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California Cases To Watch In 2023

By **Dorothy Atkins**

Law360 (January 2, 2023, 12:03 PM EST) -- In the coming year, California legal experts will keep a close eye on ex-technology executives' white collar appeals, lawsuits tied to the now-defunct law firm Girardi Keese, Golden State litigation over the collapse of cryptocurrency exchange FTX, and precedent-setting appeals clarifying the arbitrability of Private Attorneys General Act claims.

There'll be no shortage of heated courtroom battles in 2023, according to legal experts, who anticipate an uptick in new criminal and civil cases filed in California as the nation heads deeper into a recession.

"When you have these types of market corrections ... Ponzi schemes suddenly come to light, because the money isn't there," Reid Schar of Jenner & Block LLP told Law360. "Where it'll [happen] is hard to know. The crypto side of the world is in for a roller coaster ride."

Here's a look at some major legal fights attorneys in California and beyond will be following closely this year.

FTX's Collapse Spurs Calif. Litigation

As 2022 drew to a close, the collapse of FTX Trading Ltd. set off a wave of litigation in the Golden State, including proposed class actions filed by investors against the fallen crypto giant and its former CEO Sam Bankman-Fried, as well as separate investor suits against cryptocurrency bank Silvergate Bank and the accounting firms that inspected FTX's books.

The investor litigation, most of which is pending in California's Northern District, alleges that Bankman-Fried, the Golden State Warriors basketball team and a host of celebrities and athletes deceived investors and illegally offered unregistered securities.

Meanwhile, another lawsuit filed in December claims that Silvergate Bank was "complicit in and responsible for" losses stemming from FTX's downfall because it allowed FTX to direct customer deposits to Bankman-Fried's hedge fund Alameda Research LLC.

A third lawsuit accuses the public accounting firms Armanino LLP and Prager Metis CPAs LLC of colluding with Bankman-Fried and FTX's top brass to misrepresent the company's financial health, causing it to quickly grow from 2019 up until November 2022, when revelations regarding weak internal corporate controls came to light, pushing FTX into bankruptcy and causing massive losses for investors.

Wilson Sonsini Goodrich & Rosati PC partners Amy Caiazza and Neel Maitra — who was most recently senior special counsel in the U.S. Securities and Exchange Commission's Division of Trading and Markets, where he specialized in fintech and cryptocurrency — told Law360 that they anticipate the new year will bring fierce legal battles over charges from the U.S. Department of Justice and the SEC against executives and entities that were involved in FTX's collapse.

"I do think it's pretty clear 2023 is going to see some significant enforcement against FTX and Sam," Caiazza said.

Bankman-Fried face charges lobbed in December that he looted his $32 billion cryptocurrency exchange, and on Dec. 21, prosecutors announced that former FTX technology chief Zixiao "Gary" Wang and Caroline Ellison pled guilty and are cooperating with the Manhattan U.S. attorney's office in its case against Bankman-Fried.

As litigation against FTX proceeds and more information comes to light, Maitra added that he's watching closely to see how California regulators respond.

Maitra said the ongoing civil litigation will likely raise questions about the effectiveness of New York's BitLicense program, which became the first comprehensive state-level regime for licensing and overseeing digital asset companies when it launched in 2015.

In 2022, some California lawmakers sought to mimic New York's law, proposing a bill that Gov. Gavin Newsom vetoed in September. At the time, opponents of the California crypto regulations criticized it for being too similar to the New York statute, and Newsom called the proposal "premature" in light of his administration's recent research and outreach on regulatory approaches, as well as "forthcoming federal actions."

Maitra noted that the New York law includes lending and assets requirements for crypto firms, but the litigation filed in the wake of FTX's collapse raises questions about whether the Empire State is really enforcing its rules on a regular basis and whether state rules can deter civil and criminal misconduct.

"If you look at a number of firms caught up in the crypto maelstrom, a lot had New York licenses," Maitra said. "But just because something is in compliance with New York state law doesn't mean it complies with federal securities law."

Caiazza and Maitra agreed that as the FTX litigation unfolds in 2023, they expect state regulators in California and beyond will continually take a hard look at their potential roles in crypto regulations and the question of whether there is a state-based solution.

High-Profile Appeals in Theranos and Uber Cases

Last year, multiple former Silicon Valley executives — including former Theranos CEO Elizabeth Holmes, ex-Theranos executive Ramesh "Sunny" Balwani and former Uber security chief Joseph Sullivan — faced closely watched criminal jury trials, and each were convicted of white collar crimes that carry steep multiyear prison sentences.

Legal experts who spoke with Law360 are following the executives' appeals, which will head to the Ninth

Circuit in the coming months. Experts anticipate the defendants will face an uphill battle in overturning their convictions and sentences, given the length of their trials and the strength of the evidence prosecutors had against them.

