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Shareholder Advocate Fall 2024

$580 Million Stock Lending Settlement Earns Final Approval

On September 4, 2024, reading her decision into the record from the bench, Judge Katherine Failla of the Southern District of New York granted final approval to a partial settlement with a number of the world's largest banks to resolve allegations that they violated the antitrust laws by colluding to prevent the modernization of the stock lending market by jointly boycotting efficient, all-to-all trading platforms and price transparency.

PAGE 2

Abbott Investors Secure Important Ruling

PAGE 6

Investors Settle SPAC Litigation

PAGE 10

SEC Heightens Liability for Individual Auditors Who Break Accounting Rules

PAGE 14

Fiduciary Focus: Court Rules that Members Lack Standing to Sue Their Pension Plan Over Investment Choices in Defined Benefit Pension Plans

PAGE 18

Team Profile – Susan M. Greenwood

PAGE 23

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In her decision, Judge Failla noted a few unusual things about the settlement. First, its size—she recognized that the amount of the settlement, approximately $580 million in cash, is a "historical settlement amount." Second, she noted that the litigation was "particularly complex" and that "Plaintiffs' counsel really had to begin at the ground level, because there was no investigation or academic treatise or anything sort of giving them a leg up on the facts of this case; they had to find it out themselves." Third, she awarded the Iowa Public Employees' Retirement System, Los Angeles County Employees Retirement Association, Orange County Employees Retirement System, Sonoma County Employees' Retirement System, and Torus Capital LLC, incentive fees in recognition of their "extraordinary" contributions to the litigation. Finally, during the hearing Judge Failla expressed particular interest in hearing about what she described as the "compliance or equitable component of the settlement."

This component of the settlement—injunctive relief which the parties agreed upon and Judge Failla ordered—is both unusual and noteworthy. In private antitrust litigation, it is unusual for there to be changes in how businesses operate because the Department of Justice or other governmental entities seek that sort of remedy. Rather, monetary compensation is the norm for private parties. Here, however, plaintiffs truly acted as private attorneys' general.

> **The injunctive relief, developed with an expert in competition economics, creates a state-of-the-art program within Equilend, which was at the center of the collusion allegations.**

Specifically, the injunctive relief, developed with an expert in competition economics, incorporated recommendations from both the guidelines for evaluating corporate antitrust compliance programs and the guidelines for evaluating competitor collaborations, in creating a state of the art program within EquiLend, the joint venture organization that was at the center of the allegations of collusion, to deter EquiLend members from acting jointly to prevent new platforms from entering the stock lending market.

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Clear standards: The injunctive relief mandates the creation of an Antitrust Code of Conduct designed to prevent collusion and inappropriate information sharing.

Monitoring and auditing: EquiLend will require all Board Members and Alternate Board Members to certify on an annual basis that he or she will comply with the Antitrust Code of Conduct. In addition, EquiLend's Chief Compliance Officer will provide annual reports of compliance to the EquiLend Board and the Designated Antitrust Liaison Counsel at each of the owner firms.

High-level involvement: EquiLend Board members will annually certify the Antitrust Code of Conduct to be transmitted to the Chief Compliance Officer of EquiLend. If the Chief Compliance Officer believes a Board Member or Alternate Board Member has violated the Antitrust Code of Conduct, he or she is required to inform the Designated Antitrust Liaison Counsel of the owner firm that employs the Board Member or Alternate Board Member. In addition, the Antitrust Code of Conduct must explicitly state that owner firms may take further steps to investigate any suspect communications or situations.

Reporting: EquiLend Board Members and Alternate Board Members are required to report potential breaches of the Antitrust Code of Conduct to the Chief Compliance Officer of EquiLend if they become aware of such breaches.

Training: EquiLend will provide every EquiLend Board Member and Alternate Board Member with antitrust training every two years.

Information sharing: The Settlement places limits on who can have access to confidential information and a requirement to report breaches of these confidentiality restrictions to EquiLend's Chief Compliance Officer. These restrictions on information sharing must be incorporated into the Antitrust Code of Conduct.

