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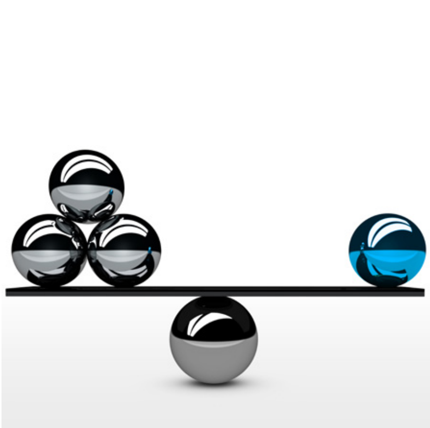

Directors and Officers Face Potential Liability under Section 14(a) for their Roles in Ohio's Largest Bribery Scheme

On May 11, 2021, in *Employees Retirement System of the City of St. Louis v. Jones*, No. 2:20-cv-04813, 2021 WL 1890490 (S.D. Ohio May 11, 2021), Chief Judge Algenon L. Marbley of the U.S. District Court for the Southern District of Ohio upheld all claims in a shareholder derivative action seeking to hold certain current and former FirstEnergy Corp. ("FirstEnergy" or the "Company") directors and officers accountable for their roles in orchestrating one of Ohio's largest public bribery schemes. Specifically, the Court found Plaintiffs had sufficiently alleged Section 14(a) derivative claims under the Securities Exchange Act of 1934 concerning FirstEnergy's issuance of false and misleading proxy statements from 2018 through 2020 related to its shareholders' annual meeting and the re-election of the Company's directors. This determination allows the Court to exercise supplemental jurisdiction over Plaintiffs' state law claims, including breach of fiduciary duty and unjust enrichment related to the same criminal scheme. The Court then held that demand was futile on the majority of the FirstEnergy board of directors (the "Board") under Rule 23.1 of the Federal Rules of Civil Procedure, and that Plaintiffs had standing to assert their state law claims too.

Cohen Milstein Sellers & Toll PLLC represents one of the Plaintiffs in the litigation. This decision represents an important victory for investors because the Court further expanded upon the view that a company's directors cannot solicit shareholders' votes using a misleading proxy statement that conceals a company's illegal activities and the company's true financial status. The Court held that a misleading proxy statement can provide an "essential link" in causing harm to a company for purposes of establishing Section 14(a) claims in the context of the re-election of directors.

Here, Plaintiffs alleged that between 2017 and 2020, FirstEnergy and its most senior officers paid more than $60 million in illegal contributions to Ohio's Speaker of the House, Larry Householder, and other Ohio public officials, in exchange for favorable legislation designed to bail out FirstEnergy's failing nuclear plants. The U.S. Attorney for the Southern District of Ohio described this plot as "likely the largest bribery, money laundering scheme ever perpetrated against the people of the State of Ohio." Notably, the bribery scheme began a few days after Householder assumed his office on January 3, 2017, when FirstEnergy flew him to Washington, D.C. on the Company's private jet to attend President Trump's inauguration. Within two months of this trip, FirstEnergy and its subsidiaries began making payments to Householder's secret 501(c)(4) entity. Householder then pushed through House Bill 6 ("HB6"), which according to the FBI, was "essentially created to prevent the shutdown

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THE COURT HELD THAT A MISLEADING PROXY STATEMENT CAN PROVIDE AN "ESSENTIAL LINK" IN CAUSING HARM TO A COMPANY FOR PURPOSES OF ESTABLISHING SECTION 14(A) CLAIMS IN THE CONTEXT OF THE RE-ELECTION OF DIRECTORS.

of [FirstEnergy's] nuclear plants." Notably, HB6 included a "decoupling" provision that ensured a guaranteed level of income for FirstEnergy, and therefore established a floor for Defendants' performance-based compensation. Even before charges of misconduct arose, the public strongly opposed HB6, and it was called the "worst energy bill of the 21st century." In fact, FirstEnergy spent $38 million to defeat a referendum of HB6, while the media publicly questioned the propriety of FirstEnergy's relationship with Householder. Plaintiffs further alleged that the directors were aware of shareholders' concerns about the Company's lobbying efforts and campaign contributions and took affirmative actions to conceal them. None of these material facts were disclosed in the Company's proxy statements and other public filings.

The bribery scheme was exposed on July 21, 2020, when formal criminal charges were brought against Householder and others, and reports of FirstEnergy's involvement surfaced soon thereafter. The Company's stock value fell 45% in the aftermath, eliminating approximately $12 billion of stockholder value. In addition, securities analysts estimate that the Company faces between $500 million and $1 billion in future sanctions. By late April 2021, the Company had disclosed that it was in early discussions with federal prosecutors about a deferred prosecution agreement.

In the May 2021 ruling, Judge Marbley found that Plaintiffs had satisfied all four elements for their Section 14(a) claims related to the Company's 2018, 2019, and 2020 proxy statements used to solicit FirstEnergy shareholders' votes for director re-election and executive compensation approval. Judge Marbley explained how Plaintiffs' allegations meet the heightened pleading requirements of the PSLRA because they alleged that "the Director Defendants caused the Company to issue Proxy Statements that concealed an illegal bribery scheme, its implications for FirstEnergy's overall business and financial health, and the deficient governance practices at the Company that allowed it to proceed." The Court then rejected Defendants' argument that Plaintiffs must plead scienter (intent to deceive) for their level of culpability. Instead, Judge Marbley held that negligence was the appropriate standard to apply for Section 14(a) liability against corporate insiders, like Defendants. The Court further determined that Plaintiffs had alleged that the directors were at least negligent due to the numerous "red flags" that put them on notice of the bribery scandal, including public news reports and concerns raised by the Company's shareholders.

