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## Pay-to-play scandal lingers long after Richardson

**By Bruce Krasnow**

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Marc Correra, center, is shown in 2009. New Mexican file photo

When Gov. Bill Richardson left office more than four years ago, his legacy included wide-ranging education reforms and far-reaching projects such as the Rail Runner commuter train and Spaceport America.

But what also lingers from his eight years as governor — and short-lived presidential run — is what has become one of the most convoluted investment scandals in the United States. The litigation in New Mexico involves millions of pages of documents and financial statements from dozens of defendants and individual donors to Richardson to investment firms and former state employees caught in the labyrinth.

The latest settlement in the case came last week when the state recovered \$3 million from a private equity firm and secured the promise of cooperation going forward that will help as the litigation enters its trial phase next year, according to state officials.

As the cases move forward, however, there are more disputes over how the settlements are being negotiated and who might be entitled to the money that is supposed to be repaid to taxpayers. One lawyer, for example, has essentially frozen the largest reimbursement so far — more than \$24 million from a 2013 settlement — in an escrow account until still more legal issues are decided.

If that money had been invested in state accounts during the time, it may have earned an additional \$4 million for taxpayers, according to past returns accrued by fund managers.

“That is a really, really sad situation,” said Peter B. Frank, a member of the State Investment Council who helped negotiate the settlements. “There are some interveners who think they know better. They have cost the state an enormous amount of money,” he said of the lost investment opportunities.

In all, the State Investment Council, the panel that manages \$20 billion for the state’s Land Grant Permanent Fund and the Severance Tax Permanent Fund, claims to have lost more than \$90 million from investments gone bad in what court documents claim was a pay-to-play scheme likened to the one that rocked New York State at about the same time and involved some of the same players.

But the total loss to New Mexico residents and taxpayers could easily end up being twice that, depending on how one looks at the markets and what could have been with equity returns.

“It’s really, really hard to quantify,” said Charles Wollman, director of communications and legislative affairs for the State Investment Council. “What does a bad investment mean? There’s not a precise way to nail that down.”

So far, over a dozen individuals or financial entities have entered into some kind of agreement with the state as one of the main parties named in the case, Marc Correra, is set for a trial in July, 2016. With appeals, there is little doubt the controversy over investments made during the Richardson

years will extend well beyond the administration of Gov. Susana Martinez, which ends in December 2018.

The investment council alleges fund managers paid Herrera more than \$22 million in improper placement fees to steer New Mexico money to their investments.

“That number is what we initially documented during our investigation in 2009, and may in fact be more than that,” Wollman said.

In its civil complaint filed in the state’s First District Court in 2012, the council noted the parallels between the New Mexico and New York schemes. “Indeed, as detailed herein, the intertwined New York and New Mexico schemes were part of a larger nationwide web of corruption that has eroded the public treasury and corroded the public trust,” the complaint said.

But unlike the New York scandal, in which state officials and fund managers faced criminal charges, the New Mexico cases have been made more difficult because no one here has been charged by the U.S. Department of Justice, which looks into criminal actions, or the U.S. Securities and Exchange Commission, which moves on civil enforcement of security laws.

These allegations, as well as others, however, cost Richardson a Cabinet appointment in President Barack Obama’s administration. He withdrew his nomination for secretary of commerce as other pay-to-play controversies around the United States shed light on his management here.

“There was a perception that bad things had happened, and frustration that the SEC wouldn’t do anything, the [Department of Justice] hadn’t done anything. What started as an action by an agency is the second biggest pay-to-play investigation in the country,” said Evan Land, general counsel for the State Investment Council.

In its claims, the State Investment Council does not need to prove fraud or bribery, though all that helps. It needs to show that those named failed in their fiduciary duty to New Mexico taxpayers. The funds distribute money each year to pay for higher education and other state services.

“A breach of fiduciary duty is not acting in the best interest of the funds,” said Steve Moise, New Mexico’s chief investment officer.

In the case of those who received placement fees, a lack of fiduciary duty could be showing they “did nothing” and that money paid for placement “could have gone into the fund or could have gone elsewhere,” Moise said.

