THE MONITOR

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The End of Mandatory Arbitration in #MeToo Litigation: A Sea Change

On March 3, 2022, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The Act amends the Federal Arbitration Act (FAA) and gives workers asserting sexual assault or sexual harassment claims under federal, state, or tribal law the option to litigate those claims in court—even if they had agreed to arbitrate before the claims arose. In other words, the new law renders unenforceable all forced arbitration agreements and class or collective action waivers with respect to sexual assault and sexual harassment claims, regardless of the date of the arbitration agreement.

The Specifics:

The Act amends the FAA to add a new subsection, which states, in part:

[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

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Key Provisions:

1. The Act effectively affords workers the option to invalidate arbitration agreements and class or collective action waivers with respect to their sexual assault and sexual harassment claims, meaning they may elect to either arbitrate their claims or litigate them in court.

2. The Act applies only to "pre-dispute" arbitration provisions and waivers; it will not affect otherwise valid agreements made between the involved parties after a dispute has arisen.

3. The Act has no effect on arbitration agreements for claims that are unrelated sexual assault and sexual harassment.

4. The Act defines "sexual assault dispute" as a dispute involving a "nonconsensual sexual act or sexual contact," as those terms are defined in section 2246 of title 18 or analogous tribal or state law, including when the victim lacks capacity to consent. The Act likewise defines a "sexual harassment dispute" as one "relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

The Act reflects yet another sea change in the #metoo litigation landscape and is, by all accounts, likely to precipitate a material uptick in harassment litigation across the country. For employers, the Act must be squarely considered in tandem with substantial and thoughtful processes and policies intended to curtail workplace misconduct. For employees who are part of the chorus of viral outrage determined to upend corporate dysfunction in America, the Act is a colossal step forward.

If you believe you have been illegally victimized by your employer or another person in the workplace, please contact us for a free consultation and case evaluation. You may telephone us at (619) 230-0063 or e-mail us at contactus@johnsonfistel.com.

HNW Planning - The Walton GRAT to Transfer Wealth is at Risk

High Net Worth (HNW) estate planning can take many forms to legally avoid taxes. In some cases, large transfers of wealth can trigger gift tax liability of up to 40%. Careful planning and the use of the Walton GRAT can help avoid this. The Walton GRAT, also referred to as a "zeroed-out GRAT," is named after a member of the billionaire Walton family that owns a large piece of Walmart and who prevailed against the IRS in tax court utilizing the strategy described below. It is also in the crosshairs of the current administration and may no longer be a useful tool next year.

Current volatile market conditions present the unique opportunity for high-net-worth individuals to use Grantor Retained Annuity Trusts (GRATs) to transfer substantial wealth to family members while mitigating potential gift tax (during their lifetime) and/or estate tax (after they die). Using a GRAT, a grantor transfers wealth and future appreciation in certain property to the grantor's chosen beneficiaries (generally the grantor's children) while receiving tax-free annuity payments over a span of years from the trust. Although large gifts made during the life of a grantor can be subject to gift tax, a "zeroed-out" GRAT, also known as a Walton GRAT, is a strategy in which the gift's taxable value is reduced to zero, allowing the grantor to transfer the potential appreciation of value to beneficiaries without any tax.

Another major advantage of the GRAT is that the grantor may not be forced to surrender control over the property transferred to the trust, as is the case with most irrevocable trusts. In fact, by the end of the GRAT's term, the grantor may potentially receive the return of the assets used to fund the trust. Any upside at the end of the GRAT term is transferred tax-free to the grantor's beneficiaries.

In a Walton GRAT, the grantor contributes assets to the GRAT that he/she hopes will significantly appreciate during the GRAT's term. The GRAT pays fixed annuity payments, using the same assets contributed to the GRAT, back to the grantor. When the grantor receives the final payment at the end of the GRAT's term, the trust can transfer all upside appreciation of the GRAT assets to the grantor's chosen beneficiaries on a tax-free basis regardless of the amount of appreciation. Some HNW individuals have several GRATs holding various assets because they view the GRATs as no-risk gamble; if the assets stay the same or decline in value nothing is transferred to beneficiaries.

