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Skadden

Inside the Courts

A Quarterly Update From Skadden Securities Litigators

Trends and Filings

Spotlight

Howey's Still Here: A Recent Reminder on the Limits of the SEC's Crypto Thaw

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Executive Summary

- **What is new:** The Ninth Circuit's recent decision in *SEC v. Barry* underscores that, despite a regulatory thaw, the *Howey* test remains the law for determining whether particular digital assets and tokenization projects are subject to the securities laws.
- **Why it matters:** Projects seeking to tokenize real-world assets or fractionalize interests must still assess whether ongoing efforts by managers could trigger securities classification.
- **What to do next:** Projects should consider carefully evaluating whether the manager's ongoing efforts and expertise steer the project toward profitability in a way that may trigger the *Howey* test.

The U.S. regulatory environment for digital assets has never been more promising for the industry. Since the change in administration, the Securities and Exchange Commission (SEC) has committed to stemming what it has characterized as the hostility of recent years, and the agency's new leadership has remarked that "despite what the SEC has said in the past, most crypto assets are not securities."

As a result, tokenization projects — where digital assets reflect so-called real-world assets — are surging. Many innovators are experimenting with tokenizing assets ranging from investment funds to precious metals, and some are already offering investors access to tokenized securities.

But while the SEC can do much to foster this kind of innovation, it is also constrained by the securities laws and how courts interpret them. In that regard, a recent decision by the U.S. Court of Appeals for the Ninth Circuit in *SEC v. Barry* serves as a reminder that the *Howey* test has by no means gone away.

Ninety years ago, in the Securities Act of 1933, Congress defined the word "security" to include an "investment contract," and the Supreme Court clarified what that meant with its decision in *SEC v. W.J. Howey Co.*: (1) an investment of money (2) in a common enterprise (3) with an expectation of profits based on the efforts of others.

The court-created *Howey* test is still the law. And unless or until it changes — which may well happen if Congress advances the CLARITY Act or similar legislation — sales of digital assets that satisfy the *Howey* test may continue to be regarded as securities transactions.

Tokenization projects therefore carry some risk of being deemed securities offerings, notwithstanding the recent regulatory thaw. As SEC Commissioner Hester Peirce noted in July 2025, "tokenized securities are still securities," and the agency's broader efforts confirm that it has not turned its back on *Howey* but rather shown more flexibility when a product offering is on the borderline of being deemed an investment contract.

Case in point, the SEC under Chairman Paul Atkins has dismissed many pending cases (including appeals) that were not in line with current thinking, but the agency did not seek to do so in *Barry*.

SEC v. Barry

The Ninth Circuit's August 11, 2025, decision in *Barry* underscores the risk that tokenization projects may be deemed securities offerings, even though the case did not concern tokenization. The *Barry* case involved sales of fractional interests in life settlements, meaning fractional interests in payouts from other individuals' life insurance policies.

Brenda Barry and other defendants worked as sales agents for Pacific West Capital Group, a firm that was in the business of buying life insurance policies from elderly policyholders and selling fractional interests in the policies to investors. The investors' investments were meant to cover all the premiums on the life insurance policies for as long as the insured individuals lived, and the investors' profits depended on how soon the insureds passed away.

Pacific did the work of reviewing the insureds' medical information, selecting which policies to offer to investors, fractionalizing the interests, handling payment of all the premiums and maintaining reserves to avoid any shortfall. Problems ensued, including that the insureds lived longer than Pacific had anticipated, the reserves ran out and investors lost their money.

The SEC sued Pacific and the sales agents, contending, among other things, that the fractional interests were investment contracts and thus unregistered securities. That set up a dispute under the *Howey* test.

There was no debate that investors had invested money in a common enterprise, but the defendants argued that the investors' expectations of profits were not based on Pacific's pre-investment review and selection of policies, nor on Pacific's money-management functions (which they characterized as merely administrative), but rather on the unknowable external factor of when the insureds would die.

The Ninth Circuit sided with the SEC, reasoning that three aspects of the transactions showed that the investors' expectations of profits were based on Pacific's efforts, satisfying the *Howey* test.

First, the court looked to Pacific's review and selection process, the purpose of which was to identify good candidates for investment.

Second, the court found that Pacific's money-management functions were not merely administrative but rather essential ongoing efforts to ensure that all the premiums would be paid on time and without shortfall.

And third, significantly, the court observed that the fractionalized nature of the interests meant that the investors did not control individual policies and were entirely dependent on Pacific to exercise control.

Takeaways

As the regulatory thaw opens up new possibilities for tokenization projects, this case serves as a good reminder of the guardrails that remain. Projects that seek to tokenize real-world assets or fractionalize interests must still assess whether the manager's ongoing efforts and expertise steer the project toward profitability in a way that may trigger the *Howey* test.

While *Howey* remains the law, the SEC may begin to find ways to work with projects that offer products that risk being regarded as investment contracts. Indeed, the SEC has shown that it is moving in that direction.

The agency currently is reviewing draft registration statements for a number of tokenization projects, and SEC Commissioner Peirce recently stated that the agency is "willing to work with people who are taking different approaches" and that market forces should decide which forms of tokenizing securities and other real-world assets will win out.

In addition to companies going the registration route, other companies are privately offering tokenized securities and other assets pursuant to legal exemptions from registration.

The SEC's Ninth Circuit win shows the continued relevance of the *Howey* test (and the SEC's continued adherence to it), but Project Crypto and other SEC initiatives suggest that it will no longer be "a scarlet letter," as Chairman Atkins has said, for digital asset transactions to be deemed investment contracts.

See also our August 19, 2025, article in Law360.com, "Despite SEC Reset, Private Crypto Securities Cases Continue."

Spotlight

Securities Lawsuits Premised on Short-Seller Reports Come Up Short

This article was originally published May 7, 2025 in Reuters

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Short-seller reports frequently lead to stock price drops that give rise to securities class action lawsuits. Plaintiffs who rely on short-seller reports to allege securities fraud are facing a skeptical reception by the Ninth U.S. Circuit Court of Appeals.

