ILLINOIS STATE BAR ASSOCIATION

MAY 2024 VOL 69 NO. 3

Business & Securities Law Forum

The newsletter of the Illinois State Bar Association's Section on Business & Securities Law

Supreme Court Holds SOX Whistleblowers Need Not Show Retaliatory Intent

BY JAY SCHLEPPENBACH

From Deep Throat and the Pentagon Papers to Linda Tripp and Edward Snowden, the impact of whistleblowers on American society has been clear.[1] Several laws protect such whistleblowers. Under the Whistleblower Protection Act, federal agencies are prohibited from taking retaliatory action against employees who make protected disclosures, or make a disclosure based on a reasonable belief that there has been a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety.[2] Under federal Equal Employment Opportunity laws such as Title VII of the Civil Rights Act of 1964, the Age

Continued on next page

Artificial Intelligence: Key Legal Issues for Businesses

BY DALIAH SAPER & JAY SCHLEPPENBACH

Artificial intelligence is all over the news these days, from United Nations resolutions seeking to ensure the world's access to this technology[1] to State Department reports about its potential national security risks.[2] Although business leaders have expressed optimism about AI's potential, only a small portion of them have implemented it widely.[3] And there is some evidence that legal uncertainty accounts for some of businesses' hesitation in adopting this technology.[4] Given the rapid pace at which AI is developing, there can be no doubt that the legal landscape is quickly shifting as well. Still, it is possible to identify several key legal areas that businesses will want to keep an eye on as AI technology evolves.

Copyright. A number of media companies have filed copyright lawsuits against AI companies, claiming that AI companies illegally train their large language models on copyrighted content.[5] And a federal district court held last year that an AI-generated image could not be copyrighted because "human authorship is

Continued on page 3

Supreme Court Holds SOX Whistleblowers Need Not Show Retaliatory Intent

CONTINUED FROM PAGE 1

Discrimination in Employment Act and the Americans with Disabilities Act, employees are protected from retaliation for engaging in "protected activity."[3] And under the Sarbanes-Oxley Act (SOX), no employee of a public company can be "discharge[d], demote[d], suspend[ed], threaten[ed], harass[ed]," or discriminated against in any way "because of" his or her actions assisting in an investigation regarding conduct by the company that the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, securities fraud, violation of SEC rules or violates any federal law related to fraud against shareholders.[4] But until recently, it was not entirely clear what a SOX whistleblower had to show in terms of intent to establish a claim. On February 8, 2024, the United States Supreme Court resolved that issue in *Murray v. UBS Securities, LLC*.[5]

Generally, to establish a retaliation claim under SOX, a plaintiff must prove four elements: (1) their employer is subject to SOX; (2) they engaged in a protected activity;

(3) the employer took an adverse action; and (4) the protected activity caused the adverse action.[6] As to the last element, a whistleblower bears the initial burden of showing that his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint."[7] The burden then shifts to the employer to show that it "would have taken the same unfavorable personnel action in the absence of" the protected activity.[8] Consistent with this framework, the trial court in *Murray* instructed the jury that, to demonstrate causation, the plaintiff need only show that "either alone or in combination with other factors," his protected activity "tended to affect in any way UBS's decision to terminate [his] employment."[9] The plaintiff need not show it was "the primary motivating factor."[10] A jury found in plaintiff's favor and awarded him millions of dollars in damages, fees, and costs.

On appeal, however, the second circuit disagreed with the district court's jury instructions, reasoning that SOX prohibited only "discrimination," a word that suggested "act[ing] on the basis of prejudice," which "requires a conscious decision to act based on a protected characteristic or action."[11] Additionally, it noted that the discrimination barred by SOX was discrimination "because of" whistleblowing, a phrase suggesting that "a whistleblower-employee must prove that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent."[12] The court concluded that "[r]etaliatory intent is an element of a section 1514A claim," and "[t]he district court erred by failing to instruct the jury on Murray's burden to prove UBS's retaliatory intent."[13] It vacated the jury's verdict in plaintiff's favor and remanded to the district court.

