

THE MONITOR

A Quarterly Publication by Johnson Fistel, LLP • Winter 2021

Shareholder Litigation in the Pandemic: Business as Usual?



In March 2020, the COVID-19 pandemic left investors and companies alike wondering whether they should expect a wave of COVID-related shareholder litigation. To many, including several prominent international defense firms, the pandemic appeared to have shaped a market ripe for such lawsuits—healthy stock prices in early February took a plunging nosedive by the end of March. After all, it was this same broad-based stock pricing pattern that prompted an explosion in shareholder litigation during the dot-com crash of 2001 and the financial crisis of 2008.

But this expectation has not become the reality. According to an article published in early February in Law360, “[s]ecurities class ac-

tion filings dropped by 22% in 2020 from a record high the year before” and so-called “core filings”—securities filings not related to M&A transactions—were down 12% in 2020 compared to the prior year, although filings remain in line with other recent years. For support, that article cited to the annual report entitled “Securities Class Action Filings: 2020 Year in Review” published by Cornerstone Research and the Stanford Law School Securities Class Action Clearinghouse. Big defense law firms echoed similar data on their websites and in articles, reacting to their prior client alerts advising of an anticipated wave of shareholder litigation earlier in 2020.

For shareholder litigation firms,

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however, this is not surprising. For starters, unlike the 2001 dot-com crash resulting from speculation in internet-based companies in the late 1990s and early 2000s, and the 2008 financial crisis predicated on widespread, systemic fraud in the financial and mortgage industries, the COVID-19 pandemic resulted from a public health crisis. In other words, nothing inherent about the pandemic necessarily suggests fraud or that boards of directors have otherwise breached their fiduciary duties.

But that is not to say shareholder litigation related to COVID-19 has been non-existent the past year. Shareholder litigation firms have not been deterred by the pandemic and continue to hold corporate fiduciaries accountable for breaching their fiduciary duties, with COVID-19-related shareholder litigation typically falling into one of two categories: (i) cases alleging misstatements regarding the detrimental impact of COVID-19

on the company's business, which have largely concerned companies in industries hardest hit by the pandemic, like the travel industry, and (ii) lawsuits alleging overly optimistic statements regarding COVID-19-related drug therapies or products by pharmaceutical companies and biotechnology companies.

For example, in March 2020, shareholders of Norwegian Cruise Line filed a suit in the U.S. District Court for the Southern District of Florida alleging the company issued misleading statements about the risks posed by COVID-19 to the cruise line industry and financial health. Likewise, shareholders of Carnival Corp. filed a similar suit also in the U.S. District Court for the Southern District of Florida shortly thereafter, alleging that the cruise line concealed its knowledge of the risks from COVID-19 to its business and industry.

And in April 2020, sharehold-

ers filed a derivative action against Inovio Pharmaceuticals in the Eastern District of Pennsylvania, alleging false and misleading statements about a potential vaccine for COVID-19. Similarly, SCWorx Corp. also found itself the subject of litigation in the Southern District of New York, where shareholders claimed the company misled investors by touting a "bogus" COVID-19 rapid test.

So although the COVID-19-related market crash has not, like its predecessor market crashes and as many expected it would, generated a significant uptick in shareholder litigation, corporate fiduciaries are at the same time not absolved from liability amidst the pandemic and shareholder litigation firms continue to pursue meritorious claims against wayward fiduciaries.

The takeaway for corporate investors? Shareholder litigation might just be one of the rare areas in which it remains "business as usual" in the pandemic.

For Now, the Dynamex Decision Is Retroactive – Workers and Employers Be Aware



In mid-January 2021, the California Supreme Court issued its ruling on whether the “ABC test” articulated in its 2018 *Dynamex Operations West Inc. v. Superior Court of Los Angeles* decision applies retroactively. At stake – the status of thousands of workers classified as independent contractors prior to *Dynamex*. One of many questions *Dynamex* left unanswered: would these workers’ classifications be assessed according to the rules then in effect, or pursuant to the later-adopted “ABC test” set forth in *Dynamex*? The California Supreme Court answered, “yes” – *Dynamex* applies retroactively.

Recall that the California Supreme Court’s decision in *Dynamex* enormously altered the employment landscape in California by imposing the presumption of employment and placing the burden on the hiring entity to establish an independent contractor relationship. To demonstrate an independent contractor relationship, all three prongs

of *Dynamex*’s ABC test must be satisfied:

(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) the worker performs work that is outside the usual course of the hiring entity’s business; and

(C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Before the ABC Test, California courts and California hiring entities used a multifactor test outlined in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, commonly known as the “Borello Test.” The *Borello* Test focused on the amount of control a business exercised over a worker by looking at numerous factors, and historically favored independent contractors.

