COHENMILSTEIN

Shareholder Advocate Summer 2024

Supreme Court to Weigh Cases that May Increase Hurdles for Securities Fraud Plaintiffs

Last month, the U.S. Supreme Court agreed to consider two cases from the Ninth Circuit Court of Appeals that will implicate the ability of investors to bring securities fraud claims.

PAGE 2

Delaware Enacts Fast-Tracked Bill that Critics Say Diminishes Shareholders' Rights

PAGE 6

Using AI for Good: Artificial Intelligence in Shareholder Advocacy

PAGE 10

Jury Verdict Reached: Chiquita Liable for Murders of Colombian Terror Victims – Must Pay $38.3 Million

PAGE 14

Fiduciary Focus: In an Uncertain World, Cybersecurity Risks Are Always Present

PAGE 18

Team Profile – Taehoon "Tae" Song

PAGE 23

Supreme Court to Weigh Cases that May Increase Hurdles for Securities Fraud Plaintiffs

Last month, the U.S. Supreme Court agreed to consider two cases from the Ninth Circuit Court of Appeals that will implicate the ability of investors to bring securities fraud claims.

The most worrisome—*NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970—will address a fundamental question about the pleading standards for securities fraud cases under the already heightened Private Securities Litigation Reform Act of 1995 (PSLRA) standard. The other—*Facebook v. Amalgamated Bank*, No. 23-980—will expound upon whether publicly listed companies must disclose past known risks that do not pose ongoing or future risks. Both cases are scheduled to be heard during the upcoming 2024-2025 term.

NVIDIA: Pleading Standards for Scienter and Falsity

In *NVIDIA*, shareholders brought a putative class action lawsuit under Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5, alleging that NVIDIA and several of its officers intentionally misrepresented the extent to which the accelerated computing company's gaming segment revenues were driven by selling its graphic processing units (GPU) to cryptocurrency miners rather than to gamers. Plaintiffs allege that defendants tracked mining-related sales in multiple ways and had access to documents that demonstrated the high demand and use of NVIDIA GPUs among cryptocurrency miners, a conclusion plaintiffs based partly on interviews with former employees. Unlike in most securities fraud class actions, the plaintiffs were even able to allege a number of specifics relating to the documents to which defendants had access, including detailed descriptions of the contents of the documents, the names of regular internal reports, and how often the reports were distributed. The plaintiffs also relied upon an RBC Capital Markets report and independent expert analysis of public data to demonstrate that NVIDIA had generated over a billion dollars more in mining-related revenues than had previously been disclosed.

> **Both scheduled for the upcoming Supreme Court term, *Facebook* and *NVIDIA* are bound to impact the ability of investors to successfully pursue securities class action lawsuits.**

The U.S. District Court for the Northern District of California dismissed the complaint, concluding that the plaintiffs were not able to point to any specific information in NVIDIA's internal

Laura H. Posner
Partner
212.220.2925
lposner@cohenmilstein.com

Alexandra Gray
Associate
212.838.7797
agray@cohenmilstein.com

documents to support an inference of scienter (defendants acting either recklessly or with knowledge that their own actions were wrong), which is required under the PSLRA. A divided panel of the Ninth Circuit reversed in part and remanded, disagreeing with the District Court and finding that plaintiffs adequately showed scienter based on the employee interviews, at least as to the CEO. In addition, considering an issue the District Court had not broached, the majority concluded that the expert report sufficiently supported plaintiffs' falsity claims.

On June 17, 2023, the Supreme Court granted *certiorari* to hear two questions, the first relating to scienter and the second relating to falsity: (1) "Whether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with particularity the contents of those documents. . ." and (2) "Whether plaintiffs can satisfy the PSLRA's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact."

> **The fact that the Justices will hear two securities fraud cases next term is a testament to the Supreme Court's increasingly active role in this space.**

Facebook: Disclosure of Previously Materialized Risks

In *Facebook*, shareholders brought a putative class action lawsuit, also under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, alleging that Facebook failed to disclose materialized business risks related to Cambridge Analytica's access to and misuse of Facebook user data, instead describing such risks as merely hypothetical. While the District Court for the Northern District of California granted defendants' motion to dismiss, the Ninth Circuit reversed. The divided panel held that Facebook could be held liable for securities fraud for disclosing in its filings that security breaches and improper third-party access to user data "could harm" its business, given that Facebook was aware of the Cambridge Analytica breach.

On June 10, 2024, the Supreme Court granted *certiorari* to consider one of the two questions from the *Facebook* petition: "Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm?"

Implications

Both the *NVIDIA* and *Facebook* cases are bound to impact the ability of investors to successfully pursue securities class action lawsuits.

