by Sam Bankman-Fried, who is awaiting trial on a range of federal charges. Silvergate shares again dropped on the news.

On March 1, Silvergate revealed in an SEC filing that it would not be able to file its annual report on time and was "analyzing certain regulatory and other inquiries and investigation" to determine whether it could remain viable. A week later, on March 8, the company announced that it planned to "wind down operations and voluntary liquidate the Bank." In the statement, Silvergate said liquidation was its best course "[i]n light of recent industry and regulatory developments."

Cohen Milstein and its co-counsel are in the process of preparing an amended complaint that will allege violations of the Securities Act and Exchange Act against the Silvergate defendants and investment bankers involved in the two secondary public offerings. ■

Carol V. Gilden is a Partner in Cohen Milstein's Securities Litigation & Investor Protection practice.

ACTIVIST PAUL RUSESABAGINA, REPRESENTED BY THE FIRM IN U.S. LAWSUIT, FREED BY RWANDAN GOVERNMENT



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RUSESABAGINA'S RELEASE CAME AMID U.S. GOVERNMENT NEGOTIATIONS AND A WEEK AFTER A LAWSUIT BY HIS FAMILY, WHOSE LEGAL TEAM INCLUDES TWO COHEN MILSTEIN ATTORNEYS, WAS ALLOWED TO PROCEED.

The government of Rwanda announced on March 24 via *The New York Times* that Paul Rusesabagina, famed "Hotel Rwanda" human rights activist, political dissident, and winner of the U.S. Presidential Medal of Freedom, had been released from prison after two and a half years. His release came amid U.S. government negotiations and a week after a federal lawsuit brought by his family, whose legal team includes two Cohen Milstein attorneys, was allowed to proceed.

Renowned for his heroic role in sheltering more than 1,200 Tutsis at the luxury hotel he managed in the city of Kigali during the 1994 Rwandan genocide, which became the subject of the movie "Hotel Rwanda," Rusesabagina, 68, became an outspoken critic of the increasingly autocratic leadership of Rwanda's President Paul Kagame. His political dissent did not go unnoticed.

As alleged in the family's U.S. federal complaint, in 2020, Rusesabagina, a Belgian citizen and permanent resident of the United States, was invited to Burundi to speak at churches and with civic leaders about his experiences during the 1994 genocide. He left his home in San Antonio, Texas for a routine trip. While flying to his destination, he was kidnapped. His flight was redirected to Rwanda, where he was arrested and subsequently imprisoned, tortured, and subjected to a sham trial, which resulted in a 25-year prison sentence—essentially, a life sentence, given his age and history of cancer.

The kidnapping was widely condemned by the United States, the European Union, the United Nations, and human rights groups worldwide.

The United States was engaged in diplomatic efforts to free Paul

Rusesabagina, and formally declared him "wrongfully detained" under the Robert Levinson Hostage Recovery and Hostage-taking Accountability Act.

At the same time, his wife and six children enlisted the services of an international legal team of human rights lawyers, including Agnieszka Fryszman and Nicholas Jacques of Cohen Milstein.

On February 22, 2022, his family filed suit in U.S. District Court for the District of Columbia against the government of Rwanda, President Kagame, and three high-ranking Rwandan officials who planned the kidnapping, alleging the illegal surveillance of the Rusesabagina family, misrepresentation, false imprisonment, and other violations of the federal Electronic Communications Privacy Act, Torture Victim Protection Act (TVPA), and Foreign Sovereign Immunity Act (FSIA).

On March 16, 2023, the Court held that the plaintiffs' claims could move forward against the three Rwandan officials: Brig. Gen. Joseph Nzabamwita, the Secretary General of Rwandan National Intelligence and Security Services (RNISS); Colonel Jeannot Ruhunga, the head of the Rwandan Investigative Bureau (RIB); and Johnston Busingye, then-Minister of Justice and Attorney General of Rwanda.

One week later, after extensive negotiations with the United States, Rwanda commuted Rusesabagina's sentence. On March 29, 2023, after two-and-a-half years in captivity, he returned home to his family in the United States.

While nobody outside the Rwandan government can know what tipped the balance in its decision, some observers have given credit to the U.S. litigation, in which the judge had just ruled that defendants could not shield themselves through sovereign immunity.