Governance reforms: The Settlement also includes limitations on the terms of EquiLend Board Members (five years), hiring of new antitrust counsel and limitations on the terms of outside antitrust counsel (three years), and requiring the names of all individuals who attend Board Meetings or Working Group Meetings to be included in the minutes for those meetings. Limitations on the terms of outside antitrust counsel is particularly important because it removes the financial incentive to get re-hired, which may result in a lack of independence in identifying collusive or anti-competitive behavior.

> **Judge Failla recognized that the amount of the settlement, approximately $580 million in cash, is a "historical settlement amount" and expressed particular interest in hearing about what she described as the "compliance or equitable component of the settlement."**

The $580 million cash payment and injunctive relief reforms put into place with the stock lending settlement agreement and ordered by the Court in connection with final approval of the stock lending settlement illustrate the public good that private litigation can bring. As the litigation continues against Bank of America, plaintiffs will continue to push for relief from these abusive anticompetitive practices.

Michael B. Eisenkraft and Julie G. Reiser are partners in the Securities Litigation & Investor Protection practice group.

Abbott Investors Secure Important Ruling

On August 7, 2024, the Honorable Sunil R. Harjani of the United States District Court for the Northern District of Illinois denied Abbott's motion to dismiss, permitting Lead Plaintiffs' key derivative claims to go forward: a claim for breach of fiduciary duty for failure to oversee the manufacturing and sale of infant formula and a claim for violations of Section 10(b) of the Exchange Act and SEC Rule 10b-5 related to false and misleading statements on those same topics and involving the company's repurchase of stock at prices inflated by the misleading statements.

Lead Plaintiffs in the case are the International Brotherhood of Teamsters Local No. 710 Pension Fund and Southeastern Pennsylvania Transportation Authority.

Background

Abbott, an Illinois corporation, is one of the primary manufacturers of infant formula products in the U.S., previously producing 40% of all infant formula products consumed in the U.S. It is also the nation's leading provider of infant formula to low-income families through the U.S. government's Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC") program. On February 15, 2022, Abbott closed its Sturgis, Michigan infant formula manufacturing facility due to the FDA's concerns about contaminated baby formula. Two days later, on February 17, 2022, Abbott announced a "voluntary" recall of infant formula products manufactured at the Sturgis plant. The consequences were devastating. A nationwide shortage of baby formula ensued as the facility remained shut down for several months.

> **On February 17, 2022, Abbott announced a "voluntary" recall of infant formula products manufactured at the Sturgis plant.**

Abbott's business suffered hundreds of millions in lost sales and profits and costs to remediate the facility and upgrade food safety compliance, risk management systems, and internal controls. The company's business and reputation were badly tarnished as it came under regulatory, criminal, and Congressional scrutiny. The company is now exposed to numerous lawsuits, including wrongful death, personal injury, and whistleblower actions, as well as consumer and investor class actions.

In addition to their oversight failures, Plaintiffs allege that certain members of Abbott's leadership violated Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act"). Specifically, the complaint alleged that they authorized the company to engage in billions of dollars in stock repurchases while Abbott's stock was artificially inflated due to false and misleading

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statements regarding Abbott's production and manufacture of infant formula products in the US., with certain Defendants benefiting personally from insider stock sales before the truth started to leak out.

> **Abbott's business suffered hundreds of millions in lost sales and profits and costs to remediate the facility and upgrade food safety compliance, risk management systems, and internal controls.**

Motion to Dismiss Ruling

Recognizing the strength of the complaint, the Court upheld the core claims against Defendants' motion to dismiss, including the federal violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5, which will allow the case to move forward in federal court. These are the claims that Defendants issued false and misleading statements to shareholders about the company that Defendants knew or recklessly disregarded were false, and which harmed the company by engaging in stock repurchases at inflated prices. The Court also found that the breach of fiduciary duty claim (sometimes referred to as a *Caremark* claim) for Abbott's directors was sufficiently plead on the first prong, that the Director Defendants repeatedly failed to implement, monitor, or oversee compliance and safety of manufacturing at the Sturgis plant. Finally, the Court rejected Defendants' contention that dismissing the suit was in the best interest of the company.

The Court did dismiss certain ancillary claims that do not affect the case's overall scope or significance.