Next, the Court held that the proxy statements issued by the directors were an "essential link" to causing harm to FirstEnergy. As the Court acknowledged, the Sixth Circuit has yet to define "transaction causation" in the context of the re-election of directors and executive compensation approval and Section 14(a). However, the Court rejected Defendants' argument that Plaintiffs cannot establish causation because other courts find that injuries caused by "mismanagement or breach of fiduciary duty" are not redressable under proxy rules. Instead,

JUDGE MARBLEY EXPLAINED HOW PLAINTIFFS' ALLEGATIONS MEET THE HEIGHTENED PLEADING REQUIREMENTS OF THE PSLRA BECAUSE THEY ALLEGED THAT "THE DIRECTOR DEFENDANTS CAUSED THE COMPANY TO ISSUE PROXY STATEMENTS THAT CONCEALED AN ILLEGAL BRIBERY SCHEME, ITS IMPLICATIONS FOR FIRSTENERGY'S OVERALL BUSINESS AND FINANCIAL HEALTH, AND THE DEFICIENT GOVERNANCE PRACTICES AT THE COMPANY THAT ALLOWED IT TO PROCEED.

the Court relied on those cases where courts had found causation in similar circumstances to those alleged by Plaintiffs. In fact, Judge Marbley highlighted how "[h]ere, Plaintiffs allege far more than more mismanagement or an isolated bad act. Rather, they have set forth in detail that the Director Defendants perpetrated an illicit bribery scheme and caused substantial risk to the Company that eventually resulted in the loss of nearly half of its stock value."

THE COURT THEN CONCLUDED THAT BECAUSE PLAINTIFFS HAVE SUFFICIENTLY PLED DEMAND FUTILITY THEY HAD STANDING TO BRING ALL THEIR STATE LAW CLAIMS. THE COURT, THUS, DENIED DEFENDANTS' MOTION TO DISMISS ON ALL COUNTS.

After upholding Plaintiffs' Section 14(a) claims, the Court then determined that those claims shared a common nucleus of operative facts with Plaintiffs' state law claims because they all related to the same criminal scheme. The Court, therefore, exercised supplemental jurisdiction over the state law claims to determine whether Plaintiffs had adequately alleged demand futility under Rule 23.1 of the Civil Rules of Procedure.

Notably, the Court held that Plaintiffs had met their burden to show demand futility in two ways. First, the Court found that Plaintiffs' allegations were plausible that a majority of the Board was directly overseeing the Company's most senior officers' illicit political activities, including the five members of the Corporate Governance Committee. Second, the Court found that the complaint's allegations were also excused demand because a majority of the Board faces a substantial likelihood of liability, since they acted with reckless disregard for the Company's best interest. Specifically, Judge Marbley held that Plaintiffs' "allegations together support the Court's inference that a majority of the Director Defendants recklessly disregarded their duties to the Company and allowed the criminal scheme to continue unchecked." The Court then concluded that because Plaintiffs have sufficiently pled demand futility they had standing to bring all their state law claims. The Court, thus, denied Defendants' motion to dismiss on all counts.

This decision as an important ruling in the area of proxy statement disclosures and solicitation of stockholder votes as the Court found a direct causal link between the misleading proxy statement and issues of voting on director elections and executive compensation—issues of paramount importance in the area of corporate governance. ■

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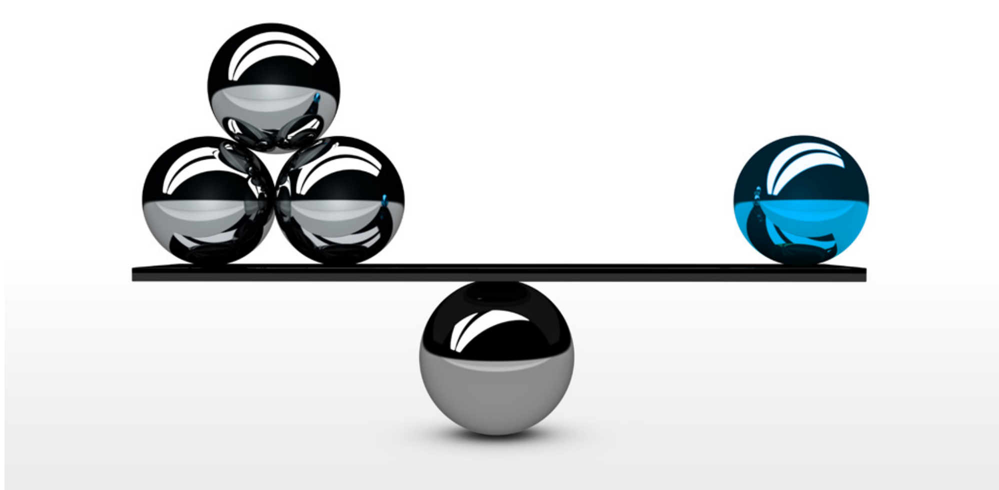
THE ESCALATING LITIGATION INVOLVING ACTUARIAL EQUIVALENCE ON TAFT-HARTLEY PLANS: NO END IN SIGHT



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The January 2020 edition of the *Shareholder Advocate* discussed important fiduciary liability concerns related to the actuarial equivalence requirements of ERISA. This article revisits the subject and provides an overview of court rulings that occurred in the past 18 months.

