Goldman Sachs amici to SCOTUS: Companies are leading social change. Don't let shareholders sue

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Alison Frankel's On The Case • September 25, 2020

(Reuters) - Goldman Sachs got a little help from its friends on Thursday at the U.S. Supreme Court.

The investment bank, as you know, has petitioned the justices (2020 WL 5040492) to review a 2nd U.S. Circuit Court of Appeals' decision (955 F.3d 254) affirming the certification of a class of shareholders who contend the bank committed securities fraud when it touted generic business principles like putting client interests first and operating with integrity. Shareholders contend those statements were exposed as false when Goldman turned out to have worked with hedge fund manager John Paulson to create complex mortgage-backed securities that Paulson shorted even as Goldman sold them to clients. In the 2nd Circuit's split ruling in April, the majority rejected Goldman's arguments that, among other things, its anodyne statements couldn't give rise to securities fraud because no reasonably investor would have considered such boilerplate to be material information.

Goldman's Supreme Court lawyers at Paul, Weiss, Rifkind, Wharton & Garrison have billed the bank's case as "the most important securities case to come before the court" since 2014, when the justices ruled in Halliburton v. Erica P. John Fund (134 S.Ct. 2398) that defendants in securities class actions are entitled to rebut the presumption that shareholders relied on alleged misstatements.

Several of Goldman's Supreme Court amici - such as the U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association, a group of prominent law professors and former SEC officials, and economists emphasizing the importance of price impact studies in shareholder litigation – are repeat players from the 2nd Circuit. And if you've been following this litigation, you're doubtless familiar with many of their arguments about the 2nd Circuit's purportedly misguided application of the Supreme Court's Halliburton decision, including its mistaken imposition of a burden of persuasion on defendants.

I was most intrigued, though, by briefs from two Goldman amici that did not appear at the 2nd Circuit: the Society for Corporate Governance, represented by Vinson & Elkins, and the Retail Litigation Center, with counsel from Alston & Bird. The two briefs posited that corporations are right now at the forefront of social reform in the U.S. – but that companies may be forced to retreat from that leadership if the Supreme Court lets the 2nd Circuit's Goldman Sachs ruling stand.

Companies in recent years "have often served as leaders on issues such as corporate governance reforms, diversity and inclusion, racial and social justice, and the environment," wrote the Society for Corporate Governance, whose 3,500 members are often responsible for corporate disclosures and filings at the Securities and Exchange Commission. "But the decision below threatens to curtail that trend, giving companies little choice but to stay silent on these important social issues, out of fear that even generalized or aspirational statements will be the basis for allegations of securities fraud liability."

The RLC acknowledged that corporations haven't exactly grabbed for leadership on so-called ESG (environment, social and corporate governance) issues. But under pressure from institutional shareholders, the RLC brief said, companies have stepped up ESG disclosures on aspirational goals on issues such as climate change and workforce diversity. The brief cited a 2020 study

that showed every one of the 50 biggest companies in the U.S., by revenue, included more aspirational statements in their 2020 proxy disclosures than their 2019 filings.

Under the 2nd Circuit decision, both the RLC and the Society briefs said, companies are exposed to securities fraud suits if they fall short of the aspirational goals they've laid out in public statements. Faced with that risk, the Society said, corporations may well just stop espousing support for social reforms – both within the company and to the public.

"The 2nd Circuit's decision would remove an important tool to help set expectations for employees and deter undesirable behavior, ranging from corruption to discrimination on the basis of race, gender, religion, or sexual orientation," the brief said.

I emailed Thomas Goldstein of Goldstein & Russell and Darren Robbins of Robbins Geller Rudman & Dowd, who represent the lead plaintiff in the Goldman case, the Arkansas Teacher Retirement System. I didn't hear back.

One point they could make in response to arguments that the 2nd Circuit decision will discourage corporate leadership on social justice issues is that Goldman and most of its amici contend Goldman's aspiration statements were not material. If Goldman is right that no one pays attention to corporate boilerplate about business principles, then the public won't be any worse off if companies stop making such statements. If, on the other hand, the Society and RLC are right about the societal value of companies' aspirational statements, perhaps shareholders should be able to sue for fraud when a company's actions prove the falsity of its words.

I know, I know – securities fraud class actions are a far more complex matter of showing that the share price reacted to a corrective disclosure. But if corporations want credit for speaking up for social good, they should also expect responsibility for what they say.

Shareholders' brief opposing Supreme Court review is due on Oct. 23.

The case is Goldman Sachs v. Arkansas Teacher Retirement System, No. 20-222 at the U.S. Supreme Court.

References

AMAZON COM INC; GOLDMAN SACHS GROUP INC (THE); HALLIBURTON CO; ROBBINS GELLER RUDMAN AND DOWD LLP; VINSON AND ELKINS LLP

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