Defendants have asked the Court to reconsider certain aspects of its ruling; Plaintiffs have opposed that request.

> **Long-term shareholders have important rights to protect their investment through investigating and, if warranted, pursuing litigation to ensure that corporate leaders fulfill their fiduciary duties.**

Key Takeaways for Shareholders

Overcoming a motion to dismiss is a key milestone in any lawsuit and particularly so for a shareholder derivative lawsuit given the high burden that plaintiffs must meet. The past few years have seen an increasing focus in state and federal courts on corporate board and executives' oversight responsibilities, particularly when health and safety is at risk. Long-term shareholders have important rights to protect their investment through investigating and, if warranted, pursuing litigation to ensure that corporate leaders fulfill their fiduciary duties. We look forward to continuing to litigate the Abbott derivative matter to protect Plaintiffs' long-term investment and hold wrongdoers to account.

Carol V. Gilden and Molly J. Bowen are partners in the Securities Litigation & Investor Protection practice group.

Investors Settle SPAC Litigation

Litigation relating to Special Purpose Acquisition Corporations, commonly referred to as "SPACs", became a trend in securities litigation beginning in 2021 with 90 cases filed since then.

Because of their unique structure as blank check companies, and their use as financing vehicles to take private companies public (referred to as a "de-SPAC" transaction), many unsuccessful SPAC mergers have since been challenged by stockholders in various types of securities litigation.

SPAC related securities cases generally have taken two forms—each designed to compensate different groups of investors. On one hand, many cases are brought as securities fraud class actions on behalf of open-market purchasers in the post-merger company after disclosure of negative financial news. These cases follow the typical pattern for securities fraud cases. On the other hand, the Delaware courts have found that in many of these ultimately unsuccessful transactions, SPAC insiders and controllers acted disloyally by recommending an unfair transaction to the pre-merger SPAC stockholders while obtaining out-sized financial benefits for themselves. These claims have been referred to as *MultiPlan* claims after the first case decided under Delaware law.

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> **This case and the related settlement highlight the unique and complex nature of these actions and some of the difficulties presented when litigating and settling SPAC cases.**

Recently, Cohen Milstein reached a settlement of *MultiPlan*-type claims in a SPAC related matter involving the merger of Pivotal Investment Corporation II ("Pivotal II") and XL Fleet Corp. ("XL Fleet") now known as Spruce Power. This case and the related settlement highlight the unique and complex nature of these actions and some of the difficulties presented when litigating and settling SPAC cases. *See In re XL Fleet (Pivotal) Stockholder Litigation*, Consol. C.A. No. 2021-0808-KSJM.

Prior to its merger with Pivotal II, XL Fleet was a privately held company manufacturing electrical vehicles. Like other typical SPAC transactions, XL Fleet became a publicly traded company through a de-SPAC merger with Pivotal II ("Merger"). At the time of the Merger, December 21, 2020, Pivotal II's stock was priced at $10.00 per share based on a purported valuation of $1 billion. Pivotal II stockholders voted to approve the Merger pursuant to an allegedly materially misleading merger proxy ("Proxy"). Like all other de-SPAC merger transactions, Pivotal II stockholders had the option before the Merger occurred to redeem their Pivotal II shares for $10.00 per share plus interest.

Immediately following the Merger, XL Fleet's stock began trading well-above $10.00 per share and continued to trade above that price for the next several months. On March 3, 2021, Muddy Waters released a short-sellers report which revealed a number of alleged serious problems in the company's business and its inflated valuation. Following release of the Muddy Waters' report, XL Fleet's stock price dropped below $10.00 and continued to steadily decline over the next year.

Not unexpectedly, shareholders filed each of the two types of securities litigation: federal securities class actions on behalf of open-market purchasers of XL Fleet stock and state breach of fiduciary duty cases challenging the Merger disclosures. Since XL Fleet was incorporated in Delaware, Cohen Milstein undertook a books and records investigation under Delaware law on behalf of a stockholder to investigate the circumstances surrounding the Merger. Following that investigation, the firm filed a complaint in Delaware Chancery Court alleging that the Merger Proxy issued by Pivotal II was materially false and misleading which was a breach of Defendants' fiduciary duties. The allegations of misrepresentations focused on three areas: (i) the failure to disclose the actual net cash per share available to contribute to the Merger; (ii) Defendants' failure to conduct due diligence of XL Fleet in connection with the Merger; and (iii) the failure to disclose XL Fleet's true valuation and the numerous problems affecting its business and operations.

