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New York Rejects Effort to Extend the Reach of U.S. Fiduciary Litigation

Since early 2020, a consortium of well-funded plaintiffs' law firms have pursued an aggressive campaign of derivative litigation in the New York courts against major European companies, including Deutsche Bank, UBS, Volkswagen, Barclays, Novartis, and Bayer (represented by this Firm). While the lawsuits differed in detail, they shared a strategic purpose: to drag international companies into U.S. courts to defend breach-of-fiduciary-duty actions, subjecting foreign firms to the more permissive rules that govern U.S. derivative litigation, and thereby extracting lucrative settlements and generating large fee awards for the plaintiffs' bar.

Last week, the Commercial Division of New York Supreme Court issued the first decision to address this litigation campaign, and it may be the last word. In [Hausmann v. Baumann](#), stockholders of Bayer AG asked the New York court to hold Bayer fiduciaries liable for losses allegedly resulting from the company's 2019 merger with Monsanto, claiming that Bayer failed to conduct adequate diligence into potential losses related to Monsanto's Roundup herbicide product. Bayer is a German-chartered company and its directors and managers are nearly all European. The plaintiffs nevertheless insisted on a New York forum, emphasizing that Bayer diligenced and closed the Monsanto deal in New York, relied on New York advisors, and listed its securities on U.S. exchanges, allegedly leading to investment losses suffered in the United States. "[B]ad acts" and "bad actors" were creating corporate "scandals" in Europe, argued the plaintiffs, and U.S. investors needed a U.S. remedy.

Decisively rejecting this position, the Bayer court dismissed the complaint in its entirety. The court held that it lacked personal jurisdiction over Bayer's directors; that Germany was a superior forum for any fiduciary breach action related to the Monsanto deal; and that the plaintiffs had improperly failed to conform with the German law prerequisites to derivative litigation. While the Bayer decision remains subject to appeal, it may sound the death knell for the plaintiffs' bar's campaign to transform New York into the forum of choice for international derivative claims. Indeed, in the immediate wake of the decision, another New York judge dismissed similar derivative claims brought on behalf of UBS. The Bayer ruling thus struck an important blow for judicial efficiency and international comity — and, if followed as it should be, the decision will safeguard the authority of foreign jurisdictions to regulate litigation involving their domestic corporations.

William Savitt
Noah B. Yavitz
Emily R. Barreca