The more control a business exercised over a worker, the less likely that the worker could be properly classified as an independent contractor.

Following *Dynamex*, courts issued divided opinions on whether the ruling was retroactive. In 2019, the U.S. Court of Appeals for the Ninth Circuit in *Vazquez v. Jan-Pro Franchising Int’l, Inc.* initially held that *Dynamex* applies retroactively, but later withdrew its opinion and certified the question of retroactivity to the California Supreme Court. The Supreme Court in *Vazquez* explained that judicial interpretations of legislative measures are generally given retroactive effect, even when the statutory language in question had been previously interpreted differently by a lower appellate court. Accordingly, absent a justified exception, the *Dynamex* decision – premised on a novel interpretation of the California Industrial Wage Commission wage orders – applies retroactively. The court rejected

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the contention that hiring entities' previous reliance on the *Borello* decision justified an exception to retroactive application – drawing a distinction between the California Labor Code language considered in *Borello* and the wage order language analyzed in *Dynamex*. The court further explained that fairness and the policy considerations of worker protection espoused by the wage orders weighed heavily in favor of retroactive application.

Vazquez settles that the employee/independent contractor relationship with respect to the wage orders will be analyzed under the ABC test, even if the conduct in question occurred prior to the *Dy-*

namex decision. This decision immediately impacts all pending classification litigation, and could lead to additional litigation regarding allegations of past misclassification previously thought to comply with *Borello* and other appellate authorities.

Any employers defending against independent contractor misclassification cases that predate the 2018 *Dynamex* decision should reevaluate those issues under the more demanding ABC Test rather than rely on the more favorable, but outdated *Borello* Test. And for those employers not facing misclassification litigation at the moment, the *Vazquez* decision justifies company

worker classification audits looking back beyond 2018. As for any California independent contractor, this is an issue that warrants immediate consideration of employment status.

Bottom Line: California's ABC Test for determining whether a worker is an employee or an independent contractor applies to claims implicating a time period prior to issuance of the *Dynamex* decision in April 2018.

Employment and Labor Litigation

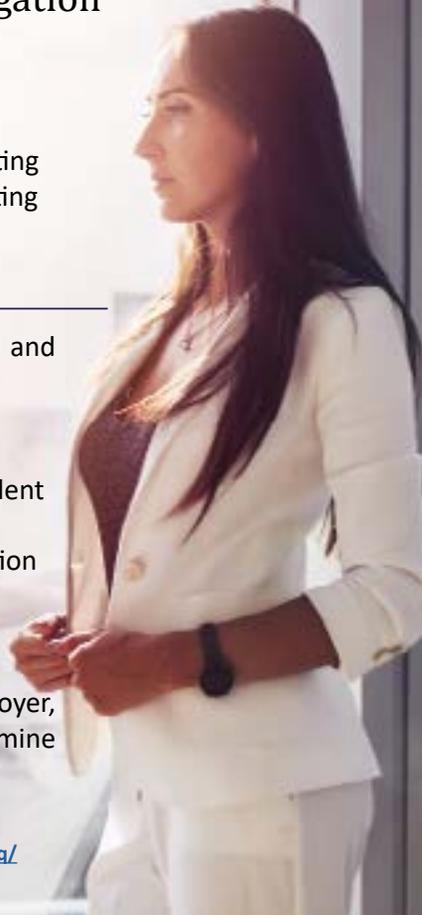
The attorneys at Johnson Fistel have obtained successful and efficient results for both employers and employees in litigating employment disputes, negotiating separations and severances, and evaluating employment policies, practices, and contracts.

Johnson Fistel can help employers and employees with the following issues:

- Minimum Wage & Overtime Pay
- Misclassifications (Employee/Independent Contractor)
- Discrimination, Harassment, & Retaliation
- Employment Contracts, Severance & Separations, & Restrictive Covenants.

Whether you're an employee or an employer, please contact us today to determine whether we may be able to assist you.

Please visit our website for FAQs about employment law: <https://www.johnsonfistel.com/faq/>





2021 - A Vintage Year for Estate Planning and Asset Protection

Although California produces stellar wine vintages year after year, there has been relatively little production of anything new or positive for California trusts. But the 2021 landscape has changed significantly, the conditions are ideal, and the time is ripe. A recent crop of legislation and cases, including California's new Uniform Trust Decanting Act and the *Paula Trust* case, as well as the potential for significant tax changes at both the state and federal level, might make 2021 a vintage year for reviewing (or creating) your estate/asset protection plans with the attorneys at Johnson Fistel.