The settlement announced April 6, for instance, is an example of how the litigation has evolved.

The agreement is between the state and Spyder Management, which wasn't even named in the original 2012 court complaint. But the firm's involvement with Correra became evident in millions of pages of documents that have been examined by the investment council and its private law firm working on contingency, Pitney Day, based in Connecticut with offices in New York, New Jersey and Washington, D.C..

Spyder received \$9.4 million from state investment funds in 2005 for placement in a firm that lends to startup or distressed businesses hoping to profit from a turnaround.

"In this case the SIC alleged that Silver Creek Technology Investors paid a placement fee to Marc Correra, whose father Anthony was an unofficial adviser to Bill Richardson," the State Investment Council stated in a news release about the settlement.

The agreement also allows the council to sell back its investment at the current market rate of \$1.9 million. Spyder and Silver Creek have denied any wrongdoing in the case, according to the settlement document.

The Investment Council has tallied a total of \$32.4 million in secured settlements so far "from investment managers and individuals who allegedly subverted the state's investment process for their own benefit," according a news release issued last week by Wollman.

But that tabulation is tenuous — \$900,000 of that amount is Correra's money being held in escrow by the state of Maryland in the event of a New Mexico judgment.

Only a portion of the rest has been deposited back in state accounts because the largest settlement reached so far by the State Investment Council is also the one that is most contentious.

In that case, Vanderbilt Capital Advisors and associated companies agreed to reimburse the state \$24.2 million for investments that originally cost \$90 million and now may be worthless.

A claim originally filed well before the Investment Council whistleblower lawsuit in 2008 by Frank Foy, the former chief investment officer at the Educational Retirement Board, alleges former state investment officer Gary Bland and Educational Retirement Board chairman Bruce Malott were instructed by former Richardson adviser Dave Contarino to invest with Vanderbilt Financial and associated companies in exchange for political contributions from the firm's employees.

None of those named were ever charged, and all have denied the allegations. Malott and Bland even released letters from the SEC confirming its investigation had been completed and that there would be no enforcement actions.

But Foy and his attorney, Victor Marshall, filed the claim under a taxpayer whistleblower law and would be eligible to receive some of the proceeds of any settlement, as well as attorney fees, if substantiated.

Lower courts determined Foy's claim cannot be pursued, and that is now on appeal with the state Supreme Court. Still, a ruling in August 2013 by state District Court Judge Stephen Pfeffer stays the Vanderbilt award until that determination is made. Marshall declined to comment for this article.

In his ruling, Pfeffer questioned whether the state has undertaken enough discovery to determine if the settlement with Vanderbilt is fair to taxpayers.

“This Court seriously questions whether it could fairly assess the propriety of the proposed settlement agreement, or if the State itself can assess the fairness, adequacy, and reasonableness of the proposed agreement under all of the circumstances,” Pfeffer wrote.

Those making decisions about the settlements dispute that — and have a second ruling from District Court approving their process.

The Investment Council claims its law firm Day Pitney is seasoned in securities cases and understands what is reasonable in settlements around the United States.

According to a court filing by the investment council, the firm reviewed all the SEC documents comprising 2.7 million pages as well as 130,000 documents from third parties; laptop data from 22 state employees; 70,000 pages of state documents; 68 backup computer tapes as well as emails, audio recordings. The trove represents “nearly five terabytes of information,” according to the filing.

The state contract with Day Pitney allows for the firm to keep 20 percent of all settlement proceeds — with the state paying expenses and fees not to exceed \$4 million. To date, the firm has received \$578,000 in contingent attorney fees. That number will rise by \$600,00 pending approval of the most recent case, Wollman said.

State Investment Council member Frank serves on the three-member litigation subcommittee for the council.

He said there are many factors in settling cases that the public doesn't see. In the case last week, for instance, cooperation from Spyder officials in the event of future trials and litigation was one factor in moving ahead with final approval. "That testimony is enormously useful as we move forward the process with other defendants," he said.