In litigation involving de-SPAC transactions the parallel nature of Delaware fiduciary litigation and federal securities class actions work in tandem to ensure that different groups of interested stockholders receive compensation for different types of claims.

The primary claim under Delaware law related to the Proxy's alleged misrepresentation that the amount of cash available for the Merger was $10.00 per share when, in fact, the net cash per share available after calculating the dilution and certain expenses left only $7.66 per share available for the Merger. In short, stockholders did not get full value for their shares contributed to the Merger. Claims relating to the failure to properly disclose net cash per share have been upheld in other de-SPAC transaction cases. The Delaware Chancery Court eventually upheld this and the other misrepresentation claims alleged in the complaint.

Unique to the Pivotal II transaction was a separate breach of contract claim based on the Pivotal II's charter. The charter required Pivotal II to enter into a business combination with a target company (XL Fleet) having a value of no less than 80% of the assets or value of Pivotal II. The required minimum in this case was approximately $180 million. Plaintiffs alleged that the pre-Merger value of XL Fleet, did not meet or exceed Pivotal II's mandated minimum valuation. Evidence suggested that certain valuations of XL Fleet were well below the minimum value required which would be a breach of Pivotal II's charter and give rise to a breach of contract claim. That claim was also sustained by the Court.

Following the completion of discovery, the parties reached an agreement to settle the Delaware action for $4.75 million. By that time, the federal securities class action on behalf of open-market

purchasers of XL common stock had settled for $19.5 million. Although there may be some overlap between the two cases, the settlements are designed to compensate two separate groups of stockholders for different types of unlawful conduct.

The Delaware action settlement will compensate pre-merger investors in Pivotal II who were misled into voting to approve the Merger due to the issuance of a misleading Proxy. Unlike the class of investors who were harmed by the misleading statements made in connection with open market purchases of XL Fleet stock, stockholders in this case were injured because their decision on whether or not to redeem their shares was impaired by the false and misleading Proxy. Because Pivotal II stockholders did not receive adequate value for the assets contributed to the Merger they were injured. This was a harm unique to this group of stockholders.

In litigation involving de-SPAC transactions the parallel nature of Delaware fiduciary litigation and federal securities class actions work in tandem to ensure that different groups of interested stockholders receive compensation for different types of claims. In fact, Delaware courts have come to recognize the separate type of damages investors may suffer when their right to redeem is impaired by a misleading proxy. As Delaware law continues to evolve in the context of de-SPAC mergers, it remains to be seen how the courts will address damages to the pre-merger SPAC stockholders. ■

Richard A. Speirs is of counsel at Cohen Milstein and a member of the Securities Litigation & Investor Protection practice.

SEC Heightens Liability for Individual Auditors Who Break Accounting Rules

The Securities and Exchange Commission (SEC) has made it easier to sanction individual auditors who "directly and substantially contribute" to their firm's accounting violations, holding them to the same negligence standard for liability as the firm itself.

Before the tightened standard took effect October 21, these "associated persons" could only be sanctioned if they acted knowingly or recklessly, a much higher bar than the one applied to audit firms.

The SEC approved the change to Public Company Accounting Oversight Board Rule (PCAOB) Rule 3502 by a 3-to-2 vote on August 20. It was one of several changes proposed by the PCAOB, which was created by Congress in 2002 to provide independent oversight of audits of U.S. publicly traded companies after a series of high-profile accounting frauds highlighted widespread auditor misconduct. The SEC also approved updates to the PCAOB's standards regarding general responsibilities of the auditor and the use of technology to assist audits.