After granting certiorari, the Supreme Court unanimously reversed. It concluded that the word "discrimination" in SOX connoted only "differential treatment," not "animus" or "malevolent motive."[14] Moreover, the court reasoned, "[r]equiring a whistleblower to prove his employer's retaliatory animus would ignore the statute's mandatory burden-shifting framework."[15] "Because discriminatory intent is difficult to prove, and because employers control most of the cards, burden shifting plays the necessary role of forcing the defendant to come forward with some response to the employee's circumstantial evidence."[16] The statutory burden-shifting framework in SOX was "a means of getting at intent," not something a plaintiff needed to prove *in addition to* intent.[17] Although the burden-shifting framework for SOX required a lesser showing of intent than some other anti-discrimination statutes, this "reflects a judgment that personnel actions against employees should quite simply not be based on protected whistleblowing activities—not even a little bit."[18] The jury heard both sides of the story and concluded that plaintiff's protected activity was a contributing factor in his firing, which was all that SOX

Business & Securities Law

This is the newsletter of the ISBA's Section on Business & Securities Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $35 per year.

To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Markus May
Samuel Neschis
William A. Price

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

required.[19]

For public companies covered by SOX, the Supreme Court's ruling provides an important reminder to refrain from engaging in any actions or communications that may be interpreted as retaliation when dealing with employees who engage in protected activities such as reporting violations of federal law, state law or employer policies, or other alleged misconduct in the workplace. These companies should ensure that their policies and procedures prohibiting retaliation are up to date and clearly drafted, that they conduct thorough and impartial investigations of employee complaints, and that their reasons for undertaking adverse employment actions against employees, particularly those who may have engaged in protected conduct, are well-documented and unrelated to protected activity.■

Jay Schleppenbach is counsel at Dechert LLP in the Enforcement & Investigations Group. Any opinions expressed herein are solely the author's and are not intended to reflect the views of Dechert LLP.

1. *See* David Cohen, *10 Famous/Infamous Whistleblowers,* Politico (Aug. 14, 2023), https://www.politico.com/gallery/2013/08/10-famous-infamous-whistleblowers-001083?__cf_chl_tk=oNpLuQxY8MWy.w.AVfDEwk9CfA0KwAgSJzLTUgGKLyQ-1710199629-0.0.1.1-1727&slide=0.
2. 5 U.S.C. § 2301 *et seq.*
3. 42 U.S.C. § 2000e *et seq.*; 29 U.S.C. § 621 *et seq.*; 42 U.S.C. § 12101.
4. 18 U.S.C. § 1514A.
5. No. 22-660 (U.S. Feb. 8, 2024).
6. *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254 (5th Cir. 2014); *Coppinger-Martin v. Solis*, 627 F.3d 745 (9th Cir. 2010).
7. 49 U. S. C. § 42121(b)(2)(B)(iii).
8. 49 U.S.C. § 42121(b)(2)(B)(iv).
9. *Murray,* No. 22-660, slip. op. at 5.
10. *Id.*
11. *Murray v. UBS Sec. LLC,* 43 F. 4th 254, 259 (2d Cir. 2022).
12. *Id.*
13. *Id.* at 262–263.
14. *Murray,* No. 22-660, slip. op. at 9-10.
15. *Id.* at 10.
16. *Id.* at 11.
17. *Id.* (internal quotations and citation omitted)
18. *Id.* (internal quotations omitted)
19. *Id.* at 12-13.

Artificial Intelligence: Key Legal Issues for Businesses

CONTINUED FROM PAGE 1

an essential part of a valid copyright claim" and is "a bedrock requirement of copyright."[6] That decision is currently on appeal and the copyright implications of AI are likely to be litigated for some time to come.

Privacy & Cybersecurity. To train AI models, developers have used much of the searchable internet, which means these models may have ingested personal information that its sharers did not imagine would be used for this purpose.[7] And then there is the data that users willingly feed into AI models, perhaps without consideration of the uses it may be put to.[8] Cyberattacks could make AI user data even more vulnerable.[9] These issues are sure to be complex as this technology develops.