As detailed by William S. Dodge, U.C. Davis Law professor and member of the Department of State's Advisory Committee on International Law, in the Transnational Litigation Blog, on March 16,

> *According to news reports, the United States had been negotiating with Rwanda for months, attempting to secure Rusesabagina's release. It is telling that the negotiations succeeded just a week after Judge Leon decided that the case could go forward.*
>
> *…the* Rusesabagina *case shows that human rights litigation can sometimes support rather than hinder U.S. diplomacy. We may never know precisely what finally convinced Rwanda to free Paul Rusesabagina. But the prospect of continuing litigation in U.S. courts and the possibility of ending that litigation must surely have influenced the Rwandan government.*

> ***"[t]he* Rusesabagina *case shows that human rights litigation can sometimes support rather than hinder U.S. diplomacy."***
>
> **WILLIAM S. DODGE,**
> **U.C. DAVIS LAW PROFESSOR**

Significantly the District Court found the government officials were not entitled to sovereign immunity and would have to respond to the litigation, including discovery and trial, in the District of Columbia.

The Court agreed with plaintiffs that the two officials from the RNISS and RIB were not entitled to immunity because they were not heads of state, heads of government, or foreign ministers. Nor were they Rwandan diplomats. The Court also determined that the third official, who is presently Rwanda's High Commissioner to the United Kingdom, although a diplomat, was also not entitled to diplomatic immunity in United States courts given that his function was not affiliated with the United States.

Second, the Court held that the defendants' conduct of illegally tapping Rusesabagina's family phones in the United States and fraudulently inducing him to leave the United States on a trip he thought would take him to Burundi met the minimum contacts with the United States criteria to fulfill the Fifth Amendment's due process clause.

In addition to Cohen Milstein attorneys Fryszman and Jacques, the Rusesabagina family's legal team included Steve Perles and Edward MacAllister from the Perles Law Firm and Brady Eaves of the Eaves Law Firm.

Cohen Milstein is delighted to have been of service to the Rusesabagina family. We are also appreciative of the industry recognition for our work, including being named to *American Lawyer's* Litigator of the Week—Runners-Up and Shout Outs. ■

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SECURITIES LITIGATION 101:

THE LEAD PLAINTIFF'S GUIDE TO 30(B)(6) DEPOSITIONS

Initially, participating in a deposition can seem daunting and fraught with peril. But with the proper preparation and support of counsel, the person being deposed, known as the deponent, can overcome these worries and fulfill this important lead plaintiff duty. This article seeks to demystify the process and provide practical guidance for pension funds and other lead plaintiff entities to follow as they prepare for their first deposition.

Process

Depositions are one of the key tools the parties use to obtain evidence. A deposition is essentially a formal interview conducted under oath and transcribed by a court reporter. The attorney taking the deposition will ask the deponent a series of questions designed to learn new information, gain admissions on key issues, and expose credibility issues. Depositions of corporations, government agencies, and other entities including pension plans are referred to as 30(b)(6) depositions, after the Federal Rule of Civil Procedure that governs the process.

In a securities fraud class action, it is virtually certain that the defendant will request the lead plaintiff's deposition. The deposition offers defendants an opportunity to test fitness to serve as the lead plaintiff and represent the class. The defendant will send the lead plaintiff a notice identifying the topics the defendant intends to cover at the deposition. The topics typically fall into two categories: (1) lead plaintiff's investments and (2) lead plaintiff's oversight of the litigation. In particular, defendants will explore how the lead plaintiff makes investment decisions, oversight of outside asset managers, any contemporaneous knowledge of the alleged fraud, knowledge of the allegations, diligence in monitoring the litigation, and oversight of outside counsel.

Frequently, defendants' 30(b)(6) notice will seek testimony that is improper, such as a topic that is irrelevant to the litigation, would be excessively burdensome to testify about, or would reveal attorney-client privileged communications. In those situations, your counsel can lodge objections to the notice, negotiate with defendants, and involve the court if necessary to ensure the potential deposition topics are appropriate.

In responding to the deposition notice, the lead plaintiff will have to designate an individual or individuals to testify on its behalf. Sometimes, a lead plaintiff will designate one person to discuss the fund's investments in the defendant company and a different person to testify on oversight of the litigation. Importantly, the deponent does not need to have personal knowledge or have been personally involved in the underlying events; the entity can educate an individual on the noticed topics so she can competently testify on its behalf.

Preparation

In the weeks preceding the deposition, the lead plaintiff and its designated deponents will need to prepare for the deposition. Counsel will guide the preparation which typically includes reviewing a small collection of documents, such as:

THIS ARTICLE SEEKS TO DEMYSTIFY THE PROCESS AND PROVIDE PRACTICAL GUIDANCE FOR PENSION FUNDS AND OTHER LEAD PLAINTIFF ENTITIES TO FOLLOW AS THEY PREPARE FOR THEIR FIRST DEPOSITION.

