SHAREHOLDER ADVOCATE

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Rick Fleming: Investors' Inside Voice

SEC's First Investor Advocate Weighs in on Issues Facing Shareholders

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Rick Fleming: Investors' Inside Voice

SEC's First Investor Advocate Weighs in on Issues Facing Shareholders

RICK FLEMING
SEC Investor Advocate

"CONGRESS HAS GIVEN THE OFFICE OF THE INVESTOR ADVOCATE UNIQUE TOOLS TO ENSURE OUR INDEPENDENCE AND ENHANCE OUR INFLUENCE."

Rick Fleming is the Securities and Exchange Commission's first Investor Advocate. Established in 2014 under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC's Office of the Investor Advocate has four core functions: to provide a voice for investors, to assist retail investors, to study investor behavior, and to support the SEC's Investor Advisory Committee. While Mr. Fleming reports to the SEC Chair, the Investor Advocate has some independence, submitting reports directly to Congress without review from the SEC Commissioners or staff.

Prior to becoming Investor Advocate in February 2014, Mr. Fleming spent 15 years as a state securities regulator, including over a decade as general counsel for the Office of the Kansas Securities Commissioner. He also worked as deputy general counsel for the North American Securities Administrators Association (NASAA), representing the state securities regulators organization before Congress and federal agencies. Mr. Fleming agreed to answer questions of interest to *Shareholder Advocate* readers after speaking at the National Conference on Public Employee Retirement Systems' (NCPERS) Legislative Conference earlier this year.[1] The questions were posed by Director of Institutional Client Relations Richard Lorant and New York-based Partner Laura Posner. Like Mr. Fleming, Ms. Posner was a state securities regulator, serving as Bureau Chief for the New Jersey Bureau of Securities before joining Cohen Milstein. During her three-year tenure as the state's top regulator, she also was an active member of NASAA, where she served as Chair of Enforcement.

Shareholder Advocate: As the first Investor Advocate, how have you worked to establish an office that can effectively influence the Commission on behalf of investors? How do you maintain your independence?

Rick Fleming: Congress has given the Office of the Investor Advocate unique tools to ensure our independence and enhance our influence. For example, we are authorized to make recommendations to the Commission, and the Commission must respond to our recommendations within 90 days. We also report directly to Congress and describe the Commission's responses to our recommendations. However, I also report to the Chairman of the Commission, so I am in a role that can involve public disagreement with my boss. I have been fortunate to have worked for two Chairmen who have respected my role and do not take my criticisms of Commission actions personally. On the other hand, I live by some simple rules that help me maintain a constructive role at the Commission—for example, I do not criticize decisions publicly unless I have already made my position clear privately.

1 The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or Commissioner. Mr. Fleming's answers reflect his views and do not necessarily reflect those of the Commission, the Commissioners or other members of the staff.

***SA*:** How did your experiences as a state securities regulator in Kansas and as deputy general counsel for the NASAA influence your approach to this job? What are the biggest differences working at the federal vs. the state level? Any suggestions for making the relationships more symbiotic?

RF: My experience as a state regulator provided an ideal background for this position. In the federal government, you tend to become highly specialized in a very narrow area, but in state government you deal with a very wide range of issues. For example, I helped attorneys for small companies understand the ways to raise capital, and I dealt with numerous technical issues related to broker-dealer and investment adviser operations. I also "advocated" for investors nearly every day. I litigated enforcement matters, including criminal cases, and have argued cases in front of juries and the Kansas appellate courts. In addition, I have drafted regulations and testified before lawmakers numerous times. But, the biggest difference between state and federal government is that state regulators tend to maintain much closer contact with Main Street investors. This means that state regulators are in a good position to judge how federal rulemakings may impact real people, and I am hopeful that the SEC will take better advantage of state regulators' insights.

***SA*:** In December, as part of its rules-making process, the Commission issued a request for comment on "the nature, content and timing of earnings releases and quarterly reports made by reporting companies." [Ed. Note: the comment period ended March 21, 2019.] You have said publicly that you would favor maintaining or increasing the frequency or reporting, a position that aligns you with investor advocacy groups like the Council of Institutional Investors but puts you at odds with comments made by the president last year. Why is reducing the frequency of financial reporting a bad idea? What can we do to discourage the "short-termism" practiced by some publicly traded companies?

RF: The justification for reducing the frequency of reporting has been to give management the space to run a company without having to fixate on quarterly performance. Management does not like how strongly the market can react to bad quarterly news, and I get that. But less frequent financial reporting will not solve the problem—it will just create even greater volatility when six-month or full-year reports come out. It also creates greater pressure for favored investors to gain access to corporate leaders, which would contribute to greater informational asymmetries in the marketplace. A better solution for quarterly volatility may be to discourage companies from issuing quarterly guidance. This is an idea that I think is worth exploring.