The first question presented in the *NVIDIA* case, in particular, could serve as a serious impediment to bringing securities fraud claims. The PSLRA, as interpreted by the Supreme Court nearly two decades ago, already provides a heightened standard for pleading scienter—much higher than in any other area of law. If the Supreme Court decides *NVIDIA* in favor of defendant-appellants, it will make bringing securities fraud cases even more difficult by requiring plaintiffs to plead in great detail the *specific contents* of internal documents for the case to proceed. It is nearly inconceivable to imagine how plaintiffs can clear this hurdle, since the PSLRA imposes an automatic stay on discovery, meaning defendants are not required to produce any internal documents until after the complaint survives a

motion to dismiss. This also would encourage the problematic practice of company insiders stealing company documents and turning them over to lawyers. The second *NVIDIA* question is important, but likely less impactful, since pleading based on expert testimony is relatively rare. And when there is expert testimony, it is not typically a "substitute for particularized allegations of fact," but rather a tool to opine on protocol in a given industry or to analyze public data.

> **Cohen Milstein is helping to organize 'friend of the court' briefs in favor of plaintiffs in both cases to submit to the Supreme Court.**

Resolution of the *Facebook* question is less likely than *NVIDIA* to be devastating to securities cases, but a decision in favor of the appellants could still have significant repercussions. If a past event presents no risk of "ongoing or future business harm," then it is not material—i.e. something that a reasonable investor would consider important in deciding whether to buy or sell a security—and a court likely will not sustain a securities fraud case on that basis. Moreover, the *Facebook* question will not impact the majority of securities fraud claims, since investors typically bring such claims only when known risks were indeed material. However, contrary to the way defendants in *Facebook* framed the question to the Court, the known risk at issue was in fact material to investors and to Facebook—indeed, Facebook agreed to pay $5.1 billion in civil penalties to settle charges by the Federal Trade Commission and the SEC over the scandal.

Regardless of the cases' outcomes, the fact that the Justices will hear two securities fraud cases next term is a testament to the Supreme Court's increasingly active role in this space. In recognition of the cases' potential impact, Cohen Milstein is helping to spearhead *amicus* efforts supporting plaintiffs in both *NVIDIA* and *Facebook*. We encourage investors to follow these cases closely and support those efforts. ■

Laura H. Posner is a Partner and Alexandra Gray is an Associate in the firm's Securities Litigation & Investor Protection practice group.

Delaware Enacts Fast-Tracked Bill that Critics Say Diminishes Shareholders' Rights

Delaware Gov. John Carney has enacted a controversial law that will allow publicly traded companies incorporated in the state to grant some stockholders broad powers without a shareholder vote, ratifying the state legislature's fast-tracked approval of the measure last month.

On July 17, Gov. Carney, a Democrat, signed Senate Bill 313 (S.B. 313), which sailed through the Delaware State Assembly in June despite concerns raised by dozens of academics, shareholder rights' advocates, and two judges.

Critics said the state's bar association and lawmakers too hastily drafted the law, contending that it allows side agreements whereby a company's board of directors can cede its rights to a few powerful stockholders. The law was conceived as a response to several high-profile court rulings by the Delaware Court of Chancery that were perceived as anti-business, one of which is still under appeal.

The Senate passed S.B. 313, unopposed and without debate on June 13, just three weeks after it was introduced; a week later, on June 20, the House voted 34 to 7 to approve the measure. Now law, the measure amends the Delaware General Corporation Law (DGCL), which directly affects the governance of millions of companies incorporated in the First State and serves as a model nationwide.

Richard E. Lorant

Director of Institutional Client Relations

202.408.3622

rlorant@cohenmilstein.com

> **Critics said the state's bar association and lawmakers too hastily drafted the law, contending that it allows side agreements whereby a company's board of directors can cede its rights to a few powerful stockholders.**

Background

The DGCL includes important investor protection privileges, which are typically refined over time through a steady stream of decisions by the highly specialized and well-respected Delaware Court of Chancery. But recently a debate has unfolded over whether the Court has given shareholders too much say over how companies are run, rather than deferring to the business judgment of corporate directors. Delaware is home to more than half of all U.S. publicly traded corporations and more than two-thirds of the Fortune 500, and some leaders fear that any perceived bias could lead to an exodus.

> **In June, more than 50 law professors signed a letter opposing the bill, telling Delaware lawmakers that the law "would allow corporate boards to unilaterally contract away their powers without any shareholder input."**

DGCL Section 141(a) says the "business and affairs" of Delaware corporations "shall be managed by or under the direction of a board of directors," as long as the directors act loyally and carefully as required by their fiduciary duty to the corporation and its stockholders. The "business judgment rule," as it's known, is an important element of the DGCL and has been a key to the state's popularity among businesses—

along with low startup costs, ease of incorporation, and the promise that legal disputes will be adjudicated by the Chancellors, as the seasoned and sophisticated Chancery Court judges are known.

Since 2023, several companies citing increased litigation risk have left Delaware, including TripAdvisor and Fidelity National Financial. Most famously, in June, Tesla CEO Elon Musk sought and received shareholder approval to reincorporate in Texas after Chancellor Kathaleen St. Jude McCormack rejected his 2018 pay package, originally worth $56 billion. In her January opinion, Chancellor McCormick sided with investors who said Tesla's Board of Directors was beholden to Musk and breached its fiduciary duty by approving the mammoth pay package after sham negotiations.