- The deposition notice and specific topics of testimony;
- Key case documents, such as the complaint, motion to dismiss decision, class certification opening brief, and any lead plaintiff declaration;
- Documents that the lead plaintiff produced to defendants;
- Documents that the lead plaintiff's asset manager produced to defendants; and
- Public documents relevant to the litigation, including investment policies, board minutes, or other documentation of the decision to initiate litigation and any news articles or social media statements about the litigation.

It may also be useful for the lead plaintiff designee to review any noteworthy prior court decisions involving the entity, especially any negative rulings regarding the lead plaintiff's ability to serve as a representative of the class.

In addition, if the deponent was not directly involved in the activities likely to be the subject of questions (such as the selection and oversight of outside counsel), they may wish to speak to individuals who were involved in that process or are knowledgeable about it. Finally, the preparation should address anything specific to the case or the lead plaintiff.

The lead plaintiff may also wish to coordinate with counsel to practice answering likely questions so they have a sense of the rhythm and a chance to work out some initial nerves. Counsel can also explain why defendants will ask certain questions so you have context to understand defendant's goals.

The Deposition

At the deposition, the court reporter will swear in the lead plaintiff's designated deponent and the opposing attorney will ask a series of questions. The lead plaintiff's attorney can object if they believe a question was improper, but with a few exceptions, the lead plaintiff is required to answer the questions notwithstanding the objection.

To successfully handle the deposition, the keys are to listen carefully to the question that is asked, ask for clarification if you do not understand, leave time for counsel to object, and then answer honestly. While it is useful to bear in mind a question's likely purpose to avoid stepping into traps, it is not the deponent's job to try to outwit opposing counsel. Focus on answering the questions and allow your counsel to handle the strategy.

At the end of the defense attorney's questioning, your counsel can ask you questions. In many depositions, this is unnecessary. But if some testimony was unclear or could be misinterpreted, your counsel may ask you about it to ensure that the record is clear and accurate.

After the deposition, the court reporter will send you the transcript to review. If you believe any testimony has been transcribed incorrectly, you can note the errors to be included with the deposition transcript.

TO SUCCESSFULLY HANDLE THE DEPOSITION, THE KEYS ARE TO LISTEN CAREFULLY TO THE QUESTION THAT IS ASKED, ASK FOR CLARIFICATION IF YOU DO NOT UNDERSTAND, LEAVE TIME FOR COUNSEL TO OBJECT, AND THEN ANSWER HONESTLY.

Conclusion

It is critically important to the class that the lead plaintiff participate in the 30(b)(6) deposition and take it seriously, as it is one of a lead plaintiff's most important responsibilities. Although a deposition may initially seem intimidating or excessively time-consuming, with the appropriate guidance and support from counsel, it can be very manageable. ■

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FIDUCIARY FOCUS

THE SEVENTH CIRCUIT DECISION WILL DIRECTLY AFFECT RETIREMENT PLANS SUBJECT TO ERISA WHILE OFFERING IMPORTANT TAKEAWAYS FOR ALL PENSION PLAN FIDUCIARIES.

HUGHES V. NORTHWESTERN OFFERS IMPORTANT TAKEAWAYS FOR PUBLIC AND TAFT-HARTLEY PENSION TRUSTEES

Late last month, the United States Court of Appeals for the Seventh Circuit revived an Employee Retirement Income Security Act of 1974 ("ERISA") lawsuit by participants in two Northwestern University's 403(b) retirement savings plans. Following guidance from the Supreme Court's 2022 *Hughes v. Northwestern* decision, a three-judge panel reinstated two of the seven original ERISA claims against Northwestern, which administers approximately $5 billion in assets in the two plans. Specifically, the three-judge panel reconsidered three claims by participants regarding breach of fiduciary duties: "that Northwestern (1) failed to monitor and incurred excessive recordkeeping fees, (2) failed to swap out retail shares for cheaper but otherwise identical institutional shares, and (3) retained duplicative funds." On March 23, the Appeals Court ruled the first two claims could proceed. The revival of these claims could result in more litigation about fiduciary decisions made by retirement plans. The decision will directly affect Taft-Hartley retirement plans, which are subject to ERISA; it also offers reminders of how all pension plan officials should carry out their fiduciary duties to participants.