***SA*:** At NCPERS earlier this year, you mentioned your general support for Regulation Best Interest, which would heighten the suitability standard under which brokers currently operate, but said it remains to be seen how close the final rule will be to a fiduciary standard—or, we might add, one that actually requires brokers to act in the "best interests" of their clients. How do you think the currently proposed rule could be modified to make it more robust?

"ONE OF MY BIGGEST CONCERNS IS THE EXTENT TO WHICH THE FOR-PROFIT EXCHANGES HAVE ALLOWED THEIR LISTING STANDARDS TO DETERIORATE, PARTICULARLY WITH RESPECT TO CORPORATE GOVERNANCES."

RF: My view about Reg BI is that it should be judged by whether it actually reduces bad conduct. If, in the end, it merely requires brokers to disclose that they are doing bad things to customers, but they can disclose it in a way that doesn't cause those customers to push back or walk away, then the disclosure isn't good enough. So, for me, the key is not whether we label the new standard of conduct "fiduciary" or "best interest," but whether the rule has enough teeth to actually make brokers stop selling products that pad their pockets when superior products are available to the customer at less cost. This means that the part of the proposed rule that requires brokers to "mitigate" financial conflicts of interest will be of critical importance.

***SA*:** You are on the record against allowing companies with permanent dual-class shares and mandatory arbitration clauses to issue publicly traded stock. How important are these threats to corporate accountability to company shareholders and what other threats would you identify as important?

RF: One of my biggest concerns is the extent to which the for-profit exchanges have allowed their listing standards to deteriorate, particularly with respect to corporate governance. Things like dual-class shares (or non-voting shares) tip the balance of power too far from the shareholders to management, which I believe will ultimately damage the markets. The Council of Institutional Investors has sponsored some strong research showing that founder control may enhance value in the first few years after a company goes public, but founder control begins to detract from value in future years. I believe the exchanges should be doing more to address this concern and should strongly consider sunsetting dual-class shares if they are allowed at all. As far as other threats to shareholders, I am currently concerned with the Commission's focus on proxy advisors. The business community does not like the influence wielded by proxy advisors, so they have called for increased regulation of those firms. They couch their arguments in terms of investor protection, but I have yet to hear from investors who want to "fix" proxy advisors by giving corporations a greater say in the recommendations they produce.

***SA*:** As the SEC's first Investor Advocate, you have had the opportunity to shape the role to some degree. Has your team changed its approach since 2014 as you have worked under two different administrations to fulfill the office's mission?

RF: The change in administrations has not altered our approach. The biggest challenge has been the fiscal environment in the past two years, which resulted in a hiring freeze that hindered our ability to build out the office as quickly as I would have preferred. In particular, we are working to build up our research capacities. Although rulemakings at the Commission are required to go out for "public comment," it is not usually the public we are hearing from, so I want to utilize tools like surveys and focus groups to get a much better sense of how Main Street investors behave and how changes to the rules will impact them. ■

"THE BIGGEST DIFFERENCE BETWEEN STATE AND FEDERAL GOVERNMENT IS THAT STATE REGULATORS TEND TO MAINTAIN MUCH CLOSER CONTACT WITH MAIN STREET INVESTORS. THIS MEANS THAT STATE REGULATORS ARE IN A GOOD POSITION TO JUDGE HOW FEDERAL RULEMAKINGS MAY IMPACT REAL PEOPLE, AND I AM HOPEFUL THAT THE SEC WILL TAKE BETTER ADVANTAGE OF STATE REGULATORS' INSIGHTS."

COHEN MILSTEIN OVERCOMES TIVITY HEALTH'S MOTION TO DISMISS

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Shareholders suing Tivity Health over the company's failure to adequately disclose that one of its largest customers was becoming a direct competitor cleared an important hurdle in March when a federal judge denied defendants' motion to dismiss the class action lawsuit.

Cohen Milstein represents Oklahoma Firefighters' Pension & Retirement System as sole lead plaintiff in the lawsuit, which accuses Tivity and three individual defendants of violating the Securities Exchange Act of 1934 by misleading investors about the terms of the contract renewal with United Healthcare (UHC), the company's second largest customer, and the actual competitive threat posed by UHC. Tivity's share price fell by more than a third on news that UHC had launched a senior fitness program that would rival SeniorSneakers, the flagship program which generates 82% of Tivity's revenues.