Actuarial Equivalence Explained

Actuarial equivalence is a computation that means that, all else being equal, all optional forms of benefits offered by a pension plan have the same economic value as each other. Practically speaking, two forms of pension benefits are actuarially equivalent if the present value of all the monthly payments that are likely to be paid to a retiree are equal in value; this calculation is done using two primary actuarial assumptions: an interest rate and a mortality table. The interest rate discounts the value of future payments, while the mortality table provides the anticipated length of time the future payments will be made based on the life expectancy of a person at a given age.

Significantly, ERISA requires the value of all optional forms to be ***actuarially equivalent*** to the value of a single life annuity beginning at normal retirement age.[1] And whether a plan violates ERISA's actuarial equivalence rules turns on whether the actuarial assumptions used to calculate all optional forms of benefits are reasonable. On the question of whether a pension plan's actuarial assumptions are reasonable, courts have considered whether those assumptions have been updated to reflect current trends in mortality and interest rates.

ERISA Litigation Alleging Non-Actuarially Equivalent Benefits

To date, eleven (11) class action lawsuits have been filed asserting ERISA violations for the failure to pay actuarially equivalent pension benefits. To date, all lawsuits in this area have involved corporate pension plans. The vast majority

1 Those provisions include ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), ERISA § 203(a), 29 U.S.C. § 1053(a), ERISA § 205(a) & (d)(1)(B), 29 U.S.C. § 1055(a) & (d)(1)(B) and § 206(a)(3), 29 U.S.C. § 1056(a)(3).

TO DATE, ELEVEN (11) CLASS ACTION LAWSUITS HAVE BEEN FILED ASSERTING ERISA VIOLATIONS FOR THE FAILURE TO PAY ACTUARIALLY EQUIVALENT PENSION BENEFITS.

BECAUSE CONTINUED LITIGATION IN THIS AREA IS LIKELY, ERISA PENSION PLAN TRUSTEES SHOULD REVIEW THEIR PLAN DOCUMENTS AND WORK WITH THEIR ACTUARY TO CONSIDER WHETHER THE ACTUARIAL ASSUMPTIONS USED BY THE PLAN ARE REASONABLE.

survived motions to dismiss in jurisdictions around the country, including: *Torres v. American Airlines, Inc.* (N.D. Tex.); *Smith v. U.S. Bancorp* (D. Minn.); *Cruz v. Raytheon Company* (D. Mass.); *Belknap v. Partners Healthcare System, Inc.* (D. Mass.); *Duffy v. Anheuser Bush* (E.D. Mo.); *Berube v. Rockwell Automation, Inc.* (E.D. Wis.); *Herndon v. Huntington Ingalls Industries, Inc., et al.*, (E.D. Va.); *Masten v. Met Life* (S.D.N.Y) and *Scott v. AT&T Inc.* (N.D. Cal).

Only two courts have granted motions to dismiss: *DuBuske v. PepsiCo, Inc.* (S.D.N.Y.) and *Brown v. UPS* (N.D. Ga.). But both dismissals were based upon procedural rather than substantive issues and in the PepsiCo case, the plaintiffs were given leave to replead.

Torres v. American Airlines and the *Smith v. U.S. Bancorp* were the first two cases where class certification was contested. In both, the proposed classes were not certified. In *U.S. Bancorp*, shortly thereafter, the parties announced they had reached an undisclosed settlement in principle.

The first major settlement for the failure to pay actuarially equivalent benefits came in February 2021, in *Cruz v. Raytheon Company*. In this case, the plaintiffs challenged Raytheon's use of 1971 mortality tables to calculate JSAs. Raytheon has agreed to pay $59.2 million to more than 10,000 participants and beneficiaries. The settlement followed the district court's denial of the motion to dismiss.

Recommendations

Because continued litigation in this area is likely, ERISA pension plan trustees should review their plan documents and work with their actuary to consider whether the actuarial assumptions used by the plan are reasonable. It is important to document all steps a plan takes to evaluate the reasonableness of the plan's actuarial assumptions in the event that litigation ever ensues.

As you consider these issues, Cohen Milstein's ERISA/employee benefits group is available to assist with a review of the actuarial assumptions in your retirement plan(s). ■

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IN *SET CAPITAL*, SECOND CIRCUIT REINSTATES INVESTORS' CLAIMS AGAINST ISSUERS OF POPULAR 'FEAR INDEX' SECURITY

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SIGNIFICANTLY FOR INVESTORS, THE APRIL 2021 DECISION CREATED POSITIVE JURISPRUDENCE FOR INVESTORS SEEKING TO BRING SO-CALLED "SCHEME LIABILITY" CLAIMS UNDER SECTIONS 10B-5(A) AND (C) OF THE SECURITIES EXCHANGE ACT OF 1934 ("EXCHANGE ACT"), AN AREA WHERE CASE LAW HAS BEEN SPARSE.

A recent ruling by the Second Circuit Court of Appeals in *Set Capital LLC v. Credit Suisse Group AG*, 996 F.3d 64, 77–78 (2d Cir. 2021) revived claims that financial giant Credit Suisse Group AG ("Credit Suisse") had manipulated the market for a popular security that, oddly enough, allowed investors to *bet against* an index reflecting expectations of upcoming stock market volatility. Significantly for investors, the April 2021 decision created positive jurisprudence for investors seeking to bring so-called "scheme liability" claims under Sections 10b-5(a) and (c) of the Securities Exchange Act of 1934 ("Exchange Act"), an area where case law has been sparse. Cohen Milstein Sellers & Toll PLLC serves as co-lead counsel for the putative class in this case and briefed and argued the case before the Second Circuit.