As background, in August 2016, participants filed suit against Northwestern's two retirement plans alleging seven different ERISA violations, including violations of duty of prudence, ERISA-prohibited transactions, and Northwestern officers' failure to monitor fiduciaries. Among the seven claims, two are especially worth mentioning given their applicability to all types of pension plans. First, participants claimed a breach of fiduciary duty by Northwestern because of excessive recordkeeping fees. Participants asserted Northwestern paid four to five times more for recordkeeping fees by using an uncapped revenue-sharing arrangement. According to plaintiffs, Northwestern should have reduced its expenses by combining two recordkeepers into one and leveraging its larger size to bargain for fee rebates. Second, participants alleged a breach of fiduciary duty by Northwestern because it failed to monitor the plans' investments. Here, participants argued the plans held too many funds that resulted in confusion among participants and generated additional expenses. Like the first claim, plaintiff argued Northwestern should have leveraged its size to bargain for replacing retail shares for lower-cost institutional-class shares of the same funds.

In May 2018, a federal district court judge dismissed the case. In March 2020, the Seventh Circuit affirmed the district court's dismissal. But in January 2022, the Supreme Court unanimously vacated the Seventh Circuit's decision and remanded the case back to the district court. In a brief six-page

opinion, Associate Justice Sonia Sotomayor reaffirmed and applied the Supreme Court's holding from its 2015 *Tibble v. Edison* decision. Her opinion held that courts must determine whether participants alleged a violation of the duty of prudence as set out in *Tibble*. As part of its inquiry, courts must determine whether a plan fell short of its fiduciary duty by failing to routinely monitor investments and recordkeeping costs and remove imprudent investments or recordkeepers within a reasonable time. The Supreme Court also rejected the Seventh Circuit's reliance on the so-called "categorical rule" where "providing some low-cost options eliminates concerns about other investment options being imprudent."

Although *Hughes v. Northwestern* arises from ERISA law that does not directly apply to public pension funds, the most recent Seventh Circuit opinion remains highly instructive for those pension funds because ERISA reflects relevant trust law and the common law that is applicable to all pension plans. As such, ERISA provides guidance for and is a standard for public pension plan conduct. Specifically, the Seventh Circuit's decision to revive two breach of fiduciary duty claims against Northwestern provides two key takeaways for all retirement plan fiduciaries, regardless of whether they are subject to ERISA.

THE REVIVAL OF THESE CLAIMS COULD RESULT IN MORE LITIGATION ABOUT FIDUCIARY DECISIONS MADE BY RETIREMENT PLANS.

First, pension funds should establish and follow processes governing their investment plan and carefully document such processes. The *Hughes* opinion states that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." The language from *Hughes* is a reminder that pension plan fiduciaries should create and adhere to procedures when evaluating investment options and recordkeepers. Furthermore, such processes should be well-documented. It's important to remember that a duty of prudence requires fiduciaries to follow a standard of conduct, not outcome. In other words, the courts will not judge pension plans by the results of their investment decisions, but by the process to reach such decisions.

Second, a pension plan that maintains large numbers of investment options, including low-cost options, could still violate its fiduciary duty. In *Hughes*, the Supreme Court stated the Seventh Circuit erred by focusing on the fact that Northwestern's savings plans offered different funds, including low-cost index funds. The Supreme Court then stated that "plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options." The *Hughes* decision is a reminder that pension plans should routinely review their investment funds and remove poorly performing funds. In the event pension plans elect to keep funds with higher fees, they should again document the process and state the reasons for doing so. ■