He also said the panel has to be practical and, despite the amount that may have been lost, some individuals named don't have much in the way of assets.

He added that retrieving dollars and putting them to work in an investment fund to earn returns now is often better than the unknown of a trial several years down the road.

"You have to be practical," Frank said. "Even if you win, you have to collect the judgment, and who knows if that person has the capability to pay?"

Investment Council attorney Land said both individuals and financial entities can go bankrupt. "We could fight for 10 years, say, 'we're going to trial' — but people go bankrupt, people disappear," he said. He added that the more important issue is that the council needs good witnesses to go after the bad actors. "Cooperation from individuals whom have firsthand knowledge is critical to our recovery effort," he said.

Another issue about the settlement process has drawn the attention of the New Mexico Foundation for Open Government, a watchdog group that promotes transparency in government.

In a petition to the state Supreme Court, Marshall wrote that Frank has testified that proposed settlements with some companies originally named as defendants in the various lawsuits were approved by "the secret litigation subcommittee," which consists of two State Investment Council members and Jessica Hernandez, Gov. Martinez's legal counsel and deputy chief of staff, but not by the council itself.

"According to Mr. Frank, the litigation subcommittee has met 7 or 8 times, operating in complete secrecy, with no published notice of meetings, no published agendas, no open meetings, no notice of executive sessions, and no minutes," Marshall wrote, claiming that the process violated the state's Inspection of Public Records Act and the Open Meetings Act.

FOG Executive Director Susan Boe said the group plans to file a amicus brief in the Foy case before the state Supreme Court. She said the Investment Council has done a good job of being transparent about much of the settlement process, but FOG questions a trend in the state where subcommittees

have full authority to make policy decisions.

“If a subcommittee has full authority, they should also have to comply with the Open Meetings Act,” she said.

Wollman maintains the exemption falls under attorney-client privilege matters and the council has unanimously approved — in open session — a litigation policy that allows for delegation of settlement authority to a legal committee.

Based on FOG concerns, he said, the agency has included a stipulation in all settlements that it would be disclosed under a public records request, but negotiating settlements at a public meeting “would damage the state’s ability to secure financial recoveries in the future.”

“We’re not trying to keep secrets, but the law requires us to operate as a fiduciary, that you operate in a manner that benefits New Mexico,” Frank said. If not for the litigation committee, “you’d have lawyers making decisions by themselves and that would really be unfortunate.”

*Disclosure: Frank Foy’s attorney, Victor Marshall, also represents The New Mexican newspaper. New Mexican Editor Ray Rivera is a Foundation for Open Government board member.*

*Contact Bruce Krasnow at 986-3034 or [brucek@sfnewmexican.com](mailto:brucek@sfnewmexican.com).*

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## Where the State Investment Council cases stand

Here is a partial list of settlement agreements or pending agreements so far brought forth by the State Investment Council and former or current investment funds and advisers.

The parties named admit no wrongdoing as part of the agreements, according to the council. The settlements cover breach of fiduciary duties, which can include subpar investments, excessive or improper fees, or a lack of disclosure of fees or risk.

\$24.5 million from Vanderbilt Capital Advisers Financial. The state invested \$90 million in collateralized debt obligations with the firm in 2006. The investments were securities backed by pools of mortgages or other assets and eventually became almost worthless during the financial meltdown.

\$3 million from Spyder Management, a private equity placement firm, for a \$9.4 million commitment in 2005 into the Silver Creek Ventures fund. The state can also sell back the investment, which is today worth about \$1.9 million.

\$1 million from Markstone Capital Group of California.

\$775,000 from Capital Point Partners of Houston.

\$770,000 from Aldus Equity Partners, an adviser to New Mexico funds from 2004 to 2009.

\$300,000 from Diamond Edge-Emerald Point.

\$250,000 from Rustic Canyon/Fontis Partners, which is based in Pasadena, Calif.

\$125,000 from investment consultant William Howell.

\$100,000 from DAV-Wetherly Capital Group.

\$17,325 from the Crestline Investors, based in Texas.

\$925,000 from Austin Capital Management as part of a pending class-action settlement.