A Product Whose Popularity Created Problems

Credit Suisse issued and sold a very popular Exchange Traded Note ("ETN") formally named the VelocityShares Daily Inverse VIX Short-Term ETN, but more commonly known by the nickname XIV. XIV was a volatility-linked financial product associated with the VIX Index, sometimes referred to as Wall Street's "fear index" or "fear gauge." The value of XIV is derived from the inverse value of the daily returns of the S&P 500 VIX Short-Term Futures Index ("VIX Futures Index"), which tracks a portfolio of first- and second-month VIX futures contracts. Generally speaking, when the relevant VIX futures contracts underlying the VIX Futures Index decrease in value by 1%, the XIV notes increase in value by 1%, and vice versa. So, when VIX goes one way, XIV goes the other—hence its clever nickname, VIX spelled backwards. To remove some of this volatility risk from its books, Credit Suisse decided to hedge the risk. And the more XIV Credit Suisse issued, the more it needed to hedge. One way to hedge the risk was to buy the underlying VIX futures contracts. The problem for Credit Suisse was XIV's popularity. XIV became a huge product, which correspondingly

THE COMPLAINT ALLEGED THAT CREDIT SUISSE KNEW, BASED ON PRIOR EVENTS AND OTHER DATA, THAT ITS MASSIVE SALES OF XIV WOULD CREATE A CORRESPONDINGLY MASSIVE NEED TO HEDGE THAT, IN A TIME OF VOLATILITY, WOULD FORCE BUYING OF LARGE AMOUNTS OF VIX FUTURES THAT, IN TURN, WOULD DRIVE DOWN THE PRICE OF XIV EVEN FURTHER.

increased Credit Suisse's need to hedge. The danger was that one of the main ways to hedge that risk, purchasing VIX Futures, could drive up the value of the VIX Futures indexes if done in high enough volume, thus further driving down the value of XIV and creating a vicious cycle.

According to the complaint investors filed in this matter, that is exactly what happened, in dramatic fashion. On June 30, 2017, Credit Suisse offered an additional 5,000,000 XIV notes to investors. On January 29, 2018, Credit Suisse offered an additional 16,275,000 notes on top of the 10,793,880 XIV notes already outstanding. This dramatically increased Credit Suisse's need to hedge. On February 5, 2018, XIV prices dropped due to an increase in volatility—a drop that accelerated due to a massive purchase of VIX futures. In a single day, the price of XIV crashed by 96%. Credit Suisse then declared an Acceleration Event that effectively delisted the security. The Complaint alleged that Credit Suisse knew, based on prior events and other data, that its massive sales of XIV would create a correspondingly massive need to hedge that, in a time of volatility, would force buying of large amounts of VIX futures that, in turn, would drive down the price of XIV even further. To quote Adam Levine, who pithily described the allegations in his *Bloomberg* column: "1. [Credit Suisse] sold notes that would go down when VIX futures went up. 2. Then [Credit Suisse] bought a ton of VIX futures, pushing their prices up. 3. Investors in the notes lost everything. 4. [Credit Suisse] made a bunch of money."[1] In the Offering Documents for these XIV notes, while Credit Suisse acknowledged that its hedging activity "could affect" the value of VIX Futures index, it also stated that it "had no reason to believe" that any impact would be "material."

Investors filed suit, alleging violations of Rules 10b-5(b) of the Exchange Act of 1934 for false and misleading statements made by Credit Suisse, Section 11 of the Securities Act of 1933 for false and misleading statements in the prospectus, and 10b-5(a) and (c) of the Exchange Act for the entire manipulative scheme. The District Court dismissed the claims in their entirety, but the Second Circuit, in an opinion issued April 27, 2021, largely reversed the District Court, allowing most of the claims to move past the motion to dismiss. *See Set Cap.*, at 68–69 (2d Cir. 2021).

The most important part of this opinion, from the perspective of an investor, is likely its ruling on the 10b-5(a) and (c) or "scheme liability claims." 10b-5(a) and (c) claims are broader than 10b-5(b) claims in that they do not require misrepresentations or omissions. Despite being broader than 10b-5(b) claims, they are brought far less frequently, resulting in sparse case law regarding scheme liability claims. The key quotation from *Set Capital* is the following

1 https://www.bloomberg.com/opinion/articles/2021-05-04/under-armour-earnings-were-a-bit-misleading?sref=1kJVNqnU

> *Open-market transactions that are not inherently manipulative may constitute manipulative activity when accompanied by manipulative intent . . . . To the extent Credit Suisse claims it hedged for a legitimate purpose, its position contradicts the complaint. As we discuss in detail below, Set Capital specifically alleges that Credit Suisse executed its hedging trades on February 5 for a manipulative purpose—to trigger a liquidity squeeze that would destroy the value of XIV Notes.*"
>
> SECOND CIRCUIT COURT OF APPEALS

holding:

> Credit Suisse argues that the complaint fails to allege any "artificial" impact on the price of XIV Notes because its hedging trades were "done openly" for the legitimate purpose of "manag[ing] risk," not deceiving investors. To be sure, it is generally true that short selling or other hedging activity is not, by itself, manipulative—even when it occurs in high volumes and even when it impacts the market price for a security. But here, the complaint alleges more than routine hedging activity: It alleges that Credit Suisse flooded the market with millions of additional XIV Notes for the very purpose of enhancing the impact of its hedging trades and collapsing the market for the notes. In this context, it is no defense that Credit Suisse's transactions were visible to the market and reflected otherwise legal activity. Open-market transactions that are not inherently manipulative may constitute manipulative activity when accompanied by manipulative intent. In some cases, as here, "scienter is the only factor that distinguishes legitimate trading from improper manipulation." To the extent Credit Suisse claims it hedged for a legitimate purpose, its position contradicts the complaint. As we discuss in detail below, Set Capital specifically alleges that Credit Suisse executed its hedging trades on February 5 for a manipulative purpose—to trigger a liquidity squeeze that would destroy the value of XIV Notes.

Set Cap. at 77–78 (internal citations omitted).

This is important for three reasons. It re-affirmed the flexibility and adaptiveness of 10b-5(a) and (c) to cope with novel schemes, it illustrated that scheme liability can protect investors in non-traditional investments, and it expanded the concept of open-market fraud to the Second Circuit.

Recently, in *Lorenzo v. SEC*, 587 U.S. ___ (2019), the Supreme Court also made clear that the scheme liability provisions "capture a wide range of conduct[,]" *id.* at 6; "even a bit participant in the securities market may be liable under [Rule] 10b-5 so long as all the requirements for primary liability . . . are met[,]" *id.* at 12 (internal quotation marks and citations omitted); and in drafting and passing the federal securities laws, "Congress intended to root out all manner of fraud in the securities industry[,]" *id.* at 13. In *Set Capital*, Credit Suisse was alleged to have executed a novel scheme that harmed investors because of the relationship between two securities—XIV and VIX futures—both of which were recent creations. *Set Capital*, one of the first circuit decisions to address scheme liability post-*Lorenzo*, re-affirms that securities fraud, no matter how novel, still falls under the remit of 10b-5.

In their papers, Credit Suisse also argued that XIV was an extraordinarily risky product designed for professional traders and that investors essentially assumed the risk that the product would fail abruptly and they would lose their entire investment. In reviving investors claims, the Second Circuit in *Set Capital* reaffirmed the principal that securities fraud is unacceptable and actionable for *any* securities—no matter how esoteric or risky.

Finally, in *Set Capital* the Second Circuit adopted the concept of open-market fraud. Whether or not otherwise legal conduct can constitute manipulation if the intent is to manipulate is a question that is currently actively being debated amongst the Courts. *See, e.g., Legitimate Yet Manipulative: The Conundrum of Open-Market Manipulation* by Gina-Gail S. Fletcher Duke Law Journal. https://dlj.law.duke.edu/article/legitimate-yet-manipulative-fletcher-vol68-iss3/ at 485 (noting divergence of views in the Courts on this issue). *Set Capital* moves the Second Circuit into line with the D.C. Circuit and out of sync with the Third Circuit. *See, e.g*, *Koch v. S.E.C.*, 793 F.3d 147, 153–54 (D.C. Cir. 2015), *cert. denied*, 577 U.S. 1235, 136 S.Ct. 1492, 194 L.Ed.2d 586 (2016) (holding that a "burst of trading" on the open market, combined with manipulative intent, was enough to violate the Exchange Act); *GFL Advantage Fund, Ltd.*, 272 F.3d at 205 (explaining that market manipulation depends on the activity rather than the intent). Given the circuit split, there is a chance that this will be an issue eventually settled by the Supreme Court.

For all these reasons, *Set Capital* is both an important decision and a positive step for investors. ■

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FEDERAL JUDGE DISMISSES LATEST LAWSUIT SEEKING TO LEGITIMIZE FORCED ARBITRATION

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COHEN MILSTEIN WAS AMONG THE LAW FIRMS WORKING ON BEHALF OF INSTITUTIONAL INVESTOR CLIENTS CONCERNED ABOUT THE POTENTIAL REPERCUSSIONS OF THE LAWSUIT, WHICH WAS THE LATEST IN A LONG LINE OF INITIATIVES LED BY HARVARD LAW SCHOOL PROFESSOR HAL S. SCOTT TO CURB SHAREHOLDER RIGHTS AND "OVERREGULATION."

A federal judge has quashed a high-profile attempt to force Johnson & Johnson to present shareholders with a proposal requiring the use of arbitration, instead of the courts, to resolve their legal disputes with the company.

In his June 30, 2021 Memorandum Opinion and Order, Judge Michael A. Shipp of the U.S. District Court of New Jersey granted Defendants' motion to dismiss a complaint filed by Harvard Law School Professor Hal S. Scott and the Doris Behr 2012 Irrevocable Trust ("Trust"). Plaintiffs in *The Doris Behr 2012 Irrevocable Trust, et al., v. Johnson & Johnson* sought declaratory and injunctive relief from Johnson & Johnson for allegedly violating Section 14(a) of the Securities Exchange Act by excluding the Trust's proposal to change the company's bylaws from the proxy materials issued for its April 2019 shareholder meeting.

