

MF Global-PwC Fight Could Set Troublesome Precedent

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Sometimes, a case comes along appearing to be on the side of right and vindication although in reality, it is a wolf in sheep's clothing. In the corporate boardroom world, one of the most glaring examples was the U.S. Department of Justice's gross overreach to extend the concept of honest services fraud to corporate executives doing their jobs. The U.S. Supreme Court cut off prosecutors' hands with its stinging rejection of the hyperextended legal theory in the Jeffrey Skilling (Enron) and Conrad Black (Hollinger) cases. One such civil trial underway similarly has all the trappings of bad law, untenable precedent and disruption of professional standards. The auditors do their jobs correctly, get the audit right and still get sued. That case is MF Global's final flailing shot directed at its former audit firm, PricewaterhouseCoopers (PwC).



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The glaring misperception created by the mere filing of the case is that PwC had or should have some responsibility for the collapse of MF Global. In this age of popularizing alternative facts and fake news, the plaintiff is attempting to rewrite the history of MF Global inconsistent with what actually happened. Bad business judgment, actually mistimed business judgment, not accounting, caused MF Global's demise. Nevertheless, lawyers for the vulture-fund plaintiff have concocted a contorted theory that the auditors should be liable for something that is unrelated to the audit. Auditors do not audit business judgment; they audit financial statements. And, here MF Global's accounting was correct, and PwC's audit was correct.

So, rather than focusing on the plaintiff's wish, which is undeserving of fulfillment, energy is better spent on the express standards of the Public Company Accounting Oversight Board that establishes clearly the roles of management as distinguished from the auditors. "The financial statements are management's responsibility." Management got that right — the accounting was correct. "The auditor's responsibility is to express an opinion on the financial statements." PwC did and did so correctly. "The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud." PwC was able to obtain such reasonable assurance because there were no material misstatements in the financial statements. That should mark the end of the analysis. Instead, easy access to America's courtrooms makes litigation possible even against "good Samaritan" doctors who come to the aid of someone in distress. So too here, this case never should have made its way into a courthouse.

As a lawyer whose practice has been in and around securities "enforcement" matters, accountant conduct and accounting issues now for almost 30 years, certain hallmarks of a framework for a potential claim against accounting firms are absent here. One is a restatement, meaning that previously issued

financial statements requires a corrected filing. Even in a restatement, where frequently the accounting firm did not err, there likely still is regulatory scrutiny to figure out whether the accounting firm had any responsibility. Here, there was no restatement, and there was no need for one because of the widely acknowledged correct accounting.

The other is a direct claim, often an enforcement action, by salivating regulatory authorities, here the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission. From the first day of concerns about custody of customer funds and the run to withdraw funds from accounts at MF Global, Congress, the SEC and the CFTC began their respective microscopic scrutiny to determine what went wrong at MF Global. Congress is not shy to issue stinging reports, and the SEC and CFTC never are reticent to hold accounting firms accountable in headline-attracting cases. None did so against PwC. There was but one enforcement action by the CFTC, and it was against Jon Corzine. There was no enforcement action by the SEC or the CFTC against PwC.

There is no altruism on the plaintiff's side. This case is not about victims. In fact, the plaintiff does not represent innocent shareholders or customers harmed by MF Global's collapse. All innocent customers of MF Global's actions already have been made whole. This lawsuit is funded by parties that bought MF Global debt after its bankruptcy. They are gamblers who lost, and now are trying to blame a nonresponsible party.

Normally, plaintiffs asserting financial loss enjoy a perception that they are vindicating a right. Not here, where the riders of the white horses are PwC's audit team. The true white knights are the audit firm's advocates and experts. Accounting firms certainly do make mistakes in audits and subject themselves to liability, despite their best efforts in most audits. We see countless examples of that in the SEC enforcement world in which I live. Here, PwC did not make any mistakes. The accounting was correct. The collapse of MF Global had nothing to do with the accounting or auditing.

Corporate business judgment errors are not and should not be the burden of the auditors. A finding otherwise will turn upside down auditing of public and regulated companies and create a troublesome and unwelcome precedent. Hopefully, the outcome will favor auditing, not just these auditors.

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