

10/23/20 Alison Frankel's On The Case 21:02:04

Alison Frankel's On The Case
Copyright (c) 2020 Thomson Reuters

October 23, 2020

Could Walmart's new suit against DOJ backfire in Delaware shareholder case?

Alison Frankel

(Reuters) - Walmart filed a fascinating declaratory judgment suit against the Justice Department on Thursday in federal court in Sherman, Texas. The suit, led by Jones Day, requests a series of judicial declarations that pharmacists and the companies they work for are not supposed to do the job of the Drug Enforcement Administration, policing the distribution and dispensation of opioids. Walmart said in a statement that it brought the case because Justice Department officials are threatening the company with a "completely unjustified" suit "claiming in hindsight pharmacists should have refused to fill otherwise valid opioid prescriptions."

The complaint includes some juicy details about the government's investigation of Walmart. Walmart confirmed what was first disclosed in a blockbuster March 25 story by Politico: Texas federal prosecutors had threatened to indict the company in 2018. (Politico said prosecutors focused on Walmart's alleged corporate failure to stem the flow of opioids prescribed by so-called "pill mill" doctors.) Walmart said in Thursday's complaint that it "elevated" what it considered to be improper threats to "DOJ leadership in Washington." Main Justice, the complaint said, agreed with Walmart and, in August 2018, formally declined to prosecute a criminal case.

The U.S. Attorney's office in East Texas, however, continued to push for civil penalties. In fact, according to Walmart, that was their goal all along: "EDTX prosecutors declared their intention to 'embarrass' Walmart and tried to use the threat of criminal indictment to pressure the company into paying a massive civil penalty," the complaint said. So instead of walking away after Main Justice squelched the threat of an indictment, Walmart said, prosecutors created a working group of 15 DOJ attorneys from around the country "to generate cases against Walmart if the company refused to comply with EDTX's demand for a massive civil penalty."

That sounds like a big deal, right? The U.S. government expending significant prosecutorial resources to extract "a massive civil penalty" from Walmart? A threat so serious that the company made a strategic decision to sue the government to ward it off?

If you were a Walmart shareholder, do you think the company's board had a duty to tell you about its feud with Texas prosecutors?

That question is at issue in a Delaware Chancery Court case in which two institutional investors sued Walmart to obtain access to a decade's worth of corporate books and records addressing the opioids crisis. Plaintiffs' lawyers in the case, in which shareholders seek to enforce their right to examine corporate records under Section 220 of Delaware's corporate code, asserted that the aborted indictment of Walmart, as disclosed in the Politico story in March, was among the reasons why shareholders should at least be entitled to see what Walmart board members knew and advised about the burgeoning prospect that the company might face exposure in opioids litigation. (Another key factor, I should note, was a decision denying summary judgment to Walmart in the consolidated federal multidistrict opioids litigation.)

At an Oct. 5 hearing before Vice Chancellor Travis Laster, shareholder lawyer David MacIsaac of Labaton Sucharow suggested that Walmart's public disclosures about DOJ's investigation were not adequate. The company disclosed in a Securities and Exchange Commission filing in June 2018 that it had "been responding to subpoenas, information requests and investigations from government entities related to nationwide controlled substance dispensing practices involving the sale of opioids."

MacIsaac suggested at the Oct. 5 hearing that the disclosure didn't go far enough. Walmart, he said, should have revealed that it was under the threat of indictment and that the government had created a 15-lawyer working group to pursue billion-dollar penalties.

Walmart is a huge company and even a billion-dollar penalty might not, on its own, be material. But MacIsaac said the government's threatened investigation overlapped with claims in the federal MDL, which Walmart has discussed in SEC filings. That overlap, he said, makes the government's pursuit of civil penalties material as well. "What is troubling is that we see a course of conduct over many years that the disclosures at issue are misleading or omissive of material information," MacIsaac told Vice Chancellor Laster.

Walmart's lawyers at Richards, Layton & Finger and Latham & Watkins told the Delaware judge at the hearing and in the company's pre-trial brief (2020 WL 5875140) that it told shareholders about the government investigation as soon as prosecutors threatened an indictment. And the language of its disclosure, the company said, made clear that a government investigation might continue. "Walmart disclosed the investigations, and when it did, it informed investors that it 'can provide no assurance as to the scope and outcome of these matters and no assurance as to whether its business, financial condition or results of operations will not be materially adversely affected,'" Walmart said in its brief. "There is no credible basis to suspect wrongdoing regarding these disclosures."

Vice Chancellor Laster ruled at the end of the Oct. 5 hearing that shareholders are entitled to most of the records they sought, suggesting that Walmart didn't have much legitimate justification to contest shareholders' purpose for seeking the documents.

To be clear: The case before the Delaware judge simply addressed shareholders' right to access the board's books and records. Shareholders have not, to date, brought a suit alleging either that Walmart fraudulently misrepresented its exposure to DOJ investigations or that members of Walmart's board breached their duty to shareholders. In fact, it's unlikely that investors will bring a securities fraud class action because Walmart's share price apparently was not affected by the Politico story revealing that the company had been threatened with an indictment.

But plaintiffs' lawyers could conceivably argue that board members had a duty to warn shareholders of the seriousness of the government's civil investigation – and that Walmart itself acknowledged the potential consequences of the DOJ civil case by filing Thursday's declaratory judgment complaint against DOJ. If the DOJ investigation was immaterial, plaintiffs might argue, why did Walmart sue to shut it down?

A Walmart spokesman told me the company would dispute any such assertion, referring me to Walmart's arguments in the books-and-records case about the adequacy of its disclosures.

---- **Index References** ----

Company: JONES DAY LP; LATHAM AND WATKINS LLP; WALMART INC

News Subject: (Corporate & Business Law (1XO58); Crime (1CR87); Criminal Law (1CR79); Financial Fraud (1FI18); Fraud (1FR30); Funding Instruments (1FU41); Government Litigation (1GO18); Legal (1LE33); Securities Law (1SE59); Social Issues (1SO05))

Industry: (Discount Stores (1DI04); Financial Services (1FI37); General Merchandise Stores (1GE70); Investment Management (1IN34); Retail (1RE82); Securities Investment (1SE57))

Region: (Americas (1AM92); Delaware (1DE13); North America (1NO39); Texas (1TE14); U.S. Mid-Atlantic Region (1MI18); U.S. Southwest Region (1SO89); USA (1US73))

Language: EN

Other Indexing: (politico) (David MacIsaac; Travis Laster; Layton; Alison Frankel)

Keywords: health; products; corpgov; securities; litigation

Word Count: 1027

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.