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Wachtell Malpractice Claims A Tough Sell For Icahn's CVR

By **Karlee Weinmann**

Law360, New York (October 30, 2013, 6:44 PM ET) -- Carl Icahn-controlled [CVR Energy Inc.](#) should expect a long, hard fight from [Wachtell Lipton Rosen & Katz](#) after telling a federal court earlier this week that attorneys from the firm had purposely concealed information tied to a \$2.6 billion takeover bid, experts told Law360.

Monday's suit, [filed in Kansas federal court](#), accuses Wachtell and two of its corporate partners, Andrew R. Brownstein and Benjamin M. Roth, of failing to properly advise it that its fees to financial advisers [Deutsche Bank Securities Inc.](#) and [Goldman Sachs & Co.](#) would double to roughly \$36 million if Icahn [took control of the company](#) — a prospect that would have changed the direction of the deal.

CVR contends that Wachtell's missteps go beyond lackluster work, saying attorneys actively tried to conceal the added fees — meant to preserve a cozy relationship with Goldman — by creating phony board meeting minutes. The allegations are a swift blow to the top corporate firm, and attorneys say it will do everything it can to erase the suit.

Wachtell could be playing with an advantage. While the accusations are severe, so is the burden placed squarely on CVR to convince the court that its case is based on more than 20-20 hindsight. That means digging up enough written communication and other records to show beyond speculation that the attorneys breached their duties, said Joseph Salvo, senior counsel in [Gordon & Rees LLP's](#) professional liability defense group.

"It's probably going to be a pretty big hurdle, but the best way to do it would be to produce that evidence," he said. "Unless there's a smoking gun, I think CVR has a significant amount of work ahead of them in order to prevail in this case. This is not a case that's going to be handled in a few months."

Further complicating matters for CVR, the allegations invite ambiguity, said Jonathan S. Ziss, a partner in the professional liability practice at [Goldberg Segalla](#). Rather than comparing Wachtell's actions against hard-and-fast standards, the suit raises questions over how far the attorneys' obligations extended into CVR's internal governance structure.

"I would suggest that no statutes or black-letter laws were violated with regard to Wachtell's silence surrounding the engagement letter," Ziss said. "It comes down to something more elusive, which is the duty of care."

For the claims to ring true, top-ranking executives, including the company's general counsel, would have to show that, without Wachtell's guidance, they did not understand the documents attached to the deal. That is likely a tall order, considering the size and scope of the deal and CVR itself.

"This is not a deal done in a back room someplace," Ziss said. "That probably comes down to expert witnesses who will talk about how C-suite officers can be reasonably expected to do their jobs, their level of sophistication and their experience."

CVR would potentially have to claim that the attorneys should have assumed they carried the responsibility to explain, piece by piece, the documents associated with the fees in question and their implications. The complaint says the counsel "failed to explain the fee terms to anyone at CVR, whom they knew had absolutely no experience retaining advisers to defend in hostile takeover battles."

But attorneys told Law360 it could be tough to paint that picture in court, given that the senior-level executives at issue were capable enough to manage a multibillion-dollar enterprise. Those claims open to courtroom scrutiny the credibility of CVR and its top brass — a key facet of the case that the attorneys said would become a pivotal part of Wachtell's defense.

"Credibility is going to be a big deal in this case. Witnesses are going to be judged heavily during depositions and long-term if this case goes to trial," Gordon & Rees partner Robert Modica said.

The company will also be challenged to frame its relatively slim losses as significant against the backdrop of a big-ticket transaction, attorneys say.

"A \$36 million fee in a \$2.6 billion deal doesn't seem to be a dealbreaker," Salvo said. "It doesn't pass the smell test, and I think that's a hurdle both legally and factually that CVR is going to have to overcome, because that will be — amongst many others — one of Wachtell's main legal defenses."

The timing of the case filing will also likely draw scrutiny in court, attorneys say. Already, [Goldman](#) and Deutsche Bank [have launched](#) twin contract suits against CVR, each saying the company owes \$18.5 million for the financial advice provided in connection with the May 2012 stock sale to Icahn. Commonly, the targets of such suits fire back at other parties in an effort to shirk responsibility for the claims leveled against them, a fact attorneys say invites scrutiny of CVR's motives for filing the suit and the validity of the company's accusations.

With enough documentation and believable testimony from people in the know, attorneys agree that CVR could build a convincing case for itself and leave Wachtell on the hook. But in the crosshairs of a potentially damaging legal action with its reputation at stake, the firm is unlikely to go quietly.

"You're throwing some bombs out there that you're going to have to deal with," Modica said. "This isn't just accusing Wachtell of making a mistake. When you start saying that Wachtell created false documents, that's very serious stuff against a very serious firm."

CVR is represented by Lee M. Smithyman of Smithyman & Zakoura Chtd.

Counsel information for the defendants wasn't immediately available.

The case is CVR Energy Inc. v. Wachtell Lipton Rosen & Katz et al., case number [2:13-cv-02547](#), in the U.S. District Court for the District of Kansas.

--Additional reporting by Keith Goldberg. Editing by Elizabeth Bowen. Editing by Philip Shea.

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