CA Decanting

The California Uniform Trust Decanting Act ("CUTDA"), which took effect January 1, 2019, has significantly eased restrictions and limitations on trust fiduciaries when it comes to "updating" irrevocable trusts in California. "Decanting" an old trust, similar to decanting an old wine, is literally the act of pouring the assets and provisions from an outdated irrevocable trust into a brand-new irrevocable trust. The

crucial difference is that wine decanting involves pouring the same wine into a different container. Trust decanting, on the other hand, allows fiduciaries the ability to modify the trust's terms and provisions, resulting in a substantially different and improved container.

Before passage of the CUTDA, a fiduciary's ability to modify the terms and provisions of an irrevocable trust in California, with certain exceptions, was limited, time consuming and expensive. In most cases, the fiduciary was required to obtain the consent of all the trust's beneficiaries, and a court hearing was needed to make any proposed changes. And even if the fiduciary was able to overcome these obstacles, their power to make substantive modifications to the original trust instrument was severely restricted.

Under the CUTDA, a fiduciary now has the power to decant and modify an irrevocable trust without the consent of the settlor, beneficiaries, or the court. The fiduciary must still provide notice to all of

the interested parties above (as well as the California Attorney General if the trust has charitable components), but their approval and consent is no longer required.

Fiduciaries can use decanting to make administrative changes and, depending upon the authority granted to them by the original trust, they may also have the power to make significant substantive changes. Fiduciaries with "expanded distributive discretion" can alter both administrative and dispositive provisions, including modifications to distributions, beneficiaries, appointments and trust duration. Decanting power does not mean unlimited power and unfettered discretion – the decanted trust's "juice" can be modified and fortified, but it can't be replaced with an entirely different product. Fiduciaries are still restricted when it comes to modifying their own powers, liabilities and compensation. In addition, they are barred from making any changes that alter the trust's charitable components and/or negatively affect its tax status.

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Fiduciaries are free, however, to make changes that positively affect the trust's tax status. The *Paula Trust* case, coupled with the new decanting powers under CUTDA, could very well provide trustees with a perfect window to make that happen.

The Paula Trust Case

In general, the income of a non-grantor trust is subject to taxation in California if that trust's fiduciary or beneficiary is a resident of California.[1] The California Franchise Tax Board ("FTB") has generally taken the position that all California-source income is subject to taxation and all other trust income is eligible for apportionment according to a formula involving the trust's fiduciaries and beneficiaries.[2]

The *Paula Trust v. FTB* [3] decision rejected the FTB's historic position and held that all of the Paula Trust's income, **including all of its California-source income**, was eligible for apportionment. A 2007 sale of the Paula Trust's property resulted in a \$2.8M capital gain in California, and the Paula Trust successfully argued that the same tax structure should be applicable to both California-source and non-California-source income. By applying the apportionment formula, the Paula Trust was able to defer California taxes on roughly \$1.4M of the gain. The *Paula Trust* decision is being appealed by the FTB, but it's currently the law of California.

Dust Off Your California Estate Plan and Pop the Cork

There are additional compelling



factors making 2021 an opportune time to evaluate and overhaul your existing estate planning strategies, including the potential sunset of the high federal basic exclusion amount at the end of 2025, CA Senate Bill 378 which could establish a separate and punitive estate tax regime in California, the availability of new insurance products that can help mitigate tax exposure, and the need to review/update your existing plan due to COVID-19 and the 2020 federal elections and ensuing transfer of power.

Effective Estate and Asset Protection Plans, like vintage Napa cabernets or First Growth Bordeaux, are precious and enduring gifts that need to be preserved and protected for future generations to enjoy and cherish. If you are a trustee or fiduciary of a non-grantor California trust that is past its prime, the

Decanting Statute and *Paula Trust* decision may empower you to make substantive changes that better serve the evolving needs of the trust's beneficiaries while significantly reducing (and possibly eliminating altogether) California tax exposure.

The Estate Planning and Asset Protection Groups at Johnson Fistel can help guide you through all the complex options and find the right fit that integrates your business and personal goals, mitigates risk and uncertainty, and maximizes potential benefits for your family and loved ones regardless of what the future may hold. Contact us for a free consultation.