Corporate Governance. AI's capacity to disrupt entire industries has been much discussed,[10] and creates new business opportunities and risks for companies. Corporate boards need to be prepared to mitigate these risks and take advantage of these opportunities, which may require restructuring of board committees and roles.[11] Boards need to consider, among other things: how their companies and competitors currently use AI; how AI may disrupt their industry; the strategic implications and risks associated with AI products and services; the impact of AI applications on the workforce and other stakeholders; legal, regulatory, and ethical obligations; and any need for new AI-related policies and controls.[12]

Securities. Broker-dealers and investment advisors have employed AI in a variety of ways, including through chatbots, robo-advisers, and algorithmic models.[13] As AI becomes more sophisticated, risks from its use in the securities industry increase, for instance of market manipulation or fraud by AI programs.[14] The SEC has already proposed new rules to address some of the risks posed by AI.[15]

Employment Law. AI can be used to streamline HR functions, such as by preparing job descriptions and analyzing internal employer data to best predict which applicants would be most successful in a position.[16] But there is a risk in using AI that it may make hiring decisions based on criteria that skew in favor of white or male applicants, causing a discriminatory impact, or make inferences based on an applicant's religion, age, sexuality, genetic information or disability status learned from the internet.[17] This could, of course, lead to litigation.

Discovery. As with any new technology, the use of AI by businesses raises questions about what information is created through its use and if and how that information is preserved for discovery in any litigation that may later arise.

Clearly, the use of artificial intelligence is rapidly changing, and this summary is just the tip of the iceberg when it comes to legal issues that businesses could face as a result. The most important thing, though, is that businesses begin to consider these and other AI issues carefully, as it is likely that they are here to stay. ■

Daliah Saper is the founder of Saper Law, an intellectual property, social media, entertainment, and business law firm with headline-grabbing clients and cases. Jay Schleppenbach is counsel at Dechert LLP in the Enforcement & Investigations Group. Any opinions expressed herein are solely the authors' and are not intended to reflect the views of their respective law firms.

1. Edith M. Lederer, *US spearheads first UN resolution on artificial intelligence -- aimed at ensuring world has access,* ABC News (March 12, 2024), https://abcnews.go.com/US/wireStory/us-spearheads-resolution-artificial-intelligence-aimed-ensuring-world-108058709.
2. Matt Egan, *AI could pose 'extinction-level' threat to humans and the US must intervene, State Dept.-commissioned report warns,* CNN (March 12, 2024), https://www.cnn.com/2024/03/12/business/artificial-intelligence-ai-report-extinction/index.html.
3. Dylan Butts, *AI is the talk of the town, but businesses are still not ready for it, survey shows*, CNBC (March 5, 2024), https://www.cnbc.com/2024/03/06/generative-ai-holds-massive-potential-but-businesses-arent-ready-yet.html.
4. Steve Lohr, *IBM Tries to Ease Customers' Qualms About*

Using Generative A.I., The N.Y. Times (Sept. 28, 2023), *available at* https://www.nytimes.com/2023/09/28/business/ibm-ai-data.html.
5. Joe Pannettieri, *Generative AI Lawsuits Timeline: Legal Cases vs. OpenAI, Microsoft, Anthropic, Nvidia and More,* Sustainable Tech Partner (March 11, 2024), https://sustainabletechpartner.com/topics/ai/ generative-ai-lawsuit-timeline/.
6. *Thaler v. Perlmutter*, No. 1:22-cv-1564, Dkt. #24 (D.D.C. Aug. 18, 2023).
7. Lauren Leffer, *Your Personal Information Is Probably Being Used to Train Generative AI Models,* Scientific American (Oct. 19, 2023), available at https://www.scientificamerican.com/article/your-personal-information-is-probably-being-used-to-train-generative-ai-models/.
8. Federal Trade Commission, *AI Companies: Uphold Your Privacy and Confidentiality Commitments* (Jan. 9, 2024), https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/01/ai-companies-uphold-your-privacy-confidentiality-commitments.
9. The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/.
10. Ajay Agrawal et al., *ChatGPT and How AI Disrupts Industries*, Harvard Business Review (Dec. 12, 2022), https://hbr.org/2022/12/chatgpt-and-how-ai-disrupts-industries.
11. NACD, *Director Essentials: AI and Board Governance* (Sept. 18, 2023), https://www.nacdonline.org/all-governance/governance-resources/governance-research/director-faqs-and-essentials/ai-and-board-governance.
12. Holly J. Gregory, *AI and the Role of the Board of Directors, Harvard Law School Forum on Corporate Governance* (Oct. 7, 2023), https://corpgov.law.harvard.edu/2023/10/07/ai-and-the-role-of-the-board-of-directors/.
13. James G. Lundy et al, *Artificial Intelligence, the SEC, and What the Future May Hold* (Nov. 13, 2023), https://www.foley.com/insights/publications/2023/11/artificial-intelligence-sec-future-hold/.
14. *Id.*
15. SEC, *Proposed Rule, Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers*, Exchange Act Release No. 97990 (July 26, 2023).
16. David E. Schwartz et al., *AI and the Workplace: Employment Considerations* (June 2023), https://www.skadden.com/insights/publications/2023/06/quarterly-insights/ai-and-the-workplace.
17. *Id.*