For the fourth time in the last four years, the Ninth Circuit has rejected a securities fraud complaint that attempts to satisfy the loss causation pleading requirement by citing reports published by short sellers of a company's stock that purport to reveal negative facts about the company.

The Ninth Circuit's recent decision in *Espy v. J2 Global, Inc.* makes clear that allegations based on short-seller reports fail to state a claim if the reports do not "relate back" to alleged false or misleading statements — and therefore reveal the statements' falsity — or if they are based entirely on already-public information that requires no expert analysis to understand.

In J2 Global, the plaintiff, a shareholder of international information services company J2 Global, Inc., brought claims under Section 10(b) of the Securities Exchange Act. The plaintiff alleged that J2 made materially misleading statements to investors (i) about a 2015 acquisition, when it omitted certain alleged details about the acquired company, including that it was a shell start-up and that it was acquired from a J2 employee as part of his compensation; (ii) about a 2017 investment, when it omitted certain facts about alleged conflicts of interest and management fees; and (iii) that, while purporting to grow through multiple acquisitions, disguised the poor performance of those acquisitions by accounting for them on a consolidated basis.

In particular, the complaint alleged that the J2 Ireland and Everyday Health acquisition were underperforming.

The plaintiff alleged that the "truth" was revealed — causing J2's stock price to decline — when well-known short-sellers of J2 stock, Citron Research and Hindenburg Research, respectively, published reports "detailing the failures of J2's acquisition model" and "arguing that J2's opaque acquisition approach has opened the door to egregious insider self-enrichment." Both reports were based entirely on already-public information.

A judge of the U.S. District Court for the Central District of California dismissed the complaint, concluding that the plaintiff failed to allege sufficiently that the defendants acted with an intent to defraud. The plaintiff appealed. The Ninth Circuit affirmed the district court's conclusion with respect to intent to defraud. And although the district court had not reached the issue, the Ninth Circuit also concluded that the plaintiff had failed to plead sufficiently that the alleged misrepresentations had caused his loss.

In particular, the court noted that to state a claim, the plaintiff was required to plead with particularity that the alleged misstatements, "as opposed to some other fact, foreseeably caused" the plaintiff's loss. To do that, plaintiffs often attempt to identify "one or more corrective disclosures, which occur when information correcting the misstatement or omission that is the basis for the action is disseminated to the market."

Plaintiffs must show that the corrective disclosures revealed, in whole or in part, the alleged truth concealed by the alleged misstatements and caused the stock price to decline. When the disclosures are based on analysis of already-public information, the plaintiff must "allege particular facts plausibly suggesting that other market participants had not done the same analysis," so that the information was not already reflected in the market price of the stock by the time of the disclosure.

Concerning the Citron Research report, the court reasoned that it stated J2 needed acquisitions and used money generated from legacy businesses to prop up its financials, and that "the market was not paying any attention to the bottom line or the quality of businesses J2 Global is aggregating." While this may be "negative information," it did not "relate back" to the alleged misstatements in the complaint.

Again, the alleged misstatements had to do with a 2015 acquisition, a 2017 investment, and consolidated accounting hiding certain underperforming assets. The Citron Research report did not specifically mention any of these and therefore could not have corrected statements about them.

As for the Hindenburg report, it was "more tethered to J2's alleged misrepresentations and omissions," but it was based on a "careful reading of public documents, including J2's investor presentations, press releases, employees' LinkedIn profiles, board members' resumes, public corporate records, and SEC filings."

The analysis it drew from these sources required "no expertise or specialized skills beyond what a typical market participant would possess." The plaintiff failed to plead particularized facts demonstrating that the analysis was not reflected in J2's stock price before the Hindenburg report was published. Therefore, the plaintiff failed to plead loss causation.

This is the fourth time the Ninth Circuit has rejected loss causation allegations based on purported "corrective disclosures" published by short sellers reporting alleged negative information about the company for purposes of driving down its stock price.

In 2020, in *In re BofI Holding, Inc. Securities Litigation*, the court concluded that anonymous blog posts may have "provided new information to the market," but they did not qualify as corrective disclosures because they were "authored by anonymous short-sellers who had a financial incentive to convince others to sell" and included a disclaimer as to their accuracy.

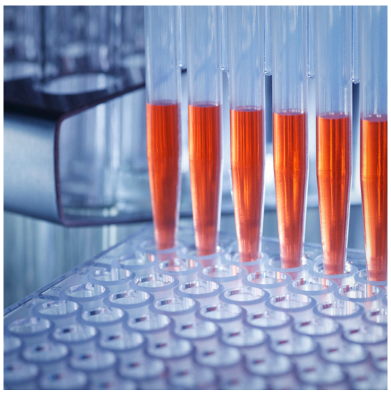
Also in 2020, in *Grigsby v. BofI Holding, Inc.*, the court concluded that the report was anonymous, contained a disclaimer, and, like the Hindenburg report in J2 Global, was based on information in public documents that did not require any expertise or specialized skill to analyze.

Then, in 2022, in *In re Nektar Therapeutics Securities Litigation*, the court rejected allegations stemming from a report by a named short-seller firm, Plainview Research, that failed to name its author or provide any contact information that would allow investors to verify the report's reliability.

All three prior decisions depended in part on the fact that the short-seller report was anonymous and therefore inherently lacking credibility. J2 Global is the first decision to reject short-seller reports based entirely on their contents — their inability, even at the pleading stage, to demonstrate that the alleged false statements caused the plaintiff's loss.

J2 Global demonstrates the Ninth Circuit's increasing skepticism when securities fraud class actions follow declines in a company's stock price caused, not by any revelation of fraud, but by those with an obvious motive to see the stock price decline. While it is unlikely such suits will disappear completely, challenging such suits on the basis of the plaintiff's failure to allege loss causation appears to be an increasingly viable argument when defendants seek to dismiss such suits.