Working in partnership with fitness centers, Tivity provides UHC and other health plan customers with fitness and health programs that the health plans offer to their members. Because of UHC's importance to Tivity, analysts and investors were closely watching Tivity and UHC's contract renewal negotiations in early 2017. As defendants reported it, the news looked good. On April 27, 2017, Tivity said it had renewed the contract for three years. While defendants refused to provide specifics when pressed by analysts, they said they were "pleased" with the contract's "favorable terms."

On November 6, 2017, however, investors learned that defendants had failed to disclose that UHC had been offering a rival fitness program to SilverSneakers in two states since late 2016, and planned to roll it out in nine more states starting in January 2018. The stunning disclosure sent Tivity stock tumbling by more than 34%, causing significant losses to Oklahoma Firefighters and other investors who bought stock during the March 6, 2017 to November 6, 2017 class period.

In denying defendants' motion to dismiss, Judge Waverly D. Crenshaw, Jr. of the U.S. District Court for Northern Tennessee rejected all their arguments, including that the alleged actionable statements were immaterial and that certain statements were protected because they were forward-looking and therefore exempt from liability under "safe harbor" statutory provisions.

In his March 18 ruling, Judge Crenshaw found that Oklahoma Firefighters sufficiently pleaded that Tivity's statements about the terms of the UHC contract were material to investors because (1) Tivity had said UHC was

COHEN MILSTEIN REPRESENTS OKLAHOMA FIREFIGHTERS' PENSION & RETIREMENT SYSTEM AS SOLE LEAD PLAINTIFF IN THE LAWSUIT.

JUDGE CRENSHAW ALSO HELD THAT DEFENDANTS COULD NOT AVAIL THEMSELVES OF THE STATUTORY SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS ABOUT TIVITY'S ABILITY TO STRENGTHEN MARKET SHARE, LONG-TERM OPPORTUNITIES, AND IMPROVED PERFORMANCE BECAUSE THE STATEMENTS "WERE PROVIDED IN THE CONTEXT OF CAUTIONARY STATEMENTS THAT WERE BOILERPLATE, NOT MEANINGFUL, AND INCONSISTENT WITH THE HISTORICAL FACTS" THAT UHC HAD STARTED TO COMPETE WITH TIVITY AND TIVITY WAS SCRAMBLING TO TRY AND "CONTAIN THE UHC THREAT."

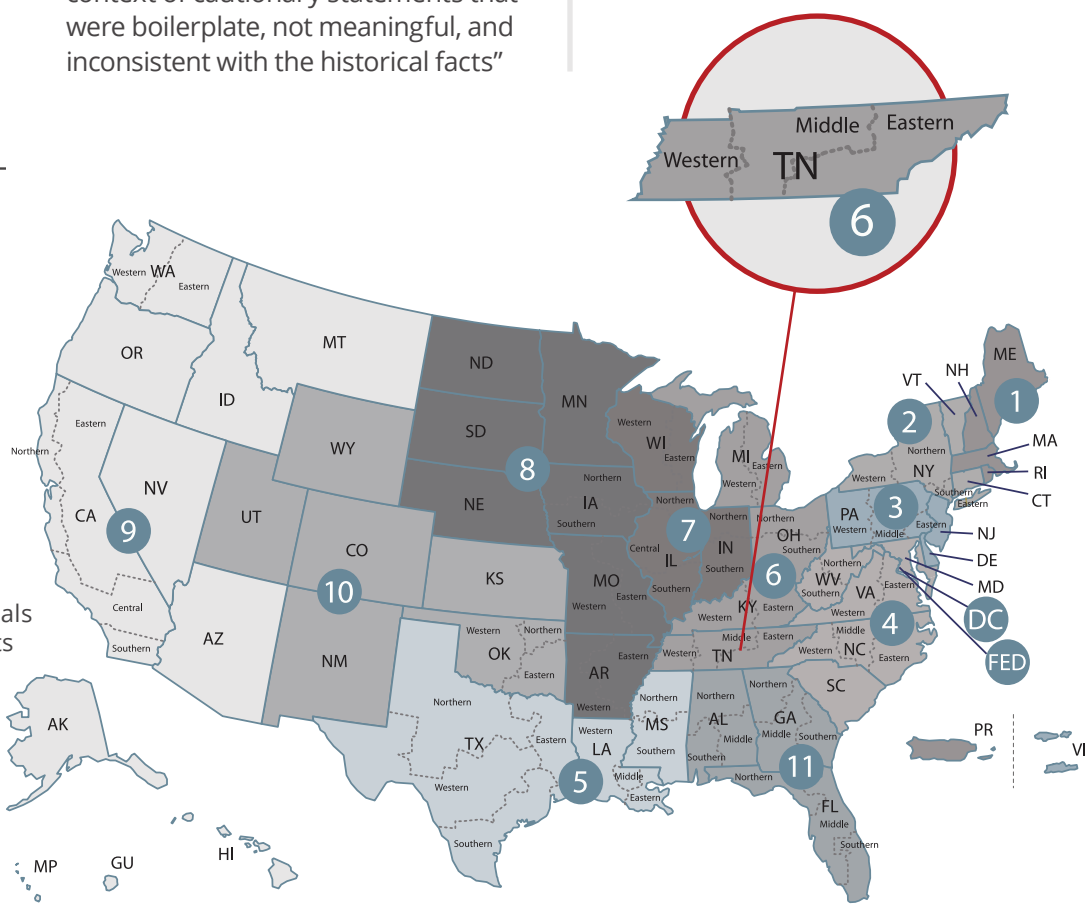
one its most important health plan customers and (2) Tivity had warned that a loss or major change to its contract with UHC—or UHC's launch of a competitive program—would hurt its operations. Further underscoring the material nature of the events, Judge Crenshaw noted, defendants themselves reacted when the contract terms changed to allow UHC to compete directly with SilverSneakers and UHC launched its own program. "Tivity was hardly nonplussed," he wrote. "It formed a committee to address the problem."