Securities Act Registration Requirements When Securities Are Sold Directly on an Exchange

BY PROFESSOR CHARLES W. MURDOCK

In *Slack Technologies, LLC, v. Pirani*,[1] the Supreme Court interpreted the scope of § 11 of the Securities Act of 1933 and determined that such section "requires a plaintiff to plead and prove that he purchased shares traceable to the allegedly defective registration statement . . . ."[2] The case is unusual in that it represents a situation in which securities were sold directly on the stock exchange.[3]

The Court noted that the Securities Act of 1933[4] and the Securities Exchange Act of 1934[5] "form the backbone of American securities law," pointing out that the 1933 Act is "'narrower' and focused 'primarily' on the regulation of new offerings," while the 1934 Act is broader and, *inter alia*, "requires publicly traded companies to provide ongoing disclosures and regulates trading on secondary markets."[6] The Court further summarized the role of the 1933 Act as follows:

Generally speaking, the 1933 Act requires a company to register the securities it intends to offer to the public with the Securities and Exchange Commission (SEC). As part of that process, a company must prepare a registration statement that includes detailed information about the firm's business and financial health so prospective buyers may fairly assess whether to invest. The law imposes strict liability on issuing companies when their registration statements contain material misstatements or misleading omissions.[7]

The Court observed that:

Typically, when a company goes public it issues new shares pursuant to a registration statement. That registration statement is filed with the SEC and made available to the public. Investment banks underwrite the offering, usually by buying these new registered shares at a negotiated price and then selling them to investors at a higher price. In this way, underwriters often carry the risk of loss should they fail to sell the shares at a profit.[8]

Selling securities to the public accomplishes a two-fold purpose: to provide the company with capital and also to provide a market for early investors and corporate employees who hold stock.[9]

In the case at bar, the defendant company employed a new process to sell shares directly on the New York Stock Exchange.[10] Slack's registration statement in a direct listing offered 118 million registered shares; there were also 165 million unregistered shares.[11]

The plaintiff, Fiyyaz Pirani, bought 30,000 Slack shares on the first day of the offering and 220,000 more shares over the next few months.[12] When the stock price later dropped, Pirani filed a class-action lawsuit against Slack, alleging that Slack violated §§ 11 and 12 of the 1933 Act by filing a materially misleading registration statement.[13] However, Pirani did not allege that the shares purchased were those covered by the registration statement.[14]

Defendant filed a motion to dismiss on the basis that a plaintiff suing under § 11 can only recover if the purchased shares were among those sold pursuant to the false or misleading registration statement.[15] The District Court denied the motion,[16] and the Ninth Circuit affirmed.[17] The Supreme Court granted certiorari on the basis that were was a split in the circuits.[18]

The Ninth Circuit deviated from previous federal courts in determining that plaintiff could sue under § 11, even though he did not allege that he could trace the shares he purchased to the registration statement.[19] In a traditional IPO, there is typically a lock-up on insiders' shares, with the result that the shares bought by the public are only the shares covered by the registration statement.[20]

However, because Slack was directly selling shares on the NYSE with no

investment banker (who could have required a lock-up of insider shares), Slack did not have a lock-up agreement after the offering.[21] Thus, unregistered shares, which holders had purchased prior to the offering on the NYSE, could be sold alongside shares sold pursuant to the registration statement.[22] Consequently under the traditional common law interpretations of § 11 and 12, a plaintiff such as Pirani would need to trace the shares purchased to those sold by a shareholder who bought his or her shares in the registered direct offering.

