

Securities Law Alert

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2025

Supreme Court Decisions and Developments

Supreme Court: Settles Circuit Split on Pleading Standards for Prohibited-Transaction Claims

On April 17, 2025, the Supreme Court unanimously reversed and remanded the Second Circuit's dismissal of an ERISA claim that was brought by plan participants alleging that their university employer and other plan fiduciaries violated Section 1106(a)(1)(C)¹ by causing the plans to engage in prohibited transactions for recordkeeping services. *Cunningham v. Cornell Univ.*, 145 S. Ct. 1020 (2025) (Sotomayor, J.). The Second Circuit had held that "the exemptions to §1106(a)'s prohibited transactions contained in §1108 imposed additional pleading requirements." Disagreeing, the Court held "that plaintiffs seeking to state a §1106(a)(1)(C) claim must plausibly allege that a plan fiduciary engaged in a transaction proscribed therein, no more, no less. Plaintiffs are not required to plead and prove that the myriad §1108 exemptions pose no barrier to ultimate relief."

1. The three elements of Section 1106(a)(1)(C) prohibit "fiduciaries from (1) causing a plan to engage in a transaction (2) that the fiduciary knows or should know constitutes a direct or indirect furnishing of goods, services, or facilities (3) between the plan and a party in interest."

In 2017, defined-contribution retirement plan participants alleged that defendants violated Section 1106(a)(1)(C) by causing the plans to engage in prohibited transactions for recordkeeping services when the university retained two financial services companies to offer plan participants investment options and to also furnish recordkeeping and administrative services. Affirming the district court's dismissal, the Second Circuit held that "the exemptions to §1106(a)'s prohibited transactions contained in §1108 imposed additional pleading requirements."² In the Second Circuit's view, the exemption for reasonable and necessary transactions codified by Section 1108(b)(2)(A)³ was incorporated into Section 1106(a)'s prohibitions. The Second Circuit concluded that plaintiffs had failed to affirmatively plead both that there was a prohibited transaction and that the transaction was unnecessary or involved unreasonable compensation.

2. In doing so, the Second Circuit created a circuit split with the Eighth Circuit, which had held in *Braden v. Wal-Mart Stores, Inc.*, 588 F. 3d 585 (8th Cir. 2009) that no additional pleading requirements beyond Section 1106(a)(1) apply to prohibited-transaction claims.

3. Section 1108(b)(2)(A) of ERISA exempts any transaction that involves "contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor."

Simpson Thacher's "deep bench of trial and appellate lawyers" is "regularly retained to act on multibillion-dollar securities class actions and derivative suits."

– *Chambers USA*

Justice Sotomayor, writing for the Court, held that “under §1106(a)(1)(C), plaintiffs need only plausibly allege each of those [three] elements of a prohibited-transaction claim.” The Court explained that Section 1106(a)(1)(C) creates a categorical bar, such that any transaction that satisfies its three elements is presumptively unlawful. Justice Sotomayor noted that “[n]othing in that section removes from its categorical bar transactions that were necessary for the plan or involved reasonable compensation.” Justice Sotomayor stated that “[t]he exemptions set forth in a different part of the statute, §1108, do not impose additional pleading requirements to make out a §1106(a)(1) claim.” Justice Sotomayor pointed out that if “plaintiffs bring barebones §1106(a)(1)(C) suits” district courts have “existing tools . . . to screen out meritless claims before discovery.” Among other options, Justice Sotomayor noted that Federal Rule of Civil Procedure 7 empowers district courts to require the plaintiff to file a reply to an answer with “specific, nonconclusory factual allegations showing the exemption does not apply.” In any event, a claim under Section 1106(a)(1)(C) remains subject to ERISA’s other restrictions, including the statute of limitations under 29 U.S.C. Section 1113.

Supreme Court: The Court Hears Oral Argument As To Whether a Private Right of Action Exists Under Section 47(b) of the Investment Company Act

After granting four closed-end funds’ petition for a writ of certiorari in June, the Supreme Court heard oral argument on December 10, 2025 concerning whether Section 47(b) of the Investment Company Act of 1940 Act (ICA) gives shareholders of registered investment companies a private right of action to bring lawsuits to rescind contracts that allegedly violate the ICA. *FS Credit Opps. Corp. v. Saba Cap. Master Fund, Ltd., No. 24-345*. This issue is critical for registered investment companies because registered investment companies conduct virtually all of their operations through contracts with external service providers, and are governed by state law instruments (bylaws and declarations of trust) that are considered contracts under state law.

Section 47(b) states:

- (1) ...a contract that is made, or whose performance involves, a violation of this subchapter ... is unenforceable by either party ... unless a court finds that under the circumstances enforcement would produce a more equitable result...
- (2) To the extent that a contract described in paragraph (1) has been performed, a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result...