Life Sciences and Health Care



Third Circuit Holds That Price Impact of Alleged Misrepresentations Can Be Proved by Evidence of Corrective Disclosures Based on Already-Public Trial Records

San Diego Cnty. Emps. Ret. Assn. v. Johnson & Johnson (3d Cir. July 30, 2025)

What to know: In an unpublished decision, the Third Circuit affirmed the grant of class certification in a Section 10(b) action, holding that the plaintiffs could demonstrate the market effects of Johnson & Johnson's alleged material misrepresentations and omissions by pointing to partial corrective disclosures that were based on already-public court records.

Johnson & Johnson (J&J) develops and sells health care products. In 2013, J&J began facing lawsuits alleging the talc in certain of its consumer products contained asbestos, causing cancer.

Investors sued under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act or 1934 Act), alleging that between February 2013 and October 2018, J&J made false and misleading statements to conceal the presence of asbestos in its talc products, which artificially inflated J&J's stock price. The plaintiffs sought class certification, arguing that they could prove reliance classwide based on the fraud-on-the-market presumption under *Basic Inc. v. Levinson*.

Under *Basic*, courts presume that, in an efficient market, a company's stock price incorporates all material public information about the company's performance, and that investors rely on the stock price's integrity when making investment decisions. Accordingly, when investors can show (among other things) that the stock at issue traded in an efficient market, courts will presume that any investors who purchased the issuer's stock between the time the alleged misrepresentation was made and when the truth was revealed implicitly relied on the allegedly false or misleading statements. Securities defendants can attempt to rebut this presumption at the class certification stage by proving by a preponderance of the evidence that the alleged misstatements did not, in fact, impact the issuer's stock price.

J&J's stock price did not meaningfully change when the alleged misstatements in this case were made. The plaintiffs nevertheless argued that the alleged misstatements impacted J&J's stock by preventing it from declining. As evidence, the plaintiffs pointed to stock price declines following several statements at the end of the class period that they claimed revealed the truth concealed by the alleged misstatements, and argued that the backend declines would have occurred earlier if the company had made truthful statements instead of the alleged misstatements, thus showing that the alleged misstatements impacted J&J's stock price.

In response, J&J argued that the backend stock price declines could not have been caused by the revelation of information allegedly concealed by misstatements because those disclosures simply repeated information that was already publicly known, and thus presumptively incorporated into J&J's stock price. The district court rejected J&J's arguments and granted class certification.

The Third Circuit affirmed, holding in an unpublished decision that, although allegations that J&J's talc products contained asbestos were publicly known before the relevant backend disclosures, the backend disclosures contained new information purportedly bolstering those allegations' credibility. The court thus held that the district court did not abuse its discretion in determining that the backend disclosures communicated new information to the market, and were thus theoretically capable of supporting the plaintiffs' theory of price impact.

Delaware Chancery Dismisses Oversight Claims Against Directors for Failure To Allege Deficient Board Protocols or Any Corporate Harm

Ritchie ex rel.Corcept Therapeutics, Inc. v. Baker
(Del. Ch. July 22, 2025)

What to know: The Delaware Court of Chancery dismissed breach of fiduciary duty claims alleging that a board failed to implement a reasonable system of internal controls over a "mission critical" risk because the complaint failed to allege that the board made "no effort" to inform themselves of mission critical issues and the plaintiff failed to identify any corporate harm.

Pharmaceutical company Corcept Therapeutics, Inc. receives most of its revenue from a single drug, Korlym, which is used to treat patients with Cushing's syndrome. Corcept's audit committee was charged with monitoring compliance and received detailed reports on Korlym issues. In Securities and Exchange Commission (SEC) filings, press releases and during analyst calls, Corcept stated that 99% of Corcept's prescriptions were "on-label," revenue was increasing as a result of Corcept's efforts to educate doctors about Cushing's syndrome and marketing materials did not constitute off-label marketing.

In 2019, several entities published investigative reports claiming that Corcept, among other things, was in violation of federal law by marketing Korlym for off-label uses. Consequently, several Corcept stockholders filed a class action complaint that alleged that the off-label drug scheme violated securities laws. The lawsuit eventually settled for $14 million, which was paid entirely by Corcept's insurers.

On January 31, 2021, plaintiff Ritchie filed a derivative action in the Delaware Court of Chancery alleging that the Corcept directors breached their fiduciary duties by failing to adequately oversee "mission critical" FDA-compliance issues (a "*Caremark* claim"), permitting Corcept to engage in illegal activity (a "*Massey* claim"), and knowingly making false disclosures to Corcept stockholders (a "*Malone* claim").

The defendants moved to dismiss the complaint for failing to plead demand futility and failing to state a claim. In response, the plaintiff argued that demand was excused because he had adequately stated a claim for breach of fiduciary duty against a majority of the Corcept directors.

***Caremark* claim:** The Court of Chancery stated that liability under *In re Caremark International Inc. Derivative Litigation* "defie[d] common sense" when the alleged wrongdoing resulted in no civil or criminal fines and a related lawsuit settled for $14 million, which was paid for by insurers. Further, the court stated that a *Caremark* claim requires that the board either (i) "utterly failed" to create a reasonable system of internal controls to monitor FDA compliance, or (ii) acted in bad faith by ignoring clear red flags of non-compliance.

Under prong (i), the court found that "legally marketing its primary drug" was essential and mission critical for Corcept, but the court determined that the plaintiff failed to plead that the board made "no efforts" to inform itself of mission critical issues. Under prong (ii), the court noted, among other things, that Corcept directors' knowledge of doctors prescribing Korlym for off-label use (which is not illegal) did not satisfy the plaintiff's obligation to allege that directors' knew or should have known that the company was allegedly marketing Korlym for off-label uses, yet failed to take any action.

The court dismissed the claim because the plaintiff failed to adequately plead either prong of this test. Because the directors faced no substantial likelihood of liability on this claim, demand was not excused and plaintiff had no standing to bring the claim.