> **The changes, which investor advocates say are long overdue, improve protections for investors, who depend on thorough, independent audits of publicly traded companies to back up financial statements filed with the SEC.**

Under the definition cited by the SEC in its order granting approval to Rule 3502, negligence is "the failure to exercise reasonable care or competence." Recklessness, in turn, constitutes an "extreme departure from the standard of ordinary care"—one that "presents a danger to investors or to the markets that is either known to the (actor) or is so obvious that the actor must have been aware of it."

The change to Rule 3502, which is more than 20 years old, eliminated two incongruities: a different liability standard for audit companies and the individuals responsible for producing the audits; and separate enforcement standards for the PCAOB and the SEC. Prior to the update, the SEC could sanction an associated person who was negligent, while the PCAOB needed to show recklessness. As a result, the PCAOB sometimes deferred enforcement of individuals to the SEC.

This led to obstacles, inefficiencies, too often allowed individuals who directly and substantially contributed to violations escape enforcement, according to the PCAOB.

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The PCAOB said it had achieved Rule 3502 sanctions in only 96 cases since 2009—fewer than one-third of the cases in which firms were penalized. Put another way, “in over two-thirds of the cases in which a firm was sanctioned, no contributory actor was held accountable under Rule 3502,” the PCAOB said. The average was even lower in the last five years, during which only 19% of cases in which firms were sanctioned charged individuals under the rule.

In approving the update, the SEC split along party lines. Both Republican Commissioners said the amendment was unnecessary since the SEC could already apply the negligence standard to individuals. They also said could lead to poorer-quality audits through excess caution and would impose undue burdens on small audit firms, which have an extra year to adapt to the new standards.

> **“When firms violate their obligations, the associated persons who directly and substantially contributed to such violations should be held to the same standards of accountability by the PCAOB,” Chair Gary Gensler said.**

The SEC's three Democratic Commissioners, meanwhile, agreed with the PCAOB that the new standards merely held individuals liable to a reasonable professional standard and fixed a 20-year disconnect between the professional obligations of accounting firms and the individuals who comprised them. The PCAOB's recommendations were based on two decades of investigative and enforcement experience, they said.

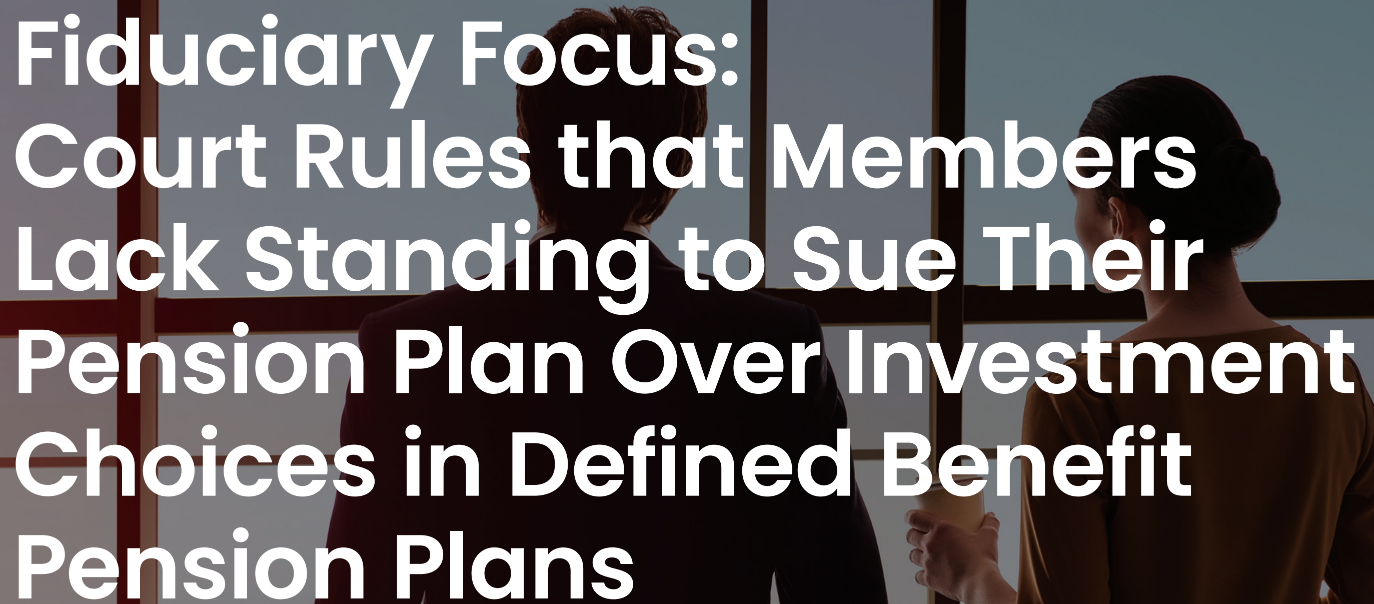
"When firms violate their obligations, the associated persons who directly and substantially contributed to such violations should be held to the same standards of accountability by the PCAOB," Chair Gary Gensler said.