> **Calling the bill "a legislative rush to judgment," the Council of Institutional Investors said the law could harm Delaware's reputation for "careful and deliberate" changes to corporate law and creating "a perception influential actors can easily change the law whenever the Delaware Court of Chancery has the temerity to rule against them."**

Moelis

In the interest of brevity, today's article will deal with only one of the three rulings addressed by the new law: the February 23, 2024 decision by Vice Chancellor J. Travis Laster in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.* (*Moelis*).

Moelis & Co is a global investment bank founded by Ken Moelis, who ran the bank for years as a private entity before deciding to raise capital by taking the company public in 2014. In order to do so, he reorganized Moelis under a new holding company incorporated in Delaware with himself as CEO and Chairman of the Board.

In *Moelis*, Vice Chancellor Laster granted summary judgment in favor of a pension fund that objected to a stockholder agreement between Mr. Moelis and the company, reached a day before the IPO, that required the Board of Directors to get written pre-approval from Mr. Moelis over important business decisions and the composition of the board itself. As summarized by Vice Chancellor Laster: "The Pre-Approval Requirements encompass virtually everything the Board can do. Because of the Pre-Approval Requirements, the Board can only act if [Mr.] Moelis signs off in advance."

Citing the standard established in Court's landmark 1957 decision, *Abercrombie v. Davies*, Vice Chancellor said some of the challenged provisions facially violated Section 141(a) because they "have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters" or "tend[] to limit in a substantial way the freedom of director decisions on matters of management policy. . ."

Moreover, Vice Chancellor Laster wrote, Mr. Moelis "could have accomplished the vast majority of what he wanted" by changing the company charter or having the company issue him new preferred stock with outsized voting and director appointment rights. Instead, he created a situation where "the business and affairs of the Company are managed under the direction of [Mr.] Moelis, not the Board," as required by Section 141(a).

Opposition to S.B. 313

Into this climate of uncertainty strode the Council of the Corporate Law Section of the Delaware State Bar Association, which quickly drew up S.B. 313 and obtained Bar Association backing. Introduced on May 23 by Delaware Senate Majority Leader Bryan Townsend, a corporate attorney with Morris James LLP, the measure allows the type of stockholder agreements invalidated in *Moelis*, even if their provisions are not specified in a certificate of incorporation.

The bill drew fire even before its introduction—including from Chancellor McCormick, the author of the two other opinions that prompted the creation of S.B. 313. In an April 12 letter that became public at the end of May, Chancellor McCormick wrote the Delaware State Bar Association that "there is no justification for the rushed nature of the proposal. . ." which, she said had "moved forward at a pace that forecloses meaningful deliberation and input from diverse viewpoints." The Chancellor also took issue with the fact that the Delaware Supreme Court had not yet ruled on an appeal to the decision. "So why the rush?" she asked.

On June 7, after S.B. 313 had been introduced, a group of more than 50 law professors opposed the bill in a letter to the members of the Delaware Legislature. In the letter, posted on the Harvard Law School Forum on Corporate Governance, the professors wrote that, beyond overturning *Moelis*, the proposal "would allow corporate boards to unilaterally contract away their powers without any shareholder input."

"We are professors of corporate law, and we routinely disagree over corporate law issues. Yet we are unanimous in our belief that the appropriate response to the Moelis decision is to allow the appellate process to proceed to the Delaware Supreme Court," the letter said. "The issues at stake warrant careful judicial review, not hasty legislative action."

Also in June, Vice Chancellor Laster, in a LinkedIn post he said was made outside his official capacity, called out S.B. 313 as "not the annual tweaking of the DGCL. That's a cosmetic procedure by comparison. This is major surgery."

Finally, on July 10, the Council of Institutional Investors asked Gov. Carney to veto the bill, saying that lawmakers' "unprecedented action" to "overturn[] a trial court ruling that is not yet final" constituted a "legislative rush to judgment. . ."