***Massey/Malone* claims:** The Court of Chancery dismissed both the *In re Massey Energy Co. and Malone v. Brincat* claims for similar reasons. Like prong (ii) of the *Caremark* analysis above, both claims required the plaintiff to adequately allege that the Corcept directors knew of the alleged off-label marketing. Without the fulcrum allegation of scienter, the Corcept directors did not face a substantial likelihood of liability for these claims, demand was not excused and the plaintiff had no standing to bring the claim.

Northern District of Illinois Grants Drug Company's Motion for Summary Judgment on Claims Arising From Its Product Support Programs

Holwill v. AbbVie Inc. (N.D. Ill. July 10, 2025)

What to know: The Northern District of Illinois granted summary judgment in favor of the defendants in a securities fraud case asserting alleged misrepresentations related to the legality of two marketing programs.

Judge John J. Tharp, Jr., of the U.S. District Court for the Northern District of Illinois granted AbbVie Inc.'s motion for summary judgment in a securities fraud complaint against the company and its former CEO and CFO, alleging that the defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by misleading investors through concealing the legal risks associated with two of its Humira-support programs, which the plaintiffs claimed violated the federal Anti-Kickback Statute.

The plaintiffs argued that AbbVie's Ambassador Program, which offered support to patients from registered nurses, and HLink, which helped health care providers secure preclearance authorization for the drug Humira, constituted unlawful kickbacks and that AbbVie's failure to disclose the risk of liability associated with these programs artificially inflated its stock price. The plaintiffs further asserted that they suffered financial losses when the California Department of Insurance (CDI) announced an investigation into AbbVie's Humira-support programs and AbbVie's stock price dropped. Following an unsuccessful motion to dismiss, the parties completed discovery and the defendants filed a motion for summary judgment.

The court highlighted three independent reasons for granting summary judgment in favor of AbbVie. First, it found that the challenged Humira-support programs provided legitimate product-support services and did not violate the Anti-Kickback Statute. The court emphasized that AbbVie's programs did not provide any independent benefits to providers beyond facilitating Humira prescriptions. This lawfulness undercut any basis upon which a reasonable jury might conclude that AbbVie made misrepresentation or misleading omissions to shareholders related to the risks surrounding the programs.

Second, the court concluded that the plaintiffs failed to establish scienter. Instead, the record supported that AbbVie had a good faith basis to believe its programs were lawful, which was buttressed by longstanding government guidance and the absence of regulatory challenges to similar programs.

Third, the court determined that, even if the plaintiffs could convince a reasonable jury that the defendants deliberately misled investors, they could not prove that any misstatements resulted in financial losses. That is because the existence of the marketing programs and challenges to their legality had been publicly disclosed in lawsuits filed six months prior to the CDI's investigation. Applying the Basic presumption that stock prices in an efficient market reflect all publicly available information, the court reasoned that any decline in stock price caused by the CDI complaint was due to new information in the market and not a correction of prior misrepresentations.

Energy

Sixth Circuit Vacates Class Certification to the Extent the District Court Applied the *Affiliated Ute* Presumption and Requires Lower Court to Assess the Ability to Prove Classwide Damages

In re FirstEnergy Corp. Sec. Litig. (6th Cir. Aug. 13, 2025)

What to know: The Sixth Circuit issued a limited remand and vacated the district court's order granting class certification in a putative securities class action against FirstEnergy Corp. and certain of its current and former officers and directors to the extent the district court applied the *Affiliated Ute* presumption rather than the presumption established in *Basic Inc. v. Levinson*. The Sixth Circuit also held that the district court erred by failing to conduct a rigorous analysis that damages for the plaintiffs' Exchange Act claims could be established on a classwide basis.

The Sixth Circuit vacated a lower court's order certifying a class of investors in an action alleging fraud under Section 10(b) of the Exchange Act and Rule 10b-5, as well as violations of the Securities Act of 1933 (Securities Act or 1933 Act). The plaintiffs alleged that FirstEnergy had engaged in a bribery scheme to make significant financial contributions to Ohio lawmakers in order to secure a bailout for the company's nuclear power plants, while making numerous public statements that allegedly misrepresented or failed to disclose the nature of the company's political activities and compliance with regulations. The plaintiffs alleged that FirstEnergy's false and misleading statements inflated the company's stock and bond prices, causing investors to suffer losses when the scheme was revealed.

The district court granted the plaintiffs' motion for class certification, holding that the plaintiffs were entitled to a presumption of reliance under the Supreme Court's analysis in *Affiliated Ute Citizens of Utah v. United States*, which applies in securities cases primarily based on alleged omissions of material facts by an alleged wrongdoer with a duty to disclose. The district court also held that the plaintiffs had established all elements of Federal Rule of Civil Procedure 23(b)(3), including that predominance existed with respect to damages.

On appeal, the Sixth Circuit addressed two main issues: whether the plaintiffs should be accorded a presumption of reliance under *Affiliated Ute*, and whether the district court conducted a rigorous analysis of whether damages were susceptible of measurement across the entire class, as required by *Comcast Corp. v. Behrend*.

The Sixth Circuit held that the class certification order was defective on both grounds. It first determined that the plaintiffs' claims were primarily based on misrepresentations rather than omissions, and as a result, the *Affiliated Ute* presumption of reliance did not apply. The court explained that, to determine whether a "mixed" case of misrepresentations and omissions is primarily based on misrepresentations or omissions, a district court must assess four factors:

i. Whether the alleged omissions are just the inverse of a misrepresentation.

ii. Whether reliance is practically possible to prove by pointing to a misrepresentation and connecting it to the injury.

iii. Whether the primary thrust of the claims involves the alleged misrepresentations.

iv. Whether the alleged omissions have no standalone impact apart from the alleged misrepresentations.

If any one of these four things is true, the case is primarily based on misrepresentations.