This litigation arose when, in reliance upon a purported private right of action under Section 47(b), an activist investor filed a lawsuit alleging that Section 18(i) of the ICA⁴ was violated when the four funds’ boards adopted resolutions opting into a Maryland law⁵ that makes it more difficult to gain control of a fund through acquiring a large block of common shares and sought rescission of the resolutions. The district court granted summary judgment in favor of the activist investor, ordered that the resolutions be rescinded, and the Second Circuit affirmed in an unpublished summary order.⁶

During oral argument before the Supreme Court, counsel representing the funds argued that Congress did not satisfy the high bar to create an *implied* private right of action in Section 47(b) based on the text and structure of the statute. In support of arguing that a private right of action exists, counsel for the activist investor primarily argued that Section

4. Section 18(i) requires, in relevant part, that every share of a registered management company be a voting stock and have equal voting rights with every other outstanding voting stock.

5. Under the Maryland Control Share Acquisition Act if the board of a closed-end fund registered under the 1940 Act adopts a resolution to become subject to the Act, then a person otherwise controlling at least 10% of shareholder voting power in such Maryland fund would not have voting rights with respect to shares in excess of that 10% threshold (“control shares”) unless approved by a two-thirds vote of other shareholders. Md. Code Ann., Corps & Ass’ns § 3-702.

6. The significance of the Second Circuit affirming the lower court in an unpublished summary order is that while the Second Circuit determined that the district court did not abuse its discretion by granting rescission under Section 47(b), it “did not otherwise address whether Section 47(b) confers a private right of action.” *Saba Cap. Master Fund, Ltd. v. Blackrock ESG Cap. Alloc. Tr.*, 2024 U.S. App. LEXIS 15648 (2d Cir. June 26, 2024).

47(b) expressly recognized a private right of action for *rescission* (but not damages), that historically “at the instance of any party” meant the right to bring a suit in the first instance, and that *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) held that § 215(b) of the Investment Advisers Act of 1940 created a private right of action for rescission and Section 47(b) of the ICA initially used the same language.⁷

The reaction of the justices at oral argument indicated that this is unlikely to result in a unanimous ruling. Justice Kavanaugh in particular stated, “I think this case is extremely close.” The justices focused on a variety of issues, including the relevance of *Transamerica*, the evolution of Section 47(b), the impact of a lack of ability to bring ICA rescission claims in federal court, the relevance of legislative history, and the Court’s overall move away from implied private rights of action. Justice Sotomayor in particular focused on statements in the legislative history around 1980 amendments to Section 47(b), whereas Chief Justice Roberts followed up by asking the litigants, “Did Congress pass the House report?” Justice Gorsuch, in response to the litigants’ arguments around whether Section 47(b) created an express or implied private right of action, wondered, “Do we have any more power to imply a modest cause of action as opposed to a substantial one?” Justice Kavanaugh also focused on whether it would be “anomalous” to “remit the litigation of a federal right to the state courts” without some indication Congress wished for that result – a point that had been made in *Transamerica*.

7. Congress changed the language of Section 47(b) in 1980.

The Court’s decision in this case is highly anticipated because of its potential consequences for the registered fund industry, and the potential it may have to signal to plaintiffs the availability of other purported private rights of action in federal statutes that previously may have been dismissed as unavailable.

Significant Circuit Court Decisions

Second Circuit: ERISA Plaintiffs Who Did Not Personally Invest in Allegedly Mismanaged Investment Options Lack Article III and Class Standing

On August 18, 2025, the Second Circuit affirmed the dismissal of a putative ERISA class action alleging that the defendant fiduciaries of an employer-sponsored defined contribution retirement benefit plan had mismanaged the plan. [*Collins v. Northeast Grocery, Inc.*](#), 149 F.4th 163 (2d Cir. 2025) (Walker, J.). The Second Circuit held that plaintiffs “lack both Article III and class standing to assert several of their claims because they did not plead that they suffered any individual harm arising from Defendants’ allegedly imprudent and/or disloyal management of investment options in which they did not personally invest or any plan-wide harm affecting their individual accounts.” Notably, the Second Circuit stated that its decision was prompted by the district court’s observation that the “Second Circuit has not definitively resolved the issue of



whether and to what extent participants of a defined contribution plan must demonstrate individual harm in order to bring claims concerning funds that they did not personally invest in.”

Plaintiffs participated in their former employer’s 401(k) Savings Plan, which provided for individual accounts where each account’s value was determined by the market performance of employee and employer contributions, less expenses. The district court dismissed holding that plaintiffs failed to establish that they had Article III standing to bring claims alleging fiduciary breaches arising from defendants’ share class selection, failure to investigate the availability of alternative funds, and revenue sharing finding that plaintiffs had not alleged any constitutionally-cognizable injury in connection with the specific investment options criticized in the complaint in which plaintiffs did not invest.