Public pension funds and their advocates mobilized to oppose the lawsuit, which offered the strange spectacle of a shareholder recurring to the courts to prevent future investors from doing the same. The New Jersey Attorney General, the California Public Employees' Retirement System and the Colorado Public Employees' Retirement Association all intervened on Johnson & Johnson's behalf in asking the judge to dismiss the claims. Cohen Milstein was among the law firms working on behalf of institutional investor clients concerned about the potential repercussions of the lawsuit, which was the latest in a long line of initiatives led by Scott to curb shareholder rights and "overregulation."

Before the April 2019 shareholder meeting, Johnson & Johnson had sought and received a "no-action letter" from the Securities and Exchange Commission supporting its decision to shelve the forced arbitration proposal presented by Scott. The New Jersey Attorney General had also asked the SEC to allow Johnson & Johnson to exclude the proposal, opining that it would violate New Jersey state law. Judge Shipp stayed the case in late 2019 to allow the Delaware Supreme Court to issue its decision in *Salzberg v.*

Sciabacucchi, reopening the case in June 2020 after it was decided. Scott's second amended complaint cited *Salzberg*, saying the decision invalidated arguments by Defendants and the New Jersey Attorney General that the forced arbitration proposal, if adopted, would violate New Jersey law. The second amended complaint sought declaratory relief—asking the Court to issue a declaration that the forced arbitration proposal would be legal under federal and New Jersey law—and dropped Plaintiffs' previous petition for injunctive relief.

In his 10-page decision dismissing Plaintiffs' complaint in its entirety, Judge Shipp sided squarely with Defendant-intervenors who argued that the Trust's claims should be rejected on multiple grounds. First, the Court agreed with Defendant-intervenors that Plaintiffs' demand for declaratory relief was moot since Johnson & Johnson excluded the proposal from proxy materials for its 2019 annual meeting and declaratory relief "cannot be obtained for alleged past wrongs." He also agreed that Plaintiffs' request for declaratory relief was not ripe for consideration "because any controversy with respect to a proposal that the Trust might submit in connection with future shareholder meetings is hypothetical on future events, including this Court issuing a declaration that the proposal is legal under both federal and state law." On the question of whether Plaintiffs deserve declaratory relief, Judge Shipp said the Trust would not "face hardship if the Court refuses to rule on the legality of the Trust's proposal" and because "the requested declaratory relief would amount to an advisory opinion," which federal courts are not entitled to grant.

THE VICTORY FOR INVESTORS COMES AMID SIGNS THAT THE SEC MAY CONSIDER FORMALIZING ITS TRADITIONAL OPPOSITION TO PUBLIC CORPORATIONS THAT SEEK TO INCLUDE FORCED ARBITRATION CLAUSES IN THEIR GOVERNING OR OFFERING DOCUMENTS.

The victory for investors comes amid signs that the SEC may consider formalizing its traditional opposition to public corporations that seek to include forced arbitration clauses in their governing or offering documents. Under the Trump administration, the Treasury Department had alarmed investor advocates when it urged the SEC to consider allowing companies to require shareholders to use arbitration, an idea that was later publicly supported by two Republican SEC Commissioners.

But in two appearances before Congress this year, new SEC Chair Gary Gensler has firmly supported the importance of preserving shareholders' access to the courts. In his most recent testimony before the House Financial Services Committee in May, Gensler was asked if it would violate federal securities law to insert a forced arbitration provision into a public company's governing documents. "The SEC has said consistently to issuers, as I understand it, that it would be best not to put this into these corporate charters," Gensler responded. "And I think the American public needs to be able to have redress to their courts. That's sort of a fundamental piece to be able to go straight to the courts. And that's been true in terms of issuers for decades. And I think that's worked well." ■

Richard E. Lorant is Director of Institutional Client Relations for the firm.

Supreme Court's Ruling in Goldman Unlikely to Hinder Meritorious Securities Claims

On June 21, 2021, in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, No. 20-222, the Supreme Court rejected a plea from Goldman Sachs Group Inc. to raise the bar at the class certification stage for shareholders alleging securities fraud in class-action lawsuits.

In the underlying case, Goldman Sachs is alleged to have artificially inflated its share price during the financial crisis by falsely claiming that it was complying with ethical rules, when in reality it was riddled with undisclosed conflicts of interest in its packaging and selling of mortgage-backed securities.

While the Supreme Court held that lower courts can continue to consider whether defendants' allegedly false statements were too generic to affect the company's stock price, it rejected Goldman's argument that plaintiffs are obliged to persuade the court that the alleged misstatements affected a company's stock price. Instead, the majority opinion authored by Associate Justice Amy Coney Barrett reaffirmed that a defendant such as Goldman "bears the burden of persuasion to prove a lack of price impact."

Laura Posner, a partner in Cohen Milstein's Securities Litigation & Investor Protection practice group and an author of an amicus brief filed in support of the Plaintiffs-Respondents, characterizes the Supreme Court's decision as a "big win" for investors. "I do not anticipate this decision having a significant—or quite frankly, even negligible—impact on class certification generally," Posner said. "It's a big blow to defendants who had hoped to significantly water down the standard and make it easier to rebut the presumption of reliance."

As a practical matter, Posner said, it is very difficult for a defendant to demonstrate a lack of price impact in the overwhelming majority of cases that get to the class certification stage, since the court will have already found that the plaintiff has sufficiently alleged both materiality and loss causation, including tying the alleged disclosures of the truth to the alleged false statements or omissions made by the defendant. ■

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ONE THING THE PANDEMIC WON'T CHANGE IS THE NEED FOR TRUSTEES TO FOCUS ON FUNDAMENTALS

As the United States slowly but steadily returns from the depths of the pandemic, many practices that became usual over the last year remain uncertain in the continuation. Will we continue to work from home? Will we continue to meet online? Will we continue to dress casually or, in some notorious cases, at all? Will we live, work and play in cities, in high rises, in proximity? Will the incidence of retirement skyrocket? Will birth rates remain low? Will we invest in online technologies and divest from REITS with shopping malls? What will the future hold for the many aspects of administering and investing a pension fund?