Judge Crenshaw also held that defendants could not avail themselves of the statutory safe harbor for forward-looking statements about Tivity's ability to strengthen market share, long-term opportunities, and improved performance because the statements "were provided in the context of cautionary statements that were boilerplate, not meaningful, and inconsistent with the historical facts" that UHC had started to compete with Tivity and Tivity was scrambling to try and "contain the UHC threat."

In addition to the company, the lawsuit names as defendants Chief Executive Officer Donato Tramuto, former interim Chief Financial Officer Glenn Hargreaves, and Chief Financial Officer Adam Holland. The case has moved into the discovery phase with Oklahoma Firefighters scheduled to move for class certification on July 1.

The case is *Eric Weiner, et al. v. Tivity Health, Inc., et al.*, Case No. 3:17-cv-01469, U.S. District Court, Middle District of Tennessee, Nashville Division. ■

Christina D. Saler is Of Counsel to the firm and a member of the Securities Litigation & Investor Protection practice group.



GEOGRAPHIC BOUNDARIES
of United States Courts of Appeals and United States District Courts

UNDER *LORENZO*, LIABILITY CAN EXTEND TO THOSE WHO KNOWINGLY DISSEMINATE FALSE STATEMENTS

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Editor's Note: As reported in the Fall 2018 issue of *Shareholder Advocate*, Cohen Milstein Partner Laura Posner and Associate Eric Berelovich submitted an *amicus curiae* ("friend of the court") brief in support of the Securities and Exchange Commission in *Lorenzo v. SEC*.

In a victory for plain language, the Supreme Court ruled in March that an investment banker who intended to defraud clients by relaying an email with contents he knew were misleading was liable for fraud even though he didn't technically "make" the fraudulent statement at issue.

In *Lorenzo v. Securities and Exchange Commission*, the Court held that the SEC correctly found Francis V. Lorenzo in violation of its Rule 10b-5(a) and (c), for his "dissemination of false or misleading statements with intent to defraud" prospective investors. The ruling upheld a decision by the D.C. Court of Appeals.

As the Supreme Court noted in its March 27 opinion, SEC Rule 10b-5's three subsections make it unlawful: (a) "to employ any device, scheme, or artifice to defraud," (b) "to make any untrue statement of a material fact," or (c) "to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit … in connection with the purchase or sale of any security."

Writing for a 6-to-2 majority, Justice Stephen Breyer held that Lorenzo, then director of investment banking at broker-dealer Charles Vista, had violated subsections (a) and (c) of Rule 10b-5 by sending prospective investors emails that vastly understated the assets of a company whose debt Charles Vista was trying to sell—"emails he understood to contain material untruths." Rule 10b-5 was promulgated by the SEC to enforce Section 10(b) of the Securities Exchange Act (Exchange Act). The Court also held that Lorenzo was liable under Section 17(a)(1) of the Securities Act of 1933, which mirrors Rule 10b-5(a)'s language against "any device, scheme, or artifice to defraud," this time in connection with sales and offerings.