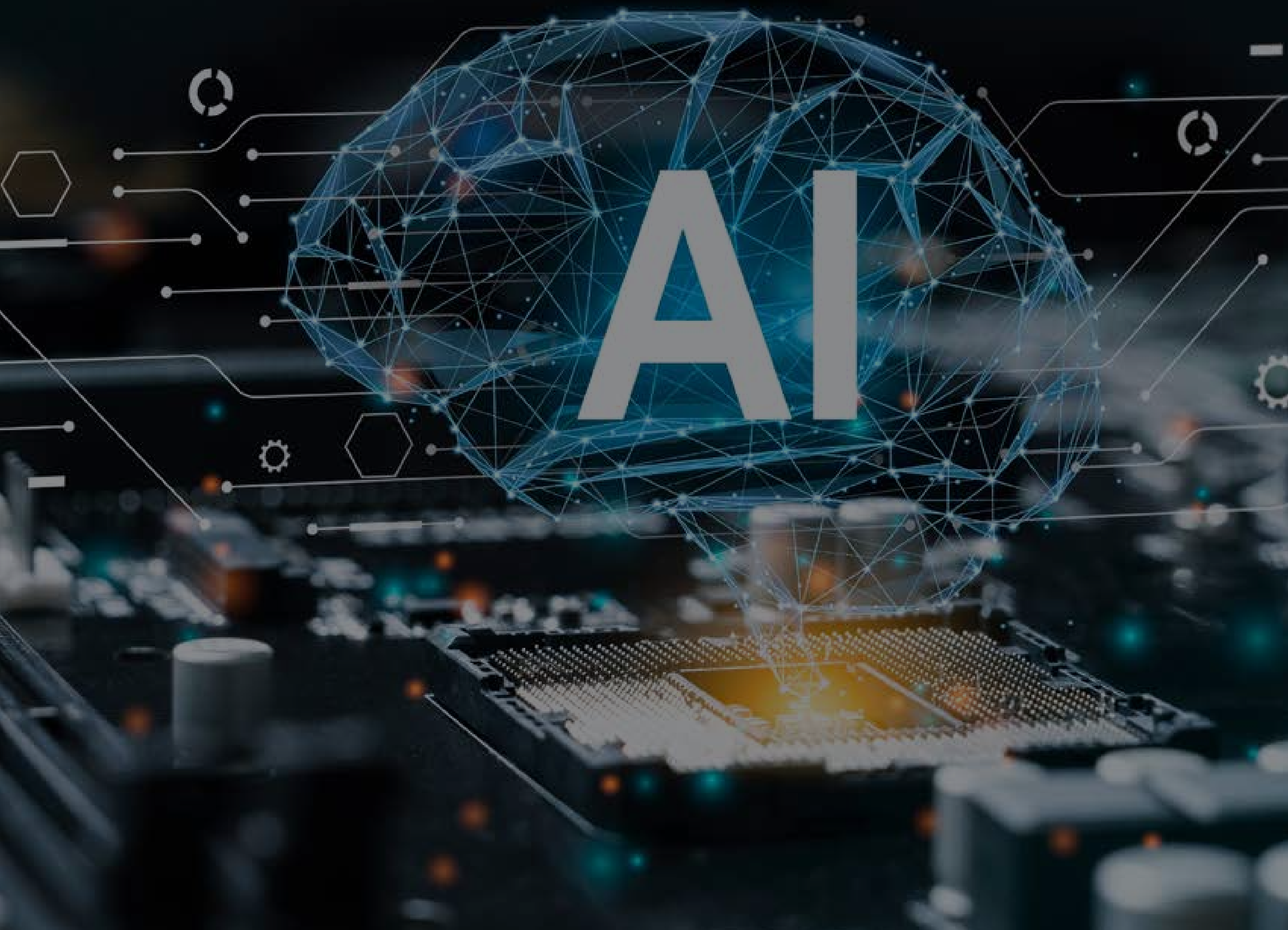
"A hallmark of Delaware General Corporation Law is the careful and deliberate nature in which it is adopted and enforced, as well as the ways in which Delaware law balances boards' decision-making with accountability to shareholders," CII Jeffrey Mahoney wrote. "That reputation could be seriously impaired by a perception that influential actors can easily change the law whenever the Delaware Court of Chancery has the temerity to rule against them."

The speed with which the measure was created, approved, and enacted appears to swing the pendulum in Delaware away from the Court of Chancery and advocates of a more deliberative approach to changes in Delaware's board-centric corporate governance model. ■

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

Using AI for Good: Artificial Intelligence in Shareholder Advocacy

One can hardly open the business section of a newspaper today without immediately seeing an article about Artificial Intelligence (“AI”).



Companies use the term to refer to different things, but one of the most prominent and frequently discussed types of AI used in businesses today is "generative AI." Generative AI trains AI to absorb large amounts of data patterns and structures—so-called large-language models—so that it can learn and eventually generate new data with characteristics that are similar to the original data. Generative AI tools include popular chat-bots like ChatGPT and Claude, and search engines like Perplexity. Companies such as Google, Microsoft, Apple, and Meta have also built AI functionality into their core products.

As a firm committed to advocating for good corporate governance and the rights of shareholders, Cohen Milstein has dedicated substantial resources to understanding how AI tools can be used to supercharge our work to achieve the best results for our clients. In this article, we will share insights about how AI tools can be used by legal advocates and pension funds.

Use of AI as Advocates for Shareholders

We are at the dawn of the AI age, and many law firms have begun exploring how best to use AI to advance their clients' interests. One simple but powerful function of AI tools is to generate accurate summaries of lengthy documents. Enforcing the securities laws often involves the review of lengthy documents, such as public companies' filings with the Securities and Exchange Commission. Generative AI tools can quickly summarize those documents and the tools can also understand natural-language questioning about those documents, which allows our attorneys and experts to put their deep substantive knowledge to use in tandem with the AI technology to efficiently identify the most salient points.