Certainly these and many other questions will take time to sort out, with their answers offering significant fodder for discussion around trustee and senior staff tables, if not Zoom screens. The fiduciary responsibility that guides these kinds of considerations, however, remains the same. Focusing on the exclusive obligation to serve beneficiaries' interests is the standard that guides trustees and senior staff, whether within or outside a pandemic. While the calculus may adjust due to changing circumstances tied to the impact of a global pandemic, the process for considering any social, political, cultural, and economic evolutions is unchanged. Fiduciary destiny requires being well informed on those circumstances and fully focused on the fund's beneficiaries. When in doubt, go back to basics.

FOCUSING ON THE EXCLUSIVE OBLIGATION TO SERVE BENEFICIARIES' INTERESTS IS THE STANDARD THAT GUIDES TRUSTEES AND SENIOR STAFF, WHETHER WITHIN OR OUTSIDE A PANDEMIC.

Despite these many adjustments and their possible accommodations due to the shared global experiences over the past year and a half, there are many considerations that seem very familiar: everything old may just be new again. For example, recent reporting indicates that the U.S. Department of Labor is again reconsidering whether changes to the standards for environmental, social, and governance ("ESG") investing are warranted. We all are well aware of the long history of yo-yoing regulatory adjustments the attention to ESG has inspired. Here we go again.

Likewise, disparities in opportunity in investing, corner offices and board rooms are receiving renewed and enhanced attention after a year of clear and often tragic evidence of racism, sexism and other bias in many aspects of American life. The 9th Circuit recently permitted a lawsuit challenging California's statutory requirement for greater gender representation on boards of local corporations to go forward, which will likely impact the viability of a lawsuit challenging a

similar California statute mandating racial and ethnic representation. Here we go again.

And issues related to climate change remain prominent. For example, Exxon must accommodate new board directors who would not be characterized as fossil fuel apologists and were elected with help from pension funds that increasingly are finding their voices on these important issues. Here we go again.

As the world returns to some semblance of the familiar, pension fund trustees and senior staff must likewise find their ways through both knowns and unknowns. There will be plenty of each to navigate but the guiding principles of fiduciary responsibility remain the same regardless of the issue, old or new, familiar or novel. Back to basics with pinpoint focus on the exclusive benefit rule is a safe approach with the virtue of providing helpful guidance. Everything old is indeed new again—including the fiduciary responsibilities shared by the trustees and senior staff of America's public pension funds. ■

Luke Bierman is Of Counsel to Cohen Milstein, and adviser to the Firm's Ethics and Fiduciary Counseling and Securities Litigation & Investor Protection practice groups.

DESPITE THESE MANY ADJUSTMENTS AND THEIR POSSIBLE ACCOMMODATIONS DUE TO THE SHARED GLOBAL EXPERIENCES OVER THE PAST YEAR AND A HALF, THERE ARE MANY CONSIDERATIONS THAT SEEM VERY FAMILIAR: EVERYTHING OLD MAY JUST BE NEW AGAIN.

RECENT HIGHLIGHTS

COHENMILSTEIN IN THE NEWS

- "Pilgrim's $29 Million Deal Headed to Judge in Wage-Fixing Case," *Bloomberg Law* – July 6, 2021
- "UFC Faces Antitrust Suit by Fighters Over 'Iron-Fisted Control,'" *Bloomberg Law* – June 24, 2021
- "Supreme Court Sends Goldman Shareholder Suit Back to Lower Court," *Pensions & Investments* – June 21, 2021
- "Centene Settles with Ohio and Mississippi Over Pharmacy Benefits Practice," *The Wall Street Journal* – June 14, 2021
- "Tivity Health Agrees to $7.5 Million Securities Fraud Class Deal," *Bloomberg Law* – June 11, 2021
- "GreenSky Investors Strike $27.5M Deal over IPO Disclosures," *Law360* – May 25, 2021
- "Don't Wait for Legislation Banning NDAs: Write Ethical Policies Now," *TechCrunch* – May 13, 2021
- "Judge Denies Wells Fargo Bid to Dismiss ERISA Suit," *Pensions & Investments* – May 13, 2021
- "Miller Energy Investors Win Class Status in Suit Against KPMG," *Bloomberg Law* – May 7, 2021
- "FAA Agrees to Pay $44 Million to Resolve Long-Running Age Discrimination Lawsuit," *The Washington Post* – April 28, 2021
- "Credit Suisse Must Face Lawsuit over U.S. 'Volatility' Crash," *Reuters* – April 27, 2021
- "Facebook Advertising Chief Worried About Whether It Overstated Reach," *Financial Times* – April 26, 2021
- "Ponzi Investors Want Class Cert. in Suit Against Comerica," *Law360* – April 20, 2021