However, the tax benefits of utilizing GRATs are at risk. On March 28, 2022, the current administration released a new tax proposal aimed at eliminating entirely or at least curtailing the benefits of the Walton GRAT. Among the various tax law changes, the proposal would require: (1) the term of a GRAT to be at least 10 years; (2) the term of the GRAT last no longer than the life expectancy of the grantor plus 10 years; and (3) the remainder interest (the amount of the taxable gift) be the greater of (a) 25% of the value of the assets contributed or (b) $500,000 (however, that this latter amount be capped at the value of the gift).

With low interest rates, undervalued market values, and efforts to eliminate its benefits, now may be a perfect time to consider establishing a Walton GRAT. The estate planning and asset protection group at Johnson Fistel would be happy to review your current plan to determine if a GRAT is right for you.

Direct or Derivative Claims? Guidance from the Delaware Supreme Court

In stockholder litigation, courts and parties often disagree about whether a claim is direct or derivative. Under Delaware law, a direct claim is one where a stockholder brings an individual suit to redress injuries sustained to his or her legal rights as a stockholder, while a derivative claim is one brought by a stockholder in a suit on behalf of the corporation for harm suffered by the corporation. Recently, in *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021), the Delaware Supreme Court clarified whether stockholders' voting and financial rights, diluted through the sale of stock to a controlling shareholder, gave rise to a direct or derivative claim.

Before *Brookfield*, pursuant to the "*Tooley* Test", Delaware courts determined whether a claim was direct or derivative by asking two simple questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). In 2006, two years after *Tooley*, the Delaware Supreme Court added to the confusion by articulating an exception to the *Tooley* Test in *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006) (the "*Gentile* Exception"). There, the Delaware Supreme Court recognized a claim could be both direct and derivative where "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d 91, 100. Thus, according to the *Gentile* Exception, while the corporation and stockholders suffered derivatively via economic harm, the stockholders endured a unique, direct harm via the dilution or loss of voting rights.

For the next fifteen years, courts struggled to apply the *Tooley* Test in light of the dual natured *Gentile* Exception until the Delaware Supreme Court issued its opinion in *Brookfield*. In *Brookfield*, after the corporation issued stock via a private placement to its controlling stockholder, the minority stockholders filed a complaint asserting direct claims because the transaction diluted both the financial and voting interests of said stockholders. Recognizing the tension between the *Tooley* Test and the *Gentile* Exception, the Delaware Court of Chancery acknowledged the dilution and overpayment claims were derivative under the *Tooley* Test, but given the *Gentile* Exception, the Court of Chancery held that the minority stockholders stated a direct claim. In doing so, the Court of Chancery, noted that the state of the law was "unsatisfying." *In re TerraForm Power, Inc. S'holders Litig.*, 2020 WL 6375859, at *15 (Del. Ch. Oct. 30, 2020). On interlocutory appeal, the Delaware Supreme Court expressly overruled Gentile and held that "the corporation overpayment/dilution Gentile claims" were "exclusively derivative." *Brookfield Asset Mgmt., Inc.*, 261 A.3d 1251, 1255.

The Delaware Supreme Court's ruling in *Brookfield*—while not eliminating the path—has certainly made stockholders' ability to remedy the dilution of their voting and economic rights far more difficult. Now, to pursue claims of overpayment and dilution, stockholders must either make a demand on the board of directors or sufficiently allege that such demand is futile, but "[i]n either case, the plaintiff must climb a 'steep road' to prevail." *Drachman v. Cukier*, 2021 WL 5045265, at *6 (Del. Ch. Oct. 29, 2021). An example of this now steep road can be seen in a recent decision from January of this year. In *Simons v. Brookfield Asset Mgmt. Inc.*, 2022 WL 223464 (Del. Ch. Jan. 21, 2022), Vice Chancellor Kathaleen McCormick dismissed a stockholder action asserting claims of overpayment and dilution in derivative and not a direct capacity for failing to plead sufficient facts showing a demand on the board of directors would have been futile. Thus, it is clear the impact of the *Brookfield* decision will have a lasting impact on stockholder litigation for years to come.