> **When used properly by expert attorneys and experts, tools powered by generative AI can find the most salient points of lengthy documents in less time.**

Another important role we serve is to thoroughly investigate reported corporate wrongdoing to understand whether our institutional investor clients have been impacted. AI can

Aaron J. Marks
Associate
212.838.7797
amarks@cohenmilstein.com

Lyzette M. Wallace
Discovery Counsel
202.408.4600
lwallace@cohenmilstein.com

accelerate our ability to conduct factual research about large numbers of companies and their officers and directors, by quickly answering numerous questions. To be sure, AI's factual output cannot be independently relied upon due to the persistent problem of "hallucinations"—i.e., the system confidently misstating the facts. Nonetheless, AI's factual output is often largely correct, and using it as a starting point (always coupled with independent factual verification) can accelerate our research and catalyze our ability to quickly understand an industry, company, or set of individuals who may have harmed shareholders.

> **Potential applications of AI extend far beyond the legal realm, offering transformative opportunities for our clients, including pension funds.**

Use of AI Within Pension Funds

Potential applications of AI extend far beyond the legal realm, offering transformative opportunities for our clients in various sectors, including pension funds. AI can enhance investment strategies through sophisticated algorithms that predict market trends, identify investment opportunities, and manage risks with greater precision thereby enhancing accuracy, efficiency, and financial stability. AI-driven solutions can also streamline administrative processes.

One of the primary advantages of AI in pension fund management is its ability to analyze vast amounts of financial data rapidly and accurately. While not necessarily something that is possible through chatbots such as ChatGPT, AI algorithms can identify patterns and trends that human analysts might miss, enabling more informed investment decisions that can help maximize returns on pension fund investments.

Risk management is another critical area where AI can make a substantial impact. Machine learning models can simulate various economic scenarios and stress-test portfolios, helping fund managers to anticipate potential risks and adjust their strategies accordingly. This proactive approach to risk management can safeguard the pension funds' assets, providing more stability for the beneficiaries.

In addition to investment and risk management, AI can streamline the administrative processes associated with pension fund management. Tasks such as tracking contributions, managing payouts, and ensuring regulatory compliance can be automated using AI-powered tools. This automation reduces the likelihood of human errors. Importantly, using AI does not equate to a loss of jobs for humans; instead, it enhances the roles of those previously managing these tasks and directs resources to other important work.

As a firm advocating for good governance and shareholder rights, Cohen Milstein dedicates substantial resources to understanding how AI tools can supercharge our work on behalf of our clients.

In conclusion, incorporating AI into pension fund management offers a range of benefits, from improved investment strategies and risk management to more efficient administrative processes. Harnessing the power of AI may help pension funds better secure the financial futures of their pensioners. As technology continues to advance and with close oversight and testing, the potential for AI to transform pension fund management will only grow, promising even greater efficiencies and financial stability for public servants, while allowing human workers to focus on other valuable contributions.

Aaron J. Marks is an Associate in the firm's Antitrust practice group. Lyzette M. Wallace is Discovery Counsel at the firm and a member of the Securities Litigation & Investor Protection practice.

Jury Verdict Reached: Chiquita Liable for Murders of Colombian Terror Victims – Must Pay $38.3 Million

On June 10, a South Florida jury found Chiquita Brands International responsible for the wrongful deaths of eight men murdered by Autodefensas Unidas de Colombia (AUC), and awarded their surviving family members $38.3 million in the first in a series of bellwether trials against the multinational.

The plaintiffs in *In re Chiquita Brands International Inc. Litigation* are the surviving family members of the eight victims who were targeted and killed by the AUC, a brutal paramilitary known for mass killing. The U.S. has designated the AUC as a Foreign Terrorist Organization which makes supporting it a federal crime. Providing financial support to the AUC was also a crime under Colombian law. The plaintiffs alleged that Chiquita paid the AUC nearly $2 million, while facilitating shipments of arms, ammunition, and drugs, despite knowing that the AUC was an illegal organization engaged in a reign of terror.

Agnieszka Fryszman* and Leslie Kroeger led Cohen Milstein's trial team in representing the family members of the trade unionists, banana workers, political organizers, activists, and others who were killed by the AUC. During the six-week trial, plaintiffs allege that the deaths of their relatives were a foreseeable result of Chiquita's financial support of the AUC.

> **'The verdict does not bring back the husbands and sons who were killed, but it sets the record straight and places accountability for funding terrorism where it belongs: at Chiquita's doorstep,' said Cohen Milstein Partner Agnieszka Fryszman, one of the trial leaders.**

"Our clients risked their lives to come forward to hold Chiquita to account, putting their faith in the United States justice system. I am very grateful to the jury for the time and care they took to evaluate the evidence," said Fryszman, chair of Cohen Milstein's Human Rights practice. "The verdict does not bring back the husbands and sons who were killed, but it sets the record straight and places accountability for funding terrorism where it belongs: at Chiquita's doorstep."