On appeal, the Second Circuit explained that to establish Article III standing, participants in a defined contribution benefit plan must plausibly plead a constitutionally-cognizable individual injury arising from the breach of the statutorily imposed duty. The Second Circuit stated that plaintiffs lack Article III standing for several of their claims because they did not plead that they suffered any individual harm arising from defendants’ allegedly imprudent and/or disloyal management of investment options in which they did not personally invest or any plan-wide harm affecting their individual accounts. The Second Circuit explained that “precedent demonstrates that defined contribution plan participants seeking to obtain monetary relief for alleged ERISA violations must allege a non-speculative financial loss actually affecting, or imminently threatening to affect, their individual retirement accounts.” The Second Circuit stated that, for some of their claims, plaintiffs “failed to allege that their benefits were or would imminently be affected by the performance of, or by fees associated with, investment options in which they did not personally invest.” The Second Circuit continued that, further, plaintiffs “failed to allege individual harm from the allegedly flawed processes resulting in the retention of the criticized investment options or the retention of Committee members who retained the criticized funds.” The Second

Circuit concluded that the district court correctly dismissed on Article III standing grounds the claims for: (i) breach of the duty of prudence based on a failure to investigate the availability of alternative share classes; (ii) breach of the duty of prudence based on the failure to investigate the availability of alternative funds; (iii) breach of the duty of prudence based on the failure to monitor indirect recordkeeper costs; and (iv) breach of the duty of loyalty regarding funds with revenue sharing. The Second Circuit also determined that plaintiffs did not plausibly allege that they had class standing to proceed with the claims for which they lacked Article III standing because a showing of individual injury is also required to establish class standing.

Second Circuit: Rejects Novel Theory of Liability for Short-Swing Profits Under Section 16(b)

On May 23, 2025, the Second Circuit affirmed the dismissal of two lawsuits⁸ brought by a shareholder seeking to impose Section 16(b)⁹ liability by pairing sales of outstanding shares made by controlling shareholders with share repurchases by corporations they control. *Roth v. LAL Family Corp.*, 138 F.4th 696 (2d Cir. 2025) (Jacobs, J.). The Second Circuit held that plaintiff’s “novel theory of liability” was “invalid” because applicable law transforms the outstanding securities into treasury shares upon repurchase by the issuer such that Section 16(b) does not impose liability for the alleged pairing.

Plaintiff is a shareholder of a Delaware corporation that is controlled by a family through its two business entities. In 2021, pursuant to Section 16(a) it was reported to the SEC that one of the two business entities sold two million shares of the Delaware corporation’s Class A common stock, while the Delaware corporation reported that it had repurchased Class A shares pursuant to a stock buyback program. Under Delaware corporate law, the repurchased shares were instantly and automatically converted into

8. This discussion will be limited to the facts of the first captioned case because, “[t]he facts in these two cases are parallel, and the legal theory advanced in them, identical.”

9. Section 16(b) requires corporate insiders to disgorge to any issuer with which they have an insider relationship all profits (the so-called “short swing profits”) that they realize from paired purchases and sales, within a six-month period, of any equity security of that issuer.

treasury shares, which had the effect of removing them from the pool of outstanding shares and divesting them of any incidents of ownership, such as rights to vote or receive dividends. Plaintiff filed suit against the two business entities on the Delaware corporation's behalf alleging that 23% of these repurchases should be attributed to the family's business entities, to match their pecuniary interest in the Delaware corporation. The district court dismissed holding that issuer repurchases cannot be paired with insiders' sales of outstanding shares to create Section 16(b) liability.



On appeal, the Second Circuit framed the issue as “whether an issuer’s share repurchase is a purchase of ‘any equity security’ that may be paired with an insider’s personal sale of outstanding shares of the issuer, such that any ‘profit realized’ by the insider is subject to disgorgement to the issuer.” The Second Circuit held that “[w]here applicable law transforms outstanding securities into treasury shares upon repurchase by the issuer, we answer this question in the negative and so conclude that Section 16(b) does not impose liability for the alleged pairing.” The Second Circuit explained that “Section 16(b) requires defendants have beneficial ownership over the shares involved in each transaction in order for them to be considered insiders; but SEC regulations preclude attributing

to controlling shareholders even indirect beneficial ownership of shares repurchased by issuers.” The Second Circuit determined that defendants “were not insiders to the repurchases because they lacked beneficial ownership over the repurchased equity securities.” The Second Circuit explained that “controlling shareholders do not become indirect beneficial owners of shares acquired by an issuer when that issuer repurchases its own issue, because state law transforms those shares into treasury shares.”