Recent Accomplishments

San Diego Magazine Recognizes Frank J. Johnson as One of the "2022 Top Lawyers" in San Diego

Frank J. Johnson, Managing Partner of Johnson Fistel, LLP, has been recognized once again by San Diego Magazine as one of the Top Lawyers in San Diego. As in prior years, the magazine created a list of the Top Lawyers in San Diego for 2022 after consulting with "Martindale-Hubbell®, the company that has long set the standard for peer review ratings with more than 130 years of history and a database of over 1 million attorneys, to share its list of local lawyers who have reached the highest levels of ethical standards and professional excellence."

Michael I. Fistel, Jr., the firm's co-founding partner, shared: "while I'm not surprised, I'm always pleased to see that Frank received well deserved recognition as one of the finest lawyers in San Diego."

Mr. Johnson has practiced law for 28 years, almost all of which involved complex business litigation. A few years after becoming a partner at the Global 100 law firm Sheppard, Mullin, Richter & Hampton, he started his own law firm. With the trust and confidence of his colleagues and clients over the past 18 years, the law firm that Mr. Johnson started with just one lawyer has now grown to a full-service law firm with 16 lawyers and offices in California, Colorado, Georgia, and New York.

See the complete list here.

2022 Johnson Fistel Super Lawyers and Rising Stars

Super Lawyers is a rating service of outstanding lawyers who have attained a high-degree of peer recognition and professional achievement. Super Lawyers uses a patented multiphase selection process that includes peer nominations and evaluations combined with independent research. While up to five percent of the lawyers in the state are named to Super Lawyers, no more than 2.5 percent are named to the Rising Stars list. Johnson Fistel is proud to announce that Super Lawyers recognized and included the following lawyers for 2022:

Selected to Super Lawyers:

Frank J. Johnson

Brett M. Middleton

Ralph M. Stone

Selected to Rising Stars:

Mary Ellen Conner

Kristen L. O'Connor

Chase M. Stern

Johnson Fistel's Client Exonerated

Johnson Fistel attorney Enoch P. Hicks recently achieved a successful and efficient result for a Client in defending against serious allegations of ethical misconduct. The Client is a member of a national organization of real estate professionals and has held numerous leadership positions with the organization. While acting within the scope of a leadership position, the Client was alleged to have violated certain articles of the national organization of real estate professionals' code of ethics. Before a panel of five esteemed real estate professionals, Mr. Hicks was able to present witnesses, documentary evidence, and argument that established that the allegations were unsupported by the evidence presented by the opposing party and also established that the Client, in fact, had not violated any of the articles.

Johnson Fistel's Client Appointed Lead Plaintiff in Ocugen, Inc.

On March 31, 2022, following extensive briefing, The Hon. C. Darnell Jones, II issued an order appointing Johnson Fistel and its client as lead counsel and lead plaintiff, respectively, pursuant to the Private Securities Litigation Reform Act of 1995 in the case captioned *In re Ocugen, Inc. Securities Litigation*, Master File No.: 2:21-cv-02725 (E.D. Pa.). Defendant Ocugen is a biopharmaceutical company with a self-described focus of developing gene therapies to cure blindness and developing a vaccine to save lives from COVID-19. The complaints allege that Ocugen, along with certain of its executives, violated the Securities Exchange Act of 1934 by disseminating materially false and misleading statements concerning COVAXIN™, an advanced-stage whole-virion inactivated vaccine candidate/product for the prevention of COVID-19 in humans in the United States. Johnson Fistel attorneys Michael I. Fistel, Jr. and Jeffrey A. Berens helped achieve this result.

In re Ocugen, Inc. Securities Litigation, Master File No.: 2:21-cv-02725 (E.D. Pa.).