To avoid this tracing problem, the Ninth Circuit held that the shares sold by insiders were also shares sold pursuant to the registration statement because, were there not a registration statement, there would not be a public market into which the insiders could sell their shares.[23] On the other hand, the dissent from the Circuit Court's opinion took the position that policy could not override the language of section 11.[24]

Section 11(a) of the 1933 Act provides:

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue [certain enumerated parties].[25]

The Court first noted that the Ninth Circuit's approach was inconsistent with prior federal court decisions and then focused on the consistent use in the statute of the word "such" by stating, "The statute authorizes an individual to sue for a material misstatement or omission in a registration statement when he has acquired '*such* security.'"[26] In reviewing the repeated use of the word "such," the Court concluded, "the statute repeatedly uses the word 'such' to narrow the law's focus."[27]

The Court also found the provision in § 11(e),[28] limiting damages against an underwriter to the amount sold by such underwriter:

Beyond these clues lies still another. Section 11(e) caps damages against an underwriter in a § 11 suit to the "total price at which the securities underwritten by him and distributed to the public were offered to the public." This provision thus ties the maximum available recovery to the value of the registered shares alone. It's another feature that makes little sense on Mr. Pirani's account, for if § 11(a) liability extended beyond registered shares presumably available damages would too.[29]

The Court consequently determined that a § 11 plaintiff must be able to trace the acquired shares to those issued under the registration statement alleged to be false.[30]

The Court implicitly recognized that plaintiff might have a cause of action under Rule 10b-5 under the 1934 Act[31] and harmonized the two statutes as follows:

As we have seen, the 1933 Act is "limited in scope." Its main liability provision imposes strict liability on issuers for material falsehoods or misleading omissions in the registration statement. Meanwhile, the 1934 Act requires ongoing disclosures for publicly traded companies and its main liability provision allows suits involving any sale of a security but only on proof of scienter. Given this design, it seems equally possible that Congress sought a balanced liability regime that allows a narrow class of claims to proceed on lesser proof but requires a higher standard of proof to sustain a broader set of claims.[32]

In the case at bar, the tracing problem for Pirani is illustrated by the fact that more shares were outstanding prior to the offering on the NYSE than were offered on such exchange in the registered offering.[33] However, these pre-issued shares were not freely tradable, as they were "restricted securities" as defined under rule 144.[34] Because Pirani's last purchase was within 90 days from the date of the public offering,[35] Slack could not have been a reporting company for more than 90 days. Consequently, "insiders"[36] would not be able to take advantage of the six-month holding period under rule 144, but would be subject to a twelve month holding period.[37] Moreover, insiders who were also controlling persons[38] would, in effect, be limited to selling on more than 1% of the outstanding securities of Slack.[39]

Depending upon when the insiders purchased their shares, and the number who would be deemed controlling persons, a substantial amount of the stock in the market could be that which was not sold pursuant to the registration statement and thus, would not carry § 11 liability. Moreover, there would be an incentive for such "insiders" to sell because they presumably purchased at a price substantially lower than the offering price.

However, this tracing problem is also one that would confront a purchaser of shares in an offering by a company that has previously had a public offering. In such a case, the trading market would be composed of shares sold under the previous registration statement and the additional shares offered under the new registration statement. Only the shares sold under the new registration statement would carry § 11 liability.

With respect to the tracing issue, the district court stated: "In a direct listing, the impossibility of tracing begins on the very first day of listing due to the simultaneous offering of unregistered and registered shares."[40] And, as stated above, this tracing issue also occurs when there are subsequent public offerings, such that the trading market includes both shares sold pursuant to the current public offering and shares sold pursuant to prior registration statements, the representations of which are no longer relevant. Thus, a current purchaser could be purchasing shares covered by the current registration statement or shares that were previously in the market.