In reaching its conclusion, the majority rejected Lorenzo's argument that he couldn't be held responsible under Rule 10b-5(a) and (c) because the email containing the fraudulent information was composed largely by his boss. Lorenzo, who sent the email to clients after adding his title and an offer to answer questions, did not deny knowing that the message's content was false.

Lorenzo's argument relied on a 2011 Supreme Court decision, *Janus Capital Group, Inc. v. First Derivative Traders*, which restricted primary liability under subsection Rule 10b-5(b) to "makers"—those who had "ultimate authority" over the statement's content "and whether and how to communicate

"AFTER EXAMINING THE RELEVANT LANGUAGE, PRECEDENT, AND PURPOSE," INCLUDING DICTIONARY DEFINITIONS OF THE WORDS IN THE STATUTE, THE COURT CONCLUDED THAT "DISSEMINATION OF FALSE OR MISLEADING STATEMENTS WITH INTENT TO DEFRAUD CAN FALL WITHIN THE SCOPE OF SUBSECTIONS (A) AND (C) OF RULE 10B–5 … EVEN IF THE DISSEMINATOR DID NOT 'MAKE' THE STATEMENTS AND CONSEQUENTLY FALLS OUTSIDE SUBSECTION (B) OF THE RULE."

WRITING FOR A 6-TO-2 MAJORITY, JUSTICE STEPHEN BREYER HELD THAT LORENZO, THEN DIRECTOR OF INVESTMENT BANKING AT BROKER-DEALER CHARLES VISTA, HAD VIOLATED SUBSECTIONS (A) AND (C) OF RULE 10B-5 BY SENDING PROSPECTIVE INVESTORS EMAILS THAT VASTLY UNDERSTATED THE ASSETS OF A COMPANY WHOSE DEBT CHARLES VISTA WAS TRYING TO SELL—"EMAILS HE UNDERSTOOD TO CONTAIN MATERIAL UNTRUTHS."

it." The Supreme Court took the case "to resolve disagreement about whether someone who is not a 'maker' of a misstatement under *Janus* can nevertheless be found to have violated the other subsections of Rule 10b-5 and related provisions of the securities laws, when the only conduct involved concerns a misstatement," Justice Breyer wrote.

"After examining the relevant language, precedent, and purpose," including dictionary definitions of the words in the statute, the Court concluded that "dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b–5 … even if the disseminator did not 'make' the statements and consequently falls outside subsection (b) of the Rule."

The majority also rejected an argument made by Justice Clarence Thomas, who was joined in his dissent by Justice Neil Gorsuch, that finding Lorenzo liable would nullify the restrictions in *Janus*, rendering it "a dead letter" and potentially putting at risk secretaries who relayed their boss's fraudulent emails. On the contrary, the Court said, *Janus* would still apply in cases "where an individual neither makes nor disseminates false information—provided, of course, that the individual is not involved in some other form of fraud." And while the Court recognized that Rule 10b-5's "expansive language" could create some "problems of scope in borderline cases," it rejected the idea that someone "tangentially involved in dissemination—say a mailroom clerk" was anything like Lorenzo, who "sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company."

Allowing Lorenzo to avoid responsibility for what appeared to be "a paradigmatic example of securities fraud" would violate both Congress's and the SEC's intentions, Breyer wrote, not to mention common meanings of the terms used in the rules themselves. "It would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud," he wrote.

Rule 10b-5 was promulgated by the SEC to enforce the Exchange Act, a sweeping law enacted after the 1929 Stock Market Crash, that is relied on by the SEC and private litigants to bring most securities fraud cases. In his conclusion, Justice Breyer wrote that in enacting the law, "Congress intended to root out all manner of fraud in the securities industry. And it gave to the Commission the tools to accomplish that job." Under *Lorenzo*, those tools will continue to include any and all of the subsections of SEC Rule 10b-5. ■

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COHEN MILSTEIN'S MBS LITIGATION WINDS DOWN—SETTLEMENTS ACHIEVED EXCEPTIONAL PAYOUTS FOR CLASS MEMBERS

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AFTER THESE RISKY SECURITIES COLLAPSED IN 2008 AND 2009, THE FIRM WENT TOE-TO-TOE WITH DEEP-POCKETED INVESTMENT BANKS IN A GRINDING SERIES OF COMPLEX CASES THAT WERE NOVEL AND EXTRAORDINARILY CHALLENGING TO LITIGATE.