Ninth Circuit: “Snappy” Opioid Slogan Not Deceptive Where Additional Disclosures Clarified Its Context

On August 20, 2025, the Ninth Circuit affirmed the dismissal of a securities fraud class action alleging that a pharmaceutical company and certain of its executives misled investors in violation of Section 10(b) and Rule 10b-5 by marketing a drug with the slogan “Tongue and Done” because administering it was more complex than just placing it under the “Tongue and Done” and therefore its potential market would be more limited. *Sneed v. Talphera, Inc.*, 147 F.4th 1123 (9th Cir. 2025) (Lee, J.). The Ninth Circuit affirmed the district court’s dismissal because plaintiffs failed to adequately plead falsity. The Ninth Circuit held that the slogan was not deceptive because the company provided additional disclosures alongside the slogan in materials intended for investors. The Ninth Circuit explained that a reasonable investor would “not blindly” accept a slogan without considering other information that clarified the slogan’s context.

The company’s new drug could be administered by placing it under the patient’s tongue rather than intravenously. To reduce the risk of misuse, the FDA conditioned the drug’s approval on compliance with an agency safety plan called a Risk Evaluation and Mitigation Strategy (REMS), which required the drug to only be administered in medically-supervised settings and also forbids home use and sales to retail pharmacies. The company adopted the slogan “Tongue and Done” for its various investor marketing materials. Subsequently, shareholders sued alleging violations of Sections 10(b) and Rule 10b-5 and claiming that the following statements at an investor conference were

false or misleading: (i) a tabletop display with the slogan; (ii) a banner advertisement with the slogan; and (iii) the CEO's statement that you "lift up their tongue, you inject it under and you're done." The district court dismissed for a failure to adequately plead facts leading to strong inference of scienter but did not rule on falsity, deeming it a "close call." On appeal, plaintiffs argued that the statements misled investors because they omitted material information, including about dosing, administration, limitations of use, REMS restrictions and the limited size of the drug's potential market due to the prohibition on home use.

Affirming the district court, the Ninth Circuit found the pleadings deficient as to falsity. The Ninth Circuit explained that an omission can mislead by affirmatively giving a reasonable investor "an impression of a state of affairs that differs in a material way from the one that actually exists" and that under *Weston Family Partnership LLLP v. Twitter, Inc.*, 29 F.4th 611 (9th Cir. 2022), a court should look at the context surrounding the statement to decide whether a misstatement or omission is misleading. The Ninth Circuit concluded that the "Tongue and Done" slogan would not mislead a reasonable investor about the need to administer the drug under a REMS plan or about the scale of its potential market. The Ninth Circuit stated that a reasonable investor would read the slogan in the context of a marketing campaign designed to highlight that patients can receive it orally, but that made no representation about REMS restrictions. The Ninth Circuit stated that

the company provided "copious clarifying information" next to the slogan, including, among other things, that the tabletop and banner ads included text that disclosed the REMS plan; the tabletop ad directed investors to the company's booth for more information; and the banner ad expressly noted that the drug has a REMS and must be "administered sublingually by a healthcare professional." The Ninth Circuit further pointed out that investors who still wanted more information could turn to the company's SEC disclosures or its dedicated REMS website. As to the CEO's speech, the Ninth Circuit concluded that it apprised investors of the limitations imposed by the REMS and limited market because the statements warned that the drug has a limited market because only healthcare professionals can administer it under a restrictive REMS.

Ninth Circuit: Clarifies the Application of the Larson Test in Shareholder Derivative Actions

On March 28, 2025, the Ninth Circuit affirmed a district court's dismissal of a shareholder derivative action brought by a venture capital firm (the "VC firm") against a technology manufacturer, on the ground that the VC firm could not fairly or adequately represent the interest of the manufacturer's stockholders. [*Bigfoot Ventures Ltd. v. Knighton*](#), 132 F.4th 1138 (9th Cir. 2025) (Gould, J.). In its decision, the Ninth Circuit clarified the application of the eight-factor test established in *Larson v. Dumke*, 900 F.2d 1363 (9th Cir. 1990), which is used to assess the adequacy of representation by a plaintiff in a shareholder derivative action.¹⁰ The Ninth Circuit held that the district court did not err in considering the ongoing litigation between the VC firm and the manufacturer, pointing out that "[s]uch entanglements may make it likely that the interests of the other stockholders will be disregarded in the management of the suit."



10. The eight *Larson* factors are: "(1) indications that the plaintiff is not the true party in interest; (2) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) the degree of support received by the plaintiff from other shareholders; (5) the lack of any personal commitment to the action on the part of the representative plaintiff; (6) the remedy sought by plaintiff in the derivative action; (7) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; and (8) plaintiff's vindictiveness toward the defendants."