Far Reaching Impact

The $38.3 million jury verdict came in the first in a series of bellwether trials against Chiquita. Roughly 4,500 plaintiffs are awaiting their trial dates. After 17 years or pre-trial litigation, this is the first time that an American jury has held a major U.S. corporation liable for complicity in serious human rights abuses in another country.

Kate Fitzgerald
Senior Manager Marketing Communications

202.408.4600
kfitzgerald@cohenmilstein.com

In *Chiquita*, plaintiffs relied on the "transitory tort doctrine," an ancient legal doctrine that provides that someone who commits a civil injury in one part of the world can be sued where he or she is found. In such cases, courts often apply the law of the place of injury, in this case Colombia. After evaluating dozens of expert reports, the court in Florida applied Colombian law on negligence and hazardous activity.

"U.S. corporations that operate in places with less rule of law and access to courts and history of corruption and political violence will look to this verdict and see you'll be held accountable in American court," Fryszman said. "You can't simply roll the dice and hope you'll not get caught. There is no law-free zone you can take advantage of."

> **The $38.3 million jury verdict came in the first in a series of bellwether trials against Chiquita. Roughly 4,500 plaintiffs are awaiting their trial dates.**

Case Background

Chiquita has operated banana plantations in Colombia since the 1960s. During much of that time, Colombia was mired in armed conflict between left-wing guerrilla groups and right-wing paramilitaries.

Plaintiffs allege that from 1997 to 2004, Chiquita issued more than 100 regular, monthly payments to AUC, totaling more than $1.7 million, as well as supplying the AUC with shipments of arms and ammunition.

With Chiquita's support, plaintiffs claim that the AUC expanded to more than 30,000 fighters. Based on official sources in Colombia, court records say that "paramilitaries were responsible for killing or disappearing more than 100,000 civilians during this time period and committed more than 10,000 acts of torture."

In March 2007, Chiquita pled guilty to criminal charges brought by the U.S. for knowingly providing material support to the AUC. The Department of Justice described Chiquita's support to the AUC as "prolonged, steady, and substantial." Following its admission, Chiquita agreed with federal prosecutors to pay $25 million in damages. The company's executives were spared criminal prosecution in both the U.S. and Colombia.

The civil claims in this suit were brought on the heels of that guilty plea and were subsequently consolidated by the multidistrict litigation (MDL) panel and heard by a federal court in Florida. A test group of plaintiffs, referred to as "bellwether" plaintiffs, was selected to proceed to trial by jury, which began on April 22, 2024.

After six weeks of trial, the jury was satisfied that plaintiffs had shown a preponderance of evidence that the AUC "in fact killed" eight of nine victims included in the first bellwether trial and that Chiquita was liable for not only providing substantial assistance to the AUC to create a foreseeable risk of harm, but failed to act as a reasonable business under the circumstances. The jury was also unconvinced that Chiquita lacked a viable alternative to supporting the AUC. Accordingly, it ordered the company to pay the eight plaintiffs more than $38 million in damages.

Next Steps

While the date of the second bellwether trial has been temporarily postponed so that Chiquita can appeal the verdict, Leslie Kroeger, a Cohen Milstein partner, stated "After a long seventeen years against a well-funded defense, justice was finally served. We look forward to the next round of bellwether trials and will continue to fight for our clients."

Cohen Milstein, EarthRights International, and other co-counsel represent the family members of the decedents. ■

**Editor's note*: Agnieszka Fryszman, chair of our Human Rights practice, was named the winner of the 2024 Public Justice Trial Lawyer of the Year Award for successfully leading* John Doe I v. ExxonMobil Corp (D.D.C.)*. After 22 years of litigation, Agnieszka's team achieved a confidential settlement days before a jury trial was to begin.*

Kate Fitzgerald is Senior Manager Marketing Communications at the firm.

Fiduciary Focus: In an Uncertain World, Cybersecurity Risks Are Always Present

There is no shortage of uncertainty in our world. That said, two certainties that bear directly on the fortunes of pension funds—death and taxes—have always impacted the work of public pension administrators. Now we can add a third certainty to this list: the necessity of cybersecurity preparation.

According to a recent *Forbes* report, there were 2,365 cyberattacks last year, with about 350 million victims. That represented a 72% increase in incidents since 2021, the previous high water mark for cyberattacks. On average, each cyberattack costs about $4.5 million. The most typical occur by email, text or phone, with familiar vendors the most common targets—Microsoft, Amazon, Google, and Apple, to name a few. The risk is apparent. And literally as I write this, a massive cyberattack at AT&T is being reported.

In June, during the National Association of Pension Plan Attorneys' 2024 Legal Education Conference, a panel of experienced pension fund lawyers and consultants offered some guidance regarding cyberattacks and how to prepare. The following draws from their advice.