With the $165 million *Novastar MBS Litigation* settlement receiving final approval in March, Cohen Milstein is concluding the last of a dozen class actions in which it represented investors against the underwriters of mortgage-backed securities (MBS). After these risky securities collapsed in 2008 and 2009, the firm went toe-to-toe with deep-pocketed investment banks in a grinding series of complex cases that were novel and extraordinarily challenging to litigate. In the end, the MBS class actions allowed investors to recover significant portions of the money they lost, standing as a rebuke to critics who deride securities litigation as returning "pennies on the dollar" to victims of stock fraud. Cohen Milstein served as sole lead counsel in the case, *New Jersey Carpenters Health Fund v. The Royal Bank of Scotland Group, PLC, et al.*, No. 08 Civ. 05310 (S.D.N.Y.). In all, the firm was sole lead counsel in five MBS class actions, co-lead counsel in four, and represented named plaintiffs in three others.

Among those MBS class actions where monies have been distributed, investors fared particularly well in three cases where Cohen Milstein served as sole lead counsel, receiving nearly a quarter to more than a third of their recognized losses ***after*** attorneys' fees. Specifically, in *New Jersey Carpenters Vacation Fund, et. al. v. The Royal Bank of Scotland Group, PLC, et. al.*, No. 08 Civ. 5093 (LAP) (S.D.N.Y. 2008) ("Harborview"), an MBS class action brought against underwriter RBS and its affiliates, 355 claimants recovered **33.9%** of their recognized losses; in *New Jersey Carpenters Health Fund, et. al. vs. DLJ Mortgage Capital, Inc., et. al.*, No. 08 Civ. 5653 (PAC) (S.D.N.Y. 2008) ("HEMT"), an MBS class action brought against the underwriter Credit Suisse and its affiliates, 153 claimants received **32.9%** of their recognized losses; and in *New Jersey Carpenters Health Fund, et. al. v. Residential Capital, LLC, et. al.*, No. 08 Civ. 8781 (HB) (S.D.N.Y. 2008) ("RALI"), an MBS class action brought against Citigroup Global Markets Inc., Goldman, Sachs & Co., and UBS Securities LLC, 355 claimants recovered **22.9%** of their recognized losses.

Distribution of the *Novastar* settlement fund is pending, so it is too early to calculate the size of recovery in relation to investors' recognized losses. But we expect investor recoveries will be in line with other MBS class actions where Cohen Milstein acted as sole lead counsel. ■

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FIDUCIARY FOCUS

TRUSTEE DELEGATION TO STAFF: FIDUCIARY IMPLICATIONS AND THE PROPER ROLE OF THE BOARD

At the February 2019 meeting of the National Association of Public Pension Attorneys (NAPPA), I had the pleasure of moderating a panel on a topic of perennial interest to many clients: "Governance and Fiduciary Implications of Delegation and the Proper Role of the Board in These Matters." The Fiduciary and Plan Governance Section panel discussed the design and implementation of delegations to pension fund staff and the proper role of the board. Panelists Lisa Marie Hammond from the California Public Employees' Retirement System, Ben Brandes from the Wyoming Retirement System, and Julie Becker from Aon Hewitt shared a broad range of pension system perspectives, making it clear that this is not a "one size fits all" exercise. We discussed delegation in the context of all aspects of pension system administration—benefit matters, third-party contracting, investments, securities lawsuits and other litigation, and proxy voting. We gave particular consideration to staff's accountability to report to the board, including what level of reporting or communication would satisfy the board's fiduciary duty.

A survey of NAPPA membership was undertaken before the February meeting to guide the discussion. Public funds of all sizes responded, and we reviewed the results to look for trends—whether delegation increased with fund size, for example. (Interestingly, fund size correlated positively with delegation in some areas, such as investment manager selection, but not across the board.)

Because fiduciaries are judged by the decision-making process they undertake, the survey looked at how delegation was typically documented. A clear majority of respondents (62%) indicated that staff delegations were set forth in "policies" of the system. The next-largest number said they relied on "law, rules and regs," followed by those who said their funds memorialized delegations in "Board minutes."

FROM A FIDUCIARY PERSPECTIVE, the question of whether to delegate is tied to trustees' application of the duty of prudence. As panelists noted, trustees simply cannot be experts on all pension-related subjects, particularly when it comes to sophisticated investments. Thus, delegation is not an abdication of responsibility; on the contrary, boards may even have a duty to delegate depending on the facts and circumstances:

> Restatement (Third) of Trusts: A trustee has a duty to personally perform the responsibilities of trustee except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom and in what manner to delegate fiduciary authority in the administration of a trust, and

FROM A FIDUCIARY PERSPECTIVE, THE QUESTION OF WHETHER TO DELEGATE IS TIED TO TRUSTEES' APPLICATION OF THE DUTY OF PRUDENCE.