Before the instant litigation arose, the VC firm made several loans to the manufacturer through promissory notes that were secured by the manufacturer's patents. The VC firm went on to sue the manufacturer in state court to collect on these notes. After that, there were several lawsuits between the VC firm and the manufacturer and its CEO/founder concerning the VC firm's investments in the manufacturer and the manufacturer's patents. In 2019, the VC firm brought the instant shareholder derivative action in federal district court alleging that an agreement transferring the manufacturer's inventory and revenue to an LLC that was formed by the manufacturer's CEO was not intended to benefit the manufacturer or its shareholders. The manufacturer moved to dismiss on the ground of plaintiff inadequacy under Federal Rule of Civil Procedure 23.1 ("FRCP 23.1"). The district court ordered supplemental briefing on whether the VC firm satisfied the test in *Larson v. Dumke* and later dismissed concluding that the VC firm was inadequate to represent the manufacturer's shareholders.

On appeal, the Ninth Circuit explained that under FRCP 23.1(a), a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association." Stating that *Larson* identified eight factors to consider in determining the adequacy of representation, the Ninth Circuit clarified that "it is not mandatory for a court to assess each and every one of the *Larson* factors" and that "[c]ourts may consider other factors like outside entanglements[.]" Notably, the Ninth Circuit stated that "[c]ourts can consider whatever other factors help them to assess" plaintiff adequacy "in addition to the *Larson* factors."

The Ninth Circuit held that the derivative action could not be maintained because the VC firm "does not fairly and adequately represent the interests of [the manufacturer's] shareholders." The Ninth Circuit held that the district court did not err in considering the ongoing litigation between the VC firm and the manufacturer under "outside entanglements," noting the frequent litigation between the VC firm and the manufacturer. The Ninth Circuit concluded that the district court correctly found that four *Larson* factors weighed against plaintiff adequacy.

Ninth Circuit: Disclaiming Fraud Does Not Waive a Section 12(a)(2) Misstatement Claim

On June 10, 2025, the Ninth Circuit reversed the dismissal of a putative securities fraud class action alleging that defendants,¹¹ who promoted their real estate investments with social media posts telling would-be investors that they could double their money and earn a 15% annualized return, violated Section 12(a)(2)¹² of the Securities Act by making misstatements in their offering materials. *Pino v. Cardone Cap., LLC*, 2025 U.S. App. LEXIS 14214 (9th Cir. 2025) (McKeown, J.). Specifically, plaintiff alleged that defendants made misleading opinion statements as to the projected internal rate of return ("IRR") and disbursements. Disagreeing with the lower court's interpretation of *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015),

11. Defendants include a real estate entrepreneur, the real estate syndicator he founded, and two equity funds managed by the syndicator.

12. Section 12(a)(2) provides a cause of action for securities offered or sold using prospectuses or oral communications that contain material misstatements or omissions. 15 U.S.C. § 771(a)(2).



the Ninth Circuit concluded that the “district court incorrectly held [that plaintiff] waived subjective falsity by disclaiming fraud in her complaint and also erred in finding that she failed to plausibly allege subjective and objective falsity.”

The Ninth Circuit stated that plaintiff’s claim under Section 12(a)(2) based on the IRR and the distribution projections requires both subjective and objective falsity. The Ninth Circuit explained that “[s]ubjective falsity means that the speaker did not hold the belief he professed and objective falsity requires that the belief is objectively untrue.” The Ninth Circuit held that the “district court incorrectly held [that plaintiff] waived subjective falsity by disclaiming fraud in her complaint[.]” The Ninth Circuit noted that the district court, citing *Omnicare*, concluded that plaintiff could not proceed with her misstatement claim because she disclaimed any and all allegations of fraud. Taking issue with this, the Ninth Circuit stated that “[a] careful reading of *Omnicare* does not support this analysis.” The Ninth Circuit explained that in *Omnicare* although the Supreme Court referenced a fraud waiver, the reference merely underscored that plaintiffs did not argue subjective disbelief at all, and instead argued defendant’s sincerely held opinion proved wrong. The Ninth Circuit concluded that the “Court’s decision in *Omnicare* makes clear that it is the absence of claims of subjective disbelief, rather than the absence of *fraud* claims specifically, that doomed plaintiffs’ claims.” The Ninth Circuit then stated that “[f]raud is not an element of a § 12(a)(2) claim, and a fair reading of *Omnicare* is consistent with [plaintiff’s] argument that disclaiming fraud alone does not foreclose an entirely separate § 12(a)(2) misstatement cause of action.” The Ninth Circuit further pointed out that the *Omnicare* waiver¹³ was “far broader” than the waiver in this case, which was limited to “any allegation in the complaint that could be construed as alleging fraud.”