Different courts have taken different approaches to how a plaintiff can prove that their purchased shares were those covered by the registration statement.[41] For example, some courts have recognized "statistical tracing":

If the volume of shares issued pursuant to an allegedly misleading registration statement is high relative to those which were not, the probability that any given plaintiff purchased the former may be very high. Some courts have found that a probability alone suffices to establish Section 11 standing.[42]

However, under this approach… "every aftermarket purchaser would have standing for every share, despite the language of Section 11, limiting suit to 'any person

acquiring such security.'"[43]

The Amicus Brief for Institutional Investors argued that the public sale of securities involves a complex system that commingles registered and unregistered stock: "'The vast majority of securities transactions in the United States occur in certificateless, electronic book-entry form,' and are 'represented exclusively through entries on electronic ledgers.'"[44] Consequently, the brief argued that the Supreme Court should affirm the Ninth Circuit and take care so that its decision would not:

> … impact the ability to plead and prove a Section 11 or Section 12(a) claim based on the traceability of securities to a registration statement, which is already technically difficult and legally labyrinthine (even for the nation's largest institutional investors). Moreover, *amici* respectfully ask the Court refrain from issuing a decision that could preclude investors from showing that federal law requires registration of all shares in a direct listing—or treating all the shares as registered under the integrated offering doctrine.[45]

Another amicus brief in *Slack* identified the tactics employed to avoid § 11 liability by commingling unregistered shares with the shares offered under the registration statement.[46] It argued that, in a direct offering, where a defendant is responsible for commingling shares because the defendant does not register the previously issued shares, a presumption of standing for pleading purposes should be recognized by the courts, and that the burden of proof should shift to require that defendant show that the plaintiff purchased no registered shares.[47] This brief concluded that, if the Court reverses the Ninth Circuit, it should remand the case to give plaintiff the presumption that he purchased registered shares and to place the ultimate burden of tracing on defendant.[48]

On the other hand, an amicus brief by law and business professors asserted that it is a myth that tracing under § 11 is impossible, and asked the Supreme Court to remand the case in order that plaintiff could establish standing through tracing. According to the professors:

> [I]t is possible to use accounting methods like first in-first out (FIFO) or last in-first out (LIFO) to identify in discovery the chain of title by which securities flow from one account to another. The best answer is to enable tracing (not assume its impossibility) through a modern procedure reflective of the technology available today.[49]

The brief did acknowledge:

> [T]he tracing requirement can be (and apparently is being) manipulated by companies, at the advice of skilled practitioners, to deliberately commingle registered and unregistered securities seeking to block tracing and thereby nullify Section 11. This should be unacceptable. If permitted, this tactic could bar Section 11 actions in both the initial public offering and seasoned offering contexts, thereby effectively precluding Section 11 litigation across the board.[50]

Although the brief provided a roadmap for tracing under its theory, it did not deal with whether tracing would be done by FIFO or LIFO, and who would decide.

In the future, it would be better if an issuer, seeking to make a direct offering on the NYSE, also registered the pre-existing shares. Unfortunately, a company has little incentive to do this voluntarily because the insiders who own pre-existing stock would most likely want to take advantage of the decision in *Slack*, which does not expose them to § 11 liability.■

This article is excerpted from Charles W. Murdock, 8 Illinois Practice -- Business Organizations, 2d ed. West 2010, supplemented 2011-2024 (hereinafter "Murdock, Illinois Practice").