[1] Cal. Rev. & Tax Code §17742(a)

[2] Cal. Code Regs. tit. 18, §17743

[3] *Paula Trust v. Cal. Franchise Tax Bd.*, 2018 Cal. Super. LEXIS 644 (currently under appeal by FTB)



Johnson Fistel Welcomes New Attorney Seth M. Schechter



Johnson Fistel is pleased to announce the addition of attorney Seth Schechter to its San Diego office. Mr. Schechter has extensive experience counseling high net worth clients with specialized asset protection strategies, wealth preservation ideas, tax mitigation, and estate planning. “I’m thrilled that Seth decided to join our firm. With his expansive background and experience, we can now offer our clients retirement planning, estate planning, business formation, and help them protect the wealth they have worked so hard to create,” said Frank J. Johnson, the firm’s managing partner.

Mr. Schechter started his legal career over 20 years ago working as a Special Assistant United States Attorney in San Diego. After spending two years defending the United States against civil actions, he spent several years at a prestigious law firm in San Diego providing estate planning services and strategizing with clients on forming the best business structures based upon a number of financial considerations to protect them from personal liability and reduce their tax obligations.

His skill and experience led billionaire Sidney Frank, creator of the Grey Goose and Jagermeister

brands, to hire Mr. Schechter as his personal lawyer and in-house counsel for Mr. Frank’s enterprises. In that role, Mr. Schechter handled virtually all of Mr. Frank’s legal matters including managing his wine brand, real estate development, and the record-setting sale of Grey Goose to Bacardi for \$2 billion. Mr. Schechter has since served as general counsel for both established companies and start-ups. In addition, Mr. Schechter has held leadership roles at large nonprofit organizations in San Diego.

Mr. Schechter will assist the firm in three primary practice areas:

- *Estate Planning:* Mr. Schechter combines his practical knowledge and technical expertise to create effective, efficient, and tax sensitive wealth planning and asset transfer arrangements. He provides advice and guidance on trust and gift planning, estate tax mitigation, life insurance strategies, philanthropic and charitable integration, and personalized asset protection. He has counseled clients from across the wealth spectrum, including individuals, families, and business entities in planning and managing estates of varying size and complexity.

- *Asset Protection:* Combining his education (LLM in Taxa-

tion) and his work experience (representing clients such as billionaire Sidney Frank and other high net worth individuals), Mr. Schechter takes estate planning to the next level by ensuring that clients’ assets are insulated from litigation concerns and other potential threats. Mr. Schechter helps clients create an individualized Asset Protection Plan designed to make sure that all current and potential personal and professional risks and threats are identified.

- *Business Law:* Mr. Schechter has a broad range of skills and experience in the fields of commercial, corporate, and securities law. He has counseled domestic and international clients in a wide variety of transactional matters.

Mr. Schechter received his Bachelor of Arts degree from Cornell University in 1990, his Juris Doctor degree from California Western in 1995, and his Master of Laws (LLM) in Taxation from the University of San Diego in 2001. He is involved with several nonprofits, including the Jackson Hole Technology Partnership and the Surfrider Foundation. In his spare time, Mr. Schechter enjoys skiing, surfing, writing, and spending time with his wife, kids, and dog.



Recent Accomplishments

In re Alphabet Inc. Stockholder Derivative Litigation, Case No. 19CV341522 (Santa Clara Sup. Ct). On February 4, 2021, the Honorable Sunil R. Kulkarni granted final approval of all terms of a settlement. The consolidated shareholder derivative actions arose from allegations that officers and directors of Alphabet, Inc., the parent company of Google LLC, breached their fiduciary duties and committed other misconduct in connection with multi-million-dollar severance awards to male executives accused of assaulting female employees, amid a broader culture of discrimination against women at the company. The settlement terms were broad and sweeping to address the allegations in the derivative actions. They included implementation of a new Diversity, Equity, and Inclusion Advisory Council for at least five years and required Alphabet to spend \$310 million over the course

of up to 10 years to fund several workplace initiative and programs directed at remedying the wrongdoing. Johnson Fistel represented a shareholder who made a demand on the board of directors to investigate the claims and played a seminal role in helping negotiate the final terms of the settlement.