Further disagreeing with the district court’s conclusion that plaintiff failed to allege either that defendants subjectively disbelieved the IRR and distribution projections or that the projections were objectively untrue,

the Ninth Circuit concluded that plaintiff’s allegations were sufficient. The Ninth Circuit found that the allegation of defendants’ subjective disbelief was “both strong and reasonable” noting the projection of 15% IRR and relatedly high distributions in the initial offering circular. The Ninth Circuit pointed out that the SEC reviewed the offer and stated in a letter to defendants that the projections lacked backing and should be removed. The Ninth Circuit observed that defendants “pushed back on other criticisms from the SEC, but not this one, suggesting that [defendants] did not truly believe its own projections and lacked evidence to rebut the SEC.” The Ninth Circuit noted that despite this, defendants continued to repeat the IRR and distribution projections to would-be investors on social media. The Ninth Circuit also disagreed with the district court’s conclusion that plaintiff failed to allege objective falsity and could not because the relevant SEC Form 1-K filings purportedly projected performance in line with the 15% IRR projection, concluding that the district court’s “approach elevates [defendants’] self-serving statements over other evidence.”

Significant State Supreme Court Decisions

Delaware Supreme Court: Reverses Rescission of Elon Musk’s 2018 Compensation Grant

In December, the Delaware Supreme Court reversed the Court of Chancery decision that rescinded Tesla CEO Elon Musk’s \$100 billion+ 2018 equity compensation package, ending a years-long, closely watched shareholder litigation. [*In re Tesla, Inc. Der. Litig.*, No. 534, 2024, 2025 Del. LEXIS 492 \(Del. Dec. 19, 2025\).](#)¹⁴ The Court held that the Court of Chancery erred in finding that a remedy of rescission was “reasonable and appropriate” because: (i) Musk could not be restored to the *status quo ante* after working for six years to meet the compensation package’s market capitalization and operational milestones; (ii) Musk’s existing equity stake could not serve as substitute consideration for the work he performed

13. The *Omnicare* waiver encompassed “any allegation that could be construed as alleging fraud or intentional or reckless misconduct.”

14. Simpson Thacher filed an *amici curiae* brief on behalf of Sequoia Capital Operations, LLC in support of appellants.

on behalf of the company over a six-year period in accordance with his plan; and (iii) the result was not equitable. The Court's *per curiam* decision did not address the Court of Chancery's findings about liability, noting that the Justices had "varying views" on liability, and instead ruled on a "narrower path" in a relatively compact decision. The Delaware Supreme Court awarded plaintiff nominal damages of \$1 and, rather than remanding the issue of fees, awarded plaintiff's counsel attorneys' fees based on *quantum meruit*. This resulted in a cash payment to be paid by Tesla of approximately \$54 million (reflecting counsels' lodestar and a four times multiplier), as compared to the \$345 million awarded by the Court of Chancery and the \$5.6 billion in freely tradeable Tesla shares plaintiff's counsel sought.

The litigation arose when a Tesla stockholder filed a derivative lawsuit against Musk and the Tesla directors who approved the 2018 equity compensation plan for Musk (the "Grant"), alleging that Musk, as a controlling stockholder, had forced the board to grant him excessive compensation. Following a five-day trial in 2022, the Court of Chancery found that Musk, as a "Superstar CEO" was a controlling stockholder of Tesla despite controlling only 21.9% of Tesla's voting power and ordered rescission of the Grant. The Court of Chancery concluded that the directors failed to prove that the Grant was entirely fair to Tesla and its stockholders and faulted the board for making misleading disclosures. The Tesla board later resubmitted the rescinded Grant for a second stockholder vote with new disclosures that included a copy of the Chancery Court's opinion and a majority of disinterested shares voted for the plan. Following this, the defendant directors asked the Chancery Court to undo its post-trial opinion but the court declined, instead entering judgment for plaintiff, ordering rescission of the Grant, and awarding \$345 million in attorneys' fees to plaintiff's counsel.

Without deciding any of the liability issues raised by the appeal, the Court disposed of the case by focusing solely on whether rescission was the appropriate remedy. The Court concluded that rescission is inequitable primarily because all parties must be restored to the *status quo ante* and total rescission would leave Musk uncompensated for his time and efforts over a period of six years,

noting that it is undisputed that Musk fully performed under the Grant, and that Tesla and its stockholders were rewarded for his work. The Court explained that Musk's preexisting equity stake could not restore him to the *status quo ante* because the stake was not consideration for the services and labor he provided under the Grant. Quoting Williston on Contracts, the Court stated that "something that has been given before the promise was made . . . cannot, properly speaking, be sufficient, valid, legal consideration."¹⁵ The Court, therefore, concluded that "Musk's prior compensation arrangements cannot solve the problem of awarding a remedy which deprives him of all compensation that he earned for six years under a new contract."