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COHENMILSTEIN IN THE NEWS

- "Perdue Plant Workers' $60M Wage-Fixing Deal Gets Initial OK," *Law360* – April 3
- "Commissions Lawsuit Now a Class Action, Greatly Increasing Its Scope," *Real Estate News* – March 30
- "Sheepherder Asks Nev. Justices To OK Pay for On-Call Hours," *Law360* – March 27
- "$626M Flint Deal Gets Final OK From Michigan State Judge," *Law360* – March 23
- "Judge Grants Class Action Status in GM Faulty Transmission Lawsuit," *Detroit Free Press* – March 20
- "Credit Suisse Must Face One Investor Class In XIV Crash Suit," *Law360* – March 17
- "Ford F-150 Buyers Say Defect Caused Trucks to Guzzle Oil," *Law360* – March 15
- "KPMG Under Pressure After Clean Audits of SVB, Signature Bank," *Bloomberg Tax* – March 14
- "Dugan Denies Dismissal for Former Casino Queen Owners in Pension Fraud Suit – Madison," *St. Clair Record* – March 14
- "Janssen Must Hand Over Records in Kickback Case," *Law360* – March 10
- "ESOP Managers Can't Force Airline Workers to Arbitrate Suit," *Law360* – March 9
- "Class Action OK to Continue vs Vee Pak, Staffing Network Over Alleged Discrimination vs Black Temp Workers," *Cook County Record* – March 7
- "Merck Hit With 3rd-Party Payor Suit Over Vaccine Bundling," *Law360* – March 7
- "2 Firms Tapped to Rep Investors in Silvergate Laundering Suit," *Law360* – March 1
- "Plaintiffs Attorneys Expect 2023 to Be Record-Setting Year for Securities Litigation Results," *The National Law Journal* – February 10
- "Centene Cuts $215M False Claims Act Deal with Calif. AG," *Law360* – February 9
- "10th Circ. Won't Force Arbitration in Radiology Co. ESOP Row," *Law360* – February 9
- "Manufacturing Co. Strikes Deal in ESOP Share Inflation Suit," *Law360* – February 9
- "10th Circ. Seeks Clarity on Overstock.com Crypto Offering," *Law360* – February 9
- "Google Faces Rare Jury Trial in DOJ Bet on Public's Tech Unease," *Bloomberg* – January 27
- "Travel Co. Workers Agree To $8.7M Deal to End ESOP Suit," *Law360* – January 27
- "ESOP's Arbitration Clause Conflicts With ERISA, Judge Says," *Law360* – January 27
- "McDonald's Ruling Means New Risks for Del. Corp. Officers," *Law360* – January 27

AWARDS & ACCOLADES

- Michelle C. Yau Appointed to *Law360*'s 2023 Benefits Editorial Advisory Board
- Litigator of the Week Runners-Up and Shout Outs – *American Lawyer*
- *Lawdragon* Names 9 Cohen Milstein Lawyers to 2023 Leading Plaintiff Consumer Lawyer List
- Envision ESOP 10th Cir. Win – Litigator of the Week Runners-Up – *The AmLaw Litigation Daily*
- Carol V. Gilden Named a 2023 *Illinois Super Lawyer*
- Nine Cohen Milstein Attorneys Named to the 2023 *Lawdragon*'s 500 Leading Lawyers in America List

UPCOMING EVENTS

- **April 23-26** | North America's Building and Construction Trades Unions Legislative Conference, Washington Hilton Hotel, Washington, DC – Arthur Coia and Christopher Lometti
- **May 21-24** | National Conference on Public Employee Retirement Systems Annual Conference & Exhibition, Marriott New Orleans, New Orleans, LA – Richard Lorant and Christina Saler
- **June 4-7** | Massachusetts Association of Contributory Retirement Systems Spring Conference, Resort and Conference Center, Hyannis, MA – Richard Lorant

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Jan E. Messerschmidt is an associate in the firm's Securities Litigation & Investor Protection practice and focuses his practice on representing institutional and individual shareholders in derivative lawsuits and securities class actions. Prior to joining the firm in 2021, Jan represented both plaintiffs and defendants in a range of issues involving antitrust, securities, cybersecurity, contract, personal tort, and malicious prosecution claims. For this issue of the **Shareholder Advocate,** ***Jan spoke with Editor Christina Saler.***

I grew up in ... Cape Elizabeth, Maine, which is on the coast of Casco Bay outside of Portland. Cape Elizabeth is probably best known for the Portland Head Light, which is the oldest lighthouse in Maine. Living on the coast, my brother and I spent our free time sailing, camping, fishing, and playing ice hockey. Maine is a great place to grow up, but every summer we were lucky enough to visit my mother's family in Sweden where I have dual citizenship. When it came time for college, I knew I wanted a completely different environment, so I headed to New York University. Urban life suits me, and my wife and I now live in Washington, DC.

I decided to become a lawyer ... on the campaign trail. After college, I worked on several political campaigns, including President Obama's in 2008, where I was based in North Dakota and Wisconsin, as well as races for city council, mayor, attorney general, and governor in New York and Maine. On each of the campaigns, I met many attorneys who often were not just working to elect policymakers, but also devising, shaping, and implementing policy. Those relationships were major inspirations for wanting to go to law school.

As a plaintiff's lawyer ... I always feel like I'm on the right side of the dispute. Having worked on both the defense and plaintiff side, I much prefer the plaintiff's side. Our cases give us the opportunity to be more creative, to try to expand the law rather than narrow it, and to right wrongs and obtain a recovery for victims of fraud and other misconduct, something that makes our work meaningful to me.

My favorite TV series are ... *Ted Lasso* and *Succession*. My wife and I prefer to watch an episode of *Succession* first and then follow it with *Ted Lasso* because *Succession* is so dark with such unsavory characters and *Ted Lasso* is just light and funny. ■

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