PROCESS, PROCESS, PROCESS!

DOCUMENT, DOCUMENT, DOCUMENT!

thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.

Proper delegation is also related to the application of the duty of care: duty to properly select the delegate, duty to monitor, duty to ensure that the delegate has adequate information and resources, and duty to impose standards of care and loyalty upon the delegate.

FROM A GOVERNANCE PERSPECTIVE, the panel said delegating may help the board make more effective use of its time, noting that boards should focus on policy, setting direction for their systems, and oversight—not on day-to-day administration. ■

KEY TAKEAWAYS

- Thoroughly delineate the various roles and responsibilities of Board, staff, and consultants/managers.
- Document delegation in writing, whether set in board policies, recorded in meeting minutes, or otherwise.
- Continually review those delegations to make sure they remain appropriate.
- Ensure that the delegate has enough information and resources to perform the functions; and hold the delegate accountable.
- Continue to carefully monitor delegated functions.
- Make sure the reporting mechanisms are sufficient to allow the board to exercise its fiduciary duty.

BECAUSE FIDUCIARIES ARE JUDGED BY THE DECISION-MAKING PROCESS THEY UNDERTAKE, THE SURVEY LOOKED AT HOW DELEGATION WAS TYPICALLY DOCUMENTED. A CLEAR MAJORITY OF RESPONDENTS (62%) INDICATED THAT STAFF DELEGATIONS WERE SET FORTH IN "POLICIES" OF THE SYSTEM.

Suzanne Dugan heads Cohen Milstein's Ethics & Fiduciary Counseling practice, which assists pension systems in creating and updating policies and procedures designed to address these and other fiduciary issues.

COHENMILSTEIN IN THE NEWS

- "Federal Judge: Flint Suit Against Snyder Can Advance," *The Detroit News* – April 1, 2019
- "Lawsuits over Bias Still Dog Walmart," *Arkansas Democrat-Gazette* – March 31, 2019
- "Will Supreme Court's Lorenzo Ruling Spur Shareholder Class Actions?" *Reuters* – March 28, 2019
- "Former IBM Employees Sue Company in Federal Age-Discrimination Lawsuit," *New York Law Journal* – March 27, 2019
- "City of Baltimore Files Lawsuit Against Pharmaceutical Company to Recover Millions in Damages," *WMAR 2 News* – March 22, 2019
- "Housing Discrimination Suit Seeks Class-Action Status," *Newsday* – March 22, 2019
- "Lawsuit Alleges Collusion, Inflated Commissions Among Realtors," *Forbes* – March 19, 2019
- "Judge's Ruling Allows Protesters' Suit Against Turkey over D.C. Attack to Proceed," *The Washington Post* – March 19, 2019
- "Tivity Atty's 'Suspicious Stock Sales' Support Suit, Judge Says," *Law360* – March 18, 2019
- "BlackRock Board Fights $100M ERISA Mismanagement Suit," *Law360* – March 14, 2019
- "$165M NovaStar Deal OK'd over FHFA Objections," *Law360* – March 11, 2019
- "Investors Seek Class Cert. in Rate-Swap Antitrust MDL," *Law360* – March 8, 2019
- "A Year After Star Turn on Oscars, 'Inclusion Riders' Are Making Inroads in Hollywood," *Bloomberg* – February 22, 2019
- "Pension Funds' Lawsuit Against Credit Suisse ADRs Allowed to Proceed," *Pensions & Investments* – February 20, 2019
- "Cohen Milstein, Levi & Korsinsky Get Lead in MoneyGram Row" *Law360* – February13, 2019
- "Judge OKs Equifax Lawsuits over Massive Data Breach," *Daily Report* – January 28, 2019
- "$60M Deal Gets Green Light in SSM Health 'Church Plan' Suit," *Law360* – January 17, 2019
- " Employees Sue Transamerica, Claim Poor Management Cost Them Millions in Retirement Accounts," *Des Moines Register* – January 11, 2019
- "Data Breach Class Action Powerhouses Team Up to File First, Fifty-State Lawsuit Against Marriott in Wake of Disastrous Data Breach," *Associated Press* – January 10, 2019
- "Google's Handling of Sexual Misconduct Claims Subject of Shareholder Suits," *San Francisco Chronicle* – January 10, 2019