In re Valeant Pharm. Int'l, Inc. Sec. Litig., (D.N.J.) Case No. 15-7658, 2017. On February 1, 2021, the Honorable Michael A. Shipp granted final approval of a settlement that provides \$1.21 billion cash recovery for over 400,000 class members. The securities fraud class action involved a price gouging strategy pursuant to which Valeant created a secret network of specialty pharmacies that would raise the prices of Valeant's products while avoiding scrutiny. Two executives from Valeant were arrested and charged with concocting and orchestrating this massive fraudulent scheme. They

were accused by authorities of using secret shell companies, hidden email addresses, and deceptive deals to get rich -- at the expense of investors at drug maker Valeant. Johnson Fistel played a significant role helping the trial team litigate the matter and secure the ninth largest class action amount ever recovered under the Private Securities Litigation Reform Act of 1995.

In re MiMedx Group, Inc. Shareholder Derivative Litig., Lead Case No. 1:18-cv-04486-WMR (N.D. Ga.). On December 21, 2020, the Honorable William M. Ray, II, granted final approval of a global settlement of a shareholder derivative action asserting claims for breach of fiduciary duty and related claims predicated on allegations that defendants, each of whom were either present and former directors and officers of MiMedx, exploited a channel-stuffing scheme to inflate sales and revenue reported in years

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"The Court rarely comments on counsel's performance. Here, such commentary is appropriate.... Counsel performed excellent work... for the benefit of the shareholders."

***The Honorable Yvonne Gonzalez Rogers
United States District Court Judge
Northern District of California***

of financial statements. The settlement, which resolved cases pending in four jurisdictions across Georgia and Florida, requires MiMedx's Board of Directors to implement a comprehensive package of corporate governance reforms. These reforms target the alleged lapses in Board and management-level supervision and internal controls Plaintiffs contend permitted the wrongdoing. They also provide for broader structural reforms designed to ensure more independent, rigorous and effective Board oversight of operations, executive conduct, and financial reporting. Johnson Fistel served as court-appointed liaison counsel for plaintiffs and the other shareholders.

In re RH Shareholder Derivative Litigation, No. 4:18-cv-02452-YGR (N.D. Cal). The firm negotiated sweeping innovative corporate

governance reforms to benefit the company, including installation of a new Chief Compliance Officer and adoption of a Disclosure Committee Charter. On December 18, 2020, the Honorable Yvonne Gonzalez Rogers granted final approval and commented as follows: "the Court rarely comments on counsel's performance. Here, such commentary is appropriate. . . . Counsel performed excellent work in not only investigating and analyzing the core of the issues, but in negotiating and demanding the necessary reforms to prevent malfeasance for the benefit of the shareholders and the consumers. The Court complements counsel for its excellence."

Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
SolarWinds	03/05/2021
QuantumScape Corporation	03/08/2021
Tricida, Inc.	03/08/2021
Decision Diagnostics Corp.	03/16/2021
Penumbra, Inc.	03/16/2021
9F Inc.	03/22/2021
Bit Digital, Inc.	03/22/2021
CleanSpark, Inc.	03/22/2021
Lizhi Inc.	03/22/2021
Walmart Inc.	03/22/2021
Voyager Therapeutics, Inc.	03/24/2021
AstraZeneca Plc	03/27/2021
iRhythm Technologies, Inc.	04/02/2021

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Company	Deadline
Tyson Foods, Inc.	04/05/2021
Clover Health Investments, Corp.	04/06/2021
bluebird bio, Inc.	04/13/2021
EHang Holdings Limited	04/19/2021
FuboTV Inc.	04/19/2021
Jianpu Technology Inc.	04/19/2021

Portfolio Monitor

Johnson Fistel recognizes that there are inherent risks when investing in the stock market. But the risks that an investor assumes do not, and should not, include the risk that the company or its officers and directors will make false and misleading statements to artificially inflate the company's stock price or sell their own stock based on insider information.

Our Portfolio Monitor is designed to alert institutional and individual investors when one of their investments may be affected by securities fraud, corporate waste, or other wrongdoing. Our Portfolio Monitor is available to both U.S. and foreign investors. There are no minimum portfolio requirements or costs to participate.



In-House Monitoring

Confidential Data Protection

Complimentary Service



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Click the link to learn more:

<https://www.JohnsonFistel.com/stockmonitor-free-portfolio-monitoring/>

Johnson Fistel was founded on the following five core values: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients — their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.

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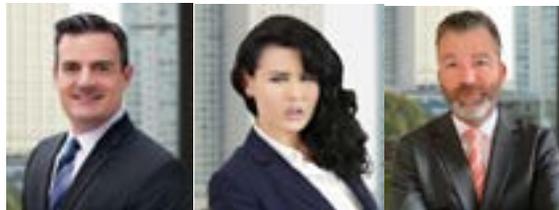
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