> **According to a recent Forbes report, there were 2,365 cyberattacks last year, with about 350 million victims—a 72% increase in incidents since 2021, the previous high.**

First and foremost, educate yourself about the risks surrounding cyberattacks. From there, it is necessary to develop policies, some of which will be mandated by law and others specific to your organization. Importantly, administrators must clearly and unambiguously specify the chain of command and roles for dealing with cyberattack issues, including an actual attack. Response protocols also must be detailed and unambiguous, so that intrusions are dealt with as quickly as possible. These processes must accommodate the many different aspects of responding to an incident; internal protocols, governing laws and regulations, notifications, and timing are among the important considerations. The development of these rules is not for the faint of heart, since they may implicate legal requirements, enterprise-wide function, beneficiaries, external constituencies, and vendors, as well as incur a variety of other risks.

Once the rules and protocols are in place, it is necessary to undertake regular training, especially for the personnel responsible for dealing with a cyberattack. Since attacks can emanate from anywhere within the enterprise, all personnel must

Luke Bierman
Of Counsel
202.408.4600
lbierman@cohenmilstein.com

> **Once cybersecurity rules and protocols are in place, you'll need to conduct regular training, especially for any personnel responsible for dealing with cyberattacks.**

be trained to recognize risks of a cyberattack that may target their own computers so that they can prevent the organization's systems from being invaded or raise an alert with those responsible for responding to a cyberattack. The training should also include drills to ensure that any actual response is quick and direct. There also must be regular review of the policies, protocols and practices with appropriate revisions and updates, especially since the breadth of risks posed by a cyberattack are constantly evolving. Vigilance is a key component to ensuring up-to-date security.

Among the many aspects of policy, protocol, and practice to be addressed is the essential challenge of notifying those potentially affected by an incident. Applicable federal, state, local, and in some circumstances even international laws govern notification requirements for law enforcement and affected members and beneficiaries. Privacy laws, including HIPAA for health information, and SEC requirements, must be considered. You may have contractual provisions governing third parties and vendors—not only regarding their roles in direct cyberattacks on the pension system but also to incidents affecting those parties that could implicate system information.

Among the many aspects of policy, protocol, and practice to be addressed is the essential challenge of notifying those potentially affected by an incident.

Cybersecurity insurance may also be warranted. First and foremost, the insurance available for these attacks must be scrutinized for coverage, exclusions, and cost, but other factors also come into play when selecting a policy. This is another area of significant variation and evolution so, again, regular review will be necessary.

As any incident is likely to involve issues with legal counsel and advice, consideration of the role of the attorneys involved should be resolved early so that issues surrounding privilege and work product can be understood. Maintaining careful records is, as always, essential to establish fiduciary compliance, and consideration to record development and retention to avoid the risks attendant these kinds of crisis situations should be given early and fully. Data are valuable in today's operating environment, meaning information not directly affected by any specific attack must also be protected, so informed assessment in these matters should be given.

This litany of approaches to deal with the risk of cyberattacks is meant merely as an introductory primer. Even from this approach, though, the risks inherent in the enterprise and the opportunities for missteps during responses, which can be hurried and erratic if not well conceived and planned, are evident, with concomitant negative effect on fiduciary duty. The use of experts, both internal and external, may well be warranted in order to minimize what is now inevitable: the risk of harm from cyberattack. ■

Luke Bierman is Of Counsel to Cohen Milstein, and adviser to the Ethics and Fiduciary Counseling and Securities Litigation & Investor Protection practices.

Recent Highlights

IN THE NEWS

BofA, Goldman Get First OK For $46M Deal In Rate-Swap Suit
Law360 – July 12, 2024

7th Circuit Panel Denies CITGO's Motion to Appeal Class Certification
Law.com – July 10, 2024

Litigation Leaders: Ben Brown of Cohen Milstein on What Makes the Firm 'a Defendant's Worst Nightmare'
The ALM Litigation Daily – June 24, 2024

Meat Plant Workers Seek OK On Latest $4M Wage-Fix Deal
Law360 – June 20, 2024

1,700 Bay Area Delivery Workers Join Mass Arbitration Claim Against Amazon
San Francisco Examiner – June 18, 2024

Apple Is Sued by Female Employees Claiming Pay Discrimination
TIME – June 14, 2024

Chiquita Held Liable for Deaths During Colombian Civil War
The New York Times – June 11, 2024

$25 Million Flint Water Class Deal Gets Early OK
Law360 – June 6, 2024

ERISA Arbitration Backers See Hope In 2nd Circ. Dissent
Law360 – May 28, 2024

Federal Judge Certifies Class Action Claiming $31M in CITGO Pension Underpayments
ALM/Law.com – May 23, 2024

Shire Settles Claims Over Alleged ADHD Generic Delay
Law360 – May 14, 2024

Nursing Home Chain ReNew Health To Pay $7 Million In Medicare Fraud Case
NPR – May 9, 2024

Redfin To Pay $9.2M To Exit Broker Fee Class Action
Law360 – May 7, 2024

SNF Provider Settles FCA Case Involving Waivers; 'Incorrect Reasoning' Raises Questions
COSMOS – May 6, 2024