Significant Settlement Achieved for Synchronoss Technologies, Inc.

On December 13, 2021, Chief Judge Wolfson granted final approval of a shareholder derivative settlement which resolved shareholder lawsuits pending in the United States District Court for the District of New Jersey, as well as in the Delaware Court of Chancery.

The actions, brought on behalf of nominal defendant Synchronoss and against certain current and former directors and officers of the company, alleged that these directors and officers: (i) caused the Company to divest itself of the profitable Activation Business on unfavorable terms to the Company's 'friends and family'; (ii) engaged in improper accounting practices with respect to revenue recognition, which ultimately required the Company to restate its public financial disclosures; (iii) made false and misleading statements to the investing public regarding the aforementioned divestiture and accounting practices; (iv) engaged in insider sales of the Company's stock while the Company's stock price was allegedly artificially inflated; and (v) caused the Company to sell a valuable subsidiary and agree to a private investment in a public equity deal on unfavorable terms to preempt a proxy contest, thereby breaching their fiduciary duties owed to Synchronoss.

The settlement reached by the parties, and approved by the court, requires reforms to be implemented for a period of four years and, as Chief Judge Wolfson noted, will "[m]ost importantly. . . ensure: (i) the Company's disclosures are accurate, material information is accurately and timely disclosed, and the Company's disclosure controls are effective; (ii) potential related party transactions are conducted at arm's-length and appropriate disclosures are made; (iii) potential stock repurchases are vetted and evaluated to ensure they remain in the Company's best interests; (iv) the Company maintains and monitors a system for reporting and investigating potential compliance and ethics concerns, employees are trained in risk assessment and compliance, and the Company maintains an Internal Audit Function to review the Company's compliance with applicable policies and review key risk areas; and (v) the independent directors of the Board are provided with meaningful leadership from the Lead Independent Director and have an effective line of communication with the Chief Executive Officer ('CEO')." Chief Judge Wolfson continued, finding that "these additional and substantial corporate reforms strike the balance in curbing future issues that are the subject of these actions, and as such, I further find that the settlement confers a substantial benefit to the corporation."

Attorneys Michael I. Fistel, Jr., Mary Ellen Conner, and Adam J. Sunstrom led the prosecution of the litigation for Johnson Fistel and helped achieve this superb result on behalf of plaintiffs and Synchronoss.

In re Synchronoss Technologies, Inc. Stockholder Derivative Demand Refused Litigation, Lead Case No. 20-07150 (FLW) (D.N.J).

For the 6th consecutive year, Johnson Fistel has been recognized in The Top 50 list. Compiled by ISS Securities Class Action Services, the Top 50 list ranks law firms by the dollar value of recoveries they obtained in the previous year in securities class actions while serving as lead or co-lead counsel. Johnson Fistel recovered $9,875,000 for aggrieved investors in 2021.

The Road Less Traveled: Johnson Fistel Successful in Pleading Microchip Technology's Board Wrongful Refused Demand

For a claim of wrongful refusal, courts refer to plaintiffs' burden of surviving a motion to dismiss brought under federal or state civil procedure rule 23.1 as a steep road to climb. However, on April 6, 2022, Johnson Fistel successfully climbed this proverbial "steep road," when Judge Timothy J. Thomason of the Superior Court of Arizona Maricopa County, Commercial Court, held "the Complaint alleges particularized facts raising reasonable doubt that the Audit Committee's decision to decline the Demand was reasonable, made in good faith and with due care."

The Complaint alleged that Microchip Technology Incorporated's ("Microchip") Board of Directors wrongfully refused Plaintiff Richard Dutrisac's litigation demand ("Demand") because members of Microchip's Audit Committee—who were charged with the responsibility to investigate and respond to the Demand—ceded control of the investigation and substituted the judgment of the principal wrongdoers identified in the Demand for the purportedly good faith judgment of the Audit Committee on whether to refuse the Demand. When construing the Complaint, and after oral arguments from counsel, the Court concluded that "[a] reasonable inference could be drawn that the Officer Defendants played an improper role in the final decision to not pursue the claims. Thus, the Court finds plaintiff has alleged particularized facts creating reasonable doubt as to whether the Audit Committee in fact acted in good faith and with due care in responding to the Demand."