Applying this framework, the Sixth Circuit then determined that the case was primarily based on misrepresentations, not omissions. For example, though the plaintiffs alleged that FirstEnergy failed to provide comprehensive disclosures of its political contributions, the court observed that this alleged "omission" was nothing more than an allegation that the truth was misrepresented. Indeed, "a 10-K statement that notes a pursuit of 'legislative solutions' carries with it the natural presumption that the pursuit was legal; the 'omission' is the fact that the pursuit in fact was illegal."

The Sixth Circuit thus held that the *Affiliated Ute* presumption was inapplicable and that the district court should have instead analyzed reliance under the more demanding standard set forth in *Basic*, which applies to cases involving material misrepresentations. To invoke the *Basic* presumption, plaintiffs must establish:

i. That the alleged misrepresentations were publicly known.
ii. That they were material.
iii. That the stock traded in an efficient market.
iv. That the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed.

The Sixth Circuit additionally found that the district court failed to conduct a rigorous analysis of the damages methodology for the plaintiffs' Exchange Act claims, as required by *Comcast Corp. v. Behrend*. Instead, the district court improperly relied on its damages analysis for the Securities Act claims, which are subject to different statutory requirements for calculating damages.

As a result, the Sixth Circuit issued a limited remand, vacating the class certification order to the extent that the district court applied the *Affiliated Ute* presumption of reliance and further remanded the case for the district court to conduct a proper damages analysis for the Exchange Act claims under the standards set forth in *Comcast*.

Delaware Supreme Court Reiterates That Claims for Aiding and Abetting Breach of Fiduciary Duties Need a Showing of Knowing Participation and Substantial Assistance

In re Columbia Pipeline Grp. Merger Litig. (Del. June 17, 2025)

What to know: The Delaware Supreme Court reversed a trial court decision awarding damages against TC Energy Corp. for aiding and abetting breaches of fiduciary duties committed by officers of Columbia Pipeline Group, Inc., because the plaintiffs failed to prove knowing participation and substantial assistance.

In 2016, Columbia Pipeline Group, Inc. was acquired by Canadian energy company TC Energy Corp. (formerly TransCanada) for approximately $10 billion. The transaction resulted in significant change-in-control payments to Columbia's top executives, who were also leading the sale negotiations. After the deal closed, Columbia's stockholders sued, alleging that Columbia's executives and board of directors had breached their fiduciary duties by prioritizing their own interests — specifically, their lucrative retirement packages — over maximizing value for stockholders. The stockholders also claimed that TC Energy, as the buyer, had aided and abetted these breaches.

The Columbia executives settled before trial for $79 million, while TC Energy went to trial. After trial, the Delaware Court of Chancery held that Columbia executives breached their fiduciary duties during the sale process by steering the transaction to TC Energy and by issuing a misleading proxy statement. The court also held TC Energy liable for aiding and abetting both breaches because it had constructive knowledge of the breaches and culpably participated in them.

On appeal, the Delaware Supreme Court reversed the trial court decision, holding that aiding and abetting liability requires proof that, among other things, the alleged aider and abettor had actual knowledge of the primary actor's fiduciary breach and substantially assisted the primary actor's breach. In doing so, the court emphasized the protection Delaware law affords to arm's-length bargaining and the resulting stringent requirements to prove an aiding and abetting claim against an independent counterparty in deal negotiations.

Sale process claims: The Delaware Supreme Court found that the record did not support a finding that TC Energy had actual knowledge of the Columbia executives' breaches because

Columbia's CEO and CFO rejected several TC Energy proposals, TC Energy and Columbia believed that they were acting consistent with the standstill in place and TC Energy did not have direct interaction with the board or sit in on any board meetings. Any breach of the duty of care by the Columbia board would have been even less clear to TC Energy.

The court also determined that, while TC Energy may have benefitted from the desire of the Columbia executives to sell their shares, the hard bargaining by TC Energy did not amount to culpable participation.

Disclosure claims: The Supreme Court also held that TC Energy did not take any affirmative steps to assist in the disclosure breaches, and that mere passive awareness or failure to act is not enough to satisfy the aiding and abetting standard. The court rejected the argument that a provision in the merger agreement requiring TC Energy to review and correct any inaccuracy in the proxy statement transformed TC Energy's lack of action into culpable participation.

Insurance

Ninth Circuit Affirms Judgment That Unregistered Sales of Life Settlements Violated Federal Securities Laws

SEC v. Barry (9th Cir. Aug. 11, 2025)

What to know: The Ninth Circuit affirmed a judgment finding that unregistered sales of life settlements violated federal securities laws, holding that life settlements may constitute securities.

A life settlement is a transaction in which investors purchase someone's life insurance policy, paying that policy's premiums in exchange for receiving death benefits upon the insured's death. Pacific West Capital Group (PWCG) purchased numerous life-insurance policies, selling fractional interests in specific policies. PWCG also created a "three-tiered premium reserve system" of funds to maintain payment of policy premiums, but required additional funding from investors if the reserves failed.

In 2015, the SEC sued PWCG, its founders, and certain PWCG sales agents, alleging that they violated Sections 5(a) and (c) of the 1933 Act by offering and selling unregistered securities, and Section 15(a) of the 1934 Act by failing to register as broker-dealers. The District Court granted summary judgment to the SEC, finding that PWCG's life settlements were securities under the 1933 Act without a valid exemption to registration. The District Court ordered disgorgement and civil penalties against the sales agents and a prohibitory injunction against another agent.

The agents appealed, and the Ninth Circuit affirmed. The court held that life settlements may constitute investment contracts under the test developed in *SEC v. W.J. Howey Co.* Under *Howey*, an investment contract exists when there is (1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others.

The court held that the key factor in assessing the third element is whether the person offering the alleged securities had the practical ability to control the enterprise and its profits. Here, the court found that the defendants had the practical ability to control the enterprise and its profits for three reasons. First, the defendants both picked and purchased the relevant life insurance policies. Second, the defendants set up a multi-layer system to ensure sufficient funds to pay the relevant life insurance premiums. Third, because investors purchased only fractional interests in the life settlements, they were dependent on the defendants to manage and structure the enterprise in a way that would generate profits. The court thus concluded that the life settlements constituted securities under the *Howey* test.