Delaware Supreme Court: Reverses Unprecedented Aiding and Abetting Decision Against Third-Party Acquiror

On June 17, 2025, the Delaware Supreme Court reversed the Court of Chancery's post-trial judgment in *In re Columbia Pipeline Group, Inc. Merger Litigation*, 299 A.3d 393 (Del. Ch. 2023), which had held TransCanada, acquiror of Columbia Pipeline Group, Inc., liable for aiding and abetting breaches of fiduciary duty by Columbia's officers and board during the deal process and awarding the plaintiff Columbia stockholders approximately \$200 million in "nominal damages." *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 342 A.3d 324 (Del. June 17, 2025). Citing its recent decision in *In re Mindbody, Inc., Stockholder Litigation*, 332 A.3d 349 (Del. 2024), the Supreme Court reemphasized the challenge of finding an

15. Williston on Contracts, § 8:13 (4th ed.)

arm’s-length buyer to be an aider and abetter, and reiterated the need to prove both actual knowledge of the target fiduciary’s breach of duty and the wrongfulness of its own conduct.

In 2015, Columbia’s CEO/Board Chair, Robert Skaggs Jr., and Columbia’s CFO, Stephen Smith, led the negotiations with TransCanada. After they recommended that the Columbia board renew exclusivity with TransCanada, TransCanada’s representative reneged on a \$26 per share agreement, lowered TransCanada’s bid to \$25.50 per share, demanded an answer within three days, and threatened to publicly announce that the negotiations were dead unless Columbia accepted the reduced offer. Skaggs and Smith recommended that the board take the reduced deal and the deal closed.¹⁶ Columbia stockholders subsequently sued alleging Skaggs and Smith breached their fiduciary duties (specifically their duty of loyalty by initiating and timing the merger to favor their own self-interest and their duty of disclosure because the proxy statement was false and misleading as to the negotiations). Plaintiffs also claimed that the Columbia board breached its duty of care by failing to provide sufficient oversight of the sale process. Plaintiffs further claimed that TransCanada aided and abetted the fiduciary breaches during the sale process and aided and abetted breaches of the duty of disclosure. During discovery, Skaggs and Smith settled leaving TransCanada as the sole defendant.

After a five-day trial, the Court of Chancery determined that plaintiffs proved the underlying breaches of fiduciary duty; that

TransCanada constructively knew of, and culpably participated in, Skaggs’s and Smith’s breaches; and—notably—that TransCanada was liable for aiding and abetting the breaches of the duty of disclosure. As TransCanada had a right under the merger agreement to review the proxy and an obligation to inform Columbia of any material omissions but remained silent when the draft proxy failed to disclose all of Skaggs’s and Smith’s interactions with TransCanada, the Chancery Court concluded that TransCanada had “knowingly permitted” Columbia to issue a misleading proxy statement, which amounted to knowing participation in the issuance of the proxy statement. As to damages for the disclosure claim, the court awarded plaintiffs nominal damages of \$0.50 per share or approximately \$200 million. On appeal, TransCanada argued that it was error to find that it had aided and abetted any sale-process breach by the officers or the board, or aided and abetted any disclosure breach, and that it was error to award nearly \$200 million in nominal damages.¹⁷

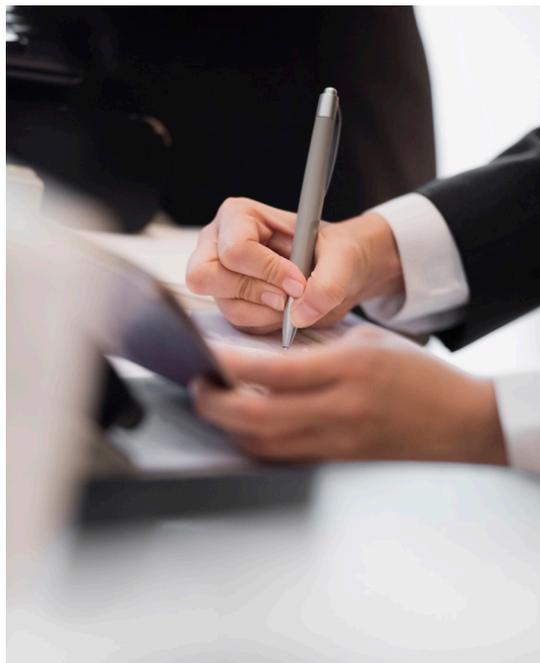
Justice Traynor, writing for the Court, rejected the Chancery Court’s determination of liability based on constructive knowledge and stated that *Mindbody* requires “actual knowledge.” As to whether TransCanada had actual knowledge that Skaggs and Smith were breaching their fiduciary duties, the Court pointed out that even though the two were eager to strike a deal and wanted to retire with their change-in-control benefits that they also had incentives to pursue the best deal possible and rejected several TransCanada

16. Simpson Thacher represented Lazard as financial advisor to Columbia in its definitive agreement to be acquired by TransCanada and also represented Lazard in its capacity as a witness at the trial concerning the acquisition.