AWARDS & ACCOLADES

- Six Cohen Milstein attorneys recognized among the 2019 Lawdragon 500 Leading Plaintiff Employment Lawyers – April 5, 2019
- Cohen Milstein's Complex Tort Litigation practice honored with three Daily Business Review "Professional Excellence Awards" – March 15, 2019
- Four Cohen Milstein attorneys, including Molly J. Bowen and Julie Goldsmith Reiser of the Securities Litigation & Investor Protection practice, receive The Burton Awards' "Law360 Distinguished Legal Writing Award: Law Firm" – February 25, 2019
- Nine Cohen Milstein attorneys, including Julie Goldsmith Reiser and Steve Toll of the Securities Litigation & Investor Protection practice, recognized among the 2019 Lawdragon 500 Leading Lawyers in America – February 22, 2019

UPCOMING EVENTS

- **May 7-10** | State Association of County Retirement Systems (SACRS) Spring Conference, Resort at Squaw Creek, Lake Tahoe, CA – Richard Lorant
- **May 19-22** | National Conference on Public Employee Retirement Systems (NCPERS) Annual Conference & Exhibition, Hilton Austin, Austin, TX – Richard Lorant and Christina Saler
- **June 5-8** | Oklahoma State Firefighters Association (OFSA) Annual Convention, Fairfield Inn, Ponca City, OK – Richard Lorant
- **June 25-28** | National Association of Public Pension Attorneys (NAPPA) Legal Education Conference, Sheraton San Diego, San Diego, CA – Luke Bierman, Suzanne Dugan, Carol Gilden, Julie Reiser, and Dan Sommers

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V-CARD

> "For my entire career at Cohen Milstein I have been litigating against the most talented defense lawyers in the country. The challenge is always to be highly creative in our strategy and management of the case."

Daniel Sommers is a partner at Cohen Milstein and member of the Firm's Executive Committee. He has been with the firm for over 31 years. For over ten years, Dan co-chaired the Securities Litigation & Investor Protection practice. Dan also is a member of the Securities Litigation Working Group of the National Association of Public Pension Attorneys (NAPPA), chairs the Markets Advisory Council of the Council of Institutional Investors, and is frequently called upon by legal publications to provide his analysis of U.S. Supreme Court decisions that impact investor's rights. For this issue of the *Shareholder Advocate*, Dan spoke with Editor Christina Saler.

I grew up in ... Tenafly, New Jersey, but spent the first five years of my life in the Bronx, New York. I can't say I was ever a city kid but always a Yankees fan. I attended the public schools in suburban Tenafly, including Tenafly High School. By way of Cohen Milstein trivia, two of my colleagues—Jeanne Markey and Joel Laitman—all went to Tenafly High at the same time (both are older than me). None of us could have predicted we would be practicing law together all these years later.

I knew I wanted to be a lawyer ... after a series of experiences. In college I had a Constitutional Law class that fascinated me, and every summer during college I worked in the library of a large law firm in New York City. Surrounded by case law and legal treatises and watching lawyers use these resources to build their cases, I found myself very comfortable in that world. My skill set seemed to match what was needed to be an effective lawyer. After graduating college, I headed to George Washington University School of Law in Washington, DC.

The most challenging aspect of my job ... is balancing firm management with litigation. When I joined Cohen Milstein in 1988, I was the 10th lawyer. Twenty years later, in 2008, we tripled in size, and today we have over 100 lawyers in six offices across the country. My work on the Executive Committee requires me to be aware of all of the firm's operations and to consider how every decision we make impacts the entire firm. This senior management role also requires careful attention to each practice group to make sure that they have the resources they need to take on and prosecute the most compelling cases. In addition, as an Executive Committee member I need to constantly be aware of and sensitive to external factors that impact the firm going forward, such as changes in the judiciary and new legislation that may impact us and our clients. As to litigation, I still enjoy the challenges of uncovering the facts, and bringing corporate defendants' wrongdoing to light so we can get relief for investors who were defrauded or otherwise harmed. For my entire career at Cohen Milstein I have been litigating against the most talented defense lawyers in the country. The challenge is always to be highly creative in our strategy and management of the case. In addition, virtually every case I have handled has required me to learn about a new business or industry. It's like being in school. There is a constant learning process that keeps my litigation work intellectually fresh and interesting. And after all these years I still find being on my feet in court to be a highlight.

My favorite pastime is ... heading out with my son to a baseball game. We love going to ballfields around the country. Given my childhood, not surprisingly Yankees Stadium in the Bronx is my favorite. We recently went to the Baseball Hall of Fame in Cooperstown, NY which we both enjoyed.

I recently saw ... "They Shall Not Grow Old." It was a powerful documentary film created using original footage from World War I. Much of it was colorized and it used sound effects and voice acting to add to its realism. While some of the movie was intense, it is well-worth seeing as it really humanizes a war that is not as well understood as World War II. ■

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