1. *Slack Tech., LLC v. Pirani*, 143 S. Ct. 1433 (2023).
2. *Id.* at 1442.
3. *Id.* at 1438.
4. 15 U.S.C. §§ 77a–77mm.
5. 15 U.S.C. §§ 78a–78rr.
6. *Slack*, 143 S. Ct. at 1437 (first quoting Gustafson v. Alloyd Co., 513 U.S. 561, 572 (1995); and then citing 15 U.S.C. §§ 78m, 78o).
7. *Id.* (citations omitted).
8. *Id.* at 1438 (citations omitted).
9. *See id.* ("Initial public offerings (IPOs) are an effective way of raising capital . . . . [R]aising capital is [not] the only reason firms might wish to go public; some may simply wish to afford their shareholders . . . the convenience of being able to sell their existing shares on a public exchange.") (citing 73 Fed. Reg. 54442 (2008)).
10. *See id.* (explaining the offering process employed by Slack, known as a "direct listing," where a company sells shares publicly on the New York Stock Exchange without an IPO. The SEC approved this process in 2018.).
11. *Id.* The issuance of shares could be exempt from registration as a private offering (see Murdock, Illinois Practice §§ 7:25-7:27 & § 7:30), as a "small" offering (see Murdock, Illinois Practice § 7:24, § 7:29, & § 7:32), as an intrastate offering (see Murdock, Illinois Practice §§ 7:22-7.23), or as an offering to employees (see Murdock, Illinois Practice § 7:31).
12. *Slack*, 143 S. Ct. at 1438–1439.
13. *Id.* at 1439
14. *Id.*
15. *Id.*
16. *Pirani v. Slack Tech. Inc.*, 445 F. Supp. 3d 367, 372 (N.D. Cal. 2020).
17. Pirani v. Slack Tech., Inc., 13 F.4th 940, 943 (9th Cir. 2021).
18. *Slack*, 143 S. Ct. at 1439.
19. *Id.* ("[A] long line of lower court cases have interpreted § 11 as applying only to shares purchased pursuant to a registration statement.")
20. *Id.* at 1438 (describing a lock-up agreement between an underwriter and the firm and its requirement that firm insiders hold their unregistered shares for a period time to prevent stock prices from falling once public trading begins).
21. *Id.*
22. *Id.*
23. *Slack*, 13 F.4th at 948 ([B]oth the registered and unregistered Slack shares sold in the direct listing were sold 'upon a registration statement' because they could only be sold to the public at the time of the effectiveness of the statement.").
24. *Id.* at 953.
25. 15 U.S.C. § 77k(a).
26. *Slack*, 143 S. Ct. at 1439 (emphasis added).
27. *Id.* at 1440.
28. 15 U.S.C. § 77k(e).
29. *Slack*, 143 S. Ct. at 1440 (citations omitted).
30. *Id.*
31. 17 CFR § 240.10b-5; see infra § 15:3 et seq.
32. *Id.* at 1441-1442 (citations omitted).
33. *Id.* at 1438 (stating that Slack's direct listing offered 118 million registered shares and 165 million unregistered shares).
34. 17 CFR § 230.144(a)(3).
35. Pirani v. Slack Tech. Inc., 445 F. Supp. 3d 367, 372 (N.D. Cal. 2020) ("Plaintiff purchased 30,000 shares of Slack's Class A common stock at $40/share on June 20, 2019, the first day of Slack's public listing, and approximately another 220,000 shares at various prices from June 21 to September 9, 2019.")
36. As used here, "insiders" refers to officers, directors, employees, and investors who purchased their shares prior to the public offering.
37. 17 CFR §§ 230.144(b)(1), (d)(1)(i), (ii); se supra § 7:33.
38. "Controlling persons" is the colloquial phrase commonly used to refer to "affiliates," the word of art in the rule which is defined as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 CFR § 230.144(a)(1).
39. 17 CFR § 230.144(e)(1)(i).
40. *Slack*, 445 F. Supp. 3d at 379.
41. *See* Brief for Law and Business Professors as Amici Curiae Supporting Respondent, Slack Tech., LLC v. Pirani, 143 S. Ct. 1433 (2023) (No. 22-200), 2023 WL 2439655 [hereinafter *Law and Business Professors Amici Curiae Brief*].
42. *Id.* at 15.
43. *Krim v. PCOrder.com, Inc.*, 402 F.3d 489, 496-97 (5th Cir. 2005).
44. Brief for Institutional Investors as Amici Curiae Supporting Respondent at 8, *Slack Tech., LLC v. Pirani*, 143 S. Ct. 1433 (2023) (No. 22-200) 2023 WL 2439650 (quoting Joseph A. Grundfest, Morrison, *The Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. Corp. L. 1, 13 (2015)).
45. *Id.* at 4.
46. Brief for Evidence and Civil Procedure Scholars as Amici Curiae Supporting Respondent at 5–6, Slack Tech., LLC v. Pirani, 143 S. Ct. 1433 (2023) (No. 22-200) 2023 WL 2439653.
47. *Id.* at 3.
48. *Id.* at 15.
49. *Law and Business Professors Amici Curiae Brief*, *supra* note 40, at 5.
50. *Id.* at 4.