

9th Circuit signals it will clarify rules for investor groups to lead class actions

2/12/21 Alison Frankel's On The Case 20:24:54 • Copyright (c) 2021 Thomson Reuters • Alison Frankel

Alison Frankel's On The Case • February 12, 2021



Alison Frankel's On the Case



(Reuters) - The 9th U.S. Circuit Court of Appeals signaled Thursday that it's interested in clarifying when and whether previously unaffiliated investor groups can be appointed to lead shareholder class actions.

Judges William Canby, Susan Graber and Michelle Friedland issued an order requesting responses to a Dec. 30 mandamus petition filed by three investors who were shut out of leading a securities fraud class action against the electric truck maker Nikola. The investors, represented by Block & Leviton and Pomerantz, had sought appointment as group, citing more than \$6 million in losses in their Nikola stakes and arguing that they had begun conferring on coordinating their leadership. But U.S. District Judge Steven Logan of Phoenix instead named ([2020 WL 7392795](#)) an individual investor who lost \$700,000 – a small fraction of the group's losses – because the judge said he had "misgivings about the cohesion of (the investor group) and its ability to control the litigation without undue influence from counsel."

The mandamus petition argued that trial courts in the 9th Circuit – and even just in Arizona, where the Nikola case is being litigated – have issued inconsistent and contradictory decisions about the appointment of investor groups. The 9th Circuit, they said, held in 2002's *In re Cavanaugh* (306 F.3d 726) that a group of investors can be designated the presumptive lead plaintiff under the procedures set out in the Private Securities Litigation Reform Act. But some trial courts, the petition said, have been leery of appointing groups of investors without a pre-existing relationship.

"The result," the mandamus petition argued, "is a hopelessly muddled and inconsistent body of caselaw that ultimately gives plaintiffs little to no guidance while providing apparent support for whichever position (groups are good or groups are bad) is most convenient in a given case."

For prospective lead plaintiffs, the petition said, trying to predict a particular judge's position on the appointment of an investor group has become an all-or-nothing strategic decision. As you know, the PSLRA sets a single deadline for all lead plaintiff candidates to file motions for appointment. So candidates don't know how their claimed losses will stack up against the losses alleged by other candidates. It's not at all uncommon for individual shareholders, and, less frequently, institutional investors, to team up in order to aggregate losses and improve their odds of being the presumptive lead plaintiff. But that could be a fatal misstep if the judge overseeing the case is skeptical about investor groups.

The mandamus petition, which cites more than a dozen decisions by trial judges on both sides of the divide, argued that Judge Logan clearly erred by deferring to his "misgivings." Block & Leviton and Pomerantz said the judge correctly determined that the investors in the group were the presumptive lead plaintiff, but fell short when he concluded that other lead plaintiffs had rebutted the presumption that the group should be appointed. Those rival candidates, the petition said, presented no evidence that the investor group – whose members said in a declaration that they had already begun discussing strategy in a teleconference – should not be appointed. Yet Judge Logan, they said, chose a lead plaintiff whose losses were smaller than those of not just the group as a whole but of every investor in the group.

"Rather than focus on whether petitioners could fulfill the tasks assigned to a lead plaintiff, here, the district court relied on a flawed notion of courts' generalized 'hesitancy to appoint groups as lead plaintiff,'" the mandamus petition said. "The lower court's decision here demonstrates that erroneous restrictions of groups' lead plaintiff eligibility persist."

In Thursday's order, Judges Canby, Graber and Friedland said the mandamus petition "raises issues that warrant an answer." The order gave the real parties in interest 14 days to respond and invited Judge Logan to either file an answer in the appeals court or issue a supplemental order in his docket.

The underlying case alleges that Nikola deliberately misled investors about its in-house design, manufacturing, testing and hydrogen production capabilities, among other alleged deceptions. Nikola said through its counsel at Kirkland & Ellis that it does not comment on pending litigation.

The lead plaintiff appointed by Judge Logan is represented by the Rosen Firm. Rosen Firm lawyers Phillip Kim and Laurence Rosen did not respond to an email request for comment on the mandamus proceeding.

Jake Walker of Block & Leviton, one of the firms that filed the mandamus petition, said via direct message that the investor group is "looking forward to the 9th Circuit's consideration."

The case is *In re George Mersho v. United States District Court for the District of Arizona*, No. 20-73819 in the 9th U.S. Circuit Court of Appeals.

The opinions expressed here are those of the author. Reuters News, under the Trust Principles, is committed to integrity, independence and freedom from bias.

References

[BLOCK AND LEVITON LLP; KAPITAN DIADO NIKOLA AD V NESUSTOIAATELNOST](#)