SEC Chief Accountant Paul Munter called the changes to Rule 3502 "critical" because easing the standard from recklessness to negligence "aligns the rule with other negligence-based conduct standards" and "aligns the rule with the same standard of reasonable care that auditors are required to exercise when executing their professional duties."

The changes, which investor advocates say are long overdue, improve protections for investors, who depend on thorough, independent audits of publicly traded companies to back up financial statements filed with the SEC. ■

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

Fiduciary Focus: Court Rules that Members Lack Standing to Sue Their Pension Plan Over Investment Choices in Defined Benefit Pension Plans



A state trial court has issued an opinion in a case of interest to pension funds across the country concerning when public pension fund members may sue their systems over investment decisions.

In the case,[1] four current and former New York City municipal employees joined with a national nonprofit organization[2] to sue three City pension plans. The plan members alleged that the retirement systems, in the exercise of their investment decision-making, breached their fiduciary duty to administer their plans solely in the interests of their participants and beneficiaries and for the exclusive purpose of providing retirement benefits. Specifically, the Plaintiffs alleged that the Defendant-retirement systems breached their fiduciary duty by deciding to divest the plans of their holdings in fossil-fuel related securities. According to the Plaintiffs, the decision to divest jeopardized the retirement security of plan participants and beneficiaries, and was thus inconsistent with the fiduciary duties of loyalty and prudence.

The Court dismissed the complaint, noting that the pension plans at issue are defined benefit retirement plans. As such, Plaintiffs are entitled to a fixed payment each month. Because Plaintiffs "will receive the same pension amount regardless of whether they win or lose this action … [they] have not, and will not, suffer any monetary losses based upon Defendants' investment decisions." Therefore, they lacked standing to bring the challenge to the investment decision-making of the plans.

> **The Plaintiffs alleged that the Defendant-retirement systems breached their fiduciary duty by deciding to divest the plans of their holdings in fossil-fuel related securities.**

In reaching its decision, the Court noted federal case law on point. In *Thole v U.S. Bank N.A.*, 590 US 538 (2020), participants in a pension plan brought an action against U.S. Bank and others, alleging that Defendants breached their duties of loyalty and prudence under the federal Employee Retirement Income Security Act ("ERISA") by poorly managing and investing the assets of the plan. The U.S. Supreme Court found that Plaintiffs

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1. *Wong, et al. v. New York City Employees' Retirement System, et al.*, NY Supreme Court, New York County (2024),

2. The organization, Americans for Fair Treatment, describes its mission as to "educate[] public sector employees about their constitutional rights around union membership."

lacked standing to challenge the plan's management, noting that in order to establish standing under the Case or Controversy Clause of the U.S. Constitution, a plaintiff must demonstrate that he or she "suffered an injury in fact that is concrete, particularized, and actual or imminent." Since the Plaintiffs in *Thole* were participants in a defined benefit retirement plan, who were entitled to receive a fixed payment each month that did "not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions", the outcome of the lawsuit would not affect their future benefit payments and thus the plaintiffs had "no concrete stake" and no standing to bring the lawsuit.

> **Because Plaintiffs [are members of defined benefit pension plans they] "will receive the same pension amount regardless of whether they win or lose this action … [they] have not, and will not, suffer any monetary losses based upon Defendants' investment decisions."**

The Court noted in its decision that while it is not bound to adhere to federal standing requirements, under applicable state law, plaintiffs must nevertheless demonstrate that they suffered an "injury in fact" by showing a "cognizable harm that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention." The Court found that the Plaintiffs in this case did not demonstrate sufficiently concrete or particularized harm, as their future pension benefits would not be affected by the outcome of the action.