17. TransCanada did not challenge the Court of Chancery’s finding that Skaggs and Smith breached their duty of loyalty as corporate officers by favoring their self-interest, or the finding that the Columbia board breached its duty of care by failing to provide sufficient oversight of the sale process.



proposals. As to whether TransCanada had actual knowledge that the Columbia board was breaching its duty of care by providing insufficient oversight of Skaggs and Smith, the Court concluded that this breach would have been even less clear to TransCanada because it did not have direct interaction with the board members and was not present for any board meetings. As to whether TransCanada culpably participated in the breaches, the Court stated that it “emphasized in *Mindbody* that whether a defendant’s participation in another’s breach of duty is culpable hinges in large part on whether the defendant substantially assisted in the commission of the breach.” The Court stated that “a bidder’s aggressive bargaining tactics, however disquieting, do not constitute aiding and abetting unless the bidder has substantially assisted, that is, ‘knowingly participated’ *in the breach*.” Reviewing the facts, the Court concluded that for TransCanada’s deal team lead to take advantage of a personal relationship with Smith and to use his superior negotiating skills and experience to secure the best reasonably available price could not expose a party to aiding-and-abetting liability. As to TransCanada’s aiding and abetting liability for the breaches of the duty of disclosure, the Court concluded that TransCanada did not culpably participate in the disclosure breaches because while TransCanada offered comments on the proxy it did not propose any of the statements found to be misleading or suggest any omissions.



California Supreme Court: Forum Selection Clauses Designating Courts That Conduct Bench Trials Are Not Per Se Unenforceable

On July 21, 2025, the California Supreme Court issued a significant decision reversing and remanding a Court of Appeal decision that had held that a trial court had properly declined to enforce forum selection clauses in a company’s certificate of incorporation and bylaws designating the Delaware Court of Chancery because they constituted an implied predispute jury trial waiver, in violation of the right to trial by jury under the California Constitution. *EpicentRx, Inc. v. Superior Court*, 18 Cal. 5th 58 (Cal. July 21, 2025). The California Supreme Court held that a “forum selection clause is not unenforceable simply because it requires the parties to litigate in a jurisdiction that does not afford civil litigants the same right to trial by jury as litigants in California courts enjoy.” The Supreme Court explained that the extent of a civil jury trial right in the selected forum may be relevant to the enforceability of a forum selection clause but that “the impact on a party’s jury trial right does not, itself, provide grounds to decline to enforce a forum selection clause.”

This litigation arose when a minority shareholder of Delaware biotechnology company EpicentRx, Inc., filed a complaint in California Superior Court asserting claims for breach of contract, fraudulent concealment, promissory fraud, breach of fiduciary duty, and unfair business practices against EpicentRx, its controlling stockholder, and certain individuals. Defendants moved to dismiss on the ground of forum non conveniens, based on forum selection clauses in the company’s certificate of incorporation and bylaws, which identified the Delaware Court of Chancery as the sole and exclusive forum for most stockholder lawsuits.¹⁸ The trial court denied defendants’ motion to dismiss and the Court of Appeal denied a petition for writ of mandate challenging the trial court’s order. Both lower courts held that the forum selection clauses were unenforceable, noting that if plaintiff’s claims were litigated in California, plaintiff

18. Specifically, the four types of claims required to be brought in Delaware Court of Chancery were: (i) derivative claims; (ii) breach of fiduciary duty claims; (iii) claims under the Delaware General Corporation Law or EpicentRx’s corporate documents; and (iv) claims governed by the internal affairs doctrine.

would have a right to a jury trial, while the Delaware Court of Chancery does not conduct jury trials. Several defendants petitioned the California Supreme Court for review.

The California Supreme Court stated that forum selection clauses typically will be enforced, absent a showing that enforcement of the forum selection clause would be unfair or unreasonable. The Court noted that one exception to this general rule of enforceability is that California courts will refuse to enforce a forum selection clause if to do so would bring about a result contrary to state public policy. The Supreme Court cautioned that “[t]his exception, however, does not give courts unbounded discretion to decline to enforce otherwise valid forum selection clauses” emphasizing that the power to declare a contract void for being in contravention of sound public policy “is a very

delicate and undefined power, and . . . should be exercised only in cases free from doubt.” On this point, the Court stated that before a court determines that a transaction is void, “it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.” The Court further stated that the “burden is on the opposing party to show that its enforcement would be in violation of the settled public policy of this state[.]” The Court cautioned that California’s strong public policy in favor of the jury trial right “does not speak to the availability of the jury trial right in other forums.” The Court stated that sophisticated parties engaging in arms-length commercial transactions may depend on the selection of a forum for dispute resolution, such as the courts of a foreign country, which do not offer a jury trial right.

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**In February 2026, Simpson Thacher announced plans to expand its presence in Texas with an office in Dallas.*

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