The Johnson Fistel team representing Plaintiff Richard Dutrisac includes Michael I. Fistel, Jr., Mary Ellen Conner, and Adam Sunstrom. *Dutrisac v. Sanghi et al.*, No. CV 2021-012459 (Ariz. Super. Ct., Maricopa Cnty.)

Employment and Labor Litigation

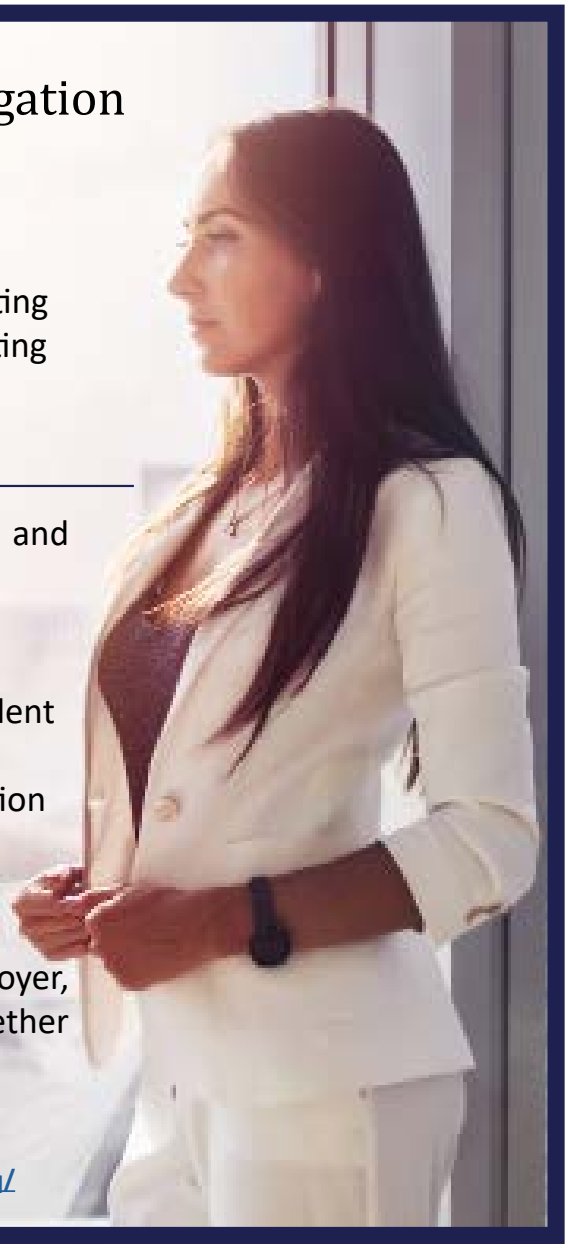
The attorneys at Johnson Fistel have obtained successful and efficient results for both employers and employees in litigating employment disputes, negotiating separations and severances, and evaluating employment policies, practices, and contracts.

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/



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 on this page 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
Gatos Silver, Inc.	2022-04-25
TaskUs, Inc.	2022-04-25
Cabaletta Bio, Inc.	2022-04-29
C3.ai, Inc.	2022-05-03
Rivian Automotive, Inc.	2022-05-06
Akebia Therapeutics, Inc.	2022-05-13
Celsius Holdings, Inc.	2022-05-13
Grab Holdings Limited	2022-05-16
FAT Brands Inc.	2022-05-17
Cano Health, Inc.	2022-05-17
Homology Medicines, Inc.	2022-05-24
Lucid Group, Inc.	2022-05-31
AbbVie Inc.	2022-06-06
Stronghold Digital Mining, Inc	2022-06-13
Twitter, Inc.	2022-06-13

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.

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For more information call 619.230.0063
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