This decision, together with the *Thole* case, underscores the need for plaintiffs to demonstrate a tangible, direct injury to successfully allege a breach of fiduciary duty for pension fund mismanagement in a defined benefit plan.

Suzanne M. Dugan is Special Counsel to Cohen Milstein, and leads the Ethics and Fiduciary Counseling practice.

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October 27-30 | Conference on Public Employee Retirement Systems Public Safety Conference
Palm Springs, CA – Christina Saler, Richard Lorant, and J.D. Davis

November 10-13 | International Foundation of Employee Benefit Plans Annual Employee Benefits Conference
San Diego, CA – Christopher Lometti and Richard Lorant

November 12-15 | State Association of County Retirement Systems Fall Conference
Monterey, CA – Julie Reiser and Richard Lorant

November 24-26 | County Commissioners Association of Pennsylvania Fall Conference
Dauphin County, PA – David Maser

December 7 | Pennsylvania Society Annual Reception
New York, NY – David Maser

Team Profile

Susan M. Greenwood

Associate Director of Securities Research and Analysis

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Susan M. Greenwood is the Associate Director of Securities Research and Analysis in the Securities Litigation & Investor Protection practice group. Susan joined the firm in 2016, bringing with her years of experience in securities litigation and case analysis. As a seasoned litigator, Susan is able to identify the strengths and weaknesses of securities fraud claims and make recommendations as to whether our clients should pursue certain cases. For this issue of the **Shareholder Advocate*****, Susan talked with Editor Christina Saler.***

I grew up in … East Brunswick, New Jersey which is best described as very suburban. Since it's less than an hour from New York City, growing up we rooted for the Jets and the Yankees and made annual trips to the City to see Broadway shows. To this day, I still love the theater and make regular trips from my home on the Upper West Side to Broadway.

I knew I wanted to be a lawyer … by the time I was in high school. My father is a lawyer, and hearing about his work I felt like it would be a good fit for me too given my love of reading and writing. At Cornell University, I majored in history and participated in Model Congress and Class Counsel. After graduating, I headed straight for law school at the University of Pennsylvania. I had clerkships during the summer and after graduation I learned the litigation ropes at a defense firm before I joined a plaintiffs' class action law firm and began litigating securities fraud class action cases. After several years, I decided to switch gears and joined *Bloomberg* where I had an excited opportunity to be part of the team developing *Bloomberg*'s first legal product. In this role, I focused on securities litigation and SEC enforcement, writing articles on securities and enforcement cases and major circuit court and Supreme Court decisions. I also tracked settlements and analyzed new trends and developments in this area of the law.

I found my way to Cohen Milstein … through an email from a former colleague who I had not spoken to in years. He was a partner at Cohen Milstein and said the firm was looking for an experienced securities litigator to analyze cases and make recommendations on the viability of claims as part of the case starting team. I liked the idea of being back in private practice and part of a litigation team where I could really dig into the facts. My favorite aspect of my work is the diversity of our cases and learning about different industries.

I read … constantly. At work, I'm sifting through SEC filings, analyst reports, and financial articles. In my spare time, I always have a couple books going at the same time—one for the subway to our office and one at night. I gravitate toward historical fiction and sci-fi fantasy. I probably read at least 30 books last year, and if I had to pick just one to recommend, I would say *Horse: A Novel* by Geraldine Brooks. The story is about a record-setting racehorse in Kentucky and his groom who are separated by the Civil War and a modern day New York City gallery owner who comes across a painting of them and becomes obsessed with finding its origins.

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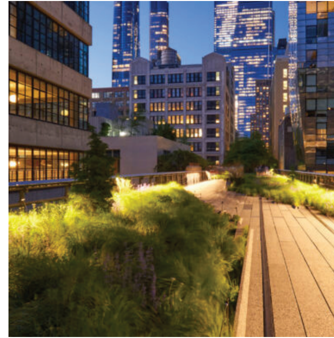

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