In reaching this conclusion, the court agreed with decisions from the Fifth and Eleventh Circuits, and disagreed with a decision from the D.C. Circuit, concerning similar issues.

The court affirmed the remaining aspects of the District Court's order.

Real Estate

Ninth Circuit Permits Section 12 Claims Alleging Misleading Opinions Delivered Through Social Media

Pino v. Cardone Capital, LLC (9th Cir. June 10, 2025)

What to know: The Ninth Circuit reversed dismissal of a putative securities class action complaint, holding that Section 12 claims are not barred by disclaimers of fraud or based on constructive knowledge of publicly available SEC letters.

Grant Cardone, a real estate entrepreneur, founded Cardone Capital, LLC, a real estate syndicator managing investment entities Cardone Equity Funds V and VI (collectively, "Cardone"). Cardone invests in real estate with funding obtained through Regulation A offerings to unaccredited investors, which Cardone publicized in part through social media.

An investor filed a putative securities class action, alleging that Cardone made material misstatements in its offering materials in violation of Sections 12(a)(2) and 15 of the 1933 Act. In particular, the plaintiff alleged that Cardone:

i. Made misleading opinion statements on Instagram and YouTube about the investment Funds' projected internal rate of return (IRR) and distribution.

ii. Omitted material information in the same social media communications regarding an SEC letter requesting Cardone remove these projections from its offering circular.

iii. Misrepresented that Cardone bore the obligation for debts in the investment funds.

The district court dismissed the plaintiff's second amended complaint for failure to state a claim.

The Ninth Circuit reversed, holding that the plaintiff had plausibly stated claims with respect to each alleged misstatement or omission.

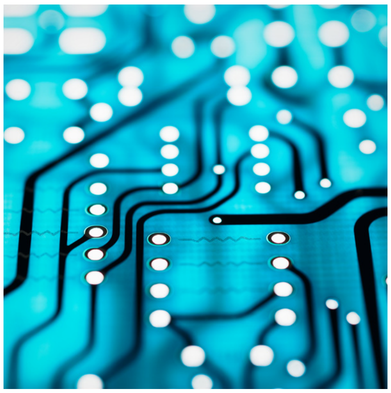
First, the appellate court held, the plaintiff plausibly alleged that Cardone made misleading opinion statements about IRR and distribution projections. Although the plaintiff disclaimed allegations of fraud, the Ninth Circuit rejected the argument that disclaiming fraud automatically waives a Section 12(a)(2) claim, because Section 12(a)(2) does not require proof of fraud or allegations of scienter so long as the plaintiff's allegations sufficiently demonstrate the defendant's subjective disbelief in its opinion statements.

Further, the plaintiff sufficiently alleged the subjective and objective falsity of Cardone's opinion statements. The plaintiff alleged Cardone's subjective disbelief of the IRR and distribution projections because Cardone did not resist the SEC's letter stating these projections should be removed from the initial offering circular, suggesting Cardone did not truly believe its own projections. The plaintiff also alleged the projections were objectively false when made.

Second, the plaintiff sufficiently alleged that Cardone's failure to disclose the SEC letter was an actionable omission because, although the SEC letter was publicly available on EDGAR, constructive knowledge does not bar recovery for Section 12 claims.

Third, Cardone's alleged misrepresentation about debts was material because a reasonable investor could consider the change in costs and returns due to Cardone's purported responsibility for the investment funds' debt to be material information.

Technology



SDNY Dismisses Claims for Failing To Specify a Misrepresentation, Provide Evidence of Scienter or Identify Loss Causation

In re UiPath, Inc. Sec. Litig. (S.D.N.Y. July 23, 2025)

What to know: The Southern District of New York dismissed securities fraud claims against UiPath, Inc. and its officers for failure to adequately plead misrepresentation, scienter and loss causation.

District Judge John P. Cronan dismissed putative class action claims brought under Sections 10(b) and Section 20(a) of the Exchange Act against UiPath, Inc. and two of its officers. The plaintiffs alleged that, during a class period spanning December 1, 2023, through May 29, 2024, UiPath and its executives made materially misleading statements and omissions regarding the company's execution of customer contracts, deal quality and strategic investments, particularly in its sales team and customer success functions.

The complaint relied in part on information from three former employees, who described internal business decisions that allegedly led to stagnating deal flow, customer pushback and loss of business. The court dismissed the claims, holding that the plaintiffs failed to adequately plead a material misrepresentation or omission, scienter or loss causation, as required by the Private Securities Litigation Reform Act of 1995 (PSLRA).

On the allegations of misrepresentation or omission, the court found that many of the challenged statements were nonactionable puffery or corporate optimism, lacking the specificity or falsifiability necessary to mislead a reasonable investor. Where statements could be construed as more concrete, the court held that the plaintiffs failed to allege facts showing that the defendants had access to specific contradictory information at the time the statements were made.

The court also rejected the plaintiffs' alternative theories of scienter, including arguments based on the timing of the CEO's departure, the proximity of the alleged misstatements to the company's downward revision of revenue guidance and the centrality of the turnaround strategy to UiPath's business. The court reasoned that such allegations, without more, were insufficient to support a strong inference of scienter, as motives such as maintaining employment or professional reputation are generally possessed by most corporate officers and do not suffice.

Finally, the court held that the plaintiffs failed to plead loss causation, as the alleged corrective disclosure, a statement by UiPath's founder and returning CEO that certain investments had "fallen short of expectations," did not reveal any prior misstatement or omission, but rather reflected disappointment in business results. The court concluded that the market cannot react to what it never learns, and that a drop in stock price following disappointing financial results, without disclosure of a prior misrepresentation, does not establish loss causation.

The court granted the plaintiffs leave to amend their complaint to address the identified pleading deficiencies.