Agustin Orozco, a member of the white collar and regulatory enforcement group at Crowell & Moring LLP and a former federal prosecutor, said that in 2023 he'll keep an eye on whether the Theranos convictions mark the beginning of a larger trend of holding Silicon Valley executives accountable for misconduct, or if the cases are ultimately outliers.

Brian Newman of Dykema Gossett PLLC said he believes the convictions are significant and send a message to technology executives that they should act with integrity throughout their fundraising efforts.

The Theranos cases also serve as a warning to investors that they should "check under the hood" and conduct true due diligence of purported revolutionary technology to ensure that new products do what startup executives claim they do before investing, Newman said. He added that Holmes' appeal in particular raises the complicated legal question of what constitutes fraudulent deception during fundraising for private Silicon Valley startups.

Newman noted that although Holmes was convicted of investor fraud based on the statements she made about Theranos' technology, other technology executives, like WeWork Inc. founder Adam Neumann, never faced criminal prosecution for painting a rosy picture of their companies, despite questionable financials.

Neumann famously pulled plans for WeWork's 2019 initial public offering after would-be investors scrutinized the company's valuation, business model and vision. The workspace venture's valuation cratered, and Neumann stepped down later that year. Since then, WeWork went public by merging with a special-purpose acquisition company.

Neumann walked away relatively unscathed and with billions of dollars, while Holmes, who never cashed out her Theranos stock, faces more than 11 years behind bars, Dykema's Newman pointed out.

"The line is not really as clear-cut as one might think," Newman said. "What is fraud and what is just optimism? [Holmes'] case is giving the public guidance on what is acceptable."

Post-Girardi Litigation, and a Calif. State Bar Proposal

In 2023, legal experts will also watch sprawling litigation that has arisen from the Girardi Keese scandal, which stemmed from 2020 revelations that the Los Angeles-based plaintiffs firm had misappropriated client funds and stolen more than $2 million in Boeing settlements from five families whose relatives died in a plane crash.

Since then, disgraced attorney Thomas Girardi and his now-defunct law firm have been embroiled in bankruptcy proceedings, with potentially more than $500 million in liabilities. Girardi, known for his role in the litigation that inspired the 2000 film "Erin Brockovich," has had his law license pulled by the State Bar of California in 2022, has been diagnosed with Alzheimer's disease and has been placed into a conservatorship under the care of one of his brothers.

Other attorneys and individuals who were once tied to Girardi Keese are also facing high-stakes litigation, including a $100 million lawsuit from Chicago-based Edelson PC filed in July over claims that Girardi Keese stole from Edelson's clients, co-counsel and vendors.

"It just goes to show that no matter how big you are, if you engage in this kind of conduct, it'll catch up to you," Orozco of Crowell & Moring said.

Orozco added that he's following the Girardi litigation in the coming months to see how the civil litigation and criminal charges against former Girardi Keese Chief Financial Officer Christopher Kamon will play out.

"Whenever you have these parallel civil and criminal proceedings, it's always interesting to see what takes precedence and how one impacts the other," Orozco said.

Newman said he's also keeping close watch over the litigation, as well as the push by the California State Bar to implement a new rule in the wake of the Girardi scandal that would give Golden State lawyers an affirmative duty to report certain misconduct of other lawyers, like misappropriation of client funds.

Newman noted that other states have adopted versions of the American Bar Association's 8.3 model rule, which says that a "lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

"It's a curious thing that California doesn't have it yet," Newman said.

Golden State Supreme Court Rulings Make Waves

In 2023, the California Supreme Court is set to address significant questions regarding the Federal Arbitration Act and its interplay with California's Private Attorneys General Act, which gives individuals a right to enforce Golden State employment laws on behalf of themselves, other workers and the state, according to Mary-Christine "M.C." Sungaila, chair of the appellate practice at Buchalter PC.

The issue of whether nonindividual claims under PAGA can be arbitrated is headed to the state high court after the U.S. Supreme Court held in June in Viking River Cruises Inc. v. Moriana that individual PAGA claims can go to arbitration.

Some courts have since followed the Viking ruling, while others have issued stays pending the California Supreme Court's resolution of Adolph v. Uber Technologies, which was filed by an Uber driver who was classified as an independent contractor and pursued misclassification claims under PAGA.

The state justices are expected to decide Adolph in the coming months, and many employment attorneys are keeping a close eye, according to legal experts.

Sungaila said she is also following the U.S. Supreme Court's review of the Ninth Circuit's 2021 finding that a law firm must disclose certain client communications that contained international tax advice to a grand jury investigating a client. That case, which is called In re: Grand Jury, will clarify the scope of attorney-client privilege in the context of dual-purpose communications, Sungaila said, which will have significant repercussions for Golden State attorneys as well as lawyers beyond the state's borders.

"It's a tax-specific case, but it's a very broad issue that can particularly affect in-house counsel [and] also can impact every lawyer in California and every attorney around the country," she said.

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