AWARDS & ACCOLADES

- Seven Cohen Milstein Attorneys Named to *Global Competition Review's* "Who's Who Legal: Competition 2021;" Richard A. Koffman Recognized as a "Thought Leader: Competition" – July 2, 2021
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- Cohen Milstein's Julie Goldsmith Reiser and Steven J. Toll Recognized as "Leading Lawyers" and Michael B. Eisenkraft Recognized as a "Next Generation Partner" by *The Legal 500* – June 9, 2021
- Cohen Milstein Recognized as a Leading Practice by *Chambers USA* in Three Categories – Antitrust; Product Liability; and Securities Litigation – May 20, 2021
- Cohen Milstein's Julie S. Selesnick Named a *National Law Journal* 2021 "Plaintiffs' Trailblazer" – May 17, 2021
- Cohen Milstein Named an "Elite Trial Lawyer" Finalist in Eight Practice Areas, Including Securities Litigation, by *The National Law Journal* – May 12, 2021
- Cohen Milstein's Laura H. Posner and Emmy L. Levens Named 2021 "Elite Women of the Plaintiffs Bar;" Molly J. Bowen and Jessica Weiner Named 2021 "Rising Stars of the Plaintiffs Bar" by *The National Law Journal* – May 12, 2021

UPCOMING EVENTS

- **August 1-4** | County Commissioners Association of Pennsylvania (CCAP) Annual Conference and Trade Show, Hershey Lodge and Convention Center, Dauphin County, PA – David Maser
- **August 29-31** | Texas Association of Public Employee Retirement (TEXPERS) Summer Educational Forum, Grand Hyatt, San Antonio, TX – Richard Lorant and John Dominguez
- **September 18-21** | Michigan Association of Public Employee Retirement Systems (MAPERS) Fall Conference, Double Tree Hotel, Bay City, MI – Richard Lorant and Christina Saler
- **September 25-29** | National Coordinating Committee for Multiemployer Plans (NCCMP), Diplomat Resort & Spa, Hollywood, FL – Christopher Lometti and Arthur Coia
- **September 26-28** | National Conference on Public Employee Retirement Systems (NCPERS) Fall Conference, Westin Kierland, Scottsdale, AZ – Richard Lorant and Christina Saler
- **September 28 – October 1** | Oklahoma Public Fund Trustee Education Conference (OPFTEC) Annual Conference, Shangri-La Resort, Monkey Island, OK – Richard Lorant
- **October 5-7** | National Association of Public Pension Attorneys (NAPPA) Winter Seminar, Tempe Mission Palms Hotel and Conference Center, Tempe, AZ
- **October 17-20** | International Foundation of Employee Benefit Plans (IFEBP) Annual Employee Benefits Conference, The Colorado Convention Center, Denver, CO – Christopher Lometti and Arthur Coia

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> "After leaving the U.S. Attorney's Office, the first big securities fraud case I worked on was the *WorldCom, Inc. Securities Litigation* . . . . Working on that case confirmed for me that I made the right move to private practice because of the positive impact our cases have for so many people who have been wronged."

Susan G. Taylor is Of Counsel at Cohen Milstein and a member of the firm's Securities Litigation & Investor Protection practice. Joining the firm in 2019, Susan brings to bear more than 20 years of litigation and trial experience prosecuting high profile securities fraud, consumer and antitrust class action claims. Prior to private practice, Susan served as a Special Assistant U.S. Attorney in the Southern District of California, San Diego. For this issue of the **Shareholder Advocate*****, Susan talked with Editor Christina Saler.***

I grew up in … the Lehigh Valley of Pennsylvania which sits very close to the boarder of Pennsylvania and New Jersey and is about a two-hour ride from Philadelphia and New York City. The area was settled by the Pennsylvania Dutch. After a trip to Munich, Germany several years back, I could see the similarities in the German countryside and the rolling green hills of the Lehigh Valley.

I knew I wanted to be a lawyer … in college. I followed in my parents' footsteps, attended Penn State University and met my husband there. While at Penn State, I studied international politics and Russian and decided that I wanted to practice law. Even before making that decision, my parents knew that was the path I would take because I had always been attuned to instances of inequality and injustice and felt the need to fix them. After law school, that strong sense of seeking fairness lead me first to the District Attorney's Office for the City of San Diego and then to the U.S. Attorney's Office of the Southern District of California.

Transitioning from the U.S. Attorney's Office to private practice … was not difficult but different. In the U.S. Attorney's Office, I worked in the Boarder Crimes Unit and dealt with drug trafficking, illegal alien trafficking and criminal deportation felonies. I was regularly trying cases that lasted no more than a few days, attending grand jury proceedings, representing the Government on arraignments, and making site visits to inspect evidence. It was fast-paced, and I felt like I was rarely in my office. In private practice prosecuting complex securities fraud cases, however, I rarely leave my office except for depositions, the occasional oral argument and mediations. Civil procedure is also different and, in a lot of ways, more arduous than criminal procedure, but my criminal prosecution background taught me to focus on the evidentiary rules in building a case to insure the admissibility of the needed evidence. After leaving the U.S. Attorney's Office, the first big securities fraud case I worked on was the *WorldCom, Inc. Securities Litigation* which settled after three years of bitter litigation and resulted in $6.2 billion going back to WorldCom investors. Working on that case confirmed for me that I made the right move to private practice because of the positive impact our cases have for so many people who have been wronged.

In my beach bag … is *The Rose Code* written by Alice Quinn and about three code breakers on a mission during World War II. I gravitate toward historical fiction and have read two of Quinn's other books: *The Alice Network* set post-World War II in London; and *The Huntress* also set post-World War II. These are entertaining and interesting reads—perfect for when you have some downtime. ■

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