EDNY Refuses To Dismiss Claims Against Company and Officers, Saying Allegations of Scienter and Loss Causation Suffice, but Dismisses Claims Against Directors

Zornberg v. NAPCO Security Techs, Inc. (E.D.N.Y. April 11, 2025)

What to know: The Eastern District of New York permitted Exchange Act claims to proceed against NAPCO Security Technologies, Inc. and certain of its officers, but dismissed certain Securities Act claims against individual defendants in a putative class action stemming from NAPCO's restatement of financials and alleged inventory overstatements.

Judge Brian M. Cogan of the U.S. District Court for the Eastern District of New York dismissed in part, and granted in part, putative class action claims brought under Sections 10(b) and 20(a) of the Exchange Act, and Sections 11, 12(a)(2) and 15 of the Securities Act against NAPCO, a security device manufacturer, and certain of its officers.

The plaintiffs alleged that NAPCO and its officers made materially false or misleading statements about inventory, cost of goods sold and profitability in quarterly reports and in materials for a secondary public offering (SPO) filed through an automatic shelf registration. (A "shelf registration" allows a company to register securities without selling the entire issue at once; the company can "put the securities on the shelf" and sell them over time, based on market conditions.)

After NAPCO announced it would restate financials due to overstated inventory and earnings, its stock price fell over 45%. The court found that the plaintiffs sufficiently pled scienter and loss causation, allowing Exchange Act claims to proceed.

On scienter, the court credited allegations that the officer defendants sold unusually large portions of their holdings (48.5% and 45.5%) shortly after positive earnings announcements, but not before or after the class period. The timing and scale of these sales, and the absence of similar sales outside the class period, supported a strong inference of motive and opportunity ("there is no question that plaintiffs have adequately pled scienter").

The court rejected the defendants' arguments that the existence of a shelf registration made the sales routine and that the public disclosure of the potential sales cut against an inference of scienter, distinguishing the discretionary nature of shelf registrations from preset Rule 10b5-1 trading plans.

On loss causation, the court held that the restatement at issue sufficiently revealed the alleged misstatements' falsity. The court noted that the resulting 45% stock price drop plausibly linked the alleged fraud to investor losses.

Separately, claims against the defendants' directors were dismissed. The court held that, under SEC rules, the effective date for liability for directors and signing officers was the shelf registration's effective date (September 12, 2022), before the class period.

Consumer Products

SDNY Lets Class Action Claim Against Executive Stand, Saying Allegations Supported Inference of Culpable Participation

Sills v. United Natural Foods, Inc. (S.D.N.Y. July 28, 2025)

What to know: The Southern District of New York denied a former executive's motion for judgment on the pleadings in a securities fraud class action involving United Natural Foods, Inc. (UNFI).

Judge Jessica G. L. Clarke of the U.S. District Court for the Southern District of New York denied a motion by defendant Christopher P. Testa, former president and chief marketing officer of UNFI, seeking dismissal of Section 20(a) "control person" claims brought under the Securities Exchange Act. The plaintiffs, purchasers of UNFI securities, alleged that UNFI and its executives engaged in securities fraud by failing to disclose the unsustainable nature of profits generated through "forward buying," a practice where UNFI stockpiled inventory at lower prices before supplier price increases, then passed on higher prices to retailers, temporarily boosting earnings. When UNFI's earnings later declined and the company revealed the extent of its reliance on forward buying, the plaintiffs claimed the company's prior statements were materially misleading.

The court previously found that the plaintiffs had adequately alleged a primary violation of Section 10(b) and Rule 10b-5 against UNFI and certain executives, but noted that Testa himself had not made actionable statements during the class period for primary liability. However, for the Section 20(a) claim, the court held that the plaintiffs sufficiently alleged that Testa exercised actual control over the company's public statements and had access to information about the forward buying practice. The court found that Testa's participation in earnings calls, his authority over company disclosures, and his access to internal information plausibly supported an inference of control.

On the issue of "culpable participation," the court acknowledged a split among district courts regarding the required pleading standard, but concluded that the plaintiffs' allegations, bolstered by Testa's suspicious stock sales shortly before negative disclosures and his executive role, were sufficient to support an inference of culpable participation, even under a heightened standard akin to scienter. The court emphasized that most of the factors supporting scienter for other executives also applied to Testa.

SEC

Ninth Circuit Affirms Facial Validity of SEC Settlement 'Gag Rule' Under First Amendment

Powell v. SEC (9th Cir. Aug. 6, 2025)

What to know: The Ninth Circuit rejected arguments that the SEC's so-called "gag rule" — which requires civil defendants settling with the SEC to agree not to later deny the SEC's allegations of wrongdoing — facially violates the First Amendment.

SEC Rule 202.5(e), referred to as the "gag rule," states that a defendant in a civil enforcement suit may not enter into a settlement agreement with the SEC while denying the SEC's allegations. The settling defendant must at minimum state it will neither admit nor deny the allegations. If the defendant violates this aspect of the settlement agreement, the SEC may request that its case be reopened by the court.

The petitioners requested that the SEC amend the gag rule. The SEC denied the request. The petitioners appealed the denial to the Ninth Circuit, arguing that the gag rule violates the First Amendment on its face.

The Ninth Circuit upheld the rule. Generally, constitutional rights may be voluntarily waived. Under the Supreme Court's holding in *Town of Newton v. Rumery*, a voluntary waiver of constitutional rights is valid unless public-policy concerns outweigh the interest in enforcing the waiver. The Ninth Circuit found that *Rumery* applied to the petitioners' facial challenge of the gag rule because the rule's speech restrictions arise out of a voluntary settlement agreement.

Applying *Rumery*, the Ninth Circuit held that the gag rule is facially valid for several reasons. First, the rule imposes no consequences other than permitting the SEC an opportunity to return the civil enforcement litigation to its pre-settlement status. Second, the rule puts the choice to the defendant to decide whether to effectively reopen the action. Third, a defendant's right to deny the SEC's allegations has a close nexus to the government's interest in proving those allegations in an enforcement action. Thus, public policy concerns did not outweigh the facial validity of the gag rule.