AWARDS & ACCOLADES

Laura Posner Is 2024 Attorney of the Year Finalist

New York Law Journal – July 17, 2024

Cohen Milstein Wins 2024 "Elite Trial Lawyers Award" Practice of the Year – Securities Litigation and Mass Tort Litigation

The National Law Journal – July 16, 2024

Julie G. Reiser & Steven J. Toll Named Leading Lawyers in Securities Litigation – 2024

Legal 500 – June 23, 2024

Michael B. Eisenkraft Ranked among Next Generation Partners in Antitrust & Securities Litigation – 2024

Legal 500 – June 23, 2024

Legal 500 Ranks Brent W. Johnson & Sharon K. Robertson Leading Lawyers in Antitrust – 2024

Legal 500 – June 23, 2024

Richard A. Koffman Honored in Legal 500 Antitrust Hall of Fame – 2024

Legal 500 – June 23, 2024

Laura Posner Ranked as Leading Lawyer in Securities Litigation

ChambersUSA – June 13, 2024

Cohen Milstein Named 2024 Leading Firm in Antitrust, ERISA, Product Liability, and Securities Litigation

ChambersUSA – June 10, 2024

Agnieszka Fryszman Named Winner of the "Elite Trial Lawyers" Lifetime Achievement Award

The National Law Journal – May 15, 2024

Molly J. Bowen Wins "Elite Trial Lawyers" Women of the Plaintiffs Bar Award

The National Law Journal – May 13, 2024

UPCOMING EVENTS

August 3-7 | National Association of State Retirement Administrators Annual Conference

Pittsburgh, PA – Richard Lorant

August 4-7 | County Commissioners Association of Pennsylvania Annual Conference and Trade Show

Adams County, PA – David Maser

August 18-20 | Texas Association of Public Employee Retirement Systems Summer Educational Forum

San Antonio, TX – J.D. Davis, John Dominguez, and Richard Lorant

September 25-27 | Oklahoma Public Funds Trustee Education Conference

Tulsa, OK – Richard Lorant and Julie Reiser

Team Profile

Taehoon “Tae” Song | Data Engineer

202.408.4600 | tsong@cohenmilstein.com

Taehoon “Tae” Song is the Data Engineer for the Securities Litigation & Investor Protection practice group. Tae plays an invaluable role developing various types of programs to catalogue clients’ trading data so that we can systematically identify and analyze market losses. Tae develops and maintains COMPAS, a CMST proprietary solution that tracks securities class actions and monitors client losses. For this issue of the Shareholder Advocate, Tae spoke with Editor Christina Saler.

I grew up in … South Korea until I was 15 years old. I then moved by myself to the United States to go to a small boarding school in Pennsylvania. After high school, I moved to New York City to go to NYU. I would occasionally travel back to South Korea to see my family and then, in between undergraduate and graduate school, I had to fulfill my obligation with the Korean Military.

I studied … statistics and accounting at NYU. Following graduation in 2016, I was interviewing for analyst positions with investment banking firms when I heard about the data analyst opportunity with Cohen Milstein. After interviewing with Cohen Milstein, I realized that the work the firm does to serve the common good really appealed to me, and I gladly took the position.

At Cohen Mistein … I’ve written codes for various programs to help us quickly and accurately identify market shifts that cause losses to our clients. My work assists the attorneys in their research of public companies that may have engaged in securities fraud. I have also developed programs that quantify our clients’ losses in different types of securities such as common stock, bonds, and ADRs. I like to say I develop programs that will make my life easier in getting at the answers that I need to do my job in capturing and analyzing trade data. In 2019, I left the firm to go to graduate school to deepen my knowledge of statistics. After graduation and a stint as a statistics consultant with a large consulting firm, I was happy to receive a call from a former Cohen Milstein colleague asking if I was interested in rejoining the firm. I jumped at the offer.

I use AI … to help with the initial building of new programs. I start by asking an initial question of how I should approach a particular problem, and then the AI program generates some generic code. I then use that code as a template to build upon. In a lot of ways, interacting with AI is like a brainstorming or study group session. The more specific questions I ask about the needed code, the more ideas I get on how to improve it. AI is a useful tool if you know how to ask the right questions and are able to spot flaws in its outputs.

In my spare time … I’m still coding! I like to build keyboards and computers. I generally don’t watch much television but recently started watching the survivalist show Alone on the History Channel. It’s so interesting to watch these highly trained survivalists sustain themselves in remote areas with absolutely no tools or aids.

Offices

BOSTON, MA

CHICAGO, IL

MINNEAPOLIS, MN

NEW YORK, NY

PALM BEACH GARDENS, FL

PHILADELPHIA, PA

RALEIGH, NC

WASHINGTON, DC

Editor: Christina D. Saler
Editorial Team: Richard E. Lorant and Samuel P. Waite

Please contact us with questions or comments at 202.408.4600.

The materials in this edition of the *Shareholder Advocate* are for informational purposes only.
They are not intended to be, nor should they be taken as, legal advice.
The opinions expressed herein reflect those of the respective author.

COHENMILSTEIN