The Ninth Circuit limited its holding to a facial challenge of the rule, which addresses only speech denying the SEC's allegations, and declined to consider restrictions in example settlements appearing in the record regarding statements that "indirectly" or "create[e] the impression" of denying the SEC's allegations. The Ninth Circuit also observed that a defendant could argue that its agreement to Rule 202.5(e) was involuntary or unknowing. The defendants also have an opportunity to make First Amendment objections before a court if the SEC seeks to reopen civil enforcement proceedings.

Eastern District of Pennsylvania Rejects Constitutional Challenge to SEC's Authority To Promulgate Insider-Trading Regulations After *Chevron* Overturned

United States v. Sacanell (E.D. Pa. July 10, 2025)

What to know: The Eastern District of Pennsylvania denied a motion to dismiss a criminal indictment for insider trading, holding that the Supreme Court's overruling of "*Chevron* deference" did not impact the SEC's authority to promulgate Rule 10b5-2.

Section 10(b) of the Exchange Act permits the SEC to promulgate rules and regulations to protect the public and investors by combating the use of "manipulative or deceptive" trading schemes. Under SEC Rule 10b5, one may be liable for insider trading based on a "misappropriation" theory of using material nonpublic information in breach of a duty of trust or confidence owed to the information's source. SEC Rule 10b5-2 provides three nonexclusive circumstances in which one has such a duty of trust or confidence.

Carlos Sacanell was charged with insider trading under this "misappropriation" theory. Sacanell moved to dismiss the indictment, arguing that Rule 10b5-2 exceeds the SEC's rulemaking authority under §10(b). Sacanell's challenge was based on the Supreme Court's overruling of "*Chevron* deference" to agency rulemaking and statutory interpretation in *Loper Bright Enterprises v. Raimondo*.

Chief Judge Wendy Beetlestone of the Eastern District of Pennsylvania rejected Sacanell's motion on two main grounds. First, it stated that the Third Circuit in *United States v. McGee* held that Rule 10b5-2(b)(2) is a valid exercise of the SEC's rulemaking authority. Although *McGee* based its holding on *Chevron* deference, the Third Circuit had not yet applied *Loper Bright* in the same context, and *Loper Bright* specifically disclaimed overruling any other prior cases relying on *Chevron*. Thus, *McGee* remains binding Third Circuit authority.

Second, the court found the other two subsections of Rule 10b5-2 still lawful. Under *Loper Bright*, courts must determine whether an agency enabling statute authorizes agencies to exercise discretion. If so, courts analyze (i) whether the statute exercises constitutional delegation, (ii) what boundaries are set for the delegated authority, and (iii) whether the agency engaged in reasoned decision-making within those boundaries.

The court found §10(b) authorized the SEC to exercise discretion. It then held that §10(b)'s delegation was constitutional as it provided an intelligible principle that the SEC must protect the public and investors by prohibiting "manipulative or deceptive" means of trading securities. Finally, the court held that in promulgating Rule 10b5-2, the SEC engaged in reasoned decision-making within §10(b)'s boundaries. Thus, the court found Rule 10b5-2 a lawful exercise of the SEC's rulemaking power under *Loper Bright*.

Second Circuit Affirms Dismissals of Short-Swing Profit Cases Where Repurchases Were by Company, Not Individual Controllers

Roth ex rel. Estée Lauder Cos. v. LAL Family Corp. (2d Cir. May 23, 2025)

What to know: In a consolidated appeal of two cases, the Second Circuit affirmed the dismissal of shareholders' claims that controllers were liable for disgorgement of short-swing profits under Section 16(b) of the Exchange Act arising from the controllers' sale of equities in an issuer within six months of the issuer's repurchase of shares.

Second Circuit Judge Dennis Jacobs, writing for Judges Calabresi and Nathan, affirmed rulings of Judge John P. Cronan (S.D.N.Y.) and Judge Dora L. Irizarry (E.D.N.Y.) granting defendants' motions to dismiss shareholders' claims that controllers were liable for disgorgement of short-swing profits under Section 16(b) of the Exchange Act. The plaintiffs, shareholders of Estée Lauder Companies and Altice USA, Inc., alleged that controllers of the respective corporations sold shares of the corporations within six months of each corporation repurchasing shares of its respective stock.

The plaintiffs alleged that the defendants' sales within six months of the corporations' repurchases were "pairable transaction[s]" and subjected the controllers to liability under Section 16(b), which imposes strict liability on a corporation's insiders for such transactions and requires them to disgorge profits from those transactions.

The Second Circuit rejected the plaintiffs' theory and held that "[w]here applicable law transforms outstanding securities into treasury shares upon repurchase by the issuer ... Section 16(b) does not impose liability for the alleged pairing." The Second Circuit noted that liability under Section 16(b) required the controllers to be “indirect beneficial owners of the repurchased shares,” but they were not “indirect beneficial owners” of the repurchased shares “because state law transform[ed] [them] into treasury shares.”

The Second Circuit further noted that a “beneficial owner” is “‘any person who ... shares a direct or indirect pecuniary interest in the equity securities’ transacted.” The Second Circuit concluded that the controllers lacked “an indirect pecuniary interest in [the] repurchased shares” by virtue of their automatic transformation into treasury shares, which were effectively valueless. The defendants were thus not beneficial owners of the repurchased shares and not subject to liability under Section 16(b).

The Second Circuit further noted that liability did not attach because:

i. The sale and repurchase transactions involved “readily distinguishable stocks.”
ii. The shareholder could not “establish that there [was] a ‘profit realized’ from” the transactions.
iii. Recognizing liability under Section 16(b) would allow an issuer to have claims against insiders “based on the issuers’ own conduct,” which would be “inequitable.”
iv. Extending Section 16(b) to repurchases “would make Section 16(b) a trap” because it would expand strict liability to insiders unaware of the repurchases.

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